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YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

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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.

Amanda Farmer: Hello and welcome. I'm Amanda Farmer and I have with me today, Reena Van Aalst from Strata Central. How are you doing, Reena?

Reena Van Aalst: Good Amanda, how are you?

Amanda Farmer: I'm doing well. I am busy. We are almost halfway through 2021 if you can believe it. That is our life in strata. Speaking of, hit me with your challenge for this week, Reena.

Reena Van Aalst: Well, as you know Amanda, being an owner in the strata property yourself. Many owners want to undertake renovations at various times. As we all know, the process can be quite arduous in terms of, first of all, the owners having to tell us what they want to do. We then have to advise them in relation to the by-laws and the Act and what approvals are necessary.

So we've had a number of apartments that actually require a CDC under the particular local government Act that they're situated at. And many owners don't seem to understand that it's not... Obviously saying, we want to put them to the expense too, but it's a requirement if they're taking out a wall in some jurisdictions that they have to actually have a CDC, which is the Compliant Development Certificate. And with that process, a lot of documentation is required. Normally, an architect does usually involved and any of the FSS and they need various plans and bits and pieces.

Reena Van Aalst: But what many owners have been asking me to do, they just give me the CDC and say, "Can you sign it and put the seal on?" And I say, "No, I actually made the whole document package that's going to be submitted to council because otherwise, I don't know what you are affixing to that and what I'm actually signing." And many people actually get quite, not irate, but thinking, "I don't know, now I've got to get my architect and put it all together." Some they don't even realise that I need to see the whole document. So even in some cases, I'm having problems trying to convince them that the owner's consent of the land is actually the owners corporation. It's not the particular owner. And this...

So basically, as strata managing agents, we are at times, really the meat in the sandwich. We don't want to make things more difficult for people trying to undertake renovations. And we know there are timelines for people in terms of occupancy, builders, tenants, et cetera. But unfortunately, we're at the mercy of the legislation, both government legislation, strata legislation. And previously, my old company, we actually had a situation where a day was signed by a strata managing agent, and the owner then submitted a totally different document in plans as to what had been approved. So we need to make sure as managing agents that whatever we're signing is actually what's being submitted to council as a total bundle of documents.

Amanda Farmer: Yes. So that is in our Environmental Planning and Assessment Act, that when there is going to be development on land, then the development application has to be signed by the landowner. And as you say, Reena, where common property is affected, the landowner is indeed the owners corporation and they need to know what they are signing. Just having the form is not good enough.

I had an experience just within the last couple of days, actually, where I gave some advice to a building, a blank development application form and asked to sign on a fix the seal to it. And the building sensibly came to me and sought advice. The form is not sufficient to sign, even though the signing of the form itself is just allowing the development application to be submitted. It's not necessarily giving consent to the works themselves. There are a whole lot of other documents that are submitted together with the development application. And unless you have seen those, and are aware of what they are, then you shouldn't be facilitating that lodgement.

Publication Date: 18 May 2021

YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

Reena Van Aalst: Yes. I mean, they are sent, Amanda, but they're sent in dribs and drabs. So sometimes you get a plan, then you get the AFSS, something like that. I actually need the whole document bundle, because that's what you're submitting. And I need to see exactly what you're submitting. I think sometimes even the Architects have a bit of difficulty understanding this whole concept that you can't just give me 2 pages, and then submit something behind that, that I'm not really necessarily aware that that is everything that's being put in.

Because sometimes people can put in other things, and it's happened in the past were an applicant, as I said, previously, had put a submission in for some amendments and included some balcony work. And then, later on, they changed that, when the DA was signed. So what they submitted in terms of those plans was different. But if an agent is just signing the cover page or just the application form, then they really are putting themselves in a bit of a situation where in the future...

I mean, it's very rare that that would happen, but you just don't know. And when you're putting the seal on, all that responsibility is falling on the agents' shoulders.

Amanda Farmer: Good reminders there, for our strata managers and for our committees, who are considering applications for approval of renovation works, where there is council involvement. Thank you for sharing that one, Reena.

