

Publication Date: 20 November 2018
YSP Podcast Transcript: Episode 139. How to fund upgrades that only benefit some owners

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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?

Amanda Farmer: I'm doing very well, it's lovely to see you, to chat with you. This is actually the first episode we're recording since my return from a little breakaway, so it feels like a reunion.

Reena Van Aalst: Yes, exactly, yes.

Amanda Farmer: We are getting to the pointy end of the year, November now, it'll be Christmas before we know it. How are things for you? Busy at this time of year?

Reena Van Aalst: Very busy. Very, very busy. I think it's the busiest I've been so far, because when you've been away, Amanda, a lot of things are still waiting for you when you come back, like meetings, etc. And now with the changes in legislation for AGMs it's once in a financial year, and so therefore a lot of June year-ends are now sort of kicking in at this part of the year as well. So yes, very busy.

Amanda Farmer: Yes, and perhaps people leave it til around this November, early December stage to have their AGMs, or realise, "Oops, we need to have our AGMs"-

Reena Van Aalst: Exactly.

Amanda Farmer: ... So the pressure is on for you strata managers.

Reena Van Aalst: Yes, exactly.

Amanda Farmer: I don't envy you.

All right, well, let's jump into our challenges and our wins for this week. Reena, what has been challenging you?

Reena Van Aalst: I had a recent meeting where, I won't go into the details of the actual works, but basically there was a motion on the agenda to approve a development application to actually replace existing windows, which needed to be done. But part of the motion also related to an upgrade of the building. In the upgrade, there were some lots that would be benefiting more than others, in terms of the upgrade works. So there was quite a bit of anxiety, perhaps, and concern by some owners that, "Why should we have to do these works? Why should some parts of the building have an upgrade and we don't get an upgrade? Your lot's going to work more money than my lot." All the things that, you know, human nature where people think, "Well, why should you have something that I can't have?" even though, perhaps, it's not possible to have it or it's too expensive to have it.

Based on the concerns of various owners, the community got some advice in relation to changing unit entitlement. Because that was the method that was reported as being an unfair mechanism for raising of funds for the works. When people sometimes have certain thought processes, and then I was just trying to say, "Well, yes, we need to get advice. I'm not an expert in this area in terms of changing unit entitlements. It's not very easy to change unit entitlements," they all said, "Oh, but how come? You've got all this experience." And I said, "Yes, I do have a lot of experience but in terms of changing-



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Amanda Farmer: But I'm not a lawyer. [crosstalk 00:03:06] Or a tribunal member.

Reena Van Aalst: Exactly, and it's only ... I mean, I was only involved in one case, and that case basically failed, so.

Amanda Farmer: Yes. They're quite rare.

Reena Van Aalst: Yes, they're quite rare.

So to allay people's concerns and fears, the community arranged for legal advice. Basically, the legal advice said, "Yes, you can't change the unit entitlements." Unit entitlements and registration are always based on the value of the lot at the time. The lawyer also referred to Section 83.2, the Act which talks about contributions being levied by owners corporation in respect of each lot are payable subject to this Section 82 by the owners in shares proportional to the unit entitlements of the perspective lots.

And he referred to a case back in I think ... might have been 8, 9 years ago. Actually I was involved in this case as a strata manager, it's strata plan six and I'm a nine, so a reported case of the Supreme Court of Appeal, where an owner at the time challenged a by-law that had been passed to allow for what we call a differential levy where some owners are levied and others are not for a certain benefit that only one set of owners would receive and others would not receive. In this case, it was a marketing fund and the retail lots would benefit and therefore the retail lots were the only people to pay it, and then the commercial lots that had no benefit from a marketing fund were excluded from this by-law.

So, I just wanted to ask you, Amanda, in terms of your experience in unit entitlements and differential levies, what do you think about works that have to be done sometimes? Work that you've done is one thing but upgrade ... when people want [crosstalk 00:04:37] to enhance and upgrade it and improve their buildings so that their asset is maintained and they get a good return on their investments when they want to sell and ... especially if the building is in prestigious areas where everything around them is going up and the air is being gentrified but some buildings just, perhaps, don't want to move in that direction.

