# Litigation Due Diligence Analysis

## Brilliant v. Mulholland Estates Homeowners Association, Inc., et. al.

August 13, 2021

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# 1.
# SUMMARY

This matter involves the interference with Robert Brilliant's ("Client") viewshed by three of his downslope neighbors, as well as the HOA's (Mulholland Estates Homeowners Association, Inc.) failure/refusal to enforce the terms of the HOA's Design Review Guidelines, other restrictions contained in the HOA's governing documents, and the association's own precedent.[1] In short, Client's once unobstructed view of the San Fernando Valley has been compromised by a row of palm and pine trees growing in three of his neighbors' properties located down the slope from his yard.

The offending properties/offending trees include:

— Lots 38 and 39 (Property #1). Property #1 is the westernmost of the offending properties and is located below Client's property. The offending trees on Property #1 include: (i) a row of pine trees along the east side of the property; (ii) two palm trees located directly in front of Client's viewshed; and (iii) a row of pine and olive trees on the property's southern uphill slope (below Client's rear yard). [See Client Docs, Exhibit A (pictures of offending trees).]

— Lot 40 (Property #2). Property #2 is in between the two other offending properties and is located below Client's property. The offending trees on Property #2 include rows/clusters of palm trees that have grown into barriers impacting Client's viewshed.[2] [See Client Docs, Exhibit A (pictures of offending trees).]

— Lot 41 (Property #3). Property #3 is the easternmost of the offending properties and is located below Client's property. The offending trees on Property #3 include a set of adjacent palm trees that have grown to block Client's viewshed and other sets of palm trees that have grown into the viewshed. [See Client Docs, Exhibit A (pictures of offending trees).]

With respect to Property #1, it appears that in the past the HOA attempted to work with the owners of Property #1 to have the offending trees removed—in recognition of its duty to do so—but then backtracked when faced

[1] E.g., that the trees must be trimmed to "no higher than the gutter line level of the roof when viewed from the upper properties."

[2] According to Client, these trees represent the most significant blockage of his view rights.

with pressure from an attorney accusing the HOA of interfering with the impending sale of the property. The HOA apparently satisfied itself with simply requiring that the trees in question be trimmed.[3]

With respect to Property #2, the HOA previously threatened in 2018 to take action to remove the trees but never followed through.

With respect to Property #3, the HOA advised the owners to cut offending trees located on the property in February and April 2013. It appears that the HOA has not addressed the offending trees on Property #3 since 2013.

A comparison of Client's viewshed in 2000 with what it is today (Client Docs, Exhibit A) reveals that the viewshed (which is to be protected under the HOA's Design Review Guidelines) has been negatively impacted by the offending trees. As a result, it appears that trees located on the three offending properties need to be removed in compliance with the HOA's Design Review Guidelines, and the precedent employed by the HOA concerning the height of such trees and protection of the viewshed of uphill members' properties.

## 2.
## PARTIES/SIGNIFICANT FIGURES

| Name of Party / Significant Figure | Significance to Underlying Matter/Dispute |
|---|---|
| Robert Brilliant | Client/Plaintiff. |
| Thomas & _____Gores | Prior owners of Property #1—14143 Beresford Road, Beverly Hills, CA 90210. See Summary above. |
| Todd Gefland, Trustee of Maximillion Trust dated 2/15/2013 | Prior owners of Property #1. |

[3] As another example of the HOA's backtracking on this issue, at one time the HOA unequivocally took the position that the trees on Property #1 interfered with Client's viewshed, only to later reverse itself. Even prior to the current owner's residence at Property #1, the HOA mandated that the offending trees be no "higher than the top of their existing roof line" so as not to "obstruct view corridors of adjacent properties."

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| Matt Rutler | Current Owner of Property #1. |
| Ted & Michele Kaplan | Owners of Property #2 (Lot #40) – 14151 Beresford Road, Beverly Hills, CA 90210. See Summary above. |
| Unconfirmed at this time.<br>Might be Dr. Grant and Sheri Stevens (were owners in 2013). | Owners of Property #3 (Lot #41) – 14155 Beresford Road, Beverly Hills, CA 90210. See Summary above. |
| HOA | Board has failed to enforce association's governing documents. |
| _____ & _____ Bower | Client's neighbors whose viewshed also appears to have been interfered with/impacted. |

The table above may be amended from time to time to reflect revisions to Client's narrative and/or new information that may become available in the future.

## 3.
## NOTABLE PROVISIONS OF GOVERNING DOCUMENTS

| **Document Article / Section No.** | **Relevant Text of the Selected Article / Section No.** |
|---|---|
| Client Docs, Exhibit B, section 1.5.2 | "Many of the lots will also share the common amenity of the viewshed. The protection of the viewshed by the control of building heights, and bulk and control of trees and lighting is a special concern of the Guidelines." |

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| Client Docs, Exhibit B, section 2.5.1 | • "To protect uphill lots' viewsheds and the privacy of downhill lots, the following planting philosophy shall be adopted for the Rear Yards of the following groupings of lots. . .the areas adjacent to the southernmost property lines should be planted with broad head, low growth shrubbery…"<br><br>• "When growth obstructs the viewshed of a neighboring lot to the south, these shrubs can be naturally topped."<br><br>• "Taller trees…will grow through the viewshed and are encouraged for the Rear Yard and rear slope areas."<br><br>• "The density of planting should be reasonably sparse in order to protect the viewshed of uphill lots."<br><br>• "For Tract 45004 lots 38 through 43, and 55 through 58 [these includes Property Nos. #1, 2, and 3], slope trees with low broadheads…planted on the southern uphill slopes will ensure privacy without blocking the viewshed of lots above."<br><br>• "The addition of tall trees such as listed above will be at infrequent intervals and will be arranged so as not to achieve a shape or density approaching that of a barrier."<br><br>• "Use of tall deciduous trees which grow faster through viewsheds, selected interior pruning during young growth, and pruning of heads are techniques to be employed regularly by Owners. The Architectural Committee may require that trees be removed, or pruned as necessary." |
| Client Docs, Exhibit P, Article X, sections 3-3f | The Association has the right, but not an obligation, to cause maintenance and installation to be accomplished and bill the Owner for it. |
| Client Docs, Exhibit P, Article XIV, section 6 | Variances from the Design Review Guidelines are not permitted unless:<br><br>— The ACC or Board (on appeal) submits a written request for variance from the Design Review Guidelines to the Design Review Committee.[4]<br><br>— "the Design Review Committee determines that the improvements described in the Plans and Specifications cannot be feasibly designed to comply with the DRC Guidelines without a variance and that granting the variance will result in a more sensitive or less intrusive use of land or a more aesthetically pleasing use of the land." |

[4] The Design Review Committee must render a decision within 60 days of receipt of the ACC's or Board's request. If the Design Review Committee fails to make a decision within 60 days, the variance will be deemed granted.

