

Queensland Law Society
SYMPOSIUM 2007

**Community Titles:
By-Laws and Building
Management Statements**

Their drafting and interpretation!

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Topics

PART 1

1. Mixed use buildings
2. Volumetric subdivisions
3. Conventional building format subdivisions
4. Requirements for building management statements
5. Contents of a BMS
6. Amendment of a BMS
7. Who is bound by a BMS

PART 2

Content of building management statements

Mixed use buildings

- Current trends
- Simple example –
 - 4 ground floor retail shops
 - 8 home units above
- More complex example –
 - Common basement/parking/loading dock
 - Shopping arcade above (podium above that)
 - 3 tower buildings above podium (offices/hotel/units)

Key issues -

- Different (often conflicting) goals and aspirations of various owners
- **Appropriate isolation of services and facilities** (e.g. swimming pool, air conditioning, loading dock, signage, etc.)
- **Maintenance of common services and facilities**
- **Equitable cost sharing arrangements**
- **Preserving the value of commercial components**

Key to successful outcomes

- What do we mean by outcomes?
- Good design
 - Isolation of services and facilities
 - Resolution of potential sensitivities (cooking smells, parking, signage, refuse removal, view lines, soundproofing, etc.)
- Good legal mechanisms (flexible subdivision patterns, tiered bodies corporate, statutory umbrella management agreements, implied easements)
- Proper application of the legal mechanisms

Volumetric Subdivisions

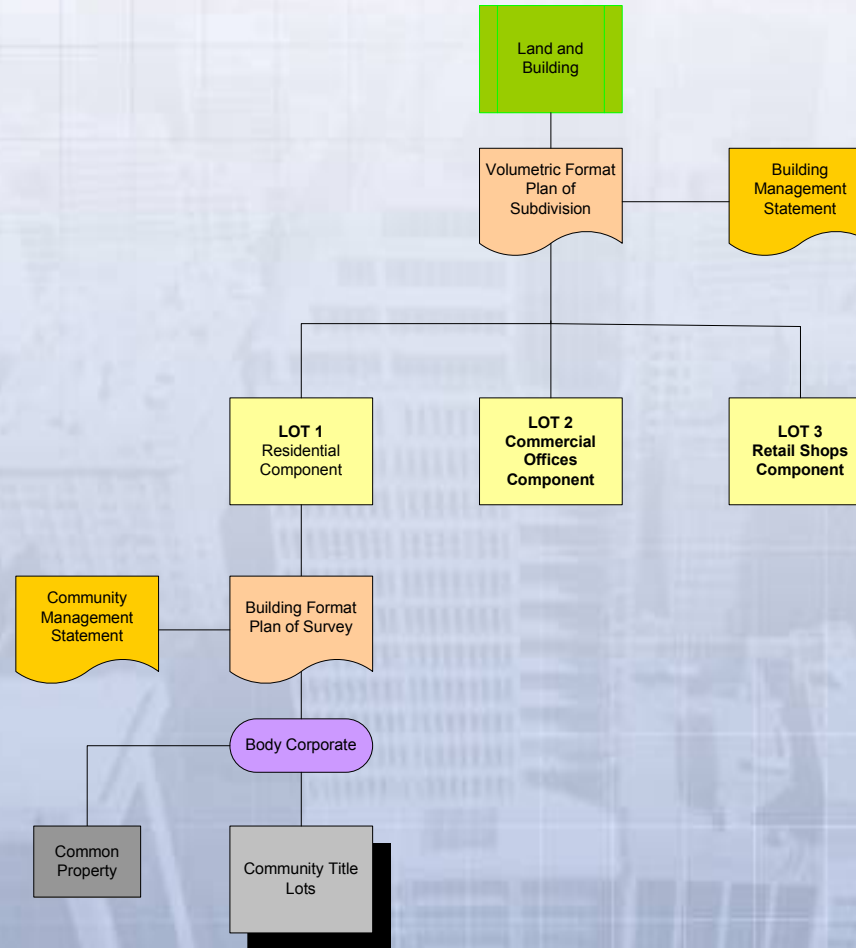
- Also known as “Stratum” and “Airspace”
- Define boundaries using 3 dimensionally located points to identify position, shape and dimensions of each boundary surface
- Boundaries may be above or below the surface
- May refer to standard height datum
- May create common property

