Date: 11/29/11
Submitted in PLUM Committee
Council File No: #11
Item No: CF 11-1453
Deputy: Comm from Public

Robina Royer
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Los Angeles, California 90034

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RE: Centinela Loft ~ Appeal to LA City Council PLUM Committee
Case No. ZA-2009-3395-ZV-1A, Reference File 11-1453

Via E-mail

Gentlemen:

I am writing to you in support of the appeal to overturn the variance granted by the West Los Angeles Planning Commission with regard to the loft at 3544 Centinela Avenue. As a long time resident of West Los Angeles and homeowner in the area, I am deeply concerned about this decision and the precedent it may set.

I am sure you will receive many letters from local homeowners decrying the decision which approves the variance and opens the door to new development – all of which raise legitimate concerns. No one in the community wants to run the risk of Centinela Avenue becoming the next Wilshire Corridor. No one wants to open the door to developers who would love to put in sky rises with beautiful ocean views, at the expense of long time hillside residents.I am confident that others will be making those points far more eloquently than I.

Instead, I would like to focus on a concern that is even more fundamental. The Planning Commission's decision unleashes a very dangerous precedent and one that should concern every citizen of Los Angeles. Essentially, it says that if you manage to dupe the City into issuing a permit based on either fraudulent statements or misrepresentations, the City then forfeits its right to pull the permit upon discovery of the fraud or misrepresentation.

The campaign to build the Shapendonks' loft was very well orchestrated from the outset. The record shows that they deliberately withheld critical information about the nature of the loft from their neighbors. Not only were there numerous violations of policy and procedure in notifying other Centinela Crest Homeowners about the loft, but the other residents were shocked when construction breached the roof. Emergency meetings were called, one of which is partially recorded. You can hear the outrage and concern expressed by several residents and the accusations of lies and misrepresentations. I understand that a summary of the recording, as well as the recording itself have been submitted to this body. [1]

Bear in mind, that at every turn, the Shapendonks were guided by a professional contractor and architect, licensed in the State, who knew – or should have known – the city laws and regulations pertaining to such construction. Architect Michael Kent, with all of his experience and professional acumen, was intimately familiar with the zoning regulations and requirements.

When, in the permitting process, the Shapendonks were advised that the loft be "No higher than exist'g parapet," Architect Kent knew exactly what this meant. As is its practice, the inspector of Los Angeles Department of Building & Saftey (LADBS) specifically noted this on the loft plans that were approved by the City. There can be no mistaking that notation.

Nonetheless, the Shapendonks proceeded to construct the loft exactly as THEY wanted it – and in flagrant disregard of the LADBS mandate.

When they sought final approval of the loft, they and their architect represented to the City that it had been built according to plan. Nothing could be further from the truth. Not only does the loft exceed the tallest parapet by several feet, but it sports a large domed skylight that was not noted in the original plans. At night, the domed skylight is often brightly lit, disturbing the views of surrounding neighbors.

Once LADBS realized that the loft was in violation of the height limitation imposed by the Q condition, it issued a notice of intent to revoke the permit. The Shapendonks' arguments in support of their variance can be boiled down to two points:

1. You granted us a permit and we've relied on that, therefore you can't take it away now.
2. It would be an economic hardship for us to remove or modify the loft.

The Shapendonks' misrepresentations did not end with the permitting process. The case was assigned to Sue Chang, one of the most thorough and well-respected zoning administrators in the City. Administrator Chang held a hearing last spring where the Shapendonks, Architect Kent and their counsel appeared as well as other members of the community. As noted on p. 10 of her report, the Shapendonks submitted to Administrator Chang the original building plans that were conspicuously MISSING the LADBS mandate of "No higher than exist'g parapet." Given their previous actions, omissions and misrepresentations all of which are fully documented, it is difficult to believe this was an oversight. In any event, Architect Kent – the professional guiding the Shapendonks at every step – must have known that this was

[1]Despite this recording, the Shapendonks continue to tell the City that when they first proposed the loft, none of their neighbors objected.

misleading – or if the did not, then he was professionally incompetent and should be held responsible.

Fortunately, Administrator Chang was able to quickly discern what was going on. In issuing her very thorough ruling, she identified the five distinct criteria that the Shapendonks would have to meet in order to be awarded a variance:

> **CRITERIA 1: That strict application of the provisions of the Zoning Ordinance would result in practical difficulties or unnecessary hardships consistent with the general purpose and in intent of the zoning regulations.**
>
> **CRITERIA 2: That there are special circumstances applicable to the subject property such as size, topography, location or surroundings that do not apply generally to other property in the same zone and vicinity.**
>
> **CRITERIA 3: That such variance is necessary for the preservation and enjoyment of a substantial property right or use generally possessed by other property in the same zone and vicinity, but which, because of such special circumstances and practical difficulties or unnecessary hardships, is denied to the property in question.**
>
> **CRITERIA 4: That the granting of such a variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the same zone or vicinity in which the property is located.**
>
> **CRITERIA 5: That the granting of such variance will not adversely affect any element of the General Plan.**

In order to prevail on the variance, the Shapendonks needed to satisfy all five of the above criteria. Legally, it is not enough to satisfy four of the specified criteria, and be lacking in the fifth. In this case, however, the Shapendonks failed to satisfy a single one of the criteria – and therefore, as a legal matter, Administrator Chang was required to deny the variance.

The Shapendonks appealed Administrator Chang's ruling and the matter was submitted to the West Los Angeles Planning Commission (the "Planning Commission").

This brings me to my second major concern about the way in which this matter has been handled. As citizens, we are entitled to responsible and reasonable city services. At a minimum, this means that when we appear before a body designed to handle grievances, that the city officials be alert, attentive and engaged as well as objective – and possess a reasonable knowledge of the law.

However, this was sadly, not the case at the June 1, 2011 hearing before the Planning Commission. On the one hand, there was Commissioner Lee, who according to several attendees at various times had his head in his arms, appearing to be half asleep, and who at

one point said dismissively "I don't even know why we're here." Another Commissioner, referred to the entire situation as a bit of "a Peyton Place." [2]

And most astonishingly, none of the Commissioners had a reasonable knowledge of the applicable law! Commissioner Donovan, a licensed attorney – who in 2008, launched a vigorous campaign to impose a Q condition on his own neighborhood – certainly should have known better. Yet at various times, he raised the issue of "economic hardship" – even though by law, this is expressly NOT a consideration. In fact, Zoning Administrator Chang attempted to school him on the law regarding economic hardship three separate times.

Other commissioners made comments evidencing a remarkable unfamiliarity with the governing law – to wit, that the loft is not "the only thing sticking out on the roof" or that the "chimney is part of the building." One Commissioner even went so far as to state that while Administrator Chang had prepared a thorough analysis in her decision, he did not agree with the law, and therefore, was not bound to enforce it.

This is all rather unbelievable, so I encourage you to read the file thoroughly and to listen to the recording of the Planning Commission hearing so that you may see for yourselves that this is actually what happened.

The Planning Commission then went on to contort language to jerry rig some basis for a finding in each of the five criteria – all of which are patently bogus. And ironically, Administrator Chang will now be forced into the ridiculous position of having to defend a decision foisted upon her – one that she does not agree with, and which is fully contradicted by the evidence on file.

We are now left with the inescapable conclusion that if Angelenos want to circumvent the law and zoning requirements, all they need to do is misrepresent their plans (and/or erroneously claim that the building was constructed as per the approved plan) in order to persuade the City to unwittingly approve the construction. They can then apply the circular reasoning that the Shapendonks do here. With permit in hand, these unethical citizens are forever protected from any attempt to revoke their permits because – they have a permit!

The Planning Commission's ruling sets a very dangerous precedent and one that will rip the very fabric of our society. We all abide by social contracts that motivate us to be honest and act in good faith in our dealings with one another. The Shapendonks broke that contract when they initially lied to their neighbors, and again when they lied to the City and misrepresented that the loft had been built according to the plans as approved by the City.

This brings us to the second argument that the Shapendonks have, which relates to their claim of economic hardship. The law is very clear that economic hardship is NOT a valid rationale for

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[2] This is most likely in reference to the allegations made by the Shapendonks in the zealous smear campaign that they have launched against one co-owner at Centinela Crest, blaming her for all of their zoning problems. Of course, those in the community are well aware that having neither the law nor the facts on their side, the Shapendonks are so desperate to preserve the loft, that they think nothing of besmirching those who were tasked by the other owners to handle the loft situation on their behalf.

approval of a variance. Nonetheless, Commissioner Donovan kept raising this issue during the hearing, seemingly incredulous at the actual state of the law. As one of the other commissioners pointed out, using economic hardship as a basis for granting a variance only opens the door for someone to build something truly awful but then refuse to fix it because it would too costly to do so.

In these dire economic times, I understand that the last thing the City wants to do is to cause citizens to incur needless costs – and in addition, the City wants to avoid a lawsuit from the Shapendonks if they revoke the permit. But make no mistake; the Shapendonks with the guidance of a professional architect and contractor, are entirely responsible for creating this situation. It was their decision to build the loft. It was their decision to lie about the loft to neighbors, thus creating an uproar of dissent. It was their decision to flaunt the LADBS mandate that in order for the loft to be permitted, it must be lower than the existing parapet. And it was they – or at the very least, their architect – who knowingly submitted the incomplete plans to Administrator Chang at the Zoning Commission hearing in hopes of duping her as well.

