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History of MKPOA Amicus Action on the Appellate Court decision "Eisen vs. Tavangarian"

On June 20, 2019, MKPOA was informed of the Appellate Court decision interpreting the CC&Rs differently than they were interpreted in previous cases. The determination was certified for publication. See link below of the Appellate Court decision:

https://www.courts.ca.gov/opinions/documents/B278271.PDF

MKPOA became concerned that the Appellate Court decision and its reasoning could weaken view protection for all residents in Marquez Knolls whose neighbors remodel their homes. A simplified descriptive summary of the issues and consequences of that decision can be found in Attachment VII and via the link below:

https://www.lawlawlandblog.com/2019/07/ccr-you-kidding-me-ca-appellate-court-rules-earlier-court-misread-restrictive-covenant-prohibiting-alterations-to-existing-homes.html

On June 27, 2019, MKPOA held a Special Committee meeting to discuss concerns, options, and actions to be presented to the MKPOA Board for consideration. Agenda and Minutes of that Special Meeting are included in Attachment I below.

The Special Committee recommended the following actions:

- *Cathi Ruddy and George Rosenberg will draft a letter from MKPOA to the Appellate Court outlining the adverse impact and damage to the Marquez Knolls community from the Appellate Court decision. Due no later than July 10. Preferably earlier.*
- *Attendees of the meeting will write personal letter to the Appellate Court outlining the adverse impact and damage to their property and their concern on the impact on the entire community. MKPOA will encourage Marquez Knolls residents and real estate brokers to also write such letters. Samples with the pertinent information and text will be made available. Send letters before July 10.*
- *MKPOA will circulate a survey, measuring support of the need and desire by Marquez Knolls residents for continued reliance on strong view protection CC&Rs.*
- *MKPOA may consider writing an Amicus Brief, outlining the adverse effect the Appellate Court decision, if left standing, will have on the Marques Knolls Community, and will if needed retain legal counsel, contingent on budget approval.*

Time was of the essence and MKPOA called for a special on-line vote to approve the recommended action items. Voting closed on July 9, with unanimous approval of the Special Meeting recommendations with 100% of the Board Members participating. See Attachment II.

On July 10, 2019, MKPOA sent an Amicus Letter to the Appellate Court via CounselPress (apatti-Jelsvik@counselpress.com) requesting that the case decision be reviewed. See Attachment III.

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Also, on July 10, 2019, Rosario Perry, for Eisen, submitted a request to the Appellate Court to review its decision. See Attachment IV.

Later that same day, MKPOA was notified that the Appellate court denied the request for review. The Special Committee was called to action on July 15, 2015. The Committee recommended the following action for Board consideration:

"Establish a legal defense fund to support the Lachman CC&Rs as interpreted under the Zabrucky case. Specifically, the fund will pay the cost of having a law firm write an amicus letter to the Supreme Court of the state of California, and other legal work in support of the CC&Rs. The legal defense fund will be funded by MKPOA in the amount of $25,000. In addition, the MKPOA Board will seek contributions from private individuals in the total amount of $12,500 to reimburse MKPOA for 50% of its expense (matching funds)"

At its regular Board Meeting on the evening of July 15, 2019 a motion was made by Gene Cameron and seconded by Jackie Lee in favor of accepting the recommendation. The vote was eight in favor with one abstention.

On July 18, 2019, MKPOA signed a Confirmation of Agreement letter with --- Gibson, Dunn and Crutcher. The flat fee retainer of $25,000 used funds from the MKPOA $65,000 Special Defense fund retained for such purpose since the settlement of the Zabrucky case 10 years ago. See Attachment V for excerpts. (The entire document is available upon request.)

On August 7, 2019, MKPOA President, Haldis Toppel, sent a letter to other Homeowner Associations asking for support in the organization's request to the California Supreme Court to review the lower Court's determination. See Attachment VII for a boiler plate draft of the request letters.

On August 9, 2019, Jeremy Smith, Esq. of Gibson, Dunn and Crutcher submitted the MKPOA Amicus Letter to the California Supreme Court, requesting a review of the Appellate Court determination. The Pacific Palisades Resident's Association and the Castellamare Homeowners Association had joined MKPOA in supporting the Supreme Court review of the Appellate Court determination. See Attachment VI.

On August 19, 2019, Rosario Perry, for Eisen, submitted a request to the California Supreme Court, requesting that the Appellate Court determination be un-published. See Attachment X for front pages excerpts. (The entire document is available upon request.)

On August 29, 2019, Rosario Perry, for Eisen, submitted a letter to the California Supreme Court, requesting a review of the Appellate Court determination. See Attachment VIII for front pages excerpts. (The entire document is available upon request.)

Between August 9, and August 29, over 45 Marquez Knolls Residents and MKPOA Board Members submitted personal letters to the California Supreme Court urging review of the Appellate Court determination and outlining hardships and failed expectations should the Appellate Court determination stand. See Attachment IX for select letters. Other letters available upon request.

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On September 11, 2019, the Supreme Court denied both the request to de-publish the Appellate Court determination and to review the Appellate Court determination. See Attachment XI.

Haldis Toppel,
President, MKPOA
9/16/2019

Since then MKPOA has researched law firms specializing in CC&R amendments and has scheduled a meeting with the firm of Adams Sterling for October 29. Should it be determined that CC&R amendments are feasible to make future view protection CC&Rs "court-proof" serious fundraising efforts will need to be made to fund the process. Until other action become available the MKPOA Board has decided to continue to help residents in their efforts to protect their views and offer mediation if requested by both parties. (see FAQ document on the MKPOA web site.) HT 10/25/19

ATTACHMENT I

Special MKPOA Committee Meeting
Agenda and Minutes
June 27, 2019 3:30 p.m. 5:30 p.m.
16788 Charmel Ln. P.P. CA 90272

Attending/Distribution:
From: hrtoppel@aol.com
To: syljonboyd@gmail.com, gene.cameron@gmail.com, jlee283@outlook.com, lgmartin@earthlink.net, lodel@verizon.net
Cc: rosario@oceanlaw.com, billfado@msn.com, galanty@juno.com, kjt@turnerlawapc.com, george@rosenberg-lawfircom, howard@howardrobinson.net, cbsruddy@aol.com, plethoraah@gmail.com, Pacpali@galanty.com, mark@galanty.com, lbh10667@hotmail.com, alisoneisen@aol.com,

Agenda:
Introductory Briefing – Haldis Toppel
Introduction of attendees
Briefing on Eisen vs Tavagarian appeal – Rosario Perry
Discuss concerns, options, and actions
Scheduling of actions

Minutes:
Meeting started at 3:30 p.m.

Present were the individual listed in the Agenda above. Also present where: Justin Escano-assistant to Keith Turner, Isaac Aba – assistant to Rosario Perry.

Haldis Toppel stated the purpose of the meeting: to get a briefing on the view litigation Eisen vs. Tavagarian, (**http://sos.metnews.com/sos.cgi?0619//B278271**) the impact on view enforcement and validity of the Lachman CC&Rs as result of the Appellate Court decision on the case, and to

discuss concerns, options, and potential MKPOA actions.

Rosario Perry gave an overview of the trial and appeal proceedings where the Trial Court sided with Eisen and the previous Zabrucky case, and the Appellate Court then overturned the lower court decision by stating that the structure view obstructions were not enforceable in the CC&Rs, but the vegetation obstructions (trees, hedges, etc.) were enforceable. Such statements, if left standing, and published, will create conflict between the Zabrucky and the Eisen determinations and create tremendous conflict among neighbors and encourage future litigation. It will bring the potential of developers rushing into the Marquez Knolls community without view protection to take advantage of this loophole, and adversely affect the quality of life of a great majority of those home that had depended on the view protection when purchased.