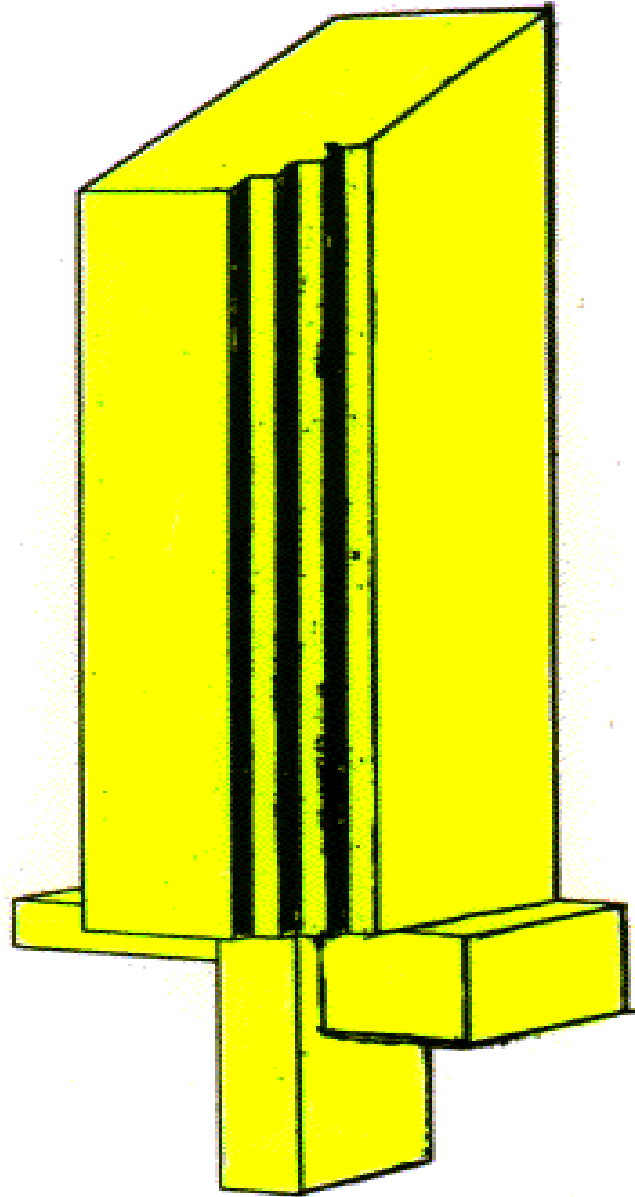
Use for mixed use projects

- Are used to subdivide the building
- No body corporate involved
(because no common property)
- Used to separately define different component use areas within the building
- Allows a component use area to be owned outside a body corporate structure
- A component use area may be subdivided by a building format plan

Volumetric Subdivision

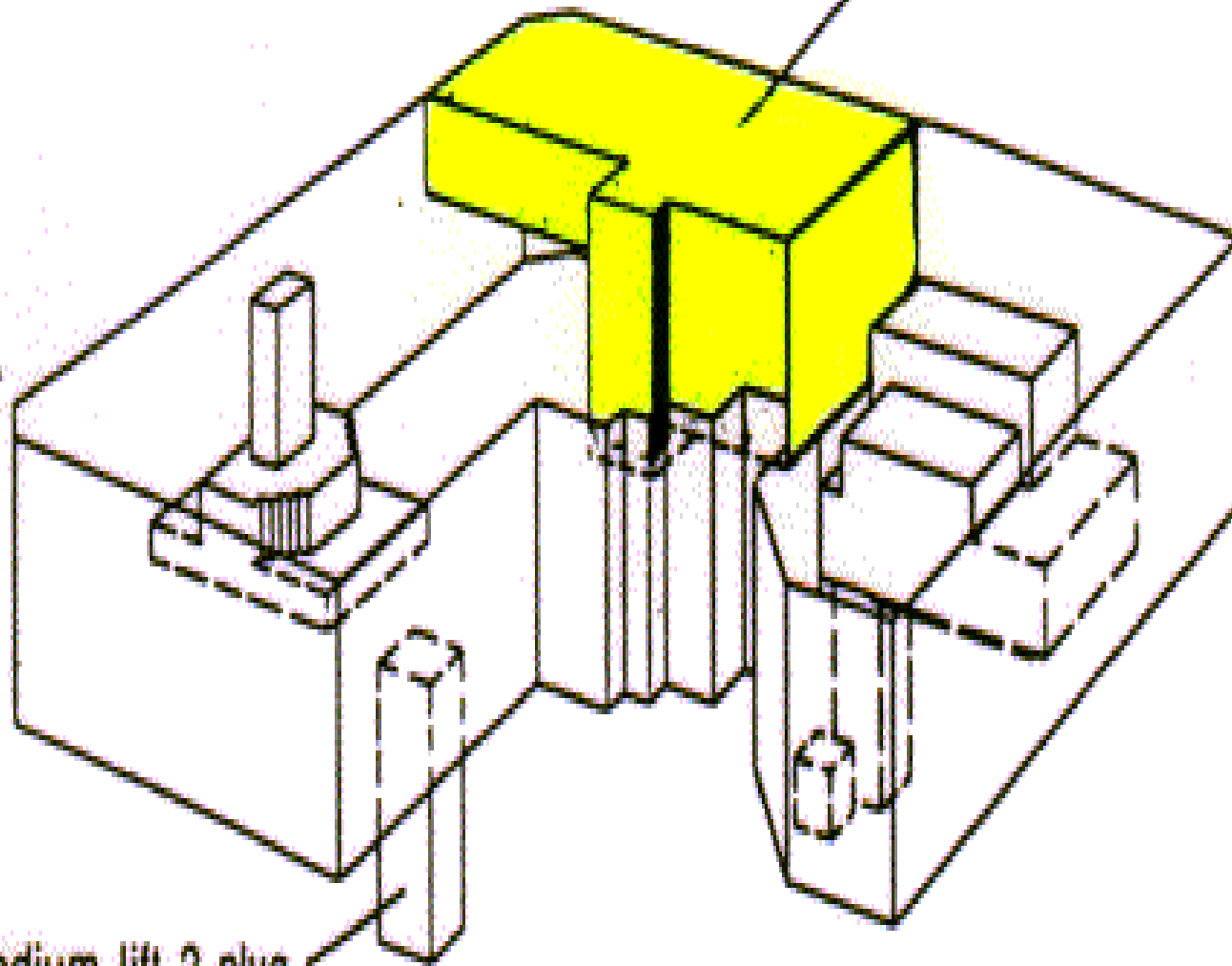
(With body corporate as a component)



