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If you have questions or comments, please contact Jim Schenkel at 415-553-4000, or email info@quojure.com.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF REDWOOD**

EMILY GREEN,
JOE GREEN, FREYA WILKES, PAUL
WILKES, EILEEN FARIESTER

Plaintiffs,

vs.

JOHN SMITH,
SHIRLEY SMITH,
OCEAN SHORE COMMUNITY
ASSOCIATION, and
DOES 1 through 20, inclusive,

Defendants.

Case No.: 987654321
**UNLIMITED CIVIL ACTION
(DAMAGES EXCEED \$25,000)**

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing date: August 10
Time: 8:30 A.M.
Department:

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TABLE OF CONTENTS

INTRODUCTION..... 5

FACTS 5

1. OSCA restrictions limit construction to single-story residences except on lots where the topography could cause a hardship..... 5

2. The Smiths’ residence and neighboring residences are single-story, affording privacy as the OSCA Restrictions and Rules require..... 7

3. When the Greens bought their house they relied heavily on the CC&R’s guarantee of privacy. 7

4. The Smiths applied for and received AAC approval of their plans and began construction of a second-story addition to their residence without showing any hardship caused by their lot’s topography. 8

5. As soon as they learned about it, plaintiffs objected to the planned construction as an invasion of their privacy..... 9

6. Plaintiffs fear far-reaching adverse effects of this project. 10

7. Plaintiffs sought alternative dispute resolution and, when that failed, began this action and sought provisional relief. 10

ARGUMENT 11

1. Preliminary injunctions are appropriate to enforce CC&Rs, particularly those that concern plaintiffs’ privacy, where plaintiffs show a sufficient mix of potential merit and balance of interim hardships..... 11

2. Plaintiffs’ likelihood of success on the merits is high because defendants have breached the CC&Rs’ ban on second-story additions except in cases of topographical hardship, and the exception does not apply. 13

A. The OSCA’s restrictive covenants are enforceable equitable servitudes..... 13

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B. The Smiths’ additions violate the restriction against second-story structures;
their lot does not come within the topographical hardship exception..... 17

C. Defendants cannot avoid the single-story rule by claiming a waiver or a change
in conditions. 19

D. Plaintiffs are entitled to enforce the restrictions the Smiths have violated,
particularly since defendant OSCA has refused to enforce them..... 21

3. The balance of interim harm tips in plaintiffs’ favor because their privacy is being
invaded and their views altered on a daily basis, while defendants will suffer only a
return to the last undisputed status quo. 22

CONCLUSION 25

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TABLE OF AUTHORITIES

Cases

B.C.E. Development, Inc., v. Smith (1989) 215 Cal.App.3d 1142 11

Butt v. State of California (1992) 4 Cal.4th 668 12

Citizens for Covenant Compliance v. Anderson (1995) 12 Cal.4th 345 14

Cohen v. Kite Hill Community Ass’n. (1983) 142 Cal.App.3d 642 21

Lamden v. La Jolla Shores Condominium Homeowners Ass’n. (1999) 21 Cal.4th 249 ... 14

Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361 14

Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc. (2001) 91 Cal.App.4th
678..... 13

Robbins v. Sup. Ct. (County of Sacramento) (1985) 38 Cal.3d 199..... 12

Seligman v. Tucker (1970) 6 Cal.App.3d 691 11, 15

Shoemaker v. County of Los Angeles (1995) 37 Cal.App.4th at 618..... 12

Woodridge Escondido Property Owners’ Ass’n. v. Nielsen (2005) 130 Cal.App.4th 559
..... 12, 16, 20

Zabrucky v. McAdams (2005) 129 Cal.App.4th 618..... 15

Statutes

Civil Code § 1350-1374 13

Civil Code §1354 13

Code of Civil Procedure § 526(a) 11

Code of Civil Procedure § 527(a) 11

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INTRODUCTION

Plaintiffs and defendants John and Shirley Smith are neighbors and adjoining property owners in the Ocean Shore Estates, a planned development in Redwood County about ten miles north of the City of Orca. Most of the houses there reflect the single-story, low-roofed “northern coast style” that gives the community and much of the surrounding area its architectural charm.

