

## CITY OF SANTA BARBARA

## COUNCIL AGENDA REPORT



REPORT DATE: October 1, 1999

TO: Ordinance Committee

FROM: Sandra E. Tripp-Jones, City Administrator *MAJ*

SUBJECT: REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR A VIEW PRESERVATION ORDINANCE

RECOMMENDATION: That the Ordinance Committee:

1. Review and consider the Draft Ordinance prepared by the View Ordinance Task Force (VOTF); and
2. Provide direction to Staff on the preferred approach to address private view preservation/privacy issues and refer the matter to the City Attorney for an evaluation of possible legal concerns with respect to such draft ordinance.

DISCUSSION: See Attached Page

ATTACHMENTS:

1. Letter and VOTF Draft Ordinance Proposal From K. Weinheimer dated September 6, 1999
2. Category Types and Summary of other Cities View/Privacy Preservation Ordinances
3. Letter from Walter Knapp, Vice President of Braemar Homeowners Association

PREPARED BY: Planning Division/DDO/JLI/CP *DD & CP*

APPROVED BY: David D. Davis, Community Development Director *DD*

REVIEWED BY: \_\_\_\_\_ Finance *SP* Attorney

STAFF USE ONLY

TO:

FROM: City Administrator

ACTION TAKEN:

DIRECTIONS:

Meeting Date October 5, 1999

Agenda Item No. 16B

APR 24 2001 #27

Council Agenda Report

REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 2

**BACKGROUND:**

On several occasions in the past, the City has considered proposals to regulate new development to protect private views. In each case, after thoughtful deliberations and discussions with the Planning Commission, Architectural Board of Review, (ABR) and Historic Landmarks Commission (HLC), the City Council concluded that the City's policies should be limited to protection of scenic vistas and that the protection of private views through an ordinance mandate had potentially insurmountable practical and legal concerns.

The issue of private view protection was considered during deliberations leading to the adoption of the Neighborhood Preservation Ordinance (NPO) in 1992. The NPO established findings for approval of new homes and major additions. The consensus of the Council, Planning Commission and design review boards in considering this question, at that time, was that the City's existing policies with respect to views were appropriate.

The Single Family Residential Design Guidelines were developed and adopted as part of the NPO to provide clear guidance for the design of projects requiring review by the ABR, HLC or Planning Commission. Part of these Guidelines included "Good Neighbor Policies" that contained suggestions for considering neighbors' existing private views and privacy. However, the primary focus of the policies is the protection of privacy rather than views. Since none of these recommendations contain mandatory design guidelines, applicants proposing construction may elect not to consider design changes in response to their neighbors concerns. The lack of mandatory guidelines appears to be the central objection to those seeking protection of private views.

The NPO was evaluated in 1993, and it was determined then that, in general, the regulations were working. During those discussions, Council again concluded that the "Good Neighbor Policies" were adequate to assist in the protection of private views and privacy.

In 1996, the City Council adopted an ordinance that required neighbors within a 100-foot radius of certain types of proposed projects be mailed a notice of a public hearing at ABR or HLC meetings. These noticing requirements were intended to provide immediate neighbors with an opportunity to participate early in the design review process.

This new noticing procedure has been very successful in giving early notice of proposed development and has allowed neighbors the opportunity to provide feedback to an applicant and the design review boards on a proposed project and its compatibility with the neighborhood. However, comments from potentially affected

Council Agenda Report

REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 3

neighbors have also highlighted the need to deal with private view/privacy concerns. The ABR/HLC have attempted to address these concerns with some limited success when reviewing projects for other relevant or related issues such as the review of size, bulk and scale or when considering tree removals. However, the Boards do not directly respond to private view concerns and can not mandate changes to applicants not willing to appease neighbors concerns.

**The View Ordinance Task Force (VOTF)**

The View Ordinance Task Force (VOTF), a citizen's group interested in the protection of private views and privacy, believes that the existing "Good Neighbor Policies" are inadequate. Therefore, on February 13, 1998, the VOTF requested that City Council consider adopting a View Preservation Ordinance. The VOTF advocated new regulations to protect private views, privacy rights and property values.

