## Commissioner Foreword

Dear Subscribers,

Welcome to our May edition of Common Ground.

You may remember in the March issue of Common Ground, we published an article about owner improvements. This month we will be focusing on maintenance and improvements to common property by the body corporate.

The process for authorising work to common property depends on whether the work is considered maintenance or an improvement. As it is not always easy to tell which is which, I encourage you to read the below article about maintenance versus improvements, which will assist you with making these decisions.

You can also access helpful resources on our website:

- Improving common property and lots
- Body corporate maintenance

We are now into month three of the new body corporate regulations. Remember, you can still find the following publications about the regulation changes on our website if you need them:

- Webinars
- Summary of new standard module regulation webpages
- Common Ground articles

If you have any questions about maintenance, improvements or the new regulations you may wish to contact the Information and Community Education team at www.qld.gov.au/bodycorporatequestion.

Finally, an update on our dispute resolution service. As mentioned in earlier editions of Common Ground, our office has experienced an increase in dispute resolution applications over the last year. In the COVID-19 environment pets, noise, maintenance, improvements and scheme governance have commonly caused issues, and the number of disputes had risen by 12% across the board. Current work volumes mean that some of our processes may take longer than usual. Our team understands the importance of these issues to parties and is working to refine processes and minimise any delays. Timeframes vary depending on the nature and complexity of applications, and whether they meet legal requirements or further case management is needed. However, most conciliation applications are still being finalised within 14 weeks, and most adjudication applications within 24 weeks. You can also help us to deliver you a timely outcome by reading the practice directions available on our website before making your application. The practice directions will assist you to ensure your application meets relevant legal requirements right from the start.

**Michelle Scott**
**Commissioner**
**Office of the Commissioner for Body Corporate and Community Management**

# Maintenance versus improvements

Bodies corporate embarking on works to common property may assume that if works are undertaken for the betterment of the scheme, it is irrelevant whether the works are classed as maintenance or improvements. However, this article will highlight that this distinction is key in determining the type of approval required under body corporate legislation. This article explains how the classification of works dictates the approval needed and – with the help of recent orders made by adjudicators – sheds light on the hazy and sometimes contentious distinction between maintenance and an improvement.

**How the distinction between maintenance and an improvement determines the type of approval needed**

There is a regular misconception that approving common property works is simply a question of confirming whether the cost of the works is within the committee's spending limit, or whether an ordinary resolution at a general meeting is needed. However, this is only the case if the works are classed as maintenance. Under section 186 of the Standard Module, additional steps are involved when working out the correct approval type for an improvement. For an improvement, the type of approval required ranges from committee resolution to as high as a special resolution, depending on which of the following applies:

- basic improvements limit (committee resolution)
- ordinary resolution improvement range (ordinary resolution required)
- other (special resolution required).

The cost of the improvement is a major factor in determining which of these categories the work falls into.

Basic improvements limit

The committee can only authorise an improvement to the common property by the body corporate if it is within the basic improvements limit. The cost of the improvement cannot be more than the number of lots in the scheme multiplied by $300 to be within this limit. However, this is subject to the general requirement that the cost of the improvement is also within the committee's spending limit. If the cost of the improvement is within the basic improvements limit, but over the committee's spending limit, the committee cannot approve the works.

However, even if the committee's spending limit has been increased at a general meeting and the work is within that spending limit - if the cost is over the basic improvements limit then the committee cannot approve the work. Basically, the committee can only approve a body corporate improvement if the cost is within the basic improvements limit **and** within the committee's spending limit.

Ordinary resolution range

If the improvement cannot be authorised by the committee, the next question is whether it can be approved by an ordinary resolution at a general meeting. The cost of the improvement must not be more than $2,000 multiplied by the number of lots in the scheme, to be within the ordinary resolution range. Importantly, the body corporate can only approve an improvement within the ordinary resolution range **once in a financial year**.

Other

If the cost of the improvement is over the ordinary resolution range – or one improvement has already been approved within the ordinary resolution range in the financial year – the body corporate must pass a special resolution at a general meeting to approve it.

Before approving any common property works the initial question for the body corporate should be: *are these works more accurately identified as maintenance or an improvement?*

At first glance, the difference between common property maintenance and an improvement seems relatively simple. Some obvious examples of maintenance include painting a wall in a similar shade if the old coat is peeling, or replacing a dilapidated wooden fence with a similar wooden fence. On the other hand, installing a new swimming pool or upgrading from a wooden fence to a coated metal version would clearly be classed as an improvement. Unfortunately, characterising common property works as either maintenance or an improvement is not always this straightforward.

**How the legislation defines 'maintenance' and 'improvement'**

Schedule 6 of the *Body Corporate and Community Management Act 1997* (the Act) states that an improvement includes:

- the erection of a building; and
- a structural change; and
- a non-structural change (for example, installing air conditioning).

Section 36 of the *Acts Interpretations Act 1954* states that a 'change' includes additions, exceptions, omissions, or substitutions.

While these provisions provide some initial guidance on what constitutes an improvement, they do not provide an exhaustive definition. Also, there is no equivalent definition of maintenance in the legislation.

**Adjudicators have distinguished between maintenance and improvements**

In situations where the line between maintenance and improvements is blurry, past orders of adjudicators can be a useful tool - being mindful, of course, that any references to these orders are intended to serve as a guideline, not precedent. Each decision has been based upon its own unique set of circumstances. There are several recent orders made by adjudicators which explore the distinction between maintenance and improvements. We will highlight some useful points raised by the adjudicators in each of these decisions.

