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CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN HARBISON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN HARBISON,

Plaintiffs,

vs.

CITY OF PALOS VERDES ESTATES, a municipal corporation; PALOS VERDES HOMES ASSOCIATION, a California corporation; ROBERT LUGLIANI and DELORES A. LUGLIANI, as co-trustees of THE LUGLIANI TRUST; THOMAS J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST U/DO MAY 2, 2012 and DOES 1 through 20,

Defendants.

Case No.: BS142768

(Assigned for all purposes to Hon. Barbara A. Meiers, Dept. 12)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OR BOTH

Hearing Date: February 25, 2015
Hearing Time: 10:30 a.m.
Department: 12

Action Filed: May 13, 2013
Trial Date: None Set

BY FAX

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MEMORANDUM OF POINT AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In June 1940, the Defendant City of Palos Verdes Estates (the "City") accepted two deeds conveying public parkland from Defendant Palos Verdes Homes Association (the "Association.") (UMF[1] Nos. 32-35). The two deeds contained a number of land use restrictions including the condition that the property remain public parkland forever. (UMF No. 37). Historically, the Association has taken the position that "the use of parkland for the benefit of a single private residence is not consistent with the intent of the deed restrictions and such use should be disallowed." (UMF No. 53). In 2014, the City and the Association deeded that public park to a private party for a wholly private purpose. (UMF Nos. 65-74). This is an action to enforce the June 1940 deed restrictions and have the September 2012 deeds declared void. The material facts are not in dispute:

This litigation concerns the ownership and use of the real property located on Via Panorama to the North/Northwest of the residential property at 900 Via Panorama (the "Panorama Parkland.") (UMF No. 2). The Association owned the Panorama Parkland until June 14, 1940. (UMF Nos. 32-35). On June 14, 1940, the Association deeded the Panorama Parkland to the City. (UMF Nos. 32-35). The June 14, 1940 deeds contained multiple restrictions, including that the Panorama Parkland remain parkland "forever." (UMF Nos. 36-37). In May 2012, the City and Association agreed to deed the property to Defendant Thomas Lieb as trustee of a private trust – "The Via Panorama Trust U/DO May 2, 2012" set up for the benefit of the children of Dr. Robert Lugliani and Delores Lugliani. (UMF Nos. 59, 64, 69-71). The current owners of the Panorama Parkland intend to use it for the exclusive private use of the Lugliani family. (UMF Nos. 73-74). In September 2012, the property was conveyed by the City to the Association and immediately thereafter to Lieb for the benefit of the Lugliani family. (UMF No. 65-66, 69-71). The September 2012 deeds conveying the Panorama Parkland authorize the construction of a "gazebo, sports court,

[1] All references to "UMF No." are to the Separate Statement of Undisputed Material Facts filed concurrently herewith.

retaining wall, landscaping, barbeque and/or any other 'accessory structure'…" (UMF Nos. 67-68).

Plaintiffs Citizens for Enforcement of Parkland Covenants ("CEPC") and John Harbison contend that the transfer of the Panorama Parkland was illegal and an *ultra vires* act. The transfer violated several deed restrictions that require that the parkland remain in public hands and be used for park purposes "forever." The City and Association contend that they have unfettered discretion to do whatever they want with Panorama Parkland and can transfer it to private parties. They claim that they have the "right but not the duty" to enforce the legal restrictions for the use and ownership of the parklands. Finally, they argue that they have the implied right to "swap" the Panorama Parkland for other parkland owned by non-party, the Palos Verdes Peninsula Unified School District (the "District").

This case presents the legal question of what occurs at the intersection between the mandatory land use restrictions in the June 1940 deeds and the City and Association's claimed unlimited discretion to use and dispose of public parkland. Plaintiffs contend that the deed restrictions trump the City and Association's claimed discretion. Therefore, this Court should declare the September 2012 deeds illegal and grant summary adjudication of Plaintiffs' Causes of Action for Declaratory Relief and Waste of Public Funds/*Ultra Vires*.

II. FACTUAL BACKGROUND

A. The Origins of the City and the Association

On May 16, 1923, the Association was formed. (UMF No. 7). On June 25, 1923, the Association enacted its bylaws. (UMF No. 8). On July 5, 1923, the developer for Palos Verdes Estates recorded Declaration No. 1 establishing basic land use restrictions for real property within what would later be known as the City. (UMF No. 9). The land use restrictions recorded on July 5, 1923 were amended and supplemented several times after July 5, 1923. (UMF No. 10).