At that time, the City Council believed that the City had adopted appropriate regulations to control the design of proposed large houses in the hillside areas, and to provide mailed noticing to immediate neighbors. The City Council denied the request from the VOTF to initiate a View Preservation Ordinance but agreed to forward their concerns to the Ordinance Committee when considering future Neighborhood Preservation Ordinance (NPO) amendments as part of the Steep Slopes Study.

Over the past eighteen months Planning Staff has been reviewing all City policies, zoning standards, the NPO Ordinance and the need to amend adopted design guidelines for proposed development on steep slopes including view/privacy preservation issues. The in depth NPO analysis included the creation of a GIS slope mapping project and the identification of a series of proposed amendments to the NPO. Staff was prepared, as part of this steep slopes study, to discuss these privacy/private view issues brought forward by the VOTF at public hearings planned in the coming months. However, the VOTF indicated that they wanted to move forward, draft their own Ordinance and seek consideration at the Ordinance Committee hearing.

Because of the complexity of this analysis, Staff believes it is now appropriate to separate the protection of privacy and private views issue from future NPO amendments. Extensive background research and legal analysis are required by the City Attorney's Office and Community Development Staff in order to help understand the legal and practical problems associated with the creation of view protection regulations.

APR 24 2001 #27

OCT 5 1999 #168

**DISCUSSION:**

**History of Proposed VOTF View/Privacy Preservation Ordinance**

In May of 1999, the VOTF developed and submitted to Planning Staff, a draft ordinance that the VOTF believed addressed its concerns regarding view access protection and privacy issues. The City Attorney's Office reviewed the draft ordinance and had serious questions regarding various elements of the draft ordinance. Specifically, concerns were expressed over the provisions to require mandatory arbitration and mediation of view blockage claims, the level of City involvement in assisting in the registration of private view claims and the constitutionality of a city adopting a private view/privacy protection ordinance.

Planning Staff also had expressed concerns regarding the difficulty in design review boards determining what types of construction projects constituted "a significant view blockage" or "a loss of privacy." The VOTF was advised that certain provisions of the draft ordinance would not be supported and that further discussions with Staff and the City Attorney's Office were necessary to better understand the unique and untested elements of the proposed ordinance.

The VOTF has since modified the draft ordinance to address some but not all of these concerns (see Attachment 1). Generally, the VOTF Draft Ordinance consists of the following:

1. Addresses view blockage by both buildings and vegetation.
2. Requires a property owner to "register" his or her view with the City Clerk's office.
3. This registration identifies the "viewshed" from the property, and establishes the existing view on the date of registration.
4. Upon registration, the owner will receive a City mailed notice of any applications for construction within the viewshed, which are filed with the City.
5. Requires special findings by the the ABR and HLC to allow structures to be constructed that have been designed to avoid impacting private viewsheds or that indicate why the design could not be changed.

**Construction Disputes**

If construction is proposed within a registered viewshed, the "registrant or "viewholder", can initiate the following process in order to attempt to resolve the dispute:

APR 24 2001 # 2 7

## Council Agenda Report

### REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 5

1. Contact the person proposing the construction in writing and propose alternatives to the view obstruction.
2. A copy of the letter is provided to the City, which will postpone further processing of the application until the issue is resolved.
3. If the informal negotiation is successful, the viewholder notifies the City, and the application proceeds through design review process.
4. If the negotiation fails, the viewholder may propose mediation. If successful, the mediator's report is forwarded to the City's Design Review Board. The Board is required to incorporate into the project's design, or identify reasons why such changes cannot be made.
5. If mediation fails, the viewholder may file a "view obstruction claim" with the City's Design Review Board, who must make the findings that the changes have been incorporated into the design, or that the changes cannot be made for specified reasons.
6. The viewholder can appeal the design review board decision to Council.