Carmel By the Sea [2020] QBCCMCmr 559

A motion passed by ordinary resolution to refurbish a common property indoor pool area was disputed as invalid on the basis that the wrong resolution type was used. The applicant contended that a special resolution was needed to pass the motion. The correct resolution type ultimately hinged on whether the work constituted maintenance or an improvement. While it was concluded by the adjudicator that the project required a special resolution, the issue was complex, as elements of both maintenance and improvements were involved in the work.

The adjudicator emphasised the body corporate's obligation to act reasonably. It was observed that if the work is largely maintenance but includes 'small or incidental components' that constitute an improvement, it may be reasonable to class it as maintenance. On the other hand, where 'a significant or appreciable component' of work in the one motion concerns improvements, the work should be passed as an improvement.

Importantly, while the adjudicator accepted that parts of the refurbishment project addressed maintenance issues, they determined that the *degree* that the project moved outside the scope of maintenance could not be viewed as small or incidental. In highlighting how significantly the work in the motion moved beyond just maintenance, the adjudicator referred to specific parts of the project. The installation of acoustic fins was singled out as the clearest example of an improvement owing to the absence of any existing fins. The adjudicator held that even if the installation of the fins may be desirable to address noise problems in the area, there was nothing supporting (or even proposing) that having no fins amounted to a failure of the body corporate's obligation to maintain the common property in good condition. The adjudicator further observed that the cost of the acoustic fins compared with the remainder of project was not insignificant – being 16% of the total cost of the project.

The committee submitted that even if the fins should have been classed as an improvement, the cost of the fins as a separate motion would have been within the ordinary resolution range anyway. The adjudicator acknowledged that this line of argument may have warranted further consideration if the fins were the only element of the project constituting an improvement. However, it was determined that various components of the project could not properly be regarded as maintenance. When explaining why it is more fitting to deem these elements as improvements, the adjudicator noted that they 'improve the use and functionality' or the appearance of the area. Another key indicator of an improvement is adding something not yet in existence – specifically, adding in new bench seating where there was no seating originally, or tiling a previously untiled wall.

The Presidents Lodge [2018] QBCCMCmr 226

It was asserted that a motion passed by ordinary resolution to effect building repair work, roof restoration and painting, and painting of the building should be declared void. As in the order discussed above, it was again argued that the works were not purely maintenance, but rather, comprised elements of improvements as well. However, the adjudicator dismissed the application, holding that the work was properly classed as maintenance and that an ordinary resolution was sufficient to pass the motion.

While we have come to view an improvement as synonymous with 'change', the adjudicator in this order interestingly observed that maintenance work often involves a change of some type – for example, 'the replacement of something with a modern equivalent' which might also "enhance the appearance". The adjudicator noted that these factors alone do not necessarily make the work an improvement under the legislation.

The adjudicator viewed the installation of metal support poles as maintenance work rather than an improvement. Although it required the addition of new poles where there were none previously, the adjudicator concentrated on the *reason* for the installation – namely, "to ensure the structural integrity of the existing pergola structures". Similarly, the installation of new flashing to gable tile edges was held to be an obvious case of maintenance, as a report indicated that the gable ends were being impacted by water penetration previously.

The applicants also argued that a proposal to pressure clean, repair and paint the roof involved an improvement, as only the pointing needed repairs. The adjudicator again classed the work as maintenance, factoring in the age of the building and the fact that the roof had not been painted before.

When discussing the proposal to apply a sealer to balcony decks, the adjudicator made some useful observations (with reference to other relevant orders) about a function of maintenance as being 'preventative' instead of waiting until something 'falls out of condition' – essentially, it involves keeping something 'in a state which enables it to serve the purpose for which it exists'.

Admiralty Towers II [2019] QBCCMCmr 545

The applicant sought an order that a motion passed by an ordinary resolution be declared void. The first ground submitted by the applicant (and the key one for the purposes of this article), was that the proposal for lift modernisation and upgrade works constituted an improvement, in which case a special resolution was required for the motion to pass.

Citing other relevant orders, the adjudicator made the critical point that maintenance is not strictly limited to the idea of 'like-for-like' replacement – rather, maintenance can involve 'a degree of increased benefit or improvement'. The main argument posed by the applicant supporting their characterisation of the work as an improvement was the change of the gear mechanism to a gearless system. The adjudicator determined that this factor was not enough to stop the work being classed as maintenance, as it did not 'substantially change the nature and use of the lifts' and was not 'unduly directed to improving the value of the scheme'. Other differences identified by the applicant were deemed as incidental by the adjudicator. Consequently, it was resolved that the lift works did not require a special resolution, as it was not an improvement.

For another informative order made recently in relation to whether a lift project constitutes maintenance or an improvement, read 19 Thorn [2020] QBCCMCmr 549.

We hope that the discussion of these recent orders provides some direction on those more complex questions. As these orders illustrate, it is by no means a black and white distinction between maintenance and improvements - various points may need to be weighed up in coming to a decision. The body corporate must do its best to act reasonably when making decisions based on the circumstances of each situation.

**Body Corporate and Community Management** **www.qld.gov.au/bodycorporate** **1800 060 119**