City of Rolling Hills INCORPORATED JANUARY 24, 1957

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PLANNING COMMISSION
PUBLIC FORUM ON VIEW PRESERVATION

STAFF REPORT ATTACHMENT

#5
LEGAL

MURRELL v. ROLLING HILLS COMMUNITY ASSOCIATION

GEORGE A. MURRELL et al., Plaintiffs and Appellants,

v.

ROLLING HILLS COMMUNITY ASSOCIATION, Defendant and Respondent.

GEORGE A. MURRELL et al., Plaintiffs and Appellants,

v.

ROLLING HILLS COMMUNITY ASSOCIATION, Defendant and Respondent.

GEORGE A. MURRELL et al., Plaintiffs, Cross-defendants and Appellants,

v.

ROLLING HILLS COMMUNITY ASSOCIATION, Defendant, Cross-complainant and Appellant;

LEONARD FULLER et al., Plaintiffs, Cross-defendants and Respondents,

v.

GEORGE A. MURRELL et al., Defendants, Cross-complainants and Appellants.

GEORGE A. MURRELL et al., Plaintiffs, Cross-defendants and Appellants,

v.

ROLLING HILLS COMMUNITY ASSOCIATION, Defendant, Cross-complainant and Appellant;

LEONARD FULLER et al., Plaintiffs, Cross-defendants and Respondents,

v.

GEORGE A. MURRELL et al., Defendants, Cross-complainants and Appellants.

Nos. B202019, B204632, B206240, B210814

Court of Appeals of California, Second District, Division One.

Filed February 24, 2011.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ORDER MODIFYING OPINION AND DENYING REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the majority opinion filed herein on January 31, 2011, be modified as follows:

1. On page 45, in the second paragraph under heading **VI.**, the amount of "$429,842.91" is changed to "$429,483.51."

2. On page 46, the text of footnote 23 is deleted and the following is inserted in its place:

1

The trial court reduced the $50,642.14 in costs sought by the Murrells to $29,552.63, which costs are not in dispute. We note that in adding these costs and the $399,930.88 attorney fees, the court simply miscalculated the sum as $429,482.91 instead of $429,483.51.

There is no change in the judgment.

Rolling Hills Community Association's petition for rehearing is denied.

MALLANO, P. J.

JOHNSON, J.

Filed 6/28/07 Murrell v. Crocker CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GEORGE A. MURRELL et al., Plaintiffs and Appellants, v. DONALD CROCKER, Defendant and Respondent.	B190152 (Los Angeles County Super. Ct. No. BC325047)

APPEAL from a judgment of the Superior Court of Los Angeles County. Andria K. Richey, Judge. Affirmed.

Law Offices of Harold J. Light, Harold J. Light and Bruce A. Gilbert for Plaintiffs and Appellants.

Sidney A. Croft for Defendant and Respondent.

Defendant Donald Crocker was a volunteer director serving on the Board of Directors of the Rolling Hills Community Association (RHCA) when neighbors of plaintiffs George and Anne-Merelie Murrell filed complaints with the RHCA that the Murrells' trees blocked the neighbors' view. As a result of the complaints, some trees on the Murrell property were trimmed or removed. The Murrells sued the RHCA and Crocker for breach of fiduciary duty and declaratory relief based on their conduct in handling the complaints. The trial court granted Crocker's motion for summary judgment, and the Murrells appealed. We affirm the judgment because Crocker's declaration is sufficient to support summary judgment in his favor and the evidence presented in opposition does not create a triable issue of material fact.

BACKGROUND

A. Allegations of Second Amended Complaint (Complaint)

The causes of action asserted against Crocker were based on the following allegations:

The Murrells and Leonard and Linda Fuller are neighbors on adjacent residential properties in the City of Rolling Hills. They are members of the RHCA, a nonprofit cooperative corporation governed by a five-member board of directors (Board). The Agreement and Declaration No. 150-AR, containing conditions, covenants and restrictions (CC&R's), is the governing document setting out the rights and obligations among the RHCA, the Murrells and the Fullers. According to the CC&R's, in order to improve the view from, and to protect, adjoining property, the RHCA has the authority to *cut back* or trim trees and shrubs on a member's property; but in the RHCA's easement over the member's lot (a 10-foot wide strip along the boundary of each lot), the RHCA had the right to *remove* trees or shrubs.[1]

---

[1] Portions of the deposition testimony of Sidney Croft, the attorney for the RHCA, were submitted in opposition to the summary judgment motion. Croft testified that, unless a member consented, the RHCA did not have the right to *remove* trees from the portion of a member's property not encumbered by the RHCA easement.

In 1997, the RHCA passed Resolution No. 166, establishing procedures for implementing its authority to maintain and improve views. At that time, the Fullers demanded that the Murrells remove foliage on their property to create a view for the Fullers. To be good neighbors and to avoid a dispute, the Murrells removed and trimmed some trees and shrubs on their property. In 2000, the Fullers brought a view complaint before the RHCA, which submitted the matter to its View Preservation Committee (Committee). The Committee recommended the removal of 12 trees from the Murrell property. During 2001, the RHCA "caused the removal" of five trees and the trimming or topping of an additional 12 trees on the Murrell property.

In November 2002, the Board adopted Resolution No. 181, which contained more detailed guidelines and procedures to implement the RHCA's authority to maintain and improve views. In June 2003, the Fullers submitted a second view complaint to the RHCA. The Committee recommended that two of the Murrells' trees be trimmed, and in late August or early September 2003, the Murrells trimmed the trees. The Fullers complained that the trees were not trimmed enough, and in July 2004 the Board ordered that a pine in the RHCA easement be removed and that other trees not on the easement be severely trimmed.

Crocker took actions in connection with the Fullers' view complaints, and encouraged other Board members to take actions, inconsistent with their fiduciary duties and the CC&R's, to wit: (1) failing or refusing to inform other Board members that the CC&R's did not permit the removal of trees or other plantings from the portion of the Murrells' property not encumbered with the easement; (2) causing the adoption of Resolutions Nos. 166 and 181, which are inconsistent with the powers granted to the RHCA under the CC&R's; (3) enthusiastically supporting the removal of trees and the remedies proposed in the Fullers' view complaints, which violated Resolution No. 181 as well as the CC&R's; (4) ignoring the Murrells' concerns about the impacts of the removal and severe trimming of their trees; (5) attempting to force the Murrells to agree to the radical trimming of trees in July 2004, even though the trees were not blocking the Fullers' view; (6) calling for the removal of the pine when the Murrells did not agree to

the radical trimming of their trees; and (7) calling for the trimming of trees so that the trees will not grow back for three or four years.

Crocker and other Board members (1) worked with the Fullers and allowed the Fullers to control the actions of the Board so that all matters involving the Murrells went in favor of the Fullers' interests and against the interests of the Murrells; (2) took actions purposely designed to interfere with the Murrells' privacy rights; (3) passed and applied resolutions to allow the illegal removal of trees to create a view for the Fullers; (4) ignored important issues relating to the Murrells' privacy and the stability of the hillside on which the pine tree was growing; and (5) ordered the removal and trimming of trees for arbitrary and capricious reasons.

B. Summary Judgment Motion

After answering the Complaint, Crocker moved for summary judgment on the ground that, as established by his declaration, there was no factual basis for the claims against him. In his 37-paragraph declaration, Crocker denied all of the foregoing assertions by the Murrells. Crocker also declared that he had no personal relationship with either the Murrells or the Fullers, that he had no financial or personal interest in the outcome of their dispute, that the Board's votes on the Fullers' view complaints were unanimous, that he had no influence over any Board member and had only one of five votes, and that he never intentionally sought to cause injury to the Murrells.

With respect to the first view complaint, Crocker declared that it was resolved by an agreement between the Murrells and the Fullers after several meetings with the Committee and an arborist (Rick Dykzel) hired by the RHCA and after several Board meetings attended by the parties. Crocker's actions were limited to participation in the Board meetings and being one of five votes — the same as all other Board members.

In opposition to the summary judgment motion, the Murrells submitted their declarations as well as the declarations of their attorney and one of their neighbors. The Murrells also offered portions of deposition testimony of the Fullers and of Croft, the attorney for the RHCA.

Linda Fuller testified that she and the Murrells reached an oral agreement in 2001 that "some trees would stay but they would be trimmed" and some of the trees would go.

In George Murrell's declaration, he stated that sometime after 2001, the Committee and the Board stated that an agreement had been reached to keep two trees trimmed to the level they were in the spring of 2001. Although George Murrell denied any such agreement, he felt that because the Committee and the Board had a negative attitude toward him and his wife, he "had no choice but to play along with the concept that some agreement had been reached as the Association Board and View Committee were claiming."

Anne-Merelie Murrell declared that no one informed her that the RHCA could not remove trees on the Murrells' property without their consent. Because she believed that they had no right to stop the removal of their trees by RHCA, her "efforts were focused on trying to persuade the . . . Board to limit its destruction of our trees and foliage so as not to destroy the privacy shield which had existed on our property for decades." Although she denied any agreement to remove trees not located in the easement, she admitted that because the Committee and the Board "made clear to me that [some trees not in the easement] were being removed, I did not vigorously fight their removal. I was attempting to avoid a confrontation in the hope that the . . . Board would, in the end, make some effort to protect some aspect of our privacy." According to Anne-Merelie Murrell, it was not until this litigation that she saw the cover letter for Dykzel's report in which he recommended the trimming of some trees and the removal of a pine and a cedar tree. In his cover letter Dykzel wrote that she seemed "'o.k. with these suggestions,'" but in her declaration she asserted that she "was not okay with the Association removing our trees."

In reply to the opposition, Crocker submitted numerous evidentiary objections to portions of the four declarations offered by the Murrells. After a hearing on the motion, the court sustained most of Crocker's evidentiary objections and granted the motion.

The Murrells appeal from the judgment, raising two main issues: (1) whether the trial court erred in sustaining Crocker's evidentiary objections and (2) whether triable

issues of fact on the claim for breach of fiduciary duty precluded summary judgment in favor of Crocker. Because the Murrells' briefs do not specifically discuss the cause of action for declaratory relief, we deem them to have abandoned the appeal as to that cause of action. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

DISCUSSION

A. Standard of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) A defendant can meet his burden on summary judgment by presenting evidence that negates an essential element of the plaintiff's claim. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We review a summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) In doing so, we consider all of the evidence offered by the parties, except that which the court properly excluded, and the uncontradicted inferences the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) Although our review of a summary judgment motion is de novo, we review the trial court's final rulings on evidentiary objections by applying an abuse of discretion standard. (*Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 467.)

B. Evidentiary Rulings

The Murrells challenge the trial court's evidentiary rulings. But instead of discussing separately each evidentiary objection and providing an argument as to the propriety of the objection, the Murrells lump together all of the objections and argue in general terms that the evidentiary objections should have been overruled. This is insufficient to meet their burden of establishing error or abuse of discretion. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1247 [challenge to exclusion of evidence is waived on appeal because brief failed to discuss issue with specificity].) Because the Murrells fail

to establish that the trial court's evidentiary rulings were erroneous or an abuse of discretion, the rulings stand. Accordingly, we do not consider the evidence excluded by the trial court.

C. Breach of Fiduciary Duty

"Directors of nonprofit corporations such as [a homeowners association] are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code." (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513.) A director fulfills his duty to a member of the association by strictly enforcing the provisions of the CC&R's but has no fiduciary duty to exercise his discretion one way or the other with regard to a member so long as the director's conduct conforms to the standard set out in Corporations Code section 7231 (section 7231). (*Frances T.*, at p. 514.) Thus, section 7231 sets out the standard of care for directors of nonprofit corporations. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 258.) Section 7231 is "California's statutory business judgment rule." (*Lamden*, at p. 259.)

Section 7231 provides in relevant part: "(a) A director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use in similar circumstances." In performing such duties, a director "shall be entitled to rely on information, opinions, reports or statements . . . prepared or presented by: [¶] (1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented; [¶] (2) Counsel . . . ; or [¶] (3) A committee of the board upon which the director does not serve . . . so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefore is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted." (§ 7231, subd. (b).)

"A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director . . . ." (§ 7231, subd. (c).)

