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October 22, 2012

Barbara Parker, Oakland City Attorney
City Hall, 6th Floor
1 Frank Ogawa Plaza
Oakland, California 94612

Re: Phyllis Bishop's Application for View Restoration Work on City Property

Dear Ms. Parker:

This office represents Phyllis Bishop, now 95 years of age, in her application to perform tree work on City trees in order to restore her views pursuant to Oakland's view preservation ordinance. As you may know, the City has been found to be in violation of its view ordinance to the extent that several of its trees are unreasonably obstructing Mrs. Bishop's views. Staff represented in open court that 1) the City trees were in violation of the ordinance, and 2) that the City was prepared to permit restorative action to address the issue (and would have already but for attempted interference with the process by the Bishops' neighbors, the Hanses). The City was moving forward with allowing the work to commence when these same neighbors filed an appeal of the permit now twice granted (once in 2009 and again in March of this year).

This letter is for the limited purpose of addressing the newly added "Attachment F" to the conditions of approval following the appeal by the Hanses. Without notice to Mrs. Bishop, your office substituted the original standard hold harmless agreement that had been part of the initial granting of Mrs. Bishop's application and staff's recommendations regarding the appeal, with an onerous and improper defense and indemnification provision. Such a broad indemnification provision is, as acknowledged by staff, unprecedented under the Ordinance.

We believe an error has been made in requiring this new condition of approval for several procedural and substantive reasons which, if not corrected, will make it impossible for Mrs. Bishop to proceed with the work the City staff intended to permit. It will also create a situation in which the City will run afoul not only of its own rules and laws, but of certain broader constitutional powers. We assume it is not the City's intention to proceed in this fashion and that once it is aware of these infirmities, they can be corrected.

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At the end of this letter, we also propose solutions for how to address the problem that

should meet the City's needs and interests for protecting its taxpayers while, at the same time, not robbing Mrs. Bishop of her rights or running afoul of the law.

FACTS AND TIMELINE

Trees on the Hanses' Property

Mr. and Mrs. Bishop purchased their property at 6807 Wilton Drive in 1964. At the time, the property had panoramic views which was the primary reason the Bishops chose that property. For two decades, they had positive relations with each of their downslope neighbors and were permitted to keep the vegetation pruned to preserve their views.

The Hanses purchased their property at 6817 Wilton Drive in 1984. Although the Hanses resided their for a brief period of time, they have used this property as a rental for most of their ownership. They currently spend their time between their two other homes in Napa and Hawaii. Following years of disputes and disagreements about the trees, the Bishops finally had to bring a legal action to restore their views.

Legal Actions And Amendments to View Ordinance

There were two trials. In the first trial in 2003, the Court held, among other things, that due to ambiguities in the language of the View Ordinance regarding the North Oakland Hills Area Specific Plan (added subsequent to its original enactment), these properties were not subject to the View Ordinance. The Bishops worked tirelessly with the City to correct and clarify this and other ambiguities in the Ordinance so that all of Oakland's citizens would be protected. Significant substantive amendments were passed by City Council in 2004 and 2006 as a result of the Bishops' hard work with the City Council.

The Bishops brought a second legal action against the Hanses when they continued to disregard the View Ordinance requirements now clearly set forth in the Municipal Code. Trial began December 2009 and concluded approximately one month later in January 2010. This time, the Court found in favor of the Bishops and required the Hanses to remove every tree in the Bishops' view corridor, to pay for that removal (and replanting), and to reimburse the Bishops for their fees and costs incurred.

The Hanses appealed the action. The Court of Appeals affirmed the trial court's judgment in full. Unfortunately, the decision was not issued until October 27, 2011, two days after Mr. Bishop passed away. This did not deter the Hanses who then petitioned the California Supreme Court which declined to hear the appeal. Ultimately, the Hanses complied with the Judgment, cutting the trees in question and paying the cost award.

City Trees 2009

During the second lawsuit and trial, the Hanses made the argument that they should not have to cut their trees because there were other trees on adjacent City property which also obstructed the Bishops' views. They argued that, unless and until the City trees were pruned or removed, cutting their own trees would be pointless.

