

The Capability Case for Co-operative Housing

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Introduction

There is a housing crisis in New Zealand. Over the past decade a rapid appreciation in house prices has generated windfall gains for the 50-60 per cent of New Zealanders who already own one or more houses.¹ But with average incomes lagging behind, for everyone else, the ‘Kiwi dream’ of homeownership has become increasingly difficult to realise.² The problems caused by this phenomenon are extensive. An increasing number of households are being forced into private rental housing where they must endure rapidly rising rents and poorer quality housing than homeowners, without secure tenure or control over housing costs.³ This precarity increases the frequency with which people must move house, which carries significant health, educational and social costs,⁴ and inhibits residents from developing strong social connections within their community.⁵ This crisis calls for housing solutions that are affordable, provide occupants with control over their housing, ensure long-term secure tenure, and better enable community bonds to develop. This dissertation argues that a co-operative model of housing underpinned by the normative framework of the capability approach is one such solution.

The capability approach is defined by two central claims: (1) that a person’s well-being must be understood as their capability to do and be what they have reason to value and that this capability to achieve well-being is of primary moral importance;⁶ and (2) that a person needs to develop certain capabilities to be able to pursue their own version of the good life.⁷ My version of this approach asserts that there are three essential capabilities that are necessary for a person to achieve well-being: security, autonomy and sociability. Thus, under my version of the capability approach, housing should be approached with the aim of ensuring that as many people as possible have the

¹ Alan Johnson, Philippa Howden-Chapman and Shamubeel Eaqub *A Stocktake of New Zealand’s Housing* (Ministry of Business, Innovation and Employment, February 2018) at 4 and 18. In the five years leading up to 2018 alone house prices increased by 30 per cent across New Zealand overall with incomes rising at only half this rate.

² At 13. Homeownership as of 2018 is at a 60-year low.

³ At 4-7.

⁴ At 40.

⁵ Margreet Frieling *The Start of a Conversation on the Value of New Zealand’s Social Capital* (The Treasury, Living Standards Series: Discussion Paper, 18/04, February 2018) at 20.

⁶ Ingrid Robeyns “The Capability Approach” (14 April 2011) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/capability-approach/>>.

⁷ Robeyns, above n 6, at 1.

material resources and opportunities to develop these three capabilities. I argue that the housing model that can best achieve these goals is a variant of the co-operative housing model, both generally and in the specific context of the current housing crisis in New Zealand.

In support of this thesis, I argue in Part One that the capability approach is a better framework for addressing the causes of the housing crisis than classical liberal property theory, which remains the dominant paradigm. I will show how liberal theory is unable to respond to, and in fact perpetuates, the housing crisis. By contrast, I will argue that the capability approach is a more accurate framework for assessing the impact of the housing crisis on individual well-being, evaluating the property-based social arrangements that have contributed to this crisis, and formulating a solution to the crisis.⁸ These advantages derive from the capability approach's recognition that it is both morally necessary and a prerequisite for individual welfare for individuals to have affordable housing in which they have secure tenure, control over their housing and the opportunity to develop strong social connections.

In Part Two I argue that a variant of the housing co-operative model is the best way of implementing the capability approach in practice. A housing co-operative is an association of persons united voluntarily to provide housing to themselves through a jointly-owned and democratically-controlled enterprise, according to the principle of one member, one vote.⁹ While other normative frameworks—such as the 'co-operative values', 'liberal commons' and 'civic republican' frameworks—might also endorse housing co-operatives, they do so for the wrong reasons; a co-operative housing model guided by the capability approach better addresses the housing crisis. The primary reason for this is that the capability approach, unlike the 'co-operative values' and 'liberal commons' frameworks, only supports the adoption of the affordable variants of the housing co-operative model. Similarly, unlike the civic republican framework, the capability approach supports co-operative housing for its numerous benefits for individual well-being, rather than just for their effect on social capital. These benefits arise from co-operative housing providing residents with control over important decisions concerning their housing, long-term secure tenure, and a social environment conducive to the development of sociability.

⁸ Robeyns, above n 6, at 1.

⁹ Jane Cameron, James Thorogood and Dominic Wood (eds) "Profiles of a Movement: Co-operative Housing Around the World" (April 2012) CECODHAS Housing Europe and ICA Housing <https://4bfebv17goxj464grl4a02gz-wpengine.netdna-ssl.com/wp-content/uploads/2016/11/Profiles_of_a_movement_web.pdf> at 6.

I argue that a co-operative housing model with these features is best implemented through the flat and office owning companies structure (also known as the ‘company lease scheme’).¹⁰ I demonstrate that the company lease scheme reflects the co-operative model in a number of important respects. Specifically, it provides for joint resident ownership of the land and buildings in which the residents live,¹¹ and can be used to ensure that the housing is affordable, is democratically controlled by its members and provides residents with a long-term secure occupancy right. These characteristics demonstrate that co-operative housing underpinned by the capability approach can in practice be a solution to the New Zealand housing crisis.

In Part Three I address some practical concerns with the implementation of the co-operative housing model through the company lease scheme. The first concern is that the shareholders of a flat and office owning company may change the aspects of the company’s constitution that ensure the company embodies the capability approach, effectively undermining the mechanism as a solution to New Zealand’s housing crisis. I argue that this concern can be mitigated through the use of a community land trust. The other concerns addressed in this part are that shareholders of a flat and office owning company may find it difficult to obtain finance and will need to do their own due diligence before purchasing a share. These concerns might be seen to demand a different legal device to implement co-operative housing—such as the Unit Titles Act 2010 or the cross lease scheme. However, I argue that these devices are unable to implement co-operative housing guided by the capability approach. Consequently, the company lease scheme remains the best way for co-operative housing underpinned by the capability approach to be implemented in New Zealand.

¹⁰ D W McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (LexisNexis, 2013) at 137.

¹¹ At 137.

Part One: The Need for a Capability Approach to Housing

This part examines the different normative frameworks from which a response to the housing crisis might be formulated, and contrasts the capability approach to the dominant classical liberal conception of property. I argue that the classical liberal theory is both unable to adequately respond to, and is a cause of, this crisis. The capability approach is a preferable framework for the housing crisis.

Classical liberal property theory views property in individualistic and exclusionary terms, emphasising principles of preference satisfaction (that is, a combined notion of efficiency and utility).¹² Premised on a Lockean notion of moral desert—that property rights in an object or land arises through the application of an individual’s labour to that object—liberal theory justifies private property as the ideal, and even natural, property form.¹³ In this spirit, Sir William Blackstone famously summed up property as that “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”.¹⁴

While this idea of sole dominion has never accurately described property ownership as it exists in the real world,¹⁵ and reinforces a flawed perception of humans as ‘atomistic’, the idea of property as something that is necessarily privately held remains dominant in New Zealand, as seen in the reverence for individual homeownership in New Zealand culture and as reflected in government policy settings. In this part I will demonstrate that this view of property is problematic both generally and in the context of New Zealand’s housing crisis.

¹² Carol Rose *Property and Persuasion* (Westview Press, Boulder, 1994) at 51.

¹³ At 57.

¹⁴ William Blackstone *Commentaries on the Laws of England* Book II Chapter 1 (Wayne Morrison (ed.), Cavendish, London, 2001) at 2.

¹⁵ Hanoch Dagan and Michael A. Heller “The Liberal Commons” (2000) 110(1) Yale L.J. 549 at 556.

