SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/01/06			**DEPT.** WEC
HONORABLE JOHN L. SEGAL	JUDGE	ELMA MORA AVA FRASER	DEPUTY CLERK CRT ASST
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	NONE	Reporter

8:30 am	SC069487 JOHN ZABRUCKY ET AL VS LLOYD MCADAMS ET AL JUDGMENT REVERSED/7-25-05 JUDGE FLYNN RECUSAL 170.6--JUDGES NEIDORF, COLLINS	Plaintiff Counsel Defendant Counsel	no appearances

NATURE OF PROCEEDINGS:

NON-APPEARANCE CASE REVIEW

Statement of Decision filed.

The Court will enter judgment in favor of defendants and against plaintiffs on the complaint. Counsel for defendants is ordered to lodge and serve a proposed judgment within ten days. The clerk is ordered to return the trial exhibits to counsel, who are ordered to keep them separate and in their present condition until the expiration of the time within which to file a notice of appeal, or, if any party timely files a notice of appeal, the issuance of the remittitur by the Court of Appeal, whichever occurs later.

Clerk to give notice via U.S. Mail.

CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 03/01/06 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage

MINUTES ENTERED
03/01/06
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NONE	Deputy Sheriff	NONE	Reporter

8:30 am	SC069487	Plaintiff Counsel	
	JOHN ZABRUCKY ET AL VS LLOYD MCADAMS ET AL JUDGMENT REVERSED/7-25-05 JUDGE FLYNN RECUSAL 170.6--JUDGES NEIDORF, COLLINS	Defendant Counsel	no appearances

NATURE OF PROCEEDINGS:

thereon fully prepaid.

Date: March 1, 2006

John A. Clarke, Executive Officer/Clerk

By: _____
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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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NATURE OF PROCEEDINGS:

SANTA MONICA, CA 90401-3319

CERTIFICATE OF MAILING

LOS ANGELES SUPERIOR COURT

Civil Division

JOHN ZABRUCKY ET AL VS. LLOYD MCADAMS ET AL	SC069487

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I am over the age of 18 years, not a party to the within action, and know the Los Angeles Superior Court practice for collection and processing of correspondence. That it is deposited with postage prepaid with the United States Postal Service the same day it is delivered to the mail room in the Los Angeles Superior Court. I declare under penalty of perjury under the laws of the State of California that I delivered a true copy of the attached document to the above named party(ies) or their attorney of record by placing a copy in a sealed envelope and deliverying it to the mail room of this court.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN AND JAYLENE ZABRUCKY,

Plaintiffs,

-vs-

LLOYD MCADAMS, ET AL.,

Defendants.

Case No. SC 069487

STATEMENT OF DECISION

On February 14, 2006 through February 17, 2006, the court conducted the trial of this action in Department C of the Los Angeles Superior Court, West District, West Los Angeles Courthouse, Hon. John L. Segal, presiding. Don Franzen, Esq., Funsten & Franzen, appeared for plaintiffs. Christopher Rolin, Esq., Law Offices of Christopher Rolin, appeared for defendants Lloyd McAdams and Heather Baines. The parties introduced oral and documentary evidence, and the case was argued and submitted for decision. Pursuant to the parties' request, the court allowed both sides to file post-trial briefs, which the parties did on February 27, 2006. The court, having considered the evidence received at trial and the parties' post-trial briefs, issues this statement of decision.

INTRODUCTION

The action involves the application of Paragraphs 1 and 11 of the Marquez Knolls CC&Rs to a dispute between two adjoining residential landowners, plaintiffs John and Jaylene Zabrucky, and defendants Lloyd McAdams and Heather Baines. The facts of this long-running neighbor dispute and the text of the applicable provisions of the CC&Rs are set forth in the Court of Appeal's decision in Zabrucky v. McAdams, 129 Cal. App. 4th 619 (2005).

