



City of Rolling Hills

INCORPORATED JANUARY 24, 1957

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Agenda Item No: 4-A
Mtg. Date: 08-09-12

TO: HONORABLE CHAIR AND MEMBERS OF THE PLANNING COMMISSION
FROM: ANTON DAHLERBRUCH, CITY MANAGER
YOLANTA SCHWARTZ, PLANNING DIRECTOR
SUBJECT: VIEW ORDINANCE
DATE: JULY 13, 2012

ATTACHMENTS:

1. Rolling Hills
 - Municipal Code Sections 17.12 and 17.26
 - "Maintaining Scenic Views in Rolling Hills" FAQ
 - Complaint Application
 - 1987/88 Planning Commission minutes
 - 1988 City Council minutes
 - Matrix of View cases
 - RHCA View Policy
2. Other Municipal View Ordinances
 - Beverly Hills
 - Laguna Beach
 - Rancho Palos Verdes
 - Rolling Hills Estates
 - Sausalito
 - Tiburon
3. Correspondence
 - From Mr. Gill
 - March 24 email "Chapter 17.26 View Preservation
 - April 11 email "VPO"
 - April 22 email "Draft view ordinance revision"
 - April 27 email "Results of Trees and Views Survey"
 - July 24 email "Planning Commission Public Forum on View Preservation – August 9 7 PM"
 - From Mrs. Greenberg
 - March 20 letter to Planning Department/Committee on Trees & Views
 - From Mr. Dahlerbruch
 - March 30 letter to Mr. Gill
 - March 30 letter to Mrs. Greenberg
4. Ballot Measure for March 2013
 - Title and Summary
 - Ordinance language
5. Legal
 - Murrell v. Rolling Hills Community Association
 - Echevarrieta v. City of Rancho Palos Verdes
 - Bishop v. Hanes
 - "Response to legal concerns raised regarding view preservation ordinance" prepared by Elizabeth M. Calciano, Asst. City Attorney

RECOMMENDATION

At its regular meeting of June 25, the City Council directed that the Commission review the City's View Ordinance (Municipal Code Sections 17.12.220 and 17.26) and consider whether to recommend changes to the Ordinance in light of two recent contentious View Ordinance proceedings (one of which is still pending) and an initiative petition seeking amendment to the Ordinance that has recently qualified for the ballot. At this meeting, it is recommended that the Planning Commission receive public comment on the subject matter and inform staff whether it desires any additional documentation or answers to specific questions. Time permitting, the Planning Commission may desire to begin discussing the City's existing ordinance in relation to possible modifications. Staff recommends that this matter then be continued to a future meeting for further consideration. Topics for consideration are listed below.

BACKGROUND

In March 1988, after 9 meetings and hearing approximately 93 public comments, the Planning Commission recommended the City Council adopt an ordinance addressing Views. The following June, after 5 meetings and approximately 22 additional public comments, the City Council adopted the View Ordinance that in substantial form remains the same today. Some of the residents who participated in the public process 24 years ago are the same residents who have recently expressed comments about Views. Many of the issues and concerns, on both sides of the topic, also remain the same.

Adoption of the View ordinance by the City Council reflected a value judgment that Views are a significant feature of the community. Since the adoption of the ordinance, the City has received thirteen (13) complaint applications, of which: three (3) were resolved through mediation, two (2) were withdrawn and resolved privately, two (2) outcomes are not known because the files are incomplete, two (2) were resolved by the Committee on Trees and Views, and four (4) were appealed to and addressed by the City Council. Of the six (6) total cases that went through the public process (Committee on Trees and Views/City Council), it was found in one case that there was "no significant view impairment" and thus, no action was directed. In two cases, a total of eight (8) trees were identified for removal along with tree trimming. In two of the cases, only tree trimming was directed. And, in the most recent case adjudicated by the Committee, approximately 20% (22 trees) of the subject landscaping were identified for removal, approximately 50% (55 trees) were subject to trimming and approximately 30% (31 trees) required no action. This case is currently on appeal to the City Council. In only one instance has a party to a View proceeding challenged a final decision of the City Council; that case is currently pending in Superior Court.

All the case files are available for public review at City Hall.

