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THOMAS J. LIEB, TRUSTEE,
6 THE VIA PANORAMA TRUST

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JUL 15 2013

**LOS ANGELES
SUPERIOR COURT**

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15 **SUPERIOR COURT OF CALIFORNIA**
16 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

17 CITIZENS FOR ENFORCEMENT OF PARKLAND
COVENANTS, an unincorporated association,

Case No.: BS142768

18 Petitioners,

19 vs.

20 CITY OF PALOS VERDES ESTATES, a municipal
corporation; PALOS VERDES HOMES ASSOCIATION,
21 a California corporation; PALOS VERDES PENINSULA
UNIFIED SCHOOL DISTRICT, a political subdivision of
the State of California,

**REAL PARTY IN INTEREST, ROBERT LUGLIANI AND
DOLORES A. LUGLIANI, AS CO-TRUSTEES OF THE
LUGLIANI TRUST; THOMAS J. LIEB, TRUSTEE, THE
VIA PANORAMA TRUST, AND RESPONDENTS, PALOS
VERDES HOMES ASSOCIATION AND PALOS VERDES
PENINSULA UNIFIED SCHOOL DISTRICT, JOINT AND
SEVERAL NOTICE OF DEMURRER AND DEMURRER
TO FIRST AND THIRD CAUSES OF ACTION IN THE
VERIFIED PETITION FOR PEREMPTORY WRIT OF
MANDATE & COMPLAINT FOR INJUNCTIVE RELIEF;
MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF; DECLARATION OF R.J. COMER
IN SUPPORT THEREOF**

22 Respondents.

23 ROBERT LUGLIANI and DOLORES A. LUGLIANI,
as co-trustees of THE LUGLIANI TRUST; THOMAS
24 J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST

25 Real Parties In Interest.

CCP § 435; § 436
CRC § 3.1322

Hon. Joanne O'Donnell
Dept. 86

26 Petition Filed:
27 Hearing Date:
28 Hearing Time:

May 13, 2013
October 25, 2013
1:30 pm

RESPONDENTS AND REAL PARTY IN INTEREST'S JOINT AND SEVERAL
DEMURRER TO FIRST AND THIRD CAUSES OF ACTION

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22 the State of California,

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Real Parties In Interest.

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CCP § 435; § 436
CRC § 3.1322

Hon. Joanne O'Donnell
Dept. 86

Petition Filed: May 13, 2013
Hearing Date: October 25, 2013
Hearing Time: 1:30 pm

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 25, 2013, at 1:30 p.m. or as soon thereafter as the matter may be heard in Department 86 at the above-entitled Court, located at 111 North Hill Street, Los Angeles, California, Real Party In Interest, Robert Lugliani and Dolores A. Lugliani, as co-trustees of The Lugliani Trust; Thomas J. Lieb, Trustee, The Via Panorama Trust (collectively “Lugliani”), together with Respondents, Palos Verdes Homes Association (the “Association”) and Palos Verdes Peninsula Unified School District (the “District”) will and hereby do jointly and severally Demurrer to the First Cause of Action set forth in the Verified Petition for Writ of Mandate and Complaint for Injunctive Relief (the “Petition”) filed by Petitioner and Plaintiff, Citizens for Enforcement of Parkland Covenants (hereinafter “CEPC” or “Petitioners” interchangeably). At the same date and time above-referenced, the Association will demur to the Third Cause of Action set forth in the Petition.

DEMURRER BY ASSOCIATION

The Association’s Demurrer to the First Cause of Action is based upon the following:

- (a) Declaratory relief under Code of Civil Procedure section 1060 is unavailable to the CEPC because the declaratory and injunctive relief sought by CEPC are identical to the relief sought in its Petition for Writ of Mandate; and
- (b) The First Cause of Action fails to state a cause of action because it fails to set forth the ultimate facts of a justiciable controversy on which the court could grant the declaratory relief.

The Association’s Demurrer to the Third Cause of Action is based upon the following:

- (a) CEPC fails to state a cause of action for Writ of Mandate because the exhibits attached to the Petition controvert the existence of the duties CEPC alleges as the bases for a Writ of Mandate against the Association.

