

FAR FROM PRIVATOPIA: PRIVATE RESIDENTIAL ESTATES IN ENGLAND AND WALES¹

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Abstract

In recent years, there has been a trend towards private maintenance of residential estates in England and Wales. Local authorities are not automatically adopting infrastructure, and this may mean lower standards of construction and upkeep. Homeowners face charges to maintain the estate, and find themselves subject to various restrictions on property use, and to onerous fees when asking permission to make alterations or sell. Many feel trapped in “fleecehold”, and concerned about estate upkeep. This article shows how the growth of these estates raises concerns about their sustainability, about fairness, and about what ownership “means”.

Keywords

Fleecehold; Leasehold; Private Residential Estates; Adoption; Privatopia; Rentcharges; Estate charges

Article

INTRODUCTION

[The] *portmanteau* word “privatopia”... embodies a utopian belief that living in a neighbourhood with privatized local government functions, including privatized corporate governance, is the route to a far better life than what is enjoyed by the rest of us.² (McKenzie, speaking of private residential communities in the United States)

Thousands are caught up in the #leaseholdscandal. You will never own your home, you are simply a tenant for the duration of the lease. Developers appear to be changing their practices to FLEECEHOLD.

FLEECEHOLD is when developers claim to be selling homes as Freehold yet they retain a vested interest in the property by including toxic, fee generating, covenants. (National Leasehold Campaign poster, 2017)

HORNET – NO TO FLEECEHOLD! For a fair deal for all home owners on privately managed estates. STOP THE ROT – ADOPT THE LOT! (Hornet, The Home Owners Rights Network, Web-page³)

The phrase “fleecehold” began to be used in 2017.⁴ It was a clever campaigning tool, seemingly bringing together various ideas. All land in England and Wales is “held” from someone else: a leasehold involves

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² E. McKenzie, “Rethinking Residential Private government in the US: Recent Trends in Practice and Policy” in A. Lehari (ed.), *Private Communities and Urban Governance* (Switzerland, 2016), 54.

³ Available at <https://www.homeownersrights.net/welcome-to-hornet/> (last accessed 4 September 2021).

⁴ A search of UK newspapers in Lexis Library reveals that before 1 January 2017 there were no references to “fleecehold” and only 3 to “leasehold scandal”; since that date there are 18 references to fleecehold and 213 to

holding rights to the land for a determinate period of time, whereas *freehold* is potentially infinite. The term *fleecehold* plays on both. It sounds like a slightly amended version of “leasehold”, about which there was already a mounting disquiet over what was being referred to as the leasehold scandal involving doubling ground rents, onerous terms, and difficulties over enfranchisement (buying the freehold). But the change to “fleece” has (intended) connotations of “rip-off”; it’s different from leasehold but it’s a freehold with strings.

The issue has come to the fore with changes in the way that houses are developed and sold on residential estates in England and Wales. Unlike some other jurisdictions where so called “master planned communities” have been part of the housing scene for some time, it is a relatively recent phenomenon here, at least at scale. The trend has been towards estates in which the developer sells houses, using either leases or freeholds, but retains some ongoing management role. This might involve, for example, the homeowner needing developer consent to do something, such as extend or sublet the property, and a “permission” fee is payable. Or, as appears common, infrastructure such as access roads or play areas, is retained by the developer and the costs of maintenance passed onto homeowners through an estate charge, rather than being adopted by the local authority to be maintained at public expense. Commenting on the increasing use of leases for house sales, a House of Commons briefing paper noted that “there’s evidence indicating that developers had started to sell new-build houses on long lease agreements as this can represent a lucrative future income stream”.⁵ A voluntary organisation has been collecting information about the number of estates subject to some form of “estate charge” and has more than 750 separate sites recorded.⁶ Given that in English law it is not easy to make positive covenants (such as an obligation to pay) binding on later homeowners, various legal mechanisms have been used to ensure that these covenants will “stick to the land” through different owners. Leases are one way of achieving this, but there are other routes that can be used with freehold sales.

This article discusses the growth of “fleecehold” in England and Wales, with a particular focus on the legal tools used by developers, and the types of covenants being used. The main research was desk-based, supplemented by a small (non-representative) study of 8 residential estates where we closely analysed various documents (title deeds, miscellaneous papers, and correspondence) and interviewed six homeowners.⁷ Title deeds were also obtained for six other sites from the Land Registry: 3 modern estates, and 3 from the 1960s/70s. In addition to information about the legal forms and covenants being used, two issues emerged. The first centres around the strong emotional responses from homeowners in relation to the covenants being imposed, both in relation given the unregulated nature of management and estate charges but also how it undermined their understandings of ownership. The second stems from the fact that as part of “creeping privatisation” many modern housing estates are

leasehold scandal. The *fleecehold* term is also referred to in a House of Commons research briefing: Briefing Paper No 8497, *Freehold houses: estate charges* 15 October 2020, available at <https://researchbriefings.files.parliament.uk/documents/CBP-8497/CBP-8497.pdf> (last accessed 4 September 2021).

⁵ House of Commons, *Leasehold and commonhold reform*, 2 August 2021, 6, available at <https://researchbriefings.files.parliament.uk/documents/CBP-8047/CBP-8047.pdf> (last accessed 4 September 2021).

⁶ <https://www.homeownersrights.net/action/estates-directory/> (last accessed 4 September 2021).

⁷ Case study sites involving research participants have been given pseudonyms, such as “Meadowview”, or “The Ridgeway”. Participants are referred to either as LH (to indicate leasehold title) or FH (to indicate freehold title).

not being adopted by local authorities, yet there appears to be virtually no data relating to this, and no forward thinking about what the long-term impact will be.

For the purchasers, often having been poorly advised during the conveyancing process, the covenants and charges may come as a surprise and generate a strong sense of injustice and frustration. It is from deep felt emotion that one of the interviewees, a leaseholder seeking to buy the freehold, coined the phrase “fleecehold” to illustrate that even if she bought the freehold it would be “a freehold that fleeced me.”⁸ Further, the restrictions imposed undermined what freehold ownership was understood to be. Referring to it as a “fake freehold” a freeholder explained:

there are various definitions of freehold: free of hold or free of any obligation to anyone else. ... I think most people’s understanding of freehold would be “it’s yours”. ... Where you’ve got managed estates you’re having to ask permission for the same sorts of things that leaseholders do... If you own a freehold home, you might expect that you don’t owe any obligations to third parties. It’s as simple as that I think. And you wouldn’t have to ask permissions.⁹

Accompanying this shift is the fact that many of these estates are not “adopted” by local authorities, that is, the infrastructure, such as roads and green open spaces, is not looked after at public expense but instead is managed by a private company and paid for by the homeowners. For convenience this article refers to these estates as “Private Residential Estates” (PREs), reflecting the twin facts of there being some private control of social behaviours and also private maintenance of shared spaces.

Although there are similarities, these modern PREs differ from the “Great Estates”, and from the Garden City movement. Typically, the developers of these older estates saw themselves as long-term stewards and intended to retain long term management of the estates, which often (but not always) had considerable architectural merit. Houses were sold on long leaseholds and it was the Leasehold Reform Act 1967 conferring the right to enfranchise (buy the freehold) that brought this method of estate development to an abrupt end. Recognising their special status¹⁰ a legal mechanism was introduced under section 19 of the 1967 Act whereby the estate landlord was able to apply for there to be a management scheme. Such schemes needed both ministerial consent and court approval, which could only be given if the area as a whole would benefit, and regard may be had to “the past development and present character of the area and to architectural or historical considerations, to neighbouring areas and to the circumstances generally”.¹¹ In approving the Dulwich Estate Scheme the Inspector appointed noted it had “special distinguishing features”, an “historical background”, and that a management scheme would “reinforce planning control and be a deterrent against undesirable speculators”.¹² Once

⁸ Meadowview LH1.

⁹ Lakeside FH1.

¹⁰ Commentators at the time claimed that the 1967 Act “threatened to destroy the unity of some of England’s greatest estates”, M Hanson, “Keeping control of Leaseholds” *Country Life*, 20 August 1970, 471. Although the same commentator also notes a scheme being approved for a 1961 estate built by George Wimpey, giving it he says, the “protection normally reserved for more venerable houses”: M. Hanson, “Preservation of Modern Housing” *Country Life*, 7 October 1971, 926,.

