

UNACCESSIBLE COMMON PROPERTY

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Non Accessible Common Property - SMA 2013

In every strata building, the Joint Management Body (JMB) or Management Corporation (MC) is most likely to face issues in managing the non-accessible common property which is only accessible through the parcel of owners.

Due to this limited access to the common property subject matter, this article will discuss whether there is a possibility to transfer the obligation of maintaining the said non-accessible common property to the owner of the parcel who has the access to the common property. The transfer of obligation could be done where it benefits both parties, for example, to set a fee to the owner in enjoying the access to the non-accessible common property and to set the JMB or MC free of the obligation to maintain the limited common property.

How Can This Be Done?

In order to transfer the obligation, there is a need to establish whether the JMB or MC has the power and authority to deal with the common property.

Pursuant to Section 2 of the Strata Management Act 2013 (SMA 2013), common property means the lot that is not comprised in any parcel or any provisional block as shown in certified strata plan and to be used or capable of being used or enjoyed by occupier of two or more parcels.

In determining the owner of the common property, Section 17B(1) of the Strata Title Act 1985 (STA 1985) provides that the MC shall become the proprietor of the common property and the custodian of the issue document of title of the lot.

Further pursuant to Section 21(1)(a) and 59(1) of the SMA 2013, it is the obligation of the JMB or MC to properly maintain and manage the common property and to keep it in the state of good and serviceable repair.

The best reference is the case of Dato 'Manokaran Veraya v Perbadanan Pengurusan Apartmen Kayangan and another (appeal) [2019] 2 MLJ 458 whereby in the case, the Plaintiff pleaded that the third defendant, the MC of the common property had allowed the lobby of the apartment to be unlawfully converted from a common area to a commercial area since they did not own the common areas of the building.

In the said case, the court recognised that the MC as the owner of the common property and shall control, manage and administer the common property.

Did the MC and JMB have the power to transfer the obligations?

In the case of Dato' Manokaran Veraya, it was also highlighted that Section 42(2)(i) of the STA 1985 (pre-amendment), read together with r 11 (1) of the Second Schedule requires a unanimous resolution for the MC to exercise its rights over the common property. A unanimous resolution means a resolution that is passed at AGM without any objection.

The court refer to the case of Sianglory Sdn Bhd & Ors v Mayor Bandaraya Kota Kinabalu & Anor [2013] 7 MLJ 274 whereby in this case, the court had decided that the management corporation has the power to regulate what can be put on the common property, however, under the proviso to section 42(2)(i) of the STA 1985 (prior to amendment), such powers may be exercised only on the authority of a unanimous resolution.

Section 42(2)(i) reads :

“except where it is specifically provided otherwise in this Act, those powers may be exercised only on the authority of a unanimous; and”

If there is even one objection to the said proposal or resolution at the AGM, the said proposal or resolution to convert could not be carried out.

Is there any resolution to that requirement?

Prior to the amendment of the STA 1985, MC is the owner of common property but with limited powers. Any dealing with the common property to other than what has been specified during the development requires a unanimous decision in the AGM.

With the enforcement of the Act 1450 (Strata Title (Amendment) Act 2013), there is no need to resort to the unanimous decision since the law has been deleted.

Pursuant to Section 21(2)(g) and Section 59(2)(g) of the SMA 2013, subject to Section 32(3) and Section 70(2), both the JMB and MC have the authority to make additional by-laws for the proper maintenance and management of the common property by passing a special resolution which is passed at a duly convened general meeting carried out by the majority consisting of not less than three-quarter of the valid votes cast by a show of hands, or if a poll is demanded and taken, by a majority consisting of not less than three-quarters in number of the valid votes cast on such poll.

Hence the possibility of the transfer of obligation could be done.

Conclusion

With the current laws, the JMB and MC have the extensive power and authority in dealing with common property to other than what has been specified during the development and it only requires a special resolution to be passed in the AGM.