

# ZONING AND PLANNING LAW REPORT

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## TREES AND NEIGHBORS – WHEN IS A VIEW SO VALUABLE THAT IT SHOULD BE LITIGATED?

By Paul J. Weinberg

*Paul Weinberg is a real property attorney practicing in Irvine, California. Since 1979, his Orange County practice has specialized in real estate, title, leasing, and real property development matters. Paul is the only non-architect member of the Laguna Beach, California Architectural Guild and acts as their legal counsel. He is a member of the Society of Architectural Historians and the American Institute of Architects. Paul has also served on the faculty at the University of California, Hastings College of Law in San Francisco, where he has taught civil trial practice, as well as teaching real property topics for the University's Continuing Education of the Bar, where he has moderated panels on a wide variety of real property topics statewide since 1988. He also authors articles for the University of California's Continuing Education of the Bar Real Property Law Reporter, and West's National Real Property Law Journal.*

### I. Introduction

#### A. Early Views of Land as a Resource

We are living in a time of decreasing resources and increasing population. One of those prime resources is land, and in particular land that carries with it attributes like a view of something desirable, such as an ocean, mountains, or other natural beauty such as a valley.

This isn't a trend that's new; Thomas Malthus predicted it in his "Iron Law of Population," which suggested that growing population rates would contribute

to a rising supply of labor that would inevitably lower wages. In essence, Malthus feared that continued population growth would drive the world into poverty.<sup>1</sup>

Paul Ehrlich took this horrifying conclusion one step further. In his 1968 book, *The Population Bomb*, he warned of mass starvation of humans in the 1970s and 1980s due to overpopulation, as well as other major social upheavals.<sup>2</sup> *The Population Bomb* has been characterized by its critics as primarily a repetition of Malthus's catastrophe argument that population growth will outpace agricultural growth unless it's controlled. Ehrlich observed that, since about 1930, the population of the world had doubled within a single generation, from two billion to nearly four billion,

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**TREES AND NEIGHBORS – WHEN IS A VIEW SO VALUABLE THAT IT SHOULD BE LITIGATED? ..... 1**

I. Introduction ..... 1

A. Early Views of Land as a Resource ..... 1

B. Modern Views—Emotional Responses ..... 2

II. A Legal Right to a View? ..... 3

A. The Common Law ..... 3

B. Municipal Ordinances ..... 4

C. Litigating Tree Ordinances..... 6

D. Spite Fence Laws ..... 9

III. Conclusion ..... 11

**OF RELATED INTEREST ..... 12**

**RECENT CASES..... 13**

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and was on track to do so again. He assumed that available resources, on the other hand, and in particular food, were nearly at their limits.<sup>3</sup>

Malthus and Ehrlich forgot about land as a resource other than to provide food. Both of them thought of it in the context of cheap labor and farming, not as a desirable resource in itself. There is no question that, particularly in the last 20 years, population patterns and population growth, particularly along the coastlines of the United States, have driven up land values and heavily emphasized the importance of factors that influence those values. One of those factors is the view from a given parcel of land and how obstruction of that view affects its value, desirability and, ultimately, its use.

The compression of population into ever smaller areas also puts pressure on the value of views and the sense of space, whether it's illusory or not. It also gives people something to fight over; one of the flashpoints in modern life now among landowners in coastal zones and zones where views are valuable is the effect of landscaping and, in particular, trees on those views and whether those trees should be trimmed or removed to restore the views that have been lost by their growth and development.

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*Emotions, not reason, often drive disputes over views—legal issues involving trees surface as the means of settling other neighborly conflicts.*

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## B. Modern Views—Emotional Responses

Disputes over views that are blocked by trees take on an enormously emotional component. In a modern world, people with opposing opinions regarding their right to a view resolve these disputes with litigation, and not surprisingly, given the explosion in property values and the paucity of land with views in coastal and other scenic locations, the volume of litigation on the topic has exploded. Practitioners in this field all agree: emotions, not reason, often drive these disputes:

[L]egal issues involving trees often surface as the means of settling other neighborly con-

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flicts... I try to look at what is motivating the dispute. Many times, it has nothing to do with the trees—the trees become a lightning rod for other issues. “They started a home remodeling project without my permission.” Or, “They didn’t invite me to their daughter’s wedding.” Sometimes people aren’t very happy in other areas of their life, so the only way they feel like they can have control is to make someone else’s life miserable.<sup>4</sup>

In a recent interview, practitioner Randall Stamen talked about it further:

These cases are similar to family law cases—they are like an ex-spouse with children. People are trying to protect their own property; they are “baby trees.”... No judge likes these cases—they’re highly contentious and highly emotional. They have rational people behaving irrationally in them. There is also more public passion for some trees—historical trees and/or trees that people are used to seeing. They can become damaging to the infrastructure and very high maintenance... When tree disputes become worse, kids cannot play together any longer; landowners blow clippings and other detritus onto the others’ driveway; I see people at their worst.<sup>5</sup>

Different areas of the country have different view problems. For example, Midwest practitioners see the issues more in relation to “marauding” tree roots, boundary line trees and falling limbs, primarily because the property values aren’t as reliant on views. A well-known tree law practitioner in Ohio, Victor Merullo, opines:

In Ohio, view block is not really much of an issue. It’s hard to show a nuisance here; this is mostly in California and in the State of Washington. Neighbor cases, though, are very difficult to deal with because of the hostility; courts are just not very understanding of the problem. Most of our ordinances and regulation have to do with maintaining historical trees and determining which species of trees are actually a nuisance and potentially causing a problem.<sup>6</sup>

## II. A Legal Right to a View?

### A. The Common Law

With this backdrop of emotion and the apparent explosion of litigation because of the dramatic increase in property values for properties with a view, what is the underlying law on the right to a view and how is it changing?

In the United States, authorities are plenary that property owners *do not* have an inherent right to a view:

Generally, a land owner does not have a right of access to air, light, and view over adjoining property, and the law is reluctant to imply such a right. Thus, under the common law, the owner of land has no legal right, in the absence of an easement, to the light and air unobstructed from the adjoining land. Courts have consistently held there is no private right to a view without an express easement or restrictive covenant. Thus, a property owner generally has no legal cause for complaint for interference with a view by the lawful erection of a building or other structure on the adjoining land.