I. Individual Investment and Preference Satisfaction

Classical liberal theorists of a utilitarian bent argue that private property is the way of distributing resources that maximises utility within society.¹⁶ A classic variant of this utilitarian position is provided by Jeremy Bentham who argues that private property rights incentivise property owners to invest in their property by providing them with the security that they will receive the full benefit or loss arising from their property.¹⁷ When combined with the ability to freely alienate one's property, this investment leads to an increase in mutually beneficial trade, which benefits society as a whole.¹⁸ This notion of property as preference satisfaction reinforces the idea that housing should be individually held and freely alienable in order to incentivise investment and beneficial trade.¹⁹

However, the metric of economic efficiency only considers the total exchange value of housing in society and ignores how resources and opportunities are distributed. Accordingly, the maximisation of economic efficiency within a housing market is reconcilable with a situation of worsening inequality where housing is unaffordable for most of society—such as the current state of housing in New Zealand.²⁰ By contrast, under the capability approach, it is more important that everyone has the basic level of resources and opportunities necessary to lead a good human life than it is to increase aggregate wealth. Accordingly, it is a priority that everyone has affordable, secure and pro-social housing. The capability approach is thus better suited to addressing New Zealand's housing crisis than classical liberalism.

Furthermore, focusing on economic efficiency can lead to an overemphasis on the importance of incentivising individual investment in property. A focus on economic efficiency justifies an individual having the right to receive the full capital gain on their property. But this emphasis is undue as most of the increase of the capital value of housing is caused by factors outside of the homeowner's control.²¹ House prices tend to be greatly influenced by public and private investment

¹⁶ Rose, above n 12, at 3.

¹⁷ Jeremy Bentham *The Theory of Legislation* (Harcourt, C.K. Ogden (ed.), Kegan Paul, Trench, Trubner & Co., 1931) at 50.

¹⁸ Rose, above n 12, at 3.

¹⁹ At 3.

²⁰ Johnson, Howden-Chapman and Eaquad, above n 1, at 4.

²¹ Anna di Robilant "Common Ownership and Equality of Autonomy" (2012) 58(2) McGill LJ 263 at 308.

in the area surrounding the house, the regional economy, immigration, and the regulation, finance and taxation of real estate.²² Thus, while the ability to freely alienate their property does provide the homeowner with some incentives to invest in improving the value of their property, it also results in them receiving a windfall gain caused by factors outside of their control. This is advantageous to those who already own one or more houses but leaves the rest of society with higher house prices relative to incomes.²³ Increasing house prices also leads to increasing rental prices relative to incomes.²⁴ This is particularly problematic as private rental tenants on average spend a far higher proportion of their disposable household income on housing than those in other forms of housing.²⁵ As such, I argue that it is not morally desirable to allow homeowners to experience these gains. By contrast, the capability approach only supports the homeowner receiving a capital gain to the extent that it strikes an appropriate balance between affordability and providing the homeowner with financial security and an incentive to improve the quality of their housing.

II. A Natural Right to Property

Another way that classical liberal property theorists justify private property as the ideal property form is by arguing that individuals can gain a natural right to property. For example, John Locke's theory of property famously argues that an individual obtains an exclusive natural private property right in something by mixing their labour with it.²⁶ The moral intuition behind Locke's theory—that private property is a just return for one's efforts—reinforces the view of home-ownership as the just reward for a hardworking New Zealander. This notion thus ostensibly justifies the financial advantages of homeownership as being an individual's moral desert for a lifetime of hard work.

However, the significance of external factors on house prices means that the moral appeal of the Lockean theory—that one obtains a benefit in proportion to one's exertion—cannot justify the homeowner obtaining full market equity in their home.²⁷ Instead, it is more plausible that the

²² At 308.

²³ Johnson, Howden-Chapman and Equb, above n 1, at 2.

²⁴ At 4.

²⁵ At 5.

²⁶ John Locke *Second Treatise of Government* (Hackett, Cambridge MA, 2010) at 19.

²⁷ Robilant, above n 21, at 308-309.

homeowner owns only the value that equals their initial investment plus a fair return.²⁸ The rest belongs to society.²⁹ However, classical liberalism's natural right justification of property does not recognise this. In contrast, the capability approach, rather than justifying the distribution of resources based on people's past actions, claims that everyone going forward should have the resources and opportunities to develop their essential human capabilities. As such, homeowners do not have a right to windfall gains as these resources could be better used bringing others up to the minimum threshold necessary to lead a good human life.

III. Despotic Disposal of Property

Furthermore, the classical liberal idea of property as that "despotic dominion" emphasises the homeowner's interest in disposing of their property as they wish. This obscures the consequence that the homeowner's freedom can come at the expense of the renter's interests in having secure tenure and control over decisions concerning the property in which they live. For instance, the more freedom that the landlord has to raise rental prices, the more likely that the renter will be priced out of the accommodation and the less able they will be to financially plan for the future. Similarly, the more freedom the landlord has to cancel a tenancy, the less security of tenure the renter has.

This lack of security is demonstrably problematic as frequently moving accommodation has significant health, education and social costs.³⁰ Those who must move frequently are less likely to have a primary health care provider and are more likely to have to change their child's school.³¹ Moreover, there is international evidence that links housing movement in the first year of a child's life with a "substantially increased risk of emergency admissions for potentially preventable hospitalisations in early childhood".³² Furthermore, the shorter the period of rental tenure, the less incentive the renter has to emotionally invest in, and identify with, their 'home'. As such, it is hard for renters to obtain the pride in one's home that the 'Kiwi dream' ostensibly offers. Finally, insecurity of tenure reduces renters' incentives to participate in local groups and activities,

²⁸ At 308-309.

²⁹ At 309.

³⁰ Johnson, Howden-Chapman and Equb, above n 1, at 40.

³¹ At 40.

³² At 41.

inhibiting the development of positive ties with their local community.³³ It also takes time to integrate newcomers into local communities,³⁴ so even where renters are willing to participate in the local community, their lack of security of tenure hinders their ability to develop local social networks and associational ties.³⁵ Low housing mobility and homeownership rates thus contribute to the decline of social capital—that is, “the social connections, attitudes and norms that contribute to societal wellbeing by promoting coordination and collaboration between people and groups in society”.³⁶ It is thus morally desirable for everyone to have secure tenure even if this comes at the cost of reducing the landlord's freedom.

However, despite the social benefits of decreasing housing movement, the standard private rental is a one-year fixed tenancy with the average tenure being just two years.³⁷ Furthermore, after the completion of the 12 month term, many of these become periodic tenancies,³⁸ which are even more insecure with a landlord only required to give tenants 90-days' notice.³⁹ As such, the increasing number of households being forced into private rental housing due to rising house prices is of significant concern.⁴⁰

However, classical liberal property theory does not single out secure tenure as a key moral good to achieve through housing. By contrast, the capability approach recognises that security is an essential human capability that housing should strive to realise. It thus gives primary moral importance to every person's interest in having secure tenure. This gives the capability approach a significant advantage over classical liberalism in addressing New Zealand's housing crisis.

³³ Frieling, above n 5, at 20.

³⁴ At 20.

³⁵ At 20.

³⁶ At I and 10.

³⁷ Johnson, Howden-Chapman and Eaquad, above n 1, at 7.

³⁸ At 38.

³⁹ At 7.

⁴⁰ At 7.

