

EXCLUSIVE USE AND IMPROVEMENTS TO COMMON PROPERTY

If an owner proposes to make an improvement to common property, there are circumstances where the usual improvement approval requirements in the regulation modules will not be enough.

Disposition

Where an improvement proposed to be made to common property by an owner has the effect of granting the use of part of the common property exclusively to an owner for an unlimited period, this amounts to a disposition of that part of common property.

In this circumstance, while an owner may be authorised to make the improvement, that owner will not have the right to use the relevant part of common property for that improvement without something more.

Examples

Whether a proposed improvement amounts to a disposition of common property (ie will be enjoyed exclusively and indefinitely by the owner), will depend on the individual circumstances.

Some examples are:

- The owner of a lot carried out works to extend the ceiling bulkhead of the lot to align with the shop frontages of the lots either side. The extension of the bulkhead meant that the bulkhead occupied part of the common property. A motion was resolved by special resolution authorising the improvement. The Court decided that the resolution was invalid because the improvement had the effect of disposing of common property and a resolution without dissent was required.
- An owner in a 10 lot residential scheme proposed to extend part of the balcony on the lower level of the lot. The proposed improvement would occupy common property airspace. That common property airspace would be enjoyed exclusively and indefinitely by the owner. The Adjudicator considered a resolution authorising the making of the improvement was insufficient to give that owner the right to use the common property airspace.

Options

There are a number of ways a body corporate can grant a right to use common property in these circumstances:

- Sell or otherwise dispose of the common property;
- Lease or licence the common property;
- Grant exclusive use to the owner of the common property.

Each of those ways require varying resolutions to be passed and steps to be taken to implement.

Consequences

If an owner is not given the proper rights to use common property for the improvement, and that improvement is constructed, it may be required to be removed by the body corporate or by an order of an Adjudicator.

The right to require the removal of an improvement will remain subject to the body corporate's duty to act reasonably and other limited defences that may be raised by the owner.

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