VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST VCAT REFERENCE NO. OC1187/2020

CATCHWORDS

Sections 14, 48, 52, 53, 138, 139, 140, 152, 153 & 155, Owners Corporations Act 2006 – s 79, Planning and Environment Act 1987 – Dunn v Owners Corporation 446158A (Owners Corporations) [2017] VCAT 1893 - *Martin & Ors v Owners Corporation 431576 (Civil Claims)* [2009] VCAT 2699 (18 December 2009) -*Dundas Terrace Pty Ltd v Owners Corporation PS5341300K (Owners Corporations)* [2019] VCAT 571 (17 April 2019) - *Towie v State of Victoria* [2007] VCAT 1489 (22 August 2007) - *Raso v Owners Corporation PS 638800J (Owners Corporations)* [2020] VCAT 211 (16 March 2020) - *Avranik Pty Ltd v Lloyd & Anor* [2012] VSC 306.

APPLICANT	Garry Dunn
RESPONDENT	Owners Corporation PS446158A
WHERE HELD	Melbourne
BEFORE	Acting Senior Member C Powles
HEARING TYPE	Hearing
DATE OF HEARING	8 November 2021
DATE OF ORDER	16 May 2023
CITATION	Dunn v Owners Corporation PS446158A (Owners Corporations) [2023] VCAT 557

ORDER

The application is dismissed.

The parties may seek orders in relation to costs in accordance with paragraph [65] of the written reasons.

C Powles
Acting Senior Member

APPEARANCES:

For the Applicant:	M Settle of Counsel and J Maloney, solicitor
For the Respondent:	A Craig of Counsel and M Lipshutz, C Leigh-Knight, solicitors

REASONS

Background

1 Garry Dunn (the **applicant**) owns and occupies **Apartment** 702, which is on level 7 of the building known as the Scala Apartments and is **lot** 702 in the plan of subdivision 446158A on land at 1 Roy Street, Melbourne.

2 The respondent, **Owners Corporation** PS446158A, is the owners corporation for the Scala Apartments.

3 The Owners Corporation made **Rules** under s 138 of the *Owners Corporations **Act** 2006*[1] by special resolution on 1 July 2016.[2]

4 The lot has a tiled **terrace** with a northern outlook over Roy Street and the applicant wishes to extend the built form of the Apartment into the terrace (the **proposed works**). The proposed works involve:

a. extending the footprint of the Apartment;

b. moving the northern and western external **walls** that are common property of the Owners Corporation; and

c. accordingly, will leave a **strip of common property** the width of the walls, where the walls were, inside the lot.

5 In late February 2017, the applicant requested approval from the Owners Corporation for the proposed works and was advised that, because the Owners Corporation considered that the proposed works would alter the external appearance of the lot, written approval of the Owners Corporation was required before the proposed works could be undertaken.

6 In March 2017, the applicant requested approval of the proposed works from the **committee** of the Owners Corporation, providing design drawings for the proposed works.

7 On 1 May 2017, the committee advised the applicant that it had resolved to reject the request for approval of the proposed works.

8 On 9 May 2017, the applicant lodged a complaint with the Owners Corporation under s 152.

9 On 1 June 2017, the applicant applied to the City of Port Philip (the **council**) for a planning permit for the proposed works and subsequently applied to the Tribunal under s 79 of the *Planning and Environment Act 1987* for review of a failure by the council to grant the planning permit within the prescribed time (the **planning permit application**).

10 On 30 November 2017, the Tribunal ordered, and provided reasons, in **separate proceedings** between the applicant and the owners corporation that the owners corporation must pay the applicant $133,519.00 for works that

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[1] Where sections, parts or divisions of or schedules to an act are referred to in this decision, they are references to sections, parts or divisions of or schedules to the Act, unless otherwise stated.

[2] **T**ribunal **B**ook 149. Section 128 requires the applicant comply with the Rules. A reference to a rule in these reasons is a reference to a rule under the Rules, unless otherwise stated.

needed to be done to waterproof the terrace and declared that the Owners Corporation was not liable to carry out any further works on the lot, including any works on the terrace.[3]

11 Over the course of late 2017 and early 2018, a number of lot owner members of the Owners Corporation lodged objections with the Tribunal against the granting of the planning permit application.

12 On 18 June 2018, the Tribunal, having conducted a hearing in relation to the planning permit application and considered the objections made, granted the planning permit application (the **planning decision**).[4]

13 In November 2019, the applicant applied to the council for an amendment to the planning permit granted by the Tribunal (the **amendment application**).