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| Client Docs, Exhibit P, Article XV, section 16 | "Views shall only be protected to the following extent: (i) Improvements…shall comply with all applicable requirements of the DRC Guidelines and the Architectural Committee Guidelines, (ii) trees shall be pruned in accordance with the Architectural Committee Guidelines…" [MBK NOTE: We need a copy of those Architectural Committee Guidelines.] |
| Client Docs, Exhibit P, Article XVIIII, section 1 | The HOA or any owner has the right to enforce, by legal proceedings or in equity, the CC&R provisions, including the right to prevent any violations of the CC&Rs. |

This table may be amended from time to time if and when new applicable documents come to light. To the extent that such new document(s) necessitate(s) any significant revisions to Client's litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

## 4.
## STATEMENT OF FACTS / EVIDENTIARY SUPPORT

| Date / NA | Fact | Evidence Supporting That Fact |
|---|---|---|
| 08/04/2000 | The HOA's attorney sent a letter to Client's former attorney regarding Property #1's proposed landscape plan—to which Client had objected—that conditioned the HOA's approval of Property #1's landscape plan upon it not interfering with Client's viewshed. HOA's attorney advised that Property #1's trees would not be permitted to grow higher than the top of Property #1's existing roof line, and plantings on the slope of the boundary would not be permitted to exceed the height of Client's retaining wall. | Client Docs, Exhibit D |
| 05/25/2000 | The HOA sent a letter to the owners of Property #1 advising that it approved their proposed landscape plan but with conditions that included that the proposed trees "may not obstruct view corridors for the adjacent properties (at the rear yard, specifically, but not limited to pine trees behind play house)" and that it is the owner of Property #1's "responsibility to maintain, trim and thin the trees to allow for unobstructed view corridors." | Client Docs, Exhibit F |
| September 2009 | Two trees in the rear yard of Property #1 had grown into Client's viewshed and had formed a barrier with overlapping heads of the trees. | N/A |

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| 09/10/2009 | The HOA wrote a letter to the owners of Property #1. Citing protection of the uphill lots' viewshed, the HOA demanded that "the palm trees be removed and replaced with trees that will not interfere with the viewshed of your neighbors based on Design Review Guidelines." | Client Docs, Exhibit G-1 |
| 11/30/2009 | The HOA sent a letter to the owners of Property #1 which advised that because the owners of Property #1 refused to remove the palm trees from their rear yard, the HOA set a hearing for 12/09/2009 re the violations related to Property #1's trees and threatened monetary penalties against the owners of Property #1. | Client Docs, Exhibit G-2 |
| 01/13/2010 | Presentation of the attorney for the owners of Property #1. The attorney for the owners of Property #1 objected to the removal of the palm trees at the hearing. Their attorney argued that:<br><br>— The offending trees were not on the uphill as claimed by the HOA<br><br>— The ACC previously reviewed the original landscape plan and included changes, including the types of certain trees and location of the trees; "ultimately approving the landscaping plans without conditions."<br><br>— The viewshed was a "philosophy" and "by definition some viewshed impairment is permissible."<br><br>— "The viewshed covenant does not contemplate a zero tolerance policy, that no impairment of viewshed will be allowed. The are no objective criterion established by the viewshed covenant, such as a not to exceed height limit for trees."<br><br>— The offending palm trees provide a "privacy screen" from the view of the uphill neighbors into the owners of Property #1's bedroom and rear yard. | Client Docs, Exhibit H |
| 01/25/2010 | The HOA sent a letter to the owners of Property #1 in which it advised that after the hearing and conducting site inspections, the Board determined that there was no material obstruction of the viewsheds from lots 34, 35, and 36. [JB NOTE: Client owns lot 37] The HOA also recommended continued observation of the heights of the two trees located on Property #1 and reserved the right to reconsider the matter if there were new complaints from neighbors affected by the trees. | Client Docs, Exhibit G-3 |

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| 06/18/2012 | The HOA wrote a letter to the owners of Property #1 and advised them that the palm and pine trees in the rear of their yard needed topping and trimming, as they were "to be no higher than the gutter line level of the roof when viewed from the upper properties." | Client Docs, Exhibit E-1 |
| 02/11/2013 | The HOA sent a letter the owner of Property #1 that asked him to "trim the pine trees in the rear yard so that his upper neighbors' view corridors are preserved." The HOA reminded the owner of Property #1 of its 06/18/2012 letter that requested that he trim the trees to "no higher than the gutter line level of the roof when viewed from the upper properties." The HOA advised that "two palm trees [had not been] trimmed at all," and the HOA noted that while the pine trees were trimmed, "they were trimmed to a height that was still well above the gutter level." The HOA advised the owner of Property #1 that if they failed to trim the trees prior to the sale, the responsibility would fall on the buyers. | Client Docs, Exhibit E-2 |
| 02/26/2013 | The HOA sent a letter to the owners of Property #2 advising them that the palm trees on their property needed to be thinned out or replaced with shorter trees "since they are obstructing your neighbors' views." The HOA's letter also stated that "all of the trees have to be trimmed to the roof gutter line." | Client Docs, Exhibit O-1 |
| 02/26/2013 | The HOA sent letters to the owners Property #3 advising them that bushes "need to be trimmed to a height of 15'" and "All backyard trees must be trimmed to the level of the roof gutter, per your written agreement as condition of approval." | Client Docs, Exhibit C-1 and C-2 |
| 03/01/2013 | The HOA's attorney sent the owners of Property #1 (through their attorney) a response to a 2/25/13 letter accusing the HOA of selective enforcement *against Property #1's owner*.<br><br>The HOA responded by reminding the attorney that there had been no selective enforcement, but rather an ongoing attempt by the HOA to bring the owners of Property #1 into compliance with the obligations contained in the governing documents, as well as the "architectural and landscaping approvals under which they were granted approval to plan certain plantings in 2000."<br><br>The HOA's letter reminded Property #1 owners' counsel that approval of their landscape plan in 2000 was conditional on their trees not obstructing view corridors of adjacent properties, and stated that the pine tree has grown to the extent it now needed to be removed. | Client Docs, Exhibit I |

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| | The HOA demanded in its letter that the two palm trees in front of the Client's view must be removed as "it is currently impossible for Mr. Brilliant or the Bowers to have the same view as they did before your clients' trees were planted, and therefore your clients are not in compliance with their obligation to provide 'unobstructed view corridors' to their neighbors."<br><br>The HOA concluded by advising that it cannot provide the owners of Property #1 with a compliance letter until they actually comply. | |
| 3/22/2013 | The HOA's attorney sent a letter to the owners of Property #1's attorney that thanked the owners for trimming their trees and advised that "the board does not feel that there is a material obstruction of the viewshed from [Property #1]."<br><br>The HOA's letter stated that the current trimming of the palm trees was "a view standard acceptable to the board" and would be used as a standard to assist the board in maintaining the trees in a properly thinned matter in the future. | Client Docs, Exhibit J |
| 05/16/2013 | The HOA sent a letter to the owners of Property #2 that advised that:<br><br>— Architectural Standards and Design Review Guidelines require trees for lots 38-43 must be trimmed to the gutter line to allow for uninhibited views on lots 34-37 (which include Client's Lot 37)<br><br>— slope trees will not block the viewshed of lots above<br><br>— tall trees will be arranged so they are not effectively a barrier<br><br>— there are approximately eight palm trees in Property #2's yard which amount to a viewshed barrier<br><br>— the owners of Property #2 had until 06/25/2018 to complete the tree and hedge trimming | Client Docs, Exhibit O-3 |
| 2013-2016 | Palm trees on Property #1 grew significantly between 2013 and 2016. | Client will testify |
| 11/03/2016 | The HOA sent the owner of Property #1 a letter that demanded maintenance, trimming, and thinning of trees to "avoid obstruction of the neighbors' view-shed." The HOA reminded the owner of Property #1 that it was his responsibility to maintain the trees "to allow for unobstructed view corridors." The HOA advised that the | Client Docs, Exhibit K |

