

## A LEGAL PERSPECTIVE ON “GATED COMMUNITIES” IN MALAYSIA\*

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### Abstract

As a developing country, Malaysia is very much influenced by the concept of planning and housing development implemented in other countries. Although the “gated community” (GC) is already popular in other parts of the world; especially in developed countries for instance Florida, Arizona, Johannesburg, Pretoria, Lisbon, Madrid etc., this concept is relatively new to Malaysia. It has gained acceptance in Malaysia and attracted studies by professionals such as planners, designers, sociologists, criminologists, lawyers etc. who are keen to gain insights on its implementation as well as its significance to the development of the country, specifically in the cities. Discussion on GC is part of the prevalent features in built environment studies which has a direct link with the issue of creating a safer urban community. It is the aim of this paper to look into the legal aspects under the Malaysian law on the implementation of the GC concept involving landed properties such as bungalows and semi detached houses. This would involve considerations on the misconceptions of the GC concept by Malaysian housing developers and its legal consequences.

### Introduction

The GC concept has been around since the Middle Ages and the Renaissance period. During these periods, kings and other royalty provided gated enclaves for their families and loyal followers during times of siege and pestilence.<sup>1</sup> Generally the GC in Malaysia is developed due to demands of society wishing to have similar facilities as offered to apartment and condominium development which are fenced and limited access for outsiders. Technically the development of these strata units is a form of GC. However these strata units are constructed as a vertical development that is regulated by the Strata Titles Act 1986. On the other hand a GC is a horizontal development and is not governed by any statute.<sup>2</sup> In this paper a “housing developer” is means a developer who undertakes to develop more than four (4) conventional units of houses which forms a GC.<sup>3</sup>

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<sup>1</sup> Edward J. Drew & Jeffrey M. McGuigan, “Prevention of Crime: An Overview of Gated Communities and Neighbourhood Watch”, a paper presented at the *Gated Communities: Building Social Division or Safer Communities? Conference*, University of Glasgow, 18-19 September, 2003. In the Malaysian context this environment would not be unusual too. During the British occupation, many British managers of rubber estates were living in guarded or fenced areas.

<sup>2</sup> Many quarters have highlighted their concern on the need for proper laws and regulations to govern the development of GCs in Malaysia. See for instance “Up close and personal with gated-&-guarded communities” *New Straits Times*, 30th July 2005 and “Lack of legislative support hindering gated community development” *The Sun*, 7th July 2005.

This article explores the development of the GC in Malaysia and several issues that will arise due to absence of legal mechanism to regulate the GCs.

## Definitions and Features of GC

Goobler has described a GC as residential development where access is restricted and public spaces are privatised. They have potential impact on their surrounding neighbourhoods such as threatening safety, restricting access and perpetuating social inequality.<sup>4</sup> According to Low a GC is defined as a residential development surrounded by walls, fences or earth banks covered with bushes and shrubs with a secured entrance.<sup>5</sup> Gurjit shares the same view where he defines GC as an enclosed residential development characterised by a guarded entrance point with the entire development surrounded by a perimeter wall or fence.<sup>6</sup> Further, Azimudin stated that the GC may refer to a cluster of houses or buildings that are surrounded by a wall or fence or a perimeter with entry or access of houses or buildings controlled by certain measures or restrictions such as guards, ropes, strings, boom gates, chains or blocks which normally includes 24-hour security, guard patrols, central monitoring systems and closed circuit televisions (CCTVs).<sup>7</sup>

Blakely and Snyder have integrated the elements of security with the life style and privilege where they gave there different forms of gated and walled residential communities: first lifestyle, second: prestige and third: inner city/suburb security zone.<sup>8</sup> Eugene McLaughlin and John Muncie<sup>9</sup> have made the following elaborations on the three types of GCs given by Blakely and Snyder above. Their observation on GCs may be summarised as follows:

Type	Description
Lifestyle	Deployed walls and gates to provide secure residential accommodation but exclusively access to the all-weather leisure activities and amenities within. This type of GC has attracted those who

<sup>3</sup> Section 2 of the Housing Development (Control and Licensing) Act, 1966 defines housing development as the development of land involving the construction of more than four (4) units of houses; and such a developer is required to obtain a housing developer's license and shall be governed by the Act.

<sup>4</sup>Goobler, A., "Outside the walls; Urban Gated Communities and their Regulation within the British Planning System", *European Planning Studies*, April, 2002, pp. 321-335.

<sup>5</sup> Low, S. *Behind the Gates: Life Security and the Pursuit of Happiness in Fortress America*, Routledge, London, 2003 as quoted by Tony Manzi & Bill Smith Bowers, Partitioning Urban Space: Exclusivity or Social Integration? Gated Communities in the United Kingdom, a paper presented at the *Gated Communities: Building Social Division or Safer Communities? Conference*, University of Glasgow, 18-19 September, 2003.

