SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

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| BAUMBLATT, ET AL.,<br>Plaintiffs,<br><br>-vs-<br><br>PALISAIR HOMEOWNERS ASSOCIATION, ET AL., and DOES 1 to 50, inclusive,<br><br>Defendants. | Case No. SC099141<br><br>**STATEMENT OF DECISION** |

On September 21 through September 29, 2009, the court conducted the trial of this action in Department O of the Los Angeles Superior Court, Santa Monica Courthouse, Hon. John L. Segal, presiding. Pursuant to the parties' request, the trial was bifurcated and conducted in two phases. The first phase was the trial of plaintiffs' third cause of action for nuisance against defendants John Lindsay and Leslie Ward. The second phase was the trial of plaintiffs' first cause of action for declaratory relief and second cause of action for an injunction against defendant Palisair Homeowners Association. The trial included a site visit to the properties on September 29, 2009.

In the first phase, Christopher Rolin, Esq., Law Offices of Christopher Rolin, appeared for plaintiffs Joel Baumblatt and Donna Reese. Zi Chao Lin, Esq., and Ryan C. Squire, Esq., Garrett & Tully, appeared for defendants Lindsay and Ward. In the second phase, Christopher Rolin, Esq., Law Offices of Christopher Rolin, appeared for plaintiffs. Joel Glaser, Esq., and Eric M. Volkert, Esq., Gordon & Rees, appeared for defendant Palisair Homeowners Association. The parties were present throughout the course of the trial, introduced oral and documentary evidence, and submitted the case for decision. The court, having considered the evidence and heard the arguments of counsel, and a statement of decision having been requested by defendants Lindsay and Ward, issues the following statement of decision.

## I. INTRODUCTION

From the air (Exhibit 248), the bucolic corner of Pacific Palisades inhabited by the parties is a peaceful, rustic community nestled in the coastal canyon hills above the Pacific Ocean, where the residents live in comfortable homes with spectacular views of the Westside and the ocean. On the ground, however, a bitter confrontation wages among the residents over land use, view protection, property values, and pets. Unable to resolve their differences among themselves, or even to speak with one another, the conflict has spilled over into the courts.

The combatants are members of the Palisair Homeowners Association, which the parties refer to as the "PHOA" or the "Association." Plaintiffs Joel Baumblatt and Donna Reese live downhill from defendants John Lindsay and Leslie Ward (and their dog Jack). Between their adjoining properties is a steep hill partially covered with a grove of Acacias, although the parties dispute whether the Acacias are trees or bushes. Next door to the Lindsay/Ward property, and uphill but to the right of the Baumblatt/Reese property, is the property of Andy and Elizabeth Tobias (and their dogs Chester and Murphy). Below the

Tobias property and next to the Baumblatt/Reese property is the property of Thomas and Susan Matteson. The Lindsay/Ward and Tobias properties have pools; the Baumblatt/Reese property does not. Everyone but Baumblatt and Reese has a dog. Reese is afraid of large dogs.

Baumblatt and Reese have two disputes with their neighbors, one small, one big. The small dispute, which forms the basis of the Baumblatt and Reese's nuisance claim against Lindsay and Ward, is that the latter are throwing tennis balls in their backyard, which sometimes go into the Acacias, and sometimes through the Acacias and downhill into the former's backyard. But the tennis balls are not the alleged nuisance. The alleged nuisance is Lindsay and Ward's dog Jack, to whom his owners sometimes throw tennis balls for exercise, and when the occasional ball "bounces off his nose" and into the Acacias, Jack comes through the Acacias, down the hill, and tramps across the portion of the hill belonging to Baumblatt and Reese. See Complaint, ¶¶ 32-34; testimony of John Lindsay. Baumblatt and Reese also claim that Lindsay and Ward discharge pool water down the hill into their property, and that debris from the Acacias on Lindsay and Ward's property falls down onto Baumblatt and Reese's property.

The big dispute, which forms the basis of Baumblatt and Reese's declaratory and injunctive relief claims against the PHOA, is that the latter has denied the former permission to build a second story, under the Association's CC&Rs. Baumblatt and Reese claim that their remodeling plans comply with the CC&Rs, and that the Association's board and tract committee has treated them unfairly and has improperly denied them permission to renovate their house. The Association claims that Baumblatt and Reese's remodeling plans violate the CC&Rs because they are incomplete, unattractive, violate the applicable 15.5 foot height restriction, would create view blockages, and would have a negative impact on the neighborhood and property values.

Pursuant to the stipulation of the parties, the trial was bifurcated into two phases. The first phase was the trial of Baumblatt and Reese's nuisance claim against Lindsay and Ward. The second phase was the trial of Baumblatt and Reese's declaratory relief and injunction claims against the PHOA.

## II. PHASE ONE - PLAINTIFFS' NUISANCE CLAIM AGAINST DEFENDANTS LINDSAY AND WARD

Baumblatt and Reese allege that beginning "sometime in 2004 and on an intermittent basis through March 2008," Lindsay and Ward conducted offensive conduct and an obstruction to the free use and enjoyment of the property of plaintiffs in the following manner:

> "A. Throwing tennis balls and other objects onto the property in front of their pet dogs, who then run down the hillside between Plaintiffs' and Defendants' properties damaging the planting, knocking lose [sic] rocks and debris, which has bounced off Plaintiffs' home and requires a clean up by Plaintiffs.
> B. Semi-annual or annual draining of the pool and flushing the water down the hill between the two properties onto Plaintiffs' property causing an erosion of the ground, destruction of plant life and the filming of the property with toxins and chemicals from their pool." Complaint, ¶ 32.

Baumblatt and Reese allege that absent the abatement of these conditions, their "health, well-being and comfortable enjoyment of life on the property will suffer irreparable damage." Id., ¶ 34.

A private nuisance is a nontrespassory invasion of another person's interest in the private use and enjoyment of land. San Diego Gas & Electric Co. v. Superior Court, 13 Cal.

