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YSP Podcast Transcript: Episode 053. How To Deal With An Owner Making Private Use of Common Property Without Approval (NSW law)

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Intro: Welcome to Your Strata Property. The podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source. To access previous episodes and useful strata tips, go to www.yourstrataproperty.com.au.

Amanda Farmer: Hello and welcome. I'm Amanda Farmer and this is Your Strata Property. A short solo episode from me today. You haven't had one for a little while. I thought I might share with you the solution to a problem, a problem that I think is increasing in our strata communities, and it's the situation where a lot owner decides that they are going to use a particular area of the common property for themselves, for their own purposes, and they basically take it over without obtaining the proper permission from the Owners Corporation to legally and exclusively use that area of the common property.

Now, I have had a few committees approach me already this year with this problem. Different circumstances, but all amounting to the same frustration. I thought it might be a good opportunity for me to share with you, the listeners, how this problem, in my view, should be solved. Now, in New South Wales, a lot owner's or occupier's use of any area of the common property exclusively for themselves, that means shutting out any others from also using the common property, is illegal unless it is approved by way of a registered by-law.

Now, that includes not only the use of the area, so for example, if it's a courtyard that is adjacent to their lot and they are using it for their kids or their dogs to play in. So the use of an open area. But also where they might have installed a structure on the common property. For example, a deck is something that we see quite often or a shed that they've put in the back common garden. However, it is that they're using the area. If they're doing that to the exclusion of other owners and occupiers and it is an area of common property that other owners and occupiers are otherwise entitled to use, then they are using it illegally unless they have a registered bylaw that permits them to use the area in that way.

Now, this is something I want to be really clear about because this has come as a bit of a surprise to some of the committees I've been working with, a bylaw is the only way to legalise that kind of exclusive use of common property. Yes, the tribunal could also make an order, which then gets registered on the title and operates like a bylaw. But outside of that forum of litigation, a bylaw is the only way that a lot owner can be legally and exclusively using the common property. Now, I think there are some owners and occupiers out there who think, "Well, if I've been using it for a long period of time, for example, many years, and I've spent money improving it, I've installed the deck, I've been looking after it, and I've been mowing the lawn, well, of course I'm legally entitled to use it." The fact is, none of that matters unless there is a registered bylaw the use of that area is illegal.

Now, the relevant section of the legislation here in New South Wales is section 142 of the Strata Schemes Management Act, and that's the part that talks about common property rights bylaws, they're what we used to call exclusive use or special privilege bylaws under the old law, now called common property rights bylaws. These are the kinds of bylaws that give those exclusive use rights to lot owners. Now, an owner's corporation can only make a common property rights bylaw if it has the written consent of the owner that is going to be enjoying the special right or privilege to use the area. And, like any other bylaw it needs to be resolved at a general meeting by a special resolution. Now, remember that a special resolution will fail if more than 25% of the total unit entitlement votes against that motion. So you need a bylaw, it needs to be specially resolved, you need the written consent of the owner who is enjoying the right to use the common property, and the bylaw has to be registered with Land and Property Information. That registration has to take place within six months of the meeting at which it is specially resolved.

Now, the other important thing to remember with these common property rights bylaws is that they must, and this is in the legislation, they must provide for the maintenance of the common property. This is in section 144 of the Strata Schemes Management Act. When it comes to providing for the maintenance of the common property, the bylaw can either say that the owners corporation continues to be responsible for the maintenance and repair of the relevant part of the property.



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Or, and this is more usual, the bylaw imposes on the owner who is enjoying the exclusive privilege of using that area of the common property, the responsibility for maintaining and repairing it. That is usually what we see, and that seems to me only fair. If you, the owner, is getting the benefit of that exclusive use, then it should be your responsibility to maintain and upkeep that area of the property. And, in the bylaws I draft, we include that it is also your responsibility to maintain, repair, and upkeep any structure, any item that you might keep inside that area. Assuming, that is, that you are permitted to install some kind of structure or keep items in the area, and it's quite possible that you might not be. The owners corporation might just permit the use of an open area, but not permit the installation of a structure in that area, like a deck or a shed.

It's important for bylaws to be really clear about that, so there's no confusion about what is and what isn't permitted within that area. A bylaw like this can also provide for money to be payable by the owner who has the benefit of the area to the owners corporation. That's usually classified as a type of license fee. It can be a one-off fee, it can be a regular monthly fee. We often see this with quite valuable areas of the common property, where the owners corporation has said, "Well, we don't want to subdivide and sell that area of the property to you, but we're happy for you to use it, pursuant to the provisions of this bylaw. But we recognise that it's valuable and we want to make sure that our owners are also sharing in the value of that area." So a license fee is set and you may need to get a qualified valuer involved in looking at the area and telling you how much it's worth and what a reasonable license fee might be. But all of that is dealt with within the terms of the bylaw.

