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**PRIVILEGED ATTORNEY-CLIENT COMMUNICATION**

**VIA ELECTRONIC MAIL ONLY**

Board of Directors  
C/O Mr. Larry Friedman  
C/O Dr. Francine Kirkpatrick  
Palisair Homeowners Association  
P.O. Box 801  
Pacific Palisades, CA 90272

Re: Hill/Isaacs

Board of Directors:

At the outset, I want to underscore the fact that this is a communication between attorney and client. As such, it is privileged. To the extent, however, that you share any of the contents of this communication with a non-board member, the privilege may be lost.

In the context of the pending application of the Isaacs for approval of their building plans, I have been asked to analyze the Third Modification of Restrictions for Tracts 15944, 15948 and 1980 (the "Third Restrictions") and on the basis of that review to recommend how to treat the Isaacs' application.

**Background Facts**

Let me first recite what I understand to be some relevant background information:

- Prior to the Third Restrictions the Tract Committee operated based on the assumption that the then applicable restrictions provided that as long as a proposed structure complied with the 15 ½ foot height restriction (the "Height Restriction"), it was not within the purview of the Tract Committees to evaluate

the view impact of the proposed structure.<sup>1</sup>

- Whether intended or not, the Third Restrictions added language to Article IV, Section 2(a), that could arguably support the proposition that it was intended to expanded the Tract Committee's right to consider the view impact of a proposed structure even if it complied with the Height Restriction.
- The written summary material concerning what was the then the proposed Third Restrictions which was provided to the homeowners, did not mention that conceptual change. Nor have I been made aware of any communications during the time that the Third Restrictions were being prepared that evidences an intention to expand the Tract Committee's rights in that area.
- Since the adoption of the Third Restrictions, there have been two applications where the proposed structures comply with the Height Restrictions (the Hills and the Isaacs) and it can be argued that both of those projects might be considered to have a negative view impact.
- Throughout the application process the Hills and the Isaacs were told by members of the Tract Committee that as long as their proposed structure complied with the Height Restriction, the view impact would not be considered.
- The Hills received preliminary approval of their plans from the Plan Committee and the Tract Committee. While the minutes do not reflect the basis for the approval, prior to the vote, the addition to Article IV, Section 2(a), which had been modified as part of the Third Restrictions, was read to the Tract Committee. The three members voting not to approve the plans were relying on the above-referenced addition to allow them to consider view impairment even when the proposed structure complied with the Height Restrictions.<sup>2</sup>
- When Hills' plans were submitted, the Plan Committee requested the installation of story poles for the purpose of verifying that the plans complied with the Height Restriction (apparently the plans were somewhat ambiguous). For reasons that

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<sup>1</sup> I understand that there is also a Plan Committee involved in the review process but ultimately, it is the Tract Committee that is vested with the ultimate authority to approve or disapprove plans.

<sup>2</sup> The Tract Committee approved the plans after the Third Restrictions were adopted but before they were recorded.

are still not clear, however, the entire Tract Committee was invited to view the story poles after they were installed.

- The Hills requested that story poles be installed in connection with the Isaacs' plans.

### **Third Restrictions**

I have reviewed the Third Restrictions for the purpose of determining whether, on Their face, they provide the Tract Committee the authority to consider view impact of a proposed structure that complies with the Height Restriction.

Article III, Section 1 provides that there is a height restriction of 15 ½ feet and provides the Tract Committee the right to approve a greater height if it will not "unreasonably obstruct or unreasonably diminish the quality and nature of the view..." The provision does not expressly address one way or the other, whether the Tract Committee can consider the view impact of a structure that is 15 ½ feet in height or less.

The other arguably relevant provision is found in Article IV, Section 2(a). The provision in question originally prohibited the installation of certain specified items that have a negative impact on view. It is clear that the intention was to address items that would not qualify as being part of the residence *per se*, such as hedges, fences, antennas, etc. The Third Restrictions added the term "residence addition" in the list of items to be considered. As I noted previously, it has been argued by some that the addition changed the historical practice and now allows the Tract Committee to consider the view impact of a proposed structure even if it complied with the Height Restriction.