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DEMURRER BY DISTRICT

The District’s Demurrer to the First Cause of Action is based upon the following:

(a) The First Cause of Action fails to state a cause of action because it fails to set forth the ultimate facts of a justiciable controversy on which the Court could grant the declaratory relief.

DEMURRER BY LUGLIANI

Lugliani’s Demurrer to the First Cause of Action is based upon the following:

(a) The First Cause of Action fails to state a cause of action because it fails to set forth the ultimate facts of a justiciable controversy on which the Court could grant the declaratory relief.

This Joint and Several Demurrer is further based upon the memorandum of points and authorities attached to this Joint and Several Demurrer, Declaration of R.J. Comer attached hereto, and all pleadings and papers on file in this matter and all arguments that the court entertains at the time of hearing of this Joint and Several Demurrer.

WHEREFORE, the District, the Association, and Lugliani jointly and severally pray:

- That the demurrers be granted without leave to amend;
- That the First and Third Causes of Action be dismissed in their entirety; and
- That the Court grant other such relief as it may deem proper.

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1 **I. INTRODUCTION**

2 This is fundamentally a dispute by one neighbor against another neighbor regarding
3 property use that has been turned into a larger dispute that risks undoing a win-win settlement of
4 prior litigation. Specifically, Petitioners John Harbison and his wife, Renata, own property in the
5 City of Palos Verdes Estates. They are the uphill neighbors on Via Panorama from Robert and
6 Dolores Lugliani. After a very public lawsuit occurred between the Palos Verdes Homes
7 Association (the “Association”) and the Palos Verdes Peninsula Unified School District (the
8 “District”), and a very public settlement of that lawsuit—which settlement involved the City of
9 Palos Verdes Estates (“City”), the District and the Association and hence was subject to multiple
10 open public meetings—the Harbisons for the first time objected to the terms of that settlement and
11 demanded that it be undone. After the parties to the settlement declined to do so, the Harbisons
12 created an unincorporated association with the moniker “Citizens for Enforcement of Parkland
13 Covenants (hereinafter “CEPC” or “Petitioners” interchangeably), and filed the instant Verified
14 Petition for Peremptory Writ of Mandate & Complaint for Declaratory Relief (the “Petition”).

15 The Petition asserts claims against the City, the Association, and the “District, and against
16 Real Party In Interest, Robert Lugliani and Dolores A. Lugliani, as co-trustees of The Lugliani
17 Trust; Thomas J. Lieb, Trustee, The Via Panorama Trust (collectively, “Lugliani”). The thrust of
18 CEPC’s lawsuit is to invalidate the Memorandum of Understanding (the “MOU”) that settled the
19 lawsuit. The MOU accomplished, among other things, the following: (a) The City received two
20 lots to be kept as open space; (b) Lugliani paid the Association \$500,000 for a steep inaccessible
21 open space lot adjacent to Luigliani’s own residence; (c) The District agreed to subject itself to
22 local zoning and Association approval before installing lights on the athletic field at Palos Verdes
23 High School; and (d) the District and Association dismissed their respective appeals. The MOU
24 was not secret or done behind closed doors. All hearings by the City were duly noticed and public.
25 The District approved the MOU in an open public session and the District and Association followed
26 all applicable notice procedures. Lugliani has also funded \$1.5 million to the District.

27 For purposes of demurrer, however, the merits of CEPC’s suit are not debated and the facts
28 alleged are assumed true. Even under these favorable conditions, CEPC’s lawsuit should be

1 dismissed.

2 The First Cause of Action in the Petition seeks “Declaratory Relief Against All Parties” to
3 resolve alleged controversies that are identical to the controversies for which a Writ of Mandate is
4 sought in the Third Cause of Action against the City and Association. Consequently, the
5 declaratory relief actions against City and Association are improper because an action for
6 declaratory relief will not lie where the relief sought anticipates an issue which could be determined
7 in the writ action.