The Bishops attempted to have the City trees pruned/removed to address this argument. Indeed, on March 20, 2009, the City issued a decision permitting the work to be performed. (See Exh.A- letter from Dan Gallagher to the Bishops agreeing to perform tree work in a two phased approach.) However, the Hanses interfered with these attempts threatening to sue the City if it proceeded with the tree work and the City, by e-mail dated May 1, 2009 (Exh. B), rescinded authorization to perform any aspect of the work.[1]

At trial, Mitchell Thomson, arboriculture inspector for the City of Oakland, testified about his familiarity with the City's various tree related ordinances, the history and background of the dispute with the Hanses as well as the Bishops' efforts to work with the City in achieving view restoration work on City property. Notably, Mr. Thomson testified that there were city trees on an adjacent lot that obstructed the Bishops views to the bay, the bridges, and the City of San Francisco.

Q. And what did you discover when you got there about the validity of [the Bishops'] claim?
A. Pretty clear to me that there is an obstruction from their home to the bay, and Acacia trees on our undeveloped lot seemed to be the main culprit, and you have the Hanes property in between the Bishops' view and our property, so both need to be dealt with to some view restoration.
Q. And when you say "both," you mean trees on the Hanes property as well as the trees on the city property?
A. Right.[2]

He then testified that he had proposed a two-phased solution to the problem. Phase one would be to clear out a group of small diameter brushy Acacia on the City property which was fairly dense. Once the Hanses' trees were dealt with, assuming the Court ordered some form of restoration, then the City would perform Phase two which would be to return and see what other trees might need to be removed and/or pruned to complete the restoration.

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[1]Independent of the view restoration application, the City's fire department reviewed some of the vegetation in the same area and determined much of it was a fire hazard due to the pyrophiric nature of the species (acacia melanoxylon). As a result, the City cleared much of the smaller stems in December 2009. The Hanses attempted to stop this fire prevention work as well but were unsuccessful in their efforts.

[2]A copy of the full transcript of Mr. Thomson's testimony can be provided upon request.

Based in part on Mr. Thomson's testimony that the City intended to perform reasonable view restoration on its property, the Judge ruled in the Bishops' favor. The Judge explained in his Statement of Decision, "[The view] is also obstructed to a lesser extent by trees located on City of Oakland property. However, the court finds that the City of Oakland trees should not significantiy affect the court's fmdings on liability or remedy, for two reasons. First, Mitch Thomson testified that the City would take steps to minhnize or eliminate the City trees' view obstruction once obstructing trees on the Hanes property were removed. Second, the Hanes actively prevented the City from taking steps to mitigate or remove the same City trees obstructions upon which they now rely." The Judge went on to note that it was "ironic" for the Haneses to "complain that it is the City, and not the Hanes, whose trees are at fault, given that the City's efforts to manage the tree growth of its own trees "were stopped by the Hanes."[3]

Echoing the trial court's findings, the appellate court reiterated the City's promise to perform view restoration work on its own trees as a basis for upholding the trial court's judgment. Indeed, the appellate court dedicated several pages to its discussion of Mr. Thomson's testimony at trial giving it substantial weight, stating, "Mr. Thomson's testimony constitutes substantial evidence in support of the finding that the City was and is prepared to remove or substantially thin the trees on its property that might also be obstructing the Bishops' views." (2011 Cal. App. Unpub. Lexis 8205)

City Trees 2012

Once the Hanses' trees were cut pursuant to the 2010 Judgment (approximately two years later), Mrs. Bishop came back to the City to complete the process she had begun in 2009. As promised, on March 29, 2012, the City granted Mrs. Bishops' application to proceed with performing work on the adjacent City parcel at her expense. Now, however, as a result of all of the efforts by the Bishops and their experts, the approval included a survey identifying the trees in question, an opinion from a geotechnical expert verifying that the proposed work would have no impact on slope stabihty, and multiple arborist opinions (including from the Hanses' own arborist and landscaper) that the removal/pruning of the largely non-native, invasive, pyrophitic species would be a benefit, not only to the Bishops, but to the entire community. This was all at the expense and efforts of the Bishops and their team of experts.

Unfortunately, not content with the agony and expense they inflicted on the Bishops for decades prior, the Hanses orchestrated a frivolous appeal of the City's decision on April 16, 2012. As the basis for the appeal, they made all the same arguments already rejected by the City, the trial court and the court of appeal.

The City staff, taking everything into account leading up to this appeal, recommended in its Agenda Report that the City Council adopt a resolution denyhng the appeal. A hearing was set for September 18, 2012.