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| | prior owners agreed to address the tree height "to avoid obstruction of the neighbors' view-shed." | |
| 12/21/2017 | The HOA sent a letter to the owner of Property #1's attorney that advised that the two palm trees on Property #1 were interfering with his neighbors' views. | Letter is referenced in Client Docs, Exhibit L |
| 03/13/2018 | The HOA's attorney sent a letter to the owner of Property #1's attorneys that:<br><br>— advised that the Board met on 02/21/2018 and voted that the two palm trees be removed from Property #1 as the trees impact other homes' views<br><br>— reiterated some of the history related to Property #1's violations, including that:<br><br>— monetary penalties totaling $34,500 had been assessed against the owner of Property #1 since 04/01/2017, but the HOA would waive the penalties if the trees were removed<br><br>— the Board held a hearing on 11/08/2017 where it determined that the trees must be removed<br><br>— the HOA's attorney sent a letter to the owner of Property #1's attorney on 11/17/2017 that confirmed the HOA's demand that the two palm trees must be removed within 30 days | Client Docs, Exhibit L |
| 03/08/2018 | The HOA's attorney wrote an email to the Board President reporting a conversation she had with the owner of Property #1's attorney, who claimed selective enforcement by the HOA. The HOA's attorney explained that she told the owner of Property #1's attorney that there has been no selective enforcement as the HOA was addressing 15 other offending palm trees on 5 other lots. | Client Docs, Exhibit M |

This table may be amended from time to time as new information/evidence comes in. To the extent that such new information necessitates any significant revisions to Client's litigation strategy, where applicable, the Firm will work with Client to develop a new strategy.

## 5.
## ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENT

The Firm should follow up with Client regarding the following items/issues:

- First names and address of the Bowers (Client's neighbors whose viewshed also appears to have been interfered with by the offending property owners)
- What is the Bowers' position re interference with their viewshed and the HOA's actions taken/not taken re the viewshed?
- How did the Client obtain a copy of the 03/22/2013 letter to the owners of Property #1's attorney (Client Docs, Exhibit J) [Client advised that the Board refused to give him a copy]?
- How high were the offending trees on any of the offending properties in 2010?
- Did the owner of Property #1 do anything in response to the HOA's 11/03/2016 letter (Client Docs, Exhibit K)?
- Were the trees trimmed on Property #1 at any time since the HOA's 11/03/2016 letter (Client Docs, Exhibit K)?
- Did the HOA follow up on its 11/03/2016 letter re Property #1 (Client Docs, Exhibit K)? If so, we need a copy of any evidence re HOA follow up.
- What did the owner of Property #1 complain about concerning Client's pool in May 2018 [referenced in Client Docs, Exhibit M]?
- How did Client obtain a copy of the 03/08/2018 email between Board President and HOA attorney (Client Docs, Exhibit M)?
- Client advised in his summary that the owners of Property #2 have been advised to trim the fronds of their trees. How did Client learn of this? What were the owners of Property #2 advised by the HOA to do exactly, and when were they advised of it? Please provide us with any documents/evidence concerning this.
- Were there any other actions taken or communications by the HOA re the trees on Property #2 other than the letters sent in February and May 2018? Please provide any documents/evidence in support.
- Have the owners of Property #2 ever trimmed the trees on their property, or taken any action re their trees/hedges?

— Were there any other actions taken by the HOA re the trees on Property #3 other than the letters sent in February and April 2013? Please provide any documents/evidence in support.

— Have the owners of Property #3 ever trimmed the trees on their property, or taken any action re their trees/hedges?

— Names and contact information of each HOA Board Member since 2000.

— Have any consultants/experts been consulted by the HOA, Client, or any of the offending property owners? If so, please provide any documentation (e.g., reports, communications, etc.) re such consultants/experts.

This section of the LADD may be amended from time to time as new information becomes known.

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## 6.
## ADDITIONAL DOCUMENTS NEEDED FROM CLIENT

The Firm needs to ask Client for the following documents:

— The HOA's Architectural Committee Guidelines

— Client' objection to Property #1's landscape plan submitted in 2000, and any communications re Client's objection to the landscape plan.

— The owners of Property #1's attorney's 02/25/2013 letter to the HOA (referenced in Client Docs, Exhibit I)

— Pictures/evidence of Property #1's palm trees that were interfering with Client's viewshed and forming a barrier with overlapping heads of the trees in September 2009

— Pictures/evidence of what the offending trees looked like in 2010

— Pictures/evidence of the growth of the trees on Property #1 from 2013-2016

— Any other pictures/evidence of the offending trees or interference with Client's viewshed (if any) that the Client has not provided us

This section of the LADD may be amended from time to time if Client locates additional documents.

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## 7.
## THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST

Client believes that one or more third parties has possession, custody, control, and/or knowledge of the following documents/information.

| Document/Information | Significance of the Document/Information | Identity of Third Party in Possession of the Documents |
|---|---|---|
| Communications between offending property owners and the HOA/Board Members re offending trees | These communications may show the HOA's flip-flopping of its position re the offending trees, its position that the offending trees violate the Design Review Guidelines/CC&Rs, potential admissions by the offending property owners re the offending trees, and other related information. | HOA and offending property owners |
| HOA Board members' communications between/amongst themselves | These communications may also show the HOA's flip-flopping of its position re the offending trees, may contain admissions by HOA board members that the offending trees should be removed/interfere with Client's viewshed/violate the Design Review Guidelines/CC&Rs, and other related information. | HOA Board Members since 2000. |
| HOA's communications with third parties | These communications may also show the HOA's flip-flopping of its position re the offending trees, may contain information that HOA board members were presented with re the offending trees (e.g., that they should be removed/interfere with Client's viewshed/violate the Design Review Guidelines/CC&Rs, etc.), and other related information. | HOA Board Members since 2000.<br><br>Any consultants/experts/third parties consulted by the HOA (if any). |

The table above may be amended from time to time as new information comes to light.

## 8.
## POTENTIAL CAUSES OF ACTION

Based upon the allegations made against Client thus far, and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the potential causes of action discussed below appear to be applicable.

### 8.1.
### Breach of CC&Rs / Violation of Civil Code § 5975

Elements—Breach of CC&Rs

— Restrictive covenants and recorded declarations are written agreements governed by contract principles. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 240.) Restrictive covenants and recorded declarations are of a contractual nature and are enforceable by statute unless unreasonable. (Id. *at* 237; and see Civ. Code, § 5975.) Because the Declaration of CC&Rs is a recorded declaration of restrictive covenants, it is enforceable provided it is not unreasonable. "[S]ettled principles of condominium law establish that an owners association, like its constituent members, must act in conformity with the terms of a recorded declaration. (See Civ. Code, § 5975, subd. (a); *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 268 [homeowner can sue association to compel enforcement of declaration's provisions]; (Citations.)" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*, supra, 55 Cal.4th at p. 239.)

— Where enforcement is an issue in a breach of CC&R cause of action, it tends to arise in two ways: (i) HOA not enforcing rules at all; or (ii) HOA applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

- HOA Not Enforcing Rules.

  → A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn., supra,* 21 Cal.4th at 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC, supra,* 55 Cal.4th 223, 239.)

- Selective Enforcement.

  → In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

  → The second avenue is to review the enforcement process used by the HOA. This enforcement must be "in good faith, not arbitrary or capricious, and by procedures which are fair and

uniformly applied." (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass'n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass'n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]" (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) "The criteria for testing the reasonableness of an exercise of such a power by an owners' association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]" (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

— "The essential elements of a claim of breach of contract, whether express or implied, are the contract, plaintiff's performance or excuse for non-performance, defendant's breach, and the resulting damages to plaintiff." (*Darbun Enterprises Inc. v. San Fernando Community Hosp.* (2015) 239 Cal.App.4th 399, 409; *San Mateo Union High School Dist. v. County of San Mateo* (2013) 213 Cal.App.4th 418, 439.)

