# Marquez Knolls Property Owners Association

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# Marquez Knolls CC&Rs Are Valid and Enforceable to Protect Your Views

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**BEFORE STARTING ANY NEW CONSTRUCTION OR REMODEL PROJECT THAT INCREASES THE HEIGHT OR FOOTPRINT OF A STRUCTURE ON YOUR PROPERTY, OR IF YOU LEARN OF A NEIGHBOR PLANNING SUCH WORK, MARQUEZ KNOLLS PROPERTY OWNERS ASSOCIATION STRONGLY RECOMMENDS THAT YOU REVIEW THE CC&RS FOR YOUR TRACT AND CONSULT WITH AN EXPERIENCED ATTORNEY. MKPOA RECOMMENDS THAT YOU PROVIDE YOUR ATTORNEY A COPY OF THE CC&RS FOR YOUR TRACT AND A COPY OF THIS DOCUMENT. IT IS IMPORTANT TO VERIFY THE CURRENT STATE OF THE LAW BEFORE PROCEEDING OR TAKING LEGAL ACTION.**

**PLEASE NOTE: NEITHER THE GOVERNOR'S NOR MAYOR'S EXECUTIVE ORDERS CONCERNING FIRE REBUILDS OVERRIDES THE RESTRICTIONS CONTAINED IN THE CC&RS.**

# EXECUTIVE SUMMARY

The Marquez Knolls Property Owners Association **(MKPOA**) seeks to provide analysis and guidance to its members, non-member property owners in the Marquez Knoll neighborhood, and real estate professionals/consultants concerning the legal status of the Marquez Knolls Covenants, Conditions and Restrictions (**CC&Rs**[1]) after the most recent Court of Appeals case that reviewed the CC&Rs and to clarify misconceptions regarding the enforceability of the CC&Rs specifically with respect to restrictions on building heights. This document addresses recent trends involving (1) erroneous claims that court rulings have invalidated the CC&Rs or the CC&Rs have expired and (2) contrary to the general limitations in the CC&Rs, an increase in building permit applications for two-story homes and taller one-story homes, which will only increase during the rebuilding process following the Palisades Fire. **This document applies only to lots located in tracts with recorded CC&Rs, which comprise the majority of the MKPOA geographical area.**

## Key Points:

1. **Legal Status of CC&Rs:**

   - Although one provision of the CC&Rs explicitly expired, the balance of the CC&Rs remain valid and enforceable, and MKPOA retains authority to oversee construction projects affecting views. Homeowners are advised to adhere to the provisions of the CC&Rs, prioritize neighborly cooperation, and engage with MKPOA for approval of plans that might impact neighbors' views and the neighborhood character. The CC&Rs also contain provisions concerning the size of setbacks and the height of fences and walls.

   - California courts have **not** ruled the Marquez Knolls CC&Rs unenforceable or expired. The MKPOA retains authority to approve second-story additions and new structures greater than one-story in height.

   - In 1979, the Court of Appeals in ***Ezer v. Fuchsloch***, in a decision concerning view obstruction by a tree, ruled that the CC&Rs "**reflects a plain intent and purpose to maintain a one-story height for all structures and trees in the tract in order to preserve the 'view' of the individual lot owners.**"

[1] The phrase "CC&Rs" as used herein refers, based on the context of the sentence, to either singularly to the CC&Rs for the respective tract or collectively to the CC&Rs for all twenty-two tracts that have CC&Rs.

- In two Court of Appeals cases, ***Zabrucky v. McAdams*** (2005) and ***Eisen v. Tavangarian*** (2019), conflicting interpretations of CC&R provisions on view obstruction by structures were issued. ***Zabrucky*** fully endorsed the view protection provisions of the CC&Rs, while ***Eisen*** narrowed the scope of one of the view protection provisions in the CC&Rs. However, neither case invalidated the CC&Rs. **Under California, both cases (as well as *Ezer*) remain valid precedents. In the event a lawsuit is commenced, the courts have discretion as to which case to follow.** In other words, a Court is not required to follow the ***Eisen*** decision, even though it was decided after ***Ezer*** and ***Zabrucky.***

**2. Misinterpretation of *Eisen*:**

- The ***Eisen*** decision narrowly addressed alterations to an approved existing two-story home. ***Eisen*** did not rule on whether or in what circumstances adding a second story to a single-story home or tearing down an existing one-story house and replacing it with a new house greater than one-story in height would be permitted.

- The ***Eisen*** case has been incorrectly cited by some as completely invalidating all the CC&Rs view protection provisions or MKPOA's authority to review projects that would detract from views from other lots.