Crocker's declaration establishes that he performed his duties in connection with both view complaints in good faith and with due care within the meaning of section 7231: His only involvement with the Murrells or the Fullers has been in public meetings of the RHCA or in officially sanctioned trips to their property attended by the Board members, the Murrells and the Fullers; he has no personal relationship with either the Murrells or the Fullers and has no personal interest in the outcome of their dispute; he was not the "primary driving force" behind the alleged improper treatment of the Murrells — he was only one of five Board members, with one vote; he participated in the meetings and voted in the same manner as the other Board members; the votes were unanimous in all Board actions regarding the Murrells and the Fullers; he did not knowingly or with reckless disregard for the truth take any action, or encourage any other Board member, to take any action inconsistent with a Board member's fiduciary duties or the CC&R's; he considered all of the facts presented by all of the parties; he never purposely took actions designed to interfere with the Murrells' privacy rights; at the July 2004 Board meeting, he did not arbitrarily or capriciously demand that the Murrells agree to allow the RHCA to trim a number of their trees; and he never intentionally sought to cause injury to the Murrells.

Liberally construed, the evidence submitted by the Murrells is insufficient to create a dispute of fact with respect to the foregoing evidence.

The Murrells argue that Crocker did not correct their mistaken belief that the RHCA had authority to remove trees not located in the easement and that he withheld this legal information from them. They thus intimate that Crocker's failure to inform them about the scope of the legal authority of the RHCA deceived them into consenting to the removal of such trees in connection with the first view complaint.

But the evidence establishes that the Murrells engaged in conduct leading the Fullers, Dykzel, and Crocker to conclude that the Murrells had consented to removal of some trees not located in the easement as part of an agreement to resolve the first view

complaint. Linda Fuller testified that the Murrells and the Fullers reached an agreement with respect to the first view complaint. Dykzel wrote that Mrs. Murrell seemed "o.k." with the removal of the trees. Mrs. Murrell admitted in her declaration that she "did not vigorously fight their removal," that she was attempting to avoid a confrontation in the hope that the Board would make an effort to protect their privacy, and that her efforts were focused on trying to persuade the Board to limit its destruction of their trees so as not to destroy their privacy shield.

With respect to the second view complaint, Mr. Murrell admitted that he "play[ed] along with the concept that some agreement had been reached" to keep the trees trimmed to the 2001 levels. And the Murrells were represented by an attorney when the Board considered the second view complaint and made its order thereon at a meeting in July 2004.

The Murrells therefore admitted that they engaged in conduct leading Crocker and the RHCA to believe that the Fullers and the Murrells had come to agreements involving the removal and trimming of the trees. Because there was no reason for Crocker to suspect that the Murrells were laboring under any mistake as to their legal rights, there was no duty for him to make any disclosures on the point. Any unexpressed position on the part of the Murrells concerning the view complaints does not create a triable issue of fact pertaining to Crocker's good faith compliance with his duties.

We thus conclude that Crocker is entitled to summary judgment in his favor. As Crocker established that the claim for breach of fiduciary duty is without merit, we need not address the issue of whether he is immune from liability under Civil Code section 1365.7, a defense not raised in his answer but in his reply to the opposition to the summary judgment motion.[2]

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[2] Civil Code section 1365.7 provides in pertinent part: "(a) A . . . volunteer director of an association . . . which manages a common interest development that is exclusively residential, shall not be personally liable in excess of the coverage of insurance specified in paragraph (4) to any person who suffers injury, including, but not
(footnote continued on next page)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

ROTHSCHILD, J.

(footnote continued from previous page)

limited to, bodily injury, emotional distress, wrongful death, or property damage or loss as a result of the tortious act or omission of the . . . volunteer director if all of the following criteria are met: [¶] (1) The act or omission was performed within the scope of the . . . director's association duties. [¶] (2) The act or omission was performed in good faith. [¶] (3) The act or omission was not willful, wanton, or grossly negligent. [¶] (4) The association maintained and had in effect . . . one or more policies of insurance . . . ."

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Court of Appeal, Second District, Division 4, California.

ECHEVARRIETA v. CITY OF RANCHO PALOS VERDES

Jon ECHEVARRIETA, Plaintiff and Appellant, v. The CITY OF RANCHO PALOS VERDES, et al., Defendants and Respondents.

No. B138366.

-- January 03, 2001

Sullivan, Workman & Dee, Los Angeles, and Robert Hampton Rogers, Sacramento, for Plaintiff and Appellant. Carol W. Lynch, City Attorney of the City of Rancho Palos Verdes; Richards, Watson & Gershon, Brea, T. Peter Pierce and Gregory M. Kunert, Los Angeles, for Defendants and Respondents.

Jon Echevarrieta (appellant) appeals from a judgment entered in favor of respondents the City of Rancho Palos Verdes (the City) and the City of Rancho Palos Verdes City Council (the City Council) after the trial court denied appellant's petition for writ of mandate. At issue is a "view protection" ordinance of the City. We affirm the trial court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Ordinance

Voters in the City approved Proposition M on November 7, 1989. It was codified in section 17.02.040 of the Rancho Palos Verdes Municipal Code (hereinafter referred to as the Ordinance), and was most recently amended in January 1997.

In pertinent part, the Ordinance prohibits residents of the City from significantly impairing

a view by permitting foliage to grow in excess of certain height limitations. If foliage in existence already exceeds those height limitations, the person whose view is impaired must first attempt to informally resolve the matter with the person who owns the foliage, and if that fails, may apply for a "view restoration permit." Hearings on the application for the permit are conducted by a view restoration commission (VRC), a committee of seven members appointed by the City Council. The VRC may grant the permit only if certain specified findings are made. If the VRC orders any foliage trimmed or removed, or replacement foliage is ordered planted, the costs are to be borne by the permit applicant. Any interested party may appeal the VRC's decision to the City Council.

The Application Process

Since 1966, Norbert Keilbach has lived on Greve Drive in the City. His home faces south towards the Pacific Ocean and Catalina Island. Appellant lives on Ganado Drive, on a slope directly below Keilbach's home. Appellant has several trees which are near the border of his property and Keilbach's which purportedly block Keilbach's view of the ocean and Catalina Island.[1] Appellant purchased his property in 1964. The trees did not exist prior to the establishment of either Keilbach's or appellant's lots.

In February 1997, Keilbach filed an application with the City in order to compel appellant to trim trees that interfered with his view.

On May 1, 1997, a public hearing was held in connection with the view restoration application. Both appellant and Keilbach appeared. At the conclusion of the hearing, the VRC adopted resolution No. 97-5, requiring that appellant remove the three pine trees and trim the tops of five other trees, at the expense of the applicant, Keilbach.

On May 16, 1997, appellant appealed the VRC's decision to the City Council. The City Council heard the appeal at its public meeting on July 1, 1997, and remanded the matter to the VRC for further consideration of the effect that trimming the trees would have on appellant's privacy.

The VRC held another public hearing on the application on October 2, 1997. At the conclusion of this hearing, the VRC ordered its staff to prepare for adoption at the next meeting a resolution requiring appellant to trim his trees.

On November 6, 1997, the VRC approved resolution No. 97-22. This resolution required appellant to trim eight of his trees but also required Keilbach to plant a barrier of no more than 20 to 25 low-growing shrubs between his property and appellant's to mitigate appellant's privacy concerns.

Appellant appealed this decision to the City Council. On March 17, 1998, the City Council heard the appeal during its public meeting.

On April 7, 1998, the City Council adopted resolution No. 98-21, affirming the VRC's approval of the view restoration permit application and requiring appellant to trim eight of his trees. Appellant then filed this lawsuit in Superior Court.

Proceedings in Superior Court

Appellant filed his "Petition for writ of mandate; complaint for declaratory relief, taking[,] spot zoning and attorney's fees" on June 17, 1998. In his complaint, he alleged that the City and the City Council abused their discretion in affirming the decision of the VRC to issue the view restoration permit, that the City and the City Council failed to grant him a fair trial, that the affirmance of the approval of the view restoration permit constituted a taking without just compensation in violation of the Fifth Amendment, and that "[b]y its enactment of the view restoration ordinance, the City has actively engaged in a species of illegal spot zoning," that is, the "unreasonable, arbitrary and discriminatory" classification of property by the enactment of unreasonable and arbitrary regulations pertaining to certain uses or classifications of property. He sought declaratory relief on two grounds: (1) that the ordinance is unconstitutional because it conflicts with state easement law and violates individual property rights and (2) that the view blockage cannot be declared a public nuisance. He also sought an award of attorney fees.

The matter came on for trial on May 4, 1999. Appellant failed to appear and the court ordered the matter dismissed. Appellant's subsequent motion to set aside the dismissal was granted and the matter was re-set for trial on August 30, 1999. The matter was ultimately submitted on October 12, 1999, and on November 19, 1999, the trial court denied the petition. It ruled, in pertinent part, "The view restoration ordinance is a valid exercise of the city's police power and is not preempted by state law. [¶] In light of the whole record, there is substantial evidence which supports the findings contained in Resolution 98-21 and the findings that support the City Council's decision. [¶] Uncontradicted evidence in the record show[s] that the plaintiff had reasonable notice of the City Council's public hearings regarding his property and was given reasonable opportunity to be heard. Plaintiff's due process rights were not violated. [¶] [Kucera v. Lizza (1997) 59 Cal.App.4th 1141, 69 Cal.Rptr.2d 582]." Appellant filed a notice of appeal on January 5, 2000.

On March 3, 2000, the City obtained from the Superior Court a warrant authorizing entry upon appellant's property "for the sole and exclusive purposes of trimming, culling, and lacing trees and foliage." On March 10, 2000, appellant obtained a 90-day stay of execution upon the warrant. Appellant filed a petition for writ of supersedeas on June 8, 2000. We denied that petition on June 9, 2000.

DISCUSSION

On appeal, appellant makes the following contentions: (1) the trial court erred in relying upon Kucera v. Lizza ; (2) the ordinance violates the takings clause; (3) retroactive application of the ordinance deprives him of due process; (4) the ordinance is deceptive and uncertain; (5) as applied, the ordinance impermissibly expands the City's police power. We first address issues (1) and (5).

1. Kucera v. Lizza and the City's Police Power

In Kucera v. Lizza, supra, 59 Cal.App.4th 1141, 69 Cal.Rptr.2d 582, the Court of Appeal considered the validity of an ordinance of the Town of Tiburon similar to the ordinance presented here. The stated purpose of the Tiburon ordinance was to establish "the right of persons to preserve views or sunlight which existed at any time since they purchased or occupied a property from unreasonable obstruction by the growth of trees" and to establish a process to achieve restoration of views and sunlight. (Tiburon Muni.Code, former §§ 15-1.A and 15-1.B.) In accord with the provisions of the ordinance, the Kuceras petitioned for informal dispute resolution with respect to trees located on the downhill lot across the street, on property owned by Lizza. The Kuceras claimed the trees obstructed their views of the San Francisco Bay and the Marin County mainland. Lizza refused to participate in the process. The Kuceras filed a complaint in superior court seeking to compel restoration of their views and for abatement of a public nuisance. The trial court entered judgment in favor of Lizza concluding that the ordinance was unconstitutional and void because it was preempted by state law and was an arbitrary and unreasonable exercise of the police power.

The Court of Appeal reversed: "It is well settled that the state may legitimately exercise its police powers to advance aesthetic values. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. [Citations.] . [¶] We hold the Tiburon ordinance is directed toward a valid police power goal-to preserve views and sunlight. Tiburon's choice of regulating obstructing trees and tree growth obviously bears a reasonable relationship to the achievement of those goals. [Citation.]" (Kucera v. Lizza, supra, 59 Cal.App.4th at pp. 1148-1149, 69 Cal.Rptr.2d 582, internal quotation marks omitted.)

Here, appellant contends that the Ordinance does not state a valid purpose because it states only that "the peace, health, safety and welfare of the community will be served by the adoption of this section." We disagree.