Paragraph 11 provides:

> No fences or hedges exceeding three feet in height shall be erected or permitted to remain between the street and the front set-back line 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, and the right of entry is reserved by the Declarants to trim any tree obstructing the view of any lot.

Paragraph 1 provides:

> All said lots shall be known and described as residential lots, 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, for no more than three cars; except; where, in the judgment of the Declarant [Marquez Knolls Inc.] 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.

In the first trial, the trial court found that a proposed addition to defendants' residence "would obstruct a portion of the view from" plaintiffs' lot, that defendants' "existing home partially blocked [plaintiffs'] view," that "various other homes in the tract also partially blocked other owners' views," but that "neither the planned addition nor the landscaping on [defendants'] property constituted a violation of Paragraph 11 or a nuisance." Id. at 621. The trial court determined that because Paragraph 11 deals with fences, hedges, trees, shrubs, and landscaping, the phrase "any structure" in Paragraph 11 "was limited to landscape-type structures." Id. at 623. The trial court therefore entered judgment in favor of defendants and against plaintiffs. Plaintiffs appealed.

A divided panel of the Court of Appeal subsequently reversed the judgment, ruling that although the trial court's interpretation of the term "any structure" in Paragraph 11 was "not illogical or unsupportable," a "contrary reading is marginally more logical and supportable." Id. at 624. The majority then interpreted the phrase "may at present or in the future obstruct the view from any other lot" in Paragraph 11 to read "may at present or in the future unreasonably obstruct the view from any other lot," id. at 629, causing Presiding Justice Perluss to point out that perhaps the majority's need to "judicially rewrite" Paragraph 11 to insert the word "unreasonably" suggested that the majority "misinterpreted that provision." Id. at 635 (Perluss, P.J., dissenting). The Court of Appeal reversed the judgment for a new trial on whether defendants' addition, which defendants constructed during the pendency of the appeal, unreasonably obstructs the view from plaintiffs' property.

PARAGRAPH 11

The primary issue in the retrial of this action is the application of Paragraph 11, and whether defendants' addition unreasonably obstructs the view from plaintiffs' property. Having listened to the testimony of the parties and the other witnesses, reviewed the photographs and other exhibits received into evidence, and conducted a lengthy and

thorough site inspection of the parties' properties and views, the court finds that defendants' addition does not unreasonably obstruct the view from plaintiffs' property. See Seligman v. Tucker, 6 Cal. App. 3d 691, 697 (1970) ("the court carries out the function of determining what is reasonable or unreasonable in light of the matter and the circumstances involved").

On February 16, 2006, the court conducted a site inspection of both plaintiffs' property and defendants' property. The court walked through both residences and over the grounds of both properties. The court, accompanied by all of the parties and counsel, viewed plaintiffs' backyard decks, plaintiffs' infinity pool, the wall along the west side of plaintiffs' property adjacent to the pool, the grassy area next to the pool, plaintiffs' deck areas, plaintiffs' sub-deck guest rooms, and the interior of plaintiffs' residence, including the dining room, living room, master bedroom, master bathroom, and all windows with a view. The court climbed up the wall built by plaintiffs adjacent to their infinity pool, stood on top of the wall, and observed the view in all directions. The court, accompanied by defendants and all counsel, viewed defendants' backyard, the interior and exterior of the addition to defendants' residence, defendants' main entrance and living room, and the view from the west side of defendants' property on the opposite side from plaintiffs' property. The court climbed up a ladder to the roof of defendants' residence, walked on the roof over the original residence and the new addition, and observed the view in all directions.