**3. MKPOA Authority:**

- MKPOA asserts its authority, as the assignee of the Declarants' (the original developers) rights, to review and approve any structure exceeding one story in height in accordance with CC&Rs.

- The CC&Rs, including the Declarants' rights as later assigned to MKPOA, are perpetual and continue to restrict construction that detracts from or obstructs the views of neighboring lots.

**4. Flaws in the *Eisen* decision:**

- The ***Eisen*** decision failed to consider the original actual intent of the Declarants when implementing the CC&Rs and their provisions for view protection despite thorough analysis of the Declarants' intent in ***Ezer.***

- It misinterpreted the definition of "structures" and overlooked critical evidence, including the Declarants' Assignment of Rights to MKPOA in 1996 and the manner of

how the community was actually **built** which, where possible, created and prioritized views from each lot.

- Numerous other flaws in the ***Eisen*** decision are described in the Discussion section of this document.

5. **Two-Story Homes:**

- There have been several recent Marquez applications to the City of Los Angeles to build new two-story homes. These applications have disregarded the need for MKPOA's review to ensure compliance with CC&Rs. MKPOA maintains that any such project, including fire rebuilds, require its approval, as do remodels that may increase the height or the footprint of the existing structure(s).

- Homeowners considering a fire rebuild, remodel to add a second story or tearing down an existing home and constructing of a new home of greater height or size, are advised to contact MKPOA to determine whether the project needs MKPOA review.

- The CC&Rs do not prohibit homes greater than one-story in height, provided the home does not detract from views from other lots.

6. **Homeowner Enforcement of CC&Rs:**

- CC&Rs are private contracts enforceable by individual property owners. While the City of Los Angeles may issue permits, including expedited permits for fire rebuilds, these permits **do not** override CC&R restrictions.

- Homeowners are encouraged to collaborate with neighbors, consult MKPOA, and seek legal advice if conflicts arise concerning view impacts. If legal action is commenced to prevent what is perceived as detraction of views, homeowners are also advised to seek to have the court apply ***Ezer*** and ***Zabrucky,*** which MKPOA believes correctly interpreted the plain meaning of the CC&Rs and the intent of the original Declarants, rather than ***Eisen.***

## Introduction:

Prior to the Palisades Fire the Marquez Knolls Property Owners Association had become aware of two recent trends: (i) a mistaken belief on the part of some property owners and real estate professionals, including attorneys and zoning consultants, that a recent California Court of Appeals case ruled that the CC&Rs for the Marquez Knolls have in some way either expired, or

were overturned and therefore are of no force and effect, and (ii) the filing of multiple City of L.A. building permit applications seeking to tear down or remodel existing one-story homes in order to build two-story homes on properties in Marquez Knolls with CC&Rs.

***This document represents MKPOA's official position on the matters contained herein based on consultation with outside legal counsel and reviewed by several experienced attorneys and real estate zoning consultants.***

**NEITHER THE CALIFORNIA COURT OF APPEALS NOR THE CALIFORNIA SUPREME COURT HAS RULED THAT THE CC&RS FOR THE MARQUEZ KNOLLS HAVE EXPIRED, ARE UNENFORCEABLE OR ARE OF NO FORCE AND EFFECT.**

**IN MOST MARQUEZ AREA TRACTS WITH CC&RS, MKPOA APROVAL IS REQUIRED PRIOR TO BUILDING A NEW HOME GREATER THAN ONE STORY IN HEIGHT OR ALTERING AN EXISTING ONE STORY HOME TO ADD A SECOND STORY.**

**WHILE THE CC&RS FOR THE TWENTY-TWO TRACTS WITH CC&RS IN THE MARQUEZ KNOLLS ARE SUBSTANTIALLY SIMILAR IN FORM AND CONTENT AND REFLECT, AMONG OTHER THINGS, THE INTENT OF THE DECLARANT (THE ORIGINAL DEVELOPERS) TO PROTECT VIEWS IN PERPETUITY, THE CC&RS ARE NOT IDENTICAL.**

**DISCLAIMER**: ***Neither MKPOA nor its attorney have made a comprehensive comparison of all of provisions of the CC&Rs in the different Marquez Knolls tracts with CC&Rs and MKPOA is aware that the Declarants amended the CC&Rs for several tracts. This document, as well as the MKPOA website, may contain errors or omissions, and each homeowner needs to <u>independently</u> obtain and review the CC&Rs for their tract. In addition, several of the issues contained in this document have yet to be ruled upon by the California Court of Appeals, or the California Supreme Court, so we do not know how these courts would ultimately interpret these provisions.***