<sup>6</sup> Gurjit Singh, , "Up close and personal with gated and guarded communities", *New Straits Times*, 30 July 2005, p.6

<sup>7</sup> Azimudin Bahari, "Regulatory and Practical Aspects of Gated Community Projects", a paper presented in a *Seminar on Gated Community Projects: Regulatory and Contractual Issues*, organised by Lexis-Nexis & MLJ, Prince and Residence Hotel, Kuala Lumpur. 28 July 2005, p. 4

<sup>8</sup>Blakely, E.J. and Snyder, M.G. *Fortress America: Gated Communities in the United States*, Washington D C, Brookings Institution Press 1997. p.70

<sup>9</sup> McLaughlin and John Muncie, Building walls II: Postmodern Cantonments, in *Understanding Cities: Unruly Cities?* Eds. Steve Pile, Christopher Brooks & Ors, Routledge, London, 1999 pp. 117-119.

	wanted to distance themselves completely from the city, desired a socially homogenous, ordered and manicured environment, and were willing to pay for separate private services and amenities. This is considered as the first generation of GCs.
Prestige	It employ increasingly sophisticated high-security walls, electrified fences, remote –controlled gates and audio-visual screening devices to project an image of high status exclusivity and signify a protected luxury lifestyle and secure property values. This type of GC can feature elaborate and ornate gatehouses, monumental entrances and sweeping driveways. Unlike “lifestyle” GC, these luxury developments located in close proximity to cities. This is considered as the second generation of GCs.
Inner city/suburb security zone	This type of GC derived from the notion of “defensible space” in which it emphasise on the measures to prevent crime through environmental design. This is considered as the third generation of GCs.

The above definitions illustrate that most of the features of a GC are mechanical crime prevention. However it is common that apart from those security features to prevent crime, a GC development will comprise of elements of privilege and privacy.<sup>10</sup> Thus a definition of a GC may properly be extended to a residential development with security features secluding residents from unwelcome outsiders and privileged to use the facilities offered within the GC.

### Gated Communities in Malaysia

Until today no specific research has been done in Malaysia on the legal aspect of the development of real property under the GC concept.<sup>11</sup> Due to this reason no specific data has been gathered as to the number of GCs that have been developed in Malaysia. The simple reason for this lacuna in research is the fact that it is a new concept in Malaysian housing development. Nevertheless, it is now an emerging feature in the Malaysian housing development landscape. The booming of the economy has contributed to the improvement in the buying power of purchasers. This has led to increase in demand of houses that offer privacy as well as a statement of its owner's emerging affluent lifestyle. On the other hand there are purchasers who opt for this concept of houses due to their conscious need of its security feature. In other words GCs can be equated with privacy, lifestyle as well as a means of crime prevention.

The first GC in Malaysia is the Kajang Country Heights.<sup>12</sup> Since then GCs have started to gain footing in Malaysia and today most of the GCs offer private facilities which sometimes

<sup>10</sup> See Table 1.

<sup>11</sup> There are a few writings in the area of built environment in which the GCs have indirectly been discussed as one of the mechanisms for crime prevention. See for instance Mohamaed Yusoff Abbas, Built Environment & Crime Prevention: Development & Issues, *Built Environment Journal*, Faculty of Architecture, Planning & Surveying, University Institute of Technology Malaysia (UiTM, Number 1, January 2004, pp. 3-6, Ida Noorjuliati Sugijanto, Prevention of Crime in Housing Through Environmental Planning, *Built Environment Journal*, Faculty of Architecture, Planning & Surveying, University Institute of Technology Malaysia (UiTM, Number 1, January 2004, pp. 7-13 and Lukman Z. Mohamad & Others, Urban Crime : Planners Obligation, *Habitat Malaysia Human Settlements Journal of Malaysia*, Ministry of Housing and Local Government, Issue No. 2, December 1999, pp.37-45.

<sup>12</sup> The project was developed by the Country Heights Holding Berhad.

may be considered as luxurious. This may be reflected from a few examples of the GC as shown in the following table.

Project	Types of Houses	Facilities Offered
Valencia Damansara (Valencia Development Bhd.)	Bungalow homes, garden terrace homes, semi-detached homes, maisonette, link-bungalow homes, hillside terrace homes.	Personalised smart tag entrance at the guardhouse, Perimeter fencing with 24-hour patrolling guards and CCTV, 9-hole-residents-only-golf course, community club, 50m Olympic size swimming pool, children's wading pool, outdoor and indoor spa, al-fresco dining, an international restaurant, gym, tennis-courts, games room and reading room.
Sierramas Sungai Buluh (Tan & Tan Development Bhd.)	Bungalow homes	24-hours security, club house, swimming pool, nursery, playground, multipurpose hall, gymnasium, pedestrian walkway & jogging tract
Signal Hill Park, Kota Kinabalu (SBC Corporation Bhd)	Semi-detached homes & link-bungalows	24 hour security, high perimeter fence, private landscape & park complete with a garden footpath and benches.

