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LOS ANGELES
SUPERIOR COURT

6 Attorneys for Defendants and Real Parties In
7 Interest ROBERT LUGLIANI and DOLORES
8 A. LUGLIANI, as co-trustees of THE
9 LUGLIANI TRUST; THOMAS J. LIEB,
10 TRUSTEE, THE VIA PANORAMA TRUST

11 SUPERIOR COURT OF CALIFORNIA CONFORMED COPY
12 COUNTY OF LOS ANGELES, CENTRAL DISTRICT
13 ORIGINAL FILED
14 SUPERIOR COURT OF CALIFORNIA
15 COUNTY OF LOS ANGELES

11 CITIZENS FOR ENFORCEMENT OF
12 PARKLAND COVENANTS, an
13 unincorporated association,

14 Plaintiff and Petitioner,

15 vs.

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

23 Defendants and Respondents.

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

26 Defendants and Real Parties In Interest.

Case No.: BS142768

DEFENDANTS AND REAL PARTIES IN
INTEREST ROBERT LUGLIANI and
DOLORES A. LUGLIANI, AS CO-TRUSTEES
OF THE LUGLIANI TRUST, THOMAS J.
LIEB, TRUSTEE, THE VIA PANORAMA
TRUST'S NOTICE OF DEMURRER AND
DEMURRER TO FIRST AND FOURTH
CAUSES OF ACTION IN THE VERIFIED
FIRST AMENDED PETITION FOR
PEREMPTORY WRIT OF MANDATE &
COMPLAINT FOR INJUNCTIVE RELIEF;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF

Hon. Joanne O'Donnell
Dept. 86

Petition Filed: May 13, 2013
Hearing Date: January 3, 2014
Hearing Time: 1:30 pm

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on January 3, 2014, at 1:30 p.m. or as soon thereafter as
3 the matter may be heard in Department 86 at the above-entitled Court, located at 111 North Hill
4 Street, Los Angeles, California, Defendants and Real Parties In Interest, Robert Lugliani and
5 Dolores A. Lugliani, as co-trustees of The Lugliani Trust; Thomas J. Lieb, Trustee, The Via
6 Panorama Trust (collectively “Lugliani”) will and hereby do demur to the First and Fourth Causes
7 of Action set forth in the First Amended Verified Petition for Writ of Mandate and Complaint for
8 Injunctive Relief (the “Amended Petition”) filed by Petitioner and Plaintiff, Citizens for
9 Enforcement of Parkland Covenants (hereinafter “CEPC” or “Petitioners” interchangeably).

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

11 (a) The First Cause of Action in Declaratory Relief is identical to CEPC’s action for Writ
12 of Mandate; and

13 (b) The First Cause of Action in Declaratory Relief fails to state a cause of action because
14 it fails to set forth the ultimate facts of a justiciable controversy between CEPC and
15 Lugliani on which the Court could grant the declaratory relief; and

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

17 (a) The Fourth Cause of Action fails to state a cause of action because it fails to establish
18 the requisite elements of nuisance per se.

19 This Demurrer is further based upon the Memorandum of Points and Authorities attached
20 to this Demurrer and all pleadings and papers on file in this matter and all arguments that the
21 Court entertains at the time of hearing of this Demurrer.

22 **WHEREFORE**, the Lugliani prays:

- 23 • That the Demurrer be granted without leave to amend;
24 • That the First and Fourth Causes of Action be dismissed in their entirety; and
25 • That the Court grant other such relief as it may deem proper.