¹¹ Leasehold Reform Act 1967, s. 19(3).

¹² Details of the Dulwich Estate Scheme of Management are available here:

<https://www.southwark.gov.uk/planning-and-building-control/local-land-charges> (last accessed 4 September

imposed, the scheme is binding on homeowners, and can incorporate both restrictive covenants and an estate payment charge. On modern PREs it is the developers who impose the terms and conditions without any public oversight and without any need for terms to be justified with reference to the character of the area.

The elements of “local laws” (restrictions etc) and estate charges mean that modern PREs resemble certain aspects of housing schemes found in other jurisdictions, such as “common interest developments” (CIDs) in the United States of America. There are, however, important differences between CIDs and the English/Welsh PREs. Unlike most PREs, CIDs are usually master planned communities designed for marketing at particular groups, often containing “luxury” recreational facilities and employing security guards. Further, CIDs have three distinct legal characteristics: common ownership of property, mandatory membership in the homeowner association, and a private regime of restrictive covenants enforced by fellow residents.¹³ As will be seen, the way in which PREs are legally structured varies but they have not been designed primarily to promote common ownership and community, nor do they usually contain high-end recreational facilities. There is often some landscaping in the form of open grassy areas, perhaps a small children’s play area, but the charges are usually focussed around infrastructure provision in the form of private roads, street lighting, public liability insurance, and drainage systems. Nonetheless, there are some commonalities between CIDs and PREs, in particular the existence of restrictions imposed from the moment of purchase by the developer¹⁴ and a service charge payment to cover estate expenses.

In England and Wales, our knowledge of PREs is still very limited and we should take heed of warnings from elsewhere. In 1994, McKenzie observed that the emergence of CIDs carries with it “significant social and political consequences” that were inadequately “considered by government and academics”.¹⁵ Focussing particularly on the risk that covenants can create “modern variations of feudal serfdom” Sherry argues for the need to establish “boundary rules” to ensure that property law is developed consistently with the multiple values of liberal democracy.¹⁶

This article identifies various social, political, and legal issues arising from the recent growth of PREs in England and Wales. The next two sections report on the research findings about the legal tools used to enable the use of covenants, and the types of covenants being imposed. The following part analyses these findings by reference to various complaints made by homeowners: poor consumer knowledge, the

2021). For details on the operation of s19, see A. Radevsky and D. Greenish, *Hague, Leasehold Enfranchisement* (London, 2021, 7th ed.). Other estate management schemes include Welwyn Garden City, see https://www.welhat.gov.uk/media/11877/EMS-Background-Brochure/pdf/Final_Proof_of_EMS_Background_Brochure.pdf?m=636123993431330000 (last accessed 4 September 2021) and Hampstead Garden Suburb <https://www.hgstrust.org/the-trust/scheme-of-management.shtml> (last accessed 4 September 2021).

¹³ E. McKenzie, *Privatopia* (New York, 1994) 19.

¹⁴ *Ibid.*, 148.

¹⁵ *Ibid.*, 26. Writing in 2010, Kenna and Stevenson note a dearth of academic scrutiny on “master planned communities” (typically with swimming pools, tennis courts, golf courses, and private security) in the Australian context: T Kenna and D Stevenson, “Negotiating Community Title: Residents’ Lived Experiences of Private Governance Arrangements in a Master Planned Estate” (2010) 28 *Urban Policy and Research* 435.

¹⁶ C. Sherry, *Strata Title Property Rights*, (London and New York, 2017). Australian master-planned communities are a more recent phenomenon than in the United States, but were enabled following legal changes stemming from the 1960s that enable obligations to pay money to attach to freehold land.

unregulated nature of most estate charges, the unfairness of paying for public infrastructure, the burdensome nature of engaging with estate management, and deep-seated unhappiness with this form of “ownership”. Consideration is then given to issues raised by this shift towards PREs with accompanying restrictions on homeowners and the imposition of estate charges. In the final section possible risks involved with this model of estate ownership are flagged. The conclusion is clear: we need better data in relation to PREs and the government must pay attention to the broader policy, social and legal issues that they give rise to.

LEGAL TOOLS USED TO SELL HOUSES ON PRES

With PREs there needs to be a mechanism to ensure that a) someone is responsible for looking after the unadopted common spaces and infrastructure; b) that the costs of this can be passed through to the homeowners and their successors; and c) that homeowners are bound by covenants regulating how the property can be used. In relation to a) there is usually a management company, often connected to the developer, at least for the initial years. The plan is sometimes for the ownership of this company then to be transferred to the residents collectively, and residents are required to become members of the company. But developers may choose to continue to be involved, particularly if this is providing a revenue stream.

Given that English law does not allow the burden of positive covenants to run with freehold land so that successors can be bound, b) and c) present a problem. In the United States positive obligations can attach to freehold land, and this enabled the “exponential development” of private communities with facilities during the twentieth century.¹⁷ Other common law jurisdictions have now created statutory title systems to enable freehold ownership to be combined with positive financial obligations, as will be the case if commonhold is (re)introduced in England and Wales in accordance with the Law Commission’s proposals.¹⁸

Various ways have been utilised to circumvent the limitations of English law. One is to sell houses on long leases as all leasehold covenants which relate to the land will be enforceable by and against the current landlord and tenant.¹⁹ Following the Leasehold Reform Act 1967, the use of leases for house sales largely stopped, with the puzzling exception of the North West. There was, however, a marked increase in the use of leases around 2009, which then dropped sharply in 2018 after media attention was given to various abuses, and the government announced its intention to ban the sale of leasehold houses and to restrict ground rents to a peppercorn.²⁰ Problems may arise, however, if the leaseholder exercises the statutory right to enfranchise and this brings the lease to an end. For estates in existence at the time the Leasehold Reform Act 1967 was passed, the management scheme discussed earlier would enable covenants to continue. But this apart, as the leading treatise on enfranchisement explains, the Act itself fails to make provision for this, and the parties may therefore have to adopt one of the other work arounds (discussed next) to ensure that the covenants still apply.²¹

¹⁷ Sherry, *Strata Title Property Rights*, 15 and ch 3.

¹⁸ Law Commission, *Reinvigorating commonhold: the alternative to leasehold ownership* HC 586 Law Com No 394.

¹⁹ *Spencer’s Case* (1583) 5 Co Rep 16a. The running of leasehold covenants is now governed by the Landlord and Tenant (Covenants) Act 1995.

²⁰ CMA, *Leasehold Housing*, CMA 115, February 2020 [24], and DCLG, *Tackling unfair practices in the leasehold market*, December 2017.

²¹ *Hague on Leasehold Enfranchisement*, ch 6.

There are two options that can be used for freehold sales. One is to ensure that there is a direct contractual relationship (covenant) between the current homeowner and the PRE developer and/or management company. This is secured by a restriction on the Land Registry title to ensure that no transactions can be registered unless evidence is provided of such a covenant being entered by the new homeowner. Where residents are required to apply for membership of the management company the covenant will also cover this.

