Provided at the request of Mayor Pro Tem Dieringer after the agenda packtes were prepared.

Agenda Item No: 6-A
Mtg. Date: 02/22/16

Hall v. City of Rolling Hills
BS 136694

Tentative decision on Petition for Writ of Mandate: granted

Petitioner Howard H. Hall, individually and as Trustee of the Howard H. Hall Living Trust ("Hall") applies for a writ of administrative mandamus overturning the decision by Respondent City of Rolling Hills ("City") requiring Hall to remove five trees from his property. The court has read and considered the moving papers, opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioner Hall commenced this proceeding on April 10, 2012. Hall seeks administrative mandamus overturning the City's March 12, 2012 decision which requires him to cut down five trees on his property.[1]

Hall owns the real property located at 48 Saddleback Road, Rolling Hills, California (the "Hall Property"). Real Party-in-Interest Oksana R. Bihun ("Bihun") is an individual residing in the City. Bihun is the owner of real property located at 49 Saddleback Road, Rolling Hills, California 90274 (the "Bihun Property").

On or about July 8, 2011, Bihun filed a view impairment complaint with the City (the "Tree Complaint") pursuant to the City's View Preservation Ordinance. After a mediation between Bihun and Hall, the Tree Committee noticed a public hearing on Bihun's Tree Complaint.

On November 15, 2011, the Tree Committee took a field trip to the Bihun Property and the Hall Property. The Tree Committee held a public hearing on the Tree Complaint on December 20, 2011.

In a resolution dated January 17, 2012, the Tree Committee decided that five trees on the Hall Property must be cut to the ground (the "Tree Committee Decision"). Hall alleges that the Tree Committee did not consider a less drastic remedy like pruning, trimming, or topping. The Tree Committee Decision stated that the five trees were to be cut to the ground, but any stump removal would be at Hall's expense.

The Tree Committee Decision did not provide for any compensation to Hall for removal of the trees. The Tree Committee Decision permits Hall to seek a total of $2,000 in reimbursement for removal of the stumps and purchase/installation of five new trees. Hall alleges that the $2,000 is only a fraction of the true cost of replacement vegetation, and is also completely arbitrary.

The Tree Committee Decision placed physical limitations on any replacement trees, including that any replacement trees have a mature height of 20 feet. Hall must also keep $250 on deposit with the City, which he forfeits if his replacement vegetation exceeds the height set forth in the Tree Committee Decision.

The Tree Committee Decision further provides that if replacement trees are not planted

[1]Hall also seeks a ruling that the decision constitutes an unlawful "taking." The taking claim is beyond the scope of mandamus review. Hall admits that he has filed a separate damages lawsuit against the City for inverse condemnation. In this proceeding, the court's inquiry is limited to whether the City's decision was an abuse of its discretion.

within a year, the entire replacement cost is to be borne by Hall, who must also bear the cost of future maintenance.

The Tree Committee Decision also required that the Decision be recorded against title to the Hall Property and the Bihun Property.

On or about February 3, 2012, Hall timely filed an appeal of the Tree Committee Decision to the City Council. The City Council noticed a public hearing on the appeal.

On February 27, 2012, the City Council took a field trip to the Bihun Property and the Hall Property. During the field trip, the Mayor noted that the Bihun Property had a view obstruction and asked if any of the City Council members disagreed. None did.

The City Council held a public hearing on the Tree Complaint on March 12, 2012. Hall requested a continuance to permit the parties to reach a resolution of the issues. The City Council denied the request for a continuance.

On March 12, 2012, the City Council enacted Resolution No. 1118 (the "Decision"). Hall alleges that the City did not consider any remedies that were less drastic than complete removal of the five trees to ground level. The City Council also required that the Decision be recorded against title to the Hall Property and the Bihun Property. Under the Rolling Hills Municipal Code ("RHMC"), recording must occur no later than thirty days after enactment of the Decision, which is April 11, 2012.

On or about March 21, 2012, Bihun gave a $2,750 check to Hall, which triggers a thirty-day period to cut the trees down.

B. Standard of Review

CCP section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15. The pertinent issues under section 1094.5 are (1) whether the respondent has proceed without jurisdiction, (2) whether there was a fair trial, and (3) whether there was a prejudicial abuse of discretion. CCP §1094.5(b). An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. CCP §1094.5(c).

The agency's decision at the hearing must be based on a preponderance of the evidence. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 514-15. Implicit in section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Topanga, 11 Cal.3d at 15.

Section 1094.5 does not in its face specify which cases are subject to independent review. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. In cases reviewing decisions which affect a vested, fundamental right the trial court exercises independent judgment on the evidence. Bixby v. Pierno, (1971) 4 Cal.3d 130, 143. *See* CCP §1094.5(c).

Hall suggests that the independent judgment test may be appropriate because a landowner

making a taking claim has a right to *de novo* review from the administrative decision. Mot. at 9. However, a landowner does not have a vested right to maintain his or her landscaping in its present state. *See* Echevarrieta v. City of Rancho Palos Verdes, (2001) 86 Cal.App.4th 472, 481. Consequently, the substantial evidence test applies to review of the City's decision on all issues other than whether it constitutes an unconstitutional taking.

"Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

An agency is presumed to have regularly performed its official duties (Ev. Code §664), and the petitioner seeking administrative mandamus therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137; Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691 ("[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion).

C. Governing Law - View Preservation Ordinance

In 1993[2], the City enacted a series of ordinances (RHMC §17.26.010 *et seq.*[3]) providing procedures for the protection of views and the abatement of view obstructions created by maturing landscaping (collectively, the "View Preservation Ordinance" or the "Ordinance").[4]

The intent of the View Preservation Ordinance is to preserve a property's view by providing procedures to restore views that have been diminished by vegetation that has matured and grown to obstruct the previously existing view. "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." §17.26.010.

