

Attachment 2

Oasis Villas Parking Considerations

Considerations for Parking Applications

Since 2010 there have been 15 registered adjudications for Oasis Villas with the Body Corporate and Community Management Commissioner of which 3 were for carparking. In each case the Adjudicator ruled and upheld the Oasis CTS 20870 by-laws for carparking. Carparking is a contentious issue within the Oasis Complex.

The Oasis Body Corporate Committee (OBCC) reviews applications from Owners/Occupiers within Oasis Villas for carparking and on behalf of the Body Corporate has the authority to approve or refuse parking applications.

In the process of reviewing these applications the following guidelines are taken into consideration. The OBCC must be able to demonstrate that it has considered all aspects of the application and must act reasonably in making the decision.

Should the OBCC refuse a request and the Applicant is not satisfied with the outcome in the first instance they should refer the matter to the Office of the Commissioner for Body Corporate and Community Management.

This may lead to conciliation, an adjudication or referral to the Magistrates Court for enforcement of an Adjudicator's order. The maximum penalty for not following an Adjudicator's order is 400 penalty units. The penalty unit value in Queensland is \$154.80 (current from 1 July 2023) i.e. the maximum penalty applied could be \$61,600.00.

Applicant's Request

1. The following points should be taken into consideration when assessing an Applicant's request:
 - a. What is the reason for the request and is it reasonable?
 - b. Is the time period defined?
 - c. Is it similar to previous requests and is there precedent?
(refer to paragraph 2 below)
 - d. Will approval of the request impact other Owner/Occupiers?
 - e. Is the request to park on common property or in a visitor carpark?
 - f. Could the assignment of a body corporate carpark fulfill the request and if so is it within close proximity to the Applicant's residence?
 - g. Has the OBCC given consideration to all the items in the Considerations Section below

- h. If the OBCC is going to approve the request are there conditions that should be included e.g. review dates
- i. If the Committee is going to refuse the request, on what grounds will it be refused and are these reasonable?

2. In Blue Pacific Village [2016] QBCCMCmr 414 [15 d.] the Adjudicator found that:

“The body corporate must consider every application to park on common property on its individual merits, so there is every chance that one application will be allowed and another refused due to perfectly valid differences in the prevailing circumstances. For example, there may be limited space to manoeuvre vehicles on one area of common property meaning it is reasonable to refuse to let anyone park there, while in other parts of the scheme there may be plenty of space. However, if the circumstances are not materially different, then it may be unreasonable to refuse permission to one occupier while granting permission to another.”

Items to be Considered in Reviewing an Application

The Complex Parking Guidelines

1. In September 2021 the OBCC issued reissued the Oasis Villas Parking Guidelines for the Complex. These were approved at the February 2022 AGM:
 - a. These guidelines supported the use of parking in front of a residents garage for a period of 2 hours in a 24 hour period.
 - b. They did not support the use of a visitor carpark.
2. Does the request fall within these guideline and can approval be provided based on this guidance?

By-Laws

1. From **Image 1** it can be seen that the title boundary as defined by the yellow lines stops at the garage roller door of most villas.
2. The following by-laws should be considered in reviewing the request.

Figure 1: By-Law 11

11 Parking

- 11.1 Owner or Occupier must not, without the written approval of the Body Corporate:
- 11.1.1 park a Vehicle or allow a Vehicle to stand, on any part of the Common Property; or
 - 11.1.2 permit a Visitor to park a Vehicle or allow a Vehicle to stand, on the Common Property (other than a designated visitor car parking bay).

7 Obstruction

- 7.1 An Owner or Occupier must not, without the written approval of the Body Corporate:
- 7.1.1 obstruct, or permit the obstruction of, the lawful use of the Common Property or another Lot by someone else; or
 - 7.1.2 use as storage, or place items on, the Common Property.

Image 1 Showing Number of Villas (76) and the positioning of each unit and indication of lot title boundaries marked in yellow.
(reference Nearmaps.com.au and City of Gold Coast)
For a more detailed view refer **Attachment 1**



3. Schedule 4 of the Body Corporate and Community Management Act has a reference to parking by-laws. The Body Corporate and Community Management Commissioner's webinar provides the following:

"The by-laws recorded in the CMS for your scheme are the enforceable by-laws. Schedule 4 of the Act does not apply to your scheme if the by-law wording is not listed or Schedule 4 is referenced in the CMS. Schedule 4 of the Act does not take precedence to your registered by-laws."

