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Queensland Body Corporate and Community Management Commissioner - Adjudicators Orders

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Macleay Tower & Villas [2006] QBCCMCMr 768 (1 September 2006)

Last Updated: 3 April 2007

REFERENCE: 0288-2006

ORDER OF AN ADJUDICATOR

MADE UNDER PART 9 OF CHAPTER 6

BODY CORPORATE AND COMMUNITY MANAGEMENT ACT 1997

Number of Scheme: 24663
Name of Scheme: Macleay Tower & Villas
Address of Scheme: Goodwin Street, KANGAROO POINT

TAKE NOTICE that pursuant to an application made under the abovementioned Act by
the Body Corporate

I hereby order that the application for an order *that the owner of lot 108 not be permitted to enclose the car space of lot 108 without prior written consent from the body corporate.*

Is dismissed.

STATEMENT OF ADJUDICATOR'S REASONS FOR DECISION - REF 0288-2006

"Macleay Tower & Villas" CTS 24663

THE SCHEME

The Macleay Tower & Villas community titles scheme is registered as a building units plan (now known as a building format plan), comprises 106 lots and operates under the *Body Corporate and Community Management (Standard Module) Regulation 1997* (the Standard Module).

APPLICATION

This application was submitted with this office by the body corporate on 20 April seeking the following interim order:

that the owner of lot 108 be directed not to proceed with enclosing of their car space until the Body Corporate has time to meet and formulate a response and proceed with appropriate action.

The applicant also sought the following final order:

that the owner of lot 108 not be permitted to enclose the car space of lot 108 without prior written consent from the body corporate.

BACKGROUND

The owners of lot 108 have advised the body corporate committee of their intention to enclose their car park space but have met with opposition from the body corporate. While negotiations have been continuing for some time, this matter was brought to a head by a letter dated 15 September 2005, in which the body corporate was advised that the owners of lot 108 intended to build an enclosure of their car parking space on level A and that the body corporate was not entitled to reject the proposed enclosure.

In a letter of reply dated 15 February 2006, the Body Corporate advised the owners of lot 108 of the need to obtain the consent of the Body Corporate pursuant to by-law 5 because, as the enclosure of the space involve affixation of a structure to the common property, the consent of the Body Corporate is required.

The Body Corporate also raised the following concerns:

- That the proposed enclosure was an alteration to the structure of the building within the meaning of By-law 13 which requires the consent of the Body Corporate;
- The car park space should be used for car parking rather than storage as proposed and may involve a breach of by-law 31;
- The enclosure may involve obstruction of common property in breach of by-law 3;
- The use of the space as a storage area could increase the risk of fire and involve a breach of by-law 22.

The Body Corporate also raised concerns that the enclosure would:

- Create a fire hazard;
- Adversely impact on adjoining owners' access to their car spaces;
- Set a precedent to the detriment of the building's appearance;
- Cause the car park to be used inappropriately as a storage area;
- Reduce acceptable levels of ventilation in the car park area;
- Restrict emergency access;
- Create an "eyesore";
- Possibly contravene building codes and WH&S codes; and
- Encroach on neighbouring car parks.

In a reply dated 21 March 2006 the lot owners' agent advised as follows:

- The common property would not be damaged and all affixations would be within their lot;

- The proposed enclosure is not structural;
- The lot owners would use the lot for vehicle parking and would comply with by-law 31, which would mean that they comply with by-law 22;
- The proposed enclosure would not restrict access to common property;
- Enclosures have already been constructed for a number of other parking spaces; and
- The owners of the lot intend to go ahead with construction of the enclosure without further notice.

SUBMISSIONS

The Commissioner issued the Body Corporate with formal notice of the application in accordance with section 243 (1) of the Act and in accordance with section 243(2) of the Act, the Commissioner also invited the Body Corporate Committee, and all owners of a lot included in the scheme, to make written submissions about the application. Submissions were received from two lot owners.

The first submission contained the following points:

- car park spaces that are currently enclosed were erected by Pidgeon/ Stencraft during construction of Macleay Tower and Villas;
- Approval of further enclosures would create an undesirable precedent;
- Enclosing the spaces would limit the ability of lot owners to effectively use adjoining car parking spaces;
- Enclosure can lead to the space being used inappropriately for storage which could cause a fire hazard;
- Enclosure could lead to darkening of the general area and reduce levels of ventilation;
- Enclosure could lead to adverse access issues (e.g. valves, plumbing, power lines, sensors etc.) for the building manager in the event of an emergency as well as hindering pedestrian access in similar circumstances.