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[3]A copy of the Statement of Decision can be provided upon request.

Condition of Approval–"Attachment F"

At some point, however, between the filing of the Appeal and the issuing of the final staff report, your office became involved and attorney Mark Wald changed one essential condition of approval. The standard "hold harmless" agreement that the public works department had always used in conjunction with granting such applications, and had been given to Mrs. Bishop in connection with her applications in 2009 and 2012 was pulled. In its place, Mr. Wald substituted an extensive and onerous defense and indemnification agreement never before used or required for tree work on City property, or even on private property.

To make matters worse, *no one advised Mrs. Bishop of this change in the conditions of approval*. Indeed, it was discovered quite by accident. In an abundance of caution, Mrs. Bishop, now 95 years old, asked this office to accompany her to the hearing in the event a question arose regarding the Hanses and the belabored history of this matter. In response, this office requested a copy of the Agenda packet which it received via e-mail the Friday before the Tuesday hearing originally set for this matter. As anticipated, the report indicated staff would be recommending denial of the appeal. The day of the hearing, this office, again in an abundance of caution, reviewed the attachments to the staff report and happened to notice the change in the original conditions of approval adding a new "Attaciment F" never before used or communicated to Mrs. Bishop or her counsel. In speaking with public works staff at the hearing, it became clear that they also were not aware of the change and had never seen or used such a provision for any previous tree or view claim.

This office attempted to address the matter at the chy council hearing originally scheduled for September 18, 2012. I was introduced to Mr.Wald, the attorney responsible for having performed this last minute covert switch. I explained to Mr. Wald the situation and requested he re-consider his recommendation that the City change hs long standing position vis-a-vis Mrs. Bishop's apphcation. Mr. Wald responded that 1) he did not know who Mrs. Bishop was and knew nothing about her dispute and could care less about either; 2) that there was *nothing he could learn or be told about the situation that could possibly change his mind*; and 3) that he did not care how his recommendations would affect her ability to perform the work previously agreed upon. He did concede that City Council was always free to reject his recommendations but under no circumstances would he review the recommendations aheady made.[4]

Mr. Wald advised that his sole duty was to protect the "City and its taxpayers." He disregarded out of hand that Mrs. Bishop was also a taxpayer whose protections were required or that she had spent years of her life and hundreds of thousands of her retirement savings to better

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[4]There were other things Mr. Wald did and said at this impromptu meeting which were rude, discourteous, and unbefittuig a public servant or member of the bar. I have since learned from other city officials that this kind of behavior is not unusual for Mr. Wald–but that is a separate issue which should be addressed internally.

the City of Oakland's ordinances for the greater good of the citizens of Oakland.

Unfortunately, before the agenda item could be heard, City Council chambers were cleared due to an unrelated disruption from protesters. Council member, Libby Schaaf, proposed to Mrs. Bishop that she postpone the hearing not only due to the disruption, but to permit time for council members to review the situation with the hope of rectifying it. On that basis, Mrs. Bishop agreed to the continuance but wanted it to be on a date where I could be available to attend. We proposed three dates in October. For reasons that were less than clear, the hearing was continued until November 13, 2012.[5]

It is my understanding that a meeting was held with Ms. Schaaf and members of your office but that your instructions to her remained that the newly created Attachment F never before used in this kind of situation would have to be a part of the conditions of approval.

THE HOLD HARMLESS AND INDEMNIFICATION PROVISIONS

The Standard Agreement

The City has a standard "hold harmless" agreement it requires when issuing permits or approvals for tree work, whether on private or city property (Exh. C). It basically requires a property owner and her contractor to take responsibility for any damage or injury that occurs as a result of tree work approved by the City. It reads as follows:

> "TREE PRUNING HOLD HARMLESS AGREEMENT: We, the undersigned, do hereby agree to defend, indemnify and hold harmless the City of Oakland, the City Council, and City officers and employees from any and all suits, claims expenses, (including reasonable attorneys' fees and costs) and actions brought by any person, or persons, for or on account of any damage to property or bodily injury, including death, or damage sustained or arising in any way from the performance of work to prune tree(s)_____."

It is to be signed by the property owner and contractor.