## <u>Discussion:</u>

### 1. Background

The Marquez Knolls area of Pacific Palisades includes 22 tracts with recorded CC&Rs (collectively the "**CC&Rs**") encumbering hundreds of homes built on a hillside from several hundred feet above sea level to slightly over 1,200 feet above sea level with often panoramic ocean and mountain

views. Although the CC&Rs are not identical, we believe that all tracts with CC&Rs contain a provision limiting the height of buildings to one-story in height unless: (a) the Declarant[2] in its judgment and (b) the Architectural Committee (whose powers ceased in all tracts at various times) approved a two-story house that does not detract from the views of other lots. In addition, most of the CC&Rs contain an additional provision prohibiting the obstruction of views from landscaping and structures.[3] There have been three published California Court of Appeals cases ruling on certain view protection provisions of the CC&Rs; one concerning landscaping and two concerning structures.

In 1979, in ***Ezer v. Fuchsloch***, the Court of Appeals ruled that a tree which obstructed the view above the defendants' roofline violated Paragraph 11 of the tracts CC&Rs, stating that the CC&Rs "**reflects a plain intent and purpose to maintain a one-story height for all structures and trees in the tract in order to preserve the 'view' of the individual lot owners**."

In 2005, in ***Zabrucky v. McAdams,*** the trial court determined that the prohibition in paragraph 11 against "structures" which obstruct a view only refers to landscape type structures and not the main dwelling. The Court of Appeals overruled the trial court, and determined that Paragraph 11 applied to **ALL** structures, including the main dwelling, but also qualified by modifying paragraph 11 so that it only applies to "unreasonable" view obstructions.

In 2019, in ***Eisen v. Tavangarian,*** which is being cited by some as invalidating the CC&Rs, the Court of Appeals adopted the same conclusion as the trial court in ***Zabrucky***, ruling that Paragraph 11 of the CC&Rs in question did not restrict renovating or altering existing structures. The Court found that the language in that paragraph only referred to landscaping and greenhouses, storage sheds or other forms of outbuildings, and not the main residence itself. The main residence in ***Eisen*** was a previously approved two-story house.

## 2. What *Eisen* Ruled

The ***Eisen*** court ruled that the Tract 20305 CC&Rs did not restrict alterations to **an existing** two-story main residence. The court found that the language in Paragraph 11, which prohibits erecting

[2] The Declarants were the original developers of Marquez Knolls which included the Lachman and Tellem families.
[3] For example, Paragraph 11 in the CC&Rs for Tract 21995 recorded in 1956, provides "No fence or hedges exceeding three feet in shall be erected or permitted to remain between the street and the front setback line." While Paragraph 11 CC&Rs recorded after the CC&Rs for Tract 21995, including those for Tract 20305 covering the ***Eisen*** case, the following language was added "nor shall any tree, shrub, or other landscaping be planted or any structures erected that may at present or in the future obstruct the view from any other lot…" The CC&Rs also contain provisions, *inter alia,* concerning size of the home, setbacks and placement of the structures.

any structure that may obstruct the view of any other lot, referred only to "outbuildings or similar objects surrounding the dwelling house, rather than improvements to the residence itself."[4] The court also ruled that Paragraph 1 of the CC&Rs does not prohibit "remodeling of the **previously approved second story of a residence**" even if such remodeling detracts from the view of another lot. This ruling contradicts ***Ezer***'s conclusion that the CC&Rs "reflects a plain intent and purpose to maintain a one-story height for all structures and trees in the tract in order to preserve the 'view' of the individual lot owners."

## 3. What *Eisen* Did NOT Do

a. ***Eisen*** did not rule that the CC&Rs are unenforceable or lapsed in their entirety. To the contrary, the Court's lengthy decision simply narrowed the definition of what the word "structure" in Paragraph 11 means on a property where an existing two-story home was previously approved pursuant to the CC&Rs.

b. ***Eisen*** specifically and intentionally did not rule whether a "single-story residence could be remodeled to add a second story." Footnote 11 in ***Eisen*** states, "***As the parties acknowledge, it is unnecessary for us to decide in this case whether a single-story residence could now be remodeled to add a second story***."[5]

c. The ***Eisen*** court did not, and under California judicial procedures did not have the authority to, overrule the decision in ***Zabrucky*** or ***Ezer***. Therefore, each case stands as a different interpretation of the scope of Paragraph 11 of the CC&Rs, each with equal precedential value[6]. Attempts to have those differences reconciled were rejected by the California Supreme Court.[7] As a result, both cases remain "good law" and citable depending upon the argument an attorney may

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[4] The main finding of the ***Eisen*** decision hinges on the court's observation that Paragraph 11 mentions "erecting" a structure but does not mention "altering" a structure. The Court opines that this word choice was intentional based on what it labels "a parity of reasoning" with no independent evidence to support this conclusion and despite citing ***Ezer*** for the proposition that "it is also 'our duty to interpret the deed restriction 'in a way that is both reasonable and carries out the intended purpose of the contract'".