Very detailed submissions were received from the owners of lot 108 which included the following:

- They first approached the committee in September 2003 requesting permission to construct a brick enclosure in keeping with other garages constructed at the time and prior approvals given by the body corporate. That request was refused because apparently the body corporate committee did not want any further block garage enclosures.
- On 1 March 2004 they again applied, proposing a wire mesh enclosure and following discussions with the committee. In May they reapplied, proposing a wire mesh enclosure and addressing concerns regarding obstruction to a water valve and ventilation.
- At the same time, other garage enclosures were being constructed of the same material;
- By letter dated 16 July 2004 the Committee advised the lot owners' agent that their application had been refused. It is noted that the minutes of the committee meeting held on 29 June 2004 included a resolution to refuse the request for permission to construct a wire mesh enclosure. It was noted that "the body corporate had never considered a request of this nature and all current installations had been installed by the developer prior to the body corporate committee being formed;
- At the same committee meeting held on 29 June 2004 the committee resolved to approve the construction of a storage locker within the car parking space for lot 15;
- On 4 November 2004 the lot owners wrote to the committee again seeking guidance as to their requirements. In reply the committee advise that permission to enclose was denied because the current installations (originally approved by the developer) are an eyesore and are not maintained as well as creating a fire safety concern;

- Following damage to their vehicles in 2005, the lot owners again wrote to the committee and offered to build a "colourbond" enclosure but this was refused although at the same time, the committee approved construction of a storage cupboard constructed of the same material in another car park space;
- The body corporate committee has not acted in a timely fashion in considering their request for permission and they believe the committee has decided not to consider their request. In support of this argument they submit that although they wrote to the committee on 15 September 2005, a response was not received until 15 February 2006. It is further submitted that as at mid June 2006 they had received no advice from the committee regarding the matter;
- The car park spaces are on title and there is no need to fix any of the enclosure to common property;
- There would be no obstruction of common property;
- There is no restrictions in the by-laws regarding alteration of appearance of a lot where such alteration would not be visible from outside the building;
- The by-laws do not restrict alterations of a non-structural nature;
- There would be no impact on utility services by the proposed enclosure which would also comply with the Building Code of Australia.

JURISDICTION

This is a dispute between the owners of lot 108 and the body corporate regarding the erection of an enclosure on a car parking space which forms part of lot 108. To determine whether I am empowered to deal with this matter it is firstly necessary to refer to sections 227 and 276 of the Act.

Section 227(1)(a) of the Act provides that a dispute between an owner of a lot and another owner of a lot, is a dispute which may be resolved under the dispute resolution provisions of the Act.

Section 276(1) of the Act provides that an adjudicator may make an order that is just and equitable in the circumstances to resolve a dispute, in the context of a community titles scheme, about-

- (a) a claimed or anticipated contravention of the Act or the community management statement; or*
- (b) the exercise of rights or powers, or the performance of duties, under the Act or the community management statement;*

Consequently I am of the view that this is a dispute which may be considered under the dispute resolution provisions of the Act.

DETERMINATION

This is a dispute between the owners of lot 108 and the body corporate regarding the erection of an enclosure on a car parking space which forms part of lot 108. As the proposed enclosure would be constructed within the lot, the resolution of this dispute revolves around the power of the committee to refuse permission under the scheme by-laws.

In this regard the following two questions arise for consideration:

- (1) Do the by-laws for the scheme restrict the erection of an enclosure within a car parking space? and
- (2) If so, is the body corporate acting reasonably as required by section 94 of the Act ?.

I have perused the Community Management Statement for this scheme and have considered whether any of the scheme by-laws could apply to the circumstances.

Firstly, I note that by law 5 provides as follows:

Damage to common property.