This is the same hold harmless provision given to the Bishops in 2009 and in 2012 with the exception that it specified the work and property address as follows: ".....from the performance of tree work on city property, identified as Assessor Parcel Number APN 048D-7292-26-02. The city lot is confronting 6897 Wilton Drive. The tree work is in conjunction with a view claim decision made on 3-29-12." (Exh. D). This is also the same hold harmless provision on the City's own web site as of the time of this writing.

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[5]While I do not like to assume the worst, it would appear now that this delay might have been politically motivated in order to put the issue off until after the election.

Mrs. Bishop was prepared to sign this hold harmless agreement as part of her agreement to also hire the contractor and pay for the tree work in question, *even though the work is on City property and required by Ordinance.*

The New Non-Standard Agreement

As noted above, without notice to Mrs. Bishop, between the filing of the appeal by the Hanses and the council hearing on the matter, the standard hold harmless agreement was pulled from the approval, and in its place was substituted the fohowing:

> ADDITIONAL CONDITIONS OF APPROVAL VIEW CLAIM: PHYLLIS BISHOP
> The following additional conditions are imposed:
> 20. To the maximum extent permitted by law, the applicant and its contractor shall defend (with counsel acceptable to the City), indemnify, and hold harmless the City of Oakland, the Oaidand City Council, the Oakland Public Works Agency and its respective agents, officers, employees and volunteers (hereafter collectively called City) from any liability, damages, claim, judgment, loss (direct or indirect), action, causes of action or proceeding (including legal costs, attorneys' fees, expert witness or consultant fees, City Attorney or staff time, expenses or costs) (collectively called "Action") against the City for or on account of any damage to property or bodily injury, including death, or damage sustained or arising out of, related to or caused by in any way from the performance of work in tiiis View Claim matter. The City may elect, in its sole discretion, to participate in the defense of said Action and the applicant shall reiinburse the City for its reasonable legal costs and attorneys' fees.
> 21. To the maximum extent permitted by law, the applicant shall defend (with counsel acceptable to the City), indemnify, and hold harmless the City of Oaidand, the Oakland City Council, the Oakland Public Works Agency and its respective agents, officers, employees and volunteers (hereafter collectively called City) from any liability, damages, claim, judgment, loss (dhect or indirect), action, causes of action or proceedmg (includmg legal costs, attorneys' fees, expert witness or consultant fees, City Attorney or staff time, expenses or costs) (collectively called "action") against the City to attack, set aside, void or amul, (1) an approval by the City relating to this View Claim matter, City's CEQA approvals and determination, and/or notices in the View Claim matter; or (2) implementation of such. The City may elect, in its sole discretion, to participate in the defense of said Action and the applicant shall reimburse the City of its reasonable legal costs and attorneys' fees.
> 22. Within ten (10) calendar days of the filmg of any Action as specified in conditions 20 or 21 above, the View Claimant and/or its contractor shall execute a Letter of Agreement with the City, acceptable to the Office of the Chy Attorney, which memorializes the above obligations. These obligations and the Letter of Agreement shall survive termination, extinguishment or invalidation of the

approval. Failure to thnely execute the Letter of Agreement does not relieve the applicant of any obligations contained in this Section or any other requirements or conditions of approval that may be imposed by the City.

As is evident from the breadth and scope, there is nothing "standard" about this new requirement.[6] It would be hard to imagine any contractor which would agree to sign such a provision as required by the first and third paragraphs. Even if she could find a contractor willing to assume such a risk, Mrs. Bishop cannot. To ask Phyllis Bishop, a 95 year old retired school teacher, to agree to such an onerous provision, is a defacto denial of the permit for view restoration work, as to agree to such a provision would surely place her at risk of bankruptcy.

The Third Non-Standard Agreement

On September 24, 2012, lim Ryugo, Building Service Manager, Department of Facilities & Environment, sent counsel for Mrs. Bishop the following unsolicited e-mail:

> Thursday, September 20, 2012 you requested a copy of the standard hold harmless agreement that is included with a tree permit. In response, Mitch Thomson sent you the View Claim decision package that was issued March 29, 2012 to Mrs. Bishop. The package included a defense, indemnification and hold harmless ("DIHH") agreement but it was not the standard DIHH language used for tree permits. Attached is the standard DIHH language for tree permits that has been used since about May 2011.
> The Hanes' appeal is the first view claim ever appealed to the City Council since the View Ordinance was estabhshed in 1980. The standard DIHH language should have been included but was inadvertently left out when this permit was issued this past March. City Council Agenda Reports and Resolutions are always reviewed by the Office of the City Attorney. During tiiat review, it was noticed that the standard DIHH language was not included in the March 2012 View Claim decision. As such, revised conditions of approval numbers 20-22 were included to conform the View Claim conditions of approval to be generally consistent with the standard DIHH language used for tree permits. Note, that on a going forward basis, all tree-related permits, including those under the View Ordinance, will have the DIHH language in conditions 20-22.

