



Civil Resolution Tribunal

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Type: Strata

Civil Resolution Tribunal

Indexed as: *The Owners, Strata Plan EPS5860 v. F.L.A. Holding Inc.*, 2021 BCCRT 323

B E T W E E N :

The Owners, Strata Plan EPS5860

APPLICANT

A N D :

F.L.A. HOLDING INC.

RESPONDENT

REASONS FOR DECISION

Tribunal Member:

Sherelle Goodwin

INTRODUCTION

1. This dispute is about an alleged nuisance, bylaw fines and injunctive relief.
2. The respondent, F.L.A. Holding Inc. (FLA) operates a restaurant out of 2 commercial strata lots it owns in the applicant strata corporation, The Owners, Strata Plan EPS5860 (strata). The strata says FLA's restaurant smell is an ongoing private

nuisance affecting the residential strata lot owners. The strata claims \$400 in unpaid fines and asks the CRT to order FLA to “stop or significantly reduce” the smell coming from the restaurant.

3. FLA denies that the restaurant smells are significant enough to be a nuisance to any of the strata lot owners. It argues that, if the smell is a nuisance, an injunction would be unfair as it would effectively shut down the restaurant. FLA asks that the claims be dismissed.
4. The strata is represented by a strata council member. FLA is represented by an owner or employee.
5. As explained further below, I find the restaurant smell coming from FLA’s strata lots is a nuisance which contravenes the strata’s bylaw. However, I find FLA is not required to pay the bylaw contravention fines assessed by the strata because they are invalid. I decline the strata’s request for injunctive relief.

JURISDICTION AND PROCEDURE

6. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over strata property claims under section 121 of the *Civil Resolution Tribunal Act* (CRTA). The CRT’s mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. The CRT must act fairly and follow the law. It must also recognize any relationships between dispute parties that will likely continue after the CRT’s process has ended.
7. The CRT has discretion to decide the format of the hearing, including in writing, by telephone, videoconferencing, or a combination of these. I am satisfied an oral hearing is not required as I can fairly decide the dispute based on the evidence and submissions provided.
8. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether the information would be admissible in court or not. The

CRT may also ask the parties and witnesses questions and inform itself in any way it considers appropriate.

9. Under section 123 of the CRTA and the CRT rules, in resolving this dispute the CRT may order a party to do or stop doing something, order a party to pay money, or order any other terms or conditions the CRT considers appropriate.

ISSUES

10. The issues in this dispute are:
 - a. Is the restaurant smell a nuisance?
 - b. Must FLA pay bylaw fines and, if so, how much?
 - c. Should I order FLA to stop, or significantly reduce, the restaurant smell?

EVIDENCE AND ANALYSIS

11. In a civil claim such as this one the strata, as the applicant, must prove its claim on a balance of probabilities. I have reviewed all the evidence and submissions provided by both parties, but only refer to that necessary to explain my decision.

Background

12. The strata was created in April 2019. It is a mixed use strata with 215 residential strata lots and 15 commercial strata lots in a 9-story building in an urban city location. The strata plan shows that strata lots 8 and 9 are side by side lots on the ground floor at the front of the tower, immediately beside the tower's front entrance and lobby.
13. The strata's bylaws are the *Strata Property Act* (SPA)'s Schedule of Standard Bylaws, plus amendments filed by the strata on April 18, 2019. Bylaw 3 (Use of Property) prohibits an owner from using a strata lot in a way that causes a nuisance or hazard to another person, or unreasonably interferes with the rights of other persons to use and enjoy common property or their own strata lot.

14. FLA purchased strata lots 8 and 9 from the owner developer (developer) in June 2018. The developer was aware that FLA purchased the strata lots with the intention of operating a restaurant. In approximately September 2019 FLA began operating a noodle restaurant from its strata lots. The restaurant has a city business licence to operate a restaurant. None of this is disputed.
15. Based on photos submitted by the strata, and mechanical drawings submitted by FLA, I find FLA installed a recirculating range hood in the kitchen at the back of the restaurant. The restaurant vented its kitchen exhaust out the front of the building, above and to the side of the restaurant's front door.
16. The strata plan shows that apartment 207 is located directly above the restaurant. Based on the photos, I find that apartment 207's window opens a few feet above the restaurant's front door and less than 4 feet away from the restaurant's exhaust vent. The apartment's air intake vent is located approximately 10 feet directly above the restaurant's exhaust vent.

