JS MUELLER & CO
LAWYERS

SINCE 1979

STRATA RENEWALS AND COLLECTIVE SALES – THE DAWN OF A NEW ERA?

JS MUELLER & CO FORUM 31.07.18

Warwick van Ede
Lawyer I BEc LLM Acc Spec (Property)
Email I LinkedIn

STRATA RENEWALS AND COLLECTIVE SALES – THE DAWN OF A NEW ERA?

Introduction

When Part 10 of the *Strata Schemes Development Act 2015* came into effect on 30 November 2016, real estate agents all over Sydney began to get very excited.

They could picture whole streets of three storey walk up strata units being transformed into rivers of gold, as developers used the more modern planning laws in combination with the provisions of Part 10 to completely transform the urban landscape into a virtual mountain range of multi-storey developments...., and the commission payments which would go along with all of this…

The mechanism which was apparently going to deliver all of this renewal and riches was of course Part 10 of the *Development Act* which would enable the sale or redevelopment of entire strata schemes notwithstanding the fact that not all lot owners were agreeable.

In his second reading speech to the Legislative Assembly on 14 October 2015, the Honourable Mr Victor Dominello, the then Minister for Innovation and Better Regulation, said in relation to this part of the new Act:

> *"The most significant reform in this bill is a new process to facilitate the collective sale or renewal of strata schemes. This proposed reform deals pro-actively with the issue of aging strata schemes and enables strata owners to make collaborative decisions about their strata building."*

The Minister then went onto describe in some detail the mechanics of the Part 10 arrangements, and reflected on the experience in other jurisdictions (outside of Australia), which has been generally to make provision for a strata scheme to be capable of being terminated with less than unanimous agreement of the lot owners.

Again, returning to the Minister's second reading speech, he said:

> *"The strata renewal process provided by Part 10 of the bill is designed to encourage owners to deal with (the issues of failing structural components, maintenance requirements and the associated expense) through a collaborative and transparent decision making process".*

Now, almost two years down the track, the process set out in Part 10 remains one which has yet to be completed – at present, there are two cases wending their way through the Land & Environment Court

aspect of the Part 10 procedures. Experience tells us that owners corporations may be shy about embarking on the formal processes set out in Part 10 of the Development Act.

What has led to this situation? – what are the implications of Part 10 for the owners corporations considering collective sales or redevelopment – and what does the future of collective sales, generally, look like?

This morning we will briefly consider each of the steps which must be taken by the owners corporation to successfully navigate the Part 10 process, beginning with an overview of that part. As we consider each of the steps, consideration will be given to your roles as Strata Managers, but also highlighting the issues which are arising in practice, and which are likely to arise for strata schemes embarking on the Part 10 journey.

As our experience is that Collective Sales, rather than re-development, is what is being contemplated by owners corporations, we will focus on that aspect this morning to illustrate the issues, but the 2 almost identical in terms of process.

"Death by a Thousand Cuts?" – The Part 10 Process in Brief

A very brief overview of the Part 10 process will assist us to comprehend the hurdles which owners corporations must overcome in order to successfully present a collective sale or renewal application through the Part 10 system, and what we all, as advisers to owners corporations, need to watch out for.
In short the following need to occur:

- There needs to be a "strata renewal proposal" and (section 156) and that proposal must include certain information;
- "As soon as practical" after receiving a strata renewal proposal the strata committee must consider the proposal to decide whether it warrants further consideration by the owners corporation (section 157);
- If the strata committee decides that the proposal does warrant further consideration, then there is a need for a general meeting of the owners corporation to be convened to further consider the proposal (section 158);
- If the owners corporation decides that the proposal warrants further investigation then it must establish a strata renewal committee by resolution and elect its members (section 160);

- The strata renewal committee is then to prepare a "strata renewal plan" (section 164), and has an initial period of 12 months to do so (section 166) although this period may be extended by special resolution of the owners corporation;

