

MWML Board, September 2021

Agenda item 8: Estate Regulations (see also Annexes A, B and C)

Purpose of paper

1. This paper sets out the factual position on the Estate Regs: their legal status, history and rationale. Attached to the paper are (at Annex A) the original regs, believed to date from 1985; (at Annex B) the current regs, approved by the Board and endorsed by the AGM in Oct 2016; and (at Annex C) a draft re-write, keeping the same content but re-ordering, removing certain objectionable passages and introducing one draft new regulation.
2. It links to a separate paper about the covenants. Neither makes recommendations.

Summary

3. MWML is empowered to make Estate Regulations by two authoritative legal texts:
 - 3.1. clause 3 (v) of the Manager's covenants, found both in the original leases and the Transfer of Part deeds, hence it bites on leaseholders and freeholders alike
 - 3.2. Para 3 (1) and (3) of the MWML's Memorandum of Association (MoA) and Articles.
4. The first states that the Manager "*will make AND ENFORCE regulations .. to enable all residents .. to enjoy the amenity lands*". The second authority goes much wider, stating that MWML's principal Objects are "*to REGULATE, CONTROL the use of and maintain... the Estate*", and "*to acquire the benefit of and to ENFORCE by all means necessary at law or equity for the benefit of all owners.. occupants and residents on the Estate all COVENANTS ..the ENFORCEMENT of which shall be for the benefit of the Estate as a whole*". [Emphasis added.] **Thus MWML is not limited to regulating use of the amenity lands.**
5. All elements of the 1985 Regs remain in the 2016 set. Both are a mix of paraphrases or summaries of the covenants, and regulation of new matters not in the covenants.
6. In law the Regulations ought not to re-interpret or alter in any way the impact of the covenants because they are "secondary legislation", subordinate to the covenants.
7. The Estate Regs (2016 version) are defective in many respects:
 - 7.1. They fail to express the positive: to encourage a harmonious community
 - 7.2. They are not organised into coherent blocks
 - 7.3. They show no clear sense of purpose or priority
 - 7.4. Some Regs promise more than they can deliver
 - 7.5. Some Regs purport to re-interpret the covenants or interfere with them
 - 7.6. Some words are wrong in law.
8. Thus there is a good case for re-writing the Regs to deal with these many defects, and to present a new set with the AGM papers for endorsement by resolution.
9. A draft new version is attached. Almost all the content has been transferred over from the current Regs, but sometimes re-worded. Passages highlighted are either new additions, or re-formulated to take account of the points above.

History

10. This is the historical sequence of events concerning the Estate Regulations:

9 Jan 1983	MWML is incorporated (registered 17 Feb 1983). Under its Articles, MWML's Objects are: " <i>to regulate, control the use of and maintain certain lands</i> [within
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	title SGL342062]...". Clause 6 binds every owner of an "A" share to perform all the covenants of the original leases.
1984	First leases. They all include this mutual covenant: "Nothing shall be done or suffered... which shall be or grow to be an annoyance to.. the owner or occupier of any adjoining or neighbouring hereditament".
1984-5	First set of MW Estate Regs drawn up, reflecting the wording of the covenants, but putting flesh on those bones, regulating details of how the estate will be administered in the collective interest of residents. The Regs evolve continuously over the next 35 years.
2016	Last formal re-issue of Estate Regs; last endorsement by an AGM.

Detail

11. MWML's power to make Estate Regulations derives from two separate authorities: the lease covenants, and the Company's Memorandum of Association.

12. Clause 3 (v) of the Managers' covenants as contained in the original leases, and repeated in each extended lease and Transfer of Part (deed of enfranchisement), states that the Manager (MWML):

will make and enforce such Regulations (if any) as it may in its absolute discretion consider necessary or desirable to enable all residents on the Estate to enjoy the amenity lands.

13. In addition, and amplifying this power, are the Objects of the Company set by its Memorandum and Articles – which state that MWML's principal Objects are:

to regulate, control the use of and maintain... the Estate

and

to acquire the benefit of and to enforce by all means necessary at law or equity for the benefit of all owners.. occupants and residents on the Estate all covenants ..the enforcement of which shall be for the benefit of the Estate as a whole.

14. The Memo and A of A are greatly reinforced by the fact that every owner is required to be a shareholder, and is thus bound to the original incorporation documents.

15. **Therefore MWML is not limited to regulating use of the amenity lands.** It can regulate anything which enables it to enforce the mutual covenants. But there is an implication of reasonableness – other statutes could trump an unreasonable regulation.