But the lies do not stop there. At the June 1st Planning Commission hearing, the Shapendonks represented a willingness to do whatever was necessary to make this situation palatable to the neighborhood. This included putting an interior covering in place so that the light would not disturb the views of hillside neighbors and others who object to the bright ambient light. Despite their fervent promises, the Shapendonks have done no such thing. In fact, the skylight continues to be lit regularly for the entire neighborhood to see.

From the beginning, the Shapendonks have been thumbing their noses at the entire community, their neighbors and the City. Their apparent modus operandi has been to say and do whatever is necessary to get their way, and then proceed to do whatever they really wanted to do all along. Had they any real concern for the community, they would have been open and honest about the nature of the loft; they would have applied for a variance before beginning construction – rather than waiting until years later after the City realized the building was not built as mandated by the permitted plans.

This above all, is a matter of trust. We want to be able to trust our neighbors and trust our government to act in good faith and to apply the law objectively. For all of the reasons articulated in Administrator Chang's original decision, the loft permit should be revoked. The appellate brief outlines the numerous errors and abuses of discretion in the Planning Committee's decision.

The Shapendonks should be required to either remove or modify the loft so that it meets the Q Condition on height limitations. Given that they were guided throughout this process by Architect Kent, he certainly has played a huge role in this entire nightmare. Perhaps the most reasonable and fair resolution would be for Architect Kent to greatly reduce the costs – or even donate – his services to a modification of the loft. In that way, the Shapendonks would not be out any additional funds, would be able to use the loft to the permissible height, and would not disturb their neighbors. The variance would be denied, the Q Condition would remain intact and not vulnerable to new development that would thwart the General Plan. And the City would be able to put this matter to rest.

Finally, I want to call your attention to 3 items:

1. "Zone Defense" an article that the Shapendonks' own counsel, James Repking published in the July-August 2009 issue of *Los Angeles Lawyer Magazine*. The article states in pertinent part:

   [Referencing landmark California Supreme Court cases, *Broadway Laguna Homeowners v. Permit Board of Appeals* and *Topanga Association for a Scenic Community v. County of Los Angeles*] In these decisions, the supreme court expressed its concern that if variances were routinely granted without satisfying the legal prerequisites, inferior administrative boards, such as planning commissions, could undermine the legislative role of a city council or board of supervisors by essentially rewriting the zoning code on an ad hoc basis.

   A copy of the full article is attached for your reference.

2. In 2008, Commissioner Tom Donovan, vigorously fought to enforce a Q Condition in his own neighborhood. Please see the attached WLANC (West Los Angeles Neighborhood Council) Alert that Donovan appears to have taken the lead on. I am curious – why was the Q Condition so important in his neighborhood, yet he was so dismissive of a Q Condition just down the street?

3. The California Appellate Court decision, *Clear Lake Riviera Community v. Robert Cramer*, 182 Cal. App. 4th, 459, 2010 which concerned a homeowner who knowingly built his home in violation of the height requirement. The court stated that:

   If the Cramers were permitted to use the fait accompli of their home's completion to avoid enforcement of the height guideline, the Association would effectively lose the ability to enforce any of its guidelines. Members could build their homes in any manner they pleased, arguing afterward in response to an action to enforce the guidelines that compliance would be unreasonably expensive.

   The same can be said in this case – only this time it's the City rather than an HOA. If the Shapendonks can say it's too expensive to modify the loft, then the City is hamstrung from enforcing its own zoning laws. Don't let this happen here. I implore you to read all of the documentation and am confident that when you do, you will reinstate Zoning Administrator Chang's original ruling to deny the Shapendonks' variance.

Sincerely,

Robina Royer

Cc: Councilman Bill Rosendahl
Enclosures

MCLE ARTICLE AND SELF-ASSESSMENT TEST

By reading this article and answering the accompanying test questions, you can earn one MCLE credit.

To apply for credit, please follow the instructions on the test answer sheet on page 33.

by JAMES R. REPKING and KATHRYN J. PARADISE

DEFENSE

Developers should consider more legally defensible alternatives to zoning variances

Property owners or project proponents may be lulled into complacency when their local planning department tells them, "Don't worry about that zoning code requirement. We will just give you a variance." However, this statement actually can be more dangerous than comforting. While a variance may be easy to attain if a project enjoys political support, it can be difficult to defend if challenged in court.

The requirements for variances under California law are very strict. As a result, variance approvals are often overturned in litigation due to insufficient findings or a lack of relevant evidence to support the findings. A project opponent may seize upon the project proponent's reliance on a variance as a weakness to be exploited in the opponent's efforts to overturn the project. Therefore, project proponents—as well as engineers, planners, and lawyers—must 1) be mindful of the strict requirements for variances and their associated risks, 2) carefully craft variance findings to meet the applicable legal standards, and 3) consider alternatives to a variance that are more defensible if challenged.

A variance is a safety valve preventing a property from becoming unusable if the zoning code were strictly applied. It protects against an unconstitutional taking and allows the owner to enjoy the benefits afforded to other properties in the applicable zone.[1] One typical use of a variance is to provide relief from design or development standards—such as height, density, setback, floor area ratio, parking, or other requirements—if those standards would prevent a property owner from using the property at issue.

Some jurisdictions may grant a variance to allow a land use that would otherwise be prohibited, such as a commercial use in a

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residential zone. This type of variance is referred to as a use variance. Charter cities[2] can approve these variances if permitted by their charter and zoning code.[3] In contrast, state law prohibits a general law city or county from granting use variances.[4]

Over the past four decades, case law addressing variances has evolved considerably. Prior to the mid-1960s, courts generally deferred to agencies' decisions and routinely upheld variances. Indeed, as of 1966, no reported case had ever reversed a variance grant.[5] However, this all changed with the California Supreme Court's landmark decisions in *Broadway Laguna Homeowners Association v. Board of Permit Appeals*[6] and *Topanga Association for a Scenic Community v. County of Los Angeles*.[7]

In these decisions, the supreme court expressed its concern that if variances were routinely granted without satisfying the legal prerequisites, inferior administrative boards, such as planning commissions, could undermine the legislative role of a city council or board of supervisors by essentially rewriting the zoning code on an ad hoc basis.[8] Therefore, the court announced new, more stringent standards for variances to ensure that variances are the exception rather than the rule. Departing from the deferential treatment applied in earlier cases, the court stated that judicial review of variances could no longer be "perfunctory or mechanically superficial."[9] Instead, the court required agencies to adopt written findings, supported by substantial evidence in the record, that demonstrate compliance with each of the statutory criteria for a variance.

Required Findings

State law requires specific findings for granting a variance. For general law cities and counties, the State Planning and Zoning Law[10] mandates that a variance may be granted only "when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification."[11] Charter cities may adopt their own standards for variances;[12] however, most jurisdictions have adopted requirements that mirror state law.[13] Other typical requirements are that the variance be consistent with the purpose and intent of the zoning code, consistent with the general plan, and not injurious to the public or surrounding properties.[14]

Generally, the findings for a variance must meet a three-prong test. Applicants must show that 1) they will suffer practical difficulties and unnecessary hardships in the absence of the variance, 2) these hardships result from special circumstances relating to the property that are not shared by other properties in the area, and 3) the variance is necessary to bring the applicants into parity with other property owners in the same zone and vicinity.

The first finding, the hardship prong, generally is evaluated based on economics and whether the property can be put to "effective use" without the variance.[15] A variance is not intended to be used for the purposes of convenience or to increase the value of a property. If a property can be put to effective use, consistent with its existing zoning, the fact that a variance would make the property more valuable or increase the income of the owner is immaterial.[16]

The Second District Court of Appeal addressed the hardship prong in *Stolman v. City of Los Angeles*. The variance applicant in *Stolman* operated a gas station in Santa Monica Canyon.[17] The property was zoned for single-family uses only, but the gas station—which had been in operation since 1925—was grandfathered as a legal nonconforming use. The applicant began detailing cars, and the city cited the applicant for illegally operating a car wash. In response, the applicant requested a variance for the detailing services, which the city approved.[18]

Nevertheless, the court overturned the variance based on a lack of hardship justifying the variance. The court viewed the key issue as whether the car-detailing operation was either so crucial that the property owner would "face dire financial hardship" without the variance, or the owner sought to provide additional services simply to make the gas station more profitable. Holding that the evidence in the record was insufficient to support a finding of financial hardship, the court noted that although the applicant represented that he made a profit of eight cents per gallon of gasoline, he did not state how many gallons were sold or whether the profit was net or gross. Moreover, the applicant did not provide any information from which to determine whether the profit was so low as to amount to "unnecessary hardship." To the contrary, more than one person testified that the applicant sought the variance "not just to survive, but [to] earn even more money."[19]

The *Stolman* case exemplifies the strict approach most courts have taken with respect to hardships, highlighting the need for the applicant to document hardships with evidence in the record. The *Stolman* court suggested that this evidence include detailed financial documentation, creating concern for applicants who do not want to publicly divulge sensitive financial information. However, in contrast to *Stolman*, the court in *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* held last year that applicants do not need to address hardships solely in economic terms but can take into account other factors, such as safety hazards.[20] The court did so in ruling on a specific plan exception, which is similar to a variance. Thus, courts have differed over the

> special circumstances are unusual physical characteristics of the property, such as size, shape, topography, location, or surroundings. For example, courts have found special circumstances when a lot was irregularly shaped and graded, had no real backyard, and faced a winding street.

