VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

civil DIVISION

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| owners corporations LIST | vcat reference No. OC1580/2018 |
| CATCHWORDS | |
| Subdivision of land; application to amend a residential plan of subdivision; section 32, 33 and 34D *Subdivision Act 1988* considered and applied; whether considerations under section 34D(1)(b) S*ubdivision Act 1988* are relevant to an application under section 34D(1)(a) *Subdivision Act 1988*; *O’Gorman v Owners Corporation RP 018831* (Owners Corporations) [2017] VCAT 579 considered and applied. | |

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| APPLICANT | Owners Corporation SP27589F |
| first RESPONDENT  Second Respondent  Third respondent | Mr Peter Roberts  Ms Victoria Magee  Ms Caryn Tan |
| WHERE HELD | Melbourne |
| BEFORE | R. Buchanan, Member |
| HEARING TYPE | Hearing |
| DATE OF HEARING | 14 February 2019 |
| DATE OF ORDER | 16 May 2019 |
| CITATION | Owners Corporation SP27589F v Roberts (Owners Corporations) [2019] VCAT 723 |

# Order

The proceeding is dismissed.

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| R. Buchanan  **Member** |  |  |

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| APPEARANCES: |  |
| For the Applicant | Mr J. B. Cohen |
| For the First Respondent  For the Second Respondent  For the Third Respondent | No appearance  No appearance  No appearance |

# Reasons

### Introduction

1. This case is about altering a plan of subdivision. The subdivision contains a number of apartments. The owners of one of those apartments want to divide their lot into two separate lots. For them to do so, the plan of subdivision must be altered and, for that, the consent of all of their fellow lot owners is required. Not all of the other lot owners have given their consent. In such a case, this Tribunal can order an owners corporation to amend its plan of subdivision.

### Background

1. In 1987 a plan of subdivision was registered for the subdivision of an existing apartment building, in a court in Highett. The subdivision contains ten apartments - five apartments with two bedrooms and five with one bedroom. The apartments are all contained in one single building. The apartments match each other, save for the apartment in lot 6. Each apartment has a car park lot.
2. Lot 6 sits at the end of the building. It contains a two-bedroom apartment of the same proportions as its two-bedroom fellows, but the land area of the lot is dramatically larger.
3. Lot 6’s apartment sits in a small area, fenced off from the (much larger) balance of the lot. The footprint of that fenced off area is similar to the footprint of the other two-bedroom lots. The balance of lot 6, the part outside lot 6’s fenced off area, is some 350 square metres in size and is known to the lot owners as “the Village Green”.
4. In 2017 the owners of lot 6 wished to subdivide lot 6 into two, separate lots. They proposed that lot 6 be reduced to the fenced off area containing its apartment and that the balance of the lot, the Village Green, should become a new lot, lot 21. In addition, the height limit on the new lot 21 would be raised from 2.5 metres to 8 metres and the lower limit from 1 metre to 2 metres. The table of liabilities and entitlements would also be altered.
5. For lot 6 to be subdivided, the necessary first step was to amend the plan of subdivision. That could be done if all the lot owners consented. Amendment of plans of subdivision is controlled by the *Subdivision Act 1988* (the Act). The Act says that an owners corporation may amend its plan of subdivision, but only if there is a unanimous resolution of lot owners.[[1]](#footnote-1)At the instigation of the owners of lot 6, the owners corporation for the subdivision (the owners corporation) conducted a ballot on the proposal of the owners of lot 6.
6. That ballot did not result in the necessary unanimous approval. Of the 10 lot owners, 5 voted to amend the plan of subdivision, 3 voted against and 2 abstained. One of the abstainers lived interstate.
7. The owners did, however, approve a special resolution, also proposed by the owners of lot 6, that the owners corporation apply to this Tribunal for orders under the Act, to require the alteration of the plan of subdivision which was proposed by the owners of lot 6.
8. I note in passing that the resolution provided, in terrorem, the following:

In taking such proceedings, the Owners Corporation will seek orders from VCAT that any owner objecting, must pay indemnity costs, alternatively Solicitor and client costs, alternatively reasonable costs, associated with bringing such legal proceedings in the VCAT to obtain orders for alteration of the Plan of Subdivision.