IV. Minimal Incentive to Improve Quality of Rental Housing

Another concern with private rental housing is that it tends to be of poorer quality than owner-occupied housing.⁴¹ However, renters—who have the most interest in making sure that rental housing is of an adequate quality—are economically disincentivised from fixing and improving their housing as the capital value of any changes is fully captured by the landlord. It is thus unsurprising that thousands of children are admitted to hospital every year with preventable illnesses caused by poor housing.⁴² However, the dominant idea of property justifies the homeowner having the right to the full capital value of their house. In contrast, under the capability approach, fixing and improving one’s housing is a valuable exercise of autonomy. As such, the capability approach can support an ownership model that provides all residents with equity in their housing—such as co-operative housing—to incentivise residents to improve the quality of their housing. The capability approach is thus at an advantage over classical liberalism in addressing the poor quality of New Zealand’s rental housing.

V. Individualised Housing and Sociability

Classical liberalism’s idealisation of individually held private property is also justified by, and reinforces, a flawed perception of humans as atomistic.⁴³ This is problematic as it downplays that for an individual to lead a good life it is essential that they develop strong social connections with others. By contrast, the capability approach recognises that “humans are inherently social creatures” that “are inherently dependent on others in the process of developing the capabilities that every person requires to live a fulfilling life”.⁴⁴ The capability approach thus claims that it is of primary moral importance to advance people’s sociability—that is, their ability to exercise and develop their essential human social capacities. As such, this approach supports housing arrangements that provide people with the opportunity to interact, deliberate and make decisions with others, and that provide the stability necessary to establish strong ties within the community. Therefore, the capability approach is better able than classical liberalism to guide the implementation of a solution to New Zealand’s housing crisis that develops our social capacities as humans.

⁴¹ At 6.

⁴² At 2.

⁴³ Gregory Alexander *Property and Human Flourishing* (Oxford University Press, New York, 2018) at xiv.

⁴⁴ At xiv.

VI. Competing Conceptions of Autonomy

Classical liberalism's atomistic conception of humanity privileges the notion of negative freedom—that is, freedom from interference. By contrast, the capability approach can embrace a broader notion of autonomy that requires a degree of negative freedom, positive freedom and the ability to communicate and debate our ideas.⁴⁵ The capability approach thus provides a normative justification for restricting people's negative freedom if this is necessary to provide more people with the material resources and opportunities necessary for them to develop and exercise their autonomy in this broader sense. For instance, it is justifiable to interfere with the landlord's ability to set rental prices, to receive the full capital gain caused by any improvements to the property and to offer short term or periodic tenancies, if doing so provides the resident with the opportunity to develop autonomy through the exercise of some control over the important decisions concerning the property in which they live. Adopting a normative framework that recognises the importance of providing everyone with the material resources and opportunities to exercise autonomy is particularly important in New Zealand where more people are being forced into accommodation that provides them with little control over their housing.

VII. The Liberal Right of Exit

Classical liberal property theory views the individual's right of exit from any property arrangement as a bedrock value.⁴⁶ This stems from the importance given to negative freedom from the liberal perspective.⁴⁷ This commits them to "open boundaries, that is, to the idea that people should be able to leave the groups with which they choose to associate."⁴⁸ As such, even where liberals value "noneconomic goals such as the intrinsic good of interpersonal cooperation", the ownership structures that they endorse do not allow any restrictions on the right of exit.⁴⁹ For instance, Hanoch Dagan and Michael Heller in their article "The Liberal Commons" argue that "for many resources, the most appealing ownership form proves to be a participatory commons regime that also allows members the freedom to come and go".⁵⁰ A legal regime is a 'liberal commons' "when it enables a

⁴⁵ Di Robilant, above n 21, at 269.

⁴⁶ Dagan and Heller, above n 15, 567.

⁴⁷ At 567.

⁴⁸ At 567.

⁴⁹ At 553.

⁵⁰ At 553.

limited group owners to capture the economic and social benefits from cooperative use of a scarce resource, while also ensuring autonomy to individual members who retain a secure right of exit”.⁵¹ Examples of the liberal commons in action include condominiums and marital property arrangements.⁵² Nonetheless, there are sometimes difficult trade-offs between maintaining a secure right of exit and achieving another important goal.⁵³ These other goals may include achieving equality within a collective property arrangement, combating adverse selection and increasing the affordability of entry into the group.⁵⁴ However, as such arrangements interfere with the sacred liberal right of exit, they are dismissed under the dominant paradigm.

By contrast, the capability approach supports restricting the individual’s right of exit in a collective property arrangement if doing so results in the better development of participants’ social capacities, or if it is necessary to increase affordability. This opens up the possibility of exploring alternative solutions to New Zealand’s housing crisis—such as housing co-operatives—that impose restrictions on the individual member’s right of exit in order to increase the affordability of entry,⁵⁵ and to foster a better social environment.⁵⁶

VIII. The Capability Approach and the Good Life

A further strength of the capability approach is that it does not define what the good life is for an individual.⁵⁷ Instead, it argues that we need to ensure that people have the material resources and real opportunities necessary to develop certain essential capabilities so that they can pursue their own vision of the good life.⁵⁸ It thus recognises that no one is better placed than the individual to decide what the ultimate purpose and meaning of one’s life is.

⁵¹ At 553.

⁵² At 553.

⁵³ Robilant, above n 21, at 277-278.

⁵⁴ At 277-278.

⁵⁵ Amanda Huron “Creating a Commons in the Capital: The Emergence of Limited-Equity Housing Cooperatives in Washington D.C.” (2014) 26(2) *Washington History* 56 at 57.

⁵⁶ Gregory Alexander “Civic Property” (1997) 6(2) *SOC & LEGAL STUD* 217 at 228.

⁵⁷ Robeyns, above n 6, at 3.1.

⁵⁸ At 3.1.

IX. Conclusion

The capability approach supports a model of housing where as many people as possible have the materially realistic opportunity to develop their capabilities of autonomy, security and sociability in order to pursue their own version of the good life. Accordingly, it recognises that it is a serious problem that an increasing number of people are being forced into private rental housing where they are more likely to experience insecurity of tenure,⁵⁹ to lack control over their housing,⁶⁰ and to struggle to establish strong social connections within the community.⁶¹ This is in contrast to the dominant classical liberal view of property which privileges the individual freedom of the private property owner and the maximising of economic efficiency above these other considerations. As such, the capability approach is a better way to approach housing both generally, and as a solution to New Zealand's housing crisis.

⁵⁹ Johnson, Howden-Chapman and Eaquad, above n 1, at 4-7.

⁶⁰ At 4-7.

⁶¹ Frieling, above n 5, at 20.

Part Two: Implementing Co-operative Housing Underpinned by the Capability Approach

In contrast to the classical liberal conception of property, the capability approach provides a principled way to address New Zealand's housing crisis. In this part I will explore how the capability approach can underpin co-operative housing as a model that supports and enhances the capabilities of security, autonomy and sociability. I argue that the best existing vehicle for implementing co-operative housing underpinned by the capability approach in New Zealand is the flat and office owning companies structure. But first I will first demonstrate that, while co-operative housing can be underpinned by normative frameworks other than the capability approach, doing so leads to worse outcomes than under the capability approach. As such, they are not able to adequately respond to New Zealand's housing crisis. This reinforces my thesis that we should embrace co-operative housing underpinned by the capability approach in New Zealand.