On July 26, 1926, Bank of America recorded Declaration No. 25 establishing the

conditions, covenants and restrictions for Tract 8652.[2] (UMF No. 11). Declaration No. 25 describes the purpose of the Association as follows:

> To carry on the common interest and look after the maintenance of all lots …[the] Association, has been incorporated …. *It will be the duty of this body to maintain the parks … and to perpetuate the restrictions*.

(UMF No. 12, emphasis added).

Declaration No. 25 provides that:

- The land use restrictions "are for the benefit of each owner of land..." (UMF No. 13).
- A breach of the restrictions shall cause the property to revert to the Association. (UMF No. 14).
- Any breach of the restrictions can be enjoined by the Association or by any property owner in the Association. (UMF No. 15).
- A breach of the restrictions shall constitute a nuisance which may be abated by either the Association or any lot owner subject to the Association's jurisdiction. (UMF No. 16).
- The provisions of the declaration "shall bind and inure to the benefit of and be enforceable by" the Association or "by the owner or owners of any property in said tract...." (UMF No. 17).

B. The June 14, 1940 Deeds Imposing the "Parkland Forever" and other Restrictions

On June 14, 1940, the Association conveyed a number of parks to the City in multiple grant deeds. (UMF No. 32). The properties conveyed by the Association to the City on June 14, 1940 included the Panorama Parkland. (UMF No. 33-35). The properties conveyed by the Association to the City on June 14, 1940 included Lot A of Tract 7540. (UMF No. 34). The properties conveyed by the Association to the City on June 14, 1940 included Lot A of Tract 8652. (UMF No. 35). The June 14, 1940 deeds conveying property from the

[2] Most of the Panorama Parkland falls within Tract No. 8652.

Association to the City included restrictions on the future use and ownership of the conveyed property. (UMF No. 36). Specifically, the June 14, 1940 deeds state:

- That the transferred property "is to be used and administered forever for park and/or recreation purposes…" (UMF No. 37).
- That "no buildings, structures or concessions shall be erected, maintained or permitted" on the parkland "except such as are properly incidental to the convenient and/or proper use of said realty for park and/or recreation purposes." (UMF No. 38).
- That the transferred property "shall not be sold or conveyed, in whole or in part…except to a body suitably constituted by law to take, hold, maintain and regulate public parks…" (UMF No. 39).
- That, with written permission, a property owner abutting the park may construct paths or landscaping on the conveyed property as a means of improving access to or views from such property. Such improvements must not impair or interfere with the use and maintenance of said realty for park and/or recreation purposes. (UMF No. 40).
- That none of the use or ownership restrictions set forth in the June 14, 1940 deeds may be changed by the City or the Association even if the Association complies with its own internal procedures for modifying land use restrictions and obtains the written consent of two-thirds of the property owners. (UMF No. 41).
- That any breach of the use or ownership conditions "shall cause said realty to revert to the" Association. (UMF No. 42).
- That the deed restrictions "inure to and pass with said property and each and every parcel of land therein, and shall apply to and bind the respective successors in interest of the parties hereto, and are…imposed upon said realty as a servitude in favor of said property and each and every parcel of land therein as the dominant tenement or tenements." (UMF No. 43).

The June 14, 1940 deeds do not contain any text or provision that authorizes the

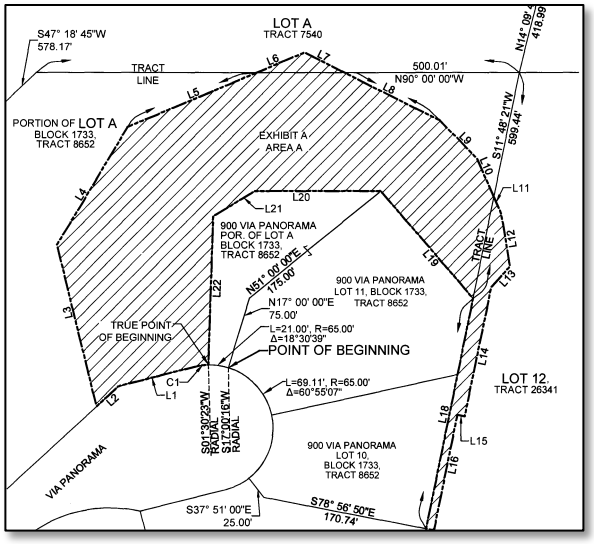
transfer of parkland to a private party for private purposes. Notably absent from the June 14, 1940 deeds are:

- Any express provision authorizing the City or Association to "swap" parkland properties. (UMF No. 44).
- Any express provision authorizing the City or Association to convey parks as part of a resolution of litigation. (UMF No. 45).
- Any express provision authorizing the City or Association to convey parks to fund budgetary shortfalls for school districts. (UMF No. 46).