However, the right of a land owner to air, light, or an unobstructed view may be created—

- by private parties through the granting of an easement.
- through the adoption of conditions, covenants and restrictions.
- by a state legislature, as by creating a right to sunlight for a solar collector.
- by local governments in adopting height limits to protect views and provide for light and air.<sup>7</sup>

Trees are clearly different from structures; they grow over time and what may not have been an obstruction at its inception can eventually become one. Courts do not like to get involved, though, in adjudicating this type of a neighborhood dispute in the absence of clear law, association restrictions, or ordinance. California has dealt with case law involving trees that essentially block sunlight to a single-family

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residence, increasing the burden home's winter heating bills and making the house gloomy. As a recent commentator put it: "Although obstruction of sunlight would appear to fall within the concept of a private nuisance as defined in the Civil Code, courts have traditionally refused to consider a landowner's access to sunlight a protected interest."<sup>8</sup>

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*If landowners cannot get redress under common law, where does that leave them? Clearly, in the purview of the legislative process or with private restrictions.*

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If landowners cannot get redress under common law, where does that leave them? Clearly, in the purview of the legislative process or with private restrictions; recent case law and other authority has made that clear. The seminal case on the right to a view, or lack of one, in California is *Pacifica Homeowners Association v. Wesley Palms Retirement Community*,<sup>9</sup> which was handed down in 1986. Its facts set the tone for not only future case law but the actions of legislative and municipal bodies coming to grips with the problem.

Appellant Pacifica Homeowner's Association members owned single-family residences located uphill from the Wesley Palms Retirement Community. Those residences had views of the ocean, Mission Bay and the city of San Diego. Covenants in the homeowners' deeds protected the views from future obstruction. Wesley Palms was granted a conditional use permit in 1958 to operate a retirement hotel on a 40-acre tract of land with landscaping and a five-story building height restriction. Twenty-five years later, eucalyptus and pine trees on the retirement hotel's property exceeded the height of its five-story building and wound up obstructing the homeowners' views. The homeowners alleged that the retirement hotel was burdened with a servitude not to permit any obstruction taller than its five-story building, but the trial court dismissed its lawsuit. The California Court of Appeal affirmed, finding that there was no implied restriction on the height of the trees in the conditional use permit that limited the height of Wesley Palms' building. The focus of the permit was on the aesthetics of the hotel's property, not on pro-

tecting the homeowners' views at the time the servitude was entered into.

The Court articulated why:

The Association also contends it has a cause of action against the Wesley Palms because Wesley Palms, in accepting the benefits of the permit, accepted a corresponding obligation to conduct its operation in good faith, i.e., to not cause unnecessary or unreasonable interference with the rights of surrounding property owners by allowing its trees to obstruct their views. However, as we noted before, a property owner has no natural right to an unobstructed view. In the absence of any agreement, statute or governmentally imposed conditions on development creating a right to an unobstructed view, it cannot be said Wesley Palms either acted in bad faith or interfered with any right. *It did only what the law allows.*<sup>10</sup>

The *Wesley Palms* court was sending a bright light out—courts are not going to interfere in these disputes unless there is a pre-existing ordinance or regulation, or an easement between the parties.

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*Cities, besieged by residents who want relief and can't get it in the courts, are beginning to enact ordinances and other municipal regulations to compel or mandate limitations.*

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## B. Municipal Ordinances

As a result of *Wesley Palms* and similar decisions, cities, besieged by residents who want relief and can't get it in the courts, are beginning to enact ordinances and other municipal regulations to compel or mandate the types of limitations sought in *Wesley Palms*, with varying degrees of municipal involvement.

An objective third party viewing this conflict would most likely wonder why a municipality would want to enter a fray fraught with liability and conflict, particularly when it would be likely to make at least one of the parties, both of whom are citizens and voters, unhappy. Not surprisingly, the cities have thought about this, too. How and in what manner

the resulting ordinances have been framed is what is beginning to guide the new wave of litigation and its eventual resolution.

### 1. San Francisco, CA

The preeminent ordinance is the one enacted by the City of San Francisco. The ordinance itself is contained in the City’s Public Works Code at §§820 to 829. It promotes solar energy (§ 821(3)) but, perhaps more importantly, it explicitly talks about creating rights in favor of neighbors whose views are blocked by trees:

The San Francisco tree dispute resolution ordinance is enacted for the following public purposes:

- (1) To create rights in favor of private property owners relating to the restoration of sunlight or views lost due to tree growth and to create a procedure for the resolution of disputes concerning those rights[.]<sup>11</sup>

The following paragraphs explicitly give an aggrieved landowner rights to complain about loss of a view, and explicitly talk about loss of value as a result:

A complaining party who believes in good faith that the growth, maintenance or location of a tree on the private property of a tree owner diminishes the beneficial use or economic value of his or her property because the tree interferes with the access to sunlight or views naturally accruing to the property, shall notify the tree owner in writing of these concerns ...

(e) Litigation. In those cases where initial reconciliation fails and binding arbitration is not elected, civil action may be pursued by the complaining party for resolution of the sunlight access or view tree claim under the provisions of this ordinance.<sup>12</sup>

The Code framework goes on to, again, explicitly mention view obstruction:

In resolving the tree dispute, the tree arbitrator or court shall consider the benefits and burdens derived from the alleged obstruction[.] The complaining party shall have the burden

of proving that the burdens posed by the tree owner’s trees outweigh the benefits provided by the trees with respected to the proposed restorative action.

(a) Burdens....

(5) *The extent to which the alleged obstruction interferes with sunlight or view.* The degree of obstruction shall be determined by means of a measuring instrument or photography.<sup>13</sup>

The ordinance goes on to discuss the aesthetics and visual quality of the tree itself and how that tree enhances the appearance, design and/or use of tree owner’s property, as well as whether the tree is native to the local region and of indigenous nature to the species that the tree belongs to. Finally, the ordinance talks about trimming and/or thinning of the branches as well as other arboreal solutions short of actually having to remove the tree.

### 2. Tiburon, CA

An adjacent city, the town of Tiburon, located in Marin County just north of the city of San Francisco, has established a similar, but perhaps even more Draconian ordinance. The phrase “unreasonable obstruction” of views is mentioned seriatim through the entire ordinance.<sup>14</sup> The ordinance actually sets out examples of what views are to be protected:

Some additional examples are:

- San Francisco Bay (including San Pablo Bay, Richardson Bay, and islands therein);
- The San Francisco-Oakland Bay Bridge;
- The Golden Gate Bridge;
- The Richmond-San Rafael Bridge;
- Mount Tamalpais;
- The Tiburon Peninsula or surrounding communities (including the City of San Francisco).<sup>15</sup>

A complex series of criteria are set out to determine whether the obstruction is unreasonable. They include:

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- (a) The extent of obstruction of pre-existing views from, or sunlight reaching, the primary living area or active use area of the Complaining Party[.]
- (b) The quality of the pre-existing views being obstructed, including obstruction of landmarks, vistas, or other unique features.
- (c) The extent to which the trees interfere with the efficient operation of a Complaining Party's pre-existing solar energy systems[.]<sup>16</sup>

Most of the remedies and other provisions in the Tiburon ordinance “track” the San Francisco ordinance and, for that matter, other ordinances in Northern California, including those of the City of Belvedere and Berkeley.