The View Preservation Ordinance establishes a Committee on Trees and Views (the "Tree Committee" or the "Committee"), which is comprised of three members of the City

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[2]The City asserts that the Ordinance was first passed in 1988. The versions in the administrative record are dated 1993. *See* AR 26-27, 80-82.

[3]All further code references are to the RHMC unless stated otherwise.

[4]Hall asks the court to judicially notice the Ordinance and the request is granted. Ev. Code §452(b).

Planning Commission. §17.26.020. The Tree Committee is authorized to consult with experts and specialists as needed, for example arborists, but cannot incur any expense on behalf of the City without City Council approval. *See* id.

The Tree Committee is vested with the authority to administer the provisions of the View Preservation Ordinance. §17.26.020. The Ordinance authorizes the Committee to order any number of restorative actions as necessary to abate a complainant's view impairment, including but not limited to "removal, pruning, topping, thinning or similar alteration of the vegetation." §17.26.050(E). The Ordinance limits this authority to prohibit restorative action that "would adversely affect the environment or would unreasonably detract from the privacy or enjoyment of the property on which the objectionable vegetation is located." Id. The Tree Committee is also authorized to impose conditions that are necessary to prevent future view impairment. Id.

Section 17.12.220 defines a "view" as "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."

The View Preservation Ordinance provides grievance procedures for a complaining property owner who believes that a property's view is impaired. §§ 17.26.040-17.26.060. The complainant must file an application for abatement of view impairment on a form provided by the City. §17.26.040(A). The City Manager refers the matter to a mediation between the complainant and the owner of the vegetation giving rise to the complaint. §17.26.040(B). If the mediation does not resolve the matter, the matter is set for a public hearing before the Tree Committee. The Tree Committee makes a decision on the application after a public hearing and is empowered to order "such restorative action as is necessary to abate the view impairment and to restore the complainant's view, including, but not limited to, removal, pruning, topping thinning or similar alteration of the vegetation." §17.26.050(E). The Tree Committee's decision is final unless that decision is appealed to the City Council within twenty days. §17.26.050(F).

If a decision is appealed to the City Council, the City Council's decision on the application is final and conclusive. §17.54.060(D). A property owner must comply with a final decision under the View Preservation Ordinance or be subject to criminal prosecution, including a fine and imprisonment. §17.26.070(A). Failure to comply with a final decision also constitutes a public nuisance is subject to abatement by RHMC enforcement procedures. Ibid. Within 30 days of a final decision affecting vegetation on one's property, the property owner must also record an informational covenant on the title of his or her property. §17.26.080.

D. Statement of Facts[5]

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[5]Hall asks the court to judicially notice a request for admissions and the responses in Hall v. Bihun, LASC BC482607. These documents are court records subject to judicial notice if relevant. *See* Ev. Code §452(d). However, as the City points out, they constitute extra-record evidence which is inadmissible under CCP section 1094.5.

Similarly, the Declaration of Cy Carlberg, which appraises the value of the trees ordered removed and the cost of replacing such trees, and the Declaration of Jerry A. Britton, which

1. The Complaint

On July 11, 2011, Real Party-in-Interest Bihun, owner of the Bihun Property, filed an application to abate a view impairment related to several trees located on the Hall Property, alleging that several trees blocked city and ocean views from Bihun's house and back yard, and requesting that the trees be cut down in order to restore her view. AR 1-2. The City evaluated the application and determined it to be complete on July 13, 2011. AR 19.

Pursuant to section 17.26.040(B), the City Manager referred the matter to mediation. AR 20. Hall and Bihun engaged in private mediation, which was unsuccessful. AR 22. Shortly thereafter, Bihun requested a hearing before the Tree Committee. AR 24.

2. The Tree Committee Hearing

On November 15, 2011, the Committee conducted a noticed public hearing in the City Hall Council Chambers. AR 58. Following a presentation by City staff (62-63), Hall and Bihun each addressed the Committee. AR 63-67, 68-73. The Chair continued the public hearing for a field visit of the properties. AR 73-74.

The Tree Committee first visited the Bihun Property. It established a viewing area and determined that a view exists from the Bihun Property that is significantly impaired by trees on the Hall Property. AR 59, 78, 92. The Committee found the protected view is from the patio area at the northeast side of the Bihun house, immediately outside the living room area, from the standing perspective of an average height person. AR 193. *See* §17.26.050(D).

The Tree Committee then visited the Hall Property and viewed the trees at that location. AR 60. The Committee adjourned the meeting and continued the public hearing to a future date when it could discuss mitigation measures to restore the view. AR 59-60.

Photographs depict the view from Bihun's residence. AR 56-57. The view includes the distant city lights and mountains. However, the trees at the Hall Property significantly obstruct the view.

On December 20, 2011, the Tree Committee resumed the public hearing. Again, Hall and Bihun addressed the Committee. AR 94-102, 132-38. Hall argued untimely notice with respect to some of the trees at issue (AR 94-95), tree removal would depreciate his property's value (AR 95), the trees are beautiful and are enjoyed by "all of us" (AR 96), and Bihun acted with unclean hands by cutting down 300 feet of his trees and shrubbery without his consent (AR 96-101).

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concerns the lost market value of the Hall Property and increased market value of the Bihun Property from removal of the trees, are both inadmissible extra-record evidence.

Hall argues that this evidence is relevant to his taking claim, but that claim is not before the court. *See infra*. Hall relies on Hensler v. City of Glendale, ("Hensler") (1994) 8 Cal.4th 1, 15-16, which provides that a taking claim adequately presented at administrative hearing may be reviewed on mandamus, and the review is *de novo*.

This reliance on Hensler is misplaced because nothing in that decision purports to obviate CCP section 1094.5(e). Hall does not show that his extra-record evidence should be admitted at the mandamus hearing because it was improperly excluded at the administrative hearing or did not exist at the time of that hearing and could not be presented in the exercise of due diligence. *See* CCP §1094.5(e). The City's objection to the extra-record evidence is sustained.