Defendant Ocean Shore Community Association (OSCA), a California nonprofit mutual benefit association, is the local homeowners’ association. After OSCA’s architectural control committee (AAC) wrongfully granted approval, the Smiths began adding a second story to their house and making other changes that violate restrictive covenants and related architectural rules. Despite plaintiffs’ complaints, OSCA has refused to rescind its approval. Plaintiffs seek a preliminary injunction to halt construction of the Smiths’ additions and restrain access to the completed or partially completed second story pending trial.

FACTS

- 1. *OSCA restrictions limit construction to single-story residences except on lots where the topography could cause a hardship.*

The OSCA’s recorded Declaration of Protective Restrictions (DPR or CC&Rs), Exhibit C to the declaration of Joe Green provides, in pertinent part:

1 No building shall be erected, altered, placed, or permitted to remain on any
2 lot other than a one-story single-family dwelling, excepting that where the
3 topography of the lot could cause a hardship, the [AAC] . . . may, in such
4 instances, permit the construction of a dwelling not exceeding two stories .
5 . . .

6 DPR ¶ 2.

7 In accordance with this restriction, single-story north-coast style houses of mid-
8 century design predominate in Ocean Shore and particularly in plaintiffs’
9 neighborhood. J. Green Decl., ¶ 5.

10
11 The AAC’s Architectural Rules (AAC Rules, J. Green Decl. ¶ 2(b) and
12 Exhibit B) have been adopted by OSCA’s Board under Article 7.9 of the OSCA
13 By-laws to interpret and implement the DPR, to provide architectural and design
14 control, and thus to preserve the area’s design integrity. Among these rules are:
15

- 16 • All residences must be single-story, “except on certain lots” (Rule C-1);
- 17 • No upper-level windows will be permitted if they allow a view into another
18 residence or lot (Rule B-18); and
- 19 • The overall design, including the roofline, must conform to the style of the
20 existing architecture (Rule B-13).

21
22 “Certain lots” in Rule C-1 evidently refers to the *only* lots on which OSCA
23 is authorized to allow two-story construction: lots “where topography could cause
24 a hardship.” Topographic hardship evidently refers to lots that slope steeply, so
25 that building a single-story house on them would be impractical; such lots are few
26 in Ocean Shore and particularly in plaintiffs’ neighborhood. In addition, if the lot
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1 lies on a steep downward slope, an upper story would not rise higher than the
2 neighboring single-story houses. See J. Green Decl., ¶ 5(g).

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5 **2. *The Smiths’ residence and neighboring residences are single-story,***
6 ***affording privacy as the OSCA Restrictions and Rules require.***
7

8 The area at issue has only a few steeply sloping lots, and the Smiths’ lot is
9 not among them. The lot is relatively flat, and defendants have not called
10 plaintiffs’ attention to any hardship claim, caused by topography or otherwise,
11 since the lot was first improved years ago. J. Green Decl., ¶ 5(g).

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14 There are no two-story residences in plaintiffs’ immediate neighborhood,
15 and plaintiffs were not aware until recently that any such residences existed
16 anywhere near them. J. Green Decl., ¶ 4.

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19 **3. *When the Greens bought their house they relied heavily on the CC&R’s***
20 ***guarantee of privacy.***

21
22

23 Plaintiffs bought their property as their primary residence in 2____
24 intending to create an extensive private pool, spa, and dining area in their front
25 courtyard. A prime inducement to buy the property was the privacy protection
26 afforded by the OSCA’s ban on additions and windows that would allow any
27 neighbor a view into their lot. Emily Green Decl., ¶ 3.

28

In November 2____, Mr. and Mrs. Green helped their daughter and son-in-

1 law to buy the house across the street from theirs. Like the decision to buy the
2 Green house, the family’s decision to buy the second house was motivated in
3 large part by the promise of complete privacy for the outdoor areas (pool and
4 courtyard). *Ibid.*

6
7 ***4. The Smiths applied for and received AAC approval of their plans and***
8 ***began construction of a second-story addition to their residence without***
9 ***showing any hardship caused by their lot’s topography.***

11 Mr. and Mrs. Smith’s house was built decades ago (plaintiffs estimate
12 about 30 years) in a mid-century northern coast design, with a low, flat roof. J.
13 Green Decl., ¶ [6A]. They acquired their property in 2____. J. Green Decl., ¶ 7.
14 In 2____, they applied to the AAC to make the following additions, as named on
15 the permitted plans:
16

- 17 • “Gallery,” a vaulted or clerestory expansion of the entry foyer at the front
18 of the house;
- 19 • “Study / Studio” and “Storage,” a second-story addition over the garage;
20 and
21 • “Artist’s Loft,” a second-story addition over the dining room at the rear of
22 the house.

