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VIA EMAIL

Board of Palisair Homeowners Association

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Re: Construction at 16100 Anoka Drive

Dear Palisair Board:

The undersigned has been retained by Francine Kirkpatrick, owner of 16050 Anoka Drive, Pacific Palisades, California to protect her interests, including privacy, being violated by proposed construction by Robert May at 16100 Anoka Drive, Pacific Palisades, California.

As you may be aware, Robert May and Ms. Kirkpatrick are next door to each other and only separated by a small driveway leading to a flag lot. As you are aware, both properties are within the Palisair Homeowners Association ("PHOA") and are subject to the covenants and restrictions of the CC&Rs imposing contractual and statutory duties on the PHOA board to act consistent with the CCRs and Civil Code and not in an arbitrary and capricious manner.

I. Summary

The proposed remodel plan at 16100 Anoka Drive includes a rooftop deck and involve plans to add 1,281 sq. ft. additional living space into the back yard (on original building pad) of an old 50's never remodeled ranch house. If these plans are allowed without rooftop deck restrictions, it will significantly damage homeowner privacy and substantially diminishing the property value of 16050 Anoka Drive.

My client's chief concern is regarding loss of privacy and diminishment of property value by the deck proposal regardless of the ultimate height of the structure. This specifically concerns the PHOA failure to investigate privacy impact and value loss, including, but not limited to, the failure to conduct an evaluation of diminishment in

value. This is clearly a rush to judgment as just last year an evaluation of diminishment of property value was done on another property in the association affected by neighbor plans for a 2-story variance request. This particular evaluation was a thorough evaluation of affected neighbor rights and is in direct contrast to how this situation has been handled.

At a February 16, 2015, board meeting, Ms. Kirkpatrick proposed cutting back the deck by 6 ft. on the southern edge. The PHOA rejected her proposal in 4 to 3 vote to approve plans as is. The unexpected quick initial motion to approve plans as is gave Ms. Kirkpatrick no opportunity to propose an alternate request for rooftop deck restrictions, as had been done with the other two rooftop desks recently allowed by the PHOA.

We are informed that the PHOA is holding a meeting on March 16, 2015 to review the current plans and rooftop deck. It is imperative that Ms. Kirkpatrick's objection to the rooftop deck and this request for restrictions consistent with prior precedent be considered at this meeting. A failure of the PHOA board to fully consider this request is a violation of due process, the Davis-Sterling Act, and the CC&Rs as specified in Article IV, Section 2(a) and can result in legal action against the PHOA.

II. Prior Decisions Concerning Rooftop Decks In The Association

Two policies have been in place for many years – neighborhood meetings prior to board vote and Plans Committee as *advisors* to the Board, without authority to make independent decisions. These policies Ms. Kirkpatrick tirelessly fought to keep in place, but have been recently ignored by the Plans Committee starting in 2011.

As the PHOA board is aware, the CC&Rs require both an evaluation of neighbor view and property value loss. In two cases in recent years, the PHOA consulted with affected neighbors and compromises were reached to allow rooftop decks subject to restrictions that were agreed to by the homeowners and recorded against the property being remodeled. These included the restrictions on Doug Baron (1120 El Medio Ave) and Tom and Susan Matteson (1091 Palisair Pl).

Additionally, other Palisades local restrictions on rooftop decks include:

- 1) Huntington Palisades maximum size of 100 sq. ft. and built within the roof well only.
- 2) Pacific Palisades Civic League: Richard Blumenberg President of PPCL reported on 2/28/15 in a PHOA meeting in his office that PPCL requires roof-decks on two stories to be placed 7'6" away from edge of roof so as to protect neighbor privacy.

III. 16058 Anoka Drive

As you may recall, not too long ago, there was huge debate on the board with respect to a proposed rooftop deck at 16058 Anoka Drive. The usual suspects took sides, Mr. Erdley and Ms. Kirkpatrick protecting privacy and property values and others

encouraging construction with less limitations. Just prior to this and as a result of the 16058 Anoka Drive rooftop deck proposal and recent construction that did damage to neighbor views and property values, Jean de Vellis (1109 El Medio) and Simon Simonian (1101 El Medio) decided to form an ad-hock neighborhood committee to study possible changes to the CC&Rs to better protect views, privacy and property values.

IV. Current Plans for 16100 Anoka Drive

On December 16, 2014, PHOA Architect, Richard Blumenberg, was given Mr. May's plans to review and he rejected the plans because the rooftop deck was "not in conformance with the neighborhood." His opinion was given no credence by the Plans Committee. In fact, Mr. Freidman blatantly denied to the Board on February 16, 2015 that Mr. Bloomberg was opposed to the deck. As recently as March 4, 2015, Mr. Bloomberg confirmed his opposition to the deck was because of the privacy invasion the deck would create.

