

Chapter 9

Intentional Communities and Care-giving: Co-Housing Possibilities

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INTRODUCTION

The term 'CoHousing' covers a great variety of 'intentional' community developments that involve members of a group sharing residential and social needs. If there is a spectrum of intentional communities stretching between the informal, 'utopian', often ideologically-defined 'commune' on one end, and the affluent, exclusive 'gated community' on the other, then, in its 'effort to resolve competing desires for inclusivity of community and exclusivity of privacy',¹ CoHousing seeks to occupy a middle section, within which there exists further differentiation based on motivations, purposes, recreational interests, age-related and social and financial characteristics of those who create and live in CoHousing communities. Perhaps there is also a sprinkling of what might be called 'life-style ideology' such as environmentalism² and sometimes those who have come together to form or who join an intentional community following the CoHousing idea do so partly because they do not fit into the dominant heterosexual family unit.

¹ Fenster, M, 'Community by Covenant, Process and Design: CoHousing and the Contemporary Common Interest Community' (1999) *Journal of Land Use & Environmental Law* 1.

² The websites of both the UK and the USA CoHousing movements, www.cohousing.org.uk and www.cohousing.org, respectively, include details of a number of environmentally responsible features of CoHousing communities.

What does CoHousing have to do with 'Caring and Sharing in Domestic Relationships'?³ In one sense 'caring and sharing' are merely incidental to the legal and physical configuration of CoHousing communities. In another sense, however, they are its main organisational impetus. CoHousing is also about 'domestic relationships' in the wider sense of relationships between people in a community of residential neighbourhood.

The definition proposed by Mark Field, a leading authority on CoHousing in the United Kingdom, in his book, *Thinking about CoHousing*,⁴, focuses on the sharing of living space and, by clear implication, on caring for people with whom living space is shared, as essential characteristics of CoHousing:

A CoHousing 'organisation' is taken to mean an autonomous association of households united in their aspirations to meet shared residential and social needs within a jointly-owned and democratically-controlled 'intentional neighbourhood'.⁵

As in other parts of the world, the main reasons for the growing CoHousing 'movement' in the UK have to do with a perceived inability of established forms of housing development and redevelopment to provide a desired balance between the independence, privacy and flexible financial security, on the one hand, and social connection, social contact and the financial advantages of combining housing capital, on the other hand. Modern CoHousing practice, began in Denmark⁶ and the Netherlands, where it is now well established. Currently, by far the largest and most

³ This paper was prepared for the workshop on 'Caring and Sharing in Domestic Relationships' held by the International Institute for the Sociology of Law in Onati, Spain in April, 2007.

⁴ Field, M, *Thinking about CoHousing* (London, Diggers & Dreamers, 2004).

⁵ *Ibid.* p 198.

⁶ The term CoHousing is an approximate translation from the Danish 'Bofaellesskaber'. See Scotthanson, C, and Scotthanson, K, *The Cohousing Handbook; Building a Place for Community* (Gabriola Island, Canada, New Society Publishers, 2005) at 3.

varied number of CoHousing communities are in the United States. British CoHousing communities, while able to claim as historically important ideological predecessors the late-Victorian garden cities and model towns, and to show a close relation to the well-established public or semi-public co-operative housing form, are small but increasing in number. Why the slowness to take up CoHousing as a mainstream form? Why, however, have CoHousing communities recently (in the last decade or more) begun to be conceived and established in Britain more frequently and, it appears, with more permanency and sustainability?⁷

What are the significant social and - most relevant for our purposes – the legal characteristics of CoHousing communities? Do CoHousing communities make a social contribution beyond the interests of their members that merits support and encouragement on public policy grounds? Does CoHousing in Britain, for instance, have a significant potential to address issues of housing provision that can contribute to the well-being and care of the elderly people, as has been the case in the Netherlands and Scandinavian countries?⁸

Part One of this paper will describe the significant legal features of a small but growing number of British CoHousing communities and will explore the adoption and adaptation of the companies limited by guarantee form for the purposes of CoHousing. In Part Two some aspects of key legal documents that have been or are proposed to be used in the setting up and running of CoHousing communities will be examined. Here the focus will be on two different CoHousing communities, one completed and the other proposed. The first is a community of ‘families’ of various

⁷ For a full comparison of CoHousing models in California and in the UK arguing that CoHousing in Britain should be encouraged because it provides greater sustainability than other UK housing forms, see Williams, J (2005) ‘Sun, surf and sustainable housing – CoHousing, the California Experience’ (2005) Vol 10, Number 2 *International Planning Studies* 145-177 (33)

⁸ Brenton, M, *We’re in Charge* (London, The Policy Press, 1998); Choi, J S, ‘Evaluation of Community Planning and Life of Senior CoHousing Projects in Northern European Countries’ (2004) 12 No. 8 *European Planning Studies* 1189.

configurations, and the second is a 'family' of older women who wish to live singly or in pairs within the CoHousing site. In Part Two other relevant aspects of other legal forms for CoHousing in Britain will be mapped, with emphasis on the potentialities of the new 'commonhold' legislation; the modernisation of charity law and the new 'community interest company.' By way of conclusion, the general social benefits of CoHousing and its particular relevance both to an aging population and to the phenomena of human dependence or interdependence will briefly be considered.