Bihun stated that the trees in question completely block her view from the living room, dining room and study, and the neighbors trim their trees. AR 132-33.

The Committee discussed multiple options for abatement of the view, including "topping" the trees (AR 105), grouping the trees and addressing abatement separately for each group (AR 107), and removing and replacing the trees with foliage that would not grow into the view area (AR 112). City staff provided evidence regarding the advice and opinions of several landscape professionals and arborists on how best to remediate the situation and, more specifically, why "topping" pine trees would not work because their center needs to be intact and there is a real risk of losing the tree. AR 104-05. The Committee considered what amount Bihun would pay for replacement trees and decided on no more than $2,000. AR 122. At the hearing's end, the Committee directed staff to prepare a resolution making written findings and providing remediation of the view based on the Committees' deliberations. AR 140.

3. <u>The Tree Committee Decision</u>

On January 17, 2012, the Tree Committee considered the resolution prepared by staff. AR 163-89. The resolution proposed removal of five trees and no action on three others. AR 164. It allowed $2,000 to replace the removed trees, and imposed a required on Hall to maintain a maximum tree height of 20 and width of 15 feet. AR 165. Bihun responded to Hall's unclean hands argument (AR 168-70), and argued that the three trees proposed for no action seriously impair the view from her bedroom window. AR 171-72. She opposed the resolution on the ground that it did not affect these three trees. AR 173. The Committee heard testimony from Bihun and, following discussion, approved the resolution unanimously (the "Tree Committee decision"). AR 187, 193-97.

4. <u>The City Council Appeal</u>

Hall submitted a request for appeal. AR 222. On February 27, 2012, the City Council held a duly noticed public hearing and visited the two properties. AR 308. In the field, the Council viewed the trees from the perspective of Bihun's residence and from the Hall Property. Upon completion of the visit, the City Council continued the public hearing to resume at City Council chambers. <u>Ibid</u>.

At the public hearing, additional testimony was taken from Hall, Bihun, and a neighbor. Bihun argued that the proposed $2,000 was more than sufficient to grind stumps, which is about $175-325 per stump, and to plant new trees at $280 per tree. AR 322. Upon discovering that one of the trees was mismarked on a diagram, the Council decided to continue the public hearing to the next regular meeting of the City Council so that staff could verify the accuracy of the diagram. AR 335-39.

The City Council received written testimony from Lynne Hersche ("Hersche"), a licensed broker. She opined that the trees, which are located on a hillside driveway and/or a City easement, away from the Hall Property residence which faces a City view and not the street, driveway, and trees. The trees in question provide neither privacy nor shade for the Hall Property residence and their removal would not diminish the Hall Property's value. AR 260. A second real estate professional attested that trees by themselves do not add value to a property. Rather, the quality of landscaping does. AR 261. The City Council also received a new series of aerial

photographs depicting the view obstruction. AR 376-78.

5. The City Council Resolution

On March 12, 2012, the City Council heard additional testimony from Bihun and Hall. Bihun argued that the other three trees should be included in the order. AR 413. Hall argued that his trust actually owns the Hall Property and there are tenants on the Hall Property, neither of whom received notice. AR 414-15. He argued that the City would be liable for damages if it adopted the Tree Commission's resolution. AR 416. The City Council debated and voted against a motion to order tree trimming for the three trees outside the Commission's resolution. AR 425-28.

The City Council voted unanimously to adopt Resolution No. 1118 (the "Resolution") requiring restorative action substantially similar to that called for in the Committee's resolution. AR 437. Among other provisions, the Resolution finds that Bihun's view is significantly impaired, and abatement is necessary to restore the view. Within 30 days, Bihum is directed to obtain three bids to remove five specified trees flush to the ground and provide a cash deposit in the amount of the lowest bid. AR 438. The tree removal must occur within 30 days of Bihun's cash deposit. Ibid. Bihun must reimburse Hall $2,000 to remove stumps and replace the trees within one year. AR 439. The replacement trees must not grow higher than 20 feet and wider than 15 feet. Ibid. Hall must maintain any replacement trees. Ibid. The Resolution shall be recorded on the title of the two properties and run with the land. AR 440. Both property owners must deposit $250 with the City for future inspections. AR 438.

E. Analysis

Petitioner Hall contends that the Resolution lacks substantial evidence, the City Council's Resolution exceeded its authority under the Ordinance and violated state law, and the Resolution constitutes an unconstitutional taking without just compensation under the Fifth Amendment of the United States Constitution.

1. The Taking Issue

Hall argues that the City's application of the View Preservation Ordinance in its Decision is an unconstitutional taking. Mot. at 11. Apparently disputing the order for tree removal as opposed to mere trimming, he contends that the City has taken his property for public use without just compensation. *See* Lingle v. Chevron U.S.A., Inc., (2005) 544 U.S. 528, 536. Alternatively, the City has taken his property and given it directly to Bihun, which is unlawful even with payment of just compensation. *See* Miller v. McKenna, (1944) 23 Cal.2d 774, 782-83. Hall notes that a Florida court has held that a public entity may not order the destruction of a healthy animal or tree that is not dangerous to others without compensating the owner. Mot. at 7. *See* Dept of Agriculter & Consumer Services v. Bogorff, (Fla. 2010) 35 So.3d 84, 90.

Hall relies on Hensler, *supra*, 8 Cal.4th at 1, in which the California Supreme Court held that a landowner cannot not assert an inverse condemnation action on the basis of a regulatory taking without first exhausting administrative and judicial remedies. The Hensler court first explained that a regulatory taking differs from a government occupation or damage to a property. The latter generally requires compensation under the Takings Clause, but where the government

merely regulates use of the property, compensation is required only if the regulation's purpose or economic impact on the owner show that the regulation unfairly singles out the property owner to bear a burden that the public as a whole should bear. Id. at 10 (citation omitted). This requires an individualized assessment of the impact of the regulation on the piece of property and its relation to a legitimate state interest. Ibid. (citation omitted).