The views observed by the court during the site inspection are very revealing, and are almost entirely dispositive of the issues in this case. The court finds, based on the evidence presented at trial and the court's site inspection, including the court's observations while walking all around the pool and standing on the wall built by plaintiff on the west side of the pool next to defendants' property, that defendants' addition does not constitute any obstruction of any view plaintiff has, had, or ever could have, of the coastline. This finding is crucial to defeating plaintiffs' claim, because plaintiffs' primary argument that defendants' addition is an unreasonable obstruction is that it deprives plaintiffs of the much-valued and

treasured view of the sand, the waves, and the lights along the coast, which the parties refer to as the "Queen's Necklace" view. Defendants' addition does not and physically cannot obstruct any portion of plaintiffs' past or present, actual or potential, view of the coastline, because a completely unobstructed view in that direction would not include the coastline. An unobstructed view from plaintiffs' property over defendants' property contains the palisades bluffs, and some ocean water in the far distance, but no shoreline. The bluffs make it impossible to see the coastline looking from plaintiffs' property towards defendants' property. It is clear from a visual inspection of the views from the parties' properties, that even if defendants' addition were removed, plaintiffs would see no more coastline and very little more ocean water than they do now.

The Court of Appeal emphasized the importance to the Marquez Knolls residents of the "beautiful ocean view," and pointed out that the homeowners were concerned about "significant obstructions to any homeowner's view of the Pacific Ocean . . . ." Zabrucky, 129 Cal. App. 4th at 623. The minimal obstruction created by defendants' addition primarily if not exclusively affects plaintiffs' view of the Palisades bluffs, not the Pacific Ocean. Indeed, even if defendants' entire house were removed, plaintiffs would not add a single jewel to their Queen's Necklace view. The minor obstruction created by defendants' addition is mostly an obstruction of a canyon view, not an ocean or coastline view.

This conclusion is confirmed by the view from the west side of defendants' property. The view from the west side of defendants' property includes virtually no coastline. The view from that angle, and the angle plaintiffs would have if defendants' residence were removed entirely, is of the bluff, not the coast. The only exception is a very small portion of the coastline, in which a small segment of the Pacific Coast Highway can be seen, which is too far to the right (west) to be seen from plaintiffs' property. The view from the roof of defendants' residence, whether from the roof of the addition or the roof of the original structure, is the same. Indeed, the fact that the roof of defendants' residence is on the

approximate level as the ground level of plaintiffs' residence confirms that the addition (and in fact defendants' house) does not obstruct any view from plaintiffs' property of the coastline.

The site inspection of plaintiffs' property further reveals, and the court finds, that the obstruction of plaintiffs' view is not unreasonable. In fact, most of the view obstructions are minimal or de minimus, if not non-existent. Looking out from the living room of plaintiffs' residence out over the infinity pool, it is clear that defendants' addition has no effect at all on the primary attribute of the pool: the "infinity effect." Because defendants' addition is not visible in the infinity sight line, the pool retains its intended aesthetic: The water of the pool appears to extend over the edge of the far side of the pool and out to the horizon, and, in the words of counsel for plaintiffs, appears to "drop off into nowhere."

Looking from the area under the cantilevered roof section or canopy shading the pool, and from the grassy area next to the pool where Mr. Zabrucky testified he drinks his coffee, the addition is visible, but obstructs a negligible portion of the overall view, and, as noted above, no portion of any coastline view. All of the segments of the coastline that can be seen from plaintiffs' property, including Santa Monica and the Palos Verdes Peninsula, is visible from the pool area. Were a swimmer in the lap pool to pause at the end of the pool farthest from the house without completing a flip turn and observe the view, he or she would notice that a very small portion of the view of the Palisades bluffs and distant ocean water would be partially obstructed, but would not lose any view of the coastline.

Similarly, from plaintiffs' new upper deck, a sliver of defendants' addition is visible, but the impact on the view, whether measured panoramically or exclusively toward the ocean, is minimal. Elements of plaintiffs' property, such as the wall adjacent to plaintiffs' pool, the large rectangular canopy suspended above the pool, and the metal railing around

plaintiffs' decks, create equally minimal impacts on plaintiffs' view.[1] Defendants' addition blocks a very small portion of the view from the deck of the bluffs and a thin band of deep ocean water, but not of the coastline. The view of coastline from Santa Monica to Palos Verdes is still entirely visible. Defendants' addition has no effect at all on that view.