PART ONE

A Description of CoHousing Design

Whether newly built or adapted from existing residential, commercial or public buildings, CoHousing schemes are physically characterised by a combination of private family or individual accommodation and shared communal areas and facilities. Often the shared facilities are centrally positioned, but in adapted buildings this is less likely to be the case. Sometimes the whole of the land upon which the CoHousing is situated is shared. In other schemes, limited undeveloped land parcels form part of the private accommodation units. Generally, parking areas on non-urban CoHousing schemes are on the periphery. Where possible, kitchens, sitting rooms and porches or balconies of private areas are positioned so as to look out on to shared spaces, and pedestrian walkways linking private and shared areas are intentionally configured so as to increase both visibility and the frequency of social interaction. The size of CoHousing communities varies but deliberate limitation of physical size and total population to the extent thought necessary⁹ to foster and support a sense of community and shared enterprise is the key aspect of what has been called a 'CoHousing dynamic.'¹⁰

⁹ Most UK CoHousing projects are of between 10 and 30 units.

¹⁰ Field, n 4, at 13.

The extent and variety of the shared facilities of CoHousing communities depend on a number of factors, including space, cost and the priorities of the people living there, often dictated by age, interests, and so forth. Shared communal cooking facilities are frequent, though it is by no means a mandatory characteristic that CoHousing communities share meals regularly.¹¹ Child-care, entertainment areas, laundries, business equipment and premises, woodworking and craft-making areas are sometimes provided. The linking of the buildings in CoHousing communities frequently provides an opportunity to maximise shared systems in order to reduce costs, to decrease environmental impact or to increase the quality of service. Thus, several new-built or renovated schemes have shared heating systems, water systems, gardens and intranet facilities.¹²

Organisational framework

What distinguishes CoHousing in terms of conceptual and organisational framework, however, is that it is conceived, initiated and, entirely or predominantly, *controlled* by those who reside in it.¹³ While other types of group housing or, perhaps more accurately 'home grouping', involve aspects of group initiation and control, for CoHousing the combination of a high degree of privacy and ownership rights over residential areas with a generally equally shared decision-making responsibility for and control over the function of common areas that rests exclusively or substantially with the neighbourhood's households, are essential. The extent of a consensus-based process of community decision-making and dispute resolution as well as controls on membership and restrictions on alienation of interests in private units are other main hallmarks of CoHousing.

¹¹ Scotthanson, n 6, at 4; Field, n 4, at 9. The Community Project of East Sussex, for instance, has a Friday 'pot-luck' supper.

¹² The Springhill cohousing community near Stroud has a number of 'eco-features' although some were abandoned for reasons of cost. 'Britain's first new-build cohousing scheme' *The Independent*, 9 January, 2007.

¹³ Fromm, D, *Collaborative Communities: CoHousing, Central Living and Other Forms of New Housing with Shared Facilities* (New York, Van Nostrand Reinhold, 1991).

A legal and organisational framework able to achieve the typical aims of CoHousing communities needs to be considered in relation to the provision of key rights and obligations of the individual participants and of the group. A bundle of core legal issues that will need to be addressed by CoHousing schemes includes:

- The means for owner-occupation rights over the interior of residential units and shared rights over the common parts;
- A mechanism for sale, disposal and encumbrance of equitable interest in the residential units that is consistent with the aims of the CoHousing community; and
- Residents' equal commitment to and participatory control of the management of common areas and facilities.

Stages of Organisational Framework

The legal needs of the initial or founding group are different in a few important respects from those of the established group into which they may evolve. Key legal and practical issues in the initiation and development stage of a CoHousing community include the need to form a separate recognisable identity that can command credibility within the market for real property, to act quickly, to borrow money and to present a persuasive and coherent voice to relevant governmental agencies, such as planning authorities. The financial risk and the financial security needs of individuals or 'families' in the group need to be addressed from the outset and balanced against the needs of the group as an entity. When, however, the project is built or the refurbishment is complete, the priorities of legal and organisational needs of CoHousing generally shift into those concerned with governance and mutual rights and obligations both between and amongst participants and between participants and the group. Thus, for instance, a key CoHousing organisational feature in the up-and-running stage, will be a workable

mechanism for controlling membership while keeping restrictions on transferring interest in housing tenure to the absolute minimum.

The Entity and Form of Ownership

In the initial stages of CoHousing development a number of factors will influence the extent of the need to form a group of people into a recognisable entity that can be tailored to achieve a specific shared ambition.¹⁴ The essential choice will be whether or not to opt for an entity providing legal personality. The choice may not necessarily need to be made before any meaningful step can be taken to form a group or to identify the group's priorities and objectives, but the advantages of legal personality gained through the formation of a company, whether limited by shares or guarantee are very significant. It is noticeable that, of the handful of CoHousing schemes that have been recently established in the UK and which are viewed as successful and viable, all have, whether initially or eventually, adopted a company form.¹⁵ The reasons are easily identifiable. A company structure is well recognised by established entities within the housing market, such as lenders and governmental agencies, building contractors and professional advisors, with which the initiating group will need to deal. It is a form that can accommodate differing and often flexible levels of individual financial commitment and, importantly, it carries limited liability. The process of formal registration (a requirement both for a company limited by shares and one limited by guarantee) is usually unproblematic, involving the filing of the company's Memorandum of Association with Companies House and the payment of appropriate fees.

¹⁴ Brenton, n 8, at 69.

¹⁵ Field, n 4, at 105.

Companies Limited by Shares or by Guarantee

Shareholder-directors, who may have equal or unequal numbers of shares, control a company limited by shares. It is possible for all shareholders to be directors, but it is also possible to have an executive committee to whom directors delegate responsibility for various matters. Other potential advantages of forming a company limited by shares, include the ease with which share ownership can be acquired and transferred, not only to individuals as either investors or future residents or both but also to other groups or entities, such as investing development partners, whether in the form of other limited liability companies or of governmental or quasi-governmental agencies. The cost of transfer of shares is generally much lower than the cost of transferring leaseholds and is potentially tax advantageous.¹⁶ Finally, shares in the CoHousing company can increase in value.