The Hensler court noted that the Takings Clause conditions the state's right to take private property for public use on the payment of just compensation, but it leaves to the state the procedures by which compensation may be sought. Id. at 13. In California, where property is damaged or physically occupied, the inverse condemnation action may be brought immediately because the irrevocable taking has occurred. Ibid. If the alleged taking is a regulatory one resulting from the application of zoning laws or regulations which limit development of real property, the landowner must afford the state the opportunity to rescind the regulation or exempt the property once it has been judicially determined that the regulation constitutes a taking. Ibid. The owner may make a facial or as applied challenge to the regulation. A facial challenge may be made through declaratory relief, and an as applied challenge may be made through administrative mandamus and may be joined with an inverse condemnation claim. Id. at 14-15. Damages from the taking may be sought in the administrative mandamus or inverse condemnation claims. Ibid. Compensation may be paid only if there has been a final determination of a taking and the public agency declines to rescind its action to avoid paying compensation for a permanent taking. Ibid.

The property owner is entitled to a judicial determination of whether there has been a regulatory taking. Id. at 15. The Hensler court agreed with the appellate court in Healing v. California Coastal Commission, (1994) 22 Cal.App.4th 1158, 1175,[6] that an administrative agency is not competent to determine whether its own action is a taking and in many cases administrative mandamus is not an adequate forum to try a taking claim. Id. at 16. If the administrative hearing is not one in which the property owner has a full and fair opportunity to present relevant evidence on the taking issue, at which witnesses testify under oath and are cross-examined, the administrative record in a mandamus proceeding will not be adequate to determine whether a taking has occurred. Ibid. If, on the other hand, the administrative proceeding resulted in full litigation of the taking facts, the mandamus court may hear the taking issue, addressing additional issues of law. Ibid. The court's review of the evidence on the taking claim is *de novo*. Ibid.

Where the administrative hearing did not result in the development of relevant taking facts, the owner is assured a full and fair hearing by joining an inverse condemnation claim with the mandate proceeding. In the inverse condemnation proceeding, the owner may litigate both the taking claim and, if successful, assert a right to jury trial on inverse condemnation. Ibid.

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[6]The appellate court in Healing held that administrative mandamus is not a substitute for trial before a court on the taking issues, which may consist of the legitimacy of the public interest, how much it is furthered by the regulatory action, the public benefit expected or obtained, the degree of impairment of the owner's property rights. Id. at 1174 (citation omitted). These things cannot be assessed without a proper factual record, which cannot be developed at the administrative proceeding in which a permit application is denied. Id. at 1174-75.

The facts necessary to Hall's taking claim were not presented at the Tree Committee or City Council hearings. None of the taking issues -- the legitimacy of the public interest, how much it is furthered by the regulatory action, the public benefit expected or obtained -- were factually developed. Halls taking claim is based on the diminution of his property's value and the enhancement of the Bihun Property's value, yet he presented no evidence on these issues before the Tree Committee or the City Council.[7] (There was evidence from Hersche that removal of the trees would not diminish the Hall Property's value.) Moreover, there was no testimony subject to cross-examination at the hearings.

Given the inadequacy of the factual record developed at the administrative hearing, the court cannot decide the taking claim on mandamus. Hall's remedy is as described in Hensler: he may litigate both the taking claim and inverse condemnation claim together. Hall has filed a separate inverse condemnation action. If he has not also alleged an unconstitutional taking in that action, he should seek leave to amend to do so.[8]

2. The Resolution Does Not Exceed the Authority Given By the Ordinance

Hall argues that the City exceeded its authority under the Ordinance, which authorizes an order for the restoration of a property owner's view, but does not exist to give a complaining owner a better view than he or she had when purchasing their property. Mot. at 6-7. Hall contends that the Ordinance must be interpreted to avoid an unconstitutional taking, and a limitation to restoration of an owner's view at purchase is required. Mot. at 7.

Although entitled "View Preservation[,]" the plain language of the Ordinance indicates that it is intended to protect and provide for a view where obstructed by landscaping, whether or not a particular property owner had the view at the time he or she acquired their property. This is because the language of the Ordinance consistently focuses on property, not property owners. Thus, the Ordinance's stated purpose is to protect the "[p]anoramic views...for many residential lots in the City." §17.26.010. Therefore, the Ordinance establishes procedures for the abatement of "view obstructions created by landscaping, while at the same time protecting natural vegetation from indiscriminate removal." ibid.

The Ordinance defines "view" with reference to property, not to an owner or time. §17.12.220. A "view impairment" is defined as a "significant interference with and obstruction of a view by landscaping...." §17.12.220. The Ordinance enables a person to seek abatement where that person owns "a residence from which view is impaired by vegetation" growing on a neighbor's property. §17.26.040. Furthermore, the decision with respect to offending vegetation is binding on all subsequent owners. Within 30 days of a final decision affecting vegetation on one's property, the property owner must record an informational covenant on the title of his or her property. §17.26.080. As a consequence, the view restoration benefits the obstructed property and runs with the land for the offending property.

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[7]Hall admits as much in attempting to present extra-record evidence.

[8]The City asserts that the taking claim is not ripe because the Decision has not been implemented and the trees have not been removed. The court agrees with Hall that the City has made a final decision; implementation of that decision is unnecessary for the claim to be ripe.