8 Furthermore, the exhibits attached to CEPC’s complaint are inconsistent with CEPC’s pled
9 facts and show that CEPC fails to set forth facts sufficient to state a cause of action in declaratory
10 relief. CEPC’s Exhibit 1 (the governing articles of the Association) directly contradicts and,
11 therefore, overrules CEPC’s factual assertions that the Association has a duty to enforce land use
12 restrictions and exercise its reversionary interests. Petition Exhibit 1 grants the Association these
13 rights, but no duty is imposed. Facts appearing in exhibits to a complaint overrule inconsistent
14 factual claims in pleadings. (*Holland v. Morse Diesel International, Inc.* (2001) 86 Cal.App.4th
15 1443, 1447 *superseded by statute on other grounds.*) Consequently, the Petitioner fails to establish
16 an actual and justiciable controversy which is a prerequisite element for a cause of action for
17 declaratory relief.

18 Even treating the pled facts as true, CEPC fails to set forth sufficient facts to establish that a
19 justiciable controversy exists between CEPC and the City. CEPC’s plea for a judicial declaration
20 that the City must enforce private deed restrictions or exercise its zoning and legislative powers in a
21 particular way is contrary to well-settled law.

22 As to the District, CEPC fails to establish a justiciable controversy because nothing in the
23 Petition establishes an actual controversy between CEPC and the District. CEPC’s statement of
24 facts shows that the District does not currently control or have any interest in any land about which
25 a judicial declaration is sought. CEPC does not seek to invalidate the conveyances of land from
26 the District to the Association and the Petition fails to set challenge or allege a controversy over any
27 foreseeable future action of the District.

1 As to Lugliani, CEPC fails to establish a justiciable controversy because nothing in the
2 Petition establishes an actual controversy between CEPC and Lugliani. CEPC clearly objects to the
3 Association’s conveyance of land to Lugliani and to any attempt by the City to re-zone or otherwise
4 permit uses of such land, but these objections do not give rise to a justiciable controversy between
5 Lugliani and CEPC.

6 CEPC’s Petition for Writ of Mandate against the Association fails for the same reasons its
7 declaratory relief claim fails—because the exhibits attached to the Petition controvert the existence
8 of a duty CEPC alleges as the basis for a Writ of Mandate against the Association.

9 Demurrer to the First and Third Causes of Action in the Petition should be dismissed
10 without leave to amend.

11 **II. FACTUAL BACKGROUND**

12 For purposes of demurrer, the facts pled by CEPC are taken as true. The relevant facts
13 concern documents—the existence and terms of which are not in dispute. Although CEPC fails to
14 present facts in an appropriate context to appreciate the benefits that resulted to the public, the
15 disputes in this case largely center on legal questions, not factual ones.

16 The Petition alleges a chronology of historical deeds and covenants, and restrictions
17 (“Historical Deed Restrictions”) that establish and govern the Association and established
18 conditions, covenants and agreements as well as deed restrictions relative to properties identified in
19 the Petition as “Lots C & D” and “Area A.” (Petition 4:24 – 7:14, Exhibits 1 & 2.)

20 The Petition also accurately identifies a prior-related lawsuit between the District and the
21 Association: *Palos Verdes Peninsula Unified School District v. Palos Verdes Homes Association*,
22 Los Angeles Superior Court Case No. BC431020 (the “District Lawsuit”). (Petition 7:15 – 8:1.)
23 The District Lawsuit resulted in a Superior Court Judgment that the Historical Deed Restrictions
24 remain valid and enforceable and apply to the District. .

25 Area A was originally conveyed from the Association to the City in 1940 and is now owned
26 by Lugliani. It is zoned open space. Area A is a curvilinear lot of steep hillside that is adjacent to
27 Lugliani’s family residence. Area A is not easily accessible from public right-of-ways. Before
28

1 taking ownership of Area A, Lugliani improved Area A with retaining walls, a level play field,
2 landscaping, and other improvements consistent with open space use.

3 The District Lawsuit settlement culminated in the MOU by and between the District, the
4 Association, the City, and Lugliani. (Petition 8:19 – 9:12, Ex. 4.) Implementing the MOU, the
5 District (which had received Lots C & D from the Association in 1938) conveyed Lots C & D back
6 to the Association. The Association then conveyed Lots C & D to the City and the City conveyed
7 Area A (which the City had received from the Association in 1940) to the Association. The
8 Association then conveyed Area A to Lugliani in exchange for \$500,000.

