Jeffrey Lewis (SBN 183934)
Kelly Broedlow Dunagan (SBN 210852)
BROEDLOW LEWIS LLP
734 Silver Spur Road, Suite 300
Rolling Hills Estates, CA 90274
Tel. (310) 935-4001
Fax. (310) 872-5389
E-Mail: Jeff@BroedlowLewis.com

Attorney for Plaintiff and Petitioner
CITIZENS FOR ENFORCEMENT OF
PARKLAND COVENANTS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS, an unincorporated association,

Plaintiff and Petitioner,

vs.

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

Defendants and Respondents,

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 and Real Parties in Interest.

Case No.: BS142768

(Assigned for all purposes to Hon. Joanne O'Donnell, Dept. 86)

MEMORANDUM OF POINTS AND AUTHORITIES BY CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS IN OPPOSITION TO DEMURRER BY ROBERT LUGLIANI, DOLORES LUGLIANI, THOMAS J. LIEB, PALOS VERDES HOMES ASSOCIATION AND PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT

Hearing Date: October 25, 2013
Hearing Time: 1:30 p.m.
Department: 86

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

This lawsuit seeks to enforce land use restrictions that, until very recently, the City of Palos Verdes Estates (the "City") and Palos Verdes Homes Association (the "Association") regarded as sacrosanct. In 2003 and 2005, the City described these restrictions as follows:

> The original developers of the City placed restrictions on these properties so that they would be eternally open to all people, and not used privately. These restrictions *legally bind* the City to keep these areas free of fences, walls or any other private usage…The City has not and will not grant any permits for permanent private occupation of City Parklands *as we are legally bound to keep these areas open to the public.*[1]
>
> Soon after its incorporation in 1939, 849 acres of open space were dedicated to the City by the Palos Verdes Homes Association, *subject to the deed restriction that these areas must be perpetually maintained for the public to enjoy.* The deed restrictions further stipulated that should any open space be privately, occupied, ownership would revert to the original owner: the Homes Association. The City *wholeheartedy accepted this condition*…[2]
>
> …the City owns 849 acres of parklands that comprise much of the open space and *are deed-restricted to remain open for the public's use*…[3]

In 2005 the City gave the Luglianis and 39 other residents five years to remove encroachments that had been made on adjoining parklands. By 2010, 38 of the residents had complied – but not the Luglianis. The City then commenced nuisance abatement proceedings against the owners of 900 Via Panorama, Dr. Robert and Delores Lugliani (the "Luglianis") for their illegal encroachment on public lands. The City had the right to force abatement through the underlying protective restrictions, and brought in a bulldozer which began to knock down some of the structures. However, the Luglianis threatened the City with legal liability if removing certain retaining walls (specifically a 23 foot high retaining wall created when the Luglianis carved out a sports field on the parkland hillside adjacent to their house)

---

[1] City Staff Memo about 900 Via Panorama by Allan Rigg, Public Works Director, August 11, 2003, emphasis added. CEPC recognizes that the statements of Mr. Rigg are not necessarily properly before the Court on demurrer. CEPC offers them now as an offer of proof to the Court of additional facts that CEPC could plead, if necessary in an amended pleading, in support of its argument that the City has a duty to enforce the land use restrictions.

[2] City Staff Memo by Allan Rigg, Public Works Director, October 25, 2005, emphasis added.

[3] Resolution R05-32, A Resolution of the City Council of the City of Palos Verdes Estates, emphasis added. See Request for Judicial Notice, Ex. C.

caused damage to their house. Fearing a lawsuit by the Luglianis, the City suspended the abatement.

During the same timeframe that the City brought incomplete and ineffective abatement proceedings against the Luglianis, the Association spent over $300,000 defending itself in litigation brought by the Palos Verdes Peninsula Unified School District (the "District") regarding the enforceability of the same parkland land use restrictions that are at issue here. The District contended that parkland land use restrictions were no longer enforceable. The District lost that case in September 2011. What circumstance occurred that would prompt the City, Association and Luglianis to file joint briefs in this Court indicating that these same land use restrictions are now optional to be enforced at the whim of the City and Association?