The City passed Resolution No. 12 formally accepting the deeds and confirming the land use restrictions. (UMF No. 47). Resolution No. 12 re-states verbatim each of the land use restrictions set forth above. (UMF No. 48).

C. The Location of the Panorama Parkland

The Panorama Parkland is an irregularly shaped parcel in the form of a crescent that wraps around the residential property at 900 Via Panorama. (UMF No. 3). The boundaries of the Panorama Parkland cross three different tract lines and, therefore, the Panorama Parkland falls within tract numbers 7540, 8652 and 26341. (UMF No. 4). The shaded section in the below map represents the Panorama Parkland and its relationship to the surrounding tract numbers and residences.



D. The May 2012 Agreement to Sell Public Parklands to Private Parties

For decades, the prior and current owners of 900 Via Panorama have allowed encroachments to remain on the Panorama Parkland. (UMF No. 52-59). These improvements include landscaping, a baroque wrought-iron gate with stone pillars and lion statutes,[3] a winding stone driveway, dozens of trees (some of which are as high as 50 feet), a now-overgrown athletic field half the size of a football field, a 21-foot-high retaining wall and other retaining walls. (UMF No. 58). In May 2012, the City and Association agreed to convey ownership of the Panorama Parkland to Mr. Lieb as trustee for the benefit of Dr. and Mrs. Lugliani's children. (UMF Nos. 59, 64).

In September 2012, the Panorama Parkland was deeded from the City to the Association and then immediately to Mr. Lieb. (UMF Nos. 65-66). The deeds conveying the Panorama Parkland provide that although the Panorama Parkland is to remain open space "it is the intent of the parties.... that [Thomas Lieb] may construct any of the following: a gazebo, sports court, retaining wall, landscaping, barbeque, and/or any other uninhabitable 'accessory structure'…" (UMF Nos. 67-68). Following the September 2012 conveyance of public parkland to a private party the new owners moved forward with their plans to convert the property to private use. (UMF Nos. 73-74). In February 2013, the current owners of the Panorama Parkland applied to the City planning commission and City council for a zone change from open space to residential zoning. (UMF No. 74). In March 2013, the owners of the Panorama Parkland, through their attorneys, confirmed that the requested rezoning, if granted, "will prohibit public access to the land." (UMF No. 74).

E. The Standing of CEPC and Harbison to Bring this Action

John Harbison has owned real property within the City since 1992. (UMF Nos. 18-19). He has paid property taxes each year he has owned the property. (UMF No. 23). His ownership of property within the City subjects him to the jurisdiction of the Association. (UMF No. 20). He is a member of good standing of the Association. (UMF No. 21).

[3] The pillars and statues encroach on the City's easements and right of way.

California courts routinely recognize the standing of citizens to challenge a municipality's attempt to violate land use restrictions for parks. (*City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295, 300 [recognizing resident's standing as taxpayer under Code of Civil Procedure, section 526a and in instances alleging ultra vires acts by the government].) Mr. Harbison is also a member of CEPC. (UMF No. 22).

III. LEGAL STANDARD ON SUMMARY ADJUDICATION

A plaintiff moving for summary judgment bears the initial burden of persuasion that there is no triable issue of material fact that he is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-51; *AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-65). A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the underlying fact in defendants' favor. (*Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at pp. 850-51). If plaintiffs satisfy this prima facie showing, the burden shifts to the defendants to demonstrate a triable issue of fact. (*Ibid.*)

IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT OR ADJUDICATION IN THE PLAINTIFFS' FAVOR BECAUSE THE CITY AND ASSOCIATION VIOLATED THE LAND USE RESTRICTIONS PREVENTING A PUBLIC PARK FROM BEING CONVERTED TO A PRIVATE BACKYARD

A. The Court Should Grant Summary Adjudication of the Declaratory Relief Cause of Action Because the September 2012 Deeds Violate the June 14, 1940 Deed Restriction that the Panorama Parkland be Used and Administered "Forever" for Park Purposes

The September 2012 deeds authorize the construction of a "gazebo, sports court, retaining wall, landscaping, barbeque and/or any other 'accessory structure'…" on the

Panorama Parkland. (UMF Nos. 62-63). These private uses for the benefit of private parties violate the June 14, 1940 deed restriction that the parkland be used "forever" for park purposes.

