
Stretching out in Strata

When a lot owner wants to expand into part of the common property

SPEIRSRYAN

More lot owners are considering expanding into the roof space or basement of a strata scheme adjacent to their lot. Doing so can have benefits but there are different approaches and conflicting views on whether an owners corporation is obliged to agree.

Exclusive use/Common Property rights by-law

The most common way of granting a lot owner rights over part of the common property.

A by-law grants a lot rights to use and occupy part of the common property to the exclusion of others. Once registered, rights and obligations under the by-law transfer to subsequent owners of that lot.

It is the quickest and cheapest option but not always the most suitable. Aspects to consider include:

- A by-law does not change a lot's unit entitlement, so unless the by-law requires payment of a fee, the by-law could increase a lot's area and value without the owner paying any more for the privilege.
- A by-law can be amended or repealed by orders of the NSW Civil and Administrative Tribunal (NCAT). A by-law is only a *right* to use land, not title to the land. This means a by-law usually represents a lower value uplift than acquiring title to the area.
- If a by-law is repealed or revoked, usually the owner must return the property to its condition before the by-law was made. A conversion of roof or basement space into a habitable area is expensive, so a by-law may lack enough ongoing security relative to the costs of the works.
- Unless the by-law provides otherwise, the owners corporation remain responsible for repair and maintenance of the common property.

Strata subdivision

An existing lot can be strata subdivided and common property acquired. A strata subdivision can operate to transfer common property into lot property.

It is a longer process and costs more. Aspects to consider include:

- When common property is being transferred, these areas become lot property with the lot owner wholly responsible for repair and maintenance.
- A strata subdivision involving common property requires re-assessment by a valuer of the unit entitlements for all the lots in the strata scheme. Any additional area acquired should be reflected in increased unit entitlement for that lot.
- When *all* the unit entitlements in the strata scheme are reassessed, issues can arise including how equitable the original allocation of unit entitlements is and how a revised schedule of unit entitlements will affect lot owners voting powers.



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- A lot owner will need to pay for the common property being acquired. Owners corporations should insist the amount payable is determined by a valuer. Stamp duty is payable on the transfer of common property.
- Costs to the lot owner will be higher, particularly considering engagement of surveyors, valuers, lawyers, council fees, registration fees and additional general meetings to vote on the proposal. Greater costs are often offset by better security and increased value in a strata subdivision compared to a by-law.
- Careful consideration needs to be given to how much of the common property is being transferred and potential future issues. For example, if a lot acquires part of the common property roof, then the whole roof needs replacement, will the transfer have restricted the owners corporation from complying with their strict duty to repair common property? Usually these issues can be resolved at the outset with well drafted documents.

Owners corporation agreement needed

Both options require motions specially resolved at a general meeting.

The high court decision of *Ainsworth v Albrecht [2016] HCA 40* held that it is not unreasonable for an individual owner to vote against a motion to grant a common property right if the grant would affect their own proprietary right. It also confirmed that a lot owner is not obliged to assist another owner to enhance that other owner's interest.

There are a number of issues to consider but if done properly expansion in strata is possible and can create income and reduce repair obligations for owners corporations. Parties should get expert advice early to ensure an outcome everyone is happy with.