I. Other Justifications of Co-operative Housing

A. Co-operative Housing Underpinned by 'Co-operative Values'

Co-operative housing can be justified under the values of the wider co-operative movement—self-help, self-responsibility, democracy, equality, equity and solidarity.⁶² To embody these values the co-operative should operate according to the 'cooperative principles', which are a set of seven ideals for co-operatives that have been adopted by the co-operative movement as guiding principles.⁶³ The 'co-operative movement' refers to the movement that emerged in the late 18th century in Scotland based on the idea that people should combine to meet their needs through a jointly-owned and democratically-controlled enterprise.⁶⁴ 'Self-help' and 'self-responsibility' are achieved through the housing co-operative educating and training its own members on how to run the co-operative.⁶⁵ They are also realised by ensuring that the housing co-operative remains autonomous and independent from outside organisations.⁶⁶ 'Solidarity' is expressed by housing co-

⁶² International Co-operative Alliance "Cooperative identity, values & principles" <<https://www.ica.coop/en/cooperatives/cooperative-identity#cooperative-values>>.

⁶³ International Co-operative Alliance, above n 62.

⁶⁴ International Co-operative Alliance "History of the cooperative movement" <<https://www.ica.coop/en/cooperatives/history-cooperative-movement>>.

⁶⁵ International Co-operative Alliance, above n 62.

⁶⁶ International Co-operative Alliance, above n 62.

operatives co-operating among themselves and demonstrating a concern for the community.⁶⁷ ‘Democracy’, ‘equality’ and ‘equity’ are then incorporated in a housing co-operative through the co-operative being democratically controlled by members, according to the principle of one member one vote,⁶⁸ and through members of the housing co-operative contributing equitably to, and democratically controlling, the capital of the co-operative.⁶⁹ However, to live up to the ideal of ‘equality’ the co-operative should also operate according to the principle of voluntary and open membership.⁷⁰ This is unrealistic for housing co-operatives as in this model there is necessarily only a certain number of dwellings and a minimum financial barrier to entry.

There is a deeper problem with a housing co-operative underpinned by the value of the co-operative movement: a housing co-operative can be democratic, equal and equitable between its members while still allowing members to sell their share at the highest price that the market can bear.⁷¹ Moreover, while ‘solidarity’ involves a concern for community, it does not necessarily extend to imposing equity restrictions on members. Instead, the ‘market-rate housing co-operative’—in which the individual co-operative member is able to sell their share at any price—is a prevalent variant of the co-operative model operating under the wider banner of the co-operative movement.⁷² However, without removing the speculative element from housing by restricting the maximum price at which each co-operative member can transfer their share,⁷³ a housing co-operative is unlikely to be significantly more affordable than owner-occupied housing.⁷⁴ As such, co-operative housing underpinned solely by the values of the co-operative movement cannot be a solution to New Zealand’s housing affordability crisis. By contrast, the capability approach only supports housing co-operatives with an equity restriction as, by increasing affordability, the restriction allows more

⁶⁷ International Co-operative Alliance, above n 62.

⁶⁸ International Co-operative Alliance, above n 62.

⁶⁹ International Co-operative Alliance, above n 62.

⁷⁰ International Co-operative Alliance, above n 62.

⁷¹ Cameron, Thorogood and Weed, above n 9, at 52 and 71.

⁷² At 52 and 71.

⁷³ Huron, above n 55, at 57.

⁷⁴ Maja Hoyer Brunn “Egalitarianism and Community in Danish Housing Cooperatives: Proper Forms of Sharing and Being Together” (2011) 55(2) *Social Analysis: The International Journal of Anthropology* 62 at 76.

people to enter a housing arrangement that, for reasons I will soon make clear, is better able to develop their capabilities than the alternatives.

B. Co-operative Housing as The Liberal Commons

A co-operative model of housing could also potentially be justified on a quasi-liberal framework. As mentioned above, collective ownership regimes that provide the individual with a secure right of exit are not necessarily inconsistent with liberal values.⁷⁵ However, housing co-operatives can only be structured in this way if its members can sell their share at any price. Therefore, housing co-operatives underpinned by liberal values cannot offer an affordable alternative to owner-occupied housing.

C. A Civic Republican Justification of Co-operative Housing

Co-operative housing can also be justified on civic republican grounds as a property form that promotes ‘social capital’.⁷⁶ This argument is made by Gregory Alexander in his article “Civic Property”.⁷⁷ He argues that social capital—that is, the capacity for the public to trust and cooperate with others—contributes to “the legitimacy and stability of the formal institutions of democracy”.⁷⁸ Moreover, he argues that limited-equity housing co-operatives (LECs) are a form of property-based social institution that is particularly good at developing social capital for two reasons.⁷⁹ Firstly, LECs’ dispute resolution processes encourage participation in discussions.⁸⁰ This is due to the informal and non-legalistic manner of the board meetings and the effort by the board to involve other residents aside from the disputing members in discussions.⁸¹ Secondly, the structural features of ownership that partially de-commodify each resident’s property interest increase their willingness to participate in the democratic governance of the co-operative.⁸² The first structural feature of ownership that achieves this in an LEC is that only residents have a vote in decisions made by the

⁷⁵ Dagan and Heller, above n 15, at 553.

⁷⁶ Alexander, above n 56, at 218.

⁷⁷ At 218.

⁷⁸ At 218.

⁷⁹ At 228.

⁸⁰ At 228.

⁸¹ At 228.

⁸² At 228.

co-operative which ensures that residents will not have to interact with absentee owners with whom residents may have had little or no personal contact.⁸³ The second feature is that there is a resale restriction that limits the price at which a member of an LEC can sell their share in the LEC for.⁸⁴ Alexander argues that this reinforces the “incentive to participate by eliminating any possibility that owners will use their equity interests solely as a market commodity”.⁸⁵

While I agree with this analysis, I argue that an individual developing the capacity to trust and cooperate with others is not only desirable in terms of its effects on our democratic institutions but also because it is intrinsically beneficial to that individual. Alexander’s variant of civic republicanism is thus a problematic way to justify co-operative housing as it does not recognise the intrinsic desirability for the individual of developing the capabilities of sociability and autonomy through interacting, deliberating and making collective decisions with others. As such, the capability approach is a better framework to guide the implementation of housing co-operatives as a solution to the social problems caused by the current state of housing in New Zealand.

II. Implementing Co-operative Housing Underpinned by the Capability Approach through the Company Lease Scheme

A co-operative housing model underpinned by the capability approach gives residents control over important decisions concerning their housing in order to develop their capability of autonomy. Moreover, it provides residents with secure tenure to develop their capability of security. Furthermore, to foster the development of sociability in residents, it provides them with the opportunity to interact, deliberate and make collective decisions with others. Finally, it is affordable in order to allow as many people as possible to enter the co-operative so that they have the opportunity to develop their capabilities in the ways just described. Therefore, we should embrace co-operative housing underpinned by the capability approach as a solution to New Zealand’s housing crisis. I argue that the existing legal device best able to implement this model is the company lease scheme.

⁸³ At 228.

⁸⁴ At 228.

⁸⁵ At 228.

A. Joint Resident Ownership

The company lease scheme, provided in Subpart 6 of the Land Transfer Act 2017, was introduced in the early 1960s as a way of better conferring a form of “ownership” of portions of a multi-storey block of flats or offices.⁸⁶ Implementing this method requires the formation of a company under the Companies Act 1993 to own the land and buildings.⁸⁷ The company’s constitution then divides the shares in the company into as many blocks as there are flats or offices in the building.⁸⁸ “Flat” includes an apartment used or intended for use as a residence.⁸⁹ The company then issues to each shareholder a “license to occupy” granting the shareholder the right to occupy or use the flat or office in the building owned by the company that is appropriate to that specific block of shares.⁹⁰ Section 122(1) of the Land Transfer Act 2017 provides that a:⁹¹

License to occupy or license means an instrument executed by a company and by a shareholder that—

- (a) grants the shareholder the right to occupy or use a specified flat or office by virtue of the shares held by the shareholder;
- (b) is evidence of the right of the shareholder by virtue of the shares held by the shareholder to occupy or use a specified flat or office.