Okay, so what do you do if you have a lot owner or an occupier illegally using an area of the common property, exclusively using an area without the benefit of a bylaw? These are the situations that I've been dealing with with a few committees recently. Well, what I recommend is this, the owners corporation, through its strata managing agent if it has one, or through its strata committee if it doesn't have a managing agent, should write to the owner of the lot that is illegally using common property and inform the owner that that use is illegal and the only method by which it can be legalized is a special resolution approving a bylaw and the registration of that bylaw.

I suggest that the owner is invited to submit a bylaw that has been prepared by an experienced strata lawyer, submit that bylaw to the owners corporation for inclusion on the agenda of the next general meeting. Another way to shortcut poorly drafted bylaws that simply aren't going to be acceptable to the owners corporation is for the owners corporation itself to engage its own lawyer to prepare a bylaw specific to that lot. Arrangements can be entered into where that lawyer acts for the owners corporation, but it is the lot owner who is paying that lawyer's fees. What that means is that the owners corporation is going to end up with a bylaw that it is happy with and it doesn't end up going around in circles with the lot owner and its lawyer who may or may not know anything about strata law, about the terms of the bylaw and what's acceptable and what's not acceptable to the owners corporation, sufficient to get that resolution passed at the general meeting.

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Now, I'm often asked, "Amanda, do we have to go through this process of inviting the owner to submit a bylaw? We really don't want them using that area. We want them to remove the deck. Can't we just go straight to the tribunal and seek an order?" The answer is, yes, you can. But my recommendation is that you don't. In my experience, if you approach the tribunal for an order that an owner cease using an area of the common property illegally or remove a structure that has been illegally installed, the tribunal often takes the view, particular where the use is already happening and the structure has already been installed, the tribunal often takes the view that, "Well, why don't you put this to a general meeting? Have the lot owner propose a bylaw and see if you can't reach some kind of compromise where the owner is permitted to continue using the area as long as there is a sufficient bylaw in place and they take on the repair and maintenance obligations, the insurance obligations, etc."

The tribunal sends everybody off to go and consider that bylaw and put it before a meeting and try and get the special resolution. My suggestion, because of that, is that you tick your boxes first. Invite the owner to submit the bylaw, because you're preempting that that's what the tribunal will suggest you do anyway, put the bylaw before the meeting and see what happens. If the bylaw gets resolved, specially resolved in the meeting, then great, it gets registered and the owner continues using that area within the provisions of the bylaw. If the special resolution is not achieved because lot owners with more than 25% of the total unit entitlement object to the bylaw or the owner's use of the area, then the owners corporation can go to the tribunal quite confidently, I think, and seek an order that the owner cease using that area of the common property and/or remove the structures that they have installed illegally on the common property.

The owners corporation can tell the tribunal that it has tried, it has tried to do what is necessary to bring this situation into compliance with the law, it has considered a bylaw, but it has determined that this use is not suitable for its community. So the tribunal then in my view is going to be more inclined to the owners corporation's point of view, and the owners corporation more like to get the order that it seeks. On the other hand, if a common property rights bylaw is put forward by a lot owner and it is not approved by special resolution at the general meeting, then the lot owner also has a right to go before the tribunal and seek an order that the owners corporation has been unreasonable in failing to approve that bylaw, and can ask the tribunal to make an order requiring the bylaw to be registered.

So it's important for owners corporations who are considering these kinds of bylaws to ensure that they do take a reasonable approach and consider the situation both from the perspective of the majority of owners, as well as from the perspective of the lot owner who is or wants to enjoy the use of that area. Now, if an owners corporation has refused to approve a bylaw on the basis perhaps that no money is offered by the lot owner for the use of a very valuable area of the common property, I think that's a pretty reasonable position to take, and you'd be telling the tribunal that that's the reason why you've refused to make the bylaw. Or alternatively maybe the bylaw that was put forward by the lot owner did not sufficiently deal with things like repair, maintenance, insurance, and for that reason the owners corporation has refused to make it.

So there's some examples of a reasonable basis, I think, upon which to refuse a lot owner's bylaw seeking the exclusive use of the common property. Okay, so I hope that helps some of you out there who may be experiencing this situation or have in the past. I know that kind of advice has been very well received by a few of my clients recently, and I thought there was some value in there to share with you. Thanks for listening. Catch you next time.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners, reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at www.yourstrataproperty.com.au. You can also ask questions in the comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?