A similar attempt to circumvent deed restrictions was attempted and struck down by the courts in *Save the Welwood Murray Memorial Library Committee v. City Council of the City of Palm Springs* (1989) 215 Cal.App.3d 1003 ("*Welwood Murray*.") In *Welwood Murray*, a dispute existed regarding the use of library property in Palm Springs. The City obtained the property by two grant deeds in 1938. The first deed conveyed the property on the condition that the City or the Library association "continue and forever maintain the Palm Springs Free Public Library above mentioned in and on buildings which are now or may be hereafter placed on the property hereby conveyed." (*Welwood Murray*, at 1006). The deed went on to state that in the event the condition was violated "this deed and the conveyance thereby made shall be void and no effect and all title to the property and rights hereby conveyed shall instantly revert to the grantor…" (*Id.*, at 1006-07). The second deed conveyed property to the City on the condition that a free public library be established in buildings to be erected on the property. (*Id.* at 1007). In the event the condition was breached, the conveyance was to be "void and of no effect" and title to the property "shall instantly revert to the grantor…." (*Ibid.*)

Thereafter, a building was constructed and a library was maintained for decades. In 1986, the City entered into a series of development agreements whereby a local restaurant was to be relocated to the library. A local citizens group filed a petition for writ of mandate to challenge the agreements on the grounds that the proposed non-library use of the grounds violated the deed restrictions. The trial court granted a petition for writ of mandate and issued injunctive relief enjoining the City from conveying title or taking any acts intending to use the property for non-library uses.

The City challenged the judgment on appeal arguing that the proposed use of the property was consistent with the deeds, that the trial court interfered with the government's discretion and the trial court abused its discretion. The Court of Appeal rejected each of the City's arguments. The *Welwood Murray* court began its analysis by examining *Roberts v. City of*

Palos Verdes Estates (1949) 93 Cal.App.2d 545 ("*Roberts*.") In *Roberts*, the Court of Appeal held that "where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose." (*Roberts*, at 547).

> Courts have guarded zealously the restrictive covenants in donations of property for public use as the foregoing cited decisions will reveal. Such an effort on the part of a municipality if successful may be but the opening wedge and, as stated in *Kelly v. Town of Hayward*, *supra*, [(1923) 192 Cal. 242, 219 P. 749], 'some future board might claim that under their discretion a corporation yard and rock- pile for the employment of prisoners, and other very useful adjuncts to the administration of the economic affairs of the town, might be located thereupon, until the entire space was fully so occupied.
>
> "What a city council or board of trustees would like to do under whatever guise it may be proposed is not the test as to the validity of the proposal. The terms of the deed alone are controlling.
>
> "Unless the buildings directly contribute to the use and enjoyment of the property in question for park purposes, there exists a violation of the restrictions." (*Id.*, at p. 548, 209 P.2d 7).

The *Welwood Murry* court, relying on *Roberts*, held that to be valid, a proposed use of property must directly contribute to the use of the enjoyment of the property for library purpose. The Court of Appeal held that the proposed use as a dining area did not contribute to the library and in fact was "antithetical" to library purposes to the extent parts of the building used for book storage would be destroyed. (*Id.* 1015). Importantly, the Court of Appeal also held that even permitting dining activity by way of a mere easement (and not a conveyance of title) would "clearly" violate the 1938 deed restrictions requiring the City to "forever maintain" the library. (*Id.,* at 1016).

The facts of the *Welwood Murray* case are directly on point here. One need only substitute the word "park" for "library" and then apply the holding here. Notably, the City of Palm Springs argued that the injunction precluding the City from undertaking any acts done primarily for a non-library purpose unduly invaded the discretionary power of the City to decide the "best use" of the property (*Ibid.)* The Court of Appeal rejected this argument and upheld the breadth of the injunction because the City retained the full discretion to make decisions to implement a use of the property so long as that use was necessary for library purposes. (*Ibid.*) Under *Welwood Murry* and *Roberts*, the terms of the June 14, 1940 deeds

"alone are controlling." The physical alterations to the Panorama Parkland contemplated by the September 2012 deeds violate the condition that the property be used "forever" for park purposes. On this basis alone, the Court should grant declaratory relief, declare the two September 2012 deeds void and issue an injunction[4] along the same terms as was issued in *Welwood Murray*: enjoining the City and Association from: a) conveying an easement, title or any other legal right over the Panorama Parkland; or b) any other act done to advance, authorize or approve a primarily non-park use or which interferes with a park-use of the Panorama Parkland."