Many questions, comments, suggestions, and recommendations were made during the discussions and the following actions items were agreed to be the most effective initial step for MKPOA to ask for reconsideration of the Appellate Court decision with regards to the validity of view protection from structures in the Lachman CC&Rs. MKPOA's concerns were focused on the validity of the view protection CC&Rs for the sake of the entire community, and not on the Eisen/Tavagarian case itself. Loss of view protection will affect the quality of life, long-term reliance on view protection, potential property values, and the enjoyment of one's property for most of the over 600 residents in the 21 Lachman Tracts.

Action Items:

- Cathi Ruddy and George Rosenberg will draft a letter from MKPOA to the Appellate Court outlining the adverse impact and damage to the Marquez Knolls community from the Appellate Court decision. Due no later than July 10. Preferably earlier.
- Attendees of the meeting will write personal letter to the Appellate Court outlining the adverse impact and damage to their property and their concern on the impact on the entire community. MKPOA will encourage Marquez Knolls residents and real estate brokers to also write such letters. Samples with the pertinent information and text will be made available. Send letters before July 10.
- MKPOA will circulate a petition in support of the need and desire by Marquez Knolls residents for continued reliance on strong view protection CC&Rs. Done by July 10.
- In case the Eisen vs. Tavagarian case goes to the California Supreme Court, MKPOA may consider writing an Amicus Brief, outlining the adverse effect the Appellate Court decision, if left standing, will have on the Marques Knolls Community, and will if needed retain legal counsel, contingent on budget approval.

The meeting adjourned at 5:15 p.m.

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Attachments II

Date: 7/7/2019 4:53:48 PM Pacific Standard Time
From: **hrtoppel@aol.com**
To: **syljonboyd@gmail.com**, **gene.cameron@gmail.com**, **lgmartin@earthlink.net**, **lodel@verizon.net, jlee283@outlook.com**, **Hrtoppel@aol.com**

Hi All, Please respond to this e-mail and write INTO THE SUBJECT LINE: YES or NO or ABSTAIN, to indicate your vote on the Action Items list below by July 9. ---- With much appreciation, Haldis

Action Items:

- Cathi Ruddy and George Rosenberg will draft a letter from MKPOA to the Appellate Court outlining the adverse impact and damage to the Marquez Knolls community from the Appellate Court decision. Due no later than July 10. Preferably earlier.

- Attendees of the meeting will write personal letter to the Appellate Court outlining the adverse impact and damage to their property and their concern on the impact on the entire community. MKPOA will encourage Marquez Knolls residents and real estate brokers to also write such letters. Samples with the pertinent information and text will be made available. Send letters before July 10.
- MKPOA will circulate a survey, measuring support of the need and desire by Marquez Knolls residents for continued reliance on strong view protection CC&Rs.
- MKPOA may consider writing an Amicus Brief, outlining the adverse effect the Appellate Court decision, if left standing, will have on the Marques Knolls Community, and will if needed retain legal counsel, contingent on budget approval.

Note: The Action Items were approved unanimously on July 9.

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ATTACHMENT III

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Marquez Knolls Property Owners Association, Inc.

Presiding Justice Dennis M. Perluss
Associate Justice Laurie D. Zelon
Associate Justice John L. Segal
Associate Justice Gail Ruderman Feuer
COURT OF APPEAL OF THE STATE OF CALIFORNIA
Second Appellate District, Division Seven
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

July 9, 2019

Re: *Eisen v. Tavangarian*,
Case No. B278271

To the Honorable Court of Appeal, Second Appellate District, Division Seven:

The Marquez Knolls Property Owners Association, Inc. ("MPKOA") respectfully requests this Honorable Court to reconsider its decision in *Eisen v. Tavangarian*, B27871 due to the devastating adverse impact it would have upon the homeowners who reside within the Marquez Knolls community who have relied upon the view protection provisions of the CC&Rs. The Marquez Knolls is a residential community in the Pacific Palisades with spectacular views of the city, hills, and ocean and coastline extending south to the Palos Verdes Peninsula, also known as the "Queens Necklace."

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The MKPOA is a non-profit corporation which was originally formed approximately 65 years ago by the original developers, the "Lachman Family." Currently, the MKPOA represents the interests of over 1200 homes in the Marquez Knolls area. Approximately 630 homes are located in the original 21 tracts developed by the Lachman family. Of these, 20 tracts contain CC&R's with view protection language. Many of these CC&Rs are virtually identical to the CC&Rs applicable to the tract in which the Eisens reside. The purpose of MKPOA is to promote and encourage preservation of the beauty and healthful environment of the neighborhood by providing informative, educational and mediative activities for the benefit of residents. For more than 25 years, MKPOA has provided information on its website or informally regarding the CC&Rs applicable to Marquez Knolls homeowners and neighbors. It has also facilitated mediation among neighbors regarding view protection issues in hundreds of cases. MKPOA was amicus curiae in *Zabrucky v. McAdams (2005)* 129 Cal.App.4th 618, 28 Cal Rptr3d 592.

The education and mediations provided by MKPOA to neighbors since the 1990's - has been based upon the common understanding in the community that the intent of the original developers was to protect and guarantee to the original purchasers of their homes and to all subsequent purchasers that

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their views would be protected from obstruction. The intended protection stands whether interference is caused by vegetation or by teardown reconstruction, expansion or renovation of an existing house or additional structures added to the property. In other words, any change in the contour or silhouette of the house that unreasonably interferes with the views from other properties is deemed to be in violation of the CC&R's. Indeed, the Zabrucky majority concluded it would be "more 'just and fair' to adopt the interpretation of Paragraph 11 understood as the proper rule by the vast majority of homeowners in Marquez Knolls." (Zabrucky, 628) Since the development of these tracts in the 1950's through the present time, over 60 years, the owners of these homes with CC&Rs, found comfort that their views, investments and enjoyment of their property would be protected.

In fact, from 1995 through 2011, this association has been involved in approximately 125 mediations involving the view protection provisions of the CC&Rs applicable to these tracts and has facilitated resolution of all but a handful of these mediations. The main focus of the MPKOA in these mediations was to resolve these disputes and preserve the view protections described in the CC&Rs without the need for litigation. Many of these mediations involved paragraph 11 of the CC&Rs (identical to the Eisen tract) where neighbors were resolving disputes regarding obstructions caused by trees, landscaping, remodels and new construction.

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The MPKOA has consistently interpreted Paragraph 11, and the wording of "any structure," to apply to the remodel of an existing home or the construction of a new home. Many homeowners have limited their remodels to avoid unreasonably interfering with their neighbors' view in reliance on this interpretation.

The MPKOA, if provided the opportunity, would provide evidence that the original intent of the drafters of the CC&Rs was to protect the views of the owners in Marque Knolls, and that the intent to protect views against remodels of structures has been perpetuated in the community and acted upon by the community. The MPKOA is cognizant that the *Eisen* decision is in conflict with the *Zabrucky* decision and with long-existing practices and beliefs, which will clearly produce great uncertainty, turmoil and the potential loss of hundreds of millions of dollars of value to the existing homeowners as well as the loss of enjoyment of their properties. It almost certainly will lead to a dramatic increase in litigation, something the MKPOA has worked very hard to prevent. It is worth noting that the Eisen decision provides greater view protection to homeowners against landscaping and trees and no protection if a structure, whether a remodel or new construction, obstructs one's view. This result flies in the face of the intent of the drafters of the CC&Rs and long-standing practices in the community.