### C. Litigating Tree Ordinances

Not surprisingly, the Tiburon ordinance became the focus of litigation not long after it was enacted. Gilbert and Heidi Kucera, owners of an apartment building, relied on the ordinance to attempt resolution of a dispute with neighboring apartment building owner Tiberio Lizza over eight Monterey pines which had grown to obstruct their view.<sup>17</sup> The trial court, however, agreed with Lizza's argument that the ordinance was invalid. It held the ordinance unconstitutional and void as preempted by State law governing the creation of servitudes and land burdens, and as an arbitrary and unreasonable exercise of the police power.<sup>18</sup> The trial court's judgment was appealed, and an absolute onslaught of municipalities ran to the defense of the Tiburon ordinance, including 71 cities ranging from Chico in northern California to San Diego in southern California.

*“The state may legitimately exercise its police powers to advance aesthetic values ... The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.”*

The big question clearly was whether municipalities could exercise their police power to regulate views and sunlight. The *Kucera* court went back to a

long line of cases (followed in Federal law as well as in state law) to determine whether the police power had been exceeded:

The constitutional measure by which we judge the validity of a land use ordinance assailed as exceeding municipal authority under the police power is whether it has a real or substantial relation to the public health, safety, morals or general welfare. Conversely, it is unconstitutional only if its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.<sup>19</sup>

Both Lizza and the court agreed that safety considerations were peripheral to the ordinance, and the court clearly said so:

The ordinance considers the effects of tree shade on solar energy systems ... and may contribute to the health of residents by preserving natural light and views ... but Lizza is correct to say the ordinance, in its stated objectives, is mainly concerned with aesthetic considerations.<sup>20</sup>

The court, however, departed from prior law and solidly came down on the side of allowing a municipality to closely regulate aesthetics:

[The fact that the ordinance is mainly concerned with aesthetics] does not void the ordinance. “It is well settled that the state may legitimately exercise its police powers to advance aesthetic values... The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.” [Citations omitted.]

Those values also change over time, flexing the elastic concept of police power. “What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power.” [Citations omitted.] “Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment and the quality of metropolitan life.” [Citations omitted.]

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The preservation of sunlight has been recognized for nearly 40 years as a valid police power purpose supporting height limitations. “In the exercise of the police power a local government can impose restrictions on the maximum height of buildings for the purpose of securing adequate sunlight to promote public health in general... And likewise such government can restrict the height of fences.” [Citations omitted.] The ordinance here is in many applications a height limitation on trees, which is directly analogous and therefore a proper police-power goal. It follows, t^he goal of preserving views is equally valid. Daytime views are created by reflected or indirect sunlight reaching the viewer. Evening views are only once removed, usually comprised of mixed natural and artificial light. “Local government may ... protect views and provide for light and air through the adoption of height limits”... and, we hold, through the regulation of tree planting or growth.”<sup>21</sup>

The *Kucera* court tried to minimize the impact of its ruling, referring to it as simply further delineating the police power and showing it to be an extension, but not an expansion, of typical zoning authority, using the example of height limitations to preserve views. This may have been sophistic legerdemain; trees grow, buildings don’t, and once a height limit is established, absent a variance or other municipal action the building owner is prevented from building the building any higher. That is not the case with trees; they can be approved in a landscape plan and no one may have thought about what happens when they grow up and block the neighbor’s view.

California, by the date of the *Kucera* opinion (1997), had already begun stringing together a series of cases to expand the definition of police power, and the *Kucera* court summarized them:

The goals of this ordinance are further supported by settled case law as preserving the character of a neighborhood, since they prevent incremental tree growth which would otherwise alter preexisting vistas and receipt of light. [Citations omitted.] A denial of a building permit under a view protection ordinance enacted “to protect the visual quality of highly scenic areas

and maintain the rural character” of a city [citations omitted] was upheld against a claim of abused discretion, the court noting proper reliance on the goal of protecting the character of the area and a finding of unmitigated adverse impact on existing views.<sup>22</sup>

What is unique about both Tiburon’s ordinance and the *Kucera* opinion is that a very arbitrary and difficult-to-define standard as to how much of a view a tree may block now comes under the penumbra of municipal regulation. There is no doubt that situations arise causing neighbor conflict over this topic. Injecting the city into it, though, allows local authority to impose its decisions on its citizens. In a very real sense this is not unlike a homeowner’s association’s set of covenants, conditions and restrictions, but they aren’t voted on by the landowners; the municipality imposes it on them.

There is no question that this is the trend, as a city to the south of Tiburon has had nearly the identical problem and found nearly the identical solution a little bit more recently. In 2011, *Echevarrieta v. City of Rancho Palos Verdes*<sup>23</sup> discussed and adjudicated the City of Rancho Palos Verdes’ Municipal Ordinance § 17.02.040 regarding a “view restoration permit.” Under Rancho Palos Verdes’ ordinance, an in-house review was conducted by the City when a neighbor complained about view obstructions. The court explained:

In pertinent part, this ordinance prohibits residents of the City from significantly impairing a view by permitting foliage to grow in excess of certain height limitations. If foliage in existence already exceeds those height limitations, the person whose view is impaired must first attempt to informally resolve the matter with the person who owns the foliage, and if that fails, may apply for a “view restoration permit.” Hearings on the application for the permit are conducted by a view restoration commission (VRC), a committee of seven members appointed by the City Council. The VRC may grant the permit only if certain specified findings are made. If the VRC orders any foliage trimmed or removed, or replacement foliage is ordered planted, the costs are to be borne by the permit applicant.<sup>24</sup>

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The *Echevarrieta* facts were perfect for this type of law-making:

Since 1966, Norbert Keilbach has lived on Greve Drive in the City. His home faces south towards the Pacific Ocean and Catalina Island. Appellant lives on Ganado Drive, on a slope directly below Keilbach's home. Appellant has several trees which are near the border of his property and Keilbach's, which purportedly block Keilbach's view of the ocean and Catalina Island. Appellant purchased his property in 1964. The trees did not exist prior to the establishment of either Keilbach's or appellant's lots.<sup>25</sup>

Keilbach went through the application process to obtain a view restoration permit, and won one, requiring that Echevarrieta remove three pine trees, and trim the tops of five other trees, at Keilbach's expense. Not surprisingly, Echevarrieta appealed the decision to the City Council and they remanded it back to the view restoration commission, which approved a resolution requiring Echevarrieta to trim eight of his trees but also required Keilbach to plant a barrier of no more than 20 to 25 low-growing shrubs to mitigate Echevarrieta's privacy concerns.