Amanda Farmer: Yes.

Reena Van Aalst: What's your experience with other schemes perhaps that you've dealt with that had similar problems?

Amanda Farmer: Yes. Very good timing to be talking about this because I actually gave an advice just a couple of months ago on exactly this point. It sounds ... I know it's not the same building, but it sounds very similar. This building approached me and about half of the lots in the building want to add balconies. They don't have any balconies, they want to actually add balconies, and they're conscious that that's a benefit to only half of them. It's quite an expensive project-

Reena Van Aalst: Yes.

Amanda Farmer: ... and they asked me before they really took any first steps, "How do we arrange for just the owners getting the benefit to pay for these works, and how do we arrange for their contribution going forward to be higher, because there are lots that are worth more that have a greater benefit." And exactly the conclusion that I think, Reena, you already knew instinctively and it sounds like you've now got legal advice to this point. There is no way to do that by changing unit entitlements, so I agree with the advice you have received. The fact that some lots have been upgraded and others haven't is not a reason under our legislation in New South Wales for unit entitlements to change, so that's going to be a waste of time going down that path.

I believe the way to do it, and I think it's the only way, is to have a common property rights by-law, what we used to call exclusive use or special privilege, that applies to those lots who are getting the upgrade. By way of by-law, you're setting out what it is these lots are entitled to do, and they are then charged a fee under the by-law for having that benefit, that right, to have that balcony in place, and the building that I've been working with, we're actually putting terms into the by-law, which are along the lines that the owners corporation is responsible for overseeing the work, for choosing the contractors, for making sure it has the benefit of all insurances, but the lot owners are going to pay for that work because they're the ones who are getting the benefit. And then

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they're going to continue to pay a fee, under the by-law, to the owners corporation, forever more until the by-law is amended or rescinded so that they are contributing on account of the benefit that they're gaining.

Amanda Farmer: I really think that's the only way to do it. Of course, the obvious problem being that the lot owners must consent to that by-law.

Reena Van Aalst: Yes. And all the owners, especially if, in your example, that you're talking about the balconies, then you'd have to have everyone on that side of the building agreeing to do that-

Amanda Farmer: Yes.

Reena Van Aalst: ... and is that being able to be achieved?

Amanda Farmer: Yes, it has. We've actually done a Phase 1 and we're moving into Phase 2, so we had one by-law that allowed them to go ahead with the investigative work, and then the Phase 2 now, the construction phase, which is an entirely separate by-law and deals in a bit more detail with those costs. But that was the first thing to cover off. That all of those owners who are going to be contributing under the by-law, who are getting the benefit, must provide written consent to that by-law being made. [crosstalk 00:07:43]

Now if you're in a building where the owner's saying, "Oh, no, well, I want my balcony but I don't want to pay for it, I don't want to pay any more and don't want to contribute any extra costs for that benefit," then they're not going to consent and you're not going to be able to have that by-law in place.

Reena Van Aalst: So, in your example, Amanda, with the ongoing fee that's going to be paid to the owners corporation as a result of this ... how is that calculated exactly?

Amanda Farmer: We haven't got to that stage yet, but the advice I've given is that they will need a valuer to come in and work out what the added value is to each of the lots, and-

Reena Van Aalst: Yes.

Amanda Farmer: ... base the fee on that kind of calculation. So it's not a calculation that I suggest the committee or the strata manager does or even a lawyer, it needs to be a valuer who's working out, *"Okay, because you've now got balconies, and again, prestigious area, nice views, that's going to be quite a benefit, and work out-"*

Reena Van Aalst: Yes. So this is ... your argument's about balconies versus no balconies-

Amanda Farmer: Yes.

Reena Van Aalst: ... and the changing value of that.