Remedies—

— While typically injunctive in nature, courts may fashion remedies to enjoin an ongoing breaches. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.) Additionally, compensatory damages are available if plaintiff incurred monetary damages. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1385; Civ. Code, §§ 3281, 3300.)

— As to whether attorneys' fees are available to the prevailing party, see "Attorneys' Fees and Costs" section below.

Applicable Statute of Limitations—

— For breach of *most* written contracts, the statute of limitations is four years. (Code Civ. Proc., § 337)

— The statute of limitations to enforce a restriction, which includes governing documents, is five years. (Code Civ. Proc., § 336(b).) Consequently, an action for a violation of a restriction must be commenced within five years after the party enforcing the restriction discovers, or through the

exercise of reasonable diligence, should have discovered, the violation. [*As used here, a "restriction" means a limitation on, or a provision affecting the use of, real property in a deed, Declaration, or other instrument in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.*] (Civ. Code, § 784.)

Application—Application of the Law to Client's Facts

— The offending trees in all three of the offending properties appear to violate the Design Review Guidelines, which each of the property owners are subject to and the HOA is obligated to enforce. Specifically, p. 20, section 2.5.1 of the Design Review Guidelines (under "Landscaping") prohibits trees that amount to being a barrier or obstruct and/or interfere with viewsheds of lots above. (Client Docs, Exhibit B, p. 5, section 1.5.2.)

— As detailed in section 4 (Statement of Facts/Evidentiary Support), while the HOA has acknowledged at various times that the offending trees interfered with and/or impacted the offending property owners' neighbors' (which include Client's) viewsheds and that the trees must be removed, it appears that the HOA has not enforced the terms of Design Review Guidelines by forcing the offending property owners to remove the trees. Indeed, the HOA has, at times, backtracked from forcing the offending property owners to remove the trees so that they no longer interfere with Client's and others' viewsheds.

— It also appears that the HOA has allowed a "variance" of sorts from the Design Review Guidelines without following the CC&R rules for variances. (Client Docs, Exhibit P, p. 56.) To be sure, it does not appear that the ACC or Board submitted a written request for variance from the Design Review Guidelines to the Design Review Committee. Also, it does not appear that the Design Review Committee determined that the two requirements for a variance to be issued under the CC&Rs were met: (i) any of the offending trees/landscape could not be feasibly designed to comply with the Design Review Guidelines without a variance; and (2) that granting the variance will result in a more sensitive or less intrusive use of land or a more aesthetically pleading use of the land (Client Docs, Exhibit P, p. 56.) It does not appear that either requirement has been, or could be met, as it appears that: (i) it is feasible for the offending property owners to comply with the Design Review Guidelines without a variance – the trees can be cut down or moved; and (ii) removing the trees is more aesthetically pleading use of the land as it does not interfere with the uphill lots' views, which are to be preserved per the Design Review Guidelines.

— Client appears to have been damaged as a result of the offending property owners' and HOA's breach of/failure to enforce the Design Review Guidelines and CC&Rs, as his viewshed has and

continues to be interfered with, his enjoyment of his property has been interfered with, and his property value may be diminished if the interference with his viewshed is allowed to remain.[5]

— The CC&Rs authorize legal proceedings to enforce the Design Review Guidelines and CC&Rs. (Client Docs, Exhibit P, pg. 81.)

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— The Design Review Guidelines specifically protect the "blocking the viewsheds of the lots above," and "protect[ing] the viewshed of uphill lots," among other things. (Client Docs, Exhibit B, p. 5, section 1.5.2.). As detailed in section 4 (Statement of Facts) above, the HOA has concluded that Client's and his neighbors' (the Bowers') viewshed has been interfered with by the offending property owners' trees, and that the offending trees need to be removed, yet the HOA has refused to follow through and enforce the Design Review Guidelines by compelling the removal of the offending trees. This appears to be a violation of the Design Review Guidelines and CC&Rs by both the offending property owners and HOA (for failure to enforce), which would warrant an award of compensatory damages, declaratory relief, and injunctive relief – mandating the removal of the offending trees.

— At this time, this cause of action is supported by the facts and the law.

— The HOA or the owners of Property #1 and #2 may argue that the statute of limitations ("SOL") for breach of contract/failure to enforce CC&Rs has lapsed because the issue related to the offending trees was first raised (after the landscape plan was approved) in 2013 (as it relates to both properties) and then again in 2016 (re Property #1), and the HOA allowed trees to remain (and found they were not a material obstruction of Client's viewshed) at that time. The HOA and offending property owners may argue that Client was aware of the breach/failure to enforce then, and therefore the SOL began to run on such dates so that the four/five-year SOL have therefore expired. Client could combat any such argument with the fact that the offending trees have only grown to become intrusive into his viewshed since then and the impact on his viewshed is much greater now, that the violation is ongoing, and that the owners of Property #1's and #2's and HOA's obligations to enforce/comply with the guidelines/CC&Rs is/are continuing/ongoing. Client could further combat any SOL argument by arguing that the violation(s)/breach(es) occurred in 2017/2018 (within the

[5] Any claimed lost value of Client's property will need to be addressed/confirmed by an appraisal expert.

SOL). *See* section 4 (Statement of Facts) above re HOA's communications with current owner of Property #1 (e.g., Client Docs, Exhibits L, M, O-1, and O-3).

## 8.2.
## Implied Covenant of Good Faith and Fair Dealing

Elements—Breach of the Implied Covenant of Good Faith and Fair Dealing

— The elements of a claim for breach of the implied covenant of good faith and fair dealing are: (i) the existence of a contract; (ii) the plaintiff's performance of the contract or excuse for nonperformance; (iii) the conditions required for the defendant's performance occurred or were excused; (iv) the defendant unfairly interfered with the plaintiff's right to receive the benefits of the contract; and (v) the plaintiff was harmed. (See *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350; *Racine & Laramie, Ltd. v. Dept. of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032.)

— Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. (Rest.2d Contracts, § 205.) "The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith. [Citations.]" (*Carma Developers (Cal.), Inc., v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372.) "All that is required for an implied covenant claim is the existence of a contractual or relationship between the parties. (*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 49.)

— The "implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose." (*Schoolcraft v. Ross* (1978) 81 Cal.App.3d 75; accord *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 401.) A "breach of the implied covenant of good faith and fair dealing involves something beyond breach of the contractual duty itself." (*Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d 51, 59.) Indeed, "breach of a specific provision of the contract is not . . . necessary' to a claim for breach of the implied covenant of good faith and fair dealing." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244.) The essence of the good faith covenant is objectively reasonable conduct. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)

— The duty of a contracting party under the covenant of good faith and fair dealing is to act in a commercially reasonable manner. (*California Pines Property Owners Assn. v. Pedotti* (2012) 206 Cal.App.4th 384, 394-396; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779.)

— While *tortious* breach of the implied covenant is generally restricted to the insurance context, it is possible to establish such a breach *outside* the insurance context if: (i) the breach is accompanied by a common law tort (e.g., fraud, conversion, etc.); (ii) the means used to breach the contract (or its implied covenant) are tortious (e.g., involving deceit or coercion); or (iii) a party intentionally breaches the contract (or implied covenant) with the intent/knowledge that such a breach will cause

severe and unmitigable harm to the other party in the form of mental anguish, personal hardship, or substantial consequential damages. (*Erlich v. Menezes* (1999) 21 Cal.4th 779.)

— As to whether attorneys' fees are available to the prevailing party, see "Attorneys' Fees and Costs" section below.

Remedies—

— General contractual remedies are available, including compensatory (money) damages. (Civ. Code, § 3300.)

