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YSP Podcast Transcript: Episode 016. How to increase your lot's value via extensions (into common property)

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer and this is Your Strata Property. Today I'm joined by Savina Yang. Hi Savina.

Savina Yang: Hi! Hi Amanda.

Amanda Farmer: How are you doing?

Savina Yang: Good thanks. Hi everyone listening to the podcast.

Amanda Farmer: Savina is one of the very accomplished young lawyers who is 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 8 where we talked about the basics of by-laws including some options for enforcement, and today Savina is 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 moving into, maybe the roof space that's above their 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 onto the common property landing or the stairwell, if you like, in old fashioned buildings, there's a bit of space there that they can extend their front door out, even if it's just three square meters or something like that, people are catching onto "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're coming to us and wanting to know the options for how they can do this legally and how they get the Owners Corporation's consent to make it happen.

Now, Savina, in particular, you're fast becoming an expert on these, you're 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 cooperation will be able to use that money or consideration paid by you to fund upcoming projects and that can benefit everyone in the building.

I remember there was a case that we did a few years back where the lot owner wanted 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 works 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 a pressing item, like a fire order or some repair works and rectification work to do, and they're pretty keen to get some money in the bank and you want to, as a lot owner, increase the value of your lot, and there can be a meeting of the minds there.

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

The first is by way of by-law, an exclusive use by-law, that gives you the right to use part of the common property, and the second method that we're going to talk about is by way of subdivision of the common property, where you're actually purchasing part of the

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common property and it becomes part of your lot.

Okay so Savina, tell us about option one, the option of an exclusive use by-law.

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

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-law, section 52 specifically says that "the owners corporation needs written consent of the owner or owners of the lot or lots concerned". Now, this actually creates a lot of difference in interpretation.

Savina Yang: A lot of people don't really understand what that means and whose consent does the Owners Corporation need.

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

So, what he is saying is, say you have a garden and you as a lot owner has exclusive use to that particular garden, then your neighbors will be deprived, and based on Justice Santow, it means you need to get written consent of your neighbors as they would 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 written 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 come in at the end of this year, is going to make this very clear.

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

Amanda Farmer: And I'm really glad that they're making that clarification because I know that there are lawyers who are still a 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 an aside there, say that we are talking about New South Wales legislation here, so just to be clear on that for our listeners who aren't in New South Wales, we do know that you're out there!

So, the new section 143 that's coming in with the new act at the end of this year, thankfully is going to be very 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 time, you know, us lawyers want our clients to act conservatively and the advice might be that you need a unanimous resolution and that not might be practical in 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, yeah 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.

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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 the form of a license fee, and that could be paid as a one-off fee or by installments.

This obligation should be set out in the by-law very clearly. For example, it needs to say when you're paying that license fee and how much that license fee is and who you're going to pay it to.

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 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 has arisen because the by-law just isn't clear. So, that's something that's really important – it's important to get these 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. So, it means that if you're 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 these conditions very, very clearly.

Amanda Farmer: And just on that point about needing your consent to repeal the by-law, you're 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 years 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 you're 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 an 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, 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 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

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property ceases to become common property and becomes a new lot.

Now, at the time of lodging the strata plan of 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 owner.

Amanda Farmer: Can I just say there Savina, when you're talking about lodging, you're talking about lodging with the Department of Lands, or as we call it in New South Wales, the Land and Property Information or 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 especially 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 purchase price or sale price is to be put in the contract, and you need to pay – the purchaser needs to pay stamp duty on the contract – and you also need the services of a surveyor because the surveyor needs to draw up the plans and draw up a new schedule of unit entitlement, and also depending on the size of the common property that you're acquiring, you might also need to get the council's approval.

Savina Yang: 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: So, the method of actually purchasing a subdivided part of the common property is certainly more involved and more costly.

As Savina pointed out, you've got additional fees with valuers, surveyors, council, your legal fees are going to 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've had some of these that drag out for months and months...

Savina Yang: Yes.

Amanda Farmer: I hate to say 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 other external entity, that for whatever reason, those transactions seem to be a little bit slower.

But having said that, there's 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 that additional part of the property is then now in 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 – and 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've had some owners approach me in buildings where they're able to conduct renovations that give them an area in 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 the 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 owners corporation 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

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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've covered it.

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. They think it's going to be a normal conveyancing matter and they enter into the transaction without knowing how long, for example, a subdivision will take, how much it would cost and what sort of professionals they need to engage.

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

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

It might be that 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 secretary who says "fabulous, lovely idea, we actually need an extra \$20K at the moment because we've just been slapped with a fire order, so great timing, let's do it and let's do it quickly". So, I think where we see these transactions 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 was 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 a 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 or 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 our other 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 their strata property. You can access all the information below this episode by 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?

