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YSP Podcast Transcript: Episode 112. How to conduct a secret ballot

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer and I have with me today Reena Van Aalst. Hi Reena.

Reena Van Aalst: Hi Amanda. How are you today?

Amanda Farmer: I'm doing very well today. Thank you Reena Van Aalst. How has your week in strata been so far?

Reena Van Aalst: Yes, I actually had an interesting week. I had a really large meeting which I can probably talk about at another time, with some various challenges, but just been very busy. This week I only had one meeting again so I'm really happy. I just have to shout it out to the world when there's only one meeting a week.

Amanda Farmer: Yes I know. I think you mentioned that a couple episodes ago and I had a couple of strata managers who spoke to me having listened to that episode and said "We're jealous, how does she do it? She needs to reveal her secrets." One meeting only a week.

Reena Van Aalst: Yes, no. I'm keeping it a secret.

Amanda Farmer: Good on you. I think the last time we spoke you were having a bit of a break for a birthday and a wedding anniversary. How was that?

Reena Van Aalst: That was lovely. That way nice did a couple nice restaurants that week and lots of alcohol and nice food. It was all good.

Amanda Farmer: Nice. I think I saw in your strata central newsletter for this month a restaurant recommendation. I really like how you do that in the right-hand column of your newsletter. Give us some around the town tips.

Reena Van Aalst: Yes exactly. That one was Bea which is the new Matt Moran restaurant down in Barangaroo which I took Robert for his birthday. So, I thought I'd share some tips and some information about things other than strata on our newsletter, so thanks for mentioning them Amanda, for those that haven't read our newsletter. You can actually go to the website and subscribe, www.stratacentral.com.au.

Amanda Farmer: Yes, highly recommend it. And I think someone else in our circle will be having a birthday at Bea Restaurant as well soon.

Good recommendation.

Alright, let's get into it, Reena. What has been your challenge for this week?

Reena Van Aalst: Well this was, again another new occurrence for me Amanda, where we have in one of the properties that I manage, the adjoining property has been demolished and they're constructing new apartments and there's actually a crane that obviously needs to be included on the land of our adjoining owner. And actually, the crane needs to obviously go over the expanse of the strata scheme.

And so at the end of last year, the builder approached me and said you didn't manage your etcetera. No I said, yes we managed the scheme. Well you know, you need to sign this document really quickly, we need to start building. We need this signed.



neighbouring property, and because of the work that is going to be done, the crane is actually going to swing over the airspace of the owner's corporation's [crosstalk 00:04:48]

Reena Van Aalst: That's correct.

Amanda Farmer: Generally what the deed will cover is the right of the builder or developer or whoever owns the neighbouring property to have the crane inside the airspace of the owner's corporation and you're right, there should be some compensation payable for the owner's corporation allowing that privilege. And the deeds that I have been involved in, and when I say deed, it's a legal term for a contract, that I've been involved in advising on, they offer that compensation or we certainly make sure we seek it for the owner's corporation who's going to be affected. And as you say, sometimes that's for a considerable time to have a crane hanging over your property while a development's being completed.

Now I haven't, Reena, been in a situation where the work has gone ahead anyway and the crane has been overhanging the property in the absence of a deed being scheduled and that is quite concerning. I'm not sure, it sounds like you do have lawyers involved.

Reena Van Aalst: Yes we do.

Amanda Farmer: I'm not sure what advice they've been giving, but I would be very uncomfortable if I was that lawyer or that owner's corporation, to be allowing that work to continue in the absence of a deed which covers the liability of the developer and also ensures that the owner's corporation is being properly compensated, because it's often hard to put the genie back in the bottle so to speak once the work's been done and they've headed off onto their next project. And the way that I would imagine that this could be dealt with, and the owner's corporation may be considering this, and it may all sound a bit hard and a bit expensive, is to head off to the Supreme Court and to seek an order restraining the neighboring developer from continuing the work or continuing to have their crane in the airspace of the owner's corporation.

Reena Van Aalst: Yes well that is the advice that the lawyer has given. So initially Amanda, when we were negotiating with the builder at the time, we asked for an insurance policy obviously, and we asked that the owner's corporation be a beneficiary of that policy, which they provided. But now that the arrangement's going to be between the developer and the owner's corporation, obviously that's not applicable in this case. And we're still asking for an insurance policy so that we know that we're gonna be covered.

