

## CONDOMINIUM AUTHORITY TRIBUNAL

**DATE:** February 27, 2023

**CASE:** 2022-00544N

**Citation:** Lake v. Bruce Vacant Land Condominium Corporation No. 19, 2023 ONCAT 28

Order under section 1.44 of the *Condominium Act, 1998*.

**Member:** Roger Bilodeau, Member

**The Applicants,**

Joanne Lake and Tony Lake

Self-Represented

**The Respondent,**

Bruce Vacant Land Condominium Corporation No. 19

Represented by Amanda Gretton, Agent (November 14, 2022 - November 30, 2022);

David Mullen, Agent (December 1, 2022 - February 8, 2023)

**Hearing:** Written Online Hearing – November 14, 2022 to February 8, 2023

### **REASONS FOR DECISION**

#### **A. INTRODUCTION**

- [1] At the heart of this case is the balance between the right of a condominium corporation to make changes or improvements to its common elements and the right of individual owners to not suffer an unreasonable disruption or nuisance as a result of those changes or improvements.
- [2] Tony and Joanne Lake (“Applicants”) own a unit in Bruce Vacant Land Condominium Corporation No. 19 (“BVLCC” 19). In July 2021, two floating fountains with lights were installed by the BVLCC 19 in Inverlyn Lake, in proximity to the Applicants’ property. The Applicants claim that light from the fountains is entering their property and creating a nuisance, annoyance or disruption, in contravention of subsection 117(2)(b) of the *Condominium Act, 1998* (“Act”). The Applicants are therefore seeking to have the fountain lights turned off. They are also requesting an award of costs in this matter.
- [3] BVLCC 19 takes the position that it has managed and will continue to manage any perceived nuisance within reasonable and acceptable bounds. Their position is based primarily upon the standards set by local municipal by-laws and by the BVLCC 19 Rules Document – article 12 in the General Section (“Rules Document”). BVLCC 19 therefore requests the CAT to decide this matter in its

favour, in that it has taken all appropriate steps to limit the impact of the illumination from the fountains and to thereby keep any perceived disruption or annoyance to an individual unit within reasonable boundaries.

- [4] For the reasons set out below, I find that the Applicants have presented convincing evidence that the fountain lights installed by BVLCC 19 constitute a nuisance, disruption or annoyance, in contravention of subsection 117(2) of the Act. Their ability to use and enjoy their house and property is unreasonably affected by the fountain lights. I am therefore directing BVLCC 19 to adjust the brightness and intensity of the fountain lights so that the illumination produced by the fountain lights will stop short of the Applicants' property.
- [5] I am also directing BVLCC 19 to pay the Applicants \$200 in reimbursement of their filing fees. Finally, I find that the Condominium Authority Tribunal (CAT) Rules of Practice, effective 1 January 2022 ("Rules of Practice") do not support the Applicants' request for an award of costs in this case.

## **B. BACKGROUND**

- [6] In July 2021, two floating fountains were installed in Inverlyn Lake, with that lake being at the center of the BVLCC 19 community of one hundred and fifty homes. The fountains are positioned so as to be visible from most of the 58 homes which surround the lake, as well as from the community clubhouse.
- [7] The fountains run for approximately six months of the year and are both illuminated by three (3) 18 watt white LED unidirectional and unshielded lights emitting 1980 lumens per light, oriented in an upward direction. The lights are turned on anywhere from 2.5 to 4.5 hours every night for the majority of the spring, summer, and fall seasons.
- [8] The Applicants sent their initial complaint to BVLCC 19 on 9 August 2021, ten days after the installation of the fountains. From that date onward and at various times in 2021 and 2022, the Applicants have asked BVLCC 19 to (i) change the shut-off time of the fountain lights; or (ii) mitigate the brightness of the lights by installing lower intensity bulbs or by placing a barrier at the base of the fountain to prevent the light source from shining directly into their home; and (iii) that the lights be turned off and/or moved to another section of the lake.
- [9] At an owners' meeting on 17 August 2021, it was decided that the community should be surveyed as to their preferred shut-off time for the lights. Since the majority of owners preferred either 11.00 p.m. or midnight as the shut-off time, BVLCC 19 decided to turn off the lights at 11.00 p.m. That shut-off time continued for the remainder of the 2021 season.
- [10] On 30 June 2022, the Applicants renewed their complaint about light pollution to BVLCC 19. On 6 July 2022, the Board of BVLCC 19 decided to turn off all lights connected to timers in the clubhouse (including the fountain lights) at 10.30 p.m. That decision was conveyed to the Applicants by email on the same date, in which

message BVLCC 19 stated that “by consensus of the board, they consider this matter closed”. That decision was ratified in a formal motion at the next BVLCC 19 board meeting of 18 July 2022.