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The MPKOA respectfully requests this court to reconsider its decision and find that the *Zabrucky* interpretation was correct; or, in the alternative, decertify the decision. If this court determines that further evidence as to the intent of the original drafters is warranted, the MPKOA would seek to intervene as amicus curiae to assist the trial court in its findings on this issue.

Respectfully submitted,

/s/ Haldis Toppel

Haldis Toppel
President

Marquez Knolls Property Owners Association, Inc.
P.O. Box 1307, Pacific Palisades, CA 90272,
310 454-7678, **info@MarquezKnolls.com**

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ATTACHMENT IV

312 Pico Blvd. Santa Monica, CA 90405 ** 310 394 9831 ** Fax 310 943 3500
email rosario@oceanlaw.com

Court of Appeal
First District
Division Three
Presiding Justice, Peter J Siggins
Associate Justice, Carin T Fujisaki
Associate Justice, Ioana Petrou
350 McAllister Street
San Francisco 94102

July 5, 2019

AMICUS CURIAE LETTER SUPPORTING PETITION FOR TRANSFER TO COURT OF APPEAL
California Rules of Court 8.1006

Re: ***Hilaly, et al. v. Allen***
Case No. A157659
Appeal of Case No. CUD 17-658964
Judge Richard Ulmer

Dear Justices:

Action Apartment Association respectfully requests that the Court of Appeal transfer *Hilaly, et. Al. v. Allen* (Case No. A157659; CUD 17-658964) to the Court of Appeal and submits this amicus curiae letter in support of Plaintiffs and Appellants' Naser and Naseem Hilaly Petition.

Action Apartment Association, Inc., is a full-service trade association, representing apartment owners in the City of Santa Monica and throughout Los Angeles County. The organization's constituents consist of approximately 3,200 housing providers, which the group supports in judicial, legislative, and regulatory affairs. It was the plaintiff in *Action Apartment Association Inc. v. City of Santa* Monica (2009) 41 Cal.4th 1232; *Action Apartment Association v. Santa Monica Rent Control Board* (2001) 94 Cal.App.4th 587; Action Apartment Association also has filed amicus briefs in many cases dealing with housing law, such as *Drouet v. Superior Court* (2003) 31 Cal.4th 583.

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Many Housing Providers and builders resort to the Ellis Act to remove their properties from local rent control jurisdiction. The Housing Providers normally have different reasons than builders. What is not recognized is that the Ellis Act plays an extremely important role in the production of new rental housing. In most cases, a few older rent controlled units on a property will be "Ellised" and then demolished, and a much larger amount of new rental housing will be built on the same property. In Los Angeles for instance, it is not unusual for a 4 unit building to be demolished and 50 units to be built on site. The new housing is not necessarily exempt from rent control for new construction, either. See for instance, Government Code §7060.2 (d) — Ellis Act provision which allows local jurisdictions to rent control new construction built on Ellised property if rented within 5 years of date of withdrawal.

What is going unnoticed and unacknowledged is that without the Ellis Act, very little new rental housing construction will be built, because local jurisdictions do not allow owners to demolish rent controlled units, even to build new and more apartment units. Without the Ellis Act — and the state preemption which comes with it — there simply would be no new housing built.

Also, what is known but not discussed in any meaningful way, is the length of time it now takes to build rental housing. The delays caused by local jurisdictions' burdensome laws has reached great heights. In 1930 it took 13 **months** to build the Empire State Building in New York. — the building is 102 stories tall. It takes 3 years today to build a 5-unit apartment building in Santa Monica.

What *Hilaly v. Allen*'s holding does is to simply extend the time to complete an Ellis by at least one year, and thus extend construction time from 3 years to 4 years. This will increase the cost of construction by 25% over the previously expensive price. And *Hilaly v. Allen* now removes all

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certainty in the Ellis eviction process. Builders can no longer anticipate when they will be able to demolish to build new, *i.e.*, when the tenant will be required to leave. Any and all tenants can now raise the "change-in-terms" defense, play on the good graces of the juries to engage in "jury nullification." Indeed, the *Hilaly v. Allen* case shows an excellent example of jury nullification wrapped within a finding of parking space disputes. We must remember that a lost Ellis eviction means that the Owner must re-Ellis the property and give another 1-year notice to vacate; awaiting another jury trial on perhaps a new "change-in-terms" defense. The end of this saga is only limited by the ingenuity of the defense counsel. This "change-in-terms" defense will lead to the end of new rental housing construction.

Furthermore, *Hilaly v. Allen* misinterprets the language of the Ellis Act and creates an unsupportable "change-in-terms" defense. While the Ellis Act clearly allows senior and disabled tenants to extend their tenancy for one full year "on the same terms and conditions as existed" prior to the start of the Ellis Act process. (Gov't Code §7060.4, subd. (b)(1). The Act clearly does not allow the Tenant to negate the Ellis eviction because of disputes over terms and conditions of occupancy. This language does not create a defense to the Ellis eviction, but rather is meant to control the relationship between Owner and Tenant during the one-year Ellis extension.

The lower court's published opinion extends the clear wording of the Act beyond what it was intended to accomplish. The appellate division below, held that the Ellis Act provided Allen with a change-in-terms-of-tenancy defense. (Op. at pp. 9–10.) The court reasoned that the Act makes non-compliance with its provisions a defense to unlawful detainer. (Op. at p. 10, citing Gov't Code § 7060.6.) However, it should be remembered that in *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 599, our Supreme Court narrowly construed the only defense (retaliatory eviction) that has

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been recognized in the Ellis Act context to avoid enabling "tenants to force the landlord to remain in business indefinitely …." As the language in question reads when a tenant elects to extend his or her stay for the full year:

> *In that situation, the following provisions shall apply:*
> *(1) The tenancy shall be continued on the same terms and conditions as existed on the date of delivery to the public entity of the notice of intent to withdraw, subject to any adjustments otherwise available under the system of control.*
> *(2) No party shall be relieved of the duty to perform any obligation under the lease or rental agreement.*
> (Bolding added)

First, Civil Code §837 allows a Housing Provider to change the terms of tenancy upon 30 days prior notice. Thus, Ellis does not provide a "lock" on the existing rental terms and conditions. Local housing laws do not prohibit a Housing Provider from changing terms and conditions, but rather only outlaw the Housing Provider's attempt to evict a tenant for breach of a term of rental agreement which was term was created without the tenant's permission. Thus, as in *Hilaly v. Allen's* case, the parking dispute in question is not an alleged illegal alteration of a preexisting term of the rental agreement; but only a change or adjustment in terms allowed by local rent control laws.

Second, Ellis Act does not state that a breach of the terms of the rental agreement is a defense to the Ellis eviction. Rather, Government Code §7060.6 states:

> *If an owner seeks to displace a tenant or lessee from accommodations withdrawn from rent or lease pursuant to this chapter by an unlawful detainer proceeding, the tenant or lessee may appear and answer or demur pursuant to Section 1170 of the Code of Civil Procedure and may assert by way of defense that the owner has not complied with the applicable provisions of this chapter, or statutes, ordinances, or regulations of public entities adopted to implement this chapter, as authorized by this chapter*

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Note that this section does not state that the tenant's defense can be non-compliance with "any" provision of the law, but rather only "with the applicable provisions" of the Act. And what are the applicable provisions? Clearly the procedural provisions about notice and disclosures. However, what happens after proper notice is served on the local entity and the tenant cannot be a defense to eviction. Especially considering Ellis' strong language: *"compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease . . . ."*

Action Apartment Association urges this Court to act, so as to consider the important issues of law presented by this case.