Money. A lot of money. $2 million to be specific.

In addition to paying $500,000 for the parkland property around their house, Robert and Delores Lugliani "donated" $1.5 million dollars[4] to the District to buy their way out of decades of illegal encroachment on public parkland. In responses to requests for admission in this case, the Luglianis confirmed that their motivation for making the "donation" was as follows:

> …as part of the MOU transactions, Robert and Dolores Lugliani provided $1.5 million to the [District] in 2012 to address the school budgetary deficit with the expectation that the MOU transactions would be completed and that required governmental authorizations referred to in the MOU would be granted provided the applications for such authorization satisfied all applicable standards and conditions."

In summary, following decades of illegal encroachment on public parklands, the Luglianis bought their way out of their troubles by paying off a public agency $1.5 million. In return for this "donation," the Association and City conveyed public parkland to the

[4] $1.5 million was paid to the District while $500,000 was paid to the Association to look the other way and abandon its historical role as guardian of the City's parklands. The Association then gave $100,000 of its $500,000 to the City – motivating the City with a monetary reward to support the deal.

Luglianis[5] for their private use for construction of a gazebo, sports court, retaining walls and the private use of the Luglianis. After trying for four months to convince the City and the PVHA to do the "right thing" and reverse the sale of parkland, the Citizens for Enforcement of Parkland Covenants ("CEPC") filed this lawsuit to put the City and Association back on the track they were on before the Luglianis made the $1.5 million dollar "donation." The Luglianis' lawyers have cynically portrayed this action as brought by a single grumpy neighbor who is unhappy with a discretionary land use decision. In fact, the opposition to the Lugliani's illegal acquisition and occupation of parkland has widespread support througout Palos Verdes as evidenced by the 100 letters, emails and petition signatures that the City has received on this topic; since then CEPC has received another 15 signed petitions. Moreover, as set forth below, this is not a typical land use decision entitled to deference by the courts. Rather, it is the illegal settlement agreement – the MOU – and the two void deeds that CEPC seeks judicial intervention to correct. The actions taken were illegal, in violation of land use restrictions and this Court is not required to defer to these illegal actions.

The Demurrer should be overruled for the following four reasons:

First, the moving parties urge dismissal of the first cause of action for declaratory relief because it is duplicative of the claim for writ of mandate. Not so. The declaratory relief claim is asserted against all parties (the signatories and benefiiciaries of the MOU) while the mandate claim is directed at only two parties, the City and the Association. The declaratory relief claim seeks to invalidate three documents: the MOU and two deeds while the mandate claim seeks to compel the City and Association to take action to enforce land use restrictions. The moving parties' argument that the declaratory relief claim is either superfluous or duplicative is without merit.

Second, the moving parties urge dismissal because the City has no duty to enforce the land use restrictions for Area A. This argument, too, lacks merit. the City unquestionably has a duty to enforce the land use restrictions protecting City parkland. The City's Municipal

[5] Technically, the conveyed land was deeded to Thomas J. Lieb, Trustee of the Via Panorama Trust for the benefit of the Luglianis.

Code establishes the City's duty to protect parklands and enforce land use restrictions. (City of PVE Mun. Code, §§ 17.32.050, 18.16.020). The City's own resolutions also confirm the City's own understanding of this mandatory duty. Resolution R05-32[6] directed City staff to tighten up its enforcement of illegal encroachments on parkland. Resolution R05-32 employed mandatory "shall" language requiring, without exception, all illegal encroachments to be removed, at the latest, within five years of the City's notification to the offending property owner. (RFJN, Ex. C, p. 3). The moving parties' argument that it has the "right" but not the "duty" to enforce land use restrictions is, therefore, contradicted by the City's Municipal Code and resolutions.