Another route is to use an “estate rentcharge”, which has the practical effect of ensuring successors pay the estate charge and are subject to the covenants. But they are not straightforward, and “whether, and how” it achieves the goal of compelling performance of positive covenants is “neither agreed, nor fully understood”.²² As Poulson explains, the term “rentcharge” is confusing, being both a periodic payment made by a freeholder to a third party (the rentcharge owner), and a proprietary interest (Law of Property Act 1925, s. 1(2)). Since the Rentcharges Act 1977 it has no longer been possible to create traditional rentcharges that were, arguably, financial devices to support house building.²³ However, the Law Commission report preceding this legislation recognised the usefulness of what they described as “covenant-supporting” or “service charge” rentcharges. This means that it is now possible to create “estate rentcharges” either to secure the enforcement of covenants (seemingly both positive and negative)²⁴ on freehold land against successors in title, or as a rentcharge that runs with the land to secure the payment of a variable “service charge” for the performance of repairing and other obligations by a management company. Remedies available for breach of covenant are extensive. They are not limited to actions in debt but under section 121 of the Law of Property Act 1925 can include a right to enter possession and take any income from holding the land for non-payment, and a similar right can be available if the deed is appropriately worded, following breach of other positive covenants.²⁵ If the “rent” is unpaid for 40 days after becoming due there is also power to demise the land to a trustee to raise money to pay the arrears and costs.²⁶ Any lease created then continues even after payment of the underlying debt.²⁷ Once this lease is registered it makes “each property unsaleable even if the tenant chooses not to take possession” and “once the lease is in existence, therefore, it amounts to a stranglehold on the property owner whose freehold is worthless in the presence of the lease”.²⁸ In *Roberts v Lawton* Judge Cooke, was damning of this as a remedy, referring to it as “a wholly disproportionate remedy”, “draconian”, and “wrong”.²⁹ Evidence suggests that rentcharges are being

²² As Poulson notes, the concept of an estate rentcharge is not easily understood: the terminology involves disparate property law components, and there is ambiguity in both “estate” and “rentcharge”: M. W. Poulson, “Estate rentcharges and positive covenants: an analysis” (2020) Conv 138.

²³ *Roberts v Lawton* [2016] UKUT 395 (TCC) [5].

²⁴ Poulson, “Estate Rentcharges”, 143.

²⁵ The government has announced its intention to repeal section 121: <https://questions-statements.parliament.uk/written-questions/detail/2020-03-19/32108> (last accessed 4 September 2021).

²⁶ Law of Property Act, s. 121 (4).

²⁷ *Roberts v Lawton* [2016] UKUT 395 (TCC) [9], [25].

²⁸ *Ibid.*, [13].

²⁹ *Ibid.*, [33]. The particular case involved traditional rentcharges with an annual sum ranging from £6 to £15, but the point remains even if larger estate charge arrears are involved. See also J. Bates, “Rentcharges, remedies and reform” (2017) 20 Journal of Housing Law 4, 5.

created that do not comply with the requirements of Rentcharges Act 1977, but that homeowners nonetheless pay for fear of s121 remedies.³⁰

One aim of the research was to understand which methods are being used on PREs. Rentcharges will generally need to be registered, but the Land Registry are unable to distinguish traditional rentcharge registrations from estate rentcharges and so the number in existence is not known.³¹ Our small sample of modern estates found examples of each legal tool: the lease, the deed of covenant coupled with a restriction, and estate rentcharges. In 2020 the Welsh government issued a call for evidence to explore PRE practices (hereafter “Welsh consultation”).³² Some resident respondents were leaseholders (15%), but most were freeholders, and almost half of them did not know which legal mechanism was used to secure the estate charge. Of the remainder, nearly all had a deed of covenant, and only a small proportion had estate rentcharges.³³ From both our survey, and the Welsh Consultation responses, it is clear that the deed of covenant and Land Registry restriction are often used alongside the other tools.

COVENANTS IN USE

Headline media stories drew attention to the way that PREs can act as an unregulated “cash cow for developers”,³⁴ that covenants are imposed that go against “the spirit” of ownership³⁵, and unreasonable fees are charged for permission to make changes to the property.³⁶ One aim of the empirical study was to examine title deeds³⁷ to see behind the headlines. We classified the covenants that we found in the modern sites into three main types: estate infrastructure charges, covenants impacting on behaviour that impacts the exterior of the property; and “permission fees”. In addition, there are some controls on behaviour that has no external impact. For example, in one 999 year lease there was a requirement that the house must be kept in “good internal decorative order”.³⁸ There may additionally be controls outside of the title deeds themselves, perhaps in estate regulations and brochures, and these do not always marry with the title deeds. One estate brochure said that permission is required to keep pets,

³⁰ Welsh Government, *Estate charges on housing developments – summary of responses*, Number WG41469 November 2020, 74, https://gov.wales/sites/default/files/consultations/2020-11/summary-of-responses_3.pdf, (last accessed 4 September 2021) (hereafter Welsh Consultation Responses).

³¹ https://www.whatdotheyknow.com/request/estate_rent_charges_in_england_a (last accessed 4 September 2021). Also personal email to author from Land Registry.

³² Welsh Government, *Estate charges on housing developments: call for evidence* Number WG39718 February 2020.

³³ Welsh consultation responses, 27. A relatively small number of organisations responded (8), of which 2 said they used a deed of covenant, 1 the estate rentcharge and one had recently stopped using the rentcharge as it felt the associated enforcement measures were disproportionate, 50.

³⁴ E. Lun, “Homeowners trapped by ‘fleecehold’ - the new cash cow for developers”, 2 December 2017, The Guardian.

³⁵ F. Parker et al, “Fleeced on the freehold”, This Money.co.uk, 22 October 2019, available at <https://www.thisismoney.co.uk/money/mortgageshome/article-7601941/Toxic-leaseholds-banned-firms-cashing-freeholds.html> (last accessed 4 September 2021).

³⁶ S Maunder, “To have or to leasehold?” Which? 14 June 2018 available at <https://www.which.co.uk/news/2018/06/to-have-or-to-leasehold-inside-the-scandal-rocking-the-new-homes-industry/> (last accessed 4 September 2021).

³⁷ The reference to title deeds includes documents on the Land Registry (such as TP1) and leases, but for some sites we also looked at other documents related to the development (such as information packs, sales literature, service charge accounts).

³⁸ Meadowview LH1.

whereas the lease itself prohibited only non-domestic animals (although it did say the leaseholder must comply with “such directions as the Landlord may...issue regarding the keeping of any animal”).³⁹

Here we focus on the three broad categories found in the title deeds. As will be seen later, they were the source of considerable disquiet in the interviews.

Estate infrastructure charges

Historically, the norm was for estate infrastructure to be adopted by the local authority and maintained at public expense. There were some exceptions. Holiday parks, for example, which are not generally open to public access and may include recreational facilities, are usually privately maintained. Two well known cases illustrate. In *Arnold Britton* there was a chalet park with the properties sold on 99 year leases, making future chalet owners liable to pay the park expenses.⁴⁰ In *Wilkinson v Kerdene Ltd* there was a holiday village including a leisure complex and the bungalows were sold as freeholds. No particular legal tool was used, and the park owners had to rely on the legal principle known as “benefit and burden” in order to argue (successfully) that the bungalow owners were liable to pay the maintenance charge.⁴¹ Likewise the historic “Great Estates” were often private, and developed using the leasehold system. But on most housing estates the core infrastructure was adopted.

The growth of PREs changes this. It is now increasingly common for at least some of the estate infrastructure not to be adopted and for the homeowners to pay for maintenance. These charges can cover a large range of items: public open spaces, play areas, landscaped or ecological buffer areas, roads, highways, ground maintenance, street lighting, cctv, pumps water and electricity for sprinklers, multi-use games areas, administration and management fees, and public liability insurance.⁴² On many PREs there appear to be a mix of adopted roads (the larger service roads) and unadopted side roads. The responses to the Welsh Government’s consultation found these charges ranged between £50 and £500 per year, with almost half of respondents reporting charges between £100 and £149.99. Sometimes the charges are higher than the council tax.⁴³

Restrictions on homeowners

All of the modern sites that we examined had schedules listing various covenants that the homeowners had to comply with. These were generally a mix of both positive and negative obligations. For example, there may be an obligation to keep the garden neat and tidy, and to replace any trees and shrubs planted by the developer that have died; and not to erect any gates, fences walls or hedges between the dwelling and the roads the plot abuts.⁴⁴ It was common to have prohibitions on parking boats, trailers, caravans, and commercial vehicles above a certain weight, etc.⁴⁵ Some sites prohibited the homeowner

³⁹ Meadowview LH1.

⁴⁰ [2015] UKSC 36, [2015] A.C. 1619.

⁴¹ [2013] EWCA Civ 44, [2013] 2 E.G.L.R. 163.

⁴² See also G. Burgess and K Karampur, *Leasehold and Freehold Charges: Appendix B: Analysis of stakeholder Interviews*, Cambridge Centre for Housing & Planning Research, November 2019, 34, available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986067/Appendix_B_Stakeholder_interviews.pdf (last accessed 4 September 2021).