The ballot measure which was approved by the voters states the purposes of the Ordinance as follows: "The hillsides of the City constitute a limited natural resource in their scenic value to all residents of and visitors to the City. The hillsides provide potential vista points and view lots. The City's General Plan recognizes these natural resources and calls for

their protection. The public health, safety and welfare of the City require prevention of needless destruction and impairment of these limited vista points and view lots. [¶] Specifically, this Ordinance: [¶] 1. Protects, enhances and perpetuates views available to property owners and visitors because of the unique topographical features of the Palos Verdes Peninsula. These views provide unique and irreplaceable assets to the City and its neighboring communities. [¶] 2. Defines and protects finite visual resources by establishing limits which construction and plant growth can attain before encroaching onto a view. [¶] 3. Insures that the development of each parcel of land or additions to residences or structures occur in a manner which is harmonious and maintains neighborhood compatibility and the character of contiguous sub-community development as defined in the General Plan." These purposes were reprinted in the View Restoration Permit Guidelines and Procedures issued by the City.

Enacting the ordinance for these purposes is a clearly a legitimate exercise of the city's traditional police power. (Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 886, 50 Cal.Rptr.2d 242, 911 P.2d 429; Kucera, supra, 59 Cal.App.4th at p. 1149, 69 Cal.Rptr.2d 582.) To the extent that the trial court cited Kucera for this proposition, it did not err.

2. The Takings Issue

We agree that the Kucera case is not dispositive of appellant's takings claim. The opinion specifically remanded the matter for further proceedings on this issue: "The takings authorities cited by the parties are, of course, not directly pertinent. This is a facial challenge and, while it is hard to imagine on this record how compliance with the ordinance and resultant tree trimming might result in an unconstitutional taking, any such argument will have to await a remand and further proceedings." (Kucera v. Lizza, supra, 59 Cal.App.4th at p. 1154, 69 Cal.Rptr.2d 582.) Here, appellant contends that the ordinance is invalid "as applied," raising the taking issue.

The Takings Clause of the Fifth Amendment to the federal Constitution provides "[N]or shall private property be taken for public use, without just compensation." "The aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' (Armstrong v. United States [(1960) 364 U.S. 40, 49, 80 S.Ct. 1563].)" (Eastern Enterprises v. Apfel (1998) 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451.) Similarly, the California Constitution at article I, section 19, provides that "[p]rivate property may be taken or damaged for public use only when just compensation . has first been paid."

A party challenging a governmental action as an unconstitutional taking bears a substantial burden. (Eastern Enterprises, supra, at p. 523, 118 S.Ct. 2131.) Not every

destruction or injury to property by the government has been held to be a taking. (Armstrong, supra, at p. 48, 80 S.Ct. 1563.) The process for evaluating the constitutionality of a governmental action involves an examination of its "justice and fairness," for which there is no set formula, and the inquiry is "essentially ad hoc and fact intensive." (Eastern Enterprises, supra, at p. 523, 118 S.Ct. 2131.) Several factors which have been held to be particularly significant are: (1) the economic impact of the regulation; (2) its interference with reasonable investment backed expectations; and (3) the character of the governmental action. (Eastern Enterprises, supra, at pp. 523-524, 118 S.Ct. 2131.)

There are two types of regulatory action which have been adjudicated to be "per se" takings without the necessity of weighing the public interest advanced in support of the restraint. Those are: (1) where the property owner has suffered a physical invasion of his property and (2) where the regulation denies all economically beneficial or productive use of land. (Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798.)

Contrary to appellant's arguments, the Ordinance does not itself compel a physical invasion of appellant's property. Rather, it is appellant's refusal to comply with resolution No. 98-21, after ample notice and opportunity to correct, that has occasioned the threat of the City's entry onto the property. It does not therefore, rise to the level of a physical invasion. (Yee v. City of Escondido (1992) 503 U.S. 519, 527, 112 S.Ct. 1522, 118 L.Ed.2d 153; Hensler v. City of Glendale (1994) 8 Cal.4th 1, 7, 12, 32 Cal.Rptr.2d 244, 876 P.2d 1043; Duffy v. City of Long Beach (1988) 201 Cal.App.3d 1352, 1358, 247 Cal.Rptr. 715.)

Likewise, we find unavailing appellant's attempt to analogize this case to Lucas v. South Carolina Coastal Council, supra, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 as a denial of his "reasonable investment backed expectations." In Lucas, the purchaser of two lots zoned for residential use was later precluded by state legislation from erecting any permanent habitable structures on the lots. Unlike the plaintiff in Lucas, appellant here is not deprived of any significant economically beneficial use of his land.

Here, while the City has imposed limitations on the height of pre-existing foliage, it is a legitimate exercise of police power which does not rise to the level of a taking. Contrary to "per se" takings, "traditional land-use regulations" such as the imposition of minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions "have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. [Citations.]" (Ehrlich v. City of Culver City, supra, 12 Cal.4th at p. 886, 50 Cal.Rptr.2d 242, 911 P.2d

429; HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508, 518, 125 Cal.Rptr. 365, 542 P.2d 237["[A] zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging."].) "The denial of the highest and best use does not constitute an unconstitutional taking of property. [Citation.] 'Even where there is a very substantial diminution in the value of land, there is no taking.' ([Long Beach Equities, Inc. v. County of Ventura (1991) 231 Cal.App.3d 1016, 1036, 282 Cal.Rptr. 877].)" (Ramona Convent of the Holy Names v. City of Alhambra (1993) 21 Cal.App.4th 10, 23, 26 Cal.Rptr.2d 140.)

It is even questionable whether there has been a diminution in the value of the land. Appellant cites the damage to his property as his loss of privacy and "utility saving cooling shade."

Appellant cannot show he has a vested right to foliage of a certain height or to a fixed amount of utility charges. In addition, appellant has not been ordered to destroy his trees, but simply to trim them. The City's resolution provides that the cost of the tree removal is to be borne by Keilbach and that reasonable replacement shrubbery is also to be purchased by him. If any of the trees or shrubs that are ordered trimmed die within one year, Keilbach is to bear the expense of a replacement tree or shrub.

While appellant cherishes his park-like privacy, the regulation of tree heights throughout the city may indirectly increase the property's value, as the city becomes known for one which has scenic vistas. (See HFH, Ltd. v. Superior Court, supra, 15 Cal.3d at pp. 520-521, 125 Cal.Rptr. 365, 542 P.2d 237.) As for the loss of his privacy, the VRC made a specific finding, after visiting Keilbach's property, that there was no unreasonable infringement of appellant's privacy "since the subject trees limit but do not totally eliminate all viewing onto the foliage owner's property from the applicant's property."

Accordingly, we find no taking as contemplated within the Fifth Amendment of the United State Constitution or article 1, section 19 of the California Constitution.

3. Due Process Claims

a. Retroactive Application

Appellant contends that retroactive application of the ordinance amounts to irrational and arbitrary action. He also argues that the ordinance allows view seekers to exact retribution against foliage owners and that the VRC did not appropriately balance the interests of the two property owners. In support of these arguments, he cites Eastern Enterprises v. Apfel, supra, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451.

In Eastern, a company that formerly was in the coal mining business left that industry.

Several years later, the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) was enacted, providing for assigned benefits to retirees in the coal industry. The effect of this Act was to impose $50 to $100 million worth of liability on the company based on its activities 30 to 50 years earlier. (Eastern Enterprises v. Apfel, supra, 524 U.S. at pp. 503, 516-517, 118 S.Ct. 2131.)

The company sued, claiming there was a taking and a violation of Due Process rights. (Eastern Enterprises v. Apfel, supra, 524 U.S. at pp. 517, 529, 118 S.Ct. 2131.) In concluding that the company's claims had merit, the Supreme Court noted that retroactive legislation is generally disfavored. It presents problems of unfairness because it can deprive citizens of legitimate expectations and upset settled transactions. (Id. at pp. 532, 533, 118 S.Ct. 2131.) The Court concluded that the length of time that the Coal Act reached back to impose liability on the company and the magnitude of the liability raised substantial fairness question.

Here, there is no automatic retroactive reach of the ordinance. Homeowners are allowed to keep foliage at the height it existed on the effective date of the Ordinance. It is only when another homeowner applies for a view restoration permit that the inquiry begins whether the foliage must be trimmed to a lower height. (See discussion, post, on vagueness claim.)

In addition, there is no showing that the ordinance was applied in an arbitrary or irrational manner. (United States v. Carlton (1994) 512 U.S. 26, 32, 114 S.Ct. 2018, 129 L.Ed.2d 22.) The ordinance requires first resort to informal dispute resolution and provides for noticed hearings and rights of appeal. Keilbach and the City Council duly followed all the required steps. There is no factual basis for appellant's contention that the City or the VRC acted with an improper motive. In fact there is no reason given by appellant for Keilbach's actions against appellant other than view restoration.

b. Uncertainty

Appellant contends that the ordinance is so unclear that it violates due process. He cites Ross v. City of Rolling Hills (1987) 192 Cal.App.3d 370, 375, 238 Cal.Rptr. 561, for the tests for vagueness challenge as follows: (1) the statute must not forbid nor require the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application; (2) the language must be definite enough to provide a standard of conduct as well as a standard by which adjudicating agencies can ascertain compliance; (3) the words used should be well known enough to enable affected persons to understand and correctly apply them; they must be either of long standing usage in the profession or industry involved or those which have be interpreted by the courts, or those which the meaning of which may be determined by knowledge and

experience, or those which may be made reasonably certain by reference to common law or legislative history. (Id. at p. 375, 238 Cal.Rptr. 561.)

The Ross case itself notes, " '[A] substantial amount of vagueness is permitted in California zoning ordinances' in order to permit delegation of broad discretionary power to administrative bodies. [Citations.]" (Ross v. City of Rolling Hills Estates, supra, 192 Cal.App.3d at p. 376, 238 Cal.Rptr. 561, citing Novi v. City of Pacifica (1985) 169 Cal.App.3d 678, 682, 215 Cal.Rptr. 439.)

The Ordinance provides at section (B)(3): "3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to grow to a height exceeding: [¶] a. The height determined by the view restoration commission through issuance of a view restoration permit under Section 17.02.040(C)(2) of this chapter; or [¶] b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of: [¶] i. The ridge line of the primary structure on the property; or [¶] ii. Sixteen feet. [¶] If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of Section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on November 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing on the effective date of this section (November 17, 1989). The purpose of this paragraph is to ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not 'grandfather' or otherwise permit such foliage to continue to block a view." 2 (Italics added.)

Appellant contends that the final paragraph of this section is so deceptive and uncertain as to violate due process principles, as demonstrated by the minutes of the City Council meeting held on July 1, 1997. In particular, appellant argues that it is unclear whether paragraph 3.b. applies when no VRC determination has been made or to all foliage in existence at the time of enactment.

Section (B)(3) can be fairly read without resort to other materials as follows: If a property owner had trees exceeding 16 feet prior to November 17, 1989, impairing the view of a neighbor, the property owner is prohibited from letting that foliage grow any higher whether or not the neighbor has obtained a view restoration permit. The final sentence means that if the neighbor does eventually seek a permit, the trees in excess of 16 feet can be ordered to be trimmed. We do not find this section to be either deceptive, unclear or uncertain.

Appellant also contends that section (C)(2)(f) of the Ordinance, which permits the VRC to recommend removal and replacement of trees, is vague and confusing because there is

no language indicating the consequences that befall a non-consenting foliage owner. That section provides: "The view restoration commission may impose such reasonable conditions or restrictions on the approval of a view restoration permit as may be found to be appropriate or necessary to protect the public health, safety or welfare or the foliage owner's reasonable enjoyment of his or her property. Such conditions or restrictions may include, but are not limited to: (1) requiring the complete removal of the subject foliage when the commission finds that the trimming, culling, lacing or reducing of that foliage to sixteen feet or the ridge line is likely to kill the foliage, threaten the public health, safety and welfare, or will destroy the aesthetic value of the foliage that is to be pruned or reduced in height, provided that the property owner consents to the removal; and (2) requiring replacement of such foliage when the commission finds that removal without replacement will cause a significant adverse impact on: (a) the public health, safety, and welfare, (b) the privacy of the property owner, . provided that the property owner consents to the replacement."