1. On 1 August 2018 the owners corporation instituted the present proceeding, seeking the Tribunal’s orders that the owners corporation amend the plan of subdivision. Initially the owners corporation did not name any respondent. The Tribunal of its own motion added as respondents the three lot owners who had voted against the amendment of the plan of subdivision.
2. Subsequently and before the hearing of this proceeding, the three dissenting lot owners withdrew their opposition to the amendment proposed by the owners of lot 6. But because two of the lot owners had abstained in the ballot, the owners of Lot 6 still did not have unanimous approval.
3. When the proceeding came on for hearing, only the applicant owners corporation appeared.

### The Tribunal’s power to approve alteration of plans

1. The Act contains a regime which allows this Tribunal to order an owners corporation to amend its plan of subdivision, in certain circumstances. That power is set out in section 34D of the Act.

34D Applications relating to plans

(1) A member of the owners corporation, an owners corporation, an administrator of an owners corporation or a person with an interest in the land affected by the owners corporation may apply to the Victorian Civil and Administrative Tribunal for—

(a) an order requiring the owners corporation to do any of the things set out in section 32 or 33; or

(b) an order consenting on behalf of a member or group of members of an owners corporation to the doing by the owners corporation of any of the things set out in section 32 or 33; or

(c) an order consenting on behalf of a person whose consent to the registration of a plan is required under section 22; or

(d) an order restraining the owners corporation from doing any action under this Act or the regulations.

(2) The Victorian Civil and Administrative Tribunal may make an order on an application under subsection (1)(a) even though there is no unanimous resolution of the owners corporation authorising the action.

(3) The Victorian Civil and Administrative Tribunal must not make an order on an application under subsection (1)(b) unless it is satisfied that—

(a) the member or group of members cannot vote because the member is or the members are dead, out of Victoria, or cannot be found; or

(b) for any other reason it is impracticable to obtain the vote of the member or members; or

(c) the member has or members have refused consent to the proposed action and—

(i) more than half of the membership of the owners corporation having total lot entitlements of more than half of the total lot entitlement of the members of the owners corporation consent to the proposed action; and

(ii) the purpose for which the action is to be taken is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the members who did not consent to the action.

(4) For the purposes of sections 32 and 33, an order made on an application under subsection (1)(b) is to be treated as a vote by the member in favour of the proposed action of the plan.

(5) The Victorian Civil and Administrative Tribunal must not make an order on an application under subsection (1)(c) unless it is satisfied that—

(a) the person whose consent is required is dead or out of Victoria or cannot be found; or

(b) it is otherwise impracticable to obtain the person's consent; or

(c) it is impracticable to serve the person with the notice under section 22(1B).

(6) Subject to this section, the Victorian Civil and Administrative Tribunal may make any order it thinks fit on an application under this section.

### The owners corporation’s application

1. By its Points of Claim, the owners corporation sought the following orders:
   1. That the owners corporation amend the plan of subdivision (section 34(1)(a)).
   2. Consenting on behalf of the members of the owners corporation to the proposed amendment of the plan of subdivision (section 34(1)(b)).
   3. Consenting on behalf of all caveators, mortgagees and lessees to registration of the amended plan of subdivision (section 34(1)(c)).
2. Either of the first two orders sought by the owners corporation would achieve the result sought by it.
3. Of the two subsections, 34(1)(a) and (b), the latter answers more fully to the problem faced by the owners corporation, namely the failure of two of its members to agree to the amendment sought by the owners of lot 6.
4. Section 34(3) requires that, before the Tribunal can make an order under section 34(1)(b), it must be satisfied that:

* Members holding more than 50% of total lot entitlements consent to the alteration of the plan of subdivision and
* The proposed amendment “is likely to bring economic or social benefits to the subdivision as a whole greater than any economic or social disadvantages to the members who did not consent to the action”.

1. The first prerequisite is met; the holders of more than 50% of lot entitlements did vote in favour of altering the subdivision. The second prerequisite is more problematic.
2. The reasons put forward by the owners corporation as to why the benefits of the proposed alteration outweighed its disadvantages were as follows:
   1. *The fencing around the new lot 21 will not be the responsibility of the owners corporation.*

That is not correct. The only fencing of the current lot 6 which is the responsibility of the owners corporation is the part of the lot which shares a boundary with the common property. If the Village Green became a new lot, the obligation of the owners corporation to fence the common boundary would remain, unaffected.

