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by Amir A. Amini

A Right to a VIEW

Covenants that run with the land and equitable servitudes are both fundamental to land use restrictions that protect views

ANYONE who has ever watched a California sunset or gazed out at Los Angeles's city lights at night knows firsthand how spectacular and unique these images can be. Therefore, it should come as no surprise that people pay a significant premium for Los Angeles properties that display one or more of the city's stunning views. Despite the significant monetary and emotional value attributed to views, most people know very little about whether their views are protected. They are dismayed when they later discover that California law does not protect views absent an express written agreement or restriction. They mistakenly believe that because they paid extra for their view, it must be protected. Even home buyers who review title and confirm that there are recorded restrictions protecting the views are blindsided when they later discover that such restrictions are not enforceable.

View protection disputes are on the rise and likely to continue. Homeowners and developers are increasingly remodeling hillside properties, often disregarding the impact on neighboring properties. Armed with deep pockets, the developers often play a game of chicken with the affected homeowners. Either the homeowners lack the resources to engage in an expensive drawn-out litigation, or if they do, the developer can rely on a laundry list of affirmative defenses that may render the applicable deed restrictions unenforceable.

In a recent high-profile view dispute involving two properties situated in the "Bird Streets," the plaintiff and defendant were next-door neighbors in a residential planned community known as the Beverly Highlands.[1] The Beverly Highlands, which consists of properties spread out along Blue Jay Way and many of the surrounding streets, is governed by a declaration of restrictions that was recorded in 1952 and subsequently amended in 1960 to include a recorded Schedule F.[2] Because of the community's topography, the developer included height restrictions in Schedule F, which have the effect of protecting the residents' privacy and preserving their city and ocean views. Schedule F restricts the height of any structure on the respective properties to no more than 16 feet above grade and one story.

The defendant purchased his property in 2009. At the time, the plaintiff's property was owned by an A-list actress who was filming a feature movie abroad. Sometime between late 2009 and early 2010, the defendant, without requesting a variance from his neighbors, began second-floor construction on his property. The plaintiff's predecessor-in-interest was unaware of the second-floor

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construction. Several neighbors complained to the defendant, sending him written notice that the second-floor construction violated the declaration's height restrictions and reminded the defendant of his obligation to obtain a variance before proceeding. Despite the neighbors' objections, the defendant completed the remodeling.

The plaintiff purchased the property in 2013. Sometime in late 2014, the defendant began expanding the existing second floor of his property thus impacting the plaintiff's panoramic view of the Los Angeles basin. The defendant ignored the plaintiff's requests to halt construction. With no homeowner's association to help protect his rights—the Beverly Highlands Homeowners Association had been dissolved in 1999—the plaintiff filed suit, alleging causes of action for breach of restrictive covenant, private nuisance, and declaratory relief relating to the infringing 2010 construction and separately for the infringing 2014 construction. The plaintiff immediately moved for a preliminary and mandatory injunction, seeking not only to halt the infringing 2014 construction but also to tear it down. Subsequently, the court granted the plaintiff's motion and issued a mandatory injunction ordering the defendant to tear down the infringing 2014 construction within thirty days, whereupon the defendant immediately appealed the ruling.

After nearly a year and a half of contested litigation, including a full briefing of the appeal, the parties reached a global settlement. Under the terms of the ensuing agreement, the defendant would sell his property to a third party who would agree to tear down the entire second floor, honor the height restrictions in Schedule F so long as they remained enforceable, pay the plaintiff's attorney's fees, and provide the plaintiff with a 60-year view easement. The plaintiff, in return, would withdraw the lis pendens recorded against the defendant's property and dismiss the case.

Although the plaintiff obtained a favorable result, the defendant did raise several potentially colorable defenses. The defendant's primary argument on appeal was that the height restrictions are neither covenants that run with the land nor equitable servitudes but rather personal powers of the association that were abandoned with the association's dissolution. In addition, the defendant raised the following defenses: lack of notice, statute of limitations, laches, estoppel, waiver, changed circumstances, and that height restrictions are unreasonable.