#### Vegetation Disputes

The process for resolving view blockage claims caused by vegetation involves:

1. Informal negotiation similar to view blockage created by structures. If this is unsuccessfully resolved, the claim can proceed through mediation, followed by binding arbitration or civil litigation.

Unlike the claims process for structures, once the viewshed is registered, the City is not normally involved unless the vegetation is subject to the City's Vegetation Removal or Tree Protection Ordinances. If the City is not involved, no design review body will implement the results of the process, nor is there an appeal process. The dispute resolution process remains a private issue.

#### Other Cities' View Preservation Ordinances

Planning Staff has completed research on various methods and measures other cities have taken, in order to address citizens concerns regarding private view and privacy protection. Staff has compiled view preservation ordinances from other cities for

Council Agenda Report

REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 6

comparison purposes in response to the VOTF concerns regarding the City's lack of addressing this view/privacy issue. There are various methods utilized by those cities to address neighboring property owners' view concerns. A brief description of the different types and a brief summary of these ordinances is outlined in "Attachment 2".

**Staff Analysis of the VOTF View/Privacy Ordinance**

**View Rights vs. Process**

As noted above, after past consideration, the City Council has elected not to provide private view protection rights. Section 22.66.010 of the Draft Ordinance submitted by the VOTF establishes a property owner's "right to seek protection and restoration of private views." However, Section 22.66.020 states that property owners are entitled to a "process" to resolve conflicts. As a result of the conflicting statements, Staff is unclear as to whether a view right or a process is being established.

Staff notes that the VOTF draft ordinance states in its title that it seeks to protect "existing views and privacy", but contains no detailed provisions other than view protection. Therefore, Staff is unable to determine what the VOTF seeks in that regard.

**View Registration of Certain Properties Covered**

The VOTF draft ordinance as proposed would apply citywide to any "owner of a single family residence in a single family zone who registers an existing view privacy area." The registration of views and privacy areas is an attempt to identify a specific view at a specific point in time. No other type of residence in a different type of residential or other land use zone would be afforded the same right.

Other cities use different methods for identifying a view. For example, the Town of Tiburon states that a person has "a right to seek restoration of views which existed at any time since they purchased or occupied the property, when such views are from the primary living area or active use area" have been obstructed. Staff has not identified any other City that has used a view registration process to identify a view. As a result, the effectiveness and day to day practicality of this approach is difficult to evaluate.

**Additional Mailed Noticing Requirements**

The view protection registration process would require the City to provide notice to all view holders of proposed construction that involves "any discretionary permit or approvals affecting

## Council Agenda Report

### REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 7

properties within the viewshed." The draft ordinance, would, therefore, require the City to increase noticing distance from 100 to at least 300 feet to ensure that all potential "viewsheds" are included.

The Draft Ordinance does address mailed noticing requirements for properties or "View Holders" where development applications receive building permits only, and where no discretionary review is required. The Ordinance acknowledges that all construction projects do not require noticing, and that the View Holder must monitor construction activities within the viewshed. However, if a view registration process is instituted, it may require Planning Staff to track all "Registered View Holders" to ensure that these "View Holders" receive proper notice. Staff believes this expanded noticing requirement could generate confusion and become unduly burdensome.

#### **Views Covered**

The VOTF draft ordinance establishes some limitations on the types of views that are protected. The VOTF Ordinance defines a protected view or privacy area as a "90 degree viewshed from a designated site on his or her property, extending no more than 300 feet from the property line of the registered property". Staff is unclear whether this means only one 90-degree viewshed is protected. Are there any limitations on the quantity of views protected? If a viewholder has multiple views of the mountains and the ocean, are both viewsheds protected? Staff believes that any view preservation ordinance requires clear limitations so that the "View Holders" clearly understand what types of views can be protected.

#### **View Access/Dispute Resolution Process Involving Structures**

The VOTF Draft Ordinance includes a dispute resolution process for applications proposing structures. If the View Holder determines that any proposed structure has the potential to create an "unreasonable obstruction" in the viewshed, he or she may send a letter to the owner of the property upon which the construction is proposed, and halt the process of the application until the negotiations are completed. Informal negotiations must be completed within 30 days.