Sincerely,

Rosario Perry

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ATTACHMENT V

GIBSON DUNN

Gibson, Dunn & Crutcher LLP

333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel 213.229.7000
www.gibsondunn.com

Theane Evangelis
Direct: +1 213.229.7726
Fax: +1 213.229.6726
TEvangelis@gibsondunn.com

July 17, 2019

Haldis Toppel
President
Marquez Knolls Property Owners Association
P.O. Box 1307
Pacific Palisades, Ca 90272

Re: Representation of Marquez Knolls Property Owners Association

Dear Haldis:

We are pleased to welcome Marquez Knolls Property Owners Association ("Marquez Knolls") as a client of Gibson, Dunn & Crutcher LLP. This letter and the attached Terms of Retention set forth the terms of our engagement.

You are retaining us to provide legal services to Marquez Knolls in connection with preparing an amicus letter urging the California Supreme Court to grant review of *Eisen v. Tavangarian* (Cal. Ct. of App. No. B278271) ("Amicus Letter").

We will endeavor to keep you informed of the progress of your matter and respond to your inquiries. You acknowledge the need to provide us with accurate and complete information and the need to cooperate and keep us informed of any developments related to our representation of you. We understand that our points of contact will be you (Haldis Toppel), Catherine Ruddy, and George Rosenberg, each of whom can provide direction to us. However, our only client will be Marquez Knolls—we do not represent any of its officers, members, or associated individuals.

Unless otherwise agreed in writing, the terms of this letter and the attached Terms of Retention, except as noted below, will also apply to any additional matters that we handle on behalf of Marquez Knolls.

Fees and Billing

As discussed, we will prepare and file the Amicus Letter for a fixed fee of $25,000, which will be paid in full by July 29, 2019. This fee arrangement applies only to the preparation of this Amicus Letter, and not any other briefing in *Eisen v. Tavangarian* or any other matters.

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Waiver of Prospective Conflicts on Unrelated Matters

We represent many other clients. It is possible that during or after the time we represent Marquez Knolls, other present or future clients will ask us to represent them in disputes or transactions with or involving Marquez Knolls (which includes any related persons or entities) as to legal matters not substantially related to our representation of Marquez Knolls. It is also possible that other future or present clients will ask us to take a position on their behalf on a legal or policy issue in matters not substantially related to our representation of Marquez Knolls that is inconsistent with, or contrary to, a position advocated by Marquez Knolls, or that Marquez Knolls may perceive as being directly or indirectly adverse to Marquez Knolls's interests. In such situations, the Firm could be tempted to balance the interests between its clients rather than vigorously assert a single client's interest on an issue. We do not believe, however, that our simultaneous representation of you in the present matter, and our representation of another client in any such substantially unrelated matter adverse to you, will compromise our ability to adequately represent you.

We wish to clarify our mutual understanding with Marquez Knolls as to the extent to which our present representation both will affect, and will not affect, our ability to represent other existing or future clients in other legal matters, whether or not Marquez Knolls (including related persons or entities) are adverse or otherwise involved in those matters. As a condition of our undertaking this matter, Marquez Knolls agrees that:

- we can continue to represent, or can in the future represent, existing or new clients in any matter, including litigation or other adversarial proceedings (which includes bankruptcy or insolvency proceedings, including instances where Marquez Knolls is a creditor or equity holder in such a proceeding) ("Other Matters"), so long as the Other Matters are not substantially related to our work for Marquez Knolls on Amicus Letter, even if those other clients' interests are adverse to Marquez Knolls's interests in the Other Matters;

- we can continue to take legal and policy positions on behalf of existing clients or future clients on matters substantially unrelated to our representation of Marquez Knolls that may be inconsistent with, or contrary to, the position advocated by Marquez Knolls or that Marquez Knolls may perceive as being adverse to the interests of Marquez Knolls ("Other Issues");

- we might obtain confidential information of interest to Marquez Knolls in these Other Matters or relating to the Other Issues that we cannot share with Marquez Knolls; and

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- Marquez Knolls waives any conflict of interest that might arise from the Firm's engagement in the Other Matters or with respect to the Other Issues, and will not seek to disqualify the Firm or any of the Firm's lawyers in or assert a conflict with respect to the Firm's engagements in the Other Matters or Other Issues.

If for any reason, Marquez Knolls's consent and waiver of potential conflicts is not effective in the circumstances, Marquez Knolls consents to our resignation from our representation of Marquez Knolls, and agrees to support a motion, if filed by the Firm, to withdraw from our representation of Marquez Knolls if resignation at that time is otherwise permissible under applicable professional rules. In that case, Marquez Knolls would need to engage, at Marquez Knolls's expense, separate counsel to represent Marquez Knolls's interests.

Of course, without Marquez Knolls's further prior written consent, we cannot and will not represent another client in a matter adverse to Marquez Knolls if we have obtained confidential information of a nonpublic nature from Marquez Knolls, as a result of our representation of Marquez Knolls, that, if known to the other client, could be used in the Other Matters by the other client to Marquez Knolls's material disadvantage, unless we have imposed in advance of that subsequent engagement an ethical screen that assures the preservation of Marquez Knolls's confidences.

Arbitration

We appreciate the opportunity to serve as your attorneys and look forward to a productive and mutually rewarding relationship. If you become dissatisfied with our charges or services, we encourage you to bring that to our attention immediately. We believe that most problems of this nature can be resolved through good faith discussion. In the event that we cannot resolve a dispute through discussion, we believe that binding arbitration offers a more expeditious and less expensive alternative than court action.

By signing this engagement letter agreement, you agree to binding arbitration of any dispute, claim or controversy regarding our services as described in the attached Terms of Retention. You are also agreeing that Marquez Knolls is waiving Marquez Knolls's right to a jury or court trial, and is waiving any right Marquez Knolls might have to collect punitive damages. This waiver of punitive damages applies only to the maximum extent permitted by law. If you do not wish to agree to arbitration, you should advise us before signing this letter. If you have any questions or concerns regarding the advisability of arbitration, we encourage you to discuss them with us, independent counsel, or your other advisors.

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GIBSON DUNN

Confirmation of Agreement

You should review and familiarize yourself with the attached Terms of Retention, which are incorporated into this engagement letter agreement. If this letter and the Terms of Retention accurately reflect your understanding of our agreement, please acknowledge your approval and acceptance of these terms by signing and returning to me the enclosed copy of this letter, along with the requested advance payment. I would be pleased to answer any questions you might have.

On behalf of Gibson, Dunn & Crutcher LLP, I look forward to working with you on this matter.

Sincerely,

GIBSON, DUNN & CRUTCHER LLP

Agreed to this 18 day of July 2019.

Marquez Knolls Property Owners Association

By: Haldis Toppel
Haldis Toppel
President

TE/cp

103396417.2

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ATTACHMENT VI

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GIBSON DUNN

Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel 213.229.7000
www.gibsondunn.com

Theane Evangelis
Direct: +1 213.229.7726
Fax: +1 213.229.6726
TEvangelis@gibsondunn.com

August 9, 2019

Chief Justice Tani Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Eisen v. Tavangarian* (No. S257181)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Marquez Knolls Property Owners Association, Inc., joined by the Pacific Palisades Residents Association, Inc. and Castellammare Mesa Home Owners, urge the Court to grant review of the Court of Appeal's published opinion in *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626. *Eisen* creates enormous uncertainty not only for homeowners in the Marquez Knolls neighborhood but for homeowners across the state, and if allowed to stand, will have negative economic consequences across California.[1]

As discussed below, *Eisen* holds that a Court of Appeal can disregard existing precedent and upend a rule of property—that homeowners and others have relied upon in making some of the biggest economic decisions

[1] The authors of this letter represents the Marquez Knolls Property Owners Association, Inc. The Pacific Palisades Residents Association, Inc. and Castellammare Mesa Home Owners have independently chosen to join this letter.