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1 **I. INTRODUCTION**

2 On October 25, 2013, the Court heard demurrers from all Respondents and Real Parties In
3 Interest challenging all causes of action in the original Verified Petition for Writ of Mandate and
4 Complaint for Injunctive Relief (the “Petition”) filed by Petitioner and Plaintiff, Citizens for
5 Enforcement of Parkland Covenants (hereinafter “CEPC” or “Petitioners” interchangeably). On
6 October 28, 2013, the Court issued a minute order sustaining demurrers to the Third Cause of
7 Action (Writ of Mandate) and granting CEPC leave to amend.¹

8 Thereafter, CEPC filed a Verified First Amended Petition for Writ of Mandate and
9 Complaint for Injunctive Relief (the “Amended Petition”) restating its previous defective claims
10 and improperly adding John Harbison, suing as an individual plaintiff and petitioner, and adding a
11 new Fourth Cause of Action in nuisance per se brought only by Mr. Harbison.² The Amended
12 Petition suffers from the same defects as the original Petition.

13 This lawsuit attempts to reverse completely lawful land conveyances and attempts to
14 impose Petitioner’s interpretation of “open space” upon their neighbor’s privately-owned property.
15 Petitioners object to a transaction that resulted in a steep hillside lot of public open space being
16 conveyed to Lugliani and to Lugliani’s private use of that land now that he owns it. Specifically,
17 CEPC member John Harbison and his wife, Renata, own property in the City of Palos Verdes
18 Estates. They are the uphill neighbors on Via Panorama from Robert and Dolores Lugliani. After
19 a very public lawsuit occurred between the Palos Verdes Homes Association (the “Association”)
20 and the Palos Verdes Peninsula Unified School District (the “District”), and a very public
21 settlement of that lawsuit—which settlement involved the City of Palos Verdes Estates (“City”),
22 the District and the Association and, hence, was subject to multiple open public meetings—the
23 Harbisons, for the first time objected, to the terms of that settlement and demanded that it be

24 _____
25 ¹ At the October 25, 2013 hearing, the court stated that it would not rule on demurrers to causes of
26 action other than the Writ of Mandate cause of action.

27 ² The court is directed to the Motion to Strike John Harbison as an individual plaintiff and
28 petitioner and the Fourth Cause of Action from the Amended Petition filed by Defendants and
Real Parties In Interest, Robert Lugliani and Dolores A. Lugliani, as co-trustees of The Lugliani
Trust; Thomas J. Lieb, Trustee, The Via Panorama Trust.

1 undone. After the parties to the settlement declined to do so, the Harbisons created an
2 unincorporated association with the moniker “Citizens for Enforcement of Parkland Covenants”
3 and filed the instant lawsuit.

4 The Amended Petition re-asserts claims made in the original Petition against the City, the
5 Association, and against Real Party In Interest, Robert Lugliani and Dolores A. Lugliani, as co-
6 trustees of The Lugliani Trust; Thomas J. Lieb, Trustee, The Via Panorama Trust (collectively,
7 “Lugliani”). The Amended Petition improperly attempts to join John Harbison as an individual
8 plaintiff and petitioner and improperly attempts to bring a new cause of action in nuisance per se
9 against Lugliani.

10 The thrust of CEPC’s lawsuit is the same in both the original Petition and the Amended
11 Petition. CEPC seeks to invalidate the Memorandum of Understanding (the “MOU”) that settled
12 the lawsuit. The MOU accomplished, among other things, the following: (a) The City received
13 two lots to be kept as open space; (b) Lugliani paid the Association \$500,000 for, and took title to,
14 a steep inaccessible open space lot adjacent to Luigliani’s own residence, which is commonly
15 known and referred to as “Area A;” (c) the District agreed to subject itself to local zoning and
16 Association approval before installing lights on the athletic field at Palos Verdes High School; and
17 (d) the District and Association dismissed their respective appeals. The MOU was not secret or
18 done behind closed doors. All hearings by the City were duly noticed and public. The District
19 approved the MOU in an open public session and the District and Association followed all
20 applicable notice procedures. Lugliani has also donated \$1.5 million to the District.

21 For purposes of demurrer, however, the merits of CEPC’s suit are not debated and the facts
22 alleged are assumed true. Even under these favorable conditions, CEPC’s various causes of action
23 (and indeed the entire lawsuit) should be dismissed.