B. The Court Should Grant Summary Adjudication of the Declaratory Relief Cause of Action Because the September 2012 Deeds Violate the June 14, 1940 Deed Restriction Precluding Structures on the Panaroma Parkland

The September 2012 deeds purport to authorize the construction of a "gazebo, sports court, retaining wall, landscaping, barbeque and/or any other 'accessory structure'…" on the Panorama Parkland. (UMF Nos. 79-80). These private uses for the benefit of private parties violate the June 14, 1940 deed restriction that "no buildings, structures or concessions shall be erected, maintained or permitted upon said realty, except such as are properly incidental to the convenient and/or proper use of said realty for park and/or recreation purposes." (UMF No. 75).

A similar issue was resolved against the City in the *Roberts* case. In *Roberts*, the City had obtained parks subject to the condition, substantially identical to the condition here:

> "that except as provided above, no buildings, structures or concessions shall be erected, maintained or permitted upon the said realty, except such as, (in the opinion of the Park Department of Palos Verdes Homes Association), are properly incidental to the convenient and/or proper use of said realty for park purposes."

(*Roberts*, at 546).

The City proposed to build a housing yard on the property for city-owned trucks.

[4] The Court has the power to issue injunctive relief as ancillary relief of the declaratory relief claim sought by plaintiffs. (*Staley v. Board of Medical Examiners* (1952) 109 Cal.App.2d 1, 6).

The trial court ruled that the City could lawfully construct buildings to be used "exclusively in connection with the care, maintenance and upkeep of the defendant city's parks and park property." (*Id.* at 547). The Court of Appeal ultimately held that the injunction was too lenient on the City. To the extent that the City was permitted by the injunction to use the housing yard to care for other city-owned parks that were not conveyed by the original deed containing the restriction, the trial court had erred. The only permissible use of the property was to allow for a use that directly contributed to the use and enjoyment of the deeded property as a park. (*Id.*, at 548-549).

Based on *Roberts*, which construed a substantially identical deed restriction, the proposed erection and maintenance of a privately used "gazebo, sports court, retaining wall, landscaping, barbeque and/or any other 'accessory structure'" for the enjoyment of private parties violates the June 14, 1940 deed restrictions. These structures are not "properly incidental to the convenient and/or proper use of said realty for park and/or recreation purposes" within the meaning of the June 14, 1940 deed. Indeed, the Association, in 1972, confirmed that the "use of parkland for the benefit of a single private residence is not consistent with the intent of the deed restrictions and such use should be disallowed…" (UMF No. 83).

The Court should grant summary adjudication of plaintiffs' declaratory relief causes of action, declare the September 2012 deeds void and issue an order enjoining the City and Association from any act done to advance, authorize or approve the erection or maintenance of any building, structure or concession on the Panorama Parkland.

C. The Court Should Grant Summary Adjudication of the Declaratory Relief Cause of Action Because the September 2012 Deeds Violate the June 14, 1940 Deed Restriction Precluding Conveyance or Sale Except to a Body Suitably Constituted by Law to Take, Hold, Maintain and Regulate Public Parks.

On September 5, 2012, the City conveyed the Panorama Parkland to the Association. (UMF No. 94). Immediately, thereafter, the Association conveyed the property to Mr. Lieb

in trust for the Lugliani family. (UMF No. 95). Both of these transfers violate the June 14, 1940 grant deed that prohibit a conveyance or sale "…except to a body suitably constituted by law to take, hold, maintain and regulate public parks…" (UMF No. 93). Mr. Lieb is an individual, not a body. (UMF Nos. 96-97). Neither Mr. Lieb nor the trust he acts on behalf of is "constituted by law to take, hold, maintain and regulate public parks." (UMF Nos. 96-99). The current owners of the Panorama Parkland intend to use the property for private purposes. (UMF No. 100). The conveyance to Mr. Lieb, a private individual, therefore violated the June 14, 1940 deed restriction.

