

# Litigation Due Diligence Analysis

Belmont Center LLC v. Pelican Hill HOA

By  
SE  
September 12, 2023

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## 1. SUMMARY

On October 1, 2020, ahead of Belmont's close of escrow on the Property, the HOA's property manager with FirstService Residential, Brian Renaud, confirmed via email that there were no active violations against the Property.

Ahead of the close of escrow, the Moalejes communicated through the sellers' real estate agent (Marcy Weinstein), who also happens to live at the HOA and serve on the ACC, regarding the large tarp the owners of 3 Premiere Point placed over the trees adjoining the Property as well as the trees the owners planted within the HOA's 30 degree "No Tree Zone."

On October 30, 2020, Belmont closed escrow on the Property making it a member of the HOA by and through its managing members, the Moalejes.

Within a couple of months after escrow closed, on December 2, 2020, the HOA accused the Moalejes of violating the HOA's governing documents by removing certain trees. The Moalejes responded that while they had removed a couple of diseased trees, they had not removed any trees in the area specified in the HOA's correspondence. The Moalejes subsequently called Mr. Renaud to clarify that the prior owners of the Property, and not the Moalejes, removed the trees referenced in the HOA's December 2, 2020 correspondence.

On February 2, 2021, Mr. Moalej followed up with an email to Mr. Renaud in which he reiterated that it had been the prior owners, and not the Moalejes, who had wrongfully removed any trees. Mr. Moalej then detailed several violations committed by their neighbor at 3 Premiere Point, including: (i) their placing tarps over trees along the property line; (ii) the fact that the covered trees had been planted within the 30 degree zone; and (iii) their failure to trim the wrongfully planted trees.

On March 15, 2021, Mr. Moalej and Mr. Renaud exchanged email communications regarding the alleged tree violations. In response to the Moalejes' concerns regarding the tarp at 3 Premiere Point, Mr. Renaud asserted that the homeowners put up the tarp "to offer privacy to both properties because there [was] no longer any trees/shrubs providing screening." Mr. Renaud stated that the owners of 3 Premiere Point would remove the tarp "if requested." Although Mr. Renaud's response addressed the tarp, he failed to respond substantively to the Moalejes' complaint regarding 3 Premiere Point's planting of trees within the "No Tree Zone."

Despite Mr. Moalej assuring Mr. Renaud, once again, that he and his wife had not removed the trees the HOA claimed they removed, Mr. Renaud ignored the Moalejes and the HOA proceeded to levy fines on their HOA account. Instead of addressing the issues relating to the violations at 3 Premiere Point, the HOA continued

sending the Moalejes violation notices for entirely different matters, including requesting that the Moalejes clean the exterior of the Property and remove their lights and security cameras,<sup>1</sup> among other things.

On May 26, 2021, the Moalejes followed up with Mr. Renaud regarding the HOA's continuing assessment of fines for trees that the prior owners of the Property had removed.

On August 22, 2021, Mr. Moalej requested a meeting with the HOA's architect at one of the HOA's design work shops to discuss the Moalejes' proposed plans ahead of their formal submission of those plans.

Between August and October 2021, the Moalejes continued engaging with the HOA and its architect to finalize their plans.

On October 13, 2021, Mr. Moalej attended an HOA hearing regarding the alleged removal of the trees. During this hearing, he reiterated that they had not removed the trees and stated that they had plans to renovate the Property, which included plans to substantially change the landscaping (making any previously removed trees moot).

On October 18, 2021, the Moalejes submitted to the ACC what would become their first architectural submission for the proposed renovation of the Property.

On October 27, 2021, the ACC sent the Moalejes a denial of their initial proposed plans. The following is the ACC's response to the Moalejes' proposed plans:

1. Insufficient information has been provided to evaluate the request:
  - a. Provide photographs of the existing home and yard areas.
  - b. Provide a conceptual grading and drainage plan.
  - c. Illustrate the 30 degree "No Tree Zone" on the plans. Architectural Guidelines page 56.

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<sup>1</sup> The Moalejes installed lighting and security cameras to protect themselves and their Property in the wake of an increase in burglaries and vehicle break-ins in the neighborhood. In fact, the Moalejes were the victims of a vehicle burglary inside the community. While they initially addressed this issue with the HOA, they subsequently learned that the master homeowner association maintains full control and operation over the security and gate guard in the community. Despite the increase in crime-related activity and the multi-million dollar properties in the community, the HOA has continued to demand that the Moalejes' remove their security cameras despite the presence of security cameras at several homes in the community, including at least one other home on the same street as the Property.

- d. Provide sections through the driveway retaining walls to illustrate compliance with Sections 16 and 17 (page 98) of the Architectural Guidelines.
- e. Provide illustrations of the proposed garden gates and driveway gate.
- f. Provide a detailed planting plan and plant list. A minimum percentage of the plants and trees must be selected from the Lot Landscape Palette on page 87 of the Architectural Guidelines.
- g. Provide a lighting plan and lighting specifications.
- h. Provide dimensions of the provide driveway aprons.
- i. Provide illustrations of the proposed water features.
- j. Provide illustration of the proposed or existing rear yard fence. Architectural Guidelines page 33, 34 and 35.
- k. Provide location, details and specification of the mailbox. Architectural Guidelines page 37 and 38.
- l. Provide a color and material board for the proposed hardscape materials.
- m. Provide a section through the home to demonstrate compliance with the Building Envelope illustrated on page 19 of the Architectural Guidelines.
- n. Illustrate the location of the solar panels and provide specifications.
- o. The southwest corner of the yard appears to be raised above grade. Clarify the height difference and setback. Provide a section to clarify.
- 2. Roof slopes may be no less than 3.5:12. Adjust the roof pitch on the home and cabana.
- 3. Plate heights for the cabana may not exceed 8 feet. adjust the height.
- 4. Attached loggia, trellis and patio covers may not extend past the Building Envelope. Architectural Guidelines page 11. Adjust the design.
- 5. Roofing material may not be grey or black. Architectural Guidelines page 45.

The Moalejes revised their plans and on November 22, 2021, they resubmitted the extensively modified plans to the ACC for a second time.

On December 7, 2021, over one month after its first written denial, the ACC sent a second correspondence with different responses (underlined below):

- 1. Insufficient information has been provided to evaluate the request:
  - a. Provide photographs of the existing home and yard areas.
  - b. Provide several sections through the driveway retaining walls to illustrate compliance with Sections 16 and 17 (page 98) of the Architectural Guidelines.
  - c. Provide dimensions of the proposed driveway aprons.