Whether and to what extent transferability and potential for value increase are important, will depend upon the objectives of a particular CoHousing group and the characteristics and skills of its members. Thus, where the group's initial acquisition of the site for the project is not a key objective because, for instance, the site is owned by existing participants, the members of a potential resident group might find it most advantageous to purchase shares in the company to the value of the planned residential units. Again assuming that securing the site is not the principal object of the initial stage, formation of a company limited by shares may attract and facilitate 'outside' investment partners whose capital can assist in the developmental or refurbishment.

A significant factor in practically all schemes, but which may have a particular impact on the desirability of forming a company limited by shares, will be the frequently varying financial resources of participants and their liquidity. Where individuals in an initiating group are of significantly unequal financial worth, the

¹⁶ This will certainly be the case in regard to capital gains tax, but stamp duty is payable on all share transactions and does not have the advantage of the nil rate band.

exposure to risk of the wealthiest is greater because a wealthy director will be more conveniently sued for the actions of other directors or the group. An additional concern, may be the unfamiliarity of potential residents with the notion of purchasing a property interest in the form of a shareholding rather than in the form of a lease holding.¹⁷ While many banks, building societies and other lenders do lend on property using shares as security, this is not the most familiar practice and may put up the cost of borrowing. Indeed, lenders are likely to insist that shares be subject to a right of conversion into leasehold. Thus, where it is essential for some members to buy on a mortgage rather than outright, the company limited by shares form is best avoided in favour of one limited by guarantee or a straight leasehold arrangement. Alternatively, it is possible to convert shares into a conventional lease later, but this would involve the agreement of all members of the eventual group.¹⁸

The group will need to consider (ideally at an early point) whether or not it is intended ultimately to provide a mix of tenures and the benefits and drawbacks of a mixed tenure scheme. The desirability of forming a developmental partnership with, for instance, a registered social landlord, such as an existing housing co-operative is likely to dictate the need to design a mixed tenure scheme. A company limited either by shares or by guarantee will provide a convenient legal structure for a mixed tenure scheme that uses investment from a separate entity partner such as a housing association or, conceivably, a private developer. The housing association or developer might, for example, join as a member by buying shares equal to the whole value of particular housing units, and act as owner-landlord of the rented accommodation that forms part of the scheme. It would also be perfectly possible in appropriate circumstances, where the financial muscle of the whole initiating group is sufficient and confidence in the market for rented accommodation as part of the scheme is high, for the company limited by shares itself to buy out the shares

¹⁷ Pickering, C, Parry, E, Jinkins, K and Jolliffe, A, *A Different Way of Living: CoHousing for Older Women* (London, The Housing Corporation, 2004).

¹⁸ *Ibid*, at 15.

representing a handful of units not subscribed for by individual or family members who are to be residents of other units. In this way, the income made on the rented units can be used to offset ongoing maintenance cost for the common parts of the site or as an amalgamation to the development funds of the project or, indeed, in appropriate circumstances as distributable profit.

Beyond the developmental stage, the governance issues arising from use of a mixed-tenure CoHousing scheme¹⁹, will need to be considered but a further advantage of a company limited by shares will be the potential to create differentiated classes of non-voting and voting shares and non-equity and equity shares. An outside institutional investor may be willing to hold non-voting equity shares whereas residents of rented accommodation may hold non-equity voting shares. Further, the convenience of differentiated types of share ownerships allows 'staircasing', that is, the buying of shares by individuals to the value of equity required, an arrangement that is suitable for people in shared ownership homes.

There appears to be a preference amongst UK-based cohousers for the company limited by guarantee over the company limited by share. It has been suggested that this arises from the compatibility of the former form with the 'egalitarian' principles that strongly influence the motivations of CoHousing scheme initiators and that the benefits of the form rightly make it a 'benchmark against which other legal frameworks could be evaluated'.²⁰ Directors of a company limited by guarantee can derive no personal financial benefit; the company is established for 'community benefit'. Mutual aid is, of course, a key principle of the cooperative form as well, but the process of incorporation and registration is arguably simpler because of the well-established and modernised administrative and statutory framework for company law.²¹ The liability of directors is limited to the usually nominal value of

¹⁹ This will be discussed more thoroughly in Part Two.

²⁰ Field, n 4, at 105 and 112.

²¹ The Companies Act 2006.

shares but they remain responsible for the 'formal effects of the company'.²² The registration fee that is payable may be reduced in some circumstances.²³ The company must agree and adopt memorandum and articles of association. In combination with the contracts and agreements mutually entered into between and amongst the members of the group and company, these define the responsibilities of members in relation to the scheme. Importantly, they will need, not only to set out a general statement of the initiating members' aims and objectives, but also to describe the legal basis of the group entity's formal ownership of common facilities and create a structure for decision-making.

PART TWO

The Community Project, East Sussex

What is now The Community Project in Laughton, East Sussex, began in the early 1990s amongst a small number of 'thirty-something' middleclass friends in North London. They started to think about how a greater sense of community could be sustained and how, for some, a better context in which to raise children could be found, by pooling home equity and sharing responsibilities, yet sacrificing neither a high degree of autonomy in their lives as individuals, couples or families,²⁴ nor long-term individual financial security tied to housing equity. The project took form in 1997 with the purchase of a cluster of disused hospital buildings set in over twenty acres of Sussex countryside. Most residential units are three to five bedroom houses and there are also a few flats, some of which are rented accommodation. There are also newly built dwellings that have been constructed with sensitivity to the environment. Most residences are arranged in groups of terraces around open courtyards that look

²² Field, n 4, at 105.

²³ Where versions of certain model rules of a model memorandum and articles of association accepted by a relevant authority are used, the fee may be reduced.