The conveyance from the City to the Association was likewise in violation of the deed restriction. Although the Association at its inception was created to hold, maintain and regulate public parks, it has not done so since the 1940's. (UMF Nos. 84-91). In the late 1930's, the Association faced an overwhelming tax debt and the threat of foreclosure of its parklands. (UMF No. 84). To avoid this result, the Association deeded its parklands to the City and to the District between 1938 and 1940. (UMF No. 85). Since then, the Association has no ownership of parklands. (UMF No. 86). Instead, the City has taken on both the ownership and stewardship of the parks. (UMF No. 87). The City has established a Parklands Commission. (UMF No. 88). Applications by residents that would impact parklands are brought to the City's Parkland Commission and not the Association. (UMF No. 89). Permits and enforcement actions concerning parklands involve the City and not the Association. (UMF No. 90). Because the Association is no longer a body that takes, holds, maintains and regulates public parks, the attempt to convey the Panorama Parkland to it in September 2012 violated the June 1940 deed restrictions. The Court should grant summary adjudication of plaintiffs' declaratory relief claim, declare the two September 2012 deeds void and issue an injunction enjoining the City and Association from conveying an easement, title or any other legal right over the Panorama Parkland to a private party.

D. The Court Should Grant Summary Adjudication of the Declaratory Relief Cause of Action Because the September 2012 Deeds Purport to Authorize Landscaping and Construction in Violation of the June 14, 1940 Deed Restrictions that Bar Improvements that Interfere with the Use and Maintenance of the Parkland for Park and Recreation Purposes

The June 14, 1940 deed restrictions include a condition that the owner of property abutting the Panorama Parkland may "…maintain paths, steps, and/or landscape improvements, as a means of egress from and ingress" to the park or to improve the view from the park. (UMF No. 102). Such improvements are only allowed with the "written approval" of the Association and a permit from the City. (UMF No. 102). Any such improvements must not, in the opinion of the City and Association "impair or interfere with the use and maintenance of said realty for park and/or recreation purposes…" (UMF No. 102).

The September 2012 deeds contemplate a use of the Panorama Parkland in direct contravention of the foregoing condition. The September 2012 deeds authorize the construction of a "gazebo, sports court, retaining wall, landscaping, barbeque and/or any other 'accessory structure'…" on the Panorama Parkland. (UMF Nos. 104-105). The current owners of the Panorama Parkland have sought permits from the City to use the land for private purposes. (UMF Nos. 106-107). These private uses directly contradict the condition in the deed restrictions that only allow an adjacent neighbor to improve the parkland's view and access for the public, not for the benefit of a single family. As stated by the Association in 1972, the "use of parkland for the benefit of a single private residence is not consistent with the intent of the deed restrictions and such use should be disallowed…" (UMF No. 108).

E. The Court Should Grant Summary Adjudication of the Waste of Public Funds/*Ultra Vires* Cause of Action Because there are no Triable Issues of Material Fact that the June 14, 1940 Deeds Created a Public Trust and that the City Violated that Trust by Executing the September 2012 Deeds

On June 14, 1940, the Association conveyed a number of parks to the City in multiple grant deeds. (UMF No. 109). The City accepted the deeds by way of written resolution. (UMF No. 111). The City's acceptance of the deeds created a public trust that is well established in case law. *City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295, 296 is instructive. In that case, in 1907, the city was deeded beach property for recreational purposes and prohibiting traffic. Fifty years later, when the city erected a fence and constructed a road on the deeded property, a city resident sued the city to enforce the 1907 deed restriction. The city demurred on the ground that only the attorney general could enforce the land restrictions. The demurrer was overruled and the city sought writ relief. In denying writ relief, the court of appeal confirmed that when a municipality is deeded land for public purposes:

> the municipality owes the public a duty to employ the property in a certain way and that the members of the public can proceed in equity to compel the municipality to live up to this part of its governmental obligations.

(*City of Hermosa Beach v. Superior Court*, *supra*, 231 Cal.App.2d at pp. 298-99).

The court went on to hold that once a city accepts a deed with restricted public purposes, the city must continue to use that land for public purposes. (*Id.* at 300). The city, in such a circumstance 'is without the power of a municipality to divert or withdraw the land from use for park purposes." (*Ibid.*) A city that attempts to use a property in violation of the deed restrictions "would be an *ultra vires* act." (*Ibid.*; see also *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 104). Notably, the City of Hermosa Beach case specifically approved the procedure of asserting a claim asserting *ultra vires* acts under Code of Civil Procedure, section 526a to protect parkland. (*City of Hermosa Beach v. Superior Court*, *supra*, 231 Cal.App.2d, at p. 300).

