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YSP Podcast Transcript: Episode 018. How unit entitlements are dealt within subdivisions, and how to deal with illegal encroachments

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Amanda Farmer: Hello and welcome. I'm Amanda Farmer and this is Your Strata Property.

Today, I'm taking the opportunity to answer a question from one of our listeners. Margaret has asked a question arising out of Episode 016 and that was when Savina and I spoke about how you can increase the value and the amenity of your strata lot by extending onto common property.

And we talked about using the mechanisms of an exclusive use by-law or the subdivision and purchase of a part of the common property. And Margaret has asked a couple of really good questions and I think they're worth sharing with you and worth sharing my thoughts on the answers to those.

First of all, Margaret's asked "how does the subdivision affect the lot owner's unit entitlement and their strata levies? Do they become liable for a higher strata levy with the other owners proportionate liability decreasing? And how is the unit entitlement determined?"

Now, that's an excellent question and it deals with a very important part of the process when part of the common property is being subdivided and being taken up by a lot owner, what happens to that lot owner's unit entitlement and everybody else's unit entitlement?

Now, Savina spoke about a strata plan of subdivision being prepared when she talked about this process of purchasing part of the common property from the owners corporation and bringing it within your lot.

And a key step in the process of preparing the strata plan of subdivision is that a new schedule of unit entitlements must also be prepared. How is the new unit entitlement determined? Well, there can be minor adjustments to the unit entitlement. So, for example, the lot that has now taken on part of the common property might have their unit entitlement – or their UE as we call it – they might have been a UE increased and that increase might be added to the total or the aggregate unit entitlement for the building.

So, if we can use the example of a 5-lot building, let's say that each lot has a unit entitlement of 10 that adds up to 50, and one of the lots has just purchased part of the common property using a strata plan of subdivision and a contract for sale.

And the new schedule of unit entitlement that that lot owner is proposing... and it usually is the lot owner who proposes the new schedule, they're the ones who generally are asked to do all the work in preparing the plans and preparing the documents that need to be approved by the owners corporation.

Let's say that that lot owner is proposing that their UE increases from 10 to 13, so that's an increase of 3, and that would mean if everybody else's UE stays the same, the total aggregate UE for the building will be 53 instead of 50.

Now, the result of that is that that lot owner then takes on a higher proportionate share of responsibilities for the building. So, their levies will be higher. On the other hand, they will also have increased voting entitlements on special resolutions which are determined by UE.

And if we keep relying on the example that I've given where everybody else has a UE of 10 and this particular lot has a UE of 13 and our aggregate is 53, then this lot is going to have what equates to about a 25% share of the say in the building and share of



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the levies and everybody else will sit at about 19%.

So that, to answer Margaret's question, is how unit entitlements are dealt with when we have a strata plan of subdivision that is giving one particular lot owner part of the common property, or rather selling part of the common property, to a particular lot owner.

And if you're interested in the relevant law on that in New South Wales, it is Section 11 of the Strata Schemes Free Hold Development Act 1973, and something else important to note there is that the special resolution that is required to approve the subdivision and the transfer of the common property, and Savina talked about that in Episode 016, that special resolution must also approve the new schedule of unit entitlement, so your new schedule needs to form part of the motion that you're putting forward to approve the plan and the transfer.

So, that's something important for lot owners to be aware of when they're going through this process and putting their proposals forward. Have all of your documents in order because you don't want to be in a situation where the motion for the subdivision and the sale is especially resolved, which is great, but you haven't put forward your new schedule of unit entitlements and the legislation is quite specific that that needs to be approved as part of the special resolution.

Alright, Margaret's actually asked another question and she has helpfully given us a scenario to work with and it's a really interesting one and I suspect it is not all that uncommon. So Margaret has asked me to comment on the following true scenario, she says:

An owner has sought approval to extend the wall of their unit into common property. The owners corporation has agreed by a letter sent to the owners corporation by the managing agent, but there's been no by-law and no other instrument used, no money has changed hands – so it really hasn't been formalised in accordance with the law – plans have been approved by council, but council hasn't placed any conditions on their consent, and the extension into common property has been completed and nobody's raised any questions.

Now since then, the property has been sold twice and let's assume that the current owner isn't aware of the history of all of this and Margaret asks the important question "where does this leave them, the lot owner, if someone challenges their lot boundary?"

Okay, now I've said I suspect that this is not all that uncommon, it's certainly something that I have come across in my practice and have been asked to advise on before and even resolve for owners corporations, and I think much depends on the significance of the extension out into the common property or the size of the extension. So, if we're talking something like 2 or 3 square meters, it might not be obvious when somebody is comparing the strata plan to the actual physical walls of the lot, that there has been a change.

If it's something more significant, and we've gathered a few meters by extending out a door or a wall, then this is really something that should be picked up by a solicitor or a conveyancer acting for a purchaser of the strata unit, where they're looking at the boundaries of the lot as shown on the plan and comparing those to the boundaries of the lot when you're physically standing in the lot looking around.

