

# REFEREE'S ORDER

Office of the Commissioner  
for Body Corporate and Community Management

**CITATION:** *Gracemere Waters North* [2019] QBCCMCmr 43  
**PARTIES:** The Body Corporate for Gracemere Waters North (**applicant**)  
Bridgette O'Connor & Craig McKeough (**respondents**)  
**PLAN:** GTP 107068  
**JURISDICTION:** *Section 77(1) of the Building Units and Group Titles Act 1980 (Qld) (Act)*.  
**APPLICATION NO:** 1032-2018  
**DECISION DATE:** 29 January 2019  
**DECISION OF:** M A Schmidt, Referee  
**CATCHWORDS:** Maintenance, by-law breach.  
*Act, ss 27(3), 51(2), 77(1).*

## ORDERS MADE:

1. **I hereby order** that, within six weeks of the date of this order, the proprietors of Lot 2, must at their own expense:
  - Remove peeling paint, reseal and repaint the driveway;
  - Remove peeling paint, repair and repaint the letterbox;
  - Waterblast and repaint the exterior walls of the dwelling; and
  - Undertake landscape maintenance, including mulching.

**I HEREBY CERTIFY** *this is a true copy of the order and reasons for decision.*

Dated this *29<sup>th</sup>* day of *January* 2019.



M A Schmidt

# REASONS FOR DECISION

## Introduction

- [2] This application is brought by the body corporate for Gracemere Waters North against Bridgette O'Connor and Craig McKeough, proprietors of Lot 2 in relation to an alleged breach of by-law 5 (*Repair and maintenance*) concerning maintenance of the driveway, letterbox, exterior walls of the dwelling and gardens, including mulching. The body corporate seeks an order, that within six weeks, the respondents:
- Remove peeling paint, reseal and repaint the driveway;
  - Remove peeling paint, repair and repaint the letterbox;
  - Waterblast and repaint the exterior walls of the dwelling; and
  - Undertake landscape maintenance, including mulching.

## Overview

### Procedure and jurisdiction

- [3] "Gracemere Waters North" GTP 107068 is a plan for the *Integrated Resort Development Act 1987 (IRDA)*. The scheme is a subsidiary scheme in Hope Island Principal Body Corporate. There are 43 lots in the scheme.
- [4] The *Building Units and Group Titles Act 1980 (Act)* applies for the operation of IRDA (section 5A, Act) and continues to apply to a group titles plan subject to IRDA (section 328, *Body Corporate and Community Management Act 1997*). Section 179A IRDA provides –
- "Subject to subsection (2), a dispute about the operation of this Act or the rights and obligations of persons under this Act may be dealt with under the Building Units and Group Titles Act 1980, part 5".*
- [5] Part 5 of the Act concerns disputes. Part 5, division 3 makes provision for orders by a referee. Within division 3, section 77(1) provides a general power for a referee, on application of a body corporate, a body corporate manager, a proprietor, a person having an estate or interest in a lot or an occupier to "make an order on any person entitled to make an application under this subsection or on the chairperson, secretary or treasurer of the body corporate for the settlement of a dispute, or the rectification of a complaint, with respect to the exercise or performance of, or the failure to exercise or perform, a power, authority, duty or function conferred or imposed by this Act in connection with that parcel".
- [6] Given section 179A of IRDA, the body corporate may make an application against a proprietor in the scheme seeking an order under section 77(1) of the Act.
- [7] In accordance with section 73(1)(d) of the Act, submissions were invited from the respondent and all lot owners, being persons who in the referee's opinion, would be affected if the order sought was made.
- [8] Nine submissions were received: one from Bridgette O'Connor and eight from other owners. Copies of all submissions received were forwarded to the body corporate (care of Grace Lawyers) with an opportunity to respond. Grace Lawyers responded via email dated 17 January 2019.
- [9] I have decided the application based on this written material and the most relevant arguments from this material are referred to below.