⁴³ A. Cameron, *Call to end ‘extremely unfair fleecedhold’ charges in South Gloucestershire*, BristolLive, 2 September 2021.

⁴⁴ Coombe Way FH1 transfer.

⁴⁵ E.g., Pine River FH3 transfer.

from changing the colour of paint used externally, either with an absolute prohibition⁴⁶ or subject to consent of the Transferor.⁴⁷ Sometimes certain restrictions (on making alterations, installing satellite dishes and changing garden layouts) applied only during the initial years (typically either 5 or 10 years), presumably so that the developer could control the appearance of the estate until sales were completed; on other sites these types of restrictions were not time-limited.

Permission fees

It was common to find provisions that required the homeowner to pay a fee in order to get consent for certain actions. So, for example, fees would be payable on any sale or letting of the house, or on requesting consent for any alterations (in some cases even internal alterations needed consent, with a fee⁴⁸). This was something that interviewees felt very strongly about, and some claimed that there was no predictability in relation to when there might be a charge, and how much it would be:

So, they don't stick to just the charges in the covenant, they'll say it's just industry standards that say we can charge this, or it says on the Gov.uk website that we can charge £40 if you're late paying. It's like they've picked everything from bits of legislation and guidance to say we can charge you more.⁴⁹

Further on down the line, [the management agents] have actually held up the sale of many, many properties because they keep asking for bits of money for this and bits of money for that – when you go to transfer the deeds they charge £350 or thereabouts. They're also threatening people with court action or people paying fines for late or non-payment of the bills.⁵⁰

In the report from the Welsh Government, almost 60% of homeowner respondents said that they had been asked to pay an “administration charge”. This was in relation to actions such as: changing names on the deeds of covenant, obtaining permission for altering the property, providing a management pack for sale, and setting up a direct debit (annually). Examples given were of fees ranging from £46.34 (for a certificate) to £300 (for management pack). Many management companies were also hasty to charge late fees (e.g., a £60 charge for late payment).⁵¹ An earlier survey of purchasers of leasehold houses found that:

On average, freeholders charged homeowners £1,422 to enquire about installing double glazing, £887 to change the kitchen units, and £689 to replace the flooring. Some even faced charges for the pleasure of changing the blinds (£526), and installing a new front door (£410).⁵²

As will be seen in the next sections, these various controls, and the legal tools used, are the source of much unhappiness and worry for homeowners.

HOMEOWNER CONCERNS

⁴⁶ Coombe Way FH1.

⁴⁷ Lakeside FH1.

⁴⁸ Meadowview LH1.

⁴⁹ Ridegway FH1.

⁵⁰ Pine River FH1 and FH2.

⁵¹ Welsh Consultation Responses, 36, 37.

⁵² PropertyMark, “Leasehold: A Life Sentence” 2018, available at <https://www.propertymark.co.uk/resource/leasehold-a-life-sentence.html> (last accessed 4 September 2021).

Poor pre-purchase advice

It is clear from our interviews that homeowners considered that they were inadequately advised at the time of purchase and had little idea about what they were getting into. Many strong emotions were expressed.

I'm fuming about not having it [the service charge] explained to me properly by my solicitor who I was paying.⁵³

They did not point out any of the obligations or explain really that leasehold meant I didn't own my own home. There was nothing at all raised by them about any obligations or what a breach in those obligations would mean because that's the greatest thing. Any breach, or if you owe money for three weeks or more, I'm what they called an assured shorthold tenancy- I know now that I could lose my home. That is something that they should have explained and they certainly didn't.⁵⁴

A common theme is that the purchasers were “persuaded to use the developer’s recommended solicitor”;⁵⁵ described by some as a “big mistake”.⁵⁶ Neither the charges, not the controls on homeowners were clearly flagged up. Both the existence of a rentcharge, and the required covenant with the management company about payment, were thought to negatively impact the value of property and said to have caused later sales to fall though.⁵⁷ Likewise, the Welsh consultation responses found that nearly a quarter of respondents indicated the charge has had an effect on buying, selling or getting a mortgage.⁵⁸

These remarks reinforce numerous reports that have identified concerns about the quality and independence of advice sometimes given by developer recommended conveyancers.⁵⁹ In the responses to the Welsh consultation only 2 out of the 6 lawyers responding indicated that clients were aware of estate charges before they committed to purchase; and 75% of homeowners said that they were either very unsatisfied (50%) or quite unsatisfied (25%) with the level of information they received about the charge before purchase.⁶⁰ The Conveyancing Association response states that buyers are rarely aware of estate charges.⁶¹ Dr Oakley and Prof Vaughan have explained that, in situations where a corporate player is able to highly influence which solicitor is appointed, the “influencer” is a “shadow client”, and that this creates a challenge to professional independence (more colourfully explained elsewhere as the

⁵³ Lakeside FH1.

⁵⁴ Meadowview LH1.

⁵⁵ Lakeside FH1.

⁵⁶ Pine River FH1 and FH2.

⁵⁷ Lakeside LH1 Pine River FH1 and FH2.

⁵⁸ Welsh Consultation Responses, 4.

⁵⁹ Law Commission, *Reinvigorating commonhold*, 11; CMA “Leasehold housing: update report” CMA115, [50] (the CMA only look at leasehold mis-selling whilst noting concerns have been expressed by Secretary of State for Housing, Communities and Local Government, MPs, and members of the public about “freehold mis-selling – so called ‘fleecehold’” [14]); S. Blandy, J. Dixon, and A. Dupuis, “Theorising power relationships in multi-owned residential developments: unpacking the bundle of rights” (2006) 43 *Urban Studies*, 2365, 2369; Burgess and Karampur, *Leasehold and Freehold Charges*, 36.

⁶⁰ Welsh Consultation Responses, 7, 4, and see 27.

⁶¹ *Ibid.*, 71.

“poodle problem”).⁶² Nor does the issue appear to be confined to this country. Writing about buying in a CID in the United States, McKenzie says that the “ability to make informed choices is reduced by.....voluminous sets of governing documents drafted in legalese...Many provisions are incomprehensible except to an attorney – and specialist at that”.⁶³ Similarly in Victoria, Australia, researchers found that there was little transparency on purchase into a master planned estate, and buyers were unaware of the real costs and of restrictions on their use of the property.⁶⁴

Uncontrollable charges and management

Homeowners were deeply unhappy with the amounts that they were being charged for the service being received, encapsulated in the title of a Guardian story: “overcharging and under-delivering”.⁶⁵ There is some regulation of charges within leases, but no controls that apply to freehold charges. With residential leases, “variable” service charges can be challenged if they are not “reasonably incurred” and the services/works are of a “reasonable standard.”⁶⁶ In *Arnold v Britton* (the chalet park previously mentioned) these controls did not apply because the service charge there was “fixed”, and did not fluctuate in accordance with expenditure. Permission fees (administration charges) for residential leases can also be challenged if not reasonable.⁶⁷ In practice, challenging charges is notoriously difficult, and may involve further financial risk if the lease allows the landlord to push legal costs through the service charge. With freehold charges, there is no regulation.

MP Helen Goodman describes the fees charged as “high, rising, uncapped and completely unregulated”, with “no transparency and little accountability”.⁶⁸ Interviewees felt very strongly about this. Many spoke about how the charges seemed excessive for the work that was involved:

One of the small open spaces outside, it’s got a hedge on one side and railings on the third, it’s surrounded by parking spaces. I would say it’s about 15 by 16 meters. On the first bill I got the estimate was £60,000 to maintain that for a year – a bit of lawn and hedge. They also put on their estimate: “dog bins £60,000 per year”.⁶⁹

[The developer] were giving us very bad service and charging us a fortune for doing three grassed areas with two ponds.⁷⁰

⁶² E. Oakley and S. Vaughan, “In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms” (2019) 46 *Journal of Law and Society* 83.

⁶³ E. McKenzie, *Beyond Privatopia* (Washington, 2011), 55.

⁶⁴ Kenna and Stevenson, “Negotiating Community Title”, 442-446.

