

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**OWNERS CORPORATIONS LIST**

VCAT REFERENCE NO. **OC1248/2016**

**CATCHWORDS**

Bin corral, whether a refurbishment of existing structure or a new structure; whether significant alteration to common property; requirement for special resolution; validity of ballot; whether conduct of OC unreasonable, oppressive or discriminatory against lot owner; devaluation of property; proposed relocation of corral; *Owners Corporation Act 2006* ss 52,167.

|                                  |  |
|----------------------------------|--|
| <b>APPLICANT</b>                 | Leonie Burke Pty Ltd (ACN: 061 114 181)  |
| <b>RESPONDENT</b>                | Owners Corporation 15762   |
| <b>WHERE HELD</b>                | Melbourne  |
| <b>BEFORE</b>                    | C Price, Member  |
| <b>HEARING TYPE</b>              | Hearing  |
| <b>DATE OF HEARING</b>           | 20 October 2016  |
| <b>DATE OF ONSITE INSPECTION</b> | 17 November 2016   |
| <b>DATE OF ORDER AND REASONS</b> | 19 December 2016   |
| <b>CITATION</b>                  | Leonie Burke Pty Ltd v Owners Corporation 15762 (Owners Corporations) [2016] VCAT 2053 |

**ORDER**

1. The respondent must relocate the corral in accordance with Planning Permit No. 0497/15 by 28 February 2017.
2. The applicant must reimburse the respondent the actual costs incurred in relocating the corral, including but not limited to, all works of construction, concreting, drainage and lighting within 7 days of being provided with a tax invoice from the respondent.
3. The applicant's costs are reserved.

C Price  
Member

**APPEARANCES:**

For Applicant

Mr Pitt QC  
Leonie Hemmingway, director

For Respondent

Fleur D'Altera, chair of OC  
Helen Kelly, member committee

## REASONS

### Background

- 1 This is a dispute about a garbage bin corral located on common property at 601 Toorak Road, Toorak. The applicant, Leonie Burke Pty Ltd ('Burke') is a member of Owners Corporation Plan No. RP015762 ('the OC') and the owner of unit 3. The four-storey building consists of 12 units, and 12 accessory units. Unit 3 is on the ground floor of the building and is occupied by Burke's tenant, Dr Hugh Robson Garner ('Dr Garner'), who uses the unit to conduct his medical and consultancy practice. The building was constructed in the 1950's and according to the OC there has been a lattice rubbish bin corral adjacent to unit 3 for as long as can be remembered, until action was taken by the OC and committee for works to be undertaken in November 2014. It is these works which are the subject of the dispute.

### Application

- 2 It is Burke's submission that the work undertaken in November 2014 was to build an entirely new corral, which was greater in dimension, and made of new materials. Further, that this was a new structure which represented a significant alteration to the common property and required a special resolution to be passed, and a building permit. There is no dispute that a special resolution was not passed, and no building permit obtained. Burke contends that in approving the works the OC has acted in a manner which is oppressive, unreasonable and unfairly discriminatory to it. It seeks to have the OC relocate the corral to an area of common property further away from the building, and that it reimburse the OC the costs of construction works associated with the relocation.
- 3 The OC contends that the work undertaken in November 2014 was refurbishment of an existing structure which did not require a special resolution or a building permit. It contends that it carefully considered the concerns of Burke following the works, and asked Burke to obtain further information about the proposed relocation of the corral. It says that the committee was deadlocked on the decision of whether to relocate the corral, so it was put by ballot to the lot owners. Of the 12 lot owners, 5 responded with only 2 in favour of the relocation. Given that the resolution was not passed by a majority of lot owners, the OC submits that the corral should remain in its existing location.

### The Evidence

#### Dr Garner

- 4 Burke's tenant, Dr Garner gave evidence. He stated that he is a medical practitioner and consultant, and is trained as a psycho-analyst. He has occupied Unit 3 for 16 years. He received no prior notice of the works in

November 2014. He identified Burke's Tab 6 document as being a photograph prior to the works. Unit 3 has two windows facing East, the more southerly window is an opaque bathroom window, and the more northerly window is a clear window of the room which serves as Dr Garner's waiting room. Prior to the works the view from that window was of a concreted area, and further away a tree, pot plants and the Uniting church. The garden view was charming and unobstructed.