## Analysis

### Submissions

#### Body Corporate

- [10] The body corporate submits that the respondents are in breach of by-law 5 by failing to maintain the driveway, letterbox, exterior walls of the dwelling and gardens, including mulching, to an appropriate standard.

*Ob. A. A.*  
29/10/19

[11] By-law 5 states:

Repair and Maintenance

Every proprietor or Occupier of a Lot will:

- (i) maintain in good condition and repair the exterior of his Dwelling, including without limitation all fences, walls, windows, gates, sidewalls, walkways and driveways within his or her Lot;  
...
- (iii) maintain in good condition and repair all yard landscaping, irrigation facilities, drainage facilities, spas, fountains, private mooring facilities and other surrounds within his or her Lot...

[12] The body corporate submits that the respondents are required to maintain their lot in good condition and where repairs are required, carry out those repairs. It states the respondents have failed to maintain and repair the driveway, letterbox, exterior walls of the dwelling and gardens, including mulching, to an appropriate standard. The respondents' lot detracts from the visual amenity that residents seek to achieve by living within Hope Island Resort, states the body corporate.

[13] The body corporate states that it wrote to the respondents on 10 March 2017, notifying them they failed to maintain the driveway, letterbox, exterior walls of the dwelling and gardens, including mulching, to an appropriate standard and requesting that the following works (the **works**) be undertaken within 30 days:

- Reseal and repaint the driveway;
- Repaint the letterbox;
- Waterblast and repaint the exterior walls of the dwelling; and
- Undertake landscape maintenance, including mulching.

[14] On 24 March 2017, the body corporate again wrote to the respondents and referred to the correspondence of 10 March 2017, and restated that the works were required to be completed by 9 April 2017. The body corporate requested that the respondents provide the body corporate with an update on the works carried out.

[15] On 28 February 2018 the body corporate wrote to the respondents and requested they attend conciliation on 9 March 2018. The body corporate stated that if:

- The works are not carried out within a further seven days; or
- The body corporate has not received a response from the respondents with respect to the invitation to attend conciliation,

the body corporate would have no option but to apply for an order of a referee.

[16] As of 17 September 2018 the body corporate had not received any correspondence from the respondents.

### **Individual Owners**

[17] Seven individual owners made submissions in support of the body corporate's application, to the following effect:

- They moved to the Hope Island Resort because it had numerous sophisticated by-laws in each of its residential bodies corporate which gave them comfort that the resort would be kept in all respects to a very high standard of appearance, thus safe guarding their substantial property investment.
- The by-laws are to provide residents with confidence that a uniform presentation, quality and standard throughout can be maintained.
- Numerous comments have been received from residents about the importance of maintaining properties within the body corporate and the condition of this particular property. The respondents' lot detracts from the level of visual amenity expected and additionally, it adversely affects the value of other properties in the vicinity.

*Handwritten signature:*  
C.B.A.A.  
29/10/18

- 2134 Beaufort Way has been an 'eye-sore'. Its position on the street is such that it is noticeable to people coming in and out of the area. The house and its surrounds do not reflect the property maintenance guidelines set down by the body corporate.
- All buyers within Hope Island are provided with the by-laws prior to purchase and expect to be able to rely on those by-laws to maintain their residential environment.
- Many of the disputed items only require basic maintenance and involve minimal cost. As a result of the lack of basic maintenance, the property is becoming more rundown and dilapidated. The owners of the property refuse to negotiate.
- The respondents are not interested in complying with the by-laws nor do they care what the standard of their property looks like. They have no respect for their neighbours or any authorities.

### Respondent

[18] Ms O'Connor submits that she lives in the residence at 2134 Beaufort Way with her children. She states the gardens, lawns and property are maintained to the best of her ability and are kept at all times in good condition. She states the photos submitted by the body corporate actually attest to this fact.

[19] The lawns, Ms O'Connor states, are never overgrown. In relation to the driveway, she comments as follows:

- Makes reference to a previous decision of this Office<sup>1</sup>.
- While the driveway is patchy in colour it is maintained and remains serviceable as an even, terraced approach to the house, and it is only the colouring of the driveway which is uneven and gives a mottled effect. It is not hazardous to anyone passing by.