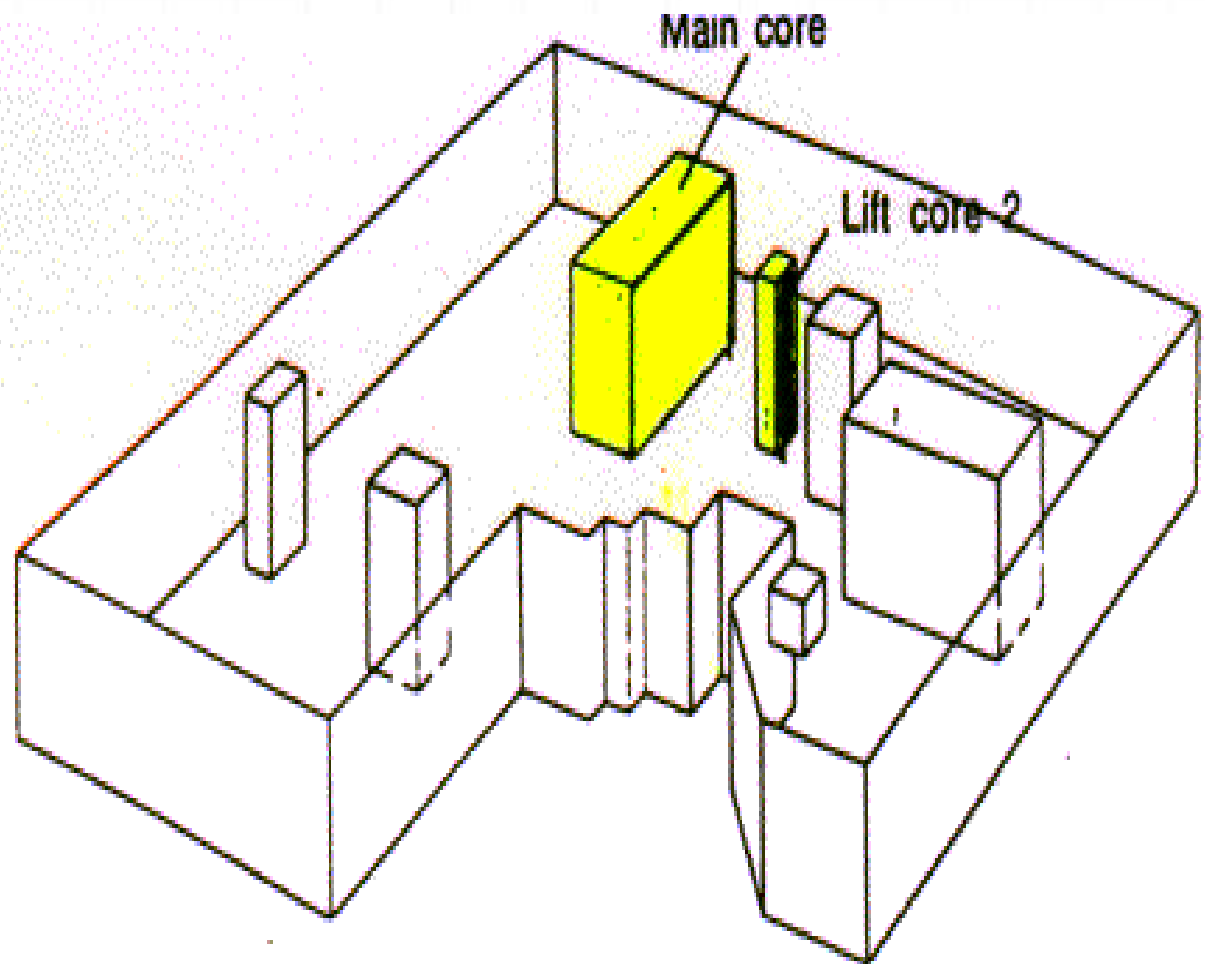


Tower & Plug

Plug Hole in Podium Levels