My challenge for this week, I have a question from a member inside our online community. And it was an excellent question that I promised to bring over to the podcast and get your thoughts as well, Reena. It's a question about engaging lawyers. Owners corporations engaging lawyers. And I've been asked to share some best practices when it comes to the engagement of lawyers on the part of owners corporations, and the management of the communications that flow between lawyer, strata manager, committee members. And I suggested that I have a chat with you about this, Reena, because I know as a very experienced strata manager, you have dealt with many legal matters in your time. And no doubt have some tips and some traps to share when it comes to working with lawyers.

First up engaging the lawyer, how do we make that process as smooth and as clear as possible? How do we make sure that the lawyer has the right instructions, the scope of work is clear and that everybody is on the same page? This can be complicated, Reena. When we're dealing with committees, everybody has a particular point of view. Do you have a best practice when it comes to the engagement of lawyers on the part of your owners corporations?

Reena Van Aalst: Yes. Well, the first, Amanda, the important thing is to ensure that whichever lawyer is selected, and I'll go into that shortly, is that basically, you have prepared a very adequate brief to the lawyer. Because the problem is that, in our minds as agents and committee members, we all know what's happening and we know the history of the matter, but very rarely is that really articulated in a way that a lawyer who knows nothing about the case can perhaps give a proper cost disclosure. And I'm aware from being married to a lawyer, that one of the complaints that he had about doing work for strata managers, it was that, they would just give you a couple of lines in terms of an email asking for a cost disclosure, giving you just a very vague description of the actual matter and then expecting you to give a cost agreement.

So, and that's, I think where a lot of lawyers, perhaps in a lot of committees have clashed in terms of the expectations and the cost disclosure, not really marrying up. So I think it's important for a strata managing agent, in a sense, to write a brief. And even though it may take some time, and mostly one on the weekend, actually, for a matter that we're dealing with in a strata scheme, which I can talk about it. It's another challenge at another time, that it took me quite some time to articulate the history, to go through what's happened, to give them some documents in terms of by-laws and minutes and et cetera. So at least then when the lawyer is providing a fee proposal or a cost disclosure, they actually have all the information there in order to provide a more accurate cost assessment.

The second thing that I know in terms of selecting a lawyer, is basically making sure that the lawyer fits in, in terms of their... Not just their intellect, obviously, but just even their approach, because some committees like to have someone who's quite aggressive and [kung-ho 00:09:04] and they want someone really to get in there. And then other people, perhaps prefer a more, not a subtle

Publication Date: 18 May 2021

YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

approach, but a different type of personality. In a sense, it's just like any business when you're trying to match a client to your staff, trying to look at the nuances there in terms of, would that committee work well with that particular lawyer or not? So that's the second consideration. Then obviously then, using that criteria and then obviously issuing a brief to a lawyer to get a few costs, disclosures.

Amanda Farmer: And when those cost disclosures come back in? I'm not sure if you have a rule, Reena, about having more than one or having at least 3. And then what are your next steps once the cost disclosures come in?

Reena Van Aalst: Yes. Normally we try at least to have two because I think you need to have some comparison. I think also, in anything normally with legal matters, not just a matter of expense, it's a matter of expertise and experience. So we're not always just looking at the dollars, but in a sense, sometimes some committees would like to speak to the lawyer, just to discuss the cost disclosure and then get a feel. So sometimes it's not always about price.

We get the least two for more complicated things. For things like by-law consolidations, obviously, that's not an issue. You're not going to get 3 quite easily. It's a very rudimentary type of procedural task that you're asking a lawyer to do.

Yes. So then after once, we get a few quotes, then we normally will put those quotes on a committee meeting in writing to approve them if they're below the statutory limit, obviously. And normally in the first instance, most of those cost disclosure will be, because until they get to that stage of being over the threshold, then we don't really need owners corporation general meeting approval.

Amanda Farmer: Now, Reena, I find that when acting for owners corporations, something that's really helpful to do straight-up is to make sure the committee, if your cost agreement is going to be approved by the committee or the owners corporation, if it's going to general meeting. Also is armed with emotion that delegates authority to particular committee members, maybe 2 or 3 committee members, if not only one, if it's a small committee or even authority to the strata manager to instruct the lawyers and to make decisions in relation to the legal matter.