— Tort damages are generally unavailable for real estate related matters other than leases and wrongful eviction claims that are classified as torts. (*Ginsburg v. Gamson* (2012) 205 Cal.App.4th 873.)

Applicable Statute of Limitations—

— Same as breach of contract. Four years for written contract (Code Civ. Proc., § 337), two years for oral contract (Code Civ. Proc., § 339), and six years for negotiable instrument (e.g., promissory note) (Comm. Code, § 3118).

Application—Application of the Law to Client's Facts

— See the Application of the Law to Client's Facts in Section 8.1 above, as the same application of the law to Client's facts apply to this potential cause of action.

— As detailed in Section 4 above, it appears that both the HOA and the offending property owners have interfered with Client's right to receive the benefits of the Design Review Guidelines/CC&RS – his right to an uninterrupted viewshed.

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— See the Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action in Section 8.1 above, as the same Strengths/Pros and Weaknesses/Cons (including as it relates to the SOL) apply to this potential cause of action.

## 8.3.
## Negligence

Elements—Negligence

— To prove a claim for negligence, plaintiff must establish: (i) duty; (ii) breach of duty; (iii) proximate cause; and (iv) damages. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.)

— In simple terms, negligence is the commission of an unintentional a wrongful act where one fails to exercise the degree of care in a given situation that an otherwise reasonable person would exercise to prevent another from harm. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753–54.)

— An HOA that fails or refuses to abide by its contractual maintenance obligations is liable to the homeowner for damages caused by such negligence. (See, e.g., *White v. Cox* (1971) 17 Cal.App.3d 824, 895.)

— The "enforcement" issue raised in the context of the "Breach of CC&Rs" cause of action above is also applicable in the context of a negligence claim.

— As to whether attorneys' fees are available to the prevailing party, see "Attorneys' Fees and Costs" section below.

Remedies—

— Compensatory damages are available for all harm proximately caused by a defendant's wrongful acts. (Civ. Code, §§ 3281, 3333-3343.7.)

— Injunctive Relief is available. Courts can fashion equitable relief to remedy negligent conditions. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.)

— Damages for emotional distress are only available in connection with bodily injury. (*Potter v. Firestone Tire & Rubber* (1993) 6 Cal.4th 965.) Such relief, when available, arises out of a claim for *negligent infliction of emotional distress*, which often involve "bystander situations"—e.g., witnessing injury to a family member. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064.) Emotional distress damages for negligence *without* injury (e.g., fear of illness such as cancer if exposed to toxic substances threatening cancer) available if defendant acted with malice, fraud, or oppression, and the fear is based on knowledge corroborated by reliable medical or scientific evidence. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000.)

Applicable Statute of Limitations—

— Two years for personal injuries. (Code Civ. Proc., § 335.1.)

— Three years for claims related to injury to property. (Code Civ. Proc., § 335.1.)

Application—Application of the Law to Client's Facts

— The HOA owes Client a duty to exercise due care and act in good faith in relation to Client and other owners.

— As detailed in Section 4 above, it appears that the HOA breached that duty of care when it refused to enforce the terms of the Design Review Guidelines and allowed the offending property owners' offending trees to remain as is and continue to interfere with Client's viewshed.

— This breach appears to have caused harm to Client, as his protected viewshed has and continues to be impeded, resulting in continuous interference with Client's enjoyment of his property, and the value of his property may be diminished/damaged if the offending trees are not removed/moved (see fn. 5 above).

— The offending property owners owe Client a duty of care (as a fellow HOA member and neighbor) to use and maintain their property in a reasonable manner, so as to avoid harm to Client and/or his property.

— The offending property owners appear to have breached their duty of care to Client (and possibly others [e.g., the Bowers – whose viewshed has also been interfered with]) when then they failed to comply with the terms of the Design Review Guidelines/CC&Rs and when they allowed their trees to interfere with Client's viewshed.

— The breach of the offending property owners' duty of care to Client appears to have caused harm to Client, as his protected viewshed has, and continues to be, impeded, resulting in interference with Client's enjoyment of his property, and the value of his property may be diminished/damaged if the offending trees are not removed/moved (see fn. 5 above).

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— As detailed in section 4 above, the HOA has previously concluded that Client's and his neighbors' (the Bowers') viewshed has been interfered with by the offending property owners' trees, and that the offending trees need to be removed, yet the HOA has refused to follow through by forcing the removal of the offending trees, and the offending property owners have refused to remove the offending trees. This appears to be a violation of both the HOA's and the offending property owners' duty of care to Client, which warrants compensatory damages and injunctive relief – mandating the removal of the offending trees.

— At this time, this cause of action is supported by the facts and the law.

— The HOA and/or the offending property owners may argue that any negligence cause of action is barred by the SOL because they may argue that the alleged violations of their duties to Client, particularly those related to Properties #1 and #2, lapsed because the issues related to the offending trees was first raised (after the landscape plan was approved) in 2013 (as it relates to both properties) and then again in 2016 (re Property #1) and in late 2017/early 2018 (re Property #1), and the HOA allowed trees to remain (and found they were not a material obstruction of Client's viewshed) at that time. The HOA and offending property owners may argue that Client was aware of the basis of his negligence claim then, and therefore the SOL began to run on such dates, and the three-year SOL

has therefore expired. Client could combat any such argument with the fact that the HOA and offending property owners' duties and violations of such duties are ongoing, and the offending trees have only grown to become intrusive into his viewshed since such time and therefore Client has only recently discovered the impact on his viewshed.

## 8.4.
## Breach of Fiduciary Duty

Elements—Breach of Fiduciary Duty

— The elements of a claim for breach of fiduciary duty are: (i) the existence of a fiduciary relationship; (ii) its breach; and (iii) damage proximately caused by that breach. (*Tribeca Companies, LLC v. First American Title, Ins.* (2015) 239 Cal.App.4th 1088.)

— Associations owe a fiduciary duty to their members. (*Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642.)

— Officers and directors of a corporation are fiduciaries and are thus required to exercise due care and undivided loyalty for the interests of the corporation. (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 179; *Francis T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513; *Mueller v. Macban* (1976) 62 Cal.App.3d 258, 274.) Likewise with respect to members of an LLC in member-managed LLCs, or managing members in manager-managed LLCs. (Corporations Code § 17704.09; *Feresi v. The Livery, LLC* (2015) 232 Cal.App.4th 419, 425.)

— Directors of an association are fiduciaries and are thus required to exercise due care and undivided loyalty for the interests of the association. (*Francis T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 513; *Mueller v. Macban* (1976) 62 Cal.App.3d 258, 274.)

— HOAs have an affirmative duty to enforce the restrictions in their governing documents. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111.)

— Among its acts, directors may not make decisions for the association that benefit their own interests at the expense of the association and the entire membership. (*Raven's Cove Townhomes, Inc. v. Kruppe Development Co.* (1981) 114 Cal.App.3d 783, 799.) This is typically referred to as "self-dealing."

Remedies—

— If the breach of fiduciary duty results in a breach of CC&Rs, then compensatory (money) damages and injunctive relief may be available.

— If the breach results in damage to property, available compensatory damages are the cost to remedy defects and for loss of use during the period of injury. (*Raven's Cove Townhomes Inc. v. Knuppe Development Co.* (1981) 114 Cal.App.3d 783, 802.)

— Civil Code § 3333: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

— Equitable remedies such as constructive trust, rescission, and restitution are available when the defendant has been unjustly enriched by the breach. (*Miester v. Mensinger* (2014) 230 Cal.App.4th 381.)