24 The First Cause of Action in the Petition seeks “Declaratory Relief Against All Parties” to
25 resolve alleged controversies that are identical to the controversies for which a Writ of Mandate is
26 sought in the Writ of Mandate Cause of Action against the City and Association. Consequently,
27 the declaratory relief actions against City and Association are improper because an action for
28 declaratory relief will not lie where the relief sought anticipates an issue which could be

1 determined in the writ action.

2 As to Lugliani, CEPC fails to establish a justiciable controversy upon which to grant
3 declaratory relief because nothing in the Amended Petition establishes an actual controversy
4 between CEPC and Lugliani, or between Mr. Harbison and Lugliani. CEPC and Mr. Harbison
5 clearly object to the Association’s conveyance of land to Lugliani and to any attempt by the City to
6 re-zone or otherwise permit uses of such land, but these objections do not give rise to a justiciable
7 controversy with Lugliani.

8 As to the Fourth Cause of Action brought by Mr. Harbison alone against Lugliani and
9 alleging nuisance per se, if this cause of action survives Lugliani’s Motion to Strike, then
10 Lugliani’s Demurrer to the Fourth Cause of Action should be sustained. Nuisance per se arises
11 when a legislative body with appropriate jurisdiction, in the exercise of the police power, expressly
12 declares a particular object or substance, activity, or circumstance, to be a nuisance. (Code Civ.
13 Proc. [“CCP”] § 3479; *People ex rel. Trutanich v. Joseph*, (2012) 204 Cal.App.4th 1512.) The
14 Amended Petition fails to cite or identify an applicable government regulation upon which to
15 establish the requisite elements of nuisance per se.

16 Thus, Demurrer to the First and Fourth Causes of Action in the Amended Petition should
17 be dismissed without leave to amend.

18 **II. FACTUAL BACKGROUND**

19 For purposes of demurrer, the facts pled by CEPC are taken as true. The relevant facts
20 concern documents—the existence and terms of which are not in dispute. The disputes in this case
21 largely center on legal questions, not factual ones.

22 The Petition alleges a chronology of historical deeds and covenants, and restrictions
23 (“Historical Deed Restrictions”) that establish and govern the Association and established
24 conditions, covenants and agreements, as well as deed restrictions, relative to properties identified
25 in the Petition as “Lots C & D” and “Area A.” (Petition 5:4 – 7:18, Exhibits 1 & 2.)

26 The Petition also accurately identifies a prior-related lawsuit between the District and the
27 Association: *Palos Verdes Peninsula Unified School District v. Palos Verdes Homes Association*,
28 Los Angeles Superior Court Case No. BC431020 (the “District Lawsuit”). (Petition 7:12 – 8:6;

1 12:12 – 14:7.)

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

8 Petitioners allege several irrelevant facts regarding encroachments into Area A prior to the
9 MOU and prior to Area A being conveyed to Lugliani—during the period of time that Area A was
10 public property. (Amended Petition 8:8 – 12:10.) These alleged facts are irrelevant because Area
11 A is now privately-owned and any concern the City and Association may have had regarding
12 encroachments into Area A when it was publicly-owned have been superseded by the MOU and
13 the conveyances resulting from the MOU. Nevertheless, the Amended Petition essentially objects
14 to landscaping, “dozens of trees,” retaining walls, a wrought iron gate, a gazebo, a playing field,
15 two lion statues, and some retaining walls, as somehow inconsistent with open space use.
16 (Amended Petition 8:12 – 16.)

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

22 CEPC filed the present lawsuit on May 13, 2013. Counsel for all parties held a settlement
23 conference on June 20, 2013. No settlement offers or agreements resulted from the settlement
24 conference. On October 28, 2013, the Court sustained demurrers to the Third Cause of Action in
25 the original Petition and granted CEPC leave to amend, and Petitioners filed the Amended Petition.