Disposition of Common Property

1. If the request is to park on a section of common property for prolonged periods it is the understanding of the OBCC this would require the Applicant to be granted "exclusive use" of an area of common property on a permanent and ongoing basis.

2. This would require a motion to be put to either a General Meeting (GM) or Annual General Meeting (AGM) of the Body Corporate and would require a vote without dissent to be successful.
3. Further, in the case of Blue Pacific Village [2016] QBCCMCmr 414 [11] the Adjudicator found that:

“The Court of Appeal has found that where use of part of the common property will pass exclusively to a specific owner for an indefinite period, it creates a disposition of the common property that requires authorisation by resolution without dissent. The legislation provides various ways this might be achieved, including:

 - a. *Amending the community management statement to record an exclusive use by-law over the part of common property ...; or*
 - b. *Selling or granting a lease or licence over the part of common property.”*
4. If selling, granting a lease or licence over the part of the common property the following will need to be considered:
 - a. The Department of Natural Resources Mines and Energy, Queensland values land on an annual basis
 - b. The latest valuation for Oasis Villas published on 1 October 2019 was for \$11.5 million for 2.6 hectares of land i.e. \$442.30 per square metre
 - c. A standard vehicle covers approximately 16.5 square metres of land (3 metres wide and 5.5 metres long)
 - d. The estimated land value for a vehicle to sit on is \$7,300.00 not including GST or any legal costs and surveying costs that may be incurred in the sale or development of lease/license
5. Disposition of Common Property is covered by the Body Corporate and Community Management Act 1997 (updated December 2020) S154 and Body Corporate and Community Management (Standard Module) Regulation 2008 S161.

City of Gold Coast Carparking Requirements

6. The Oasis Villas Complex was built in or around 1988. Prior to construction the developer was required to submit a development application (DA) to the City of Gold Coast (CoGC) for the Complex.
7. This DA included a designated number of visitor carparks as required by CoGC planning requirements. For the Complex this equated to 38 carparks (1 per 2 Villas) designated for visitors to the Complex, not Occupiers or Owners and a requirement for each villa to have two carparks within their title boundary.
8. Refer Gold Coast Planning Scheme 03, Part 7, Division 3, Chapter 4, Attached Dwellings for determining the number of carparks. Further, the key objectives of this document are to make *“on-site provision (for carparks) available for occupants and on-street provision and/or public car parks available for visitors”*.

9. Apart from the visitor car parks the Complex has a further 4 Body Corporate exclusive use car parks available to be allocated by the OBCC. These are not allocated on a permanent basis and are allocated as needs on request.
10. Whilst the CoGC does not appear to enter private property to monitor or enforce visitor parking they will act on complaints received. CoGC may issue an enforcement notice to comply with the original development approval for Oasis Villas i.e. to have available 38 visitor car parks.
11. Penalties for the contravention of the development approval may be applied as per the below (extract from a letter sent by CoGC to another Body Corporate):

Penalties

It is a development offence to contravene a development approval. Upon conviction by a court for the development offence the current maximum penalty is 4500 penalty units (currently in 2022 - \$646,875.00) for an individual or \$3,234,375.00 for a corporation). In addition, legal costs can be claimed, and a court may make other orders against you.

If an enforcement notice is issued to you, it is an offence under section 168(5) of the Planning Act to contravene the enforcement notice. Upon conviction by a court for the offence the current maximum penalty is 4500 penalty units (currently in 2022 - \$646,875.00) for an individual or \$3,234,375.00 for a corporation). In addition, legal costs can be claimed, and a court may make other orders against you.

Further in relation to a corporation, section 227 of the Planning Act provides that an executive officer of a corporation commits an offence against an executive liability provision of the Planning Act, and did not take reasonable steps to ensure the corporation did not engage in the conduct constituting the offence. The current maximum penalty which can be imposed on an executive officer for committing an offence against section 227 of the Planning Act is the penalty for a contravention of the executive liability provision by an individual.

In addition to the above, Council may also issue penalty infringement notices (on the spot fines) of 20 penalty units (currently \$2,875.00) for an individual, or a 100 penalty units (currently \$14,375.00) for a corporation.