23 The Smiths’ claims of hardship apparently were and are that (1) they need
24 more space for Mrs. Smith’s work as a potter, and (2) their garage is unsuitable
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1 for dry storage because it floods in heavy rains. The Smiths make no claim of
2 hardship based on the topography of their lot.

3
4 Disregarding DPR paragraph 2 and AAC Rules C-1, B-18 and B-13 (cited
5 above), the AAC approved the project. J. Green Decl., ¶ 6.

6 The Smiths hired a contractor and began construction on May __, 2____. *Id.*

7
8 7. Plaintiffs were never consulted about the Smiths' plans, neither by the Smiths
9 nor by anyone else, and none of them knew about the planned construction until it
10 began. J. Green Decl., ¶ 11.

11
12 ***5. As soon as they learned about it, plaintiffs objected to the planned***
13 ***construction as an invasion of their privacy.***

14
15 On May 6, Mr. Smith informed Mr. and Mrs. Green that he and Mrs. Smith
16 would be gone for a month on a trip, and that they were about to start construction
17 on their house. He said they planned to extend the foyer toward the garage and
18 add three feet above the roofline for storage space. He said the additions would
19 not be visible from the Green property. J. Green Decl. ¶ 14.

20
21
22 On May 14, after discovering that Mr. Smith had understated the planned
23 addition's scope and effect, Mr. Green put his concerns before the AAC with a
24 telephone call and a letter. In a May 23 reply, the AAC stated that it had
25 approved plans for a second story and other changes, and that it stood by its
26 decision. J. Green Decl., ¶ 12 and Exhibit ____.

27
28

1 Plaintiffs object to the planned construction because, among other things,
2 the second-story additions look directly into the spa, pool, fireplace, and enclosed
3 private patio area of their property. J. Green Declaration, ¶ 5(g). The additions
4 will seriously invade plaintiffs' privacy and significantly intrude on their solitude.
5

6
7 ***6. Plaintiffs fear far-reaching adverse effects of this project.***

8
9 More broadly, plaintiffs were and are concerned about the adverse effects
10 of the additions on their quality of life. They believe that allowing second story
11 houses (where they are not necessary to prevent a hardship caused by topography)
12 will set a dangerous precedent that will likely lead to construction of many other
13 second-story houses in their neighborhood. This precedent could encourage
14 opportunistic developers to buy houses to elevate and flip, detracting from the
15 neighborhood's classic ocean ambiance, impairing its reputation, and diminishing
16 their property values.
17
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19
20 ***7. Plaintiffs sought alternative dispute resolution and, when that failed,***
21 ***began this action and sought provisional relief.***

22
23 On May 26, 2___, after retaining counsel, plaintiffs delivered a cease-and-
24 desist letter to the Smith residence and filed a written notice of architectural
25 violation with the Association. By this letter, plaintiffs sought an immediate
26 resolution of the problem and offered to participate in alternative dispute
27 resolution. The Association refused to order the Smiths to halt construction. J.
28

1 Green Decl., ¶ 16.

2 On June 18, the Greens and the Smiths, who were represented by counsel,
3 met in mediation. That meeting was unsuccessful. J. Green Decl., ¶ 17.
4

5 When mediation failed, plaintiffs sued and applied for an Order to Show
6 Cause and a Temporary Restraining Order. This Court denied the TRO on the
7 ground that it was not necessary to restrain construction pending the OSC hearing
8 because the Smiths were already on notice of plaintiffs' objection to the work and
9 therefore "are to some extent proceeding at their peril." Transcript of 7/05/___
10 hearing, 2: 18-20; J. Green Decl., Exh. 6.
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15 ARGUMENT

- 16
- 17 **1. Preliminary injunctions are appropriate to enforce CC&Rs,**
18 **particularly those that concern plaintiffs' privacy, where plaintiffs**
19 **show a sufficient mix of potential merit and balance of interim**
20 **hardships.**