The *City of Hermosa Beach* case is not an aberration:

> California courts have been loathe to cast aside use restrictions on property contained in deeds: " 'It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose. (*Roberts v. City of Palos Verdes Estates* [(1949)] 93 Cal.App.2d 545, 547 [209 P.2d 7]; *Griffith v. Department of Public Works* [(1956)] 141 Cal.App.2d 376, 380 [296 P.2d 838].)' " (*Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 103, 132 Cal.Rptr. 835 [*Big Sur Properties*]; see also *Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 Cal.App.3d 1003, 1012, 263 Cal.Rptr. 896 [Welwood Murray].)
>
> Likewise, California courts have often held that " '[w]here a tract of land is donated to a city with a restriction upon its use—as, for instance, when it is donated or dedicated solely for a park—the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant.' (Citations.) Further, where, as here, property is acquired by a public entity through private dedication, the deed is strictly construed. (Citations.) As several California courts have observed: "Courts have guarded zealously the restrictive covenants in donations of property for public use...." (Citations.) In fact, where property has been donated for public use, some courts have concluded such property "is held upon what is loosely referred to as a 'public trust,' and any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto is an ultra vires act. (Citations.)

(*County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, 575-76).

In sum, *City of Hermosa Beach v. Superior Court*, *supra*, 231 Cal.App.2d at pp. 298-99 and *County of Solano v. Handlery*, *supra*, 155 Cal.App.4th at pp. 575-76 confirm that a city that accepts deeds with land use restrictions remains bound by those land restrictions. Because there are no triable issues of fact concerning the City's acceptance of the deed restrictions and the violation of those conditions, summary adjudication is appropriate. Specifically, the Court should issue an order declaring the September 2012 deeds to be *ultra vires* and enjoining the City from taking any further actions to deprive City residents of the use of the Panorama Parklands.

F. The Court Should Grant Summary Adjudication of the Waste of Public Funds/*Ultra Vires* Cause of Action based on the Doctrine of Collateral Estoppel Because of the Prior Litigation Concerning these Deed Restrictions

In the *Roberts* decision, the City previously litigated (and lost) the issue of whether it could substitute its "best judgment" for the express terms of a parkland deed. In *Roberts*, the

City had obtained parks subject to the condition, substantially identical to the condition here:

> "that except as provided above, no buildings, structures or concessions shall be erected, maintained or permitted upon the said realty, except such as, (in the opinion of the Park Department of Palos Verdes Homes Association), are properly incidental to the convenient and/or proper use of said realty for park purposes."

(*Roberts*, at 546; UMF Nos. 112-113).

In the *Roberts* case, the City argued that it could substitute its "best judgment" for the use of the park for the express terms of the deed. (*Roberts*, at 546; UMF No. 114). The Court of Appeal specifically rejected that argument. Under the doctrine of collateral estoppel, the defendants here may not re-litigate the issue a second time. The elements of collateral estoppel require that an issue:

> (1) must be identical to that decided in the former proceeding, (2) must have been actually litigated in the former proceeding, (3) must have been necessarily decided in the former proceeding, (4) the decision must have been final and on the merits, and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party in the former proceeding.

(*Union Pacific Railroad Company v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134).

Here, the issue decided then and now is whether the City can substitute its best judgment for the express terms of a parkland deed; the issue was actually litigated, on the merits, in the prior case to final conclusion; and the issue was central to the *Roberts* ruling. The City was a party to the *Roberts* case. Accordingly, the City should not be permitted to re-litigate the issue of whether its discretion trumps a parkland deed restriction.

G. If the Court Grants Summary Adjudication as to the First and Second Causes of Action, it Should Grant Summary Judgment as the Third Cause of Action was Pled in the Alternative to the First Two Causes of Action.

Plaintiffs have asserted a nuisance cause of action in the alternative to the first two causes of action. In the event that the Court grants summary adjudication as to plaintiffs' first and second cause of action, the third cause of action is arguably moot and plaintiffs consent to its concurrent dismissal without prejudice to allow for judgment to be entered

against defendants.

H. The Court Should Grant Summary Adjudication as to the Affirmative Defense of Standing Because there are no Triable Issues of Fact Regarding CEPC and Harbison's Right to Assert Claims

The defendants have asserted an affirmative defense that plaintiffs lack standing. (UMF Nos. 115-117). However, both Harbison and CEPC have standing by virtue of Harbison's ownership of real property within the City. It is undisputed that he owns property within the City and is subject to the jurisdiction of the Association. (UMF Nos. 118--123).