Third, the Association also has the duty to enfore the land use restrictions. The Association's governing documents declare that: "It will be the duty of [the Association] to maintain the parks … and to perpetuate the restrictions. (Complaint, Ex. 1, p. 6 of 77). Section 17 of the Association's governing documents is entitled "Interpretation and Enforcement by Palos Verdes Homes Association." (Complaint, Ex. 1 p. 19 of 77, § 17). This title confirms that the Association has the duty not only to read and understand the land use restrictions, as suggested by the moving parties, but to also enforce them.

Fourth, the City and Association are estopped by their prior conduct from now claiming that the land use restrictions are optional for enforcement. In the 1940's, the Association avoided a large tax burden and the City acquired parklands by representing that the City had accepted the deeds for the parklands, including the land use restrictions. Having reaped the benefits in the 1940's of this transaction, the City and Association are now estopped from denying the binding nature of those restrictions. The City is also estopped from denying the mandatory nature of the land use restrictions due to its prior, unsucessful litigation of this very issue in the 1940s.

In sum, the pleadings establish that the City and Association have a duty to enforce the land use restrictions protecting Area A. The pleadings also establish the existence of a controversy among CEPC, all the defendants and the real parties in interest.

[6] CEPC Request for Judicial Notice, Ex. C

II. THE DEMURRER TO THE FIRST CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE THE CLAIMS FOR DECLARATORY RELIEF AND WRIT OF MANDATE SEEK DIFFERENT RELIEF AGAINST DIFFERENT PARTIES

The moving parties seek dismissal of the declaratory relief claim on the grounds that it is "identical" to the petition for writ of mandate claim. (Demurrer, p. 5, li. 11-17). CEPC respectfully disagrees. The declaratory relief is fairly broad in scope while the petition for writ of mandate is very narrow. Three key differences in the claims:

- The declaratory relief claim seeks relief against all of the parties to this action (the signatories to the MOU as well as the Luglianis). (Complaint, p. 10, li. 6-7). The mandate claim seeks only relief against two parties, the City and Association. (Complaint, p. 13, li. 1-3).
- The declaratory relief claim seeks a judiical declaration that the portion of the MOU that authorizes the conveyance of Area A is illegal. The declaratory relief claim also asks the Court to declare that the two deeds for Area A violate land use restrictions. No similar relief is sought in the petition for writ of mandate.
- While the declaratory relief action seeks to invalidate three *documents* (the MOU and two deeds) the mandate action seeks to compel *action* above and beyond those documents: to enforce land use restrictions.

Notably, if the declaratory relief claim is dismissed, CEPC will be left with no remedy against the Luglianis, Thomas Lieb or the District. Moreover, the ability of CEPC to obtain a judicial declaration as to the MOU will be impaired absent the presence of all the signatories to that agreement as indispensible parties.

III. THE DEMURRER TO THE FIRST CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE CEPC HAS STATED THE EXISTENCE OF A CONTROVERSY

The moving parties seek dismissal of the declaratory relief claim on the grounds that CEPC is not a party to the MOU and has failed to state the existence of an actual

controversy. Both arguments lack merit. At the outset, it should be noted that a demurrer is a poor tool to test CEPC's declaratory relief claim. A "general demurrer is usually not an appropriate method for testing the merits of a declaratory relief action, because the plaintiff is entitled to a declaration of rights even if it is adverse to the plaintiff's interest." (*Qualified Patients Ass'n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 751). That rule is particularly appropriate here where the moving parties' arguments are directed to the underlying merits rather than the adequacy of the pleading.