16. The first set of regulations (Annex A), dating from 1984-5 and inherited from another Wates estate, comprised 29 items. Of these, 9 were printed in italics to show that they were not new regulations but paraphrases of the original covenants. No written evidence is available showing these regulations to have been amended at all by MWML between 1985 and 1990 (the year when Estate freehold ownership transferred to Danesdale). They were amended on at least eleven occasions between 1990 and 2016, when the current set were circulated. The changes were usually quite minor, always communicated promptly to owners and residents, and appear to have been widely accepted and supported.

17. As can be seen, the 29 initial regulations included many related to access to and use of the Amenity Lands including roads, parking and garages. But other regulated wider matters, for which the Manager was and remains responsible given its central function of maintaining and enforcing the collective and mutual covenants. Thus interwoven in to this first set of Regulations are direct quotations, or sometimes paraphrases, of the covenants – and to indicate this, those sections were shown in italics.

18. Many of the 1985 regulations went beyond the amenity lands: eg regulations 5 and 6 stated that the garages had to go with premises whenever let, and must not be alienated to persons living off the estate.

19. Over the years, but particularly since 2010, some owners have protested, asserting that MWML has no power to make regulations which affect private property (in this case, the use of garages), and that attempting to regulate any aspect of enfranchised houses is ultra vires. For example, in a 2014 letter Mr J Lyons claimed to have received legal advice to the effect that, having signed the original regulations but never having signed any variations over the years, he was not bound by any regulation subsequent unless it was specifically limited to the amenity lands. He claimed that for MWML to make and enforce such regulations (eg banning the erection of an estate agent's board on his land) breached his fundamental rights as a residential occupier under various current UK laws.

20. This objection is wrong in law. As noted above, MWML is not only required by the leases to regulate on use etc of the amenity lands: it is also required by the Memorandum and Articles of Association to regulate to enforce the central, mutual MW covenant:

Nothing shall be done or suffered... which shall be or grow to be an annoyance to.. the owner or occupier of any adjoining or neighbouring hereditaments.

21. But objectors have a sound point in opposing the use of the Estate Regs to **re-interpret matters governed strictly by the covenants**, eg alterations to owners' property. Even where MWML can properly control such matters, it cannot do so via the Estate Regulations, because these are always subordinate to the covenants.

22. Some of the current Regs (Annex B) offend against this principle. For example, no. 17 states that "Structural alterations are not permitted without the consent of the freeholder and management company." Alterations are a matter determined by the covenants, which are different for houses rather than flats because the houses were always on a "repairing lease" and after enfranchisement there is no reversion to a superior lessor. Thus the words of this regulation are inappropriate and wrong. Furthermore the word 'freeholder' is confusing where enfranchised houses are concerned.

23. In addition, the current regs (Annex B) read badly.

23.1. They fail to express the positive - the underlying rationale of having regulations at all: namely to encourage a harmonious community, bound in common covenants to prevent "annoyance" to one another.

23.2. They are not organised into coherent blocks, instead they jump all over the place, from amenity-lands trivia to fundamentals of ownership and property use.

23.3. They are not organised with any sense of priority and scale.

23.4. Some issues are spelt out in excessive detail while others are left very vague.

- 23.5. There is a general sense of “promising more than we can deliver”; eg reg. 44 states that persons who do not keep their dog on a lead in the common parts of their own block may be fined. With no clear mechanism for doing this, fines have never actually been implemented (even if occasionally threatened). MWML would need to set up elaborate processes to try, convict, set a penalty, collect the fine, hear appeals etc in each such case. By contrast, fines for unauthorised parking are well established, easily evidenced and widely accepted across the community.
- 23.6. Likewise reg no. 45 states that dogs “shall be prevented from fouling any public area”. Dogs may be discouraged from fouling; they may be prevented “so far as possible” – but they cannot be prevented! And this is recognised in the next sentence : their owner is absolutely responsible for the removal of the fouling, using the red bins which we have put out in recognition of dogs’ natures!
24. The wider point is that regulations, to be effective on an estate of 222 properties, need the informed consent of the vast majority of residents. If not, they will not be observed, and then the Board will have a deal of trouble (correspondence, appeals, even litigation) in attempting to enforce them. It is five years now since the Regulations were last endorsed by an AGM, and even then it was by show of hands rather than through careful consideration of a previously circulated draft compiled through consultation. For all these reasons, it seems an appropriate moment to consider re-issuing the Regulations, re-written to be more coherent, and removing the sections which have caused most controversy and are least justifiable in law.
25. It might also be a moment to introduce a regulation where currently there is none, namely use of the gardens for private events/parties involving significant numbers (say, more than 6) of non-residents.
26. See attached cock-shy draft. If approved in principle by the Board, the draft (as amended in discussion) would be included in the information papers issued to members 21 days ahead of the AGM.
27. There is therefore time for Directors to review the detail in correspondence – the exact wording does not need to be decided finally at the 7 September meeting.

Michael Stark
31 August 2021