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Exclusive Use Car Spaces

How secure are they?

By Gary Bugden

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When they are “on title” they have all the benefits of freehold ownership – permanent, identifiable location and secure title guaranteed by the Government. In contrast, an exclusive use by-law only confers contractual rights of use which, by their nature, carry a number of risks.

When these risks are evaluated the conclusion is that car spaces and garages on title are a much better proposition than those that rely upon exclusive use by-laws. *Click here* to read more.

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Home unit buyers often fail to appreciate the importance of ensuring that their car space or garage is included as part of their title instead of simply being allocated by way of an exclusive use by-law.

Historically in Queensland, car spaces and garages have commonly been allocated to units by means of an exclusive use by-law. This is in contrast with the normal approach in other states where car spaces and garages are provided “on title”. When they are on title they have all the benefits of freehold ownership – permanent, identifiable location and secure title guaranteed by the Government.

In contrast, an exclusive use by-law only confers contractual rights of use which, by their nature, carry a number of risks, including those relating to:

- Identity of location
- Validity of the by-law
- Verification of the rights
- Enforcement
- Permanency

Identity of location

Exclusive use areas are identified either by description or by means of a plan attached to the minutes of the meeting at which the by-law was approved or recorded at the Titles Office with the document notifying the by-law. If there is no plan the description becomes critical in identifying the area over which exclusive use has been granted. If there is a plan, identification depends on the accuracy of the plan. Plans related to exclusive use by-laws are not normally as accurate as registered survey plans that identify title areas. There is also the risk that minutes of the meeting may subsequently be lost or destroyed.

It follows that from an identity perspective car spaces or garages attached by exclusive use by-laws are not as good as those included on the title of the unit, or covered by a separate title.

Validity of the by-law

Exclusive use by-laws are made at meetings and they must be made strictly in accordance with the rules set out in the governing legislation. Those rules require the consent in writing of the recipient owner prior to the making of the by-law. If that consent is not obtained the by-law is invalid and of no effect. If the written consent is misplaced or discarded by the body corporate, then it may be impossible to be satisfied that the by-law is valid. A good example of the uncertainty attached to an exclusive use right is the New South Wales decision in *Young & Anor v. The Owners – Strata Plan 3529 and Ors* [2001] NSWSC 1135. In that case there was a proposal to pass a by-law granting rights of exclusive use and enjoyment over a swimming pool. The proposed recipient owner had consented in writing to the grant but the plaintiffs maintained that their consent was also required and, in any event, the proposed grant would effectively be a fraud on the minority. The Court held that, on the wording of the relevant legislation, the written consent of all owners was required. This decision was in contrast to the long standing practice of only obtaining the consent of the proposed recipient unit owner and it has raised doubt about the validity of many exclusive use by-laws in New South Wales.

Then there is the question of validity of the meeting. For the by-law to be valid the meeting at which it was made must be valid. The rules for convening and conducting meetings are detailed and complex. Failure to comply with these rules may invalidate the meeting. Furthermore, it can be very difficult to form an opinion on the historical validity of a meeting, particularly if the relevant documentation has since been destroyed.

These questions of validity do not arise if the car space or garage is on title. Therefore, from a validity perspective, the title based right is far superior to the contractual right conferred by an exclusive use by-law.

Verification of the rights

When a solicitor acts for a buyer of a home unit he or she investigates the title to the unit. Because the title is registered, statutory based, searchable and Government guaranteed, this is a relatively simple process that is adequately undertaken in every case. In contrast, if the car space or garage attached to the unit depends upon an exclusive use by-law, the solicitor needs to be satisfied of a number of things, including:

- That the written consent to the making of the by-law was given.
- That the location of the area can be identified with certainty.
- That the meeting at which the by-law was passed was validly convened and held.
- That the by-law has not been repealed.

These things can be very difficult to determine. More significantly, many solicitors do not go to the trouble of investigating those things, either because they do not understand the need to do so, or they simply accept the fact that such investigations are usually inconclusive.

Enforcement

Asserting rights to registered land title is relatively straight forward, although Court action will usually be necessary. Furthermore, those rights cannot be challenged before an adjudicator or Tribunal under the relevant governing legislation, because questions of title to land are beyond their jurisdiction. In contrast, rights under an exclusive use by-law are contractual rights that can be enforced by an adjudicator or Tribunal. The problem is that those quasi-judicial entities have extensive discretionary powers that may result in enforcement difficulties. Arguably, these types of difficulties are less troublesome when action is taken before the Courts.

Permanency

Freehold ownership via a registered title is as permanent as any form of ownership. While it can be interfered with by resumption by the Government or a local Government body, there are strict checks and balances in place to protect ownership rights and, ultimately, proper compensation will be assured. In contrast, the contractual rights under an exclusive use by-law can disappear. In jurisdictions where there is a Commissioner and/or a Tribunal, those bodies have the right to invalidate exclusive use by-laws and even to cancel them. For example in Queensland an adjudicator, if having regard to the interests of all owners and occupiers is satisfied that the by-law is oppressive or unreasonable, may make an order requiring removal of the by-law (cf Clause 20 Schedule 5 of the *Body Corporate and Community Management Act 1997*). In some situations it may be considered unreasonable that a particular lot owner has 2 or more car spaces when others only have one.

In a very recent New South Wales case the Consumer Trader and Tenancy Tribunal upheld the decision of an adjudicator who repealed an exclusive use by-law relating to a garage and replaced it with a new by-law containing more onerous terms than the repealed by-law. Both the adjudicator and Tribunal held that an exclusive use by-law does not confer rights in perpetuity. (See *Reen v. The Owners – Strata Plan No 300* CCH ¶80-116.)

Although the risk of having an exclusive use by-law removed may not be high, this is still a point of difference between rights on title and rights dependant on a by-law.

The benefits of exclusive use rights

Exclusive use rights are not all bad news. Two benefits are often cited in their support over car space and garage rights on title, namely:

- The ability for owners to “swap” spaces.
- The flexibility available to developers to allocate spaces during the sales process.

In Queensland, the ability for owners to swap spaces is a clear advantage. It is much easier and cheaper to swap spaces regulated by an exclusive use by-law than it is to swap spaces on title. Because of differences in governing legislation, the same swap mechanisms do not apply in other states, although even in those states it may still be easier and cheaper to change an exclusive use by-law than to effect a re-subdivision and mutual transfers of title.

So far as flexibility for developer allocations is concerned, this is not really a valid argument because the same flexibility can be organized where spaces are to be included on title. Contrary to popular belief, it is not necessary for all “on title” spaces to be pre-allocated before commencement of the sales program.

Exclusive use allocations are also useful (and justifiable) in other circumstances. For example:

- Where a “trigger” is to be included to cancel the rights in certain circumstances.
- Where there are surplus car spaces or storage areas that are to be “sold” to owners after all the units have been sold. (At that point it is from a practical perspective too late to include such areas on title.)
- Where the areas are not part of the underlying parcel and therefore cannot be included on title (e.g. a private marina that is held by the body corporate under a sea-bed lease).

Conclusion

To maximize the value of one’s unit and substantially reduce the risk of loss of use it is clearly preferable to ensure that car spaces and garages are included on title rather than allocated by means of an exclusive use by-law. Buyers of units should keep this in mind when comparing various units for purchase.

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