All of the above examples of GCs boasting common facilities such as golf courses, club houses (with restaurants, swimming pools, gymnasiums and tennis courts) and recreation areas. The emphasises in these GCs are the combination of security<sup>13</sup>, privacy and the affluent lifestyle of its residents. It means that the features of the GCs in Malaysia comprise all of the types of GCs as described by Blakely and Synder earlier.

In this article the focus of discussions is not on the physical features of GCs but on the conceptual elements in GCs which is summarised as follows:

- i. the existence of a Management Company to manage the common facilities);
- ii. the existence of a Management of Security; and
- iii. the existence of the Deed of Mutual Covenants ("DMC") which will create a contractual relationship between property owners and housing developers.

All of the three elements above are considered as tools for the "modus operandi" of GCs in Malaysia.

## Grey Areas in Law relating to GCs

### a. In adequacy of the National Land Code, 1965

At present there are no laws in Malaysia governing the development of land conforming to the GC concept. In Malaysia among the laws applicable to real property development are the National Land Code, 1965, the Strata Titles Act, 1985, the Land Conservation Act, 1960, the Environmental Quality Act, 1974, the Town and Country Planning Act, 1976, the Housing Development (Control and Licensing) Act, 1966 and the Street, Drainage and Building Act, 1974. The issue at hand is whether all these statutes could promote the development of land along the lines of the GC concept? Under the GC concept, its emphasis is more on privately governed residential areas rather than the enforcement of the aforementioned statutes.

One of the processes which a developer has to undertake in the housing development involving landed property is to apply for the sub-division of the land so that individual title

<sup>13</sup> All Gcs in Malaysia offer 24 hour security and this is one of the compulsory features in GC schemes.

certificates could be issued in favour of property owners.<sup>14</sup> Sub-division is necessary to enable developers to sell the property to an individual purchaser who will then obtain certificate of title to the property. This is known as a conventional title. Sometimes, contemporaneous with the application for sub-division, a developer may also need to apply for surrender and re-alienation of the land forming the GC.<sup>15</sup> Under this procedure, a developer will surrender certain areas of land to be reserved for particular purpose (such as reserved areas for access roads, back lanes, playgrounds, parks, mosques and other amenities) and the other plots of land will be re-alienated to that particular developer.<sup>16</sup> Upon surrender, such reserved land will become state land and the road will become a public road.<sup>17</sup> Thus whenever a developer constructs walls or fencing or whatever means to transform the area as a GC, it may not change the status of the road as a public road.<sup>18</sup> Instead if a developer fenced off the housing area to prohibit outsiders from entering it and prevent outsiders from utilising public road and public amenities which can be found within the GC scheme, it could technically amount to an offence under the law<sup>19</sup> and violation of public right. This is due to the fact that the land no longer belonged to the developer. Although these public amenities are regarded as common properties for residents under the GC scheme, according to the Local Government Act, 1976, these so called common properties are deemed to be public places that fall within the jurisdiction and control of the local authority and not the developer.<sup>20</sup> In other words it cannot be restricted for exclusive use by the residents of the GC scheme only.

However the issue of infringement of public right is only applicable for the restriction of public to use public road and basic amenities only. This is because as mentioned earlier public road and basic amenities already became reserved land upon the surrender by a

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<sup>14</sup> The procedure for sub division is governed by section 136(1)(h) of the National Land Code, 1965. The nature of sub-division provided by the National Land Code 1965 is only to facilitate the sub-division of landed property. The code does not include horizontal development with shared property that is featured in the GCs. Thus even if there is a compulsory requirement imposed by the local planning authority on the developer to apply for sub-division of land prior to the approval of the development plan; and a separate title may be issued for the land designated for the construction of a shared property (for instance a club house), there is no clear legal provision whom shall be the proprietor of the shared property and how this shared property shall be managed.

<sup>15</sup>The procedure for surrender and re-alienation is mentioned in section 204A to 204H of the National Land Code, 1965. There is no direct provision in the National Land Code, 1965 or in the Street, Drainage and Building Act, 1976 on the compulsory requirement for a developer to surrender a part of the land comprised in his title. Section 200 of the National Land Code, 1965 just states that “.....a proprietor wishing to surrender....” However in practice a local planning authority will normally tied up the requirement to surrender as one of the conditions for approval of the development plan.

<sup>16</sup>Section 136(1)(h) of the National Land Code, 1965 clearly states that the application for sub division would only be possible to be approved if a satisfactory means of access will be available as of right from each portion. This would include right of way to the land.

<sup>17</sup> Section 136(2) of the National Land Code 1965 states that an allocation for a standard specified in the designation must be made for a road and those lands is deemed to have been surrendered to the state authorities.

<sup>18</sup>The power of a local authority to declare private streets as public streets is provided in section 13 of the Street, Drainage and Building Act, 1974.