Amanda Farmer: That's it, yes. And a very important point that you make therein with reference to Section was it 83?

Reena Van Aalst: 83.2.

Amanda Farmer: 83.2. Our legislation does say that we cannot charge levies or impose levies, otherwise than in accordance with unit entitlements. We can't actually levy owners whom we think, over time, have developed better lots or have done work to make their lots better or more valuable. We can't charge them extra through levies. It can only be done through by-laws, in my view, and with their consent.

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Reena Van Aalst: But if for example, Amanda, let's say, works have been done in your particular ... rather than having a fee, let's say, the work has been completed and then everyone agrees that the valuer comes in, because normally the UEs are based on market value, and the valuer comes in after the balconies have been put in, values each lot, recalculates the UE, and says, "This would be the new UE had this building been a new construction," and if that went to a general meeting and that was unanimous by all the owners, could you then still go to NCAT, or you still can't change it regardless?

Amanda Farmer: No, even with unanimous consent, that's not a basis for revising your schedule of unit entitlements. You do need an order, but you're making a very good point. It's essentially the same exercise, but you're incorporating the additional levy, calling it a fee, into the terms of the by-law. So you're getting the same result that these owners with the better units with the benefit are paying more each quarter. But they're doing so under a by-law, not under a levy, and not because of their unit entitlement but because of the terms of the by-law. And by the way, you don't call it a levy, be very careful about that, you call it a fee or an additional expense and it should be separately itemised on the levy notice, so it's separate from the levy. You've got your quarterly levy is one-line item, and your fee under by-law 32 is another line.

Reena Van Aalst: Yes, but now it also would be shown separately in the accounts as well.

Amanda Farmer: Yes. I think that's how you do it. I'm very interested to continue working with this building I'm talking about to see that play out, but you've got to have everybody on board.

Reena Van Aalst: Yes.

Amanda Farmer: Unfortunately, perhaps, which means it's not ... doesn't work for every building.

Reena Van Aalst: And just to ask you also, Amanda, the owners corporation is still the entity that actually is engaging the contractors. 'Cause, therefore, if those owners doesn't collectively come together, it's going to be hard for them to go to a contractor and say, "So if the owners corporation does it," ...

Amanda Farmer: Yes. That's been my advice, that all contracts are with the owners corporation so it has that level of control and oversight for the works, and it has the right to enforce contracts against contractors if there is a breach or there needs to be a claim on insurances or things like that. It gets a little bit messy if we let the owners go off and do their own thing.

Reena Van Aalst: Amanda, what happens if someone doesn't pay? Say you've got 10 owners on one side of the building, they all agree to put the balconies in, but if something happens in their financial situation-

Amanda Farmer: Yes.

Reena Van Aalst: ... and they're unable to pay. How does the owners corporation enforce that person's contribution?

Amanda Farmer: I suggest that there's actually a requirement under the by-law and this is why, for this particular building we've done as a Phase 1, Phase 2, that there is payment upfront. There is at least a proportion of the cost of the construction, whether that's 50% or could be 80%, there is payment upfront before anything even happens.

Oh, okay.

Amanda Farmer: So those owners, under the by-law, must pay upfront to the owners corporation what the estimated cost is going to be. Of course, if they don't pay, they breach the by-law and there's an enforcement process, the usual enforcement process, before the tribunal for by-law breaches.

Reena Van Aalst: Oh, okay. That's interesting.

Amanda Farmer: As you would enforce any other by-law. The owners have agreed to this by-law, they provided their written

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consent, they get the first invoice, which is 20% deposit towards stage 1 of the construction works. They don't pay it, you're off to the tribunal.

Reena Van Aalst: Yes. Okay, it's very interesting.

Amanda Farmer: All I can hear while this is going, *"that sounds great, Amanda, in theory. Good luck."* It's the usual tribunal headaches, yes I agree, but again, this is the kind of project that is only going to work in a building where everybody's on board and they realise the benefit they're getting, they've really thought about this, it's been years in the making, it's going to add so much value to their lots, to their building as a whole, and they committed to the process.

