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November 18, 2024

City of San Clemente  
City Council  
c/o Adam Atamian  
910 Calle Negocio  
San Clemente CA 92673

VIA U.S. MAIL &  
EMAIL  
atamiana@san-clemente.org

**Re: Broadmoor San Clemente Community Association**

**Subject: Tree Height Violation Hearing**

Dear Members of the City Council:

This firm is legal counsel for the Broadmoor San Clemente Community Association ("Association"). We are writing to you regarding the Notice of Public Hearing regarding the tree height restriction within the Association's CC&Rs and the Association's enforcement of that restriction.

The Association does enforce those tree height limitations and acts when a complaint is received and verified as accurate. In the past three years, the Association has enforced this restriction 15 times successfully.

It is our understanding that the City contends that the height restrictions were specifically included to benefit the property owners located outside the Association (perhaps on Calle Felicidad), a contention that has not been supported by documentation and which claim was recently denied in the Orange County Superior Court.

Standing to enforce the CC&R provisions, is limited to the Association and the individual owners. Article X, Section 1 of the CC&Rs provides, in pertinent part, as follows:

The covenants, conditions and restrictions of this Declaration shall run with and bind the real property within Broadmoor San Clemente, and shall inure to the benefit of and be enforceable by the Association, or the Owners, including Developer, of any Lot subject to this Declaration, their respective legal representatives, heirs, successor, and assigns, and are imposed upon the real property within Broadmoor San Clemente as a servitude in favor of each and every parcel of land therein as a dominant tenement... (emphasis added)

Furthermore, the Davis-Stirling Act limits standing to enforce Governing Documents to associations and their members. *Civil Code* §5975 provides, in pertinent part, as follows:

(a) The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

The Association's CC&Rs do not contain any express provisions that would establish and/or confer a benefit to non-member landowners of real property located on Calle Felicidad. Consistent with the express provisions of the Association's CC&Rs, and the language set forth in *Civil Code* §5975, it appears that only the Association and its owners may enforce the provisions of the CC&Rs. The Association has not failed to respond or take action to any valid claim for enforcement of the tree height restriction, giving the City the right to interfere with the Association's management of itself.

#### **No Statutory Right to a View**

Absent a specific provision in an association's CC&Rs, Californians have no right to air, light or an unobstructed view. (*Pacifica HOA v. Wesley Palms; Posey v. Leavitt.*)

It is a bit hypocritical of the City to demand the Association enforce tree height limits, when the City itself in fact does not regularly maintain the trees and tree heights in Verde Park, adjacent to the Association -- an issue that has been raised numerous times over the years, as these Verde Park trees have exceeded over 20 feet in height and block the views of Broadmoor members.

The City is overstepping its authority to act in place of a non-Association member who has already sued a member of the Association on Calle Delicada, and lost in June 2023. In the Orange County Superior Court case *Buck v. Garruba*, Case No.: 30-2019-01086744, Paul Buck, a resident on Calle Felicidad attempted to enforce the Association's CC&Rs against a Broadmoor owner. Buck argued that he and his neighbors on that street were "intended third-party beneficiaries" of the Association's CC&Rs and they had an equitable servitude allowing them to dictate tree height to Association members. The Court disagreed.

Restrictive covenants can be enforced only if the restriction constitutes an equitable servitude or a covenant running with the land. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375 (Nahrstedt).) A restrictive covenant runs with the land, binding successive owners, if (1) the agreement specifically describes the lands to be benefited and burdened by the restriction; (2) it includes express provisions declaring that successors in interest of the burdened land will be bound for the benefit of the other party's land; (3) the restrictions relate to use, repair, maintenance, or improvement of the property; and (4) the restrictions are recorded in the county recorder's office. (Civ. Code § 1468; *Nahrstedt* at p. 375.)

Thus, to be enforceable, both the dominant and servient estates must be expressly identified in a recorded document to enforce a restrictive covenant. Dominant and servient tenements must be described in a recorded document. An equitable servitude cannot be created without some designation or description of the land to be benefited and the land to be burdened. Without this description, no servitude is created and there is merely a personal covenant, despite the recital of a common plan and the making of similar deeds, since the grantor is not bound to continue to impose restrictions on any defined parcel or property. Nothing exists, giving this benefit to owners on Calle Felicidad or owners further uphill from Calle Delicada.