Covenants That Run With the Land

There are two basic methods of enforcing land use restrictions like the declaration: 1) covenants that run with the land, or 2) equitable servitudes.[3] Only covenants specified by statute run with the land, primarily those in Civil Code Sections 1462 and 1468.[4] Under Section 1462, a covenant that benefits the property may run with the land, but not one that burdens it.[5] Under Section 1468 both benefits and burdens can run with the land, but the former Section 1468 only applied to a covenant between the owner of land with the owner of other land.[6] Section 1468 was amended in 1968 and 1969 to apply to covenants between a grantor and grantee after their enactment.[7]

In the Bird Streets litigation, the defendant argued that the height restrictions burdened the defendant's land and thus did not run with the land under Section 1462. Further, former Section 1468 does not apply because the declaration of restrictions applied between the grantor (declarant) and the grantee (purchasers of the individual lots).

The plaintiff responded that the height restrictions are mutual covenants involving an entire subdivision, thus the burdens can also be classified as benefits.[8] As the defendant correctly pointed out, however, the mutual benefit theory was rarely applied under Section 1462. The majority of cases rejected the mutual benefit theory.[9] It is unlikely that the court of appeals would have found the height restrictions enforceable as covenants running with the land under either Section 1462 or former Section 1468.

Equitable Servitudes

Equity courts, recognizing that the limitations on covenants running with the land led to inequitable results, adopted the concept of "equitable servitudes"[10]—restrictions on the use of land that run with the land. The three requirements of an equitable servitude are that 1) the deeds must reflect the intention of both the grantor and the grantee that the property be restricted pursuant to a general plan, 2) the deeds must show that the parcel conveyed is subject to the restriction at issue in accordance with the plan for the benefit of all the other parcels in the tract and such other parcels are subject to the same restriction for its benefit, and 3) the dominant and servient tenements must be adequately described.[11] However, when a declaration of restrictions is recorded before the first deed out from the subdivider, all lots in the subdivision will be governed by the restrictions whether or not each deed expressly references the recorded declaration.[12]

Courts have drawn a distinction between an equitable servitude and a personal power. Generally, when a grantor reserves the right to enforce or waive a deed restriction, it is considered a personal power of the grantor and not an enforceable equitable servitude that runs with the land.[13] A personal power lacks the mutuality of enforcement characteristic of an equitable servitude. The determination of whether a restriction is personal or runs with the land is factual and rests upon intent, notice, and other equitable factors.[14]

In the Bird Streets litigation, the defendant argued that while some provisions in the declaration might be enforceable equitable servitudes, the height restrictions were personal powers. The defendant focused on Section 4.01(b) in Schedule F, which the defendant argued gave the declarant discretion to approve changes to the height restrictions. The manner in which the declarant approved variations was set forth in Section 7.01 of Schedule F, and any variation required written approval of the declarant. Finally, the defendant argued that under Schedule F the approval rights and powers of the declarant could only be assigned to the association and not to individual homeowners. Thus, the defendant concluded that the language of the declaration clearly indicated that the height restrictions were intended to be a personal power of the declarant and its assignee association, and not mutual equitable servitudes enforceable by individual homeowners.

In response, the plaintiff argued that the declaration satisfied the requirements for an equitable servitude. The declaration 1) was recorded and provided a legal description of the properties in the subdivision, 2) stated that each of the restrictions therein would bind and benefit each parcel as a planned community, 3) stated that the intention of the declarant to establish a general plan for the development and improvement of the described property and to subject the properties to the restrictions therein, including the height restrictions, and 4) stated that each of its restrictions ran with the land and were binding on grantees and successors.

The plaintiff rejected the defendant's personal power argument. Section 7.01 of Schedule F, Approval of Plans, did not address how to obtain a variance. To the contrary, it addressed how to obtain approval of construction plans, all of which must be compliant with the declaration's restrictions. Further, the discretion of either the declarant or the association, or both, is limited to ensuring that any proposed structure is not "inharmonious or out of keeping with the general plan." Either the declarant or association, or both, had a fiduciary duty to enforce the restrictions in good faith.[15] If the homeowners were dissatisfied, Article XIV of the declaration gave them the right to remove the declarant's approval power. Accordingly, the plaintiff concluded that neither the declarant nor the association had absolute discretion to vary the height restrictions. Rather, to obtain a variance, the defendant was required to comply with the procedure set forth in Article XIV, which can be employed by any

MCLE Test No. 260

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1. Two methods of enforcing land use restrictions contained in a recorded declaration of restrictions are as covenants that run with the land or as equitable servitudes.
True.
False.