²⁴ Conversations over several years with Linda Glenn of The Community Project.

onto a road leading to an extensive common house and miscellaneous out buildings. There are shared, environmentally sound sources of heating and water, gardens, woods, a pond, fields and even a paddock for horses.

The Community Project set up as a company limited by guarantee. The initial funding came from private loans of various amounts from a nucleus group who used their savings or mortgaged or sold their homes. The members of this group entered into a deed that set out a detailed scheme for sharing risk, calculating interest and providing formulae for loans and interest thereon to be set against the acquisition costs of individual units as determined by independent valuation. The whole arrangement was underpinned by an alternative dispute resolution mechanism involving use of an expert valuer. All leaseholders became directors and all residents, including non-leaseholders, are members, with prospective residents given associate membership. The Memorandum and Articles of Association adopted by the Community Project are standard documents²⁵ with the Memorandum broadly defining the company objects and limiting liability to one pound. Objects include power to 'acquire and provide housing and communal facilities for the benefit of the Company's members through the provision of individual dwelling units on a purchased leasehold basis and the maintenance and management of common areas and facilities'. Other than in this clause, there is virtually no clue of the CoHousing nature of the association; there are standard powers to carry on any advantageous trade or business, to purchase any type of property, to borrow, mortgage, lend, invest, and so on, and the company can enter into a variety of partnership arrangements.

The lease is the means for defining owner-occupation rights over the interior of residential units and shared rights over the common parts and does so by setting covenants of the occupier and of the company. Essentially, as in a standard lease,

²⁵ The Community Project documents were drafted by Malcolm Lynch Solicitors and ICOM (the Industrial Common Ownership Movement Limited), Leeds, England.

the inside surfaces of the units and the window glass is part of the lease and the structure and utilities conduits (those 'not solely for the purpose of one unit'), as well as the surrounding land, roads, entrances and facilities, are owned by the company. The company as landlord is owed ground rent, has rights of access, to serve repair notices and to approve alterations and to levy a service charge linked to an indexed measure of inflation, while the leaseholder has rights to peaceable enjoyment, reinstatement out of insurance proceeds and maintenance of the reserved (common) parts. The company covenants to supply heat and water from communal facilities.

The lease also contains provisions that control sale, disposal and encumbrance of legal and equitable interest in the residential units. The company covenants not to grant leases of units not in substantially similar terms – again, a standard term. To this is added a detailed schedule on restrictions of dealings. There is a mechanism for independent evaluation of the unit to be sold based on an 'agreed consideration' of the lease at a price that takes into account the open market price but 'disregarding the effect on valuation of the existence of the community comprising the occupiers of the Units' and ignoring the restriction on assignment as well as any incumbrances created by the occupier. The company has a period of three months from receipt of an independent valuation to find a 'nominee' buyer who is approved as 'suitable' in being willing to subscribe to the principles of and participate in the community. The company has a right to nominate up to three nominee buyers. Failing completion by a nominee of the company, the leaseholder is free to find his own buyer, provided that the agreed price does not exceed the independent valuation amount.

There is no prohibition of sub-letting, but lessees must be approved by the company and the length of the sub-leases is limited to a period of five years within any ten-year period. Where a lease is devolved by way of intestacy or will, the company cannot refuse membership to the person to whom it is devolved provided such person agrees to a direct covenant to 'pay rent and perform and observe the

covenants of [the] lease'. Where a mortgagee exercises a power of sale the company does have a right to approve membership of a buyer but cannot 'unreasonably or capriciously refuse membership to a prospective assignee from such Mortgagee who is shown likely to be a respectable and responsible tenant'.

Residents' equal commitment to and participatory control of the management of common areas and facilities is provided mainly through the Articles of Association. All members (leaseholders, whether joint or single, and renting residents) have an equal vote and are alike entitled to notice of meetings. There are provisions for loss of membership; when a member resigns, dies, ceases to be eligible to be a company director by reason of bankruptcy or otherwise, ceases to meet the qualification of leaseholder or resident or is expelled.²⁶

There is an effort to minimise meetings and to make the provisions for notification and convening uncomplicated. The governing principle of decision-making is consensus for the usual on-going business of the community: generally meetings must 'endeavour to arrive at a decision by consensus, by which is meant that all those present and entitled to vote (in person or by proxy) are in agreement with the proposal or agree not to maintain an objection to it'. If consensus fails, the first step is to defer the meeting and to try again for consensus, but after this the matter is put to the vote and decided by simple majority. There are, however, in respect of particular types of decisions, provisions for 'special' and 'elective' resolutions to be made by a super-majority (three quarters) and a unanimous vote, respectively. Special resolutions cover alteration to the Memorandum and Articles, winding up, and other matters mandated by statute. Elective resolutions include those dispensing with annual General Meetings, laying of accounts and reports and appointment of auditors. There are provisions for quorums and voting is usually by show of hand but may be secret in some circumstances. There is delegation of

²⁶ Expulsion is initially by consensus and thereafter by majority.

some business to temporary committees or individuals but the Board of Directors is coextensive with the membership and there is a permanent or occasionally temporary chairperson.

Making decisions by consensus is ‘fundamental to the way [the Community Project] operates’²⁷ but it can be difficult and frustrating. In the words of two representatives of the Community Project:

It is not easy for more than thirty adults to make decisions together. Meetings can be very lengthy when everyone wants their say and it can be difficult to resolve opposing views. Everyone at one time or another has had to let go of dearly held opinions for the sake of finding some consensus with the wider group. While we strive to avoid a sense of institutionalisation, inevitably, members may need to give up certain individual freedoms – for example, with no private land on the site, people need to negotiate before undertaking anything major in the garden areas. Compromise and negotiation remain the name of the game, although we are determined to improve our use of consensus decision-making to remove the tendency for current procedures to leave people feeling frustrated or sidelined. We remain committed to ‘decision by consensus’ despite knowing that we need to make it work better. This is because we know from other communities that other forms of democracy using majority voting means people can become marginalized and excluded and this undermines group functioning.²⁸

²⁷ Field, n 4, at 32.