MCLE Test No. 183

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. A general law city can grant a "use" variance.
True.
False.

2. California law requires that an agency make findings supporting the adoption of a variance.
True.
False.

3. Applicants for a variance are forbidden from providing an agency with proposed variance findings.
True.
False.

4. A "special circumstance" justifying a variance may involve:
A. Existing historic structures.
B. Unusual topography.
C. Characteristics of the users of the proposed project.
D. Overlapping regulations.
E. All of the above.

5. A variance may not be used:
A. To relieve a property owner from height and density limitations.
B. To allow for the use of a property when a strict application of the zoning code would render the property unusable.
C. To increase an applicant's property values regardless of whether the property is usable under its current zoning status.
D. To bring a property owner into parity with other similarly situated properties.

6. There must be a "logical relationship" between the identified special circumstance and the requested variance.
True.
False.

7. A property owner may be able to obtain a variance even when the hardship justifying the variance was self-imposed.
True.
False.

8. A variance is a safety valve that protects property owners from an unconstitutional taking.
True.
False.

9. Charter cities may impose additional variance requirements, including:
A. The variance must be consistent with the purpose and intent of the zoning code.
B. The variance must be consistent with the general plan.
C. The variance must not be injurious to the public or surrounding properties.
D. All of the above.

10. The standard of review for a zoning change is stricter and less deferential than for a variance.
True.
False.

11. Special circumstances claimed to justify a variance must be related to the physical nature of the property.
True.
False.

12. California courts did not reverse a variance grant in a reported decision prior to 1966.
True.
False.

13. A charter city must impose the same variance findings required by Government Code Section 65906.
True.
False.

14. Which of the following facts is relevant to justify a variance?
A. Project design and amenities.
B. Benefits to the community.
C. The superiority of the proposed project to the viable alternatives.
D. None of the above.

15. A court hearing a challenge to an agency's variance grant or denial may consider extra-record evidence in determining whether the agency's action was proper.
True.
False.

16. A variance is the only way property owners can obtain relief from regulations limiting the use of their land.
True.
False.

17. Courts generally defer to agencies' decisions granting variances.
True.
False.

18. A developer's voluntary adoption of stricter building standards is a hardship justifying the approval of a variance.
True.
False.

19. In deciding whether to grant a variance, agencies must consider similarly situated properties in the same zone and geographic area.
True.
False.

20. Applicants seeking a variance for a project should use the required variance findings to focus on project benefits to sell the project to decision makers and the public.
True.
False.

MCLE Answer Sheet #183

ZONE DEFENSE

Name _____

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

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3.	☐ True	☐ False
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5.	☐ A ☐ B ☐ C ☐ D	
6.	☐ True	☐ False
7.	☐ True	☐ False
8.	☐ True	☐ False
9.	☐ A ☐ B ☐ C ☐ D	
10.	☐ True	☐ False
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18.	☐ True	☐ False
19.	☐ True	☐ False
20.	☐ True	☐ False

factors and level of hardship that must be present in upholding a variance or plan exception, depending on the facts and equities of a particular case.

Some property owners have attempted to create a hardship to justify a variance, but courts have roundly condemned this practice.[21] In one case, a property owner deliberately sold a portion of its land to create a claimed "hardship" that allegedly justified a front-yard tennis court prohibited by the zoning code.[22] Not surprisingly, the court upheld the city's denial of the variance.[23] Similarly, in another case, a court held the developer's use of "attractive architectural features" and voluntary adoption of stricter building standards were self-imposed hardships that did not justify a variance from floor-area-ratio requirements.[24] Self-imposed hardships also include circumstances in which property owners purchase property in anticipation of obtaining a variance for a use forbidden at the time the owners bought the property.[25] Hardships created by the previous owner of a property also may be considered self-imposed and thus are insufficient for a variance.[26]

The "special circumstances" finding required for a variance—the second prong of variance analysis—involves distinguishing the property from other properties in the zone. Classic special circumstances are unusual physical characteristics of the property, such as size, shape, topography, location, or surroundings.[27] For example, courts have found special circumstances when a lot was irregularly shaped and graded, had no real backyard, and faced a winding street.[28] These special circumstances warranted the granting of a variance from building setback and fence height requirements.[29] Similarly, a variance from off-street parking requirements was appropriate because of the special circumstances involving a parcel partially submerged by the San Francisco Bay. To meet the parking requirements, the owner would have needed to fill the submerged area and demolish an existing building on the parcel.[30] Special circumstances also can include existing historic structures and landscaping.[31]

The particular characteristics of the expected occupants or users of a building can be a special circumstance. For example, special circumstances supported a reduction in parking for a neighborhood synagogue, to which most regular attendees walk rather than drive.[32] Another court found that reduction in parking for an apartment building was supported by the fact that most prospective residents would not own cars.[33] Close proximity to other parking facilities can also be a special circumstance supporting a parking variance.[34]

Special circumstances do not necessarily need to be physical. Overlapping regulations that create a disparate impact can be grounds for a variance.[35] In *Craik v. County of Santa Cruz*, a Federal Emergency Management Act (FEMA) regulation prohibited the owner of a beachfront parcel from using the ground floor as living space.[36] The local zoning code also imposed various height, setback, and floor-area-ratio limits that further constrained development of the parcel.[37] The court found that although the FEMA and related zoning regulations applied in the abstract to all owners in the applicable zone, in reality the regulations only affected a few vacant parcels because most of the other properties in the zone were already developed.[38] The court concluded that this disparity was a special circumstance that could support a variance.[39]

Finally, in order to qualify as a special circumstance, there must be a "logical relationship" between the condition identified and the variance requested.[40] This means that the unusual condition must cause the hardship. For example, in *Broadway Laguna*, the applicant presented evidence the property had unusual topsoil conditions; however, he was requesting a variance from floor-area-ratio requirements, and he failed to show any link between the topsoil and the need for additional floor area ratio. Therefore, the court concluded a variance was improper.[41] In another case, a property was closer to the freeway than other similarly regulated properties, but the findings failed to provide a rationale for why the property's proximity to the freeway justified a height variance.[42]

The third finding establishes that the variance is necessary to bring the property owner into parity with other properties in the same zone and vicinity. Conversely, a variance cannot grant the applicant a special privilege.[43] Thus, the particular characteristics of a property are not by themselves sufficient to support the grant of a variance.[44] The applicant must show that these characteristics differ from other similarly situated properties.[45] For example, in *Topanga*, the staff report described the property's "rugged features" but did not conclude that the property was any different from neighboring land.[46]

Therefore, agencies must examine the characteristics of similarly situated properties in the same zone and geographic area.[47] For example, a yard variance to allow a 4,000-square-foot residence might not be justified if other homes in the neighborhood are generally half that size. In one case dealing with a variance for a hotel, the court upheld a variance because the agency had compared the hotel with a competitor hotel in the same zone and concluded that the variance was necessary to create parity between them.[48]

Additionally, in *Stolman*, part of the court's reason for overturning the variance allowing detailing operations at a gas station was because the similarly situated properties relied upon by the city to approve its variance findings were not in the same zone or even the same city.[49] The closest property was in Eagle Rock, over 19 miles from the gas station, which was located in Santa Monica Canyon.[50] The court found that the city's reliance on these other properties was "not only a reach but [was] an irrational stretch."[51] With *Stolman* and other case law as a guide, counsel should ensure that variance findings provide sufficient detail regarding similarly situated properties in the same zone and located as close as possible to the subject property.

Many agencies permit or even require the applicant to prepare an initial draft of the agency's written findings to support the variance. Even when the agency drafts its own findings, it is essential that the applicant review them to ensure the variance findings are tailored to the applicable legal requirements.

One common problem with variance findings is that an applicant or planning staff will often focus on project benefits in order to "sell" the project to the decision makers and the public, ignoring the relevant legal requirements. However, courts have been clear that project design, amenities, benefits to the community, and the superiority of the proposed project design to ones developed in conformity with zoning regulations are irrelevant when considering whether to grant a variance.[52] As one court explained, the agency cannot use a variance to balance one code provision against another and "earn immunity from one code provision merely by over-compliance with others."[53] Variance findings should demonstrate that the agency based its approval on the relevant legal requirements and did not simply grant a variance because it favored the particular project.

Variance findings should be as detailed as possible, providing specific facts 1) demonstrating the hardship—preferably the economic hardship, 2) describing the unusual circumstances and showing that those circumstances are different from other properties, and 3) showing that the unusual circumstances cause the hardship. Furthermore, the findings should provide details about many properties in the same zone and vicinity, as close as possible to the property, to show that the variance is necessary to bring the property into parity with others similarly situated.