We find no vagueness in this section either. The VRC is empowered to impose whatever reasonable conditions or restrictions as are appropriate or necessary "as may be found to be appropriate or necessary to protect the public health, safety, or welfare" in the event that a property owner does not consent to removal or replacement. There is nothing unconstitutional about this delegation of broad discretionary power to the VRC and the City. (Ross, supra, 192 Cal.App.3d at p. 376, 238 Cal.Rptr. 561.)

DISPOSITION

The judgment of the superior court is affirmed.

FOOTNOTES

1. There are eight trees which are the subject of the dispute: 2 pine trees which measure approximately 40 feet, 1 pine tree which measures approximately 60 feet, 1 pine tree which measures approximately 20 feet, 1 ash tree measuring approximately 40 feet, 1 olive tree which measures 40-50 feet, 1 ornamental plum tree which measures 20 feet and 1 scrub oak tree which measures 40-50 feet.

2. The last two sentences were not contained in the original Proposition M. The first of these sentences was added when Proposition M was codified, the last one added when the ordinance was amended in 1997.

HASTINGS, J.

CHARLES S. VOGEL, P.J., and EPSTEIN, J., concur.

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APPENDIX A

Bishop v. Hanes

(Cal. Ct. App., Oct. 27, 2011, A129018) 2011 WL 5118770

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Court of Appeal, First District, Division 1, California.

Lloyd BISHOP et al, Plaintiffs and Respondents,
v.
Ernest HANES et al, Defendants and Appellants.

Nos. A129018, A130062. | (Alameda County Super. Ct. No. RG 09443093). | Oct. 27, 2011. | As Modified on Denial of Rehearing Nov. 21, 2011.

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Opinion

I. INTRODUCTION

MARCHIANO, P.J.

*1 This appeal stems from a long-standing dispute between adjoining neighbors over a view obstruction. When plaintiffs Lloyd and Phyllis Bishop bought their house in the Oakland Hills in 1964, they had unobstructed views from their property of the San Francisco Bay and the surrounding visual environment. For 20 years, until the defendants, Dr. and Mrs. Hanes, bought the property directly below the Bishops' property in 1984, the Bishops were able to work amicably with their down slope neighbors to preserve their views. However, the defendants allowed the trees and vegetation to grow and, over time, obstruct the views from the Bishops' property. In 2001, the Bishops filed an unsuccessful lawsuit against the Haneses based on an easement and Oakland's View Ordinance (hereafter "the View Ordinance"), seeking injunctive relief. Following amendments to the View Ordinance in 2004 and 2006, the Bishops and the Haneses engaged in failed mediation leading to a second lawsuit alleging a continuing nuisance and again seeking injunctive and other relief. This time, the Bishops' lawsuit was successful. The Haneses appeal, claiming that the Bishops' second lawsuit was barred by res judicata, that applying the amended View Ordinance to them violates their due process rights, and that the remedy, including the award of litigation costs and attorney's fees to plaintiffs, as well as all of the costs incurred to restore the Bishops' views, is unjust and unauthorized. We reject all of defendants' contentions because we find that res judicata does not bar the Bishops' second lawsuit, application of the amended View Ordinance to the Haneses does not violate their due process rights, the costs and attorney's fees are reasonable, and substantial evidence supports the court's order imposing all of the costs of view restoration on the Haneses. Therefore, we affirm the judgment and postjudgment orders.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties and Their Properties.*

The plaintiffs in this case are Lloyd Bishop and his wife, Phyllis Bishop ("The Bishops"). They have owned the real property at 6807 Wilton Drive in Oakland since 1964.1 The defendants in this case are Dr. Ernest Hanes and his wife, Okhoo Hanes ("The Haneses"). They bought the real property at 6817 Wilton Drive, downhill and adjacent to the Bishop's property, from the Aldriches in 1984. One of the reasons they purchased the property was that the trees and vegetation gave the property a "Tahoe look" and a "sense of serenity," providing a visual and noise buffer.

1 At the time of trial in 2009, Lloyd Bishop was 87 and Phyllis Bishop was 93 and they had moved from their home on Wilton Drive to an assisted care facility in downtown Oakland, but they still visited their home in the hills regularly.

Before the Bishops bought their property, their parcel and the Haneses' parcel were both part of one, larger parcel owned by Lynn and Bernice Aldrich ("The Aldriches"). At the time they bought the property, the Bishops negotiated for and obtained a covenant running with both parcels of land to protect their panoramic views of the San Francisco Bay, Peninsula, and skyline, downtown Oakland, the Oakland Estuary, the island city of Alameda, Yerba Buena Island, the Golden Gate and Bay Bridges and the Marin Headlands. The covenant limited the height of structures that could be built on the downhill parcel. The covenant was recorded against both parcels on the same day as the grant deed.

B. *The Genesis of the Dispute.*

*2 Between 1964 and 1986, the Bishops were able to amicably resolve view obstruction issues with their downhill neighbors, including the Haneses. Whenever trees or vegetation began to encroach upon the Bishops' views, the Bishops' neighbors would allow them to enter their land to cut and trim the trees and vegetation. However, by 1987, the relationship between the Bishops and the Haneses had become strained. The Haneses felt that the Bishops had a cavalier attitude towards the Haneses' property and privacy rights, entering their property at will to cut down trees and vegetation, leaving the cutting debris in the Haneses' yard, and allowing their workmen to use and block the Haneses' driveway in order to gain access to the rear of the Bishops' lot.

In 1990, the Haneses moved away from the Bay Area and rented out the house.2 Between 1990 and 1994, the Haneses gave the Bishops permission to cut trees on their property under a property manager's supervision. However, when Mrs. Hanes visited the property periodically, she discovered that the trees had been "crew cut" and "the yard was a mess." At that point, the Haneses forbade the Bishops to cut trees on their property and subsequently erected a six-foot chain link fence to prevent the Bishops and their workmen from "[using the property] like it was a public thoroughfare." The Bishops felt that the fence obstructed their view. And, the trees and vegetation continued to grow unabated. After numerous failed attempts to resolve the view dispute by mediation in the late 1990's through 2001, the Bishops sought legal counsel to restore and protect their views.

2 Except for a brief period in 1998, the Haneses have not lived in the house since 1990. The house remains a rental, although the Haneses intend to return to live in it someday.

C. *The First Action and Trial.*

In 2001, the Bishops filed a lawsuit against the Haneses seeking injunctive relief to have the fence removed or lowered, and the trees and vegetation cut. Alternatively, the Bishops asked for monetary damages. Their action was based on the elevation requirements of the 1964 agreement between the Bishops and the Aldriches, the Haneses' predecessors in interest. In addition, the Bishops sought injunctive relief to require the Haneses to trim or remove certain trees and vegetation so as to restore and preserve the views previously enjoyed by the Bishops, based on Oakland's then extant View Ordinance. (Oakland Mun.Code, tit. 15, §§ 15.52.010 et. seq.)

After a two-day trial in January 2003, at which seven witnesses testified, the court found for defendants and against the plaintiffs on their view claims. In its statement of decision, the court ruled that the September 1964 view agreement between the Bishops and the Aldriches did not bind the Haneses because the Haneses did not have constructive notice of any

restrictions placed on their property by the agreement between the Bishops and the Aldriches. The court also ruled that the Oakland View Ordinance protected views from obstruction by " '[t]rees or vegetation' " only in that view corridor " 'designated on the site development map of the North Oakland Hills Area Specific Plan' " [hereafter NOHASP], and that "[t]he residential parcels owned by the Plaintiffs and the Defendants are outside the parameters of the site development map of the [NOHASP]." Therefore, "[t]he Oakland View Ordinance does not apply."

***3** The Bishops did not appeal. Instead, they sought to have the Oakland City Council (City Council) clarify the scope of the View Ordinance. Their efforts were successful. In 2004, the View Ordinance was amended "to clarify that the private right to reconciliation and arbitration established by the View Ordinance, OMC section 15.52, applies throughout the City of Oakland and further clarifies that the provisions of OMC section 15.52.040 regarding protected view corridors applies only to limited public views in specific locations in the NOHASP." In 2006, the View Ordinance was again amended "to clarify that the View Ordinance applies to all trees at issue on the tree owner's property, both those planted by the tree owner as well as trees allowed to sprout as a result of natural regeneration."

D. The Current Action and Trial.

By letter dated May 29, 2007, the Bishops' new counsel contacted the Haneses and invited them to "work with the Bishops, either through direct negotiations or through mediation, to attempt to resolve your differences once and for all so that each of you may put this matter to rest." In July 2007, the Haneses' attorney responded that the demand had been forwarded to the Haneses' insurer and they were awaiting word about their coverage.

In December 2007, the Bishops again sent a demand for alternative dispute resolution under the View Ordinance. Mediation finally took place in June 2008. As a result of mediation, in September 2008 the Haneses agreed to the removal of 26 or 27 acacia trees located directly in front of the Bishops' deck, and the topping of some other trees located above the Haneses' driveway. The work was completed in October of 2008. According to the Haneses, they fulfilled every aspect of the mediation agreement. The Bishops did not dispute this. However, according to the Bishops, these measures did not restore their views and no further agreement could be reached. The Bishops filed the present action on March 24, 2009.

Plaintiffs' First Amended Complaint contains two causes of action, one for nuisance and one for declaratory relief. Both causes of actions sought view restoration pursuant to the View Ordinance as amended in 2004 and 2006. Defendants answered, asserting a variety of affirmative defenses, including res judicata. The Haneses moved for summary judgment in August of 2009 alleging, inter alia, that the new lawsuit was barred by res judicata, and that application of the amended View Ordinance to them was retroactive and prohibited. The court denied the motion on November 17, 2009, ruling that the bar of res judicata did not apply, and the amended View Ordinance was not retrospective in its application to defendants.

A court trial commenced December 7, 2009 and concluded January 7, 2010. The court conducted a site inspection on December 17, 2009. The court issued a proposed statement of decision on March 22, 2010. Following submission of objections and responses by both parties, the court issued its final Statement of Decision on May 10, 2010.

E. *The Court's Statement of Decision.*

***4** As relevant here, the court found that from their 1964 purchase of the property, and for approximately the next 20 years, the plaintiffs enjoyed "a panoramic view looking out into a westerly direction over Oakland, the Oakland Estuary, the island of Alameda, the San Francisco Bay, the San Francisco city skyline, the Golden Gate and Bay Bridges, Yerba Buena and Treasure Islands, and the Marin Headlands." The Bishops' view is one of " 'high-value,' " given the landmarks in view and the viewing points from the Bishops' living room, study, dining room, master bedroom, lanai, and deck. All the experts, including defendants' landscape architect, agreed with this assessment. The view is "significantly diminished by trees located on the Hanes property" in that "the most valued features and landmarks are almost completely obstructed by Defendants' trees."

To a lesser extent, the Bishops' views were also obstructed by trees located on the City of Oakland's property. However, the court found that these trees did not significantly affect its findings on liability or remedy because Oakland Arboricultural Inspector Mitch Thomson testified that "the City would take steps to minimize or eliminate the City trees' view obstruction once obstructing trees on the Hanes property were removed," and because "the Hanes actively prevented the City from taking steps to mitigate or remove the same City trees obstructions upon which they now rely."

The court's site inspection confirmed that the Haneses' trees substantially obstructed the Bishops' views of San Francisco, the Bay, the Marin Headlands, Oakland, Alameda and other landmarks from various perspectives on the Bishops' property, including the living room, study, dining room, master bedroom, lanai, and deck.

The inspection also confirmed that the trees in question might provide some subjective benefit to defendants. However, the court did not accept defendants' testimony that they enjoyed the visual screening their trees provide, because defendants do not live at the their property, no testimony was offered as to whether the tenants similarly valued the screening, and the expert testimony was that "the trees at issue offered little objective screening of defendants' home from any other feature." This opinion was confirmed by photographic evidence. In addition, defendants' own expert concurred that the sense of privacy was largely "in the minds of [the] Defendants," and that other plants would perform a better job of benefitting the defendants' property "from an objective landscape architecture standpoint." The court also gave little credence to testimony that birds might enjoy the trees at issue, because the testimony was vague and, because the trees were non-native, they "not only do not attract wildlife particularly well, they preclude the growth of other plants nearby that might themselves attract wildlife."