Defendants' addition has even less of an impact on the views from the interior rooms of plaintiffs' residence. From the dining room, there is no loss of any coastline view, and very little loss of any view at all. Defendants' addition is barely visible from the dining room, and can be seen only by standing in the corner of the dining room, far from where any dining room table would reasonably be situated. The view of defendants' addition from plaintiffs' master bedroom and master bathroom is negligible, if any. In fact, although Mr. Zabrucky testified that he likes to soak in the bathtub before he showers, and sometimes likes to work in the bathtub, the court cannot see how defendants' addition disturbs Mr. Zabrucky's view from his bathtub. Assuming that Mr. Zabrucky, like most bathers, positions himself with his head away from the faucet, he would be looking out the bathroom window to the east, away from defendants' property to the west.

The dozens if not hundreds of photographs and other exhibits further confirm that defendants' addition does not unreasonably obstruct the view from plaintiffs' property. See,

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[1] Plaintiffs suggest that the metal railing around their deck is for the safety of plaintiffs' three small children, and, to the extent that the railing impacts their view, the fact that they took such a reasonable precaution should not count against them. Defendants' expert Mr. Poyourow suggests that plaintiffs could have achieved the same safety result with less self-created view obstruction by using a different, clear material. Although plaintiffs' choice of material for their deck railing is not a significant issue in evaluating plaintiffs' loss of view, it raises a related issue that is. Because plaintiffs have small children, the County of Los Angeles requires that they cover their infinity pool with a solid, retractable cover or net, or that they install a fence with gates around the pool. See Los Angeles County Code §§ 11.51.010, 11.51.030; Mattingly v. Anthony Industries, Inc., 109 Cal. App. 3d 506, 510-11 (1980). These improvements impact the character of and view from plaintiffs' infinity pool much more than defendants' addition.

e.g., Exhs. 2, 20, 29, 36, 37, 63, 67, 68, 87, 93, 220, 229. There is an obstruction. It is not unreasonable. Defendants' addition obstructs none of plaintiffs' view of the city, none of plaintiffs' view of the sparkling city lights, none of plaintiffs' view of the beach, none of plaintiffs' view of the Queen's Necklace, and none of plaintiffs' view of the canyons and bluffs in all other directions. The breathtaking panorama view from plaintiffs' property remains virtually unaffected by defendants' addition.

The evidence also shows other reasons for finding that the obstruction of plaintiffs' view caused by defendants' addition is not unreasonable. For example, the aerial photographs reveal that defendants' property is at the end of the cul-de-sac, and plaintiffs' property is on the side. The geography of the area dictates that defendants will have a better view, and that some blockage of plaintiffs' view is inevitable. As defendants' expert Mr. Curran accurately stated, the existence of defendants' home is a fact of the local geography.

In addition, the evidence shows, and the court finds, that defendants acted reasonably in constructing their addition. For example, defendants reduced the extension of the addition by five feet out of concern over unreasonably blocking their neighbors' views. See, e.g., Exhs. 2F (outlining with a yellow rope the reduction in the proposed addition), 210. Defendants also made reasonable efforts to work with their immediate neighbors and the Marquez Knolls' homeowner association. Thus, to the extent that the parties' actions are relevant to the determination of whether defendants' addition unreasonably obstructs the view from plaintiffs' property, the court finds that defendants acted reasonably.