- 5 Dr Garner identifies Burke's Tab 5 document as being a photograph of the new corral. He said it was not the same size, and had been extended towards the garden, and vertically extended, as well as extended in height. He explained that if the bathroom window is open the drop down to the corral is shorter than previously. The new corral extends across the window of the waiting room which it did not previously, and that window is the only operable window to air the unit. The other side of Unit 3 faces onto St Georges Road, 50 metres from the corner of Toorak Road, and there is too much traffic noise to open that window. He identifies Burke's Tab 4 document as being the current view from the waiting room window into the corral. He stated that prior to the works he could open the waiting room window to air the unit; the previous structure was latticed and unobtrusive, whereas now it collects odour and smells unpleasant, and if air is blowing it brings the smell into the unit. He is able to hear the movement of bins and bottles off and on all day. He did previously, however not to the same extent, and wonders if that is because the solid corral bounces the noise back into the apartment. He confirmed that his written statement dated 7 August 2016 was true and correct.
- 6 When cross-examined Dr Garner stated that before the construction he could see the rubbish bins if he looked to the side, but the view was otherwise unobstructed into the backyard area. The OC produced a photograph showing the bathroom window in Unit 3 open. When questioned about why the window would be open if the smell was so bad he stated that he does not open the window, but leaves it unlocked to allow a patient who has a bowel action to open it if they wish. He is dismayed that the structure has obstructed the view; it is a small apartment, and previously the view gave the feeling of being connected to the outside garden area.

#### Submissions and further evidence on behalf of Burke

- 7 The photographs in Tabs 4, 5, and 6, and the OC's exhibits B and C demonstrate that the former corral was located adjacent to the bathroom window in unit 3, whilst the new corral extends across the living room window of unit 3, which means the new corral is located further north, is larger, and abuts the wall of unit 3, which the previous corral did not. The photographs show the former corral was 3 bins wide and two bins deep, whereas the new corral is 3 bins wide, three bins deep, with dimensions of 3.4 metres deep, 4.3 metres long, and 1.45 metres high (which is significantly higher than the former corral). It is made with solid timber,

whereas the previous corral was wooden lattice. It is incorrect to state that the new corral is a refurbishment when it is clearly a new structure. The relative size, location and capacity of the new corral compared to the old corral is a significant alteration to common property. It is a significant alteration in that it abuts the wall containing the only operable window to unit 3, and it is a significant alteration both when viewed from the living area window of unit 3, and when viewed from outside on common property. It is submitted that the construction of the new corral required a special resolution pursuant to Section 52 of the *Owners Corporations Act 2006* ('The Act') and there was not one.

### Submissions and evidence on behalf of the OC

#### Mr Hicks-Newbegin

8 Mr Hicks-Newbegin gave evidence on behalf of OC, confirming that his statutory declaration dated 26 September 2016 was true and correct. That document confirms that the garbage corral has been in place since at least the early 1990's, and that he has resided at the premises for the last 10 years. In cross-examination he agreed that the previously the corral did not extend across the window, but came up to the edge of it. He confirmed that there was an increase of bins in the late 1990's with some overflow of bins outside the corral, and again 2-3 years ago 2 garden recycling bins were added. He confirmed there were 6 rubbish bins, 6 recycling bins, and 2 garden recycling bins, all of which are 240 litres in size. He has not noticed that the corral has malodours, and he came across a cockroach in the bin area a couple of years ago.

#### Ms D'Altera

9 Ms D'Altera is the chairperson of the OC committee, and the owner of Unit 2. It is her submission on behalf of the OC that the works carried out in November 2014 were a refurbishment of the existing corral, it was not a new structure and therefore did not require a council planning or building permit. In addition that the refurbishment of the existing corral was not a significant alteration to common property, required only a minimal amount of work, and that a special resolution was therefore not required pursuant to section 52 of the Act.

10 It was her evidence that 2 to 3 existing foundation points were used along the south side of the corral near the bathroom window. Those foundation points are wooden and concreted in place, and the corral on that side has been built upon them.

