

NEWSLETTER ISSUE 19 JANUARY 2016

Welcome to 2016. Here is our first newsletter of the year, I hope you find it interesting and beneficial. I think it contains information that all owners should be aware off!

Free car parking: Tribunal upholds exclusive use car parking by-law

This case demonstrates the need for scheme's to consider carefully the arrangements and agreements made when providing exclusive use – as you can't change them without the beneficiary's agreement later.

Introduction

In *Croyden & Anderson v The Owners – Strata Plan No 1583* [2015] NSWCATCD 104 (Member Hennings, 1 September 2015), the NSW Civil & Administrative Tribunal (**NCAT**) held that lot owners who have the benefit of an exclusive use by-law allowing them to park on common property car spaces and who had not paid for the exclusive use of those car spaces were not acting unreasonably when they refused to consent to the owners corporation's request for the by-law to be repealed.

Free car parking given in 1991 but Owners Corporation changes its mind in 2009

The exclusive use by-law was duly made in 1991, conferring on the lot owners the exclusive use of two car parking spaces that formed part of the common property. There was no evidence that the lot owners paid for exclusive use of the car spaces. In 2009, the owners corporation decided to repeal the by-law so that it could lease out or sell the car spaces. Not unexpectedly, the lot owners refused to consent to the repeal, so the owners corporation commenced proceedings to have the by-law repealed.

A little bit about repealing exclusive use by-laws

Normally, an exclusive use by-law can only be repealed with the consent of the lot owner benefited by the by-law. However, section 158 of the *Strata Schemes Management Act 1996* gives an adjudicator or NCAT the power to repeal an exclusive use by-law where the lot owner unreasonably refuses to consent to its repeal.

The decision

Six years after the dispute began in 2009, NCAT decided to uphold the by-law and dismiss the owners corporation's application to have it repealed under section 158 because:

- The by-law was validly made, there was no controversy about how it operated in practice and there was no controversy with the by-law itself from 1991 to 2009.
- There is no legal obligation on an owners corporation to rent out or sell common property to make money.
- While the car spaces were effectively gifted to the lot owners in 1991, the time for the owners corporation to ask for money was in 1991 as a condition for passing the by-law and not 18 years later in 2009.

- While the lot owners obtained the benefit of car spaces without an increase in their unit entitlements or levies, which was an issue the owners corporation could have considered in 1991 when passing the by-law but it choose not to ask for any payment for the by-law in 1991.
- New lot owners had bought into the owners corporation's strata scheme fully aware of the by-law.
- The by-law created a property right which NCAT should not lightly revoke unless there were good reasons. It created value to the lot owners' lots. The owner's corporation was not offering any compensation for the loss of that property right.
- The only thing that had changed between 1991 and 2009 was that the owners corporation now desired to make money out of the car spaces.

Lessons

The case demonstrates that an exclusive use by-law can be hard to repeal. Where such a by-law confers exclusive use of common property such as a car space or storage area, the appropriate time for the owner's corporation to ask for payment for that by-law is at the time the by-law is made and as a condition for making the by-law. An alternative may be to include a sunset clause in the by-law so that it expires after the passage of a number of years.

If you would like more information about this case, by-laws and NCAT proceedings, please contact Carlo Fini at Nexus Law Group on (02) 9016 0141 or email clf@nexuslawyers.com.au.

Disclaimer: this note is intended only to provide a summary and general overview of matters of interest. It is not intended to be comprehensive. It is not intended to constitute and it does not constitute legal advice. You should seek legal or other professional advice before acting or relying on it.

Disclaimer: This material is general information only. All reasonable care has been taken in it's preparation, but no warranty is made about its accuracy in certain circumstances or completeness, and should not be relied on as professional advice. Progressive Strata Services Pty Ltd disclaims liability for any loss occasioned as a result of consequence of reliance on this material.