

June 7, 2017

**Mr. Ross Edwards
Caymus Builders
281 2nd Street East
Sonoma, CA 95476**

Re: **Tree Protection and Hillside View Preservation for 4th Street Parcel Map**

Dear Mr. Edwards:

You have asked us to propose restrictive covenant provisions to address tree protection and hillside view preservation concerns prompted by the feedback you received from the City of Sonoma Planning Commission hearing for your proposed parcel map for the property located adjacent to the intersection of 4th Street and Barzil Street in the City of Sonoma. In addition, you have asked that we provide an overview of the legal framework that would enforce the proposed restrictive covenants.

With respect to the proposed restrictive covenants, we understand the properties within the proposed parcel map as well as two separate properties will all share a private driveway which will be maintained by a property owners' association. This arrangement is well suited to serve the objectives of the proposed restrictive covenants, as the California caselaw dealing with the enforcement of similar restrictive covenants has consistently upheld not only the right to enforce such provisions but also the express duty to enforce the restrictive covenants as well.

Proposed Restrictive Covenants

Tree Protection Restrictions can utilize existing tree locations which can be incorporated into an exhibit attached to the restrictive covenants declaration:

As of the date of recording of this Declaration, no tree identified in attached Exhibit "A" shall be cut, pruned, altered, or removed without the prior written consent of the City of Sonoma. Any approved cutting, pruning, alteration or removal of any tree identified in Exhibit "A" shall only be performed by a licensed arborist.

Such provisions can be written to require either the parcel owner or the property owners' association to be responsible for the stewardship of the existing trees.

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Hillside View Preservation Restrictions can be written to address both landscaping and architectural design concerns:

Each Parcel Owner shall install and maintain the landscaping within his or her parcel in a manner which incorporates random groupings or clusters that mimic or maintain natural assemblages rather than in systematic rows. Owners shall maintain vegetation lines which convey the existing slope of the hillside. All residences and any structures constructed or placed on a parcel shall be designed to minimize visual obstruction of the existing hillside.

Legal Authority To Compel Enforcement of Proposed Restrictive Covenants

California law imposes specific obligations upon property owners' associations to discharge the specific requirements in Covenants, Codes & Restrictions (CC&Rs). Two judicial decisions discussed below outline how California law operates with respect to imposed obligations and financial obligations.

The two case decisions, *Ekstrom v. Marquesa at Monarch Beach HOA* (2008) 168 Cal. App. 4th 1111, and *James F. O'Toole Co., Inc. v. Los Angeles Kingsbury Court Owners Assn.* (2005)126 Cal.App.4th 549, give solid legal assurances that CC&R obligations imposed upon a property owners association will be discharged as contemplated, and that the association's board of directors will in fact raise the necessary funds to discharge its obligations. Prior to the *Ekstrom* case, there was a very legitimate concern that a owners' association board of directors could avoid following an obligation under the CC&Rs by evoking the "business judgment rule" deference to a board's decision to avoid performing obligations imposed by the CC&Rs. That is no longer a concern due to the *Ekstrom* decision:

In *Ekstrom*, the property owners' association's board of directors refused to enforce specific provisions of the CC&Rs which required all trees blocking ocean views to be trimmed. The HOA board refused to enforce the tree trimming obligation with respect to palm trees, contending:

"[t]he "judicial deference rule" adopted by the California Supreme Court in *Lamden v. La Jolla Shores Clubdominium Homeowner's Assn.* (1999) 21 Cal.4th 249 (*Lamden*), which is an adaptation of the business judgment rule applicable to directors of corporations, precludes judicial review of any of its decisions concerning the enforcement or nonenforcement of section 7.18 of the CC&Rs as to palm trees. We disagree."

The Court went on to hold that the board's interpretation of the CC&Rs was inconsistent with the plain meaning of the document and thus not entitled to judicial deference. The relevance of the *Ekstrom* case to the City of Sonoma's tree protection and

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hillside view protection concerns is that if the project's CC&Rs include the tree protection and hillside view preservation restrictions and obligate the property owners association to implement and enforce the provisions, California law now makes it clear that those obligations are not subject to the whims or discretion of the association's board of directors. Nor can the board claim "we don't have the money to perform the CC&Rs obligations" as the *O'Toole* case now makes it clear that a Community Association must impose the assessments necessary to perform its CC&Rs obligations.

James F. O'Toole Co., Inc. v. Los Angeles Kingsbury Court Owners Assn.
(2005)126 Cal.App.4th 549

"In this case, in typical form, the Los Angeles Kingsbury Court Owners Association's Declaration charges the Association with the duty to "maintain, repair, restore, replace and make necessary improvements to the Common Area so that the same are at all times in a first-class condition and good state of repair," and to "pay, out of the general funds of the Association, the costs of any such maintenance and repair" After the Northridge earthquake, the Association took the first step but not the second, and the question now before us is whether the Association can be compelled to impose an assessment to obtain the money needed to pay for the work that was performed for the benefit of the Association and its members. For the reasons that follow, we answer the question affirmatively."

The Court went on to hold the appointment of a receiver to take control of the owners association and to levy the necessary assessments to permit the owners association to discharge its obligation:

"It follows that the trial court correctly ordered the Association to impose a special emergency assessment and, in light of the Association's refusal to do so, correctly decided to appoint a receiver to carry out the court's order."

These two cases provide assurances that any specific and mandatory obligations stated in CC&Rs must be discharged by the property owners association. Essentially, *Ekstom* says, "a property owners' association must do what the CC&Rs obligate it to do, period," and *O'Toole* says (so to speak), "levy the assessments you need to pay for whatever the services property owners' association is obligated to perform, period."

Thus, to the extent the proposed restrictive covenants require trees to be maintained, the aforementioned judicial decisions create a legal means of imposing the obligation upon the development's property owners' association. The restrictive covenants can also be written to require the property owners association to contract with a licensed arborist or landscape architect to perform any oversight regarding the tree protection and

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hillside view preservation provisions. The CC&Rs provisions would also include a provision which prohibits the amendment of the obligation in the CC&Rs without the prior written approval of the City of Sonoma.

Property owners' association have a reputation for being overly controlling or overly political (think of Jerry Sienfeld's Del Boca Vista Phase III condo association), but whatever they are, in California, they are legal entities that must do what their governing documents mandate and must fund their mandatory debts (such as contracting with an arborist or landscape architect). As such, for the purpose of satisfying the City of Sonoma's tree preservation and hillside view preservation concerns, having property use restrictions which must be enforced by a property owners' association is an excellent option.

If you have any questions regarding any aspect of this letter, please do not hesitate to contact me.

Very truly yours,

INMAN LAW GROUP, LLP

Bruce R. Inman