* 1. *There will be no liability on the owners corporation to insure any building on the new lot 21.*

Not a benefit to the subdivision. The owners corporation has no obligation to insure lots, only common property.

* 1. *Public risk insurance would be reduced.*

The owners corporation currently has no public risk exposure in relation to the Village Green – the land belongs to the owner of Lot 6, not the owners corporation.

* 1. *There would be improved safety and security with “reduced opportunities for vandalism or persons engaging in antisocial behaviour”.*

The owners corporation adduced no evidence to suggest that there were currently any safety or security issues in relation to the Village Green or persons engaging in vandalism or antisocial behaviour.

* 1. *All expenses relating to the future development of the new lot 21 would be met by the owners of the new lot 21, not the owners corporation.*

Obviously, not a benefit to the subdivision.

* 1. *There will be no reduction in the common property.*

Obviously, not a benefit to the subdivision.

* 1. *There will be improved safety and security.*

No evidence was adduced by the owners corporation about what safety and security risks the Village Green currently presents.

* 1. *The house likely to be built on the new lot 21 would have a higher value than the houses in the court and, therefore, property values in the immediate locality would increase, thus benefiting the subdivision as a whole.*

The owners corporation did not adduce any evidence to support that assertion.

1. The disadvantages to the subdivision as a whole which the owners corporation identified were:
   1. A negligible increase in traffic on the common property driveway.
   2. Disruption as a result of construction on the new lot.
   3. The visual amenity of lots 5, 6 and 7, which have outlooks towards the Village Green, would be reduced.
2. Reflection shows that the disadvantages to the subdivision are both more numerous and substantial than those identified by the owners corporation.
   1. The subdivision would lose the benefit of the Village Green. The owners corporation submitted no evidence about the role of the Village Green in the life of the subdivision. It is, however, improbable that the lot owners would refer to the land as “the Village Green” if it were not seen by them as being an asset for the subdivision as a whole. The Village Green is not an irrelevant, dangling appendage to the subdivision. The parking lots are located around it and the photographic evidence tendered by the owners corporation showed that the Green is mown, neat and, as its name suggests, ideal for a hit of cricket or kicking a football. Its amenity is increased by the fact that it is located at the end of a court.
   2. The height limit of 8 metres proposed for the new lot 21 would allow the construction of a substantial, double-story building. The construction of such a building would render the proposed amended table of liabilities and entitlements inaccurate, as the table was based on the proposed lot 21 being vacant land. [[2]](#footnote-2) The table is required to reflect the value of the lots as well as a just and equitable contribution to the costs of the owners corporation – section 33 (2) and (3) of the Act. If the table did become inaccurate, the owners corporation would be exposed to the real prospect of conflict, as well as the cost and trouble of amending the table to reflect whatever was built on the new lot 21.
   3. It is probable that the new lot 21 would be developed, with a building very different to the ageing, low-scale building on the rest of the subdivision. In such circumstances, there would be significant potential for conflict over insurance and repair and maintenance.
   4. There would be increased traffic in the court.
   5. Perhaps most significantly, the owners of Lot 6, who have not offered any payment to the owners corporation, would acquire, without cost, extremely valuable property of the owners corporation. Unfortunately, the owners corporation did not provide any evidence about the current value of the Village Green or the likely value of the proposed lot 21. With a current upper limit of 2.5 metres and a lower limit of 1 metre, the development potential of the Village Green must be limited, at best. By contrast, the value of the proposed lot 21, vacant residential land suitable for a 2-storey home, 800 metres from a railway station in an established bayside suburb, could not be anything other than substantial. It follows that the airspace above and the land below the Village Green, which the owners of Lot 6 would acquire and which are the property of the owners corporation, are of very significant value. It follows equally that for the subdivision to transfer them to the owners of lot 6, without any compensation, is a most significant economic disadvantage to the members of the subdivision.
3. In summary, I find that the proposed amendment’s economic and social advantages to the subdivision as a whole, if any, do not outweigh the economic or social disadvantages to the members who did not consent to the amendments. That part of the owners corporation’s claim is dismissed.