⁶⁵ E. Lunn, “Fleecehold’ complaints flood in as residents battle to turn tide; Our story about homeowners on private estates facing uncapped fees for maintaining communal areas prompted a stream of responses” 6 January 2018, *The Guardian*. On Facebook there are various private members groups unhappy with estate managers e.g. “Unhappy homeowners against Greenbelt Group”. In Scotland various legal challenges have been brought e.g. *Marriott v Greenbelt Group Limited* available at <http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2014.27.html> (last accessed 4 September 2021).

⁶⁶ Landlord and Tenant Act 1985, s.19.

⁶⁷ Commonhold and Leasehold Reform Act 2002, s, 158, Sch 11.

⁶⁸ House of Commons research briefing, *Estate Charges*, 2,3.

⁶⁹ Ridgeway FH1.

⁷⁰ Meadowview LH1.

A media report gives instances of residents complaining of street lights not fixed for years, sewer covers in danger of collapse, members of the public trashing privately maintained playgrounds at homeowners' expense, bin men not coming down the roads, and potholes filling up with water.⁷¹ The Welsh consultation response is also littered with complaints from respondents about costs, and the quality of services ("awful quality of workmanship"; the "estate is a mess and very run down"; unadopted roads that "are unlit and dangerous at night.... Full of pot holes", "uncapped, inflated charges").⁷² In one case the management charges made up over 90% of the bill.⁷³ One respondent noted that many of the spaces could have been allocated to an adjacent property but keeping it as part of the maintained estate meant that "they use us as a cash cow charging us for 'managing' it. I feel this is an absolute rip off and I feel upset and angry...".⁷⁴

Homeowners we interviewed also felt hopeless about challenging charges: there is no practical remedy that residents can pursue. If the homeowners wanted explanations of the charges, or challenged them, they often found the management company unhelpful:

...all the powers and advantages are on [the developer's] side: they can charge what they want and they don't have to explain to us what it is. They can say £60,000 for keeping the gardens tidy, but they don't seem to be able to or want to break down where that money's gone. They never ever give us this information.⁷⁵

Another freeholder on the same site said they would not have bought had they known who the estate manager was to be given its reputation; and there is no opportunity for residents to challenge costs or the efficiency of management, or to pursue claims that costs are wrongly allocated to residents. In the Welsh consultation responses, more than a third of respondents had challenged their charge, but the majority reported being dissatisfied with the nature of the response they received.⁷⁶

If the homeowners refused to pay until there was an explanation there was a risk of late payment fees being imposed, and real fear of the remedies that could be exercised:

I have discovered that there is a paragraph at the end that I'm liable to pay any of [the appointed managing agent's] legal costs, which I take to mean we can't even take them to court as we'd have to pay all their legal costs as well as our own. So I'm quite angry about the whole thing.⁷⁷

Surprisingly, in the Welsh Government report more than a third of respondents had had action threatened or taken for non-payment, including additional fees and penalties, legal action, bailiffs,

⁷¹ See also: A Williams, "The great unadopted road dodge" 7 October 2017, The Times.

⁷² Welsh Consultation Responses, 26, 28, 47.

⁷³ Ibid., 20.

⁷⁴ Ibid., 47.

⁷⁵ Ridgeway FH1

⁷⁶ Welsh Consultation Responses, 4.

⁷⁷ Ridgeway FH1.

damage to credit rating, reporting to lenders and having charges added to mortgages, and report of threats of losing the property.⁷⁸

Given the complexity of the legal tools, and how uninformed they were at purchase, some homeowners had later accrued an impressive legal understanding:

Now they didn't tell us about the rentcharge or that the company was accountable to the rentcharge owner. When we did discover what it meant to have a rentcharge, we found out that a lease could be taken out on the house if the charge isn't paid through s 121 of the Law of Property Act, we then realised actually that we- there was potential for this, we're not sure if this actually happens. We realised that we'd bought a pup really and our only way out of it would be to sell up, but of course once people find out that there is this burden there it's going to be difficult to sell.⁷⁹

As noted earlier, there will usually be a management company charged with responsibility for looking after the estate. Sometimes the intention is to enable homeowners to become members of this company, and when the development is completed the control of the company is then transferred to them. It is the resident controlled management company who is then able to appoint and instruct the management agents. At one of our sites, Meadowview, the residents were so unhappy with the way it was managed that they constantly challenged the management and clearly "got on the [developer's] nerves". In the end the developer "basically walked away from [the] estate and said we'll hand it over to the residents as directors". But this has proven to be very burdensome:

I didn't buy a house to become a Director of a business; to become an accountant; an estate manager; a leader of a Resident Group and more. This was definitely not in the sales documents. I am spending well over 20 hours a week doing this, alongside working full time.... I am exhausted and yet still trying my very best to support and advise almost a whole estate of people who are probably as scared as myself.⁸⁰

This echoes finding in earlier surveys of leaseholders. In one (which related to blocks of flats, not housing estates), the burden of being an RMC director was clear in some comments: "...it is hard to find directors willing to play their part and be committed and contribute time and effort"; 62% said that the role took up more time than expected; and several did not have good relationships with either their fellow directors (16%) or leaseholders (14%).⁸¹

Again, there are similar experiences in other jurisdictions. Writing of the position in relation to CIDs in the United States (which tend to be more complex than English PREs), McKenzie explains the strain of governance on the homeowner volunteers who step up, the tensions and conflicts that can arise between those on the governing board and other residents, and he questions whether this level of

⁷⁸ Welsh Consultation Responses, 4.

⁷⁹ Lakeside FH1.

⁸⁰ Meadowview LH1: Correspondence with journalist.

⁸¹ "National Leasehold Survey 2016" conducted by Brady Solicitors, in conjunction with The Leasehold Advisory Service, available at <https://www.lease-advice.org/files/2016/07/Brady-Solicitors-in-partnership-with-LEASE-Leaseholder-Survey-June-16.pdf> (last accessed 4 September 2021).

responsibility is appropriately given to untrained, unregulated volunteers.⁸² Although focussed on apartment living (not houses) Easthope similarly found there may be difficulties in persuading people to join governing bodies, perhaps with little comprehension of the tasks involved, and not having appropriate skills.⁸³

In our sample, some estates had been marketed as promising residents control, and this was also suggested in the legal documentation we saw. In practice, residents were not always able to become members:

you can only *apply* to be a member. They haven't implemented that and have no plans to implement it. We didn't find that out until after we'd brought either.⁸⁴

Sometimes there appears no way of changing estate managers. A resident at one site states that the management company, Greenbelt is "named in our deeds so we can't change them".⁸⁵ Similarly one of our interviewees, unhappy with management being tied to a particular company, said that the Managing Director spoke at a public meeting and "he said you've got us in perpetuity and there's nothing you can do about it."⁸⁶

Unfairness of paying for things that should be a public service

This is a major issue for many of those living on PRes. Our interviewees considered it "discriminatory" that those on older estates don't have these charges.⁸⁷ Many saw it as a form of double taxation: "it's unfair we pay council tax on top of the estate charge";⁸⁸ "we are 'paying twice', first for the management company maintenance, and secondly the full council tax".⁸⁹ It was complained about in all of our interviews. The Welsh consultation responses also notes problems. Some purchasers were made promises before purchase that infrastructure would be adopted, but this did not happen; and there was a widely "expressed desire for the LAs to adopt and manage the public spaces on the estates, with management companies involvement and ownership of community lands being abolished".⁹⁰

On some sites there was particular angst amongst homeowners having to pay for "SuDs". These are sustainable drainage systems "designed to both manage the flood and pollution risks resulting from urban runoff and to contribute wherever possible to environmental enhancement and place making".⁹¹ In Pine River FH1 and FH2 complained that the attenuation ponds (part of the SuDs system) were "not

⁸² McKenzie, *Privatopia* and McKenzie, *Beyond Privatopia*.

⁸³ H. Easthope, *The Politics and Practices of Apartment Living*, (Cheltenham, 2019).

⁸⁴ Lakeside FH1.

⁸⁵ C. Priestley, "Shadow minister sees housing issues in Spennymoor and Bishop Auckland" 16 October 2019, The Northern Echo.