²⁸ *Ibid*, at 33.

Older Women's CoHousing, London

This group is currently in the development phase, hoping to purchase a site in north London.²⁹ There will be a mixture of 25 single and shared ownership³⁰ units and low cost rental units for those eligible for social housing. There will be a common room, guest accommodation and some common facilities. The ambition of the group is to create a number of such CoHousing communities throughout London.

Two features which distinguish OWCH from more mainstream CoHousing groups are that their project is limited to women over 50 and is geared to accommodate a social housing element. The group and its project have been the subject of study over several years by academic sociologists and housing experts whose work was supported by the Housing Corporation.³¹

Like the Community Project, OWCH have incorporated as a company limited by guarantee and ownership will be by means of conventional leases,³² but they will operate in partnership with an existing Housing Association³³ that will be a member and will own the lease of the rented flats. It is possible that the company, which will be called the CoHousing 'Society', will convert to a cooperative at some point following full occupancy but it may be decided that this will impose a too burdensome regulatory regime. Extensive work has been done on a package of legal documents for OWCH as a case study. These include a membership agreement, a purchase agreement and a standard lease. There will be a development agreement as well as agreements between the housing association landlord and member tenants of rented units as well as a standard company Memorandum and Articles. Members will pay a deposit to the CoHousing company, funds will be advanced by the housing association and a commercial loan will be sought. The development agreement will

²⁹ See the OWCH website: www.owch.org.

³⁰ These can include part tenancies shared between the resident and the company.

³¹ Pickering et al, n 17.

³² A lifetime interest scheme was considered but rejected as a vehicle as was seeking charitable status, at least in the short term, because of regulatory demands.

³³ The website of Housing for Women is: www.h4w.org.uk. They are a RSI and eligible for social housing grant.

provide for the sale of units to the CoHousing company by the developer within a set period backed up by loss of deposits and a penalty for failure to purchase, with a right of the developer to sell unclaimed units on the open market.

Most of the lease is standard, dealing with such things as ground rent, service charges and access for repairs. Clauses notable in defining the CoHousing aspects of the project include a lessee's covenant to remain a member of the CoHousing company with resignation or expulsion automatically leading to the offer of the unit back to the lessor. In other words, an expelled member, for example, is treated as having proposed to sell under the mechanism set out in the lease. Encumbrance is allowed with notice to the company but sub-letting is restricted to someone who has previously become a member by signing the membership agreement. The lessor covenants to consult the lessee on changes in the landlord's management policies and performance. The restrictions on alienation adopt a different mechanism than that in the Community Project lease, but the effect is much the same. OWCH leaseholders are required to offer to assign the lease of the unit back to the company, or as the company directs. The offer must be at a 'fair market price' to be stated by the leaseholder, who is also to propose terms of the contract of assignment. The Society then can agree or dispute the price and the terms and make counter offers. There is a strict timetable for this negotiation process and there are rules affecting the sending of communications and the effect of non-response. There is provision for the nomination of a qualified arbitrator to decide disputes on price and terms. Where there is no agreement on the appointment of the arbitrator, there will be outside appointment. Where the CoHousing society cannot afford to buy back the lease, they must allow it to be sold on the open market 'with removal of the special CoHousing term'. This ensures a degree of certainty and security to leaseholders and, in the final analysis, if the CoHousing company is unable to find members and thus cannot continue to exist, it may decide to convert into an ordinary leaseholders' company.

The OWCH membership agreement is a separate document between each member and the 'Society.' The requirement limiting membership to women does not contravene the Equality Act 2006 because a private non-profit body is permitted to discriminate on the grounds of gender. However, subsequent dealings by member-leaseholders could indirectly discriminate by limiting transfer. For this reason, the resale provision requires transfer back to the Society, which can then resell under the exemption granting a benefit from a private society.

It is in the membership agreement that the CoHousing nature of the project is most obviously expressed. Members undertake to 'promote a combined private and communal life as an intentional community based on specific principles of CoHousing communities'. In addition, principles for the interpretation of all the agreements between the members and the society (i.e. the lease, as well) include not only the principle that an occupant must be a member but also that 'the successful working of a CoHousing community demands mutual acceptance of responsibilities, obligations and duties that go beyond the ordinary requirements of behaviour as a good neighbour in ordinary residential accommodation'. All members are directors but there is a management committee that appears to have quite extensive powers to create further rules, regulations and 'policies.' Members promise to attend general meetings or seek permission for absence, to undertake a fair share of the administrative and other work involved in running the organisation, to carry out obligations in respect of the common facilities (such as are reasonably required by the management committee). Certain matters, including change in the terms of the membership agreement require a vote of three quarters of members, but there is no detailed consensus-making system described by the project documentation. Altogether, the framework requires considerable 'participation' by members and members have to accept that failure to observe the terms of the membership agreement can lead to expulsion with expulsion leading to a presumed offer to sell the lease.

PART THREE

The risk for cohousers of not incorporating is individual exposure to liability for the group's actions. This may largely account for the current predominance of the company form within the UK. Vehicles other than the company form, however, have aspects that could make a contribution to the aims of CoHousing in particular circumstances. These include the familiar housing co-operative and the less familiar co-ownership society; the housing association governed by the Housing Corporation; the partnership; and the registered charity, including the charitable trust. In addition, it may be useful to consider ideas from the new form of registration as a commonhold association and from the common interest company (CIC). A full discussion of the relevance of each of the forms to CoHousing is beyond the scope of this chapter, but a few aspects of some forms will briefly be considered, particularly in relation to the social purposes of cohousing and with a focus on the relatively new commonhold and common interest company vehicles.

