IN THE MATTER of the *Body Corporate and Community Management Act 1997* ("the Act")

and

IN THE MATTER of a Specialist Adjudication

BETWEEN:

Mr Leon and Mrs Susan Baker

("The Applicant")

and

The Body Corporate for Valley Views (No. 1)

("The Respondent")

ADJUDICATORS ORDER

Pursuant to appointment by the Commissioner for Body Corporate and Community Management, dated 4 April 2006.

DELIVERED BY:

WARREN D FISCHER

Civil Engineer, Grade 2 Arbitrator, Registered Adjudicator and Accredited Mediator
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IN THE MATTER of a Specialist Adjudication

MR LEON AND MRS SUSAN BAKER v
THE BODY CORPORATE FOR VALLEY VIEWS (NO. 1)

ORDER OF WARREN FISCHER
Specialist Adjudicator

CONTENTS

Adjudication regarding:

Adjustment of an Interest Lot Entitlement Schedule pursuant to Section 48 of the Act to reflect the current unimproved market values of the lots.

Hearing Date:

25 May 2006

Delivered as an adjudicators order:

To the Commissioner for Body Corporate and Community Management on the Fourteenth day of June 2006.

ORDER

I, Warren Fischer, appointed specialist adjudicator, order as follows:

That the interest schedule lot entitlement for each lot in the Valley Views (No. 1) Community Titles Scheme 18901 be adjusted to be reflect the unimproved market value of each lot, such that the interest schedule of lot entitlements is as follows:

Lot No	Interest Schedule Lot Entitlement
5	400
6	300
7	450
9	450
10	300
11	275
12	300
13	375
14	250
15	475
AGGREGATE	3575

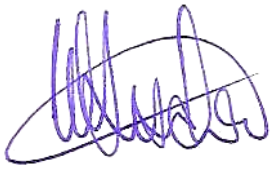
That in accordance with the provisions of Section 48(9) of the Act the body corporate as quickly as practicable lodge a request to record a new community management statement reflecting the adjustment ordered.

For the avoidance of doubt, pursuant to Section 284 of the Act, this Order is to have effect as a resolution without dissent.

That in accordance with the provisions of Section 63(3) of the Act the body corporate is responsible for the costs of preparing and recording the new community management statement.

That pursuant to Section 280(2) of the Act the Applicant and Respondent are jointly and severally liable for the cost of the adjudication. As between themselves the Respondent is liable to pay the cost of the adjudication.

Signed



Warren Fischer
Specialist Adjudicator
14 June 2006

Witnessed

Jennifer Winzar

PARTIES AND REPRESENTATIVES

Parties	Representatives
Mr Leon and Mrs Susan Baker **Registered Owners of Lot 7** **("Baker")** **Applicant**	**Self represented**
The Body Corporate for **Valley Views (No. 1)** **Community Titles Scheme 18901** **("Body Corporate")** **c/- The Community Managers** **Ms Lucy Ewens** **("Ewens")** **Respondent**	**Represented by Mr Stephen Wells** **Body Corporate Chairman** **("Wells")** **and assisted by Mr Neil Teves** **AAPI Registered Valuer No. 382** **of Asset Advance Pty Ltd** **("Teves")** **Expert**

RECITAL OF RELEVANT EVENTS LEADING TO THE DISPUTE

1. The scheme consists of the common property of Valley Views (No. 1) Community Titles Scheme 18901 ("CTS") and lots 5 to 7 on Group Titles Plan No. 70025, lot 9 on Group Titles Plan No. 70206, lot 10 and 11 on Group Titles Plan No. 70233, lot 12 and 13 on Group Titles Plan No. 70368 and lot 14 and 15 on Group Titles Plan No. 70462 ("the Scheme").

2. Group Titles Plan 70025 was registered on 22 March 1979 and included lots 1 to 7. Lots 1 to 4 have subsequently been subdivided to ultimately become lots 9 to 15. Subdivision of lot 3 was registered on or about 11 July 1986 as Group Titles Plan 70206. Subdivision of lot 1 was registered on or about 8 December 1987 as Group Titles Plan 70233. Subdivision of lot 2 was registered on or about 7 November 1991 as Group Titles Plan 70368. Subdivision of lot 4 was registered on or about 22 April 1993 as Group Titles Plan 70462.

3. The Scheme is located at Trezise Road, Mowbray via Port Douglas, Queensland. It is apparent that at the time of registration of Group Titles Plan 70025 the usage of the lots was primarily pastoral. Expansive views including panoramic ocean views are available from some elevated lots within the scheme. The scheme is zoned rural (general farming) however it is apparent that the actual use might more appropriately be stated as rural residential.

4. It is apparent that the use of the Scheme common property is essentially restricted to access (driveways), there are no common property facilities. There are ten (10) lots in the Scheme, all used for predominantly residential purposes, the lot titled areas vary from approximately 1 Ha (lot 12) to 9.354 Ha (lot 7). No lots have any attaching exclusive use rights over common property.

5. The interest lot entitlement schedule contained in the current Community Management Statement ("CMS") executed on 14 April 2005 provides variations in lot entitlements between 98 (lot 12) and 2310 (lot 7) with an aggregate of 4,200.

6. An extraordinary general meeting of the Body Corporate was held on 22 July 2005. At that meeting a motion, proposed by Baker, was considered to record a new CMS that altered the interest schedule lot entitlements such that the interest schedule lot entitlements reflected the unimproved market value of the lots as determined by an independent registered valuer engaged by the Body Corporate. That motion failed.