<sup>19</sup> Obstruction of public place (including road, which has been declared as public road) is an offence under section 46 of the Street, Drainage and Building Act, 1974. Similarly section 80 of the Road Transport Act, 1987 states that it is an offence to put any rope, hump, wire, chain, tackle etc across the road.

<sup>20</sup>Under section 63 of the Local Government Act, 1976 the public places shall be under the control of the local authority. There are normally specific by laws to govern the use and control of such public places. This power of the local authority to make by laws is under section 102 of the Local Government Act, 1976.

developer. As for GCs which provide for extra facilities for instance a swimming pool, a club house, a tennis court and a gymnasium in which the properties are registered in the name of developers, any outsiders who intrude into the area definitely will run the risk of being sued for trespass. The issue on these types of extra facilities therefore is not on the contravention of public right but on the proprietorship and management of those properties.

#### **b. Inadequacy of the Strata Titles Act, 1985**

In Malaysia the law governing development of land involving the construction of a building having two or more storeys on alienated land held under one lot is governed by the Strata Titles Act, 1985.<sup>21</sup> The Act contains *inter alia* provisions on sub-division of building into parcels, common property, the Management Corporation (MC) and its operation.<sup>22</sup>

Some of the features of the development of land under the GC scheme may run parallel with the provisions of the Strata Titles Act, 1985. An example is the existence of common property and the MC. This is therefore probably the reason why a few property developers have adopted the Act for their development of the GC scheme. In actual fact the provisions of the Strata Titles Act, 1985 closely relates to the GC concept. A problem which could arise is when the land development for the GC scheme involves the construction of buildings that are not feasible to be sub-divided into parcels as provided in the Strata Titles Act 1985.<sup>23</sup> For instance bungalow houses, semi-detached houses, double-storey houses and single storey houses do not fall within the jurisdiction of the Strata Titles Act, 1985. All these types of houses are incapable of being sub-divided into parcels. It is a unit by itself and it is landed property. Similarly the formation of the MC under the Act is not identical to the Management Company that is established under the GC scheme. Under the Act all purchasers are the shareholders to the common properties whereas under the GC scheme, the common properties are registered under the name of the developer. Therefore it is not possible to resort to the Strata Titles Act, 1985 as a means for managing the common properties under the GC scheme. On the other hand, as a protection measure, if the common properties are registered under the name of the developer, purchasers could register an easement<sup>24</sup> over the common properties, so as to gain greater protection in the GC scheme. Alternatively a caveat<sup>25</sup> could be another potential means of protection to prevent developers from transferring the said common properties to others without their consent. Nevertheless in the absence of clear legal mechanism to regulate the status and management of common properties in GCs purchasers will probably face difficulties if developers' companies managing the common properties go into liquidation.

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<sup>21</sup>Section 6 of the Strata Titles Act, 1985 states that any building or buildings that held under one lot shall be capable of being sub divided into parcels. This parcel must have different access.

<sup>22</sup> Under the Strata Titles Act, 1985 all properties other than the parcel unit belonging to the individual proprietor are known as common properties. For instance swimming pool, gymnasiums and lifts. The management of these common properties would be the responsibility of the MC while the proprietors have to pay the maintenance fee.

<sup>23</sup> The pre amble to the Act clearly states that the purpose of the Act is to facilitate the sub division of building into parcels, the disposition of titles thereto and for purposes connected therewith.

<sup>24</sup> The provision on easement is provided in section 283 of the National Land Code, 1965

<sup>25</sup> The provision on caveat is provided in section 319 to 333 of the National Land Code, 1965.

As far as maintenance of these common properties are concerned, under the GC scheme proprietors are required to pay maintenance fees to the developer of the GC. This however, does not exempt them from paying annual assessment fees to the local authority and quit rent to the State Authority. They are therefore subjected to payment of double maintenance fees for their common properties as well as payment of quit rent.

### **c. Uncertainty of the Use of the Standard Form of Agreement**

The Housing Development (Control and Licensing) Act, 1966<sup>26</sup> provides that, any developer who constructs more than four units of houses must be licensed by the Ministry of Housing and Local Government.<sup>27</sup> The Act prescribes a standard form of sale and purchase agreement which must be used by developers in entering into an agreement to sell houses to purchasers. Schedule G to the said Act is used as a standard sale and purchase agreement for sale of landed property while the Schedule H agreement is to be used for the sale of undivided shares in a building. Earlier discussions on the definitions and features of GCs above clearly will provide an answer that neither schedule G nor schedule H will be applicable for the sale and purchase of houses within the GCs scheme.

Due to the lack of suitable legal framework, in practice the GC scheme in Malaysia adopts two approaches; one following the strata approach and the other the landed property approach. Could any one of these approaches therefore be able to comply with the regulatory measures currently enforceable in Malaysia?