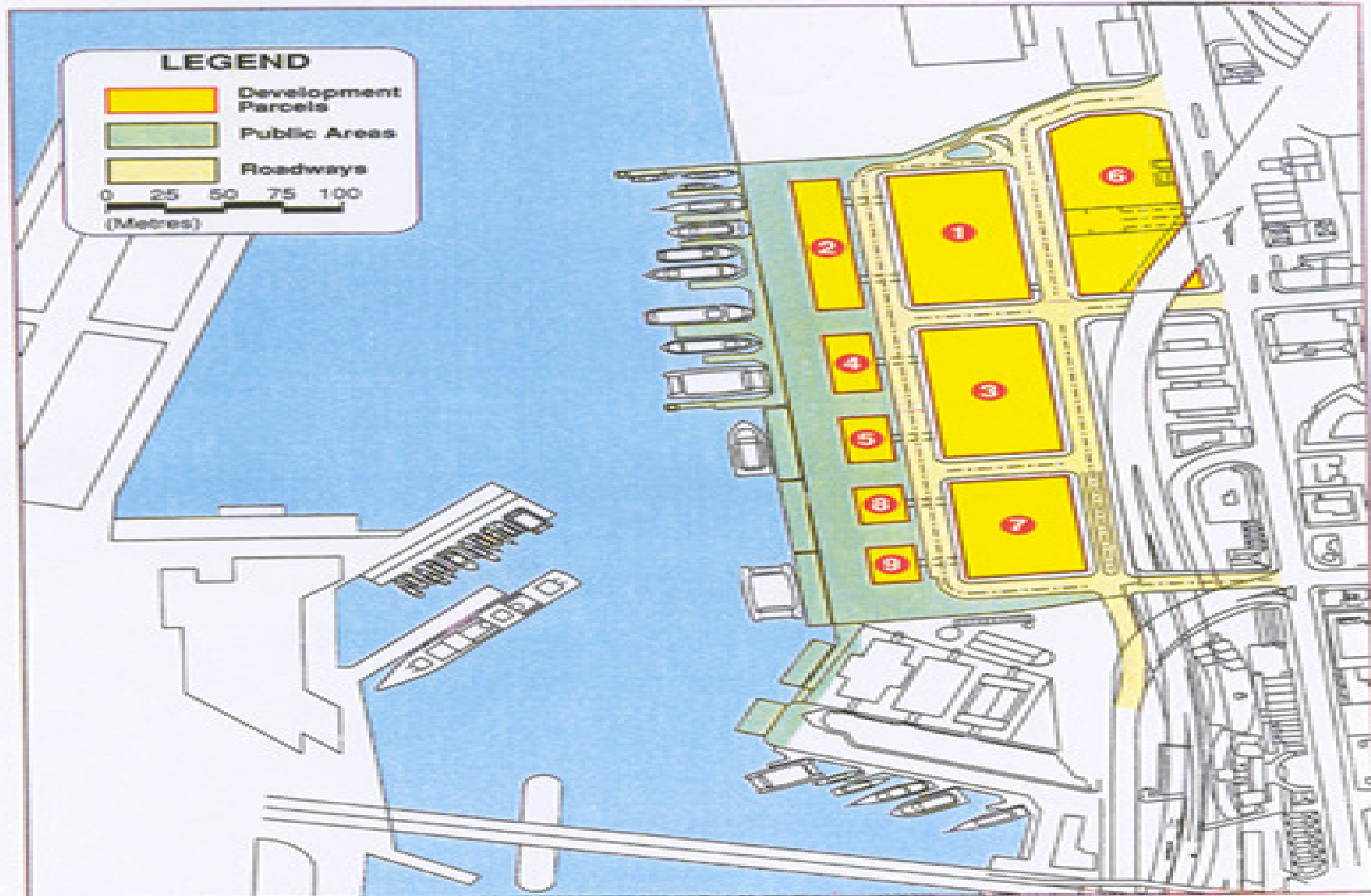
Podium lift 2 plug

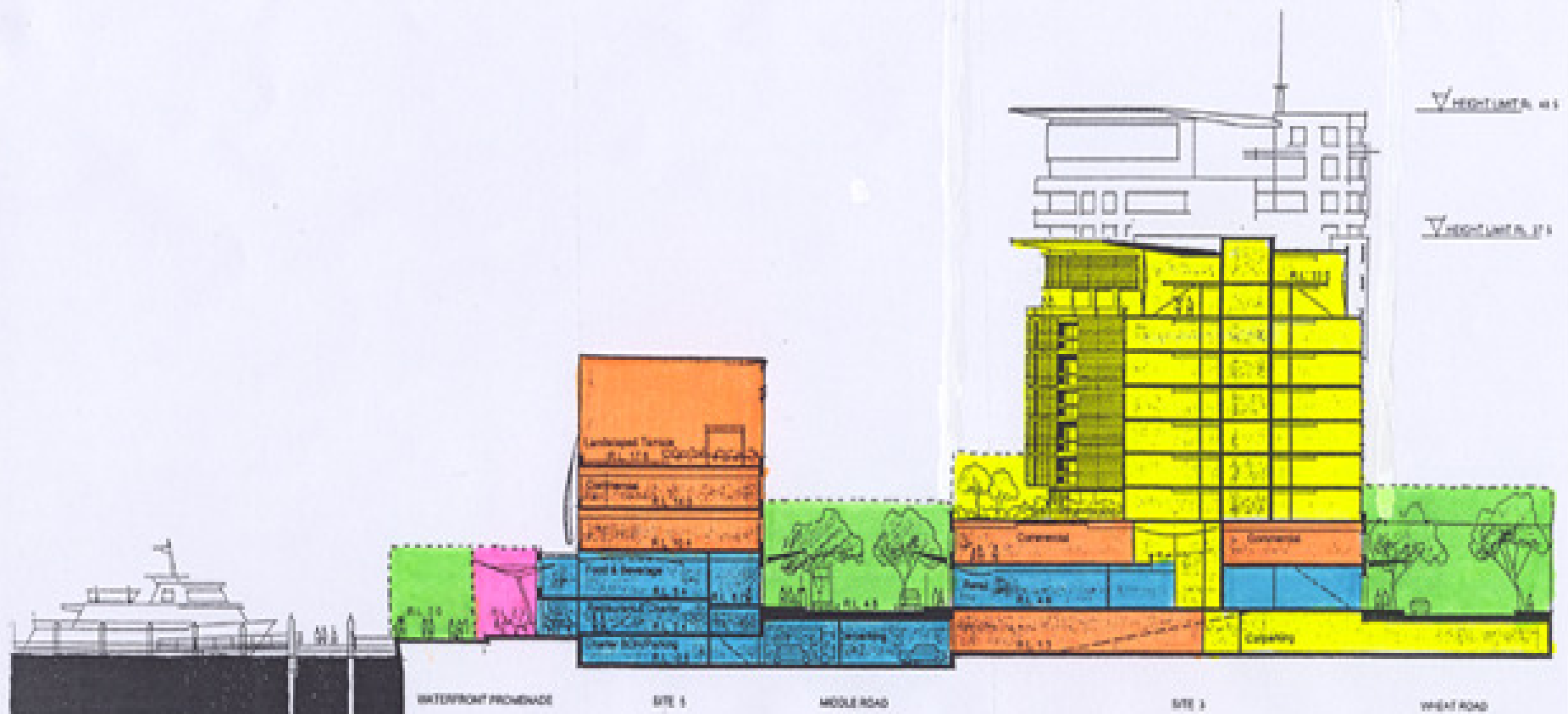


Plug Holes in