14 Over the course of November and December 2019, a number of other lot owners in the Owners Corporation objected to the amendment application.

15 On 13 January 2020, the council approved the amended planning permit application and provided the Applicant with endorsed plans for the **amended planning permit**.[5]

16 On 18 February 2020, the applicant sought approval from the owners corporation for the proposed works in accordance with the amended planning permit.[6]

17 On 25 March 2020, the Owners Corporation refused the applicant's request for approval of the proposed works and gave the applicant a **Notice of Repair** under s 155 in relation to the works the subject of the separate proceedings (the **repair works**).

18 On 31 March 2020, the applicant's solicitor wrote to the Owners Corporation claiming that the refusal of the request for approval of the proposed works was unreasonable and capricious, objecting to the Notice of Repair and seeking initiation of the Owners Corporation grievance procedures by making a **complaint** using the Owners Corporation complaint form.

19 On 20 May 2020, the applicant applied to the Tribunal, seeking orders:

a. declaring that:

   i. the Owners Corporation had unreasonably withheld approval of the proposed works; and

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[3] *Dunn v Owners Corporation 446158A (Owners Corporations)* [2017] VCAT 1893.

[4] See *P2971/2017*.

[5] TB pp 441 – 448. The amended planning permit approved a further extension of the western wall (including windows) of 605 mm beyond that approved in the planning decision. The amended planning permit also approved a further extension of the northern wall (including windows) but the applicant stated at hearing that the proposed works did not include the further extension of the northern wall beyond that approved in the planning decision.

[6] See letter at TB 449 – 450.

ii. the applicant is not required to obtain a special resolution of the Owners Corporation under ss 14 & 53 to undertake the proposed works;

b. requiring the Owners Corporation:

i. approve the proposed works and the related use of common property in accordance with the Rules; and

ii. withdraw the Notice of Repair; and

c. for the applicant's costs of the proceeding to be paid by the Owners Corporation.

20 After the provision of a Further Amended Points of Claim (dated 6 August 2021); an Amended Points of Defence (dated 13 September 2021); expert reports (which were tendered as exhibits at hearing without challenge);[7] witness statements; and a **T**ribunal **B**ook, I heard the application on 8 - 9 November 2021.

21 At the hearings, I heard evidence from:

a. the applicant;

b. Mr C. Jackson, a member of the Owners Corporation Committee; and

c. Mr P. Williams, chair of the Owners Corporation Committee.

22 At the second day of hearing, a photograph of a neighbouring apartment not included in the TB was tendered as an exhibit.

23 In accordance with orders I made at that hearing, the applicant and the Owners Corporation provided further written submissions, and the applicant provided submissions in reply by 7 December 2021.

24 Unfortunately, resource demands placed on the Tribunal as a result of backlogs arising from the Covid 19 pandemic and other operational requirements has delayed the provision of my decision and reasons until now. I apologise to the parties for the delay.

Legal framework

25 **Rule 3.1.2** states:

> **3. Use of common property**
>
> 3.1 General
>
> 3.1.2 An owner or occupier of a Lot must not without the written approval of the Owners Corporation, use for their own purposes as a garden or for any other purpose, any portion of the Common Property.

26 **Rule 3.4.1** states:

[7] The reports, both submitted by the applicant, confirmed that the repositioning of the walls will not be structural changes to the Scala Apartments but will leave the strip of common property within the boundaries of the lot.

3.4.1 An owner or occupier of a Lot must not mark, paint, damage or alter the Common Property without the written approval and direction of the Owners Corporation.

27 **Rule 3.4.2** states:

3.4.2 An owner or occupier of a plot must not alter or damage in any way a structure that forms part of the Common Property without the written approval and direction of the Owners Corporation.

28 **Rule 4.2.1** states:

4.2 External Appearance of Lots

4.2.1 An owner or occupier of a Lot must not in any way alter the external appearance of a Lot or any structure on a Lot including by any addition of any nature, change of colour, finish or declaration of any external wall or woodwork, without first obtaining the written approval and direction of the Owners Corporation.

29 **Rule 6** states:

6.1 Grievance procedure

The grievance procedure set out in this rule applies to disputes involving a Lot owner, and occupier of a Lot, the Manager or the Owners Corporation.