7. An extraordinary general meeting of the Body Corporate was held on 25 November 2005. At that meeting a motion, proposed by Baker, was considered to record a new CMS that altered the interest schedule lot entitlements to the proposed interest schedule lot entitlements set out in the motion. That motion failed.

8. Section 227(1)(b) of the Act provides:

   "227 Meaning of dispute

   (1) A dispute is a dispute between—

   (b) the body corporate for a community titles scheme and the owner or occupier of a lot included in the scheme"

9. In my view, the failure of Baker's motion at the extraordinary general meetings of the Body Corporate, held on 22 July 2005 and 25 November 2005, each gave rise to a dispute as defined in Section 227(1)(b) of the Act between the owner of lot 7 and the Body Corporate.

10. Section 238(1) of the Act provides:

"238 Who may make an application

(1) A person, including, if appropriate, the body corporate for a community titles scheme, may make an application if the person is a party to, or is directly concerned with, a dispute to which this chapter applies."

11. From 22 July 2005, an application could be made by Baker pursuant to Section 238 of the Act.

12. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply **[my underlining]** *—*

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

13. Pursuant to Section 48(1)(b), any owner in a scheme is entitled to make an application for the adjustment of a lot entitlement schedule. I consider that the reference in Section 48(1)(b) to "*under chapter 6*" is only a reference to the provisions set out in that chapter as to the method and form of application and procedures to be adopted by the Commissioner and Specialist Adjudicator and not a reference to any specific requirement for the existence of a "dispute" as defined in Section 227 of the Act. I consider that the right to make an application for the adjustment of a lot entitlement schedule is provided by Section 48(1). Otherwise the provision at Section 48(1) is otiose as an application might always otherwise be made pursuant to Section 238 of the Act once a dispute as defined in Section 227 of the Act has arisen.

14. On 30 January 2006, Baker lodged a Dispute Resolution Application ("the Application"), dated 10 January 2006, with the Commissioner for the adjustment of the interest lot entitlement schedule for the Scheme. The Application does not identify whether it is made pursuant to the provisions of Section 48(1) or Section 238, however in the circumstances I am not required to decide that question as the Application is, in my view, valid on either basis.

15. These circumstances gave rise to the issue which I was required to consider, namely:

"1. The adjustment of the interest schedule lot entitlements to more equitably reflect the market unimproved values of lots within the Scheme preferably as per the entitlements proposed as per motion 2 of the 25 November 2005 meeting.

2. It is our understanding that the adjustment of entitlements does not have effect unless and until a new Community Management Statement is recorded detailing the amended interest schedule lot entitlements.

As the local Council rates assessments have issued for the year (1 July 05 to 30 June 06) that the Adjudicator determine immediately upon the recording of the new Community Management Statement, the re apportionment of Douglas Shire rates payments between the low owners relevant for the period from the date of recording the new CMS to 30 June 2006.

3. If the adjudicator determines that there should be an adjustment of interest schedule lot entitlement that:

(i) the Body Corporate pay the Adjudicator's and or Valuer's fees incurred in connection with the adjudication; and

(ii) the Body Corporate pay the costs of preparation and recording of the new Community Management Statement giving effect to the adjusted entitlement "

REFERENCE TO SPECIALIST ADJUDICATION

16. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply—

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

17. Section 265(1)(c) of the Act provides:

"265 Specialist adjudication of particular disputes

(1) The adjudication of a dispute must be specialist adjudication if—

(c) another provision of this Act requires the adjudication to be specialist adjudication."

18. Section 239(2)(d) of the Act provides:

"239 How to make an application

(2) The approved form for the application must provide for each of the following matters to be stated in the form—

(d) for an order about a dispute mentioned in section 265—the name and address of 1 or more persons—

(i) considered by the applicant as having the appropriate qualifications, experience or standing for acting as a specialist adjudicator for the application; and

(ii) nominated by the applicant for appointment as the specialist adjudicator."

19. The Application, lodged on 30 January 2006, provided my name among others as nominee for appointment as the specialist adjudicator.

20. Section 265(2) of the Act provides:

"265 Specialist adjudication of particular disputes

(2) The specialist adjudicator must be the person chosen by the commissioner, and need not be a person nominated by a party to the application."

21. I was nominated as specialist adjudicator by the Commissioner in a letter, copied to the parties, dated 4 April 2006.

PROCEDURAL STEPS

22. Baker lodged the Application with the Commissioner, dated 10 January 2006, relying on the attached grounds, CMS, minutes of meetings (which included a schedule based on valuations made by a local real estate agent) and sales data.

23. By correspondence, dated 6 February 2006, the Commissioner notified all lot owners in the Scheme of receipt of the application and invited all lot owners to make submissions on the Application, which was attached to that notice, by 27 February 2006.

24. Eight (8) submissions were made, the Body Corporate did not make a submission.

25. Section 48(2)(a) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(2) Despite any other law or statutory instrument—*
>
> *(a) the respondent for an application mentioned in subsection (1) is the body corporate"*

26. On 1 March 2006, by telephone, Ewens advised the Commissioner that the body corporate committee was not making a submission.