[11] On 14 August 2022, the Applicants notified BVLCC 19 of their intention to take this matter to the CAT.

### **C. ISSUES & ANALYSIS**

[12] The issues in this case may be summarized as follows:

- i. Do the lights from the fountains cause an unreasonable nuisance, annoyance or disruption that negatively impacts the Applicants’ use and enjoyment of their property?;
- ii. If the lights do cause an unreasonable nuisance, annoyance or disruption to the Applicants, what is the appropriate remedy?; and
- iii. Should the Tribunal order any compensation or costs?

[13] As a starting point and as in the case of *Nikolov v. Halton Standard Condominium Corporation No. 476*, 2022 ONCAT 65 (“Nikolov”), I note that the Tribunal has jurisdiction to deal with these issues: see subparagraph 1(1)(c.1) of Ontario Regulation 179/17 to the Act which provides that the Tribunal has jurisdiction over “a dispute with respect to subsection 117(2) of the Act”. Subsection 117(2) of the Act in turn provides that:

No person shall carry on an activity or permit an activity to be carried on in a unit, the common elements or the assets, if any, of the corporation if the activity results in the creation of or continuation of,.....

(b) any other prescribed nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation.

Section 26 of Ontario Regulation 48/01 to the Act then goes then states that:

For the purposes of clause 117(2) of the Act, each of the following is prescribed as a nuisance, annoyance or disruption to an individual in a unit, the common elements or the assets, if any, of the corporation if it is unreasonable:.....

4. Light

[14] As in the Nikolov case, the combined effect of these sections of the Act and regulations is to give the Tribunal jurisdiction over this dispute.

**Issue 1: Do the lights from the fountains cause an unreasonable nuisance, annoyance or disruption that negatively impacts the Applicants’ use and**

## **enjoyment of their property?**

### Applicants' Position

- [15] The Applicants submit that there is an excessive amount of light being emitted from the two fountain lights which is the source of glare and light trespass onto their property, thereby causing an unreasonable nuisance and annoyance. They contend that the glare and light illuminate and cast shadows on the outside wall of their home, as well as illuminating a painting on the inside dining room wall which is located at least fifteen feet inside the home, with a similar impact in their bedroom.
- [16] The Applicants add that the glare and light from the fountains impacts the way they use their home and bedroom every evening/night, including their ability to look out their windows, even with curtains closed. They further contend that the source and intensity of the lights is such that they appear as two large bright balls of light and that the direct glare from the fountain lights and the reflected glare from the water flowing from the fountains combine to produce an intense glare and light trespass which constitutes an unreasonable nuisance, disruption and annoyance, thereby negatively impacting the peaceful use and enjoyment of their property, including the ability to enjoy the peaceful night environment in their backyard.
- [17] The Applicants claim that BVLCC 19 has done nothing to restrict the brightness, location, or intensity of the light from these two fountains that intrudes onto their property.
- [18] The Applicants submit that individual owners have the right to the peaceful use and enjoyment of their property and to expect that their individual complaints will be addressed in a timely manner. In their view, these rights cannot be overridden by a survey of owners on a given topic, especially given the different impact that the fountain lighting has on various residents, depending on their location. The Applicants further submit that it is the responsibility of BVLCC 19 to act on owners' complaints and to protect the individual rights of owners, even if such action goes against the personal wishes of BVLCC 19 board members and the desires of a perceived majority of owners.
- [19] The Applicants also submit that the City of Toronto has published useful guidelines on lighting titled 'Best Practices on Effective Lighting' (2017) ("Toronto Guidelines"), a copy of which they provided to the BVLCC 19 board and management in June 2022 and which they submit could have been used as a helpful resource to address this issue. The Applicants further contend that the fountain lights do not meet any of the recommendations found in the City of Toronto guidelines.
- [20] In addition to the above, the Applicants maintain that the Nikolov decision supports their position, in that a light from the common elements was shown to intrude onto a resident's property, thereby creating an unreasonable nuisance and annoyance

or disruption. The Applicants also point out that in that case, the condominium corporation was directed to change a security light so as to not intrude on the applicant's property.

- [21] In closing, the Applicants maintain that they have made every effort to resolve this matter in good faith and that this issue has now been ongoing for two years. They submit that the longer it has gone on, the more they have come to realize that the timing and duration of the lights is not the main problem. In their view, the lights themselves are a problem in that they are excessive in terms of their location and function, thereby causing an unreasonable nuisance and annoyance when they are turned on.