9 Subsequent to the MOU, Lugliani filed an application to change the zoning of Area A from
10 open space to residential. The application was modified to seek a zone text amendment instead of a
11 change in zoning to allow for accessory uses on private open space set forth in the MOU for Area
12 A. Lugliani recently suspended the processing of their application. No hearings or actions are
13 pending with regard to Lugliani’s land use application for Area A.

14 CEPC filed the present lawsuit on May 13, 2013. Counsel for all parties held a settlement
15 conference on June 20, 2013. No settlement offers or agreements resulted from the settlement
16 conference.

17 **III. ANALYSIS**

18 **A. Standard of Review**

19 Material facts alleged in a pleading are treated as true for the purpose of ruling on a
20 demurrer. (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 572.) A demurrer, however,
21 does not admit contentions, deductions, or conclusions of fact or law alleged therein. (*Moore v.*
22 *Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 125.) A demurrer can be addressed “to any of the
23 causes of action stated therein.” (Code Civ. Proc. [“CCP”] section 430.50, subd. (a).)

24 Claims for declaratory relief, such as those that CEPC makes in its First Cause of Action,
25 are subject to general demurrer for failing to set forth facts sufficient to state a cause of action, i.e.,
26 to establish a justiciable controversy. Furthermore, declaratory relief is subject to general demurrer
27 where, as here, it relates to a substantive claim that is invalid as a matter of law or is wholly
28

1 derivative of a statutory claim. (*Ball v. Fleet Boston Financial Corporation* (2008) 164 Cal.App.4th
2 794, 800.) “Conclusory allegations without facts to support them are ambiguous and may be
3 disregarded.” (*Interior Systems, Inc. v. Del E. Webb Corp.* (1981) 121 Cal.App.3d 312, 316; see
4 also *Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 125 [courts do not assume the truth of
5 contentions, deductions, or conclusions of law or fact]; CCP section 430.10, subs. (e), (f).) Facts
6 appearing in exhibits to a complaint overrule inconsistent factual claims in pleadings. (*Holland v.*
7 *Morse Diesel International, Inc.* (2001) 86 Cal.App.4th 1443, 1447) Where it is clear from the face
8 of the pleadings that a petitioner cannot cure a pleading defect through amendment, a court may
9 sustain the demurrer without leave to amend. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349“;
10 *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 306.)

11 **B. CEPC’s Declaratory Relief is Identical to Its Action for Writ of Mandate**

12
13 Declaratory relief against the City and Association is not available to CEPC because CEPC
14 seeks identical remedies in Writ of Mandate under CCP section 1085. When an action that should
15 be brought in mandate is improperly labeled as an action for declaratory relief, the complaint is
16 subject to demurrer. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249.) An action
17 for declaratory relief will not lie where the relief sought anticipates an issue which could be
18 determined in the main action. "The object of the statute [*Code Civ. Proc.*, § 1060] is to afford a
19 *new* form of relief where needed and not to furnish a litigant with a second cause of action for the
20 determination of identical issues." (*Hannon v. Western Title Insurance Company* (1989) 211
21 Cal.App.3d 1122, 1128-112 [quoting *Allstate Ins. Co. v. Fisher* (1973) 31 Cal.App.3d 391, 39].) An
22 action for declaratory relief will not lie where the relief sought anticipates an issue which could be
23 determined in the main action. (*Id.*) Mandamus is the appropriate remedy to test the proper
24 exercise of discretion vested in local agencies such as the City and the Association. (*Hostetter v.*
25 *Alderson* (1952) 38 Cal.2d 499, 500; *State v. Superior Court of Orange County* (1974) 12 Cal.3d
26 237, 249 [party may not seek declaration that it is entitled to a permit]. In *Livingston etc. Co. v.*
27 *County of Los Angeles* (1954) 43 Cal.2d 121, 129, the Court held that, “under all the circumstances,
28 plaintiffs have an adequate remedy at law for review of the planning commission’s proceedings,

1 and therefore they are not entitled to injunctive or declaratory relief (citations omitted).”

