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The Members of Owners Corporation № 1 on Plan № PS435322B
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22 June 2022

Dear Sir or Madam,

***Amended review of the validity and enforceability of the
Rules of the Waterways Owners Corporation***

We are instructed to review the consolidated rules of the Waterways Owners Corporation (“the Waterways OC”) as passed by special resolution on 21 March 2014. This review has been amended pursuant to the changes in the OC Act which came into effect 1 December 2021.

1. Introduction

- 1.1. Section 4(f)(iv) of the *Owners Corporations Act 2006* (Vic) (“the Act”) prescribes that “*An owners corporation has the following functions— to carry out any other functions conferred on the owners corporation by— the rules of the owners corporation*”.
- 1.2. Section 138 of the Act provides, in subsection (1) that “*By special resolution, an owners corporation may make rules for or with respect to any matter set out in Schedule 1*”, and in subsection (3) that “*A rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot*”.
- 1.3. Section 138B of the Act provides that subject to some restrictions regarding sustainability items such as solar panels, “*an owners corporation may make rules in respect of proposed works to renovate or alter the external appearance of a lot-*
 - (a) *To protect the quiet enjoyment of all other lots and the common property during those works; and*
 - (b) *To protect the structural integrity of any building...*
 - (c) *To ensure the market value of any other lot does not decrease as a result...*
- 1.4. Schedule 1 of the Act is set out in Appendix 1 to this advice.
- 1.5. Section 140 of the Act provides that:

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

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- (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—*
 - (i) *this Act; or*
 - (ii) *the Subdivision Act 1988; or*
 - (iii) *the regulations under this Act; or*
 - (iv) *the regulations under the Subdivision Act 1988; or*
 - (v) *any other Act or regulation.*

1.6. We note that the Waterways OC's consolidated rules do not refer to the Model Rules of an owners corporation (as featured in Schedule 2 of the *Owners Corporations Regulations 2018*) and thus the Model Rules are to be taken as applying to the Waterways OC insofar as concerns matters on which the consolidated rules are silent.

2. The law relating to the validity of an owners corporation's rules

2.1. In *Owners Corporation RP 3454 v Ainley [2017] VSC 790* His Honour Derham AsJ noted the essential requirements stipulated by s 138 of the Act necessary to the validity of an owners corporation's rule:

"There are thus three requirements for a valid rule to be made. First, the rule must be made by a special resolution of the OC in accordance with s 96 of the Act. Second, the rule must have a sufficient connection with a matter set out in sch 1, that is, the rule must be 'for' or 'with respect to' such a matter. Third, the rule must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot." [at paragraph 18]

2.2. Despite the fact that an owners corporation's rules might comply with s 138 of the Act in having been validly made, s 140 of the Act provides that a rule can still be invalid on the basis that *"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—(i) this Act; or (ii) the Subdivision Act 1988; or (iii) the regulations under this Act; or (iv) the regulations under the Subdivision Act 1988; or (v) any other Act or regulation."*

2.3. Whilst sections 138 & 140 provide the criteria for a rule's validity that are internal to the Act, the decision of Riordan J in *Owners Corporation PS 501391P v Balcombe [2016] VSC 384* ("*Balcombe*") provided a broader and more determinative 3-step basis for determining the validity of an owners corporation's rule. As a result of his analysis Riordan J held that an owners corporation did not have the power to make a rule prohibiting the short-term letting of apartments. His Honour's 3-step basis for determining the validity of an owners corporation's rule is lengthy and is set out in Appendix 2 to this advice.

2.4. The practical impact of adopting the reasoning in *Balcombe* is illustrated in the VCAT decision in *Owners Corporation RP3454 v Ainley [2017] VCAT 470* whereby an owners corporation's special rules which prohibited a lot owner from building a second storey on their lot without having obtained the consent of the owners corporation were struck down as invalid. The Tribunal's reasoning is given at Appendix 3 to this advice and the Tribunal's decision was upheld on appeal by the Supreme Court of Victoria.