A. CEPC has standing to assert these claims as a Taxpayer's Action, under the Citizen's Suit doctrine and through Harbison's right to directly enforce the land use restrictions

CEPC adequately pled its standing at paragraph nine of the complaint:

> CEPC has standing to assert the below pled claims for the following three reasons: First, by virtue of John Harbison's payment of taxes within the past year, CEPC may assert on his behalf, a taxpayer's action pursuant to Code of Civil Procedure section 526a. Second, under the "Citizen Suit" doctrine, CEPC has standing to enforce a public duty (the property restrictions alleged below) 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). Third, by virtue of Mr. Harbison's ownership of real property within the CITY, he is a beneficiary of the restrictions and CEPC may assert those restrictions on Mr. Harbison's behalf.

The moving parties' passing reference[7] to standing does not address these three separately pled bases to esablish CEPC's standing. This is not surprising since 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, § 526a and in instances alleging ultra vires acts by the government].) The standing argument should be rejected.

[7] Demurrer, p. 8, li. 11-16, p. 11, li. 17-22, p. 12, li. 8-10.

B. CEPC has adequately pled a dispute between CEPC and the City regarding the legality of the MOU, the validity of the deeds and the failure of the City to perform its ministerial duties

The moving parties argue that CEPC has failed to allege a justiciable controversy concerning the City. (Demurrer, p. 8, li. 26-28). The moving parties argue that in 1940 when the City accepted ownership of Area A, the City did not become bound by the land use restrictions. (Demurrer, p. 9, li. 13-19). Specifically, the moving parties argue that the City was without the power to "contract away" the power of a future city council. (Demurrer, p. 9, li. 13-15). This argument lacks merit. If such a legal principle were valid then the entire basis of the MOU: the City's extraction from the District of recognition of the enforceability of land use restrctions on parkland in the City is a sham. If the City was without the power in 1940 to "contract away" the power of a future city council to make land use decisions, then the District was likewise without power in 2012 to sign the MOU and thereby "contract away" the District's right to contest the land use restrictions.[8]

The moving parties' argument also is contrary to well established law governing land grants for the purpose of public parks. *City of Hermosa Beach v. Superior Court*, *supra*, 231 Cal.App.2d at p. 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.

[8] Notably, the MOU provides that it is "binding on all Parties" and on their successors. (Complaint, Ex. 4, MOU, p. 12, ¶ L). If the City represented to the parties to the MOU that it could be bound by land use restrictions now and in the future how can the City now make contrary representations to this Court?

(City of Hermosa Beach v. Superior Court, *supra*, 231 Cal.App.2d 295, 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). 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).

The moving parties cite several cases in support of their argument that the City is not bound by the deed land restrictions. Each case is inapplicable to the facts here. The moving parties cite *County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 589, 590) for support. The *Lackner* case involved a dispute between the State of California and individual counties over Medi-Cal reimbursement. The question presented in *Lackner* was the validity of certain Medi-Cal legislation. The validity of deed restrictions was not considered. Here, in stark contrast, we have deed restrictions which the City "wholeheartedly" accepted in 1940. The moving parties also cite *Thompson v. Board of Trustees* (1904) 144 Cal. 281 for the proposition

that the land use restrictions do not bind the City. (Demurrer, p. 9, li. 16-18). In *Thompson* the California Supreme Court considered a city ordinance that allowed residents to, by ten percent vote of the population, bring certain issues to a public vote. This ordinance was held to be an improper suspension of the city council's legislative powers. (*Id.* at 282). The *Thompson* case has no applicability to this case involving deed restrictions. The moving parties also cite *Briare v. Matthew* (1927) 202 Cal. 1. In the *Briare* case, the California Supreme Court concerned itself with whether an ordinance concerning appointments to the police department was enforceable. Ultimately, the court held that it was not enforceable because it conflicted with the city charter. (*Id.* at 7). Notable, *Lackner, Thompson* and *Briare* have never been cited in the context of a case involving city owner property and deed restrictions.

In sum, it is beyond cavil that the City was bound by the land use restrictions when it accepted the parcels in 1940. *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. The City's present legal posture: that the land use restrictions have no force and effect confirm the existence of the very controversy alleged in the pleadings: the $2.0 million payoff by the Luglianis in exchange for parkland property presents a very real and actionable justicable dispute.