6.1.1 A party making a complaint to the Owners Corporation pursuant to Section 152(1) …

30 **Rules 7.1.1**(a) and (c) state:

7.1.1 An owner or occupier of a Lot must not undertake any building works within or about or relating to the Lot which shall affect Common Property, services within Common Property and/or Lots unless the owner or occupier:

(a) submits to the Owners Corporation plans and specifications of any works proposed by the owner or occupier which affect the external appearance of the Building, or any of the Common Property of which affect the Building structure or services or the fire or acoustic ratings of any component of the Building; and

(b) …

(c) receives written approval for those works from the Owners Corporation, such approval not to be unreasonably or capriciously withheld but which may be given subject to the condition that the reasonable costs of the Owners Corporation (which costs may include the costs of building consultants engaged by the Owners Corporation to consider such plans and specifications) are met by the proprietor or occupier and such approval shall not be effective until such costs have been paid …

(e) has obtained all requisite permits, approvals and consents under all relevant laws and copies have been given to the Owners Corporation.

[Underlining added]

31 Sections 14, 52 and 53 relevantly state:

14 Leasing or licensing of the common property

By special resolution, an owners corporation may lease or license the whole or any part of the common property to a lot owner or other person.

52 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—

(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.

53 Upgrading of common property

(1) An owners corporation may by special resolution approve the carrying out of upgrading works for the common property and the levying of fees on lot owners for that purpose.

…

(2) In this section ***upgrading works*** means building works for the upgrading, renovation or improvement of the common property where—

(a) the total cost of the works is estimated to be more than twice the total amount of the current annual fees; or

(b) the works require a planning permit or a building permit before they can be carried out—

but does not include works that are provided for in an approved maintenance plan or works referred to in section 4(b).

Applicant's position

32 The applicant submits that:

a. the proposed works would not alter the appearance of the Scala Apartments because:

   i. the proposed works would reduce the terrace area around the lot from approximately 96 m² to approximately 82 m²; and

   ii. given the size of the terrace and of the setback of the lot on the seventh floor, the proposed works would not be visible or apparent from the street or neighbouring properties;

b. Rule 7.1.1 allows a lot owner to undertake building works that affect common property with the written approval of the Owners Corporation, which should not be unreasonably withheld;

c. if the only reason the Owners Corporation did not approve the proposed works under Rule 7.1.1 was that the proposed works would alter the appearance of the Scala Apartments, which the applicant submits it was, then the approval was unreasonable;

d. rule 7.1.1(e) does not require the applicant to *first* obtain all required permits, approvals and consents;

e. the applicant has obtained all permits and consents he is able to, being the amended planning permit, endorsed amending planning permit plans, construction plans, two engineering reports and a land surveyor report, with the only remaining permit required being a building permit which the applicant cannot obtain without the Owners Corporation's consent;

f. a request for approval by the Owners Corporation under the Rules does not need to refer to each rule by rule number so the requests for written approval made by the applicant should be considered to be requests for written approval under all relevant rules;

g. sections 52 & 53 do not apply when it is the lot owner and not the owners corporation carrying out works on common property;

h. if s 53 applies to upgrading work undertaken by a lot owner, it can only apply when a levy is to be imposed in relation to the upgrading work;

i. under Rule 3.1.2, the Owners Corporation can, without passing a special resolution, approve "use" by a lot owner of any portion of the common property "for any other purpose";

j. approval of "use" under Rule 3.1.2 includes the Owners Corporation licencing or leasing common property to a lot owner;

k. the use of the word "may" in section 14 means an owners corporation has a discretion about whether to require the passing of a special resolution before entering into a lease or licence with a lot owner;

l. the applicant is prepared to enter into a lease or licence of the strip of common property and be responsible for the maintenance of the relocated walls;

m. there is no need for the applicant to enter into a lease or licence over any structural columns because the proposed works do not involve structural works;

n. accordingly, the Owners Corporation can approve entering into a lease or licence of the strip of common property to the applicant without a special resolution;

o. alternatively, the special resolution passing the Rules was the special resolution required under s 14 for leasing or licensing common property; and

p. the Notice of Repairs should be withdrawn or dismissed because the Owners Corporation has not responded to a complaint made by the Applicant in response to the Notice of Repair, in accordance with the dispute resolution provisions in the Rules.