- d. The southwest corner of the yard appears to be raised above grade. Clarify the height difference above original grade and setback. Provide a section to clarify.
- e. Provide an exhibit and specification of the proposed Tesla roofing system. Roofing material may not be grey or black. Architectural Guidelines page 45. If the proposed Tesla roofing is too dark and does not conform to the community character, conventional PV solar panels are to be proposed and illustrated.
- f. Clarify the color of the proposed auto court gates.
2. The auto court gates are too long and too solid. A reduced length and a design with more detail is to be provided.
3. Attached loggia, trellis and patio covers may not extend past the Building Envelope. Architectural Guidelines page 11. Adjust the design.
4. The proposed cabana may not be placed in the 30 degree “No Tree Zone”. Modify the design to comply. Due to placement outside the Building Envelope, the cabana is to be modified to exclude solid walls and enclosed spaces. Eliminate the pool bath and entertainment walls. Confirm with the fire authority the constructability in this location.
5. Dark grey and black concrete is not permitted. Adjust the concrete color. Guidelines, page 46.
6. The Architecture of the home is deviating too much from the Mediterranean style of the community. Additional eave detailing, traditional guardrail detailing facing the street, windowsill detail, adjustment of first floor header heights and window proportions and adjustment of the rear loggia column widths and soffit between the lower floor and balcony are needed. Additional changes (offsets) in the balcony are needed to eliminate the straight balcony appearance along the rear elevation. [Emphasis added.]

On March 30, 2022, the Moalejes amended their plans and submitted them for a third time. Then on April 25, 2022, the ACC sent Mr. and Mrs. Moalej the third denial of their proposed plans.

On July 22, 2022, the Moalejes revised the plans and sent their fourth submission to the ACC. The ACC turned around and on August 17, 2022, issued its fourth denial of their proposed plans.

On September 20, 2022, Mr. and Mrs. Moalej submitted their fifth set of revised plans requesting the ACC’s review and approval. By this time, the Moalejes had been revising their original plans for *nearly one year*.

Around this time, the HOA circulated a proposed Contractor Policy & Procedure Manual containing new restrictions that were not in effect when the Moalejes submitted the five iterations of their plans. In fact, the Moalejes were not aware of any other members in the architectural review process to renovate a property. The Moalejes were apparently the only members with pending construction plans at the time of the HOA’s decision to update its Contractor Policy & Procedure Manual.

On October 5, 2022, the HOA enacted its proposed amended Contractor Policy & Procedure Manual.<sup>2</sup> Five days later, on October 10, the HOA sent Mr. and Mrs. Moalej a letter informing them that the ACC had once again denied their fifth plan submission. This time, the HOA the ACC claimed that the Moalejes plans contained the following issues:

1. The Architecture of the home is deviating too much from the Mediterranean style of the community. More elaborate eave detailing, windowsill detail, etc. are needed.
2. The southwest corner of the yard has been raised to accommodate the pool. Provide an increased setback from the side property line to the pool to allow sufficient space for plants or trees to screen the pool from the neighbor. Screen the pool from the adjacent neighbor with plants or trees placed outside the “No Tree Zone.”
3. The view fence<sup>3</sup> along the right side property line wall (adjacent to Common Area) must be preserved. The view fence may not be changed to a solid block wall.<sup>4</sup>
4. Cameras are to be placed in discreet locations and are to be directed away from neighboring homes. Provide illustrations of the mounting height and the monitoring zones.

On October 19, 2022, Mr. Moalej had a telephone call with the HOA’s architect to discuss the Moalejes’ current plans. Some of the architect’s comments were inconsistent with the ACC’s position. Notably, the ACC’s most recent denial demanded that cameras be in “discreet locations,” but even the HOA’s architect acknowledged the Moalejes plans adequately addressed that issue already. During this time, several of the Moalejes’ neighbors had security cameras in plain view.

On October 27, 2022, Allison Santos, the Community Design Review Specialist with FirstService Residential, emailed Mr. Moalej claiming that “[t]he neighbor at 3 Premier Pt was not provided a copy of the

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<sup>2</sup> Applying the amended Contractor Policy & Procedure Manual to the Moalejes’ project would drastically increase the cost and timing of the project not to mention it would be unjust because the Moalejes’ first five plan submittals all occurred prior to the HOA’s adoption of the amended Contractor Policy & Procedure Manual.

<sup>3</sup> The reference to a “view fence” appears to be concocted by the HOA to conclude that the side yard wrought iron fence that is adjacent to the common area greenbelt exists because it protects a view. The HOA does not have a protected view from the common area greenbelt and no nearby owner has a protected view that the Moalejes would disturb with construction of their proposed solid block wall.

<sup>4</sup> The Moalejes’ project includes a proposed 6-foot solid wall around the perimeter of the rear and side yards of the Property.



plans.”<sup>5</sup> Mr. Moalej denied that contention and explained that his neighbor had in fact received a hard copy of the plans, and that he had actually spent 30 minutes discussing the plans with the neighbor. Mr. Moalej went on to explain that after that lengthy conversation, the neighbor at 3 Premier Pt refused to sign the notification form.

On November 30, 2022, the Moalejes (through counsel) served on the HOA (through its counsel) a demand for alternative dispute resolution (“ADR”) setting forth their various claims and defenses against the HOA. The ADR demand contained clear photographs of the violative trees at 3 Premiere Point—trees that the Moalejes’ neighbors planted within the 30 degree zone that obstructed the ocean view from several viewpoints at the Property.

Despite the undisputed location of the neighbor’s trees, the HOA requested ahead of this mediation, an HOA board inspection of the trees from the backyard of the Property. Three out of the five board members live on the Moalejes’ street and are presumably irked that their neighbors (the Moalejes) are planning to rebuild their home, a process that could take one year or more, causing heavier traffic in the area and debris, among other construction-related concerns.

In March 2023, Mr. and Mrs. Moalej submitted their sixth and final proposed plans to the ACC.<sup>6</sup> The Moalejes’ final plans feature a pool design where the pool deck area is not raised any higher than the existing pool area of the Property. Their plans also include a proposed cabana (on the opposite end of the pool) with a bathroom that is located in the corner of the backyard where there are *zero* privacy concerns—the area immediately next to the Property is the common area greenbelt, not a private residence, and the home that is on the other side of the common area sits at a much higher elevation than the Property.