Basement Levels

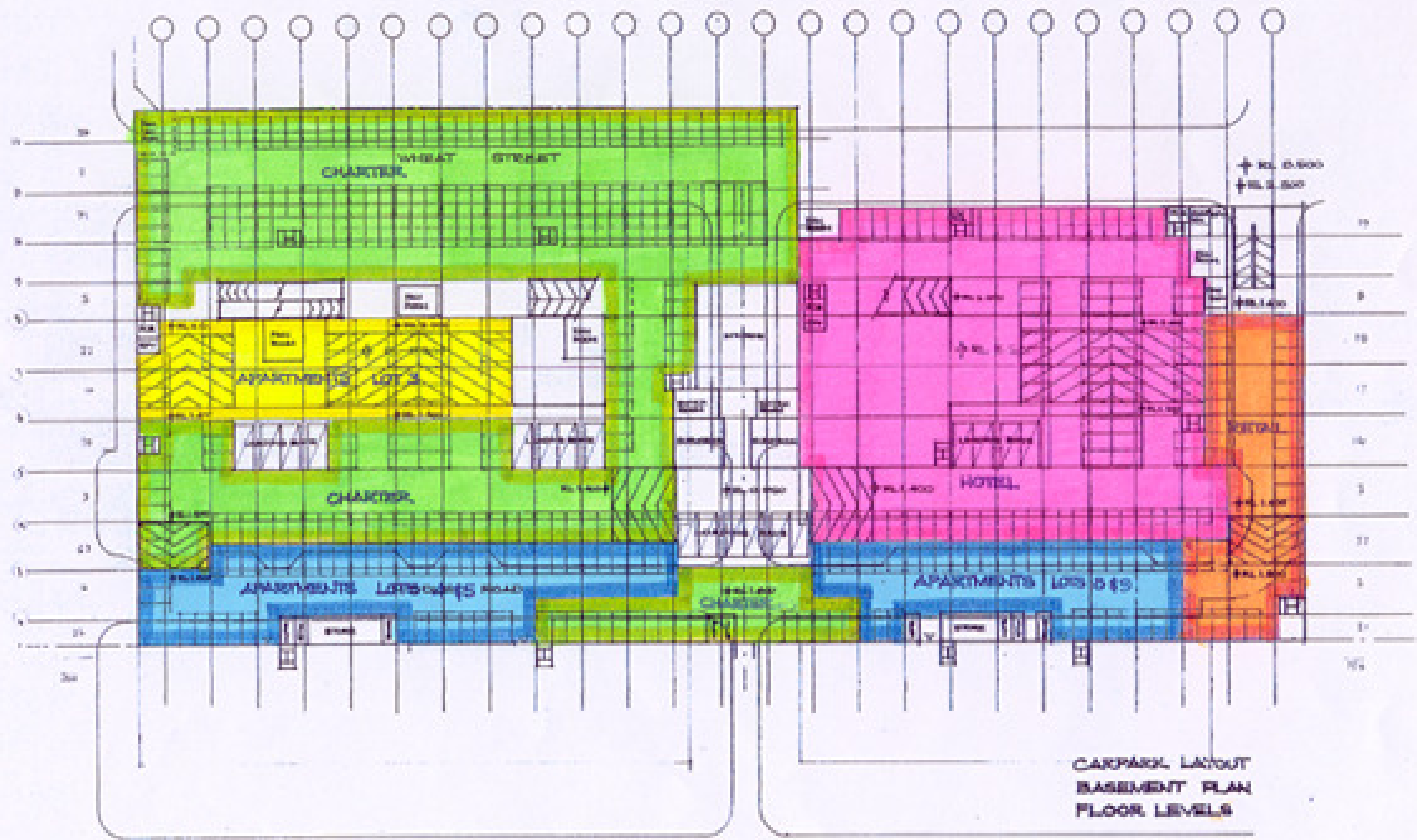
DARLING HARBOUR 9 & 10 Development Parcels