Also, it is essential that the administrative record contain evidence in support of those findings. This evidence can be in the form of photographs, view simulations, maps, technical reports from experts, and other documentation. Counsel should submit the evidence to the agency as part of the administrative proceedings relating to the

variance. The law prohibits extra-record evidence from being submitted after the variance has been challenged in court.[54]

Alternatives to Variances

Because variances are one of the most difficult entitlements to defend in court, it is important to consider alternatives that are more legally defensible. For example, an applicant can request a zone change or a zoning code amendment. A zone change constitutes a legislative approval, even if it affects only one single parcel, and under state law is afforded more deference than an agency's adjudicative decisions.[55] Additionally, a zone change does not require explicit findings,[56] is entitled to a strong presumption of correctness, and can only be overturned "if it has no reasonable relation to the public welfare."[57] However, although a zone change is easier to defend in court, the drawback is the approval process is more time consuming. A zone change takes longer because a public hearing must be held before the planning commission and legislative body of the agency (such as the city council or board of supervisors) prior to approval, unlike a variance, which can be approved by a planning commission or a hearing officer.[58] Furthermore, some agencies may be reluctant to process zone changes without an elected official sponsoring the amendment.

"Variance-light" procedures are another alternative adopted by many jurisdictions. These allow minor adjustments and modifications of development standards but do not require the same strict findings as those needed for a variance. For example, the City of Los Angeles allows a zoning administrator to approve adjustments and minor modifications in yard, area, building line, and height requirements, sometimes even without a public hearing if the matter is not controversial.[59] Likewise, the County of Los Angeles has a parking permit procedure that allows the planning director to reduce the amount of required parking spaces if certain requirements are met.[60] The requisite findings for these adjustments are similar but less strict than for a variance.

Nevertheless, it is presently unclear whether a court would be more deferential regarding these approvals or would apply the same standards for unnecessary hardships and special circumstances otherwise applicable to variances. One of the only reported cases that has addressed a variance-light procedure (in that case, a specific plan exception) generally applied the same hardship and special circumstances standards that apply to variances.[61] Thus, an applicant should always ensure that adequate written findings address each requirement of the applicable code and the record contains evidence supporting these findings.

Other alternatives may be available for relief from otherwise applicable restrictions. Depending on the jurisdiction, these alternatives may be included in overlay zones or other zoning provisions. Furthermore, the recently strengthened density bonus law may provide relief from certain requirements for residential projects that incorporate affordable housing.[62] This relief involves permitting additional density beyond code mandates as well as other concessions and incentives, such as a reduction in setbacks and parking requirements. These incentives should be considered as an alternative to a variance.

Relying on a variance is always a matter of calculated risk. A variance can speed the approval of a project initially but can dramatically slow down the process if the variance is challenged and overturned by a court. With this risk in mind, an applicant should gauge potential opposition before applying for a variance. If a variance is opposed, the applicant should consider changing course and pursuing an alternative entitlement strategy. In any event, the applicant should not blindly rely on planning staff or other government officials to ensure the record is adequate. Considering variance alternatives and bullet-proofing variance findings can make the difference in preventing a project from being overturned in court and incurring years of costly delays.

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[1] *See* Metcalf v. County of Los Angeles, 24 Cal. 2d 267, 271 (1944); Hamilton v. Board of Supervisors, 269 Cal. App. 2d 64, 66 (1969).

[2] A charter city is organized pursuant to its own city charter. CAL. CONST. art. XI, §§5-6, 8. A general law city is organized under the general laws of the state. GOV'T CODE §§34100-34102.

[3] *See, e.g.*, L.A. MUN. CODE §12.27.

[4] GOV'T CODE §65906.

[5] Allen v. Humboldt County Bd. of Supervisors, 241 Cal. App. 2d 158, 163 (1966).

[6] Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767 (1967).

[7] Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles, 11 Cal. 3d 506 (1974).

[8] *Id.* at 517.

[9] *Id.*; Orinda Ass'n v. Board of Supervisors, 182 Cal. App. 3d 1145, 1161 (1986).

[10] GOV'T CODE §§65000 *et seq.*

[11] GOV'T CODE §65906.

[12] GOV'T CODE §65700. The Planning and Zoning Law is not applicable to charter cities.

[13] *See, e.g.*, L.A. MUN. CODE §12.27; L.A. COUNTY CODE §22.56.330.

[14] *Id.*

[15] Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767, 775, 777-78 (1967); Stolman v. City of Los Angeles, 114 Cal. App. 4th 916, 926-27 (2003).

[16] Hamilton v. Board of Supervisors, 269 Cal. App. 2d 64, 67 (1969).

[17] Stolman, 114 Cal. App. 4th at 919-20.

[18] *Id.* at 920.

[19] *Id.* at 926.

[20] Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles, 161 Cal. App. 4th 1168, 1184, n.12 (2008).

[21] Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767, 778 (1967); *see also* L.A. MUN. CODE §12.27(D) ("The Zoning Administrator may deny a variance if the conditions creating the need for the variance were self-imposed.")

[22] Atherton v. Templeton, 198 Cal. App. 2d 146, 153-54 (1961).

[23] *Id.*

[24] Broadway Laguna, 66 Cal. 2d at 776-78.

[25] San Marino v. Roman Catholic Archbishop, 180 Cal. App. 2d 657, 672 (1960); Minney v. Azusa, 164 Cal. App. 2d 12, 31-32 (1958).

[26] *See* PMI Mortgage Ins. Co. v. City of Pacific Grove, 128 Cal. App. 3d 724, 731-32 (1981) (holding that the illegal subdivision of a property by a previous owner was not a hardship justifying a variance).

[27] *See* GOV'T CODE §65906.

[28] Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles, 161 Cal. App. 4th 1168, 1183-84 (2008).

[29] *Id.* at 1184.

[30] Zakessian v. City of Sausalito, 28 Cal. App. 3d 794, 802 (1972).

[31] Miller v. Board of Supervisors, 122 Cal. App. 3d 539, 546 (1981).

[32] Lucas Valley Homeowners Ass'n v. County of Marin, 233 Cal. App. 3d 130, 152-53 (1991).

[33] Siller v. Board of Supervisors, 58 Cal. 2d 479, 485 (1962).

[34] *Id.*; Lucas Valley Homeowners Ass'n, 233 Cal. App. 3d at 153.

[35] Craik v. County of Santa Cruz, 81 Cal. App. 4th 880, 890 (2000).

[36] *Id.* at 886.

[37] *Id.*

[38] *Id.* at 890.

[39] *Id.*

[40] Broadway Laguna Homeowners Ass'n v. Board of Permit Appeals, 66 Cal. 2d 767, 774 (1967).

[41] *Id.* at 774-75.

[42] Orinda Ass'n v. Board of Supervisors, 182 Cal. App. 3d 1145, 1166 (1986).

[43] GOV'T CODE §65906; Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles, 11 Cal. 3d 506, 520 (1974).

[44] Topanga, 11 Cal. 3d at 520.

[45] *Id.*

[46] *Id.*

[47] Stolman v. City of Los Angeles, 114 Cal. App. 4th 916, 929 (2003).

[48] Miller v. Board of Supervisors, 122 Cal. App. 3d 539, 544-45 (1981).

[49] Stolman, 114 Cal. App. 4th at 929.

[50] *Id.*

[51] *Id.*

[52] Orinda Ass'n v. Board of Supervisors, 182 Cal. App. 3d 1145, 1166 (1986).

[53] *Id.* at 1165.

[54] *See* CODE CIV. PROC. §1094.5.

[55] Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 514 (1980); Mira Dev. Corp. v. City of San Diego, 205 Cal. App. 3d 1201, 1218 (1988).

[56] Arnel Dev. Co., 28 Cal. 3d at 522.

[57] Mira Dev. Corp., 205 Cal. App. 3d at 1213.

[58] *Compare* GOV'T CODE §§65853-65856 *with* §65901(a).

[59] L.A. MUN. CODE §12.28.

[60] L.A. COUNTY CODE §§22.56.990 *et seq.*

[61] Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles, 161 Cal. App. 4th 1168, 1183-84 (2008).

[62] GOV'T CODE §65915. *See* Aamir Raza & Ted M. Handel, *Gimme Shelter*, LOS ANGELES LAWYER, Jan. 2009, at 29.

West L.A. ISSUE

WLANC DEVELPMENT ACTION ALERT

Prepared by the West L.A. Neighborhood Council · 8/17/08

Content

WLANC DEVELOPMENT ACTION ALERT

2108 Federal Avenue

Case No.: AA-2007-1861-PMLA-CN

CEQA No.: ENV-2007-1862-MND

Proposed Development Hearing

LAST DATE FOR INPUT

Wednesday, August 20

Representing WLANC, Tom Donovan, Vice Chair, WLA Neighborhood Council (WLANC) and Chair, Planning & Land Use Management Committee (PLUM) appeared and spoke at the August 13 hearing regarding the 2108 Federal Ave. project.

At the hearing the City Planner indicated that based on information received from the *WLANC and neighborhood residents*, he revised his Staff Report to recommend approval of the project, but with a "Q" condition, limiting it to 2-stories and 30' in height, in agreement with WLANC's positon.