Under the schedule G agreement, a developer undertakes to deliver a separate individual document of title to purchasers,<sup>28</sup> but the clauses in schedule G are silent with regard to the common properties in the GCs and the Management Company managing the GC. On the other hand, schedule H contains provisions on the common property and Management Corporation<sup>29</sup>. However it is not suitable to a GC scheme comprising of landed property such as bungalows, semi-detached houses, linked houses etc.

Thus, none of the above standard form agreements are suitable to regulate the sale of a unit of landed property in the GC scheme. The contract entered by a developer and purchaser in such a situation could arguably be void under the Housing Development (Control and Licensing) Act, 1966 with a purchaser ending up without a title to his property under the GC scheme. Due to this uncertainty it could also be difficult for purchasers to obtain financing for the purchase of their houses.<sup>30</sup>

### **d. Liability of Developer for Misrepresentation**

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<sup>26</sup> This Act is formerly known as the Housing Developers (Control and Licensing) Act, 1966. (Act 118.) The Act came into force on 29<sup>th</sup>. August 1969. The new name of the Act was affected through the latest amendment, which came into force on the 1<sup>st</sup>. December 2002. It is only applicable in Peninsular Malaysia.

<sup>27</sup> Section 3 and 5 of the Housing Development (Control and Licensing) Act, 1966.

<sup>28</sup> Clause 11 of Schedule G of the Housing Development (Control and Licensing) Regulations, 1989.

<sup>29</sup> Clause 18 of Schedule H of the Housing Development (Control and Licensing) Regulations, 1989.

<sup>30</sup> In an ordinary loan agreement, the property being financed will become the security/collateral to the loan granted by a financier to a purchaser. In the case of land with title, there would be a registration of charge; and when there is no title, then the Deed of Assignment will be adopted.

In view of the above, a developer is legally bound under statute to deliver a certificate of title to his purchasers and the developer may be guilty of misrepresentation or breach of contract if he is unable to do so.<sup>31</sup> In the GC scheme apart from the sale and purchase agreement, another agreement known as a deed of mutual covenants (DMC) or deed of mutual governance (DMG) will also be entered into between the purchaser and the developer. The DMC will set out the rights and responsibilities of purchasers and developers including matters related to the usage of the common properties, payment of maintenance fees, security services as well as the running of the management company. In theory, the GC concept is dependent on the principle of mutual consent of parties to the contract. Thus in any non-compliance of the contract, the innocent party can initiate a civil action.

In *Dato' Soo Lai Sing v Kumpulan Sierramas (M) Sdn. Bhd. & Anor.*<sup>32</sup> the plaintiff purchased a house built under a GC scheme developed by the defendant. In the promotional brochures and sales campaign for Sierramas Resort Homes, the defendant stated that they would provide unique and special security features within the housing estate to ensure the safety and tranquility of its residents. The plaintiff purchased a housing lot and moved into the housing estate. Subsequently, he was robbed when his house was broken into. The plaintiff commenced action against the defendants for damages arising from the defendants' failure, neglect and/or carelessness which resulted in the robbery. The court held that there was a misrepresentation on the part of the defendants as they provided poor security services. In this case the mobile guards on duty did not provide sufficient security for the area concerned as well as absence of CCTV cameras and anti burglary systems to the perimeter fencing. The court granted special and general damages to the plaintiff.

In the absence of clear provisions as to how the GC scheme should be implemented, purchasers would have to challenge the validity of certain exemption clauses that tend to exclude the liability of developers.<sup>33</sup> Developers may inform purchasers that their GC schemes offer 24 hour security. However if the DMC contains a clause exempting the developer against any liability for theft, purchasers may challenge such clause as invalid. In law, the fundamental terms of a contract cannot be abrogated by exemption clauses.<sup>34</sup> Thus, if security is regarded as a fundamental term in a GC, any exemption that amounts to an exemption clause excluding liability of the developer can be challenged by purchasers in a court of law.

#### **e. Limitations of the DMC**

Being a GC, one of its essential features would be private governance. In this regard, a DMC between a developer and a purchaser will serve as a means of governing the relationship, rights and obligations of the parties to the contract. Generally, one of the

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<sup>31</sup> Section 18 of the Contracts Act, 1950.

<sup>32</sup> [2004] 3 MLJ 546.

<sup>33</sup> In Malaysia there is no statutory intervention as to limit the operation of the exemption clause. Comparatively in England and Wales, the main laws to govern this subject matter is the Unfair Contract Terms Act, 1977 and Unfair Terms in Consumer Contracts Regulation, 1999.