2. Only covenants specified by statute run with the land.
True.
False.

3. Under Civil Code Section 1462, a covenant that benefits or burdens the property may run with the land.
True.
False.

4. Civil Code Section 1468 was amended in 1968 to include covenants between a grantor and grantee and can be applied retroactively.
True.
False.

5. Whether or not a declaration of restrictions is recorded before the first deed out from the subdivider, lots in the subdivision will only be governed by the restrictions if each deed expressly referenced the recorded Declaration.
True.
False.

6. The determination of whether a restriction is a personal power or runs with the land is factual and rests upon intent, notice, and other equitable factors.
True.
False.

7. A restrictive covenant is not enforceable against a subsequent grantee unless the grantee had notice of the restriction at the time title to the property was received.
True.
False.

8. A recorded restriction constitutes constructive notice, which has the same effect as actual notice.
True.
False.

9. A homeowner may rely on the title report received from the insurance company as the accurate status of title.
True.
False.

10. A cause of action for violation of a restrictive covenant must be filed within four years from the time the person seeking to enforce the restriction discovered, or through the exercise of reasonable diligence should have discovered, the violation.
True.
False.

11. For purposes of determining when the statute of limitations begins, what a plaintiff knows, or reasonably should know, is a question of fact.
True.
False.

12. A laches defense requires a showing that the delay in asserting the right to enforce the restriction was unreasonable such that enforcement of the restriction now would cause material prejudice to the party against whom enforcement is sought.
True.
False.

13. The laches defense may be applicable even when the party seeking enforcement has notified the violating party of the violation yet the party continues to violate the restrictions.
True.
False.

14. For a demurrer to be sustained on the grounds of laches, both the delay and injury must be disclosed in the complaint.
True.
False.

15. Estoppel may apply when the offending party detrimentally relies on the actions of the party seeking to enforce the restriction.
True.
False.

16. Under the doctrine of changed circumstances, a restriction may become unenforceable when the original purpose of the restriction has become obsolete and continued enforcement would be oppressive and inequitable.
True.
False.

17. The defense of changed circumstances does not apply so long as the original purpose of the restriction can still be realized, even if the unrestricted use of the property would be more profitable to its owner.
True.
False.

18. Courts may enforce equitable servitudes even if they are determined to be unfair or inequitable.
True.
False.

19. Reasonable height and view restrictions are enforceable.
True.
False.

20. To create a uniform general plan, as long as the general plan or scheme applies to all of the parcels in the tract, specific restrictions may apply differently to separate parcels within the tract.
True.
False.

MCLE Answer Sheet #260

A RIGHT TO A VIEW

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1.	☐ True	☐ False
2.	☐ True	☐ False
3.	☐ True	☐ False
4.	☐ True	☐ False
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15.	☐ True	☐ False
16.	☐ True	☐ False
17.	☐ True	☐ False
18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

property owner and is not contingent upon the existence of the declarant, association, or review board. The language of the declaration evidenced a clear intent to create a common plan, with each of the restrictions running with the land, and enforceable by individual homeowners. Finally, the plaintiff argued that the court of appeals had already determined that the declaration "clearly create[d] covenants running with the land or equitable servitudes."[16] Although *Committee to Save Beverly Highlands Home Association v. Beverly Highlands Home Association* dealt with Article X of the declaration, Article X was subject to the identical approval and assignment rights as the height restrictions. By the same logic, the plaintiff argued, if Article X runs with the land, so do the height restrictions.

Although the issue was not ultimately resolved in the Bird Streets litigation, whether a restriction is a personal power or equitable servitude has significant ramifications especially in Los Angeles County where many of the covenants, conditions, and restrictions were drafted in the 1950s and 1960s and contain poorly drafted language. Whereas on the face of the declaration, it appears that the intent was to create equitable servitudes that run with the land, in practice their poor construction may result in a finding of personal powers.