The Hearing Officer, Michael S.Y. Young, indicated that he would keep his file open until August 20, stating that he believes that the City can limit this project, as a subdivision for two condominiums is sought.

Young withheld his final decision on the application and could choose not to take the City Planner's recommendation.

The City actually counts the emails and letters received from the community regarding projects. It makes a difference when you send an email expressing your views.

Even if you do not live near the project, be aware that these projects can set precedent for the rest of our neighborhood. The next project may be on your block, right next to you.

An email will take only a few minutes of your time.
Anyone who lives or works in our neighborhood
has a right to be heard.

You have until August 20, so there is
still time to weigh in regarding the project.

Your email should be sent to:
Mike Young mike.young@lacity.org
and copied to:
Maya Zaitzevsky maya.zaitzevsky@lacity.org
Marc Woersching Marc.Woersching@lacity.org
Councilman Bill Rosendahlcouncilman.rosendahl@lacity.org
Grieg Asher grieg.asher@lacity.org
Whitney Blumenthal whitney.blumenfeld@lacity.org
Len Nguyen len.nguyen@lacity.org
WLA Neighborhood Council info@wlanc.com

For further information, contact:
Tom Donovan at:
DONOVAN & SAPIENZA
100 Wilshire Blvd., Suite 1755
Santa Monica, CA 90401
(310) 260-6016 (310) 260-5015 (Fax)
tdonovan@wlanc.com

Please forward this email to others who may wish
to be heard regarding this project.

CLEAR LAKE RIVIERA COMMUNITY ASSOCIATION, Plaintiff and Respondent, v. ROBERT CRAMER et al., Defendants and Appellants.

A122205

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

182 Cal. App. 4th 459; *105 Cal. Rptr. 3d 815*; *2010 Cal. App. LEXIS 242*

February 26, 2010, Filed

PRIOR HISTORY: [***1]

Superior Court of Lake County, No. CV402997, Robert L. Crone, Jr., Judge. Retired judge of the Lake Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant homeowners challenged a judgment of the Superior Court of Lake County, California, which ordered them to bring their home into compliance in an action filed by plaintiff, the community association for a common interest development, to abate the owners' violation of an association guideline that limited the height of homes within the development. The trial court found that the owners had knowingly violated the guideline.

OVERVIEW: The court found that the trial court was entitled to infer the association's proper adoption of the guideline from the circumstantial evidence of long enforcement provided by the association. The court found no legal support for the owners' claim that a common interest association was required to provide direct, rather than circumstantial evidence that its use restrictions were properly adopted in an action to enforce the restrictions. Because there was no evidence the height guideline was enacted by a rule change initiated after 2003, it was not subject to *Civ. Code, § 1357.100 et seq.* The testimony of an expert retained by the owners did not support their claim that they would be required to tear down their house to comply with the trial court's order. There was no abuse of discretion in the trial court's decision to require compliance with the guidelines rather than award money damages. Substantial evidence supported the trial court's finding that the violation was intentional, as well as its finding of irreparable harm. There was no evidence that the cost of correcting the violation would be grossly disproportionate to the hardship caused to the association.

OUTCOME: The court affirmed the judgment.

LexisNexis(R) Headnotes

Real Property Law > Common Interest Communities > General Overview

[HN1] Common interest developments have become a widely accepted form of real property ownership. Ordinarily, such ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project. Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any

shared ownership arrangement. Use restrictions contained in a recorded declaration are afforded a presumption of validity and are enforced unless found unreasonable under a deferential standard. While use restrictions outside the declaration are not afforded the same presumption of validity, they are nonetheless enforced unless they fail a straight reasonableness test.

Civil Procedure > Trials > Bench Trials
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
[HN2] An appellate court must uphold a trial court's findings of fact if they are supported by substantial evidence.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence
[HN3] Unlike direct evidence, circumstantial evidence does not directly prove the fact in question. Instead, circumstantial evidence may support a logical conclusion that the disputed fact is true.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence
[HN4] Facts can be proven by circumstantial as well as direct evidence.

Real Property Law > Common Interest Communities > Homeowners Associations
[HN5] When a homeowners' association seeks to enforce the provisions of its covenants, conditions, and restrictions to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable, and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious.

Evidence > Procedural Considerations > Circumstantial & Direct Evidence
Real Property Law > Common Interest Communities > General Overview
[HN6] There is no legal support for a claim that a common interest association is required to provide direct, rather than circumstantial evidence that its use restrictions were properly adopted in an action to enforce the restrictions.

Governments > Legislation > Effect & Operation > Prospective Operation
Real Property Law > Common Interest Communities > General Overview
[HN7] *Civ. Code, § 1357.100 et seq.*, establishes procedural requirements for the adoption of the operating rules of a common interest development association. *Civ. Code, §§ 1357.110, subd. (a), 1357.130, 1357.140.* Pursuant to *Civ. Code, § 1357.150, subds. (a) & (b)*, the requirements of these sections apply only to a rule change commenced on or after January 1, 2004, and do not affect the validity of a rule change commenced before January 1, 2004.

Civil Procedure > Remedies > Injunctions > General Overview
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN8] Ordinarily, when an appellate court reviews a trial court order granting injunctive relief, it applies the deferential abuse of discretion standard. A decision will be reversed for an abuse of discretion only when it exceeds the bounds of reason or disregards uncontradicted evidence. The burden rests with the party challenging an injunction to make a clear showing of abuse.

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Real Property Law > Adjoining Landowners > Encroachments
[HN9] In evaluating the grant of injunctive relief for encroachment, courts apply a three-part test known as the hardship doctrine. To deny an injunction requiring removal of an encroaching structure, three factors must be present. First, the defendant must be innocent. That is, his or her encroachment must not be willful or negligent. The court should consider the parties' conduct to determine who is responsible for the dispute. Second, unless the rights of the public would be harmed, the court should grant the injunction if the plaintiff will suffer irreparable injury regardless of the injury to defendant. Third, the hardship to the defendant from granting the injunction must be greatly disproportionate to the

hardship caused plaintiff by the continuance of the encroachment, and this fact must clearly appear in the evidence and must be proved by the defendant.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action brought by a community association of a common interest development, the trial court ordered the owners of a home within the development to bring it into compliance with an association guideline limiting the height of homes. The court found that the homeowners had knowingly constructed the home too far up on a sloping lot, thereby violating the height guideline by nine feet. (Superior Court of Lake County, No. CV402997, Robert L. Crone, Jr., Judge.*)

* Retired judge of the Lake Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

The Court of Appeal affirmed the judgment. The homeowners' primary argument was that the association had failed to prove that the guideline had been properly adopted because the association provided no direct evidence, such as meeting minutes, demonstrating the guideline's adoption. The court found no legal support for the homeowners' claim that in an action to enforce restrictions, a common interest association must provide direct, rather than circumstantial, evidence that its use restrictions were properly adopted. Instead, the court concluded, the trial court was entitled to infer the association's proper adoption of the guideline from circumstantial evidence, including the guideline's publication and long enforcement. In addition, the court concluded the guideline was not subject to *Civ. Code, § 1357.100 et seq.*, which establishes procedural requirements for the adoption of the operating rules of a common interest development association, because the height restriction was adopted prior to the January 1, 2004, effective date of the code sections. The court also found no abuse of discretion in the trial court's decision to require compliance with the guideline rather than award money damages. Substantial evidence supported the trial court's finding that the violation was intentional, as well as its finding of irreparable harm. There was no evidence that the cost of correcting the violation would be grossly disproportionate to the hardship caused to the association's members by the oversize home. (Opinion by Margulies, Acting P. J., with Dondero and Banke, JJ., concurring.) [*460]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Property § 1--Common Interest Developments--Owners Associations--Use Restrictions.--Common interest developments have become a widely accepted form of real property ownership. Ordinarily, such ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project. Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement. Use restrictions contained in a recorded declaration are afforded a presumption of validity and are enforced unless found unreasonable under a deferential standard. While use restrictions outside the declaration are not afforded the same presumption of validity, they are nonetheless enforced unless they fail a straight reasonableness test.

(2) Evidence § 2--Circumstantial.--Unlike direct evidence, circumstantial evidence does not directly prove the fact in question. Instead, circumstantial evidence may support a logical conclusion that the disputed fact is true. Facts can be proven by circumstantial as well as direct evidence.

(3) Property § 1--Homeowners Associations--Covenants, Conditions, and Restrictions--Enforcement.--When a homeowners association seeks to enforce the provisions of its covenants, conditions, and restrictions to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable, and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious.

(4) Property § 1--Common Interest Developments--Owners Associations--Use Restrictions--Circumstantial Evidence of Adoption--Enforcement.--There is no legal support for a claim that a common interest development association, in

an action to enforce use restrictions, is required to provide direct, rather than circumstantial, evidence that the restrictions were properly adopted. Accordingly, the trial court was entitled to infer proper adoption from circumstantial evidence of long [*461] enforcement of a guideline that limited the height of homes within a development.

