

**Publication Date: 20 February 2019**  
**YSP Podcast Transcript: Episode 150. How to increase the value of your property by extending into the common property**

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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](http://www.yourstrataproperty.com.au).

**Amanda Farmer:** Hello and welcome. I'm Amanda Farmer and this is Your Strata Property. Hi everyone, this week's something a little bit different. I am bringing to you an oldie – an oldie but a goodie, a past episode. We are going all the way back to Episode number 016.

One of our earliest episodes close to 3 years ago now but by far our most popular episode. Episode 016 is all about how to increase the value of your unit, of your lot, your apartment by extending into the common property.

Now, this episode is downloaded so many times by owners, residents, committee members interested in how they can use the adjacent common property whether that is a ceiling cavity, a courtyard, a terrace area to improve the amenity, the use and ultimately the value of there property.

We get lots of emails about this process. How is it done? What are the details we get questions inside the Your Strata Property members' only forum. So I thought being one of our most popular episodes a very hot topic I will bring it back for you. In this episode, I'm chatting to Savina Young and we are talking at a time when our 2015 legislation in New South Wales have not yet come in. So you'll hear us mention the 2015 Act and we say that it's about to come in and we talked about sections of the legislation. The section number that we refer to is still the correct section number, Section 143. But you'll also hear us talk about the old 1996 Act which had Section 52 so when you hear references to Section 52 just bear in mind that is now Section 143 in our 2015 Act.

But all of the content very much relevant maybe even more so 3 years down the track as we are looking at creative ways we can use our properties.

Now, bear in mind, this was one of my earliest of episodes. You might notice a few changes in the podcasting skill level shall we say. Podcasting is definitely a learned skill like a lot of things worth doing in life if you practice, if you do it again and again you get better. So going back and having a listen to an early episode is interesting shall we say that. So apologies if it's a little bit different to what you used to but definitely a topic worth revisiting.

So, enjoy this flashback and while I'm here, I'm going to share with you another hot tip not so much about extending into the common property but you've heard me mention just there the Your Strata Property membership and the Q&A forum. If you are not on the whitelist for membership, now is the really a good time to get on that whitelist.

Membership is currently closed but those who are on that whitelist are going to be getting a little something special soon. So if you're not on the whitelist, head over to [www.yourstrataproperty.com.au/join](http://www.yourstrataproperty.com.au/join) that's where you join and you can also check out on the website what membership is all about and the inside suggestion for me is check that out sooner rather than later. I shall leave it at that.

Okay, enjoy way back to Episode 016 when I was just a wee podcasting newbie chatting to Savina about how to increase the value of your unit by extending into the common property. Catch you next time.

Today, I'm joined by Savina Yang. Hi Savina.

**Savina Yang:** Hi. Hi Amanda.

**Amanda Farmer:** How are you doing?

Thanks. Good. Thanks. Hi everyone listening to the podcast.



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**Amanda Farmer:** Savina is one of the very accomplished young lawyers whose part of my team at Lawyers Chambers and this is the second time that Savina has been on the show. She first joined us for Episode 008 where we talked about the basics of by-laws including some options for enforcement.

And today, Savina's here to chat with me about something a little bit different but it also involves by-laws. We are talking about how to increase the value of your strata unit by extending into common property. So, the kinds of things that we are seeing are renovations where people living into maybe the roof space that's above the unit. Now that's common property and they are wanting to extend up there and maybe create an attic space or some storage or if it's big enough and the council allows it, they might even create some extra living space.

People who extend out on to the common property landing or the stairwell if you like in old fashioned buildings there is a bit of space there that they can extend their front door out even if it's just 3 square meters or something like that. People are catching on hey that's usable space. It's usable for me no one else is using it and there's some value there if I'm able to re-jig a door and some walls and have that space as part of my lot.

So, people are getting increasingly savvy about this and they are coming to us and wanting to know the options for how they can do this legally. And how they get the owners corporations consent to make it happen.

Now, Savina in particular your becoming fast becoming an expert on this. You are doing a lot of them.