In addition to Harbison's standing, CEPC has standing to assert claims herein for the following four reasons:

First, by virtue of Harbison's payment of taxes within the past year, Harbison may assert a taxpayer's action against the City pursuant to Code of Civil Procedure, section 526a. (*Pratt v. Security Trust & Savings Bank* (1936) 15 Cal.App.2d 630, 636 [holding that a taxpayer has standing to bring a suit to challenge *an ultra vires* act].)

Second, under the "Citizen Suit" doctrine, both Harbison and CEPC have standing to enforce a public duty (the property restrictions) and raising questions of public rights (the rights of City residents to enforcement of protective covenants, to preserve open space and to prevent unlawful conveyances of parklands to private parties). (*County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 129 [holding that the citizen suit doctrine provides "a general citizen remedy for controlling illegal governmental activity."].)

Third, by virtue of Harbison's ownership of real property within the City, he is a beneficiary of the restrictions and CEPC may assert those restrictions on Harbison's behalf. (*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673 [holding that an association has standing to sue when its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action].)

Fourth, Harbison is a member of the Association. The Association's bylaws state that

its members shall be constituted of "all who hold legal title of record" to any lot located within Palos Verdes Estates. (UMF No. 124). "Such building title shall be the sole qualification for membership in the [Association]." (UMF No. 124).

For the foregoing reasons, the defendants' affirmative defense that plaintiffs lack standing lacks merit and summary adjudication is proper.

I. The Court Should Grant Summary Adjudication as to the Affirmative Defense of Non-Joinder Because there is no Triable Issue of Fact Regarding the District's Participation in this Action

The City and Association have asserted an affirmative defense that there is a missing, indispensible party. (UMF Nos. 125-126). Presumably, defendants are referring to the District. The District was initially a named defendant in this matter because in the original pleading plaintiffs attacked the validity of the written agreement (an "MOU") signed by the District and other defendants herein. The purpose of the MOU was to, among other things, document the agreement to convey public parkland to private parties. The operative pleading does not attack the validity of the MOU. Because the District was neither a grantor nor a grantee of the September 2012 deeds, the District is not a necessary party to these proceedings.

Code of Civil Procedure, section 389 provides guidance as to whether a party is necessary and should be joined:

> (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest...

(Code Civ. Proc., § 389).

Here, plaintiffs are not attacking the validity of the MOU. Indeed, this Court, in overruling the defendants' demurrers has held that the District's interests are not implicated by this lawsuit. (UMF Nos. 129-130). Specifically, this Court has held: "The matters now

before this court do not depend, in this Court's view, on the MOU and who were or were not parties to it.'].) (UMF No. 129). This Court also noted:

> The parties to the MOU made a deal and took the risk that what they were doing would not be challenged or, if challenged, the challenge would not be successful. That challenge is what they are now facing, but the MOU, in this court's view, does not need to be vacated or set aside for the restrictions allegedly tied to [the Panorama Parkland] to be enforced if they have been or are being violated. The private agreement of parties to the MOU does not bind others with an interest or preclude a court from acting.

(UMF No. 130).

Based in no small part on this Court's April 11, 2014 order, on May 1, 2014, the plaintiffs requested dismissal of the District without prejudice. (UMF No. 131). The clerk entered dismissal on May 5, 2014. (UMF No. 132). Plaintiffs served written notice of entry of the dismissal order on May 7, 2014. (UMF No. 133). None of the defendants objected to the dismissal or made a subsequent motion to dismiss this action on the basis of non-joinder. (UMF No. 136). If, any defendant in good faith believed the District was a necessary party, the defendant could have asserted a cross-complaint in response to the Second Amended Complaint. In fact, on October 31, 2014, plaintiffs' stipulated to leave to file such a cross-complaint. (UMF No. 134). No Defendant has done so. (UMF Nos. 135-137). The failure of any defendant to name the defendant as a necessary party by way of a cross-complaint or to file a motion seeking dismissal of this case on the basis of non-joinder is dispositive. Moreover, this Court's April 11, 2014 order constitutes a finding that the District is not a necessary party to this proceeding. For the foregoing reasons, the Court should grant summary adjudication regarding the City and Association's affirmative defense of non-joinder of parties.

V. CONCLUSION

This case has far reaching implications for the future of the City and its residents. The City has over 600 other acres of parkland. This Court's decision will determine whether the City will retain its claimed unfettered power to sell off parkland to meet future financial

needs. The specific deed restrictions from June 1940 trump the City and Association's discretion. Accordingly, summary judgment, adjudication or both is required.

DATED: December 3, 2014

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