[*Cal. Forms of Pleading and Practice (2009) ch. 124, Condominiums and Other Common Interest Developments, § 124.16*; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 117 et seq.]

(5) Property § 3--Acquisition--Common Interest Developments--Owners Associations--Operating Rules--Operability of Statutes.--*Civ. Code, § 1357.100 et seq.*, establishes procedural requirements for the adoption of the operating rules of a common interest development association (*Civ. Code, §§ 1357.110, subd. (a), 1357.130, 1357.140*). Pursuant to *Civ. Code, § 1357.150, subds. (a) & (b)*, the requirements of these sections apply only to a rule change commenced on or after January 1, 2004, and do not affect the validity of a rule change commenced before January 1, 2004.

(6) Adjoining Landowners § 5--Rights, Duties, and Liabilities--Encroachments--Injunctive Relief--Elements.--In evaluating the grant of injunctive relief for encroachment, courts apply a three-part test known as the hardship doctrine. To deny an injunction requiring removal of an encroaching structure, three factors must be present. First, the defendant must be innocent. That is, his or her encroachment must not be willful or negligent. The court should consider the parties' conduct to determine who is responsible for the dispute. Second, unless the rights of the public would be harmed, the court should grant the injunction if the plaintiff will suffer irreparable injury regardless of the injury to defendant. Third, the hardship to the defendant from granting the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment, and this fact must clearly appear in the evidence and must be proved by the defendant.

COUNSEL: Ewing & Associates and Mike Ewing for Defendants and Appellants.

Abbey, Weitzenberg, Warren & Emery, Lewis R. Warren and Rachel K. Nunes for Plaintiff and Respondent.

JUDGES: Opinion by Margulies, Acting P. J., with Dondero and Banke, JJ., concurring.

OPINION BY: Margulies [*462]

OPINION

[**817] **MARGULIES, Acting P. J.**--Plaintiff Clear Lake Riviera Community Association (Association) regulates new construction within a common interest development. Defendants Robert and Catherine Cramer (the Cramers) purchased a lot within the development and drew up plans to build a house. In approving their plans, the Association committee with responsibility for plan review applied an Association guideline that limited the height of homes within the development. Because the Cramers' home was located on a sloping lot, compliance with the height guideline depended not only on the height of the structure itself but also its location on the lot.

During construction, it was called to the attention of defendant Robert Cramer (Cramer) that the location [***2] he selected for the home would result in a violation of the height guideline, but he disregarded the warnings. When the resulting home exceeded the height guideline by nine feet, the Association filed suit to abate the violation. Finding the Cramers knowingly violated the height guideline, the trial court ordered them to bring their home into compliance. They contend the height regulation was unenforceable because the Association failed to prove it had been properly adopted and the trial court abused its discretion in awarding injunctive relief rather than damages. We affirm.

I. BACKGROUND

The Association is a nonprofit corporation organized under the Davis-Stirling Common Interest Development Act (*Civ. Code, § 1350 et seq.*) to manage Clear Lake Riviera (Riviera), a common interest [**818] development located in Lake County. In 1992, the Association recorded an amended declaration of covenants, conditions, and restrictions (declaration) governing Riviera. Among other measures, the declaration established an architectural control and planning committee (committee), consisting of three members appointed by the board of directors of the Association (Board). The committee was charged with reviewing [***3] the plans for any improvements contemplated within Riviera to ensure they complied with the requirements of the declaration and were "in

harmony with the general surroundings of such lot or with the adjacent buildings or structures." In addition, the committee was empowered to enact height restrictions for buildings within Riviera, as well as other restrictions on the size and appearance of Riviera construction. The declaration stated that, once plans had been approved by the committee, "[a]ctual [*463] construction of any improvements ... must be in strict conformity with said plans."

The committee maintained a set of guidelines that was given to persons who planned to build in Riviera, along with a copy of the Association bylaws and a checklist for application processing. The guidelines described the process of plan approval and contained various substantive regulations governing new construction. Among the guidelines was one limiting the height of structures to a maximum of 17 feet above street level or the "control point" of the lot. For a sloping lot, the control point was the elevation at the center of the lot. Although there was no evidence when and how this guideline was enacted, [***4] it had been applied by the committee since at least 1995.

In March 2005, the Cramers submitted to the committee plans for a home they hoped to construct in Riviera. Rather than retain a general contractor, Cramer intended to act as his own builder. The Cramers' plans were approved by the committee in April. Beneath the approval stamp on each page of the plans, the committee had printed, "structure height not to exceed 17 feet from control point of lot." Cramer was aware of the notation and knew the Association's guidelines imposed the height restriction. In a plot plan submitted with his application and approved by the committee, Cramer had placed an asterisk in the middle of the lot map and written "Control Point" and "+17" next to the asterisk.

The evidence was in dispute at trial regarding the exact information and warnings given to Cramer about his compliance with the height restriction. A member of the committee, Curtis Winchester, testified he had discussed lot setbacks and application of the Association's height restriction with Cramer even before his plans were submitted to the committee. Winchester explained to Cramer that he and the committee would have to agree on the location [***5] of the lot's control point before the application could be approved and a height variance was unlikely because there were many homes within Riviera on similar upslope lots that complied with the height restriction. Winchester told Cramer it would be necessary to remove a substantial amount of soil from the lot to meet the height restriction, given the particular house design the Cramers had chosen, and Cramer agreed to do the necessary grading of the property.

Cramer acknowledged he was aware of the height guideline, but he testified he was confused about the concept of "control point" and its [*464] measurement and had no knowledge or experience in determining the elevation of buildings. He never personally did the measurements necessary to determine how high his house was. Cramer said he relied on his grading contractor [**819] to determine compliance with the height requirement and, in any event, could not have placed the home's foundation any lower because the grading contractor ran into rock that prevented further excavation. [1]

> 1 The grading contractor directly contradicted this testimony. He denied being responsible for the elevation decision, testifying that Cramer instructed him regarding the [***6] depth to grade the hillside, and said his grading was never impaired by rock underlying the soil.

In June or early July 2005, after Cramer had completed grading and installed the wooden forms for his foundation, the committee met with him and two persons working with him to discuss application of the height restriction. The meeting occurred as a result of the complaint of a neighboring homeowner who was concerned from the location of the Cramers' foundation forms that the resulting house would be too tall.

Winchester testified the committee told Cramer at the meeting that if he chose to build at the location of his foundation forms, the planned house would have to be altered considerably to meet height requirements, and they recommended further grading to lower the foundation. At the close of the meeting, Winchester testified, Cramer was noncommittal, but he did not indicate any reservations about complying with the height guideline.

Cramer and one of his contractors disputed this account of the meeting. According to these witnesses, the committee dismissed the neighbor's complaint and told Cramer there was no problem with his construction. As a result of the committee's apparent approval, [***7]

Cramer testified, he decided soon after to pour the foundation concrete. Cramer denied ever being warned by a committee member prior to the pouring of his foundation that the house would be too high.

In mid-July, the committee sent the Cramers a notice stating that their house appeared to depart from the approved plans and noting the completed building would violate the height restriction in the guidelines. The form requested the Cramers to notify the committee if they could not comply, but they did not do so. The committee sent a similar form in September, after the foundation was poured but before the walls were erected.

It was undisputed that when the Cramers' house was finished, it differed significantly from the house depicted in the approved plans, with one wall [*465] being considerably higher and more massive than shown on the plans. The house exceeded the 17-foot height restriction by nine feet and impinged severely on the views of at least two neighboring homes. In November, after the home was complete, the Cramers unsuccessfully requested a variance from the committee that would have ratified their violation of the height restriction.

In June 2006, the Association filed an action [***8] against the Cramers seeking a declaration they were in violation of the guidelines and the approved construction plans, an injunction requiring compliance, and monetary damages. Following a bench trial, the court found for the Association in a statement of decision. The court rejected the Cramers' various arguments that the height restriction was invalid or unenforceable, found the Cramers' home to be nine feet higher than permitted under the guidelines, and concluded Cramer knowingly built the home in violation of the height guideline. Finding the Cramers' home had caused irreparable injury to neighboring homeowners, the court ordered them to bring it into compliance with the guidelines.

[**820] II. DISCUSSION

[HN1] **(1)** "Common interest" developments, such as Riviera, "have become a widely accepted form of real property ownership." (*Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361, 370 [33 Cal.Rptr.2d 63, 878 P.2d 1275].*) "Ordinarily, such ownership also entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property [***9] within the project." (*Id. at p. 373.*) "Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement." (*Id. at p. 372.*) Use restrictions contained in a recorded declaration are afforded a "presumption of validity" and are enforced unless found unreasonable under a deferential standard. (*Id. at p. 383.*) While use restrictions outside the declaration are not afforded the same presumption of validity, they are nonetheless enforced unless they fail a "straight reasonableness test." (*Dolan-King v. Rancho Santa Fe Assn. (2000) 81 Cal.App.4th 965, 977 [97 Cal.Rptr.2d 280]* (*Dolan-King*).)

A. *The Validity of the Height Guideline*

The Cramers do not challenge the trial court's conclusion their home violated the Association's construction guidelines, nor do they contend the height guideline is unreasonable. Rather, they contend "the evidence was [*466] insufficient to support the conclusion that there was a duly adopted and enforceable height restriction."