The parties also introduced conflicting evidence, in the form of testimony from real estate appraisers, on the issue of the "depreciation of economic worth" of plaintiffs' property as a result of the construction of defendants' addition and its affect on the view from plaintiffs' property. See 129 Cal. App. 4th at 623-24. Plaintiffs' expert estimated that the

obstruction of plaintiffs' view by defendants' addition had an adverse impact on the market value of plaintiffs' property in the approximate amount of $170,000. Defendants' expert put the potential impact at $5,000, or $15,000 "at the outside." To the extent this testimony is relevant to and helpful on the issue of the reasonableness of the view obstruction, the court finds that defendants have the better of the argument and the evidence. The court agrees with defendants' real estate expert, Daniel Poyourow, that the detriment to plaintiffs' view caused by defendants' addition is "relatively insignificant," and the court finds the testimony of Mr. Poyourow more credible than the testimony of plaintiffs' real estate expert, Lawrence Sommers, on this point. Plaintiffs did not meet their burden of proof that defendants' addition had any significant or unreasonable detrimental impact on the fair market value of plaintiffs' residence.

Finally, Mr. Zabrucky's testimony that defendants' addition has "destroyed [his] entire ocean view" and "one-third to one-half of [his] view from the pool," that defendants did not merely obstruct his view but "killed it," and that he can see defendants' addition "from everywhere" on his property, is simply not true. Mr. Zabrucky's view expectancy is unreasonable, and his characterization of the obstruction is blown beyond any reasonable sense of proportion.

The addition that defendants built may not have been the most neighborly way to go about adding square footage to their residence. The addition may not be the most attractive architectural structure, and perhaps defendants could have been a little more considerate of plaintiffs in the design of the addition. But the fact remains that the addition does not unreasonably obstruct the view from plaintiffs' property. Defendants' addition does not violate Paragraph 11 of the Marquez Knolls CC&Rs.

PARAGRAPH 1

The secondary issue in the retrial of this action is the interpretation and application of Paragraph 1, and whether defendants' addition violates Paragraph 1 by exceeding one story in height. The Court of Appeal did not reach this issue. See 129 Cal. App. 4th at 629.

There was considerable testimony at trial about whether defendants' addition is a two-level one story structure, or a two-story structure. Viewing the interior and the exterior of the addition, as the court did during the site inspection, defendants' addition appears to be a hybrid between a pure two story addition and a one story addition with a basement-like lower level. Overall, the evidence was inconclusive on the issue of whether defendants constructed a one story or a two story addition. Defendants' addition is more than one story yet less than two stories.

Paragraph 1 of the CC&Rs says nothing about a two story homes. Paragraph 1 prohibits single-family dwellings from exceeding "one story in height." Paragraph 1 is silent, however, on the level from which the "height" should be measured when the properties such as these contain dwellings built on very steep slopes. (The slopes in the parties' backyard are so steep that although the court was able to use the pool filter to climb up onto the wall next to plaintiffs' pool, and was able to go up a ladder to defendants' roof, the court could not successfully traverse the backyard slopes.) Although perhaps not the "true conundrum" presented by Paragraph 11, see 129 Cal. App. 4th at 624, Paragraph 1 is ambiguous on this point. Measured from the street level or the steeply sloping grade level, most of defendants' addition does not exceed one story in height. Measured from the bottom of the addition in defendants' backyard, the addition does appear to exceed one story in height. See Exhs. 212, 220. The evidence shows that most of the lower level of defendants' addition is cut into the hillside below the grade. It is only because the grade takes a steep

downward turn at the base of the addition that the addition appears to be a height above one story.

As the Court of Appeal stated, restrictive covenants are to be constructed strictly against the persons (here, plaintiffs) seeking to enforce them. Zabrucky, 129 Cal. App. 4th at 622. In addition, in interpreting Paragraph 1 the court should look to the purposes of the CC&Rs and the intentions of their drafters, and may imply an element of "reasonableness" into the provision. Id. at 623, 629. Plaintiffs concede that the CC&Rs allow for a structure that exceeds one story in height, as long as the structure does not obstruct a neighbor's view:

> The question then arises, since the architectural committee ceased to exist in 1980, and even the powers thereafter transferred to the Marquez Knolls Property Owners Association expired in 1995, **is it still permissible to build two story structures in the Marquez Knolls?** (The construction at issue here took place after all such powers ceased.) **Plaintiffs believe it is, so long as the second half of Par. 1 is observed, namely, that the 'two story dwelling' does not 'detract' from views.** Plaintiffs' Post-Trial Brief, 9:16-20 (emphasis added); see id. at 14:17-22.