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<sup>5</sup> The HOA’s assumption that the owners of 3 Premiere Point were being transparent when these are the same neighbors who refused to remove their trees within the 30 degree “No Tree Zone” further reinforces the Moalejes’ belief that the HOA has promoted the interests of the Moalejes’ neighbors at the expense of the Moalejes.

<sup>6</sup> Our office will email you the files containing the most recent set of plans ahead of the mediation.

**2.**  
**PARTIES/SIGNIFICANT FIGURES**

<b>Name of Party / Significant Figure</b>	<b>Significance to Underlying Matter/Dispute</b>
Reza and Naseem Moalej (“Clients”)	Clients
Belmont Center LLC	LLC that owns the Property Clients are managing members of the LLC
Pelican Hill Community Association (“HOA”)	The HOA

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

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### 3. NOTABLE PROVISIONS OF THE GOVERNING DOCUMENTS

Document Name Article / Section No.	Text of the Selected Article/Sections No. (if none, put "N/A"; delete rows that you didn't use; maintain formatting)
CC&Rs Article I, Section 1.27	<p style="text-align: center;"><b><u>Section 1.27 - "Design Guidelines"</u></b> shall mean and refer to those standards, guidelines and procedures initially established by the Declarant for the Covered Property, as revised from time to time pursuant to the procedures and subject to the limitations upon revision set forth in this Declaration, for use, in part, in the preparation of plans and specifications by an Owner, the review and approval or disapproval of such plans and specifications by the Architectural Control Committee and the Board in connection with the construction and installation of Improvements on the Covered Property, the regulation of construction activity of the Improvements described on such approved plans and specifications and access to the Covered</p> <p style="text-align: center;">Property by contractors and other third parties. The Design Guidelines which regulate such construction activity and access may be set forth in a separate contractor(s) manual for Pelican Hill.</p>

<p>CC&amp;Rs Article VI, Section 6.03</p>	<p><b><u>Section 6.03 - Nuisance.</u></b> No noxious or offensive trade or activity shall be permitted upon any part of the Covered Property, nor shall anything be done thereon which shall in any way interfere with the quiet enjoyment of each Owner's respective Lot, or which shall in any way increase the rate of insurance on any other Lot or the Covered Property. No plants or seeds infected with insects or plant diseases, shall be brought upon, grown or maintained upon any part of the Covered Property. No motorcycles, dirt bikes or other mechanized vehicles may be operated upon any portion of the Common Area not improved as a street, without the prior written approval of the Board, which approval may be withheld for any reason whatsoever. No motorcycles, dirt bikes or other mechanized vehicles may access Buck Gully or other public open space from the Covered Property. Alarm devices used exclusively to protect the security of a Lot or an automobile and its contents, shall be permitted, provided that such devices do not produce annoying sounds or conditions as a result of frequently occurring false alarms. No rifle, shotgun, pistol, revolver or firearm of any kind shall be shot, fired or discharged anywhere within the Covered Property. No explosive of any kind shall be detonated anywhere in the Covered Property, except to the extent permitted by Local Government and then only upon the issuance of any required permit(s) by the Local Government and/or other governmental agencies having jurisdiction.</p>
<p>CC&amp;Rs Article VI, Section 6.17</p>	<p><b><u>Section 6.17 - View.</u></b> Each Owner, by acceptance of a deed or other conveyance of a Lot, acknowledges that any construction or Improvement by Declarant, the Association or any other Owner, or any owner of any other property may impair or obstruct any view that such Owner may have enjoyed at the time of the purchase of his or her Lot, and such Owner hereby acknowledges that any rights acquired in the Lot do not include the right to any view or the preservation of any view and further consents to such obstruction and/or impairment.</p>



CC&Rs  
Article  
VIII,  
Section  
8.02

Section 8.02 - Design Guidelines. Subject to the right of the Declarant to approve any amendments thereto as described in subsection (e) below, the Board may, from time to time, adopt and promulgate, by majority vote, Design Guidelines to be administered through the Architectural Control Committee. No such amendment to the Design Guidelines shall be effective if it conflicts with or is otherwise inconsistent with the Custom Lot Declaration or this Declaration. The Design Guidelines may include, among other things, those restrictions and limitations upon the Owners set forth below.

(a) Time limitations for the completion of the Improvements for which approval is required pursuant to the Design Guidelines. In addition to such time limitations, the completion of Improvements may also be subject to the terms and conditions of a separate instrument recorded against a Lot by the Declarant and the Owner thereof.

(b) Conformity of completed Improvements to plans and specifications approved by the Architectural Control Committee; provided, however, that purchasers and encumbrancers of a Lot in good faith and for value shall, subject to the terms and conditions of any separate instrument recorded against a Lot by the Declarant and the Owner thereof which may require the express approval of the Architectural Control Committee of plans and specifications, be deemed to be in compliance with approved plans and specifications and in compliance with the Design Guidelines unless notice of noncompletion or nonconformance specifying the reason for the notice shall be filed of record against such Lot in the Official Records within one (1) year of the expiration of the time limitation set forth in the Design Guidelines, or unless legal proceedings shall have been instituted to enforce compliance or completion within said one (1) year period. The Owner to whom a notice of noncompletion or noncompliance has been issued shall be bound by such notice regardless of whether such notice has been filed of record in the Official Records. Each Owner hereby is deemed to have consented to and authorized the recordation against his or her Lot of such a notice of noncompletion or nonconformance executed by duly authorized officers or by the president and secretary of the Association.

(c) Subject to the limitations of subsection (f) below, such other limitations and restrictions on Improvements as the Board in its reasonable discretion shall adopt, including, without limitation, the regulation of the placement, kind, shape, materials, plant species and location of any Improvement and the height of any Improvement in connection with the review of plans and specifications for proposed Improvements, including without limitation, a procedure for and approval of preliminary and

final plans and drawings, the number of sets of plans to be submitted and provisions for notice to be given to affected Owners of the nature of the proposed Improvements. Unless any such rules are complied with, such plans and specifications shall be deemed not submitted.

(d) A description of certain Improvements which shall be set forth in the Design Guidelines and which, if completed in conformity with the Design Guidelines, shall not require the approval of the Architectural Control Committee.

(e) Provisions regulating, in part, the activities of the contractor(s) of an Owner in connection with the construction and installation of Improvements upon a Lot and regulating access of such contractor(s) and other third parties to the Covered Property. Such provisions may be set forth in a separate contractor('s) manual.

(f) Until the completion of construction of a residential dwelling upon each Lot in conformance with the specifications approved by the Architectural Control Committee, any amendment to the Design Guidelines shall require the written approval of the Declarant.