Abandonment of Height Restrictions

What was the effect of the dissolution of the association on the height restrictions? The defendant argued that because the height restrictions were a personal power of the declarant and its assignee association and because the homeowners dissolved the association, the height restrictions have been abandoned. The defendant conceded, however, that other than dicta in *Beverly Highlands*, the defendant could not find any other California decisions that have addressed this precise issue. As a result, the defendant relied on a series of out-of-state authorities.[17]

The plaintiff rejected the defendant's abandonment argument and claimed that Article XVI of the declaration specifically gave individual homeowners the right to enforce the declaration. In fact, in *Beverly Highlands*, defendants who were officers of the association, in support of their argument that the association should be dissolved, asserted that "even if the Association is dissolved, the Beverly Highlands property owners still can enforce the Declaration."[18] Although dicta, the court of appeals agreed.[19] The plaintiff also referred the court to the court of appeals unpublished decision in *Chevrets v. Dockson* dealing with the same declaration and the precise issue of abandonment.[20] Chevret wanted to build on Lot 53 even though Section 10.05 of the declaration expressly prohibited any "building or other structure" to be erected on it "without the written approval of the Association." When other property owners objected, Chevret brought suit and, like the defendant in the Bird Streets litigation, argued that because the declarant and association were dissolved, the declaration was no longer enforceable.[21] The trial court ruled in the defendants' favor, and the court of appeals affirmed, determining that although "the Association [was] now defunct," Article XIV set "forth the method for obtaining approval to build on the lot."[22]

Not surprisingly, the defendant objected to the plaintiff's reliance on the unpublished decision in *Chevrets*. While *Chevrets* seems to conflict with the out-of-state authority cited by the defendant, as it stands there are no published California decisions addressing the defendant's abandonment argument. Given the rise in property prices, poorly drafted declarations from the 1950s and 1960s, and dissolution of many homeowner associations, it is just a matter of time before California courts will have to issue a published decision addressing this issue.

Lack of Notice

A restrictive covenant is not enforceable against a subsequent grantee unless the grantee had notice of the restriction at the time title to the property was received.[23] A recorded restriction, however, constitutes constructive notice, which has the same effect as actual notice.[24] This is true even if the recorded restriction is not referenced in any of the deeds to the property described in the declaration.[25]

In the Bird Streets litigation, the defendant argued that there was insufficient notice to enforce the height restrictions against him because the title company did not provide him with the restrictions at the time he purchased his property.[26]

The plaintiff countered that the notice was proper not only because the restrictions were recorded but also because the defendant had received a copy from his neighbors. Further, the defendant could not rely on the title report as the status of title.[27] Judge O'Brien granted the plaintiff's motion for injunctive relief finding that the notice was sufficient. The defendant did not raise this issue on appeal.

Statute of Limitations

A cause of action for violation of a restrictive covenant must be filed within five years[28] from the time the person seeking to enforce the restriction discovered, or through the exercise of reasonable diligence should have discovered, the violation.[29] What a plaintiff knows, or reasonably should know, is a question of fact.[30] In the Bird Streets litigation, the defendant's demurrer argued that the plaintiff's cause of action relating to the 2010 construction was time-barred. The complaint was filed in October 2014. The defendant asked the court to take judicial notice of certain Los Angeles City Building Department records that the defendant alleged showed significant second-floor construction on his property since September 2009. The court granted the defendant's request but refused to take judicial notice of the truth of the matters asserted therein. Regardless, the court determined that nothing in the building records suggested any second-floor construction. Further, the court reasoned that because the plaintiff also claimed a height restriction violation, it may have been impossible for the plaintiff to have known about the violation until after construction was completed.

While the court in the Bird Streets litigation acknowledged in its ruling on the plaintiff's demurrer that it may be impossible to determine a violation of a height restriction until construction is complete, there is no assurance that other courts will reach the same conclusion. As such, it is important to keep in mind that the statute of limitations serves as an absolute bar to maintaining a cause of action against the alleged wrongdoer. If property has been affected by infringing construction, one should act promptly and expeditiously to resolve the matter informally and, if that fails, to file suit and seek injunctive relief. Even though within the statute of limitations, any delay in filing suit may potentially bar a claim.

Laches

A laches defense requires a showing that the delay in asserting the right to enforce the restriction was unreasonable such that enforcement of the restriction now would cause material prejudice to the party against whom enforcement is sought.[31] Laches is not applicable when the party seeking enforcement has notified the violating party of the violation yet the party continues to violate the restrictions.[32] Additionally, when construction is completed before a violation of a restrictive covenant can be confirmed, laches is not a defense because "it would not have mattered whether plaintiff was diligent."[33] Finally, for a demurrer to be sustained on the grounds of laches, both the delay and injury must be disclosed in the complaint.[34]

In the Bird Streets litigation, the defendant's demurrer alleged that the plaintiff's claims relating to the defendant's 2010 construction were barred by the doctrine of laches. The defendant argued that the neighboring homeowners were aware of the violation but stood idly by and watched the defendant incur costs yet did nothing. The

neighbors' behavior constituted prejudice and acquiescence by the homeowners, including the plaintiff as successor-in-interest.

