

The Issue with Planter Boxes

Repair and Maintenance Obligations

Planter boxes are a vexed issue in strata, owners corporations and lot owners frequently run into disagreement about who holds the repair and maintenance obligations.

Planter boxes are also a frequent source of water ingress into lots and common property, due to issues associated with trees, pebbles, and other debris clogging drainage pipes or causing leaks in the waterproofing membrane.

When trying to identify whether a planter box is the responsibility of the owners corporation, it is important to first determine whether the planter box is shown on the strata plan as lot, or common property. It is also important to review the strata scheme's registered by-laws to clarify whether the obligations for repair and maintenance of a planter box has been passed onto the lot owners.

It is also important to note that where a leak occurring from a planter box occurs from drainage pipes rather than from a failed waterproofing membranes, it is important to determine whether that drainage pipe is considered to be common infrastructure pursuant to section 4 of the Strata Schemes Development Act 2015 (the "SSDA").

The Strata Schemes Development Act 2015

Pursuant to section 4 of the SSDA, common property "*means any part of a parcel that is not comprised in a lot*".

Lot property is also defined in section 4 of the SSDA as "*one or more cubic spaces shown as a lot on a floor plan relating to the scheme, but does not include any common infrastructure, unless the common infrastructure is described on the plan, in the way prescribed by the regulations, as a part of the lot*".

Under circumstances where the strata plan clearly describes a planter box as common property, the definitions contained above are enough to determine that the repair and maintenance obligations rest with the owners corporation pursuant to section 106(1) of the Strata Schemes Management Act 2015 (the "SSMA").

However, the above definitions of lot and common property are only helpful under circumstances where a planter box is described as common property on the strata plan.

Lot Property Planter Box and Notations on the Strata Plan

Under circumstances where a planter box is described as lot property, the issue with repair and maintenance obligations for that planter box (including waterproofing membranes contained within) becomes a more complex issue. It can be particularly confusing where a strata plan contains a notation regarding the “*stratum height*”, setting out that the airspace of the lot on a balcony or terrace is restricted to a certain height above the concrete slab.

In addition, the strata scheme’s by-laws may also provide that a lot owner holds the obligations for repair and maintenance of a planter box even if it is listed as common property on the strata plan, throwing a further spanner into the works.

Clarity from the Courts

Whilst the legislation remains ambiguous on these issues, precedents have been set in the Supreme Court of NSW and the NSW Court of Appeal regarding the relationship between lot and common property, and how the strata plan determines who carries responsibilities for repair and maintenance of planter boxes. Such cases include the matters of:

- *The Owners Strata Plan No. 35042 V Seiwa Australia Pty Ltd* [2007] NSWCA 272, which clarifies what boundaries are defined by stratum height notations on strata plans; and
- *The Owners – Strata Plan No 87265 v Saaib; The Owners – Strata Plan No 87265 v Alexandrova* [2021] NSWSC, which clarifies that two separate cubic air spaces of lot property must be divided by a structure that is common property.

Removal of Planter Boxes

Owners corporations and lot owners may seek to remove planter boxes due to their reputation for causing issues with water penetration.

Under circumstances where a planter box forms part of the common property, the owners corporation may remove the planter box by special resolution of the owners corporation pursuant to section 108 of the SSMA. To do this, pursuant to section 106(3) of the SSMA, it must determine by special resolution that it is inappropriate to maintain, renew, replace or repair the planter boxes, and that this decision will not affect the safety of any building, structure or common property in the scheme or detract from the appearance of any property in the scheme.

Under circumstances where the planter box is lot property, the owners corporation cannot remove the planter box or compel the lot owner to do so.

However, often the structural elements of the planter box (e.g. the waterproofing membrane) are common property even if the planter box is lot property, which can cause additional complications in seeking to remove planter box.

Council Approval

A barrier that owners corporations may face when removing planter boxes might be that in doing so, they are in breach of their development consent. An owners corporation should review the development consent for their strata scheme to ensure that there is no requirement for planter boxes to remain in place. Some development consents may mandate a planter box under circumstances where there is a requirement for a certain amount of “green space” to be present in the scheme.

Should an owners corporation face issues with their development consent, they may make apply to modify a development consent with their respective council, pursuant to section 4.55 of the Environmental Planning and Assessment Act 1979. The respective council may modify the development consent if it is satisfied that, amongst other requirements, the proposed modification is of minimal environmental impact.

**Prepared by Bannermans Lawyers
10 November 2022**