<sup>34</sup> See Syed Ahmad Alsagoff, *Principles of the Law of Contract in Malaysia*, 2<sup>nd</sup> ed. Malayan Law Journal, 2003, pp. 198-199 & Artin Vaqari, "Contracting Out and Public Policy Ground Under Section 24(E) of the Contracts Act 1950", 2 *MLJ* 1998, pp. 1-7.

clauses contained in the DMC is the binding effect of the agreement on the successors in title. In absence of such provision, based on the principle of privity of contract, the DMC will not bind a new purchaser who has no contract with a developer. Subsequently if a new purchaser does not pay maintenance fees then the developer cannot take any action against him. Nevertheless in practice, as a safeguard the developer would normally incorporate a clause in the DMC stating that in any case if a purchaser intends to sell his unit in the GC scheme which has yet to be issued with individual title, he must first obtain consent from the developer. In this situation a developer may require a subsequent purchaser to sign the DMC with him or otherwise the consent to transfer will not be given.<sup>35</sup>

#### **f. Non Uniformity of the Planning Guidelines**

Due to the absence of regulatory measures with regard to the GCs, there are no standard planning guidelines which can be adopted by local authorities. There are varieties of guidelines which differ from one local authority to another local authority.<sup>36</sup> The guidelines on GC schemes imposed by City Hall of Kuala Lumpur (CHKL) are more liberal and quite practical. It has incorporated certain initiatives to ensure that the development of any GC scheme will be coherent with existing laws. Those conditions are:-

- a) Buyers should be made aware that they are buying into a GC scheme.
- b) There should not be any barrier for access to the public road within the GC scheme. No guard post may be erected at the centre of the road. If there is any, its size should not be more than 6' x 5'.
- c) There should be an agreement between a developer and CHKL that the maintenance of the GC should be the responsibility of the developer.

Clear guidelines as imposed by CHKL are one of the ways to minimise problems faced by GC schemes.

#### **Occupier's Liability**

In Malaysia the issue on occupier's liability is governed by common law principles.<sup>37</sup> In this respect the issue on occupier's liability is related to the question who is the party responsible or liable for any tortious act committed within a GC scheme? Is it the developer, the property owner or local authority or are all three jointly liable in their respective capacities?<sup>38</sup> Both developers' and house owners' prospective liabilities and limitations should probably be clearly stated in the DMC on this issue.

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<sup>35</sup> Under Schedules G and H of the Housing Development (Control and Licensing) Regulations, 1989 a purchaser must obtain a consent for a transfer from a developer if at the time of the transaction, the title/strata title is yet to be issued.

<sup>36</sup> Azimudin Bahari, "Regulatory and Practical Aspects of Gated Community Projects", in *Seminar on Gated Community Projects: Regulatory and Contractual Issues*, organised by Lexis-Nexis & MLJ, Prince and Residence Hotel, Kuala Lumpur. 28 July 2005.

<sup>37</sup> Under the common law principle, the occupier owes a duty of care to all visitors; i.e. invitee, licensee and trespasser. Nevertheless the standard duty of care that is imposed on all these three categories of visitors is different from one to another.

<sup>38</sup> An example of an issue which may arise in relation to occupier's liability is insurance claim for accidents which took place within the GC scheme. As a general rule the Third Party Insurance Policy will only be covered if the accident occurs on public road. So, what is the status of the road in the GC? Which law should be applied? Shall we resort to the law of contract or alternatively file the claim under the law negligence?

## GC Schemes in Other Jurisdictions: A Few Examples

### a. New South Wales, Australia

In New South Wales, Australia, the law with respect to development of land under GC schemes is the Community Land Development Act, 1989 and the Community Land Management Act, 1989. The former Act is to facilitate the sub-division and development of land with shared property, similar to the shared ownership of common property in a strata title scheme. It deals with plan requirements, plan registration, changes to the sub-division and dealings with the lots. The latter Act provides for a system for the management of community schemes, precinct schemes and neighbourhood schemes. Each and every scheme will form an association where this association will manage the association's properties (i.e. common properties within the GC scheme). This includes the management of funds and books of accounts, the holding of meetings of the property owners' association and the executive functions and responsibilities of the association to maintain association property and take out insurance.<sup>39</sup>

A community, precinct or neighbourhood association<sup>40</sup> starts when a community plan, precinct plan or neighbourhood plan is registered by the Department of Lands, Land and Property Information Division as a deposited plan. This is known as initial period.<sup>41</sup> In most cases the builder or developer will be the only member of the association at this initial stage. As lots are sold or again subdivided, membership increases where purchasers of development lots are registered as proprietors and will become members of the association automatically.<sup>42</sup> Basically the initial period ends when one-third of the total units under the scheme has been sold. At the initial period a community association will appoint a licensed managing agent until termination of the agency at the first annual general meeting.<sup>43</sup>

An association has the power to enter into an agreement with a person or body for services or recreational facilities. The association is required to take out insurance for buildings or structures on its association property under a damages policy with an approved insurer. Similarly the association is required to insure against damage to property, death or injury for which the association could become liable.<sup>44</sup> This would include events on open or private access way.<sup>45</sup> The association has a power to impose levy on its members in the scheme to raise enough funds to carry out its duties in which all levies shall be paid out in proportion to the unit entitlements of the lots.<sup>46</sup> Similarly the association will manage the administrative fund for the cost of maintaining the association

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<sup>39</sup>Schedule 1, Community Land Management Act, 1989.