2 A careful study of the Third Cause of Action for Writ of Mandate and the Prayer for Relief
3 reveal that the declaratory relief sought against the City and the Association are improperly
4 duplicative of the remedies sought in Writ of Mandate. This is best illustrated by a side-by-side
5 comparison.
6

Declaratory Relief Sought	Identical Writ of Mandate Sought
7 8 a) To declare illegal and unenforceable the 9 provisions of the MOU authorizing conveyance 10 of Area A allegedly in violation of the 11 Historical Deed Restrictions (Petition 11:14- 12 18; 14:3-6); 13 14 15 16 17 18	To mandate the Association to enforce its reversionary rights to Area A (Petition 14:23- 24); To mandate that the City and the Association enforce the Historical Deed Restrictions and use all legal means to remove the allegedly illegal improvements from Area A, including restoration of Area A to its prior state (Petition 13:12-21; 14:25-28); <u>Discussion:</u> Both Declaratory Relief and Writ of Mandate seek to invalidate the MOU and conveyance of Area A.
19 b) To declare that the quitclaim deed and grant 20 deeds dated September 5, 2012 are void and 21 unenforceable, alleging that they violated 22 Historical Deed Restrictions specifically that 23 the property be used for public park and 24 recreation purposes (Petition 11:19-25; 14:7- 25 11); 26 27 28	To mandate the Association to enforce its reversionary rights to Area A (Petition 14:23- 24); To mandate that the City and the Association enforce the Historical Deed Restrictions and use all legal means to remove the allegedly illegal improvements from Area A, including restoration of Area A to its prior state (Petition 13:12-21; 14:25-28); <u>Discussion:</u> Both Declaratory Relief and Writ of Mandate seek to invalidate the MOU and conveyance of

1	Area A.
<p>2 c) To declare that the attempted conveyance on 3 September 5, 2012 triggered a reversion Area 4 A back to the Association (Petition 11:26-27; 5 14:7-11); the Prayer for Relief combines 6 declaratory relief requests b) and d) as they are 7 pled as an either/or remedy; 8</p>	<p>To mandate the Association to enforce its reversionary rights to Area A (Petition 13:12- 21; 14:23-24); <u>Discussion</u>: Both Declaratory Relief and Writ of Mandate seek to invalidate the MOU and conveyance of Area A.</p>
<p>9 d) To declare that the City and Association 10 have a right and a duty to enforce the Historical 11 Deed Restrictions and use all legal means to 12 compel removal of allegedly illegal 13 improvements from Area A and require that 14 Area A be restored to its prior state before 15 improvements were made (Petition 11:28-12:4; 16 14:12-14);</p>	<p>To mandate that the City and the Association enforce the Historical Deed Restrictions and use all legal means to remove the allegedly illegal improvements from Area A, including restoration of Area A to its prior state (Petition 13:12-21; 14:25-28); <u>Discussion</u>: Relief sought is identical.</p>
<p>17 e) To declare that the Association has a right 18 and affirmative duty to enforce its reversion 19 right to claim title to Area A (Petition 12:5-6; 20 14:12-14);</p>	<p>To mandate the Association to enforce its reversionary rights to Area A (Petition 14:23- 24); <u>Discussion</u>: Relief sought is identical.</p>
<p>21 f) For an order enjoining all defendants and 22 real parties from executing further documents 23 purporting to convey Area A to Lugliani 24 (Petition 14:16-18); 25 26 27 28</p>	<p>To mandate the Association to enforce its reversionary rights to Area A (Petition 14:23- 24); To mandate that the City and the Association enforce the Historical Deed Restrictions and use all legal means to remove the allegedly illegal improvements from Area A, including restoration of Area A to its prior</p>

	state (Petition 13:12-21; 14:25-28); Discussion: Relief sought is identical despite declaratory relief being worded differently.
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The side-by-side comparison in the table above demonstrates that CEPC’s request for judicial declarations against the City and the Association are identical to its Prayers for Relief in Writ of Mandate. Declaratory relief, therefore, is improper. On this basis, Demurrer should be granted and the First Cause of Action dismissed without leave to amend with regard to the City and the Association.