— Punitive damages may be available if the breach constitutes constructive fraud. (Civ. Code., § 3294; *Hobbs v. Bateman Eichler, Hill Richards Inc.* (1985) 164 Cal.App.3d 174.)

— As to whether attorneys' fees are available to the prevailing party, see "Attorneys' Fees and Costs" section below.

Applicable Statute of Limitations—

— A claim for breaching a fiduciary duty must be brought within four years of the breach. (Code Civ. Proc., § 343; *William L. Lyon & Assoc, Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.) If the breach of fiduciary duty stems from the defendant's fraud (even if pleaded as breach of fiduciary duty), which has a statute of limitations of only three years, the claim must be brought within *three* years. (Code Civ. Proc., § 338; *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.)

Application—Application of the Law to Client's Facts

— As a member of the HOA, the HOA owes Client a fiduciary duty, including an affirmative duty to enforce the restrictions in their governing documents. (See Section 8.4 [Elements] above.)

— See the Application of the Law to Client's Facts in Section 8.1 above, as the same application of the law to Client's facts apply to this potential cause of action.

— As detailed in Section 4 above, it appears that both the HOA breached its fiduciary duty to enforce the Design Review Guidelines/CC&RS – specifically, preservation of Client's right to an uninterrupted viewshed.

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— See the Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action in Section 8.1 above, as the same Strengths/Pros and Weaknesses/Cons (including as it relates to the SOL) apply to this potential cause of action.

— See Section 9 below re Business Judgment Rule ("BJR"), as the HOA may raise BJR as a potential defense.

## 8.5.
## Nuisance[6]

Elements—Nuisance.

— The elements for a private nuisance claim are: (i) plaintiff's interest in property; (ii) defendant's creation of the nuisance; (iii) unreasonable interference with plaintiff's use or enjoyment of property; (iv) causation; and (v) damages. (Civ. Code, §§ 3479, 3491; *San Diego Gas & Electric Co. v. Sup. Ct.* (1996) 13 Cal.4th 893, 937.)

— Simply put, a cause of action for private nuisance requires the plaintiff to prove that the defendant interfered with his or her use and enjoyment of the property. (*Adams v. MHC Colony Park, L.P.* (2014) 224 Cal.App.4th 601, 610; *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302-303.)

— A person's unreasonable, unwarrantable, or unlawful use of his or her own property in a way that interferes with the rights of others is a nuisance. (*Hutcherseon v. Alexander* (1968) 264 CA2d 126.)

— A nuisance occurs where the invasion of the property of another is intentional and unreasonable, or is unintentional but caused by negligent or reckless conduct, or is from an abnormally dangerous activity. An *intentional* nuisance requires proof of malice or actual knowledge that harm was substantially certain to follow from the activity. The conduct is not a nuisance if it is intentional but reasonable, or is accidental and not within one of the above definitions of a nuisance. Where negligence and nuisance causes of action rely on the same facts dealing with lack of due care, the nuisance claim is a negligence claim.

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[6] Trespass v. Nuisance. Trespass refers to a physical invasion of property, either person entering, or a substance such as drainage, toxic spills, or encroachment of a physical object, or a structure built over a property line. Nuisance is based on the other property owner's use of its own property, such as making too much noise, vibration, smells, etc. that affect other property owners.

— If the interference is substantial *and* unreasonable (so much so that it would be offensive or inconvenient to the "normal" person), then almost any disturbance of the enjoyment of someone's property could constitute a nuisance. (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302-303 citing *Koll-Irvine Center Property Owners Assn v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 ["an interference need not directly damage the land or prevent its use to constitute a nuisance; private plaintiffs have successfully maintained nuisance actions against airports for interferences caused by noise, smoke and vibrations from flights over their homes ... and against a sewage treatment plant for interference caused by noxious odors...."].)

— Nuisances are characterized as either permanent or continuing. The nature of the claim and available damages are different for either type of nuisance. The crucial distinction between a permanent and continuing nuisance is whether the nuisance is abatable—i.e., capable of being remedied at reasonable cost and by reasonable means. (See *Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1093; *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 84.)

Remedies—

— Remedies are different, depending upon whether the nuisance is *permanent* or *continuing*.

- For *permanent* nuisances, compensatory (money) damages are available. The usual measure of such damages is the diminution in fair market value of the affected property. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 292 [jury decides fair market value before and after creation of nuisance].) A plaintiff may also recover the present value of losses or expenses he or she may, with reasonable certainty, incur in the future because of the nuisance. (Id*. at* 295.) A plaintiff must recover all past, present, and future damages in one suit. (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271-272.)

- For *continuing* nuisances, the compensatory (money) damages are different. A plaintiff can only recover actual damages *through the date of the suit* (i.e., plaintiff cannot recover damages for diminution in value) because there is no certainty the nuisance will continue. The rational for that is apparently that if the defendant is willing and able to abate the nuisance, it is unfair to award damages on the theory that the nuisance will continue. (*Gehr v. Baker Hughes Oil Field Operations Inc.* (2008) 165 Cal.App.4th 660, 668.) Which leads to the most common remedy for ongoing nuisances—abatement. A continuing nuisance is ongoing and can be abated at any time via injunction. (*Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 868-871.)

— Emotional distress damages are also a possibility. (See *Kornoff v. Kingsburg Cotton Oil Co.*, *supra*, 45 Cal.2d at 272; *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 986, fn.10; *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 287-288; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464 [damages recoverable in a successful nuisance action for injuries to real property include not only diminution in market value but also damages for annoyance,

inconvenience, and discomfort].) Mental distress is an element of loss of enjoyment. (*Sturges v. Charles L. Harney Inc.* (1958) 165 Cal.App.2d 306, 323.)

— Punitive damages may be awarded where plaintiff proves by clear and convincing evidence that defendant was guilty of oppression, fraud, or malice. (Civ. Code, § 3294(a); *Hassoldt v. Patrick Media Group Inc.* (2000) 84 Cal.App.4th 153, 169-170.)

— Declaratory relief may be available in nuisance cases. (Code Civ. Proc., § 1060; *Shamsian v. Atlantic Richfield Co.* (2003) 107 Cal.App.4th 967, 984.)

— As to whether attorneys' fees are available to the prevailing party, see "Attorneys' Fees and Costs" section below.

Applicable Statute of Limitations—

— Three years for property damage resulting from a nuisance. (Code Civ. Proc., § 338(b); *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 743-745.)

— Two years for personal injuries resulting from a nuisance. (Code Civ. Proc., § 335.1.)

— Commencement of running of the statute can be an issue.

- For private *continuing* nuisances, each repetition of a continuing nuisance is considered a separate wrong that commences a new period in which to bring an action based on the new injury. (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996), 44 Cal.App.4th 1160.)

- For a *permanent* nuisance (e.g., a building, fence, buried sewer, or structure located on the property of another), the three-year statute of limitations begins to run *when the nuisance first occurred*.

Application—Application of the Law to Client's Facts

— Client has continuously had an interest in his property which is located above the offending property owners' properties, and previously had an uninterrupted open viewshed that was not to be disturbed (per the Design Review Guidelines and HOA precedent – see Section 4 above).

— The offending property owners allowed trees to grow into Client's viewshed and have interfered with his enjoyment of his viewshed and property.

— Such interference with Client's viewshed appears to be unreasonable (given the Design Review Guidelines ensuring protection of the viewshed) (and as it relates to Property #1, given the conditions agreed-to by the prior owners of Property #1 so that their landscape plan could be

approved conditions which Client relied upon in order not to continue to challenge the landscape plan in 2000]).