Complaints and evidence about the smell

17. On September 26, 2019 apartment 207's owner (MM) complained to the strata's property manager about very strong cooking and food smells in his strata lot, coming from the restaurant below. MM complained about the ongoing restaurant smell in his apartment on September 26, 29 and 30, 2019.
18. In his September 2019 complaints, MM described "an oniony smell that was not very pleasant" saturating his apartment and his clothes. MM described the odour as strong, overwhelming, and nauseating. He said the restaurant smell started when the restaurant opened around 11 am and continued well after the restaurant closed for the night. MM said the odour in his apartment was worse when his window was open, or his air intake system was on. MM said he tried, unsuccessfully, to reduce or eliminate the smell with an air purifier, essential oils, and candles. MM also described a badly burnt barbecue smell that he could feel in his eyes. He said the restaurant smell made him feel nauseous, and that it was becoming increasingly difficult to sleep, or spend time in, his apartment.

19. On October 2, 2019 MM complained again about the smell. He was concerned that his furniture and belongings were absorbing the smell. MM told the strata that the tenant in neighbouring apartment 206 said his apartment was filled with very strong smells from the restaurant. The tenant told MM that he was worried that the restaurant smell would sink into his couch and clothes.
20. The owner of apartment 205 emailed MM in October 2019 and said he smelled a “heavy smell” from the restaurant in his apartment when he had his air intake fan on. He described the situation as “not great”.
21. In December 2019 MM complained that his apartment smelled “disgusting” and was daily filled with “overwhelmingly strong fumes” from the restaurant below.
22. In an undated and signed statement, MM says the restaurant opened 4 months after MM purchased his strata lot. MM described an initial smell of burnt barbecue meat, then a boiled egg and oniony broth smell after the restaurant opened. MM says that, even with his windows closed and air intake fan off, the smell still permeated his apartment.
23. MM wrote that he was unable to stay in his apartment very long because of the smell, was unable to sleep well, and had difficulty working. MM said his apartment was “unlivable”. He had stayed in hotels, went camping, and slept at friends’ houses to avoid the smell and get some sleep. This is supported by October and November 2019 hotel room receipts submitted by the strata, as well as MM’s comments in his complaints to the strata.
24. MM said the stress and instability of not being able to bear the odours in his apartment resulted in him taking a medical leave from work. In a series of medical notes, MM’s doctor wrote that MM was unable to work because of a medical condition “related to his living environment”. MM’s pay stubs show that he missed work due to illness in October and November 2019.

25. In April 2020 MM told the strata that he had fresh air in his apartment again, with no restaurant smell, while the restaurant was closed due to Covid-19. However, the restaurant was due to open again for take out orders and MM was again concerned about cooking odours entering his apartment.
26. On April 22, 2020 the strata told FLA that it had received complaints from 7 owners about the smell. The strata did not submit those 7 complaints as evidence in this dispute. The strata demanded that FLA stop causing the nuisance within 60 days. FLA denied causing a nuisance and declined to stop operating the restaurant.
27. In the fall of 2020, the strata sent a survey to its owners about whether they could smell exhaust or cooking odours from the restaurant. The responses submitted by the strata and FLA show:
- The owner of apartment 825 frequently smelled odours from his balcony which, at times, could fill the apartment, when the windows were open. The smell significantly impacted the owner's strata lot use, on a frequent basis.
 - The owner of apartment 205 wrote that his tenant smelled the odour inside his apartment, with the windows open or closed. It significantly impacted his apartment use and frequently caused him headaches, nausea and other symptoms.
 - MM frequently smelled the odour with windows open or closed. It significantly impacted his use of his strata lot and frequently caused headaches, nausea and other symptoms.
 - The above 3 owners said the smell had been the same since the spring of 2020.
 - The owners of apartments 436, 426, 421, and 409 did not smell the restaurant odour.
28. A strata council member went to apartment 207 to investigate MM's complaints. In her statement, the council member says she smelled a "thick unpleasant odour" upon entering MM's apartment. She described it a steamy smell that permeated MM's

furnishings and walls. The strata council member also experienced the overwhelming, unpleasant restaurant smell outside the front of the building, in the lobby, and in the parkade between 10 am and 9 pm. The member admitted that her strata lot, on the 4th floor and at the back side of the building, was not affected by the odour. I accept the strata council member's description as it is consistent with MM's many complaints and the complaints of the other 2nd floor residents. Although it is unclear when the council member went to apartment 207, I find the nature and intensity of the odour has not changed since the spring of 2020, based on the survey results and MM's statement.