C. CEPC Fails to Establish Justiciable Controversies

CEPC’s First Cause of Action fails to set forth facts sufficient to state a cause of action in declaratory relief because it fails to set forth the ultimate facts of justiciable controversies on which the Court could grant the declaratory relief CEPC seeks. (CCP section 436, subd. (b).) CEPC admits that it is not a signatory to the MOU and, therefore, has no direct privity of contract with any of the parties to the MOU. CEPC merely pleads a legal conclusion that actual legal controversies exist between it and the other parties. CEPC must do more than merely allege that an actual controversy exists between itself and the parties it sues. CEPC must allege that the controversy regards some “legal rights and duties of the respective parties” and set forth what those rights and duties are. (*Alturas v. Gloster* (1940) 16 Cal.2d 46, 48; CCP section 1060.) For the Court to exercise its discretion to declare the rights and duties of the parties, the controversy involved must be justiciable - that is it must be a controversy which admits of specific and conclusive relief by judgment. (*Selby Realty Co. v. San Buenaventura* (1973) 10 Cal.3d 110, 117.) A complaint for declaratory relief that fails to allege an actual justiciable controversy between the parties fails to state facts sufficient to constitute a cause of action. (*Wilson v. Transit Authority* (1962) 199 Cal.App.2d 716, 722-724.)

1. No Justiciable Controversy Regarding the City

CEPC seeks a judicial declaration that the City has an affirmative duty to enforce the Historical Deed Restrictions and appears to take, as a given, that the private covenants and

1 restrictions in the Historical Deed Restrictions mandate that the City exercise zoning and police
2 powers to effectuate the Historical Deed Restrictions. These assumptions by CEPC are contrary to
3 well settled law and the Court cannot issue such a judicial declaration.
4

5 At the root of CEPC’s declaratory relief claim against the City is CEPC’s objection to how
6 the City exercises its zoning and legislative power, but “[a] citizen's mere dissatisfaction with the
7 performance of either the legislative or executive branches, or disagreement with their policies does
8 not constitute a justiciable controversy.” (*Zetterberg v. State Dept. of Public Health* (1974) 43
9 Cal.App.3d 657, 662.)

10 The City’s acceptance of land in the form of deeds accompanied by Historical Deed
11 Restrictions does not prevent the City from exercising zoning power contrary to the private
12 Historical Deed Restrictions and does not compel the City to enforce them. Zoning ordinances
13 constitute a justifiable exercise of the police power. (*Miller v. Board of Public Work* (1925) 195
14 Cal. 477, 487; *Acker v. Baldwin* (1941) 18 Cal.2d 341, 344.) A City cannot restrict the powers of
15 its successor by contracting away legislative and government functions—any attempt to do so is
16 invalid and unenforceable as contrary to public policy. (*County of Sacramento v. Lackner* (1979) 97
17 Cal.App.3d 576, 589-590.) It was beyond the powers of the 1940 City Council when accepting
18 ownership of Area A to divest itself or any future City government of its police and legislative
19 powers. (*Thompson v. Board of Trustees* (1904) 144 Cal. 281, 281-283; *see also Briare v. Matthew*
20 202 Cal. 1; *Hyde v Wilde* (1921) 51 Cal.App. 311.) Because CEPC’s plea for declaratory relief
21 incorrectly assumes that the City must adhere to and enforce the private Historical Deed
22 Restrictions, CEPC’s complaint for declaratory relief fails to establish a justiciable controversy.
23 Where the facts are not in dispute and the nature of the Plaintiff’s claim is clear, but under the
24 substantive law no liability exists and no amendment would change the result, sustaining a
25 demurrer without leave to amend is proper. (*Ceres v. Modesto* (1969) 274 Cal.App.2d 545, 554
26 *citing Routh v. Quinn* (1942) 20 Cal.2d 488.) CEPC also seeks an order “enjoining all defendants
27 and real parties from enacting ordinances and authorizing improvements on Area A.” (Petition
28 14:19-20.) CEPC’s prayer, to the extent it is meant to be included within its declaratory and

1 injunctive relief cause of action, is improper and fails to allege a justiciable controversy. First, only
2 the City can enact an ordinance—not Lugliani, the District, or the Association. As to the City, this
3 prayer for an order should be treated as part of the writ claim for injunctive relief. A petition for
4 writ of mandate includes an implied claim for injunctive relief. (*Camp v. Board of Supervisors*
5 (1981) 123 Cal.App.3d 334, 556.)