Furthermore, s 122(1) also provides that a “share certificate means a share certificate for shares to which a license relates”.⁹² As such, one cannot have a license to occupy a flat or office without owning shares in the company that owns the land and buildings. Moreover, one cannot own shares in the company without having a license to occupy a specified flat or office. The company lease scheme thus ties joint ownership of the land and buildings with a right to occupy a specific unit—a necessary feature of co-operative housing.

⁸⁶ Thomas Gibbons *The Laws of New Zealand* Statutory hybrid interests in land (online ed) at [58].

⁸⁷ McMorland and Gibbons, above n 10, at 137.

⁸⁸ At 137.

⁸⁹ Land Transfer Act 2017, s 122(1).

⁹⁰ McMorland and Gibbons, above n 10, at 137.

⁹¹ Land Transfer Act, s 122(1).

⁹² Section 122(1).

Joint ownership and the linking of ownership to residency are disadvantages under the dominant classical liberal view that property should be both privately held and freely alienable to increase individual freedom and economic efficiency. However, the capability approach supports joint resident ownership as it enables residents to impose equity restrictions, increasing the affordability of entry into the housing co-operative.⁹³ It thus enables those who would otherwise be unable to afford homeownership to exercise some collective control over their housing through their rights as shareholders in the company. This also means that they can achieve security through providing themselves with long-term secure tenure. Therefore, joint resident ownership is a beneficial tool for addressing New Zealand's housing crisis.

B. Equity Restriction

A housing co-operative implemented through the company lease scheme could implement an equity restriction by specifying in its constitution and/or each member's share purchase agreement that a member cannot sell their share, and the accompanying license to occupy their flat, for more than a certain maximum price. An equity restriction in the constitution would be binding between the company and each shareholder, and between each shareholder.⁹⁴ Moreover, if this restriction was included in each member's share purchase agreement, each member would be contractually bound by it. The equity restriction could limit the resale price to the price at which the member bought the share.⁹⁵ Alternatively, it could allow for appreciation in equitable value according to a formula contained in the constitution and each member's share purchase agreement.⁹⁶ I argue that the maximum price at which a member can sell their share should be restricted to the original purchase price, plus increases to the consumer price index since the share was purchased, plus the costs that each member has spent on any upgrades to their unit approved by the board of directors. However, there should be an exception that the unit can be sold for market-price if the market-price is lower than the formula-price.⁹⁷ Co-operative housing can thus remove the speculative element from housing. As such, it will likely become significantly more affordable than owner-occupied housing

⁹³ Huron, above n 55, at 57.

⁹⁴ Companies Act 1993, s 31(2).

⁹⁵ Gerald Sazama and Roger Wilcox *An Evaluation of Limited equity Housing Cooperatives in the United States* (University of Connecticut: Department of Economics, Working Paper Series, 1995) at 26.

⁹⁶ Julie D. Lawton "Limited Equity Cooperatives: The Non-Economic Value of Homeownership" (2015) 23(3-4) *Journal of Affordable Housing* 393 at 410.

⁹⁷ Sazama and Willcox, above n 95, at 26.

over time. Furthermore, as aforementioned, resale restrictions can increase the incentive to participate in the governance of the co-operative “by eliminating any possibility that owners will use their equity interests solely as a market commodity”.⁹⁸ This is beneficial as the interaction, deliberation and group decision making that are a part of collective governance develop the participants’ capabilities of sociability and autonomy.

Nonetheless, one may question why we should allow the member to obtain any equity at all given that a housing co-operative with no member equity would be even more affordable. However, there are three reasons to endorse housing co-operatives that enable some, albeit limited, equity appreciation over a housing co-operative model without member equity. The first is that in the limited-equity model, members are not actively disincentivised from investing in improving the quality of their unit as they will receive back any money spent on upgrades approved by the board of directors upon selling their share. The second is that a limited-equity co-operative still provides members with some financial security as they are able to receive their original equity contribution plus some appreciation. Finally, the limited-equity model is more likely to be accepted by the New Zealand public as, by allowing the member to retain some equity, it will feel more like homeownership. Therefore, a limited-equity co-operative model is best able to address New Zealand’s housing crisis as it strikes an appropriate balance between promoting affordability on the one hand and providing residents with financial security, productive incentives and the feeling of homeownership on the other.

Moreover, a flat and office owning company’s constitution could provide that shares can only be bought by those who fall below a certain income to ensure that membership is reserved for those who would otherwise struggle to afford homeownership. An income restriction of this nature is justified on the capability approach as a means of prioritising entry into the co-operative for those who would otherwise be in private rental housing where they would be without security of tenure and control over their housing.

A housing co-operative model implemented through the company lease scheme can thus provide people who would otherwise be unable to afford homeownership with control over important aspects of their housing. This control is realised by a shareholder in a flat and office owning

⁹⁸ Alexander, above n 56, at 228.

company through their use of the rights and powers attached to their share as per s 36 of the Companies Act 1993. Section 36(1) provides that these rights and powers include, subject to exceptions in s 36(2) that are not of concern for the present purposes, the right to one vote on a poll at a meeting of the company on any resolution.⁹⁹ The co-operative member will thus be able to exercise control over decisions made by the company that owns their housing through their vote on any resolution.

C. Long-term Secure Tenure

For instance, shareholders of a flat and office owning company could, through the company, issue to each shareholder a license to occupy for a long fixed term such as 99 years. Alternatively, they could issue a license to occupy for a shorter term with the tenant having the right to renew the license at their option. Both types of occupancy right provide the member with the security that they will have an exclusive right to occupy their unit for as long as they are willing and able to meet the requirements of membership. This security will eliminate the need for tenants to frequently move houses, reducing the significant health, educational and social costs associated with this movement.¹⁰⁰ It will also incentivise the member to invest in maintaining and improving the quality of their housing as they will obtain the use benefit of these changes for a long period of time. Furthermore, it provides the member with the stability necessary to develop strong social connections with other residents of the co-operative and the rest of the local community.¹⁰¹ Thus, co-operative housing underpinned by the capability approach can provide, through the company lease scheme, an affordable alternative to homeownership with secure tenure. Therefore, it is able to combat the pressing social problems caused by insecurity of tenure insecure in private rental housing.

Nonetheless, although the license to occupy will be able to be registered under Subpart 6 of the Land Transfer Act 2017,¹⁰² this does not confer an indefeasible title on the licensee.¹⁰³ However, this is not an issue so long as there are no defects in the execution of the license to occupy. The lack

⁹⁹ Companies Act, s 36.

¹⁰⁰ Alan Johnson, Philippa Howden-Chapman and Shamubeel Eaquad, above n 1, at 40.

¹⁰¹ Frieling, above n 5, at 20.

¹⁰² Land Transfer Act, s 124.

¹⁰³ Section 126.

of infeasibility is thus not a major source of insecurity for the members of a flat and office owning company.

D. Control of Housing Costs

Members of a housing co-operative need to pay operating expenses to the company to cover costs such as immediate repairs and maintenance of the building and paying insurance.¹⁰⁴ In the company lease scheme each member will be able to exercise some control over the level of these expenses through their voting power as shareholders in the company. Moreover, as those who set the payment are the ones who have to pay it, the levied operating costs will likely be no higher than what is needed to meet the company's necessary expenses.¹⁰⁵ Co-operative housing implemented through the company lease scheme thus provides members with more control over their housing costs than those in rental housing have. This is a reason to endorse co-operative housing on the capability approach as this exercise of control contributes to each member being autonomous. Furthermore, a study of housing co-operatives in the United States found that the ability to share decision-making—and, in particular, the financial planning element of decision-making—provides members with a valuable sense of security.¹⁰⁶ As co-operative housing underpinned by the capability approach also enables members to jointly control their collective finances, it can provide a similar benefit.