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in their lives—simply based on a change in court composition and a newfound belief that a previous decision was mistaken. This Court should grant review to clarify what circumstances justify a departure from stare decisis in a case involving real property, as well as the two additional issues raised by the Eisens in their petition for review.

I. Background

The Court of Appeal in *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626 examined covenants, conditions, and restrictions ("CC&Rs") applicable to two neighbors in the Marquez Knolls community in Pacific Palisades. Nearly 15 years earlier, the same division (Division Seven) of the Second District had examined the same key paragraph of the CC&Rs, paragraph 11, which states: "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." (*Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618, 622 (*Zabrucky*), italics added.)

Focusing on the phrase "or any structures erected," the Court of Appeal in *Zabrucky* held that the interpretation that was most "logical and supportable," "'just and fair,'" and best reflected the intent of the original drafters, was that paragraph 11 prohibits a homeowner from remodeling his home in a way that "unreasonably obstructed" the views from neighboring properties. (*Id.* at pp. 624, 628–629.)

This was a critically important ruling to homeowners, as *Zabrucky* recognized, because "much of the value of any property within" Marquez

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ATTACHMENT VII

Hi [Name]

Thank you very much for speaking with me about the *Eisen* decision. I have attached the letter to the California Supreme Court that our association's attorneys at Gibson Dunn plan to send to the Supreme Court on Thursday and that we very much hope you will join. (I apologize for the rush. Our lawyer has explained that this stage of the proceedings in the Supreme Court can move quite quickly, so we need to submit our letter this week.)

We think *Eisen* is a very important case for the Supreme Court to review, not only because it affects the character of our neighborhoods, but also because it creates instability for all of us. As I mentioned, and a recent article further explains (https://www.lawlawlandblog.com/2019/07/ccr-you-kidding-me-ca-appellate-court-rules-earlier-court-misread-restrictive-covenant-prohibiting-alterations-to-existing-homes.html), the decision is quite concerning to us because the Court of Appeal gave no weight to fact that it already decided this exact issue more than a decade ago, which many people relied upon to make significant financial decisions like whether to purchase the house or remodel it. See article below.

With Best Regards,

Haldis Toppel
President, Marquz Knolls Property Owners Assoc. Inc.
Pacific Palisades
310 663-1076

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CC&R You Kidding Me?: CA Appellate Court Rules Earlier Court Misread Restrictive Covenant Prohibiting Alterations to Existing Homes

By James Swearingen & Sarkis Haroutunian on July 11, 2019
POSTED IN CONTRACTS, LITIGATION, REAL ESTATE

In recent years Los Angeles has experienced an unprecedented wave of mega-mansion development, which has inevitably changed the aesthetic and character of some of the city's most iconic neighborhoods. In turn, some residents have sought aid from the courts to preserve the aspects of their communities that they cherish most. On June 20th, a California appellate court sided with development over preservation in a case involving a house renovation that obstructed a neighbor's prime ocean views.

In *Eisen v. Tavangarian*, a California appellate court reviewed the CC&R's of Marquez Knolls, a prominent Pacific Palisades community. The court chose not to enforce a restrictive covenant recorded in 1962 and instead ruled in favor of a neighboring property owner's free use of land. Paragraph 11 of Marquez Knolls CC&R's prohibits "any structures erected that may at present or in the future obstruct the view from any other lot."[1] The complaining neighbor prevailed at the trial court level when the judge found that various improvements to a newly-renovated $9.4 million home "unreasonably obstructed" the plaintiff's ocean views.

The appellate court reversed the trial court's decision. The appellate court framed the issue as a seemingly straightforward question: "Does paragraph 11 of the CC&R's…apply to alterations or renovations to ***existing*** homes?"

This is not the first time California courts have grappled with this issue in Pacific Palisades. In 2005, the same appellate court, in a case entitled *Zabrucky v. McAdams*, examined nearly-identical CC&R's of a neighboring tract in Marquez Knolls. That court held that paragraph 11 applied to ***any*** alteration or remodel of an existing dwelling that "may at present or in the future unreasonably obstruct the view from any other lot."

Over a decade later, the *Eisen* court made some alterations of its own, not to an existing structure, but rather to the existing precedent. The *Eisen* court bluntly stated that "[t]the *Zabrucky* majority misread paragraph 11" of the CC&R's. The *Eisen* court relied on the well-settled principle that "[u]nder California law a landowner has no right to an unobstructed view over adjoining property, and the

law is reluctant to imply such a right." While the court acknowledged that neighborhoods can create such a right through well-crafted CC&R's, it held that courts should interpret such restrictions strictly.

Specifically, in considering the enforceability of restrictive covenants like the Marquez Knolls CC&R's relating to view obstruction, "[i]t is a general rule [in California] that restrictive covenants are construed strictly against the person seeking to enforce them, and any doubt will be resolved in favor of the free use of land." Stated otherwise, there is no California common law right to a view and any CC&R's protecting a view will be narrowly construed.

Against this backdrop, and revisiting the earlier decision in *Zabrucky*, the court read paragraph 11 in conjunction with other provisions in the community's CC&R's, ultimately concluding that paragraph 11 restricts only building a new structure, not making alterations to an existing one. Unfortunately for this homeowner, and other Marquez Knolls residents, seeking to a curb major remodels and protect their views, neither the common law nor the CC&R's got the job done.

[1] In its entirety, paragraph 11 of the Marquez Knolls CC&R's 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." *Id.* at *2.

Article contributed by Sarkis Haroutunian and James Swearingen of Greenberg Glusker Fields Claman & Machtinger LLP.

Click on this link to read the *Eisen v. Tavangarian* case.

Click on this link to read the *Zabrucky v. McAdams* case.

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ATTACHMENT VIII

In the

Supreme Court

of the

State of California

GLENN EISEN et al.,

Plaintiffs and Appellants,

v.

ARDESHIR TAVANGARIAN et al.,

Defendants and Appellants

CALIFORNIA COURT OF APPEAL · SECOND APPELLATE DISTRICT · NO. E178271
SUPERIOR COURT OF LOS ANGELES · HON. CRAIG D. KARLAN · NO. SC121338

REPLY TO ANSWER TO PETITION FOR REVIEW

RICHARD B. MILLER, ESQ. (31137)
ATTORNEY AT LAW
802 El Cao Lane
Pacific Palisades, California 90272
(310) 459-2207 Telephone
(310) 459-1416 Facsimile

ROSARIO PERRY, ESQ. (55061)*
HIROKO J. USHIMARU, ESQ. (276436)
ISAAC ABA, ESQ. (319726)
ROSARIO PERRY,
A PROFESSIONAL LAW CORPORATION
512 Pico Boulevard
Santa Monica, California 90405
(310) 394-5831 Telephone
(310) 388-5733 Facsimile

Attorneys for Petitioners Glenn Eisen and Alison Eisen

COUNSEL PRESS (213) 680 2300

PRINTED ON RECYCLED PAPER

I. The Appellate Court Did Not Provide a Strong Justification To Deviate From the Stare Decisis Doctrine.

The Tavangarians allege that the Court of Appeal, by reconsidering a decision of another panel in the same division, did not even implicate the *stare decisis* doctrine. However, this self-serving contention undermines the impact of the Court of Appeal's decision to the Marquez Knolls community. The stare decisis doctrine encourages sticking to even wrongly-decided preceding authority to minimize confusion and enhance predictability and certainty in the judicial system. *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d, 287, 296. The fact that the Court of Appeal decided to reconsider the 2005 *Zabrucky v. McAdams* decision (129 Cal.App.4th 618) indicates that *Zabrucky* was not decided correctly. However, absent strong justification, the Court of Appeal is barred from deviating from precedent the preceding authority, even if it believes that it was decided incorrectly. *Kimble v. Marvel Entm't, LLC*, (2015) 135 S.Ct. 2401, 2409. ("Respecting stare decisis means sticking to some wrong decisions").