⁸⁶ Pine River FH1 and FH2.

⁸⁷ Ridgeway FH1.

⁸⁸ Lakeside FH1.

⁸⁹ Pine River FH1 and FH2.

⁹⁰ Welsh Consultation Responses, 31, 33, 44.

⁹¹ <https://www.local.gov.uk/topics/severe-weather/flooding/sustainable-drainage-systems> (last accessed 4 September 2021).

constructed in a safe and correct way". It is possible for these to be adopted.⁹² For example, on one site we examined the council adopted management of the SuDs, but the developer chose "to transfer the grounds maintenance liabilities of [the] estate to a management company rather than transfer the liability to the District Council."⁹³

Open spaces raise further issues, especially if they include play areas. In both our interviews and the Welsh government report it was felt unfair that homeowners were paying for facilities open to the general public:

Public areas should be adopted by the council as they are open for anyone to use not just those that live on the estate. If this cannot be done then a reduction in council tax should be offered to those that are stuck paying estate charges.⁹⁴

It's not right we are subsidising amenities for the local community. If there's vandalism we pay to have it put right. We are footing the bill for the behaviour of the whole community when they are using the public spaces on the estate⁹⁵

The children's play area is right next to a large public car park for visitors to [a nearby attraction] and yet it's included in the things we as residents are responsible for paying.⁹⁶

Trapped: It's not really ownership

Buying a house on a modern PRE with all of the restrictions and the requirement to pay an estate charge can create a strong sense that this is not really ownership. The idea is encapsulated by an interviewee who said that even though the title bought was freehold it is not "free from hold",⁹⁷ and another described it as "fake freehold."⁹⁸ A freehold purchaser considered it more like leasehold:

I had no idea that as a freeholder I could have covenants and restrictions and charges for goodness knows what else placed on me.... I've been sold a leasehold house under the guise of a freehold one.⁹⁹

But leaseholders also felt cheated out of home-"ownership" and the impact on wellbeing is significant. One leaseholder explained how she really struggled with the idea that the developer "still owned it as they were my landlord" and that she "had sunk [her] life savings into a house that *still* belonged to the [developer]".¹⁰⁰ Discovering that the developer proposed to sell the freehold reversion caused her to

⁹² <https://www.susdrain.org/delivering-suds/using-suds/adoption-and-maintenance-of-suds/adoption/SuDS-adoption-in-England-and-Wales.html> (last accessed 4 September 2021).

⁹³ https://www.whatdotheyknow.com/request/annual_management_charge_and_cou (last accessed 4 September 2021).

⁹⁴ Welsh Consultation Responses, 46.

⁹⁵ Lakeside FH1.

⁹⁶ Ridgeway FH1.

⁹⁷ Pine River FH1 and FH2.

⁹⁸ Lakeside FH1.

⁹⁹ Ridgeway FH1.

¹⁰⁰ Meadowview LH1.

think that her “world had collapsed, there are no other words that fit better”.¹⁰¹ The strength of feeling was demonstrated when she added:

I don't look at the house- when I'm walking toward the house when I'm going home, I know it's not my home, it might as well have [the developer's name] written all over it because they even tried to tell us that we couldn't change the colour of the front door or the garage.... To say that I feel like I've made the worst mistake of my life is not understating it. I wish I had never, ever bought that house..... I'll never be truly free.

The next section considers the various issues raised by the homeowners under three broad themes: understandings of ownership, the justifications for imposing restrictions on homeowners, and reduction in local authority adoption of estate infrastructure.

REFLECTING ON THE ISSUES RAISED

Reflecting on “Ownership”

It is clear from the campaign for leasehold reform and the recent programme of Law Commission on residential leasehold and commonhold that homeowners want to have control over decision-making in relation to their properties. What our PRE interviews and media noises reveal is a deeper thread of emotion and understanding about what constitutes “ownership”. For some, “full ownership” is associated with freehold ownership, and leasehold is acknowledged to be in some way “lesser”. For lawyers, this is intriguing. At one level, the legal distinction between freehold and leasehold is often portrayed as a purely temporal one: the lease being of certain duration, and the freehold of indeterminate length but effectively “forever” (subject to the rare possibilities of escheat or bona vacantia). What the interviews suggest is that the distinction in the public eye is one of levels of control, and the freehold should be free from controls by other private persons. Interestingly, there are echoes of this also in the way that the common law has approached burdens on land, as discussed shortly.

The expectations about levels of freedom may be a reflection of common ways in which leasehold and freehold have been used in conveyancing practice over the years. Leasehold has been the norm for sales of flats and other connected properties because of the way that it enables the enforcement of covenants, both positive and negative, against successors in title. Thus leasehold is generally understood to carry with it various obligations (e.g. a service charge), and restrictions (e.g. not to make structural changes as this may impact on those living above or below). In contrast, with the exception of PREs, most freehold house sales will be largely burden free, save for the relatively common restrictive covenants enforceable by neighbours, such as those prohibiting particular uses or new building work. The common law has always supported this idea that freehold carries with it a liberal bundle of rights. When referring to freeholds in *Rhone v Stephens* Lord Templeman said that:

When freehold land is conveyed without restriction, the conveyance confers on the purchaser the right to do with the land as he pleases provided

¹⁰¹ Meadowview LH1, Correspondence to journalist.

that he does not interfere with the rights of others or infringe statutory restrictions.¹⁰²

He continued, however, by noting that the conveyance may impose *restrictions* which “deprive the purchaser of some of the rights inherent in the ownership of unrestricted land”, whilst common law had no power to enforce a positive covenant as to do so “would be to enforce a personal obligation against a person who has not covenanted.”¹⁰³ Although his explanation as to why negative (or restrictive) covenants affect successors is not entirely convincing (it “prevents the successor from exercising a right which he never acquired”¹⁰⁴) the judgement does reflect a central idea about freehold ownership: the burden of positive obligations does not run. Of course, through the imposition of rentcharges, the sale of houses as leaseholds, and the use of direct covenants coupled with the Land Registry restriction, ways have been found to circumvent this idea. But the idea itself lingers: a freehold should be a “free” form of ownership. It’s a myth, but a powerful one.

PREs are game changers. Estate charges are the norm, covering items historically maintained through public taxation, and undermining the idea that positive obligations do not run with freehold land. Restrictions on use are also the norm, enforceable not by neighbours but by a developer or management company, and covering a far wider range of issues than was the norm historically (save for the carefully managed and designed “Great Estates”). In addition, the idea that freehold is indeterminate (“permanent”) ownership is threatened when a rentcharge is used (due to the possibility that the rentcharge owner may exercise the right to re-enter conferred by s121 Law of Property Act 1925 or by deed).

Justifying controls and restrictions

As shown in the interview extracts earlier, homeowners may strongly resent the controls imposed on them through the title deeds.

Some of the restrictions may be justified on the grounds of good estate management, trying to maintain a certain aesthetic appearance and orderliness. This, for example, may explain why large vehicles cannot be parked, why gardens have to be maintained and even why it is not possible to change paint colours. In some respects this echoes the approach in the traditional “Great Estates” where these types of restrictions were commonplace and justified on the basis that they were “comprehensively managed leasehold estates where enlightened management contributes greatly to the well-being of the residents by maintaining the character of the estate.”¹⁰⁵ Indeed, in order to justify the imposition of a management scheme following the Leasehold Reform Act 1967 it must be shown that “in order to maintain adequate standards of appearance and amenity . . . it is likely . . . to be in the general interest that the landlord retain power of management”.¹⁰⁶ Further, it is not unusual for housing estates from the 1960s and 1970s to have similar covenants designed to preserve an estate feel.

¹⁰² [1994] 2 AC 310, 317.

¹⁰³ *Ibid.*, 317, and 321.

¹⁰⁴ *Ibid.*, 317.

¹⁰⁵ *Leasehold Reform in England and Wales* (1966) Cmnd 2916 at para 22.

¹⁰⁶ S 19(1).

