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DEVELOPMENT APPLICATIONS AND RENOVATIONS - DO YOU NEED TO APPROVE THEM?

STRATA MANAGERS FORUM: 25 JULY 2014

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DOES AN OWNERS CORPORATION HAVE TO APPROVE DEVELOPMENT APPLICATIONS AND RENOVATIONS?

1.0 Introduction

Strata buildings are becoming older. This has given rise to an increasing number of renovations that are carried out in strata buildings. This, in turn, has resulted in more owners corporations and strata managers being asked to approve development applications, and building works associated with renovations. Often requests for development applications or building works to be approved are made urgently and owners corporations and strata managers are threatened with legal action if approval is not given promptly. But does an owners corporation have to approve a development application or allow an owner to renovate his or her unit? What happens if the owners corporation refuses to approve a development application or permit renovations? Can the owners corporation's decision be overturned? If so, how? This paper will provide the answers to these questions.

2.0 Development Applications – An Introduction

The making of development applications to local councils is governed by the provisions of the Environmental Planning & Assessment Act 1979 ("Environmental Act") and the Environmental Planning & Assessment Regulation 2000 ("Environmental Regulation").

Section 78A of the Environmental Act says that a person may, subject to the Environmental Regulation, apply to a consent authority such as a local council for consent to carry out development.

Clause 49 of the Environmental Regulation says that a development application may be made by:-

(a) The owner of the land to which the development application relates, or
(b) Any other person, with the consent in writing of the owner of that land.

Therefore the owner of the land to which a development application relates is given control over the making of the development application. The owner must either make the application or give written consent to the making of the application.

An owners corporation is the owner of the common property in a strata scheme by virtue of section 18 of the Strata Schemes (Freehold Development) Act 1973. Therefore, the owners corporation is the body which must either make, or consent to the making of, a development application concerning the common property including for building work to be done on common property.

2.1 Does a Land Owner Have to Consent to a Development Application?

Just because the owners corporation is the body which must either make or consent to the making of a development application concerning common property does not mean it is under any obligation to do so.

In Mulyan Pty Ltd -v- Cowra Shire Council & Anor [1999] NSWLEC 212, the Land and Environment Court considered whether an owner of land was under any obligation to consent to the making of a development application for development by a third party on the owner's land. The Court came to the following conclusions:-

a) The owner of land can generally withhold consent to the making of a development application concerning his or her land.
b) The Environmental Regulation has the effect of by and large giving the owner of land a right to veto the making of a development application concerning their land.
c) A third party proposing a development application for the owner's land generally cannot insist that the owner make or consent to the making of the development application unless the third party has:

    i. a proprietary interest or rights in relation to the owner's land such as the benefit of an easement or a lease, or
    ii. the third party has a contractual right against the owner such as a licence to use the owner's land,

in which case the third party can insist that the owner give consent to or possibly even make the development application.

2.2 Does an Owners Corporation Have to Consent to a Development Application over a Lot?

Cameron's Case

In Owners – Strata Plan No. 50411 & Ors -v- Cameron North Sydney Investments [2003] NSWCA 5 the NSW Court of Appeal had to consider whether an owners corporation was under any obligation to consent to a development application of a lot owner for building work to, and a change in use of, a lot. The Court of Appeal could not find any obligation for the owners corporation to consent to the owner's development application in the Environmental Act or the Environmental Regulation, nor could it find any such obligation in the Strata Schemes Management Act 1996. Indeed the Court said that where a development application relates only to a lot, and does not affect the common property in any way, there is no need for an owners corporation to approve the development application, and the owner can lodge the development application with the local council without the owners corporation's approval: see [155] and [163] per Heydon JA.

2.3 Does an Owners Corporation Have to Consent to a Development Application over Common Property?

Pham's Case

In The Owners – Strata Plan No. 37762 -v- Dinh Phuong Dung Pham [2006] NSWSC 1287, the Supreme Court of NSW decided that an owners corporation is under no obligation to sign a development application submitted to it by a lot owner for building work which will affect the common property unless the owner has already been given permission to carry out the building work by the owners corporation via a by-law or licence. The court also concluded that the Consumer, Trader and Tenancy Tribunal ("CTTT") (now the NSW Civil and Administrative Tribunal ("NCAT")) does not have the power to force an owners corporation to sign a development application submitted to it by a lot owner.