And that can often be quite obvious that there has been a change that's not reflected in the strata plan. But I fully accept that there are conveyancers and perhaps solicitors out there who might not be providing that full level of service to their purchasers and this is definitely something that does slip through the cracks.

So I think, to answer Margaret's question, we need to think about 2 scenarios where this might come up as an issue and I see these two scenarios as follows:

Number 1 – this could be an issue when the current owner of the lot goes to sell the lot and the potential purchaser has a clever lawyer or conveyancer that picks this up. So following the best practice that I've just outlined, actually looking at the plan and looking at the lot or getting your client to look at the lot and see if there's a difference, so that could be one time that this comes to light.

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The 2nd occasion where this might come to light could be where the owners corporation says it wants its common property back. It's become alive to this issue, they say: "Well, there's been no special resolution, there's no by-law permitting you to use part of this common property and it certainly hasn't been subdivided to become part of your lot, so it's ours and we want it back."

So, there are two different situations there where we might start having a bit of dispute about this issue. Now if we're in situation one, that's a fight between the current lot owner and their potential purchaser. The potential purchaser, if they've got their heart set on this property, they might say "well I'm not purchasing it while this issue is outstanding, I want a by-law to be put in place which will regularise this change", it would be a by-law that grants retrospective approval to the owner of the lot to use that part of the common property, and the purchaser would then take the benefit of that by-law, as long as it's registered at the time that they've settled their purchase.

So, that could be a condition of the sale that the purchaser insists upon, requiring the current lot owner to do everything necessary to ensure that the by-law is in place prior to settlement. I suspect in that scenario, what would happen in reality, particularly if we're talking about the property market in Sydney, is that the lot owner would just find someone else to purchase their lot who doesn't have an issue with this.

So, that fight's probably not going to last too long unless that lot owner is desperate to sell and can't find a willing purchaser.

Let's have a look at the second scenario where I think this would come up, and does come up... the owners corporation realises that this has happened and says that it wants its common property back, or it wants to regularise the situation, it wants to formalise and bring the records up to date.

Now what I've seen happen in this situation, and I have facilitated a situation just like this for an owners corporation, the owners corporation talks to the owner, explains what seems to have happened, particularly if it was many years ago, explains to the owner that they don't actually have a legal right to be using that part of the common property and that as far as the strata plan is concerned, their lot is, in fact, smaller than they think it is.

In the case that I was involved in, an agreement was reached that a by-law would be put in place and the present owners would pay a license fee for their use of that part of the common property. It was recognised by the owners that having the by-law in place actually added to the value of the lot because they had clarified something that was otherwise subject to dispute by future purchasers.

And by having the by-law in place, there was an accurate record on the title, on the common property title, and in the owners corporation's books and records that this lot had more space than the others and it was therefore worth spending a bit more money on.

So, the situation that I was involved in was resolved in terms of a by-law. Another option is to put forward the proposal that a subdivision and a sale be agreed, the lot owner then getting the formal and legal benefit of finally having that area of the common property on their title with the strata plan being amended to reflect that and the area legally becoming part of their lot.

So that might be something that the lot owner and the owners corporation can have a meeting of the minds about and, of course, if they can't agree what happens? Well, in my view, the owners corporation would be able to approach the strata schemes adjudicator for an order, they'd probably make that application under Section 158 of the Strata Schemes Management Act, and that would be an application for an order that the lot owner has unreasonably refused to consent to the making of a by-law.

So, they've put forward the proposal, "hey let's make a by-law, let's formalise this, let's give you retrospective approval and maybe you can pay us a license fee." The lot owner said, "no, I'm not going to do it, this happened 20 years ago, it has nothing to do with me." The owners corporation could then argue that that owner is being unreasonable and seek that order under Section 158. It probably could also seek an order that the common property be reinstated; that the wall that has been moved is put back where it belongs, that would be an application seeking an order under the general power of an adjudicator and that's Section 138.

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Now, of course, there are difficulties with going down that path depending on the age of the building, the significance of the encroachment – that's what it is; it's an encroachment onto common property – and how long ago all of this happened. The owners corporation is probably going to have trouble proving what the state of the common property was, prior to the change.

So that's going to be the hardest task for the owners corporation and I have seen those cases fail for that reason: the owners corporation hasn't been able to prove, because the change has been so minor, what the location of the original wall actually was, and even if they could show through surveyors evidence that the wall had been moved, if it is minor, the adjudicator has really broad discretion to say "look, this really isn't that unreasonable" and refuse to make the order.

So, I strongly advise both owners corporations and lot owners who are dealing with these issues, to get advice before proceeding down a litigious path.

Okay. Fabulous questions there from Margaret, I hope that's been helpful Margaret and I hope that's also been helpful for other listeners out there who might find themselves in similar situations. Thanks for listening and I'll catch you next time.

Outro: Thank you for listening to Your Strata Property. The podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode 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?



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