Echevarrieta then filed a petition for writ of mandate and a complaint for declaratory relief, claiming that the City and City Council abused their discretion in affirming the VRC's decision and, interestingly, that "the City [had] actively engaged in a species of illegal spot zoning," that is, the "unreasonable, arbitrary and discriminatory" classification of property by the enactment of unreasonable and arbitrary regulations pertaining to certain uses or classifications of property.<sup>26</sup>

Echevarrieta's petition was denied, and the City took the extraordinary step of obtaining from the Superior Court a warrant authorizing entry onto Echevarrieta's property "for the sole and exclusive purposes of trimming, culling, and lacing trees and foliage." This forced Echevarrieta to obtain a 90-day stay of execution on the warrant, and he then filed a petition for writ of supersedeas. The California Court of Appeal denied the writ and heard the overall appeal.

The ordinance at issue had been approved by voters before becoming part of the City's Municipal Code. The *Echevarrieta* court cited and followed the *Kucera* court in determining that the ordinance was a valid exercise of police power since the articulation of public health, safety and welfare concerns were set out on the ballot put before the voters:

Specifically, this ordinance:

1. Protects, enhances and perpetuates views available to property owners and visitors because of the unique topographical features of the Palos Verdes Peninsula. These views provide unique and irreplaceable assets to the City and its neighboring communities.
2. Defines and protects finite visual resources by establishing limits which construction and plant growth can attain before encroaching onto a view.
3. Insures that the development of each parcel of land or additions to residences or structures occurs in a manner which is harmonious and maintains neighborhood compatibility and the character of contiguous sub-community development as defined in the General Plan.<sup>27</sup>

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*In a very real sense, the court's "hands off" policy is analogous to aesthetic regulation in general and design review boards in particular; if a municipality wants to predetermine what it's going to look like aesthetically, it can do it.*

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Now, the *Echevarrieta* Court was expanding the *Kucera* doctrine and clothing it in self-determination language. In essence, the *Echevarrieta* court was saying, if the citizens want it, and they'll delegate the power to a City agency to do it, we won't interfere with it. In a very real sense, this "hands off" policy is analogous to aesthetic regulation in general and design review boards in particular; if a municipality wants to predetermine what it's going to look like aesthetically, it can do it and now, under *Kucera* and *Echevarrieta*, it can regulate how it looks with regard to its landscaping, too.

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So, in order to make the nuisance claims that litigants try to use to “bootstrap” their “right to a view” into compensable damages and perhaps an injunction, they seem to need an ordinance to do it. However, not many of those ordinances exist outside of California and, for that matter, almost nowhere other than on the West Coast. The reason that this is true is simple, and was brought out in an interview by a well-known tree law practitioner, Victor Merullo: “California is the leading state for tree view block. Where I practice, in Ohio, it’s hard to show nuisance here so we don’t have any real cases. This really isn’t dealt with in the Midwest or, for that matter, in the East, either.”<sup>28</sup>

For some reason, a number of “celebrity” cases have arisen in the last few years regarding tree view block. Dr. Mehmet Oz, a well known television personality, is embroiled in litigation with his uphill neighbor, Angelo Bisceglie, Jr., and the borough of Cliffside Park in New Jersey.<sup>29</sup> The plaintiff’s attorney, Mark Silberblatt, opined in a recent interview that: “The Yankee (East Coast) mentality is to resolve these matters without the intervention of courts generally and without towns or municipalities getting involved.”

The San Francisco software magnate, Larry Ellison, owner of Oracle Software, became embroiled in litigation with his downhill neighbor in the tony Pacific Heights area of San Francisco, leading to highly publicized litigation and eventual resolution before trial.<sup>30</sup> In that case, Ellison had the advantage of the City of San Francisco’s tree view ordinance to “piggyback” onto, as well as a cause of action for declaratory relief.<sup>31</sup>

Because Defendants have failed and refused, and continue to fail and refuse, to maintain their trees at a reasonable level, so as to leave Plaintiff’s views unobstructed and allow access to sunlight, Plaintiff has been forced to bring this action. Plaintiff believes that Defendants will continue to violate the Ordinance unless they are permanently enjoined by the Court. Injunctive relief is specifically authorized by San Francisco Municipal Code § 827.<sup>32</sup>

The plaintiff litigating against Dr. Oz can’t avail himself of an ordinance; he is resorting to consider-

ing a stand of trees in his case as a “spite fence.” In the case involving Dr. Oz, the plaintiff is alleging the violation of a “fence ordinance”:

[T]his action concerns construction that the Ozs have recently undertaken on the Property, including in particular: (a) the erection of two fences ... one (consisting of three (3) forty (40) foot high cedar pine trees spanning forty (40) feet) located immediately behind Plaintiff’s residence; the second (consisting of numerous bamboo trees, each approximately 14’ high) located on the western portion of the Property ... 4. The above construction, which has resulted in depriving Plaintiff of a spectacular view of the Hudson River and the New York skyline, was undertaken in violation of a Cliffside Park fence ordinance ...”<sup>33</sup>

## D. Spite Fence Laws

Spite fence statutes can provide another avenue for complaining property owners to get relief, if they can fit within the confines of spite fence law. Spite fence laws are common throughout the United States. A recent article defines them and explains why the rationale makes some sense:

A spite fence can be defined as any structure which serves no useful purpose or which serves a purpose deemed ‘subordinate and incidental’ to the detriment suffered by the complaining landowner as a result of such structure... Today, many American states have created spite fence statutes, and those which have not generally allow for an action to curtail spite fences in the courts. The spite fence exception proves significant because it affords a landowner, having no special easement to view, a superior right vis-a-vis another individual who wishes to maintain a fence which serves no useful purpose and which obstructs the complaining landowner’s view. It is also significant in that it affords the landowner an action in nuisance against the individual who constructed the ‘spite fence,’ and thereby lends support to the possibility of a more general action in nuisance for landowners suffering losses of view.<sup>34</sup>