**Section 8.04 - Approval of Plans.**

(a) No Improvements shall be made upon the Covered Property except in compliance with plans and specifications therefor which have been submitted to and approved by: (i) a majority of the Architectural Control Committee, (ii) approval of the Owner of an adjacent Lot if the Improvements involve a side yard wall or fence or other Improvements as provided for in the Design Guidelines, and (iii) after the Turnover Date, the approval of Declarant's Representative on the Architectural Control Committee if the plans and specifications for the Improvements consist of the initial custom home constructed on a Lot.

(b) The Architectural Control Committee shall review plans and specifications submitted for its approval as to style, exterior design, appearance and location and shall approve such plans and specifications only if it deems that the proposed Improvement will not be detrimental to the appearance of the Development as a whole; that the Improvement complies with the Design Guidelines; that the appearance of any Improvements will be in harmony with the surrounding structures; that the construction of any Improvement will not detract from the beauty and attractiveness of the Development or the enjoyment thereof by the Owners; and that the upkeep and maintenance of any Improvement will not become a burden on the Association. The Architectural Control Committee may (i) determine that such Improvement cannot be approved because of its effect on existing drainage, utility or other easements, (ii) require submission of additional plans and specifications or other information or materials prior to approving or disapproving plans and specifications submitted, or (iii) condition its approval of plans and specifications for any Improvement on such changes therein as it deems appropriate such as, and without limitation, the approval of such Improvements by a holder of an easement which may be impaired thereby or upon approval of any such Improvement by the appropriate governmental entity. Any Architectural Control Committee approval conditioned upon the approval by a governmental entity shall not imply the Association is enforcing any

CC&Rs,  
Article  
VIII,  
Section  
8.04



	<p>government codes or regulations, nor shall the failure to make such conditional approval imply that any such governmental agency approval is not required.</p> <p>(c) In the event the Architectural Control Committee fails to approve or disapprove such plans and specifications within forty-five (45) days after the same have been duly submitted in accordance with any rules regarding submission stated in the Design Guidelines or adopted by the Architectural Control Committee, such plans and specifications will be deemed disapproved. In the event of a disapproval, the Owner may resubmit the plans and specifications. If the Owner resubmits plans and specifications, the Architectural Control Committee shall have thirty (30) days to review and either approve or disapprove same. Failure by the Architectural Control Committee to approve or disapprove such plans and specifications within this subsequent thirty (30) day period will be deemed the approval thereof.</p>
<p>CC&amp;Rs Article VIII, Section 8.06</p>	<p><u>Section 8.06 - Nonliability for Approval.</u> Plans and specifications are not approved for (a) engineering design, (b) compliance with zoning and building ordinances, and other applicable statutes, ordinances or governmental rules or regulations, (c) compliance with the requirements of any public utility, (d) compliance with any easements or other agreement, or (e) preservation of any view. By approving such plans and specifications neither the Architectural Control Committee, the members thereof, the Association, the Owners, the Board, the Declarant, nor agents, representatives, employees, attorneys or consultants of any of the foregoing, assume liability or responsibility therefor, or for any defect in any Improvement constructed from such plans and specifications or for any obstruction or impairment of view caused or created as the result of any Improvements approved by the Architectural Control Committee.</p>



<p>CC&amp;Rs Article VIII, Section 8.10</p>	<p><b><u>Section 8.10 - Variances.</u></b> The Board may authorize a variance from compliance with the Design Guidelines when circumstances such as topography, natural obstructions, hardship, aesthetic, or environmental consideration may require such variance; provided, however, that: (a) no variance from the use restrictions contained in the Article entitled "Use Restrictions" of this Declaration may be granted, (b) no variance shall be inconsistent with or conflict with the covenants, conditions, restrictions and reservations set forth in this Declaration or the Custom Lot Declaration; and (c) until the completion of construction of a residential dwelling upon each Lot in conformance with the plans and specifications approved by the Architectural Control Committee, no variance may be granted without the prior written approval of the Declarant. In</p> <p>addition, no variance shall be inconsistent with the rights reserved to Declarant or the Golf Course Owner under the Golf Course Easement Agreement. Written evidence of such variance must be delivered to such Owner and a copy of the resolution of the Board authorizing such variance must be retained in the permanent records of the Association. If such variances are granted, no violation of the covenants, conditions, restrictions and reservations contained in the Association Management Documents shall be deemed to have occurred with respect to the matter for which the variance was granted. The granting of such a variance shall not operate to waive any of the terms and provisions of the Association Management Documents for any purpose, except as to the particular Lot and particular provision of this Article covered by the variance, nor shall it affect in any way the Owner's obligation to comply with all government laws and regulations affecting use of the Lot including, but not limited to, zoning ordinances and lot setback lines or requirements imposed by any governmental or municipal authority.</p>
<p>CC&amp;Rs Article XVI, Section 16.01</p>	<p><b><u>Section 16.01 - Enforcement.</u></b> The Association, the Declarant (as long as the Declarant is an Owner or has any right to annex any Annexation Property without the approval of the Members) or any Owner shall have the right of action against any Owner, and any Owner shall have a right of action against the Association, to enforce by proceedings at law or in equity, all restrictions, conditions, covenants and reservations, now or hereafter imposed by the provisions of the Association Management Documents and/or any amendment thereto, including the right to prevent the violation of such restrictions, conditions, covenants, or reservations and the right to recover damages or other sums due for such violation, except that Owners shall not have any right of enforcement with respect to Assessment liens. With respect to architectural control and Association Rules, the Association shall have the exclusive right to the enforcement thereof unless the Association refuses or is unable to effectuate such enforcement, in which case any Owner and the Declarant (for the above-defined period of time) shall have the right to undertake such enforcement.</p>