The court also found that while the trees do provide some erosion control, the uncontradicted expert testimony from a geotechnical engineer, which the court stated it accepted, established that the trees at issue "do not materially contribute to slope stability, and that removal and replacement would have no impact on the issues of erosion or stability, provided the work was performed correctly." The court also noted that despite defendants' asserted concerns about slope stability, they had never retained the services of a geotechnical or soils engineer to evaluate their concerns.
***5** The court also found that the trees provided no energy conservation or climate control benefits and, as stated by the defendants' own expert, were mostly "non-native, grow very quickly, are messy, unattractive, contain a toxin which can inhibit other plant growth, and, in general are not optimal for a residential setting." In addition, the trees had no significant economic value, were highly flammable and of poor specimen quality. Finally, acacias were listed by the City of Oakland (City) "as an undesirable species that should not be planted." For all of these reasons, the court concluded that the trees at issue "provide almost no benefit to the Hanes and impose a substantial detriment on the Bishops" and therefore, "[o]n balance, the benefits the trees provide Defendants are significantly outweighed by the burdens they impose on the Hanes[*sic*]."[3]

3 We assume, from the entire tenor of the court's statement of decision, that the court meant to state "the Bishops" and not "the Hanes."

Accordingly, the court adopted the recommendations made by plaintiffs' consulting arborist and horticulturist "which are that the trees and vegetation in question be removed with the tree stumps left in place and treated chemically to inhibit regrowth[; and] that the trees be replaced with shrubs that can provide screening and erosion control without creating a view obstruction." Specifically, the expert arborist recommended the immediate removal of all the blackwood acacia trees, the smaller of two Monterey pines, a redwood, and two plums. He also recommended the removal of the larger Monterey pine in three to five years due to its age and the potential structural hazard it presented, as well because of its view obstruction. The court did not follow this recommendation, finding instead that the second Monterey pine should be removed now rather than later, to avoid the possibility of further litigation. The court noted that the defendants' expert recommended a similar plan. The court concluded: "In short, due to the poor condition, undesirable species, and inappropriate plant material, the experts are in accord that the offending trees and vegetation should be removed and replaced with more suitable plant material, such as non-flammable, native shrubs, which will not become view obstructions at maturity. [¶] The experts agreed that the recommended proposal—removal and replacement—would be the most effective way to proceed and ... is ultimately a benefit to both properties."

Relying on *Echevarrieta v. City of Rancho Palos Verdes* (2001) 86 Cal.App.4th 472, 103 Cal.Rptr.2d 165 (*Echevarrieta*), the court expressly rejected defendants' claims that application of the amended View Ordinance to them was retroactive and violated their due process rights.

F. *Remedies.*

1. *Permanent Injunction*

On May 26, 2010, the court entered judgment for the plaintiffs, finding that "defendants' trees in their present condition violate Chapter 15.52 of the Oakland Municipal Code (Oakland View Ordinance), and constitute a nuisance," and issued a

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permanent mandatory injunction abating the nuisance. Defendants were ordered, at their own cost, to (1) retain the services of a licensed and certified arborist to remove the specified trees and vegetation which have grown into "the view corridor," as defined in the judgment, and chemically treat the stumps to prevent regrowth; and (2) retain the services of a licensed professional to replace the trees and vegetation with native, non-flammable plants whose mature height would not encroach on the view corridor. The injunction further ordered that (3) no existing or future vegetation be allowed to grow into the view corridor, except as specifically provided; and that (4) plaintiffs, as the prevailing parties, recover their attorney's fees and all costs of litigation.

2. *Attorney's Fees*

***6** Pursuant to section 15.52.070 of the View Ordinance,[4] the court designated plaintiffs the prevailing party and awarded them reasonable attorney's fees and costs. The court judgment granted plaintiffs $202,144.17.

4 Oakland Municipal Code of Ordinances, Title 15, Chapter 15.52, section 15.52.070 provides: "Each party shall pay his or her own costs and attorneys fees except in the case where the dispute goes to trial or judicial arbitration. In the event that an action under this chapter is resolved after trial or judicial arbitration in municipal or Superior Court, the prevailing party shall be entitled to reasonable attorney's fees and costs of suit."

3. *Costs*

The court made findings pursuant to section 15.52.060, subdivision (B) of the View Ordinance,[5] and imposed 100 percent of the costs of restoration and replacement on defendants. On August 20, 2010, the court granted defendants' motion to tax the expert costs in the amount of $30,101.25, and the motion to tax other miscellaneous costs in the amount of $6,113.01. The court denied defendants' motions to tax the exhibits, court reporters' fees and mediation fees.

5 Oakland Municipal Code of Ordinances, Title 15, Chapter 15.52, section 15.52.060 provides: "The cost of all restorative actions, replacement plantings, and arbitration shall be apportioned between the view claimant and the tree owner as follows:

"A. The view claimant and tree owner shall each pay fifty (50) percent of such costs in those cases involving any tree planted or allowed to sprout as a result of natural regeneration by the tree owner subsequent to the effective date of this chapter (August 5, 1980).

"B. The tree owner shall pay one hundred (100) percent of such costs in those cases where:

"1. The tree owner has refused to participate in good faith in the initial reconciliation or voluntary arbitration processes (Section 15.52.090B) and where the view claimant has prevailed at trial or judicial arbitration; or

"2. In any subsequent dispute between the same parties, to restore any view obstructed by the same tree or trees or any of the plantings substituted for the original offending tree or trees described in subsection A of this section.

"3. The tree owner plants a tree(s) against the expressed, written objection of the view claimant and the same tree(s) later become subject of a view claim.

"C. In all other cases, the view claimant shall pay one hundred (100) percent of such costs."

Defendants timely appealed from the judgment entered on May 26, 2010 after a court trial (A129018), and from the amended judgment and order awarding attorney's fees and costs filed on August 20, 2010 (A130062). This court ordered the appeals consolidated.

III. DISCUSSION

A. The Bishops' Claims Were Not Barred by Res Judicata.

Defendants assert that all of the Bishops' current claims were barred by res judicata. " '[T]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*' (7 Witkin, Cal. Procedure [3d ed. 1985] Judgment, § 188, p. 621, italics in text.)" (*Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 67, 241 Cal.Rptr. 578 (*Nakash*).) Defendants attack the trial court's ruling on their summary judgment motion on three grounds: (1) the prior lawsuit resulted in a final judgment on the merits; (2) both lawsuits arose out of the

same "primary right"—the Bishops' asserted right to an unobstructed view over the Haneses' property—and since the prior lawsuit established that the Bishops' had no such right, the exception for an "ongoing relationship" does not apply; and (3) that the "injustice exception" to the application of res judicata "is inapplicable where ... the only possible basis for its implementation is founded on a change in law following the original judgment." (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 796, 126 Cal.Rptr. 225, 543 P.2d 593.)

We need not address the res judicata argument because this case presents the classic example of an ongoing dispute over a continuing nuisance to which the doctrine of res judicata does not apply.6 In *Spaulding v. Cameron* (1952) 38 Cal.2d 265, 239 P.2d 625, involving a neighbor dispute over a continuing nuisance consisting of mudflow onto the down slope neighbor's land from leveling operations on the up slope neighbor's land, our Supreme Court observed: "[I]t has been recognized that in doubtful cases the plaintiff should have an election to treat the nuisance as either permanent or not. [Citations.] If the defendant is not privileged to continue the nuisance and is able to abate it, he cannot complain if the plaintiff elects to bring successive actions as damages accrue until abatement takes place. [Citations.] On the other hand, if it appears improbable as a practical matter that the nuisance can or will be abated, the plaintiff should not be left to the troublesome remedy of successive actions. [Citations.]" (*Id.* at pp. 268269, 239 P.2d 625. See also *Nakash, supra,* 196 Cal.App.3d 59, 69, 241 Cal.Rptr. 578.) In our view, the trial court did not err in concluding that "[t]he doctrine of res judicata was not intended to apply to parties in an ongoing relationship, such as that between spouses, parents and children, or continuing business partners and fiduciaries, or (as here) neighbors, 'where the courts have traditionally recognized the need for serial adjudication.' (See, e.g., *Nakash* [, *supra*] 196 Cal.App.3d [at p.] 69, 241 Cal.Rptr. 578.)"

6 Because of the posture of the litigation, res judicata was not controlling. Judge Baranco concluded the ordinance in effect at that time did not apply and ruled in favor of defendants. This decision was not appealed and became final. Subsequently the Oakland City Council corrected or clarified the View Ordinance to include all residents of the Oakland Hills within the protection of the ordinance. By 2004 the ordinance had been changed to allow all Oakland residents to enjoy the benefits of the revised ordinance. The View Corridor was identified correctly as the Public View Corridor, compatible with the map under the revised legislation. The revised ordinance applied to the parties and all other similarly situated Oakland residents so that they would have a protected view. The parties then proceeded on the claim of a right to a view based on the changed ordinance. This new ordinance, further modified in 2006, was the basis for the litigation before Judge Tigar and created a right that did not exist when the matter was litigated before Judge Baranco.

*7 At oral argument, defendants maintained that their trees did not constitute a continuing nuisance because any injury to plaintiffs' views that had occurred since 2006 had been taken care of as a result of mediation. But there was expert testimony to the contrary. For example, consulting arborist and horticulturalist James MacNair made his first site visit to the Bishops' property in 2008 and then again in 2009, when he was also able to visit the Haneses' property. In the course of preparing his report and making recommendations, he reviewed historical photographs, including those from 1991, 2001, and 2008. The photographs showed that in 1991, the Bishops had panoramic views. By 2001, the acacias were starting to interfere with the views. By 2008, the view loss was significant. He prepared a chart showing the extent of the view loss over the last 20 to 25 years and estimated that the Bishops had lost 80 to 90 percent of the view they once had from their living room.

Most tellingly, MacNair testified that on his second visit in 2009, he observed that part of the acacia stand had been removed, and that the balance had been topped. However, from the perspective of the Bishops' property, there was no change in the obstruction from 2008 because "when you top the acacia, there is almost immediate response of rapid regrowth ... and so it goes into an active growth phase, and that's what happened. So the density of the grove was not much different in terms of the foliage mass. There were fewer stems, and they had been brought down a bit, but in terms of the view obstruction, it really wasn't effective." He opined that "you can expect a minimum of three to four feet of growth a year from those trees after a topping cut." As for the Monterey pine, it was not as fast-growing as an acacia, but MacNair nevertheless observed that the branches had been growing fairly rapidly below the pruning cut. Substantial evidence supports the view that even with periodic cutting and topping, the Haneses' trees continually grew and obstructed the Bishops' views from at least 2006 to the present, and that the cutting and topping undertaken in response to mediation had not solved the problem. In our view, the trial court did not abuse its discretion in concluding that the trees constituted a continuing nuisance to which the doctrine of res judicata did not apply.

Application of Oakland's Amended View Ordinance to Defendants Does Not Violate Defendants' Substantive or Procedural Due Process Rights.

Defendants argue that application of the amended View Ordinance to them "constitutes an impermissible retroactive application of the law" that "effects a 'taking' of the Hanes property." We disagree, because the law, as applied to them, is

prospective in application and, even if it were retroactive, it would not constitute a taking or otherwise violate due process, as explained in *Echevarrieta, supra,* 86 Cal.App.4th 472, 103 Cal.Rptr.2d 165.

"A statute has retrospective effect when it substantially changes the legal consequences of past events." (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243, 62 Cal.Rptr.2d 243, 933 P.2d 507 (*Western*).) In this case, the amended ordinance was applied to view obstructions that postdated the 2004 and 2006 amendments: the Bishops did not request reconciliation and mediation under the ordinance until 2007. The fact that existing trees may or may not have obstructed the Bishops' views before 2004 does not mean that the ordinance is retrospective in its application. "A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment." (*Ibid.*)

***8** Moreover, both amendments were accompanied by clear legislative statements that it was the intent of the City Council to *clarify* that the View Ordinance always applied throughout Oakland, and to all trees, sprouted or planted. "[A] statute that merely *clarifies,* rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment.... Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. [Citations.] Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. [Citations.] [¶] One such circumstance is when.... [¶] ' "[T]he amendment was enacted soon after controversies arose as to the interpretation of the original act, ..." ' [¶] Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. [Citations.] Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them." (*Western, supra,* 15 Cal.4th 232, 243244, 62 Cal.Rptr.2d 243, 933 P.2d 507.)