[5] MKPOA believes, as provided in Paragraph 1 of the CC&Rs, the restriction is not limited to remodeling a residence to add a second story but includes any remodel which increases the height of the existing approved structure.

[6] One critical difference in the facts was that in ***Eisen*** the defendants were making changes to a **previously approved** two-story house, while the defendant's house in ***Zabrucky*** was a one-story house.

[7] After publication of the ***Eisen*** decision, MKPOA and numerous property owners asked the California Supreme Court to take the ***Eisen*** case on a Petition for Review to resolve the conflicting decisions, but the Supreme Court declined the Petition.

want to assert or a ruling a court may want to make.[8] Moreover, since the ***Eisen*** decision specifically refrains from ruling whether a new story can be added to an existing single-story home, the addition of a new story to an existing home, as well as fire rebuilds are presumably governed by ***Zabrucky*** and ***Ezer's*** overriding holding that "plain intent and purpose to maintain a one-story height for all structures and trees in the tract in order to preserve the 'view' of the individual lot owners"***.***

d. ***Eisen*** did not analyze or review the **intent** of the original drafters of the CC&Rs, while both ***Ezer*** and ***Zabrucky*** found the plain intent of the CC&Rs was to protect views.

e. Neither ***Eisen*** nor ***Zabrucky*** (***Ezer*** was decided prior to the recording of the Assignment) discuss the implications of the Assignment Of Rights And Powers Under Covenants, Conditions, And Restrictions, signed in October 1994 by the Declarants of all the Marquez Knolls tracts with CC&Rs and validly recorded on March 13, 1996, transferring "certain judgment, approval, and enforcement rights and powers" reserved by the Declarants under the CC&Rs to Marquez Knolls Property Owners Association ("**Assignment**"). ***Eisen*** did not examine the Assignment and its explicit statement of the Declarants' intent which provides in part, "the Declarants wish to focus the power and right to enforce the terms and intentions of the CC&R[s] in [the] residents of the Marquez Knolls community as represented by the Marquez Knolls Property Owners Association, Inc."

## 4. The *Eisen* Decision Is Fundamentally Flawed

The MKPOA Board and multiple attorneys and land use professionals believe that the ***Eisen*** decision is fundamentally flawed in many ways, including but not limited to the following:

a. As held in ***Zabrucky***, the references to "structure" in Paragraph 1 clearly includes the main dwelling, yet the ***Eisen*** court interpreted the word "structure" in Paragraph 11 to refer only to outbuildings.

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[8] See ***Auto Equity Sales, Inc. v Superior Court*** *(1962) 57 Cal 2d, 450, 456* the California Supreme Court held that where appellate decisions are in conflict "the court exercising inferior jurisdiction can and **must** make a choice between the conflicting decisions." (Emphasis supplied.) ***Eisen*** did not overturn ***Zabrucky*** and ***Zabrucky*** and ***Eisen*** are appellate court decisions which conflict. ***Auto Equity*** requires a court to choose between them for a determination of the standards that apply. Moreover, if a court determines that paragraph 11 of the CC&Rs is ambiguous, a question not litigated in either ***Zabrucky*** or ***Eisen***, then evidence of the intent of the Declarants as part of interpreting the view protections is appropriate.

b. ***Eisen*** is internally inconsistent in its search for an ideological conclusion supporting the legal theory of "free use" of property. Most of the Marquez Knolls' CC&Rs have three provisions addressing view obstruction, Paragraphs 1, 2 and 11.[9] Clearly it was an issue of utmost concern to the Declarants, and as concluded by the Court in ***Ezer,*** that the Declarants did not want views to be blocked by any structure or landscaping in perpetuity. This position is further supported by the language of the Assignment signed over thirty (30) years after the first CC&Rs were created. It makes no sense to conclude that the original drafters of the CC&Rs intended to allow the main residence to be remodeled in a manner that blocks neighbor's view, but to prohibit landscaping and tool sheds from doing so.