But we've actually also put our own insurer on notice as well because I think that it's important for strata managers to know that there's something sort of hanging in the wings, and there's no certainty. And there could be a potential claim that under the duty of disclosure requirements for every insurance policy that a scheme will have, that you need to advise the insurer. So we've advised the insurer. And the first thing they've asked for, rightly so, is a copy of the insurance policy of the developer, which we still don't have.

So the problem I think that our owner's corporation has is been hardly any communication from the other lawyers, I think, from the developer. So our lawyer mentioned that the only way for us to remedy this is to go to the Supreme Court and get an injunction, but the strata committee, some members are not happy with spending legal fees. But as I've said to them, it shouldn't really be put to the owner's corporation during the general meeting even if you don't agree with going down that path, cause I don't believe that the committee should be sort of holding this item in their carriage unless we have some resolution from the other side.

Finally, we've got some traction with the lawyers are now communicating with our lawyer. We're still going through argy-bargy with terms and negotiating some money, et cetera, so I'll keep you posted, and our listeners posted, Amanda, as to when we will have a resolution. And hopefully, I'll have a win to report as opposed to a challenge.

Amanda Farmer: Yes hopefully we can move this into the win column soon. A very good point that you make there Reena in terms of the exposure of the committee members if they make a decision like this that they either let this lie without a deed and allow the crane to remain in place, or they take the step of commencing legal proceedings. And I agree with you completely, even

though it may not be a strict requirement under the act, I do recommend to committees who are making these important decisions to put it to the owners in general meeting, and not take on that burden on their own shoulders to make decisions that could have some pretty serious consequences. So if the owners decide no, let it lie, it's all too expensive to chase this as the lawyers may recommend, fair enough, that's the democratic process. But not a matter that even I as a committee member would want to have on my shoulders.

Reena Van Aalst: Yes, definitely, Amanda.

Amanda Farmer: Okay, so, looking forward to hearing the results of that one. My challenge for this week, it is a question that's been raised by a member inside the YSP online community, and it is an excellent question. It's about secret ballots.

And I'm hoping, Reena, you might be able to give me some guidance from your experience on the ground at meetings conducting secret ballots. But this particular member was a little bit confused, understandably, by the wording in the legislation, which on the one hand seems to allow a secret ballot for the election of committee members, but then on the other, also requires a ballot for the election of committee members to be signed by a voter.

And the parts of the legislation I'm referring to are clause ten in the strata schemes management regulation here in New South Wales, and that's the clause that sets out that you can have a ballot for the election of your strata committee, and it says in sub clause three of clause ten that for a vote to be valid, a ballot paper must be signed by the voter and completed by writing on it not only the names of the candidates the voter is electing but the capacity in which the voter is exercising their vote. So are they an owner, are they a company nominee, are they a proxy.

Now that's clause ten of the regulation, but then we also have clause 29 in schedule one to the strata schemes management act. And that clause says that we can vote on a motion or for an election at a meeting by way of secret ballot.

Reena Van Aalst: So the ballot for a strata committee, Amanda, is more about if there are more candidates for election than there are number? Is that what that's about?

Amanda Farmer: Yes. Clause ten applies if a ballot is required. And you're exactly right, a ballot's going to be required if we've got more nominees than we do positions. So we've got to decide who gets the most votes and we do that by conducting a ballot. Now the question that this member has asked quite properly is, how does that work together with the ability for owner's corporations to have motions decided by secret ballot? On the one hand, we've got clause ten in the regulation telling us we've gotta sign ballot papers and we've gotta disclose who we are. And we've got clause 29 in schedule one to the act saying that a motion can be resolved by a secret ballot or an election can be conducted by secret ballot, simply if the strata committee determines that that's the case or one quarter of the people entitled to vote on the motion agree that there should be a secret ballot.

Now I think the confusion's arising from the fact that, as far as I can see, the legislation doesn't otherwise provide any guidance as to how a secret ballot should be conducted. So the query I had for you, Reena, is whether you have ever conducted a secret ballot, been asked to conduct a secret ballot, and how in your experience that works in practice.

Reena Van Aalst: No, it's a very interesting question, Amanda, cause I have never been asked to conduct a secret ballot yet. And I think obviously these provisions are in the new act. So that may occur in the future. But I do see a bit of a conflict between the fact that you've got, on one hand, owner's corporation's records have to be available, and that would include all records. And especially in the ballot situation for a strata committee election, if there are more nominees than there are positions. But I don't really understand exactly how a secret ballot would work in this case at all when you are required to sign and disclose the capacity in which you are voting.