In this case, shortly after the first lawsuit between the parties resulted in a judicial opinion that the View Ordinance only applied to trees planted in certain areas of Oakland, excluding the parties' properties, the City Council amended the statute, admittedly at the Bishops' instigation. In doing so, the City Council expressly stated that its intent was to "clarify that the private right to reconciliation and arbitration established by the View Ordinance applies throughout the City of Oakland; [and] ... [¶] ... to clarify that the View Ordinance applies to all trees at issue on the tree owner's property, both those planted by the tree owner as well as trees allowed to sprout as a result of natural regeneration." Although this expression of intent is not binding on us, defendants do not tender any reason why we should refuse to give it credence. In the absence of any such reasons, we see no basis for disregarding the City Council's stated legislative intent.

In any event, even if the amendments changed, rather than clarified the View Ordinance, the City Council's declarations of intent reflected a "purpose to achieve a retrospective change.... '[W]e must give effect to this intention unless there is some constitutional objection thereto.' " (*Western, supra,* 15 Cal.4th at p. 244, 62 Cal.Rptr.2d 243, 933 P.2d 507.)

Defendants object that retrospective application of the amended View Ordinance to them constitutes a "taking" and denies them due process. The same contention was rejected on strikingly similar facts in *Echevarrieta, supra,* 86 Cal.App.4th 472, 103 Cal.Rptr.2d 165. In that case, the City of Rancho Palos Verdes enacted a view protection ordinance that prohibited residents from permitting vegetation to grow beyond certain height limitations if it would significantly impair another resident's view. (*Id.* at p. 475, 103 Cal.Rptr.2d 165.) If existing vegetation already exceeded the height limitation and impaired a view, the ordinance required the view owner to first attempt informal resolution of the matter with the vegetation owner. If that failed, the view owner could apply to the view restoration committee (VRC) for a view restoration permit. (*Ibid.*) After a hearing, the VRC could order the removal or replacement of vegetation, at the view owner's expense. Any interested party could appeal to the City Council of Rancho Palos Verdes. In *Echevarrieta,* the permit seeker had views of the Pacific Ocean and Catalina Island which were obstructed by the down slope neighbor's trees. (*Id.* at pp. 475–476, 103 Cal.Rptr.2d 165.) After multiple hearings before the VRC, the down slope neighbor was required to remove some trees and trim others, and the view permit seeker was required to plant shrubs between his property and his neighbor's to mitigate his neighbor's privacy concerns. (*Ibid.*) After the City Council of Rancho Palos Verdes rejected the down slope neighbor's appeal, he unsuccessfully sued the City of Rancho Palos Verdes. (*Id.* at pp. 476–477, 103 Cal.Rptr.2d 165.)

***9** On appeal, the down slope neighbor argued that the ordinance violated the takings clauses of the Fifth Amendment to the federal Constitution, and article 1, section 19 of the California Constitution. (*Echevarrieta, supra,* 86 Cal.App.4th at pp. 479–480, 103 Cal.Rptr.2d 165.) He also argued that retroactive application of the ordinance deprived him of due process. (*Id.* at p. 482, 103 Cal.Rptr.2d 165.) The Court of Appeal rejected both arguments. With respect to the takings clause contention, the *Echevarrieta* court ruled that the imposition of limitations on the height of preexisting foliage was a legitimate exercise of the police power which did not rise to the level of a taking under well-established precedent. (*Id.* at pp. 479481, 103 Cal.Rptr.2d 165.) With respect to the due process contention that retroactive application of the ordinance amounts to

irrational and arbitrary action, the court held that the ordinance was not irrational or arbitrary because "there is no automatic retroactive reach of the ordinance. Homeowners are allowed to keep foliage at the height it existed on the effective date of the Ordinance. It is only when another homeowner applies for a view restoration permit that the inquiry begins whether the foliage must be trimmed to a lower height.... [¶] In addition, there is no showing that the ordinance was applied in an arbitrary or irrational manner. [Citation.] The ordinance requires first resort to informal dispute resolution and provides for noticed hearings and rights of appeal. [Plaintiff] and the City Council duly followed all the required steps." (*Id.* at p. 482, 103 Cal.Rptr.2d 165.)

In our view, *Echevarrieta* is dispositive of defendants' takings clause argument. Oakland's View Ordinance, too, is a proper exercise of the police power. Furthermore, we are not persuaded by defendants' arguments that the differences between the Oakland and Rancho Palos Verdes ordinances render *Echevarrieta* inapposite on the due process issue. Both ordinances operate retrospectively in the same way: Homeowners are allowed to keep their vegetation at preexisting heights, unless a neighbor complains that his or her views are obstructed. At that point, both ordinances encourage informal mediation to resolve the conflict. Under the Rancho Palos Verdes ordinance, if mediation fails to resolve the conflict, hearings and appeals ensue. Under the Oakland ordinance, if mediation fails, the ordinance creates a private cause of action, and places "the burden of proving the alleged view obstruction and the suitability of the proposed restorative actions" on the view claimant. (Oakland Mun.Code of Ord., tit. 15, ch. 15.52, § 15.52.090, subd. (C).) Ultimately, a judge decides, based on enumerated statutory factors, and, as this case demonstrates, the losing party may appeal. The Oakland ordinance provides fair notice and procedural protections that are comparable, if not identical to, the ones provided by the Rancho Palos Verdes ordinance. Defendants have not demonstrated that the Ordinance is arbitrary or irrational in application. Their due process rights were not violated.

B. The Remedy Fashioned by the Court Did Not Constitute An Abuse of Discretion.

***10** Defendants argue that the remedy fashioned by the court is unfair and unauthorized because the court did not properly consider that the trees on the City property would block the Bishops' views even if the Haneses' trees were removed. They characterize the court's reliance on the "breezy assurance[s]" of city arborist Mitch Thomson as "suspect, at best." As we understand defendants' argument, the Haneses appear to attack the court's issuance of a permanent mandatory injunction ordering the removal of their offending trees and replacement with conforming vegetation, on the ground that the court should have rejected Mr. Thomson's testimony.

We review the court's decision to grant a permanent injunction for abuse of discretion. "A reviewing court will exercise its independent judgment when it is required to interpret and apply a statute where the underlying facts are not in dispute. [Citation.] [¶] However, to the extent the trial court had to review the evidence to resolve disputed factual issues, and draw inferences from the presented facts, an appellate court will review such factual findings under a substantial evidence standard. Our power in this regard '*begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. [Citations.] [¶] When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.' [Citation.]" (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 912, 117 Cal.Rptr.2d 631.)

Substantial evidence supports the trial court's findings in support of the issuance of the injunction. Arboriculture inspector Mitch Thomson testified that he had worked for the City in that capacity for almost 21 years and had helped resolve "hundreds" of view disputes in that time. In response to a view claim from the Bishops requesting some relief from a view obstruction on City land, Thomson did a field investigation of a City lot near the Bishops' property. To Thomson, it was "[p]retty clear ... that there is an obstruction from their home to the bay, and acacia trees on our undeveloped lot seemed to be the main culprit, and you have the Haneses' property in between the Bishops' view and our property, so both [the Haneses' and the City's trees] need to be dealt with to do some view restoration." High-value views of water and San Francisco from main living areas of the Bishops' house were being obstructed. The obstruction came from a fairly dense clump of "small brushy acacia[s]" on the City's lot. The solution that made sense to him was to first clear out this group of acacias "as a phase one[,] because you can get a fairly good idea of what [view] is going to be available, but you won't know for sure until that brushy material is gone.... [¶] I proposed a phase two where we come back and we evaluate once the small material is gone and see do any other trees need to be removed. Maybe some of the larger trees on the city lot just need some limbs removed off the bottom and we see under the trees or maybe there is just a selective tree here and there that would be removed because ... we're looking for a compromise and a balance."

***11** In all, he identified 21 "smaller non-protected size trees"7 in this clump that he believed it would be "reasonable to

remove." He also identified a clump of trees that were to remain on a steep bank next to the road to help with surface erosion. There were also a number of quite large Monterey pines, cypress trees and other trees, including some acacias, that would remain. But, in Thomson's view, the removal of the acacia clump he had identified would "absolutely" have made a difference to the Bishops' views even with the remaining trees on the slope. However, Mrs. Hanes objected to the removal of the acacia trees on City land and, as a result, the project had to be put "on hold to see if we could resolve that issue."

7 Mr. Thomson testified that eucalyptus, Monterey pines, and acacia trees under nine inches in diameter, four and one-half feet off the ground, were not protected and could be removed without first obtaining a permit.

Mr. Thomson did *not* endorse the view, espoused by defendants, that the City's trees and the Haneses' trees were redundant view obstructions. Mr. Thomson testified that he had no opinion "in terms of what view would be provided if only the acacias on the Haneses' property were removed," because his evaluation was for the City's acacia trees. Further, when asked if it would "be correct that you can't determine what view would be provided until the city's acacias are cut and the Haneses' acacias are cut because one is redundant of the other," Thomson replied: "I would say that I couldn't tell the full extent, but you can see small gaps between everybody's trees to give you a hint of daylight through and down to the Bay, so you do get some idea of what might pop open."

Defendants also argue that Mr. Thomson had no expertise with respect to the Open Space Conservation and Recreation (OSCAR) element of the general plan and was mistaken when he testified that the City lot at issue was not subject to OSCAR. Mr. Thomson acknowledged that he was not assigned to deal with OSCAR. However, he had researched the zoning designation of the lot at issue and had confirmed with the zoning manager, that the lot was zoned R30–S10 or residential with some building restrictions,8 and that "anything that is considered a park or open space always has the 'OS' designation in front of it." He agreed that if it were open space, it would be exempt from a private view claim.

8 Mr. Thomson testified that "the S–10 has the word 'scenic' in it, and maybe that's a misunderstanding. All it means is if you are going to build on that property, there are some requirements of height and setback for the building on that property since this is a scenic corridor, and height limits are going to be lower, and the building is going to be designed and constructed such that you are trying to minimize the impact to the public as they travel that road and try to preserve the views they can for the public."

Defendants presented *no* evidence at trial to contradict or refute Mr. Thomson's testimony.9 Their belated attempt to bring evidence before *this* court to suggest that "S–10 is an open-space scenic route designation, indicating that the affected properties are subject to [OSCAR]" cannot cure that defect in the trial evidence.10

9 Dr. Hanes did testify to his belief that "the way our property sits ... it is open land, it's an S10, it's part of the OSCAR plan...." However, the court struck that testimony. Furthermore, the court told defendants' counsel that if Mr. Thomson was wrong about the ordinance, he should tell the court during closing arguments and show the court a copy of the ordinance at that time. Counsel did not do so.

10 Defendants request that we take judicial notice of copies of zoning maps for the City of Oakland, and excerpts from the Oakland General Plan concerning the OSCAR, along with an a chart entitled "Addendum to City of Oakland General Plan and Zoning Map dated May 6, 2010." We decline to do so because the documents were not presented to the trial court and reference in part post trial dates.

Defendants also disagree with Mr. Thomson's opinion that the acacia trees on City property could be removed without public notice and comment. However, the trial court prevented Mr. Thomson from testifying about the legal advice given him by the City Attorney's Office about public notice and posting. Defendants presented no evidence on this point either. Moreover, whether or not removal of the City's trees was subject to public notice and comment has no bearing on the critical question before the trial court: whether defendants' acacia trees constituted a view obstruction and continuing nuisance, the City's acacia trees notwithstanding. Mr. Thomson's testimony constitutes substantial evidence in support of the finding that the City was and is prepared to remove or substantially thin the trees on its property that might also be obstructing the Bishops' views. Moreover, the court's own site visit confirmed, and provided substantial evidence for, the court's conclusion that "defendants' trees present a substantial obstruction to Plaintiffs' views from various perspectives on Plaintiffs' property." (*Wade v. Campbell* (1962) 200 Cal.App.2d 54, 62, 19 Cal.Rptr. 173 [trial court's site visit is evidence that can be used to support findings].) No abuse of discretion appears.