- The strata renewal plan must contain certain prescribed information including details of payments (section 170);

- Once the strata renewal plan has been prepared then the strata renewal committee must convene a general meeting of the owners corporation to consider that plan. The meeting of the owners corporation may:
  (a) return the plan to the strata renewal committee for amendment; or
  (b) decide to take the strata renewal plan to owners for the consideration of owners (section 172);

- Owners must be given a copy of the strata renewal plan and each owner can either support the plan (section 174) or not support the plan – a positive act in returning a "support notice" is required to count as support from the owners;

- If at least 75% of the number of lots (not unit entitlement) return a "support notice" then certain processes are invoked, including notifying the Registrar General;

- If the required level of support for the strata renewal plan is obtained from the owners then a further meeting of the owners corporation must be convened to decide whether to apply to the Land & Environment Court for approval of the plan;

- If a decision is made to obtain the approval of the Land & Environment Court then relevant documents need to be prepared and the application is made for the Land & Environment Court;

- If the Land & Environment Court approves the strata renewal plan (being satisfied with various matters) then it may make an order giving effect to the strata renewal plan;

- The redevelopment/collective sale can then take place.

Is it possible that significant amounts of money could be spent by the owners in undertaking a certain number of the steps, only for something to occur which causes a plan to lapse or fail?.....…….the answer is clearly, "Yes"……

I haven't counted the precise number of "ifs" in the above process, but there are a number of them, and "if" one of those steps is deficient, or fails for some reason, then there is no ability to continue with the process. If the process breaks down then it is also possible that a disappointed owner is going to be looking for someone to blame!

So, let us then have a look at some of those steps in a little more detail.

Strata Renewal Proposal

The definition of "strata renewal proposal" pursuant to Section 156(1) of the *Development Act* includes both a collective sale or a redevelopment of the strata scheme.

Whilst it seems that most often approaches are being made via a particular lot owner within a strata scheme, it is also likely to be the case that that lot owner's first port of call will be you as strata managers to work out how to deal with a proposal that is received.

To be a "strata renewal proposal" the following information must be included:

1. The name and address of the person giving the proposal;
2. Details of the financial interests (if any) that the proponent has in any of the lots in the strata scheme;
3. A general description of the proposal and the purpose of the proposal;
4. How the proposal will be funded;
5. An estimate of the total cost of obtaining an order from the Court to give effect to the plan;
6. Whether the proponent will provide any monetary contributions towards the costs and expenses incurred by the owners corporation (including the costs of the strata renewal committee);
7. If the proponent is to provide monetary contributions what (if any) security will be provided by the proponent;
8. The potential (if any) for owners to buy back into the development following a collective sale;
9. An indicative sale price and an explanation of how that sale price was determined and the distribution of that sale price on current unit entitlements;
10. The proposed timetable for the collective sale including the date by which the owners will be required to vacate premises;
11. A warning notice as set out in the Regulations. I have put the warning notice up on the screen.

If you, as a strata manager, receive what is expressed to be a "proposal", and it does not contain the matters set out above, then it would be wise to have the proponent re-do the proposal to ensure that those matters are covered.

What is the effect of a "strata renewal proposal" which does not comply with the *Development Act* and the Regulations in containing details of each of these matters? The answer is, we do not know with any certainty at this stage. What I do know, is that you will not want to be the strata manager who has a strata renewal proposal go through the entire process to reach the requirement for an approval from the Land & Environment Court, and for the Court to disallow the proposal because, thirteen months earlier, the process began with a defective strata renewal proposal.

Initial Considerations by the Strata Committee and the Owners Corporation

The first few steps in the process, following receipt of a "strata renewal proposal" require the holding of meetings of the strata committee and the owners corporation and ultimately the appointment of a "strata renewal committee". In relation to the initial consideration by the strata committee as to whether the proposal warrants further consideration by the owners corporation, if the strata committee decides the question in the negative, and a "qualified request" to consider the proposal at a general meeting has not been made within 44 days after the date that the strata committee made that decision, then the proposal lapses.