c. ***Eisen's*** holding that "once a second story was approved and erected as part of the original construction of a home … paragraph 1 played no further role" is illogical and contrary to the explicit language of Paragraph 1 which prohibits both a home from being "erected" or "altered" if it detracts from the views of other lots.[10] When the Tavangarian house was originally approved as a two-story structure, prior to approval it's design was analyzed based on a specific set of plans which enabled the potential impacts to be specifically analyzed. Altering the design of an approved structure changes the analysis of whether the structure "detracts from the view of any other lot" and would have to be reviewed again. If this was not the case, a property owner who wanted to build a structure greater than one-story in height could simply divided the project into two phases, first getting the one-story project approved and then without approval or ramifications altering the existing approved structure in a manner that would not initially have been approved.

d. ***Eisen,*** in contrast to ***Ezer*** and ***Zabrucky,*** did not examine the actual **intent** of the original Declarants, which intent was manifested in **both** the language of the CC&Rs and Assignment and how the homes were originally laid out and approved.

1. The ***Eisen*** court stated that it is "our duty to interpret the deed restriction 'in a way that is both reasonable and carries

[9] There are other provisions in the CC&Rs regulating setbacks, heights of fences, etc.

[10] Paragraph 1 states "...no structure shall be erected, altered, placed, or permitted to remain on any building plot other than one detached single-family dwelling not to exceed one story in height and a private garage…"

out the intended purpose of the contract"… and in "the absence of ambiguity, the fair intent of the parties is enforced." Yet nowhere in ***Eisen*** does the Court state an intent or purpose. Rather, the ***Eisen*** Court relied on selected quotes from case law concerning "free use of land" to underpin their decision.[11]

2. This approach is made abundantly clear in Section 3 of the Discussion in ***Eisen.*** The court concludes that "plain language" of Paragraphs 1, 2 and 11 control different aspects of development, with Paragraph 1 "defining the character of the development", Paragraph 2 "as regulating the initial construction and subsequent alterations of a permitted single-family residence", and Paragraph 11 "as controlling the height of fences, hedges, other landscaping and out buildings other than a detached garage", concluding "[t]his interpretation of the CC&Rs not only comports with their ***apparent intent*** **[**emphasis added] but also furthers the public policy in favor of the free use of land."

3. A simple survey of the neighborhood, both before the Palisades Fire and after the fire, by an experienced architect, planner or other qualified expert, would clearly reveal the plain and unambiguous intent of the Declarants to provide for maximum views from each lot, as opposed to the "apparent intent" as divined by the ***Eisen*** court. This actual intent is evident when looking at how the community was laid out on a hillside, with great efforts taken to maximize views, including the extensive use of flag lots and terracing, use of flat or slightly sloped roofs generally uniform in height, and the ubiquitous presence of one-story homes in

[11] In ***Bass v. Helseth*** (1953) 116 Cal. App. 2d 75, pages 81-82, the court noted "'In construing covenants or restrictions as to the use of property, the circumstances and conditions surrounding the parties and property must be considered as well as the manifest objects of the grant or restriction. So, the intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation. In other words, effect is to be given to the intention of the parties, as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction, and the object had in view by the parties.' After the rule as to strict interpretation quoted by appellants there follows: 'This rule, however, obtains only where the parties have failed to express their meaning with sufficient clarity to enable the court to say that its construction is plain and admits of no doubt; the [free use] rule will not be applied to defeat the obvious purpose of the restriction. . . .'"

virtually all locations. In other words, the CC&Rs were written to preserve the unique neighborhood character of the Marquez Knolls as originally developed by the Declarants, which intent was reiterated explicitly in the language of the Assignment which states "the Declarants wish to focus the power and right to enforce the terms and intentions of the CC&R[s] in [the] residents of the Marquez Knolls community as represented by the Marquez Knolls Property Owners Association, Inc." This language recognizes a unified neighborhood interest and contemplates enforcement of the CC&Rs across tracts promoting fairness and consistency in perpetuity.

4. In addition to the unimpeachable evidence of how the portions of Marquez Knolls built on the hillside, a community of hundreds of homes, was planned and built to maximize views from as many lots as possible, there is additional collateral evidence in the way of depositions of family members of the Declarant, who had first-hand knowledge of the Declarants' intent which included the intent to enforce the view protection provisions across the different tracts in the Marquez Knolls that had CC&Rs .[12]

5. The ability to enforce view protection provisions, including across tracts, is an essential tool and consistent with the intent of the Declarants to prevent the construction or alteration of a house greater than one-story in height that would detract from the views of "any other lot".

