

STRATUM

LEGAL

enforcing pet by-laws

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Re-published 13 October 2014

The decision of *Isle of Palms Resort CTS 20860 [2010]* shows that a by-law banning pets will be overturned on adjudication for being oppressive and unreasonable.

The By-Laws

Isle of Palms had a pet by-law for a number of years which provided that an occupier or invitee must not, without the Body Corporate's written approval, bring or keep an animal on a lot or common property. The Applicant brought his dog into the scheme without first seeking approval. When he did ultimately seek approval the committee refused to grant it, ostensibly on the basis of a 'no pets' policy.

In February 2010, the owners voted to amend the by-laws to reflect that policy; the proposed by-law provided that an owner or invitee was not permitted to keep an animal within the lot or on common property. The Applicant objected to both the committee's refusal and the new by-law.

The Applicant submitted that the proposed by-law prohibiting the keeping of any animal was too restrictive, unjust and not enforceable. In his submissions, he referred to the decisions of *Tutton v Body Corporate for Pivotal Point Residential CTS 33550 [2008]* CCT KA0005-08 and *Koongamiah [2009]* QBCCMCmr 215, each of which indicated that it may be oppressive or unreasonable for a Body Corporate to adopt a by-law prohibiting the keeping of any pets.

The Decision

The Adjudicator held that it was not objectively reasonable for the Body Corporate to absolutely prohibit the keeping of any animal, in any circumstances. Further, the Adjudicator found that the proposed by-law was oppressive in that it unduly restricted the use of a lot by preventing an owner from keeping any animal, even something as inoffensive as a single goldfish. While the Adjudicator recognised the Applicant's non-compliance, by not first seeking approval for the dog before bringing it home, this did not affect either the reasonableness of the committee's refusal or the oppressive nature of the proposed by-law. Accordingly the Adjudicator declared the proposed by-law void.

Tips for Drafting

Blanket bans on animals will be overturned by Adjudicators; care should be taking in drafting a by-law to restrict pets.

Firstly, drafters should appreciate and carefully consider the Scheme. They should look at the history of the complex in relation to pets, the number and type of pets currently living in the Scheme and the physical layout of the Scheme.

The Isle of Palms Scheme covers a large area of land which consisted of low-rise villas and duplexes with private yards, rather than high-rise accommodation. This was a factor in the Adjudicator's decision.

Drafters should also consider their objectives and whether they really wish to put in place a total ban or just a ban on adverse impacts; for example noise, smell or obnoxious behaviour. The proposed by-law should also provide for procedural fairness and clear criteria against which an application for consent will be considered. For example an applicant might be required to provide 'pet references', evidence of completion of obedience training and a vet check with health report certifying the animal is free of parasites. Where possible avoid weight or height limits but where they are used require the results to be certified by a vet.

Allow conditions to be imposed on an approval. They might include that:

- The animal is kept hygienically, with prompt veterinary or other appropriate treatment as necessary, and in a manner where other occupiers are not subject to any significant increased risk of pests or disease;
- No noises, odours, or allergens that are in any way related to the keeping of the animal are readily discernible from the common property or other lots; and
- The animal is kept indoors within the occupier's lot or otherwise contained to minimise the risk of other occupiers being affected by noises, odours, allergens, pests or disease. Further, the animal must be kept in a closed carrier whenever it is necessary to transport the animal across the common property.

An approval might also require that breach of critical conditions, such as the animal roaming free across common property, will render the approval liable to be revoked. When a breach is alleged the owner must however be given a chance to respond, and that response must be considered before revocation occurs.

Adopting the By-law

Once drafted the by-law should be circulated to owners and feedback sought, so that all owners are made aware of the proposed changes and any deficiencies in policy can be identified. If there are shortcomings, redraft. Aim for consensus if possible.

Once the draft has been finalised the correct notice and meeting procedures must be used; the Body Corporate should not rush a change just to try and head off a current or expected problem.

Enforcing the By-Law

Enforcement begins with awareness. Owners and buyers should be made aware of the pet by-law; if the Scheme has a notice board, post the by-laws on it. The Body Corporate might instruct, and pay for, their Body Corporate Manager to provide with each information certificate for a buyer, a copy of the by-laws. Record in the minutes all enforcement action taken, why it was taken and with what result.

The Body Corporate should enforce the new by-law fairly, reasonably and without fear. A history of contravention notices will lessen the ability of an Adjudicator to conclude that a Body Corporate has acted unreasonably in one particular instance.

The Body Corporate should not delay or fail to act to enforce the by-law. If it does then an owner may argue that there has been acquiescence on the part of the Body Corporate in not taking steps earlier.

The committee should not refuse the request of one owner to keep an animal but grant approval to another where there is no logical or reasonable basis for a distinction to be made. Bodies Corporate should treat all owners reasonably and be seen to be doing so.

Summary

Enforcing a pet-law is not difficult but it does need careful consideration, planning and timely action. If the issue of pets is a critical one for a Scheme then using the process detailed above delivers the greatest chance for the right result, including on adjudication.

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