

## Friday AAN: 21 March 2025

In today's "Ask Amanda Now" session, Amanda answered Julie's question: "Another owner wants to build on our exclusive use common property. We believe that requires our written consent and we're NOT being unreasonable saying no! Can you help?"



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**Amanda Farmer:** Hello and welcome to Ask Amanda. Now it is Friday. It is time for one quick Strata question. You got the question. I've got an answer for you to one of those questions. We are here each Friday, sometimes with a longer chat. Today is one of our shorter chats. I put the call out there for Strata questions, send them through on the Facebook page, on email, I will choose one, I will answer it for you.

These questions keep getting better and better, harder and harder to choose just one. That is what I've done. We do have a question for you today to which I do have the answer. It's a nice one. I am here with my background blurred out, which those of you who join me regularly on a Friday will know I don't usually do and that is because I have an office full of stuff, bit of swag, some attendee resources and attendee packs for our Mudgi event that is happening next Friday.

It is only a week away. I can't wait to see so many of you here in Mudgi. We've had a whole heap of rain here today, but I think we've got a warm, dry weekend. It's going to be just gorgeous when you come and visit me all next Friday. So won't be here next Friday live. I will be Friday in person with those who are joining me for our annual CPD event in Mudgie.

I'll be very pleased to be clearing out my office and handing over all these goodies to you. Switching over to these comments here. Hello, my friends. Hey, Sean M and Nathan, Suzanne, Bill and Ben. Good to see you. All right, I'm going to dive straight in to our question for this week. Team. Bring that question up here on the screen. It is a question from Julie and Julie says another owner wants to build on our exclusive use common property.

What? We believe that requires our written consent and we are not being unreasonable saying no. Can you help? This one caught my eye. Bit of an unusual one perhaps, but does raise a few interesting issues that I want to make sure you're all aware of. Little bit more detail in Julie's email, I think it was that came to me with this question. The owner who wants to build on Julie's exclusive use common property.

They say we can do this. It just requires a vote at a meeting of the owners corporation. Not sure if that person thinks it's an ordinary resolution or a special resolution for this vote, but apparently the person who wants to build on Julie's exclusive use said we can, we just need to vote on it at a meeting. Julie is saying no, we think it requires the written consent of those people on whom the common property right is bestowed.

Julie's words. So that's us, says Julie. We have to consent to this. If someone is going to build on our property and we don't want to consent to this. Well, I shouldn't say our property, our area that we have a right to use the common property that we have a right to use under this exclusive use bylaw. We don't want to give consent. We don't think that's being unreasonable.

Amanda, can you help to sort this one out? Really like this one? Let me know what you think. Just checking over those comments to say hi to Chris on our platform that we stream through here for our live. Unless you give it permission for me to see your name in the comments, you come up as a user. So someone on LinkedIn is saying hello to me. I can't see on my end who that is.

Feel free to let me know your name. Hello to you, hello to Daryl. Okay, awesome. The person who's on LinkedIn commenting. Absolutely. Many people have sent me questions via email as they do every day, not just our Friday ask, Amanda. Now I have chosen one question to answer today and it is Julie's. So let's talk about exclusive use or common property rights bylaws. So these are the bylaws that get made to give an owner of a lot the right to use exclusively, as in to the exclusion of anyone else, a specified area of the common property.

And we see these bylaws used to give owners the right to use areas of the common property for parking areas of the common property garden to be able to use for their own benefit. The garden area might be adjacent to a particular lot. No one else is really using it, no one else can access it. It makes sense for Lot 2 to have access to that. They may pay a fee for that benefit or they may not.

It may be the top floor lot that gets exclusive use to the rooftop. Some very, very valuable rights can be given to owners by way of

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exclusive use or what we now call in New South Wales common property rights bylaws. And these bylaws are made as any other bylaw is made by passing a special resolution at a general meeting of the owners corporation. So a special resolution, we need that super majority, no more than 25% of the unit entitlement voting against, otherwise the resolution will fail.

So it's pretty much a 75% in favour at that meeting to be able to get an exclusive use of common property rights. Bylaw passed. The question from Julie here is, well, we've got this common property rights bylaw. Now someone wants to use this space, so it kind of flies in the face of our exclusive use. They're saying they just need to get a resolution at a meeting to use this space.