As noted above, defendants' addition, to the extent it is greater than one story in height, does not detract from plaintiffs' views, or, applying the Court of Appeal's standard, defendants' addition does not "unreasonably" obstruct or detract from plaintiffs' views. Therefore, defendants' addition does not violate Paragraph 1.

Moreover, the interpretation of Paragraph 1 that is most reasonable and most consistent with the purposes and intent of the view-conscious drafters of Paragraph 1 is that Paragraph 1 prohibits structures that exceed one story in height measured from the grade level and that, as plaintiffs concede, detract from views. Structures that rise up more than

one story in height above the grade level may tend to block views. Structures that go down a slope or into the ground and do not rise to a height of more than one story above grade level generally do not. If Paragraph 1 were interpreted to prohibit structures that exceed one story in height as measured from the bottom of the hillside, then many of the structures that the court observed on the surrounding hills of the Marquez Knolls community would violate Paragraph 1. In fact, plaintiffs' deck and guestroom structure appears to exceed two stories in height from the bottom of the steep grade behind plaintiffs' residence. See Exh. 216. The fact that the lower level of defendants' addition consists of rooms and the lower level of plaintiffs' addition does not, makes no difference to the degree of view-obstruction. An interpretation of Paragraph 1 that measured the height from the bottom of the hillside would be unreasonable as applied to the parties' properties in Marquez Knolls, and not what the drafters of the CC&Rs would have intended. See Smith v. North, 244 Cal. App. 2d 245, 249 (1966) ("In light of the fact the proposed dwelling would not obstruct the view from plaintiffs' lot any more than it would obstruct such were the space under the first level not used as a garage, the conclusion reached conforms to the law in the premises directing a construction of restrictive covenants in light of their purpose and in favor of the free use of property.").

True, in King v. Kugler, 197 Cal. App. 2d 651 (1961), the court saw "nothing vague, ambiguous or uncertain in the meaning of the restrictive phrase 'one story in height,' or as to what was intended thereby." Id. at 655. Nor did the King court find "anything ambiguous about the term 'height.'" Id. at 656. "Story" meant a "set of rooms on the same floor or level; a floor, or the habitable space between two floors." Id. at 656 (quoting Webster's New International Dictionary (2d ed.), at 2487). "Height" meant "the perpendicular distance from the actual adjoining sidewalk or ground level to the lowest point of the finished ceiling of the top story of the building." Id. (quoting former Health & Safety Code § 15850).

But what is unambiguous and certain in one case may not be so unambiguous or certain in another. This case is more complicated than King. The ambiguity comes not from the words "one story in height" or "height", but from the application of those terms to the physical condition and orientation of the properties. Measured from the "actual adjoining sidewalk," the "perpendicular distance" to "the lowest point of the finished ceiling" of defendants' addition is less than one story in height. Measured from the ground level at the bottom of the grade, the height is more than one story in height. Measured from grade level before defendants dug into the hillside to construct their addition partially underground, the height appears to be less than one story, although the documentary and oral testimony at trial is inconclusive. King, although instructive, is distinguishable.

For these reasons, the court finds that defendants' addition does not violate Paragraph 1 of the CC&Rs.

DISPOSITION

The court will enter judgment in favor of defendants and against plaintiffs on the complaint. Counsel for defendants is ordered to lodge and serve a proposed judgment within ten days. The clerk is ordered to return the trial exhibits to counsel, who are ordered to keep them separate and in their present condition until the expiration of the time within which to file a notice of appeal, or, if any party timely files a notice of appeal, the issuance of the remittitur by the Court of Appeal, whichever occurs later.

Dated: March 1, 2006

JOHN L. SEGAL
JUDGE OF THE SUPERIOR COURT