27. However, by e-mail on 22 April 2006, Wells advised that:

> *"A Valley Views committee meeting was conducted at the conclusion of the preliminary conference concerning this dispute held by Warren Fischer at Port Douglas on Friday 21st April 2006.*
>
> *This meeting was attended by Mr & Mrs Baker (lot 7), Mr Graham Phillips (lots 12 &13), Mr Jeff Heidke (lot 6), Mr Colin Heidke (lot 9), Mr Steve Wells (lot 6), Len & Val Down (lot 10), Mr Gary Martin (lot 15) and Mr Chris Young (lot 14). This meeting resolved to defend the application by Mr/s Baker to amend the Interest Schedule."*

28. Section 48(2)(b) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(2) Despite any other law or statutory instrument—*
>
> *(b) at the election of another owner of a lot in the scheme, the other owner may be joined as a respondent for the application"*

29. Section 48(3) of the Act provides:

> *"48 Adjustment of lot entitlement schedule*
>
> *(3) An owner who elects, under subsection (2)(b), to become a respondent for the application must give written notice* **[my underlining]** *of the election to the body corporate."*

30. At the preliminary conference held on 21 April 2006, I provided directions for the further conduct of the matter. Those directions included that owners, if wishing to be joined as a Respondent for the application, must provide a written notice of that election in accordance with the provisions of Section 48(3) of the Act. I also required that a copy of any notice given was to be provided to me by 5 May 2006. I advised that without such notice Section 48 of the Act prevented me from giving consideration to their submissions. I anticipate that the intension of the legislature in making that provision was in some way motivated by the potential for a Respondent to be ordered to contribute to the costs of the adjudication and to ensure that lot owners did not fall into that position unwittingly.

31. The minutes of the preliminary conference held on 21 April 2006 (attended by representatives of lots: 5 (Heidke), 6 (Wells), 7 (Baker), 9 (Heidke), 10 (Down), 12 and 13 (Phillips), 14 (Young) and 15 (Martin)) were circulated to all owners on 24 April 2006. Those minutes repeated the advice that any submissions made by the Applicant were to be provided to the Body Corporate Chairman, Wells, who was to make those documents available for inspection and copying by all owners.

32. On 28 April 2006, by e-mail to myself and the Respondent, I received the Applicant's full submissions in accordance with my directions.

33. No Section 48(3) notices were provided to me by 5 May 2006 in accordance with my directions, or at all, by any owners wishing to be joined as a Respondent.

34. On 15 May 2006, by post, I received a copy of the expert report prepared for the Body Corporate by Teves.

35. On 17 May 2006, by e-mail to myself and the Applicant, I received from Wells the Body Corporate reply to the Applicant's submissions.

36. On 22 May 2006, by e-mail to myself and the Respondent, I received the Applicant's rejoinder.

37. By e-mail on 22 May 2006, I confirmed to the parties that the provisional further conference would proceed at 12:30 on 25 May 2006 and that *"a representative from the Applicant and from the Respondent should be present at the conference along with each party's experts."*

38. On 25 May 2006 the conference proceeded, the Applicant and the Respondent's representative, Wells, attended the conference. The Respondent's expert, Teves, also attended the conference however the Applicant's expert, Mr Phil Holloway ("Holloway"), did not appear. Owners of lots 5 (Heidke), 10 (Down), 11 (Stalker), 14 (Young) and 15 (Martin) also attended the conference.

FINDINGS AND REASONS

39. The documents considered in this adjudication include the relevant documentation included within the file forwarded to me by the commissioner, the further submissions by the Applicant, the submissions by the Respondent and those documents supplied by Ewens upon my request and bearing on the issues, namely:

    a. The Dispute Resolution Application and all attachments thereto including, but not limited to:

        1. Minutes of Annual General Meeting of the Scheme held 7 March 2005;
        2. Community Management Statement, executed 14 April 2005;
        3. RP Data extract evidencing values of lots within the scheme;
        4. Letter to Body Corporate from Bolt Burchill Tranter Lawyers (for the Applicants), dated 20 June 2005;
        5. Minutes of Extraordinary General Meeting held 22 July 2005;
        6. Commissioner's letter, dated 30 September 2005;
        7. Minutes of Extraordinary General Meeting, dated 25 November 2005;
        8. Blin Maps and Photographs of the area;
        9. Letter to the Commissioner from Bolt Burchill Tranter Lawyers, dated 29 March 2006;

    b. The Applicants further submissions, dated 28 April 2006 including:

        10. the expert opinion / appraisal of Holloway of Century 21, Port Douglas, dated 27 April 2006.
        11. RP Data Information detailing sample sales of lots in surrounding areas.
        12. Print out of Valleys Views administrative and sinking fund contributions for the financial period 1 August 2004 to 31 July 2005.

    c. The Respondents submissions in reply, dated 17 May 2006 (including the expert report of Teves, dated 2 May 2006);

    d. The Applicants rejoinder to the submissions in reply, dated 22 May 2006;

    e. Group Titles Plan 70025 as amended by Group Titles Plan No.'s 70206, 70233, 70368 and 70462;

    f. The adopted administrative fund account for the period 1 August 2004 to 31 July 2005 and the proposed administrative fund budget for the period 1 August 2005 to 31 July 2006; and

    g. The adopted sinking fund account for the period 1 August 2004 to 31 July 2005 and the proposed sinking fund budget for the period 1 August 2005 to 31 July 2006.

40. Both experts, Holloway and Teves, do not clearly identify those documents to which they have had regard but rather have included broad statements identifying that they have primarily had regard to the land sales in the area and the attributes of the individual lots when drawing their conclusions. The Teves report includes attached RP data records and a 'sales schedule', there are no similar attachments to the Holloway report.

41. No specific attention was paid to the various lot owners submissions as no lot owner had elected to be joined as required by Section 48(3).