#### The On-site inspection

11 Following the conclusion of the hearing on 20 October 2016, the OC requested the Tribunal attend for an on-site inspection prior to making a decision. Burke was not opposed to this, and the matter was adjourned to

enable an on-site inspection to occur, which it did on 17 November 2016. The Tribunal attended the property alone and made the following observations:

- The bathroom and lounge room windows of unit 3 were shut.
- The corral was constructed of timber palings which were painted black, and the south side of the corral abutted the brickwork of the building.
- There were a total of 17 garbage bins in the corral, 8 regular bins, 7 recycling bins, and 2 green waste bins. There was significantly more room to fit additional bins. The corral was approximately 5 bins wide on the southern side and 6 bins wide on the east side.
- It was noted there were malodours when standing inside the corral.
- The lounge room window of unit 3 looked into the corral, the toilet window was not above the corral, and did not overlook it.
- The windows and balcony of the units on the south side of the building would all have a view of the corral to their left, and in particular the units on levels 1 and 2 would have clear views into the corral on their left. However when looking straight ahead out of those units they would see leafy trees, shrubs and a low tiled garden bed on the common property to the East.
- One old concrete footing was observed on the south wall of the corral, otherwise the structure seemed to be new, constructed with timber slats.
- The proposed relocation site of the corral would require the removal of ground plants, ferns and shrubs, and would be located on the back wall which is the northern fence line of the property. It appeared that it would be almost completely obscured from the first and second storey units on the south side as there were established trees that would substantially block the view of the corral from these units. The ground floor unit would have less coverage and would see the corral.

#### Findings of fact and reasons for decision

Did the works undertaken in November 2014 amount to a refurbishment of the existing corral or the construction of a new corral? Did the work undertaken in November 2014 amount to a significant alteration to common property requiring a special resolution under section 52 of the Act?

- 12 It is the Tribunal's view that the evidence clearly supports the fact that a new structure was built, and that the works undertaken did not amount to the refurbishment of an existing structure, being the previous lattice bin corral. Multiple aspects of the evidence supports this. It is not disputed

that the current bin corral is of different dimensions and constructed of different material to the previous structure. The previous corral was constructed of wooden lattice material, this has not been used in the new structure, which is a solid structure made of timber that does not allow significant amounts of air to pass through it. This was not the case with the previous corral. The dimensions and placement of the previous and current corral vary significantly. The photographs in Tabs 4, 5, and 6, and the OC's exhibits B and C, Dr Garner's oral evidence, together with the on-site inspection conducted, satisfies the Tribunal of this. The Tribunal finds that the former corral was located adjacent to the bathroom window of unit 3, whilst the new corral extends across the living room window of unit 3. The Tribunal also finds that the new corral is located further north, is larger, and abuts the wall of unit 3, which the previous corral did not. The former corral was 3 bins wide and two bins deep, whereas the new corral is significantly larger, with dimensions of approximately 3.4 metres deep, 4.3 metres long, and 1.45 metres high, which is significantly higher than the previous corral. Ms D'Altera's evidence was that 2 to 3 existing foundation points were used along the south side of the corral near the bathroom window. Those foundation points are wooden and concreted in place, and the corral on that side has been built upon them, thereby confirming the refurbishment of an existing structure. At the on-site inspection I could only see 1 foundation point, but that does it mean there were not 2 or 3 as stated by Ms D'Altera. The Tribunal does not accept however that the use of foundation points establishes that the existing corral was refurbished, all it establishes is that on one side, the new corral sits where the previous one did. In all respects the evidence substantiates that the current corral was an entirely new structure, and the Tribunal finds this to be the case.

13 Section 52 of the Act states:

**Significant alteration to common property requires special resolution**

An owners corporation must not make a significant alteration to the use or appearance of the common property unless—

(a) the alteration is—

**S. 52(a)(i) amended by No. 2/2008 s. 12(2).**

- (i) first approved by a special resolution of the owners corporation; or
  - (ii) permitted by the maintenance plan; or
  - (iii) agreed to under section 53; or
- (b) there are reasonable grounds to believe that an immediate alteration is necessary to ensure safety or to prevent significant loss or damage.

Sections 52(a)(ii)&(iii) and 52(b) are not relevant to this dispute. The question for the Tribunal to determine is whether the construction of the new bin corral was a significant alteration to the use or appearance of the common property which first required approval by a special resolution of the owners corporation. The word 'significant' is suggestive of an alteration which is important, noticeable or of consequence. The Tribunal is satisfied based on the evidence that the construction of the new bin corral represents a significant alteration to the appearance of the common property. The bin corral is a large timber structure which sits on common property with dimensions of approximately 3.4 metres deep, 4.3 metres long, and 1.45 metres high. It is visually prominent from the living area of unit 3, from the common property at the rear of the property, and also from the windows and balconies of multiple lots. The construction of the new bin corral was a significant alteration to common property, and there was a requirement pursuant to section 52 of the Act to obtain approval by special resolution prior to the carrying out of such works. The Tribunal finds that the OC failed to obtain a special resolution prior to the construction of the new bin corral, and in doing this, failed to comply with its obligations pursuant to section 52 of the Act.