The court said that where a lot owner wants to do building work on the common property which requires Council approval, the proper procedure is for the lot owner to firstly obtain the permission of the owners corporation to carry out that work by obtaining a by-law or licence. If the owners corporation refuses to make the by-law or grant the licence and that decision is unreasonable, the lot owner should go to the CTTT and ask for that decision to be reviewed. Once a by-law or licence is made (either voluntarily by

the owners corporation or by order of the CTTT (now NCAT), the owners corporation must sign a development application for the building work because of the owner's rights granted under the by-law or licence.

2.3.1 Pham's Case - The Facts

Pham's case involved an industrial strata scheme situated in Chipping Norton, Sydney. The controversy in the case surrounded the construction of a spray painting booth in lot 5 and associated structures on the surrounding common property.

In July 2003 the owner of the lot, Ms Pham, applied to the local council for development consent to set up a spray painting booth inside a factory unit known as lot 5. This was done by lodging a development application ("DA"). The DA was not consented to or signed by the owners corporation. Problems arose because construction of the spray painting booth required work to be performed on the common property including the installation of a chimney and two vents through penetrations made in the roof and the excavation of the floor of the factory unit.

The council approved the DA and issued a development consent for the construction of the spray booth inside the factory unit in October 2003. Shortly afterwards, structures, including the chimney stack, were installed on the roof, and the tenant began operating a smash repair business from lot 5.

The owners corporation was not happy about the installation of the spray booth particularly the chimney stack and vents on the roof. After all it never gave Ms Pham permission to erect those structures nor did it sign the DA for them. It simply wanted the structures removed from the common property.

Once the owners corporation's grievances were made clear, Ms Pham asked it to approve the spray booth and the chimney and vents and to sign a DA for them. The owners corporation refused. The dispute then escalated.

After an unsuccessful mediation, Ms Pham commenced proceedings in the CTTT requesting an order that the owners corporation consent to the spray booth and the chimney and vents and sign a DA for the work. The owners corporation, in turn, commenced its own set of proceedings in the CTTT presumably seeking orders for the removal of the chimney and vents. Shortly afterwards, proceedings were commenced in the Land and Environment Court against Pham seeking orders restraining her and her tenant from using the factory unit for spray painting, requiring the removal of the chimney and vents from the roof and requiring the reinstatement of the common property to its former condition. A declaration was also sought that the development consent issued by the local council was null and void because the DA was made without the consent of the owners corporation. The owners corporation was successful and it got the orders it sought. The Land and Environment Court ordered Pham to remove the chimney and vents from the common property.

However shortly afterwards, Pham's CTTT application came on for hearing. At the hearing, the CTTT concluded that the Strata Schemes Management Act 1996 ("Strata Act") required the owners corporation to seal the DA for the building work associated with the spray booth and that by refusing to do so the owners corporation had failed to exercise one of its functions. Consequently, the CTTT ordered the owners corporation to affix its seal onto the DA. Not surprisingly, the owners corporation was not happy with the CTTT's decision and it appealed to the Supreme Court.

The Supreme Court took the view that when the CTTT made its order requiring the owners corporation to seal the DA, it must have been acting under the powers vested in it under s. 138 of the Strata Act. Section 138 is the "catch all" provision which allows the CTTT to resolve disputes or complaints about the exercise of, or the failure to exercise, a function of the owners corporation, or the operation, administration or management of a strata scheme.

2.3.2 Pham's Case – The Important Bits

The Court concluded that s. 138 of the Strata Act did not give the CTTT power to order the owners corporation to seal the development application. In his judgment, Rothman J made a number of interesting observations. These included:

- The seal of an owners corporation on a lot owner's DA to the local council for building work is not the consent of the owners corporation to perform that work. It is only the consent of the owners corporation to the making of the application for development consent to the council.
- A lot owner can carry out building work within a lot without the endorsement of an owners corporation, provided that the work does not impinge upon the common property. An owners corporation has no power to approve or reject such work.
- The only right of an owners corporation or any other lot owner regarding work solely affecting a lot, is the right to make objection to the local council against the grant of development consent for the work.
- The Strata Act does not confer a function on an owners corporation to consent to a DA submitted to it by a lot owner nor is that task a function imposed upon an owners corporation under the Environmental Act.
- The operation, management and administration of a strata scheme does not involve an owners corporation consenting to a lot owner's DA.
- When an owners corporation seals a DA it is exercising one of the functions of an ordinary land owner (as the owner of the common property) whose consent is required to submit a DA to carry out development on its land. It is not exercising any function under the Strata Act nor does what it is doing have anything to do with the operation or management of the strata scheme.
- The CTTT (or a Strata Schemes Adjudicator) does not have jurisdiction under s. 138 to make an order forcing an owners corporation to consent to a lot owner's DA.