4th 893, 937 (1996); see Civ. Code § 3481. A nuisance is defined "as anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Civ. Code § 3479. "In the absence of evidence of interference with the use and enjoyment of the land, and damages based on that injury, there is no cause of action for nuisance." Chee v. Amanda Goldt Property Management, 143 Cal. App. 4th 1360, 1373 n. 6 (2006). "The resolution of a particular claim of nuisance cannot be resolved definitionally and instead must be determined by reference to the particular facts and circumstances shown by the evidence." Beck Devel. Co. v. Southern Pacific Transp. Co., 44 Cal. App. 4th 1160, 1211 (1996).[1]

For private nuisance, the plaintiff must prove, among other things, that (1) the "invasion of the plaintiff's interest in the use and enjoyment of the land was substantial" and caused the plaintiff "substantial actual damage," and (2) the interference with the protected interest was unreasonable in that it was "of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land." San Diego Gas & Electric, 13 Cal. 4th at 938-39; see Birke v. Oakwood Worldwide, 169 Cal. App. 4th 1540, 1546 (2009); Restatement (Second) Torts, §§ 822, 826-31. "To recover damages for nuisance the plaintiff must prove the defendant's invasion of the plaintiff's interest in the use

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[1] Nevertheless, courts instruct juries that the elements of a nuisance cause of action are that (1) the plaintiff owned, leased, occupied or controlled the property; (2) the defendant, by acting or failing to act, created a condition that was harmful to health, or was indecent or offensive to the senses, or was an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway; (3) this condition interfered with the plaintiff's use or enjoyment of his or her land; (4) the plaintiff did not consent to the defendant's conduct; (5) an ordinary person would be reasonably annoyed or disturbed by the defendant's conduct; (6) the plaintiff was harmed; (7) the defendant's conduct was a substantial factor in causing plaintiff's harm; and (8) the seriousness of the harm outweighs the public benefit of defendant's conduct. See CACI 2021.

and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer substantial actual damage. The interference must also be unreasonable." Haley v. Casa Del Rey Homeowners Ass'n, 153 Cal. App. 4th 863, 866 (2007) (emphasis in original) (quotations omitted); see San Diego Gas & Electric, 13 Cal. 4th at 913-14, 937-39; Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263, 304-09 (2008). Both of these elements, substantial invasion and unreasonable interference, turn on the particular facts of each case. San Diego Gas & Electric, 13 Cal. 4th at 937-39.

Not everything that citizens do in and around each other's presence constitutes a nuisance, even if the conduct is annoying, unfriendly, or unneighborly.

> Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability for damages is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." San Diego Gas & Electric, 13 Cal. 4th at 937-38.

Neighbors, like the parties in this dispute, don't have to like each other, respect each other, or even be nice to each other. They just can't unreasonably and substantially interfere with each other's use and enjoyment of their property.

Baumblatt and Reese's nuisance claim based on pool water incursion onto their property is not supported by the evidence. The evidence shows that there has been one instance of water spillage down the hill in approximately fifteen years when, in late 2004 or early 2005, a hose in Lindsay and Ward's pool equipment broke. The water caused mud to come down the hillside and into Baumblatt and Reese's back yard. The pool service company repaired the hose. This evidence is essentially undisputed. Baumblatt testified about a conversation that he claims he had with Ward in approximately May 2005 in which Ward discussed regular "backwashing" of the pool filter down the hill, but the court discredits this testimony. Noel Romeo, whose company has serviced Lindsay and Ward's pool for over fifteen years and whose testimony the court credits, testified that he has never "backwashed" or removed water from the pool, and that Lindsay and Ward purge the tank twice a year down a drain. Ward denied ever having such a conversation with Baumblatt or engaging in any such "backwashing," and the court credits her testimony. The only other evidence is the statement by Baumblatt that he occasionally found "wetness in the rock and in the soil" in his backyard over the years, but he did not consider it significant enough to ever tell Lindsay and Ward about it. Baumblatt and Reese have not shown by a preponderance of the evidence that pool water from Lindsay and Ward's property has substantially and unreasonably interfered with the enjoyment of their property. Hardly a nuisance here.

Baumblatt and Reese's nuisance claim based on Jack and the tennis balls is also not supported by the evidence. The evidence shows that since 2005 there have been no more than one or two instances of tennis balls followed by Jack coming through the Acacias from Lindsay and Ward's property onto Baumblatt and Reese's property. Lindsay and Ward

candidly admit that once or twice over the years a tennis ball has bounced off Jack or otherwise gone astray into the Acacias, and that Jack, who apparently has not seen an official survey of the property line between the Lindsay/Ward property and the Baumblatt/Reese property nor been trained to locate it, continues to retrieve balls that go into the Acacias. Baumblatt has no knowledge of any incursion by Jack onto his property because he is almost never there. He works six or seven days a week at his office and admittedly leaves all issues relating to the Baumblatt/Reese home and home life to his wife. All of his knowledge of this dispute (and virtually all other issues in this litigation) is through his wife, Reese. Reese testified essentially that she has seen Jack in her backyard approximately once a year, and she even managed to get a photograph of one such instance. See Exh. 210. Baumblatt and Reese have not shown by a preponderance of the evidence that Jack or the tennis balls have substantially and unreasonably interfered with the enjoyment of their property.[2] Again, no nuisance here.

As for Baumblatt and Reese's claim that debris from Lindsay and Ward's Acacia trees/bushes has fallen on their property, Baumblatt and Reese did not even include any such claim in their complaint or in their original or supplemental interrogatory responses. See Complaint, ¶¶ 32-34; Plaintiffs' Responses to Interrogatory Nos. 53, 58, 61. Consequently, Baumblatt and Reese's motion at trial to amend their complaint to add falling Acacia debris as a basis for their nuisance claim is denied. Moreover, even if the court were to allow the amendment, Baumblatt and Reese have failed to meet their burden of proving by a preponderance of the evidence that the falling Acacia debris constituted a nuisance. It is undisputed that Lindsay and Ward trim the Acacias several times a year (for fire safety reasons), and that branches and other trimmings obey the law of gravity and fall to the ground and sometimes down the hill to Baumblatt and Reese's property. Baumblatt

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[2] If anyone is acting unreasonably, it is Baumblatt and Reese, who have forced Lindsay and Ward to stop playing with their dog in their own back yard because they fear that Baumblatt and Reese will bring meritless nuisance claims like this case.

and Reese's claim is essentially that the gardeners hired by Lindsay and Ward, in Baumblatt's words, "do a poor job" cleaning up after themselves, which is why Baumblatt and Reese no longer allow the gardeners access to their property to clean up. Reese testified that she no longer allows the gardeners access because of the contentiousness of the situation, including this litigation, which she and her husband initiated.[3] Baumblatt and Reese have not shown by a preponderance of the evidence that Acacia debris from Lindsay and Ward's property has substantially and unreasonably interfered with the enjoyment of their property.

Baumblatt and Reese have also not shown by a preponderance of the evidence that they have suffered any damages as a result of anything Lindsay and Ward have done or failed to do. Baumblatt and Reese's evidence of damages essentially comes out of thin air. Baumblatt admittedly has "not done an exact calculation" of the increased gardening expenses that he and Reese claim are attributable to Lindsay and Ward (and Jack). He thinks that 40%-50% of the their regular gardening expenses may be attributable to cleaning up debris from the Acacias, but that "is a guess." Any money paid for extra work performed by Baumblatt and Reese's gardener is pure speculation. And there is no evidence of any damage caused by water, Jack, or the tennis balls. Indeed, as Baumblatt testified: "It's not about the money."