<p>CC&amp;Rs Article XVI, Section 16.08</p>	<p><b>Section 16.08 - Nuisance.</b> The result of every act or omission where any provision, condition, restriction, covenant, easement, or reservation contained in this Declaration is violated in whole or in part, is hereby declared to be and constitutes a nuisance, and every remedy allowed by law or equity against a private nuisance, shall be applicable against every such result, and may be exercised by the Association or any Owner. Such remedy shall be deemed cumulative and not exclusive.</p>
<p>Design Guidelines Pg. 9</p>	<div data-bbox="578 510 1130 543" data-label="Section-Header"> <h3>THE MEDITERRANEAN CHARACTER</h3> </div> <div data-bbox="292 546 823 745" data-label="Text"> <p>Pelican Hill will include a variety of architectural styles which are characteristic of the area around the Mediterranean. Thematic or period homes which reflect the authentic architectural styles of Italy, France and Spain are permitted. These styles reflect the Mediterranean expression selected for the Newport Coast because of the similarities between the climatological, topographic and cultural influences of the two regions.</p> </div> <div data-bbox="292 766 823 1110" data-label="Text"> <p>Mediterranean architecture is characterized by the use of forms and materials which provide relief from the sun and which work with the natural hillside terrain. Solar protection is commonly provided by diffusing direct sunlight through the use of deep set windows and doors, arcades, balconies, and interior courts. Sensitivity to the landform is achieved by designing custom homes which terrace down the hillsides and by clustering development within the generous expanses of open space. This architecture features the use of classic mediterranean detailing with building materials that include colored stucco walls, subdued concrete, clay tile and slate roofs, and enriched accent materials. (Figures 2 and 3, Pages 9-10 and the Newport Coast Architectural Character-Appendix).</p> </div> <div data-bbox="297 1131 829 1207" data-label="Text"> <p>An intent of these Design Guidelines is to define some of the materials, colors, and forms that constitute these Mediterranean styles.</p> </div> <div data-bbox="297 1228 828 1329" data-label="Text"> <p>Inappropriate designs are those that deviate from these Mediterranean themes, such as post modern and period styles from countries other than Italy, France, or Spain. Post modern architecture is usually characterized by the eclectic</p> </div> <div data-bbox="878 546 1347 598" data-label="Text"> <p>timber, pseudo castles, minarets and pueblo styles of architecture are not acceptable.</p> </div> <div data-bbox="912 630 1344 993" data-label="Image"> </div> <div data-bbox="912 1016 1344 1367" data-label="Image"> </div>



## BUILDING ENVELOPE

Each Lot has been evaluated to determine the volume of space that the house may occupy. The building envelope establishes the maximum height, as well as the front, side, and rear Lot setbacks of each custom home.

**NOTE:** The building envelope does not represent the ultimate shape or architectural appearance of the custom home. It is merely a boundary within which a custom home may be built. The Mediterranean character of the Newport Coast concept encourages a great variety in building mass and architectural character.

No custom home or auxiliary structure may protrude outside the building envelope except roof overhangs, chimneys, free-standing trellises, sun shades, pool buildings, game courts, mechanical equipment structures, gazebos, loggias, sundecks, fences, screens, patios and pool decks as described in these Design Guidelines.

- **Roof Overhangs**  
Roof overhangs and chimneys may protrude a maximum of two and one-half (2½) feet into the front, side or rear yard setbacks.
- **Chimneys**  
Chimneys may protrude above the height limit only if necessary to meet code requirements of Orange County, and if approved by the ACC as being consistent with the intent of these Design Guidelines.  
(The maximum height of a chimney to the top of the spark arrestor enclosure or shroud shall be four feet above the ridge line or four feet above the nearest slope at a 10 foot distance, whichever is less.)

**Free-Standing Trellises, Sun Shades, Pool Buildings, Game Court Fences/Screens, Mechanical Equipment Structures, and Gazebos and Similar Structures**  
These appurtenant improvements to the custom home should be within the building envelope, but may be allowed outside the building envelope if approved on a case by case basis following a review by the ACC. Porte coche shall not be allowed outside of the building envelope. (See Page 39 for more information).

### Gazebos

Gazebos proposed to be constructed outside the building envelope will be considered by the ACC on a case by case basis. The following criteria will be reviewed and evaluated to determine approval for the gazebo; all of the criteria must be satisfied in order to receive approval.

- **Location** The location should not unduly impede the view or privacy of the neighboring lots nor impinge upon a positive view to the project from surrounding roadways. Should a structure appear to adversely affect a neighboring lot, the ACC may, at its sole discretion, require the approval of the affected neighbor. **Under no circumstances may a structure over six feet in height be placed in the 30-degree zone.**

<p>Design Guidelines Pg .12</p>	<ul style="list-style-type: none"> <li>- <b>Form &amp; Mass</b> Lightness in overall appearance is desirable. Lightness is determined by the design of the structure and by the type and size of building materials used. Open wrought iron framing/tubular steel framing and open wood framing are most desirable. Open roof structures are preferred over solid roof structures.</li> <li>- <b>Scale</b> The structure must be low in scale and stature. Maximum height allowed will be 8'-0" at the plate and 12'-0" overall.</li> <li>- <b>Landscape</b> The structures must be screened with trees, shrubs and/or vines. The landscape materials must be compatible with the overall scheme for the landscape design.</li> <li>- <b>Balconies, Sundecks, Patios and Pool Decks</b> Sundecks, patios, decking and pool decking (decks) may extend beyond the building envelope if they are not constructed above the finished first floor elevation. Decking and balconies constructed above the finished first floor elevation may not protrude beyond the building envelope. All decks constructed at or below the level of the finished first floor are restricted to a maximum six foot elevation increase over finished grade level. (Section 13, Page 90).</li> <li>- <b>Loggias</b> On Lots which slope ten percent (10%) or more, loggias may be permitted to protrude outside the building envelope at the 30 or 40 foot rear yard setback, which ever is greater, if approved on a case by case basis by the ACC.</li> <li>- <b>Play Equipment and Structures</b> Any temporary play structure (e.g., without any structural consideration whatsoever for support) under 10'-0" may be installed without approval from the Architectural Control Committee (ACC). However, this structure may not be located within the view cone.  Any play structure which exceeds 10'-0" in height or is permanently installed (e.g., requiring footings, bearing pad or earth moving equipment of any type for support or stabilization) must be submitted to the ACC for review and approval prior to installation. The plans may be submitted in sketch form but must be submitted via a Request to Revise. (Please refer to the "Request to Revise Form" in the Pelican Hill Contractor's Manual).  The approval of a play structure will be based on the same criteria established for gazebos as described above. The structure must be of a design and color that is compatible with the approved custom home.  NOTE: Structural improvements are not permitted in the Rear Yard Drainage Easement and combustible improvements are not permitted in the Fuel Modification Combustible Structures Setback. Refer to the Lot Specific Design Criteria to determine if your Lot is front draining and therefore does not have a Rear Yard Drainage System. Refer to Figure 29, Page 48 to determine if your Lot is adjacent to a Fuel Modification Zone.</li> </ul>
<p>Design Guidelines Pg. 32</p>	<p>The rear yard portion of the side yard wall is located between the rear yard property line and a point which is either a minimum of twenty (20) feet from the rear yard property line (Lots which are less than or equal to one hundred seventy (170) feet deep) or thirty (30) feet from the rear yard property line (Lots which are greater than one hundred seventy (170) feet deep). If the Lot owner chooses to install a fence along the rear yard portion of the side yard property line, then the Lot owner must install a tubular steel fence, a combination tubular steel fence with a tempered glass overlay, or a tempered glass panel. The design of these options must match Figures 23 and 24 on pages 34-35. Other than tubular steel and/or tempered glass, the Lot owner is prohibited from installing any other type of fencing along the rear side yard.</p>