Co-operatives, especially, are well established vehicles with a recognised mutual support purpose and model rules exist that set minimum numbers of subscribers and combine rental housing with a form of limited equity home ownership. Co-ownership societies have a membership structure that is consistent with the membership framework for CoHousing and can distribute homes to members as profit of the society. Model rules for a 'CoHousing co-operative' have been created and registered,³⁴ but they contemplate only a mixed tenure scheme. Further, the co-operative is, in practice, an umbrella-like structure that lacks the

³⁴ Above n 4, at 106. Model rules were created by Catalyst Collective, a body supporting co-operatives.

degree of direct initiation, design and control by residents through a participatory democracy and the degree of private ownership of dwellings by which CoHousing is characterised.

Partnerships are likely to be relevant only either tangentially or initially as a convenient vehicle for managing initial financial contributions, identifying and researching potential sites and sharing risks in the very first stages of formation of the CoHousing group. But a partnership will not be useful as a permanent form of CoHousing both because it lacks limited liability and because it does not offer the flexible means of accommodating changing membership that the company forms do. As mentioned previously, however, a partnership with another entity can frequently benefit a CoHousing group where its purposes and that of the other entity sufficiently coincide, and especially where it is intended to provide mixed tenure residence as a means of part-funding the scheme.

Like the partnership form, the charitable organisation may have a supporting role to play in CoHousing but it is unsuitable as an entity. Charitable organisations in housing may adopt a number of differing entity forms. They may be trusts or Community Land Trusts³⁵ or Community Interest Companies ('CICs') and housing associations may gain charitable status. Although the Charities Act 2006 has greatly expanded and 'modernised' the traditional four 'heads' of charity³⁶ into twelve in a

³⁵ See The website of the Community Land Trust; www.communitylandtrust.org.uk. See also 'Community Land Trusts – the legal perspective' a paper presented by Catherine Hand of Trowers and Hamlins, Solicitors and 'CLT: Affordable homes in sustainable communities', a CLT policy paper. Both are on the website.

³⁶ 'Charity in its legal sense comprises four principle divisions: trusts for the relief of poverty: trusts for the advancement of education: trusts for the advancement of religion, and trusts for other purposes beneficial to the community'. *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, per Lord MacNaghten.

way that might, on a broad construction, include at least some aspects of some CoHousing schemes, the ability of a CoHousing to meet the requirement that the activities of a body having charitable status be exclusively for the benefit of the public is extremely problematic. The trustees of a charity cannot themselves benefit from the scheme and this precludes residents from being trustees. Following a consultation process, the Charity Commissioners have reworked the public benefit requirement, removing any presumption of public benefit and continuing to preclude recognition as charitable of provisions essentially intended for a closed group,³⁷ unless they are being provided by reason of characteristics of members of that group which make them particularly needed, as by reason of poverty or disability.

It is open to be argued that some aspects of the activities of some CoHousing communities, actual or proposed, are now somewhat more likely to be able to take advantage of the expanded and modernised list of charitable ‘heads’, especially, for example, in so far as environmental activities and environmentally healthy aspects of building design are concerned. The “advancement of environmental protection or improvement” is a specific new ‘head’ of charity. While not all of what are called ‘eco-villages’ are in the form of CoHousing and not all UK CoHousing communities have protection of the environment as a main purpose, environmentally sustainable design is a significant feature of new built CoHousing especially. Further, existing CoHousing communities are quite frequently involved in activities of an

³⁷ See, *Oppenheim v Tobacco Securities Trust* [1951] AC 297.

educational³⁸ and therefore 'charitable' nature in 'spreading the word' about CoHousing theory, design and practice to others, including nascent CoHousing groups. Finally, a very broad interpretation of the broader view of charitable status contained in the Act might, in the case of mixed tenure projects created in partnership with a registered social landlord, conceivably comprehend CoHousing on the grounds that it advances 'citizenship or community development', another of the new twelve categories listed in the Act.

The Potential Usefulness of Commonhold and CIC forms

The Commonhold and Leasehold Reform Act 2002 and accompanying statutory instruments have created a new form of land-holding. The legislation was designed to assist owners of residential (or commercial) units that are 'interdependent', usually because they are physically adjacent, contiguous or enclosed within a larger structure and therefore likely to share common parts. This law reform was preceded by a rather piece-meal approach, was, perhaps, a long time coming and, since there has been limited uptake, may be viewed as something of a 'damp squid.' However, though it may not immediately provide all necessary and desirable features of a particular scheme, commonhold is undoubtedly interesting and may have a significant relevance to CoHousing.

The purpose of the commonhold legislation was to address a bundle of practical problems arising from the tenure of leasehold ownership of interdependent properties. Amongst these were the wasting nature of the leasehold, which

³⁸ The Vivarium project, which hopes to model itself on Danish and Dutch CoHousing for older people and will be located near Fife in Scotland, has applied for charitable status. See www.paperclip.org.uk.

sometimes impeded sale and obtaining mortgage finance,³⁹ problems with freehold landlords either neglecting repairs to common parts or 'soaking' long leaseholders by passing on the cost of repairs without any obligation for consultation and, lastly, the possibility, however remote, of forfeiture for a minor breach of covenant.⁴⁰ The legislation will result in the registration of the owners of each unit as freehold owner of both the unit and of the common parts and will allow both positive and negative covenants to bind successors in title of the individual units. The organisational mechanism of commonhold appears extremely similar to what is becoming the dominant form of modern British CoHousing; owners of individual units are automatically members of a commonhold association, which is a company limited by guarantee.