In sum, the evidence in this case shows a complete failure by Baumblatt and Reese to prove that Lindsay and Ward have done anything that interferes, let alone substantially and unreasonably interferes, with Baumblatt and Reese's use and enjoyment of their property. A few tennis balls and Acacia branches, one accidental water spill in fifteen years from a broken hose, and the occasional appearance of a dog, does not a nuisance make.

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[3] One wonders how the gardeners are to clean up debris on Baumblatt and Reese's property when Baumblatt and Reese deny the gardeners access to the property. From the photographic evidence, the testimony of the witnesses, and the court's site visit, the hill is too steep to allow the gardeners to hang from the Acacia trees or bushes and reach over to retrieve leaves and branches that may have fallen on to Baumblatt and Reese's property.

Finally, Baumblatt and Reese are not entitled to an injunction. Baumblatt testified that he wants "something to stop their [Lindsay and Ward] bad behavior." Counsel for Baumblatt and Reese argued that his clients are entitled to an injunction requiring Lindsay and Ward's gardeners to "do a good job" when they cut the Acacias. Even if Baumblatt and Reese had proven liability for nuisance, which they have not, the court would still not issue the requested injunctions. This is not the kind of injunction that the court, exercising its equitable discretion, is inclined to issue and monitor semiannually.

For these reasons, the court will enter judgment in favor of defendants Lindsay and Ward against plaintiffs Baumblatt and Reese on plaintiffs' third cause of action for nuisance. The other issues on which defendants Lindsay and Ward requested a statement of decision are not "principal controverted issues." Code Civ. Proc. § 632; see R. E. Folcka Constr., Inc. v. Medallion Home Loan Co., 191 Cal. App. 3d 50, 54 (1987) ("the statement of decision must include the factual and legal basis as to each of the 'principal controverted issues'"); Wolf v. Lipsy, 163 Cal. App. 3d 633, 643 (1985) (findings on subsidiary or immaterial issues are not required), disapproved on other grounds, Droeger v. Friedman, Sloan & Ross, 54 Cal. 3d 26 (1991); Kuffel v. Seaside Oil Co., 69 Cal. App. 3d 555, 565 (1977) ("A 'material' issue of fact is one which is relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issues in the case.").

## III. PHASE TWO - PLAINTIFFS' DECLARATORY RELIEF AND INJUNCTION CLAIMS AGAINST PALISAIR HOMEOWNERS ASSOCIATION

### A. Plaintiffs' allegations

Baumblatt and Reese allege that in 2006 they "engaged an architect for the purpose of expanding their residence at 1085 Palisair Drive, Pacific Palisades, California," "submitted a copy of the plans" to the Association, and "made the plans available to"

Lindsay and Ward. See Complaint, ¶ 12. Baumblatt and Reese allege that in compliance with Section 1369.560 of the Civil Code, the Davis-Sterling Act, the parties participated in mediation sessions in January, February, and April 2008. Id., ¶ 13. Baumblatt and Reese allege that the Association advised them on June 20, 2008 that their proposed remodel "would diminish the view and value" of Lindsay and Ward's home, but did not specify whether the proposed remodel violated any specific provision in the CC&Rs. Id., ¶ 14. Baumblatt and Reese further allege that the Association "has refused to consider whether or not Plaintiffs' proposed addition to their home violates the CC&Rs . . . ." Id., ¶ 15. Baumblatt and Reese allege that "their proposed add on extension to their home does not obstruct the view from the Defendants Ward and Lindsay lot," and that the Association, Lindsay, and Ward are all "unwilling to consider whether or not the proposed addition 'unreasonably obstructs' the view from any other lot in connection with the subject CC&Rs." Id., ¶¶ 17, 19. Baumblatt and Reese seek, in their first cause of action for declaratory relief, "a judicial determination of their rights and duties . . . as to whether or not [they] can go forward with their proposed addition," and in the second cause of action for injunctive relief, an "injunction to restrain Defendants from taking any action which will prevent the Plaintiffs from proceeding with their remodel plans . . . " Id., ¶¶ 22, 30.

B. The Relevant CC&Rs

As noted in the court's July 28, 2009 order, this litigation implicates several provisions of the Association's CC&Rs, although the parties have differing views about which and how the provisions apply. The most important provision for purposes of this dispute is the second paragraph of Article III, Section 1, which provides:

> "No structure of any kind shall exceed one story in height, that is, the top of its ridge pole shall not be more than 14 feet above the finished floor nor more that 15½ feet above the finished ground at the front, except that the Tract Committee, in its sole discretion and after consultation with the possibly affected neighbors, may

permit the erection of a 2-story structure provided it will not substantially obstruct or diminish the view from any other land of this or any adjoining tract." Exh. 1, Art. III, § 1.

The parties dispute what this provision means. Here is what the court thinks it means: No structures over 15.5 feet, except that the Tract Committee has discretion after consulting with the "possibly affected neighbors" to permit a structure over 15.5 feet, as long as the exercise of the Tract Committee's discretion does not result in a (greater than 15.5 foot) structure that substantially obstructs or diminishes the view from anyone's property. In other words, the clause "provided it will not substantially obstruct or diminish the view from any other land of this or any adjoining tract" modifies the Tract Committee's discretion, not the 15.5 foot height restriction.

A few observations about Article III, Section 1. First, Article III, Section 1, does not say, as Baumblatt and Reese contend, that structures over 15.5 feet are allowed if they do not obstruct a neighbor's view. See Plaintiffs' Trial Brief, 14:3-5 ("PHOA may permit a second story if it does not substantially obstruct or diminish the view from any adjoining tract"). Article III, Section 1 says that structures over 15.5 feet are prohibited, unless the Tract Committee, in its "sole discretion," permits such a structure. The only exception to the Tract Committee's discretion is that the committee cannot approve a structure over 15.5 feet that substantially obstructs or diminishes a view, even if the Tract Committee wants to allow such a structure. Second, in exercising its "sole" discretion, the Tract Committee is not, as Baumblatt and Reese contend, limited to consideration of view obstructions. The Tract Committee may consider all kinds of things in exercising its discretion: non-view impacts, impact on property values, statements from "affected" and "unaffected" members of the Association, the precedential effect of each decision, the effect on the character of the neighborhood, and many other factors. Third, although the Tract Committee has "sole discretion," it must exercise its discretion in good faith, non-arbitrarily, and consistent with the CC&Rs and California law. Fourth, the limit on the Tract Committee's discretion in the

final clause of Article III, Section 1 is not only view obstruction; it is also view diminishment. All kinds of things may diminish a view without obstructing it. Fifth, as Baumblatt and Reese correctly contend, the term "view" is a defined term in the CC&Rs. Under Article V, Section 8, "view" means "a view of the ocean or the mountains or the city recognized by the Tract Committee as being such an important part of the property's value that it is entitled to protection." Thus, Article V, Section 8 defines the view limitation on the Tract Committee's discretion to permit structures taller than 15.5 feet.