29. The strata says the owners of another 5 strata lots, from the 4th, 7th and 9th floors, indicated that the restaurant smell interfered with their use of their strata lots, or the common property. However, the strata did not submit copies of those complaints or survey responses to show which strata lot owners complained, and how they believed the smell interfered with their use of the property. So, I give that evidence little weight.

Is the smell a nuisance?

30. The BC Supreme Court has defined "nuisance" in a strata setting as an unreasonable, continuing, or repeated interference with a person's enjoyment and use of their strata lot (see *The Owners, Strata Plan LMS 3539 v. Ng*, 2016 BCSC 2462). Nuisance is an unreasonable interference with an owner's use and enjoyment of their property that is also substantial or non-trivial (see *The Owners, Strata Plan LMS 1162 v. Triple P Enterprises Ltd.*, 2018 BCSC 1502). The test is an objective one, measured with reference to a reasonable person occupying the premises. The courts have said that in a strata corporation, a certain amount of "give and take" is necessary among neighbours (see *Sauve v. McKeage et al.*, 2006 BCSC 781).
31. I disagree with FLA that the strata has failed to prove that the cooking odours came from FLA's restaurant. In its correspondence to the strata FLA acknowledged that the restaurant produces cooking smells. Although I accept that the building is in a busy urban area, there is no evidence that there are other restaurants near the building, that produce the same or similar cooking odours. The complaints and statements in evidence describe a particular odour, of boiled onions and cooked meat, outside the

front door of the restaurant, in the building's lobby immediately beside the restaurant and, most acutely, in and around the apartments on the floor above the restaurant and closest to the restaurant's air exhaust vent. Further, the restaurant smell dissipated when the restaurant was closed due to Covid-19. On balance, I find it more likely than not that the cooking and food smells experienced by the strata lot owners come from FLA's restaurant.

32. FLA says that the restaurant's ventilation system was approved by both the developer and the city. This is supported by emails from the city submitted by the strata. The evidence shows that the restaurant is licenced to operate and that the strata is located within a city zone which allows commercial businesses, including restaurants. Despite FLA's arguments, I find the restaurant can still create a nuisance, even when it operates lawfully (see *Suzuki v. Monroe*, 2009 BCSC 1403).
33. As pointed out by the strata, the law of nuisance focusses on the harm suffered, rather than on the conduct of creating the harm (see *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft*, 1979 CanLII 2776 (BC CA). So, even though the evidence shows that the restaurant installed a specific filtration system to reduce emissions, and that it further installed a charcoal filter in the system in November 2019, FLA's actions do not protect it from a finding that its cooking smells are a nuisance at law, and contrary to strata bylaws.
34. I agree with FLA that one of the factors to consider is the fact that this is a mixed use building, zoned for restaurant use. In other words, the standard to assess is that of a reasonable person who lives in the particular neighbourhood or even, in this case, the particular building (see *Halsey v. Esso Petroleum Co. Ltd.*, [1961] 2 All E.R. 145 (Q.B.D.)).
35. I find the commercial zoning and restaurant allowance was set out in the developer's disclosure document, which was filed with the Superintendent of Real Estate. I agree with FLA that the strata owners should have been aware of the possibility of a restaurant in the building. However, I find MM purchased his strata lot before the restaurant opened and before it installed its ventilation system. So, I find MM could

not have anticipated the type and intensity of cooking and food smells he has described inside his strata lot. While I accept that a certain amount of noise and odour comes with living in an urban center, I find a reasonable person would object to strong cooking odours in their apartment, regardless of whether their windows were open or closed.