The Tavangarians attempt to hide the confusion in the law on the importance of stare decisis by conflating the issue of whether a Court of Appeal is *bound* by another panel with what *weight* it should give stare decisis. Just because the *Eisen v. Tavangarian* ((2019) 36 Cal.App.5th 626) court may not have been bound by *Zabrucky* does not mean it was free to give *Zabrucky* no weight whatsoever.

For example, this Court is not bound by its own decisions, but that does not mean it is free to disregard them whenever it disagrees with a prior conclusion. As explained just last year, this Court is not bound by its decisions, but is "particularly reluctant to overrule precedent when … '[d]oubtless many people' have entered into transactions in reliance upon

that precedent" and a "'rule of property' … encourages strict adherence to precedent." (*Samara v. Matar* (2018) 5 Cal.5th 322, 337.)

This distinction shows why *In re Marriage of Shaban*, (2001) 88 Cal.App.4th 398 and the concurrence from *Cedars Sinai Medical Center v. Superior Court* (1988) 18 Cal.4th 1, *Fudge v. City of Laguna Beach* (2019) 32 Cal.App.5th 193, and *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447 are themselves distinguishable from our case.

The issue raised by the Petition that requires this Court's guidance is what *weight* to give earlier decisions particularly in property cases, precisely when the court is *not* bound. And there is clear confusion on that question, as the Tavangarians concede through their silence. On one end of the spectrum is this Court's holding in *Sacramento Bank v. Alcorn* (1898) 121 Cal. 379 that no matter how "thoroughly [the Court] might now be convinced that the [existing] rule [of property] is erroneous, it should not be disturbed." (*Id.* at 383.) And on the other extreme end of the spectrum is *Eisen* and similar cases that hold a Court of Appeal can disregard existing precedent and upend a rule of property simply based on a change in court composition and a newfound belief that the previous court "misread" the operative legal document. (*Eisen*, 36 Cal.App.5th at 643; see also *Saucedo v. Mercury Sav. & Loan Assn.*, 111 Cal.App.3d 309, 315 ["With due apologies to the trial court and others who relied on our decision of the attorney fee question in *Pas v. Hill*, supra, 87 Cal.App.3d 521, we overrule that decision insofar as it is inconsistent herewith"].)

The Court should grant review to make clear that the Court of Appeal cannot disregard a rule of property simply because it now believes it was mistaken, and provide guidance on what is the proper role of stare decisis in property cases.

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ATTACHMENT IX-a Fado

William R. Fado
1336 Luna Vista Drive
Pacific Palisades, CA 90272
310-459-6620
billfado@msn.com

September 3, 2019

Chief Justice Tani G. Cantil-Sakauye
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *Eisen v. Tavangarian* (No. S257181)
In Support of "Petition for Review"

Dear Chief Justice Cantil-Sakauye:

Shocking, devastating and disheartening. That is how I would describe the decision of the Eisen Appellate panel to reverse the prior Appellate decision of Zabrucky. I purchased my home in the Marquez Knolls area of Pacific Palisades in 1973. The primary reason I purchased this particular home was because the property offered spectacular views of the city, ocean and mountains . You cannot imagine how much enjoyment I get from these views.

Here's why. Before I purchased my property I met with Mr. Ralph J. Yarro who was a senior officer of all the Lachman companies that built homes in Marquez Knolls. I asked Mr. Yarro if the views in the area were protected, He assured me that views were protected by the CC&Rs applicable to all properties. Subsequently, in a declaration Mr. Yarro made on April 4, 1999, this is what he declared about the intent, purpose and objectives of the CC&Rs that were put in place;

.

"Based on my 33 years of active participation in the business and operations of Marquez Knolls, Inc. as an employee and officer, and based on my close personal relationship with Melvin Lachman and Earl Lachman, the officers of Marquez Knolls, Inc. who signed the annexed tract restrictions, I acquired and have personal knowledge of the intent, purpose, and objectives of the annexed tract restrictions. **The intent, purpose, and objectives of the annexed tract restrictions was** to establish and maintain a community of single-family homes in Marquez Knolls; to prevent nuisance-causing uses of the lots in the community; and **to protect the scenic views of the sea and mountains available from lots and homes in the community**. To protect those views, paragraphs (1) and (11) in the annexed three tracts are identical. Paragraph (1) provides for one-story homes except where in our corporation's judgment as declarant of the tract restrictions, a two-story home could be constructed without detracting from the scenic views of other lots in the community. **Paragraph (11) prohibits other kinds of view-obstructing structures, trees and landscaping in the community."**

So there it is; no need to try to interpret what the intent of the developers was because Mr. Yarro has told us what their intent was. I pose this simple question. If you asked 100 people to read Mr. Yarro's declaration above, how many people do you think would say that the developers only wanted to protect view obstruction from trees and landscaping but did not want to protect view obstruction from man-made structures such as home-additions?

Because of my passion for view protection, I served on the board of the Marquez Knolls Property Owners ("MKPOA"), the local homeowners association, for more than 25 years. In 1995, I helped establish a CC&R Review Committee which I headed and subsequently personally mediated approximately 75 view disputes/issues between

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homeowners. I achieved excellent results; very few of these disputes resulted in litigation. It was one of the most fulfilling things I have ever done. The significant time I spent helped preserve the majestic views in our area and a wonderful harmony within our community was maintained. I also worked with the law firm that represented Zabrucky. In addition, I met with Mitch Ezer who was the prevailing party in Ezer-Fuchsloch, a landmark Appellate decision that related to view obstruction by trees in Marquez Knolls. Discussing this important case with Mr. Ezer gave me valuable insight regarding the thinking of the three justices that decided this case. So, although I am not an attorney, I have a very good understanding of the CC&Rs that apply to properties in our community.

I know you are going to receive a brief on the Eisen case with a request to be heard. I would like to explain why I think the Eisen case should be heard by your court.

1. Because of Eisen **we now have two opposing Appellate decisions that apply to the same CC&R issue for the same geographic area!** So where there was certainty, there is now uncertainty. **Unless these opposing decisions are resolved by your court, where there was little litigation, there will be a lot of litigation.**

2. The basic decision from Ezer regarding view obstruction by trees was that trees should not be allowed to grow above roof-top level. However, in its ruling, the Ezer court said that the language in paragraph 11 **"seems clearly designed to maintain the area above the one-story homes free and clear in order to preserve the view of the individual lot owner at various elevations."** So if you think carefully about the Ezer decision, you can see that it also **implicitly said that existing roof-tops should not be raised because doing so would obstruct views.** Essentially, Ezer used existing rooftop levels as the "horizontal marker" beyond which view obstruction was not allowed. This important case gave homeowners a clear guideline on what was, and what was not allowed.

3. **The Zabrucky decision is totally consistent with Ezer.** Zabrucky said that no construction shall be allowed that unreasonably obstructs views and this includes raising roof-tops.