REVIEW OF ORDINANCE MODELS¹

A number of jurisdictions throughout the State have passed ordinances providing protection for private views. The specific legislative approach taken varies rather greatly from jurisdiction. Two view preservation ordinance models on either end of the spectrum are the Tiburon Model, which provides for a private right of action for enforcement, and the Rancho Palos Verdes model, which provides for a local agency review and permitting system. Both models have been the subjects of published cases in the Court of Appeals. Some other jurisdictions, like Sausalito and Laguna Beach, have chosen a hybrid approach that are also discussed below.

1. Private Cause of Action—The Tiburon Model

The Town of Tiburon in Marin County has sought to preserve the views of its homeowners by creating a privately enforceable right 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." TMC § 15-1(a)(1). Property owners are therefore forbidden to allow their foliage to unreasonably block the protected views of others, see § TMC 15-4(a), and homeowners are given standing to sue them if they violate this rule. See § TMC 15-3.

This right is conditioned, however, upon the homeowner's completion of several dispute resolution attempts prior to litigation. Thus, a person who wants to require a neighbor to trim, top, or remove foliage that has obstructed his or her view must first engage in informal discussions with the neighbor to resolve the issue. See § TMC 15-9. Upon proof that such talks have failed, the homeowner must attempt to engage his or her neighbor in non-binding mediation. If this should fail, he or she may then attempt to engage in binding arbitration. See TMC § 15-11. Only if should this too fail, or the foliage owner refuses to participate, is the homeowner authorized to litigate the issue. See § TMC 15-12.

The Tiburon ordinance provides that all costs of mediation and arbitration are to be split evenly between the complaining homeowner and the foliage owner, unless the parties agree otherwise or permit the mediator or arbitrator to apportion the costs differently. See TMC § 15-13. The costs of any eventual litigation are to be apportioned by the judgment of the court or settlement agreement. Lastly the cost of any restorative action (i.e., trimming, topping, or removing offending foliage) is "[t]o be determined by mutual agreement, or through mediation, arbitration, court judgment or settlement." *id.* The result of the private litigation model and these provisions is that the city bears little if any administrative costs in its attempt to preserve the right of its citizens to enjoy their scenic views.

The primary advantage to a local government of the Tiburon model is financial. Because it simply creates a privately enforceable right, it ideally achieves the goals of

¹ Jenkins & Hogin provided staff the following information regarding the various types of view preservation/restoration ordinances in place around the state.

preserving and restoring views without greatly adding to a municipality's administrative or litigation costs. The costs of both resolving the issue and any restorative action are instead born by the private parties. This results in an efficient outcome by encouraging parties to enforce their rights under the ordinance only when they most value them, thereby discouraging petty disputes.

The largest drawback to the Tiburon model is that a private enforcement mechanism necessarily cedes control of local land use decisions to the courts because, although the ordinance sets out specific standards for which foliage should be found to be violating the law, see TMC § 15-8 (describing a preferred hierarchy of restorative actions), the ultimate determination of rights and the extent of any required corrective action will be made by a mediator, an arbitrator, or the court and not by the municipality. The extent to which this is a real concern will necessarily vary on two conditions: the extent to which a municipality wishes to control land uses in its jurisdiction, and the scope of disputes arising under the newly created right. For example, a city may care not to be involved in a simple dispute between two neighbors over a single pine tree. The City of Westlake Village has taken a similar approach with its view preservation ordinance.

2. Local Review & Permitting System - The RPV Model.

In contrast to the Tiburon Model, the City of Rancho Palos Verdes (RPV) has created two view recovery procedures; one to "Preserve" views which existed at the time their Ordinance became effective (November 1989) and the other procedure to "Restore" a view that existed at the time the affected view lot was legally created. See generally RPVMC § 17.02.040 *et seq.* The City's Planning Commission administers the View Restoration Permit process and with this process the homeowners are not given standing to enforce any rights in private litigation. Under the View Preservation Application process, foliage owners are required to maintain their foliage at the same height that it was in November 1989 or thereafter and the burden of proof rests with the property owners whose views have become significantly impaired. The RPV ordinance also differs from the Tiburon model by accounting for the impact on protected views of both new development as well as foliage growth. The system is thus bifurcated with one procedure for reviewing height variance requests, and another for permits to remove offending foliage.