This is particularly important when you're in the middle of litigation or you're going to be before the Tribunal or the courts, and decisions have to be made quickly that somebody has authority given to them by a meeting resolution to instruct lawyers and make decisions. And I see cases come undone sometimes when this authority is not given early on. And there is a decision that has to be made quickly about a settlement offer, for example, or the other side is a little bit clever and questions who has authority to instruct the lawyers.

Why is the secretary making these decisions? Are these decisions in the interest of the owners corporation? If they're not, then why does this person insist that they are continuing down this path? Really important to have that authority motion early on. And if the lawyer isn't giving you one, then asking for one to be provided, so you can put it on the agenda. Is that something you've seen before, Reena, and being helped by it?

Reena Van Aalst: Not very often, because normally...

Yes, depending on the committees. If we're the person that is the intermediate between us and the lawyer, because let's say you have a large committee, I mean, you can't have everyone emailing. So what we try and do is, as the intermediary between the lawyer and the committee, we will email and say, *"Please see below request from the lawyer. Can you all confirm our return email if you're happy with the settlement offer."* And then sometimes, I think in more complicated litigation amount, as you've said, or if there's a settlement offer then we do try. And if the lawyer has needs someone that they need to confer with more quickly, because obviously as agents, we get so many emails a day and therefore sometimes, urgent matters, the lawyer needs to be able to ring someone or email someone directly. So we have done that also.

In some schemes actually, we prefer that we're just copied in and the lawyer writes to everybody depending on the particular matter. So that at least responses can be provided in a more timely manner back to the lawyers so that there's not... They're not

Publication Date: 18 May 2021

YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

waiting for me to then forward the email, then they then all talk and then they all then just respond and copy us in. Then the lawyer can call directly if they have instructions. Especially, I think in defect matters. We've had a few of those where it's just quicker, I think, in defects where you just said to the lawyer, "Yes, *that's fine, engage the joint expert*", or things like that. Where they're not... It doesn't require that much back and forth. It's just more, "Yes, *are you happy with this person? Or are you happy with...*" We've already agreed down a path in terms of how the matter is being approached, it's just more confirming the mechanics of that approach.

Amanda Farmer: I do think that where you have a large committee, and as a lawyer acting for the owners corporation, receiving instructions from that entire committee can be difficult, not just difficult, but turn out to be expensive. Because if I'm getting input from 6 or 7 people, and I'm then having to explain to four or five of those people, why I don't think what they're suggesting is in the best interest of the owners corporation, I mean, cost just rack up really quickly.

So I think you're right. It does depend on the type of matter that it is, and the size of the committee, and how quickly the matter has to proceed. But we do have examples of cases in our Tribunal and in our Courts, where there have been challenges to decisions that have been made during litigation, including decisions to settle, and settlements have come undone because there hasn't been proper authority for a particular committee member, or the committee full stop to sign a settlement agreement. So I do think that's something that can be easily dealt with at the beginning of a case, too often gets forgotten. And by the time you are at the end of the litigation, it can be hard to convene a meeting and get that formalised.

Reena Van Aalst: Yes, I agree. Because I remember many years ago, it would have been about 15 years ago, I had defects matter that was settling. And again, it was with one of the big building companies who now no longer exist, actually. And one of their issues was, yes... On, show us the authority that you have to actually, in this case, even submit the whole proceedings. And then they then made that even further in terms of, who's got the authority to settle the matter. So you're absolutely right. Especially in larger cases where it does require immediate advice and you can't just go back and forth with various people.

I think I saw, I find that one of my schemes I've just taken over, they had a an architect to... Does beautiful homes in terms of design and paint and colour. And she said that she doesn't like working... It's only a small scheme, but she doesn't like working with body corporates, she calls them, because there's so many people that are in charge. They don't know what they want. So- [crosstalk 00:16:05].

Amanda Farmer: Oh yes.

Reena Van Aalst: You'll probably come across that too.

Amanda Farmer: Yes. There's a lot of cooks, I'll tell you that.