Another relevant provision is Article IV, Section 2(a) of the CC&Rs. The first paragraph of Article IV, Section 2(a) provides:

> No residence, garage, out-building, fence, wall, mast, aerial, clothes line pole, sidewalk, steps, or other structures, and no improvement, utility, swimming pool, parking area or driveway shall be erected, constructed, laid down, altered, installed, located, relocated or maintained and no cutting down, filling up or grading (except 'fine grading' for landscaping) shall be done on, under or about any land of said tract unless complete grading and/or building plans (including elevations, and, if requested by the Tract Committee, a rendering) and specifications thereof showing the nature, kind, shape, height, type, material and color scheme thereof, together with the plot plan indicating the location on the lot or building site, shall have been submitted to and approved in writing by the Tract Committee and a copy of such plans, specifications and plot plan, as finally approved, permanently deposited with the Committee.

A few observations about the first paragraph of Article IV, Section 2(a). First, Article IV, Section 2(a) prohibits members from constructing anything unless they submit "complete" grading plans, building plans, elevations, and specifications, and, if requested by the Tract Committee, a rendering. Without such submissions, the member cannot get approval to build. Second, the required specifications must be very detailed. They have to

show the nature, kind, shape, and height of the structure, and even the material and color scheme that the member proposes to use on the structure. This is an awful lot of detail, but members of Association must submit all of it before they can obtain approval to build. Without this detail, the application is incomplete, and the proposed structure cannot be built.

These are the primary provisions applicable to this dispute. There are other tangentially relevant provisions, such as the prohibition against "freakish," uncommon, or "unsightly" exterior appearances, designs, and structures. See Exh. 1, Article IV, Section 2(a)(1). But the most relevant provisions are the second paragraph of Article III, Section 1, and first paragraph of Article IV, Section 2(a).

C. Chronology of events

The chronology of the events leading up to this trial are complicated by the fact that none of the parties speaks with any of the other adverse parties. The parties use surrogates, or they just avoid each other. All of the parties (and their agents) say they always wanted to meet with the other side, and accuse each other of refusing to meet. But the truth, as the evidence at trial showed beyond any doubt, is that throughout this dispute all of the parties consistently and steadfastly refused to speak or meet with each other. Baumblatt had virtually no involvement at all in this dispute. He testified that his job was to work six or more days a week in his office "and make the money for the renovation," and that the renovation was Reese's job, not his job. There is little evidence that Reese communicated or made any effort to communicate with anyone other than her husband and her agents. She testified that she was not involved in submitting plans to the Association, but delegated that task to her architect and her attorney. Lindsay and Ward were not on speaking terms with their downhill neighbors, and there is scant evidence that Baumblatt and Reese and representatives of the Association ever communicated or made any genuine effort to communicate with each other.

Nevertheless, here essentially is what happened.

In January 2005, shortly after purchasing their new home on Palisair Drive, Baumblatt and Reese hired a designer named Eric Ryder, who became a licensed architect in California about a month before the trial in this action, to prepare plans for a second story addition to their residence. Ryder went on to serve as Baumblatt and Reese's designer, architect, representative, and negotiator. It is unclear why Baumblatt and Reese chose an inexperienced, unlicenced architect working as a "designer" to serve as their exclusive representative in discussions with their neighbors and the PHOA during this period. Baumblatt and Reese personally had virtually no direct contact with the Association or their neighbors, but relied on Ryder to represent them.

In June 2005 Ryder sent his first draft of plans to Lindsay and Ward, and asked for their "approval in concept." Exh. 132. It does not appear that Ryder submitted these plans to the Association.[4] Ryder testified that for the next eight months, he had no contact with anyone other than his clients. These plans, which it is undisputed were not complete, apparently called for a 25 foot structure with a roof deck. Donald Westland, who was chair the Tract Committee of the Association at this time, made several requests for complete drawings, elevations with dimensions, plot plans and roof treatment, as required by the CC&Rs, but did not receive them. See Exh. 2. Westland also tried to arrange a meeting with all the parties, but was unsuccessful. Ryder also tried to arrange a meeting with all the parties, but was unsuccessful.

In February or March 2006 Ryder arranged to have story poles erected over the

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[4] In 2005, the board of directors of the Association consisted of President Dean Preston, Vice President Dawn Hill, Secretary Tim (probably Tom) Matteson, Treasurer Hal Erdley, and members Miran Kojian, Donald Westland, Doug Baron, and Robert Munakash. The last three members served on the Plans Committee. Exh. 131. The March 20, 2005 annual meeting report also states that under the CC&Rs the "association itself is a 'Tract Committee,'" which would mean the Tract Committee is not, as the parties stipulated, the board of directors, but the entire membership of the Association. Id.

Baumblatt/Reese residence, which outlined with poles and orange netting the general shape and height of the proposed addition. Ryder did not recall that he, Baumblatt, or Reese advised the Association or any of the neighbors that they were going to put up the story poles; they just did it. From the neighbors' perspective, this set of story poles simply arose one day without notice or explanation.

In May 2006 Ryder provided Reese with revised plans, although he did not provide them to anyone else, such as the Association or the neighbors. Exh. 135; But see Exh. 141 (July 26, 2006 letter from Ryder to Preston stating that "this is our first submittal [sic] to the PAHOA [sic] for our architectural addition"). Ryder testified that these plans were "still in the conceptual design phase," and thus not complete. Ryder did not recall if the Association ever saw these plans, but it is clear from the evidence that the Association did not. If Ryder did not submit the plans to the Association, no one did, because Baumblatt and Reese did not submit anything to the Association.

In June 2006 Lindsay and Ward sent a letter to Baumblatt and Reese objecting to Ryder's plans. Exhs. 5, 140. Lindsay and Ward complained that Baumblatt and Reese's proposed plans would violate the CC&Rs, change the character of the neighborhood, and interfere with views. Lindsay and Ward also asked Baumblatt and Reese to take down the story poles that they and Ryder had erected in March 2006. The Tobiases also objected, stating the proposed plans exceeded the height limit on buildings in the CC&Rs and impeded existing views, and opining that the plans "would probably reduce the value of at least three other existing homes." Exhs. 4, 142. Ryder and Westland exchanged additional emails during August through December 2006, with each side essentially offering to meet and then blaming the other side for refusing to meet. See Exhs. 144, 145, 146, 148. Ironically, in light of his clients' refusal to meet with anyone, Ryder wrote: "Taking positions solely for the purpose of posturing isn't helpful." With lawyers on the horizon, however, the posturing had only just begun.