Reena Van Aalst: Yes. That's fantastic, actually.

Amanda Farmer: It's a few ideas, and I think we're going to see a lot more of that as people get smarter about what they can do with their strata units, value's going up, beautiful buildings on our foreshore, and I think we're going to see lots more of that. Really exciting to be a-

Reena Van Aalst: Yes, yes. Especially with the apartments near the water and facing the water differently. Yes, I agree with that. Yes, keep me posted, Amanda, I'll be interested to see how all that goes.

Amanda Farmer: Yes, me too.

Okay. My challenge for this week ... this is actually a listener question, and Bev has dropped me an email and told me about her 16-lot building, and she said that each of the lots have security screen doors and they also have fire doors. So obviously their front door is a fire door, then they have a security screen door, and so that they can get some airflow, they often prop their fire doors open. And she's recently been told by her strata manager that it's not legal to prop open a fire door at any time, and she has asked us, Reena, is this true?

Have you got any experience with this area?

Reena Van Aalst: Yes, I have lots of experience in this area, actually.

Amanda Farmer: Great.

Reena Van Aalst: The answer is that they can't leave a fire door open because the whole point of a fire door is to actually stop a fire spreading into the common areas, and the whole point is to contain the fire within the apartment. And so, in another scheme that I used to manage people wanted to do that and prop their fire doors open, and then I think we had to actually pass a by-law or something to stop people doing that because of the fact that it actually was against the EPA and fire safety regulations and although people wanted ventilation, and I can understand that, 'cause if you've got a balcony and you open your front door then you get that cross-ventilation but unfortunately we were told by the fire safety company that the fire door is designed to keep the fire contained within the apartment. That's why it has so many hours before a fire will go through it or whatever-

Amanda Farmer: Yes.

Reena Van Aalst: And it also has to do with smoke, that's why you got to have ... the gap has to be correct so the smoke doesn't leave the apartments. So all those safety measures are then nullified if you leave the door open.

Amanda Farmer: Yes, indeed. That makes sense. I do find that I get a few questions about fire and fire safety and differing points of view from fire safety professionals if you like. It is an area where, unfortunately, there seems to be a lot of grey. But in the case of fire doors, open closed, the answer seems to be, *"Closed"*.



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Reena Van Aalst: Yes. Also, if you look at some of those safety audits that are done in terms of common property, a lot of the times people have propped open, say, the fire stairs, Amanda, they put something to keep it open, and again, that comes back that that fire door has to be closed in the fire stairs. So, again, the same sort of thing applies. It's all about containing fire within certain parts of the building and stopping it from spreading to other parts of the building.

Amanda Farmer: Yes, very important.

Reena Van Aalst: And also, Amanda, I'm not sure if you would nullify ... your insurance policy ... I don't know if there was a claim and it was discovered that the door had been left open. Would the insurer say, *"Well, that's ... we're going only pay, not the whole amount,"* but it could expose the owners corporation to a problem in the future if there was to be a fire and it was not contained because the door was open, and-

Amanda Farmer: Especially if you had on record a report from a couple of months previously, that said, *"Your fire doors are propped open and they shouldn't be."*

Reena Van Aalst: Exactly.

Amanda Farmer: Yes, yes. Alright. Let's jump in to wins for this week. Reena, what has been your win?

Reena Van Aalst: This is actually an interesting one, Amanda, because I was chairing a meeting about a month ago and I had some difficult people that were basically talking of other people or taking aim at some of the committee members, and so then, when I tried to stop the person doing that and I stopped ... sometimes, you got to keep the meeting in order, he said to me, *"You can't tell me to stop talking."* And someone behind him said, *"Yes, she can, she's the chairperson, that's the role of the chairperson,"* and I thought it was quite interesting because I think sometimes people don't understand what the role of the chairperson is.