Owners Corporation's position

33 The Owners Corporation submits that:

a. s 14 requires that a special resolution is obtained before an owners corporation can exercise its discretion to grant a lease or licence for the use of common property;

b. the strip of common property will be used exclusively by the applicant as it will be within his apartment;

c. the Owners Corporation cannot consent to the proposed works because the applicant has not proposed, and the Owners Corporation had not obtained, a special resolution for a lease or licence in relation to any common property affected by the proposed works;

d. section 53 is not limited to circumstances where it is an owners corporation undertaking works on common property because:

i. approval of "the carrying out" of works suggests an owners corporation can consider a proposal from a third party, which logically may be a lot owner wanting to alter common property in the course of works done on their lot; and

ii. the reference at s 52(1)(a)(iii) to an alteration being "agreed to under s 53" supports this reading of s 53; and

iii. ss 52 & 53 work in tandem with s 14 concerning the need for a lease or licence in relation to common property.

e. the proposed works constitute:

i. a significant alteration to the use of the common property because they would make the strip of common property part of the applicant's internal living area; and

ii. upgrading works under s 53(2) because they involve the renovation of common property, being the movement of the walls and change to use of the strip of common property;

f. accordingly the Owners Corporation can only approve the proposed works under rule 7.1.1 after a special resolution is passed under s 53 for the upgrading works to the common property, being the renovation referred to above;

g. rules 3.1.2, 3.4.1, 3.4.2 & 4.2.1 require the applicant to obtain the written approval from the Owners Corporation without any obligation on the Owners Corporation to not unreasonably withhold approval;

h. the applicant has not obtained written approval from the Owners Corporation under rules 3.1.2, 3.4.1, 3.4.2 & 4.2.1 so it is not unreasonable for the Owners Corporation to withhold approval under rule 7.1.1;

i. even if the obtaining of a lease or licence, approval under s 53 or under rules 3. 1.2, 3.4.1, 3.4.2 & 4.2.1 are not required before approval can be given under rule 7.1.1, it is not unreasonable for the Owners Corporation to withhold approval under rule 7.1.1 because:

i. the planning decision was not the "final word on aesthetics";[8]

ii. if aesthetic concerns were not a reasonable basis for withholding consent, it was also not unreasonable to withhold approval because what was being proposed was uncommercial in so far as the proposal did not:

1. identify who would bear risks and liabilities associated with the proposed work;

2. provide a timeline for the completion of the proposed work;

3. propose any lease or licence of common property;

4. provide any form of security for damages caused; or

5. identify who would be undertaking the proposed works;

iii. the applicant had not complied with rule 7.1.1(e) at the time the proposal was put to the Owners Corporation; and

j. the Notice of Repair should not be withdrawn because of any non-compliance with the Owners Corporation's grievance procedures in response to the applicant's complaint because s 152 applies to complaints about lot owners or owners corporation managers, not about an owners corporation itself and so the Owners Corporation's role under Rule 6 is as a facilitator, not a party to a complaint;

[8] Respondent's Submissions [50].

k. the applicant has not undertaken all of the repairs works despite payment having been made by the Owners Corporation as required by the separate proceedings; and

l. the repair works need to be completed regardless of whether the applicant is allowed to undertake the proposed works.

FINDINGS

34 The issues for the Tribunal to decide in this matter are:

a. what approvals from the Owners Corporation must the applicant obtain before being able to commence the proposed works;

b. whether the Owners Corporation is entitled to withhold any approval for the proposed works; and

c. whether the Notice of Repairs should be withdrawn.

35 For the following reasons the Tribunal finds that:

a. the applicant must obtain approval from the Owners Corporation under rule 7.1.1 before undertaking the proposed works;

b. the Owners Corporation can withhold approval under rule 7.1.1 if:

i. rule 7.1.1 or other rules in the Rules will be breached by the proposed works in a way that means it is not unreasonable or capricious to withhold approval; or

ii. the proposed works require the lot owner obtain a lease or licence of common property; and

iii. the lot owner has not obtained the necessary lease or licence, in which case it would not be unreasonable or capricious to withhold approval until the lot owner had done so;

c. the proposed works do not breach rule 7.1.1 or other rules in the Rules in a way that means it is not unreasonable or capricious to withhold approval;

d. the proposed works require the lot owner obtain a lease or licence of the strip of common property;

e. a special resolution is required for the Owners Corporation to enter into a lease or licence of the strip of common property with the lot owner;

f. a special resolution to this effect has not been passed;

g. accordingly, it is not unreasonable or capricious for the Owners Corporation to withhold approval of the proposed works under 7.1.1;

h. the Owners Corporation is entitled to continue to withhold approval of the proposed works unless or until a special resolution is passed agreeing to the lot owner obtaining a lease or licence of the strip of common property; and

i. the Notice of Repair should not be withdrawn.

Approvals from the Owners Corporation required

Is a special resolution under ss 52 & 53 required?