1. *Adoption of the Height Guideline*

The Cramers' primary validity argument is that "[t]here was no showing whatsoever by plaintiff that the [guidelines] were ever adopted by a [***10] duly constituted [committee]."

The trial court held that the height guideline was valid and enforceable, a finding that necessarily includes the conclusion the guideline was properly enacted under the Association's rules. [HN2] We must uphold the trial court's findings of fact if they are supported by substantial evidence. (*In re Charlisse C. (2008) 45 Cal.4th 145, 159 [84 Cal.Rptr.3d 597, 194 P.3d 330].*)

The limited testimony at trial addressing the guidelines demonstrated they were available in printed form at the time the Cramers sought to build, were distributed to all who planned to build in Riviera, were followed by the committee throughout the time in question in evaluating applications, and were believed by committee members to constitute enforceable regulations governing construction at Riviera. [2] There was no evidence when and how the height guideline was enacted, but Winchester testified it had been applied by the

committee since at least 1995.

> 2 The Cramers claim the introduction of the guidelines as an exhibit at trial was without foundation because they came in through Russell Patterson, who they contend was not an official member of the committee. The trial court did not abuse its discretion in admitting the [***11] guidelines because Patterson, whatever his status, was personally very familiar with the activities of the committee.

(2) While circumstantial, the foregoing provides substantial evidence supporting a finding the height guideline was validly adopted. (See *People v. Lenix (2008) 44 Cal.4th 602, 627 [80 Cal.Rptr.3d 98, 187 P.3d 946]* ["unlike [HN3] direct evidence, circumstantial evidence does not directly prove [**821] the fact in question. Instead, circumstantial evidence may support a logical conclusion that the disputed fact is true."].) The Association's amended declaration was adopted in 1992. Three years later, the committee was enforcing the height guideline. It is a permissible inference from this evidence that the guideline had been properly adopted, since the application of the guideline likely would have encountered resistance had it not been properly adopted. Further support for proper adoption is found in the height guideline's long history of enforcement since that time and the ease with which the Association or the [*467] committee could have repealed the guideline if it had become disfavored by the members or if there were concerns about the propriety of its adoption.

It is true, as the Cramers contend, there was no direct evidence [***12] of the guideline's adoption. A witness provided by the Association in response to a trial subpoena testified he could not locate any documents reflecting "the result of any vote of the members of the committee ... on any rule or regulation involving height." That the Association was unable to locate a document reflecting the adoption of the guidelines, however, does not necessarily support a finding they were not properly adopted. As one committee member testified, the committee operated relatively informally. It did not always keep minutes, and the minutes it kept were not rigorous. Further, the height regulation had been enacted more than 10 years before the trial. In the absence of testimony about the Association's document retention policy, it would not be surprising if documents reflecting adoption of the height guideline had not been retained over that time. Indeed, no written records were produced dating from the era of the guideline's adoption. Under these circumstances, the absence of records regarding the adoption of the guideline does not outweigh the substantial circumstantial evidence supporting its proper adoption.

Accordingly, the Cramers' argument that there was insufficient [***13] evidence of proper adoption of the height guideline reduces to the claim the Association was required to prove proper adoption by *direct* evidence, i.e., by a written record reflecting the formal vote of the committee to adopt the regulation, rather than by *circumstantial* evidence. The Cramers, however, present no persuasive argument to support such a conclusion.

It is a truism of the law that [HN4] facts can be proven by circumstantial as well as direct evidence. (*Ortega v. Kmart Corp. (2001) 26 Cal.4th 1200, 1210 [114 Cal.Rptr.2d 470, 36 P.3d 11]*.) The Cramers provide no argument that would differentiate the issue of proper adoption from any other fact in this regard. Indeed, none of the decisions reviewing an action to enforce a common interest development regulation holds the association is required to provide direct evidence that a regulation was properly adopted to prevail. (E.g., *Pacific Hills Homeowners Assn. v. Prun (2008) 160 Cal.App.4th 1557, 1566 [73 Cal.Rptr.3d 653]*; *Rancho Santa Fe Assn. v. Dolan-King (2004) 115 Cal.App.4th 28, 39 [8 Cal.Rptr.3d 614]*; *Cohen v. Kite Hill Community Assn. (1983) 142 Cal.App.3d 642, 646, 648 [191 Cal.Rptr. 209]*.) On the contrary, those decisions never address the procedural history of the regulations, and there is no indication in any of them [***14] the association provided, or was required to provide, direct evidence the regulation had been properly adopted. In *Villa De Las Palmas Homeowners Assn. v. Terifaj (2004) 33 Cal.4th 73 [14 Cal.Rptr.3d 67, 90 P.3d 1223]*, in which the association originally attempted [*468] to enforce such a regulation, the Supreme Court expressly noted there was no evidence regarding the date [**822] of its adoption. (*Id. at p. 80.*) Although the regulation was ultimately not enforced, the court did not indicate the regulation would have been found unenforceable merely for the lack of direct evidence about its genesis.

(3) The closest arguable authority for such an evidentiary requirement is *Ironwood Owners Assn. IX v. Solomon (1986) 178 Cal.App.3d 766 [224 Cal.Rptr. 18]*, which states, [HN5] "When a homeowners' association

seeks to enforce the provisions of its CCRs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious." (*Id. at p. 772.*) In holding an association must show its standards and procedures were followed, however, [***15] *Ironwood* was not referring to proof that proper procedures were used for adoption of the guideline. Rather, the "standards and procedures" referred to by *Ironwood* were the internal procedures for *enforcement* of the restrictions, rather than their adoption. (See *Pacific Hills Homeowners Assn. v. Prun, supra, 160 Cal.App.4th at pp. 1566-1567.*)

The Cramers cite *Dolan-King* for the proposition that regulations adopted by an association are not afforded a presumption of reasonableness, but this portion of *Dolan-King* is concerned with the substantive reasonableness of regulations, not their procedural validity. (*Dolan-King, supra, 81 Cal.App.4th at p. 977.*) In any event, there was no need for a presumption of reasonableness here. As discussed above, the trial court was entitled to infer proper adoption from the circumstantial evidence of long enforcement provided by the association. Further, there was no suggestion in *Dolan-King* that the association was required to provide direct evidence its existing regulations had been properly adopted, and there is no indication in the decision such evidence was provided. (*Id. at pp. 977-979.*)

(4) Accordingly, we find [HN6] no legal support for the Cramers' claim [***16] that a common interest association is required to provide direct, rather than circumstantial, evidence that its use restrictions were properly adopted in an action to enforce the restrictions.

In arguing the guideline was invalid, the Cramers also cite a resolution passed by the Board in 2000 that rescinded "each and every former Policy & Procedure, Rule & Regulation, and Resolution put into effect prior to January 1, 2000." Because this document was introduced without any foundational testimony, the Board's intent in passing it is unclear. The text of the resolution, however, suggests it was intended to repeal enactments of the [*469] Board itself, rather than those of the committee. Nor does the resolution literally apply to the height restriction at issue here. It does not purport to repeal "guidelines," but only policies, procedures, rules, regulations, and resolutions. Further, regardless of the intent of the Board resolution, there was sufficient time between years 2000 and 2005 during which the committee could have readopted the guidelines, assuming they were ever repealed. Substantial evidence therefore supported the trial court's conclusion that the 2000 resolution did not preclude [***17] enforcement of the guidelines.

2. *Application of Civil Code section 1357.100 et seq.*

(5) [HN7] *Civil Code section 1357.100 et seq.* establishes procedural requirements for [**823] the adoption of the "operating rules" of a common interest development association. (*Civ. Code, §§ 1357.110, subd. (a), 1357.130, 1357.140.*) The Cramers contend the height guideline is an operating rule as so defined and was not adopted in accordance with the procedures specified by statute.

We need not decide whether the height guideline is an operating rule. Pursuant to *Civil Code section 1357.150, subdivisions (a)* and *(b)*, the requirements of these sections apply only "to a rule change commenced on or after January 1, 2004" and do not affect "the validity of a rule change commenced before January 1, 2004." Winchester testified he had been involved with the committee since 1995 and the height restriction had been in effect throughout that time. While the copy of the guidelines in the record bears notations indicating changes had been made around April 2005, the height restriction was not changed by these amendments. Because there was no evidence the height guideline was enacted by a rule change initiated after 2003, it was not [***18] subject to *section 1357.100 et seq.*

3. *The Composition of the Committee*

The Cramers also dispute the trial court's finding the committee "was a valid and functioning committee pursuant to and within the scope of the Declaration." The Cramers do not argue the committee failed to hold meetings or otherwise perform its functions, or its actions were arbitrary and not in accord with the governing documents of the Association. Rather, their argument is founded on the testimony of Winchester that, at the time the Cramers' plans were considered, the committee had "four or five" members and, while the committee met every week, not every member attended every meeting. The Cramers also point to evidence indicating the "official" membership of the committee consisted of

three particular persons in 2004, and the Board minutes disclosed no action to appoint any other person to the committee. Yet two other persons, Robert Frane and Russell Patterson, purported to act on behalf of the committee and had substantial involvement with the Cramers' application. [*470]

Because this issue was not explored at trial, but appears to have arisen as a result of a set of documents produced in response to a trial subpoena, [***19] the evidence is not clear on the composition or working of the committee. When Patterson testified at trial as a member of the committee, for example, he was never asked on what authority he believed himself to be a committee member or whether he viewed himself as an official voting member. Given the Cramers' failure to make a complete record on this issue, we are inclined to find the testimony of Patterson alone to constitute substantial evidence to support a finding that he was, indeed, a committee member, despite the lack of any documentary evidence to back his claim.