2.5. In essence, the Supreme Court endorsed the Tribunal's view in *Ainley* that the 'External Appearance Power' to make rules (as found at 5.2 of Schedule 1 of the Act) *"...does not extend to what can be built, or how it must be built, but is confined to regulating the appearance of what is built or to be built."* whilst the *design, construction and landscaping power* (as found at 6 of Schedule 1 of the Act) *"...enables an owners corporation to prescribe the design and landscaping outcomes for a lot. The*

construction power does not give an owners corporation the power to make rules to say how or what can be constructed. That power lies with the planning and building authorities. The construction power may give an owners corporation the power to prescribe the type of building materials which may be used.”

2.6. The apparent certainty of the above statements withers under closer examination; tending to the question, ‘How can the ‘External Appearance Power’ be “*confined to regulating the appearance of what is..to be built.*” and the ‘Construction Power’ “*prescribe the type of building materials which may be used*” if “*The construction power does not give an owners corporation the power to make rules to say how or what can be constructed.*”?

2.7. Faced with such confusing and apparently contradictory statements the better view is perhaps that expressed by the Tribunal to the effect that an owners corporation does not have the power to pass or enforce rules on matters that are the contents of planning permits and building permits. As the Tribunal stated in *Ainley* at paragraph 18:

“The process to obtain both a planning permit and a building permit is a comprehensive process which allows objectors a say and a right of review and appeal. The Planning and Environment Act 1987 and the Building Act 1993 and case law relating to both those Acts and Regulations make up a huge body of law. It is inconceivable that the owners corporation, by vote of the lot owners, or by decision of the voluntary committee, whose main function is to administer and maintain common property, could have the power to veto an otherwise legal building proposal, based on less than ten words in Schedule 1 of the OC Act.”

2.8. Section 138B of the Act which was incorporated in the December 2021 amendments has allowed for an Owners Corporation to have expanded power with regard to proposed works to renovate or alter the external appearance of a lot in order to:

(a) *Protect the quiet enjoyment of all other lots...*

(b) *Protect the structural integrity of any building on the plan; and*

(c) *To ensure the market value of any other lot does not decrease as a result...*

2.9. This power, particularly within section 138B(c), may provide a means for the Owners Corporation to enforce rules where it can show that proposed works are likely to affect the resale value of other lots on the plan. This will prevent the Owners Corporation from having to enforce guidelines which can only be enforced by the Council.

3. The extent and validity of the Waterways OC’s rules: the absence of common property

3.1. The primary characteristic of the Waterways OC’s consolidated rules is that they exist in the absence of any common property. This has an impact on the degree to which the Model Rules can be taken as applying to the Waterways OC insofar as concerns topics on which the consolidated rules are silent.

3.2. Notwithstanding the proposition that the relevant Model Rule apply to owners corporations whose consolidated rules are silent on a Model Rule topic, it is submitted that the better view is that the application of the Model Rules to the Waterways OC is restricted by the fact that the Model Rules have provisions within them that hinge on the existence of common property. Without the Waterways OC having any common property to take into account, some of the Model Rules have no application to the Waterways OC.

3.3. For example, the only elements of Model Rule 4 (“Use of common property”) that might be said to apply to the Waterways OC are 4.3(4) and 4.3(5) relating to the installation of anti-intruder

locking/safety devices and anti-animal/insect screens or barriers. The remaining elements of Model Rule 4 referring to obstruction of lawful use and enjoyment, animals that are a danger or causing a nuisance and vehicles parked in obstruction of lots depend on the presence of common property for their validity.