And I do have a policy and strata managers who may have approached me sometime in the last year or so and committee members. I do have a policy that if an owners corporation is coming to me for a quote, I don't tender for work. So I do ask whether my quote is being put up against others at a general meeting. And I only work with owners corporations that come to me specifically wanting to work with me, not just to quote shop or compare my cost agreement to others. Because I can tell you, it's not high on my list of desirable clients, large committees and owners corporations. It is much easier to communicate with just the one client, the one lot owner client. And I do mostly lot owner work these days for all of those reasons.

That's not to say I don't have my particular favourite buildings out there, who I do repeat work for, but things to bear in mind. One question that this member in our forum was also asking was about costs. And whether as a strata manager, Reena, you have any tips for reviewing bills that lawyers may issue, or being conscious of costs in order to save money for the owners corporation. Have you got any tips there that you're able to share?

Reena Van Aalst: Yes. I think one of the manner is obviously using us as the filter between the committee and the lawyer. Because as you said before, if you're getting emails from 6 people and having to try and decipher what the instruction is, and then

YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

go back and forth, that is in a sense our wager to try and save money by getting all the feedback, condensing it, and then asking them a few points which are important, that everyone by majority has agreed. Because again, you can't raise every single thing that everyone wants, especially in larger committees.

And the second thing, I do look at the bills. And I remember years ago, there was a lawyer who, quite prominent doing a lot of work for strata companies. And I remember I just started and I was looking at the bill, and they had obviously charged for the time on the phone with me, which of course that's fine. I mean, obviously, I'm the client, representing the owners corporation. And I recall saying, "*Oh, that doesn't sound right.*" I signed up because I also built for my time, I wind up going back to my records and basically, all those times have been doubled. So I had to go back to the lawyer.

Amanda Farmer: Oh. So it was more. So a half-hour call was billed an hour call.

Reena Van Aalst: [crosstalk 00:18:28] Was an hour call. Yes. Everything was longer than... Because I obviously keep meticulous records myself. So it's hard to go back and say...

And then of course that then put a hole on the whole bill. Then what else are you exaggerating? If I picked up this particular issue in terms of my time spent with the lawyer, then what else in terms of other work that they've built out or other times that they've noted is actually inaccurate. So I think just having a cursory look at the bill is really important as an agent and making sure that... Because there isn't when you work with a number of lawyers and you've... You tend to know the costs, generally what they are in terms of if it's a conference...

If there's a conference for an hour, it's an hour, it's quite simple. But also, I think sometimes things take longer than what people think it might take. I mean, as a lawyer and even as managing agents, we're even writing minutes, it takes us a lot longer than what people think. Then, you've got 4 pages, but by the time you look at your notes and you condense it. And as a lawyer, man, obviously you're looking at cases and you're trying to look at the law, and people think, "*Oh, that letter took an hour, but it's only 2 pages.*" But it's not about typing the letter up. It's all the thinking that goes behind it.

Amanda Farmer: Yes. Very true. And in relation to the bills, almost all lawyers, I think these days, unless you have quoted for a fixed fee, will be issuing itemised bills. And I do think that clients often don't look at what's set out in the itemisation. I know employing lawyers myself, as the secretary of my committee. I'm the one who looks at the bill and checks it. And I have in the past picked up, doubled up charges, typos mistakes, entries that I think are incorrect or they're due to some oversight that don't match my own records. Having a closer look and picking this up and going back to the lawyer, and my experience, maybe this is because I'm a lawyer talking to a lawyer, but my experience has been that the lawyers say, "*Absolutely, Amanda, we're sorry. And here's the thousand dollars off the bill, or whatever it is.*" If I didn't look at that bill, I wouldn't have saved that money for the building. So strata managers do, do that. You'll have happy clients if you're able to make those easy savings for them.

Reena Van Aalst: Yes. I agree, Amanda. I think that just having a closer look at it. I mean, I know even looking at other managing agents. We take over schemes and then we get their schedule B. It's the time that we bill out, which is outside of the fixed fee that we've quoted to manage a building. Sometimes I think, "*Oh, my God.*" I mean, I can see that it can't take 15 minutes to do that, but you can see it sometimes, or some agents now have what they call a minimum fee, a minimum time.