Fig.5





MIDDLE SECTION



Shared Facilities

- Areas, services, equipment and amenities shared by 2 or more component use areas
- Examples; access ways, stairs, elevators, pumps, exhaust fans, fire sprinkler system
- Must be maintained and costs shared equitably
- Placement is very important
- Listed in schedule to the BMS
- Basis for cost sharing also listed
- Provision for adjustment of list and cost sharing

Sample Cost Sharing Schedule

SCHEDULE 1

List of Shared Facilities and Division of Costs of Shared Facilities.

The permitted uses described in column 5 represents the Member permitted to use each Shared Facility. The percentages in columns 6, 7 and 8 represent the total cost for each Shared Facility that each member must pay.

	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
No	Shared Facility	Description	Location	Permitted Users	Residential	Retail	Commercial
1	Lifts	Lifts in the foyer and extending to levels 4 and 5 of the car park	Area A on plan annexed	Residential, Retail and Commercial	45%	15%	50%
2	Service area and goods lift	Service area and goods lift, comprising loading dock, turning area and lift	Area B on the annexed plan	Retail and Commercial	0%	35%	65%
3	Garbage area	Garbage and recycle receptacle areas, including bins and compactor	Beside the loading dock; area C on the annexed plan	Residential, Retail and Commercial	38%	49%	13%
4	Stair pressure units	Stair pressurization units to for smoke control in the fire escape stairs	At the top of each of the fire escape stairs	Residential, Retail and Commercial	48%	8%	44%
5	Fire sprinkler system	Pipes, heads, pumps and control equipment relating to the fire sprinklers	Throughout the entire building and car parks	Residential, Retail and Commercial	42%	17%	41%

Column 2
Shared Facility
Lifts
Service area and goods lift
Garbage area
Stair pressure units
Fire sprinkler system

Column 5	Column 6	Column 7	Column 8
Permitted Users	Residential	Retail	Commercial
Residential, Retail and Commercial	45%	15%	50%
Retail and Commercial	0%	35%	65%
Residential, Retail and Commercial	38%	49%	13%
Residential, Retail and Commercial	48%	8%	44%
Residential, Retail and Commercial	42%	17%	41%

KING STREET WHARF – Schedule 2

Sheet 78 of 90 sheets

No.	Shared Facility	Commercial Strata Scheme	Combined Retail	Xerts	Charters 1 - 6	Single Retail	Serviced Apartments	Residential Strata Scheme	Method Of dividing cost
22	Electricity consumption for Parcel 9 shared meter Shared Facility	57%	43%	0%	0%	0%	0%	0%	Calculation based on area served, estimate of time served and equipment rating.
23	Gas consumption Shared Facility	0%	0%	0%	0%	30%	0%	70%	Calculation based on area served, estimate of time served and equipment rating.
24	Lift service (public) Global Cost Item	20%	20%	5%	55%	0%	0%	0%	Distribution based on estimated benefit.
25	Pest control - loading dock Global Cost Item	10%	45%	2%	32%	1%	0%	10%	Distribution based on estimated benefit.
26a	Pest control -other Shared Facilities and areas Global Cost Item	18%	12%	2%	3%	3%	27%	35%	Relative area of each Strata Scheme and Stratum Lot.
26b	Pest control - other Shared Facilities Shared Facility	18%	12%	2%	3%	3%	27%	35%	Relative area of each Strata Scheme and Stratum Lot.
27	Carpark roller shutters Global Cost Item	18%	12%	2%	3%	3%	27%	35%	Relative area of each Strata Scheme and Stratum Lot.
28	MATV system Shared Facility	18%	12%	2%	3%	3%	27%	35%	Relative area of each Strata Scheme and Stratum Lot.
29a	General repairs and maintenance Global Cost Item	22%	23%	5%	9%	5%	10%	26%	Relative proportion of contribution to operating costs.
29b	General repairs and maintenance Shared Facility	22%	23%	5%	9%	5%	10%	26%	Relative proportion of contribution to operating costs.

Conventional building format subdivisions

- May be used to subdivide simple mixed use buildings
- Commercial components are included in the CTS
- Issues –
 - Impact on value of commercial components
 - Dealing with differential use of common property

Potential solution - NSW

- Case: 3 ground floor shops/10 units above
- Notional division of common property –
 - That used by shops
 - That used by units
 - That used by both shops and units
- Joint exclusive use by-laws (x 2)
- 3 separate accounting divisions
- Pressure points covered in other by-laws

Application to Queensland

- Two constraints –
 - No express provision for joint exclusive use by-law
 - Prohibition on exclusive use over “utility infrastructure”
- Result – doubtful the same solution can be used in Queensland

Definition of BMS

A building management statement is defined as “*an instrument that –*
(a) identifies lots to which it applies;
and
(b) contains provisions benefiting and burdening the lots to which it applies;
and
(c) otherwise complies with the requirements of this division for a building management statement.”

