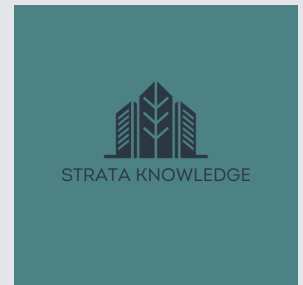


# Strata Governance Responsibilities

## *To what extent should developers of strata schemes be responsible for good governance outcomes?*



During the life of a strata scheme, the owners corporation is responsible for its operations.<sup>1</sup> However, the scheme developer makes governance decisions that can impact the future operations of a scheme. A developer effectively imprints governance arrangements that, in many instances, are difficult to change.

Subject to legal restrictions, the developer can create binding contractual relationships knowing that upon registration, it controls the owners corporation and therefore can ratify or pass any resolutions relating to these promoted arrangements. In some but not all jurisdictions, these arrangements must be disclosed to potential buyers. When disclosure is not required, it falls to the legislation to provide safety measures that ensure developers act in the interests of the owners corporation when negotiating and creating these arrangements.

The legislation provides a governance framework for strata schemes. However, it does not necessarily follow that the legislation aids in the betterment or production of well governed schemes. The governance quality achieved by any organisation is highly dependent on the standards imposed by those controlling (governing) the organisation or, the standards imposed by a regulatory authority. Putting any regulated standards aside, it is up to the developer, then the owners corporation to implement good governance strategies if the goal is to achieve a well-functioning owners corporation long term.

The question posed in this brief is, to what extent should scheme developers be responsible for ensuring good governance outcomes?

To answer this question, we need to unpack the concept of 'governance responsibilities'.

The term 'governance' is somewhat difficult to accurately define. Although used frequently in the public and private sectors, there is no one singular definition. After a review of many definitions, Kaler's definition incorporates the aspects advocated by most scholars. He states that generally, governance '*is about systems for directing and controlling more or less formally structured groupings of people, be they states, communities, companies or whatever*'. He further suggests that the word systems '*concerns the established structures for decision-making: structures for determining who has what sort of decision-making powers in relation to what sort of issues*'.<sup>2</sup>

The term 'responsibility' is also difficult to succinctly define. Allen and Mintrom state that '*[a]s a concept, responsibility is related to the concepts of control and accountability*'.<sup>3</sup> Efforts have been made in the literature to formulate a typology of responsibility. Pellizzoni and Schlenker et al suggest that there are two essential facets of responsibility – imputability (or imputation) and answerability (accountability).<sup>4</sup> Imputability assigns the

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<sup>1</sup> The term 'owners corporation' is used generically to refer to any private governing entity created under a strata or community title arrangement (e.g., body corporate, strata company, association).

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<sup>2</sup> John Kaler, 'Responsibility, Accountability and Governance' (2002) 11(4) *Business Ethics: a European Review* 331, 334.

<sup>3</sup> Ann Allen and Michael Mintrom, 'Responsibility and School Governance' (2010) 24(3) *Educational Policy* 439;

<sup>4</sup> Barry Schlenker et al, 'The Triangle Model of Responsibility' (1994) 101(4) *Psychological*

action, event or consequence *'to an agent as its causal factor'*. That is, the agent caused the specific outcome. Answerability, on the other hand, concerns the reason or explanation for the choice made.

It is apparent that those owing duties or the ability to control or cause an outcome are not only held to be the responsible party but must account for and justify their decisions once an action is invoked. The concept of responsibility imposes legal duties and also ethical obligations on the agent to make appropriate choices. Therefore, responsibility is apparent when an agent *'faces choices, understands the broader consequences of those choices, and chooses options that are likely to produce good and fair outcomes.'*<sup>5</sup>

Governance and responsibility are not intrinsically linked. However, responsibility becomes involved in governance when, *'the directing and controlling is required to have a purpose other than serving the interests of those doing the directing and controlling.'*<sup>6</sup>

To appraise the presence of developer governance responsibilities, it is necessary to: determine the legal duties imposed on developers that should restrain them from acting in a self-interested manner; and the ethical determinants that should act as a deterrent to self-interested decision-making.

As outlined in more detail in my PhD dissertation, there are a number of legal duties imposed on strata developers (while undertaking various roles) including fiduciary duties that prevent self-interested decision-making. Therefore, it is evident that developers are not only responsible for the governance decisions made (and

should account for and justify the decisions), but when faced with governance options, should choose the options that are likely to produce good governance outcomes.

In order to achieve effective scheme outcomes: developers need to be aware of their governance responsibility; developers need to avoid conflict of interest situations; and good governance standards need to be imposed and met.

Good governance standards can only be created once developers understand and acknowledge the impacts that their decisions have on strata schemes over time.

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Review 632; Luigi Pellizzoni, 'Responsibility and Environmental Governance' (2004) 13(3) *Environmental Politics* 541.

<sup>5</sup> Above n 2.

<sup>6</sup> Above n 1.