Hence, the Ordinance consistently refers to the protection of views from a property that are infringed by the landscaping of another property without regard to when either owner acquired the property or how long the obstructed view has existed. The Ordinance's plain language provides for abatement -- including removal, pruning, topping, and thinning -- where the view from a property is obstructed by a neighboring property's landscaping. *See* 17.26.040. There is no limitation on the abatement as to when the owner of the obstructed property acquired it. Hall points to nothing in the plain language of the Ordinance supporting his position that it is intended to restore a property owner's view, not creating a view which is obstructed by landscaping. Hall's broad argument that the Ordinance should be so limited is inadequate. *See* Mot. at 7; Reply at 3.[9]

As for Hall's argument that the Ordinance must be interpreted to impose a limitation to restore an owner's view, that is an issue the court need not decide. It is true that a court must resort to "every reasonable construction" in order to save a statute from unconstitutionality. Hooper v. California (1895) 155 U.S. 648, 657. This doctrine requires two plausible constructions for a statute. Assuming *arguendo* that such a limitation is plausible, the interpretation to avoid a taking is better left to the court addressing the taking claim.[10]

The City Council's Resolution provides for an abatement of an obstructed view from the Bihun Property, and did not exceed its authority under the plain language of the Ordinance.

3. The City Did Not Violate State Law

Petitioner Hall argues that the Resolution conflicts with state easement law. He notes that a landowner in California has no natural right to air, light, or an unobstructed view. Posey v. Leavitt, (1991) 229 Cal.App.3d 1236, 1249-50. He acknowledges that an ordinance could require tree trimming to restore the pre-existing view of a property owner. Mot. at 6. However, easements for light and air can only be created by express grant or covenant. Mot. at 7. *See* Taliaferro v. Salyer, (1958) 162 Cal.App.2d 685, 690 (citation omitted). Civil Code section 804 ("section 804") provides that "a servitude can be created only by one who has a vested estate in the servient tenement." Hall concludes that a view easement may only be created by a property owner. Yet, the Ordinance creates an equitable servitude running with the land in violation of section 804. Mot. at 8.

The City argues that Hall waived this argument by not presenting it to the Tree Committee or City Council. Opp. at 10. *See* Woods v. Superior Court, (1981) 28 Cal.3d 668, 680-81.

There is an exception to the exhaustion requirement where a party claims that the agency lacks authority, statutory or otherwise, to resolve the underlying dispute. Coachella Valley

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[9]~~Interestingly, the City's opposition does not take a position on whether Hall's interpretation of the Ordinance is correct.~~

[10]Hall does not cite to any facts which would bring him within the proposed limitation -- how long he has owned the Hall Property, how long Bihun has owned the Bihun Property, when the trees were planted (Hall merely guesses that they are 40 years old (AR 95)), and what the view from Bihun's Property was at the time of each party's purchase.

Mosquito & Vector Control Dist. v. Cal. Public Employment Relations Bd., (2005) 35 Cal.4th 1072, 1081-82. The policy reason behind this exception is clear – it strains reason to ask a public agency to decide whether it has acted outside the scope of its authority. Hall did not waive this issue by failing to raise it earlier.

In Kucera v. Lizza, ("Kucera") (1998) 59 Cal.App.4th 1141, the court considered a city ordinance that sought to preserve the right of property owners to views and sunlight, which existed at the time they purchased or occupied the property, from unreasonable obstruction by trees. Id. at 1144. The ordinance set forth a procedure by which a property owner could obtain restoration of such views and sunlight. Ibid.

The court noted that a land use ordinance is unconstitutional as exceeding municipal authority under the police power only if its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Id. at 1147. Under the concept of public welfare, a state may legitimately exercise its police powers to advance aesthetic values. Id. at 1148. The preservation of sunlight has been recognized for many years as a valid police power supporting height limitations on buildings, fences, and by analogy, trees. Ibid. The ordinances goals are further supported by case law concerning the preservation of neighborhood character, since they prevent incremental tree growth which would alter preexisting vistas and receipt of light. Id. at 1149. The court held that the ordinance was directed toward preservation of view and sunlight, a valid police power, and the regulation of tree growth bore a reasonable relation to those goals. Ibid.

The court also addressed whether the ordinance was preempted by state law on easements. Id. at 1151. The trial court accepted the argument that the ordinance created *de facto* easements for views and sunlight which conflicted with Civil Code section 801 *et seq.* concerning the creation of easements by a vested estate. The appellate court found these arguments "misdirected and to some extent premature." Id. at 1151. The arguments were premature because the ordinance had yet to be applied to the petitioner. Ibid. They were misdirected because the ordinance was permissive, not mandatory, with respect to whether the conditions of restoration should be recorded and run with the land. Id. at 1151-52. Additionally, the facial argument, which was ripe, was not well taken. The Kucera court noted that local governments may regulate many aspects of property affecting sunlight and views under Govt. Code section 65850 ("section 65850"), which "easily embrace [the city's] ordinance protecting views and sunlight against unreasonable obstruction by trees." Id. at 1152. The state law on easements was not intended to apply to easements incidentally created community wide by the ordinance at issue. Id. at 1153.

Hall distinguishes Kucera as a facial challenge to a view ordinance, not the as applied challenge that he is making. Mot. at 8. Moroever, the ordinance in Kucera was permissive on recording and running with the land. Hall points out that the Resolution requires that it shall be recorded and run with the land. He concludes that this creates a *de facto* easement on his property in favor of Bihun and her successors in conflict with state law. Mot. at 8.

The court is unpersuaded. The Kucera court expressly noted that section 65850 permits local governments to enact a broad range of regulations affecting views and sunlight. 59 Cal.App.4th at 1152. Section 65850 permits a local government to regulate the use of land and residences (subdivision (a)), and the size and use of lots, yards, courts, and other open spaces.

(subdivision (c)(2)). Kucera found that both "easily embrace" an ordinance protecting views and sunlight against unreasonable obstruction by trees, showing that the general law on easements was not intended to preempt such ordinances. Id. at 1152.

That is exactly what the Ordinance and resulting Resolution do here. The Resolution orders Hall to remove five trees with Bihun to pay the cost of stump removal and replacement of the trees with trees which will not grow higher than 20 feet or wider than 15 feet. AR 439. In properly implemented, nothing in the Resolution distinguishes it from section 65850's general authorization of view protection ordinances. The fact that the Resolution must be recorded to protect the view from the Bihun Property in the future does not change this result. *See also* Echevarrieta v. City of Rancho Palos Verdes, (2001) 86 Cal.App.4th 472, 481 (ordinance limiting tree height and order for view restoration permit to require trimming of trees to restore neighbor's view was not a taking).