E. Physical and Social Control of the Building

Furthermore, through their voting power in the flat or office owning company as shareholders, co-operative members could include provisions in each member's license to occupy to regulate possibly socially disruptive behaviour such as noisy activities. Moreover, their collective control over the company means that they can decide when to fix and upgrade units and common spaces. Thus, co-operative housing can develop each member's capability of autonomy by providing them, through the company lease scheme, with physical and social control over the building in which they live. This is an advantage of co-operative housing over renting as renters typically do not have control over these aspects of their housing.

¹⁰⁴ Brunn, above n 74, at 71.

¹⁰⁵ Sazama and Wilcox, above n 95, at 14.

¹⁰⁶ Susan Saegert and Lamar Benítez "Limited Equity Housing Cooperatives: Defining a Niche in the Low-Income Housing Market" (2005) 19(4) J Plan Lit 427 at 429.

F. Occupancy Restriction

The shareholders of a flat and office owning company could also, through the company's constitution, restrict each member's ability to rent out their flat. Specifically, the constitution could require that members have to occupy their unit as their primary residence. Occupancy restrictions infringe upon the co-operative member's freedom and are, in theory, economically efficient. They are thus unacceptable on the classical liberal framework. However, as aforementioned, an occupancy restriction of this nature would incentivise resident participation in the governance of the co-operative by ensuring that residents will not have to interact with absentee owners with whom residents may have had little or no personal contact.¹⁰⁷ This participation develops member's sociability and autonomy. As such, the capability approach supports occupancy restrictions within housing co-operatives. This reinforces my argument in Part One that the capability approach is a better way to approach housing than classical liberal property theory.

G. Control of Membership

The company lease scheme also allows shareholders to control who can become a member of the co-operative. The company's constitution could provide that anyone who wants to purchase a share in the company must obtain the board of directors' consent. Moreover, the constitution could make it mandatory for the board to conduct an interview with any potential new member and to perform background financial and criminal checks. These would be to ensure that the prospective member is not a threat to the safety of other residents and has the ability and willingness to contribute to the collective governance and finances of the company. While the housing co-operative having this power would contribute to the autonomy of its members, one may argue that it makes the housing arrangement exclusionary and potentially discriminatory.¹⁰⁸ However, the company will not be able to treat prospective shareholder-tenants in ways that constitute discrimination under s 53 of the Human Rights Act 1993.¹⁰⁹ Moreover, the exception in s 54 of the Human Rights Act 1993 to residential accommodation which is to be shared with the person disposing of the accommodation, or on whose behalf it is disposed, is unlikely to apply.¹¹⁰ The reason for this is that under the

¹⁰⁷ Alexander, above n 56, at 228.

¹⁰⁸ Mark Fenster "Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community" (1999) 15(1) J LAND USE & ENVTL L 3 at 42.

¹⁰⁹ Human Rights Act 1993, s 53.

¹¹⁰ Section 54.

company lease scheme the person who disposes of the accommodation—the company—will not be sharing accommodation with the prospective residents.

Nonetheless, inclusion in a housing co-operative is still linked to capacity to pay and “to the endowment of social and cultural capital—that is, the social networks, cultural and educational resources, norms, values and attitudes that might be implicitly required to gain membership”.¹¹¹ However, under the capability approach some form of discrimination in a housing co-operative is justified as it is necessary for the survival of a housing arrangement that is particularly adept at fostering essential human capabilities. Specifically, discrimination based upon capacity to pay and social and cultural capital is necessary to ensure that prospective members have the ability and willingness to meet the company’s joint expenses and participate in collective governance.¹¹² Therefore, control over who can be a member is necessary for this model to address New Zealand’s housing crisis as the co-operative would struggle to survive without it.

H. Expulsion of Members

Co-operative housing underpinned by the capability approach also allows for members to exercise collective control over when to expel a member. In considering how this would work under the company lease scheme, the first thing to note is that the Residential Tenancies Act 1986 does not apply in this instance as the “tenancy arises wholly from or depends wholly upon the ownership by the tenant of any share in a company that owns the premises”.¹¹³ Nonetheless, each member’s share purchase agreement could provide that a member’s license to occupy and share certificate will be cancelled if the member continually fails to meet their share of the common expenses. This is necessary to ensure that the flat and office owning company is able to meet its collective financial obligations.¹¹⁴ However, it should be noted that a provision in the share purchase agreement of this nature will be an invalid penalty clause if it is out of all proportion to any legitimate performance interest of the company.¹¹⁵ One way for the company to minimise this risk is to necessitate that the

¹¹¹ Lorenzo Vidal “Cooperative Islands in Capitalist Waters: Limited-equity Housing Cooperatives Urban Renewal and Gentrification” (2019) 43(1) IJURR 157 at 158-159.

¹¹² Lawton, above n 96, at 409.

¹¹³ Residential Tenancies Act 1986, s 5(1)(r).

¹¹⁴ Julie D. Lawton “Unravelling the Legal Hybrid of Housing Cooperatives” (2014) 83(1) UMKC L REV 117 at 127.

¹¹⁵ *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] NZCA 122 at [31].

expelled member be paid out the full value of their share minus any amounts owed to the company. Despite this, there is still a risk that such a provision would be a penalty as the value of the member's interest is not just financial. However, as expulsion is necessary for the housing co-operative to be financially viable, the company has a significant interest in performance. Moreover, the threshold—'out of all proportion'—is a particularly high one.¹¹⁶ Thus, a provision allowing for expulsion with an equity pay out for the continual non-payment of common expenses is unlikely to be an invalid penalty clause as it is a stretch to claim that it is out of all proportion to any legitimate performance interest of the company. As such, a co-operative housing model will likely, through the company lease scheme, be able to expel members where doing so is necessary for the financial viability of the co-operative. This supports my claim that we should embrace co-operative housing underpinned by the capability approach as it demonstrates that this model is legally and practically viable in New Zealand.

I. Democracy within the Housing Co-operative

Co-operative housing guided by the capability approach can thus, through the company lease scheme, provide members with control over many aspects of their housing. However, it is also a necessary feature of housing co-operatives that this control be democratic, according to the principle of one member one vote.¹¹⁷ Operating democratically is also an advantage on the capability approach. The reason for this is that having equal voting rights ensures that all members have the opportunity to exercise the minimum level of control needed to develop the capability of autonomy. The company lease scheme, however, does not necessarily operate according to the principle of one member one vote as each block of shares in the company could carry different voting rights. Nonetheless, the company's constitution could stipulate that each block of shares in the flat and office owning company that are issued confer a single vote on any resolutions of the company. Therefore, if we embrace the capability approach, we can, through the company lease scheme, enable democratically controlled housing.

J. Resolving Disputes

However, the possibility remains that the flat and office owning company could breach its obligations to members. If this happens, the resident will be able to pursue remedies pursuant to

¹¹⁶ At [32].