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1 **III. ANALYSIS**

2 **A. Standard of Review**

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

8 Claims for declaratory relief, such as those that CEPC makes in its First Cause of Action,
9 are subject to general demurrer for failing to set forth facts sufficient to state a cause of action, i.e.,
10 to establish a justiciable controversy. Furthermore, declaratory relief is subject to general
11 demurrer where, as here, it relates to a substantive claim that is invalid as a matter of law or is
12 wholly derivative of a statutory claim. (*Ball v. Fleet Boston Financial Corporation* (2008) 164
13 Cal.App.4th 794, 800.) “Conclusory allegations without facts to support them are ambiguous and
14 may be disregarded.” (*Interior Systems, Inc. v. Del E. Webb Corp.* (1981) 121 Cal.App.3d 312,
15 316; see also *Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 125 [courts do not assume
16 the truth of contentions, deductions, or conclusions of law or fact]; CCP § 430.10, subds. (e), (f).)
17 Facts appearing in exhibits to a complaint overrule inconsistent factual claims in pleadings.
18 (*Holland v. Morse Diesel International, Inc.* (2001) 86 Cal.App.4th 1443, 1447) Where it is clear
19 from the face of the pleadings that a petitioner cannot cure a pleading defect through amendment, a
20 court may sustain the demurrer without leave to amend. (*Goodman v. Kennedy* (1976) 18 Cal.3d
21 335, 349; *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 306.)

22 **B. CEPC’s Complaint for Declaratory Relief Against the City and the Association**
23 **is Improper Because It is Identical to Its Action for Writ of Mandate**

24 Declaratory relief against the City and Association is not available to CEPC because CEPC
25 seeks identical remedies in Writ of Mandate under CCP Section 1085. When an action that should
26 be brought in mandate is improperly labeled as an action for declaratory relief, the complaint is
27 subject to demurrer. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249.) An action
28

1 for declaratory relief will not lie where the relief sought anticipates an issue which could be
 2 determined in the main action. “The object of the statute [*Code Civ. Proc.*, § 1060] is to afford a
 3 *new* form of relief where needed and not to furnish a litigant with a second cause of action for the
 4 determination of identical issues.” (*Hannon v. Western Title Insurance Company* (1989) 211
 5 Cal.App.3d 1122, 1128-112 [quoting *Allstate Ins. Co. v. Fisher* (1973) 31 Cal.App.3d 391, 39].)
 6 An action for declaratory relief will not lie where the relief sought anticipates an issue which could
 7 be determined in the main action. (*Id.*) Mandamus is the appropriate remedy to test the proper
 8 exercise of discretion vested in local agencies such as the City and the Association. (*Hostetter v.*
 9 *Alderson* (1952) 38 Cal.2d 499, 500; *State v. Superior Court of Orange County* (1974) 12 Cal.3d
 10 237, 249 [party may not seek declaration that it is entitled to a permit]. In *Livingston etc. Co. v.*
 11 *County of Los Angeles* (1954) 43 Cal.2d 121, 129, the Court held that, “under all the
 12 circumstances, plaintiffs have an adequate remedy at law for review of the planning commission’s
 13 proceedings, and therefore they are not entitled to injunctive or declaratory relief (citations
 14 omitted).”

15 A careful study of the Third Cause of Action for Writ of Mandate and the Prayer for Relief
 16 reveal that the declaratory relief sought against the City and the Association is improperly
 17 duplicative of the remedies sought in Writ of Mandate. This is best illustrated by a side-by-side
 18 comparison.

Declaratory Relief Sought	Identical Writ of Mandate Sought
a) To declare illegal and unenforceable the provisions of the MOU authorizing conveyance of Area A allegedly in violation of the Historical Deed Restrictions (Petition 20:6-10; 24:8-10);	To mandate the City and Association to enforce the Historical Deed Restrictions, to remove the allegedly illegal improvements from Area A, including restoration of Area A to its prior state (Amended Petition 22:9-13; 25:4-7); <u>Discussion:</u> Both Declaratory Relief and Writ of Mandate seek to invalidate the MOU and conveyance of Area A.