- 3.4. Likewise, the obligations in Model Rule 5.3 upon a lot owner or occupier to notify the owners corporation when undertaking any renovations or other works also turn on the reference to common property. This is because the only ‘...renovations or other works...’ which are covered by Model Rule 5.3 are those which ‘...may affect the common property and/or other lot owners’ or occupiers’ enjoyment of the common property’.
- 3.5. Similarly, Model Rule 6 (“Behaviour of persons”) targets behaviour likely to interfere with ‘the peaceful enjoyment of any other person entitled to use the common property’. Without any of the lot owners or occupiers being ‘entitled to use the common property’ there appears to be no consolidated rule that regulates behaviour and noise and nuisance control.
- 3.6. Nevertheless, and despite the absence of common property, the Tribunal has, in *Flew v Lum [2018] VCAT 1278*, determined that the Waterways OC can repair and maintain the fountains and water features at Waterways through the application of the consolidated rules:

“In my view, the maintenance of the two fountains would fall within the scope of Rule 5.1.2 as this constitutes ‘maintenance, repair and improvement of the Lake’.

Additionally, the maintenance of the six water features would fall within the scope of rule 5.1.4. This is on the basis that such maintenance is ‘for the benefit of members’ and is consistent with the objective in rule 1.4 to ‘provide services to members consistent with the quality of the Development’.

It is also consistent with the objective in rule 1.2, of ‘maintaining and enhancing any landscaping for which the Owners’ Corporation is responsible’.

Thus in my view the rules are valid, although they do not of themselves provide a separate legal basis on which the OC may determine to fund the maintenance of the two fountains and the six water features (without a special resolution being required).”
[at paragraphs 43 to 46]

4. The extent and validity of the Waterways OC’s rules: Rule 3 - ‘Development and Maintenance of a Lot’

- 4.1. Consolidated rule 3 is prefaced by the proposition that, “*Each Member must do the following on each Lot of that Member.*” and consolidated rule 3.1 continues “*comply with the Design Guidelines*”.
- 4.2. The Tribunal addressed the issue of the validity of the consolidated rules of an owners corporations at Sanctuary Lakes which incorporated building design guidelines in *Sulomar v Owners Corporation No 1 PS511700W [2016] 1502*.
- 4.3. In *Sulomar* the applicant’s lot was, as with Waterways, affected by an owners corporation which did not own any common property. Within that owners corporation there operated a building code that tightly regulated the building of residential lots, down to the determination of the colour of the buildings and type of building materials, height of the buildings, setbacks and even landscaping. The Tribunal noted that:

“...In some of these developments the building code, or design guidelines, are not only imbedded in the rules of the owners corporation, they are also incorporated into the local council planning scheme and under the Planning and Environment Act 1987 have the force of law. Where the planning scheme requires adherence to the owners

corporation design guidelines, local councils must be satisfied of compliance with the guidelines before building approval will be granted.

However, in the case of Sanctuary Lakes there appears to be no inclusion of the building code in the local planning scheme. The owners corporation relies entirely on the rules to give force to the building code.” [at paragraphs 5 to 6]

- 4.4. The Tribunal's point about the inclusion of the building code in the local planning scheme is pivotal; without a planning scheme that requires adherence to an owners corporation's design guidelines, a council will not be compelled to require adherence to those design guidelines.
- 4.5. However with Waterways, unlike the position in *Sulomar*, the Waterways OC's Design Guidelines are not only imbedded in the rules of the owners corporation, they are also incorporated into the council's 'Kingston Planning Scheme' ("the Scheme").
- 4.6. Within the Scheme section 2.0 of 'Schedule 6 To The Design And Development Overlay' expressly states that, "*Before approving any subdivision or use or development of land the responsible authority must have regard to: The Environmental Living and Design Guidelines set out in the schedule to the Section 173 agreement required under Schedule 2 to clause 43.03 of this Scheme.*"
- 4.7. Within that 'Schedule 2 To Clause 43.03 Incorporated Plan Overlay' section 2.0 is entitled "*Requirement before a permit is granted*" and provides that, "*The owner **must** enter into an agreement under Section 173 of the Act. The agreement **must** provide for: ... A schedule which includes Environmental Living and Design Guidelines.*" [emphasis added]
- 4.8. Thus, apart from relying upon prosecuting the crime of breach of a planning permit, there is also available to council a further potent mechanism for enforcing compliance by lot owners with the Design Guidelines. This mechanism is the civil remedy of enforcing a lot owner's contractual obligation under the section 173 agreement (an obligation that arose upon settlement of the contract by which means the lot was purchased) to abide by the Design Guidelines.
- 4.9. Whilst council therefore has available to it both criminal and civil mechanisms for enforcement of the Design Guidelines, the criminal mechanism for enforcement is not available to the Waterways OC given that the Waterways OC can be no more than a complainant to council, the prosecuting authority.
- 4.10. Insofar as concerns the question as to whether the Waterways OC can use the civil (i.e. contractual) mechanism of its consolidated rules for enforcement of the Design Guidelines, the Tribunal also noted in *Sulomar* that:

"It is also not disputed that the rules and building code were included in the contract of sale. The contract of sale did no more than give notice of the rules and the building code to Mr Sulomar. The contract of sale, of itself, does not make Mr Sulomar bound by the rules and building code."

- 4.11. Although the Waterways OC consolidated rules are incorporated as contractually enforceable into the contract of sale of a lot (see special condition 11.1.2) and that enforceability applies even though the consolidated rules may be amended from time to time (see special condition 11.7) it is nevertheless the case that the common law doctrine of 'privity of contract' prevents the contractual enforcement of the consolidated rules by the Waterways OC. The principles of privity of contract enable only the particular parties to the contract of sale of a lot to enforce the terms of that contract, and, as is self-evident, the Waterways OC is not a party to a contract of sale of a lot.

- 4.12. So, notwithstanding the incorporation of the consolidated rules into the contract of sale of a lot as contractually enforceable, the Waterways OC remains confined to relying upon the determination of whether its consolidated rules are valid in order to compel compliance with the Design Guidelines.
- 4.13. In *Sulomar* the Tribunal adopted the *Balcombe* approach to the determination of whether a consolidated rule was valid and, in doing so addressed a number of consolidated rules whose validity had been impugned by the applicant. Those impugned consolidated rules were made under the *Subdivision (Body Corporate) Regulations 2001* and it was contended by the applicant that they were not made valid by the Act's transitional provisions when the Act came into effect on 1 January 2007. Thus the Tribunal's decision does not specifically address whether the impugned rules could have been made under the Act - as were the Waterways OC's consolidated rules.
- 4.14. However, the particular and valuable significance of *Sulomar* is that the consolidated rules under the Tribunal's scrutiny closely echoed those appearing in the Waterways OC's consolidated rules.
- 4.15. Thus, the Tribunal was called upon to determine the validity of rule 3.8 which stated "*Each member of the Body Corporate must do the following on each Lot of that Member: 3.8 Sanctuary Lakes Homeowner Building Code comply with the Sanctuary Lakes Homeowner Building Code*" whereas the Waterways OC's corresponding consolidated rule 3.1 reads, "*Each member must do the following on each Lot of that Member: 3.1 Design Guidelines comply with the Design Guidelines*". The Tribunal held this rule to be invalid.
- 4.16. Likewise the Tribunal also held to be invalid further rules which closely echo the following Waterways OC's consolidated rules:

3.4 "*Regular Inspection of Works allow the Owners' Corporation to conduct inspections as deemed necessary of any works in progress on a Lot for the purpose of ascertaining compliance with the approved plans and specifications for such works and with any of the rules in the Design Guidelines*";

- (i) 3.6 "*Nature Strip maintain and keep tidy any nature strip adjoining the Lot*"
- (ii) 3.9 "*Rectification of Non-Compliance rectify any non-compliance with the approved plans and specifications for the works in accordance with any notice in writing served on the Member by the Owners' Corporation*", and
- (iii) 3.10 "*Cease Construction on Demand cease construction of works on a Lot if required by notice in writing served by the Owners' Corporation pending resolution of any dispute about a non-compliance with the approved plans and specifications for the Lot.*"

The Tribunal considered these rules "*invalid because they are seeking to enforce the building code. The body corporate has no function or power to control what is to be built on a lot except to the extent that common property is involved.*" or – as in the case of maintaining the nature strip - which were invalid because lot owners cannot be required to maintain council land.