— The offending property owners appear to have caused harm to Client, as his viewshed has, and continues to be, interfered with, and he has lost enjoyment of his viewshed as a result of the offending property owners' trees.

— In addition to compensatory damages related to the past and present interference with his viewshed, Client will likely be entitled to declaratory relief (a court order confirming that the trees are improper and should be removed) and injunctive relief – ordering that the trees be moved. Client might also be entitled to emotional distress damages, if Client has experienced annoyance, inconvenience, and discomfort related to the offending property owners' refusal to remove the trees.

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— See the Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action in Section 8.1 above, as the same Strengths/Pros and Weaknesses/Cons apply to this potential cause of action.

— As it relates to the SOL, the offending property owners may argue that the SOL has run because Client was aware of the alleged nuisance (at least as it relates to Property #1) since 2013, and he was again continuously aware of the alleged nuisance (the offending trees) since that time. Client will likely be able to combat such argument however, as for private *continuing* nuisances, each repetition of a continuing nuisance (which appears to be the case here) is considered a separate wrong that commences a new period in which to bring an action based on the new injury. (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996), 44 Cal.App.4th 1160.)

## 8.6.
## Declaratory Relief

Elements—Declaratory Relief

— The essential elements of a declaratory relief cause of action are: (i) an actual controversy between the parties' contractual or property rights; (ii) involving continuing acts/omissions or future consequences; (iii) that have sufficiently ripened to permit judicial intervention and resolution; and (iv) that have not yet blossomed into an actual cause of action. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 366–69.)

— In an action for declaratory relief, an "actual controversy" is one that "admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts; the judgment must decree, not suggest, what the parties may or may not do." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110.)

— Code Civ. Proc., § 1060 explicitly permits declaratory relief claims to determine the rights and duties of an HOA/homeowner.

— The "enforcement" issues discussed in the context of the "Breach of CC&Rs" and "Negligence" causes of action above are also applicable to a declaratory relief claim.

Remedies—

— The remedy for a declaratory relief cause of action is a judicial declaration specifying the rights and obligations of the parties. (Code Civ. Proc., § 1060.)

— As to whether attorneys' fees are available to the prevailing party, see "Attorneys' Fees and Costs" section below.

Applicable Statute of Limitations—

— The statute of limitations governing a request for declaratory relief is the one applicable to an ordinary legal or equitable action based on the same claim. (*Mangini v. Aerojet–General Corp.* (1991) 230 Cal.App.3d 1125, 1155.)

Application—Application of the Law to Client's Facts

— An actual controversy exists between Client, on the one hand, and the HOA and the three offending property owners, on the other hand. Client maintains that the offending trees must be removed/cut down as they block his viewshed and are required to be removed/moved/cut down under the Design Review Guidelines, while the offending property owners contest the trees removal/cutting and the HOA does not appear to be willing to enforce the Design Review Guidelines and mandate that the offending property owners remove/cut down the trees so that they do not interfere with Client's viewshed. Also, Client contests that the standard recently employed by the HOA – merely trim the trees (like was done in 2013) – is not the standard required under the terms of the Design Review Guidelines and that no variance has been sought or given (and that the standards for a variance have not, and cannot, be met). The HOA appears to attempt to employ an entirely different standard than what is stated in the Design Review Guidelines– the trimming of the palm trees is sufficient (as asserted in 2013) and appears willing to give the offending property owner variances of sorts.

— The actual controversy between Client and the HOA and offending property owners appears to involve continuing acts/omissions/future consequences, as Client maintains that the offending trees need to be removed/moved per the terms of the Design Review Guidelines.

— The actual controversy appears ripened to permit judicial intervention, as the offending trees are interfering with Client's viewshed and causing him harm.

— Declaratory relief is necessary. While the other causes of action may address the harm to Client, the other causes of action are unable to procure an affirmative determination from the Court that the offending trees violate the Design Review Guidelines and that they must be removed/moved per such guidelines.

Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action

— See Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action in Section 8.1 above, as the same Strengths/Pros and Weaknesses/Cons apply to this potential cause of action.

— At this time, this cause of action is supported by the facts and the law.

## 9.
## POTENTIAL AFFIRMATIVE DEFENSES

Based upon the allegations made against Client thus far, and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the affirmative defenses discussed below appear to be applicable.

### 9.1.
### BJR (Lamden)

— The business judgment rule ("BJR") is a court-made doctrine of judicial deference granted to boards of directors. In general terms, under the BJR, courts presume that directors have based their decisions on sound business judgment, and therefore interference by the court with a board's decisions is something to be avoided. The BJR applies as long as the director's decision was made in good faith and in the absence of a conflict of interest. (Corp. Code, §§ 309, 7231; *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1045.)
— The BJR was formally applied to boards in HOA cases by a famous case called *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249.[7]

— This presumption granted under the BJR, however, can be overcome—i.e., directors won't be shielded from personal liability—if the directors' business decisions were made without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Berg & Berg Enterprises,*

[7] Although the *Lamden* court narrowed its holding to *maintenance*-related decisions, over the last two decades, other courts in California have applied the *Lamden* rule to non-maintenance decisions made by HOA boards/committees. (See, e.g., *Dolan-King v. Rancho Santa Fe Ass'n* (2000) 81 Cal.App.4th 965 [reviews of architectural applications given deference]; *Healy v. Casa del Rey Homeowners Ass'n* (2007) 153 Cal.App.4th 863 [board decision as to how and when to enforce governing documents given deference]; *Harvey v. Landing Homeowners Assn.* (2008) 162 CalApp.4th 809 [whether owners should be granted exclusive use of common areas given deference].)

*LLC v. Boyle*, *supra*, 178 Cal.App.4th at 1045.) In other words, to defeat the *Lamden* rule of judicial deference, a plaintiff will need to show that the board either acted in bad faith, failed to investigate, acted with self-interest, or acted outside the scope of its authority. In fact, notwithstanding the expansion of the BJR under *Lamden* referenced in the footnote below, other courts in California have limited *Lamden* in a variety of ways.

- In *Affan v. Portofino Cove Homeowners Assn.* (2010) 189 Cal.App.4th 930, the court recognized *Lamden's* narrow scope and noted that while it was certainly a rule of deference in favor of HOA boards, it did NOT create "blanket immunity" for all board decisions. (*Id*., at 940.)

- In *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.* (2008) 168 Cal.App.4th 1111, the court described Lamden's BJR as being in the nature of an affirmative defense (and held that a defense of good faith is necessarily factual in nature). Thus, under *Lamden*, that court reasoned that "judicial deference [was] owed only when it ha[d] been shown the Association acted after reasonable investigation, in good faith and with regard for the best interests of the community association and its members." (*Id*., at 1122-1123.)

- The BJR under *Lamden* does *not* extend to legal questions that may involve the interpretation of an HOA's CC&Rs—i.e., courts, not HOAs, decide *legal* questions. An association's Board is afforded deference in determining how to make necessary repairs to common areas, it cannot substitute its discretion for that of a court deciding whether the association has an obligation to make repairs to common areas based upon statutory and contractual language. (*Dover Village Assn. v. Jennison* (2010) 191 Cal.App.4th 123.) *In other words, a board is offered protection under the BJR when it makes a choice, not when it ignores problems.*

Application/Conclusion—Application of the Affirmative Defense to Client's Facts

— The HOA may raise this as an affirmative defense to Client's claims related to the HOA's failure to enforce the Design Review Guidelines/CC&Rs and claim that that it had the right to exercise its discretion in how to proceed against the offending property owners regarding the offending trees. Client could combat that argument by presenting evidence to show that in light of the explicit terms of the Design Review Guidelines and the precedent employed by the HOA itself regarding the offending trees (see section 4 above), exercising such discretion was not in good faith or reasonable, and that the Design Review Guidelines/CC&Rs should have, and must be, enforced. Therefore, the HOA is liable for refusing to enforce them.