42. Following the exchange of documents between the parties and the discussions held at the preliminary conference, the outcome sought by the Applicant at the commencement of the hearing was amended from that in the Application to:

> *"1. The Applicant is now prepared to accept the adjustment of the interest schedule lot entitlements to that proposed by the body corporate's valuer given that such valuation is not significantly different from the appraisals previously obtained by the Applicant.*
>
> *2. The recording of a new Community Management statement for the scheme correctly recording the amended interest schedule lot entitlements.*
>
> *3. The Applicant withdraws its request that the 2005 / 2006 rates be apportioned and accepts that the new assessments will be issued by the Douglas Shire Council upon receipt of information in regard to the new Statement.*
>
> *4. That if the Adjudicator orders that there be an adjustment of interest schedule lot entitlement that:*
>
> *(i) the Body Corporate pay the Adjudicator's (or the majority part thereof) and or Valuer's fees incurred in connection with the adjudication; and*
>
> *(ii) the Body Corporate pay the costs of preparation and recording of the new Community Management Statement giving effect to the adjusted entitlement "*

Findings on the application for adjustment:

i. The existing interest lot entitlement schedule does not reflect the current unimproved market value of the lots.

ii. That interest schedule lot entitlements that do reflect the current unimproved market value of the lots, are as follows:

Lot No	Interest Schedule Lot Entitlement
5	400
6	300
7	450
9	450
10	300
11	275
12	300
13	375
14	250
15	475
AGGREGATE	3575

iii. That there exists no circumstances which would give rise to a just and equitable reason for the interest schedule lot entitlements of any lot to be adjusted such that it does not reflect the current unimproved market value of the lot.

Reasons

Legislative Considerations

43. Section 46 of the Act provides, inter alia:

*"**Lot entitlements***

*(1) A "**lot entitlement**", for a lot included in a community titles scheme, means the number allocated to the lot in the contribution schedule or interest schedule in the community management statement.*

*(3) The "**interest schedule**" is the schedule in a community management statement containing each lot's interest schedule lot entitlement.*

*(5) The "**interest schedule lot entitlement**", for a lot, means the number allocated to the lot in the interest schedule.*

(9) A change to a lot entitlement takes effect on the recording of a new community management statement incorporating the change."

44. Therefore, for the purposes for which an interest schedule lot entitlement is used, this order has no effect until such time as the new community management statement ordered is recorded.

45. Section 47(3) of the Act provides:

"47 Application of lot entitlements

(3) The interest schedule lot entitlement for a lot is the basis for calculating—

(a) the lot owner's share of common property; and

(b) the lot owner's interest on termination of the scheme, including the lot owner's share in body corporate assets on termination of the scheme; and

(c) the unimproved value of the lot **[my underlining]***, for the purpose of a charge, levy, rate or tax that is payable directly to a local government, the commissioner of land tax or other authority and that is calculated and imposed on the basis of unimproved value."*

46. Section 47(3) addresses the application of lot entitlements and in so doing provides some insight to the considerations that might be made when determining them.

47. Section 48 of the Act provides, inter alia:

"***Adjustment of lot entitlement schedule***

(4) The order of the court or specialist adjudicator must be consistent **[my underlining]** *with—*

(b) if the order is about the interest schedule—the principle stated in sub-section (6)

(6) For the interest schedule, the respective lot entitlements should reflect the respective market values of the lots included in the scheme when the court or specialist adjudicator makes the order, except to the extent to which it is just and equitable in the circumstances for the individual lot entitlements to reflect other than the respective market values of the lots. **[my underlining]**

(8) For establishing the market value of a lot created under a standard format plan of subdivision, buildings and improvements on the lot are to be disregarded. **[my underlining]**

48. Section 48(4)(b) of the Act limits an adjudicators discretion as it requires that an adjudicators order must be consistent with the stated principle. Thus an adjudicator has a duty to ensure that any order made is consistent with the stated principle. For this reason an adjudicator may not make a consent order.

49. Section 48(6) of the Act refers to 'market values'. Section 47(3)(c) refers to 'unimproved value'. Section 48(8) confirms that for establishing the 'market value' of a lot created under a standard format plan of subdivision, buildings and improvements are to be disregarded. If a standard format plan is considered, it is the 'unimproved' market value that should be determined.

50. The Act refers to the *Land Title Act 1994* for the definition of standard format. Sections 48A to 48D of the *Land Title Act 1994* provide:

48A ***Available formats for plans***

(1) A plan of survey may be in a standard, building or volumetric format.

(2) The format to be used in the plan depends on how the plan is to define the land to which it relates.

48B ***Standard format plan***

A "standard format" plan of survey defines land using a horizontal plane and references to marks on the ground.

48C ***Building format plan***

(1) A "building format" plan of survey defines land using the structural elements of a building, including, for example, floors, walls and ceilings.

(2) For subsection (1)—

"structural elements", of a building, includes projections of, and references to, structural elements of the building.

48D ***Volumetric format plan***

A "volumetric format" plan of survey defines land using 3 dimensionally located points to identify the position, shape and dimensions of each bounding surface."

51. The Group Titles Plan to which the Application relates defines the land and identifies the lots by means of a cadastral survey providing lengths and bearings in two (as opposed to three) dimensions only. There is also nothing in the Group Titles Plan which relates to structural elements of a building. It is therefore my decision that the Group Titles Plan the subject of this application is a Standard Format Plan as defined in the Land Titles Act.

52. Thus the prima facie' position for the determination of the interest schedule lot entitlements is that the interest schedule lot entitlements are to equal the unimproved market value of the lots.