C. CEPC has adequately pled a dispute between CEPC and the Association regarding the legality of the MOU, the validity of the deeds and the failure of the Association to perform its ministerial duties

The City also argues that CEPC has failed to allege a justiciable controversy between CEPC and the Association. According to the moving parties, the Association has the right but not the duty to enforce land use restrictions. (Demurrer, p. 10, li. 7-23). As set forth in **Part V** below, the governing documents establish that the Association exists for the purpose of enforcing land use restrictions and protecting public parkland. The fact that the Association has demurred to the complaint and argued in its Memorandum that it has no duty to enforce the restrictions confirms the existence of an actual controversy with CEPC.

D. CEPC has adequately pled a dispute between CEPC and the District regarding the legality of the MOU

The moving parties also argue that CEPC has failed to allege a justiciable controversy between CEPC and the District. (Demurrer, p. 11, li. 17-27). The District is a signatory to the MOU and obtained $1.5 million as a result of the MOU. The Luglianis have confirmed in discovery that they "donated" $1.5 million with the expectation that the parkland would be conveyed to the Luglianis. The District is, therefore, interested in the enforcement of the MOU and its ability to retain the $1.5 million. Moreover, the MOU states on its face that it obligates the District to affirm "application of all protective and use restrictions" to land owned by the District within the City. (Complaint, Ex. 4, MOU, p. 5, Art. II, ¶ A). The efficacy of this provision is at issue in this action as the moving parties now take the position that the City in the 1940's and the District's board in May 2012 was without the power to make any binding representations concerning the land use restrictions.

E. CEPC has adequately pled a dispute between CEPC and the Luglianis regarding the legality of the MOU, the illegal encroachments they have maintained on parklands and the propriety of the $1.5 million "donation" and $500,000 sale proceeds

The moving parties also argue that CEPC has failed to allege a justiciable controversy between CEPC and the Luglianis. (Demurrer, p. 12). The Luglianis have the most to lose by this litigation. It was their $1.5 million "donation" and $500,000 sale proceeds that caused the City and the Association to abandon their historic role of enforcing parkland covenants. Should CEPC's declaratory relief action prevail at the conclusion of this litigation, the deeds conveying Area A for the benefit of the Luglianis will be deemed void. Given the potential loss of the Luglianis' "private" parkland, the Luglianis have the most interest in the enforcement of the MOU.

IV. THE DEMURRER TO THE THIRD CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE THE CITY MUNICIPAL CODE, RESOLUTIONS AND OTHER GOVERNING DOCUMENTS DEMONSTRATE THAT THE CITY OWES A DUTY – NOT A MERE RIGHT – TO ENFORCE LAND USE RESTRICTIONS

The moving parties urge dismissal of the third cause of action on the grounds that the City has no obligation to enforce the land use restrictions of Area A. The City unquestionably has a duty to enforce the land use restrictions protecting City parkland. The City's argument that it has the mere "right" but no "duty" argument is without merit. The City's Municipal Code makes it clear that a private person's use of public parkland for private purposes is a city nuisance. (City of PVE Mun. Code, §§ 17.32.050, 18.16.020). The City Municipal Code declares it is the "right and duty" of all residents to "participate and assist the city officals" in the enforcement of the City's zoning and building codes. (City of PVE Mun. Code, § 17.32.050). Similarly the Municipal Code *requires* the city attorney to commence legal proceedings and take other legal steps to remove illegal structures and abate illegal uses of public parklands. (*Ibid.*).