36. FLA says that MM appears to have a heightened sensitivity to smell and may not be suited to residing in an urban setting. I infer FLA to mean that MM is not an ordinary and reasonable person. I disagree.
37. First, FLA has provided no supporting evidence of MM's heightened sensitivity. Second, it has provided no evidence of a lack of smell experienced by anyone else in the same vicinity of MM. Although strata survey responses from several owners on the 4th floor showed no restaurant smell in their apartments, I find that unhelpful for determining what MM and the owners directly above the restaurant experienced. Third, the strata council member who investigated MM's apartment described the same intensity and odour as MM did in his many complaints. Further, the same smells were described by MM's neighbouring residents. So, I find the strata has provided evidence that substantiates MM's complaints about intense cooking and food smells in, and around, his apartment.
38. I disagree with FLA that apartment 206's survey results carry no weight because the survey was completed by the non-resident owner. I accept the owner's statement that his tenant had told him about the restaurant smell and how it affected the tenant. This is substantiated by MM's description of what the tenant said to him in October 2019. Although both pieces of evidence are hearsay, I find they are consistent with each other and so give them weight.
39. Given the descriptions of the smell, the amount of the daytime hours the smell emanates from the restaurant, and the lingering nature of the smell in MM's apartment, I find the restaurant smell is a continuing and repeated interference with MM's enjoyment and use of his strata lot. I accept MM's evidence that he took steps to be away from his apartment when possible to avoid the smell and tried to keep his

windows closed and fan off to minimize the smell. Given MM's difficulty sleeping and coping with the smell and the pressure of dealing with the smell, I accept that the restaurant odour substantially interfered with MM's use and enjoyment of his strata lot. I find it was more than a mere inconvenience. On balance, I find the food and cooking smells coming from the restaurant are a nuisance. So, I find the restaurant has contravened bylaw 3.

Must FLA pay any bylaw fines?

40. The strata noted in the November 26, 2019 strata council meeting minutes that an owner had complained about the restaurant smell. In a December 9, 2019 letter the strata advised FLA about the complaint and provided it with an opportunity to respond. The strata noted that bylaw 3 prohibits an owner from causing a nuisance or hazard to another person, or unreasonably interfering with the rights of other persons to use and enjoy common property or their own strata lot. The strata warned FLA that it could be fined if the strata found it had violated the bylaw.
41. FLA's lawyer wrote to the strata on December 23, 2019. He said FLA had not contravened bylaw 3 because nothing about the restaurant was unreasonable, unwarranted or unlawful. The lawyer pointed out that the restaurant was licenced, compliant with zoning and city bylaws, and that the restaurant's ventilation system had been inspected and approved by both the developer and the city. The lawyer said the residential strata lot owners had chosen to live in a mixed use building zoned for restaurant use in an urban setting, and so some restaurant smell was not unreasonable.
42. At the January 28, 2020 council meeting, the strata decided to fine FLA \$200 for failing to remedy the smell, with an additional fine every 7 days until the issue was resolved. The strata advised FLA of the \$200 fine in a February 5, 2020 letter. In a February 12, 2020 letter FLA disputed the fine and refused to pay. On February 18, 2020 the strata said it would levy a \$200 fine each week until FLA remedied the situation.

43. Section 135(1) of the SPA states that a strata corporation is not entitled to impose a fine against an owner for a bylaw contravention unless it has given the owner written particulars of the complaint received and a reasonable opportunity to answer the complaint, including a hearing if requested. The strata must also give the owner written notice of its decision “as soon as feasible”.
44. Section 135(3) of the SPA says that once the strata has complied with subsection (1), then it may impose a fine for a continuing contravention without further compliance with section 135.
45. I find the strata has not complied with section 135(1) of the SPA because it did not give FLA a reasonable opportunity to answer the complaint. Notably, the strata did not consider FLA’s December 23, 2019 response before imposing the initial \$200 fine and the recurring \$200 fine. Rather, the strata noted it had received no response from FLA in the January 28, 2020 council meeting minutes. As the strata produced the December 23, 2019 letter in evidence, I find it received the letter. However, the strata has not explained what happened to FLA’s response, or why the strata failed to consider it before imposing fines against FLA. I find the strata failed to give FLA a reasonable opportunity to answer the complaint because the strata failed to consider FLA’s written response.
46. As stated in *Terry v. The Owners, Strata Plan NW 309*, 2016 BCCA 449, the strata must strictly follow the procedural requirements in SPA section 135 before assessing a fine. Further, continuing fines under SPA section 135(3) are invalid if section 135(1) has not been followed (see *Dimitrov v. Summit Square Strata Corp.*, 2006 BCSC 967). I find the fines levied by the strata are invalid because it failed to comply with section 135 of the SPA. I dismiss the strata’s \$400 claim for bylaw contravention fines.