Amanda Farmer: Some general advice that I have given managers in the past who've asked about how to conduct a secret ballot is that when attendees turn up to register at the beginning of the meeting, you're usually going to give them, I know Reena this is your practice, you're gonna give them what we call a voting paper, which they will need to complete should there be a special resolution on the agenda or should there be a demand for a poll. And voting papers, Reena tell me if I'm wrong, but my

understanding is they have the lot owner's name, their lot number, their unit entitlement, and it generally lists sort of the motion numbers. And it is available then for them to fill out should there be a special resolution or a poll demanded. And it can be handed back in so that the vote can be counted on a unit entitlement basis.

Reena Van Aalst: Yes but there's one more thing too, Amanda. Sometimes when there's lots of people at the meeting, you've got husband and wife, unless you have a voting paper, you don't know, like some people put up their hands. So when there's a lot of people, I always ask, even just for one vote per lot, I always ask them to raise their papers, so I know exactly how many votes, cause, as you may know, people sometimes don't understand that only one owner can vote. And most of the time, out of just ignorance, people, like the wife and the husband, or both owners, will put up their hand. And you can't count that as two votes, it's only one vote. Unless you have a paper, then you don't know who's who, then you need to define them some way.

Amanda Farmer: Yes I like that, very good advice.

So we're giving out voting papers on registration, and if we think that there might be a secret ballot or this is the kind of building that regularly wants secret ballots, then what I recommend is that the strata manager or the chair, whoever's conducting the registrations, also hands out a ballot paper. And this ballot paper, I suggest, has nothing on it save for the unit entitlement for the lot, because bear in mind that there could be a poll demanded on a motion being decided by secret ballot, so we do have to have the unit entitlement recorded on the paper. And you're then going to mark off the fact that you have given a person present and entitled to vote a ballot paper. And if there is a secret ballot called, then that person can fill in their vote on that ballot paper, and bear in mind that it's blank, it doesn't have their name or identifying details, it just has their vote when it comes time for them to fill it in, and then they then hand that back in, and you're going to mark them off as having handed it back in.

So the reason that you wanna track that they've both been given a ballot paper and handed it back in is so you can ensure that only those present and entitled to vote are voting on a secret ballot because remember there's no other way to identify their vote.

Now I fully appreciate that this does not meet the requirements of clause ten in the regulation that says that we must sign our ballot papers when we are electing committee members, and that is a conflict, I think, between the act and the regulation. And where we have such conflict, we look to the legislation that takes precedence, and in this situation, it would be the act taking precedence over the regulation.

So my suggestion, and I absolutely welcome any direction to the contrary, to help solve this sticky situation, would be that if you are conducting a secret ballot to elect committee members, then you are not signing those voting papers in compliance with the requirements of clause 29 of the act for a secret ballot.

Reena Van Aalst: Yes it's very confusing, I think, for the managers and for owners to understand that whole concept, Amanda, where you have a secret ballot and then you need to elect a committee. But I think obviously, as you said, the act takes precedence over the regulations. The other thing I think that we need to remember with any motion, including a secret ballot, is that you need to have a quorum for that motion to be considered. So if you don't get enough papers back based on your quorum, then that motion really can't be considered, cause you need to have a quorum for every single motion that is put to the meeting.

Amanda Farmer: Yes, very good point. A tricky situation and an excellent question from that member. If there are strata managers listening who conduct these secret ballots, or this question has arisen before and been resolved, or you can offer some assistance for us and our listeners, please don't hesitate to get in touch. You know where to find me, amanda@yourstrataproperty.com.au Alright with that brain strain, let's move on to a win, Reena.

Reena Van Aalst: Definitely a brain strain. The win that I wanna talk about is something that perhaps a lot of owners don't understand or even know, and maybe some managers aren't even aware of, but last week I was asked to act on behalf of an owner in a scheme that I'm consulting on behalf of, and what the owners didn't realize is that even though a motion is decided by how many votes are cast in favor of the motion based on one vote per lot, once the chairperson has declared that motion, someone can call for a poll. So in that case, the motion had been declared, and then I called for a poll because I knew from all the

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proxies that the owners that I was acting for had, that we had enough entitlements to basically carry the motion through. So I then called for a poll on that particular motion, and then the initial result was declared obviously not valid anymore because when the motion was put by poll, it was actually decided in the affirmative and passed.