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The article points out that spite fence statutes exist in California, Connecticut and New York,<sup>35</sup> and Georgia has common law supporting spite fence litigation.<sup>36</sup>

Spite fence statutes generally articulate a height limitation, and California's is no different:

#### 841.4. Spite fences.

Any fence or other structure in the nature of a fence unnecessarily exceeding 10 feet in height maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance.<sup>37</sup>

Regarding the history of spite fence statutes, one California court has noted:

[S]pite fence statutes grew out of an increasing awareness in the late 1800's that a property owner's right to use his or her land was not unlimited. Various states enacted such statutes to prevent an owner from building a structure or fence that was unnecessarily high and that needlessly interfered with his or her neighbor's light and air.<sup>38</sup>

Other states are beginning to follow California's lead and, rather than clothe tree view block law in "spite fence" law, are enacting specific municipal ordinances to deal with the issue. For example, the Clyde Hill, Washington ordinance and its reason for enactment bear review, as its genesis was a far different one than the impetus to create the California ordinances.<sup>39</sup>

Clyde Hill itself is an interesting "laboratory" to test a view ordinance. It is a very wealthy town in the state of Washington, ranking fourth of 522 areas in the State of Washington in per capita income. It comprises only 1.1 square miles and, as of the 2010 census, its population was only 2,984 people.

A local realtor in the area, Emmanuel Fonte, provides on his website a bucolic description of the city:

Clyde Hill lies serenely overlooking the glistening waters of Lake Washington just east of the city of Seattle. It was formed as a low-density residential community which over the years has produced an established large lot residential development pattern. Today the philosophy of the city is to retain and maintain its original

spacious and wooded character and to remain a relatively small, simple and intimate community. Clyde Hill demonstrates its commitment to things environmental and the quality residential areas, the parks, the views and natural landscape are all features the community fiercely maintains.

Clyde Hill was incorporated in 1953 and covers an area of approximately one square mile. It is known as one of the "Point Cities" on the Eastside's "Gold Coast" and has a total land area of only 667 acres. The city is zoned single family residential with the exception of a gas station on the corner of 84<sup>th</sup> Avenue NE and Points Drive, and a Tully's Coffee shop located on Points Drive and NE 28<sup>th</sup> Street.<sup>40</sup>

Clyde Hill's municipal ordinance "tracks" the Tiburon ordinance, and that's no coincidence. In an interview with Mitch Wasserman, Clyde Hill's City Manager of 21 years, he related that when the city began searching for a tree view ordinance that it could emulate, it found Tiburon's.<sup>41</sup>

The ordinance itself closely tracks Tiburon's; its § 17.38.050 requires findings of its Board of Adjustment as follows in order for a complainant to obtain relief:

2. That the view from or the sunlight reaching the real property of the complainant is *unreasonably obstructed* and the manner in which the view or sunlight is obstructed. In determining whether the view from or sunlight reaching the real property of the complainant is unreasonably obstructed, the board may consider several factors, which include but are not limited to, the following:

- a. The extent of the alleged view obstruction, expressed as a percentage of the total view, and calculated by means of a surveyor's transit or by photographs or both;
- b. The extent to which landmarks or other unique view features ... are obstructed;
- c. The extent to which the tree(s) cause shadows or reduce air circulation and/or light;

d. The extent to which the tree(s) affect the real property value of the complainant's real property[.]

3. That such obstruction materially decreases the enjoyment of the real property of the complainant; and

4. That trimming, pruning, removal or other alteration of the site of the obstruction in the manner to be determined by the board will not unreasonably decrease the enjoyment of the real property of the tree owner, as determined by an objective evaluation.<sup>42</sup>

The drafting of this ordinance clearly puts the City's Board of Adjustment in control of making view obstruction decisions. When asked why the City was willing to take on the responsibility, the City Manager went into great detail about the process that brought the City's residents and citizens to this conclusion:

We have a series of hearings; it was very contentious but we worked through the process. Our citizens felt that it needed to be addressed neighbor to neighbor in a neighborly way. We put it into effect in 1991. We used an intern from the University of Washington to prepare a landscape "bible" which was a guide to the different types of indigenous plants and trees, together with how they would affect view. We divided up areas of the city into different tree or plant "zones"—how you might mitigate the impact to neighbors—what's appropriate for the area. For example, sequoias are not appropriate for all areas.

We provide a free service with the city arborist; we've only had two of these issues go to the Board of Adjustment since the inception of the new framework. It's a no-win if you cannot work it out in a neighborly way. We recognize the motivations and try to address them. If the neighbors have other "baggage," that causes problems and that takes time to affect. But we find it very rewarding. We're the "Switzerland" of views. We require a landscape review if the footprint of a home will change; the arborist looks at the plans ... it's good to have a neutral

expert. We want to try to maintain the self-respect of the neighbors.<sup>43</sup>

The City Manager's comments echo those of the tree attorneys. The emotional tenor of these disputes play into them and, oftentimes, neighbors have other complaints unrelated to the view that are affecting or coloring the dispute. In a sense, though, because of Clyde Hill's tiny size, its affluent population, its rugged topography and the direct link of views to property value, it's a perfect microcosm to study whether regulatory oversight by a municipal body will work. The bigger question, though, is whether this framework would actually work in a larger, more spread-out region.

### III. Conclusion

Clearly, as land values related to views become worth more and more, friction and disputes will most certainly arise. While California has been on the cutting edge area of law, population growth, escalating property values for view property, and the general increasing volume of litigation all militate in favor of the likelihood of further aesthetic regulation. Most likely, that regulation will extend to granting police power to municipalities around the country to carefully regulate landscaping in detail, far beyond the level and extent that municipalities presently engage in. The question of private property rights and, for that matter, privacy in general, will therefore be left to another day. Without a doubt, though, that day is fast approaching.