If negotiations are unsuccessful, a mediation process may be initiated. According to the draft proposed process, this process has time limits which can take up to an additional 34 days to complete. If the mediation is unsuccessful, a view obstruction claim can be submitted to the design review boards. The entire City design review process can be suspended for over 2 months. Staff believes this process could be used by individuals to unduly

Council Agenda Report

REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 8

delay projects. Furthermore, Staff is unclear about what is meant by an "unreasonable obstruction" and who should make such a determination

Finally, the draft ordinance also includes private view protection for other minor structures such as fences and walls. Staff believes that this provision is too restrictive.

**Special ABR/HLC Findings for Approval**

If mediation is unsuccessful or not accepted, the design review boards would be made responsible for balancing the burdens and benefits of a "Viewshed Obstruction Claim" without appropriate standards of review. The draft ordinance would require the boards to evaluate the viewshed obstruction claim and make the special findings listed in the ordinance. The draft ordinance would require the ABR and HLC to include special findings that would document why the design of the structure was modified or could not be modified.

In addition, the ABR/HLC decision on a particular design has a possibility that it may conflict with the decision of mediation, arbitration or a judge. Planning Staff is unaware of any other City that uses this mediation/arbitration approach for determining view blockage issues involving new construction.

Other cities have addressed view blockage issues that involve new construction by requiring that a design review finding of approval be made that considers private views for new construction. Staff believes that this is a more workable method for considering view impacts involving new construction. However, Planning Staff believes that ABR/HLC consideration of private view/privacy impacts will result in longer, more contentious design review meetings. The mailed noticing requirement would increase public comment regarding protection of privacy and views. The ABR/HLC would, therefore, effectively become a forum for consideration of neighboring parties' view blockage concerns or loss of privacy disputes. Of course, such disputes would also be appealable to City Council.

Finally, consideration of potential view blockage is highly subjective given the nature of view angles and the definitions that exist regarding what constitutes an unreasonable obstruction. For this reason, Staff believes that City Council appeals of ABR/HLC decisions may actually increase. An ordinance that requires consideration of private view impacts would mandate that the design review boards (and the City Council for appealed decisions) resolve these difficult disputes.

APR 24 2001 # 2 7



Council Agenda Report

REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 9

**View Access/Dispute Resolution Process Involving Vegetation**

The VOTF Draft Ordinance provides that view access disputes involving trees or foliage use the same process for dispute resolution as those involving structures. The process consists of initial contact and discussion between the respective parties. If this initial contact is unsuccessful, the "View Holder" may seek mediation, or arbitration/litigation.

Staff believes that this method of dispute resolution involving vegetation could be more successfully handled privately than could view/privacy disputes involving new construction. However, including trees and foliage in a private view preservation ordinance would result in additional restrictions placed on property owners as well as tree and vegetation pruning or removal.

Furthermore, staff is of the opinion that vegetation or tree removal for the sake of view protection could result in significant impacts to the appearance of landscaping elements if not performed correctly. The City Parks Department has concerns that some oversight of vegetation and tree removal disputes should be required to avoid the topping of trees and to prevent the loss of canopy trees consistent with existing ordinances.

**Approaches for Possible View Preservation Ordinance**

As noted earlier, other cities have adopted a variety of plans to address protection of private views/privacy. These plans range from legislation creating minimal to extensive City involvement in private view/privacy protection. The following choices outline the different levels and approaches the City can undertake to address private view/privacy protection.

**Approach #1: No Involvement/Status Quo or Minor Amendments to Existing Design Guidelines**

The City can do nothing and remain neutral to any involvement in privacy or private view matters. Another slightly different approach would be to amend the Single Family Residence Design Guidelines and strengthen the "Good Neighbor Policies"

**Advantages:** The approach would minimize the City's potential for legal challenges if construction applications are denied due to structures or vegetation that may affect privacy or private views.

**Disadvantage:** If nothing is done, disputing parties have no effective way, incentives or legal basis to resolve view or privacy disputes.