6. Marquez Knolls was also one of the early communities with underground utilities to keep views unobstructed consistent

[12] Ralph Yarro, the son-in-law of Earl Lachman and one of the members of the Architectural Committee tasked with ensuring CC&R compliance, declared in an action entitled ***Saxer v. Radtke***, Los Angeles County Superior Court, Case No. SC 011 853 that "At no time did we think or intend that the homes in any single tract which we developed would have the right to ignore the height limits in other tracts we developed." The height, width and angle of the homes was not an accident. Each home was placed to optimize views, which David Tellem described as "the most important thing". See complaint 24STCV25529, Superior Court of the State of California for the County of Los Angeles.

with the intent of the Declarants to maximize unobstructed views.

7. It is also illogical to believe that the intent of the Declarant was that a property owner would be prohibited from blocking a neighbor's view before December 31, 1980, but would be permitted to do so the very next day after the powers of MKPOA, as successor in interest to the Architectural Committee,[13] expired under Paragraph 2. It also illogical to conclude, although ***Eisen*** did, that if the Declarant and the Architectural Committee approved a two-story house on the basis that it did not detract from the views of other lots, that the property owner now had the unfettered ability to alter the house in manner that would impact views from other lots. The approval was based on a specific and detailed set of plans for the house. If the property owner is now altering those plans a new analysis needs to take place. Finally, it would be illogical, unfair and inconsistent to conclude that the property owner of the most downslope lot in a tract would be prevented from increasing the height of their home by all the uphill owners in their tract, but would have no rights to prevent the owner of a lot immediately below theirs in a different tract from doing alterations or tearing down and building a new structure that detracted or unreasonably obstructed from their views.

8. There are multiple provisions in the CC&Rs that regulate the location, height and size of improvements: Paragraph 3 (Setbacks), Paragraph 4 (Minimum lot size), Paragraph 7 (Minimum main structure size), Paragraph 8 (Height of aerials), and Paragraph 12 (Fence height)[14].

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[13] For Tract 20305, in which the ***Eisen*** home is located, Paragraph 2 of the CC&Rs provide the powers and duties of the Architectural Committee ceased on December 31, 1966, and thereafter the power and duties previously exercised by the Architectural Committee were vested in MKPOA until December 31, 1980, when the powers ceased. In contracts, the powers, rights and duties of the Declarants under the CC&Rs never expire and were transferred to MKPOA in the Assignment recorded in 1996.

[14] Paragraph references are from Tract 20305 CC&Rs.

9. In most of the CC&Rs, Paragraph 11, as recognized in ***Ezer***, is a broad statement in support of protecting view rights, by prohibiting any obstruction including new or altered structures and landscaping. This language is consistent with the language Paragraph 1, which prohibits the erection or alteration of structures greater than one-story in height that would detract from the views from any lot.

10. The CC&Rs do not provide that the view protection provisions ever expire or terminate.

11. The "one story in height" language on Paragraph 1 means the height of the homes built and approved by the Lachmans when the tracts were built out and is intended as a view protection provisions enforceable across tracts.[15]

e. ***Eisen*** mentions that the rights and powers of the Architectural Committee as originally exercised by the Architectural Committee or thereafter exercised by MKPOA, specifically expired on December 31, 1980 and the Court erroneously stated "All parties, as did the trial court, that paragraph 2's December 31, 1980 sunset provision meant that covenant is no longer enforceable." However, the Court did not mention the "Declarant" or note any differentiation between the Declarant and the Architectural Committee, even though the CC&R's make a clear distinction between the two bodies, giving each different duties and powers and refer to them as different entities. Moreover, the ***Eisen*** Court failed to mention the critical distinction that the rights and powers of the Architectural Committee (exercised by either the original Architectural Committee, or MKPOA until December 31, 1980) specifically expired, but the duties and the powers of the Declarant (either the original Declarant or MKPOA as assignee of the rights and powers) never expire, so the balance of Paragraph 2 remains in full force and effect.

f. The CC&Rs run in perpetuity with the land and do not tie or bind view protections in the CC&Rs to the lifespan of the Architectural Committees

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[15] See ***King v. Kugler*** which examined a provision of CC&Rs also limiting structures in the tract to "one-story in height" and determined that the phrase was a view protection provision as follows: "In the light of the restrictions and conditions contained in the declaration, the topography of the tract and elevation of the lots, and the existing structures thereon, the general plan of the grantor reflects its plain intent and desire to maintain a one story height for all structures in the tract for the purpose of preserving the view of the individual lot owners at varied elevations."

