Topic 3 - Exclusive use by-laws

Exclusive use by-laws are generally contained in Schedule E of the community management statement.

What is the purpose of exclusive use by-laws?

An exclusive use by-law attaches to a lot and gives the occupier of the lot exclusive rights and enjoyment, or other special rights to a part of the common property or body corporate asset identified in the by-law.

How are they made?

An exclusive use by-law may only attach to a lot if the lot owner agrees in writing before the relevant motion granting exclusive use is passed by a resolution without dissent at a general meeting of the body corporate.

Exclusive use by-laws may have conditions attached. For example the body corporate may require the owner to make periodic payments to the body corporate (SM s173).

The common property or body corporate asset to which an exclusive use by-law applies, must be specifically identified in the by-law or allocated either by the original owner (an authorised allocation) or by 2 or more lot owners under a reallocation agreement (an agreed allocation) (A s171).

How can exclusive use be cancelled?

Section 171 of the BCCM Act further provides that an exclusive use by-law may stop applying only if the lot owner agrees in writing or votes personally in a resolution without dissent consenting to the recording of a new community management statement that does not contain the exclusive use by-law. Again, a new community management statement must be lodged with the Land Registry Office and will only take effect when it is recorded by the Registrar of Titles.

As we saw in Topic 2, if the body corporate passes a resolution relating to by-laws, it has in effect given its consent to the recording of a new CMS (A s62). This would also apply to a resolution granting or removing an exclusive use by-law. The committee or the body corporate manager (if authorised to do so under the body corporate manager's engagement) must prepare the new CMS which can then be lodged for registration in a Land Registry Office.

Maintenance responsibilities

Unless there is a particular provision in the exclusive use by-law to the contrary, the lot owner who has exclusive use or other rights is responsible for the maintenance and operating costs for that part of the common property (SM s173).

The legislation does not specifically identify what features of the common property the lot owner is responsible for, however there have been a number of adjudicator's orders that have clarified this point. For example, adjudicators have determined that doors and windows located in exterior walls that adjoin common property to which exclusive use has been granted are the responsibility of the lot owner to maintain.

There have also been orders where the adjudicator has defined the body corporate's area of responsibility in exclusive use areas. For example, adjudicators have determined that, in a building format plan where the area of common property, the subject of exclusive use, provides shelter or support for the general benefit of the scheme, the body corporate is responsible for the maintenance of those elements (e.g. roofs and foundations).

Relevant orders which define these responsibilities are: Parkview Lodge – order: 0442-1999; Hillside Gardens – order: 0215-2001 and Sailport – order: 0360-2007.