Only leasehold unit owners can be members and liability of members for the debts of the company on the guarantee is limited to one pound. Nor does the commonhold form preclude a mixed tenure scheme with sub-leases of less than 21 years created after the conversion to commonhold out of an individual unit owners' freehold or, indeed, possibly, out of the common parts freehold. In addition, a "web of rights and duties"⁴¹ of commonholders will be contained within and be prescribed by a commonhold community statement. The commonhold community statement is a mandatory model document under the legislation and accompanying regulations.⁴² This feature may impede the usefulness of the commonhold as an entirely sufficient legal package for intending CoHousing communities in that it may allow less room

³⁹ Lenders hesitate to lend money on leases with less than 60 years to run.

⁴⁰ Mackenzie & Philips (2006) *Textbook on Land Law*, 11th edn, (Oxford University Press, Oxford). Regarding forfeiture, see *Van Haarlwm v Kasner* (1992) 64 P&CR 214.

⁴¹ Above n 40.

⁴² See CR 2004 regs. 13 and 14, Schedules 1 and 2.

for creativity and response to the particular character of a CoHousing scheme. Whilst the contents of the model statement includes matters that a CoHousing scheme organised as a company would likely need to include in its memorandum of association in any case: allocation of rights and duties; definitions of permitted uses; financial arrangements for meeting expenses and reserving funds for maintenance and insurance of the common parts; and arrangements for resolution of disputes between and amongst the unit holders and the commonhold association,⁴³ a much greater degree of social association and interdependence than is represented by the commonhold model statement is desirable in CoHousing.

The legislation does appear to allow for 'local rules' setting out additional requirements applicable to a particular scheme.⁴⁴ These, as well as the terms of the general model, appear to be underpinned by a provision to the effect that '[a] duty conferred [by the statement] on a unit holder shall not require any other formality.' In other words, they shall not be required to be comprised in a deed of transfer.⁴⁵ Further, transferees of the unit holders take subject to all existing rights and duties. Thus far, so good; the commonhold appears to be a sufficient vehicle. But, a further and possibly serious impediment is presented by a prohibition on restriction of transfer: the statement "may not provide for the transfer or loss of an interest in land on the occurrence or non-occurrence of a specified event." The purpose of this provision is to prevent exactly the danger of forfeiture for breach of covenant that was objectionable in its application to long-leasholders. The difficulty is that it may

⁴³ Alternative Dispute Resolution is encouraged by the legislation. See s. 35.

⁴⁴ Above n 43, at 260.

⁴⁵ Section 31 (7).

also fetter the ability of CoHousing entities to enforce rules that restrict the sale of leases to persons not vetted by the community.

Arguably, the emerging practice of having a tailor-made set of legal documents underpinned by the company entity may more nearly achieve the particular local purposes of UK CoHousing communities. On the other hand, this practice has not seriously been tested in the courts. Thus, there would appear to be one clear advantage to trying to fashion a commonhold arrangement for the purposes of a CoHousing scheme: the enforcement provisions presented by Section 37 of the Act. This section sets out specific descriptions of enforceable rights and duties including liabilities for compensation for breaches of duties and for contributions to cost of common parts maintenance, thus obviating the problem of enforcement issues affecting free-fashioned rules and by-laws of a CoHousing entity operating as a company limited by guarantee. Moreover, while company-form CoHousing provisions can contain clauses requiring arbitration,⁴⁶ the commonhold statutory framework sets up as a requirement participation in an ombudsman scheme.

The CIC is a new form of company created by Part Two of the Companies (Audit, Investigations and Community Enterprise) Act 2004.⁴⁷ It was designed to recognise the needs of non-charitable but nonetheless 'socially beneficial' enterprises formed by shareholding. In this respect it is an appropriate new form for

⁴⁶ This is so for the Community Project documents.

⁴⁷ The Act received Royal Assent on 28 October 2004 and, following approval of the regulations, it has been possible to register CICs since 1 July 2005.

organisations that have purposes somewhere between a business and charity. There are already a growing number⁴⁸ of diverse enterprises that have adopted the model and are engaged in a variety of activities “using business solutions to achieve public good.”⁴⁹ They include mutual organisations such as co-operatives and companies limited by guarantee or shares. The causes now represented in CIC form include groups for fair trade, an improved environment, social justice, community transport, childcare, and a whole host of unique commercial community-based efforts, for example, the running of a village shop selling local produce. To be accepted as a CIC, an organisation must satisfy the regulator that its purpose “could be regarded by a reasonable person as being in the community or wider public interest and to confirm that access to the benefits it provides will not be confined to an unduly restricted group.”⁵⁰

Organisationally, the defining features of the CIC are the ‘light touch’ regulation (compared with other company forms or charities⁵¹) by an independent regulator⁵² and the statutory ‘asset lock.’ Although there can be distribution of profits and assets to member-shareholders, they are strictly limited and profits are mainly reinvested for the purposes of the company. CICs do not enjoy the tax concessions of charities but there are tax advantages for some CICs through the relief on investors.⁵³ CICs will be obliged to involve stakeholders in decision-making

⁴⁸ There are over 300 CICs now and the number is increasing rapidly. See www.socialenterprise.org.uk, the website of the Social Enterprise Council.

⁴⁹ The CIC website is www.cicregulator.gov.uk .

⁵⁰ *Ibid.*

⁵¹ A CIC cannot have charitable status.

⁵² An annual report explaining how the activities of the CIC have benefited the community is required.

⁵³ Community Interest Tax relief is 5% tax relief to those investing in a Community Development Finance Institution that provides funds to CICs and the CICs are also eligible for the usual company tax reliefs.

but will be mainly run by boards of directors with directors being able to be paid reasonable remuneration.

