VIEW PROTECTION: Is It Possible?

By Elizabeth A. French, Esq.

For most people, the purchase of a home represents the single largest investment that they will make during their lifetime. This is especially true in California, where real estate prices are soaring to all time record highs. So it is no wonder that people who pay extra for a view or a "premium lot", as many developers prefer to call it, are eager to find a way to protect that view. In fact many such purchasers of premium lots are dismayed to later discover that their view is not protected absent an express written agreement or restriction. The homeowners seem to think the fact that they paid extra for a lot or view means that their investment is absolutely protected. Not so in California. Many of these people also believe that their view is protected even where they signed purchase documents that make it clear that there is no such protection. Unfortunately, the homeowners have misplaced trust in notions of fairness and equity.

Generally, in California, there is no right to air, light or an unobstructed view. No matter the facts, the law will not find that there is such a right by implication or prescription. The failure to provide such a right is not a legislative oversight. Public policy disfavors such protection because of the chilling effect on development. So it doesn't matter if there is a state or local ordinance that restricts the height of fences or imposes setback requirements. And it does not matter how long you have enjoyed your view. Absent an express written agreement or restriction, there is no view protection.

There are some exceptions, of course, as with any area of the law. For example, California Civil Code § 841.4 prohibits the construction of "spite fences" that are taller than ten feet. So, your neighbor can't construct an eleven foot high fence just to annoy you because you didn't invite him to last Saturday's barbeque. And, while public policy disfavors view protection, it does favor the use of the sun as an alternative source of energy. So, under some circumstances, California Civil Code § 801.5 provides a solar easement for the purpose of operating a solar energy system.

There are not too many exceptions to the rule that there is no right to a view. The good news is that some common interest developments in California have CC&R's that provide view protection. But many common interest developments that were marketed as communities with a view of the coast, mountains or golf course have no such view protection. And now the homeowners want to amend their CC&R's to provide that protection. Such an amendment is possible, but there are pitfalls to avoid and important considerations to weigh before making such an important change.

First, determine what the governing documents require to make such an amendment. For example, the number of members that must vote in favor of the amendment before it can go into effect. Also, consider whether the proposed amendment to the CC&R's conflicts with any other provision of governing documents.

Next, consider that there will not be retroactive application of the amendment. The association can not tell someone who previously built a second story to their home to tear it down. As such, it is likely that existing improvements that block views would be grand fathered in which could result in discontent down the road among homeowners who later desire similar improvements but are now prohibited under the amended CC&R's. And, as anyone who lives in a common interest development knows, discontent often breeds discord and unfortunately, lawsuits.

Another consideration is how the board will enforce the view protection and the associated enforcement costs. Consistent and fair enforcement of the CC&R's is important to ensure that the CC&R's remain enforceable. Such enforcement is not cheap. For example, routine maintenance of vegetation such as tree topping can be expensive if that is not already part of the operating budget. Additionally, consistent enforcement of the CC&R's could result in increased legal and management expenses.

Finally, the last and most important and complex consideration: how will the board define a view for purposes of any newly adopted restriction? After all, beauty is in the eye of the beholder. What one man (or woman) thinks is a view, is not necessarily the same as the neighbors. It is virtually impossible to come up with a definition for view that is all inclusive and without ambiguity. For example, should the definition only include views from a particular portion of a lot or should it include any location on a lot? Also, does a view include all views or only medium to long ranged views?

California Civil Code § 1354 allows a common interest development to have a restriction on the use of property within the development as long as such a restriction is reasonable. Thus, any definition of "view" must be reasonable and capable of being enforced by the association in a consistent manner. Ambiguity and inconsistent application will only lead to discontent and costly litigation. And what a court may determine is reasonable is difficult, if not impossible to predict. Generally, courts will uphold a decision by the board of a homeowner's association where the court determines that the decision was made in good faith and complies with the developments governing documents and public policy.

Ultimately, view protection is not an easy task. There is no easy answer or formula to apply. While value can certainly be brought to a development that protects views, especially in the current real estate market. At the same time, view protection can be a real headache for an association. Given this, any association contemplating view protection should work closely with owners, management and legal counsel to adopt restrictions that are reasonable and that are ultimately capable of enforcement

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