Finally, it is noteworthy, that there are other provisions in the Third Restrictions that expressly vest the Tract Committee with the authority to consider view impact. See for example, Article III, Section 9.

### **Likely Legal Result**

Restrictions are interpreted like contracts. The most important consideration is of course the language chosen by the drafters. Unless an agreement is ambiguous a court will only focus on the language of the agreement. In order to determine whether a contract is ambiguous, the court must first determine whether the agreement is "reasonably susceptible" to the alternative interpretations. In our case, I would argue that the Third Restrictions are at least ambiguous with

respect to the issue presented; the ability to evaluate view impact on proposed structures that comply with the height restrictions.<sup>3</sup>

Once a court concludes that an agreement is ambiguous, it uses a number of tools to determine the intended meaning. Those include but are not limited to: (a) the surrounding circumstances; (b) testimony of those that participated in the negotiation or creation of the agreement; (c) how the parties treated the agreement before there was a dispute; (d) industry practice, among other tools. In addition, if there are two interpretations, the one that best harmonizes conflicting provisions will be adopted.

This is just a cursory overview of the legal approach to claimed ambiguous contracts. In this case, I place great (not exclusive) weight on how the Tract Committee has addressed this issue both before and after the adoption of the Third Restrictions. Of almost equal importance is the absence of any evidence contemporaneous with the drafting that of the Third Restrictions supporting the proposition that the addition to Article IV, Section 2(a) was intended to change the Tract Committee's scope of review. Therefore, on the basis of the facts presented to me,, at least with respect to plans that have been developed in reliance on past practices, it is most likely that a court would conclude that the Third Restrictions do not provide the Tract Committee the power to consider view impact if a proposed structure complies with the Height Restriction.

### **Recommendations**

Under the circumstances, the most conservative approach is for the Tract Committee to not consider the view impact of the Isaacs' proposed structure. While the Hills and others can challenge the Tract Committee's approach, given the historical precedent and other factors I have mentioned, I believe that the Tract Committee will be able to defend its position. On the other hand, the Tract Committee will have a much more difficult time if, for the first time, it rejects a proposed structure on the basis of view impairment that otherwise complies with the Height Restriction.<sup>4</sup>

I do have a suggested approach intended to perhaps defuse the situation surrounding the Isaacs' application. It is my understanding that the Isaacs had previously sought to build a two story structure. While the structure would have exceeded the Height Restriction, it would not have any negative impact on any neighbors' view. Given the informal complaints about the proposed structure, the Isaacs abandoned that concept and submitted their current plans. Under the circumstances, I suggest approaching the Isaacs to see if they will consider reverting back to their original plan (which they apparently favor). At the same time, I propose speaking to the

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<sup>3</sup> One can even argue that before the adoption of the Third Restrictions the prior versions were also ambiguous given the failure to expressly address the issue.

<sup>4</sup> The Hills can also bring their own action against the Isaacs to enforce the Third Restrictions.

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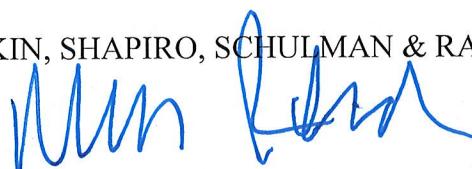
Hills' counsel explaining that while his clients previously objected to the proposed two story structure, given the limitations of the Tract Committee's review (discussed above), realistically it would be in the Hills' interests to allow the two story structure as opposed to the current proposed structure.

Going forward, the best approach would be for the Tract Committee to attempt to modify the Third Restrictions to clearly provide the expanded level of review apparently desired by some of its members. Alternatively, it would be possible to communicate to the homeowners that the Third Restrictions were intended to allow for an expanded review, that such intention was not clearly communicated to the homeowners so the Tract Committee felt constrained to abide by its historical practice but that going forward, the Tract Committee was going to consider view impact even for proposed structures that comply with the Height Restriction. Under the circumstances, the latter approach is a stretch and has some inherent risks that need to be taken into account before embarking on that course.

Please feel free to contact me if you have any further questions.

Very truly yours,

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP



MARC E. ROHATINER

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