21 Restraining a threatened or ongoing breach of recorded restrictions in a
22 planned community is a classic ground for granting a preliminary injunction. See
23 Code Civ. Proc. §§ 526(a)(1)-(5) and 527(a) and *B.C.E. Development, Inc., v.*
24 *Smith* (1989) 215 Cal.App.3d 1142 (affirming preliminary injunction against
25 homeowners to halt construction of residence that departed from plans approved
26 by architectural committee); *Seligman v. Tucker* (1970) 6 Cal.App.3d 691
27
28

1 (preliminary injunction sought to halt construction of addition to house that would
2 cut off neighbors' view, in violation of subdivision CC&Rs; mandatory injunction
3 granted to remove or lower the addition).
4

5 In addition, the case for provisional relief is strengthened where, as here,
6 the breach involves an invasion of a neighbor's contractually assured privacy,
7 which is in the nature of a private nuisance. See *Woodbridge Escondido Property*
8 *Owners' Ass'n v. Nielsen* (2005) 130 Cal.App.4th 559, 563 (association
9 documents declare that any violation of the CC&Rs is a nuisance that may be
10 remedied by the association or any owner). Both invasions of privacy and
11 nuisances are classic cases for provisional relief.
12
13

14 Although the court has broad discretion in ruling on an application for a
15 preliminary injunction, its discretion must be exercised in light of the following
16 interrelated factors: who will suffer greater injury pending trial (see *Shoemaker v.*
17 *County of Los Angeles* (1995) 37 Cal.App.4th at 618, 633) and what is the
18 probable outcome at trial ("likelihood of success on the merits"; see *Robbins v.*
19 *Sup. Ct. (County of Sacramento)* (1985) 38 Cal.3d 199, 206). The court's
20 determination must be guided by a combination of the potential-merit and interim-
21 harm factors: the greater plaintiffs' showing on one, the less need be shown on the
22 other to support a preliminary injunction. *Butt v. State of California* (1992) 4
23 Cal.4th 668, 678; see *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling,*
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1 *Inc. (2001) 91 Cal.App.4th 678, 696 (where potential-merit showing was high,*
2 *court could issue injunction even if plaintiff could not show greater interim harm).*

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2. Plaintiffs' likelihood of success on the merits is high because defendants have breached the CC&Rs' ban on second-story additions except in cases of topographical hardship, and the exception does not apply.

A. The OSCA's restrictive covenants are enforceable equitable servitudes.

A recorded Declaration of Restrictions for a subdivision that includes the required terms creates equitable servitudes on each of the parcels described in the Declaration. Civ. Code § 1350-1374 (commonly known as the Davis-Stirling Common Interest Development Act) governs such common interest subdivisions. Civil Code §1354 provides 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.

1 See *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 382
2 (homeowner association CC&Rs are presumed to be reasonable and enforceable).
3
4 Reasonableness is not based on its application to an individual, but on its
5 application to the common interest development as a whole. *Id.* at 386.
6 Moreover, a change in the language of § 1354 making the restriction “enforceable
7 ... unless unreasonable,” “cloaked use restrictions contained in a ...
8 development’s recorded declaration with a presumption of reasonableness by
9 shifting the burden of proving otherwise to the party challenging the use
10 restriction.” *Id.* at 380. A common interest development’s recorded use
11 restrictions are reasonable and enforceable unless they are wholly arbitrary,
12 violate a fundamental public policy, or impose a burden on the use of affected
13 land that far outweighs any benefit. *Lamden v. La Jolla Shores Condominium*
14 *Homeowners Ass’n.* (1999) 21 Cal.4th 249, 263.
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18 If a declaration establishing a common plan for ownership of property in a
19 subdivision and containing restrictions on the use of property as part of a common
20 plan is recorded before sales of any land in the subdivision and satisfies other
21 specified requirements, purchasers who have constructive notice of the recorded
22 declaration are deemed to intend and agree to be bound by the common plan.
23

24 *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349.
25

26 Restrictions on second-story additions and the like have often been upheld
27 as reasonable.
28

1 Thus in *Seligman v. Tucker, supra*, a subdivision restriction prohibited
2 erection of a structure on any lot in such a location or in such a height as to
3 “unreasonably obstruct” the view from any other lot. When the defendants began
4 adding a room to their house that would cut off the plaintiffs’ view, the plaintiffs
5 sued for a preliminary injunction to halt construction and for a final mandatory
6 injunction requiring the structure’s removal. The trial court granted relief,
7 requiring the defendants to remove or lower the addition. The appellate court
8 affirmed, finding that the requirement was not unreasonable or too vague to be
9 enforced. 6 Cal.App.3d at 699.

