

There could be any number of reasons why an aged care provider might wish to sell land which was previously used as part of a retirement village. However, two recent decisions of the Supreme Court of WA show the need for caution. While the cases focused on the law in Western Australia, because the legislation regulating retirement villages is similar across Australia the cases are relevant to aged care providers across Australia.

Since legislation regulating retirement villages was introduced in each State, residents of retirement villages who pay a form of partially refundable ingoing contribution or "premium" to gain entry into the aged care facility are granted statutory security over the land of the retirement village they are entering. The various pieces of legislation require retirement village operators to lodge a notice with the land administration authority when that land is used for a retirement village and a "premium" has been paid by one or more residents. This "notice" provides a warning that the land is subject to statutory charges in favour of the residents securing any right to repayment of their premium.

If land is being sold, unless the buyer intends to operate the same retirement village, the buyer (or their bank) will require the notice to be removed from the title before they will settle on the purchase. At least in WA some considered it possible to have the statutory notice removed from the title of land that previously formed part of a retirement village if it was shown it was no longer used as part of a retirement village. However, following the recent Court decisions (one involving Retirement Care Australia (Hollywood) Pty Ltd and the other SwanCare Group Inc) the position in WA which would seem likely to be followed in other States is:

- a provider cannot remove the notice from (and in most cases will not be able to sell) part of the land which used to be part of a single village unless the retirement village is no longer operating at all;
- a provider who runs multiple separate villages might be able to remove the notice from all of the land in one village (and sell that land) while continuing to run a different villages on different land;
- if a single notice was lodged covering multiple villages, it is likely that an application will need to be made to the Court to convince the Court that the notice can and should be removed from the land in the discontinued village.

The cases show that the statutory protections provided to people who pay a premium to enter a retirement village will be carefully protected by the Courts. Providers who have excess land or multiple retirement villages and may think of selling land now or in the future need to be careful to check what land is covered by notices and obtain legal advice to determine whether the notices can be removed. This advice should be obtained before sale contracts are entered into to prevent additional costs associated with the sales contracts and any Court proceedings necessary to remove the notice from the title to the land.

Similarly if an aged care provider is considering purchasing an existing retirement village from another provider, care should be taken to confirm what land is mentioned in the notice and to ensure the land being purchased is not security for residents of a retirement village operated by the outgoing provider at another location.

Contacts

Graeme Slattery

Partner
T +61 8 9429 7576
E graeme.slattery@
squirepb.com

Carl Black

Partner
T +61 8 9429 7629
E carl.black@
squirepb.com

Rebecca Heath

Senior Associate
T +61 8 9429 7476
E rebecca.heath@
squirepb.com

Retirement Care Case

- Retirement Care Australia:
 - operated a retirement village at Nedlands in Perth;
 - had lodged a notice under the legislation covering all the land in that village;
 - redeveloped part of the village and demolished several older buildings, resulting in a section of the land which had previously been used becoming vacant; and
 - decided to sell the vacant section of land but to continue to run the village on the rest of the land.
- The Court found:
 - that the law did not allow Hollywood to remove the notice from the vacant section of land and sell that part of the land without the notice on it; and
 - the statutory charges continued to apply to the vacant land even though it was no longer used for the retirement village.

SwanCare Case

- SwanCare Group Inc:
 - operated multiple retirement villages at different locations;
 - lodged, when the legislation first commenced in 1992, a single notice which listed the land for all of its villages rather than separate notices for each separate village;
 - redeveloped a village in Carlisle which had become dilapidated, but was unsuccessful in interesting retirees in the redeveloped retirement village; and
 - decided to seek to sell the new units to the general public and obtained the necessary planning approval.
- When SwanCare went to finalise the sales of the new units, the land authority refused to remove the notice on the title to the land because the notice also referred to land in other villages that SwanCare still operated. This was despite the fact that it was clear the retirement village previously operated on the land no longer existed and all premiums that had been paid by residents of the retirement village had been repaid.
- In order to overcome this issue SwanCare engaged Squire Patton Boggs (AU) to make an application to the Court seeking orders removing the notice, ultimately resulting in the Court allowing SwanCare to lift the notice and finalise the sales.