<sup>40</sup> The establishment of this association is provided in section 25 of the Community Land Development Act, 1989. The association is not a corporation within the meaning of the Corporation Law.

<sup>41</sup> Office of Fair Trading, NSW Consumer Protection Agency, Department of Commerce, *Living in a Community Scheme-What You Should know about community, precinct and neighbourhood schemes*, NSW, 2004, p.4

<sup>42</sup> Ibid.

<sup>43</sup> Section 50(1) of the Community Land Management Act, 1989.

<sup>44</sup> Section 39(1) of the Community Land Management Act, 1989.

<sup>45</sup> Section 40(2)(b) of the Community Land Management Act, 1989.

<sup>46</sup> Section 20 of the Community Land Management Act, 1989.

property, for the payment of insurance premiums and etc.<sup>47</sup> Apart from this the association will manage the sinking fund to cover future capital needs of the association. The fund shall be used for instance to paint/repaint structures that are part of its association property and to renew or replace any fixtures or fittings that are part of its association property.<sup>48</sup> Another attractive feature of this Act is the availability of provisions relating to disputes settlement by way of mediation or adjudication or tribunal.<sup>49</sup>

A closer examination of the provisions of the Community Land Development Act, 1980 and the Community Land Management Act, 1989 above would reveal that the development of GCs in Australia (particularly in New South Wales), is simply being controlled through the enforcement of the law which is almost similar with the law governing the strata properties. It gives clear indication that Malaysia may overcome the current dilemmas in GCs development by having a proper law, which facilitates subdivision and development of land with shared property identical to the shared ownership of common property in a strata title scheme.

## 4.2 United States of America

In America, the GC scheme is known as the Common Interest Housing Developments (CIDs).<sup>50</sup> Common interest housing includes planned development of single family homes, town houses and condominiums. These developments involved a form of ownership in which home buyers purchase both an individual interest in a particular unit and interest consisting of streets, recreation centres, golf courses and other facilities which all residents own in common.<sup>51</sup> They buy their property subject to voluminous sets of deeds restrictions, rules and regulations, under which all owners agree to make monthly payments to a homeowner association, a private government into which all residents are members from the moment the purchase contract is executed. The association is run by the residents, supported by cadres of lawyers and other professionals, and it enforces the deed restrictions against all residents and manages the use of property and other aspects of life in the development.<sup>52</sup>

It is probably impracticable to draw a comparison between the GC scheme in Malaysia with the practice in the USA. Nevertheless, it is worthy to note here that the practice in America on CIDs is very much supported by local governments. For instance in Las Vegas, the city's Zoning Code and Development Code are administered to require that all

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<sup>47</sup> Clause 13(1) Schedule 1 of the Community Land Management Act, 1989.

<sup>48</sup> Clause 13(2) Schedule 1 of the Community Land Management Act, 1989.

<sup>49</sup> Michael Allen, *Buying Off the Plan in NSW*, CCH Australia Limited, Sydney, New South Wales, 2001, pp.

<sup>50</sup> This term may be found in various writings on the subject. For instance Evan McKenzie, "Private Gated Communities in the American Urban Fabric: Emerging Trends in their Production, Practices and Regulation", a paper presented at conference on *Gated Communities: Building Social Division or Safer Communities?*, Department of Urban Studies, University of Glasgow, Scotland, 18-19 September 2003 and Richard Briffault, "Protecting Public Interest in the Private City", a paper presented at *International Conference on Private Urban Governance*, Institute of Geography, University of Mainz, Germany, 5-9 June 2002.

<sup>51</sup> Evan McKenzie, "Private Gated Communities in the American Urban Fabric: Emerging Trends in their Production, Practices and Regulation", a paper presented at conference on *Gated Communities: Building Social Division or Safer Communities?*, Department of Urban Studies, University of Glasgow, Scotland, 18-19 September 2003, pp. 3

<sup>52</sup> *Ibid*, pp.3-4.

new development contain certain features, including a landscaping plan, open spaces, and often security walls. The Code also requires that there must be a homeowner association to maintain them. Similarly the Code will regulate the manner how the homeowner's association should be administered and the Code clearly provides an express authority to the homeowner's association to control private streets and gated entrances.<sup>53</sup> The whole idea of the implementation of CIDs in USA is based on the privatization of the local government. As a result private governance is the dominant feature of CIDs in America.