2.3.3 Pham's Case – The Wash Up

A number of these observations will no doubt take you by surprise. In particular, I expect that you will find the Court's statement that an owners corporation has no power to approve or reject work affecting a lot extremely controversial. However, there are a number of aspects of the judgment that are extremely helpful and will assist your day to day management of strata schemes.

Firstly, it is now abundantly clear that the act of an owners corporation sealing a DA does not mean it is agreeing to let the owner carry out the work which is the subject of the DA. The lot owner must still get the formal approval of the owners corporation to carry out the work (which should be given via a by-law or licence).

Secondly, a lot owner who wants to carry out work on common property should firstly approach the owners corporation before going to council and ask for:

- permission to do the work under s. 65A of the Strata Act (which gives the owners corporation the power to let owners add to, alter and erect new structures on common property by a special resolution or by-law);
- a licence to use the common property under s. 65B of the Strata Act (which lets the owners corporation grant licences to owners to use common property in a particular manner or for particular purposes by passing a special resolution); or
- an exclusive use by-law under s. 51 of the Strata Act.

If the owners corporation refuses to let the lot owner carry out the work, the lot owner can go to NCAT and ask for that decision to be reviewed on the grounds that the owners corporation acted unreasonably. If permission to carry out the work is granted (either voluntarily by the owners corporation or by NCAT), the lot owner will then be entitled to have the owners corporation seal a DA for the work because of the owner's rights over the common property granted via the by-law or licence.

The Supreme Court's decision in Pham has important ramifications for strata managers and owners corporations. It gives you a very good example of how messy and complicated things can become when lot owners do work affecting common property without proper approvals. This is especially so when you consider that the owners corporation in this case was put through at least four separate sets of court and CTTT proceedings because of the actions of the lot owner.

Building work on common property is a common occurrence in strata schemes which you are no doubt confronted with on a regular basis. Pham's case should give you some guidance in this area and help you deal with requests by lot owners to sign DA's and carry out work in a more confident and efficient way.

3.0 Renovations – An Introduction

The strata legislation gives a unit owner who has a proposal to carry out renovations that will affect the common property rejected by an owners corporation the right to apply to a Strata Schemes Adjudicator for an order to overturn the decision made by the owners corporation: see sections 140 and 158 of the Strata Act. If it is appropriate to do so, the Adjudicator will overturn the decision of the owners corporation by either ordering the owners corporation to consent to the renovations (s140) or by making an order prescribing the making of a by-law granting an owner special rights over the common property to carry out renovations (s158).

3.1 A Decision to Reject Renovations Must be Reasonable

The Adjudicator will only overturn the decision of the owners corporation and give the owner a right to carry out renovations, if the Adjudicator considers that the decision of the owners corporation to reject the proposal for the renovations was unreasonable. The expression "unreasonable" is not defined in the Strata Act. It is therefore to be given its ordinary, everyday meaning: see Curragh Coal Sales Co Pty Ltd v Wilcox (1984) 1 FCR 461. An Adjudicator will consider a decision "unreasonable" if the decision is:

- Not reasonable;
- Not endowed with reason;
- Not guided by reason or good sense;
- Not based on, or in accordance with, reason or sound judgment;
- Exceeding the bounds of reason;
- Immoderate;

- Capricious;
- Exorbitant.

Hence, a decision made without any reason – that is, without regard to any relevant facts or circumstances but rather arbitrarily or capriciously or in order to achieve some collateral purpose – is unreasonable.