**Savina Young:** So, people can usually be put off by thinking it's a very complex process. But it's actually not that complicated especially if you have a cooperative owners corporation and if the deal is structured properly.

It's actually a win win situation because where you as a lot owner will gain extra space, increase the value of your lot and the owners corporation will be able to use that many [inaudible] consideration paid by you to fund upcoming projects. And that can benefit everyone in the building.

I remember there was this case that we did a few years back where the lot owner wants to buy a little area of the common property from the owners corporation for the purpose of turning that little area into a nursery as she was expecting.

And the owners corporation was very happy to sell that little piece of area to her because first of all, nobody else in the building had access to that area.

And second of all, the owners corporation wanted that money to do some work in order to comply with a fire order issued by the local council. So, it's a win win situation.

**Amanda Farmer:** Yes, that's a really good example particularly where the owners corporation might have oppressing item like a fire order or some repair works and rectification work to do. And they are pretty cain't to get some money in the bank. And you want to as a lot owner increase the value of your lot and they can be a meeting of the minds there.

So, let's talk about the methods by which this can be achieved and we are going to talk about 2 methods today.

The first is by way of by-law and exclusive use by-law that gives you the right to use part of the common property and the second method that we are going to talk about is by way of a subdivision of the common property. Where you actually are purchasing part of the common property and it becomes part of your lot.

Okay. So, Savina tell us about the option 1: the option of exclusive use by-law.

**Savina Yang:** Yes. So, option 1 by-law is actually a more cost saving and less time consuming option.

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Basically, it just means you need a by-law to be specially resolved under Section 52 of the Strata Schemes Management Act. And this type of by-law confers on you as a lot owner a right of exclusive use and enjoyment of the whole or any specified part of the common property.

Now, it's important to remember that in order to make this by-laws, Section 52 specifically says that: "The owners corporation needs written consent of the owner or owners of the lot a lot's concern." Now, this actually create a lot of difference in interpretation. A lot of people don't really understand what that means and whose consent does the owners corporation needs.

In 2002, there was a case named *Young v The Owners SP 3529* where Justice Santow held that means the written consent of the owners of lots which would be deprived of use of the common property of the by-law where passed.

So, what he is saying is say you have a garden and here's a lot owner has exclusive use to that particular garden. And your neighbours will be deprive and based on Justice Santow it means you need to get a written consent of your neighbours as they will be deprived of that exclusive use of the garden.

But that was all changed in a 2012 case called *James v The Owners – Strata Plan No. 11478 (#4)* where the New South Wales Supreme Court held that the only reason consent you need is actually you know, the consent from you as the lot owner who is getting the exclusive use.

The new Strata Schemes Management Act 2015 that is actually due to coming at the end of this year is going to make this very clear.

The particular section that I'm referring to is section one 143 actually specifically states that: "*The only consent you need is from the owner of the lot who is getting the benefit of exclusive use.*"

**Amanda Farmer:** I'm really glad that they are making that clarification because I know there are lawyers who are still little bit uncertain about this issue of consent under Section 52 of the Strata Schemes Management Act in New South Wales. And let me just as a side there, that we are talking about New South Wales legislation here just to be clear on that for our listeners who aren't in New South Wales. We do know that you are out there.

So, the new Section 143 is coming in with the new act at the end of this year. Thankfully it's going to be clear about fact that the consent is for the owner of the lot who is getting the benefit as Savina said. And we won't have any more uncertainty around that issue which is great.

**Savina Yang:** Yes, exactly. Because a lot of the times you know, as lawyers want our clients to act conservatively and the advice might be you need a unanimous resolution. And that not might be practically a lot of circumstances.

**Amanda Farmer:** By which you mean the consent of everybody which is effectively a unanimous resolution...

**Savina Yang:** Yes.

**Amanda Farmer:** Even though the section only says a special resolution. So, yes the new law is making that absolutely clear we are just talking about a special resolution and the consent of yourself as the owner of the lot who is getting the benefit.