In an effort to preserve a well maintained and open appearance in adjacent rear yards, and to prevent the potential for unsightly encroaching landscaping near private lot lines or adjacent common areas, a 30 degree "No Tree Zone" has been established in the corners of the rear yards. This zone is measured from a point on the side yard property line which is either 20 feet from the rear yard property line, for lots with depth less than or equal to 170 feet or 30 feet from the rear yard property line, for lots with depth greater than 170 feet. The 30-degree angle should be projected from the side yard property lines. No element of any tree shall encroach into the "No Tree Zone". Shrub planting is permitted to a maximum of five feet. (Fig. 30a)

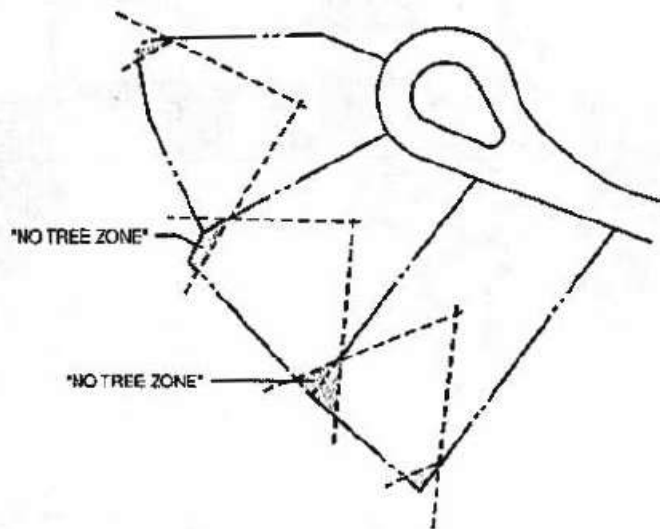


FIGURE 30a

The table may or may not contain all the significant provisions of the document(s) at issue. It is simply a place to include one or more provisions of one or more operative agreement/document that we believe could play a role in some aspect of Clients' case (e.g., binding arbitration, attorneys' fees, and choice of law provisions). The provisions contained in the table, therefore, should neither be viewed as an exhaustive list of key provisions/evidence, nor be used as a measure of what provisions of the operative documents might strengthen (or weaken) Clients' case.

**4.**

**ADDITIONAL INFORMATION/CLARIFICATION NEEDED FROM CLIENTS**

At this time, the Firm does not need Clients to provide any additional information or clarification. This section of the LADD may, however, be amended from time to time as new information/questions arise.

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**5.**

**CIVIL CODE § 5200 DOCUMENT DEMAND**

The HOA produced some documents in response to a Civil Code section 5200 demand. The Firm will complete its review of those documents to determine whether any that should've been included are in fact missing.

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**6.**

**ADDITIONAL DOCUMENTS NEEDED FROM CLIENT**

At this time, the Firm does not need Clients to provide any additional documents. This section of the LADD, however, may be amended from time to time if Clients locate additional documents, or if a third party produces additional documents.

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**7.**

**THIRD-PARTY DOCUMENTS/INFORMATION KNOWN TO EXIST**

At this time, Clients are unaware of any documents or information that can only be obtained from a third party. This, however, may change as new information comes to light, in which case the LADD may be amended to reflect such new information.

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## 8. POTENTIAL CAUSES OF ACTION & THE STRENGTHS/WEAKNESSES OF EACH

### 8.1.

#### Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. 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 are 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.)
- “A decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious.” (Civ. Code, § 4765(a)(2).) “It is a settled rule of law that homeowners’ associations must exercise their authority to approve or disapprove an individual homeowner’s construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith. (*Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 447; *Bramwell v. Kuhle* (1960) 183 Cal.App.2d 767, 779.) As the court in *Hannula* stated: ‘Each of the decisions enforcing like restrictions has held that the refusal to approve plans must be a reasonable determination made in good faith.’ (*Hannula v. Hacienda Homes*, supra, 34 Cal.2d 442, 447.) The converse should likewise be true, ... ‘[T]he power to approve plans ... must not be exercised capriciously or arbitrarily.’ (*Bramwell v. Kuhle*, supra, 183 Cal.App.2d 767, 779); [Citations]” (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642.)

#### Applicable Statute of Limitations—

- 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.)

#### 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.

#### Application—Application of the Law to Clients’ Facts

- The CC&Rs require that the Architectural Control Committee (“ACC”) review and approve Clients plans “only if it deems that the proposed Improvement complies with the Design Guidelines; that the appearance of any Improvements will be in harmony with the surrounding structures; that the construction will not detract from the beauty and attractiveness of the Development or the environment thereof by the Owners; and that the upkeep and maintenance of any Improvement will not become a burden on the Association.” (CC&Rs, See Article VIII, Section 8.04.)
- From the Clients’ first plan submittal, the ACC responded by applying arbitrary and capricious rules requiring that Clients modify their plans with the hope of obtaining the approval needed to move forward with their renovations. The HOA’s application of these unreasonable, arbitrary, and capricious rules violated Article VIII, Section 8.04 of the CC&Rs because although Clients submitted plans that complied with the CC&Rs and the Design Guidelines (for the most part), the ACC would still find a reason to deny the plans.
- During the review and approval process, the ACC failed to explain how its requests for modifications were supported by the foregoing language, namely, that the modifications would ensure that the proposed improvements were “in harmony with the surrounding structures...that the construction [would] not detract from the beauty and attractiveness of the Development...” As a community composed of custom-built properties, no two homes are alike in design or appearance. The ACC is obligated, therefore, to apply an objective reasonable person standard when reviewing and approving plans. For example, the HOA cannot reasonably require that Clients move the location of their pool because the pool design plans do not objectively violate the Design Guidelines nor do they interfere with the foregoing concepts. For the same reason, the HOA should also not require that Client make adjustments to the design of the home (e.g., window trim, addition of pilasters).
- If a reasonable person would agree that a design detracts from or adversely affects the harmony and attractiveness of the community (e.g., a gothic-style home with dark exterior), then the ACC would have grounds to deny the plans. That does not apply to Clients’ proposed plans. With this in mind, if there is no reasonable argument that the designs detracts from or adversely affects the harmony and attractiveness of the community, and the plans otherwise comply with the Design Guidelines, then the ACC must arguably approve the plans absent any plausible reason to deny them.