#### NOTES

1. Malthus, Sir Thomas, *An Essay on the Principle of Population* (Oxford World's Classics) Oxford University Press, USA (August 1, 2008).
2. Ehrlich, Paul, *The Population Bomb*, MACMILLAN; Rev. Ed. (1971).
3. Ehrlich, Paul, *The Population Bomb*, MACMILLAN; Rev. Ed. (1971).
4. Tree Law: Specializing in the Legal Issues that Surround You; Patrick White; *Tree Service Magazine*, May 2006, quoting Barri Bonapart, attorney at law.
5. Interview with Randall Stamen, Esq. of September 6, 2011.
6. Interview with Victor Merullo, Esq. of September 14, 2011 with the author. See also *Arboriculture*

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- and the Law* (1992); Victor D. Merullo and Michael J. Valentine; published by the International Society of Arboriculture, Savoy, Illinois 61874, ISBN 1-881956-01-6.
7. Am. Jur. 2d, Adjoining Landowners § 93 (citations omitted). See also *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. Dist. Ct. App. 3d Dist. 1959); *Koblegard v. Hale*, 60 W. Va. 37, 53 S.E. 793 (1906). Air and light are neither appurtenances nor hereditaments, in the absence of an easement therefor. *Wolf v. Forcum*, 130 Ind. App. 10, 161 N.E.2d 175 (1959).
  8. Cal. Jur. 3d, *Nuisances* § 26, see also *Sher v. Leiderman*, 181 Cal. App. 3d 867, 875-876, 226 Cal. Rptr. 698 (6th Dist. 1986).
  9. *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*, 178 Cal. App. 3d 1147, 224 Cal. Rptr. 380 (4th Dist. 1986).
  10. *Pacifica Homeowners' Assn.*, supra n. 9, 178 Cal. App. 3d at 1156.
  11. San Francisco Public Works Code § 821(a)(1). This article does not consider the effect of solar shade ordinances; that is a separate topic not relating to view but simply to the right of a landowner to have uninterrupted sunlight for provision of solar energy.
  12. San Francisco Public Works Code §§823(a), 832(e).
  13. San Francisco Public Works Code § 824(a)(5).
  14. See e.g., Chapter 15, Tiburon Municipal Code, §§15-1(3) to 15-1(5).
  15. Town of Tiburon Municipal Code Chapter 15-2.
  16. Town of Tiburon Municipal Code Ordinance 15, Chapter 15-5.
  17. *Kucera v. Lizza*, 59 Cal. App. 4th 1141, 1143, 69 Cal. Rptr. 2d 582 (1st Dist. 1997).
  18. *Kucera*, supra n. 17, 59 Cal. App. 4th at 1143.
  19. *Kucera*, supra n. 17, 59 Cal. App. 4th at 1147.
  20. *Kucera*, supra n. 17, 59 Cal. App. 4th at 1148.
  21. *Kucera*, supra n. 17, 59 Cal. App. 4th at 1148-49.
  22. *Kucera*, supra n. 17, 59 Cal. App. 4th at 1149.
  23. *Echevarrieta v. City of Rancho Palos Verdes*, 86 Cal. App. 4th 472, 103 Cal. Rptr. 2d 165 (2d Dist. 2001), as modified on denial of reh'g, (Jan. 30, 2001).
  24. *Echevarrieta*, supra n. 23, 86 Cal. App. 4th at 475.
  25. *Echevarrieta*, supra n. 23, 86 Cal. App. 4th at 475-476.
  26. *Echevarrieta*, supra n. 23, 86 Cal. App. 4th at 477.
  27. *Kucera*, supra n. 17, 86 Cal. App. 4th at 479.
  28. Interview of Victor Merullo with author, September 14, 2011
  29. Superior Court of New Jersey, Appellate Division—Docket No. BER L-11157-10 P W.
  30. *Ellison v. Von Bothmer*, Superior Court for the City and County of San Francisco, Case No. CGC-10-501041.
  31. See Plaintiff's complaint, page 5, line 17 through page 7, line 11.
  32. Plaintiff's complaint, page 6, lines 18 through 22.
  33. Plaintiff's complaint, *Bisceglie v. Oz*, Superior Court of New Jersey Law Division, Bergen County, Docket No. BER-L-11157-10 P.W., page 1, paragraph 3 through page 2, paragraph 4.
  34. *Securing a Right to View: Broadening the Scope of Negative Easements*; Tara J. Foster; Pace Environmental Law Review, Vol. 6, Issue 1, Fall 1988, Article 7. Available at <http://digitalcommons.pace.edu/pelr/vol6/iss1/7>
  35. *Securing a Right to View: Broadening the Scope of Negative Easements*; Tara J. Foster; Pace Environmental Law Review, Vol. 6, Issue 1, Fall 1988, Article 7. Available at <http://digitalcommons.pace.edu/pelr/vol6/iss1/7> (see, FN 11) and *Downe v. Rothman*, 215 A.D.2d 716, 627 N.Y.S.2d 424 (2d Dep't 1995)).
  36. *Hornsby v. Smith*, 191 GA. 491, 13 S.E. 2nd 20 [1941] [Plaintiff successfully brought suit against defendant for damages for the maintenance of a fence which effectively obstructed plaintiff's view and which obstructed the free passage of light and air over her property]. See also *Securing a Right to View: Broadening the Scope of Negative Easements*; Tara J. Foster; Pace Environmental Law Review, Vol. 6, Issue 1, Fall 1988, Article 7. Available at <http://digitalcommons.pace.edu/pelr/vol6/iss1/7> (see, FN 112).
  37. California Civil Code § 841.4. See also *Vanderpol v. Starr* (2011) 194 Cal. App. 4th 385
  38. *Vanderpol v. Starr* (2011) 194 Cal. App. 4th at 393
  39. See e.g., *City of Clyde Hill, Washington, Municipal Code* § 17.38
  40. [Http://EmmanuelFonte.web864.com/2011/02/01/city-of-clyde-hill](http://EmmanuelFonte.web864.com/2011/02/01/city-of-clyde-hill)
  41. Interview with Mitchell Wasserman, City Manager for City of Clyde Hill, Washington, with the author, September 30, 2011.
  42. *City of Clyde Hill Municipal Code*, §§17.38.050, B.2.a through g, B.3, and B.4.
  43. Interview with Mitchell Wasserman, City Manager of City of Clyde Hill, Washington, on September 30, 2011.

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## OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

Ziegler, Rathkopf's *The Law of Zoning and Planning* §§20:1 et seq., § 52:12



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## RECENT CASES

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### Eighth Circuit Court of Appeals holds part of St. Louis sign ordinance unconstitutional.

Neighborhood Enterprises, Inc. (Neighborhood) managed several properties of Sanctuary in the Ordinary (SITO), a nonprofit corporation. Both organizations were founded by Jim Roos, a critic of the City of St. Louis's use of eminent domain for private development. Roos commissioned a sign or mural that was painted on the side of a SITO-owned building. The sign/mural consisted of the words "End Eminent Domain Abuse" inside a red circle and slash. It was about 363 or 369 square feet in area.