- 4.17. With the addition of section 138B, the OC now has an alternate means of making rules which relate to the external appearance of a lot. As explained above, subject to some limits regarding sustainability items such as solar panels, an Owners Corporation can now make rules under section 138B(c) which allow them to make rules regarding proposed works where it might affect the value of other lots.
- 4.18. This means that the OC can use the potential for diminishing value as a legitimate purpose or justification for seeking enforcement under model rule 5.2.
- 4.19. This is a purpose which does not rely on the existence of planning guidelines, which means that the OC would be able to enforce the rules relating to the compliance with the guidelines on this basis.

5. The extent and validity of the Waterways OC's rules: Rule 4 - 'Amenity Controls'

- 5.1. In *Sulomar* the Tribunal also invalidated a rule similar to the prohibition in Waterways OC's consolidated rule 4.2(a) ("Commercial vehicles park or allow to be parked on a Lot or any road or any other land in the vicinity of a Lot any commercial vehicles (including but not limited to trucks, utilities, caravans, trailers, boats or any other mobile machinery) unless such commercial vehicles are housed or contained wholly within a car park or garage on a Lot or parked in the driveway on a lot and screened from public view.") on the basis that the rule "...is invalid for the reason that the body corporate did not have the power to regulate parking of vehicles or storing of caravans and boats on private lots...The external appearance power relating to private lots only extended to maintenance. It did not extend to controlling where and what vehicles can be parked on private lots or on the street in the vicinity of the lot."
- 5.2. Amongst the Waterways OC's consolidated rule that are, on the basis of the decision in *Sulomar*, likely to be invalid are 4.2(b) ("All Vehicles park or allow any vehicle to be parked on the front lawn of a Lot or the nature strip adjoining a lot") and 4.3 ("No Vehicle Repairs carry out or cause to be carried out on a Lot or on any road or any other land in the vicinity of a Lot any dismantling, assembling, repairs or restorations of commercial vehicles unless carried out at the rear of a Residence in a location which is screened from public view."), on the basis of the Waterways OC's inability to regulate the behavior of individuals on land other than common property in circumstances where the individual is behaving lawfully, for example by running a car repair shop or engaging in solar panel import/export.
- 5.3. The inability of the Waterways OC to to regulate the behavior of individuals on land other than common property in circumstances where the individual is behaving lawfully also contaminates with invalidity the following rules:
- (i) 4.6 ("Dogs Kept on Leads allow the Member's dog or dog of the Member's invitee to be other than on a lead in areas designated by the Owners' Corporation as areas in which dogs must be kept on leads");
 - (ii) 4.7 ("No Fishing fish or allow a Member's invitee to fish in the Lake or other water bodies in the development");
 - (iii) 4.8 ("No Feeding of Birdlife feed or allow a Member's invitee to feed birdlife in areas around the water bodies in the Development");
 - (iv) 4.9 ("No Swimming swim or allow a Member's invitee to swim in the Lake or other water bodies in the Development"); and
 - (v) 4.10 ("No Motorised Watercraft allow any motorised watercraft of the Member or Member's invitee (including motor boats, remote-controlled toy motor boats, and any other motorised watercraft) to be operated on the Lake or other water bodies in the Development")

6. The extent and validity of the Waterways OC's rules: Rules 5 & 6- 'Provision of Services and Levies' and 'Non-compliance'