53. Section 49 of the Act provides, inter alia:

"Criteria for deciding just and equitable circumstances

(2) This section sets out matters to which the court or specialist adjudicator may, and may not, have regard for deciding—

(b) for an interest schedule—if it is just and equitable in the circumstances for the individual lot entitlements to reflect other than the respective market values of the lots.

(3) However, the matters the court or specialist adjudicator may have regard to for deciding a matter mentioned in subsection (2) are not limited to the matters stated in this section.

(4) The court or specialist adjudicator may have regard to—

(a) how the community titles scheme is structured; and

(b) the nature, features and characteristics of the lots included in the scheme; and

(c) the purposes for which the lots are used.

(5) The court or specialist adjudicator may not have regard to any knowledge or understanding the applicant had, or any lack of knowledge or misunderstanding on the part of the applicant, at the relevant time, about—

(a) the lot entitlement for the subject lot or other lots included in the community titles scheme; or

(b) the purpose for which a lot entitlement is used.

(6) In this section—

relevant time means the time the applicant entered into a contract to buy the subject lot.

subject lot means the lot owned by the applicant."

54. Section 49(4) sets out some of the matters to which a specialist adjudicator might have regard when deciding if it is just and equitable in the circumstances for the interest schedule lot entitlements to reflect other than the respective market values.

55. Section 49(5) specifically prevents an adjudicator from having regard to any knowledge or understanding that the Applicant's had with respect to lot entitlements when they contracted to buy their lot. For that reason any prior knowledge of the Applicant can not form the basis of any just and equitable adjustment to the interest schedule lot entitlements.

56. Section 10 of the Act provides, inter alia:

"Meaning of community titles scheme

*(1) A **community titles scheme** is—*

*(a) a single community management statement recorded by the registrar identifying land (the **scheme land**); and*

(b) the scheme land.

(2) Land may be identified as scheme land only if it consists of—

(a) 2 or more lots; and

*(b) other land (the **common property** for the community titles scheme) that is not included in a lot mentioned in paragraph (a).*

(4) For each community titles scheme, there must be—

(a) at least 2 lots; and

(b) common property; and

(c) a single body corporate; and

(d) a single community management statement.

*(5) A community titles scheme is a **basic scheme** if all the lots mentioned in subsection (2)(a) are lots under the Land Title Act.*

57. The CMS sets out that the scheme land comprises the common property of Valley Views (No. 1) CTS 18901 and each of lots 5, 6, 7, 9, 10, 11, 12, 13, 14, 15 each with its own title reference. As each of the lots has its own unique lot description and title reference, I infer that each lot is a lot under the *Land Title Act* and therefore that the Valley Views (No. 1) Community Titles Scheme 18901 is a basic scheme as defined in the Act.

58. The CMS also sets out that the Scheme is in the Standard Module. The Scheme is therefore subject to the provisions of the *Body Corporate and Community Management (Standard Module) Regulation 1997*.

Scheme Considerations

59. I now turn to consideration of the matters the legislation requires to be considered in respect of the Scheme.

60. The nub of the Applicant's grounds are that *"the current unimproved values of Lots 5, 6 ,7 ,9, 10, 11, 12, 13, 14 and 15 do not reflect surrounding market unimproved values of lots of the same area / locality. The unimproved values are inequitably and unfairly apportioned between the lots within the scheme."*

61. Following my appointment this assertion appears to have been accepted by the Respondent which, in its submissions in reply, states *"The Body Corporate requests that the Adjudicator orders the adjustment of the Interest Schedule lot entitlement to reflect the unimproved market value of each of lot as outlined in the valuation report of Mr Neil Teves."*

62. As the Applicant in its rejoinder identifies *"the Applicant has demonstrated (as borne out by the Valuer's valuations being comparable to the Agent's appraisals) that the existing entitlement does not reflect market unimproved value and that the Applicant's suggested recalculated entitlements are reasonable."*

63. A comparison of the valuations provided by each party's experts does show a marked similarity. The Applicant's expert ("Holloway") uses $$50,000 value increments and the Respondent's expert ("Teves") uses $25,000 value increments. With the exception of lot 15 all other lots are valued by both experts within one increment of each other.

64. To make a comparison with the existing interest schedule the only proper method by which to ascertain if there has been any relevant movement between the lots, which would be an indicator of the suitability for schedule adjustment, is to compare the unimproved market value of each lot expressed as a percentage of the unimproved market value of the aggregate of the lots, that is, the relative change in the unimproved market value of a lot compared to the unimproved market value of the scheme.

65. Between the two experts the maximum variation in the unimproved market values of individual lots as a percentage of the aggregate unimproved market value of the lots is between [9.6% v 8.4%] -1.2% (lot 6) and [11.0% v 13.3%] +2.3% (lot 15).

66. Between the existing schedule and Holloway's recommended schedule the maximum variation in the unimproved market values of individual lots as a percentage of the aggregate unimproved market value of the lots is between [55.0% v 13.7%] -41.3% (lot 7) and [2.9% v 13.7%] +10.8% (lot 9).

67. Between the existing schedule and Teves' recommended schedule the maximum variation in the unimproved market values of individual lots as a percentage of the aggregate unimproved market value of the lots is between [55.0% v 12.6%] -42.4% (lot 7) and [2.9% v 12.6%] +9.7% (lot 9).

68. This comparison highlights the degree of agreement between the experts and the significant deviation between the current unimproved market values of the lots and the current interest schedule lot entitlements of the lots.

69. As both experts are in close agreement and their valuations are markedly different to the existing interest schedule lot entitlements, it is my decision that the evidence confirms that the current interest schedule lot entitlements do not reflect the current unimproved market values of the lots.