The City of St. Louis issued a citation declaring the sign/mural to be an illegal sign for which a permit had to be obtained. SITO and Neighborhood applied for a permit, but the application was denied because, inter alia, the sign was larger than allowed by the zoning code. The denial was upheld on administrative appeal.

SITO sued in state court, alleging, inter alia, that the City's denial of the permit, and the zoning code provisions on which the City relied, violated its state and federal constitutional rights to free speech. The action was removed to federal district court, and that court entered summary judgment in favor of the City.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed and remanded. The court noted that while restricting signs, the ordinances also exempted from the definition of "sign" various categories of displays, including (1) flags of nations, states, cities, and fraternal, religious and civic organizations; (2) merchandise; (3) time and temperature devices; (4) national, state, religious, fraternal, professional and civic symbols or crests and displays showing the time and subject matter of religious services; and (5) works of art. Because the distinctions between displays regulated by the sign ordinances and those not subject to the ordinances were based solely on content, the ordinances were content-based and therefore subject to strict scrutiny.

The City asserted that its interests in enacting the ordinances were traffic safety and aesthetics. These

interests, the court said, have been deemed substantial in some cases, but never compelling. And even if the City's interests were assumed to justify content-based sign restrictions, the ordinances could not withstand strict scrutiny, because they were not narrowly tailored to accomplish the City's ends. The court remanded the case for determination of whether the unconstitutional content-based definition of "sign" could be severed from the remainder of the ordinance. *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011), reh'g and reh'g en banc denied, (Aug. 18, 2011).

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### Commonwealth Court of Pennsylvania upholds refusal to permit construction of religious offices and conference room in residential area.

The Bawa Muhaiyaddeen Fellowship owned two adjacent parcels of land in a residential district in Philadelphia. The Fellowship acquired the first parcel in 1973 and constructed a mosque on it as a legal nonconforming use. In 2001 the Fellowship purchased the adjacent property, on which stood a residential home. The Fellowship wanted to renovate the property to accommodate the needs of its fellowship. It sought a use variance in order to construct a mechanical room in the basement, an office with a conference room on the first floor, more offices on the second floor, and a caretaker's apartment on the third floor.

The variance was denied on the grounds that the proposed use was not permitted in a residential district. The decision was upheld on administrative appeal to the Zoning Board of Adjustment. The Fellowship sought judicial review, and the trial court upheld the denial.

On appeal, the Commonwealth Court of Pennsylvania affirmed. The Fellowship argued that denial of the variance resulted in unnecessary hardship because the property in question, being surrounded by properties used for religious purposes, was valueless as a residence. The court rejected this contention. The properties at issue—a Cardinal's home, a convent adjacent to that home, and a residence owned by St. Joseph's University—were indeed owned by

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religious institutions, but there had been no showing that they were being used as anything but residences.

The Fellowship also contended that the Board of Adjustment erred in concluding that its proposed uses would create an overuse of the property, inasmuch as the granting of the variance would merely shift uses already being made on the adjacent property to the subject property. The court, however, said that the Fellowship had not presented evidence supporting that contention. Rather, noted the court, the Fellowship's general secretary had testified that eight volunteers would use the subject property daily and up to 12 additional people would visit the library and use the conference room each week. The evidence was sufficient to support the Board's determination that the proposed use of the property was contrary to the public interest.

Finally, the court rejected the Fellowship's contention that the denial of the variance violated its equal protection rights. To prevail on this issue, the Fellowship had to show that its proposed nonconforming uses were similar to those permitted in the district by right or special permit. The Fellowship argued that its proposed uses of the property for a conference room, library, and offices were similar to use as a family day care center (a use permitted in the district), because those uses were low-intensity and beneficial to the community. The court noted that to be permitted under the relevant ordinance, a family day care center had to be operated in a manner incidental to the use of a property as a residence, which was a use as of right. By contrast, the use of the Fellowship's property as a visiting center for volunteers and scholars would not be incidental to the primary use of the property as a residence and would not involve a use as of right. The court also noted that use of property as a family day care center was limited to six children and was closely regulated, while the Fellowship's intended use did not limit the number of people using the property and was not subject to regulatory oversight. The court concluded that the Fellowship's proposed uses of the property were not similarly situated to a family day care center.

Finally, the court addressed the Fellowship's argument that its proposed uses were similar to nonconforming religious uses taking place on surrounding properties, including those owned by St. Joseph's

University and the Pentecostal Christian Church. The Fellowship, said the court, had not offered any evidence to establish how the surrounding properties were being used, or whether such uses were nonconforming. Nothing in the record indicated that the properties were being used other than as residences, a use permitted in the district. Furthermore, unlike the Pentecostal Christian Church, the Fellowship did not intend to use its property as a place of worship. *Bawa Muhaiyaddeen Fellowship v. Philadelphia Zoning Bd. of Adjustment*, 19 A.3d 36 (Pa. Commw. Ct. 2011).

### Court of Appeals of Texas holds that city asserting ownership of land under color of title lacked intent needed to support claim for inverse condemnation.

Sherwood Blount owned real property in downtown Dallas. Sunbelt Savings and NCNB Texas National Bank obtained independent judgments against Blount. In the years that followed, the judgments and resulting liens against Blount's property were transferred to various different entities, and the downtown property was subjected to three foreclosure sales, at which it was purchased by two different entities. The City of Dallas ultimately claimed ownership of the property, tracing its title through the Sunbelt Savings judgment. CKS Asset Management, Inc. claimed title to the same property, tracing its title through the NCNB Texas National Bank judgment.

After the City began construction on the property for a performing arts center, CKS filed suit against the City, alleging that CKS was the owner of the property. CKS asserted an inverse condemnation claim, requesting "just compensation." The City filed a plea to the jurisdiction (challenging the trial court's subject matter jurisdiction). After a hearing, the trial court denied the plea.

On interlocutory appeal, the Court of Appeals of Texas, Dallas, reversed. The City argued, inter alia, that because it was acting under color of title, it did not have the requisite intent to support a claim for inverse condemnation. The court agreed. The City had submitted documentation in the trial court that it had purchased the property at issue from a third party. Although the court did not attempt to decide

who had superior title, the court held that in asserting its ownership the City was acting “akin to a private party,” and not as a sovereign. The court acknowledged a conflict between its holding and that of the Austin Court of Appeals in two other cases, but noted that it was not bound by those cases and in any event deemed them distinguishable. The court dismissed CKS’s claims against the City. *City of Dallas v. CKS Asset Management, Inc.*, 345 S.W.3d 199 (Tex. App. Dallas 2011), petition for review filed, (Aug. 22, 2011).

