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# CHANGING COMMON PROPERTY: AN ORDINARY OR SPECIAL RESOLUTION?

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## CHANGING COMMON PROPERTY: AN ORDINARY OR SPECIAL RESOLUTION?

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What type of resolution must an owners corporation pass in order to authorise a change to common property? The strata legislation allows an owners corporation to replace common property with the authority of an ordinary resolution. But the legislation also says that an owners corporation cannot upgrade common property unless it first passes a special resolution. Where is the line drawn between replacing and improving common property? In this article we take a closer look at this much vexed issue.

### **Legislative Framework**

Section 106 of the *Strata Schemes Management Act 2015 (Act)* imposes on an owners corporation the duty to renew and replace common property. The owners corporation is able to make decisions to replace items of common property by passing an ordinary resolution.

Section 108 of the Act allows an owners corporation to alter, add to or erect a new structure on the common property, for the purpose of improving or enhancing the common property, by passing a special resolution.

So when is a change to common property merely a replacement that can be approved by an ordinary resolution compared to an improvement or enhancement that needs a special resolution in order to be properly authorised? The question can be answered by taking a look at three common scenarios.

### **Scenario One – Repainting**

Consider a strata building that is painted in white. The owners corporation decides to repaint the building. Does that decision need to be approved by an ordinary or special resolution? The answer depends on why the owners corporation has decided to repaint the building. If the existing paint is old and worn and needs to be replaced, then the decision to replace the paint can be authorised by an ordinary resolution because that decision is being made to keep the common property in good repair (section 106). But if there is nothing wrong with the existing paint job, and the owners corporation simply decides that it is time to modernise and freshen the appearance of the building by giving it a new lick of paint, then that decision needs to be authorised by a special resolution because it is made to improve or enhance the common property rather than keep it in good repair (section 108).

What happens if the owners corporation decides to change the paint colour from white to brown? Does that make a difference? Does the decision to change the paint colour need to be authorised by a special resolution? The analysis above does not change. If the decision to change the paint colour is made because the existing paint is old and worn and needs to be replaced, then changing the paint colour can be authorised by ordinary resolution.

This was confirmed by the NSW Supreme Court in *Stolfa v Owners Strata Plan No. 4366* [2009] NSWSC 589. There, an owners corporation decided to replace a rotten timber floor with a concrete floor slab in a common property void area. The Court concluded that the decision to replace the timber floor with a new concrete floor could be authorised by ordinary resolution because the new floor was not an improvement or enhancement under section 108 but appropriate repairs to common property that was in disrepair that were required under section 106. So it did not matter that the owners corporation replaced a timber floor with a concrete floor. The decision could still be made by ordinary resolution as the decision was made for the purpose of keeping the common property in good repair.

### **Scenario Two – Window Replacement**

An owners corporation decides to replace all of the windows in the facades of its building. The decision is made because the windows are old and worn and some of them leak when it rains. In the case of some of the windows, replacement parts for them are no longer available. Does the decision to replace all of the windows in the building require an ordinary or special resolution?

The answer to this question depends on whether it is reasonably necessary for the owners corporation to replace all of the windows. This, in turn, depends on whether all of the windows have reached the end of their service life, can no longer be properly maintained, are beyond repair and need to be replaced. If the windows have reached the end of their service life and there is no way to keep them in good repair except by replacing them, then the decision to replace the windows can be authorised by an ordinary resolution (section 106). But if some of the windows have not reached the end of their service life or can still be kept in good repair by ongoing maintenance and repairs and do not have to be replaced, the decision to replace all of the windows must be made by a special resolution (section 108).

This was confirmed by the NSW Supreme Court in *Glenquarry Park Investments Pty Ltd v Hegyesi* [2019] NSWSC 425. There, the majority of owners in a strata building wanted to replace a lift which was old, often broke down and operated in a clunky manner. The minority of owners (who held more than 25% of the unit entitlements) did not want to spend the money replacing the lift. The owners corporation passed an ordinary resolution to replace the lift. The Court concluded that it was not reasonably necessary for the owners corporation to replace the lift because even though the lift was old it had not reached the end of its service life, parts were still available for it and it could still be kept in good repair through ongoing maintenance at least for a few more years. For that reason, the Court decided that the decision to replace the lift was made for the purpose of improving or enhancing the common property rather than keeping the common property in good repair and therefore needed to be approved by a special resolution (section 108).

That was the case even though the lift would need to be replaced in a few short years and, in the long run, it would likely prove more expensive to keep the lift going rather than replacing it now.

### **Scenario Three – Upgrading Balustrades**

An old high rise apartment building has numerous balcony balustrades which are common property. The balustrades complied with the applicable ordinances at the time they were built. However, the balustrades do not comply with contemporary safety standards expressed in the Building Code of Australia. For example, the balustrades are less than 1 meter high, contain climbing elements and also have gaps greater than 125mm that could allow an infant to fall through them. There are a group of owners in the building who want to replace the balustrades to make them compliant with the Building Code. There is another group of owners who do not want to replace the balustrades. Does the decision to replace the balustrades need to be approved by ordinary or special resolution?

The answer to this question will primarily depend on whether or not the balustrades are unsafe. If the balustrades are unsafe and the owners corporation knows, or should know, that they are unsafe, then the decision to replace the balustrades can be authorised by an ordinary resolution (section 106). But if the balustrades are not unsafe, or the owners corporation does not and should not know that they are unsafe, then the decision to replace the balustrades must be authorised by a special resolution (section 108).

This was confirmed by a recent decision of the Appeal Panel of NCAT in which our firm acted for the successful lot owner, the case of *The Owners – Strata Plan No. 36613 v Doherty; Doherty v The Owners – Strata Plan No. 36613* [2021] NSWCATAP 285. In that case, the lot owner claimed that certain outdoor balustrades were unsafe because they were not high enough, contained climbing elements and large gaps and did not comply with the current Building Code. The owners corporation argued that it was not responsible for upgrading the balustrades to ensure that they met contemporary safety standards expressed in the Building Code.

Ultimately, the Appeal Panel concluded that the balustrades were unsafe and that the owners corporation knew or should have known that they are unsafe. This is because the owners corporation had obtained several expert reports and advice from the local council verifying that the balustrades were unsafe. For that reason, the Appeal Panel said that the duty of the owners corporation to repair and replace common property required the owners corporation to act to replace an unsafe balustrade on common property. Hence, the decision to replace the unsafe balustrade could have been authorised by an ordinary resolution (section 106). It would not matter that an old balustrade would be replaced by a new, superior one.

The balustrade needed to be replaced to make it safe to ensure the common property was in good repair, not to improve or enhance the common property: see *The Owners – Strata Plan No. 50276 v Thoo* [2013] NSWCA 270.

### **Conclusion**

Often there is no bright line test to delineate when a decision to replace an item of common property must be authorised by an ordinary or special resolution. However, there is now enough case law to provide adequate guidance for most scenarios involving decisions to replace items of common property such as the scenarios we have discussed in this article. Ultimately, the question as to whether a decision to replace an item of common property requires an ordinary or special resolution will depend on the particular circumstances of the case and if there is any uncertainty as to what type of resolution must be passed to authorise the replacement to proceed, legal advice should be sought.

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JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of all strata law inclusive of by-laws, building defects and levy collections.

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