70. The question is to then determine what the best determination of the current unimproved market values is.

71. There are various close definitions of Market Value:

"the amount that a seller may expect to obtain for merchandise, services, or securities in the open market; or

the price at which a buyer is ready and willing to buy and a seller is ready and willing to sell; or

the price at which buyers and sellers trade the item in an open marketplace"

72. Teves provides a more detailed but similar definition, *"the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arms length transaction, after proper marketing, wherein the parties each acted knowledgeably, prudently and without compulsion."*

73. The question is, acknowledging that each of the experts have determined very close valuations in any event, which is the more accurate.

74. Holloway has 19 years experience as a real estate agent in the local (Port Douglas) real estate market. The Respondent asserted that Holloway could not be properly accepted as an expert. When I asked the Respondent whether it considered that Holloway had a greater knowledge of real estate prices in their area then the average person it responded without hesitation that it considered that he did. It seemed that the basis for the Respondent's assertion that the Holloway was not an expert was that he does not hold tertiary qualifications in land valuation (I note that the curriculum vitae of its own expert, Teves, also does not identify any tertiary qualification), I consider that such an approach to the assessment of expertise is flawed. I consider that the Respondent is wrong in its assertion, I consider that Holloway would pass the expert test (broadly stated as a person that has knowledge of the subject matter that is not normally possessed by the average person) with respect to being able to determine the unimproved market values of the lots and accordingly I accept Holloway's appraisals as those of an expert.

75. Teves also has a long history in land valuation having been registered as an urban and rural valuer in 1967. Teves is located in Cairns and would therefore also have a good appreciation of the area of the scheme. There has been no argument raised as to the credibility of Teves as an expert and in light of his experience I also accept Teves' report as that of an expert.

76. The next question is to determine which of the expert reports is to be preferred. As stated earlier, despite my instruction, Holloway did not appear at the conference. Therefore, the appraisals given by Holloway were not able to be put to any proper scrutiny. The absence of an ability to properly test the Holloway appraisals must be taken into account when according that report due weight.

77. I had identified one error, more of a technical nature, in the Teves report. Teves referred to the common property as *"easements over properties which provide access to the rear lots which do not have actual road frontage and this factor has been considered in this report."*

78. I put it to Teves that this statement, which he had noted a consideration in his report, was incorrect and that the correct position was that the area that he referred to was, in fact, common property and not any easements and that, if the scheme were to be extinguished, the interest in that land would be held by each of the lots in proportion to the interest schedule.

79. I asked Teves in light of that correction whether he wished to revise the valuations he had made. Teves responded that there was no need to revise the valuations as that correction would, in his opinion, have no effect on the unimproved market values.

80. I then asked Teves whether he had considered the Holloway appraisals, he had not seen the letter of Holloway dated 27 April 2006. That document was then handed to Teves for his consideration following which I enquired of Teves whether, having considered that document, he saw any reason to reconsider his report, he did not.

81. In determining which of the expert reports I prefer, I find that I must give a higher weight to Teves, not because of any clear difference in expertise but because Holloway was not present at the conference to be tested.

82. The Teves report considers, inter alia; the particulars of each of the lots, the particulars of the local authority, the location, the historical background, the climate, population trends, the economic structure, tourism, building activity, services and amenities, improvements and market evidence.

83. Having put the only issues I had to Teves, and being satisfied with his replies and considering the similitude of the two export valuations, I find that it is appropriate that I adopt the valuations of Teves as the current unimproved market values of the lots.

84. The onus to prove that it is fair and equitable to adjust from the unimproved market value and the scale of that adjustment rests with the party seeking any adjustment. Neither party sought to argue that it was fair and equitable to make any adjustment to the unimproved market values of the various lots.

85. Considering the purpose for which the interest schedule of lot entitlements is applied, I would anticipate that any argument for further adjustment to ensure fairness and equity would likely have some basis in either the lot owner's share of common property or the lot owner's interest on termination of the scheme including the lot owner's share in the body corporate assets.

86. It is clear from the express references in the expert reports that both experts when determining the unimproved market values of the lots considered the nature, features and characteristics of the lots (s49(4)(b)) and the purposes for which they are used (s49(4)(c)).

87. I have concluded earlier that the Scheme is in the standard module and is a basic scheme as defined in the Act, there is nothing in the structure of the Scheme which would suggest that it would be just and equitable to make any adjustment to the unimproved market values when determining the interest schedule lot entitlements.

88. Having reviewed the information available to me, including the: CMS, financial accounts and Group Titles Plans there was nothing evident to me which might arguably make it fair and equitable to divert from the prima facie position.

89. Other than the driveway, the body corporate has little by way of assets, no body corporate facilities are apparent.

90. Having given due consideration to the relevant matters pursuant to Sections 48 and 49 of the Act, I consider that there exists no other circumstances which would give rise to a just and equitable reason for the interest schedule lot entitlements of any of the lots to be further adjusted so as to not reflect the prima facie position that those entitlements reflect the unimproved market values of the lots. Therefore, in accordance with the provisions of Section 48 of the Act, I order that the interest schedule lot entitlements be adjusted to reflect the current unimproved market values of the lots as determined by Teves. For simplicity, I will divide all valuations by 1000.

COSTS

Findings:

i. That the Respondent is responsible for the costs of preparing and recording the new Community Management Statement.

ii. That each party is responsible for its own costs of experts.

iii. That the applicant is responsible for its own legal professional fees.

iv. That the Respondent is responsible for the cost of the adjudication.