A proprietor or occupier of a Lot shall not mark, paint, drive nails or screws or the like into, or otherwise damage or deface, any structure that forms part of the common property except with the consent in writing of the body corporate, but this By-Law does not prevent a proprietor or person authorised by him from installing -

- (a) any locking or other safety device for protection of his lot against intruders; or*
- (b) any screen or other device to prevent entry of animals or insects upon his lot:*

Provided that the locking or other safety device or, as the case may be, screen or other device is constructed in a workman-like manner, is maintained in a state of good and serviceable repair by the proprietor and does not detract from the amenity of the building.

The owners of lot 108 advise that their car parking space is part of lot 108 and that it is proposed to construct the enclosure without affixing any part of the enclosure to the common property. Having regard to the material submitted by the owners of lot 108, including architect's plans and an engineers report, it seems clear to me that the enclosure can be constructed wholly within the lot and therefore by-law 5 has no application.

The second by law with possible application to the circumstances is by law 8 which provides as follows:

Appearance of building.

In the case of a building units plan, a proprietor or occupier of a lot shall not, except with the consent in writing of the body corporate, hang any washing, towel, bedding, clothing or other article or display any sign, advertisement, placard, banner, pamphlet or like matter on any part of his lot in such a way as to be visible from outside the building.

As the proposed work would not be visible from the exterior of the building, this by-law can have no application.

The third by law with possible application to the circumstances is by law 13 which provides as follows:

A proprietor or occupier of a lot shall not make any structural alterations to any lot (including any alterations to gas, water or electrical installations) without the prior written consent of the body corporate.

This by-law refers generally to structural alterations" and then refers to particular activities which are to be taken as being within the scope of structural alterations". The term is defined in Butterworths Australian Legal Dictionary, (updated) 1997 edition, p.1122, as "Building work done to the fabric of a building. also defines "structure" (at page 1123) as, "Something built or constructed; a building, bridge, dam, or framework."

It seems to me that a "structural alteration" to a unit would normally involve some form of improvement, change or adjustment that directly pertained to the structure of a building. Without purporting to create an exhaustive list, "structural alterations" could include adjustments to the essential supporting framework of a building, or perhaps significant improvements to fundamental aspects of a building such as brickwork, roofing or decking. Normally, I would also expect that structural alterations would be of a relatively long term, if not permanent nature. I would not normally expect "structural alterations" to be readily removable.

I have reviewed the correspondence between the owners of lot 108 and the body corporate and note that their primary concern is to enclose their car parking area for security purposes. Originally they

proposed a masonry enclosure similar to some of the original car park enclosures. Although they obtained confirmation from a professional engineer that such a masonry enclosure would be "non structural" the lot owners were prepared to accommodate concerns raised by the body corporate and subsequently offered to construct enclosures from "colourbond" sheet metal or from chain wire mesh. In my view construction of the enclosures proposed by the lot owners, particularly the wire mesh and "colourbond" enclosures, would not involve structural alterations to the lot.

The next by law with possible application to the circumstances is by law 31 which provides as follows:

Residential Use

Each lot other than lot 13 in the building shall only be used for residential purposes provided that any part of a lot on level A (other than lot 13) shall be used for car parking only. A proprietor or occupier of such lots shall keep such part on level A clean, tidy and free from rubbish.

I note that the body corporate has raised concerns that further enclosures should not be approved because current enclosures are an "eyesore", are not maintained and present a fire risk. With respect I am unable to agree that these are reasonable grounds to refuse approval.

Clearly, the body corporate has sufficient powers under the by laws, the Act and regulation Module to ensure that:

- the area is kept tidy and free from rubbish;
- the operation of fire protection devices such as sprinklers is not interfered with; and
- any improvements are maintained.

Accordingly, I propose to order that the owners of lot 108 shall be permitted to construct an enclosure on or within the boundary of the car parking area for lot 108, provided that the enclosure meets the requirements (if any) of the Building Code of Australia and the Brisbane City Council.

Finally, I would point out that even if I was of the view that the by-laws required the lot owners to firstly obtain approval from the body corporate committee, the body corporate is obliged by section 94 of the Act to act reasonably in performing its functions, including enforcing scheme by-laws (see section 94(2) of the Act). Given the willingness of the lot owners to address the concerns of the body corporate, for example by considering different ways of constructing the enclosure, I believe that the continued refusal by the body corporate could be regarded as "unreasonable".

The interim order made on 3 May 2006 ceases to have effect from the date of making this order.