The Resolution, which is the City's application of the Ordinance, did not violate state easement law.

4. The Findings on Remedy Are Not Supported

Hall argues that the Resolution is not supported by substantial evidence. Specifically, he argues that the findings that tree removal is "necessary," would not "adversely affect the environment," and would not "unreasonably detract from the enjoyment or privacy" of the Hall Property are unsupported. Mot. at 9-11.

Preliminarily, the View Preservation Ordinance permits abatement action only where there is a finding that a "view exists" and "that [view] is significantly impaired." *See* §17.26.050.E. The Resolution made both findings (AR 437-38), and the evidence supports a conclusion that the five trees in question significantly impair the view from the Bihun Property. Hall does not dispute this conclusion. The issue is the remedy for this view impairment.

a. The Need for Findings on Tree Removal as a Remedy

The City argues that the View Preservation Ordinance does not expressly require findings on the issue of remedy. Opp. at 12. However, as Hall points out (Reply at 6), the City chose to make such findings.

More important, the Resolution must comply with Topanga by setting forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. 11 Cal.3d at 515. The hearing officer is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Id. at 514-15. Hence, the Resolution must bridge the analytic gap with findings and reasoning whether or not expressly required by the Ordinance.

b. The "Necessary" Finding

The View Preservation Ordinance provides for specific abatement action of "removal, pruning, topping, thinning, or similar alteration of the vegetation" that is "necessary to abate the view impairment and to restore the complainant's view." *See* §17.26.050.E. This the abatement action ordered must be necessary to abate the view impairment. *Compare* Kucera, *supra*, 59 Cal.App.4th at 1145 (view ordinance created hierarchy designed to impose the least intrusive

remedy).

The Resolution finds that tree removal is necessary (AR 438), and the City argues that the evidence "overwhelmingly supports the [Resolution]." Opp. at 12. However, the City's opposition only generally refers to the reports, Ordinance provisions, correspondence from the parties and neighbors, field trips, and testimony presented to the Tree Commission and City Council. Opp. at 13. Nowhere does the City mention any evidence that tree removal, as opposed to other less abatement, is necessary.

The court has reviewed the record and found only the following on the "necessary" issue. The Tree Committee discussed abatement options, including topping the trees (AR 105), grouping the trees and addressing abatement separately for each group (AR 107), and removing and replacing the trees with foliage that would not grow into the view area (AR 112). City staff verified that professional landscape professionals advised that you can thin, trim, or lace pine trees, but "it is not good to cut pine trees" because their center needs to be intact. AR 104-05. Such trees can be topped, but there is a real risk of losing the tree and a topped tree is ugly. AR 105.

The risk of topping to the health of the trees, and the aesthetic impact of doing so, is not substantial evidence that their removal is <u>necessary to abate the view impairment</u>. The trees belong to Hall. The view from the Bihun Property depends on the height and width of the trees: it does not depend on their removal. The Tree Committee may appropriately be concerned about the health of the trees, but only to the extent that an abatement order would affect Hall's property rights. That is, the Tree Committee has discretion under the Ordinance to order abatement of the offending vegetation, and to be concerned that a topping order would kill the trees. But the Ordinance is not an aesthetic ordinance that gives the Committee or City Council discretion to elect between two abatement remedies, both of which will abate the view impairment, based on aesthetics.

Hall did state that the trees are fragile and will die if trimmed, based on unidentified proof "in your file." AR 95. Whatever its value, this statement is not a binding election of remedies. Based on the necessary finding, Hall should have the right to elect either remove the trees or top them, running the risk that they will die.[11]

The finding that tree removal is necessary to restore the Bihun Property's view is not supported by substantial evidence.

c. <u>The "Would Not Adversely Affect the Environment" Finding</u>

The View Preservation Ordinance does not permit abatement if it "would adversely affect the environment." §§17.26.050.E.

The Resolution found that tree removal would not adversely affect the environment. AR

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[11]Hall also argues that the necessity finding is supported only by hearsay expert opinion. Mot. at 10. The administrative proceeding was not governed by the Administrative Procedures Act, which permits hearsay only to corroborate. Hall points to no authority in the RHMC that the City may not rely on hearsay. Indeed, the View Preservation Ordinance expressly provides that the Tree Committee may consult with "specialists such as landscape architects and arborists as required...." §17.26.020.

438.

Hall argues that this finding is conclusory and unsupported. Mot. at 10. He is correct. Neither the Resolution nor the Tree Committee's decision provides any explanation in the finding as to why the tree removal would not adversely affect the environment. Consequently it violates Topanga. The City's opposition cite to any evidence that supports this finding, but that does not mean none was presented. The court cannot make this determination without knowing the City's reasoning.

The finding that tree removal would not adversely affect the environment may or may not be supported by substantial evidence, but is not supported by the analysis required under Topanga.

d. The "Will Not Unreasonably Detract from the Enjoyment or Privacy" of the Hall Property Finding

The View Preservation Ordinance does not permit an abatement action if it "would unreasonably detract from the privacy or enjoyment of the property on which the objectionable vegetation is located." §§17.26.050.E.

The Resolution found that tree removal will not unreasonably detract from the enjoyment or privacy of the Hall Property. AR 438.

Hall argues that this finding is unsupported by substantial evidence. Mot. at 11. Again, he is correct.

The Resolution requires Bihun to pay for tree removal, and to reimburse Hall $2,000 to remove stumps and replace the trees within one year. AR 438-39. The Tree Committee considered what amount Bihun should pay for this task and decided on no more than $2,000. AR 122. Neither the Resolution nor the Committee decision explains how this figure was reached, a violation of Topanga.