Council Agenda Report

REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 10

**Approach #2: Minimal Amount of City Involvement**

The City can merely attempt to initiate discussion among competing interests of property owners with view/privacy disputes. To accomplish this the City can:

1. Suggest, in the case of new structures, that design review boards consider neighbors' existing views, but do not create any rights in property owners. The design review boards' findings would be advisory in nature only.
2. Provide a mechanism whereby neighboring property owners are given a forum to voice their concerns. This can be accomplished with the assistance of a neutral mediator. If, however, the parties cannot reach a resolution, the complaining party has no effective right to arbitrate or litigate his complaint, since no right has been created.

Advantages: Provides a forum for neighboring property owners with view/privacy disputes to voice their views.

Allows for a neutral party to facilitate resolution.

Avoids City involvement in the process.

Disadvantage: If the mediation process fails, the parties have no effective way to resolve the dispute.

**Approach #3: Limited City Involvement/ New View Preservation Ordinance**

The City can attempt to balance the desire for maintaining an existing private view/privacy with the burden on neighboring property owners who wish to develop their property or maintain trees and foliage on their property in an unrestricted manner. To accomplish this the City can:

Establish a homeowner's right to a view but adopt language such as the new development will not create a "significant obstruction", or trees and foliage shall be maintained in a manner that will not "needlessly impair" a view.

1. Require, in the case of new structures that design review boards consider neighbors' existing views/privacy when approving new construction and establish a homeowner's right to a view.

APR 24 2001 # 2 7

Council Agenda Report

REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE

October 1, 1999

Page 11

2. Provide a dispute resolution process for view obstructions involving vegetation, whereby the City recommends resolution through:

- a) Initial Reconciliation: The parties attempt to resolve their dispute by personal discussion.
- b) Mediation: If this fails, the parties attempt to resolve their dispute with the assistance of a neutral mediator.
- c) Arbitration or Litigation: If this fails the parties can seek to resolve their dispute privately through binding arbitration or litigation. This step can only take place if a homeowner's right to a view is defined and established.

Advantages: Provides a way for property owners with competing interests to resolve their disputes.

Limited City involvement in view disputes.

Disadvantages: New development restrictions placed on some property owners.

Will result in some tree pruning or removal.

**Approach #4: The Greatest Amount of City Involvement**

The City can place a higher value on a homeowner's right to a view than the burden on other property owner's right to develop his property or grow vegetation in an unrestricted manner. To accomplish this, the City can:

1. Create a property owner's right to a private view.
2. Set concrete restrictions (e.g. no trees above a certain level) on view impediments for both structures and foliage.
3. Establish City run hearings with specifically created boards or committees to hear disputes among disputing property owners.
4. Make the final determination on whether a structure or particular planting violates a complaining party's rights as created by the ordinance.

Advantage: Disputes resolved at City level without need for further litigation.

Council Agenda Report  
REQUEST FROM VIEW ORDINANCE TASK FORCE TO CONSIDER PROPOSAL FOR  
A VIEW PRESERVATION ORDINANCE  
October 1, 1999  
Page 12

Disadvantages: Administrative and enforcement cost to the City.

New development restrictions for property owners.

Will result in tree pruning or removal.

Each of these approaches bears its own advantages, but raises issues, burdens and risks. Staff seeks direction from the Ordinance Committee on which, if any, approaches or elements outlined could be supported.

**RECOMMENDATION:**

Planning Staff recommends that the Ordinance Committee:


- A. Review and consider the Draft Ordinance prepared by the View Ordinance Task Force (VOTF); and,
- B. Provide direction to Staff and the City Attorney's Office on the preferred approach to address private view preservation/privacy issues and refer the matter to the City Attorney for an evaluation of possible legal concerns with respect to such an ordinance.