We're saying that's not right. You need our consent. Who's right here? Well, Julie, you are on the right track in thinking that if somebody wants to use your space, they need your written consent or they need your consent. I hear where you're coming from with this, but I'm just going to take it back a couple of steps. So the way that it works with exclusive use bylaws is that you have the rights that are set out in the bylaw.

So I don't know what your bylaw says, but sometimes these exclusive use bylaws say the person with the benefit can put chairs and tables out in their garden space, they can plant things in the garden, they can park their vehicle on the common property, they can build a shed in the courtyard area. Sometimes these bylaws are quite specific about what you can do. And usually, depending on the terms of the bylaw, a lawyer, a strata lawyer is going to look at these and say, unless the bylaw is clear about allowing you to construct something within your exclusive use area, you probably can't do that.

The bylaw needs to be clear in saying your right extends to constructing things in the area, putting things in the area, building, setting things up, especially things that will change the external appearance of the building. If you're going to be doing things like that in your exclusive use area, you probably, and I speak very generally here, probably need that to be clear in the terms of the bylaw.

So that's the first thing to have a look at. What do the terms of your bylaw say about what can happen inside this or on this part of the common property over which you have exclusive use? Does it say that things, whatever it is, that this owner wants to build, that anything can be built in the exclusive, exclusive use area? Because if it doesn't say anything about what can be built, then that's the short answer.

This area does not permit anyone, it doesn't permit me as the owner with the benefit of the exclusive use, it doesn't permit you, anyone else in the building, from building within this exclusive use area. And if I or anyone else want the right to build in the exclusive use area, the bylaw needs to be changed. And this is where the written consent comes in. And this is why Julie, you're on the right track.

If the bylaw is going to be changed, it needs to be changed by resolution at a general meeting and that is a special resolution. If we're amending a bylaw special resolution at a general meeting and if we're amending a common property rights bylaw, yes, you're right. The written consent of the owner who has the benefit under the common property rights bylaw needs to be obtained. So you're on the right track, Julie, but a couple of steps in the process here, it is quite likely, I think, that you can just look at those bylaw terms and say no one's allowed to build in this area.

I'm not allowed to build in this area. You neighbour a. You're not allowed on this property because that's the nature of exclusive use. It is exclusive. It is to the exclusion of anyone else. So they're not allowed on the property. But even if they were, they likely have a problem that the exclusive use bylaw doesn't allow any building on that area. So have a look at the terms of the bylaw.

If the bylaw is going to allow anyone else to use it other than you, or it's going to allow building on the property, on the common property, it's likely going to need amendment. If it needs amendment, then yes, your written consent is required as well as a special resolution at a general meeting. So I'm not sure if you're tuning in, Julie. I'm always scanning those comments to see if the person who's asked the question is able to tune in or if you're catching the replay.

Let me know what you think about that or if you've got any more information to assist us with heading over to say some more hellos there. Hey, Wendy, Kristen, Happy Friday to you. Layla made it. Good to see you, Leila. Danny, is it? If I pronounced that correctly, saying I have this problem. My flat roof is common property, exclusive use. How can you use or even maintain a roof?

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This is totally wrong. After lengthy research, the answer is the lot owner only owns the space of an exclusive use. The lot owner never owns any structure of the building or any element of the building which are all common property and belongs to the building. Totally correct, Danny. So this is a right to use, exclusive use or common property Bylaws do not transfer ownership of any property. If that's what you want to do.

If you want to buy part of the land. If you want to buy part of the building, yes, that may be possible. You need to subdivide the parcel and then the owner is buying a discrete new lot, new part of the property that's created through the subdivision. That is how you then take ownership of land. If it is an exclusive use bylaw, then it is only that right to use.

However, Danny, here's the thing. It is legal to include terms in an exclusive use bylaw that require the owner with the benefit to also take on the responsibility to repair and maintain that part of the common property. So I love your rooftop example. And it's sounding like, I think you have this right to use exclusively the rooftop in your building, but you also have the responsibility to maintain it.

That is legal. I'm not going to say correct. I'm going to say that is legal. That is possible that a bylaw can give lot owners that obligation to repair and maintain the common property. There's obviously questions there around how long this bylaw has been in place. Did the person with the first benefit of it give their written consent to the making of that bylaw? And these rooftop bylaws or rooftop exclusive use bylaws are always interesting to me because very early on in my career as a strata lawyer, I was involved in a case, I think the building was over on the north side in Manly or Fairlight.