3.2 What Factors Does the Adjudicator Consider?

In deciding whether a decision is "unreasonable", the standard to be applied is that of a hypothetical reasonable person. The subjective judgment of the individuals affected is not determinative: see Patterson, Garth, Owner of Lots 51 and 52 [1999] NSWSSB 66. In other words, the test of what is reasonable is an objective test. This requires the existence of facts which are sufficient to induce that state of mind in a reasonable person: see George v Rocket (1990) 170 CLR 104 at 112.

Hence a decision by an owners corporation to withhold consent to an owner's proposal to renovate would be reasonable if there was, on the material before the owners corporation, a sound basis for making that decision. Conversely if there was no such sound basis the decision would be unreasonable: Carroll and OC SP865 v Alldritt [2013] NSWCTTT 525.

In determining whether the decision of the owners corporation to reject the proposal for renovations was unreasonable, the Adjudicator generally must consider:

- the interests of all owners in the use and enjoyment of their lots and common property; and
- the rights and reasonable expectations of the owner who wants to renovate: see section 158(2) of the Strata Act.

This requires the Adjudicator to weigh up two competing interests: the interests of all of the owners in the use and enjoyment of their units and the common areas versus the renovator's rights and reasonable expectations.

In scrutinising the decision of the owners corporation to assess its reasonableness, the Adjudicator is only able to consider the affairs in existence at the time the decision was made. This means that the Adjudicator cannot consider material (such as expert reports) that came into existence after the decision was made in order to determine if the decision was reasonable: see Owners Corporation Strata Plan 7596 v Risidore & Ors [2003] NSWSC 966. However, when weighing up the two competing interests (the interests of all owners versus the interests of the renovator) the Adjudicator is able to consider and take into account material that came into existence after the decision was made: see Long v Milman [2005] NSWCTTT 503.

In considering the decision of the owners corporation, it is not simply a matter for the Adjudicator to determine whether it is beneficial or reasonable for the owner to carry out the renovations. The issue is more complex and the Adjudicator must weigh up the interests of all owners in the use and enjoyment of their lots and common property versus the renovator's rights and reasonable expectations: see Graziani v The Owners – SP37657 [1998] NSWSSB 53. The Adjudicator needs to consider how the interests of all of the owners in the use and enjoyment of their lots and of the common property would be affected if a by-law for the renovations were to be made and, as against those interests, consider the rights and reasonable expectations of the renovator.

The owner who wants to renovate bears the onus of demonstrating that the owners corporation's decision was unreasonable. The owners corporation does not have to prove that it acted reasonably in withholding its consent to a proposed by-law: Bartlett v Owners Corporation SP1429 [2011] NSWCTTT 219.

If neither the owners corporation nor any of the owners make any submissions against an application to an Adjudicator to overturn a decision of the owners corporation, then the application is likely to be successful and the decision overturned: Bath v Owners SP13820 [2006] NSWCTTT 58.

Ultimately, in assessing the question of the reasonableness of the decision of the owners corporation the Adjudicator needs to decide whether the owners corporation exercised sound judgment or good sense: Patterson.

3.3 Do Adjudicator's Overturn Unreasonable Decisions to Reject Renovations?

There have been many cases decided by Adjudicators (and, on appeal, the CTTT – now NCAT) concerning decisions made by owners corporations of residential apartment buildings to reject by-laws that would permit owners to carry out renovations or other types of building works. Each case turns on its own facts. A reasonable decision to reject a proposal for renovations in one case may not be reasonable in another. But the cases do show that unreasonable decisions made by owners corporations to refuse to allow owners to renovate for no good reason can be and are overturned by Adjudicators.

3.3.1 Cases Overturning Decisions of Owners Corporations

In McCann v The Owners – Strata Plan No 11318 [1998] NSWSSB 44 the Strata Schemes Board (now NCAT) made a by-law which had been rejected by an owners corporation to permit an owner to enlarge the size of a window on the boundary of her unit. The window faced Sydney Harbour and the owner proposed to double its size. The Tribunal held that the decision of the owners corporation to reject the by-law was unreasonable because the new window would not be out of keeping with the appearance of the building and it would not be visible from outside the building except to someone with a keen eye and then only when viewed from Sydney Harbour.