[20] The property, on a whole, including the letterbox and dwelling is maintained in good working order and whilst not pristine or new looking, Ms O'Connor states that she is not in a position to rectify this. Her situation at the time of making her submission in 2018, remains as it has been for the past nine years. She claims the property is subject to a fraud dispute between herself and Westpac Bank. There were negotiations taking place the week Ms O'Connor was making her submission. She states when the dispute is settled, the property will have works carried out to place it back into new condition.

### Body Corporate's reply to submissions

[21] The body corporate made a detailed reply to the submissions, as follows:

#### SUBMISSIONS IN REPLY

1. On 4 December 2018 the Respondent filed written submissions in response to the Application for an order by a referee (the **Application**). The Applicant was provided with a copy of those written submissions on 6 December 2018.
2. Further written submissions from the Respondent were filed on 13 December 2018, which was outside the time for compliance set by the Commissioner for Body Corporate and Community Management (the **Commissioner's Office**).
3. An undated and unsigned two page document (the **Submissions**) appears to have been authored by John Andrews of Lynch Andrews Lawyers Brisbane. However, the Submissions are written in the first person and seem to be a statement of Bridgette Ann O'Connor.
4. The Submissions make very little, if any, reference to the material provided and read more as a narrative of the Respondent's circumstances to date.

#### RESPONDENT'S SUBMISSIONS

<sup>1</sup> *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009)

*Jb.A.A.*  
29/01/19

5. In support of their Submissions, the Respondent provided the Commissioner's Office with:
  - (a) an Order of a Referee made 21 August 2009, and the statement of reasons for that decision<sup>2</sup>;
  - (b) written submissions from lot owners in response to matter 0568-2014<sup>3</sup>;
  - (c) a Defence and Counter Claim filed 3 October 2018;
  - (d) a letter from Centrelink dated 17 August 2018 regarding electronic messaging; and
  - (e) an Affidavit of Bridgette Ann O'Connor and annexures appearing to relate to an action brought against the Respondent for unpaid levies.
6. *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009) and *Gracemere Waters North* [2014] QBCCMCmr 311 (28 August 2014) are not directly relevant to the present application. Nor is the documentation relevant to the proceedings brought against the Respondent for unpaid levies.
7. Nevertheless, the approach taken by the referee in *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009) is helpful to the present application as the referee correctly had regard to relevant questions to be determined in this application, including:
  - (a) what is the standard the property is to be maintained?; and
  - (b) has that standard been breached?
8. By-law 5 of the *Gracemere Waters North* By-laws (the **By-laws**) states:

"Every Proprietor or Occupier of a Lot will:

  - (i) Maintain in good condition and repair the exterior of his Dwelling including without limitation all fences, walls, windows, gates, sidewalks, walkways and driveways within his or her Lot;
  - (iii) Maintain in good condition and repair all yard landscaping, irrigation facilities, drainage facilities, spas, fountains, private mooring facilities and other surrounds within his or her Lot..."
9. Whether the Respondents' lot is kept in 'good condition and repair' is determined by reference to the neighbourhood to which the by-law applies (*Gracemere Waters North*) and the standard of properties maintained within that neighbourhood.
10. Hope Island Resort is a premium residential community with sophisticated instruments in place for decades to ensure a consistent, high quality aesthetic to all development within the resort. This can be demonstrated by the development control by-laws that must be adhered to when new residences are constructed. Members of this community place importance on ensuring that their own residences are maintained to this standard, and expect the same of their neighbours.
11. As such, it is not sufficient to say that the standard of 'good condition and repair' is maintained if the driveway is functioning so that a car can drive across it, and the letterbox can hold mail; if that same driveway and letterbox are covered in peeling paint, mould and the numbers on the mailbox are missing and / or faded.
12. We annex to these submissions photographs taken on 11 January 2019 of the surrounding lots and the Respondents' lot (**Annexure A**). As you can see, the surrounding lots are kept to the same high standard. The Respondents' lot is the exception to that standard.
13. Therefore, it stands to reason that the Respondents' lot, specifically the driveway, letterbox, exterior walls and gardens are not maintained to the standard of 'good condition and repair' required by the by-law.
14. Further, the Respondent in their submissions acknowledges that the lot is not maintained in a '...pristine or new looking...' condition and alludes to an inability to afford further works to the property.