Critical requirement Pt 4 Div 4

- At least one lot to which the BMS applies must be a lot entirely or partly contained in, or entirely or partly containing, one or more buildings
- Building is defined –
“... a fixed structure that is wholly or partly enclosed by walls and is roofed, and includes a part of a building.”

Another important requirement

- Lots in a BMS must form a single, continuous area of land
- 2 exceptions –
 - Dissecting road or watercourse
 - Registrar satisfied they are located within a sufficiently limited area
- Query – does this refer to each lot or the total land parcel(s)

Compulsory contents of a BMS

- Supply of services to lots
- Rights of access to lots
- Rights of support and shelter
- Insurance arrangements

Note:

1. Intended to replace formal easements
2. Draft carefully (See comments on page 11 of the paper.)

Voluntary contents of a BMS

- Establishment and operation of a management group
- Imposition, recovery, accounting for and expenditure of levies
- Property maintenance
- Architectural and landscape standards
- Dispute resolution
- Rules for common services and facilities
- Administrative arrangements
- Arrangements for extinguishment
- Proposed future development

Binding nature of a BMS

- NSW – comprehensive statements of who is bound
- No corresponding statement in Qld
- Relevant provisions –
 - Rights in nature of easements operate according to their terms
 - A BMS binds a community titles scheme
 - A BMS contains provisions benefiting and burdening
 - A BMS benefits and burdens the land over which it is registered

Binding nature of a BMS

(Continued)

- Legislative intention – binds owners for time being of lots covered by the BMS
- Original owners signed/incoming owners had notice by registration
- But what about?
 - Mortgagees
 - Lessees
 - Occupiers
- Scope to use by-laws and BMS to extend?

An aerial view of a city skyline, likely New York City, with a grid overlay. The image is faded and serves as a background for the text.

QUESTIONS

Part 2: Drafting a BMS

1. Rules and by-laws
2. Insurances
3. Management group
4. Managing agent
5. Building manager/caretaker
6. Committee meetings
7. Non accounting records
8. Accounting records
9. Dispute resolution
10. Summing up

Rules and by-laws

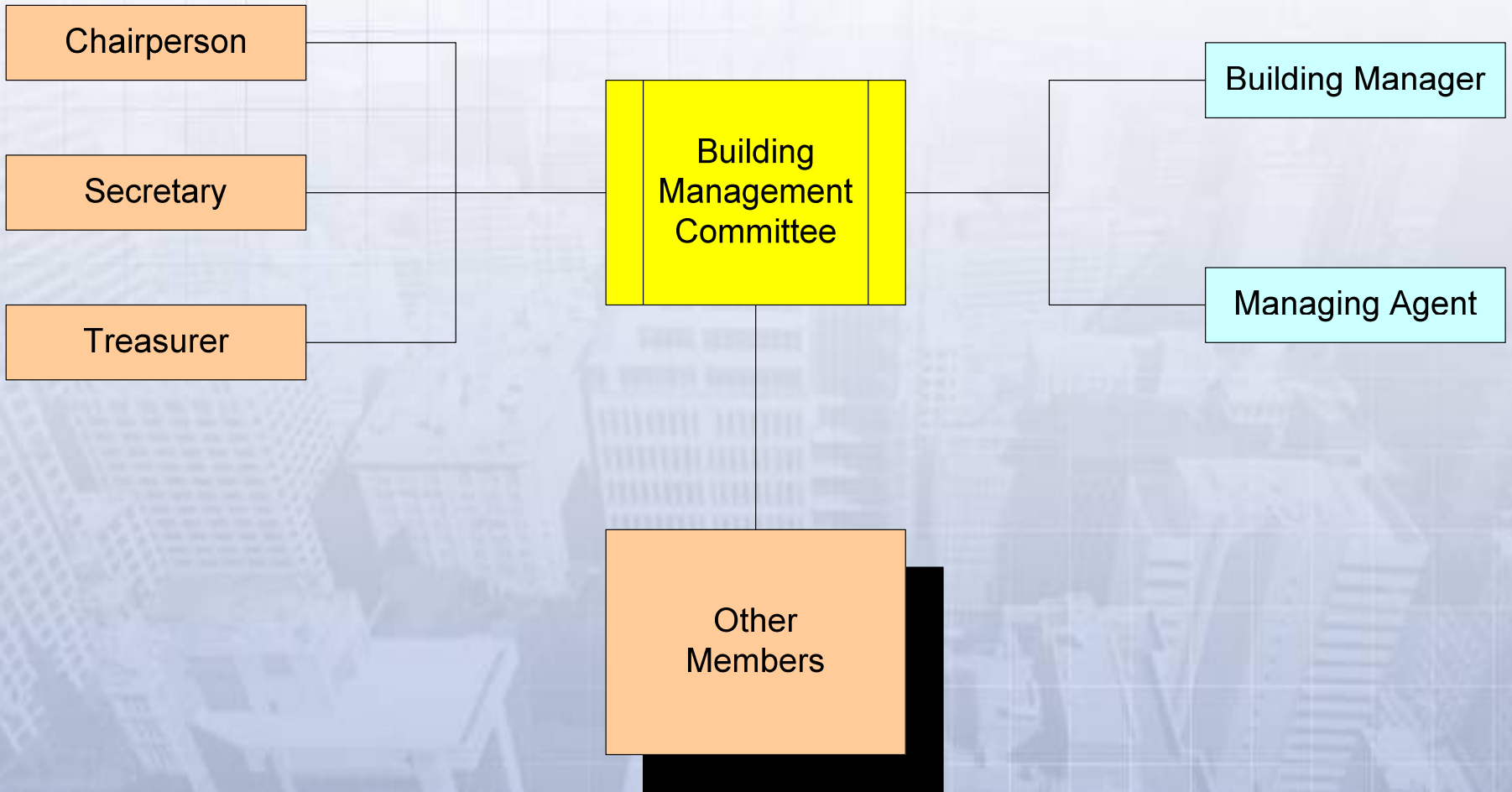
- Rules are in the BMS
- Rules regulate common services and facilities
- By-laws are in the CMS
- By-laws regulate common property
- Both are required and need to be comprehensive
- Body corporate manager should be involved