## **The Way Forward**

### **a. Reform of the Existing Law**

It has been stated earlier that in Malaysia, some developers have taken a strata title approach while others have adopted the landed property approach in developing GCs. The closest law that would be relevant as the model for developing the GC scheme would be the Strata Titles Act, 1985. Section 6 of the Act that provides for the sub-division of buildings into parcels may be amended to include sub-division of land as well. In other words the Strata Title Act, 1985 may be given a wider application to cover any type of housing either landed or strata unit and not necessarily applies to housing with vertical development only.<sup>54</sup> The inclusion of such an amendment would pave the way for the creation of a management corporation to manage the common property as if it is a common property in a strata title scheme. Through this amendment all issues on the status of roads and amenities within the GC scheme will be put to rest since it will properly regulated by the Strata Titles Act, 1985.

### **b. Introduction of Specific Statutes**

At present the development of GC schemes are dependant on the planning guidelines issued by the local authorities. There is no uniformity of guidelines from one local authority to the other. Therefore the introduction of specific uniform laws to regulate and control the GC scheme in Malaysia is very much welcome. These laws are expected to provide *inter alia* a standard form of deed of governance between developers and purchasers to resolve the problems currently plaguing GC schemes. Nevertheless another point to be taken into consideration in drawing up the standard form of deed of governance or DMC is the balance of bargaining powers between developers and purchasers. In addition the establishment of tribunals as a redressal mechanism of any dispute that may arise in the GC scheme would be most desirable. The implementation of the Land Development Act, 1989 and the Community Land Management Act, 1989 of Australia may be taken as useful models.

### **c. Control by Local Authority and the Ministry of Housing and Local Government**

While waiting for the implementation of any of the above suggestions, it is necessary for the local authority<sup>55</sup> and the Ministry of Housing and Local Government<sup>56</sup> to use their

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<sup>53</sup> Ibid, pp.5-6.

<sup>54</sup> See discussion on inadequacy of the Strata Titles Act, 1985.

<sup>55</sup> The power to approve building plans and specifications is conferred by Section 21C of the Town and Country Planning Act, 1976, Section 70(19) of the Street, Drainage and Building Act, 1974 and By Law 3(1)(c) of the Uniform Building By Laws, 1984.

powers to monitor the development of GC schemes. The authorities must take steps in supervising the developments undertaken by developers. This is to ensure compliance by developers with the terms and conditions of the development approval, which has been granted. A proper co-operation between the local authority and the Ministry of Housing and Local Government must be established in order to monitor the GC scheme. This is to ensure rights of all the stakeholders involved in the housing industry will be protected, especially house buyers.

The first authority that is able to determine the type of development is a local planning authority.<sup>57</sup> Thus the local authority concerned should immediately provide proper guidelines before approving the application for approval of the planning permission. This information should be transmitted to the Ministry of Housing and Local Government, in particular the Licensing Unit where it may require the developer concerned to give clear information in its sales brochure that the housing development taking shape is a GC scheme. The Ministry may require the developer concerned to explain to the prospective purchasers the effect of the creation of a GC scheme. For instance to inform the prospective purchasers that the road and basic amenities within their housing will not belong to them and their liability to pay extra maintenance and service fees to the developer besides paying assessment fees to the local authority. This is to avoid any misconception when purchasers decide to purchase the house within the scheme. A local authority as well as the Ministry may impose a requirement on the developer concerned to enter into an agreement with the local authority to privatise the management and maintenance of the public road and the basic shared properties within the GC scheme. Failure on the part of a developer to comply with any of the above mentioned requirements will result in rejection of the developer's application for approval of development plan proposal by the local planning authority and the developer's license by the Ministry.

## Conclusion

The development of GC schemes in Malaysia now seems to be part of the features of the housing industry. Undoubtedly the scheme will be attractive to developers due to its higher returns and increasing demand from the market, especially in urban areas like Kuala Lumpur, Shah Alam, Penang and Johore Bahru. However there are a few legal issues which housing developers must take into account before undertaking this type of development. The present legislation was drafted years ago at a time when GC schemes have yet to find footing in Malaysia. Therefore, existing laws are quite incapable of addressing the legal issues and complications which are faced by GC schemes and the players in the industry like developers, financial institutions and potential house buyers. The need to review the present laws is necessary in order to support the growth of GC schemes as well as to protect rights of consumers. At present we have yet to come across a detailed study on social implications of the GC scheme in Malaysia. This is an aspect which is expected to be a subject of future research.

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<sup>56</sup>Section 5 of the Housing Development (Control and Licensing) Act 1966 states that no housing development shall be engaged in, carried on, undertaken or cause to be undertaken except by a housing developer in possession of a license issued under the Act.

<sup>57</sup> Section 21(1) of the Town and Country Planning Act, 1976 requires that any application for planning permission to the local planning authority must be accompanied with the Development Proposal Report which inter alia contains the location map, site plan and layout plan of the proposed project. For example a developer is going to undertake a housing development involving landed properties but the layout plan shows that there is a proposal for the construction of a club house in the project. At this instance a local planning authority supposedly aware that there is a possibility a development will be in the form of a GC.

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