---

<sup>2</sup> *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009)

<sup>3</sup> *Gracemere Waters North* [2014] QBCCMCmr 311 (28 August 2014)

*Handwritten signature:* Jb.A.A.  
29/01/19

15. In *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009) the referee held that:
- An inability to afford to maintain is no excuse for failing to maintain in accordance with the legislation and the by-laws of the scheme.
16. In their Submissions the Respondent asserts that they have undertaken certain garden works, including mulching.
17. The Applicant understands that some mulching was undertaken of two of the five front garden beds.
18. However, please refer to the images in Annexure A of the Respondent's lot taken on 11 January 2019 to show that overall the garden has not been maintained in good condition as required by the by-law.
19. The second image in Annexure A shows the letterbox in the foreground. In that image weeds are growing in the garden bed directly behind the letterbox. The third image shows dead fronds and weeds are visible in the garden beds on the left and right to the image.
20. The images in **Annexure B** are also of the Respondent's lot and were taken in September 2018. As you can see, there is little to no difference in the three months between the photographs being taken.
21. The Body Corporate maintains that the gardens are not up to the standard required of the Respondent by the by-law, or by the standard upheld by the community of Hope Island Resort.
22. The present application is brought some ten years after *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009).
23. The Respondent has not performed any remedial works to the driveway for at least the past seven years. Some seven or eight years ago some works were undertaken without proper preparation, which has contributed to the present condition of the driveway.
24. Not only has the Respondent failed to repair and maintain the driveway in the previous seven or eight years, but further deterioration of the dwelling is evidenced by the state of the letterbox, exterior walls and gardens.
25. This shows a disregard for the concerns previously raised by the Body Corporate to maintain the standard required by the by-laws, and the wider community of Hope Island Resort.

#### OWNER'S SUBMISSIONS

26. In *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009) the referee noted that no owners filed submissions in support of the Body Corporate's application. The referee found that the '*...clearly mottled effect does not so distress other owners that they find it a detriment to their visual amenity.*'<sup>4</sup>
27. In the present application owners have filed submissions in strong support of the Body Corporate's claim and argue that the state of the Respondents' lot detrimentally affects the visual amenity of the scheme.
28. On 13 November 2018 the owner of Lot 2151 provided the following submission:
- "... I feel strongly that the visual amenity and ambiance of our neighbourhood be maintained. I therefore fully support the bodycorp in the insistence that our neighbours carry out the required repairs and maintenance to the part of their property visible from the street. Indeed, if the bodycorp did not force the issue then I would consider the bodycorp manager negligent in their duties..."
29. A further submission was received from the owners of Lot 21 who say:

---

<sup>4</sup> *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009)

*Jb. D. A.*  
29/11/19

"...the decrepit and neglected state of 2134 Beaufort Way has been an 'eye-sore' for not only ourselves, but also our visitors who have commented on its state of disrepair and poor aesthetic".

30.A further five submissions were received from owners who expressed similar concerns with the condition of the Respondents' lot.

31.The community is evidently concerned with Respondents' longstanding disregard for the By-laws and the impact this has on the visual amenity of their own lots.

## CONCLUSION

32.The Respondents have failed to maintain their lot by the standard required, maintained and expected of Hope Island Resort.

33.Since 2009 the Body Corporate has raised concerns with the Respondents as to the condition of their lot.

34.Most recently, in March 2017 the Body Corporate's concerns were again raised with the Respondents.

35.In February 2018 the Body Corporate sought to meet with the Respondents and discuss their concerns. The Body Corporate did not receive a response to that request.

