Unreasonable Unit Entitlements – They Can Be Changed

Unit entitlements are a very important issue for owners of strata lots. They impact on levy contributions, voting rights, common property interests, distribution of surplus moneys and entitlements on termination of a scheme. They also impact on council rates and land tax.

From 30 November 2016 onwards, all strata schemes that are registered will require their unit entitlements to be apportioned on a market value basis.

For strata schemes registered prior to 30 November 2016, whilst they must include a schedule of unit entitlements, this need not necessarily be based on lot values. However, the Strata Schemes Management Act 2015 ("SSMA") makes provision for reallocation of unit entitlements which were initially allocated unreasonably. Typical problem areas for unit entitlement allocation include:

- Mathematical and/or typographical errors.
- A developer having made an allocation resulting in lower levies for lots retained by the developer.
- A developer having made an allocation resulting in greater voting rights for particular lots.
- An allocation based on floor area only, not taking into account other factors relevant to value.

Although there is provision for unit entitlements to be reallocated, our experience is that there is a considerable level of misunderstanding regarding when this can be done and how to go about it.

Section 236 of the SSMA provides in effect that various parties, including the owners corporation, a lot owner and council can apply to the NSW Civil and Administrative Tribunal for a reallocation of unit entitlements. The Tribunal may make such an order if, having regard to the respective values of the lots, the Tribunal considers that the allocation of unit entitlements among the lots was unreasonable when the strata plan or a strata subdivision plan was registered or became unreasonable because of a change in the permitted land use. In the case of a staged development, the allocation could also have been unreasonable when a revised schedule of unit entitlements was lodged at the conclusion of a development scheme.

However, that alone is not sufficient, as the Tribunal might exercise discretion not to order a reallocation in some cases, e.g. where it would have an adverse impact on control of the scheme. The cases, e.g. *Sahade v The Owners - Strata Plan 62022 [2014] NSWCA 208* suggest that factors other than market value (e.g. impact on control) do not go to reasonableness of initial allocation, but are relevant to whether the Tribunal should exercise its discretion to make an order adjusting unit entitlements. In practical terms, this means that the applicant needs to demonstrate why the initial

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allocation was unreasonable and why the Tribunal should exercise its discretion to order a reallocation.

Section 236(6) of the SSMA provides that, if a developer did not allocate unit entitlements according to a valuation by a qualified valuer and did not allocate them reasonably, the Tribunal can order the developer to pay other parties' costs of the application and assessed overpayments by lot owners for which liability arose in the 6 year period preceding the order.

Broadly, the procedure is as follows:

- A valuation complying with requirements of section 236 of the SSMA must be obtained.
- The need for other relevant evidence should be considered, e.g. if the change will be controversial and there might be issues whether the Tribunal should exercise its discretion to order a reallocation.
- An application to the Tribunal must be prepared and filed. Various parties will be notified and there will be a period for objections to be made.
- A meeting of the OC should be held before the hearing date.
- A hearing is held and parties can and should be legally represented.
- The Tribunal may make an order for reallocation of unit entitlements and ancillary orders.
- If an order for reallocation of unit entitlements is made, it must be registered with the Department of Land and Property Information.

Properly advised lot owners have good prospects of having unreasonably allocated unit entitlements reallocated and may also be able to obtain orders for costs and repayment of overpaid levies, based on incorrect initial allocations. Accordingly, lot owners and owners corporations with issues regarding unit entitlements should obtain legal advice.

Key takeaways

- Unit entitlements affect various aspects of strata ownership, including levy contributions and voting rights.
- From 30 November 2016, all new strata schemes must apportion unit entitlements based on market value.
- The NSW Civil and Administrative Tribunal can order the reallocation of unit entitlements deemed unreasonable.
- Demonstrating the unreasonableness of initial allocations is crucial for a successful application to the Tribunal.
- Developers may be liable for costs if they fail to allocate unit entitlements reasonably.

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