- 6.1. The Waterways OC's consolidated rules pertaining to the provision of services and levies are valid. This has been determined by the Tribunal in *Flew v Lum* insofar as rule 5.1.4 is concerned (see paragraph 3.6 above) and insofar as concerns rules 5.1.1, 5.1.2 and 5.1.3 by virtue of the fact that these activities are encompassed by s 4(b)(iii) of the Act which stipulates:

"An owners corporation has the following functions—to repair and maintain—equipment and services for which an easement or right exists for the benefit of the land affected by the owners corporation or which are otherwise for the benefit of all or some of the land affected by the owners corporation"

which was also recognised by the Tribunal in *Flew v Lum*, as follows.

"Simply, these 'services' are for the benefit of all or some of the land affected by the

owners corporation. That is so regardless of the fact that they are on Melbourne Water and/or Council land, and that the OC has no common property." [at paragraph 22]

- 6.2. Consolidated rule 5.2 is likely to be deemed valid as it draws on power 3.1 in Schedule 1 of the Act in order to make owners corporation rules which relate to '*Management and administration of common property and services*' and draws on the provisions in s 12(2) of the Act to "*require a lot owner or occupier to whom a service has been provided to pay for the cost of providing the service to the lot owner or occupier*"
- 6.3. Consolidated rule 5.3 would similarly be likely to withstand the Tribunal's scrutiny as it draws on power 5.2 in Schedule 1 of the Act in order to make owners corporation rules which relate to '*External appearance of lots*' and on power 5.3 in Schedule 1 of the Act in order to make owners corporation rules which relate to '*Requiring notice to the owners corporation of renovations to lots*' and draws on the provisions in ss 48 and 50 of the Act for an owners corporation to ensure that lots are properly maintained and to authorise a person to enter a lot.
- 6.4. However, we note that the members of the Waterways OC are still required, by virtue of Model Rule 5.2(1) concerning the external appearance of lots, to obtain the written approval of the Waterways OC before making any changes to the external appearance of their lot.
- 6.5. Restrictions in Model Rule 5.2(3), (4), and (5) also relate to the installation of sustainability items, such as solar panels. An Owners Corporation cannot unreasonably prohibit the installation of sustainability items on aesthetic grounds and can only make rules related to the installation and position of the items.
- 6.6. By contrast consolidated rule 6.1 may only have the potential to be considered valid. By virtue of s 48(2) of the Act a lot owner has 28 days from the issue of a compliance notice in which to carry out the repairs, maintenance or other works required by the notice whereas rule 6.1 provides only "*... 14 days generally*".
- 6.7. A similar truncation of time limits exists in rule 6.1 to "*within 7 days for breaches of Builders Site Refuse Guidelines...*" whereas s 51 of the Act provides for at least 7 days' notice in writing from the Waterways OC to the occupier of a lot of its intention to enter the lot. The uncertainty arising in respect of this rule's validity is due to the fact that the rule shortens notice periods specified in the Act.
- 6.8. In determining whether the OC is acting within its power in obtaining provisions or services, or in ensuring compliance with Council regulations and other improvements, it is first necessary to find a function under section 4 of the Act under which the OC could be acting for the particular service. Once a function has been identified, the OC has all powers necessary to exercise the relevant function under section 6 of the Act. There is no requirement for the OC to obtain a resolution in order to exercise a power which is conferred on it by legislation.

7. The extent and validity of the Waterways OC's rules: Rule 7- 'Appointing Sub Committees'

- 7.1. Consolidated rule 7 draws on power 2.1 in Schedule 1 of the Act in order to make owners corporation rules which relate to '*Functions, powers and reporting of committees and sub-committees*' and draws on the provisions in both s 116 of the Act for an owners corporation to appoint sub-committees and in Model Rule 2.1 that, "*A committee may appoint members to a sub-committee without reference to the owners corporation.*". As such, consolidated rule 7 may be deemed valid.