36.The Respondents, by way of written submissions, have failed to establish that the:

- (a) driveway;
- (b) letterbox;
- (c) exterior walls of the dwelling; and
- (d) gardens including mulching.

are in good condition and repair, and maintained to the standard required of them by Hope Island Resort.

37.Instead, the Respondent alludes to financial difficulty to substantiate their inability to comply with their obligations. It was held previously that financial hardship is not an excuse.<sup>5</sup>

38.As such, the Body Corporate maintains that the Respondents are in breach of By-law 5 and the Applicant requests that orders are made requiring the Respondents to:

- (a) remove peeling paint, reseal and repaint the driveway;
- (b) remove peeling paint, repair and repaint the letterbox;
- (c) waterblast and repaint the exterior walls of the dwelling; and
- (d) undertake landscape maintenance, including mulching.

## Determination

[22] There is no general duty to maintain a lot in IRDA. *Section 51(2)* of the Act requires a proprietor to maintain and repair his or her lot and keep the same in a state of good repair, reasonable wear and tear excepted.

[23] In this matter, the body corporate seeks to enforce its own By-law 5 as quoted above. The by-law requires that driveways, all external surfaces of the dwelling and landscaping are maintained "in good condition and repair." The body corporate is required to do all things reasonably necessary for the enforcement of the by-laws.<sup>6</sup>

[24] There is no dispute between the parties that Ms O'Connor has been made aware that the body corporate was of the view that the driveway, letterbox, exterior walls and gardens of Lot 2 required attention and were considered to be in breach of by-law 5.

<sup>5</sup> *Gracemere Waters North* [2009] QBCCMCmr 309 (21 August 2009)

<sup>6</sup> Section 27(3), Act.

Ch. A. A.  
29/01/19

- [25] In the previous decision regarding the driveway of Lot 2, referred to by Ms O'Connor, there were no submissions from the other 42 lots in the scheme about the Respondents' driveway, and the referee concluded that "*the mottled effect does not so distress other owners that they find it a detriment to their visual amenity, and "unsightly", or more to the point of By-law 5, to be evidence of a failure to maintain a driveway in good repair*". As detailed by the body corporate, that is not the case with this dispute, with seven individual lot owners making submissions in support of the application.
- [26] I note Ms O'Connor's submission in relation to financial hardship, but also the comments of the referee in the previous decision that "*An inability to afford to maintain is no excuse for failing to maintain in accordance with the legislation and the by-laws of the scheme.*"
- [27] I further note the following comments of the referee in the same decision:
- It may be that the driveway will deteriorate further and there may come a time when this driveway is no longer in "good condition and repair." The Respondents should consider rectifying the driveway before the quotation increases, and the driveway does fall into disrepair. However, at present, I am not satisfied that the standard of "good condition and repair" has been breached, even if the driveway is "unsightly" and no longer in perfect condition, as preferred by the body corporate.
- [28] Almost ten years have passed since that decision was made and the condition of the driveway has not been rectified to a standard the body corporate considers acceptable. There has been no work at all done to the driveway for at least seven years.
- [29] Further, I am of the view that if a particular item to be maintained is painted, then part of the obligation to maintain it in "good condition and repair" includes repainting it when that is obviously required. There is ample precedent for the proposition that the obligation to maintain in good condition includes painting.<sup>7</sup>
- [30] The photographs provided by both the body corporate and Ms O'Connor satisfy me that work is also needed on the letterbox and gardens in order for them to be considered to be in a state of good condition and repair.
- [31] In the circumstances, I will make the order sought by the body corporate.

## Conclusion

- [32] The material before me satisfies me that there has been a breach of by-law 5 by the proprietors of Lot 2. I am further satisfied that the proprietors have been notified of the breach, have had ample opportunity to remedy the breach and have failed to do so. I have made the order sought.

*J. A. A.*  
*29/10/19*

---

<sup>7</sup> See, for example, *Bayshore Central* [2017] QBCCMCmr 550