- One aspect of Clients’ plans that does *not* comply with the Design Guidelines is Clients’ proposed block wall that would face the HOA’s common area greenbelt. Because another HOA member, who happens to be on the HOA’s board of directors, has a similar block wall, Clients contend that the HOA’s refusal to permit them to have a block wall would constitute disparate treatment. Article VIII, Section 8.10 of the CC&Rs permit the HOA to grant Clients a variance for the block wall.
- In addition to the block wall, the HOA has raised issue with Clients’ proposed pool cabana. There are no view protections under the CC&Rs (see above), but the Design Guidelines have certain requirements regarding gazebos and the like, which would include the pool cabana. These requirements prohibit structures that would interfere with the views of other lots and also restrict structures over six feet in height in the 30 degree zone. (See pg. 11 of the Design Guidelines.) The HOA has contended that the board would allow the construction of the pool cabana despite the foregoing as a variance.
- In addition, the HOA has failed to enforce its CC&Rs regarding nuisance behavior. The neighbor’s maintenance of trees within the 30 degree “no tree zone” makes the neighbor liable for nuisance under Section 6.03 of the CC&Rs. Likewise, the HOA is liable for nuisance because it has allowed the trees at the neighboring property to remain despite knowing that the trees more than likely fall within the 30 degree “no tree zone.” The presence of these trees has interfered with Clients’ use and quiet enjoyment of the Property. A violation of any provision of the CC&Rs makes the party also liable under Section 16.08 for nuisance.

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

- Clients have strong claims that the HOA has acted in an arbitrary and capricious manner inconsistent with its CC&Rs. Furthermore, Clients have strong claims that the HOA has allowed the ongoing maintenance of the trees at the neighboring property (3 Premiere Point).
- At this time, this cause of action is supported by the facts and the law.

## **8.2. Breach of Other Governing Documents**

#### Elements—Breach of Articles, Bylaws, Rules, Etc.

- Civil Code section 5975(a) makes the CC&Rs enforceable as an equitable servitude. Articles, bylaws, and rules (defined as governing document in Civ. Code, § 4150) are not in Davis-Stirling’s definition of equitable servitudes. Civil Code section 5975(b), however, authorizes enforcement of the other governing documents such as bylaws, articles, and rules by an association against a homeowner, and by a homeowner against the association (*but not by an owner against other owners*).

## Remedies—

- While typically injunctive in nature, courts may fashion remedies to enjoin any ongoing breaches. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.) Additionally, compensatory (money) 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—

- Unrecorded governing documents (e.g., architectural guidelines, rules, etc.) fall within the same five year statute of limitations that breach of the CC&Rs does. (*Pacific Hills Homeowners Ass'n v. Prun* (2008) 160 Cal. App. 4th 1557, 1563.)

## Application—Application of the Law to Clients' Facts

- See above analysis regarding the Breach of the CC&Rs.
- As detailed above, the Design Guidelines contain the architectural requirements for improvements at the HOA. The ACC has the authority to review and approve plans, but it must do so in accordance with the CC&Rs and Design Guidelines.
- The ACC's objections to Clients' proposed plans, including their desire to build a block wall, pool design, and other design elements comply with the Design Guidelines. Notwithstanding those design elements, the ACC may argue that Clients' proposed pool cabana violates the Design Guidelines because it would interfere with the view of a neighboring lot, but the HOA has not been able to support this contention. The home that sits behind the Property is built several feet above the Property so there would be no reasonable concern that the pool cabana (which is situated on Clients' plans in the corner of the Property) would interfere in any manner with the view of that neighboring home.
- As to the HOA's contention that Clients' proposed pool cabana triggers the prohibition for a structure over six feet in the 30 degree "no tree zone," it bears noting that the Design Guidelines require that the 30 degree measure from the side yard property lines. Because the side of the Property where the pool cabana is intended does not adjoin another lot, it is the HOA's common area greenbelt, the above requirement arguably should not apply and prevent the placement of the pool cabana in that location.
- Finally, under the Design Guidelines provisions stated above, the trees at 3 Premiere Point violate the 30 degree "no tree zone." Despite the length of time that the trees have stood at 3 Premiere Point

and interfered with Clients' use and enjoyment of the Property, the HOA has not taken any action against the owner of 3 Premiere Point to rectify the violation.

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

- Clients have strong claims that the HOA has breached its Design Guidelines both as to Clients' architectural plans and the violative trees at 3 Premiere Point.
- At this time, this cause of action is supported by the facts and the law. The board may contend that it has the power to make business decisions for the HOA, including whether to approve certain architectural plans. That said, the HOA may assert that so long as the HOA's decision is not arbitrary or capricious, it is protected under the business judgment rule. For the reasons described above, however, including the HOA's disparate treatment of Clients, this affirmative defense can be rebutted because Clients contend that the HOA has acted in an arbitrary and capricious manner.

### **8.3.**

#### **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. Knappe Development Co.* (1981) 114 Cal.App.3d 783; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642.)
- 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."
- The "enforcement" issues discussed in the context of the "Breach of CC&Rs" cause of action above is also applicable to a breach of fiduciary duty claim.

- The standards by which an HOA must review a homeowner’s architectural plans discussed in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a breach of fiduciary duty claim.

#### 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 Clients’ Facts

- The board has breached its duty of care and loyalty to Clients by failing to review and approve their architectural plans objectively and applying arbitrary and capricious rules requiring Clients to repeatedly modify their plans at significant cost to them (e.g., delays caused increase in construction costs, modifications caused Clients to incur additional architectural fees, etc.).

- As explained above, the HOA denied Clients' request for construction of a solid block wall on the side of their Property even though another member has the same type of block wall. That member just so happens to be a board member. Clearly, the HOA's decisions on Clients' plans have been arbitrary and capricious, but also self-serving.
- The HOA has also failed to take corrective action against the owners of 3 Premiere Point even though the HOA is well aware that the trees on that property are within the 30 degree no tree zone. Clients sent the HOA photographs depicting the precise location of these overgrown trees at 3 Premiere Point. Despite providing all that evidence and the HOA's prior complaints against Clients for trees on the Property, the board has apparently not taken any action against the owners of 3 Premiere Point. Presumably, if the board had sent the owners a violation or hearing notice, the owners would have complied with removing the trees but that has not happened. This coupled with the board's failure to timely demand the removal of the tarp at 3 Premiere Point and the board's position on Clients' proposed security cameras among other things described above is another example of the unequal enforcement of the governing documents and breach of its fiduciary duties to Clients.