4. **The Eisen decision is totally inconsistent with Ezer**. Eisen would contradict and jeopardize Ezer. Under Eisen, anyone could raise their roof-top even if doing so would obstruct the views of others. So think about this. If someone's trees were in violation of Ezer, because of the Eisen decision, that same party would be allowed to build an addition to the height of their trees and the same prior view obstruction would no longer be a violation. Does this make sense?

Together, **the Ezer and Zabrucky decisions were the two pillars of view protection for the entire Marquez Knolls area**. As a result of these two Appellate decisions, there were clear and consistent guidelines as to what constituted a violation of the governing CC&Rs. Essentially, **Eisen is a wrecking ball that will demolish our two pillars of view protection.** All the considerable efforts of the MKPOA to protect views and maintain harmony among neighbors are going to go down a "rat hole". It is a very disheartening situation because I know exactly what paragraph 11 in the CC&Rs is supposed to mean.

I also have a number of questions **regarding the ethics surrounding the Eisen decision**. These questions relate to Justice Perluss who **was the dissenting justice on Zabrucky**. I attended the oral Appellate hearing on Zabrucky. At that hearing Justice Perluss was very animated and passionate about his dissenting point of view. He firmly believed that the CC&Rs described in paragraph 11 did not prohibit construction that obstructed views. Justice Perluss ultimately wrote a very long opinion that dissented with the majority decision in Zabrucky. Please take the time to read it. Frankly, I'm confused;

Canon 3 of the California Code Of Judicial Ethics states **"A judge shall perform the duties of judicial office impartially, competently, and diligently"**. Canon 3 E (4) further states that;

(4) An appellate justice shall disqualify himself or herself in any proceeding if for any reason:

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(a) the justice believes his or her recusal would further the interests of justice; or
(b) the justice substantially doubts his or her capacity to be impartial; or
(c) the circumstances are such that a reasonable person aware of the facts would doubt the justice's ability to be impartial.

1. Based on his prior involvement in the Zabrucky case and strong dissenting opinion on Zabrucky, I do not think **a reasonable person would have allowed Justice Perluss to be on the Eisen panel and vote on the very same CC&R issue again.**

2. My understanding is that the panel for an Appellate case **is selected randomly** within a district. There are 8 panels in a district and 4 justices per panel and 3 justices hear a case. It's hard to believe that the panel with Justice Perluss was randomly selected for Eisen. It's also hard to believe that the selection of Justice Perluss as one of the three justices on the panel was just a coincidence.

3. Once Justice Perluss' panel was selected for Eisen, **because of his prior dissenting opinion on Zabrucky on the very same issue, shouldn't he have recused himself from hearing the Eisen case?**

4. Because of his prior dissenting opinion on Zabrucky on the very same issue**, was it appropriate to allow Justice Perluss to be the presiding justice on Eisen?**

In summary, **the Ezer and Zabrucky Appellate decisions are consistent** and served as the pillars of view protection for Marquez Knolls. Because of these two decisions, a wonderful spirit of harmony now exists in the Marquez Knolls. **Eisen contradicts the two landmark cases of Zabrucky and Ezer**. Eisen states that trees in a given physical spot are considered an obstruction of views but an addition in the very same spot is not. It's nonsensical! I further believe **there are legitimate and serious ethical questions about the Eisen decision because of the involvement of Justice Perluss.** Respectfully, the ethical questions alone justify your court hearing this case. "Lady Justice" is supposed to be blind. I do not believe she was blind in Eisen.

We now have **contradictory opinions on the same view protection CC&R in the same community!** This is certain. If the Eisen decision remains in place, the community of Marquez Knolls will be devastated. Developers will run rampant. Mansionization will occur. Views will be lost. Litigation will become common, clogging courts that are already badly overloaded. **Hearing the Eisen case is the only way to resolve the current uncertainty caused by these two contradictory Appellate opinions and prevent the unnecessary litigation that will occur if this case is not heard. A hearing by your court is the only way to ensure that this important CC&R issue will receive a fair hearing that no one can question.** It would mean a lot to our community and the credibility of our judicial system if the petition for hearing this case is granted.

Respectfully,

William R. Fado
Former President - Marquez Knolls Property Owners Association
Former Chairperson - Marquez Knolls Property Owners Association - CC&R Review Committee

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ATTACHMENT IX-b Rosenberg

August 2, 2019

Chief Justice Tani Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Eisen v. Tavangarian* (No. S257181)

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I purchased my home in the Marquez Knolls community in 1997. I had visited the area and had been invited to the home of Lloyd McAdams which is just down the street from my present home. I marveled at the incredible views from his home. (Incidentally, that was the home involved in the *Zabrucky* case!) I had told my then girlfriend and real estate agent who had sold the home to McAdams and his wife, Heather Baines, that if I could ever afford to buy a home with such a view, that would be my dream house!

In early 1997, my home which is located at 1130 Vista Grande Drive came on the market. I saw it and even though it was more than I could really afford at the time, I saw it as a once in a lifetime opportunity. I recall walking outside and saw a 270 degree panoramic view extending from the Pacific Ocean to well past downtown L.A.:

The view was unobstructed and I was assured that the CC&Rs, which I reviewed, protected my unobstructed view. I relied on the CC&Rs in making the biggest investment of my life, recognizing that my investment in my home would only go up should I need to sell it in the future. I made an offer to buy that home on the spot without even going inside the house.

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Between 2005-2007, I remodeled my home, expending well over $1 million. My wife and I designed the remodel to maximize the view by creating open interior spaces utilizing floor-to-ceiling windows and glass sliding doors. I was confident that this additional investment in my home would be protected because of *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618 (*Zabrucky*). It was a published decision that enforced the view protections in the CC&Rs, and the decision explicitly recognized that "much of the value of any property within" Marquez Knolls "depends on the quality of the view" and "[t]o significantly obstruct any homeowner's view of the Pacific Ocean is to depreciate the economic worth of their property—often by [then] several hundred thousand dollars—as well as dramatically reduce their enjoyment of the home they bought and live in." (*Id.* at pp. 623–624.)

As a practicing attorney, I would have never expected the Court of Appeal to adopt the *Zabrucky* dissent more than a decade later, simply because the court now believed it was better reasoned. I thought stare decisis would require, at a bare minimum, a significant change in circumstances to justify departure from precedent that so many people had financially relied upon.

My reliance on *Zabrucky* not only led me to make a huge investment in my home, but it also impacted the remodel itself. I restricted my remodel to conform to the CC&Rs. In fact, when my neighbors saw the proposed new roof line to my house, I agreed to reduce the height by six inches to accommodate their concerns that the new roof line would obstruct their views. That modification caused me to redo my plans and lose crawl space for lighting and HVAC which added $30,000 to my cost. I did this in reliance on the CC&Rs and *Zabrucky*.

If *Eisen* stands, the value of my home will be significantly and adversely impacted. I would have never purchased this home or expended the substantial amount to a remodel if I knew that one day my view could be obstructed and that the CC&Rs would not protect me. The enjoyment of our property is directly related to having this spectacular view which we enjoy from inside and outside our home on a daily basis.

I respectfully request this Court grant review.

Sincerely,
George Rosenberg

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ATTACHMENT IX – c Toppel

My name is Haldis Toppel, and I am President of the Marquez Knolls Property Owners Association (MKPOA). I previously served as President for 4 years starting in 2011, and my late husband of 41 years, Kurt Toppel, served as President for several terms over a 10-year period between 1994 – 2005. He led the re-establishment of the current MKPOA in 1995 with the specific intent to continue to support and protect the community's CC&Rs with special concern for view protection.

I have extensive and first-hand knowledge of the history of MKPOA, the common understanding of the application of the CC&Rs, and the expectations of the approximately 600 homeowners and their families covered by view protection CC&Rs.