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[6]This may be the type of indemnification agreement more "standard" in the planning context. When someone is applying for discretionary approval to build or remodel a multi-milhon dollar home, it may make sense to shift the burden of defending litigation onto the apphcant. However, when a citizen is asking the City to abide by its own ministerial duty to comply with its own ordinance, and is willing to pay the few thousand dollars to assist the City with said compliance, it is arbitrary and selectively burdensome to then require the citizen to potentially pay hundreds of thousands of dollars to defend the City against any and all attacks as a result of complying with the law.

Attached to the e-mail was a third and *different* indemnification provision incorporated into two different "check the box" forms, both of which are entitled "TREE PERMIT–Chapter 12.36, Oakland Municipal Code." (Exh. E). Close inspection of the two forms reveal different conditions of approval, one containing twelve, and the other containing seven with no apparent reasoning or explanation. In the middle of both forms is a section entitled "OAKLAND MUNICIPAL CODE SECTION 12.36.060 CONDITIONS OF APPROVAL" and below it a paragraph that reads:

> **Defense, Indemnification & Hold Harmless.** Within ten (10) business days of the filing of a claim, action or proceeding that is subject to this provision, the applicant shall execute a Letter Agreement with the City, acceptable to the Office of the City Attorney, which memorializes this condition of approval: *The applicant shall defend (with counsel reasonably acceptable to the City), indemnify, and hold harmless the City of Oakland, the City of Oakland Redevelopment Agency, the Oakland City Planning Commission and their respective agents, officers, and employees from any claim, action, or proceeding (including legal costs and attorney's fees) against the City of Oakland, Oakland Redevelopment Agency, Oakland City Planning Commission and their respective agents, officers or employees to attack, set aside, void or annul, an approval by the City of Oakland, the Planning and Zoning Division, Oakland City Planning Commission, the City of Oakland Redevelopment Agency or City Council relating to this project The City shall promptly notify the applicant of any claim, action or proceeding and the City shall cooperate fully in such defense. The City may elect, in tits sole discretion, to participate in the defense of said claim, action, or proceeding.*

This "new" provision[7] is substantively different from the one provided to the Bishops both in 2009 and 2012. It is also substantively different from the one inserted by the City Attorney in conjunction with the appeal. Most telling however, it is drastically different from the one found on the City's *own website as its standard hold harmless provision.* And this makes sense. Even a cursory review of this "new" provision, demonstrates that it does nothing to protect the City from claims of damage or injury as a result of tree work–the primary exposure to liability the City should care about.

The most important aspect of this "new" provision, however, is that it pertains to Chapter 12.36–not at issue in this application or appeal. *Indeed, regardless of whether the City ought to he including this provision in conjunction with applications pursuant to 12.36 there is NO authority for it to do in connection with Chapter 15.52.*

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[7]Notably, while all other conditions of approval on these two forms have a box to check, this provision does not.

LEGAL ARGUMENT

There is no legal basis for the City to require as a condition of approval the defense and indemnification provision your office is attempting to belatedly impose on Mrs. Bishop after years of assuring her it would allow the work to be performed on its property under the reasonable terms and conditions first issued in 2009, repeated on the stand and admitted into evidence at trial under penalty of perjury, and then reiterated in March 2012.[8]

The Ordinance

The view ordinance in question is found at Chapter 15.52. City trees are not exempt from the requirements of this ordinance. Indeed, Section 15.52.100 outlines the procedures for claim filing, investigation, restorative action, public posting and input, and appeals concerning city trees. Mrs. Bishop followed to the letter all requirements required by the claim filing procedures.

As testified to in court under oath, Mr. Thomson performed the investigation and found that the Bishops had a valid view claim against the city. The Ordinance makes restorative action mandatory when a claim is found to be valid. The Ordinance states, "All view claims found by the city to be valid ***shall*** be subject to restorative action in accordance with Section 15.52.050."