The usefulness of the CIC for CoHousing is clearly not in relation to the holding of the property interests. The particular context and location of a CoHousing community and the interests and priorities of its membership will determine whether a CIC will be useful; the form could be imaginatively and advantageously be employed for adjunct activities, such as provision of childcare, educational and cultural programmes, environmental conservations projects, the provision of a local shop for the community and its surrounding area and a multitude of other purposes that, indeed, would be considered by a 'reasonable person' to be in the interest of both the community and the wider public.

CONCLUSION

There is a huge energy and momentum in British CoHousing currently. In comparison with that in North America, and especially in comparison with that in Denmark and the Netherlands, however, the movement is only beginning to accelerate and is probably still widely viewed as unorthodox. In defining their outward legal status and their internal legal relationships, Britain's cohousers appear to have adopted a pattern of creative adaptation of the company limited by guarantee and are not attempting to create new legal forms.⁵⁴ The growth of British CoHousing has happened at an interesting and perhaps propitious moment in the development and

⁵⁴ In this respect they appear to follow developments in North America CoHousing In North America, units will typically be owned via a condominium or subdivision with adjacent land owned through a cooperative or a land trust being used partly as a undeveloped environmentally protected buffer and partly for the provision of common facilities. Even small parcels of undeveloped common CoHousing land can sometimes attract subsidies if it can be shown that they contribute to conservation.

'reform' of some areas of housing and non-business 'organisations' law; the recent introduction of the commonhold; modernisation of charity law in a way that has a potential to be interpreted so as explicitly to acknowledge the public benefit of some aspects of newly constructed communities; and the wider recognition of enterprises that have a 'community' benefit in the invention of the CIC. On the other hand, it might be argued that these legislative developments, while useful as adjuncts to the arrangements, activities and interest of British CoHousing communities, are not really necessary as a catalyst to the growth of CoHousing. The ingenuity of what is still only a handful of British CoHousing communities in adopting the company limited by guarantee to their purposes, sometimes in combination or collaborative partnership with existing social housing entities is much to be admired and holds promise for expansion of CoHousing. It will be interesting to see how quickly and variously CoHousing develops in the UK in the next decade. The website of the British CoHousing Community⁵⁵ lists eight fully established communities and 13 planned or starting. Geographically, they spread from the highlands of Scotland to the south coast. Government departments and financial institutions are becoming actively involved. Within the CoHousing community a survey on the obstacles of CoHousing has been completed indicating a variety of planning and financial issues.

Are expansion and public support in the wider public interest, as cohousers claim? Private domestic sector housing development has often had a negative environmental and social impact. Those able to participate in the movement are largely limited to middle income owners of existing property, though, as seen in the on-going and yet to be successful efforts of OWCH, this is not uniformly the case. Inclusion of an element of 'affordable' housing appears to be an aim that is viewed as desirable, if not always feasible, by cohousers. Similarly, the environmentally sensitive innovations of some existing and planned CoHousing communities, while widely enough adopted to be seen to be central to the 'ethos' of British CoHousing

⁵⁵ www.CoHousing.org.uk.

efforts, are not essential to the form. So, the claim that cohousing is sufficiently in the public interest on this account is not particularly persuasive.

The case that CoHousing in Britain might rightly be publically supported on the grounds that it is capable of addressing issues of social cohesion and isolation of the elderly in an aging population, is slightly stronger. High urban property values, land scarcity and high living costs increasingly force aging Britons to see their housing equity as a retirement resource, which nonetheless can trap them in neighbourhoods that lack cohesion and mutual social support.

In respect of projects like OWCH that are modelled on the considerable experience of Danish and Dutch CoHousing for older people,⁵⁶ there is a powerful argument that CoHousing can, by combating isolation, greatly increase the general health, well being and longevity of residents, thus reducing the cost to the public of social care and the pain, anxiety, loneliness and sorrow of individuals. The UK CoHousing Network website, shows new CoHousing venture in West Yorkshire, providing more evidence of continued interest in CoHousing that serves this purpose. Styled the 'Lifetime Community Project', the West Yorkshire group seeks to attract those who seek "a co-operative and self-responsible life style for their later years" and aims to "support members to grow older together, to "age in place" safely and enjoyably." The rise in the proportion of the elderly, especially women, will, in most western European countries, be this century's defining demographic trend, may influence the direction of politics as well as of economic growth and may help to strengthen the case for greater political and public encouragement of CoHousing.⁵⁷

⁵⁶ Brenton, n 8. See also, Croucher, K, Hicks, L and Jackson, K, *Housing With Care for Later Life; A literature review* (York, Joseph Rowntree Foundation, 2006) at pp. 21-2.

⁵⁷ Carncross, F, 'Forever young: a Survey of Retirement' *The Economist*, March 27, 2004.

Indeed, a perceived decline in 'local social capital' in part motivates the current government's interest in supporting more sustainable housing models.⁵⁸ CoHousing clearly can make a contribution to stronger communities through its core values relating to control, accountability, provision of individual financial security and, especially, through its model of deliberative, consensus-based and democratic participation. As Fenster has argued from the viewpoint of the North American CoHousing movement, '[t]o the extent that original residents initiate and participate in a CoHousing project's development, [their] identification with the community is likely to be greater'.⁵⁹ At the same time, CoHousing has the potential to make a contribution towards addressing a failure of modern western society (including the inability of the law) to conceptualise, acknowledge and celebrate a 'good' adult dependency⁶⁰ in which people consciously construct shared spaces within which mutual caring is fostered.

⁵⁸ Williams, n 7.

⁵⁹ Fenster, n 2, at 19.

⁶⁰ Lim, H and Roche, J, 'Feminism and Children's Rights' in J Bridgeman and D Monk (eds), *Feminist Perspectives on Child Law* (London, Cavendish Publishing, 2000).