Some restrictions, however, have no external impact. For example, one interviewee said that discovering permission and a fee were necessary for even internal alterations, “was a shock”. Other restrictions in her lease are clearly inappropriate for a detached house: a clause permitting the landlord to inspect to examine the condition, and to make good repairs in default of the leaseholder doing so; a clause to comply with the landlord’s directions regarding the keeping of any animal; and a requirement to keep windows clean and have “appropriate curtains and/or blinds”.¹⁰⁷ It may be that these are simply the product of bad drafting; of lifting clauses from legal precedents for other property types.

It is unclear why the external *restrictions* now cause so much resentment. It may be just that there are more restrictions than was typical in older estates, or it may be part of the general dissatisfaction with modern PREs. Some, of course, are linked to permission fees and seen as money makers for the developer.

There is a broader question about whether there should be constraints on private governance. Where there is already public regulation, some consider it inappropriate to add another, private, layer of control:

The covenant defines that, if I wish to put a conservatory on my property, or make external changes I would need to seek the approval of, in this case, Barratt Homes. In my case the home had been built for 16 years and I believe that I should not have to get the approval of Barratt Homes let alone pay for it. This is why we have planning laws..... I could live at the house for 100 years and still have to pay them for approval.¹⁰⁸

It may be that private controls enable there to be more nuance and sensitivity to local conditions than planning laws,¹⁰⁹ but the quotation also raises an issue about the problematic nature of the perpetual duration of these restrictions as it means that there is no allowance for the preferences and character of sites to change over time.

In addition, McKenzie and Sherry both discuss whether there should be aspects of residential life that should remain in the private sphere, beyond the control and reach of other private actors; what Sherry refers to as the boundary rules.¹¹⁰ Perhaps private governance should have nothing to do with banning pets that are not a nuisance to others, or determining the appropriateness of curtains and blinds.

What emerged powerfully from our interviews was a strong sense of unfairness, and, sometimes, real anger. Similarly, the Welsh consultation responses note that there were “perceptions that deeds of covenant are one sided and an excessive imposition on freehold property rights”.¹¹¹

McKenzie has noted similar responses where he notes that unwilling purchasers approach ownership with an expectation of greater dominion over their property than CIDs normally allow and, turn, this

¹⁰⁷ Meadowview LH1.

¹⁰⁸ This was a response given to the Law Commission’s consultation on its 13th Programme of Law Reform, supplied by email to author.

¹⁰⁹ A Law Commission report said that “privately imposed restrictions will continue to have a useful part to play, complementary to that of planning controls”: Law Com, Published Working Paper No 8 HMSO 1967.

¹¹⁰ McKenzie, *Beyond Privatopia*, esp 114-119; Sherry, *Strata Title Property Rights*.

¹¹¹ Welsh Consultation Responses, 35.

contributes to growing tide of owner resistance and activism. The responses to the Welsh government consultation noted that some of the unadopted open spaces were in practice becoming “privatised” as the charge payers thought of it as “their” land:

with residents who pay for them excluding non-residents who are not directly paying for the space and its upkeep. It was indicated that there are already examples where signs have been erected stating that roads to a new estate are private and only for use by residents and visitors.¹¹²

In turn, this “could be damaging and adversely impact on social cohesion”.¹¹³

Public or private infrastructure

As part of the debate revolving around the 1967 legislation that gave long residential leaseholders the right to purchase the freehold, it was noted that there had then been a shift away from private maintenance:

Drainage, water and power supply, sea defences, street-lighting, road construction and the provision of public parks have all become a public responsibility and are thus no longer dependent on private landowners. Probably the latter can still usefully provide facilities for their tenants. Many areas for example lack open space and playgrounds and others would certainly benefit from more tree-planting and landscaping. It is a matter of opinion whether public authorities should be solely responsible for the provision of these amenities, although it is hard to deny that private individuals can usefully supplement the work of public authorities.¹¹⁴

There are various possible explanations as to why there has been a more recent move back towards private maintenance of estate facilities.

Austerity is likely to play a significant part,¹¹⁵ and private maintenance arrangements may also be required as a planning condition.¹¹⁶ The Welsh consultation responses explain that local authorities will have policies on the requirements for adoption, which will include meeting minimal standards, for example for the safety of playground equipment, and the width and construction of roads. In addition they will charge a sum for adoption, which is based on “commuted sums covering between 20-30 years maintenance costs”.¹¹⁷ Developers responding to the Welsh government consultation commented that it has become increasingly more difficult to get local authorities to agree to adopt all public spaces in the last 5-10 years. It is easier to get roads adopted, and sometimes sewers, but most other open spaces were privately maintained.¹¹⁸

¹¹² Ibid., 7, 75.

¹¹³ Ibid., 75.

¹¹⁴ I. J. McDonald, “The Leasehold System: Towards a Balanced Land Tenure for Urban Development” (1969) *Urban Studies* 179, 188.

¹¹⁵ Welsh Consultation Responses, 76; Burgess and Karampur, *Leasehold and Freehold Charges*, 34.

¹¹⁶ <https://questions-statements.parliament.uk/written-questions/detail/2018-12-04/198765> and <https://hansard.parliament.uk/Commons/2019-01-22/debates/69D31E91-49DD-4DF4-B638-4620B5314D15/FreeholdEstateFees> (last accessed 4 September 2021).

¹¹⁷ Welsh Consultation Responses, ch 7.

¹¹⁸ Ibid., 51.

There is also an element of developer choice, however. According to the local authority responses to the Welsh consultation, developers often choose not to seek adoption, perhaps because of not wanting to meet the required standards or being unwilling to pay the committed sum.¹¹⁹ Tellingly, one local authority commented that “developers can sometimes look for cheapest option for themselves, rather than the best option for meeting resident’s needs & the best long term solutions”.¹²⁰ In an earlier study one housebuilder reported that 9 out of 10 roads were not adopted as they are “cheaper to build, to develop and it stays within your control.”¹²¹ In a further twist, some councils have now set up their own management companies that can be employed to look after these PREs.¹²²

Sometimes there are practical reasons why certain services cannot be adopted. An example is given that in order to install sprinklers in homes a higher flow and water pressure is needed than supplied by the local utilities provider, and thus there is a need for a privately maintained supply.¹²³

Some of our interviewees were remarkably well informed about adoption. Lakeside FH1 mentioned that non-adoption is cheaper for developers “as they don’t have to construct the roads to adoption standards, which are quite stringent”. She knew about “commuted sums” and said “if you ask most councils that would be the equivalent to about 20 years maintenance”. Meadowview LH1 reported that the fee for adoption would have been £50k (according to planning papers), which is around 10 years of maintaining the estate but instead the developer preferred to set up the management company as a “nice cash cow”. Indeed, the opportunity to generate a revenue stream is likely to be part of the story. A study by the Cambridge Centre for Housing & Planning Research said that it was reported that “some developers may build these amenities to a lesser standard so they get the benefit of income from management of the estate charges.”¹²⁴

These various concerns are similar to those in other jurisdictions. McKenzie notes that some states require new residential construction to be in the form of a CID with community association private government, thereby “enabling cities to acquire new property-tax payers without having to extend the city’s government-funded infrastructure to them” and thereby engaging in “redistributive policy”.¹²⁵ In New Jersey, however, he reports that the double-taxation issue has been partially curtailed by a provision that requires municipalities either to provide certain services (snow and leaf removal, waste collection and recycling, and street lighting), or to reimburse the communities for the costs of those services.¹²⁶ Given that CIDs are collectively owned by the purchasers, there is not the same “cash cow” opportunity in the United States. Paying twice is also referred to as a “sore point” and “source of

¹¹⁹ See also G. Burgess and M. Jones, *Road and Sewer Bonds in England and Wales*, Cambridge Centre for Housing & Planning Research, May 2015, 25, available at https://www.cchpr.landecon.cam.ac.uk/system/files/documents/Report_100.pdf (last accessed 4 September 2021).

¹²⁰ Welsh Consultation Responses, 51.

¹²¹ Burgess and Jones, *Road and Sewer Bonds*, 26.

¹²² <https://www.southsomerset.gov.uk/media/3650/statements-of-accounts-2019-20.pdf> p 82 (last accessed 4 September 2021), but note that this business plan is now being revised: <https://www.southsomerset.gov.uk/media/4726/statement-of-accounts-unaudited-finaldocx.pdf>, 15-16 (last accessed 4 September 2021).