So I just wanted to put it out there for owners that sometimes even though a motion's been carried, if someone asks for a poll, then that has to be recalculated based on unit entitlements of those who are present and entitled to vote and actually do cast a vote for that motion. So just something that owners should be aware of and sometimes, unfortunately, in buildings there can be a lot of politics for those that are involved in such buildings, and it's based on numbers, and sometimes it's also based on UE, it's not just the numbers. So you may not have the numbers, but you might have enough unit entitlements based on the value of your lots, which a term in the date of registration when you buy your lot, it's on the strata plan, it runs unit entitlement. That you may be able to use that method as opposed to just the one vote per lot.

Amanda Farmer: Yes thanks for that important reminder, Reena. And it is set out in clause 14 of schedule one to the strata schemes management act in New South Wales that a poll may be demanded immediately before or after a vote is decided by majority in number. And the demand for a poll can always be withdrawn by the person who made it. That raises a separate question, doesn't it? As to withdrawing that demand once the result of the poll is known. Who knows whether that's what those words mean.

Don't we love strata law? The uncertainties inherent in our legislation. There's no surprises there.

Reena Van Aalst: Continuing to be present even though we just reviewed our Act.

Amanda Farmer: I know, I know. Okay. Well, the win that I would like to share with everyone this week, many of you already know about this, but a few weeks ago now, on the 17th of April, we conducted our inaugural Your Strata Property live event. And it was an overwhelming success. Reena was one of our star guests and Reena, thank you very much for giving over your time and our other guests Gary Bugden, Dr Cathy Sherry, Paul Keating over CI insurance, Natalie Fitzgerald of Strata Sense.

Reena Van Aalst: Yes it was a great evening, Amanda. We had a good turn out of managers and owners who were interested, obviously, in learning more about strata and how their schemes are working. And definitely, it was to me a really inspiring, and the way that Gary Bugden sort of facilitated the discussion was really interesting, especially about some of the new topics; electronic voting, for example, one topic that was raised. I think which people may think is wonderful in terms of convenience, but it may have some ramifications that people really didn't think about, and Gary brought those to the forefront, which I think was a really interesting topic to discuss.

Amanda Farmer: Absolutely. We talked about short-term leasing, and I spoke about where the law is at in New South Wales on that front. Reena you and I recorded a live podcast, and we spoke about levee recovery and also the sale and subdivision of parts of the common property, and how popular that's becoming. And we had a very lively panel talking about child safety devices, not just window locks, but netting which is fast becoming a hot issue. We talked about the professionalism, the need to increase professionalism of strata managers. And electronic voting, as you say. And many other things. So it was a great night and I've decided there will certainly be more YSP live events, which is really exciting. And of course the whole evening was recorded, both audio and visual. We do have a video and we are busy working in the background to put that material together to make it available for those who weren't able to attend the evening.

So that includes strata managers who might be wanting to claim some CPD points. The video will be available so that you can have a watch of that and go ahead and claim your points. So listen in in a couple of weeks time, I'll be giving you details of how you can get your hot little hands on that video. But certainly, sometimes well spent listening to those hot topics.

Reena Van Aalst: Yes. I think it was really interesting too, Amanda, was the diversity of the panel. So you had an academic in Cathy Sherry, you had myself and Natalie who are practising managers, you had Paul Keating who is insurance and giving interesting comments about officer's liability and acting in good faith, and things like that. So I thought the breath and the diversity of the panel was really important in terms of giving different aspects of the various topics that were raised by owners and



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managers in the forum. So it was really a good event. I really enjoyed it, and we look forward to the next one.

Amanda Farmer: Yes, absolutely. I think it's great just to see our listeners in person and members inside our community, and to hear from you, and to see so many engaged people living in strata is always encouraging. Reena and I, our heads are often in the problems and the challenges as we talk about, and it's lovely to see people come out wanting to invest in their education, which is just so important in this area, I think.

Reena Van Aalst: Yes, definitely, Amanda.

Amanda Farmer: Alright well, another jam-packed episode. I think that is it for this week, Reena.

Reena Van Aalst: Thanks Amanda, see you next time.

Amanda Farmer: See you next time.

Reena Van Aalst: Bye.

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