### Supreme Judicial Court of Maine rejects landowners’ contention that they were not responsible for code violation consisting of presence of mobile home on their property placed there by another.

Lawrence A. Taylor and Donald C. Taylor owned a lot in the Town of Levant and were negotiating the sale of the lot to Timothy Linnell. Linnell parked a mobile home on the lot. It remained unoccupied and was not connected to any plumbing or utilities. The town’s code enforcement officer sent the Taylors a letter stating that the presence of the mobile home was a violation of the Town’s land use ordinance. Shortly afterward, the Town attorney sent the Taylors a letter directing them to cease the violation within 15 days. The Town ultimately filed a complaint against the Taylors in state court

After a hearing, the court found that the presence of the mobile home violated a provision of the town’s land use ordinance requiring a permit for relocating or locating one or two buildings onto a lot. The court rejected the Taylors’ contention that they were not liable for the violation inasmuch as they had no role in allowing the mobile home to be placed on their land and to remain on their land.

On appeal, the Supreme Judicial Court of Maine affirmed. The lower court did not err in holding the Taylors liable for the violation committed on their property, because (1) the Town’s ordinance authorized imposition of fines against landowners for the violation; (2) the Taylors had notice of the violation; (3) as the landowners, they had control over the use of their land; and (4) they had a reasonable opportu-

nity to correct the violation. *Town of Levant v. Taylor*, 2011 ME 64, 19 A.3d 831 (Me. 2011).

### Supreme Court of Louisiana holds that denial of permit to allow liquor store to sell high alcoholic content beverages was not arbitrary and capricious.

Roland Toups applied for a zoning change and a special exception use to allow him to operate a liquor store in Shreveport and sell high alcoholic content beverages. Although both applications were initially granted, a local church appealed those decisions to the City Council, which overturned both decisions. Toups appealed to district court which, although reversing the Council’s decision denying the rezoning of the property, upheld its decision denying the special exception use for the sale of high alcoholic content beverages.

Toups appealed the district court’s decision to the Louisiana Court of Appeal. The Court of Appeal initially upheld the district court, but on rehearing held that the City Council had acted arbitrarily and capriciously in denying the special exception use, and that the district court had erred in affirming that decision.

The City appealed the Court of Appeal’s decision regarding the special exception use, and the Supreme Court of Louisiana reversed. The Court of Appeal, noted the Supreme Court, had found that the Council had acted arbitrarily and capriciously in denying the special exception use because its decision was not supported by objective facts. The Court of Appeals found that Toup had supported his position with “rational and objective facts,” whereas his opponents had merely submitted unsubstantiated opinions as to increases in traffic and crime that might result from granting the special exception use.

The Court of Appeal’s reasoning, said the Supreme Court, was contrary to longstanding jurisprudence which recognizes that expressions of opinion by citizens to a legislative body may serve as the means by which that body learns the will of the people and determines what benefits the public good. The Court of Appeal’s approach would require courts to inquire into the motivations and wisdom of legislative determinations by concluding that only opinions supported by “rational and objective facts” are worthy

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of acceptance by legislators. Such an approach, said the Supreme Court, has been soundly rejected, particularly in the context of zoning decisions; it is not within the province of a court to second-guess a zoning decision that appears to have been based on appropriate and well-founded concerns for the public.

The court went on to say that the decision of the Council was reasonably related to promoting public health, safety, and welfare. Opponents of the special exception use raised concerns about the proximity of the store to a local church and its school, and traffic ramifications. While recognizing that three other stores in the same area were also permitted to sell alcohol, the court noted that those stores were allowed to sell beer and wine, not hard liquor, and that the sale of alcohol was not their main purpose. The court also noted that the proposed liquor store would feature a drive-in window at which customers could purchase drinks, sealed only by tape, and reenter traffic. The Council, said the court, could logically assume that these factors, coupled with the presence of novice drivers from the nearby church school, could increase the likelihood of traffic accidents in the area. The court also held that the denial of the special exception use did not amount to a local prohibition without voter approval, an act forbidden by state law. *Toups v. City of Shreveport*, 60 So. 3d 1215 (La. 2011).

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### Court of Appeals of Mississippi holds that property owners had standing to appeal grant of permit for nonconforming use.

Mike Jones leased property near Lake Washington, a popular vacation spot, and on the property he operated an RV campground and a convenience store, and rented out cabins. In 2006, Washington County's Zoning Ordinance was adopted. Jones's businesses were not in conformity with the ordinance, but were allowed to remain in operation as permissible nonconforming uses as long as they were not expanded.

Jones began displaying and selling on the property portable cabins. Most of the portable cabins were re-

moved from Jones's property by their purchasers, but two of the cabins were, at the request of the purchasers, placed on RV lots elsewhere on Jones's property. The purchasers paid Jones rent like RV users.

The Washington County Planning Director told Jones he could not display the cabins on his land, and could not keep the two cabins on the RV lots, because these activities constituted an expansion of his nonconforming use. The Washington County Planning Commission agreed that the display of the cabins for sale was an impermissible expansion, and Jones stopped displaying the cabins. The Commission disagreed with the Director about allowing the two purchased cabins to be located on RV lots. The Commission found that this was a permissible continuation of the nonconforming use, not an expansion, and granted Jones a permit to allow the cabins to remain.

Four nearby homeowners appealed the decision to the Board of Supervisors, which affirmed the Commission's decision. The circuit court, however, reversed the Board of Supervisors' decision.

On appeal, the Court of Appeals of Mississippi reversed. Although Jones argued that the homeowners had no standing to challenge the Board of Supervisors' decision, the court disagreed. All of the homeowners owned homes on Lake Washington, and two of them owned land adjacent to Jones's property. They alleged that their property values would be adversely affected if Jones were allowed to continue placing portable cabins on his land. This, said the court, was a sufficient assertion of a colorable interest in the subject matter of the litigation to confer standing.

Turning to the merits, the court noted that the zoning ordinance's definition of an RV appeared to be broad enough to include the portable cabins, in which case their placement on the RV lots would not be an expansion of the nonconforming use. The Board of Supervisors' decision was, therefore, fairly debatable and was not manifestly unreasonable. The circuit court had erred in setting aside the decision. *Jones v. Lutken*, 62 So. 3d 455 (Miss. Ct. App. 2011), reh'g denied, (May 31, 2011).

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