Ryder submitted new plans to the Association in April or May 2007.[5] These plans are the first set of plans that Baumblatt and Reese submitted (through Ryder) to the Association that were sufficiently complete for the Association to consider, although it is undisputed that these plans were still incomplete and were not in compliance with Article IV, Section 2(a). Baumblatt and Reese also put up another set of story poles. At this time, Westland consulted with the neighbors and with Dean Preston, president of the PHOA, and went to observe the story poles. Westland and Preston concluded that Baumblatt and Reese's proposed second story blocked a portion of the view from Lindsay and Ward's property and violated the CC&Rs. The Tobiases also sent their objections to Preston on April 29, 2007. Exh. 153. Lindsay and Ward sent Westland another list of objections on May 1, 2007. Exhs. 10, 154. Other neighbors, Phyllis and Jean de Vellis, also objected. Exhs. 12, 156. Westland received and reviewed other written and oral complaints from neighbors about Baumblatt and Reese's proposed second story remodel.

In the meantime, a new representative for Baumblatt and Reese (who still refused to speak with anyone) had entered the scene, Christopher Rolin, an attorney. Rolin wrote letters to Preston on February 21, 2007 and March 12, 2007. Exhs. 7, 8, 150, 151. On April 10, 2007 Westland responded on behalf of Preston, repeating his requests to Ryder from 2005 and 2006 for a proper set of plans that included a plot plan, elevation plans, and description of the roof treatment. Exh. 9.[6] Westland also quoted Article III, Section 1. One

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[5] In 2007 the board of directors of the Association consisted of President Dean Preston, Vice President Robert Munakash, Secretary Tim (or Tom) Matteson, Treasurer Hal Erdley, and members Donald Westland (Chair, Plans Committee), Doug Baron (Plans Committee), and Dawn Hill (Tree Committee). Exh. 149.

[6] The decision to bring in attorneys at this point may not have been the most constructive development in this dispute. See, e.g., Exh. 15 (letter from Rolin to Westland sarcastically stating that he has "always been interested in the study of ostriches and the comparison to persons in positions of responsibility, who enjoy emulating the posture of ostriches with their heads in the sand"); Exh. 207 (letter from Rolin to Lindsay and Ward accusing them of being "incredibly rude, selfish and disrespectful"); Exh. 210 (letter from Zu Chao Lin, counsel for Lindsay and Ward, to Rolin, demanding that counsel "refrain from making such threats in the future as we will not be intimidated or swayed by them").

of Rolin's letters to Westland was a July 25, 2007 letter giving the Association a ten day time limit before initiating litigation. Exh. 15. Rolin also threatened to sue Lindsay, Ward, the Tobiases, and the Association. Exhs. 17, 157, 162. Westland, an angry, troubled man who probably does not respond well to threats, responded first on June 22, 2007 expressing his lack of appreciation of Rolin's litigation threats, and then on August 7, 2007 with written confirmation of the Association's decision not to approve Baumblatt and Reese's plans for failure to comply with the CC&Rs. Exhs. 158, 161. Although Westland did not specifically name the applicable provisions of the CC&Rs, it was obvious to everyone involved that Baumblatt and Reese's proposed remodel was more than 15.5 feet tall under Article III, Section 1, and that the plans were still incomplete under Article IV, Section 2(a) . The Association and Lindsay and Ward retained separate counsel. Exh. 20.

Baumblatt and Reese responded on August 28, 2007 by filing the first lawsuit, Case No. SC095098. Then the parties proceeded to litigate against each other. The defendants, Lindsay, Ward, and the Association, ultimately obtained from the court, Hon. Joe Hilberman, a dismissal of the first action on December 17, 2007, by successfully arguing that Baumblatt and Reese had not complied with the mediation requirement in the Davis-Sterling Act, Section 1351(a) of the Civil Code. After the Judge Hilberman dismissed the first action, the parties participated in the pre-filing mediation that Lindsay, Ward, and the Association had argued was required under the Davis-Sterling Act.

At some point the Association (and perhaps Lindsay and Ward) agreed to give Baumblatt and Reese a three foot variance, so that Baumblatt and Reese would receive permission to build a second story up to 18.5 feet (15.5 + 3.0). In February 2008, Ryder prepared and counsel for Baumblatt and Reese distributed a new set of plans. Exhs. 22, 129, 167, 206. These plans, however, provided for a second story of approximately 21 feet 2 inches, not 18.5 feet, but no longer included a roof deck. Exhs. 128, 129. Rolin submitted Ryder's new plans to counsel for the Association, counsel for Lindsay and Ward,

and the Tobiases. Ryder admitted at trial, however, that even these plans were not complete. They did not include color and other required specifications, and thus did not comply with Article IV, Section 2(a). Indeed, Ryder testified that as of June 2008 he and his clients were still discussing material and color scheme specifications, and that Baumblatt and Reese had not decided on the materials that they were going to use. In fact, Ryder testified that Baumblatt and Reese never finalized the roof treatment specifications, although he thought "it could have been grass or something of that nature." Ryder admitted that even at the time of these February 2008 plans, which were his last plans, the height of the proposed remodel, the major issue among the parties, was still only an approximation, and not precisely known

Ryder also testified that none of the plans he submitted to the Association on behalf of Baumblatt and Reese was a final architectural drawing. Ryder testified that the plans were always "in a state of flux," and still required geotechnical drawings and specifications. Nor, according to Ryder, did Baumblatt and Reese ever advise the Association of the choice of materials that they intended to use on the project. Although Ryder's answers were relatively evasive on this issue, he seemed to suggest, through constant use of the conditional verb tense "would," that the parties could infer what kind of materials Ryder might use on the project by observing other buildings he had designed. Baumblatt testified only that the unidentified materials he and his wife would use would be "of the highest quality" and "in high end fashion." Baumblatt also said about the plans: "It's still a work in progress to some extent."