With this background it stands to reason, that my husband and I applied the common understanding and interpretation of the CC&Rs with great care and with respect for our neighbor's views when we planned the remodel of our house in 1982. This included the addition of a second story above our stand-alone garage, the addition of a guest room behind the garage, and an expansion of our bedroom. This added approximately 1,000 sq ft. of living space and provided for an almost 360 degree unobstructed view of the City, the mountains and the sea from the second story above the garage.

Never in our wildest dreams did it occur to us, our neighbors, the Board of Directors of MKPOA, or any outside observer that a second story above our standalone garage was not considered part of our "house" and would not be included in view protection by the CC&Rs, or that the guest room addition behind the garage, or the bedroom expansion of the main house would be exempt from view protection in any way. Consequently, we took great care with each addition to discuss it with our neighbors on lower and upper Enchanted Way and El Oro. Many homes are well beyond the 500 ft radius commonly used for notifications. We visited perhaps 30 homes that all could see our house from above or at street level. We modified the design, changed the roof line, and listened to our neighbors wishes on the shape, material, and color of the newly covered roof of both the house and the garage structure at significant expense to us, in order not to "detract" from the view of others.

Over the last 50 years many homes in our neighborhood have been modified. Not one home on our street exists today exactly as it was built by the original developer (Lachman). Yet, over the years we continued to share the enjoyment of our own views with that of our neighbors and we were grateful for the courtesy, respect, and consideration we all extended to each other in the application of the view protection CC&Rs as we understood them.

I am now 77 years old. I have paid my dues to the workforce both in the private and public sector, to my family, and by serving my community in many different capacities beyond MKPOA. My endurance as waned, and I am looking forward to a restful retirement for the few years I have left. I no longer have the energy to relocate or to remodel in response to a potential view obstruction of my treasured vista which brings on a smile every morning at a magnificent sunrise, and a soothing calm at night when I can watch the City lights or the jets descending towards LAX.

I beg you, please grant review of *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626 to restore my confidence and that of our entire community in a tranquil future.

With much respect,

Haldis Toppel

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ATTACHMENT IX -d Ruddy

Catherine Hunt Ruddy
671 Enchanted Way
Pacific Palisades, CA 90272

Chief Justice Tani Cantil-Sakauye and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Eisen v. Tavangarian*

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I am writing to request a hearing in the above-referenced case. The existing opinion of the Court of Appeals unfairly changes long-standing property rights in our neighborhood, prejudicing existing homeowners who relied on the community understanding of the intent of the CC&Rs and on pre-existing case law.

In 2004, I purchase a small, ugly house in Pacific Palisades with an expansive view of Santa Monica Bay, Catalina, the Santa Monica mountains and city lights. I understood that the view was protected by CC&Rs that prevented neighbors from remodeling in a way that might interfere with that view. I also understood that I would be unable to remodel my ugly house in a way that might interfere with my neighbors' views. The value of the house to me was almost entirely in the view. I planned to turn my back on the house and look at the view until I could afford to update the house.

Shortly after purchasing the house, one of my neighbors sent me an appellate decision enforcing the CC&Rs, along with a request that I remove a palm tree. I had the tree removed.

I began planning a remodel and revised my plans repeatedly to avoid interfering with my neighbors' views. I eliminated plans for a pop-up gable that would have improved curb appeal but might have interfered with two neighbors' views. I eliminated my architect's plans to change the direction of the roofline in the back of the house that would have interfered with a view from my immediate neighbors' kitchen window. I eliminated the proposed expansion of ceiling space in my master bedroom. In 2012, I then spent over $350,000, all of my savings outside my retirement accounts, to execute the revised plans.

I am now retired and do not have the assets to engage in a building war to maintain my view if my neighbors are allowed to remodel in a way that is different from the rules in effect in 2012. At that time, Zabrucky v. McAdams, (2005) 129 Cal.App.4th 618 was controlling. Please consider the effect on homeowners who relied on existing law before you allow the Court of Appeals to change the rules.

Respectfully submitted,
Catherine Hunt Ruddy

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ATTACHMENT X

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312 PICO BLVD. SANTA MONICA, CA 90405
TEL 310 394 9831 FAX 310 388 5733 EMAIL ROSARIO@OCEANLAW.COM
ROSARIO PERRY, A PROFESSIONAL LAW CORPORATION

August 19, 2019

Honorable Tani Cantil-Sakauye, Chief Justice and Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102

Re: ***Eisen, et al. v. Tavangarian, et al.***
Supreme Court of California Case No. S257181
Second Appellate District Court Case No. B278271
Request for Depublication
(Cal. Rules of Court, rule 8.1125(a))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Plaintiffs, Respondents, and Cross-Appellants Glenn Eisen and Alison Eisen respectfully urge this Court to order the Court of Appeal's opinion in *Eisen v. Tavangarian* (2019) 36 Cal. App. 5th 626 not to be published in the official reports. The Eisens have timely petitioned this Court to review *Eisen*, and seek depublication as alternative relief.[1]

The Eisens' Interest.

The Eisens are the Plaintiffs, Respondents, and Cross-Appellants in *Eisen*.

Why Depublication Is Necessary.

I. Depublication Is Necessary Because *Eisen* Is Wrongly Decided.

The *Eisen* decision creates severe conflicts with the plain meaning of "structures" in the CC&Rs, and disregards long-established view protections that were affirmed in *Zabrucky*, and which were relied on by Marquez Knolls homeowners since the 1960s. The Court of Appeal, by its own analysis of sentence structure and word placement in

[1] Supreme Court Case No. S257181. A copy of the *Eisen* decision is attached as to the Eisens' Petition for Review.

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312 PICO BLVD. SANTA MONICA, CA 90405
TEL 310 394 9831 FAX 310 388 5733 EMAIL ROSARIO@OCEANLAW.COM

Paragraph 11, applied a rule of construction, "*noscitur a sociis*," rather than the "plain English" interpretation that the *Zabrucky v. McAdams* (2005) 129 Cal.App.4th 618 majority adopted, despite the fact that for 57 years, since the inception of the subdivision, the community has applied the "plain English" interpretation of "any structures," and despite the fact that approximately 26 other cases, including 5 published decisions from the California Courts of Appeal, have followed *Zabrucky*'s "plain English" interpretation of "any structures" or promoted the policies that the *Zabrucky* court laid out to interpret restrictive covenants. *Zabrucky* has been in place for almost 15 years, and has been relied on by hundreds of homeowners and in countless transactions. However, the interpretation of "any structures" by the *Eisen* court is too narrow because Paragraph 1 outlaws all outbuildings, regardless of view obstruction.

Paragraph 1 of the CC&Rs states:

> *"[N]o 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 . . ."* [Emphasis added].

Paragraph 11 of the CC&Rs states:

> *"No fences or hedges exceeding three feet in height shall be erected or permitted to remain between the street and the front setback 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 . . ."* [Emphasis added].

Paragraph 1 prohibits any structure that is not a single family dwelling or a private garage, as it states that:

> *" . . . 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 not more than three cars; 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."* [Emphasis added].

It follows that "outbuildings" are not permitted on any property under Paragraph 1 of the CC&Rs, as the only structures permitted are a single family dwelling and a private three-car garage. Thus, the meaning of "any structures" in Paragraph 11 cannot be limited to "outbuildings" which are already prohibited under Paragraph 1. The purpose of

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ATTACHMENT XI

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Disposition

EISEN v. TAVANGARIAN
Division SF
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Case Citation:
none

Date	Description
09/11/2019	Petition and Depub. request(s) denied

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