Sometimes you're trying to stop people from talking, but there's procedural matters that have to be followed and ... if people could talk endlessly, then you'd be there all night. There's got to be some form of control in terms of letting people speak for and against a motion and having some control.

The fact that an owner who actually was a member of parliament in this case, but it was just interesting that when it comes from the floor and from others owners, the chairperson has a right to say, *"Can I stop you there,"* or *"You've had ... now we need to move on to the next,"* and someone else wants to raise a point, can we just make sure that any point that's raised has not been raised before so we can keep the meeting to a schedule and trying to get all the motions discussed, and give everyone a fair go because sometimes in meetings, Amanda, which I'm sure you've experienced, there are some people that keep talking, that doesn't allow other people to have a say.

The loudest people sometimes dominate, and the people that do want to say something perhaps don't get the chance, because of these people sometimes just hijack the meetings. So it was actually quite interesting, I thought, for people to understand, what is the role of the chairperson? And the chairperson has quite a few responsibilities that are noted as well in terms of ruling motions out of order, etc. I think that sometimes it's important for people to understand that it's not really a person trying not to disenfranchise people from speaking, but to take some control of the meeting and ensure that the agenda is followed and that people stick to the items that are on the agenda. Because again, sometimes, people digress from what's actually being discussed.

Amanda Farmer: Yes. Well, good on you and good on that other member of the owners corporation for pointing out that as a chairperson you are indeed entitled to call the meeting to order. Sometimes chairs who are not as experienced perhaps as strata managers or who haven't been in their chairperson role for very long, they're not quite sure of the words to use, the terminology, and back in episode 89 of the podcast, I think that's a solo episode from me, I outlined some of the steps that you can take as chair, how to effectively chair a meeting, and some of the words you can use and guidelines that you might want to put in place before the meeting even starts, to say, *"This is how we're going to have a smooth, efficient, productive meeting this evening."* So, if you're a chair or a strata manager looking to improve your skills as a chair, perhaps pop back to that episode number 89.

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Reena Van Aalst: That's great, Amanda.

Amanda Farmer: Well, the win that I would like to talk about this week ... I'm putting this up to a win, it's not a matter that's resolved or completed yet, but when the query came through to me from a strata manager I was just so impressed with this building and this question, that I popped it on our list to talk about as a win.

I have been asked by a strata manager whether or not a strata building, an owners corporation, can donate to charity.

Reena Van Aalst: Oh, yes. That's an interesting question.

Amanda Farmer: I nearly fell off my chair when I got that question. I thought, "*Wow, what is this?*" [crosstalk 00:19:35]

Reena Van Aalst: I never heard of a building wanting to donate to charity.

Amanda Farmer: Yes! Where is this building that wants to donate to charity? And I got a little bit more information. I'm not going to, of course, disclose the identity of the building, but it is a building that is connected to health care and there, because of that connection, there is a desire, a need, to send some money across out to what is essentially a charity.

But very good question from the strata manager. Can we do this? How do we do this? And it's got me looking at Section 73 of our Act, which sets out what money is to be paid into the administrative fund and what money can be paid out of the administrative fund.

Our legislation is fairly strict about that. Perhaps stricter, I think, when it comes to the capital works fund than it is the administrative fund, hence why I'm looking at Section 73 and saying, "*Can we pay out money from the admin fund to a charity legally under this Section?*" And my thoughts on this question are this. I think they would need a by-law empowering them to do this, and if they had that by-law in place, and of course, passed by special resolution, then they'd be able to send this money across to charity and noting of course that's in the budget, that it's been raised, or perhaps it's a surplus. If they had a by-law allowing them to do it, then I think they could do it. What do you think, Reena?

Reena Van Aalst: Yes, I was thinking about your inquiry in terms of what the Act says, and our saying has always been in the owners corporation that you only spend money on common property, 'cause that was in a sense what it was responsible to do. But when you look at the wording, I can't really see anything that would preclude a by-law because it doesn't say ... there's no clauses there that say what you cannot do, really-

Amanda Farmer: Yes.