Nor is the finding supported by substantial evidence. The Resolution appropriately orders that Bihun should pay for the cost of tree removal, and to reimburse Hall if he grinds the stumps and replaces the trees. *See* Eschevarrieta, *supra*, 86 Cal.App.4th at 475 (ordinance limiting height required applicant for view restoration must pay costs of foliage trimmed or removed, and replacement foliage).

However, there is not substantial evidence as to what that cost is. The $2,000 figure is a plug number created by the Tree Committee. AR 122. Bihun opined that $2,000 was more than enough because it would cost between $175 and $325 to remove stumps (unclear whether her quote was for all stumps or per stump) and about $280 "at Armstrong" to buy six to seven trees (unclear whether this price is for all trees or per tree). AR 322. She did not explain where these numbers came from, and her statements were ambiguous. Additionally, her estimates for replacement trees are highly dependent on the age of the tree. A young sapling will be far cheaper than a relatively large tree observing the height and width restrictions imposed by the City. There also is no evidence concerning the cost of planting.

In sum, substantial evidence does not exist to support the $2,000 figure for stump grinding and tree replacement. Hall is most probably correct that this number is far below the amount required. The finding that tree removal will not unreasonably detract from the enjoyment or privacy of the Hall Property is not supported by substantial evidence.

F. Conclusion

The taking issue belongs in the inverse condemnation case. Absent a contrary interpretation required to avoid an unconstitutional taking, the City did not exceed its authority under plain language of the Ordinance. Nor is the Resolution preempted by state law on easements. The Resolution's findings for the remedy of tree removal, however, are not supported by substantial evidence and/or Topanga reasoning. A writ will issue directing the City to set aside the portion of the Resolution imposing the remedy of tree removal. As the view impairment for the Bihun Property must be remedied, and as no evidence has been received on some of these issues, the City must conduct a new hearing solely on the remedy where the parties may present evidence. *See* Sanchez v. Unemployment Insurance Appeals Board, (1977) 20 Cal.3d 55 (remand for additional hearing appropriate where no evidence taken on an issue).

Petitioner Hall is ordered to prepare a proposed judgment and writ of mandate, serve them on the opposing parties for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for January 15, 2012 at 1:30 p.m.

FILED
Superior Court of California
County of Los Angeles

JAN 15 2013

John A. Clarke, Executive Officer/Clerk
By A. Fajardo, Deputy
ANNETTE FAJARDO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

HOWARD H. HALL, an individual, as Trustee of the HOWARD H. HALL LIVING TRUST; Petitioner, vs. CITY OF ROLLING HILLS, a municipal corporation; CITY OF ROLLING HILLS CITY COUNCIL, a public legislative body; Respondents.	CASE NO. BS136694 Assigned to the Honorable James C. Chalfant [Proposed] **JUDGMENT GRANTING WRIT OF ADMINISTRATIVE MANDATE**
OKSANA R. BIHUN, an individual; Real Party in Interest.	

On December 4, 2012, the Petition for Writ of Administrative Mandate filed by Petitioner Howard H. Hall (the "Petition") was heard regularly in Department 85of the above-entitled court, the Honorable James C. Chalfant, presiding. Kevin M. Yopp of Gilchrist & Rutter, PC appeared for Petitioner. Christi Hogin of Jenkins & Hogin, LLP appeared on behalf of Respondents City of Rolling Hills and City of Rolling Hills City Council (collectively, the "City"). Real Party Oksana R. Bihun did not make an appearance at the proceedings.

The record of the administrative proceedings was received into evidence and examined by the Court. After considering the administrative record, the written submissions by the parties, the

evidence submitted by the parties which was properly subject to judicial notice and the oral argument of counsel, Mr. Hall's Petition is GRANTED for the reasons stated in the attached decision of the Court, which is incorporated herein by reference.

IT IS ORDERED that:

1. A writ of administrative mandate shall issue from the Court remanding the proceedings to the City Council and commanding the City Council to set aside the portion of Resolution No. 1118 dated March 12, 2012 imposing the remedy of removal of Mr. Hall's five trees and to conduct a new evidentiary hearing on the appropriate remedy, if any, for the Bihun property view impairment.

2. The administrative record lodged in this action is ordered forthwith returned to Petitioner, to be preserved without alternation until the Judgment herein is final, and to be forwarded to the Court of Appeal in the event of an appeal.

3. Petitioner shall recover his reasonable costs of suit herein incurred in the amount of $829.61.

4. The Clerk shall enter this Judgment and shall enter the accompanying Writ of Administrative Mandate.

IT IS SO ORDERED.

DATED: 1/15/13

James C. Chalfant
Los Angeles Superior Court Judge

Submitted by,

JENKINS & HOGIN, LLP
Attorneys for Defendants
CITY OF ROLLING HILLS AND
ROLLING HILLS CITY COUNCIL

RESOLUTION NO. 1141

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROLLING HILLS RESCINDING CITY COUNCIL RESOLUTION NO. 1118 ADOPTED ON MARCH 12, 2012 SETTING FORTH FINDINGS RELATING TO THE REMOVAL OF TREES AT 48 SADDLEBACK ROAD DUE TO VIEW IMPAIRMENT FROM PROPERTY AT 49 SADDLEBACK ROAD.

THE ROLLING HILLS CITY COUNCIL DOES HEREBY FIND, RESOLVE AND ORDER AS FOLLOWS:

Section 1. A view impairment complaint ("Complaint") was filed by Oksana Bihun (Bihun), 49 Saddleback Road on July 8, 2011 pursuant to Chapter 17.26 of the Municipal Code claiming that a view impairment was caused by trees located at 48 Saddleback Road (Hall). Hall opposed the view complaint on numerous grounds. The Complaint was considered by the Committee on Trees and Views and the City Council and was resolved by the Council's adoption of Resolution No. 1118, ordering remedial action to restore the view, including the removal of five trees.