powers. Specifically, Paragraph 2 provides "[i]n the event the said [Architectural] committee fails to approve or disapprove a design and location within thirty (30) days after said plans and specifications have been submitted to it, ***or in any event***, if no suit to enjoin the erection of said such building or making of any alterations have been commenced prior to the completion thereof, such approval will not be required and this covenant will be deemed to have been fully complied with." The "**or in any event**" language, following by "if no suit to enjoin the erection of said such building" was meant to provide a mechanism that outlasted the Architectural Committee as a means of enforcing view rights. In other words, in the absence of an Architectural Committee, the CC&Rs clearly contemplated and did not restrict or place time limits on a property owner's ability to enforce the right to protect their views, which run with the land, by bringing an action for a determination by the courts as to whether a proposed construction will "detract from the view of any other lot."

g. In addition to property owners having the right to enforce the view protection provisions of the CC&Rs in court, the MKPOA Board and its legal counsel believe that the Assignment was validly executed and that it vested specific rights and powers under the CC&Rs. Specifically, under Paragraph 1, any structure (main dwelling or outbuildings) greater than one-story in height, whether a remodel or a new construction including fire rebuilds[16], needs to be presented to MKPOA for MKPOA to render its judgment as to whether the structure detracts from the view of any other lot. In addition, MKPOA believes that all property owners have indemnified and agreed to hold MKPOA harmless from any judgment it renders under Paragraph 1 of the CC&Rs by the specific language contained in Paragraph 2 of the CC&Rs[17].

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[16] Paragraph 1 includes the word "altered" as well as "erected".

[17] Paragraph 2 of the CC&Rs provide in part "Neither the Declarants, individually, severally or jointly, nor the architectural committee, nor any members thereof, nor any successor member thereof, shall ever be liable because of any action they take, or fail to take, or for any defect in any building erected herein, or at all, as a result of these restrictions, or otherwise and the owners of said lots, each of them agree jointly and severally to hold said declarants and members of said architectural committee free and harmless and to indemnify them accordingly from any claims, suits, any alleged liabilities, or otherwise." It should also be noted that the Declarant did not have any powers and duties under Paragraph 2. Declarants' duties were in paragraphs 1 and 11, yet the indemnification and the hold harmless protections to the Declarant are contained in Paragraph 2, and the hold harmless provision specifically did not "sunset".

h. ***Eisen*** failed to acknowledge or take judicial notice that when the Marquez Knolls was developed the use of CC&Rs was at its infancy throughout the United States and therefore the language that was used in the late 1950s and 1960s does not reflect the more detailed and precise language that is currently contained in CC&Rs for new developments. The fact that the Declarants choose to use CC&Rs, which contain several clauses that protect views, indicates their actual (not "apparent"), unequivocal and plain **intent** (as recognized in both ***Ezer*** and ***Zabrucky***) to protect the views in perpetuity with the tools available at the time. It is MKPOA's understanding that similar CC&Rs were used in many other subdivisions in California and in states.

## 5. Homes Greater Than One Story In Height

Paragraph 1 of the CC&Rs states, in part, "no structure shall be erected, altered, placed or permitted to remain on any building plot other than one detached single-family dwelling not to exceed one story in height … except; where, in the judgement of the Declarant and approved by the Architectural Committee, one two story single-family dwelling may be erected where said dwelling will not detract from the view of any other lot." Thus, assent from two bodies was originally required before a two-story home could be built, based on a finding that neighbor's views would not be negatively affected.

This restriction on homes exceeding one story in height was intended as a view protection provision. Similar language has been determined by a California Court of Appeal, in ***King v. Kugler***, to reflect the original developer's "plain intent and desire to maintain a one-story height for all structures in the tract for the purpose of preserving the view of the individual lot owners at varied elevations."

The drafters of the CC&Rs mandated a procedure for review and approval prior to construction of any structure greater than one story in height. The drafters also included a provision to eventually terminate the Architectural Committee. However, they left the Declarant's rights and powers in effect in perpetuity, preserving the review procedure for homes greater than one story in height. The rights and powers of the Declarant were assigned to MKPOA in an Assignment of Rights and Powers document ("**Assignment**") recorded in 1996. A copy of this Assignment is typically provided to all new property owners in the relevant tracts in the title report received when they first purchase their property, as is the applicable CC&Rs for their tract.

Prior to the Palisades Fire, several Marquez Knolls property owners had recently submitted building permit applications to the City of Los Angeles, seeking to demolish an existing one-story home and replace it with a two-story home. They may be thinking that since the Architectural

Committee's rights and powers have terminated, or perhaps due to something from the ***Eisen*** decision, that the requirement for approval is no longer valid. MKPOA disagrees.

The original Declarant and the Architectural Committee, did approve multiple homes greater than one story in height where they determined that those homes, as designed, did not detract from the views of other lots. Similarly, MKPOA, does not have a blanket position that homes greater than one story in height are never permitted. Rather, like the original Declarant, if a property owner wants to remodel or rebuild a new home greater than one story in height, MKPOA believes that the property must submit the project to MKPOA to be reviewed to determine whether it detracts from the views from another lot. And if it does not, it should be allowed to be built.

The ***Eisen*** decision specifically limited its findings to the condition of a remodel project for an existing two-story home. **The decision has no bearing on demolition and new construction projects, including fire rebuilds.** The ***Eisen*** decision also avoided making any statement limiting the rights of the Declarant, as assigned to MKPOA, regarding issuing a judgment on a new two-story home, or an addition of a second story on an existing one-story home.

## 6. How Can I As A Homeowner Enforce The CC&Rs And Protect My Views?

The CC&Rs are a private contract among property owners and like any contract it is up to the parties to the contract to enforce the terms of the CC&Rs. The City of Los Angeles does not take private CC&Rs into consideration when reviewing building applications or issuing building permits; and, the provisions of the CC&Rs may be more restrictive than the City of Los Angeles building code. In other words, the City can issue a building permit for a house greater than one story in height even though such a structure may be prohibited under the CC&Rs.

Prior to the Palisades Fire, MKPOA recommended that as soon as you are aware that a neighbor is contemplating a remodel or tear down, you should speak to the neighbor and try to understand if the project could impact your views. And prior to the fire, Board members had heard many instances of neighbors working together to modify projects to minimize or eliminate impacts to views and in other instances where the parties could not work things out.

Given the unprecedented destruction caused by the Palisades Fire, necessitating the rebuilding of perhaps hundreds of homes subject to the limitations contained in the CC&Rs, the failure to strictly adhere to the terms and conditions of the CC&Rs, will fundamentally change the character of the Marquez Knolls community. **MKPOA REITERATES THAT WE STRONGLY RECOMMEND PROVIDING A COPY OF THIS DOCUMENT TO AND CONSULTING WITH AN EXPERIENCED ATTORNEY TO VERIFY THE CURRENT STATE OF THE LAW BEFORE PROCEEDING WITH A FIRE**

**REBUILD, REMODEL OR A TEARDOWN-REBUILD THAT CHANGES THE FOOTPRINT OR HEIGHT OF THE EXISTING HOME OR TAKING LEGAL ACTION AND THAT YOU CONSULT WITH YOUR NEIGHBORS.**

## Conclusion:

Property owners who are contemplating a fire rebuild or a remodeling project should consider the impact the project may have on the views enjoyed by neighbors, and not just your immediate neighbors, and discuss the project with all potentially affected neighbors. Property owners engaging in fire rebuilds or considering demolition and new construction projects should be very careful to design in such a way as to not exceed the original building envelope of the existing home or in any way block neighbors' views. There have been several significant projects built in the area which involve major excavation to create a basement level, as defined by City of L.A. Department of Building and Safety. This can allow significant increases in floor area while creating little or no view blockage compared to the prior structure and can be a legally prudent approach. The legal landscape is currently fraught with uncertainty, and it may be perilous to proceed with an expensive construction project and face substantial legal risks.

Property owners contemplating homes exceeding one story in height, whether fire rebuilds, remodels or new construction, as defined by City of L.A. Department of Building and Safety, are invited to contact MKPOA to discuss the project and determine whether review by MKPOA is required by the CC&Rs.

Property owners who believe their views are or will be impacted and/or unreasonably obstructed should argue that ***Zabrucky*** and ***Ezer,*** not ***Eisen***, should control because (i) the ***Eisen*** decision was fundamentally flawed (ii) the ***Eisen*** decision was a narrow decision dealing with the renovation of a previously approved two-story house and (iii) under California law, when there are conflicting Court of Appeals decisions, the trial court has discretion to choose which case to follow. Property owners who believe their views are being unreasonably detracted by a second story addition or a new two-story home should determine whether MKPOA approval has been obtained by the owner, and if not, argue that construction without such approval is a violation of the CC&Rs.

## CONTACT:

If you would like to discuss further, please contact MKPOA President Howard Robinson (howard@howardrobinson.net) or Vice-President Robert Gold (robertgold100@gmail.com).