**Savina Yang:** Yes. Now, also in relation to a section 52 by-law you need to be aware that the owners corporation under the Strata Schemes Management Act both existing and new is allowed to set out specific conditions in the by-law and that means the owners corporation can ask you to pay for the privilege in a form of license fee and that could be paid as a once all fee or by installments.

This obligation should be set out in the by-law very clearly. For example, it needs to say when you are paying that license fee and

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how much that license fee is and who you are going to pay it to. Yes.

**Amanda Farmer:** Yes. I have seen problems with exclusive use by-laws where the value of the exclusive use is quite high. So it's something like extending into a roof space or out into a landing. And there has been a lot of confusion about how much the fee is for that benefit and when it should be paid and whether it's a recurring fee that's an annual fee that's to be paid by the owner of the lot whoever that is from time to time each year.

And the confusion is the reason because the by-law just isn't clear. So, that's something really important it's important to get this by-laws professionally drafted...

**Savina Yang:** Yes.

**Amanda Farmer:** So that lawyers who are used to doing these things can cover off those issues and prevent dispute down the track.

**Savina Yang:** Exactly. And another feature of this by-law is that it actually runs with the title. It means, if you are selling the property, this by-law also binds the purchaser of your unit.

**Amanda Farmer:** Yes. Good point.

**Savina Yang:** So, you know, unless you as the lot owner gives consent for the by-law to be amended or revoked that by-law runs with the title. So, it's very important that the by-law should set out all this conditions very very clearly.

**Amanda Farmer:** Just on that that point about needing your consent to repeal the by-law, you've probably planning to talk about this Savina. But it's important to note that the by-law can also be altered or repealed by an order from the strata schemes adjudicator.

So, if for example, the owners corporation says to you some use down the track. We don't like this by-law anymore we think it's unfair and unreasonable that you have this benefit we want you to consent to the by-law being repealed or being amended and you say no, get lost. Why should I?

The owners corporation can apply to the strata schemes adjudicator for an order and that's under Section 158 of the current act and if the adjudicator finds that you have withheld your consent unreasonably then the adjudicator can make an order that the by-law be repealed or amended. So, that's something to be aware of particularly when your comparing the two methods of using an area of common property, the by-law method, whilst it might be quicker, cheaper, more straightforward. It is certainly more uncertain because the owners corporation does have the power to take that right away from you or attempt to take that right away from you. And the adjudicator has the power to order that it be taken away from you. So, it's a little bit precarious I think.

**Savina Yang:** Yes, definitely. Now, the second method that I will talk about is as Amanda mentioned, the subdivision of common property.

**Amanda Farmer:** Yes.

**Savina Yang:** So, in effect, this method means that part of the common property becomes part of your lot. So, in this transaction what you need to do is you need to register a strata plan subdivision. Once you've registered that, the subdivided property ceases to become common property and becomes a new lot.

Now, at the same of lodging the strata plan subdivision you also need to lodge a transfer form. So, what that does is it transfers the owners corporation's interest in that new lot to you as the lot. Now...

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**Amanda Farmer:** Can I just say there Savina when you are talking about lodging, you are talking about lodging with the Department of Lands or as we call it in New South Wales Land and Property Information or the LPI.

**Savina Yang:** That's right. Now, this process is more costly and lengthy than the by-law path that we just talked about. Because first of all, you need to have a contract for sale prepared and you enter into that contract with the owners corporation. The proposed subdivision needs to be specially resolved by the owners corporation and this is the same approval threshold as the Section 52 by-law that we just mentioned. And also you need to have a proper valuation done so that you know what the right to purchase price or sale price is to be put on the contract and you need to pay. The purchaser needs to pay stamp duty on the contracts. And you also need the services of surveyor because the surveyor needs to draft the plans and draw up a new schedule of unit entitlement and also depending on the size of the common property that you are acquiring. You might also need to get council's approval.

So, those are the type of things you need to keep in mind when you are weighing up the pros and cons of both methods.