The Court held in the Buck lawsuit that, “the Court finds the express recorded provisions must prevail. No recorded document indicates the City ever granted any rights in perpetuity either to all of Calle Felicidad, or specifically Buck’s property.” The Court further found that, “Consistent with this position (that only the Association’s members can enforce the Association’s rules/tree height) is the City’s global refusal to restrict views...Daly confirmed the City’s Municipal Code imposes no restrictions regarding views. In fact it appears the City has never restricted views, and as recently as October 4, 2022, rejected a proposal to protect views<sup>1</sup>.” The Court in the Buck matter also remarked that, “Worthy of Note, the City Attorney was involved in the (Association) approval process for this development, and yet no recorded rights were granted to any property owners on Calle Felicidad.”

### Has the City Ever Enforced An Association’s CC&Rs

While we clearly believe this is an abuse of City resources and power, the Association is curious if the City of San Clemente has ever attempted to enforce one of the many Associations residing within the City’s limits, CC&Rs in place of that Association. It seems highly unlikely, and thus we made a public records request for any and all documents related to the City acting on behalf of another Association to enforce their CC&Rs and or enforce tree height requirements on November 11, 2024. No response has been provided as of this date, which acts to prejudice the Association’s response to the City.

### Statute of Limitations

In order for the City to stand in the shoes of the Association, under Article XII of the CC&Rs and enforce the CC&Rs and governing documents against the Association’s Members, specifically the residents on Calle Delicada, the City would have to follow the same legal process as the Association in order to remedy the tree height. That will not be successful.

In California, the Statute of Limitation for enforcing CC&R violations is 5 years from when the board discovers the violation or, through the exercise of reasonable diligence, should have discovered the violation. (Code Civ. Proc. § 336(b)) Based on the height of the trees at issue, enforcement against these Calle Delicada neighbors may be time-barred.

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<sup>1</sup> [https://www.picketfencemedia.com/sanclementetimes/eye-on-sc/council-passes-on-seeking-ordinance-to-protect-ocean-views/article\\_3e196744-e22b-56c7-8e47-b4b5cc78fb2.html](https://www.picketfencemedia.com/sanclementetimes/eye-on-sc/council-passes-on-seeking-ordinance-to-protect-ocean-views/article_3e196744-e22b-56c7-8e47-b4b5cc78fb2.html)

**No Obligation for the City to Continue**

Does the City of San Clemente want to promote the removal of mature palm trees that are iconic to beach city communities? As the City is aware, the trees at issue are mainly palm trees and those cannot be trimmed. They would have to be removed. This seems like a poor environmental decision. As cited previously, Article XII of the Association's CC&Rs state, "if the Association has failed to perform any of its duties under the Declaration, the City shall have the right, **but not the obligation**, to thereafter assume the performance of any such duty until such time as the Association demonstrates its ability to resume such performance..." The City declined to act the last two times the Calle Felicidad residents requested interference as well, by letters dated November 5, 2018, and June 30, 2021, from the City Attorney.

**The City Cannot Assign this Duty**

The report from City staff to the Council about this matter contains a recommendation for consideration that the City Council can assume the enforcement duty and assign that authority to another party (namely the Calle Felicidad residents). This is incorrect. The language of the Declaration/CC&Rs clearly states that "the City shall have the right, but not the obligation, to thereafter **assume the performance of any such duty** until such time as the Association demonstrates its ability to reassume such performance; provided, however, that the City shall not exercise any of the rights granted under this Article XII unless..." These trees are palm trees and cannot be trimmed, they are also residing on private property lots. Calle Felicidad owners have no viable means to assume this alleged duty via assignment nor does the language of the CC&Rs allow for such an assignment.

The City has no obligation to continue along this path, unsupported by the City Municipal Code, legal precedent, past City precedent or California law. The Association respectfully urges you to close this matter and deny the request from the Calle Felicidad owners.

Very truly yours,

HICKEY & ASSOCIATES, P.C.



Joshua A. Smisko, Esq.

JAS:rf

cc: Board of Directors,  
Broadmoor San Clemente Community Association