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11
12 Similarly, in *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618,
13 landowners sued their neighbors alleging that the neighbors’ proposed addition of
14 several rooms to their residence would violate relevant covenants, conditions, and
15 restrictions by obstructing the view of the ocean. The CC&Rs provided that any
16 dwelling was not to exceed one story in height, and provided that no tree, shrub,
17 or other landscaping could be planted or any structures erected that would obstruct
18 the view from any other lot. The trial court interpreted the prohibition as applying
19 to “structures of the landscaping type,” not dwellings. But the appellate court
20 reversed, finding that the restriction’s plain language prohibited “any structure”
21 that obstructed a view. By interpreting that provision to include the erection of an
22 addition, the court was acting in accordance with the parties’ original intent and
23 the common understanding of neighboring homeowners. *Id.* at 628.
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1 *Woodridge Escondido Property Owners' Ass'n. v. Nielsen* (2005) 130
2 Cal.App.4th 559 upheld a homeowners' association's enforcement of restrictive
3 CC&Rs by requiring removal of a deck that was constructed in an easement area
4 by a homeowner who had obtained architectural committee approval for the
5 improvement. The deck was found to be a "permanent structure" that violated the
6 restriction against permanent structures in the easement area. *Id.* at 570. Since the
7 committee had no authority to permit construction in that area, its approval could
8 not prevent the association from seeking removal of the offending structure. *Id.* at
9 572.

10 Here, as in the above-cited cases, the recorded Declarations created
11 equitable servitudes intended to benefit all owners in the Ocean Shore project.
12 Defendants had constructive notice of the declarations, since they were recorded
13 before any lots in the subdivision were sold. The CC&Rs, as interpreted by
14 architectural rules adopted by the Association, are clear and unambiguous,
15 expressly prohibiting second-story structures (except to prevent topographical
16 hardship) and any change that would alter a structure's existing roofline. These
17 restrictions are enforceable against defendants to preserve plaintiffs' privacy and
18 the existing character of the Ocean Shore development. Under the CC&Rs, the
19 committee had no authority to approve the construction of the offending second-
20 story additions. Thus, it is proper for this court to halt their construction and use
21 now and, if plaintiffs prevail at trial, to order their removal.

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B. The Smiths’ additions violate the restriction against second-story structures; their lot does not come within the topographical hardship exception.

The Architectural Rules and Guidelines (“Rules”) specify that all residences **shall be one-story** except on certain lots. E. Green Decl. Exhibit B, Rule C1, at 12. The Declaration of Protective Restrictions (CC&Rs), *id.* Exhibit C, explains *which* “certain lots” may have more than one story: those where the **topography would cause a hardship:**

2. All of the lots in said subdivision shall be used for single-family dwelling purposes only, subject to the exceptions herein set forth. No building shall be erected, altered, placed or permitted to remain on any lot other than a **one-story** single-family dwelling, **excepting that where the topography of the lot would cause a hardship....**

Id. at 2, ¶ 2. (emphasis added)

The Rules further mandate that the design of additions, including roofline, must conform to the style of the existing structure. Rule B13, at 10.

Despite the restrictions under which the Smiths acquired title, they have

1 begun construction on extensive prohibited additions to their house, including a
2 raised clerestory entry foyer that punches through the existing roofline, two
3 separate second-story additions, a large upper-level sliding glass door, and other
4 work that completely changes the original low, flat roofline, and deviates from the
5 existing 1970s mid-century design single-story residence, all in violation of Rules
6 B13, C1 and ¶ 2 of the Declaration.
7
8

9 The Smiths have claimed “hardship” under ¶ 2 of the Declaration of
10 Protective Restrictions because water allegedly runs into their driveway when it
11 rains, threatening to flood their garage. J. Green Decl. ¶ 12. But that proffered
12 “hardship” justification makes no sense: a *drain* is needed for too much water,
13 not a second story. Moreover, defendants have not shown that any previous
14 owner has claimed or been granted a hardship exception on this or any other
15 ground since their house was built some 35 years ago.
16
17