Scott Dinslage, a licensed architect in California for 18 years (i.e., approximately 17 years and 11 months longer than Ryder) hired by the PHOA to review Baumblatt and Reese's plans, testified that none of the plans specified the materials that Baumblatt and Reese intended to use, such as color renderings, site plans of the new versus existing structures, and specifications of the texture, type, and size of the materials. Dinslage also

testified there is a six inch height discrepancy in Ryder's February 2008 plans that precluded a determination of the actual height of Baumblatt and Reese's proposed second story addition. Indeed, Ryder's plans even state that the final roof elevation has yet to be established. See Exh. 129_004. Dinslage also opined that there were a few different ways that Baumblatt and Reese could build a second story with a lower height. Although Ryder testified that such alternatives were not feasible, the court credits Dinslage and his far greater experience and expertise. See CACI 221.

The neighbors again objected to Ryder's February 2008 plans, which still called for a second story in violation of the 15.5 foot height restriction. Lindsay and Ward, through counsel, and Tobias, objected to the new plans. Exhs. 27, 169, 168. On March 20, 2008 the Association, though counsel, denied Baumblatt and Reese permission to build their proposed second story at 21 feet 2 inches, but invited Baumblatt and Reese to submit new plans. Exhs. 24, 171, 211 (citing Article III, Section 1, and Article IV, Section 2).

The parties apparently had another mediation in April 2008. The parties subsequently agreed to split the cost of another story pole study of Baumblatt and Reese's proposed second story addition, this time at a height of 21 feet 2 inches. The members of the Association were invited to view the story pole study, including from Lindsay and Ward's property, and many of them and the board members did so. For example, Andrew Tobias viewed the story poles from the Lindsay and Ward's property, and was shocked to see that the story pole study revealed that the second story would be "right in the face" of Lindsay and Ward. Tobias could also see the story poles from inside his house, which he felt was very intrusive. Maureen Zweig thought the proposed addition outlined by the story poles would "substantially impair the view" from the backyard of Lindsay and Ward's property and from the den of their home. Lindsay testified that he was "horrified" when he saw these story poles. The Association also received written objections. See, e.g., Exh. 25.

Robert Munakash, the new president of the Association, went with other board members on June 12, 2008 to view the story pole study, and found a substantial impairment of the view. Munakash consulted with at least three other board members, and asked them to look at the plans, the story poles, and the CC&Rs. Munakash received objections from other neighbors, including one neighbor who threatened to sue the Association if it gave Baumblatt and Reese permission to build their proposed 21 foot 2 inch second story addition. Munakash testified that the board of the Association based its decision to deny Baumblatt and Reese permission to build the 21 foot 2 inch structure on many considerations, including that (1) the proposed addition was clearly visible from the Lindsay/Ward property and impaired the view; (2) the proposed addition was visually obtrusive and negatively impacted the perception of the view; (3) neighbors with whom the board had consulted expressed concern and voiced objections; (4) the proposed addition would impair or negatively impact the character of and property values in the neighborhood; (5) approval would set an undesirable precedent of approving projects over the objections of neighbors; and (6) many members of the Association considered the proposed addition an "eyesore."

On June 20, 2008 the Association, through counsel, denied Baumblatt and Reese's request for permission to build their second story at 20 feet 2 inches. Exhs. 174, 213. The Association offered Baumblatt and Reese a lesser height variance, invited them to submit revised plans, and suggested three acceptable alternatives that might allow them to build a second story. Baumblatt and Reese filed this action on July 25, 2008.

D. Analysis of plaintiffs' claims

In Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n, 21 Cal. 4th 249 (1999), the Supreme Court adopted a rule of judicial deference, from the business judgment rule applicable to directors of corporations, to homeowner association board decisions

where owners "seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors." Id. at 260; see Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n, 168 Cal. App. 4th 1111, 1123 (2008). The Lamden court held that "where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." Lamden, 21 Cal. 4th at 265; see Nahrstedt v. Lakeside Village Condominium Ass'n, 8 Cal. 4th 361, 383 (1994) (the general rule is that when "an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly"); Rancho Santa Fe Ass'n v. Dolan-King, 115 Cal. App. 4th 28, 37-38 (2004).

In Harvey v. The Landing Homeowners Ass'n, 162 Cal. App. 4th 809 (2008), the court applied and extended the Lamden rule of deference beyond "ordinary maintenance decisions" to an association's decisions regarding common areas for storage, in light of the association's sole and exclusive right, under the operative CC&Rs, to maintain, control and manage the common areas. Id. at 821. In Ekstrom, however, the court distinguished Harvey and held that where the board acts consistently within the authority granted to it by the CC&R's, the Lamden rule applies, but that where the CC&Rs do not give the board discretion to act as it did, or the board acts in a manner rendering a provision of the CC&Rs meaningless, Lamden does not apply. Ekstrom, 168 Cal. App. 4th 1124-25; see Cohen v. Kite Hill Community Ass'n, 142 Cal. App. 3d 642, 650-52 (1983) (pre-Lamden case holding that the association could not approve a fence in violation of the CC&Rs).

Thus, the Lamden rule of judicial deference applies where an association acts consistently within the authority vested in it by the CC&Rs. Ekstrom, 168 Cal. App. 4th at 1124-25. It is only where, as was the case in Cohen and Ekstrom, the association acts inconsistently with the CC&Rs that Lamden does not apply, and the association must act in good faith and not in an arbitrary or capricious manner, and enforce the rules fairly and uniformly. See Nahrstedt, 8 Cal. 4th at 383; Ekstrom, 168 Cal. App. 4th at 1124-25; Cohen, 142 Cal. App. 3d at 648-50; Cf. Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Ass'n, 166 Cal. App. 4th 103, 122 (2008) (dicta stating that Lamden "gives no direction as to what standards courts should apply when faced with a challenge to a board action involving an extraordinary situation (e.g., major damage from an earthquake) or one not pertaining to repair and maintenance actions, e.g., a decision to deny approval to an improvement project desired by an owner.").

Here, the Association acted consistently with the authority vested in it by the CC&Rs. Article III, Section 1 prohibits structures over 15.5 feet "above the finished ground at the front." The second story proposed by Baumblatt and Reese is over 15.5 feet high. It is prohibited. The Tract Committee, after consulting with Lindsay, Ward, Tobias, Matteson, and many other directly, indirectly, and even distantly affected neighbors, exercised its discretion and denied Baumblatt and Reese permission to build over 15.5 feet. Whether Baumblatt and Reese's oversized proposed structure substantially obstructs or diminishes the view from anyone's property is not relevant at this point, because it only applies if the Tract Committee exercises its discretion and grants permission to build over the 15.5 foot height restriction, which the Tract Committee did not do. This is not a case where the board of the Association acted inconsistently with or outside the authority granted by the CC&Rs. The CC&Rs expressly give the board of the Association the discretion to approve or disapprove structures over 15.5 feet, and the board exercised this very discretion. In denying Baumblatt and Reese permission to build over 15.5 feet, the Association acted consistent with the CC&Rs, not in violation of them.

