



Civil and Administrative Tribunal  
New South Wales

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Case Name: Cusak v Marais  
Medium Neutral Citation: [2023] NSWCATCD 63  
Hearing Date(s): 14 April 2023  
Date of Orders: 13 June 2023  
Decision Date: 13 June 2023  
Jurisdiction: Consumer and Commercial Division  
Before: C Campbell, General Member  
Decision: 1. The application is dismissed  
Catchwords: Nuisance – Breach of By-Law  
Legislation Cited: Strata Schemes Management Act 2015  
Category: Principal judgment  
Parties: Applicant: Paul Cusak  
Respondent: Emma Marais  
Representation: Applicant: Self-represented.  
Respondent: Self-represented.  
File Number(s): SC 22/54125  
Publication Restriction: Nil

## REASONS FOR DECISION

1 This is an application by a lot owner seeking an order the respondent complies with by-law 9 and are not use her BBQ smoker anywhere within her lot or on the common property of Strata Plan 81508. In the alternative the applicant alleges the respondent is in breach of s 153 of the *Strata Schemes*

*Management Act 2015* in so far as the smoke created by the cooker is a nuisance to the applicant and interferes with his enjoyment of his lot.

- 2 Both parties appeared in person and had complied with the procedural directions in relation to the exchange of their documentary evidence.

### **APPLICANT'S EVIDENCE**

- 3 The applicant alleges the respondent is in breach of By-Law 9 which is in the following terms:

(1) An owner or occupier or any invitee of the owner or occupier, must not smoke tobacco or any other substance on the common property

(2) An owner or occupier of a lot must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.

- 4 The applicant and the respondent are next door neighbours. There are 22 lots in the scheme. The respondent has a Traeger wood pellet grill in her backyard. The cooking source comes from wood pellets, and it is this smoke which the applicant alleges interferes with his enjoyment of his lot. The applicant has kept a "smoke log" of the dates, time of day and hours the respondent has used the grill between 07 March 2021 and 10 December 2022. He says on average it is used every second weekend for a period of between 4- 6 hours. He ceased keeping the log after the 10 December 2022 as the respondent has used the grill less frequently since that date.
- 5 He said there is initially visible smoke which is emitted from the grill and thereafter there is no visible smoke, but it continues to emit an offensive odour during the cooking process which he said smells like a bush fire.
- 6 He has to go inside and shut his windows and doors whilst the grill is in use. This can extend for hours if the respondents are doing slow cooking. He has avoided having guests over. He is unable to leave his premises. He cannot hang out his washing.
- 7 There are 22 lots in scheme and many of the other lot owners have BBQs in their premises. He does not find the smell of the smoke emitted any other BBQs offensive. He also said they do not cook on them for hours at a time. His complaint is the length of time the respondents sometimes take to cook the

food on their grill. In his opinion the respondent should be limited to her cooking time to 30 minutes only as after that it becomes an imposition on him.

- 8 He does not rely on any statements from any other neighbours who may be affected by the respondent's grill. The grill is depicted in an advertisement. It has a chamber within which the food is contained, but the smoke does not stay within the chamber, there is a chimney on the top where the smoke escapes.
- 9 On the 12 March 2021 the strata managing agent sent a letter to the respondent informing her she was in breach of the by-law 9. No further action has been taken by the Owners' Corporation against the respondent since that date.
- 10 It is his submission that the by-law 9 relates not only to tobacco smoke but any other smoke including smoke caused from any cooking process. And the use of the respondent's grill is therefore a breach of by-law 9.
- 11 He submitted it is the odour emitted from the grill that is a nuisance rather than the smoke itself, which interferes with the use and enjoyment of his lot.

#### **RESPONDENT'S EVIDENCE**

- 12 The respondent says this particular grill is sold throughout Australia. In 2022 the respondent has only used the grill 27 times, since it was purchased on the 05 March 2021.
- 13 The grill emits white smoke for a period of some two minutes during the igniting stage and thereafter there is no visible smoke. It is called a Traeger Grill as after the brief period of white smoke, the smoke stays wholly within the appliance and cooks the food like an oven.
- 14 To interpret the by-law in the manner proposed by the applicant would be to the effect that all lot owners would be prevented from doing outdoor cooking and it would be harsh or oppressive or unconscionable. Particularly as many other lot owners, including the applicant use Weber BBQs which emit smoke throughout the cooking process.
- 15 No other lot owner has made any complaint about the use of the grill. The applicant relies on statements from Bruce Lawson who is a member of the

Executive Committee (“EC”) and Mr and Mrs Jarolimek who are the next door neighbours on the other side of the applicant’s lot.

