Mixed Use Developments and Complex BMC Arrangements

Mixed Use Developments are increasingly popular with both the residential and commercial sectors in the current Sydney property market. Essentially they involve a combination of various types of uses in the one building or complex.

A key to mixed use development is that there are *Shared Facilities* in the development that are used by two or more of the lots that make up the mixed use scheme such as, car parking, loading docks, fire stairs, façades, entrances and exits, plazas or piazzas, lifts, electrical plant and infrastructure, air conditioning plant and infrastructure, water, fire safety systems and gardens.

Mixed Use Development described as Stratum Subdivisions are themselves not regulated by the strata legislation (as are individual strata schemes within the mixed use development) and, in fact, are not collectively regulated at all. Each scheme operates under a contract arrangement known as a Building Management Statement (BMS).

Every lot in a mixed used development, (residential strata scheme or otherwise) is required to comply with the provisions of the BMS. Schedule 8A of the Conveyancing Act 1919 sets out matters that must be included in a BMS when the development is registered. Note that, when a strata scheme is included in the mixed development, the BMS becomes known as a Strata Management Statement (SMS).

The SMS is usually drawn up and registered when the strata plan is registered on the instructions of the developer/owner and presented to subsequent residential strata schemes as a fait accompli. It is a contractual agreement that does not have any requirement to balance the rights of the various types of lot owners in the scheme (and there is no legislation to say it must). However, there are new legislation provisions that a SMS must provide for the fair allocation of the costs of shared expenses relating to parts of the building and must include details of the method used to apportion those costs of shared expenses (see Schedule 4 of the Strata Schemes Development Act 2015).

The SMS establishes the Building Management Committee (BMC) and its office holders which govern the scheme in accordance with the SMS. The SMS provides details of the management structure for the complex, meeting procedures, voting and finances.

However, the very nature of a mixed use complex indicates a plethora of interests, including the residential owners/tenants, the commercial landlords (often the original developers), the commercial tenants, local authorities, customers and visitors generally. The potential for conflicts between these often competing needs and interests is very real.

Strata Managers are usually called upon to manage both the strata schemes within the mix use development and the overriding Building Management Committee for the whole complex. This

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effectively means that the strata managing agents have two clients in the same development. Please note that the BMC is not a legal entity and therefore cannot contract directly with third parties.

The potential for conflicts of interests, communication issues and management problems is very real and needs careful skilled consideration.

Set out below are some practical tips for residential lot owners and executive committees.

Top Ten Tips for Mixed Use Residential Owners:

1. Be Alert but not alarmed!

- Living in a strata unit in a mixed use development provides two additional levels of regulation that govern your rights and obligations:
  - Strata legislation and the registered by-laws for your strata plan, AND
  - the provisions of the SMS which override the individual strata by-laws.
- Strata living is governed by NSW legislation and the regulations and provides a degree of consumer protection and dispute resolution avenues.
- Mixed Use living is not regulated as such and, on purchase, you accept in total the terms of the SMS without any opportunity to negotiate the terms.
- Prudent prospective purchasers must do a comprehensive due diligence about the residential unit they wish to live in or use as an investment.

2. Inform yourself BEFORE you make your purchase

- If you are buying "off the plan" consider the SMS before you are contractually bound.
- Ask your lawyer to explain fully the terms and the scope of the SMS as well as the by-laws and be aware that by-laws cannot conflict with the SMS.
- The by-laws of your strata plan, do NOT apply to other lot owners in the complex who are NOT part of your particular strata plan.
- You will be required to contribute funds to the management and maintenance of both your strata plan and to the *Complex.* Your strata levies will include a component of contribution which your strata scheme pays to the BMC in accordance with the SMS.
- Tenants in the complex have the same rights and obligations under the SMS and the SMS conditions should be included in all commercial leases in the complex.

3. Identify various components of the mixed use complex

- Identify the various lots in the complex and their involvement with the SMS.
- Identify the *shared facilities* in the complex and how these are used, by whom and how the expenses are allocated.
- Be aware of the management structure imposed by the SMS on the BMC, the strata representatives and on the managing agent.

4. Familiarise yourself with your rights and obligations and those of other lot owners

- Attending meetings and voting is an essential part of strata and mixed use dwelling.
- Meetings are a forum for "*knowing what is going on*" in the complex, discussing issues and concerns and airing of grievances and making decisions, try to attend these meetings.
- Ensure that your strata BMC representative attends BMC meetings and votes on any motion *only* in accordance with the instructions of the owners corporation.
- Be aware of just what issues/motions your representative can cast a vote and the value of that vote. There may well be some issues where your strata representative does NOT have a vote at all.