The RPV system for issuing permits to remove foliage that blocks a protected view is unique. Under the system, both for "Preservation" of view and "Restoration" of view a resident or homeowner whose view has become impaired must first attempt to consult with the foliage owner and, upon proof of failure to resolve the issue privately, may then apply to the City. The City's View Restoration Commission reviews applications for a view restoration permit and City staff reviews applications for view preservation permit under its code enforcement ability. Once an application is filed for view restoration, the Commission then holds a noticed hearing on the matter and issues a permit to have the foliage removed, altered, or replaced if it makes six findings, including that the foliage significantly impairs a view from the applicant's viewing area and that any change will not cause an unreasonable infringement of the privacy of the occupants of the property upon which the foliage is located. See RPVMC § 17.02.040(C)(2)(a) and RPVMC § 17.02.040(C)(2)(c). The applicant, foliage owner, or any other affected party may

appeal this decision to the city council. See RPVMC § 17.02.040(C)(2)(g). Execution of the permit is provided for as follows:

[T]he [planning] director shall send a notice to the property owner to trim, cull, lace or otherwise cause the foliage to be reduced to sixteen feet or the ridge line of the primary structure, whichever is lower, or such limit above that height which will restore the view. The applicant shall be responsible for the expense of the foliage removal and/or replacement ordered pursuant to this subsection only to the extent of the lowest bid amount provided by contractors licensed to do such work in the city of Rancho Palos Verdes and selected by the applicant. If after ninety calendar days the foliage has not been removed, the city of Rancho Palos Verdes will authorize a bonded tree service to trim, cull, lace or remove the identified foliage at the owner's expense. After the initial trimming, culling, lacing or removal of the foliage, the owner, at the owner's expense, shall be responsible for maintaining the foliage so that the view restoration required by the view restoration permit is maintained. § RPVMC 17.02.040(C)(2)(d).

The RPV ordinance's cost-shifting provision thus differs from the Tiburon model in placing almost all the costs of restorative actions on the party asserting the right to a protected view. It also differs in explicitly allowing the city agent to enter the premises and complete the task if the foliage owner refuses to comply with the permit order.

The RPV model puts the city in the position of enforcing rights afforded by the view preservation ordinance. Appointed members of the View Restoration Committee determine which trees create an obstruction and what restorative measures are involved, with the city council sitting as the forum for appeals. The degree of control ceded to the courts is thus limited to mandamus review of city decisions.

This degree of local control necessarily comes at a price, however. First, although the RPV model shifts the costs of restorative actions to the party asserting the view restoration right, it costs a city money to establish and administer the permitting system. It is possible, however, to recoup some administrative costs with permitting fees. Second, such a system potentially subjects the city itself to litigation.

3. Hybrid Models—Laguna Beach and Sausalito

In between the purely private litigation established by the Tiburon Model and the wholly municipal permitting scheme of the RPV model, there are a range of options available. The cities of Laguna Beach and Sausalito have both opted to adopt the basic structure of the Tiburon Model (reconciliation, mediation, arbitration, and litigation), but have inserted local governmental action at some point prior to litigation.

Thus, in Laguna Beach a property owner is eligible to file a complaint/application in order to preserve a reasonable amount of view which existed after either the property acquisition date or the effective date of the ordinance, whichever is later. After the complainant has unsuccessfully tried to resolve the issue on his or her own, the issue must be presented to a Tree/View Review Equity Evaluation (TREE) Board prior to attempts at mediation, arbitration, litigation. See Laguna Beach Municipal Code (LBMC) § 12.16.060. The TREE Board holds a noticed hearing and issues findings as

to whether the complainant's view is unreasonably blocked and if so what corrective action should be taken. See LBMC § 12.16.080. The decision of the board is non-binding, however, and participation in the hearing is not mandatory. A tree owner's failure to participate may, however, be brought to the court's attention in any subsequent litigation.

The Laguna Beach ordinance thus combines both the private litigation model of the Tiburon ordinance and the municipal review of the RPV model. It may thus impose more administrative costs on the city than the Tiburon model, but does not subject it to further direct litigation.