Of course, in refusing to give Baumblatt and Reese permission to build their structure above 15.5 feet, the Association must act in good faith, reasonably, unarbitrarily, non-capriciously, and consistent with the CC&Rs and applicable law. The evidence at trial shows that the Association did.

When Baumblatt and Reese finally submitted (still incomplete) plans in April 2007, board members, as described in detail above, consulted with neighbors, viewed story poles, received and reviewed complaints and objections from members, and corresponded with Baumblatt and Reese's architect and later their attorney. The board reached a decision within a few months (April to August), communicated it in writing, and then responded to Baumblatt and Reese's first lawsuit. When Baumblatt and Reese submitted new (still incomplete) plans in April 2008 and June 2008 with a height of 21 feet 2 inches, after the Association had agreed to a three foot variance up to 18.5 feet, board members again heard and considered objections and complaints from neighbors and other members, viewed more story pole studies, considered the effect of the proposed addition on views in the neighborhood, reviewed and discussed the CC&Rs, considered the effect of the proposed addition on the overall neighborhood, and communicated the decision within weeks of the applications.

Baumblatt and Reese complain that the board members in general and Westland in particular had a fundamental misunderstanding of the CC&Rs and violated their fiduciary duties because they wanted Baumblatt and Reese to communicate with and seek approval from their immediate neighbors. There was absolutely nothing wrong with this effort by the Association. Under the Article III, Section 1, the Association had a duty to consult with the possibly affected neighbors. It was an imminently reasonable and practical decision for the Association, in fulfilling its duty to consult with the affected neighbors, to ask Baumblatt and Reese to meet with their neighbors, and to seek approval from or a compromise with them.

Baumblatt and Reese also contend that the Association has applied the 15.5 height restriction unfairly and discriminatorily against them, pointing to the existence of other homes in the PHOA with heights in excess of 15.5 feet. The evidence does not show, however, that the Association has enforced the 15.5 foot height restriction in the CC&Rs unfairly or selectively. The testimony at trial and the court's site visit reveal that over the years the Association has enforced the 15.5 foot height limit consistently and uniformly, and that members who have renovated their homes have taken precautions and incurred expense in ensuring that their renovations comply with the CC&Rs, including excavating into the ground or building down the hillside. The evidence also shows that enforcement of the 15.5 foot height limit in the CC&Rs has been and continues to be an important priority of the Association's members.

Finally, the photographic evidence and the court's site visit show that although Baumblatt and Reese's proposed addition would not directly block the view from Lindsay and Ward's property of the ocean, the mountains, or the city, it would have a significant if not dramatic effect on the view from their property. The proposed 21 foot 2 inch second story to Baumblatt and Reese's house would not physically obstruct much of the view, but it would substantially diminish the nature and quality of the view from Lindsay and Ward's backyard, den, and living room. As the court's site visit revealed, Baumblatt and Reese's home is much closer to Lindsay and Ward's home, and the hill between them is much steeper, than the photographs show, making the impact of the proposed addition on the view from Lindsay and Ward's home much greater than the photographs suggest.

Baumblatt and Reese also contend that the Association did not comply with the Davis-Sterling Act, and in particular Section 1378 of the Civil Code. Baumblatt and Reese contend that the Davis-Sterling Act applies to this litigation. See, e.g., Plaintiff's Trial Brief, 8:11-10:5, 11:19-27, 12:15-17. The Association contends that the Davis-Sterling Act does not apply to it, and it may be correct, but as explained in the court's July 28, 2009 order, the

Association is judicially estopped from arguing that the David-Sterling Act does not apply, at least with respect to this dispute. The only reason that the Association's compliance with Section 1378 is an issue is that judicial deference to the Association's decision applies only where the board acts consistently with the CC&Rs (which it has) and with applicable law, such as the Davis-Sterling Act.

Section 1378(a) provides that "in reviewing and approving or disapproving a proposed [physical] change" to an owner's separate interest, the association must comply with these requirements:

> "(1) The association shall provide a fair, reasonable, and expeditious procedure for making its decision. The procedure shall be included in the association's governing documents. The procedure shall provide for prompt deadlines. The procedure shall state the maximum time for response to an application or a request for reconsideration by the board of directors.
>
> (2) A decision on a proposed change shall be made in good faith and may not be unreasonable, arbitrary, or capricious.
>
> (3) Notwithstanding a contrary provision of the governing documents, a decision on a proposed change may not violate any governing provision of law . . . or a building code or other applicable law governing land use or public safety.
>
> (4) A decision on a proposed change shall be in writing. If a proposed change is disapproved, the written decision shall include both an explanation of why the proposed change is disapproved and a description of the procedure for reconsideration of the decision by the board of directors.

(5) If a proposed change is disapproved, the applicant is entitled to reconsideration by the board of directors of the association that made the decision, at an open meeting of the board."

Baumblatt and Reese contend that the Association violated subdivisions (1), (2), (4), and (5) of Section 1378(a). The evidence, however, shows otherwise.

The Association provided Baumblatt and Reese with a reasonably expeditious and fair procedure, and did so at least three times. After each submission of plans by Baumblatt and Reese (April 2007, February 2008, and June 2008), the Association responded reasonably promptly and consistent with the board's duties and responsibilities under the CC&Rs. Association board members communicated with "possibly affected neighbors" throughout the neighborhood, reviewed plans submitted by Baumblatt and Reese even though the plans admittedly were incomplete and did not comply with the CC&Rs, spoke with each other, and made decisions within a few months (August 2007, March 2008, and June 2008, which is four months, one month, and the same month, respectively). It is true that the CC&Rs do not contain the procedures, deadlines, and maximum response times, but that is because the Association had no knowledge that the Davis-Sterling Act and Section 1378 would apply to it in this dispute until the court on July 28, 2009 found that the Association was judicially estopped from arguing that the Act did not apply, based on the actions of and positions taken by its attorneys. Thus, although all parties agree it is probably time to revise and update the CC&Rs, the fact that the Association's CC&Rs do not fully comply with a statute that only applies for purposes of this litigation is not a basis for finding a violation of the statute. Moreover, it is chronologically impossible for the Association to have rewritten its CC&Rs after the court's July 28, 2009 hearing to apply to events in 2006 through 2008.

As noted above, the Association's decisions on Baumblatt and Reese's proposed change were made in good faith and were not unreasonable, arbitrary, or capricious. To the contrary, the Association's decisions were quite reasonable, and were based on good faith inspections and investigations, considerable deliberation, wide input from many different members of the Association, and reviews of Baumblatt and Reese's plans and story pole studies, even though they never submitted plans in compliance with Article IV, Section 2(a).