18 The Smiths also claimed hardship, and OSCA justified its approval of their
19 second-story additions, on a second ground: that their house is too small and
20 cannot be expanded horizontally because their back yard is too close to the OSCA
21 golf course. Transcript of OSC and TRO Hearing, *supra*, 16:11-15. But this
22 problem is not due to the topography. Neither the *size* nor the *location* of a lot
23 relative to other properties or other sections of the neighborhood is part of the
24 lot’s *topography*. Moreover, if the lot is too small for a horizontal expansion, the
25 Smiths’ obvious remedy is to sell this house and buy a larger one.
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1 This is not a case, like those defendants point to, that allows the AAC or
2 OSCA latitude to interpret its CC&Rs or its Architectural Rules as it sees fit.
3 Rather, as in *Seligman, supra*, at least as to the second-story additions if not to all
4 the challenged changes and additions, defendants' violation of the CC&Rs and
5 Architectural Rules is clear on its face.
6

7 The Davis-Stirling Act does not allow a homeowners association to
8 *arbitrarily* choose whether or not to enforce the CC&Rs according to their plain
9 meaning. See *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642,
10 650. Accordingly, this Court should not defer to the OSCA's decision but should
11 rule on the issue as a matter of law.
12

13 In sum: Since the Smiths have not cited and evidently cannot cite any
14 "hardship caused by the topography of [their] lot," it is beyond dispute that their
15 second-story additions violate plaintiffs' rights under the CC&Rs.
16
17

18
19 **C. Defendants cannot avoid the single-story rule by claiming a waiver or**
20 **a change in conditions.**
21

22 At the July 5 TRO hearing, the Smiths' attorney offered to produce
23 photographic evidence that other two-story houses exist "within a few block
24 radius" of their house. Yet even if defendants can produce such evidence, it will
25 not avail them because the Smiths' project, unlike houses "a few blocks" away,
26 directly threatens plaintiffs' privacy and views. Thus such evidence will not show
27
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1 that plaintiffs have waived their right to object to the Smiths' project.

2 Nor can the OSCA waive its right and duty to enforce the CC&Rs against
3 the Smiths. As recently shown in *Woodbridge Escondido, supra*, erroneous
4 approval of construction plans that violate an association's CC&Rs does *not*
5 waive restrictions and creates *no* right to continue building or to allow improper
6 construction to remain. Indeed, the OSCA's by-laws on architectural control,
7 while allowing for variances from the Architectural Rules (not, of course, from
8 the CC&Rs) where reasonably necessary to carry out the intent of the governing
9 documents or necessary to avoid "extensive hardship, expense, or impossibility of
10 performance," contain the following anti-waiver provision: "Any variance shall be
11 in writing and shall not constitute a waiver of any Architectural Rule or hinder the
12 enforcement thereof." By-laws, § 7.8 at p. 21.

13 Nor, finally, can defendants use evidence of two-story construction in
14 surrounding neighborhoods as evidence of changed conditions in *plaintiff's*
15 neighborhood. Moreover, the only "changed condition" defendants can point to
16 anywhere near plaintiffs' neighborhood is the recent trend to expand house sizes
17 as lot prices rise. This Court should not permit defendants' claim of changed
18 conditions on this basis to be asserted at plaintiffs' expense.
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1 **D. Plaintiffs are entitled to enforce the restrictions the Smiths have**
2 **violated, particularly since defendant OSCA has refused to enforce**
3 **them.**
4

5 Section 1354(a) entitles owners or a homeowners' association to enforce
6 CC&Rs unless the declaration of CC&Rs provides otherwise. (The declaration
7 here does not.) See *Cohen v. Kite Hill Community Ass'n*, *supra*, 142 Cal.App.3d
8 at 653.
9

10 In *Cohen*, the declaration of CC&Rs provided that the association was
11 responsible for preserving the aesthetic quality within the community; provided
12 for an architectural control committee to approve all remodeling or additions to
13 structures, including fences; and provided standards for approval of
14 improvements, including the preservation of views and aesthetic beauty. Despite
15 these restrictions, the committee approved an owner's construction of a fence that
16 obstructed a neighbor's view, and the owner sued. The court held that the
17 association, as a "mini-government," owed and breached a fiduciary duty to its
18 members similar to the duty of a public agency. Not only must such an
19 association act in compliance with its recorded Declaration; it has an affirmative
20 duty to protect the homeowners from violations of the governing documents by
21 other owners. Moreover, despite an exculpatory clause within a declaration, the
22 governing body's individual members can be held personally liable for damages
23 to an owner injured by their failure to comply with their responsibilities. *Id.* 142
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1 Cal.App.3d at 654-55.