Sausalito's ordinance also follows the basic Tiburon model, but entails more municipal involvement than the Laguna Beach ordinance. A property owner in Sausalito may file an application for view preservation that existed at the time of purchase of the property. The ordinance also is clear that the owner is eligible for a not a panoramic view. Like the Tiburon model, the complainant must first attempt to resolve a view dispute through informal meetings, mediation, and arbitration. See Sausalito Municipal Code (SMC) § 11.12.040(B). At the arbitration phase, however, the city's Trees and Views Committee acts as the arbitrator at a noticed hearing, the outcome of which is binding on the parties. See SMC § 11.12.040(B)(3). Sausalito's ordinance further deviates from the Tiburon model by requiring parties who forgo arbitration to solicit a Fact Finding and Advisory Decision of the Trees and Views Committee before proceeding to litigation. See SMC § 11.12.040(B)(4). Like the decision of Laguna Beach's TREE Board, this decision is non-binding, and either party may subsequently pursue litigation. Unlike the Laguna Beach ordinance, however, the Sausalito ordinance purports to create a rebuttable presumption in such litigation that the decision of the Trees and Views Committee is correct, thus shifting the burden to the party pursuing litigation to show otherwise. The Sausalito ordinance, then, creates a private right of action but also attempts to maintain a large degree of municipal control over the final view preservation outcome by entrenching its opinion via arbitration or an advisory opinion combined with a rebuttable presumption.

Generally speaking, considering the various options, the greater control a city wants to exert over view preservation disputes, the greater the costs it will incur from administration and litigation.

DISCUSSION – TOPICS FOR CONSIDERATION

Rolling Hills essentially has a hybrid View ordinance that aligns more closely with the Rancho Palos Verdes model. For discussion of possible modifications to the ordinance, the Planning Commission may want to:

1. Consider if the existing ordinance is appropriate for the community or, what alternative model should be adopted? Should the City have a View ordinance?
2. Consider whether “restore” and “restorative action” should be defined more clearly or replaced with another term.
3. Consider whether to modify the Ordinance by adding a time from which the view is considered protected.
3. Address whether “view” should be defined as “corridor” views or panoramic views or some other criteria.
4. Consider including a procedure to recover costs for completing CEQA review when necessary;
5. Whether there is another mechanism for handling the funds rather than the Complainant providing the funds to the homeowner to remove the trees;
6. Whether additional factors should be added to Rolling Hills Municipal Code (RH) § 17.26.060 to clarify the Committee’s discretion regarding how to apportion the costs of initial removal and subsequent maintenance
7. Fix typographical error in RH § 17.26.010; the fourth sentence should read: “The purpose of this chapter is to protect this important community asset by establishing procedures for the protection of views and abatement of view obstructions created by landscaping . . .”
8. Whether more than one viewing area should be considered for view preservation, and if so, what criteria should be employed.
9. Consider whether the ordinance should require the complainant to indemnify the City against any legal challenge.
10. Should there be consideration of trees located on properties beyond the adjacent property of the complaining party.

OTHER RELATIVE INFORMATION

The City of Rolling Hills together with the rest of the Peninsula Cities has been designated as a Very High Fire Hazard Severity Zone (VHFHSZ). As such, the Fire Department is strongly recommending that Eucalyptus Trees and Pine Trees not be planted and when possible removed. In addition, with every new development and substantial addition, the Fire Department Forestry Division reviews landscaping plans for "fuel modification zones" requiring that only certain plants be planted within certain distances to a structure. Very few trees may be planted within one hundred feet of a structure, which do not include Eucalyptus or Pine Trees.

Recognizing that views are a desirable asset of properties, the City has been placing a condition on most of its discretionary approved cases which require that any new trees, if a part of the landscaping scheme, be of a type that at maturity do not exceed the ridge height of the structure.

FISCAL IMPACT

Corresponding with the new 2012/13 fiscal year, the complaint and processing fees for a view impairment complaint was increased to more fully reflect the administrative cost of providing the service. The current fee structure is reflected in the attached "complaint application."

If the City Council chooses a different model of enforcement, or chooses to require indemnification from the property owner, the fiscal impacts from potential litigation could be significantly decreased. Further, changes ultimately adopted by the City Council that affect the City's administrative procedures may result a modification to the fees.

NOTIFICATION

Notice of this meeting to inform the community was included in two City newsletters.

CONCLUSION

When the Planning Commission has identified specific changes it desires to consider as modifications to the existing View ordinance, staff will prepare a Resolution for approval recommending an ordinance modification to the City Council.

AD:hl

View Ordinance staff report.docx