¹¹⁷ Cameron, Thorogood and Wood, above n 9, at 6.

their contracts with the company and may also, in qualifying circumstances, have a claim in terms of the Companies Act 1993 or potentially in judicial review. However, to make my main point that we should endorse co-operative housing underpinned by the capability approach, it is not necessary to conduct a detailed analysis of these options. Doing so is thus outside the scope of this dissertation, although it is an interesting area for further research. Nonetheless, to embody the capability approach, a housing co-operative should resolve disputes in a way that is able to develop residents' capabilities. As aforementioned, housing co-operatives in the United States have incentivised resident participation in discussions through the board of directors involving other residents aside from the disputing members in discussions.¹¹⁸ Housing co-operatives underpinned by the capability approach should operate similarly in order to develop the social connections and capacities of members. Moreover, the housing co-operative should aim to generally use majority decision making so that it can operate with reasonable efficiency. This relates to the main argument as if a housing co-operative is unable to operate its day-to-day business with some expediency, it will not be a viable solution to New Zealand's housing crisis.

III. Conclusion

I have demonstrated that the aspects of co-operative housing that embody the capability approach can be implemented through the company lease scheme. This reinforces my thesis that co-operative housing underpinned by the capability approach is a solution to New Zealand's housing crisis as it shows that this form of housing can, as a matter of law, be implemented in New Zealand.

¹¹⁸ Alexander, above n 56, at 228.

Part Three: Some Practical Concerns with Implementing Co-operative Housing

This part will address some remaining practical concerns with the implementation of the co-operative housing model through the company lease scheme. The first concern is that the company's shareholders will change the aspects of the company's constitution that enable the mechanism to embody the capability approach and, consequently, be a solution to New Zealand's housing crisis. This can be addressed through placing ownership of the land of the housing co-operative in a community land trust. There are also other concerns that might lead one to explore other ways of achieving co-operative housing through New Zealand law, specifically the Unit Titles Act 2010 and the cross-lease scheme. However, co-operative housing cannot in any sense be implemented under the UTA 2010. Moreover, the cross-lease scheme is filled with practical problems. Therefore, the company lease scheme is the best way of implementing co-operative housing underpinned by the capability approach as a solution to New Zealand's housing crisis.

I. Abusing the Co-operative Model

A concern with implementing co-operative housing through the company lease scheme is that the shareholders could, by special resolution, revoke the company's constitution or alter the aspects of the company's constitution that ensure that the flat and office owning company operates as an housing co-operative guided by the capability approach.¹¹⁹ For instance, the shareholders could vote to remove occupancy restrictions. Moreover, they could vote to remove resale restrictions in order to realise the full market value of their share. Furthermore, the shareholders could all agree to sell the underlying fee simple at market value and split the profits.¹²⁰ The temptation to cash in at market value would be particularly strong in times of high real estate prices.

II. The Community Land Trust

A solution to these problems that has been used in other countries, especially in the United States, is to place ownership of the land in a community land trust (CLT) while the housing co-operative retains ownership of the buildings.¹²¹ A CLT is a way of owning land in perpetuity on behalf of the

¹¹⁹ Companies Act, s 32.

¹²⁰ Meagan M. Ehlenz "Making Home More Affordable: Community Land Trust Adopting Cooperative Ownership Models to Expand Affordable Housing" 26(3) 283 at 288.

¹²¹ At 288.

community.¹²² In the United States, a CLT will typically be set up and administered by some local government agency or by a non-profit.¹²³ It will then enter into a long-term ground lease with the housing co-operative which will own buildings on the trust land.¹²⁴ The ground lease will detail the relationship between the CLT and the co-operative while the relationship between the housing co-operative and its members will continue to be regulated by the share-purchase and occupancy agreements.¹²⁵ The ground lease can include various restrictions on the housing co-operative. For instance, it can prevent the housing co-operative from removing occupancy and equity restrictions and from selling the buildings at market value.¹²⁶

A CLT could also be used in New Zealand. The flat and office owning company could transfer ownership of the land to an incorporated society registered under the Incorporated Societies Act 1908. The incorporated society would be established with the object of providing affordable co-operative housing to the community.¹²⁷ The incorporated society would then enter into a ground lease with the flat and office owning company. The ground lease would include obligations on the company's part to observe occupancy and equity restrictions and to refrain from selling the buildings in their entirety at market value. The ground lease could also mandate that a member of the local community be put on the housing co-operatives board of directors to prevent abuses in the co-operative's governance. Moreover, membership on the board of the incorporated society could also itself be split between local community members, co-operative housing members and representatives from any sponsoring government or third sector organisation. As such, the housing co-operative members would be allowed some control over the CLT. However, they would not on their own be able to remove the restrictions placed upon the housing co-operative. Thus, the benefit of the CLT is that it provides external governance to monitor and prevent abuses by the housing co-operative which would otherwise be likely to occur as the property's market value increased over time. Accordingly, housing co-operatives combined with a CLT can deliver housing that will

¹²² At 285.

¹²³ Jennifer Cohoon McStotts "Dwelling together: using cooperative housing to abate the affordable housing shortage in Canada and the United States" (2004) 32(1) GA J INTL & COMPL L 131 at 149.

¹²⁴ Ehlenz, above n 120, at 300.

¹²⁵ At 300.

¹²⁶ McStotts, above n 123, at 149-150; Ehlenz, above n 126, at 288.

¹²⁷ Incorporated Societies Act 1908, s 6(1)(b).

continue be affordable over time. This illustrates a strength of the capability approach as a tool for addressing New Zealand’s housing crisis—it supports a split ownership model that restricts the freedom of the co-operative members in order to provide affordable housing.

III. Disclosure Requirements and Financing

An issue with the company lease scheme is that rules around disclosure that apply to properties owned in accordance with the UTA 2010 do not apply.¹²⁸ This includes information on the amount of the contribution levied by the body corporate for that unit and whether there are any legal proceedings pending against the body corporate.¹²⁹ As such, the prospective purchaser in a company lease scheme will have to do their own due diligence.

There is also the issue of raising finance. A shareholder’s licence to occupy can be mortgaged.¹³⁰ However, due to the lack of indefeasible title either on the licensee or on any mortgagee of the license, lending institutions can be reluctant to lend on the security of a mortgage or a registered license to occupy.¹³¹ As such, the prospective member may struggle to raise finance to purchase their company lease share. Given this, the company could instead take out a blanket mortgage secured by the property as a whole.¹³² The payments on the blanket mortgage would then be levied on the shareholder-tenants through the operating expenses. Nonetheless, there is a risk that banks will still be reluctant to lend at reasonable rates as they may be unfamiliar with the flat and office owning company structure as it is seldom used.

IV. The Unit Titles Act 2010

The UTA 2010 provides “a legal framework for the ownership of land and associated buildings and facilities... by communities of individual owners” that avoids the problems around disclosure and finance that hinder the company lease scheme.¹³³ However, the UTA 2010 is, unlike the company lease scheme, essentially an implementation of the dominant conception of private property

¹²⁸ Unit Titles Act s 144-157.

¹²⁹ Unit Titles Regulations 2011, reg 3.

¹³⁰ Land Transfer Act 2017, s 129.

¹³¹ McMorland and Gibbons, above n 10, at 137.

¹³² At 139.

¹³³ At 7-8.

reorganised for multiple unit existence. As such, it is unable to implement co-operative housing underpinned by the capability approach.