2 Since the Association here has not complied with its duty to all
3 homeowners to enforce these reasonable restrictions, plaintiffs are entitled to seek
4 a preliminary and permanent injunction.
5

6
7 **3. The balance of interim harm tips in plaintiffs' favor because their**
8 **privacy is being invaded and their views altered on a daily basis,**
9 **while defendants will suffer only a return to the last undisputed**
10 **status quo.**

11 Plaintiffs' interim hardship if a preliminary injunction is not granted is
12 serious. It consists mainly of invasion of privacy but also involves altered views
13 and impaired property values. By contrast, defendants' only interim hardship will
14 be a halt to construction (which they stated at the July 5 hearing was two-thirds
15 complete) and denial of use of the additions plaintiffs contend are prohibited by
16 both the letter and the spirit of the CC&Rs and the Architectural Rules. Such an
17 order would return the parties to the last undisputed status quo, or as much of the
18 status quo as the Smiths are willing to restore by dismantling the construction they
19 have begun.
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22 The Smiths' other claims of hardship are insubstantial:

23 (1) Their asserted need for more space for Mrs. Smith's art projects or to
24 store her artwork is a "hardship" they walked into when they bought their house.
25
26 Moreover, they can rent additional studio and/or storage space in or near Ocean
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1 Shore.

2 (2) The risk that a rainstorm may flood their garage is another “hardship”
3 that was or should have been apparent when the Smiths bought their house. Mr.
4 Smith’s May 28, 2___ letter describes it this way:
5

6 **Our “hardship” is that of being several feet below**
7 **street level grade in fact when it rains, the entire**
8 **street drains straight toward our house into the**
9 **driveway and can flood our garage.**
10

11 This suggests that water is running from the Association common areas into the
12 Smiths’ garage. If so, they may have a remedy against the Association. Or they
13 can simply install better drainage. Ample drainage could presumably be installed
14 for much less than the hundreds of thousands of dollars they have allegedly
15 agreed to pay for their additions.
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18 (3) The Smiths’ investment in the project does not qualify as a substantial
19 hardship because, like the other hardships mentioned above, they walked into it
20 with their eyes open.
21

- 22 • They knew or should have known when they submitted plans to the AAC
23 that the AAC lacked authority to approve them because the second-story
24 additions, at least, violated the CC&Rs on their face. Moreover, they made
25 no effort to obtain plaintiffs’ consent to these additions.
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- 27 • On May 17 if not sooner, only 10 days after construction began, they knew
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or should have known that Mr. and Mrs. Green objected to the additions.

- On May 28, if not sooner, the Smiths’ received a “Cease and Desist” letter from plaintiffs’ counsel. The letter clearly outlined the violations and warned them about spending additional money on the construction. They assumed a risk by continuing to spend money on the construction—yet they now claim that the investment is actually a defense to the violation itself. They had ample warning before the lawsuit was commenced and their investment does not excuse a violation of the rules. The Architectural Rules do not provide an exception for expensive construction.

As this Court said on the investment issue at the July 5 hearing—38 days after defendants received plaintiffs’ May 26 cease and desist letter—

They’re taking their chances. I mean, if they’re in violation and they have your note, your letter saying you’re in violation and they went ahead and did whatever they’re doing anyway, they’re taking their chances that, you know, a court’s going to later find that they were in fact in violation and sorry, they’re going to have to undo what they’re doing.

Transcript at 16: 7-12

Adding that it would not sympathize with any such defense, the Court added:

“isn’t that . . . sort of the proverbial orphan that killed his parents and beg(ged) for mercy?” *Id.* 18: 12-13.

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For these reasons, if a preliminary injunction issues to halt construction and refrain from occupancy of the additions, the Smiths will suffer little if any hardship they have not brought upon themselves.

CONCLUSION

Plaintiffs reside in an area that has covenants and restrictions against changing a one-story building to provide views over their neighbors' properties. The Smiths have begun construction that ignores those restrictions, to plaintiffs' harm, and the OSCA, in dereliction of its fiduciary duty to plaintiffs, has refused to enforce them. This Court should therefore issue a preliminary injunction prohibiting defendants from proceeding with their proposed additions, or occupying any part of them, pending trial.

Dated: