



## VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

### CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO. OC934/2016

#### CATCHWORDS

Special rule prohibiting pets from common property and private lots; owners corporation seeking order removing pet; special rules invalid; application dismissed.

APPLICANT: Owners Corporation SP24474  
FIRST RESPONDENT: Greg Watkins  
SECOND RESPONDENT: Madison Brewster  
THIRD RESPONDENT: Philip Webb Real Estate (ACN: 004 943 882)  
WHERE HELD: VCAT 55 King St, Melbourne  
BEFORE: Member L. Rowland  
HEARING TYPE: Hearing  
DATE OF HEARING: 29 June 2016  
DATE OF ORDER: 11 August 2016  
DATE OF REASONS: 11 August 2016  
CITATION: Owners Corporation SP24474 v Watkins (Owners Corporations) [2016] VCAT 1312

### ORDERS

#### The Tribunal orders:

1. The second respondent, Madison Brewster, must keep her dog on leash or otherwise restrain the dog whilst on common property until 1 March 2017.
2. There is no order for costs or application fees.
3. The application is otherwise dismissed.

### MEMBER L ROWLAND

#### APPEARANCES:

For the Applicant: Mr Mazlin, chair of the owners corporation

For the Respondents: Mr L Weller and Ms J Watkins, property managers

## REASONS FOR DECISION

### Introduction

1. In October 2013, the owners corporation passed two special rules prohibiting pets from common property and private lots. In these proceedings the owners corporation seeks an order requiring the occupier of lot 2 to remove a Cavoodle dog from the subdivision on the grounds that it breaches the newly created rules.

### Background

2. The subdivision, created in 1986 consists of 6 townhouses with a private courtyard for each lot. The common property consists principally of a driveway which gives access to each of the lots. The lots are all owner-occupied with the exception of lot 2 which is rented. None of the owner-occupiers has a pet. In response to a previous issue with a dog, the owners corporation passed two special rules prohibiting pets on common property and from private lots. The rules were lodged with the registrar of titles and on 1 April 2014 took effect as rules of the owners corporation. [\[1\]](#) The special rules provide as follows:

3.1(4) Pets are not allowed on common property

5.2(3) Pets are not allowed in units.

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[\[1\]](#) Section [142\(4\)](#) of the [Owners Corporations Act](#).

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3. On 14 December 2015, the second respondent, Ms Brewster, took up occupancy of lot 2. The first respondent, Mr G Watkins, is the owner of lot 2. He was represented by his daughter, Jessica Watkins, who is also his property manager and an employee of the third respondent, Philip Webb Real Estate. Ms Watkins said that Ms Brewster's tenancy application was accepted on the basis that she did not have a pet. However, shortly before taking up the tenancy, she inherited her parents' Cavoodle dog. Ms Brewster sought and obtained permission from Mr Watkins to keep the dog at the lot.
4. Permission was not sought from the owners corporation to keep the dog at the lot. The owners corporation served a number of breach notices upon both Mr Watkins as owner and Ms Brewster as tenant. The respondents did not comply with the notices because they did not consider the dog was causing a nuisance. The owners corporation commenced these proceedings to obtain an order for removal of the dog.
5. By all accounts, the dog is not dangerous. It does not bark excessively or particularly loudly. It barks only when people walk past lot 2. There is no evidence that the dog is causing a nuisance.

The owners corporation seeks its removal simply on the grounds that it is in breach of the rules. In submissions to the Tribunal the chair of the owners corporation stated:

The only transgressions that have been committed are by the respondents not by the owners corporation. All the owners corporation has to prove is that the rules have been breached and this is in defiance of section [141](#) of the [Owners Corporations Act 2006](#). When we point out that the issue is not how much of a nuisance the dog is causing, but that the dog is there at all, there is no response.

6. The hearing proceeded on 29 June 2016. I informed the parties that my view was that the special rules were invalid, but because an appeal was pending in a proceeding involving a challenge to special rules of an owners corporation, I decided to reserve my decision. I made the following interim orders:
  1. The decision is reserved pending the outcome of the Supreme Court Appeal in [Owners Corporation PS501391P v Balcombe](#) [2015] VCAT 956.
  2. Until further order, the tenant, Madison Brewster, must keep her dog on leash or otherwise restrain the dog whilst on common property.
7. The appeal decision in [Balcombe](#) was handed down on 22 July 2016, [\[2\]](#). I can now proceed to finalise my reasons in light of the Supreme Court authority on point.

Power to make rules

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[\[2\]](#) [Owners Corporation PS501391P v Balcombe](#) [2016] VSC 384.

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8. Under the [Owners Corporations Act 2006](#), an owners corporation has the power to make rules about any matter set out in Schedule 1 of the Act providing it is for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot, [\[3\]](#). A rule made within power may be of no effect if it unfairly discriminates or is inconsistent with other laws, [\[4\]](#).

Consideration of special rule 5.2(3) – prohibiting pets from private lots

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[\[3\]](#) See s 138 [Owners Corporations Act 2006](#).

[\[4\]](#) See s 140 [Owners Corporations Act 2006](#).

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9. In my view, special rule 5.2(3) prohibiting pets from the private units is an invalid rule because Schedule 1 of the Act does not give the owners corporation the power to make the rule in the context of this subdivision. The powers given under Schedule 1 relate mainly to common property and the administration of the owners corporation. There is limited rule making power to

control the use and enjoyment of private lots. The powers which relate to private lots are as follows:

**I. Health, safety and security**

1.1 Health, safety and security of lot owners, occupiers of lots and invitees.

1.2 Safety of children, including their exclusion from areas that may be unsafe for them or restricting activities that may be unsafe.

1.3 Storage of flammable liquids and other dangerous substances and materials.

1.4 Waste disposal.

**5. Lots**

5.1 Change of use of lots.

5.2 External appearance of lots.

5.3 Requiring notice to the owners corporation of renovations to lots.

5.4 Times within which work on lots can be carried out.

**7. Behaviour of persons**

7.1 Behaviour of owners, occupiers and invitees on common property.

7.2 Noise and other nuisance control.

10. In Balcombe, Riordan J set out a three step approach to determine if a rule was made within the scope of what Parliament intended when enacting the Owners Corporations Act 2006. The three questions necessary to consider are:

(a) What was the statutory purpose of the relevant provisions in the legislation?

(b) What is the character of special rule?

(c) Is there a sufficiently direct and substantial connection between the statutory purpose and the likely operation of the rule?

II. One of the statutory purposes of an owners corporation is to make rules with respect to the matters set out in schedule 1 for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot. The character of special rule 5.2(3) is to prohibit pets from private lots in order to prevent noise and nuisance. The special rule must be connected to a power or function of the owners corporation.

12. The owners corporation's power to make rules in respect of private lots is set out in Clauses, 1, 5 and 7 of Schedule 1 as set out above. I will examine each of the powers to determine if there is a sufficient connection to rule 5.2(3).
13. I do not consider there is a sufficient connection between the rule and the health, safety and security of owners, occupiers and invitees' power. There is no factual or evidentiary material which supports a rule prohibiting pets from private lots is likely to protect the health and safety of other occupiers. In my opinion, the rule prohibiting pets cannot be made under that power.
14. There is also no connection with the limited powers relating to lots. Clause 5 of Schedule 1 enables an owners corporation to make rules regarding the external appearance of a lot and renovations. There is no power to make a rule prohibiting pets under that power.
15. There is a tenuous connection between the rule and the power to make rules with respect to noise and nuisance. However, I do not consider that a concern about possible noise or nuisance is sufficiently connected to a general ban of all pets from all lots. In my opinion, the power under 7.2 to control noise and nuisance and the behaviour of persons, does not give an owners corporation power to prohibit an otherwise legal activity on the basis that it would prevent a possible noise or nuisance. The exercise of the power is disproportionate to the noise and nuisance it is seeking to prevent. As Riordan J held in [Balcombe](#) :

In summary, I do not consider that the Parliament conferred powers on bodies corporate for the Statutory Purpose of substantially interfering with rights and privileges usually attendant upon freehold owners. To adopt the words of Brennan J, notwithstanding that his Honour was in the minority, '[t]he indiscriminating nature of the regulation certainly reveals that, in many instances, the regulation would apply to [Short-Term Letting] which does nothing to enhance the risk of [conduct problems]; but it also reveals – and this is relevant to validity - that the regulation has been framed without regard to 'a body corporate's limited functions and powers under the [Subdivision Act 1988 \(Vic\)](#) and its regulations. Accordingly, I consider that Rule 34 was not sufficiently directly or substantially connected with the Statutory Purpose to be a real exercise of the rule making power. <sup>[5]</sup>

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<sup>[5]</sup> See paragraph 124 of the judgment of Riordan J in [Balcombe](#) .