Is the strata entitled to an injunction?

47. The strata asks for injunctive relief, which is an order for someone to stop doing something. Injunctions are a discretionary remedy and are not invariably awarded for nuisance (see *Zhang v. Davies*, 2020 BCSC 1301). A number of factors should be considered in determining whether or not to grant an injunction for nuisance, including

the inadequacy of damages, the nature of the applicant's injury, and the balance of convenience between the parties (see *Suzuki v. Monroe*, 2009 BCSC 1403).

48. Previous CRT decisions have held that injunctions should be used to address repeated wrongful conduct when other remedies, such as fines, prove ineffective (see, for example, *Athwal v. The Owners, LMS Strata Plan 2768*, 2020 BCCRT 1300 and *Barn v. The Owners, Strata Plan VR533*, 2020 BCCRT 1315).
49. The strata says that FLA refuses to remedy the nuisance and so the strata has no other option than to request an injunction. It asks that FLA be ordered to "stop or significantly reduce the smell" coming from the restaurant. For the reasons below, I decline to make this order.
50. First, I find the strata and FLA have not yet exhausted other possible remedies for this situation. The evidence before me indicates that FLA may have an option to vent the restaurant exhaust out of the building at the 3rd level. The evidence indicates such alterations may raise other potential issues and it is unclear whether this would redirect the nuisance smell toward other strata lot owners. While this idea may not be the appropriate solution, it shows that there are other options available to both FLA and the strata to remedy the restaurant smell nuisance. Further, section 133 of the SPA allows the strata to take reasonably necessary steps to remedy a bylaw contravention. So, I disagree with the strata that it has no other option to stop FLA from creating a nuisance in the strata complex.
51. Second, I find the strata's requested order is too vague to be enforceable. It does not suggest an action or step that FLA must take and it provides no measurement or guideline to determine when FLA has achieved the objective. Further, the requested order is far reaching, where the evidence shows the restaurant smell is only substantially interfering with MM's apartment and, to a lesser extent, MM's neighbours on the 2nd floor.
52. As noted in *Nova Scotia v. Doucet-Boudreau*, 2003 SCC 62, an injunction must give the parties proper notice of the obligations imposed on them, and clearly define the standard of compliance expected of them. Vague or ambiguous language should be

avoided. This is because injunctions are court orders, a breach of which is punishable in a quasi-criminal manner. Under section 60 of the CRTA, a person who fails, or refuses, to comply with a CRT order is liable to be punished for contempt as if in breach of an order or judgment of the BC Supreme Court. So, I find the need for precise language in an injunction is also necessary in a CRT order. I find that precision is not present here.

53. On balance, I decline to order FLA to stop or significantly reduce the smell coming from the restaurant. I dismiss the strata's claim for injunctive relief.
54. FLA has a statutory duty to comply with the strata's bylaws, including not to create a nuisance. I decline to order FLA to comply with that existing legal duty as I find such an order is redundant and unnecessary. I expect FLA to respect my finding that the restaurant smell is a nuisance and take steps to bring itself into compliance with the strata's bylaws, as it is legally required to do.
55. Nothing in this decision prevents the strata from levying new fines for new contraventions of bylaw 3, should FLA repeat its breach of the bylaw. Further, it is open to the strata to renew its request for a specific injunction, should FLA breach bylaw 3 by causing a nuisance again in the future.

CRT FEES and EXPENSES

56. Under section 49 of the CRTA, and the CRT rules, the CRT will generally order an unsuccessful party to reimburse a successful party for CRT fees and reasonable dispute-related expenses. Although I found that FLA created a nuisance with the restaurant smell, I find the strata did not prove its entitlement to any of the remedies sought. So, I find the strata is unsuccessful in this dispute and is not entitled to its CRT fees or dispute related expenses. As the successful respondent, FLA did not pay any CRT fees or claim any dispute related expenses and so is not entitled to any reimbursement.

57. The strata must comply with section 189.4 of the SPA, which includes not charging dispute-related expenses against FLA.

ORDERS

58. I dismiss the strata's claims and this dispute.

Sherelle Goodwin, Tribunal Member