What must VCAT consider pursuant to section 167 of the Act when making an order?

- 14 Burke seeks orders requiring the OC to relocate the corral to an area of common property further away from the building, and states that it will reimburse to the OC the costs of all construction works associated with the relocation. It does not automatically follow that because the OC has breached its obligations pursuant to section 52 of the Act that Burke is automatically entitled to the orders it seeks. When making orders the Tribunal is bound to consider the provisions set out in section 167 of the Act.

Section 167 of the Act states:

**What must VCAT consider?**

VCAT in making an order must consider the following—

- (a) the conduct of the parties;
- (b) an act or omission or proposed act or omission by a party;
- (c) the impact of a resolution or proposed resolution on the lot owners as a whole;
- (d) whether a resolution or proposed resolution is oppressive to, unfairly prejudicial to or unfairly discriminates against, a lot owner or lot owners;



- (e) any other matter VCAT thinks relevant.

Parties evidence and submissions regarding section 167 factors

- 15 Burke submits that by constructing the corral abutting Burke's only openable window to the habitable room, the conduct of the OC was unreasonable, oppressive, unfairly prejudicial and discriminatory to Burke. Burke contends this is so for several reasons. Firstly, because there was a range of alternative positions for a rubbish collection facility away from the units, and further, that the previous corral was a trellis construction which did not abutt the habitable room window of Burke's unit. It was foreseeable that the concentration of rubbish immediately adjacent to and abutting the openable window would have malodours impacting Burke's unit. With respect to this an Environmental Health Officer of the City of Stonnington conducted an on-site inspection and by e-mail dated 5 November 2014 states amongst other things:

I can advise that the ongoing presence of flies and malodours impacting on the unit immediately alongside the bin storage area may constitute a public health nuisance.

- 16 In addition it was foreseeable at the time the new corral was constructed that given its placement it would substantially devalue Burke's unit. In respect of this Burke provided a letter from James Connell, licensed estate agent who valued the property in the vicinity of \$500,000 on 15 August 2013. On 13 November 2014 Mr Connell states amongst other things:

Further to our telephone conversation, I wish to confirm that I have now physically viewed the abovementioned property with regard to assessing the rubbish bin corral and the effect that this new installation has in relation to your apartment...I feel that the installation in this particular part of the property was ill conceived, for one, it is arguably a health hazard as the bins are located directly below windows to habitable rooms, secondly an enhanced security risk now exists....there is no doubt in my mind that the capital value of your unit has been adversely affected by at least 10%, if not 15%, of its otherwise unencumbered value.

- 17 Mr Connell then states by letter dated 11 February 2015 that 'Based on my knowledge of the area and comparable sales, I would feel that a realistic market value for the property if placed on today's market is in the vicinity of \$425,000'.
- 18 The OC submits that to relocate the corral to the area proposed by Burke would cause 6 units on the Western side of the property to have their master bedroom or living area windows (which are 2-3 times the size of Burke's living room window) looking out to the bin corral, when that area currently has garden beds, plants and trees. Unit 4 is the closest unit to the proposed relocation area.

- 19 In addition other problems associated with the relocation of the corral would be the requirement to add drainage and extra piping to an already problematic piping system. There would need to be a tap for cleaning the corral, and lighting to enable lot owners to take their bins out at night. So there would be potential plumbing issues, the upkeep of the new area, and a query as to what would happen to the old area.
- 20 The OC further submits that the committee acted fairly and reasonably in respect of the process. They have always responded to Burke's representatives concerns, and when she obtained further information with respect to the proposed relocation the committee vote was tied. Ms D'Altera's evidence was that she did not exercise her casting vote as chairperson, but the committee decided that the most appropriate course of action was to put the matter to the lot owners. Of the 12 lot owners, 5 responded with 2 in favour of relocation and 3 against.
- 21 An Occupational Health and Safety Report prepared by Australian Essential Services Group dated 14 April 2015 (exhibit G) includes a single comment only on the bin corral; that the step should have a safety strip. The corral and bins are cleaned fortnightly and have not been identified by any other resident as being malodorous (exhibits H & I).
- 22 Burke's claims of unreasonableness are unfounded as the work involved the refurbishment of an existing structure which abutted Burke's window both before and after the refurbishment. The statement from the Stonnington Council Officer states the bin 'may' constitute a public health nuisance and is not conclusive, or supported by the Australian Essential Services Group OH&S Report. Burke's diminishing property values are irrelevant because the bin corral has been in the same place for the full duration of Burke's ownership of Unit 3.
- 23 Burke's claims of oppression are unfounded as the OC has always been responsive to Burke's concerns; the issue has been through a democratic postal ballot of lot owners, and the wishes of lot owners should be respected.