The UTA 2010 does not provide for joint ownership of the land and buildings—an essential component of co-operative housing. Instead, it confers upon the registered owners ownership of stratum estate in freehold, leasehold or license.¹³⁴ This includes a fee simple estate, or estate as lessee or licensee in the unit.¹³⁵ Moreover, it is highly doubtful that restrictions could be placed on the right to transfer one’s ownership of a stratum estate. The UTA 2010 does not expressly prohibit any rule prohibiting or restricting a unit title holder’s power to deal with their unit as the Unit Titles Act 1972 did.¹³⁶ However, such a restriction may be seen as an invalid exercise by the body corporate of a power or duty that is “not incidental to the powers and duties conferred or imposed on the body corporate under this Act”.¹³⁷ Moreover, restraints on alienation may be void as the law regards interests in land as having the right of alienation.¹³⁸ Given that the UTA 2010 is creating a strata freehold system with individual units held in fee simple, I argue that the courts, if asked to solve disputes based only on the UTA 2010, would likely ascribe to the classical liberal view of property where the right of alienation is essential. As such, a body corporate of a unit title development is likely not able to impose restrictions on the price at which a unit owner can sell their unit.

This means that unit title developments are not able to remove the speculative element from housing. As such, the UTA 2010 cannot deliver affordable housing. Moreover, participation in body corporate governance is disincentivised as owners cannot be sure that others are not using their equity interests solely as a market commodity.¹³⁹ Furthermore, the UTA 2010 provides that “a person eligible to vote at a general meeting of the body corporate... is a person” who is “the owner of a principal unit” or “the representative of that owner”.¹⁴⁰ Thus, absentee owners cannot be

¹³⁴ Unit Titles Act, s 18.

¹³⁵ Unit Titles Act, s 18(a).

¹³⁶ McMorland and Gibbons, above n 10, at 137.

¹³⁷ At 137.

¹³⁸ At 137.

¹³⁹ Alexander, above n 56, at 228.

¹⁴⁰ Unit Titles Act, s 96(1).

excluded from participation in the body corporate. As such, the UTA 2010 cannot provide residents with democratic control over their housing. This also further disincentives participation in the body corporate governance as residents will have to interact with absentee owners with whom residents may have had little or no personal contact.¹⁴¹ Therefore, the UTA 2010, unlike the company lease scheme, does not have the potential to provide affordable housing that fosters the development of residents' capabilities through participation in the democratic governance of their housing. It is thus not able to implement co-operative housing underpinned by the capability approach as a solution to New Zealand's housing crisis.

V. The Cross-Lease Scheme

The cross-lease scheme is another way in which people can combine their ownership interests.¹⁴² In this scheme, the fee simple or other underlying estate in the land and buildings is owned by the occupants of the flats on the land as tenants in common.¹⁴³ The tenants in common then join in leasing each flat to its occupant, normally for 999 years.¹⁴⁴ Unlike unit title ownership, the form of a cross-lease is not prescribed by statute or regulation.¹⁴⁵ Instead, the rights and obligations of lessees are defined by covenants in the cross-leases.¹⁴⁶ Normally a cross-lease will contain a covenant by the lessee to keep their interest in the freehold as one of the tenants in common for as long as they are the lessee.¹⁴⁷ Furthermore, a covenant could be included in the cross-lease restricting subletting. As such, the cross-lease scheme is able to guarantee that ownership of the underlying estate is tied to occupation of the land. Moreover, the covenants can mandate that a democratic decision making process such as majority rule or unanimous consent be used where a decision is required to be made.¹⁴⁸ Thus, the cross-lease scheme can provide an opportunity for the co-owners to develop their capabilities of autonomy and sociability through participation in interaction, deliberation and collective decision making. The covenants can also include various

¹⁴¹ Alexander, above n 56, at 228.

¹⁴² McMorland and Gibbons, above n 10, at 97.

¹⁴³ At 97.

¹⁴⁴ At 97.

¹⁴⁵ At 100.

¹⁴⁶ At 100.

¹⁴⁷ At 100.

¹⁴⁸ At 127.

restrictions that provide each co-owner with a degree of control over what other co-owners can do with their flat.¹⁴⁹ For instance, the covenants can provide co-owners with some control over the alterations and additions that others can make to their flat.¹⁵⁰

However, there are disadvantages in using cross-leases. Firstly, as with flat and office owning companies, co-owners in a cross-lease arrangement do not have the disclosure obligations upon sale that are mandatory under the UTA 2010.¹⁵¹ Furthermore, while a covenant could potentially include restrictions on the ability of one tenant in common to alienate their land without the consent of the others, it is not clear whether such a restriction would be valid.¹⁵² It is thus unclear whether covenants could include restrictions on the price at which tenants in common could sell their interest in the land. As such, the cross-lease scheme cannot necessarily be used as a tool for reducing housing speculation and, consequently, promoting housing affordability. Moreover, cross-leases are a poor fit, and are seldom used, for developments with a large number of flats due to the ‘unwieldy’ and complex nature of the arrangement.¹⁵³ Thus, they may not be suitable for the large scale affordable housing projects that are necessary to combat New Zealand’s housing affordability crisis. Furthermore, if any of the owners wish to convert to a fee simple title structure, they may apply to the court under s 339(1) of the Property Law Act 2007 for an order for the “division of the property in kind among the co-owners”.¹⁵⁴ As such, the cross-lease structure can easily collapse into individual fee simple titles. Finally, there is no requirement for common insurance in a cross-lease scheme. This is a liability in the event that any of the flats need repair as was seen with the major practical problems caused by cross leases following the Christchurch earthquakes.¹⁵⁵ As such, the cross-lease scheme has a number of practical problems that make it a poor fit for implementing cooperative housing as a solution to New Zealand’s housing crisis.

¹⁴⁹ At 132.

¹⁵⁰ At 132.

¹⁵¹ At 131.

¹⁵² At 132.

¹⁵³ At 97-98.

¹⁵⁴ At 130.

¹⁵⁵ Jamie Small “Christchurch family’s rebuild botched, can’t sell land tied up in cross lease” (19 October 2017) [stuff.co.nz <https://www.stuff.co.nz/the-press/business/the-rebuild/97952455/christchurchs-familys-rebuild-botched-cant-sell-land-tied-up-in-cross-lease>](https://www.stuff.co.nz/the-press/business/the-rebuild/97952455/christchurchs-familys-rebuild-botched-cant-sell-land-tied-up-in-cross-lease). This article provides an example of the problems caused by a lack of common insurance.

VI. Conclusion

I have demonstrated that the risk of abuse of the housing co-operative form in the company lease scheme can be greatly diminished by placing ownership of the land in a community land trust. I then noted that there are some remaining practical weaknesses with the implementation of the co-operative housing model through the company lease scheme. However, I have shown that it is still the best way to implement co-operative housing underpinned by the capability approach as a solution to New Zealand's housing crisis.

Conclusion

The ‘Kiwi dream’ of homeownership is increasingly just that: a dream. As house prices continue to outstrip average incomes, more New Zealanders are being forced into private rental housing where they lack control over their housing and security of tenure, leading to a myriad of social problems. To address this challenge—and in light of the other valuable reasons to live together more closely with one another—this dissertation has argued that we should consider co-operative housing. But co-operative housing cannot be supported by the dominant classical liberal view of property. Accordingly, we must look to a different normative framework. I have argued that the capability approach is the best such framework to underpin a co-operative housing model, as it views affordability, security of tenure, resident control and a good social environment as the key moral goods that housing should strive to achieve. In practice, this approach is best implemented through the company lease scheme with land held as a community land trust. Presently in New Zealand such legal structures are commonly regarded as unconventional. This dissertation has argued that there is no good reason for this situation. Co-operative housing underpinned by the capability approach offers a powerful tool for addressing one of New Zealand’s most pressing and persistent social ills: the housing crisis.

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