The City's own resolutions also confirm the City's own understanding of this mandatory duty. In 2005, faced with an ineffective policy to end illegal encroachments on City parkland, the City passed Resolution R05-32. (RFJN, Ex. C). That Resolution directed staff to tighten up its enforcement of illegal encroachments on parkland. All of the language directing staff to remove illegal encroachments on City parkland uses the mandatory "shall" language. For example, when a property has been transferred adjacent to an illegal encroachment, Resolution R05-32 states that the illegal encroachment "shall be removed by the adjacent property owner and the area shall be restored" to its parkland condition. (RFJN, Ex. C, p. 3, ¶ 3). Resolution R05-32 also states that if a property adjacent to an illegal encroachment has not been transferred within five years following notification by the city of an illegal encroachment, the encroachment "shall be removed by the adjacent proeprty owner." (RFJN, Ex. C, p. 3, ¶ 4). Resolution R05-32 also requires that as City staff learns of

illegal encroachments on parkland, a notice of violation "shall" be sent to the adjacent property owner. (RFJN, Ex. C, p. 3, ¶ 5). Resolution R05-32 requires staff to track property transfer records and requires the City's Code Enforcement Officer to investigate all transfers. (RFJN, Ex. C, p. 3, ¶ 6). Resolution R05-32 concludes with the following statement:

> If an illegal encroachment(s) is not removed per this policy, the City will immediately remove the encroachment(s), bill the adjacent proeprty owner, lien the property if necessary, and cite the adjacent property owner for an infraction(s).

(RFJN, Ex. C, p. 3, ¶ 6).

The City's repeated use of mandatory language in Resolution R05-32 compels the conclusion that the City itself acted as though it had a duty to enforce the land restrictions. Resolution R05-32, if followed by the City, would have eradicated all known illegal enrcoachments on parklands by November 8, 2010. There is no language in Resolution R05-32 suggesting that either the City Council, City Attorney or City Staff viewed the enforcement of land restrictions as discretionary. Based on PVE's own Municipal Code and Resolution R05-32, this Court should find that the City has a duty to enforce the land use restrictions affecting Area A and overrule the demurrer.

V. THE DEMURRER TO THE THIRD CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE THE ASSOCIATION'S GOVERNING DOCUMENTS IMPOSE A DUTY – NOT A MERE RIGHT – TO ENFORCE LAND USE RESTRICTIONS

The moving parties argue that the Association can arbitrarily choose which land use restrictions to enforce. According to the moving parties, the Association has the "right" but not the "duty" to enforce the restrictions. This argument ignores the Association's quasi-government status. (*Cabrera v. Alam* (2011) 197 Cal.App.4th 1077, 1087). The argument is also contradicted by those portions of the restrictions that the moving parties did not cite in their moving papers. The land use restrictions that form the basis for the existence of the Association were attached as Exhibit 1 to the complaint and certain cherry-picked portions

also appear attached to the Declaraton of R.J. Comer in support of the demurrer. Not cited anywhere in the demurrer papers is the following language from the land use restrictions:

> To carry on the common interest and look after the maintenance and welfare of all lot owners right from the beginning, a community association, with the name of Palos Verdes Homes Association, has been incorporated as a non-stock, non-profit body under the laws of California, in which every building site has one vote. *It will be the duty of this body to maintain the parks*, street planting, and other community affairs, *and to perpetuate the restrictions*.

(Complaint, Ex. 1, p. 6, emphasis added).

The moving parties make of the following phrase appearing in the restrictions dictating that the Association "shall interpret and/or enforce any or all restrictions…." (Demurrer, p. 10). The moving parties suggest that the existince of the "and/or" abrogates any duty of enforcment. This argument ignores the title of this particular section: "Interpretation and Enforcement by Palos Verdes Homes Association." (Complaint, Ex. 1 p. 19 of 77, § 17). The fact that the title for this section includes the word "and" and omits the word "or" demonstrates that the enforcement of the land use restrictions is not discretionary.