6 2. No Justiciable Controversy Regarding the Association

7
8 The exhibits attached to CEPC’s complaint are inconsistent with CEPC’s pled facts and
9 show that CEPC fails to plead facts sufficient to state a cause of action in declaratory relief against
10 the Association. CEPC’s fundamental factual allegation is that the Historical Deed Restrictions
11 impose upon Association an affirmative duty to enforce land use restrictions and exercise
12 reversionary interests with regard to its conveyance of Area A to Lugliani. The governing articles
13 of the Association attached to the Petition directly contradicts CEPC’s allegation. Petition Exhibit
14 1 “Declaration Number 1” (Petition Ex. 1 pp. 25-50) states that the Association has the *right* to
15 exercise a reversionary interest, but nowhere does the document impose a *duty* upon the
16 Association, or anyone else, to exercise a reversionary interest. It grants the Association a right to
17 enforce deed restrictions, but not the duty to do so. (Petition Ex. 1 pp. 28-30, 48-49 Decl. of R.J.
18 Comer [“Comer Decl.”] Ex. A.)¹ Furthermore, the document grants the Association the right and
19 power to “convey, sell, and otherwise encumber ... for public use and/or *otherwise dispose of* real
20 property...” and the “right and power to ... dispose of parks, parkways, playgrounds, open space
21 and recreation areas.” (Petition Ex. 1 pp. 28 & 29 [emphasis added] see also Ex. 1 p 51 [Articles of
22 Incorporation – authority to sell and otherwise dispose of real property]; Comer Decl. Ex. A.) The
23 document grants the Association the power to interpret, modify, amend, cancel, annul, and/or
24 enforce deed restrictions. (Petition Ex. 1 p. 30, 52; Comer Decl. Ex. A.) Finally, Section 11 of the
25 document expressly grants the Association a right to interpret or enforce the deed restrictions and
26 that the Association’s interpretation “shall be final and conclusive upon all interested parties.”

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28 ¹ For the court’s convenience excerpts from CEPC’s Exhibit 1 are attached hereto with the relevant language highlighted. See Declaration of R.J. Comer attached hereto.

1 (Petition Ex. 1 p. 50; Comer Decl. Ex. A.)

2 Facts appearing in exhibits to a complaint overrule inconsistent factual claims in pleadings.
3 (*Holland v. Morse Diesel International, Inc.*, *supra*, 86 Cal.App.4th at 1447.) CEPC’s own exhibits
4 contradict its factual allegation that the Historical Deed Restrictions impose a duty upon the
5 Association to enforce the Historical Deed Restrictions or exercise its reversionary interest.
6 CEPC’s Exhibit 1 reads “Palos Verdes Homes Association *shall interpret and/or enforce* any or all
7 restrictions, conditions, covenants...” (emphasis added). The “and/or” phrase means that
8 Association has a choice between interpreting or enforcing the reversionary interest—which
9 directly contradicts and, therefore, supersedes CEPC’s statement of facts. The language in the
10 exhibit is not ambiguous, thereby requiring judicial interpretation and declaration of rights. It is
11 quite simple—the document governing the Association does not contain any language imposing the
12 duties upon the Association that CEPC alleges are contained within that document. Because the
13 language of the exhibit overrules CEPC’s inconsistent factual claims, CEPC’s Petition fails to set
14 forth sufficient facts to establish a justiciable controversy upon which a judicial determination may
15 issue.