On December 17, 2014, Ms. Kirkpatrick emailed the Board voicing her concerns regarding privacy invasion and her willingness to tolerate restrictions if relocating the deck or reducing the deck size was not a satisfactory solution. She offered to use the same restrictions agreed to with Doug Baron, a copy of which is attached as Exhibit 1.

On December 29, 2015, Ms. Kirkpatrick emailed Mr. de Saia reporting her conversation with Robert May shortly after he bought the house in August 2014 re rooftop decks wherein she told him of the limitations on use of rooftop decks in the PHOA (Baron and Matteson) that he could expect if he proposed a rooftop deck. When Robert May later showed Ms. Kirkpatrick the plans he brought up the restriction demonstrating his knowledge restrictions may be required.

On January 14, 2015, Jean de Vellis and Simon Simonian sent the PHOA Board a letter proposing a rooftop deck survey that they would be willing to conduct. Fearing their proposal would be ignored they added, "Or if the Board does not want to formally authorize us to do the survey we would as a neighborhood committee, independently conduct the survey....." Because of the undeniable reasonableness of a survey the Board agreed, but the task has been put in the hands of a PHOA "committee" where it has been stuck with non-action for the past two months.

Regarding the May plans Vi Walquist, current Board member and past PHOA President, insisted on the wisdom of meetings with neighbors prior to a board vote, a long standing policy in place before 2011. On January 27, 2015, Mr. Freidman agreed to a neighbor meeting to review plans prior to Board vote. Ms. Walquist emailed Mr. Freidman her intention to invite the association membership (especially given the highly controversial nature in the neighborhood on rooftop decks).

On January 28, 2015, Mr. Freidman wrote to Ms. Walquist: ".none of us that looked at the plans and the property that day which included the Executive committee,

thought that a neighborhood meeting was necessary because May was not seeking a variance of any kind.” Mr. Freidman also attacked the request to invite the entire association as being “ridiculous” and stated “I don’t approve of at all.” Mr. Freidman further argued against getting neighbors involved stating “Once again, for those of us that are on the front line negotiating with the builder, we can’t make decisions, as we have on this one, only to be second guessed later and potentially reversed.” This pattern of making agreements with the builder without board approval is contrary to precedent and Board decision on Dec 16, 2013 that gave limited authority to the Plans Committee to grant preliminary plans approval only on construction “if there are no unusual circumstances or requests for a variance”. Certainly plans for rooftop decks as highly controversial within the community constitutes an unusual circumstance.

On January 29, 2015, Mr. Freidman sent the board a proposed draft email to be sent to owner/builder of 16100 Anoka Dr where he proposes saying, “As far as we are concerned you are in full compliance with the CC&Rs” After receiving strong challenge to this email, it does not appear that this email was sent.

Finally, on January 30, 2015, Mr. Freidman agrees to an invite to “select” neighbors for a neighbor plans review meeting on either in February 7 or 8, 2015.

On February 2, 2015, a postal service letter from homeowners Simon Simonian and Jean de Vellis addressed to all association members arrived in homeowner mailboxes. The letter regarded the rooftop deck controversy and encouraged attendance at the February 7 or 8, 2015 meetings.

On February 5, 2015, Mr. Friedman sent to Ms. Kirkpatrick and Vi Walquist an outline he wanted to follow at the neighborhood meetings where again he says, “stress that they do not pose a per se violation of the CC&Rs at present.” But later in the outline corrects himself saying the building, not the deck is in compliance (*therefore indirectly admitting that the deck falls under Art IV, Sec 2 (a) and an evaluation is necessary of property value effect from privacy invasion*). In that same email he references the story poles that will go up. Ms. Kirkpatrick's prior request that the board require story poles was ignored. That same day, Karen Olan, Board member, who had done very little to assess the privacy violation and had not seen story poles or conducted any other formal investigation , emailed Ms. Kirkpatrick stating: “the May’s rooftop deck will not pose a privacy issue for you”.....”Much Ado about Nothing”.

On February 7 and 8, 2015, there were neighborhood meetings at Ms. Kirkpatrick's house to view story poles and look at plans (Ms. Kirkpatrick who had temporarily resigned from the Board, not just recused herself, chose to not attend the neighborhood meetings so as to make it very clear that her actions were solely as an affected neighbor and not as a board member.)

At the February 16, 2015, Board meeting Ms. Kirkpatrick gave a presentation regarding the impact of the rooftop deck and proposal for a 6 ft. reduction of deck along

the south edge. This presentation was given with consult with attorney, Barry Ross. Comments from the Board were “that’s just one attorney’s opinion” and “I walked around your house several times and see no privacy invasion”, etc. Instead of presenting a motion to the board regarding the proposed deck revision, the President accepted a motion to approve plans as is: 4 in favor and 3 opposed. The meeting quickly moved along which did not permit an alternative request for rooftop deck restrictions. Also, immediately following the vote, Robert May announced he was revising his plans to raise his flat roof from 11 ft. to 14 ft. (rooftop deck to remain at same elevation with top of railing at 14.5 ft.).