The moving parties also make much of language in the restrictions allowing the Association to convey or sell property and also the right to "interpret, modify, amend, cancel, annul and/or enforce deed restrictions." (Demurrer, p. 10, 17-26). The Association certainly does not have the power to do so *at will* and without the consent of its members. Notably, any of the land use restrictions in Palos Verdes Estates, including the land use restrictions at issue here, can only be modified by a vote of two-thirds of the owners within 300 feet of the affected property. (Complaint, Ex. 1, p. 17 of 117, § 9). No such modification was sought here. The moving parties have not and cannot reconcile the two-thirds requirement to modify restrictions with their argument that the Association can disregard the restrictions at will (or for anyone willing to make a $2.0 million payoff to buy the discretion of public officials).

This Court is required to give the land use restrictions a reading as a whole and construe the terms in their ordinary and popular sense. (*Butler v. City of Palos Verdes Estates* (2005) 135 Cal.App.4th 174, 183-84). The reading of the land use restrictions advocated by

the moving parties, that the land use restrictions are optional and superfluous is at odds with a common sense reading of the restrictions.

VI. THE CITY AND ASSOCIATION IS ESTOPPED FROM DENYING THE ENFORCEABILITY OF THE LAND USE RESTRICTIONS

In 1940, the City accepted the parkland conveyance from the Association, including the land use restrictions, for the purposes of cancelling the substantial tax debt impairing the properties. (Complaint, Ex. 2, p. 4, §§ 1-4). The County of Los Angeles subsequently cancelled that tax debt. Evidence Code, section 623 provides:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

The City, having taken possession of the parkland property and the Association, by avoiding the tax debt by affirming the deeds, the City and Association are estopped from now denying the efficacy of the entire deeds, including the land use restrictions.

The City is also estopped to deny the mandatory nature of the land use restrictions due to prior litigation of this very issue. In *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d 545, the Court of Appeal was faced with the issue of the deed restrictions for land granted to the City "exclusively for park purposes." The City wanted the flexibility to use the deeded property as a housing yard for city owned trucks and vehicles. The *Roberts* court found against the City on this issue and held:

> 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* [192 Cal. 242, 219 P. 750], '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.

(*Roberts v. City of Palos Verdes Estates, supra*, 93 Cal.App.2d at p. 548).

Having already litigated the issue of what flexibility the City enjoys over land use restrictions for deeded parklands, the City may not re-litigate the issue here. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828 [holding that collateral estoppel "may allow one who was not a party to prior litigation to take advantage, in a later unrelated matter, of findings made against his current adversary in the earlier proceeding."].) Having lost this issue in 1949, the City may not re-litigate it here.

The Association and District are also likewise barred from re-litigating the question of the enforceability of the restrictions.[9] The Los Angeles Superior Court entered judgment against the District in September 2012 declaring the covenants enforceable. (Complaint, ¶ 14, Ex. 3). The District and Association may not now re-litigate the question. As a matter of judicial estoppel, this Court should not countenance the Association seeking to enforce the parklands restrictions for purposes of earlier litigation and now taking the exact opposite position on the identical issue.

VII. IF THE COURT SUSTAINS THE DEMURRER, CEPC REQUESTS LEAVE TO AMEND TO STATE ADDITIONAL FACTS REGARDING THE DEFENDANTS' PAST ADMISSIONS AND CONDUCT GIVING RISE TO THE DUTY TO ENFORCE THE RESTRICTIONS AND SUPPORTING THE DOCTRINE OF ESTOPPEL

Should the Court sustain the demurrer for any reason, CEPC requests leave to amend by alleging additional historical facts concerning the City and Association's statements and conduct establishing: a) the City and Association's duty to enforce the land use restrictions of Area A; b) estoppel of the City and Association to deny the existence of the duty to enforce the land use restrictions; and c) the existence of controversies among the named parties.

VIII. CONCLUSION

For the foregoing reasons, CEPC respectfully requests that the Court overrule the demurrer in its entirety. Alternatively, CEPC requests leave to amend.

[9] A copy of the District and Association's operative pleadings from the prior litigation are attached as Exhibits "A" and "B" to CEPC's request for judicial notice herein.