In response, the plaintiff argued that the defendant failed to cite any legal authority establishing that the neighbors' failure to bring suit was unreasonable, or that it resulted in delay attributable to the plaintiff. The plaintiff's predecessor-in-interest was unaware of the violation until after construction was complete. The defendant was notified of the violation yet continued the infringing construction.

Although the court declined to rule on demurrer whether laches applied, the court seemed somewhat convinced by the defendant's laches argument. The best way to discard this defense is to act diligently if a neighbor begins infringing construction, i.e. immediately request that the infringing party cease and desist from further infringing construction, and if that proves unsuccessful, be ready to promptly initiate litigation.

Estoppel

Estoppel may apply when the offending party detrimentally relies on the actions of the party seeking to enforce the restriction.[35] Thus, in the Bird Streets litigation, the defendant's demurrer contended that the plaintiff was estopped from enforcing the height restrictions because the plaintiff's property violated the same restrictions. To support its allegation, the defendant asked the court to take judicial notice of an old construction application for the plaintiff's property. The court rejected the defendant's argument, finding that it was based on matters outside the scope of the complaint and not subject to judicial notice.

When evaluating the applicability of the estoppel defense, it is important to understand that in many neighborhoods in Los Angeles County, homeowners have worked around height restrictions by building below the lot's grade level, i.e. they have technically created a "basement." For example, although the Bird Streets lots are generally limited to one-story buildings, many lots contain two-story residences with the first floor built below grade.

Waiver

The right to enforce a restrictive covenant may be deemed generally waived when there are a sufficient number of waivers so that the purpose of the general plan is undermined.[36] Further, a restriction can be waived if a plaintiff fails to meet the burden of demonstrating fair and uniform enforcement.[37] A waiver may also occur when a plaintiff knowingly delays bringing suit.[38]

In the Bird Streets litigation, the defendant made two separate waiver arguments. First, he argued that the height restrictions had been waived because several other homes in the immediate vicinity exceeded the height restrictions. Then, he argued that the plaintiff's delay in asserting the right to enforce the height restrictions relating to the 2009 infringing construction constituted waiver.

The plaintiff responded that the defendant's only evidence that other properties exceeded the height restrictions—a declaration from the defendant's contractor—did not lay proper foundation that the allegedly infringing properties were in the same tract or that they exceeded 16 feet above grade level. Relying on declarations of other homeowners in the tract, the plaintiff argued that Beverly Highland homeowners had complied with the height restrictions, continued to believe that they are enforceable, and requested that the defendant bring his property into compliance. In granting mandatory injunction, the court determined that the plaintiff had not waived the right to object to the 2014 construction.[39]

Similar to the estoppel defense above, it is important to keep in mind that in many neighborhoods in Los Angeles County, homeowners have worked around height restrictions by building below the lot's grade level—exactly what many homeowners in the Bird Streets had done while complying with the deeded height restrictions.

Changed Circumstances

A restriction may become unenforceable when, by reason of changed circumstances,[40] the original purpose of the restriction has become obsolete and continued enforcement would be oppressive and inequitable.[41] Whether this equitable defense may be invoked is a factual determination with no fixed formula.[42] One important factor is the location of the changed conditions—changes within the disputed tract are given greater weight than changes outside the tract that are not subject to the same restrictions.[43] However, so long as the original purpose of the restriction can still be realized, it will be enforced even though the unrestricted use of the property would be more profitable to its owner.[44]

In the Bird Streets litigation, the defendant's opposition to the injunction motion argued that the declaration relied on the association for the execution and enforcement of many of its provisions, including the height restrictions. Because the association had dissolved, there was no procedure for the defendant to request a variance. Thus, under the doctrine of changed circumstances, the height restrictions were unenforceable.

In response, the plaintiff asserted that the original purpose of the declaration to create a residential planned community subject to certain restrictions, including height restrictions, was still intact. The other properties within the tract had continued to comply with the declaration. Further, to obtain a variance, the defendant would have to comply with the procedures set forth in Article XIV of the declaration.