### The Position of BVLCC 19

- [22] BVLCC 19 acknowledges that the Act prohibits the creation or continuance of a nuisance, including light, which causes an unreasonable annoyance or disruption to a property owner. However, BVLCC 19 submits that the Act does not provide any concrete standard by which to determine what should be considered unreasonable. It also submits that the definition of "reasonable" can vary considerably within a condominium community and that it is largely a matter of personal preference.
- [23] BVLCC 19's position is that the Applicants are the only unit owners who find the fountain lights to be an unreasonable nuisance and that none of the other owners have identified any unreasonable annoyance or disruption as a result of those lights. To the contrary, BVLCC 19 maintains that residents often remark on the beauty of the lights and the ambience that they create.
- [24] BVLCC 19 submits that it has managed and will continue to manage any perceived nuisance within reasonable and acceptable bounds. In support of its position, it relies on the standards set out in local municipal By-Laws and in its Rules Document, in particular the fact that the Township (Huron-Kinloss) where BVLCC 19 is located does not have a by-law dealing with light controls but that it addresses the similar issue of noise control by requiring annoying neighbourhood noises to cease at 11.00 p.m., as well as its Rules Document which does not address light-related issues but which does require neighborhood noises to cease at 11.00 pm. BVLCC 19 therefore considers it reasonable to apply a similar standard to lighting issues.
- [25] BVLCC 19 also submits that the residents of other homes at a similar distance from the fountains as that of the Applicants have provided evidence that they do not find that the fountain lights present any unreasonable annoyance or disruption.
- [26] In addition, BVLCC 19 relies on the abovementioned survey of its residents conducted in 2021 to ascertain the time that residents felt was reasonable for the lights to be shut off. BVLCC 19 also submits that the shut-off time was set at 10.30 p.m. as soon as possible after the Applicants reiterated their complaint in the

summer of 2022.

[27] BVLCC 19 also adds that in October 2022, the shut-off time for the month of October was changed to 9.30 p.m. and that a motion was passed to alter the lighting season from the period of 1<sup>st</sup> May to 31 October to that of 15 April to 15 October. In BVLCC 19's view, that change to the start and end dates of the lighting season will eliminate 16 days when sunset is earlier. As a result, BVLCC 19 submits that the fountains will be illuminated for less than two hours a day from 15 May to 15 August and that they will be illuminated for between two and three hours for the remainder of the lighting season. In BVLCC 19's view, that approach limits any perceived disruption to a very reasonable length of time.

[28] BVLCC 19 also submits that the Nikolov case can be distinguished from the present case in that there are significant differences between Nikolov and this case, namely that in the Nikolov case:

1. the security lights were on all night, all year long;
2. Ms. Nikolov proposed a reasonable and inexpensive solution to her problem, i.e. the installation of light fixtures with baffles and that this solution did not negatively affect any other unit owners;
3. Ms. Nikolov took proactive measures to mitigate the intrusion of the lights by installing blackout shades;
4. The respondent HSCC 476 contested the allegation that the security lights were the source of Ms Nikolov's problem whereas BVLCC 19 holds that any perceived amount of light emitted by the fountain lights reaching the Applicants' home is negligible. BVLCC 19 further argues that an exterior light source which is turned on until 10.30 pm from April to September and until 9.30 pm in the month of October does not constitute a reasonable claim of nuisance or disruption, as well as being well within the boundaries set by municipal by-laws and condominium rules to control nuisance.

[29] BVLCC 19 further submits that its Board must balance individual complaints against the will of the majority and that in a democratic community, one owner's dissatisfaction should not outweigh the enjoyment of many others, so long as disruptions to any aggrieved owners are kept at a reasonable level.

[30] In conclusion, BVLCC 19 submits that it has taken all appropriate steps to limit the impact of the illumination emitted by the fountain lights and that any perceived disruption or annoyance to an individual unit is within reasonable boundaries.

#### Determination of Issue 1

[31] As a starting point, BVLCC 19 has an interest in making its common elements useful, attractive or enjoyable for all owners. Concurrently, individual owners have an interest, as well as a right, in enjoying their property free from any

unreasonable nuisance, annoyance or disruption.