So their time is, instead of giving you an hourly rate and in the agreement, which I've noticed, they give you per 15 minutes. So I think, I find it very non-transparent because to me an hourly rate should be an hourly rate. You can't put 15 minutes, then people have to then times it by 4, and most people don't really do that calculation until it's too late. But then I end up just charging him 15-minute increments. Something that could take 5 minutes, I think that's... But anyway, I suppose you've got to look at the fine print when you're looking at a cost agreement or an agency agreement, they're both the same thing in terms of enhanced bill out on a cost basis, needs to be properly assessed.

Amanda Farmer: So much more that we could talk about in there. And I know we haven't covered everything that our member was raising there in the forum, a topic, perhaps to come back to in an episode all of itself, I'd be happy to hear from any listeners

Publication Date: 18 May 2021

YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

out there of specific questions they have about working with lawyers, engaging lawyers in the strata context and both Reena and I are well-placed I think, to assist with those from our respective positions as strata manager and strata lawyer. Reena, do you have a win to share with us this week?

Reena Van Aalst: Yes. A very quick one. Amanda. In one of our schemes, we had engaged an engineer because we wanted... There was a lot of dampness and mould in a particular apartment. And unfortunately, initially, the committee said, *"Oh no, just get quotes to fix it."* And as I had predicted and realised, you get a quote from various builders telling you to do various things, at various costs. So I said, can we just engage an engineer, I got a quote. And he went in there and basically said that the main issue he believed was, it was lack of ventilation in the apartment. And of course, the owners did not agree with that. Got quite angry. The daughter rang the engineer basically saying that he had no... He was wrong, et cetera. That her parents had been overseas, that never happened before.

And anyway, so what happened, the engineer just told her, *"Please don't ring me, direct all your comments back to the strata managing agent."* So he didn't engage with her apart from confirming his advice. But it was good that he directed her back to us, because in a sense, you can't have individual owners just ringing up people. Again, you're alluding to previously a matter about the cost blow out that would happen if every owner could then ring the engineer or ring the Lawyer themselves, what would happen in that case?

And secondly, it was good that the engineer directed the daughter's own reaction back to us and said, *"No, anything you have to say about my report should come through your managing agent and don't ring me."* And I thought that was fantastic. But that's good, because at least then people know the demarcation, and that is...

You're not an individual client for an engineer. It's the owner's corporation that's engaging you, even if you don't agree, it's fine. I'm not saying people can't disagree with advice, that happens quite often. It's more about how you proceed in terms of communicating that disagreement.

Amanda Farmer: And that does cause problems at times, doesn't it? Even with contractors attending on lot owners at their properties to fix what is a common property problem. The contractor is engaged by the owners corporation, and the lot owner is directing the contractor. It might be a plumber. It might be an electrician. This is not what I want. This is what I want, and frustrating when the contractor then complies with that and comes back to the strata manager of the community to say, *"Oh, I did A, B, and C."* and the manager has to explain, *"Well, no, you're only instructed to do A and we're all in a mess."* So-

Reena Van Aalst: Yes.

Amanda Farmer: So refreshing.

Reena Van Aalst: Is that girl I've conversed about, that I'm never coming back to this building again.

Amanda Farmer: Yes.

Yes, I have experienced a couple of those myself as well.

Yes. Refreshing that you have a professional there who understands who their client is, the scope of their engagement and where their instructions are coming from. So yes, a really good one to raise off the back of our discussion about lawyers as well.

Reena Van Aalst: Yes.

Amanda Farmer: Thank you. I am going to wrap up by sharing my win for this week. And I am very pleased to report that one off the number of pet cases that I have on my books at the moment, has been resolved. And it has been resolved prior to the first appearance before the tribunal, which is always a good thing. Cost-saving for both sides. This was a case in a building that had a

YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

blanket ban on pets. Very similar to the ban that we saw invalidated in the Cooper case, before our court of appeal, last year.

Amanda Farmer: Lot owners wanting to keep a dog at their property, came to me seeking advice. And I started communications last year with the owners corporation, explaining to them how our law in New South Wales has changed and why it is that their blanket ban is invalid. Unfortunately, at that time, the committee was insistent that they would continue to enforce their ban and even sent notices to comply and threatened fines against my clients for continuing to have their dog on the premises. Ultimately, when my letters fell on deaf ears, we applied for mediation, and that occurred a few months ago.