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

- Clients have strong claims that the board has breached its fiduciary duties and that these breaches have caused Clients to incur damages in the form of increased construction expenses (the cost of construction has risen significantly since Clients first submitted their plans to the ACC), etc.
- At this time, this cause of action is supported by the facts and the law. Even if the board were to assert a defense of the business judgment rule, it would likely fail because the board has acted in an arbitrary and capricious manner towards Clients.

### **8.4. Nuisance**

#### 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.
- 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.)
- Article XVI, Section 16.08 of the CC&Rs specifically states that a violation of the CC&Rs gives rise to a separate nuisance claim.
- Nuisance v. Trespass. Nuisance is based on a property’s owner’s use of his or her own property in a way that adversely affects other property owners. Typical examples of a nuisance include things like excessive noise, vibration, odors, etc. Trespass refers to a physical invasion of property, either by persons entering the property, or a substance that is dumped, has drained onto, or under the property (e.g., drainage, toxic spills, etc.), or the encroachment of a physical object, such as a structure built over a property line.

## 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 rationale 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 Clients’ Facts

- The HOA’s Design Guidelines clearly state that no trees can be located in the corner of a property adjoining another lot measuring outward 30 degrees. The photographs provided by Client from all angles illustrate that the trees planted at 3 Premiere Point are within the 30 degree “no tree zone.”
- Although the HOA’s board has known about the trees at 3 Premiere Point since before Clients purchased it, the board has not taken any disciplinary measures against the neighbors.
- As a result of the HOA’s failure to take enforcement action against the neighbors, Clients have been unable to have the full use and enjoyment of the Property, which includes a 180-degree view of the ocean.

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

- Clients has strong claims that the HOA is liable for nuisance.
- At this time, this cause of action is supported by the facts and the law.

### **8.5. 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 “Breach of Fiduciary Duty” causes of action above is also applicable to a declaratory relief claim.
- The standards by which an HOA must review a homeowner’s architectural plans discussed in the context of the “Breach of CC&Rs” and “Breach of Fiduciary Duty” causes of action above is also applicable in the context of a claim for declaratory relief.

#### 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 Clients’ Facts

- Because the CC&Rs contain language requiring that the ACC review and approve architectural plans based on whether the plans comply with the Design Guidelines and also on standards using the terms, “harmony,” “beauty,” and “attractiveness,” it may be appropriate for a court to issue a judicial declaration specifying whether Clients’ proposed plans meet that standard.

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

- A court could find this cause of action moot if the other causes of action listed above are adjudicated.
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## **9. STRATEGIC CONSIDERATIONS**

### **9.1. Statute of Limitations**

This section is *not* intended to address whether or not the statute of limitations has run on a particular cause of action that might have otherwise been relevant under the facts. Those specifics can be found in reference to each of the potential causes of action discussed above. This section of the LADD is intended only to highlight the earliest statute of limitations of a claim that remains available to Clients.

If Clients want to file a lawsuit containing the applicable the causes of action discussed above, the action must be filed on or before **February 2, 2024** (the *earliest* of the applicable non-expired statutes of limitations deadlines given the desired causes of action).

### **9.2. Applicability of Davis-Stirling Act**

The Davis-Stirling Act applies to the facts of this dispute.

### **9.3. Jurisdiction**

#### **9.3.1. Arbitration**

Since there is no binding arbitration provision in the CC&Rs, any litigation related to the dispute must take place in the superior court of Orange County because that is where Clients' property is located.

#### **9.3.2. Venue**

Because the issues related to the current dispute involve Clients' property, which is located in Orange County, that is the appropriate venue for this case.

### **9.4. Standing**

Based upon the information/evidence that Clients have provided thus far, Clients have standing to pursue the foregoing causes of action against each of the intended defendants (excluding DOES, of course) notwithstanding a procedural concern regarding Belmont Center LLC that is discussed below.

Belmont Center LLC is a Delaware limited liability corporation that has not been registered to do business in California. This may present an issue if a determination is made that owning real property in California, even if only as a holding company, constitutes doing business in the state, because that would require Clients to register as a foreign LLC. If that is the case, Clients may have to register as a foreign LLC even to file the case in court.

## 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”].)

#### Anti-SLAPP Test—

- The courts use a two-prong test to determine if a claim is protected under the anti-SLAPP statute. First, the defendant must prove that the at-issue claim arises from a constitutionally protected activity. (*Ruiz v. Harbor View Community Assn.*, *supra*, 134 Cal.App.4th at 1466; Code Civ. Proc., § 425.16(b)(1).) If the defendant satisfies his or her burden, the burden shifts to the plaintiff to show that there is a probability that he or she will prevail on the merits of the at-issue claim. (*Ibid.*; *Equilon Enterprises v. Consumer Cause Inc.* (2002) 29 Cal.4th 53, 67; Code Civ. Proc., § 425.16(b)(1).)
- With regard to the first prong, there are four categories that the anti-SLAPP statute is intended to protect:
  - Any statement (written or oral) or document generated in connection with (or as part of):
    - Any official proceedings authorized by law—e.g., legislative, executive, or judicial proceedings. (Code Civ. Proc., § 425.16(e)(1).)
    - Any issue under consideration or review by a legislative, executive, or judicial body. (Code Civ. Proc., § 425.16(e)(2).)
  - Any statement (written or oral) or document made in a place open to the public (or in a public forum) and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(3).)
  - Any other conduct made in furtherance of the exercise of a constitutional right of petition or free speech and made in connection with an issue of public interest. (Code Civ. Proc., § 425.16(e)(4).)

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**  
**(e.g., Notice or Mediation Requirements)**

Given the facts of this dispute, the Davis-Stirling Act does *not* require pre-lawsuit ADR.

**9.7.**  
**Attorneys' Fees and Costs**

The prevailing party is entitled to attorneys' fees and costs under the Davis-Stirling Act. The prevailing party is also entitled to their attorneys' fees and costs under Article XVI, Section 16.09 of the CC&Rs.

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

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

None at this time.

This section of the LADD might be amended from time to time to reflect new information, strategies, or concerns that arise during the course of the litigation.

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