***12** Defendants also assert that the court's order unfairly punished them for exercising their right under the ordinance to protest "the City's decision to remove the grove of acacias at the end of their driveway ... that provided shade and seclusion

to their property ." Defendants' criticism is not well taken. In a footnote, the court noted the irony in defendants' claim that the *City's* trees, and not defendants', were "to blame for the loss of any significant views by the Bishops," when "some of the City's efforts to manage the tree growth on the City's own property were stopped by the Hanes." This footnote is not evidence of judicial misconduct.

Finally, defendants contend that the court erred in "saddling" the Haneses with 100 percent of the costs of remediation for two reasons: (1) because the ordinance, as they interpret it, requires the view claimant to have prevailed in the prior lawsuit, before they can be found liable for 100 percent of the cost of view restoration; and (2) the Bishops could not have anticipated "that a judge might, in the future, ignore the doctrine of res judicata and find that the Bishops were entitled to bring successive lawsuits on the their view claims." We reject these arguments for the following reasons.

As noted, the View Ordinance provides in relevant part that "[t]he tree owner shall pay one hundred (100) percent of [the cost of all restorative actions and replacement plantings] in those cases where: [¶] 1. The tree owner has refused to participate in good faith in the initial reconciliation or voluntary arbitration processes ... and where the view claimant has prevailed at trial or judicial arbitration; or [¶] 2. In any subsequent dispute between the same parties, to restore any view obstructed by the same tree or trees or any of the plantings substituted for the original offending tree or trees described in subsection A of this section." [I.e., "those cases involving any tree planted or allowed to sprout as a result of natural regeneration by the tree owner subsequent to the effective date of this chapter (August 5, 1980)."] (Oakland Mun.Code of Ord., tit. 15, § 15.52.060, subds. (A), (B)(1) & (2).)

The court made several factual findings in support of its conclusion that defendants' had refused to participate in good faith in the initial reconciliation or voluntary arbitration. The court found: "First, the Hanes delayed unreasonably in attempting to resolve this view dispute. Second, at no time have the Hanes tried to determine what steps, reasonable or otherwise, would restore all or part of the Bishops' views. Third, and perhaps as partial motivation for the previous facts, the evidence suggests that the Hanes are motivated by personal animus. For example, in his testimony, Dr. Hanes called the Bishops 'the face of evil,' [11] and in letters to the City of Oakland the Hanes called the Bishops 'neighbors from hell.' ... Fourth, the Hanes actively frustrated the City of Oakland's efforts to help both parties resolve their dispute without court action. Fifth, some of the Hanes' testimony regarding how much they like trees ... was directly contradicted by their prior actions. The Hanes removed trees on the northern edge of their property, without doing any replanting and leaving only unattractive stumps. The court can only conclude that the Hanes' apparent disquiet at the prospect that other of their trees might be removed is, to some extent, feigned. Sixth, and perhaps most strikingly, *the parties' experts actually agreed on the appropriate remedy in this case.* The court is left to wonder whether so much litigation was necessary."

11 Actually, Dr. Hanes testified, referring to the Bishops: "You know, villainy has many faces, and I think self-righteousness is probably the most beguiling and deceiving of all."

***13** "Bad faith" is an "amorphous concept," but it has been defined in this District as " ' "[t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake ..., but by some interested or sinister motive[,] ... not simply bad judgment or negligence, but rather ... the conscious doing of a wrong because of dishonest purpose or moral obliquity; ... it contemplates a state of mind affirmatively operating with furtive design or ill will. [Citation.]" [Citations.]' " (*Silver Organizations Ltd. v. Frank* (1990) 217 Cal.App.3d 94, 100, 265 Cal.Rptr. 681.) We review the court's finding of bad faith for substantial evidence. (*Id.* at p. 99, 265 Cal.Rptr. 681.)

Defendants take issue with "the court's factual assertion that the Hanes had refused to cooperate in the reconciliation progress." In fact, the court made no such assertion. The court did state that the Haneses had "delayed unreasonably in attempting to resolve this view dispute." As to this factual assertion, defendants argue only that "the merits of the claim of delay are questionable," and that the court failed to take into account Dr. Hanes' Hawaii residency and patient load. But the court was aware of these facts from Dr. Hanes' testimony. Defendants also take issue with the court's finding that they never tried to determine what steps, reasonable or otherwise, would restore all or part of the Bishops' view. Defendants claim they could not have known the court would "ignore the doctrine of res judicata," and the fact that the Haneses *did* engage in mediation with the Bishops in September of 2008, and *did* agree to remove some trees and top others, although that agreement did not restore the Bishops' views. Substantial evidence supports the court's conclusion that the Haneses had not participated in good faith, exhibited by two years of foot dragging, ineffectual efforts to reach a realistic resolution of the conflict, failure to work with the City of Oakland, and the expert testimony, even accounting for Dr. Hanes' scheduling problems, and defendants' belief in the merits of their res judicata defense.

C. The Court Did Not Err in Awarding Attorney's Fees.

As noted above, section 15.52.70 of the View Ordinance calls for each party to pay his or her own costs and attorney's fees, unless the dispute goes to trial or judicial arbitration, in which case the prevailing party is entitled to reasonable attorney's fees and costs of suit. Defendants do not challenge the reasonableness of the attorney's fees award, or the fee-shifting provision of the View Ordinance. In their opening brief, they argue only that "if this Court reverses the judgment, it must reverse the award of attorney's fees as well." In their reply brief, they argue: "The Bishops do not even attempt to defend the court's assertion that it was appropriate to shift fees because the Hanes had *prevailed* in the previous lawsuit." However, the court made no such assertion. Furthermore, since we find no error, we will affirm the judgment and the award of attorney's fees.

IV. CONCLUSION

***14** The doctrine of res judicata does not apply to defeat plaintiffs' action. Defendants' due process rights are not violated by application of the amended View Ordinance to them. The court's remedy is not unjust or unauthorized. The court did not err in awarding attorney's fees and costs.

V. DISPOSITION

The judgment is affirmed.

We concur: MARGULIES and DONDERO, JJ.

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JENKINS & HOGIN, LLP

A LAW PARTNERSHIP

MEMORANDUM

TO: MEMBERS OF THE COMMITTEE ON TREES AND VIEWS

FROM: ELIZABETH M. CALCIANO. ASSISTANT CITY ATTORNEY EMC

DATE: MARCH 26, 2012

RE: RESPONSE TO LEGAL CONCERNS RAISED REGARDING VIEW PRESERVATION ORDINANCE

INTRODUCTION

This memorandum responds to the legal concerns raised in recent correspondence provided to the Committee on Trees and Views ("Committee") from Stephen and Christine Greenberg, dated March 20, 2012, and Dr. Lynn Gill, dated February 29, 2012. This memorandum addresses only the legal, not the policy concerns, raised. Both communications express concerns regarding the legality of the View Preservation Ordinance (Rolling Hills Municipal Code Chapter 17.26) ("VPO").

SUMMARY RESPONSE

The legal concerns raised by the Greenbergs and Dr. Gill are not supported by the case law. See below for a discussion of the relevant law and a detailed response to the claims by the Greenbergs and Dr. Gill.

DISCUSSION

I. Background

California courts have upheld ordinances that protect views as a valid exercise of the police power. The police power provided to municipalities under the Constitution (Art 11, sec. 7) is broad and includes protection of aesthetic values. In *Ross v. City of Rolling Hills Estates* (1987) 192 Cal. App. 3d 370, the

California Court of Appeal upheld the City's denial of construction of a second story on a house in Rolling Hills Estates on the ground that the additional height would obstruct views. The court held that the ordinance was not impermissibly vague and that view protection was a valid exercise of the City's zoning power. In 1998, the Court of Appeal in *Kucera v. Lizza* (1998) 59 Cal. App. 4th 1141, extended that rule to view preservation from foliage, holding that the Town of Tiburon could validly protect views from foliage. Later, in *Echevarrieta v. City of Rancho Palos Verdes* (2001) 86 Cal.App.4th 472, the court upheld a view ordinance against arguments that it effected an unlawful taking and that it was impermissibly applied retroactively. Both are explained below.

A. Takings arguments.

The plaintiff in *Echevarrieta* raised a takings challenge to Rancho Palos Verde's (" RPV's") view ordinance "as applied".[1] The court noted two types of regulatory action that have been found to be *per se* takings. "Those are: (1) where the property owner has suffered a physical invasion of his property and (2) where the regulation denies all economically beneficial or productive use of land."[2]

The court found that the ordinance at issue did neither of these. The ordinance did not compel a physical invasion of Echevarrieta's property, "Rather, it is appellant's refusal to comply with Resolution No. 98-21[3], after ample notice and opportunity to correct, that has occasioned the threat of the City's entry onto the property. It does not therefore, rise to the level of a physical invasion. [Citations omitted.]"[4]

Nor did the Resolution deny all economic use of the land. The court likened the City's view restoration actions to common land use regulations.

> "Here, **while the City has imposed limitations on the height of preexisting foliage**, it is a legitimate exercise of police power which does

[1] There are two types of challenges: "as applied" which means that the ordinance as applied to a particular circumstance effects a taking, and a facial challenge which means that the ordinance on its face effects a takings. A facial takings challenge was previously rejected in *Kucera v. Lizza*, 59 Cal.App.4th 1141, 1154, and the court in *Echevarrieta* agreed with that holding. (*Id.* at 479.)
[2] *Id.* at 480.
[3] The View Restoration Commission Resolution ordering Echevarrieta to trim eight of his trees.
[4] *Id.* at 480.

> not rise to the level of a taking. Contrary to 'per se' takings, traditional land-use regulations such as the imposition of minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property."[5]

The court also discounted the claim of loss of privacy, noting that the trees did not totally eliminate all viewing onto Echevarrieta's property from the neighbor's property.[6]

B. Retroactivity arguments

The Greenbergs and Dr. Gill claim that the VPO applies retroactively in violation of the due process clause of the Constitution. However, the VPO does not apply retroactively. Courts explain that: "[a] statute has retrospective effect when it substantially changes the legal consequences of past events."[7] However, courts have consistently held that: "[a] statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. [cites omitted.]"[8] In this case, the VPO does not penalize the past conduct of planting a tree, but only punishes future conduct of maintaining a tree that blocks a view inconsistent with the VPO.[9]

Mr. Echevarrieta cited to *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498 to support his similar claim that the RPV ordinance operated retroactively. That case involved a statute which reached back 30 to 50 years to impose automatically a liability of $50 to $100 million on a coal company for additional worker benefits.

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[5] *Id.* at 481, internal quotations omitted, citations omitted, emphasis added.
[6] *Id.* at 481.
[7] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232.
[8] *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 474.
[9] See *Burks v. Poppy Const. Co.* (1962) 57 Cal.2d 463, 474 (holding that a law which punished illegal discrimination in sale of housing that received public assistance did not operate retroactively merely because it may apply in some instances to housing which was receiving public assistance when the statute was enacted).

The Supreme Court explained that retroactive legislation is generally disfavored, as it deprives citizens of legitimate expectations and upsets settled transactions.[10] The Court concluded that the length of time that the Coal Act reached back to impose liability on the company and the magnitude of the liability raised substantial fairness question.[11] The court in *Echevarrieta* was not persuaded that the RPV view ordinance was retroactive like the Coal Act. The court acknowledged that the RPV view ordinance permitted the City to require the lowering of the height of vegetation that existed prior to the adoption of the ordinance, but the court did not find this to be impermissibly retroactive.[12]

Another California appellate court decision, *Bishop v. Hanes*,[13] issued recently, although not a published case and thus not citable in court, is persuasive because the court relied on *Echeverrieta* and similarly concluded that a City of Oakland view ordinance at issue in that case was not retroactive even though it applied to lower the height of vegetation in existence at the date the view ordinance was adopted. The court held that: "The fact that existing trees may or may not have obstructed the Bishops' views before [applicable amendments to a view ordinance] does not mean that the ordinance is retrospective in its application'" because "[a] statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. [cites omitted.]" Further, the court wrote, even if there were an argument that the City of Oakland ordinance applied retrospectively, it would not be unconstitutional:

> "In our view, *Echevarrieta* is dispositive of defendants' takings clause argument. Oakland's View Ordinance, too, is a proper exercise of the police power. Furthermore, we are not persuaded by defendants' arguments that the differences between the Oakland and Rancho Palos Verdes ordinances render *Echevarrieta* inapposite on the due process issue. Both ordinances operate retrospectively in the same way: Homeowners are allowed to keep their vegetation at preexisting heights, unless a neighbor complains that his or her views are obstructed. At that point, both ordinances encourage informal mediation to resolve the conflict. Under the

[10] *Id.* at pp. 532, 533, 118 S.Ct. 2131.
[11] *Id.*
[12] *Echevarrieta v. City of Rancho Palos Verdes* (2001) 86 Cal.App.4th 472, 482 (noting that the RPV ordinance did not automatically deprive owners of trees that pre-existed the ordinance, but rather required a process that included a noticed hearing).
[13] 2011 WL 5118770.

> Rancho Palos Verdes ordinance, if mediation fails to resolve the conflict, hearings and appeals ensue. Under the Oakland ordinance, if mediation fails, the ordinance creates a private cause of action, and places "the burden of proving the alleged view obstruction and the suitability of the proposed restorative actions" on the view claimant. (Oakland Mun.Code of Ord., tit. 15, ch. 15.52, § 15.52.090, subd. (C).) Ultimately, a judge decides, based on enumerated statutory factors, and, as this case demonstrates, the losing party may appeal. The Oakland ordinance provides fair notice and procedural protections that are comparable, if not identical to, the ones provided by the Rancho Palos Verdes ordinance. Defendants have not demonstrated that the Ordinance is arbitrary or irrational in application. Their due process rights were not violated."

The VPO is similar in all relevant aspects to the RPV ordinance in *Echeverrieta* and to the City of Oakland view ordinance in *Bishop*, so similarly it is not retroactive even though it can be applied to lower the height of vegetation in existence at the date the view ordinance was adopted. The *Bishop* opinion is attached as Appendix A for your reference.

II. Response to Greenbergs' Legal Concerns

Claim: The Greenbergs' claim that the current interpretation by the Committee on Trees and Views of the VPO is "retroactive, unconstitutional and flies in the face of all basic principles of law when applied in this case" because they claim that their lot and trees existed before the Reis' lot. They cannot find "a single case that created a view that did not exist in the history of the property."

Response: As noted above, both the ordinances in *Eschevarrieta* and the unpublished case of *Bishop v. Hanes* provide the City with the authority to create a view that existed before an ordinance became effective. There is no reference in either case to when a lot existed as being a relevant consideration or factor in each case. The courts' discussions centers on whether an ordinance is retroactive if it applies to lower vegetation before the date of the ordinance adoption. In *Eschevarrieta* , the court explained as follows:

> "If a property owner had trees exceeding 16 feet prior to November 17, 1989, impairing the view of a neighbor, the property owner is prohibited from letting that foliage grow any higher whether or not the neighbor has

> obtained a view restoration permit. . . . . [I]f the neighbor does eventually seek a permit, **the trees in excess of 16 feet can be ordered to be trimmed."**

(*Id.* at 484 (emphasis added.) Therefore, the ordinance in *Eschevarrieta* permits the City to require vegetation be trimmed to below the height that existed at the adoption of the ordinance, regardless of when it existed. This applies regardless of whose lots or trees were there before the other.

Claim: The Greenbergs disagree with our office that the *Echevarrieta* case is similar to this one.

Response: The similarities between the cases are as follows:

- Both ordinances allow the cities to require the removal of vegetation that blocks a view below the heights of the trees that existed at the time that the ordinances were adopted.
- Both ordinances employ an adjudicative hearing process wherein each party is provided notice and an opportunity to be heard before a committee orders a restorative action below the height of the foliage at the time of the ordinance. The *Echevarrieta* court wrote:

  > "Here, there is no automatic retroactive reach of the ordinance. Homeowners are allowed to keep foliage at the height it existed on the effective date of the Ordinance. It is only when another homeowner applies for a view restoration permit that the inquiry begins whether the foliage must be trimmed to a lower height [than that which existed at the effective date of the ordinance]."[14]

- In, *Echevarrieta* , the RPV view ordinance is challenged on grounds of vagueness, and the court rejected that challenge by noting: " '[A] substantial amount of vagueness is permitted in California zoning ordinances' in order to permit delegation of broad discretionary power to administrative bodies.[15]

It is true that there are factual differences between the cases. But the Greenbergs (and Dr. Gill) describe distinctions in the facts of the cases that make no

[14] *Echevarrieta v. City of Rancho Palos Verdes* (2001) 86 Cal.App.4th 472, 482.
[15] *Id.* at 483.

difference. It is true in *Echevarrieta* the court noted that: "The trees did not exist prior to the establishment of either Keilbach's or appellant's lots."[16] However, the court in *Echevarrieta* does not indicate that it relies on this fact in making its ruling. Similarly, the court makes no statement that whether an ordinance is adopted by initiative or by action of the City Council makes a difference to the court. Both are enforceable local laws.

Claim: The Greenbergs also state that the intent of the VPO is unclear because the terms such as "maturing landscape" and "restorative action" imply that the VPO was not intended to require the removal of already "mature" landscape.

Response: The intent of the VPO is clear. The VPO references no date to which a view is to be restored because the homeowner is entitled to the view that would exist but for the view blocking trees, regardless of when the homeowner purchased the property, regardless of when the lot was created, and so forth.

Courts interpret statutes pursuant to certain rules of statutory construction. The California Supreme Court describes these rules as follows:

> "To interpret statutory language, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." . . . . In undertaking this determination, we are mindful of this court's limited role in the process of interpreting enactments from the political branches of our state government. . . . . In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, " ' "whatever may be thought of the wisdom, expediency, or policy of the act." . . . . ' " "[A]s this court has often recognized, the judicial role in a democratic society is fundamentally to interpret laws, not to write them. The latter power belongs primarily to the people and the political branches of government. . . . It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. . . . **"This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed."**[17]

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[16] *Id. at* 476.

[17] *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632-33 (cites omitted, emphasis added).

The Rolling Hills Municipal Code ("RHMC") defines a "view" and "view impairment" as follows:

> "View" means a view from a principal residence and any immediately adjoining patio or deck area at the same elevation as the residence which consists of a visually impressive scene or vista not located in the immediate vicinity of the residence, such as a scene of the Pacific Ocean, off-shore islands, city lights of the Los Angeles basin, the Palos Verdes Hills or Los Angeles Harbor.
>
> "View impairment" means a significant interference with and obstruction of a view by landscaping, trees or any other planted vegetation."

The VPO describes the intent of the ordinance as follows:

> "The City recognizes the contribution of views to the overall character and beauty of the City. Panoramic views of the Pacific Ocean, Catalina Island, City lights and Los Angeles Harbor are a special quality of property ownership for many residential lots in the City. These views have the potential to be diminished or eliminated by maturing landscaping located on private property. The purpose of this chapter is to protect this important community asset by establishing procedures for the protection and abatement of view obstructions created by landscaping, while at the same time protecting natural vegetation from indiscriminate removal."

The RHMC does not establish a point in time from which a view must be preserved such as the date of the subdivision, final certificate of occupancy for a current or future house, the move-in date of a current resident, or any specific date. There is no intent expressed in the intent section of the ordinance to reference any particular date. To read a date into the ordinance from isolated words such as "maturing" and "restorative" would contravene the clear intent of the VPO. The VPO is unambiguous on this point. The community and the policy-makers can vote to add a date as a matter of policy, but the courts will not act as policy-makers and create a date from whole-cloth and insert one.

III. Response to Dr. Gills' Legal Concerns

Claim: Dr. Gill states that the VPO is so vague as to violate due process because it is not clear about the date a view is established. He argues that this forces the Committee to pick a date for a view, and if they pick one before the VPO was established, that would be unconstitutionally retroactive.

Response: As noted above in the last response to the Greenbergs' concerns, the VPO is not vague as to date – it purposefully chooses no date. Furthermore, in *Echevarrieta*, the court rejected a vagueness challenge in that case by noting: " '[A] substantial amount of vagueness is permitted in California zoning ordinances' in order to permit delegation of broad discretionary power to administrative bodies.[18]

Dr. Gill also distinguishes the *Echevarrieta* case on five grounds set forth and addressed below:

Claim: In *Echevarrieta*, the view ordinance was adopted by referendum, but the VPO was adopted by City Council.

Response: As noted above, this is a distinction that makes no difference. Both are enforceable local laws.

Claim: In *Echevarrieta*, the view ordinance "grandfathered" the height of foliage existing on November 7, 1989, except that if a tree was higher than 50 feet, it had to be maintained no higher than 50 feet. In Rolling Hills, the VPO is "vague and unclear" concerning the date that "view-obscuring foliage exists."

Response: This is an incorrect statement of the RPV ordinance as described by the court in *Echevarrieta* . Moreover, it is not true as stated in Dr. Gill's correspondence that in *Echevarrieta* the court picked a date before which all foliage was grandfathered in. Instead, the ordinance expressly stated the opposite: "*The purpose of this paragraph is to ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not 'grandfather' or otherwise permit such foliage to continue to block a view.*"[2] (Italics added.)" (*Id.* at 483-84.)[19]

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[18] *Id.* at 483.

[19] The full quote from *Echevarrieta* is as follows: "The Ordinance provides at section (B)(3): "3. Foliage Obstruction. No person shall significantly impair a view from a viewing area of a lot by permitting foliage to

Claim: In *Echevarrieta*, all new plantings after November 7, 1989 had to be maintained at a height less than 16 feet. This provision is not contained in the VPO.

Response: This is a matter of policy and is not mentioned by the court in *Echevarrieta* as a basis for its decision.

Claim: In *Echevarrieta* , the area of the city called Miraleste with a large number of trees predating the city is exempt from the view ordinance, and Miraleste is strikingly similar to Rolling Hills where there are hundreds of beautiful trees on larger properties.

Response: This is a matter of policy and is not mentioned by the court in *Echevarrieta* as a basis for its decision.

Claim: The view ordinance in *Echevarrieta* arose when Mr. Echevarrieta, knowing the provisions of the view ordinance, refused to maintain his trees below the prescribed heights. The court found that the view ordinance in *Echevarrieta* was not unconstitutionally retroactive or so vague as to constitute a violation of due process. Dr. Gill claims that the VPO is vague regarding a date of view and "retroactive if a date is picked" before an owner purchases his or her property "to establish height of foliage."

Response: The VPO is not ambiguous because it has no date in its view definition. It has no date because that was the City Council's intent as noted above in the response to the Greenbergs' last claim above. The VPO references no

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grow to a height exceeding: [¶] a. The height determined by the view restoration commission through issuance of a view restoration permit under Section 17.02.040 (C)(2) of this chapter; or [¶] b. If no view restoration permit has been issued by the view restoration commission, a height which is the lesser of: [¶] i. The ridge line of the primary structure on the property; or [¶] ii. Sixteen feet. [¶] If foliage on the property already exceeds the provisions of subdivisions (i) and (ii) of Section 17.02.040(B)(3) of this chapter on the effective date of this section, as approved by the voters on November 7, 1989, and significantly impairs a view from a viewing area of a lot, then notwithstanding whether any person has sought or obtained issuance of a view restoration permit, the foliage owner shall not let the foliage exceed the foliage height existing on the effective date of this section (November 17, 1989). *The purpose of this paragraph is to ensure that owners of foliage which violates the provisions of this paragraph on the effective date of this section shall not allow the foliage to increase in height. This paragraph does not 'grandfather' or otherwise permit such foliage to continue to block a view.*"[2] (Italics added.) (*Id.* at 483-84.)

date to which a view is to be restored because the homeowner is entitled to the view that would exist but for the view blocking trees, regardless of when the homeowner purchased the property, regardless of when the lot was created, and so forth. Under the applicable cases law, such a date is not required. Also, see Section I.A. on "Retroactivity" above and see the discussion of the Greenbergs' first claim and response that explains that the courts are unconcerned with whether the City enforces the height of foliage established before or after a lot was purchased. This is a matter of policy for the City Council or community to decide.