Yet even if we assume Frane and Patterson were merely volunteers who assisted the official members of the committee, we would find no basis to question the trial court's conclusion that the committee was properly functioning under the terms of the declaration. As the trial court noted in its statement of decision, there is no dispute the committee had been in existence for many years, conducted weekly meetings, and reviewed the planned construction within Riviera, all as required by the declaration. While there is no provision in the declaration for the appointment of "pro tem" committee members, neither does it preclude [***20] the practice.

Further, the Cramers cite no prejudice from the participation of the two purportedly unofficial members, who worked with them to bring their construction plans into compliance with the Association's various [**824] rules. There is no evidence the Cramers' plans were not reviewed and approved by the three official members of the committee, as required by the declaration. Nor is there any evidence the committee imposed requirements on the Cramers' construction that were outside the guidelines or otherwise unreasonable. On the contrary, the evidence showed the committee's application of the height guideline was consistent with its application to similar lots in Riviera, on which compliant houses had successfully been built. In short, the mere participation of nonappointed persons in the business of the committee, under these circumstances, would not invalidate the committee's official actions.

4. *Estoppel*

The Association contends and the trial court held the Cramers are estopped from challenging the validity of the height guideline because they signed a document, required by the Association as a condition of the plan review process, stating they "agree[d] to" the guidelines. Because [***21] we conclude the Cramers failed to carry their burden of demonstrating the height guideline is invalid, we need not reach this issue. [*471]

B. *The Trial Court's Grant of Injunctive Relief*

The trial court's judgment finds the Cramers' house is nine feet higher than allowed, orders them to "abate forthwith the foregoing violation," and precludes them "from maintaining any structure on the Subject Property which violates the CC&Rs." The Cramers argue the trial court abused its discretion in "ordering [them] to tear down their house," which, they contend, "was the effect of the mandatory injunction issued by the court." Instead, they argue, the court should have awarded damages.

The testimony of an expert retained by the Cramers does not support their claim that they will be required to tear down their house to comply with the court's order. The expert testified it will be possible to preserve the house, although it will cost at least $ 200,000 to do so. He recommended removing the house from its foundation, moving it off the lot, lowering the foundation, and remounting the house on the new foundation. Although it might be necessary to "cut [the house] in half" to remove it from the construction [***22] site, it need not be destroyed. Nonetheless, although the house need not be torn down, there is no doubt fixing the problem will be expensive and inconvenient, and its cost may exceed the amount of economic harm inflicted by the Cramers on the neighboring properties, at least as measured by the diminution in market value of those properties.

[HN8] "Ordinarily, when we review a trial court order granting injunctive relief, we apply the deferential abuse of discretion standard. [Citation.] A decision will be reversed for an abuse of discretion only when it exceeds the bounds of reason or disregards uncontradicted evidence. [Citation.] The burden rests with the party challenging an injunction to make a clear showing of abuse." (*In re Lugo (2008) 164 Cal.App.4th*

1522, 1535 [80 Cal.Rptr.3d 521].)

(6) We find no abuse of discretion in the trial court's decision to require compliance with the guidelines rather than award money damages. In attempting to find a standard against which to judge the trial court's exercise of discretion, we analogize this case to those requiring the removal of a structure that encroaches on a property line. Although the two situations are not identical, they both raise the possibility that the [***23] cost and inconvenience of removal of an existing structure may be disproportionate [**825] to the actual damage caused by it. [3] [HN9] In evaluating the grant of injunctive relief for encroachment, courts apply a three-part test known as the "hardship doctrine." (*Hirshfield v. Schwartz (2001) 91 Cal.App.4th 749, 758-759 [110 Cal.Rptr.2d 861].*) "To [*472] deny an injunction [requiring removal of an encroaching structure], three factors must be present. First, the defendant must be innocent. That is, his or her encroachment must not be willful or negligent. The court should consider the parties' conduct to determine who is responsible for the dispute. Second, unless the rights of the public would be harmed, the court should grant the injunction if the plaintiff 'will suffer irreparable injury ... regardless of the injury to defendant.' Third, the hardship to the defendant from granting the injunction 'must be *greatly disproportionate* to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant. ...' " (*Id. at p. 759.*)

> 3 As authority, the Cramers rely largely on *Sharon v. Sharon (1888) 75 Cal. 1 [16 P. 345]*, a decision reviewing a trial court's award [***24] of temporary alimony. We find the circumstances of *Sharon* sufficiently different from those of the present situation that it provides little clear guidance in reviewing the trial court's exercise of discretion.

The trial court found the Cramers' violation of the height regulation to be knowing, rather than innocent. The Cramers argue at length this conclusion was against the weight of the evidence, contending they relied on the committee's conclusion at the June/early July meeting that there would be no violation. As discussed above, the evidence was conflicting on exactly what Cramer was told about the height of his house at that meeting. Evaluating the credibility of the witnesses was the responsibility of the trial court, and it found the Association's witness to be more credible on this issue. Further, we find substantial evidence to support the court's finding that the violation was intentional in the testimony of Winchester, who stated Cramer was told unequivocally that if he built the house where the foundation forms were located it would result in a significant violation, the neighbor who confronted Cramer about the location of his foundation forms, and other Association witnesses [***25] who testified Cramer was fully and timely instructed about the proper siting of his home. [4]

> 4 The Cramers object the trial court did not specifically address in its statement of decision what Cramer was told at the June/early July meeting. In fact, the statement of decision notes that "Mr. Winchester again covered the matter [of the excessive height of the building] with Mr. Cramer and his associates." Regardless of what was said at the meeting, however, there was substantial evidence to support a finding that Cramer's violation of the height guideline was not innocent.

In any event, to defeat an injunction under the hardship doctrine the defendant must demonstrate the encroachment was neither willful *nor negligent.* (*Hirshfield v. Schwartz, supra, 91 Cal.App.4th at p. 759.*) There is little question, under even the most generous interpretation of the evidence, the Cramers' violation was negligent. Cramer did not dispute he was aware of the height restriction. He had personally marked the control point and the height restriction on a map of his lot. As the effective general contractor, Cramer was responsible for ensuring his home complied with the height restriction. Yet he testified he [***26] never bothered to learn how building height was measured under the guidelines and never, despite the controversy his home caused, personally measured the projected height of his home. In fact, Cramer [*473] presented no [**826] evidence he or his contractors had ever measured the elevation of the home prior to pouring the foundation. Further, no one involved with construction of the home appears to have had responsibility for compliance with the height guideline. Cramer contended the task had been delegated to the grading contractor, but that contractor denied responsibility and said he had been instructed by Cramer on the location of the home. The only conclusion to be drawn from the evidence was that Cramer made no effort to comply with the height guideline, even though he was

well aware of the restriction and his neighbors had raised the issue prior to the pouring of the foundation. [5] In light of this clear evidence of carelessness, there is no basis for finding the height violation to have been innocent.

> 5 This carelessness is further confirmed by the scope of the violation. The Cramers' home did not miss the guideline by a trivial amount, as one might expect if they made a good faith effort to [***27] comply. It is *nine feet* over the limit.

The trial court's finding of irreparable harm was also supported by substantial evidence. Two neighbors testified at trial that their prior unobstructed views had been blocked by the Cramers' home, resulting not only in a diminution in value of their homes but also a substantial loss of their enjoyment in them. Where previously the neighbors were able to enjoy views of the nearby lake, they now saw only the walls of the Cramers' home. For both neighbors, this was compounded by a loss of privacy, since the Cramers' home looked onto theirs. There was a further incommensurable risk in refusing injunctive enforcement of the height violation. If the Cramers were permitted to use the fait accompli of their home's completion to avoid enforcement of the height guideline, the Association would effectively lose the ability to enforce any of its guidelines. Members could build their homes in any manner they pleased, arguing afterward in response to an action to enforce the guidelines that compliance would be unreasonably expensive.

Finally, there was no evidence the cost of correcting the violation would be grossly disproportionate to the hardship caused [***28] to the Association. Although there was no estimate of the total diminution in value caused to neighboring homes by the Cramers' violation, one neighbor testified his home's value had been diminished by more than $ 75,000. Even if that was the only economic damage, the $ 200,000 required to correct the Cramers' violation would not be *grossly* disproportionate to the loss. As noted above, however, there was also diminution in value to at least one other home, along with damage that is more difficult to quantify. The trial court did not abuse its discretion in directing the Cramers to bring their home into compliance. [*474]

III. DISPOSITION

The judgment of the trial court is affirmed.

Dondero, J., and Banke, J., concurred.