16 3. No Justiciable Controversy Regarding the District

17 CEPC is not a signatory to the MOU and, therefore, has no privity of contract with the
18 District through the MOU. CEPC’s statement of facts does not take issue or seek any declaratory
19 relief as to the District’s conveyance of Lots C & D to the Association. CEPC’s statement of facts
20 does not state that the District has ever possessed, owned or even had or has the ability to control
21 the zoning of Area A. Stated plainly, CEPC’s statement of facts shows that the District does not
22 currently control or have any interest in Lots C & D—which are now owned by the City and that
23 the District does not currently control or have any interest, and has never had such control or
24 interest, in Area A—which is now owned by Lugliani. CEPC neither seeks any declaratory relief
25 relevant to any rights and duties of the District in the MOU nor requests any judicial declaration
26 directly-related in any way to the District. Thus, CEPC’s First Cause of Action fails to set forth any
27 basis of a justiciable controversy between CEPC and the District.
28

1 The gravamen of CEPC’s petition and complaint concerns Area A and portions of the MOU
2 that do not involve the District. Also, CEPC’s interest in enforcing the Historical Deed Restrictions
3 does not establish a justiciable controversy because CEPC has not set forth any right it has under
4 the Historical Deed Restrictions that can require a judicial declaration regarding the District or any
5 property under the District’s control.

6 On this basis, Demurrer should be granted and the First Cause of Action dismissed without
7 leave to amend.

8 4. No Justiciable Controversy Regarding Lugliani

9 As previously stated, CEPC is not a signatory to the MOU and, therefore, has no privity of
10 contract with Lugliani through the MOU. The Petition fails to set forth any fact that any member of
11 CEPC is bound to Lugliani by any other agreement, deed, or legal instrument—nor does the
12 Petition seek to directly enforce or declare the rights and duties within any such instrument linking
13 CEPC and Lugliani. CEPC clearly objects to the Association’s conveyance of land to Lugliani and
14 to any attempt by the City attempt to re-zone or otherwise permit uses of such land, but these
15 objections do not give rise to a justiciable controversy between Lugliani and CEPC. CEPC also
16 fails to set forth any particular disputed rights or duties particular to CEPC and Lugliani which the
17 court could resolve by judicial declaration.

18 On this basis, demurrer should be granted in the First Cause of Action discussed without
19 leave to amend.

20
21 **D. CEPC Fails to State A Cause of Action for Writ of Mandate**

22 CEPC’s Petition for Writ of Mandate against the Association fails because the exhibits
23 attached to the Petition controvert the facts CEPC alleges as the basis for a Writ of Mandate against
24 the Association. Similar to the defects in CEPC’s declaratory relief claims, the documents
25 governing the Association attached to the Petition expressly contradict CEPC’s allegation that the
26 Historical Deed Restrictions impose upon the Association, “a clear, present, and ministerial right
27 and affirmative duty to enforce its reversionary rights to AREA A...” and “to enforce the land use
28 restrictions.” (Petition 13:12-16.) As shown in Section III.C.2 above, the documents governing the

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rights, duties and powers of the Association do not impose any such duty, but merely confer a right to do so while also granting the Association’s broad discretion to convey and dispose of land and interpret the Historical Deed Restrictions. (*See* Petition Ex. 1 pp 28-30, 48-50.)

Again, facts appearing in exhibits to a complaint overrule inconsistent factual claims in pleadings. (*Holland v. Morse Diesel International, Inc., supra*, 86 Cal.App.4th at 1447.) The document attached to the Petition establishes the unambiguous and overriding facts of the Association’s powers. The overriding facts of CEPC’s Petition therefore show that the Association had the power to enter into the MOU and to convey Area A to Lugliani. CEPC’s own exhibit clearly shows that the Association has a *right* to exercise its reversionary interest in Area A, but not the duty to do so. Similarly, the exhibit shows that the Association has the power to interpret the Historical Deed restrictions and the right to enforce them, but not the duty to do so simply because CEPC says they should.

Thus, CEPC’s Petition fails to set forth facts that the Historical Deed Restrictions impose upon the Association any duty that the Court can compel by Writ of Mandate.

IV. CONCLUSION

For all the aforementioned reasons, the Court should grant this joint and several Demurrer and dismiss CEPC’s First and Third Causes of Action without leave to amend.

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DATED: July 15, 2013

Respectfully submitted,
ARMBRUSTER GOLDSMITH & DELVAC LLP

By  _____
R.J. COMER

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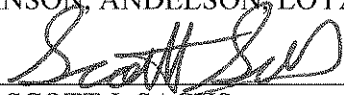
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