

Harsh, Unconscionable or Oppressive Pets By-laws

The commencement of the Strata Schemes Management Act 2015 (“SSMA”) on 30 November 2016 changed the rules concerning pet ownership in strata buildings. Recent cases have clarified how this is impacting in key areas. Those key areas seem to be:

- How far a by-law prohibiting or restricting pet ownership can go without being invalid.
- What is required for an animal to be an “assistance animal” and be protected from such by-laws.

As to pet ownership by-laws, the key issues are:

- The SSMA permits by-laws restricting pet ownership. In fact, the model by-laws contained in the associated regulation contain a suggested pet ownership by-law.
- Section 139(1) provides that a by-law must not be “harsh, unconscionable or oppressive”. A person entitled to vote on a motion making a by-law may apply to the NSW Civil and Administrative Tribunal (“NCAT”) for an order invalidating such a by-law.
- Section 157 gives NCAT jurisdiction to make an order permitting an applicant owner or occupier to keep an animal on the lot or common property if NCAT is satisfied that the owners corporation (“OC”) has unreasonably withheld its approval to the keeping of the animal on the lot or common property and the by-laws permit the keeping of an animal with OC consent and provide that the OC cannot unreasonably withhold consent.
- Accordingly, disputes tend to divide into two scenarios:
 - Where a by-law outright prohibits pets, i.e. the OC has no power to give consent and an aggrieved person considers that “harsh, unconscionable or oppressive”; or
 - Where the OC withholds consent to a particular pet and an aggrieved person considers that unreasonable.
- As to outright prohibitions, a recent NCAT decision, apparently the first case concerning a Section 150 application, *Yardy v Owners Corporation SP 57237 [2018] NSWCATCD 19*, found such a by-law invalid, revoked the by-law and revived a previous by-law. The key findings seem to be:

- Establishing that a by-law is “harsh, unconscionable or oppressive” involves a higher bar than demonstrating that the by-law is unreasonable.
- The specific by-law was “harsh” because it was “a blunt instrument which imposes a complete prohibition upon the keeping of animals as pets, with no exceptions” and “provides no means by which the special circumstances of particular lot owners might be considered” and “it is based on the interests of only one side of the issues associated with the keeping of animals as pets”.
- The specific by-law was “unconscionable” because “it quite unreasonably and unnecessarily precludes the exercise of a right of habitation which the Tribunal considers is part of contemporary community standards associated with the rights of owners and occupiers of lots in strata schemes”, “it provides no opportunity for consideration to be given to the rights and needs of individual lot owners” and “it is unbalanced and operates only in the interests of those who are opposed to the keeping of animals as pets”.
- The specific by-law was “oppressive” because “it does not involve or permit a balanced consideration of the interests and needs of all lot owners or occupiers and operates only in the interests of lot owners who are opposed to pet ownership” and it “provides no process by which a lot owner could be able to keep an animal as a pet and thus operates only in the interests of those opposed to the keeping of animals as pets”.
- This strongly suggests that a by-law involving an outright prohibition of pet ownership is unlikely to withstand challenge.

As to assistance animals, the key issues are:

- Sections 139(5) & (6) provide in effect that:
 - a by-law has no force or effect to the extent to which it restricts the keeping or use of an “assistance animal” as defined in the Commonwealth Disability Discrimination Act 1992 (“DDA”) on a lot or common property; but
 - a by-law may require a person who keeps an assistance animal on a lot to produce evidence that the animal is an assistance animal.
- Given the wording used, an NCAT order invalidating an infringing by-law is not required and an aggrieved party could simply take the position that the by-law has no effect. However, given the potential exposure to liability and costs, an application for orders clarifying the position would be prudent.

- A recent NCAT decision, *Trustees of Catholic Aged Care Sydney v Murphy [2017] NSWCATCD 46*, has considered previous authorities and clarified NCAT’s approach to determining whether an animal is an assistance animal in the sense of the DDA. Key findings include:
 - The person keeping the assistance animal must have, have previously had or potentially have in the future a disability, which is defined broadly to extend beyond physical disability and include a “disorder, illness or disease that affects...thought process, perception of reality, emotions or judgement or that results in disturbed behaviour”.
 - The assistance animal should have training to assist in alleviating the effect of the disability and should be trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place, mere obedience training being insufficient. That training may be undertaken by any person or organisation qualified to do so, but that there must be a specific nexus between the training undertaken and the alleviation of the effects of a hearing disability. Bear in mind that, in NSW, there is no statutory regime for accreditation of hearing dogs or training organisations for hearing dogs, let alone assistance animals generally.
 - In this case, the Member found that there was no relevant disability and also was not convinced that the animal had the requisite level of training.
- It seems clear that, although not limited to dogs, let alone guide dogs or hearing dogs, in order for an assistance animal to be outside the scope of a by-law which would otherwise prohibit the keeping of the animal:
 - The person keeping the animal must, in the past, presently or potentially in the future have a disability as defined in the DDA.
 - The animal must assist in alleviating the effect of the disability.
 - The animal must have suitable training with respect to assisting in alleviating the effect of the disability and meeting appropriate standards of hygiene and behaviour.

We have considerable experience with these issues and can assist if you are having difficulties with them.

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