APR 24 2001 #27

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CITY OF SANTA BARBARA  
INTEROFFICE MEMORANDUM

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**To:** City Council Ordinance Committee  
**From:** Stephen P. Wiley, Assistant City Attorney   
Don Vickers, Attorney at Law  
**Subject:** View Preservation Ordinance - "View/Privacy Task Force" Proposal  
**Date:** December 3, 1999

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### INTRODUCTION

This memorandum analyzes and comments upon the draft view preservation ordinance submitted by the attorney for the "View/Privacy Task Force" to the City Council by letter dated September 6, 1999. The general format of this memorandum is to consider each section of the proposed ordinance separately; however, since many of the sections interact with each other, a consideration of such interaction is also necessary.

### GENERAL CONCLUSIONS

Existing case law indicates that the City has the constitutional police power authority to place reasonable design, size, scale, and other aesthetic restrictions upon residential property development, particularly through the use of a design review board of qualified individuals. Under limited circumstances, this police power authority can also include design review consideration of the impact that a proposed residential development may have on the privacy and scenic views of a neighboring property owner. However, to our knowledge, the approach taken by this ordinance of authorizing the "registration" of a protected private view corridor is a great deal more invasive of personal property rights than anything previously validated by the courts. Consequently, a major concern to this office is the ordinance's lack of a well-articulated and constitutionally recognized "public purpose" for the ordinance and its unique approach of a "registered" view corridor. Further, there are provisions of the ordinance, as presently drafted, which are apparently vague and ambiguous, possibly to such an extent that the ordinance might not be legally and constitutionally enforceable. Finally, some provisions of the ordinance may be difficult for City staff to implement from a practical day to day standpoint and may also conflict with preemptive state statutes, such as the Permit Streamlining Act (Gov't Code §§ 65950 et seq.) and state Civil Code provisions concerning the creation and use of easements (Civil Code §§ 801-813), especially Civil Code § 801.5 which establishes the manner in which a "solar easement" may be created.

APR 24 2001 # 2 7

DEC 7 1999 # 1 8

## I. SECTION BY SECTION ANALYSIS OF THE PROPOSED ORDINANCE

**Section 22.66.010.** This section provides that the ordinance establishes a private right among property owners to register and seek protection and restoration of private views and "privacy " areas for parcels located within single family zones in the city.

*COMMENT.* The word "privacy" is used in this section and in other parts of the ordinance as an apparently operative term. The use of the word would seem to indicate that there is a right **not** to be seen as well as a right to enjoy a particular scenic view; however, other portions of the ordinance appear to limit its scope to preserving private scenic views. If the ordinance is intended to provide protection against development that invades a homeowner's sense of privacy, it should probably clearly and consistently so provide. As drafted, the use of the word "privacy" is ambiguous and what the ordinance does to "protect" this sense of privacy is not at all clear.

For example, it is unclear which impacts upon "privacy" are restricted. The provisions of the ordinance which limit a protected area (the "viewshed") to 90 degrees and which require an adverse impact on at least 20% of that area in order to make a "view obstruction claim" do not appear to make sense when applied to impacts on "privacy."

Further, in using the words "establishes a private right" the ordinance seems to imply that it creates a private right of legal action (the right to sue and obtain judicial relief) to vindicate a personal right to preserve and protect a private view and that this right to sue is separate and distinct from the ordinance's subsequent provisions regarding design review and mediation. If this is true, it is not at all clear to us what constitutional authority would allow the City to create a private right of action involving private parties over an apparently private property rights dispute.

**Section 22.66.020.** This section makes certain findings. These findings recognize that both views and vegetation contribute value, both aesthetically and economically, but that the two may come into conflict with each other. It also recites that property owners are entitled to a process to resolve conflicts and balance the benefits of trees, views, and privacy with private property rights of development.

*COMMENT.* The primary concern here is the lack of any apparent or articulated public health, safety, and welfare purpose for the protection of the private viewsheds of single-family homeowners through the use of a City ordinance. That is, the fundamental constitutional starting point of any zoning or other police power ordinance substantially implicating private property rights (as does this ordinance), must be a clear and apparent legitimate and valid public purpose for the ordinance. The "public purpose" of this ordinance is not apparent in this section. Also, the imprecisely defined right of privacy is again referred to.