- 16 The latter couple state the smoke initially lasts for “less than two minutes”. They say that the smoke smells no worse than a bushfire. Depending on the food being cooked they say there is a slight aromatic food smell after a couple of hours and that smell is less strong than a typical BBQ and is very pleasant. Neither the smoke nor the food smell is unpleasant. They have never felt the need to close their windows. They frequently have had laundry on their washing line and neither the smoke nor cooking smells have permeated their washing. They state the cooker has many advantages and it produces less smell and smoke than a standard BBQ and they are considering buying one.
- 17 The respondent said that many other lot owners use some form of outdoor cooking equipment. They initially had it adjacent to their neighbours side fence but moved it further down into the centre of their backyard.
- 18 The issue was raised at AGM held on the 08 September 2021 and it was agreed the use of the grill twice a month was “acceptable”.
- 19 The respondent disputes the accuracy of the applicant’s smoke log The appliance has an electronic log which keeps a record of the length of time it is being used and the temperatures it reaches over that period of time. A copy of readout from the grill is before the Tribunal and shows it was used 2.44 times per month from March to December 2021, and 2.25 times per month in 2022.
- 20 The respondent said she had felt intimidated by the applicant over this issue and earlier issues. She attended Mona Vale police, who spoke to the applicant on the 02 December 2021. A copy of the police report from Senior Constable Grogin dated 03 December 2021 is before the Tribunal, and it states:

Please be advised that Police did attend and speak with your neighbour late yesterday afternoon. The feedback I received was that his biggest gripe was regarding the smoker. Police attempted to reason with him that this was not an issue.

Best wishes for the future. I hope this gives you some relief for you and your family.
- 21 By email dated 19 December 2021 the applicant sent an email the executive committee asking for them to agree to issues proceedings in the tribunal to

enforce that the use of the smoker ceases and to comply with by-law 9. The request was denied.

## **APPLICANT'S EVIDENCE IN REPLY**

- 22 The respondent relies on a statement from Mr Lawson who is a lot owner and a member of the Executive Committee ("EC"). She has also included an email from Mr Lawson dated 20.12.21. The applicant said the statement and a comment in the email were contradictory. Mr Lawson was not asked or summonsed to be available for cross-examination. The contradiction was that in his statement he says inter alia:

Myself and my family have had lunch at the Marais family home where we sat in the garden next to the Traeger Grill whilst the meat was smoking. We did not encounter any smoke nor was there any offensive odours. I had to check the smoker was turned on whilst sitting next to it, when it was. In my opinion the claims are excessive and do not pose any more dissatisfaction than a regular BBQ being used which residents are within their rights to do so....".

- 23 In the email dated 20.12.21 Mr Lawson states, inter alia:

With the smoker which is used as a BBQ the actions taken against unit 5/12 are excessive. Complaining to the Northern Beaches Council, quoting warnings for a Californian residents from the Treager website – which are the same warnings that come with my Gamin watch seem unbalanced and I am confused at the intent behind the responses.....

.....to talk about the fumes from a smoker vs a smoker that is used as a BBQ, whilst quoting tobacco smoke by-laws, which has no substantive evidence that can reasonably be held up in a case....

...I understand the smoker is annoying and we have a 'no smoking' clause...

- 24 The fact that Mr Lawson uses the word "annoying" confirms that it is a nuisance. He submitted annoying has the same meaning as nuisance in the context of the s 153 of the Act, which is in the following terms:

### ***153 Owners, occupiers and other persons not to create nuisance***

*(1) An owner, mortgagee or covenant chargee in possession, tenant or occupier of a lot in a strata scheme must not—*

*(a) use or enjoy the lot, or permit the lot to be used or enjoyed, in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot (whether that person is an owner or not), or*

....

## **DECISION**

- 25 I am not satisfied that by-law 9 relates to smoke which emanates from a cooking appliance. The by-law prohibits the smoking of tobacco "...or any other substance."
- 26 The words "or any other substance" follow the word "tobacco". The use of the word "or" in this sense means a person smoking tobacco or some other substance for personal inhalation, such as cigarettes, cigars, pipes, e-cigarettes, vaping products, and other prohibited drugs which are inhaled by the user. It is not referable to the activity of outdoor cooking using a barbeque or similar cooker, even if the process necessarily generates charcoal or woodsmoke.
- 27 The by-laws are for regulation of community life within a strata complex. Outdoor cooking is an ordinary incident of suburban life. This is illustrated by the fact the applicant enjoys using his own barbeque in his backyard.
- 28 The purpose of the by-law 9 is not to outlaw that activity. It is to prohibit second hand smoke from tobacco products and other personal use inhalants being emitted which may expose other residents to the known risks associated with passive smoking.
- 29 For these reasons I do not accept the use of the cooking grill is a nuisance, as it is an ordinary and natural use of an outdoor cooking appliance within the respondent's lot.
- 30 For these reasons the application is dismissed.

## **ORDERS**

- 31 For the above reasons the Tribunal makes the following orders:

(1) The application is dismissed.

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I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

## **Amendments**

14 August 2023 - Formatting amendments.

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