Section 2. Hall filed a petition for writ of mandate in the Los Angeles County Superior Court entitled *Hall v. City of Rolling Hills*, Los Angeles Superior Court Case No. BS136694 challenging the validity of the view ordinance and its application to the Bihun Complaint. The court upheld the validity of the City's view impairment ordinance and the City Council's findings of view impairment, but held that the evidence before the Council was insufficient to impose the remedy of tree removal. The court issued a writ commanding the City to rescind and reconsider the remedy imposed in the case.

Section 3. On February 25, 2013, the City Council adopted Resolution No. 1138, setting aside the remedy ordered in Resolution No. 1118 and the City Attorney thereafter reported this action to the court in compliance with the writ. The Council further scheduled a public hearing on April 8, 2013 in order that the City further comply with the writ of mandate by considering new evidence and reconsidering the remedy previously imposed.

Section 4. On March 5, 2013, the electorate enacted Measure B, a ballot measure that amended Chapter 17.26 by (i) protecting only a view that existed when the current property owner acquired ownership of the property, (ii) limiting the protection of the ordinance to views obstructed by "maturing" vegetation, thereby excluding views obstructed by trees that were "mature" at the time of property acquisition, (iii) requiring that the existence of a view to be demonstrated by "clear and convincing" evidence, and (iv) limiting restoration of views to "view corridors," rather than panoramic views. Measure B states that it has retroactive application to 1988, the date that the existing ordinance was adopted.

Section 5. The City Council held a duly noticed public hearing on April 8, 2013 to further comply with the writ of mandate and to reconsider the remedy imposed in the original proceeding. However, the Council finds that since issuance of the writ the governing law has changed with respect to what constitutes a protected view and that it must now act in accordance with the law that is currently in effect. As amended by Measure B, the view ordinance now only protects views that existed on the date that the property owner acquired the property. The ordinance now exempts trees that were "mature" at the time of property acquisition and requires clear and convincing evidence of the existence of a view. These issues were not addressed by the Committee on Trees and Views nor the City Council in the hearings that led to the adoption of Resolution No. 1118, and no evidence regarding these issues was presented or considered. The Council concludes that its original action, as memorialized in Resolution No. 1118, is no longer valid in light of the enactment of Measure B and further, that any determination of a remedy must be preceded by determination of a protected view based on the evidence required by Measure B.

Section 6. Based on the foregoing, Resolution No. 1118 is hereby rescinded and the Complaint is hereby remanded to the Committee on Trees and Views for further consideration in light of the requirements of Measure B.

PASSED, APPROVED AND ADOPTED by the Rolling Hills City Council this 8th day of April 2013.

Frank E. Hill
Mayor

ATTEST:

Anton Dahlerbruch
City Clerk

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS
CITY OF ROLLING HILLS)

The foregoing Resolution No. 1141 entitled:

> A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ROLLING HILLS RESCINDING CITY COUNCIL RESOLUTION NO. 1118 ADOPTED ON MARCH 12, 2012 SETTING FORTH FINDINGS RELATING TO THE REMOVAL OF TREES AT 48 SADDLEBACK ROAD DUE TO VIEW IMPAIRMENT FROM PROPERTY AT 49 SADDLEBACK ROAD.

was approved and adopted at a regular meeting of the City Council on April 8, 2013, by the following roll call vote:

AYES: Councilmembers Pieper, Black, Lay, Dieringer and Mayor Hill.

NOES: None.

ABSENT: None.

ABSTAIN: None.

Anton Dahlerbruch
City Clerk

From Mayor Pro Tem Dieringer.
Received after agenda packets were prepared.

In determining whether a tree is "mature," an ASCA certified consulting arborist shall use the latest Sunset Western Garden Book as a reference and shall be guided by the following definition of a "mature tree": "A tree that has reached at least 75% of its final height and spread at a particular site" (Gilman p.457). Particularly in cases where a tree has been previously trimmed, the arborist shall also consider the age of the tree, by multiplying the tree's diameter at diameter breast height by its growth factor for the Rolling Hills area in determining whether such tree is "mature." All arborist opinions regarding the maturity of trees shall be provided in a report and shall be supported by substantial evidence based on factual data and accepted arboricultural principles that are predominantly relied on by arborists.

"Current owner" shall be defined as the person or persons who, on the date of the view complaint filing and during its pendency, have the legal right to control all aspects of the property, as evidenced by title to the property based on the most current recorded deed. The "date of acquisition" of the property is defined as the date upon which such "current owner" obtained the legal right to control all aspects of the property. In cases where ownership of the property or title to the property is held by an entity such as a trust, limited liability corporation, general liability corporation, partnership or other entity, the "current owner" shall be the person or persons who have the majority control of or other legal right to control such entity. For example, in the case where title to the property is held by a revocable trust, the person(s) who are the grantor(s) of the trust, who retain the legal right to control the property in the trust, would be considered the "current owner" and the "date of acquisition" would be the date that such person(s) first obtained the right to control the property in whatever capacity. In the case of property as to which title is held by an irrevocable trust, the "current owner" is the person or persons who are the beneficiaries of such trust and the "date of acquisition" would be the date that such person(s) received the right to control all aspects of the property within that trust. In the case of property in which title is held by a corporation or partnership, the "current owner" is the person or persons who have the right to control all decisions of that corporation or partnership by reason of his or her majority share of the ownership of or other legal right of control over such entity; the "date of acquisition" would be the date that such person(s) received the right to control all aspects of the property as the "current owner" of the corporation or partnership.

RECEIVED
FEB 22 2016
City of Rolling Hills
By _____

From City Attorney's office and Staff.

POSSIBLE INTERPRETATION OF "MATURE TREES".

For purposes of RHMC section 17.26.090 (2) a tree will be considered mature when it has achieved 75% of its expected canopy height and width (spread). "Expected canopy height and width" will be as set forth in the latest edition of the Sunset Western Garden Book.

RECEIVED
FEB 22 2016
City of Rolling Hills
By