The committee wasn't represented by a lawyer at the mediation. And despite our attempts to once again, explain the legal position, the committee wasn't willing to come to any compromise in the mediation or accept that their by-law was invalid. And we proceeded to lodge our tribunal application after the mediation.

Now, what changed? Well, the committee sensibly went and got some advice from a strata lawyer. And we now have a proposed new by-law going before a general meeting, which will amend the blanket ban to an application process. Pets will be permitted on application and no unreasonable refusal allowed. So a very happy outcome there for my clients, perhaps a little bit bittersweet because yes, I have been working for them for more than a year, incurring legal fees, sending my bills and they have been committed to their cause. And I know they do wish that the owners corporation had sought that formal advice a little bit earlier, but perhaps we can say all's well, that ends well.

Reena Van Aalst: Yes, I agree with you, Amanda. It is unfortunate that it took the committee having to engage a lawyer when there was so much publicity about this Cooper case that you're referring to, in the media and legislation and various legal emails sent out by various legal firms in terms of case updates, that this actually didn't resonate with this particular committee. And right until the last minute, they continued until the 11th hour, as you say, but anyway, all's well, that ends well. So I guess now your owner has been able to keep their pet without any worries.

Amanda Farmer: Yes. I think sometimes when you are facing an issue in your community and you're sitting on the strata committee, it's important to acknowledge that you may not have enough removal, let's say, from the issue to make objective decisions that are in the best interests of the owners corporation. I know this particular committee member who perhaps was most vocal against my client's cause, lived in the building and had a particular attitude when it came to the keeping of animals.

And I think perhaps that may have obscured the ability to act objectively and to see the situation from the legal perspective. So recognising that you may have that bias, and for that reason seeking independent or relatively independent from your advise, early on is a good decision. Even if you might think you're right, you might be surprised by what a lawyer has to say or somebody a little more removed from the situation, and acting in the best interest of all of the owners, has to say.

Reena Van Aalst: Yes, I agree with you, Amanda. I think a lot of community members sometimes bring a very personal aspect to how they deal with the whole thing. I mean, I had a meeting a few weeks ago and it was a couple of... Actually 4 committee members. And even though three of them were saying, "Yes, we're happy with this suggestion." This other was saying, "I. This is what I want." It's not, you don't own... A lot of people had this proprietorial way of thinking because they may not live in the building and this is an investment. Or even if they do live in the building, it's... I mean, they're speaking from a voice as if they own the whole building. And then sometimes in life, people do have a lot of control in their life, in their other aspects, whether it's personal or professional, but then they bring that to the table when it comes to being on a strata committee.

And unfortunately, it's... Someone said to me the other day, buying in strata is like the wild west. You never know who the next sheriff is going to be. And the next sheriff is going to be a new committee member. And sometimes, for instance, in your own home, if you're in a house, you can do whatever you want and you don't have to ask anyone. You can make the whole thing fall down around you. When it comes to living in a strata scheme, they're obviously statutory obligations. And you're just one of so many people that are involved in the decision-making process. And it's not just all about you. So, yes.

Amanda Farmer: Yes, absolutely. And I do agree with you, where people perhaps in their professional life or their past history has

Publication Date: 18 May 2021
YSP Podcast Transcript: Episode 264. A strata manager's guide to engaging a strata lawyer

been such that they have called the shots, maybe they're business owners, maybe they sit on boards and they do think, *"I'll join the committee. I've got skills sitting on committees and I'll be able to direct what happens in this community"*, often do get a rude shock, and they're the ones that we have to massage, perhaps a little bit and get them on board.

Reena Van Aalst: *"My way or the highway"*, doesn't really work.

Amanda Farmer: Not with strata.

Reena Van Aalst: It might want to put you on time.

Amanda Farmer: Thank you so much for sharing your challenges and your wins with me this week, Reena. I have enjoyed that very much, and I will look forward to catching up with you again in a few weeks time.

Reena Van Aalst: See you next time, Amanda. Bye.

Amanda Farmer: Bye-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 comments section, which Amanda will answer in her upcoming episodes. How can Amanda help you today?