In Stronach v The Owners – Strata Plan No. 9561 [2002] NSWCTTT the Tribunal overturned a decision of an owners corporation to reject a by-law to allow several owners to replace existing metal balustrades with transparent glass balustrades to allow the owners to enjoy their harbour views. The Tribunal concluded that the owners corporation's decision was unreasonable because the difference in the appearance between the new balustrades and the existing ones would not be noticeable because it was only possible to view the entire building from a few very specific locations; the installation of the balustrades would significantly improve the owners' enjoyment of their lots and increase the value of their lots; and the owners would be paying for the installation of the new balustrades and so there would be no impact on the owners corporation's funds.

In Long v Milman [2005] NSWCTTT 503 the Tribunal overturned a decision by an owners corporation to reject a by-law that permitted an owner to construct a lift in a common property lobby to give him access to his unit on the 3rd floor of the building. The owners corporation had rejected the by-law on the basis that the addition of the lift would reduce the value of the ground floor unit and may cause offensive or distracting noise. The Tribunal was not satisfied that there was any evidence to demonstrate that the value of the ground floor unit would be diminished by the lift or that the lift would cause offensive or distracting noise.

In Barth v The Owners – Strata Plan No. 13820 [2006] NSWCTTT 58 an Adjudicator considered unreasonable an owners corporation's rejection of a by-law that would have given an owner the right to enclose part of an undercover deck area at the rear of the owner's unit because the enclosure would not be visible from the front of the building, would be barely visible from the road at the rear of the building and no other owner would see the enclosure; the enclosure's glass and aluminium framework matched the building; the presence of the enclosure would not detrimentally impact the resale value of any other units; and the structural integrity of the building would not be adversely affected by the enclosure.

In Chen and Hu v The Owners SP69221 [2010] NSWCTTT 305 the Tribunal overturned a decision by an owners corporation to reject a by-law that would have allowed an owner to carry out minor alterations to the common property to enable his lot to be used as a cafe because the owners corporation's reasons for rejecting the by-law did not have a sufficient proximity or connection to what the by-law sought to achieve. The Tribunal held that the by-law only sought to permit the owner to carry out minor alterations to common property pipework and damage the waterproof membrane on the roof. The Tribunal remarked that "it is not unreasonable ..... for the residents of any building, but particularly one of historic architecture and construction such as this, to have a legitimate concern about the appearance of the building. That is why it is common place to have by-laws to limit what can be done by lot owners that may affect the external appearance of a strata scheme, for example by hanging washing on balconies ..... legitimate concerns about matters such as the use of construction materials sympathetic to the original materials and the general appearance of the building from public areas are matters that the owners corporation is entitled to consider."

3.4 What Factors Make a Decision to Reject Renovations Reasonable?

These cases demonstrate that there are a range of facts and circumstances which might provide a reasonable basis for an owners corporation to reject a proposal by an owner to renovate. These include:

- The impact of the renovations on the appearance of the building particularly if the renovations will not be in keeping with the appearance of the building and will be visible from various points within and/or outside the building;
- The impact the renovations will have on the structural integrity of the building particularly if no engineer's report is presented by the owner or such a report does not adequately address reasonable concerns that have been raised by the owners corporation concerning the impact of the renovations on the building's structural integrity;
- The fact that the renovator has not offered to pay any compensation to the owners corporation in consideration of obtaining a right of exclusive use and enjoyment over common property that will be built on during the renovations if that right has more than a nominal value;
- The fact that the renovations might impede or hinder the ability of the owners corporation or another owner to access and use an area of common property;
- Inadequate information being given about the impact the renovations would have on the common property and other units in the building;
- The fact that limited information has been provided about the materials and colour schemes that will be used during the renovations;
- Any failure by the renovator to address, or adequately address, any reasonable concerns held by the owners corporation about the renovations.

4. Conclusion

Building work on common property is a common occurrence in strata schemes which you are no doubt confronted with on a regular basis. Pham's case should give you some guidance in this area and help you deal with requests by lot owners to sign DA's and carry out work in a more confident and efficient way.

The cases show that an owners corporation must act reasonably when considering an application made by an owner for permission to carry out building work or renovations that will affect common property. If the owners corporation acts unreasonably and refuses to allow an owner to renovate for no good reason, its decision can be overturned by an Adjudicator. Ultimately, an owners corporation needs to exercise sound judgment or good sense if it wants to ensure that its decision is not reversed by an Ajudicator.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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