That is, even if the strata committee decides not to put the matter to the owners corporation, it is still open to a person to make a request under Section 19 of the Management Act for the matter to be considered by the owners corporation generally.

Assuming that the strata committee decides that the proposal warrants further consideration by the owners corporation, then the strata committee must, within 30 days, convene a general meeting of the owners corporation to further consider the proposal.

What happens if the meeting of the owners corporation is not convened within 30 days? You would like to think that a subsequent decision by the owners corporation would not be invalidated as a result, however we have yet to see the manner in which, and the strictness with which the Land & Environment Court requires compliance with each and every aspect of this process.

In any event, you as strata managers should keep these timetable issues at the forefront of your mind, and know that once the strata committee has made their decision in relation to a proposal, that there will be consequences that need to occur in a timely fashion.

The Strata Renewal Committee

If the owners corporation decides that the proposal warrants investigation by a strata renewal committee, then the owners corporation must establish that committee, including electing its members. There is a certain flexibility in the make-up of the strata renewal committee, but one important restriction is that a person who has a financial interest in more than 25% of the lots in the strata scheme must NOT vote in a resolution to establish a strata renewal committee or be elected as a member of that committee, unless that person has disclosed the fact to the owners corporation (presumably at the time of the vote to establish a strata renewal committee).

Again, at this point in time we need to work on the basis that each of the requirements in establishing the committee need to be followed precisely, because we do not know the attitude that the Court will ultimately take to any failures to comply with these processes. It is likely that in your positions as strata managers you will be consulted in relation to this part of the process, and it is critical that it is carried out correctly.

Creation of the Strata Renewal Plan

Section 170 of the Development Act sets out those matters which a strata renewal plan must include. Some of the material is similar to what should have been contained in the strata renewal proposal but there are some interesting extras. For example, a strata renewal plan must contain "a full and frank statement" by the proposed purchaser/developer of their intended use of the strata parcel. Putting aside for one moment whether a developer is capable of giving a full and frank statement of anything (!!) one wonders again how this will ultimately be considered by the Land & Environment Court at the end of the process if there is some discrepancy which has arisen between the time of the strata renewal plan and the time when the owners corporation seeks an order form the Court approving the plan.

The other matters which need to be included in the strata renewal plan relate to identification of a buyer, of the price, of the proposed completion date, when the owners are required to provide vacant possession, costs and expenses, and any other terms and conditions which the strata renewal committee considers are significant.

Another timeframe to bear in mind at this point is that the strata renewal committee has to prepare the strata renewal plan within 12 months, but this period may be extended by special resolution of the owners corporation. Whilst it is difficult to see how a strata renewal committee could go beyond the 12 month period, it is important for you to know that the ability to extend is there (Section 166).

The Next Round of Notices and Meetings

The finalization of the strata renewal plan brings about obligations to:

- convene a general meeting of the owners corporation, which may;
- return the plan to the committee for amendment; or
- decide to take the strata renewal plan to owners for their consideration.

Assuming the plan goes forward, then there are processes for owners to be given a copy of the strata renewal plan and specific processes for them to give their support. The Act makes reference to a "support notice".

Moving on to Court

Assuming that the requisite support is obtained (75% of the number of lots, not unit entitlement) then certain other processes begin. One such process is the need to notify the Registrar General, because obviously the existence of a "live" proposal is going to be relevant to a prospective buyer of a lot in the scheme.

A further meeting of the owners corporation is to be convened to then decide whether to apply to the Land & Environment Court for the approval of the plan and then that process can begin.

This is an interesting process because most of our litigation in Australia is adversarial in nature, and parties can "settle" disputes even when Court proceedings are on foot without the need to have a full hearing before the Court and have the Court make a decision. That is not the case with the strata renewal process. Explicitly, the process requires the approval of the Land & Environment Court, and, as of August 2018, the manner in which the Court will approach the question of how it approves or disapproves a strata renewal plan is largely a matter of assumption and inference, as there are still no approvals which have been granted by the Land & Environment Court.

