10 - Year Sinking Fund Plans

There have been many enquiries about 10-year sinking fund plans.

Legislation
There are a combination of legislative provisions which are relevant.

Section 75A of the Strata Schemes Management Act 1996 (**"the Act"**) explains the requirement to, and how to create a 10-year sinking fund plan.

Section 75(4) of the Act provides:

> "In estimating amounts to be credited to the sinking fund, an owners corporation that is required to prepare a plan under section 75A is to take into account anticipated major expenditure identified in the plan for the 10-year period to which the plan relates."

The interpretation of this section is pivotal in the determination of whether or not an owners corporation should have funds or raise funds in accordance with their plan.

The terms 'take into account' is not defined but appears elsewhere in the legislation at section 75(3) of the Act (see copy of section below).

> "75 **Estimates to be prepared of contributions to administrative and sinking funds**
>
> (3) When estimating amounts needed to be credited to the administrative fund or the sinking fund the owners corporation must have before it, and **take into account**, a statement of the existing financial situation of the strata scheme and an estimate of receipts and payments.

Some interpretations of the meaning of 'take into account' include the following:

The *Concise Oxford Dictionary* (5th Ed) provides:

> take into account– include in one's calculations, expect.

The Free Dictionary by Farlex provides the following definition and synonyms:

> take into account – To take into consideration; allow for.
>
> allow– count on, figure, forecast, reckon, estimate, calculate– judge to be probable
> It is my belief that any legislative requirements to do something, such as, take into account something requires that it be done reasonably and in good faith.

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Second reading speech

There are various interpretations of section 75(4) of the Act.

Section 34(2)(f) of the Interpretation Act 1987 provides that you may use the second reading speech to assist in interpreting the meaning of legislation where for instance its meaning is ambiguous.

For those who consider the meaning of these legislative provision to be ambiguous, I provide below an extract from second reading speech of Ms Reba Meagher (Minister of Fair Trading and Minister Assisting the Minister of Commence) presented on 4 December 2003 which introduced the Strata Schemes Management Amendment Bill 2003 to Parliament.

> "Changes are to be made to the way in which sinking funds are required to be managed by owners' corporations. This bill will require that owners' corporations have a structured approach to sinking fund reserves. It will be mandatory for all new schemes to implement 10-year sinking fund plans, and they will have to be reviewed at least each five years. They will be required to have a 10-year maintenance and expenditure plan and associated budgeting.
>
> In other words, owners' corporations will have to turn their minds to capital expenditure that will arise over the following 10 years and plan their sinking fund budget accordingly. The revised sinking fund provisions received overwhelming public support during recent consultation on the "Living in Strata Developments in 2003" issues paper. It is clearly preferable for adequate financial reserves to be built up over the passage of time so that regular planned maintenance can be carried out. This bill will provide sensible support to such an approach. Owners' corporations will be free to use expert outside assistance in formulating their 10-year sinking fund plans if they wish, but this will be optional. They may have experts within the scheme who can help with devising the plans, and, if so, little or no additional costs will arise from for the owners' corporation in putting their plan together. I am sure that members will support the Government's endeavours in this area as they will provide benefits to strata unit owners and the wider community for generations to come."

The Strata Schemes Management Act 1996 does not refer to budgeting but does refer to estimates. Once these estimates are determined then there needs to be sufficient decisions made to cover these estimates at the same meeting.

Section 76 of the Act provides:

> "(1) The owners corporation must determine the amounts to be levied as a contribution to the administrative fund and the sinking fund to raise the amounts estimated as needing to be credited to those funds."

NSW Strata and Community Schemes Management and The Law, Thomson Lawbook Co., 4th Edition, by Alex Ilkin provides at [907]:

'Failure to present and take into account the 10-year sinking fund plan at each annual general meeting when the sinking fund contribution is being determined may render the owners corporation's determination invalid. An adjudicator could order the determination invalid pursuant to an application under ss 138 or 149, with the consequence of the contribution having to be redetermined by following the correct procedures."

Key takeaways

- Owners' corporations must prepare a 10-year sinking fund plan as per Section 75A of the Strata Schemes Management Act 1996.

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- The term 'take into account' in the legislation implies a reasonable and good faith approach to financial planning.
- The second reading speech of the Strata Schemes Management Amendment Bill 2003 highlights the necessity for structured sinking fund reserves.
- Regular reviews of the sinking fund plans are mandatory at least every five years.
- Expert assistance in formulating sinking fund plans is optional for owners' corporations.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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