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16. Although Riordan J was referring to the power of a body corporate under the [Subdivision Act 1988](#) , I find that the statement is equally applicable to the powers conferred on an owners corporation under Schedule 1. For the reasons stated above, I find that the rule prohibiting pets from private lots is invalid because the owners corporation did not have the power to make the rule.

Consideration of special rule 3.1(4) – prohibiting pets from common property

17. In my opinion, special rule 3.1(4) prohibiting pets from common property is made within the powers and functions given to owners corporations to control and manage common property. The owners corporation has wide ranging powers to control, manage and administer common

property and the rule can be properly made under one or more powers conferred on owners corporations by Schedule 1.<sup>[6]</sup> However, that is not the end of the matter. A rule made within power is of no effect if it is discriminatory or inconsistent with law. Section 140 of the Act relevantly provides:

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<sup>[6]</sup> Under 4.1 of schedule 1, the owners corporation has power to make rules concerning the 'use of common property'. The rule might also be properly made under 7.1 of the schedule.

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#### **140. Rules to be of no effect if inconsistent with law**

A rule of an owners corporation is of no effect if it

- (a) unfairly discriminates against a lot owner or an occupier of a lot; or
- (b) is inconsistent with or limits a right or avoids an obligation under...

18. Rule 3.1(4) discriminates against animal owners because it treats animal owners less favourably than non-animal owners. That of itself does not make the rule invalid under s 140. The issue for determination is whether the rule **unfairly** discriminates against a lot owner or occupier of a lot. An example of a rule which discriminates against a lot owner but does so fairly is a rule which prohibits animals from gymnasiums and swimming pools or requires an animal to be on a lead in some common areas. There is nothing unfair about these rules.<sup>[7]</sup> Other lot owners and occupiers have the right to enjoy common property without the interference of animals. No-one can reasonably expect that an animal should be permitted into a swimming pool or gymnasium. Rules which limit the movement of animals on common property are not necessarily unfair.<sup>[8]</sup> To determine if a rule unfairly discriminates, the rule needs to be examined in the context of the particular subdivision.

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<sup>[7]</sup> The obvious exceptions are guide dogs and assistance animals. Any rule which prohibited a guide dog or assistance animal would be an unfair rule and is also likely to be inconsistent with both State and Commonwealth legislation prohibiting discrimination on grounds of disability.

<sup>[8]</sup> The rules would obviously need to exempt guide dogs and assistance animals.

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19. In this case, the subdivision consists of 6 townhouses, each with a backyard and a common property driveway. The townhouses are similar to a row of terraces. In order for the lot 2 occupier to take the dog outside the lot it is necessary to traverse the common property driveway. A rule which prohibits an animal from the only ingress and egress from a private lot effectively prohibits a lot owner from having an animal at all. There was no evidence that an appropriately restrained dog traversing the common property driveway could interfere with the enjoyment of

the common property by other lot owners and occupiers. In my view, the rule unfairly discriminates against the occupier of lot 2 because there is no reasonable justification for a total prohibition of animals on common property in the circumstances of this subdivision.

20. I find therefore, that the rule, in its present form, is of no effect under s 140(a) of the Act.

#### Conclusion

21. I decline to make an order removing the Cavoodle dog from lot 2 because, in my opinion, special rules 3.1(4) and 5.2(3) are invalid and of no effect.

22. It is clear that the majority of lot owners do not favour the presence of animals on the subdivision. I will continue the interim order requiring the dog to be restrained whilst on common property for a period of 6 months to enable the owners corporation to pass and register an effective rule if it chooses to do so.

MEMBER L ROWLAND

Please insert Members name above.