The court's order granting injunctive relief indicates that the court found the defense of changed circumstances inapplicable because the land area surrounding the defendant's property is being used the same way as it had been over 10 years earlier when the restrictive covenants were first imposed on the property. As long as the neighborhood continues to be used for residential purposes, it is unlikely that this defense will apply.

Unreasonable Restrictions

Courts will not enforce equitable servitudes that are determined to be unfair or inequitable.[45] Reasonable height and view restrictions are enforceable.[46] Courts will examine the restrictions by applying an objective standard of reasonable intent to give a just and fair application of the restrictions as would be understood and intended by a reasonable person.[47] Courts will weigh all factors, including whether the harm caused by the restriction is disproportionate to the benefit of its enforcement.[48]

To create a uniform general plan, it is not necessary that the restrictions apply identically to all parcels within the community.[49] As long as the general plan or scheme applies to all of the parcels in the tract, specific restrictions may apply differently to separate parcels within the tract.[50]

In the Bird Streets litigation, the defendant's appeal presented a many-pronged argument challenging the reasonableness of the height restrictions. Many of the arguments have already been addressed above and will not be repeated here, but the defendant did raise two new arguments. First, the defendant argued that several lots in the tract were not subject to height restrictions, thus enforcement of height restrictions against the defendant's property would be unfair and discriminatory. The plaintiff countered that the clear intent of the declaration was to create a general plan for the Beverly Highlands. Out of the 63 lots in the tract 58 are subject to height restrictions to ensure that adjacent lots do not impair each other's light, air, and views. The five lots without height restrictions are situated in a canyon below a hill and, due to their natural topography, could not possibly block the view of another lot.

The defendant's main argument challenging the reasonableness of the height restrictions was a variation of the abandonment argument. The defendant argued that under the declaration only the declarant or association could approve changes to the height restrictions and that power was not assignable to the individual homeowners. It would be

unreasonable to allow homeowners to enforce the height restrictions because it would create chaos as each homeowner would have a veto right over every minor change a neighbor wants to make to his or her property. The plaintiff's response to this argument largely mirrored the response made to the personal power and abandonment argument. The plaintiff emphasized that Article XIV of the declaration provided the mechanism for homeowners to request a variance since the association has been dissolved.

Because the defendant raised this issue for the first time on appeal, it is unclear what, if any, merit the court of appeals would have given it. That said, there are a number of California cases finding that height restrictions are not unreasonable.

Given the rise in real estate prices and the emotional attachment people ascribe to their views, it is likely that we will see an increase in view disputes. The Bird Streets litigation highlights only some of the issues that may arise when a homeowner seeks to enforce recorded height restrictions. These disputes can be expensive and drawn out. It is advisable that homeowners develop relationships with their neighbors in an effort to prevent disputes. If that does not work, however, and your neighbor begins construction in violation of recorded height restrictions, it is important to act swiftly in order to preserve all available remedies. ■

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[1] The Beverly Highlands is not a "community interest development" as defined by the Davis Sterling Act. *See* Committee to Save Beverly Highlands Home Ass'n v. Beverly Highlands Home Ass'n, 92 Cal. App. 4th 1247 (2001); *see also* Davis Sterling Act, Civ. Code §§4000 *et seq*.

[2] The declaration was recorded with the Los Angeles County Recorder's Office on June 27, 1952, in book 39264, p. 95 of the official records. Schedule F was recorded on March 22, 1960, as Instrument No. 2948.

[3] Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345, 352 (1995).

[4] Civ. Code §1460.

[5] Civ. Code §1462; Marra v. Aetna Constr. Co., 15 Cal. 2d 375, 378 (1940).

[6] Anderson, 12 Cal. 4th at 355.

[7] *Id.* at 353.

[8] Anthony v. Brea Glenbrook Club, 58 Cal. App. 3d 506, 511-12 (1976).

[9] Scaringe v. J.C.C. Enters., Inc., 205 Cal. App. 3d 1536, 1543 (1988).

[10] Werner v. Graham, 181 Cal. 174, 180, 181 (1919).

[11] *Id.* at 174.

[12] Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345, 349 (1995).

[13] McCaffrey v. Preston, 154 Cal. App. 3d 422, 428 (1984).

[14] *Id.* at 438.

[15] Clear Lake Riviera Cmty. Ass'n v. Cramer, 142 Cal. App. 3d 642, 650-52 (1983).