Therefore, the level of technical compliance with each of the steps set out above which the Court will require in order to give its approval, is unknown. Questions include:

- Will the failure to include certain information in the strata renewal proposal (that is right back at the beginning) mean that the Court will not grant approval?

- Will a technical breach of timing requirements in relation to the initial meetings disqualify a plan from being approved by the Court?
- Will the omission of a certain piece of information from a strata renewal plan mean that it will automatically fail to be approved by the Court?
- To what extent are the technical elements surrounding the holding of meetings to approve a plan, send out notices to the owners, and receive notices of support for a plan, going to be adhered to as being essential to a plan being approved by the Land & Environment Court?

The answer to all these questions is unknown, and whilst the responsibility for much of the documentation which forms part of the strata renewal process will be with a developer or "proponent", if a plan is not approved by the Land & Environment Court because of a technical decision in the process, to what extent are those involved in managing that process (including strata managers) going to be liable to disappointed lot owners who must then wait a period of 12 months before being able to take forward a new proposal?

Again, the answer to that question is unknown, which only underlines the need to take great care with each and every step of the process.

Caution to Strata Managers

In the current environment it is unclear as to the manner in which we might expect the Land & Environment Court to interpret Part 10 and its particular requirements.

With this in mind, the prudent strata manager who is or becomes aware of a strata renewal proposal should take steps to ensure that all the "technical" requirements of the Part 10 process are observed. If this is done, then it is almost certain that such a strata manager would be clear of liability in the event that the ultimate strata renewal plan which emerges from the process is not approved by the Land & Environment Court.

To reiterate, in particular the strata manager should take careful note of:

1. Whether a "strata renewal proposal" is compliant with Section 156 of the relevant regulation;
2. That the initial meetings both of the strata committee and of the owners corporation take place with proper notice and within the relevant timeframes, and using proper procedures;
3. That the strata renewal plan is completed within the relevant timeframes (or a special resolution is passed to extend the timeframe) and contains all prescribed information;

4. That the procedures set out in the Act following the completion of the strata renewal plan are followed precisely, including the calling of meetings, the issuing of notices and the returning of such notices.

Conclusion and Future

The requirements of Part 10 may appear to be quite daunting. Indeed it is not a path down which an owners corporation would proceed lightly, given the uncertainties which exist about how many of the matters that I have referred to would be interpreted by the Land & Environment Court.

It may well be that the sheer demandingness of this process actually leads to a greater number of collective sales of strata schemes because it may be preferable for lot owners to "go the extra mile" with one or two lot owners who are holding out, rather than spend 12-24 months engaged in a process, the outcome of which is uncertain.

Among other things, I have not touched upon all the valuation questions which form part of the process, but which significantly underpin where a strata scheme will go as regards a dissenting owner.

I sub-titled this paper "Dawn of a new Era?" (with a question mark) because the very mechanisms which have been legislated to ensure fairness and a proper outcome may indeed be the very reason why Part 10 remains an absolute last resort for strata schemes – as far as this is concerned we will have to wait and see probably how the next 10 years plays out – it will be interesting indeed!

Warwick van Ede
Lawyer l BEc LLM Acc Spec (Property)
warwickvanede@muellers.com.au

Warwick is a lawyer of 28 years practicing in the areas of strata law, property law and litigation. He is a NSW Law Society Accredited Specialist in property law who has significant experience advising on strata and community title developments. Warwick has a focus on providing assistance to developers and owners corporations including drafting by-laws, community and strata management statements, conveyancing and all aspects of strata law. He is also an accomplished litigator having appeared as advocate in all senior courts in NSW.

About JS Mueller & Co

JS Mueller & Co 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.

02 9562 1266
enquiries@muellers.com.au
www.muellers.com.au