¹²³ Welsh Consultation Responses, 49.

¹²⁴ Burgess and Karampur, *Leasehold and Freehold Charges*, 35.

¹²⁵ McKenzie, *Beyond Privatopia*, 74, 75.

¹²⁶ *Ibid.*, 78.

considerable anger” in an Australian study, with residents seeking to “renegotiate the relationship between the estate and the local council with a view either to reduce the rates they pay the council or increase the services the council provides.¹²⁷

As well as the possible impact on standards of construction and maintenance, private control of estate infrastructure and open spaces often leaves homeowners feeling powerless. Further, although there is some recourse available to leaseholders through legislation, there is no regulation of charges on freehold properties. This differential treatment cannot be justified, which the government has recognised by stating that it will legislate:

...to give freeholders on private and mixed tenure estates equivalent rights to leaseholders to challenge the reasonableness of estate rent charges (replicating relevant provisions in the Landlord and Tenant Act 1985) as well as a right to apply to the First-tier Tribunal to appoint a new manager to manage the provision of services covered by estate rent charges (replicating relevant provisions of the Landlord and Tenant Act 1987).¹²⁸

In the next section, we consider whether there are other risks from the rapid expansion of PREs in recent years.

FUTURE RISKS

The growth of PREs in England and Wales may have significant mid-long term “political and social consequences” that both national and local governments should pay attention to.

Unadopted infrastructure may be built to lower standards. Private roads may be more narrow, with less room for parking, and no pavements, have lower specification street lighting, repairs may be frequently required and difficulties with access means that local authorities waste collection may stop short of some houses.¹²⁹ There can also be problems when the estate is not maintained to an appropriate standard, and disgruntled residents may then look to the local authority to help them out. A 2015 report found that: “local authorities said that they encounter problems as schemes age and management arrangements lapse and residents look to the local authority for repairs for which they are not technically responsible.”¹³⁰ Local authority responses to the Welsh government consultation support these concerns, noting that councils are often contacted even if they have no responsibility for the land, especially as residents are often unaware that the infrastructure is not adopted. Further, there are sometimes serious problems:

Poor management of utilities and assets such as drainage systems, trees, etc can cause significant wider problems for council, or utility operators e.g. clearance of ditches and water

¹²⁷ Kenna and Stevenson, “Negotiating Community Title”, 442, 446-7.

¹²⁸ MHCLG, “Implementing reforms to the leasehold system in England: summary of consultation responses and government response”, June 2019, 9, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/812827/190626_Consultation_Government_Response.pdf (last accessed 4 September 2021).

¹²⁹ <http://www.new-home-blog.co.uk/why-are-private-roads-so-common-on-new-housing-developments/> (last accessed 4 September 2021); A. Williams, “The great unadopted road dodge” 7 October 2017, *The Times*.

¹³⁰ Burgess and Jones, *Road and Sewer Bonds*, 26.

courses and tree inspections, which if not carried out can cause major, if not catastrophic issues.¹³¹

On one of our case study sites, residents were hoping to get the council to adopt the infrastructure,¹³² something that the Welsh government report also noted did sometimes occur “due to political and public pressure”.¹³³

In the longer term, the costs of repairing infrastructure could be significant.

This is an issue of concern in the study of CIDs in the United States, and master planned communities in Australia, particularly as there are usually inadequate reserve funds to cover major expenditure:

One of the issues here is because we have a gate house with private roads, we have to maintain the roads as well, so when this thing needs re-bitumening, it's going to be our cost, and it's just not sustainable. . . . Eventually, there'll be a huge re-bitumening job, a million bucks, and we won't have the money. And that's the bit that worries me. (Chair MLCA, 2007) (Australia)¹³⁴

Failure of individual private governments is not a theoretical proposition: it has occurred on a number of occasions and is grounded in the failure of private governments to accumulate the reserve funds necessary to maintain the property. (United States)¹³⁵

McKenzie explains how financial institutions and governments have sought to protect themselves from the “previously-unrecognized fragility of CID housing”.¹³⁶

It is also a concern flagged by a local authority in its response to the Welsh government's consultation:

If private management companies go out of business, this then leaves the Council with little option to step in but without the necessary funding to maintain the site. Ideally it would help if the Council were afforded step in rights along with a roof tax or some method of enabling funding for future maintenance.¹³⁷

On PREs where management is eventually handed over to the homeowners, there may be additional problems. It is clear from our interviews that involvement with managing estates can be burdensome. Again, this is something that McKenzie identifies as a serious problem in the United States:

...Perhaps the most critical variable is the ability and willingness of homeowners...to do all the things the institution expects of them... (p22)

..it is no easy task for even the best-intentioned volunteers to handle all the operational issues involved...The result is often a high level of internal conflict and some deeper structural challenges. (p 93)

¹³¹ Welsh Consultation Responses, 63. McKenzie discusses “troubled private infrastructure” in CIDs, noting that associations frequently seek to divest themselves of streets: McKenzie, *Beyond Privatopia*, 72-74.

¹³² Meadowview.

¹³³ Welsh Consultation Responses, 64.

¹³⁴ Kenna and Stevenson, “Negotiating Community Title”, 443; see also 442-445.

¹³⁵ McKenzie, *Beyond Privatopia*, 81; and generally pp 80-88.

¹³⁶ McKenzie, “Rethinking Residential Private government in the US”, 53.

¹³⁷ Welsh Consultation Responses, 63.

There is some evidence that this can be problematic within leasehold property: a survey found that being involved as a Right to Manage director is burdensome, and can create tensions with fellow leaseholders.¹³⁸ But the outcry against the absence of voice about management decisions, and “rip off fees” that has occurred in the campaign for leasehold reform suggests that homeowners do want control of their home environment. PREs do, however, raise the issue to a different level as it means looking after infrastructure, such as roads and SuDs, that many consider should be adopted.

There may be further impacts beyond issues of repair. In the responses to the Welsh Government report various organisations noted the importance of open spaces for biodiversity, preserving habitats, and general well-being and have a concern that unless the arrangements for long-term maintenance are robust and properly resourced these goals may not be safeguarded in perpetuity.

CONCLUDING REMARKS

A possible way to evaluate the recent growth of PREs is to ask whether they meet standards of efficiency, accountability, sustainability and fairness. It is clear from this small study that there are serious concerns in relation to each of these. For homeowners there is often poor pre-purchase advice which means that they are shocked to learn about restrictions on their use of the home, the need to get consent to do things that many homeowners take for granted, and the requirement to pay an estate charge on top of council tax. This is not what many understand ownership to be. Further, these charges are unregulated, there is often little transparency and it is difficult to challenge them. Even if the government does introduce the reform to make the charges and fees subject to the same regime as currently exists for leasehold properties, and, as proposed, repeal the troublesome section 121 of the Law of Property Act 1925, these will only scratch the surface of perceived unfairness. Emotions can run high. One interviewee said:

to say that I feel like I’ve made the worst mistake of my life is not understating it. I wish I had never, ever bought that house.¹³⁹

The fact that core infrastructure may be constructed to standards lower than required for adoption, and that upkeep and maintenance of these PREs is managed by private companies, dependent on the ability of homeowners to pay what are likely to be increasingly onerous estate charges gives rise to hitherto unacknowledged concerns about sustainability. Private estates in the United States are different, but McKenzie’s work identifies that significant failures can occur without proper regulation.

In the concluding chapter of his first book on this topic, *Privatopia*, McKenzie refers to a novel by Samuel Johnson, *Rasselas*, which ends with the statement that “nothing is concluded”.¹⁴⁰ Likewise this article draws no conclusions, but this study does identify various broad issues stemming from the growth of PREs. How big a problem they are, and what the long-term implications are, cannot be known without more data. And at present, with the recent exception of the Welsh consultation, neither national nor local governments are collecting data on this.

¹³⁸ National Leasehold Survey 2016.

¹³⁹ Meadowway LH1.

¹⁴⁰ McKenzie, *Privatopia*, 175.