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- Insist on publication of agenda items and motions within the prescribed time and that all minutes are appropriate and published and circulated within the required times set out in the SMS.

5. Communicate, communicate and then communicate some more!

- Ask your lawyer about the matters raised above. Remember SMS's are usually long and complex, and not all the same.
- Talk with your strata committee members and your elected BMC representative about any concerns you may have. Remember to listen too!
- Try to develop a co-operative relationship with other lot owners in the complex and your strata manager.
- Insist on feedback from your representatives and timely proper publication of strata and BMC meetings, agendas and minutes in accordance with the SMS.
- Your strata manager is employed by you and will help you to find your way around the SMS, to manage the complex and deal with and, hopefully, resolve issues. He/she must do so strictly in accordance with the SMS and only takes his/her instructions from the BMC representative or strata committee of your strata plan.

6. Don't be bullied by overbearing committee members of strata schemes or BMC or Strata Managers

- The strata committee and BMC representative are elected by you and act in a voluntary role. Mostly they do a very good job. Occasionally a representative may take on the role and adopt a "*CEO of BHP*" approach. This is unhelpful and unnecessary and there are always elections at the next AGM.
- The potential for conflict between residential and commercial owners is greater in Mixed Use Schemes and must be resolved within the terms of the SMS.
- Self-interested personal and commercial gain motivations are human nature and not uncommon, but *might should not overcome right*. The SMS has the final say, even if you think the result is wrong or unfair.
- Your strata manager who usually acts for both strata scheme and BMC and should be seen to be, and be impartial when disputes arise, and be guided by the SMS.

7. Always follow the procedural steps carefully

- Be acutely aware of SMS procedures at all times.
- Keep your personal and service of notices details up to date on the strata records.
- Stay financial and pay your levies in full as and when they fall due. Withholding or part payment of your levy contributions is not acceptable in any circumstances.
- Make it clear to your strata committee and BMC that you expect compliance with all procedural issues.

8. Accept the things you cannot change…. but

- Try to be objective and unemotional about issues that may arise. Compliance is part of the deal for you and everyone in the complex.
- Once you are aware of any downsides, compromise and accept it as part of your SMS obligations and move on and enjoy mixed use living benefits.
- But, it is important to be aware also of the obligations of other members of the complex and to bring issues that impinge on your rights in the complex in breach of the SMS to the attention of your strata committee and the BMC or local authorities if necessary.

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- Do not be afraid of challenging actions and behaviour that may be in breach of obligations …. BUT always calmly and courteously.

9. Don't be afraid to ask for assistance

- Regulation and remedies for conflicts and disputes are severely lacking and residential owners have little legislative protection.
- Mixed Use living is new and evolving. Experience is in short supply and an SMS can vary from complex to complex.
- Your strata manager should be able to assist you with your queries and a specialist strata lawyer will be familiar with SMS interpretations and interactions with your strata plan.
- If you don't understand, ask again. However, remember, the answer may not always be what you want to hear. You may have to accept the answer.

10. Forewarned is forearmed

- Know the benefits and accept the restrictions on the use and enjoyment of your residential unit before you enter into a contract to buy into a mixed use complex.
- The SMS will tell you the procedure for making changes but, like the Australian Constitution, it is usually very hard to do, often needing a unanimous vote of the BMC members, who may have quite different expectations.
- Remember that the SMS was in most circumstances, drafted by the developer of the complex, (before the residential strata plan was registered or while still owned by the developer). This usually means the developer and commercial interests are well catered for in the document, and there is little, or no balancing of the residents' interests or consumer protections available.
- Know what your rights and obligations are, accept that you may not be able to change them and relax and enjoy the best bits *of living, working and playing* in a mixed use development.

Please contact Bannermans Lawyers for further advice on enquires@bannermans.com.au

Key takeaways

- Mixed use developments combine residential and commercial uses within a single complex.
- Shared facilities are essential components of mixed use developments, governed by a Building Management Statement.
- The Strata Management Statement outlines the management structure and cost-sharing methods for mixed use developments.
- Residential owners must comply with both strata legislation and the provisions of the SMS.
- Conflicts of interest can arise in mixed use developments due to the diverse interests of stakeholders.

****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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