Reena Van Aalst: You're saying a by-law-

Amanda Farmer: What I'm thinking in Section 73 sub-section 4, an owners corporation can pay from administrative fund payments in connection with exercising its functions under the by-laws. Now, a real question is going to be whether an owners corporation can legally have a by-law which grants it the function of donating to charity because I acknowledge that that is not a function that is connected to-

Reena Van Aalst: Yes. The owners corporation.

Amanda Farmer: ... connected, yes, to its management and administration of the common property. [crosstalk 00:22:07] So, good point there. We would have to look closely at the reason for the donation. I do know that this particular building, as I said, is connected to the health care service, that is then in turn connected to the charity, so how that may impact the common property is going to be a crucial element. But I definitely think by-laws is the avenue to be investigated if you're wanting to do something like this, and really looking closely at the purpose of the donation. I think it's just wonderful. We see so much dispute, conflict, at least

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we do, Reena, I know that we've probably seen the 2% of the worst, but it's wonderful to see a building trying to find ways to be philanthropic.

Reena Van Aalst: Yes, it's very unusual actually, to see that because most people don't want to spend any money even on common property that's supposed to repair and maintain, let alone-

Amanda Farmer: Exactly. [crosstalk 00:23:03] Give it away.

Reena Van Aalst: But I've had the experience where sometimes buildings that say, there's a tree on an adjoining property, not on their property, and they want to prune that tree, and the adjoining owner consents on the basis that they pay for it, and of course when people have come to me and said to me, "*Reena, can we do that through the owners corporation?*" I say no because it's not on our land, it's not actually a function of the owners corporation in terms of this management of the scheme, and normally I think I would just advise those owners just to collectively come together and pay for it. The ones ... 'cause usually, only one side of the building would benefit from views sometimes, and there are some owners at the back that don't receive that benefit. So, yes, in this instance, they've just collectively put money together and they just paid for the adjoining tree to be trimmed.

Amanda Farmer: That's interesting. I wonder if you could stretch the situation to say that the tree, because of its impact on the common property, so it's dropping branches or leaves or debris or whatever it is, that it's important that that tree be removed to alleviate the impact on the common property, and find your common property connection there.

Reena Van Aalst: It was more to restore your views, Amanda.

Amanda Farmer: It was viewed, yes. [crosstalk 00:24:17] Well, let's say it's about the enjoyment of common property in my lot, isn't it? [crosstalk 00:24:19]

Reena Van Aalst: Oh, the enjoyment [crosstalk 00:24:21]

Amanda Farmer: I'm such a liar.

Reena Van Aalst: I agree with that.

Amanda Farmer: Listen to me. [crosstalk 00:24:23]

Reena Van Aalst: Sometimes those enjoyments cause us grief because of their owners are not happy with the fact that these owners are going to get a view, why should I pay for that?

Amanda Farmer: Oh, and here we are. What a wonderful ... we have come full circle. Back to talking about benefits and levies and who should- [crosstalk 00:24:39] Who should pay more. Excellent.

Well, fabulous episode. I think we've tried to jam in our 4 to 6 weeks of not having a chat to ... into this one episode, so lots of good, juicy stuff there. Don't forget that you can download the transcript of our episodes over at your strataproperty.com.au/podcast.

Amanda Farmer: Anything to add before we wrap up, Reena?

Reena Van Aalst: Nothing at all, Amanda. Just trying to get to the end of the year. I'm looking forward to ... I know I've already had a break, but ... it's just [crosstalk 00:25:12]

Amanda Farmer: Feels like a lifetime ago.



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Reena Van Aalst: Exactly. And I think with summer being here, it'll be wonderful just to have that time over Christmas and recharge the batteries.

Amanda Farmer: Yes, sounds good. Well, I shall catch you next time, Reena.

Reena Van Aalst: Okay, Amanda. Bye.

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 comment section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?