Reasons:

91. Both parties made relatively extensive submissions in respect to costs, a number of those submissions are in respect of costs which are simply irrelevant to the matters that I have to decide such as the Applicant's: legal costs, expert costs and costs in establishing the body corporate. The Applicant is not seeking an order in respect of any of these costs and, in any event, I do not consider that I have any jurisdiction to make an order in respect of them. I briefly set out my reasoning in respect of the costs of the preparation and registration of a new CMS, and the party's legal and expert costs.

New Community Management Statement

92. Both parties made submissions in respect of the costs of preparing and recording the new Community Management Statement. Ultimately the Respondent accepted the Applicant's request that I find the Respondent responsible for those costs.

93. Such a finding is dictated by the legislature as Section 63(3) of the Act provides:

"The body corporate is responsible for the costs of preparing and recording the new community management statement, unless this Act provides otherwise."

94. Neither party drew my attention to any provision of the legislature which provided otherwise in the circumstances of the Application.

95. Therefore I must find that pursuant to Section 63(3) the Respondent is responsible for the costs of preparing and recording the new Community Management Statement.

Cost of experts (and legal professional costs)

96. Both parties made submissions during the course of the matter in respect of both legal professional fees and the costs of experts.

97. The only costs which remain pressed are the Respondents costs of its expert. The Respondent submitting that the Applicant should be responsible for these costs.

98. Section 48(2)(c) of the Act provides:

(2) Despite any other law or statutory instrument—

(c) each party to the application is responsible for the party's own costs of the application.

99. The Respondent submitted that despite this clause I should order these costs be paid by the Applicant as I advised at the preliminary conference that I had power to order that an expert report be compiled.

100. As stated to both parties I do have that power by Section 271(1)(a)(i) which provides:

*"**Investigative powers of adjudicator***

(1) When investigating the application, the adjudicator may do all or any of the following—

(a) require a party to the application, or someone else the adjudicator considers may be able to help resolve issues raised by the application—

(i) to obtain, and give to the adjudicator, a report or other information; or"

101. If I had made an order that an expert report be compiled, then I consider that the cost of that report might properly become a cost of the adjudication and hence I would have some discretion in determining the liability for those costs.

102. In the circumstances of this Application no such order was made, or necessary, the Respondent at a committee meeting held on 21 April 2006 resolved of its own accord to engage it's expert.

103. In those circumstances, as with legal professional costs, I do not consider that I have any jurisdiction to make an order for costs.

104. The Respondent did not identify any provision in the Act which might give rise to ability for me to make the order they requested. A specialist adjudicator's discretion to make cost orders in regard to "the costs of the adjudication", pursuant to Section 280 of the Act, in my view is restricted to the adjudicator's own costs and expenses and potentially those costs arising in relation to any order made pursuant to Section 271.

105. There is nothing in my view which I consider to be contrary to the decision of McGill DCJ in *Woodrange Pty Ltd v Le Grande Broadwater Body Corporate [2004] QDC 215*

106. I therefore decline to make the order requested by the Respondent, even if I am wrong in my view that such an order is outside my jurisdiction, I would decline the request in any event as I have found that an adjustment is to be made, that adjustment is in line with the Respondent's report and but for that report an adjustment would still have been ordered, potentially as per the Applicants report.

Costs of the Adjudicator

107. Both parties made lengthy submissions that the other be liable for the adjudicator's costs.

108. To summarise the Applicant's submissions:

With the aim of avoiding the necessity for adjudication the Applicant has twice put motions to the Body Corporate to make the adjustments requested.

On the first occasion the motion moved that the Body Corporate engage an independent valuer to determine the current unimproved market valuers.

With the Applicants attempts to engage a valuer thwarted by the individual lot owners resistance to entry by a valuer on their properties for the purpose of conducting a valuation. On the second occasion the motion moved that the Body Corporate accept that appraisals of an established registered local real estate agent. The identity of the author of the appraisals was made known to the Body Corporate Chairman prior to the meeting.

The defeating of those motions was due to many circumstances which are disclosed by the lot owners submissions to the Commissioner in reply to the Application which are not based any provision in the legislature. Such as that the lot owners considered the interest schedule lot entitlements were accepted as the previous owner had not disputed them.

The provisions in the Act in regard to interest schedule lot entitlements are clear and unambiguous and were provided to the Body Corporate with the motion to be put to the general meeting on both occasions. Despite the clear intention of the Applicant to have the interest schedule adjusted the Body Corporate sought no advice to verify its position.

The Body Corporate recalcitrance, despite the steps taken by the Applicant to avoid the necessity for such measure, to delay the adjustment of the interest schedule thereby causing the Applicant to incur not insignificant costs on the basis of the current schedule, which if amended would be significantly reduced. Furthermore, it has caused the Applicant to incur not insignificant legal costs.

It is only in the face of the adjudication process that the Body Corporate has resolved to obtain it's own valuation by an independent valuer, a motion that the Applicant proposed in July 2005.

The payment by the Body Corporate of the Adjudicator's costs is more than reasonable in the circumstances.

The Applicant notes that as a member of the Body Corporate if the Body Corporate is required to pay the Adjudicator's costs it will bear a portion of those costs. The Applicant should not be penalised for:

(a) seeking to ensure that the Body Corporate meet its obligations under the Act; and

(b) twice punished (via the payment of the Adjudicator's fees) upon the order as to the altered entitlement.