36 In ***Martin*** *& Ors v Owners Corporation 431576 (Civil Claims)*,[9] Senior Member Vassie held at [33] that:

> While at first sight it may seem incongruous that (unless other exceptions in section 52 apply) an owners corporation requires the approval of a special resolution of members before it can make a significant alteration to the appearance of common property, but does not need such a special resolution before being able itself to approve a significant alteration which a lot owner proposes to make to the common property, in fact there is no incongruity. Section 52 is contained within Part 3 Division 5 of the Act, entitled "Asset Management". Within Division 5, section 46 sets out the owners corporation's obligation to repair and maintain common property. In order to fulfil that obligation, an owners corporation may set fees and levy special fees and charges, which must be based on lot liability (see sections 23 and 24) and which lot owners must pay in proportion to their respective lot liabilities. If as part of its "asset management" the owners corporation wishes to make alterations to the use or appearance of common property, the alterations will have financial consequences for all lot owners, for the owners corporation will be looking to them to share the cost of the alterations in proportion to their respective lot liabilities. It is for that reason, in my opinion, that section 52 includes, as an exception, approval by a special resolution. The members have the safeguard that the alterations, for which they will all be expected to pay, cannot be made unless by special resolution the members approve them. By contrast when an individual lot owners wishes to make a significant alteration to the appearance of common property and seeks the owners corporation's approval of the proposed alteration, there are no financial consequences for the other lot owners. The individual lot owner will be bearing the cost. So the rationale for having a safeguard of a special resolution of members does not exist.

37 This reasoning was adopted by Member Johnson, as she then was, in ***Dundas*** *Terrace Pty Ltd v Owners Corporation PS5341300K (Owners Corporations)*.[10]

38 While the Tribunal is not bound by decisions of previous Tribunal members, the Tribunal should consider them in determining whether the Tribunal should make findings that are inconsistent with those decisions.[11]

39 The Tribunal finds it would be inconsistent with those decisions to conclude that the applicant in this case cannot commence the proposed works until after a special resolution has been passed under section 53.

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[9] [2009] VCAT 2699 (18 December 2009).
[10] [2019] VCAT 571 (17 April 2019) at [56] – [59].
[11] *Towie v State of Victoria* [2007] VCAT 1489 (22 August 2007).

40 A plain reading of ss 52 - 53 is that the operative section is section 52, which applies to circumstances where an *owners corporation* is seeking to alter the use or appearance of common property. One of the circumstances in which it can do so under s 52(a)(iii) is by the passing of a special resolution for upgrading works under s 53(1).

41 While s 53(1) does not expressly include words specifying who is carrying out the upgrading works the subject of the section, given the same subsection refers to the levying of fees, as do subsections 53(1A) & 53(1B), the Tribunal finds it is clearly intended that the upgrading works referred to in s 53(1) are those carried out by or on behalf of the owners corporation, and not any works that affect common property carried out by a lot owner.

42 The Tribunal finds that the words "agreed to" in s 52(a)(iii) when read in this context must mean "agreed to by a sufficient number of the voting members of the owners corporation that a special resolution for the upgrading works to be done can be passed".

43 Accordingly, the Tribunal follows the reasoning in *Martin* and *Dundas* and, applying it to the circumstances in this case, finds the proposed works can be undertaken without a special resolution being passed under s 53 because the proposed works are to be undertaken by a lot owner and not the Owners Corporation.

Rules

44 As set out above, there are several rules in the Rules that require approval from the Owners Corporation for a lot owner to use or alter common property, or to alter the external appearance of a lot.

45 At hearing, and in post-hearing submissions, the Owners Corporation submits that the applicant is required to seek approval under all rules relevant to the proposed works and that without approval under each rule it cannot be unreasonable or capricious for the Owners Corporation to withhold approval under rule 7.1.1(c).

46 The Tribunal does not accept this submission. An owners corporation's obligation to exercise due care and diligence under s 5(b) requires an owners corporation to consider any request for approval of work to be done by a lot owner that affects common property in relation to all relevant rules of the owners corporation. If insufficient information is provided by the lot owner about the nature of any use or alteration of common property, or the external appearance of a lot, it is for the owners corporation to advise the lot owner of which rules prevent the lot owner undertaking what they propose without approval of the owners corporation, or without providing further information before approval can be considered.

47 A question arises under the Rules about what should be made of the difference between approval under rule 7.1.1, which cannot be "unreasonably or capriciously withheld" under rule 7.1.1(c), and under rules 3.1.2, 3.4.1, 3.4.2 & 4.2.1, which have no equivalent to rule 7.1.1(c). The Tribunal finds

that the Owners Corporation will still be required to comply with its obligations to act honestly and in good faith, and exercise due care and diligence, in assessing a request for approval under the latter rules.

