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CRANE ACCESS RIGHTS DURING SYDNEY'S BUILDING BOOM – IS OWNERS CORPORATION CONSENT REQUIRED?

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CRANE ACCESS RIGHTS DURING SYDNEY'S BUILDING BOOM – IS OWNERS CORPORATION CONSENT REQUIRED?

Unit blocks as far as the eye can see – Sydney has become saturated with apartments. One of the major issues that owners corporations are facing with these new developments is the use of cranes. How does an owners corporation control the way in which developers use their airspace? And, can an owners corporation stop a developer passing a crane through its airspace?

Introduction

In the last few years there has been an explosion in the number of unit developments in Sydney. This has led to an increase in the use of cranes. In fact, there has been a 65 per cent increase in crane usage in the last two years. Out of the nearly 350 cranes erected in Sydney 298 of them are used for residential purposes. An article in the Sydney Morning Herald highlights just how prevalent cranes are in Sydney's skyline (<http://www.smh.com.au/nsw/is-it-a-bird-is-it-a-crane-new-figures-reveal-shifting-shape-of-sydneys-record-crane-boom-20180112-h0hs1f.html>). The increase in the number of cranes appearing on Sydney's skyline has meant that more owners corporations are confronted with requests for crane access rights.

Issue 1: Does a developer need the owners corporation's consent to swing a crane through its airspace?

A developer must obtain consent from an owners corporation or an order from a court before swinging a crane through the airspace above an owners corporation's building. If a developer passes a crane through an owners corporation's airspace without its consent or a court order, the developer will be committing a trespass and breaking the law.

This is illustrated by the decision in the recent case of *Janney & Ors v Steller Works Pty Ltd* [2017] VSC 363 where the Victorian Supreme Court granted an injunction to stop a developer's weathervaning crane from overhanging a neighbouring property.

In that case, a developer notified homeowners that a crane would be erected on his development site and that it would overhang the homeowners' land while not in use. That meant the crane would be able to rotate freely with the wind. The homeowners had safety concerns and could not come to an agreement with the developer about the crane. Negotiations between the parties broke down but despite that the developer swung the crane through the homeowners' airspace.

The homeowners made an application to the Supreme Court for an interlocutory injunction. The purpose of the application for an injunction was to effectively restrain the developer from trespassing into the airspace of the homeowners' land. The Court granted the injunction which prevented the developer from continuing to swing the crane through the homeowners airspace without their consent.

The case demonstrates that a developer must seek the consent of an owners corporation before passing a crane through its airspace.

Issue 2: What can an owners corporation do if a developer swings a crane through its airspace without its consent?

If a developer swings a crane through the owners corporation's airspace without its consent an owners corporation can apply to the Supreme Court for an injunction. The case of *Janney & Ors v Steller Works Pty Ltd* emphasises the fact that an encroachment by a crane into airspace without consent raises a strong prima facie entitlement to an injunction.

In the *Janney* case, the Court said that the homeowners should not have to live in fear that at any time the crane may crash down on their home and family.

Issue 3: What can a developer do if an owners corporation refuses to give consent for a crane to swing through its airspace?

If negotiations breakdown and an owners corporation refuses to give consent for a crane to pass through its airspace, then a developer can obtain the right to use the airspace for a crane through the *Access to Neighbouring Land Act 2000* (NSW).

A person who requires access to neighbouring land may apply to the Local Court for an Access Order under the *Access to Neighbouring Land Act 2000*. That person can seek an access order under the Act if they need access to a neighbouring property for the purpose of carrying out construction on their property.

In determining whether or not to grant an Access Order the Court will consider:

- (a) whether the work would be substantially more difficult to carry out without access, and
- (b) whether access would result in unreasonable hardship to the person affected by the Access Order.

Normally, if a crane is necessary to assist with the development of a property then the court will make an order granting the developer the right to pass the crane through the airspace of a neighbouring property on certain conditions.

Issue 4: Is an owners corporation entitled to be paid compensation for granting a developer the right to swing a crane through its airspace?

An owners corporation is not automatically entitled to compensation if it allows a developer to swing a crane through its airspace. However, often the negotiations for crane access rights will culminate in an



agreement for the developer to pay the owners corporation compensation. Any such agreement should also require the developer to pay the owners corporation's costs. However, if a developer obtains an Access Order under the *Access to Neighbouring Land Act 2000 (NSW)* it is unlikely that a court will grant compensation to the owners corporation.

Conclusion

When a developer requires crane access which does not pose any safety issues or other genuine concerns for an owners corporation, it is usually more advantageous for an owners corporation to come to a private commercial agreement with the developer, rather than take its chances in court. An agreement will enable the owners corporation to have control over not only of the terms on which the developer will be given crane access, but it will also give the owners corporation capacity to obtain compensation from the developer, when the right to compensation is limited if the matter proceeds to the Local Court. However, if negotiations go pear shaped, the developer simply cannot start swinging the crane through the owners corporation's airspace without a court order and by doing so would be breaking the law.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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