Insurances

- One policy for building in joint names
- Building cover comparable to BCCM Act module requirements
- Formula for allocating premium (value + usage)
- Resolution of disagreement
- Joint public liability cover
- Possible additional covers (fusion, voluntary workers, worker's compensation)

Management Group

- Called *building management committee*
- Comprises representatives of all owners (?)
- Not a separate legal entity (like an incorporated assoc.)
- Administers common elements
- Raises funds/levies to cover costs
- Can be structured like a body corporate committee



Managing agent

- Undertakes administrative functions
- Appointment by committee
 - Resolution
 - Management agreement
- Role determined by the agreement
- Status (contractor or agent) determined by BMS and/or agreement
- Body corporate manager normally appointed
- May be a service contractor for BCCM Act purposes

Building manager/caretaker

- Common requirement (facilities management)
- Attends to repairs and maintenance
- Also supervise security and operational matters (e.g. basement)
- Appointed in same way as managing agent
- Usually longer term appointment
- Will be a service contractor

Committee meetings

- These are the only meetings involved
- Regulated by the BMS
 - Notice
 - Quorum
 - Appointment of alternates
 - Voting
- BMS is effectively the “constitution”

Non-accounting records

- Owners register
- Committee register
- Contracts register
- Shared facilities register (with capacity to record changes)
- Asset register
- Minute book

Accounting records

- Should be specified in detail
- Should include normal records
(Cheque book, receipt book, bank deposit book, bank statements, cash books, journal or corresponding computerised records.)
- Chart of accounts is critical
- Cost sharing allocation ledger
- Budget preparation requirements
- Be aware of impact of reserves on capitalization rate
- Reporting should follow the chart of accounts

Accounting Records Illustrated

Step 1 - Budget

BUILDING MANAGEMENT COMMITTEE BUDGET

Item	Description	Lot 1 %	Lot 1 \$	Lot 2 %	Lot 2 \$	Lot 3 %	Lot 3 \$	Total
1	Fire safety contracts	0.2	867	0.4	1734	0.4	1734	4335
2	Emergency generator	0.3	720	0.2	480	0.5	1200	2400
3	Building manager	0.3	6300	0.2	4200	0.5	10500	21000
4	Cleaning	0.2	2720	0.5	6800	0.3	4080	13600
5	Lift maintenance	0.31	1099.88	0.15	532.2	0.54	1915.92	3548
Totals			11706.88		13746.2		19429.92	44883



Step 2 – Raise Contributions

Contributions Register Lot 1

Date	Description	Debit	Credit	Balance
01-1-06	Contribution raised	\$11706.88		(\$11706.88)
21-1-06	Contribution payment		\$11706.88	0.00



Accounting Records Illustrated (Continued)

Step 3 – Receipt and Enter in Cash Book

Cash Receipts Book

Date	Description	Item 1	Item 2	Item 3	Item 4	Item 5	Total
21-1-06	Contribution – lot 1	\$ 876.00	\$ 720.00	\$6300.00	\$2720.00	\$1099.88	\$11706.88

Step 4 – Post to Ledger



Ledger Account Item 5 (Lift Maintenance)

Date	Description	Debit	Credit	Balance
21-1-06	Contribution (Lot 1)		\$1099.88	\$1099.88
24-1-06	Contribution (lot 3)		\$1915.92	\$3015.80
02-2-06	Contribution (Lot 2)		\$ 532.20	\$3548.00
08-3-06	Lift service fee	\$3162.00		\$ 386.00

Dispute resolution

- Normal commercial processes applied
- Chapter 6 BCCM Act neither imposed nor available
- Must not operate to “*stop final determination of the dispute in a court of competent jurisdiction*” Section 54C(4)

Summing up

- Responsibility of developer's lawyer to properly apply the legal mechanisms
- Requires a very detailed understanding of how complex buildings operate and how they are managed
- That detail needs to be reflected in the provisions of the BMS
- This will ensure satisfactory outcomes for stakeholders

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