48 The Tribunal also notes that that rule 4.2 does not include a provision equivalent to Rule 5.2(2) of the Model rules[12] which states an owners corporation "cannot unreasonably withhold approval" for a lot owner making any changes to the external appearance of a lot.

49 Under s 139(3), if the Model rules provide for a matter and the rules of the owners corporation to not, the Model rules relating to that matter are deemed to be included in the rules of the owners corporation. Accordingly, the Tribunal finds that Model rule 5.2(2) should be deemed to be included in rule 4.2 of the Rules, meaning that the Owners Corporation cannot unreasonably withhold approval of any alteration to the external appearance of a lot under rule 4.2.1.

50 The Tribunal is satisfied that an unreasonable or capricious withholding of approval under any or all of the relevant rules is likely to be a breach of the Owners Corporation's obligations under s 5(b) and so finds that the question for the Tribunal in assessing the Owners Corporation's refusal to approve the proposed works under any or all of the relevant rules is whether it is unreasonable or capricious in a way that would amount to a breach of obligations under s 5(b).

Basis on which Owners Corporation can withhold approval

51 In his letter to the Owners Corporation dated 18 February 2020, the applicant seeks approval for the proposed works under Rule 7.

52 In refusing the request for approval, in its letter to the applicant dated 25 March 2022,[13] the Owners Corporation does not refer explicitly to Rule 7, but states:

> [t]he Owners Corporation remains of the view that the proposed terrace extension will significantly alter the external appearance of the building at the Property as a whole and therefore, the Owners corporation does not provide its consent to the extension works being undertaken. It remains of critical importance to the Owners Corporation that the external appearance remain uniform and unaltered.

53 In a separate letter to the applicant sent a few weeks earlier, on 6 March 2020,[14] the Owners Corporation stated it had received a report on 4 March 2022 that terrace works at the Lot had commenced and noted that this would be in breach of rules 4.2 & 4.3.[15]

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[12] Schedule 2 - Model rules for an owners corporation.
[13] TB 467 – 468.
[14] TB 465 – 466.
[15] Rule 4.3 refers to the internal use of lots. The Owners Corporation did not, at hearing or in post hearing submissions, press any claim that rule 4.3 was relevant to the proposed works

54 In the course of this proceeding, the Owners Corporation has also submitted that the proposed works require the applicant lease or licence the strip of common property and that without an agreement for that lease or licence being reached the Owners Corporation cannot approve the proposed works.

55 In light of the above, the Tribunal finds that the reason the Owners Corporation does not approve the proposed works is because the Owners Corporation considers:

a. the proposed works will affect the external appearance of the lot and of Scala Apartments in a way that does not "accord with the reasonable aesthetic of the"[16] Scala Apartments;

b. the applicant has not obtained a lease or licence for the strip of common property; and so

c. withholding approval is not unreasonable or capricious.

External appearance

56 The applicant claims that:

a. the proposed works will not alter the external appearance of the lot (and so is not a breach of rule 4.2.1) and will not affect the external appearance of the Scala Apartments (and so is not required to submit plans and specifications of the proposed works under rule 7.1.1(a)); and

b. if the sole reason for withholding approval under 7.1.1(c), or under the Rules more generally, is that Owners Corporation considers the proposed works will alter the external appearance of the lot or affect the external appearance of the Scala Apartments then approval is being unreasonably or capriciously withheld.

57 The Tribunal finds the proposed works will alter the external appearance of the lot and affect the external appearance of the Scala Apartments because:

a. while the member presiding in the planning decision:

i. accepted "council's assessment and reasoning to support the proposal", [17] which was that "[t]he overall design and appearance of the building would be retained from the public realm … There would be little perceivable change to the appearance of the building … it would have limited visibility from ground level … [and] … the minor nature of the proposal … would make the alteration is virtually imperceptible from a streetscape perspective"[18] ; and

[16] See rule 7.1.1(b).
[17] P2971/2017, [3].
[18] TB 407, [7.3] & [7.8].

ii. found that the "design is consistent with the appearance of the building and its visibility from the public realm is almost [imperceptible]";[19]

b. the member presiding in the planning decision also noted that "[a]ny perceived issues … with the Body Corporate are outside the ambit of the planning permit application";[20]

c. the proposed works extend the northern wall of the lot by a distance that is more than twice the distance approved in the planning decision; and

d. it is a matter of simple logic that if the walls of a lot are moved, meaning in a physically different position than they were previously, then the appearance of that lot and the building of which it forms a part is altered or affected.