109. To summarise the Respondent's submissions:

"In regard to the Interest Schedule lot entitlements, there has been no dispute with the previous owners of Lot 7 over their Interest Schedule lot entitlements since the group title was approved. This led to an acceptance by the other lot owners that the original allocation of lot entitlements was correct.
…
The rejection of the motion for the change to the Interest Schedule put to the November meeting, was due to the Applicants refusal to supply any details about who conducted the assessment, their qualifications or how the assessment was arrived at. Without this information, the body corporate could not be expected to seriously consider this motion.
…
If the Applicants had taken the path of employing a Valuer following the July 2005 meeting, it is likely the matter would not now be the subject of adjudication. The acceptance of the Teves report by the lot owners shows that lot owners are receptive to properly compiled and sourced information presented by properly qualified persons.
…

The Applicants submission seeks to indicate that the Body Corporate had an obligation / responsibility to change the Interest Schedule under law. We are unable to find any part of the Act which places an obligation or responsibility on the body corporate to approve changes to either the Contributions Schedule or the Interest Schedule. "

Legislative Considerations

110. Section 265(1)(c) of the Act provides:

"265 Specialist adjudication of particular disputes

(1) The adjudication of a dispute must be specialist adjudication if—

(c) another provision of this Act requires the adjudication to be specialist adjudication."

111. Section 48(1)(b) of the Act provides:

"48 Adjustment of lot entitlement schedule

(1) The owner of a lot in a community titles scheme may apply—

(b) under chapter 6, for an order of a specialist adjudicator for the adjustment of a lot entitlement schedule."

112. Section 280 of the Act provides:

"280 Costs of specialist adjudication

(1) This section applies to an application dealt with by specialist adjudication mentioned in section 265.

(2) Unless the adjudicator otherwise orders, the applicant is responsible for the costs of the adjudication."

113. Thus the prima facie' position is that the applicant is responsible for the cost of the adjudication. There must exist some reason for the adjudicator to exercise their discretion to otherwise order.

Application Considerations

114. The Respondent's submission that they accepted the existing interest schedule lot entitlements as correct because of the previous owners did not dispute them is not a submission with any credible basis to deflect the Applicant's submissions.

115. The Respondent's submission that the Body Corporate was not aware of the author of the appraisals is rebutted by the Applicant's assertion that the Chairman, Wells, was made aware of the author of the appraisals prior to the meeting.

116. The Respondent did not dispute the Applicant's assertion at the conference. Furthermore, reference to the submission to the Commissioner by Wells could be taken to indicate that Wells was aware of the author of the appraisals, his submission when discussing the draft interest schedule makes reference to *"the other lot owners"* indicating that he might be excluded from that consideration.

117. On weighting the submissions I prefer the submission of the Applicant that the Body Corporate Chairman was aware of the identity of the author of the appraisals prior to the November meeting.

118. The Respondent's submission that if the Applicant had employed a professional valuer the Body Corporate would have accepted the recommendations as shown by its acceptance of the Teves Report is countered by the Applicant's submission that the lot owners submissions to the Commissioner establish that the reasons for rejection are wider then the report preparation and therefore the motion would not have passed in any event. The Respondent in its own submission identified that numerous of the lot owners understood the current entitlements to be correct as they were not disputed by the previous owners.

119. There were eight submissions to the Commissioner (representing nine lots) of which five were against the adjustment generally. The submissions to the Commissioner do disclose the position among a number of the lot owners that they understood the entitlements to have been accepted and their views that the Applicant's knew what the 'rates' were when they bought and therefore the schedule should not be altered. The reasons to resist the change are numerous and are not limited to the identity of the author of the appraisals; indeed some of the submissions against the Application do not raise the issue of the identity of the author of the appraisals at all. Therefore the Respondent's assertions are not borne out by the lot owner's submissions to the Commissioner. On balance, I prefer the Applicant's submission that irrespective of the identity of the author of the appraisals, the motion was unlikely to pass the November meeting without dissent.

120. The Respondent's submission that there is no express obligation in the Act for the Body Corporate to accept an amendment appears to overlook the duty upon society to comply with the Law. While it may be true that there is no express provision in the Act requiring the Body Corporate comply with its provisions, I consider that such a provision is so obvious that it goes without saying. It is a long establish implied provision that persons should comply with the law. I do not consider that any lack of an express term defeats a proper expectation by the Applicant that the Body Corporate would act fairly and reasonably and in accordance with the Law.

121. It is apparent that the Scheme is a well established scheme in an area where the typical land use appears to have changed over the years such that many lots are now used for rural residential purposes and the sought after property features have changed affecting the relative valuations of each of the lots.

122. No adjustment has been made to the interest schedule lot entitlements since the inception of the Scheme some 27 years ago.

123. This appears to be a case where the Applicant has now sought to require adjustment to bring the interest schedule lot entitlements in line with the current unimproved market value of each of the various lots.

124. It is apparent that the disparity stems from a change in property demands generally rather than from any act or omission of the Applicant.

125. While the Body Corporate did ultimately obtain an expert report and submit that it should be adopted that only occurred after the making of the Application and the preliminary conference.

126. The expert report obtained by the Body Corporate is only marginally different to that obtained by the Applicant and based upon which the Applicant presented its proposal to the Body Corporate.

127. This is not a case where the Body Corporate had, prior to the Application, obtained its own report and the Application was to resolve a dispute between conflicting expert reports. It is apparent that the Application was made because the Body Corporate was sitting on its hands in regard to obtaining its own advice while concurrently refusing the Applicants reasonable proposals.

128. To my mind the Body Corporate has not acted fairly and reasonably in its conduct and has resisted conformity with the prevailing legislation. Therefore it would be reasonable that the Body Corporate bear the cost of the adjudication and I exercise my discretion accordingly.