8. Moving forward

- 8.1. We advise that the Waterways OC appears to lack the ability to enforce the rules contained within

the Design Guidelines as they are not privy to the section 173 agreement between the council and the owner. It may be possible for the OC to alternatively rely on the new section 138B requirements to allow for the guidelines to be enforced under model rule 5.2. The owners must give written notice to the OC about any external changes to a lot, and the OC can reject the requests on the basis that the proposed alterations are likely to cause the value of the other lots to diminish. This process is relatively untested in VCAT as it relates to recent amendments in the Act, however on the face the changes result in this new power.

- 8.2. Nor does it appear that the Waterways OC is able to prohibit breaches of any Planning Permit. For example, the consolidated rules reveal that Waterways OC does not have the facility described in *Owners Corporation PS425500K v Nova Stargate Pty Ltd (ACN 096 721 498) (Owners Corporation) [2011] VCAT 194* of being able to assert a rule that provides “*A member must not, and must make sure that the occupier of a member’s lot does not use or permit a lot...to be used for any purpose which may be illegal...*” which would - in the decision by the Tribunal - enable the Waterways OC to prohibit breaches of a Planning Permit on the basis that, “*Whilst the word “illegal” is a strong one, sections 126 and 127 of the Planning Act make it abundantly clear that conduct which contravenes a Planning Permit is illegal.*” [at paragraph 17].

Yours faithfully,

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APPENDIX 1

Schedule 1—Power to make rules of owners corporation

1. 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.

2. Committees and sub-committees

- 2.1. Functions, powers and reporting of committees and sub-committees.
- 2.2. Functions of the chairperson and secretary.
- 2.3. Financial controls for committees, sub-committees and delegates.

3. Management and administration

- 3.1. Management and administration of common property and services.
- 3.2. Functions of manager.
- 3.3. Repair and maintenance of common property and services.
- 3.4. Metering of services and apportioning of costs of services.

4. Use of common property

- 4.1. Use of common property.
- 4.2. Use of equipment, services and amenities on common property.
- 4.3. Vehicles and parking on common property.
- 4.4. Drying of laundry on common property or external or visible areas of lots.
- 4.5. Damage to common property (but not preventing the installation of insect screens or safety lock devices).
- 4.6. Deposit of rubbish and other material on common property.

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.

6. Design

Design, construction and landscaping.

7. Behaviour of persons

- 7.1. Behaviour of owners, occupiers and invitees on common property.
- 7.2. Noise and other nuisance control.

8. Dispute resolution

Dispute resolution, including internal grievance procedures, hearing procedures and communication procedures.

9. Notices and documents

- 9.1. Notices, noticeboards and advertising.
- 9.2. Fees for provision of copies of rules, records and owners corporation register.
- 9.3. Notices about fees and charges.

10. Common seal

The use of the common seal of the owners corporation.

APPENDIX 2

- “(a) First, it is necessary to determine the statutory object to be served by, and the ‘true nature and purpose’ (‘the Statutory Purpose’) of, the power to make regulations [i.e owners corporations rules]. The relevant inquiry as to the Statutory Purpose of the power is considered by reference to the scope, object and subject matter of the empowering Act [i.e the Owners Corporations Act 2006].
- (b) Secondly, it is necessary to characterise the impugned regulation [i.e the owners corporations rule which is being disputed] by reference to the circumstances in which it applies, in particular its operation and effect. The evidence of the circumstances in which the regulation will operate will enable the court to form a view about the nature and apparent purpose of the regulation; and the existence and dimensions of the actual or threatened mischief sought to be addressed by the impugned regulation.
- (c) Thirdly, ‘once armed with knowledge of these facts’, the court then makes its own assessment of:
- (i) whether the connection between the likely operation of the regulation and the Statutory Purpose of the power is sufficiently direct and substantial; or
 - (ii) whether the regulation could not reasonably have been adopted as a means of attaining the Statutory Purpose, in which case it will be so lacking in reasonable proportionality as not to be a real exercise of the power.