It then outlines the procedure for performing the work. "Such restorative actions shall be performed by a contractor selected by the claimant, and said contractor shall be required to execute a hold harmless agreement acceptable to the city and dispose of all slash and debris generated by the restorative actions. All private contractors performing view restorative activities on city property shall also be required to furnish evidence of current certification by the International Society of Arboriculture."

There is NO requirement that the *claimant* execute a hold harmless provision. Nor is there a requirement that the contractor or claimant execute a defense and indemnification agreement for the City to comply with it s ministerial duty. This all makes sense in the context of the claimant agreeing to pay for work on city property that the city would otherwise be responsible for paying 50% or even 100% given its responsibility as the "tree owner." (15.52.060)

Chapter 12.36 covers issuance of permits for removal pursuant to development and non-development situations. However, there is nothing in that Chapter which would give authority to the City for including onerous or unreasonable conditions on a view applicant seeking to have the City comply with its own view ordinance. Indeed, the only reference to a hold harmless provision is found in § 12.36.200 which provides: "The issuance of a permit pursuant to this chapter shall not create any liability of the city with regard to the work to be performed, and the applicant for

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[8]While we understand that a hot campaign issue is the expenditures on outside counsel during a time of budgetary crisis, using Mrs. Bishop as the cause celebre for this political issue is not the way to address the controversy. As the saying goes, "bad facts make bad law."

such permit shall agree to hold harmless the city and is officers and employees from any damage or injury that may occur in connection with, or resulting from, such work."

This wording is consistent with the standard hold harmless agreement that was issued to the Bishops in 2009 and again in 2012 and can be found on its web site. In fact, § 12.36.140 specifically exempts all permit requirements for trees ordered to be removed as part of an action under Chapter 15.52. "Court Mandated Tree Removals. A tree removal permit shall not be required for the removal of any protected tree mandated by a court of law in accordance with Chapter 15.52 of this code (view preservation ordinance)." In other words, had Mrs. Bishop obtained a ruling by a Court that the City trees were a view obstruction, there would be no permit required, and therefor no conditions of approval. Arguably, the court's finding based on City testimony that the trees are a view obstruction to be removed or pruned should be sufficient to satisfy this requirement.

Limitations on City's Police Powers

Notwithstanding the unambiguous language in the Municipal Code, the City Attorney revoked its original hold harmless agreement and replaced it with a requirement so stringent against Mrs. Bishop and her contractor, that the practical effect is to revoke the permission already given now three times. In essence the City is saying to Mrs. Bishop that your application meets all of the criteria required under the applicable codes for approval, however, unless you agree to protect and defend the City from any attack on that approval the City will not issue you a permit. This is a clear abuse of the City's police power under Article 7 of the California Constitution and a violation of Mrs. Bishops Fourteenth Amendment Equal Protection Rights. The court's have held that it is unconstitutional to impose additional conditions upon an applicant when they have otherwise met all of the criteria for issuance of a permit. *Long Beach Lesbian and Gay Pride, Inc. v City of Long Beach* (1993) 14 Cal.App.4th 312.

An equal protection claim arises when 1) a citizen was treated differently from other similarly situated persons; 2) the difference in treatment was intentional; and 3) there was no rational basis for the difference in treatment. *Village of Willowbrook* v. *Olech* (2000) 528 U.S. 562. (City's demand for a 33' easement as opposed to standard 15" easement to connect to water supply irrational and wholly arbitrary). See also *Genesis Env. Services v. San Joaquin Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605 (arbitrary discrimination can arise from improper execution of a statute when district applies guidelines in an unequal manner). In this instance, Mrs. Bishop is being treated differently from every other citizen in Oakland. The City admits that this treatment is intentional because she has the misfortune of residing next door to litigious (albeit absentee) homeowners. Finally, there is no rational basis for doing so–indeed, given the alternatives available, it is completely irrational.