**Amanda Farmer:** The method of actually purchasing a subdivided part of the common property is certainly more involved and more costly.

You, as Savina pointed out, you've got additional fees with valuers, surveyors, council. The legal fees are gonna be higher. Your strata manager is probably going to charge the owners corporation additional fees for dealing with the matter and it can take some time to get everything ready. I know in our experience Savina we had some of these that drag out for months and months.

**Savina Yang:** Yes.

**Amanda Farmer:** I hate to say it some even years but those longer ones are generally where an owners corporation is carving out part of the common property and selling it to a neighbour or some of the external entity that for whatever reason those transaction seemed to be a little bit slower.

But having said that, there is certainly a benefit I think in purchasing a subdivided part of the common property rather than having an exclusive use by-law and that is as Savina pointed out, that additional part of the property is then now on your title and compare that to a by-law where the by-law is simply giving you the right to use part of the common property.

You don't actually own that part of the common property. That's the key difference here. It's a more valuable right certainly but it's probably more expensive to gain.

So, the factors I suppose, to weigh up and something else to bear in mind when we see protracted negotiations over this issue. The issue of price so the owners corporation is going to have an idea in its head of how much it thinks you should pay for that roof space or even floor space.

I have some owners approach me in buildings where they are able to conduct renovations that give them an area on the floor space which is pretty cool. The owners corporation will have an idea of what that property is worth to them. And of course, you as a lot owner will have an idea of what it's worth and we sometimes see situations where we have the battle of the valuers. The owner cooperation has their valuer and you have yours. And each have very different ideas so people be prepared to enter into what can be some sticky negotiations.

But if you are committed to the cause and you are committed to increasing the value and even the amenity of your lot for the long term then I definitely think that purchasing the common property through a subdivision process is the way to go.

**Savina Yang:** Yes. I agree.

**Amanda Farmer:** Okay. Anything you want to add there Savina or do you think we are covered.

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**Savina Yang:** Just one more thing, I know earlier I said a lot of people can be put off by thinking it's a complex process but we do encounter some people who think it's a very simple transaction. Think it's going to be a no more conveyancing matter and they enter into the transaction without knowing how long for example, a subdivision will take, how much will it would cost, what sort of professionals they need to engage.

So it's very important that before you enter into any transaction get proper advice from your lawyer, get proper advice from your surveyor. Know what you're getting yourself into so that you avoid any unnecessary expenses later down the track. So, yes.

**Amanda Farmer:** I think it's a good advice to have a chat to your fellow owners about it. If you are on a committee, have a chat to your fellow committee members or find out who the committee members are and approach them and say hey this is something I like to do what do you think? And just get the general lay of the land.

It might be the person who owned the unit before you had the same idea and for whatever reason it didn't work out. There might be some history there that you need to be aware of or you might be very well received and you have a chairperson or a secretary who says fabulous lovely idea. We actually need an extra twenty grand at the moment because we've just been slapped with the fire order so great timing let's do it and let's do it quickly. So, I think when we see this transaction run most smoothly is where you do have that cooperation from the owners corporation. And they feel like they are getting a valuable benefit as well as you.

**Savina Yang:** Yes definitely.

**Amanda Farmer:** Okay. Wonderful! Well, thanks for joining me again Savina.

**Savina Yang:** It is my pleasure. Thank you so much for having me. I can't wait to do this again.

**Amanda Farmer:** I know. I can't hold you back. We'll let someone else have the turn.

**Savina Yang:** Okay.

**Amanda Farmer:** And thank you very much to our listeners. If you have questions about this process of extending into the common property to increase the value of the amenity of your lot then please feel free to shoot them through to us. Place a comment in the comment section and either Savina or I or both of us will answer it for you and for the benefit of the listeners who may well have the same question. Chat to you next time.

**Savina Yang:** Bye guys.

**Outro:** Thank you for listening to Your Strata Property. The podcast which consistently delivers to property owners' reliable and accurate information about the strata property. You can access all the information below this episode by the show notes at [www.yourstrataproperty.com.au](http://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?