[16] Committee to Save Beverly Highlands Home Ass'n v. Beverly Highlands Home Ass'n, 92 Cal. App. 4th 1247, 1255 (2001).

[17] *See e.g.* Pulver v. Mascolo, 155 Conn. 644, 646 (1967); Julian v. Lawton, 240 N.C. 436 (1954); Allison v. Greear, 188 Va. 64, 65 (1948).

[18] Beverly Highlands Home Ass'n, 92 Cal. App. 4th at 1272.

[19] *Id.*

[20] Chevrets v. Dockson, et. al., B173237, 2005 WL 1006853 (May 2, 2005).

[21] *Id.* at *5.

[22] *Id.* at *6-7.

[23] Taormina Theosophical Cmty., Inc. v. Silver, 140 Cal. App. 3d 964, 972 (1983).

[24] Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345, 355 (1995).

[25] *Id.*

[26] The height restrictions are contained in Schedule F to the declaration of restrictions.

[27] Siegel v. Fidelity Nat'l Title Ins. Co., 46 Cal. App. 4th 1181 (1996).

[28] If there is an enforceable view restriction, then an aggrieved homeowner may also allege a nuisance cause of action, which has a three-year statute of limitations. *See, e.g.*, Tint v. Sanborn, 211 Cal. App. 3d 1225, 1235 (1989).

[29] Civ. Proc. Code §336(b).

[30] Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1111 (1988).

[31] Wells Fargo Bank v. Goldzband, 53 Cal. App. 4th 596, 632 (1992).

[32] Morgan v. Veach, 59 Cal. App. 2d 682, 689 (1943).

[33] Pacific Hills Homeowners Ass'n. v. Prun, 160 Cal. App. 4th 1557, 1565 (2008). When a homeowner has constructed an improvement in violation of a height or view restriction, the court may apply a three-part test known as the hardship doctrine to determine whether the improvement must be taken down. *See* Clear Lake Riviera Cmty. Ass'n v. Cramer, 182 Cal. App. 4th 459, 471-73 (2010).

[34] Sangiolo v. Sangiolo, 87 Cal. App. 3d 511, 514 (1978).

[35] Diederichsen v. Sutch, 47 Cal. App. 2d 646, 650 (1941).

[36] Bryant v. Whitney, 178 Cal. 640, 643 (1918).

[37] Prun, 160 Cal. App. 4th at 1566; Alfaro v. Cmty. Hous. Improvement Sys. & Planning Ass'n, Inc., 171 Cal. App. 4th 1356, 1380 (2009).

[38] Los Angeles v. Arizona Land Co. v. Marr, 187 Cal. 126, 133 (1921).

[39] The injunction motion only addressed the defendant's 2014 construction, and the defendant's waiver defense concerning the 2009 construction was not addressed at all.

[40] This defense may not apply to a restriction enforceable by statute as a matter of law.

[41] Hirsch v. Hancock, 173 Cal. App. 2d 745, 761 (1959).

[42] Arrowhead Mut. Serv. Co. v. Faust, 260 Cal. App. 2d 567, 582 (1968).

[43] Bard v. Rose, 203 Cal. App. 2d 232, 236 (1962); *compare* Atlas Terminals, Inc. v. Sokol, 203 Cal. App. 2d 191, 202 (1962).

[44] Marra v. Aetna Construction Co., 15 Cal. 2d 375, 378-79 (1940).

[45] Hotz v. Rich, 4 Cal. App. 4th 1048, 1057 (1992). This type of defense may not apply to a restriction enforceable by statute as a matter of law. Moreover, restrictions in common interest developments are presumed reasonable unless proven otherwise. *See* Civ. Code §§4000 *et. seq*.

[46] King v. Kugler, 197 Cal. App. 2d 651, 655 (1961).

[47] Hannula v. Hacienda Homes, 34 Cal. 2d 442, 444-45 (1949).

[48] Moss Dev. Co. v. Geary, 41 Cal. App. 3d 1, 13 (1974).

[49] Cebular v. Cooper Arms Homeowners Ass'n, 142 Cal. App. 4th 106, 120 (2006); *but see* Moe v. Gier, 116 Cal. App. 403, 408 (1931).

[50] Martin v. Ray, 76 Cal. App. 2d 471, 476 (1946).