DATED: October 11, 2013

BROEDLOW LEWIS LLP

By: _____
Jeffrey Lewis

Attorneys for Plaintiff and Petitioner
CITIZENS FOR ENFORCEMENT OF
PARKLAND COVENANTS

PROOF OF SERVICE

Citizens for Enforcement of Parkland Covenants v. City of Palos Verdes Estates, et al.
Los Angeles Superior Court Case No. BS142768

I, Jason R. Ebbens, declare that I am over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 734 Silver Spur Road, Suite 300, Rolling Hills Estates, CA 90274.

On October 11, 2013, I served the foregoing: **PLAINTIFF CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS' OPPOSITION TO DEFENDANTS AND REAL PARTIES IN INTEREST'S DEMURRER** on the interested parties in this action by placing ☐ the original ☒ a true copy thereof, enclosed in a sealed envelope with postage pre-paid, addressed as follows:

** See Attached Service List **

☐ BY MAIL. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the U. S. Postal Service. The within correspondence will be deposited with the U. S. Postal Service on the same day shown on this affidavit, in the ordinary course of business. I am the person who sealed and placed for collection and mailing the within correspondence on this date at Palos Verdes, California, following ordinary business practices.

☒ BY OVERNITE EXPRESS/FEDERAL EXPRESS. The within correspondence will be deposited with Overnite Express on the same day shown on this affidavit, in the ordinary course of business. I am the person who sealed and placed for collection and mailing the within correspondence on this date at Palos Verdes, California, following ordinary business practices.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 11, 2013, in Los Angeles County, California.

Jason R. Ebbens

Jason R. Ebbens

SERVICE LIST
(Page 1 of 2)
Citizens for Enforcement of Parkland Covenants v. City of Palos Verdes Estates, et al.
Los Angeles Superior Court Case No. BS142768

ATKINSON, ANDELSON, LOYA, RUUD & ROMO 12800 Center Court Drive, Suite 300 Cerritos, CA 90703 **Terry T. Tao, Esq.** TTao@AALRR.com Tel: (562) 653-3200 | Fax: (562) 653-3333 **Scott J. Sachs, Esq.** SSachs@AALRR.com Tel: (562) 653-3599 | Fax: (562) 653-3951	*Attorneys for Defendant and Respondent:* **Palos Verdes Peninsula Unified School District**
JENKINS & HOGIN, LLP 1230 Rosecrans avenue, Suite 110 Manhattan Beach, CA 90266 **Christi Hogin, Esq.** CHogin@LocalGovLaw.com Tel: (310) 643-8448 | Fax: (310) 643-8441	*Attorneys for Defendant and Respondent:* **City of Palos Verdes Estates**
LAW OFFICE OF SIDNEY CROFT 314 Tejon Place Palos Verdes Estates, CA 90274 **Sidney F. Croft, Esq.** SFCroftLaw@AOL.com Tel: (310) 849-1002 **GREENWALD, PAULY, FOSTER & MILLER APC** 1299 Ocean Avenue, Suite 400 Santa Monica, CA 90401 **Andrew J. Haley, Esq.** AHaley@GPFM.com Tel: (310) 451-8001 | Fax: (310) 395-5961	*Attorneys for Defendant and Respondent:* **Palos Verdes Homes Association**

SERVICE LIST
(Page 2 of 2)
Citizens for Enforcement of Parkland Covenants v. City of Palos Verdes Estates, et al.
Los Angeles Superior Court Case No. BS142768

ARMBRUSTER GOLDSMITH & DELVAC LLP 11611 San Vicente Blvd., Suite 900 Los Angeles, CA 90049 **Damon P. Mamalakis, Esq.** Damon@AGD-LandUse.com Tel: (310) 254-9026 | Fax: (310) 254-9046 **R.J. Comer, Esq.** **RJ@AGD-LandUse.com** Tel: (310) 254-9056 | Fax: (310) 254-9046	*Attorneys for Defendants and Real Parties in Interest:* **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**