- [32] I also wish to clarify at the outset that this case does not turn on the issue of majority rule in a condominium community context. The sole issue to be decided is whether the fountain lights installed by BVLCC 19 in a common element area cause an unreasonable nuisance, annoyance or disruption that negatively impacts the Applicants' use and enjoyment of their property, in contravention of subsection 117(2) of the Act.
- [33] It is true that a condominium property owner in a multi-residential setting can and should expect a certain level of disruption or annoyance. Nothing is perfect. It is also true that an owner has a duty to mitigate his or her own circumstances, including factors or disruptions which are beyond the owner's control. On the other hand, a condominium corporation should not impose a nuisance on an owner. In other words, BVLCC 19 must consider how any improvements to its common elements (such as the abovementioned fountain lights) do not unreasonably interfere with an owner's regular use and enjoyment of his or her property.
- [34] Based on all of the above and from my review of the evidence, including photographs submitted by the parties, as well as their submissions, I conclude that the Applicants have presented convincing evidence that the fountain lights installed by BVLCC 19 constitute a nuisance, disruption or annoyance, in contravention of subsection 117(2) of the Act. Their ability to use and enjoy their house and property as they see fit is unreasonably affected by the brightness and intensity of the fountain lights. While true that BVLCC 19 has made changes to the times and dates when the fountain lights are turned on, it has not addressed the actual problem, being the brightness and intensity of those lights.
- [35] In regard to the Nikolov case referred to by both parties, every case is different and can be distinguished or applied in various ways. However and at a minimum, Nikolov stands for the proposition that lighting can be a nuisance or disruption, even if not every case involving lighting will constitute a nuisance in violation of subsection 117(2) of the Act.

**Issue 2: If the lights do cause an unreasonable nuisance, annoyance or disruption to the Applicants, what is the appropriate remedy?**

- [36] The Applicants are entitled to relief and in the circumstances of this case, I am of the view that BVLCC 19 must adjust the brightness and intensity of the fountain lights so that the illumination produced by the fountain lights will stop short of the Applicants' property. For example, the installation of baffles which would direct the fountain lights upward and away from the lake's shoreline could well be part of the solution. The Applicants have also put forward the Toronto Guidelines as a document which could be useful in this context.

**Issue 3: Should the Tribunal order any compensation or costs?**

- [37] Rule 48.1 of the Rules of Practice sets out the general rule that the unsuccessful

party will be required to reimburse the successful party for his or her Tribunal fees. Those fees amount to \$200 and I therefore direct BVLCC 19 to pay that amount to the Applicants.

- [38] The Applicants have also requested an award of costs. Rule 49.1 of the Rules of Practice provides that “The CAT generally will not order one Party to pay another Party compensation for time spent related to the CAT proceeding.” I see no reason to vary that general rule in this case and as a result, there will be no order as to costs or any other compensation.

#### Breach of the CAT’s Rules on Confidentiality

- [39] Rule 5.1 of the Rules of Practice provides that all messages, settlement offers, and documents that are shared in Stage 1 - Negotiation or Stage 2 - Mediation of a CAT case are private and confidential, with the result that messages, settlement offers, or documents that were provided in these stages cannot be made public or used in Stage 3 - Tribunal Decision, unless the Users agree and the CAT allows it.

- [40] In this case, the Applicants have raised for the first time in their written submissions the fact that BVLCC 19 has not abided by those rules of confidentiality during the Stage 3 - Tribunal process, in that they used information from both messages and settlement offers in Stages 1 and 2 in various documents filed during the Stage 3 process, as well as in their written submissions.

- [41] The Applicants are correct in that BVLCC 19 should not have done so and in my assessment, that was most likely the result of an oversight by BVLCC 19 or a probable lack of familiarity with the CAT rules and processes. In the circumstances, I wish to remind BVLCC 19 of the need to comply with that limitation in any future Stage 3 proceeding, as may be the case.

- [42] As a final note on this topic, I wish to confirm for the benefit of all parties that I did not consider that information from Stages 1 and 2 for the purposes of my decision and that my decision was based solely on the evidence submitted in the Stage 3 – Tribunal proceeding and the applicable law.

#### **D. CONCLUSION**

- [43] Based on all of the above, I conclude that the Applicants have presented convincing evidence that the fountain lights installed by BVLCC 19 constitute a nuisance, disruption or annoyance, in contravention of subsection 117(2) of the Act. As a result, their ability to use and enjoy their house and property is unreasonably affected by the fountain lights.

- [44] In closing, I wish to thank the parties for their submissions and their cooperation in providing me with all necessary information and documents related to this matter.

#### **E. ORDER**



[45] The Tribunal orders that BVLCC 19 must:

- i. take appropriate steps to adjust the brightness and intensity of the fountain lights so that the illumination produced by those lights will stop short of the Applicants' property;
- ii. test the results of the remedial work to ensure that the concerns of the Applicants, as described in this decision, are resolved; and
- iii. keep the fountain lights turned off until such time as the abovementioned remedial work and testing has been completed.

[46] The Tribunal also orders that BVLCC 19 will pay the Applicants the amount of \$200 on account of their filing fees with the Tribunal.

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Roger Bilodeau  
Member, Condominium Authority Tribunal

Released on: February 27, 2023