The Association communicated each of its decisions to Baumblatt and Reese in writing. See Exhs. 24, 161, 171, 174, 211, 213. (In fact, because Baumblatt and Reese did not speak with anyone else, the decisions had to be in writing.) Baumblatt and Reese complain that the Association's written communications did not include explanations of the disapproval with citations to the specific applicable provision of the CC&Rs, and did not describe a procedure for reconsideration by the board. The second and third decisions by the Association (March 2008 and June 2008), communicated through counsel, however, included both. The letters contain citations to specific provisions of the CC&Rs, invite Baumblatt and Reese to submit new plans that comply with the CC&Rs, and indicate the procedure for reconsideration: through counsel, because by this time the parties had, in Munakash's apt phrase, "lawyered up." The Association's August 7, 2007 communication of its initial decision, prepared by Westland, was not as detailed as the two letters prepared by counsel, but it was sufficient. Although Westland did not cite a specific provision of the CC&R in his August 7, 2007 letter, he did advise Baumblatt and Reese that their plans did "not conform to the PHOA CC&Rs," and it was obvious to everyone that Westland was referring to the 15.5 feet height restriction in Article III, Section 1. Westland also testified, understandably, that he drafted the August 2007 letter hastily because the clock was ticking on Rolin's ten day deadline for initiating litigation, and that he probably could have written a better letter. Nevertheless, in light of all the circumstances, it was a sufficient explanation.

Finally, Baumblatt and Reese had an opportunity for reconsideration by the board at an open meeting of the board, but they chose not to attend. True, the reconsideration meeting was not held until August 27, 2009, long after litigation among the parties had twice commenced and about a month before the trial in this action. But the CC&Rs do not require an open reconsideration board meeting, and the Association did not learn that, for purposes of this litigation based on the positions taken by its attorneys, it had become subject to the Davis-Sterling Act in general, and Section 1378(a)(5) in particular, until the court's July 28, 2009 order. Approximately three weeks later, on August 17, 2009, Munakash gave notice of an open meeting of the entire Association board to discuss and reconsider Baumblatt and Reese's plans (even though Baumblatt and Reese had still not complied with Article IV, Section 2(a)). Exhs. 122, 123. Munakash actually called and spoke with Baumblatt on the telephone (a first for the parties) before the meeting, and invited him, Reese, and Ryder to come to the meeting and discuss their project. Baumblatt told Munakash that he would consider it, but that "it might be too late." Neither Baumblatt, Reese, nor any of their representatives attended the meeting.

At the meeting, Munakash distributed sets of Baumblatt and Reese's plans, the CC&Rs, and emails he had received from some of the members of the Association. One board member, Stanley Swartz, who is also an experienced general contractor, testified that prior to the August 2009 meeting he reviewed Baumblatt and Reese's plan thoroughly, inspected the building site, visualized the proposed height, and concluded that it would "obviously" block views from Lindsay and Ward's property. Swartz also voiced his opinions that the plans were incomplete, confusing, unclear, and internally inconsistent in some parts, and could not be evaluated and approved. Swartz, a particularly credible witness, testified that he would have liked Baumblatt and Reese to have attended the meeting so that he could have asked them questions about the plans. Zweig stated that she believed Baumblatt and Reese's proposed structure would substantially impact Lindsay and Ward's property and the quality of the neighborhood. Lindsay, of course, voiced his objections, as

did many others in attendance. The board ultimately voted unanimously (6-0) to affirm the decision to deny Baumblatt and Reese permission to build a second story to 20 feet and 2 inches. Munakash communicated the decision in writing to Baumblatt and Reese on September 2, 2009. Exh. 124.[7]

Therefore, because the Association acted well within its authority under the CC&Rs and in compliance with applicable law, the court defers under Lamden to the Association's decision. The court finds that the board acted well within its authority and discretion under the CC&Rs and applicable law, and acted reasonably under the circumstances and in good faith. Even if the court were not to defer under Lamden, the court finds that the Association did not act in an arbitrary or capricious manner, and enforced the CC&Rs fairly and uniformly. Therefore, under Lamden or Ekstrom, the Association is entitled to judgment.

For these reasons, the court will enter judgment in favor of defendant Palisair Homeowners Association and against plaintiffs Baumblatt and Reese on plaintiffs' first cause of action for declaratory relief and second cause of action for injunctive relief.

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[7] Baumblatt and Reese presented the expert testimony of David Swedelson, a very knowledgeable and experienced attorney who specializes in homeowner association governance and the Davis-Sterling Act. Swedelson testified that the Association acted unreasonably in denying Baumblatt and Reese's request to exceed 15.5 feet by (1) making them deal with their neighbors instead of the board, (2) using devaluation of homes as a basis for decision without getting proper appraisals or other information, (3) not acting as a tract committee but deferring to one individual (Westland), and (4) Westland's failure to cite specific provision of the CC&Rs in his August 7, 2007 letter. As noted above, the board's efforts to have Baumblatt and Reese discuss the issues with their neighbors, with whom the board had a duty to consult, was reasonable under the circumstances and a step not mutually exclusive with making a decision. And the effect of the proposed addition on the neighborhood and members' property values was a legitimate concern that was appropriate for the members to express and the board to consider, among many other factors. See Evid. Code § 813(a)(2). Although at the time Westland was the Chair of the Plans Committee, there was evidence at trial that he did consult with other members in connection with the Association's August 2007 decision. And it would have been better if Westland had been a little more specific in his August 7, 2007 letter, but the letter does reference the CC&Rs, and it was obvious to all involved that the main issue was the 15.5 foot height restriction in Article III, Section 1.

## IV. DISPOSITION

The court will enter judgment in favor of defendants Lindsay and Ward against plaintiffs Joel Baumblatt and Donna Reese on plaintiffs' third cause of action for nuisance. The court will enter judgment in favor of defendant Palisair Homeowners Association and against plaintiffs Baumblatt and Reese on plaintiffs' first cause of action for declaratory relief and second cause of action for injunctive relief. Counsel for defendant Palisair is ordered to file and serve an appropriate proposed judgment pursuant to Section 632 of the Code of Civil Procedure and Rule 232 of the California Rules of Court. The clerk is to return the trial exhibits to counsel, who are ordered to keep them separate and in their present condition until the expiration of the time within which to file a notice of appeal, or, if either party timely files a notice of appeal, the issuance of the remittitur by the Court of Appeal, whichever occurs later. The clerk is to give notice.

Dated: October 7, 2009

JOHN L. SEGAL
JUDGE OF THE SUPERIOR COURT