On February 17, 2015, Richard Dinel (16131 Anoka Dr), homeowner and attorney sent an email to the board that he wants a “moratorium be imposed on roof decks immediately until such an election is held or manifest unfairness will result.” He voices a common conviction that property values will decrease because of the privacy invasion caused by roof top decks.

V. Legal Discussion

A director of a homeowners association must act in good faith. (Cal. Corp. Code § 7231(a) [“A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”].) This same standard governs for-profit corporate directors, and the standard is commonly known as the “business judgment rule.” (Cal. Corp Code § 309(a); *Finley v. Superior Court* (2000) 80 Cal.App.4th 1152, 1161; *Frances T. v. Village Green Owners Association* (1986) 42 Cal. 3d 490, 507.) The courts review homeowners association decisions looking for arbitrary or capricious conduct. (*Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [citing *Bramwell v. Kuhle* (1960) 183 Cal.App.2d 767, 779].) This rule was adopted by the California Supreme Court, at least as it relates to common maintenance issues, and has been followed by other courts since. (*See Lamden v. La Jolla Shores Condominium Homeowners Association* (1999) 21 Cal.4th 249, 270-271; *Dolan-King v. Rancho Santa Fe Association* (2000) 81 Cal.App.4th 965 [applying same to disapproval of proposed remodel construction]; “ *Cohen v. Kite Hill Community Ass’n.* (1983) 142 Cal.App.3d 642, 650 [issue of applicability of rule is “well settled” when a homeowners association denies or approves construction or development].)

While not specifically identified in the CC&Rs, rooftop decks are quite clearly regulated in the second to last paragraph of Art IV, Sec 2:

The erection, alteration, maintenance, location or relocation of any clothes line pole, fence, hedge, mast, aerial or antenna for radio or television, or other structure of a similar or dissimilar nature, whether separate or an integral part of the dwelling, such as a residence addition, shall be disapproved or desisted from whenever such structure, because of its kind, shape, color, height, material, or location, in the

opinion of the Tract Committee would be unsightly, or detrimental to, or unreasonably obstruct or unreasonably diminish the nature or quality of the view from any other land in this or an adjoining tract, or otherwise tend to lower the value of any land of the tract.

Rooftop decks are included in “other structure of a similar or dissimilar nature”. The May rooftop deck is also “a residence addition.” The Board is mandated to follow a thorough evaluation process with regard to affected neighbor views and property values for Article IV just as when evaluating for a variance in Article III.

Although the word privacy is not specifically found in PHOA's CC&Rs, privacy rights have been defended in many lawsuits both at the State and Federal level, including the California State Constitution:

“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

Equally important, loss of privacy can diminish the value of a home such as Ms. Kirkpatrick's, a home which consists of multiple Southern windows overlooking the ocean and city lights views. To allow a homeowner to build a rooftop deck that will look directly into Ms. Kirkpatrick's living room, family room, bedroom, bathroom and office will substantially diminish her property value. It will also force her to alter her lifestyle including what clothes she wears and the activities she undertakes in her home. The proposed rooftop deck and any fixtures and people on the deck will be seen from all five interior rooms. Moreover, people on the deck will have a bird's eye view into Ms. Kirkpatrick's home. Attached as Exhibit 2 are photos showing the story poles of the proposed rooftop deck from within Ms. Kirkpatrick's home. As set forth above, the proposed rooftop deck will significantly diminish her property value. It is for this reason in the past that the PHOA board through counsel developed restrictions for rooftop decks that guarded against privacy invasion and loss of property value that ran with the property. Accordingly, the PHOA board has to abide by its contractual and statutory duties and precedential decisions and consider a reasonable restriction in this case. To do otherwise, would be an arbitrary and capricious misuse of its discretion.

VI. Conclusion

Robert May's revised plans will be voted on at the March 16, 2015 board meeting where Ms. Kirkpatrick requests to be heard on the issue of imposing deck restrictions similar those imposed on Doug Baron (Exhibit 1). If reasonable deck restrictions are not considered, this dispute could result in legal action against the PHOA for breach of contractual and statutory obligations and the resulting privacy invasion and diminishment in value of Ms. Kirkpatrick's property.

The PHOA board has already acknowledged through its site visit the need for an investigation into this matter. However, the investigation has not been thorough and has

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been insufficient to make a determination on the damage the proposed rooftop deck will do to Ms. Kirkpatrick's privacy and property value. Further, it would be abuse of discretion for the Board of Directors to rule based on prior approval letters that were not reviewed or sanctioned by the board, and which relate to plans that have been modified. This is particularly true in this case where Mr. May has changed the height of the proposed structure.

Of course, we hope the PHOA will make the right decision and exercise its discretion as it has in the past to protect the property values in the association.

Very truly yours,

CHARLES C. WELLER, A PROFESSIONAL CORPORATION



Charles C. Weller, Esq.

Enclosure:
Exhibit 1: Restriction on 1120 El Medio