Council may take action to commence prosecution or other proceedings for a development offence at any time regardless of this notice if it is considered warranted.

12. Furthermore, regarding visitor parking the Body Corporate and Community Management Commissioner's webinar provides the following:

"Adjudicators have consistently stated that the body corporate cannot grant an occupier permission to park in a visitor car park as they are usually regulated by the local council planning requirements."

Previous Parking Adjudications in the Oasis Complex

13. Oasis [2001] QBCCMCmr 338 (20 June 2001) the Adjudicator found that:

“Accordingly, the by-law provides that owners and tenants of lots have no authority to park vehicles in visitors parking bays or upon any other part of the common property without the written approval of the body corporate committee. Designated visitor car parking spaces are a universal local government requirement for the registration of a community titles scheme and remain a continuing requirement of the scheme. Even if the body corporate wanted to use these spaces for resident parking, or some other purpose, it is not able to do so. There is therefore no question of Mr Considine, or any person other than a genuine visitor, being allowed to park in the designated visitor car spaces. As to parking on other areas of the common property, this is clearly regulated by the above by-law as a necessary control to prevent hazards and inconvenience to other users of the common property.”

Who is a visitor

14. In defining a visitor, the circumstances must be considered separately on each occasion. Trades people are visitors, Owners or Occupiers with a commercial vehicle are not trades people and not permitted to use a visitor carpark.
15. In the case of Gresham Gardens [2006] QBCCMCmr 355 the adjudicator found that a person who stays overnight on a regular basis is an occupier.

“There does seem to be some uncertainty about who constitutes a genuine visitor to the scheme and will be entitled to use the visitor car parks. There seems to be a general understanding that occupiers of the scheme are not entitled to use the visitor car parks. However, the distinction between an occupier and a visitor may not always be completely clear. As a general rule, persons letting a unit for a week (including family or friends accompanying those persons for the majority of the period let) would be classed as occupiers. Persons just visiting for one or two nights of that period would normally be classed as visitors. Similarly, if the relative of an owner/occupier regularly visits for one or two nights every month then that relative would normally be classed as a visitor. The more difficult questions arise when a person stays with someone for a number of nights or on a very regular basis. In those cases, it will be necessary to look at all the circumstances to determine if they are an occupier or a visitor.”

“..Following this logic, a person who stays overnight in a residential lot 2 or 3 nights on a regular basis could still be considered an occupier.

I do not consider that the lot must be the person’s principal place of residence for them to be an occupier of the lot. It is conceivable that a person may occupy more than one residential abode.

If someone were to visit regularly but not usually stay overnight, or were to stay overnight for a few nights occasionally, I would not normally consider they were occupying the lot. The key here, I believe, is the combination of two factors. Firstly, the respondent stays overnight for 2 or 3 nights (rather than just visiting during the day or evening) and in addition the respondent is present on a very regular basis (every week, or at least most weeks).”

Equity for all Owner and Occupiers

16. In considering an application for parking the OBCC must also consider the impact to all other owners and occupiers within the Complex.

“Section 180 of the Act was amended in 2010 to include subsection (7) A by-law must not be oppressive or unreasonable, having regard to the interests of all owners and occupiers of lots included in the scheme and the use of the common property for the scheme.”

17. To permit an Applicant to park in front of their garage on common property and outside the title boundary would create inequity for other owner/occupiers within the complex unless they are also granted similar access.

18. **Image 2** and **Image 3** depicts the impact to the congestion that would be created on the Complex roadways if owner/occupiers were to parallel park in front of their garage.

Image 2 Demonstrates for a sample section of the Complex of the congestion that would be created by permitting parking on common property in front of garages and the restricted access along the roadway.



19. Further, this restricted access will also impact the turning circle required for vehicles using the visitor carparks.

Image 3 Demonstrates for a sample section of the Complex of the congestion that would be created by permitting parking on common property in front of garages and the restricted access along the roadway.



20. The Austroads Design Vehicles and Turning Path Templates Guide provides for a turning circle of 6.3 metres for a passenger vehicle.
21. Consideration of an application should also take into account the impacts to other vehicular traffic in the complex and any impedance to turning, parking and through traffic.

The above whilst comprehensive may not cover all circumstances and parking applications will be considered on their individual merits.