58 However, the Tribunal finds that if the Owners Corporation's sole reason for withholding approval for the proposed works is that the proposed works will alter the external appearance of the lot or affect the external appearance of the Scala Apartments then the withholding of approval is unreasonable because:

a. in assessing what is a reasonable basis for refusing approval where building works may affect the external appearance of the building under rule 7.1.1, significant weight should be given to the findings set out and referred to in the planning decision that the effect of the proposed works on the external appearance of the Scala Apartments will be virtually imperceptible from a street level and retain the overall design and appearance of the Scala Apartments;

b. having reviewed the photographs and other documentary evidence provided in the TB, in particular those at TB 348 - 354, the Tribunal is satisfied that given the distance of the lot from street level, even taking into account the increase in the extension of the northern wall of the lot in the proposed works being more than twice the distance approved in the planning decision, the effect of the proposed works on the external appearance of the Scala Apartments is likely to continue to be almost imperceptible and not inconsistent with the Scala Apartments' step-like design; and

c. at hearing, the chair of the Owners Corporation committee stated that the effect on the external appearance of the Scala Apartments was no longer considered by the committee to be a significant issue in relation to the approval of the proposed works.

Requirement for lease or licence

[19] P2971/2017, [4].
[20] Ibid.

59 However, as found above, the effect on the external appearance of the Scala Apartments is not the sole reason for the Owners Corporation withholding approval for the proposed works under Rule 7: the Owners Corporation also withheld approval because it considered it necessary for an agreement to be reached between the applicant and the Owners Corporation for a lease or licence for the strip of common property.

60 The applicant has submitted that the proposed works do not require him to enter into a lease or licence for the strip of common property but that, if it does, he is willing or able to enter into a lease or licence for the strip of common property and it is open for the Owners Corporation to enter into such an agreement with the applicant without the need of a special resolution being passed under s 14.

61 The Tribunal does not accept the applicant's submissions on this issue because:

a. in ***Raso*** *v Owners Corporation PS 638800J (Owners Corporations)*,[21] Member Rowland found that the lot owner applicant had no legal right to occupy the equivalent of the strip of common property in that case and in order to legally occupy that common property needed a licence, lease or amendment to the plan of subdivision;

b. the applicant seeks to draw a distinction between the common property in issue in *Raso* and the strip of common property, being that the former was physical common property and the latter is "airspace",[22] and submits that while it is reasonable for an owners corporation to require a lot owner enter into a lease or licence so that the owners corporation can "resolve any future legal issues of liability, ownership, maintenance and repairs" for the former, an owners corporation does not need to do so for the latter;

c. given that, as found in one of the expert reports provided by the applicant,[23] the strip of common property will remain within the lot and the moved walls will need to be the responsibility of the applicant, the Tribunal finds that there remain issues of liability and ownership, if not maintenance and repairs, that require resolution in relation to the strip of common property that, if not addressed through an amendment to the plan of subdivision, require an agreement to lease or licence;

d. accordingly, the Tribunal follows the reasoning in *Raso* that if a lot owner seeks to make alterations to a lot that also require alterations to the placing of common property within a lot, such as is the case here, the owners corporation is entitled to consider what legal agreements, such as a lease or a licence, are necessary before approval of any such alteration can be given;

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[21] [2020] VCAT 211 (16 March 2020), [14].
[22] Applicant's submissions [50] – [51].
[23] TB 45.

e. the Tribunal does not accept that the use of the word "may" in s 14 refers to a discretion as to whether a special resolution must be obtained before common property may be leased or licensed to a lot owner;

f. a plain reading of s 14 is that the word "may" allows a discretion as to whether the owners corporation enters into a lease or licence, not whether a special resolution is required to do so;

g. given the significance to the owners corporation and all its lot owning members of the restrictions on their use of common property by it being leased or licensed, the Tribunal finds that is clearly intended that under s 14 a lease or licence can only be entered into by an owners corporation agreeing by special resolution to do so;

h. while the Rules were passed by special resolution, the Tribunal does not accept that a special resolution passing rules addressing the approval by an owners corporation of use or alteration of common property by a lot owner satisfies the requirement that an owners corporation obtain a special resolution to enter into a lease or licence for the use or alteration of common property because:

   i. under s 140, a rule of an owners corporation is of no effect if it is inconsistent with or limits a right avoids an obligation under the Act;

   ii. if the passing of rules was read to mean that the owners corporation did not need to obtain a special resolution to enter into a lease or licence for the use of common property then those rules would be inconsistent with the obligation imposed on the owners corporation under s14 to only lease or licence common property by special resolution;

   iii. accordingly, such a rule or rules would be of no effect; and

   iv. reading the Rules as a whole in context,[24] the passing of the Rules by special resolution cannot be read as the owners corporation agreeing in advance to entering into leases or licenses for common property without any further special resolution required;

i. in light of the above, the Tribunal also does not accept that the word "use" in Rule 3.1.2 includes the leasing or licencing of common property without a special resolution;

j. for an owners corporation to consider obtaining a special resolution to enter into a licence or lease for common property with the lot owner, the proposed terms and conditions of any such licence or lease, or at least a potential range of proposed terms and conditions, must have been proposed or otherwise articulated by the lot owner or owners corporation for consideration in the passing of a special resolution; and

[24] See *Avranik Pty Ltd v Lloyd & Anor* [2012] VSC 306.

k. in this case, it is clear from the material before the Tribunal that there had not been any particular proposal by or on behalf of the applicant about the terms and conditions on which a lease or licence of the strip of common property could be entered into by the Owners Corporation: when asked at hearing when a proposal for the terms on which he would enter into a lease or licence for the strip of common property was put in writing to the Owners Corporation, the applicant only referred to the expert report referred to above that recommended in general terms that an agreement for the use of the strip of common property be executed between the applicant and the Owners Corporation as an alternative to seeking an amendment to the plan of subdivision.[25]

62 In light of the above, the Tribunal is satisfied that:

a. the proposed works requires the applicant and the Owners Corporation enter into a lease or licence for the strip of common property;

b. a special resolution of the Owners Corporation agreeing to enter into a lease or licence for the strip of common property is required;

c. the applicant has not proposed terms or conditions, or a range of possible terms or conditions, to the Owners Corporation for consideration in relation to a special resolution;

d. the lack of a special resolution and resulting agreement between the applicant and the Owners Corporation for a lease or licence for the strip of common property is a reasonable, and not capricious, basis for the Owners Corporation to continue to withhold approval of the proposed works under Rule 7 1.1(c); and

e. accordingly, the Tribunal cannot:

i. declare that the Owners Corporation has not unreasonably or capriciously withheld approval for the proposed works or that the applicant does not need to obtain a special resolution to enter into a lease or licence for the strip of common property; or

ii. order that the Owners Corporation must give its written approval to the proposed works under the Rules.

Notice of Repair

63 The Tribunal is not satisfied there are grounds justifying an order that the Notice of Repair be withdrawn because:

a. the applicant acknowledges that he has not undertaken the repair works the subject of the Notice of Repair and states he is willing to undertake the repair works, albeit only at the same time as the proposed works;

[25] TB 46 at [29].

b. the Notice of Repair was given under s 48, which is in Division 5 of Part 3, and so is not a Notice to Rectify Breach under s 155 or any other action taken "under this Part" as stated in s 153(3), which is in Division 1 of Part 10;

c. accordingly the Owners Corporation was not prevented from giving the Notice of Repair by the operation of s 153(3) and was not required to follow its dispute resolution procedures before doing so;

d. the applicant has not disputed that the repair works are work required to be done in order for the applicant comply with s 48;

e. the Owners Corporation has not yet applied to the Tribunal in relation to any failure to comply with the Notice of Repair;

f. the complaint is not a complaint under s 152 because that section covers complaints made by a lot owner about an alleged breach by a lot owner or a manager whereas the complaint is against the owners corporation itself;

g. on 1 December 2021, s 153(3) was amended so that it only refers to a complaint made under s 152; and

h. accordingly, s 153(3) no longer requires the Owners Corporation to follow its dispute resolution procedures before taking action under Part 10 or applying to the Tribunal in relation to the Notice of Repair.

Conclusion

64 For the above reasons, the Tribunal finds there is no basis for making the declarations sought by the applicant and so dismisses the application.

65 I will consider written submissions from the parties on the issue of costs and will decide based on those submissions without a hearing unless a costs hearing is specifically requested by one or both of the parties. If either or both parties continue to seek orders for costs in the proceeding, I require that party to provide to the Tribunal and the other party:

a. submissions on costs by 26 June 2023; and

b. submissions in reply, if any, by 7 August 2023.

C Powles
Acting Senior Member