Tribunals' findings and reasons regarding section 167 matters

- 24 With respect to section 167(a) the conduct of the parties, and (b) an act or omission by a party, the Tribunal takes into account the conduct of the OC in breaching its obligations pursuant to section 52 of the Act. The Tribunal has found that the OC caused to be constructed a new bin corral which was a significant alteration of the appearance of the common property, and it did so without obtaining the required special resolution. In addition to this, the Tribunal accepts that Burke was not notified of the proposed works until after they had taken place. This had the effect of putting Burke in the unenviable position of having to deal with the dispute with the new corral constructed. The OC has tried to justify its conduct by submitting that the works involved the refurbishment of an existing structure. This submission is unsupported by the evidence, and is legally untenable. To adopt a

position that the work had been done, and require that the relocation proposal be put to a postal ballot which was unsuccessful, left Burke with little alternative but to seek redress at the Tribunal.

- 25 The Tribunal considers that OC's decision to construct the bin corral abutting Burke's only openable window to the living area was unreasonable, oppressive, and unfairly prejudicial to Burke, and are factors relevant to section 167(e). The Tribunal accepts Burke's evidence of the effect of this decision, including the Environmental Health Officer of the City of Stonnington who stated by e-mail dated 5 November 2014 that the ongoing presence of flies and malodours impacting on the unit immediately alongside the bin storage area may constitute a public health nuisance. Dr Garner's oral evidence regarding malodours is accepted and preferred by the Tribunal, over multiple statutory declarations from other lot owners who refer to the corral area being clean, but make no comment as to malodours. I noted the presence of malodours at the on-site inspection on 17 November 2016. The OC's OH&S report is unsatisfactory, and is a general report, detailing numerous issues about the property, without addressing the corral in any detail at all.
- 26 The Tribunal also finds that it was reasonably foreseeable that the new corral would devalue Burke's unit, and based on the evidence the Tribunal finds that the construction of the new corral has done so. The impact of all of these issues on Burke, and only Burke, is to have resulted in the OC undertaking a course of action which not only breaches section 52 of the Act, but is unreasonable, and unfairly oppressive and prejudicial to Burke.
- 27 Finally, the Tribunal has considered the proposed relocation of the bin corral on other lot owners and the OC as a whole. Burke has obtained a building permit for the relocation of the corral, and seeks orders that reimburse the OC the entire cost of relocation, including any necessary ancillary works such as concreting, drainage and lighting. The OC submits that the effect of relocation would be worst for the units on the North-West side of the building because their master bedroom or living area windows (which are 2-3 times the size of Burke's living room window) would be looking out to the bin corral, when that area currently has garden beds, plants and trees. The Tribunal does not accept the effect of the relocation will be as suggested by the OC, having viewed photographic evidence and attending on-site. The closest units to the proposed relocated corral would indeed be on the North-West side of the building. All three levels would have windows that would overlook the corral, and the ground floor unit may see bins inside the corral, but from a considerable distance of over 5 metres, with the corral surrounded by trees, shrubs and garden. Other windows would be unlikely to see into the corral, but would just see the charcoal coloured corral from a distance. Unlike the current position, they would not be looking deep into the corral (as many of the units on the South, and South-West side currently do), but seeing it from a distance with leafy trees and shrubs around it. The current corral is on concrete and not

obscured by garden, whereas the proposed relocation site would be in an area with grass, trees and shrubs which would assist in obscuring the corral. The relocated corral would be over 5 metres from any apartment in the complex, which is a much further distance away than many apartments to the existing location. It is appropriate taking into account these factors, to order that the corral be relocated.

C Price  
Member