### Application under section 34D(1)(a)

1. While the owners corporation’s application under section 34D(1)(b) fails, there remains its application under section 34D(1)(a).
2. The interplay between section 34D(1)(a) and (b) was considered by the Tribunal in the matter of *Conroy v Owners Corporation Strata Plan 30438* (Owners Corporations) [2014] VCAT 550 (*Conroy)*. In that decision, Garde J made it clear that an application may be brought under either subsection -and that failure under one, does not necessarily affect an application under the other:

There is no conflict between s34D(1)(a) and (b), or between these provisions and (c) and (d). The provisions have different work to do. While an application that does not meet the limitations imposed on the exercise of the power in (b) cannot attract the exercise by the Tribunal of that power, the application may nonetheless favourably attract the exercise by the Tribunal of the power in (a) provided of course that the Tribunal after considering all of the relevant considerations is minded to grant the application and exercise the power contained in (a).

### Matters to be considered

1. In *Conroy*, Garde J discussed the matters which the Tribunal should consider in an application under section 34D(1)(a):

Section 34D(1)(a) of the Act is not subject to any express limitation. There are no express considerations. Nevertheless, guidance can be obtained from the language of s 32 and s 33 as to the considerations that are relevant to an application made under s 34D(1)(a). Section 33(2) states that “the owners corporation must have regard to the value of the lot and the proportion that the value bears to the total value of the lots affected by the owners corporation.” Section 33(3) requires that “[i]n making any changes to the lot liability an owners corporation must consider the amount that it would be just and equitable for the owner of the lot to contribute towards the administrative and general expenses of the owners corporation.” These considerations are also significant at the Tribunal level.

1. Under section 34D(1)(a) an owners corporation can be required to do any of the things which it is authorised to do under section 32 – in the present case, creating a new lot and altering lot entitlements and liabilities.
2. The Act does not, however, set out the matters which the owners corporation must consider when so amending a plan of subdivision under section 32. The Tribunal’s power to order an owners corporation to amend its plan of subdivision is subject to section 34D(6), which says:

Subject to this section, the Victorian Civil and Administrative Tribunal may make any order it thinks fit on an application under this section.

1. The effect of section 34D(6) was considered by the Tribunal in the matter of *O’Gorman v Owners Corporation RP 018831* (Owners Corporations) [2017] VCAT 579, where Member Rowland observed as follows:

I do not consider that the Tribunal’s power to order an owners corporation to do any of the things under s 32 *Subdivision Act 1988* (including altering a plan of subdivision), is at large. In considering an application under s 34D(1)(a), the Tribunal should approach the application with caution. The Tribunal should not make an order for altering a plan of subdivision lightly.

The lot owners have a vested interest in the existing plan of subdivision. To change the plan of subdivision may change their rights and obligations. Each plan of subdivision and each application to amend a plan of subdivision will have its own unique set of circumstances. Different considerations will apply in each case. An application to amend an obvious error in a plan of subdivision will involve different considerations to an application where a lot owner seeks to acquire common property. It is for the applicant in each case to establish that the proposal is justified and that the Tribunal should make the required order.

In the circumstances of this application, I consider that the considerations which applied to an application under s 34D(1)(b) are relevant. It will not always be the case that the considerations under section 34D(1)(b) are relevant in an application under 34D(1)(a). Amending an obvious mistake in a plan of subdivision is an example where the considerations under s 34D(1)(b) might not be applicable. However in circumstances where a lot owner is seeking to acquire common property and amend lot liability such that all of the lot owners are affected in some way, the considerations under s 34D(1)(b) are relevant.

1. With respect, I agree with the views expressed by Member Rowland. It is clear that the considerations under section 34D(1)(b) are applicable to the owners corporation’s present application under section 34D(1)(a). In view of my findings about the owners corporation’s application under section 34D(1)(b), it necessarily follows that the owners corporation’s application under section 34D(1)(a) also fails. It also follows that the owners corporation’s application for an enabling order under section 34D(1)(c) also fails.

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| R. Buchanan  **Member** |  |  |

1. Sections 32 and 33. [↑](#footnote-ref-1)
2. Report by Dickson Hearn Pty Ltd, surveyors, tendered by the owners corporation. [↑](#footnote-ref-2)