In the latter case the regulation will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power.

If it is determined that there is a sufficiently direct and substantial connection, ‘[n]o further inquiry into the proportionality of the by-law is permitted or required’. There is no separate question of whether the court considers that the power is disproportionate or so unreasonable that it should interfere. It is not for the court to substitute its judgment for that of the legislator; or to ask whether, in the court’s opinion, the by-law is a reasonable and proportionate response to the mischief to which it is directed. The question is whether the by-law is authorised by the relevant Act; and not whether the court should hold the regulation to be invalid because it appears to the court to be an ‘unreasonable provision’.

The question of whether there is sufficient connection between the Statutory Purpose and the impugned regulation necessarily involves questions of degree and judgment. However, the validity of the impugned regulation is a question of law and the appellate court must determine for itself the sufficiency of the connection.

Having stated the principles in the abstract, it is apparent that each case will be determined by reference to its own facts relating to the Statutory Purpose of the empowering Act, the provisions of the impugned regulation and the evidence of the circumstances surrounding the making of the regulation and its operation.”

[Balcombe [2016] VSC 384 at paragraphs 85 to 88, footnotes omitted]

APPENDIX 3

- “14 *In my opinion, the external appearance power and the design power conferred upon owners corporations to make rules affecting private lots does not extend to making a rule to arbitrarily determine whether or not a lot owner is permitted to build or alter any structure within their lot.*
15. *The power to determine whether a building is permitted to be built on private property is governed by the Planning and Environment Act 1987 and the Building Act 1993.*
16. *The process to obtain a planning permit involves submission of detailed plans in accordance with the local planning scheme, notification to affected land owners, a right of objection, community consultation and a determination by local council. There is a right of review to the Tribunal and an appeal from the Tribunal, to the Supreme Court of Victoria on a question of law.*
17. *The owner must then obtain a building permit. The building permit process gives affected neighbours an opportunity to object to protection works and an appeal lies to the Building Appeals Board.*
18. *The process to obtain both a planning permit and a building permit is a comprehensive process which allows objectors a say and a right of review and appeal. The Planning and Environment Act 1987 and the Building Act 1993 and case law relating to both those Acts and Regulations make up a huge body of law. It is inconceivable that the owners corporation, by vote of the lot owners, or by decision of the voluntary committee, whose main function is to administer and maintain common property, could have the power to veto an otherwise legal building proposal, based on less than ten words in Schedule 1 of the OC Act.*
- 19 *In my view, **the external appearance power gives the owners corporation a power to make rules with respect to the aesthetic look of the lot, including but not limited to, colour and conformity of appearance to other lots and common property. The power does not extend to what can be built, or how it must be built, but is confined to regulating the appearance of what is built or to be built.***
- 20 ***The design, construction and landscaping power enables an owners corporation to prescribe the design and landscaping outcomes for a lot. The construction power does not give an owners corporation the power to make rules to say how or what can be constructed. That power lies with the planning and building authorities. The construction power may give an owners corporation the power to prescribe the type of building materials which may be used. However, it is not an unfettered power. The rule must be for the control, management, administration, use or enjoyment of common property or of a lot.***
- 21 *Rules 2(a) and (c) are ultra vires. They are made beyond power because the owners corporation does not have the power to determine what may or may not be built on private lots. Rule 2(b) may have been valid if it extended only to the front facade of the development. Instead, the rule applies to the whole of the unit by referring to the external facade. Because the rule attempts to control the entire external facade of the unit, and thereby prevent any extension or alteration to the buildings on the lots without the consent of the owners corporation, it too, is made beyond power. The special rule goes beyond both what parliament intended owners corporations can regulate and also goes further than the purposes set out in section 138 of the OC Act.”*

[Owners Corporation RP3454 v Ainley (Owners Corporations) [2017] VCAT 470 (Member L Rowland) at paragraphs 14 to 21, footnotes omitted]