## 9.2.
## Statute of Limitations

The applicability of a statute of limitations defense depends upon the nature of the claims alleged. The following represent the more common allegations in the context of an HOA dispute:

— The statute of limitations to **enforce a restriction**, which includes CC&Rs, is five years. (Code Civ. Proc., § 336(b).) Consequently, an action for a violation of a restriction must be commenced within five years after the party enforcing the restriction discovers, or through the exercise of reasonable diligence, should have discovered, the violation. [*As used here, a "restriction" means a limitation on, or a provision affecting the use of, real property in a deed, Declaration, or other instrument in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.*] (Civ. Code, § 784.)

— For **breach of verbal contracts**, the statute of limitations is two years (Code Civ. Proc., § 339); for breach of most **written contracts**, the statute of limitations is four years (Code Civ. Proc., § 337); and for breach of **negotiable instruments** (e.g., promissory notes), the statute of limitations is six years (Comm. Code, § 3118).

— Same **breach of the implied covenant of good faith and fair dealing** is the same as breach of contract.

— Two years for **personal injuries** (Code Civ. Proc., § 335.1); three years for claims related to **injury to property** (Code Civ. Proc., § 335.1).

— A claim for **breaching a fiduciary duty** must be brought within four years of the breach. (Code Civ. Proc., § 343; *William L. Lyon & Assoc, Inc. v. Sup. Ct.* (2012) 204 Cal.App.4th 1294, 1312.) If the breach of fiduciary duty stems from the defendant's **fraud** (even if pleaded as breach of fiduciary duty), which has a statute of limitations of only three years, the claim must be brought within three years. (Code Civ. Proc., § 338; *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.)

— For *property damage* resulting from a **nuisance**, three years. (Code Civ. Proc., § 338(b); *Wilshire Westwood Assocs. v. Atlantic Richfield Co.* (1993) 20 Cal.App.4th 732, 743-745.) For *personal injuries* resulting from a nuisance, two years. (Code Civ. Proc., § 335.1.)

- For private *continuing* nuisances, each repetition of a continuing nuisance is considered a separate wrong that commences a new period in which to bring an action based on the new injury. (*Beck Development Co., v. Southern Pacific Transportation Co.* (1996), 44 Cal.App.4th 1160.)

- For a *permanent* nuisance (e.g., a building, fence, buried sewer, or structure located on the property of another), the three-year statute of limitations begins to run when the nuisance first occurred.

— For **fraud** and **intentional misrepresentation**, three years. (Code Civ. Proc., § 338(d).)

— For **negligent misrepresentation**, three years. (Code Civ. Proc., § 338(d).)

— The statute of limitations governing a request for **declaratory relief** is the one applicable to an ordinary legal or equitable action based on the same claim. (*Mangini v. Aerojet–General Corp.* (1991) 230 Cal.App.3d 1125, 1155.)

Application/Conclusion—Application of the Affirmative Defense to Client's Facts

— See section 8 above; specifically, each prospective cause of action which analyzes/addresses the SOL issues (if any) related to each respective cause of action.

## 9.3.
## Jurisdiction

### 9.3.1.
### Arbitration

None of the documents reviewed require Client to submit the current dispute to binding arbitration. Client may, therefore, *choose* whether to agree to arbitration. Whether that is a good idea or not depends upon a variety of factors that Client and the Firm can discuss at a later time.

### 9.3.2.
### Personal Jurisdiction

It is likely that given the facts and parties relevant to this dispute, the superior court in Los Angeles County may exercise personal jurisdiction over the parties.

### 9.3.3.
### Subject Matter Jurisdiction

Subject matter jurisdiction is a requirement for suits filed in federal court. There are no federal court issues of subject matter jurisdiction in connection with this dispute.

## 9.4.
## Standing

Based upon the information/evidence that Client has provided thus far, Client has standing to pursue every cause of action described above against each of the intended defendants (excluding DOES, of course).

## 9.5.
## Anti-SLAPP Analysis

Anti-SLAPP Overview—

— Strategic Lawsuits Against Public Participation ("SLAPP") are lawsuits designed to hinder or prevent parties (typically the defendant) from engaging in constitutionally protected activities (e.g., petitioning or free speech). For example, development companies have used SLAPP suits to harass environmental groups standing in the way of large development/construction projects. These companies would file lawsuits against the environmentalists for the express purpose of tying up the smaller (and not as well-funded) environmental groups' financial resources, effectively preventing them from having their "day in court." In response, the Legislature passed the anti-SLAPP statute, which was codified in Code of Civil Procedure section 425.16. This statute allows the defending party to file a special motion to strike (called an anti-SLAPP motion) to have the court determine whether the lawsuit can proceed or should instead be thrown out as a meritless attack on the defendant's acts made in furtherance of his or her right "to petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (Code Civ. Proc., § 425.16(b)(1).)

— The granting of an anti-SLAPP motion can have *severe* consequences, not the least of which is the dismissal of the at-issue claim(s)—or even the entire complaint—depending on the circumstances. In addition, a defendant who prevails on an anti-SLAPP motion *must* be awarded his or her attorneys' fees and costs, which, given the complexity of anti-SLAPP motions, is typically quite significant. (Code Civ. Proc., § 425.16(c)(1).)

Anti-SLAPP Statute's Application in HOA-Related Cases—

— SLAPP suits can, and have, arisen in lawsuits by and against HOAs and HOA members. For example, a member might file a lawsuit against a director or committee member to pressure that person to change a critical vote regarding some issue or another. To prevent that type of abuse, and to discourage members from naming individual board members as defendants in litigation, courts have determined that the protections offered under the anti-SLAPP statute apply to various issues that arise in the HOA arena. (*Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130-36 [tree trimming dispute between adjacent homeowners that involved covenants to all lots in the community satisfied the definition of "public interest"]; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476-77 [newsletter published to 3,000 residents of an HOA was a "public forum" even if access to the newsletter was selective and limited]; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1409-10 [letters from attorney to management company and the HOA's board regarding nuisance caused by an HOA member].)

— Obviously, however, not all HOA-related disputes are covered by the anti-SLAPP statute. (*Talega Maintenance Corp. v. Standard Pac. Corp.* (2014) 225 Cal.App.4th 722, 732 [holding that HOA

proceedings must have a strong connection to governmental proceedings to qualify as "official proceedings"]; but see *Lee v. Silveira* (2016) 6 Cal.App.5th 527, 540-46 [holding that HOAs "functioned similar to a quasi-governmental body" to constitute a "public forum"].)

Application/Analysis/Conclusion—

— Based upon the applicable facts and claims, an anti-SLAPP motion is unlikely because none of the conduct complained of arises from constitutionally protected activities.

## 9.6.
## Pre-Filing Requirements

Civil Code section 5925, et. seq. requires that Client submit this dispute to Alternative Dispute Resolution ("ADR") prior to initiating a lawsuit, as it will be an enforcement action for declaratory/ injunctive relief (enforcing the governing documents, among other things).

## 9.7.
## Attorneys' Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys' fees and costs under Article XIII, Section 5 (p. 82) of the CC&Rs and Civil Code § 5975(c).

If new information comes to light that affects Client's right to attorneys' fees and costs, Client will be notified.

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# 10.
# FINAL
# THOUGHTS/ISSUES/CONCERNS/COMMENTS

I don't have any issues or concerns at this time.

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