Moreover, the City's "addhional conditions" require that Mrs. Bishop not only stand in the place of the City, but pay all costs, including but not limited to attorney's fees, staff time, expert witness and consultant fees, that may be incurred if a member of the public "attacks" the City's lawful

issuing of Ms. Bishop's permit. Mrs. Bishop is aware of the dire financial crisis facing our municipal governments. However, this additional condition would require Mrs. Bishop to bear the full burden that she and all other constituent tax payers are entitled to have the City they hve in shoulder[9]. This attempt at full exculpation by the City violates Civil Code § 1668 and the pubhc pollcy of the State of Cahforma. As the court held in *Salton Bay Marina, Inc. v Imperial Irrigation Dist* (1985) 172 Cal.App.3d 914, when a public agency attempts by way of an agreement to exempt itself from performing its stated duties and obligations such agreements are contrary to public policy and void. Such is the case here in seeking to have Mrs. Bishop defend the City from a declaratory relief or mandamus action for lawfully issuing Mrs. Bishop her view restoration permit.

The only real challenge to the approval of Mrs. Bishop's view restoration apphcation is from the Hanses with whom she had a protracted and expensive legal action and who has, on numerous occasions, threatened to sue the City. In order to avoid its own embroilment in a similar expensive legal action as endured by Mrs. Bishop, the City added the additional condition that Mrs. Bishop once again pay for any such attack. In fact, the Agenda Report uses this additional exculpatory provision in support of its findings on the limited fiscal hnpact of the denial (Agenda Report page 7 Cost Summary/Implications). As shown above, this shifting of the City's duty to the pubhc, which includes Mrs. Bishop, solely onto Mrs. Bishop's shoulders is unlawful, a violation of Mrs. Bishop's rights, and against pubhc pohcy.

A municipality must treat all of hs citizens and apply all of its criteria for permitting equally. It cannot decide, as in the instant matter, to shift its duties and obligations to defend its proper and lawful determinations because it is afraid of the potential fiscal hnpact a challenge to such decision may create. Cities cannot require a person to give up a constitutional right in exchange for even a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit. *Dolan v City of Tigard* (1994) 512 U.S. 687. Similarly, Mrs. Bishop should not have to give up her right to have her view restored in exchange for taking on the duties of the City of Oakland to defend its own City Council's decisions.

To be clear, this is not the a situation where there are discretionary rights involved upon which restrictions can be placed such as with the discretionary approval for the development of a house. Here, the city has been found to be in violation of its own ordinance and is required to perform restorative work as a result. The City, therefore, has a ministerial duty to act which is enforceable via a petition for writ of amndate should Mrs. Bishop seek one in court. Where a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and elimninates any element of discretion.

To ask Mrs. Bishop to pay for that work and to ask her contractor to hold the City harmless from damage or injury are arguably reasonable conditions of approval. To ask Mrs. Bishop to be the

[9] Ms Bishop has already agreed to pay 100% of the cost to remove and top the City uees which is in excess of the requirement of the code.

first and only person ever required to risk spending hundreds of thousands of dollars to defend an action for the City's compliance with its own laws is another matter entirely.

PROPOSED SOLUTION

Staff and your office acknowledge that this is the first time this situation has arisen. Apparently, Mr. Wald, without knowing or caring anything about the facts or circumstances of this particular dispute, decided to make this a test case. Given the fact that it is the Hanses, not the Bishops, who have created this difficulty with their pattern of delays, litigiousness, and bad faith, as found by the trial and appellate courts, it is patently unjust to place the burden of the risk once again on Mrs. Bishop's 95 year old shoulders. She stands ready to sign, and have her contractor sign the standard hold harmless provision which protects the City against liability for injury or damage.

If, however, the City wants protection against a suit brought to stop the work, Chapter 15.52 does have an attorneys' fee provision in it. Arguably, if the Haneses were to file an action, and lose (which is almost guaranteed), they could be subject to the attorneys' fee provisions of the Ordinance. This is the City's protection against its stated desires to protect its and its taxpayers fiscal position. If and when the Hanses bring an unsuccessful action, the City can and should then seek reimbursement of its reasonable fees and costs.

In addition, given that this is not only a view issue, but a vegetation management issue as well, the City could (and should) proceed with removal and/or pruning of all of the pyrophitic species involved as it began to do in 2009. This can be done without permits, approval or comment from the public.

The one solution that will not work is to selectively and retroactively impose this burden on Mrs. Bishop. That will lead not just to an inequitable result, but a legal action against the City which it will lose and then be liable to Mrs. Bishop for her fees and costs. In short, this is not the set of facts the City should be using for a test case.

Yours truly,

Barry Kaplan Bonapart

BKB/abk

cc: City Council
Public Works