It might have been those who know that area and there was a very, very valuable right pursuant to an exclusive use bylaw that was given to a penthouse apartment owner. They had the right to use this rooftop. Gorgeous views, you can imagine there of the harbour. And the bylaw hadn't been in place for many, many decades. And I was successful acting for the building in that situation before the tribunal having that bylaw repealed, the owners corporation had sought the repeal of that bylaw.

The owner with the benefit had unreasonably refused to give their consent to that repeal. And because of the way the bylaw was put together, because there was no money offered, there was no requirement, I think in that case even for the penthouse owner to deal with any repair and maintenance. The tribunal found that the bylaw never should have been made and looked at the rights and the expectations of all other owners, looked at a lot of the history around how the bylaw was made and found that the bylaw shouldn't have been made and shouldn't be there, and issued an order repealing it, saying that the lot owner had unreasonably refused their consent to the repeal.

So really interesting case. And you know, while these rights can be very valuable when they are in the form of a bylaw, even though yes your written consent is required to the amendment of the bylaw, as we've discussed here with Julie, also to the repeal of the bylaw. Your right is not secure, not as secure as you might like it to be. The tribunal can certainly alter or remove that right, especially if it finds that you, as the owner with the benefit, have been unreasonable in refusing your consent to any amendment or any repeal.

So lots of interesting rabbit holes we can go down when we're talking about exclusive use and common property rights bylaws. Hey Luke, happy Friday to you and I too am looking forward to seeing you next time Friday. I can see your comment there, Bill and Ben, it's a long one, I can't see it all. I'm going to leave that one there, Sue, saying, can the owner in an exclusive use area, common property place lock, security key lock on the gates to that area?

Oh, that's a really good question, Sue. I would say it depends on exactly what the area is, what is inside that area. So Sue, I'm not sure if you would have caught this one if you're inside our membership, but a few weeks ago I released a member call where I was chatting to somebody whose, whose dad it was actually. Elderly father, lives in a two lot villa set up and his neighbour had exclusive use of a passageway area next to the villa.

And the problem was that the metre, the electricity metre, was inside that area and the owner, with the benefit of the exclusive use, used to lock the gate and go on holidays and then the metre reader couldn't come in and check the metre because the gate was locked. So there was a real question around. Well, in a normal circumstance it's probably okay to lock that gate. This is your exclusive use, and I keep coming back to that word, exclusive, that is to the exclusion of others.

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No one else should be going in there. But when it's an area that needs to be accessed by contractors, by service people, then you're going to have a problem if there's a locked gate. So kind of depends on the circumstances to be able to answer that one. But I absolutely encourage any owners, any communities who are looking at making these bylaws think really hard about what is in the area.

What are we allowing or not allowing the owner to do in that area? Be really clear about that. Are they allowed to construct things? Are they allowed to install fences and gates and are they allowed to lock other people out? If they do, do we care? Let's be clear about that in the bylaw to try and avoid these grey areas that come up when we don't think about these things in advance.

Okay, yeah, Danny. Saying most of the time bylaws are not drafted correctly. Yeah, correctly or clearly, Danny, that's the problem. And it is hard often, especially if you're not seeking legal advice at the time, it can be hard to understand or anticipate the kinds of conflicts, roadblocks, misunderstandings that you might end up in down the track. So absolutely. These kind of bylaws, as I keep saying, very valuable rights, very hard fought litigation, when they're being challenged for obvious reasons, people want to hang on to them.

They don't want them changed or they do want them changed because they want to be able to sell this right perhaps to somebody else. You do want to be getting lawyers involved at that drafting stage. Even if it might seem simple. Just have a Strata lawyer check over the terms of that bylaw to try and avoid some of these confusing, expensive disputes down the track. That is our question and answer for today.

Thank you very much, Julie for throwing that one in the ring. That was a great one. I am going to wrap up with some client work that I'm still going on with here at about 4:30 on our Friday. I know how you Strata managers feel. It never ends. We're going to try and get it done before the weekend. I'm looking forward to seeing so many of our Strata managers with me in Mudgie next week.

I'm looking forward to clearing out my office here so I can stop having to blow the screen for you and see all of these awesome goodies that I am hiding away for our event attendees. Have a great weekend in Strata, everyone. Or out of Strata. Wherever you are. Rest up and I look forward to sharing some more with you next week. Bye for now.