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<p>b) To declare that the quitclaim deed and grant deeds dated September 5, 2012, are void and unenforceable, alleging that they violated Historical Deed Restrictions specifically that the property be used for public park and recreation purposes (Petition 20:11-16; 24:11-15);</p>	<p>To mandate the Association to enforce its reversionary rights to Area A (Petition 14:23-24; 25:2-3); 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 25:4-7); <u>Discussion:</u> Both Declaratory Relief and Writ of Mandate seek to invalidate the MOU and conveyance of Area A.</p>
<p>c) To declare that the attempted conveyance on September 5, 2012 triggered a reversion Area A back to the Association (Petition 20:11-19, 24-25; 24:14-15);</p>	<p>To mandate the Association to enforce its reversionary rights to Area A (Petition 14:23-24; 25:2-3); <u>Discussion:</u> Both Declaratory Relief and Writ of Mandate seek to invalidate the MOU and conveyance of Area A.</p>
<p>d) To declare that the City and Association have a right and a duty to enforce the Historical Deed Restrictions and use all legal means to compel removal of allegedly illegal improvements from Area A and require that Area A be restored to its prior state before improvements were made (Petition 20:20-23; 24:16-17);</p>	<p>To mandate the City and Association to enforce the Historical Deed Restrictions, to remove the allegedly illegal improvements from Area A, including restoration of Area A to its prior state (Amended Petition 22:9-13; 25:4-7); <u>Discussion:</u> Relief sought is identical.</p>
<p>e) For an order enjoining all defendants and real parties from executing further documents purporting to convey Area A to Lugliani</p>	<p>To mandate the Association to enforce its reversionary rights to Area A (Petition 14:23-24; 25:2-3); <u>Discussion:</u> Relief sought is</p>

<p>1 (Petition 24:18-20);</p> <p>2</p>	<p>identical.</p>
<p>3 f) For an order enjoining all defendants and</p> <p>4 real parties from authorizing the erection and</p> <p>5 maintenance of improvements on Area A</p> <p>6 (Petition 24:21-22);</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p>	<p>To mandate the Association to enforce its</p> <p>reversionary rights to Area A (Petition 14:23-</p> <p>24; 25:2-3); To mandate the City and</p> <p>Association to enforce the Historical Deed</p> <p>Restrictions, to remove the allegedly illegal</p> <p>improvements from Area A, including</p> <p>restoration of Area A to its prior state</p> <p>(Amended Petition 22:9-13; 25:4-7);</p> <p><u>Discussion:</u> Relief sought is identical despite</p> <p>declaratory relief being worded differently.</p>

14 The side-by-side comparison in the table above demonstrates that CEPC’s request for

15 judicial declarations against the City and the Association are identical to its Prayers for Relief in

16 Writ of Mandate. Declaratory relief, therefore, is improper. On this basis, demurrer should be

17 granted and the First Cause of Action dismissed without leave to amend with regard to the City

18 and the Association. CEPC’s ultimate claim against the City and the Association is that they each

19 improperly exercised their discretion by entering into the MOU, by conveying Area A, and by

20 taking no action to enforce the deed restrictions on Area A. Mandamus is the appropriate remedy

21 to test the proper exercise of discretion—if such discretion exists—by the City and the

22 Association, and the duplicative declaratory relief actions against the City and the Association

23 should be dismissed. (*Hostetter v. Alderson, supra*, 38 Cal.2d at 500; *State v. Superior Court of*

24 *Orange County* (1974) 12 Cal.3d 237, 249.)

25 C. **CEPC’s First Cause of Action Fails to Establish a Justiciable Controversy with**

26 **Lugliani**

27 CEPC’s First Cause of Action fails to set forth facts sufficient to state a cause of action as

28 to Lugliani in declaratory relief because it fails to set forth the ultimate facts of justiciable

1 controversies on which the Court could grant the declaratory relief CEPC seeks. (CCP § 436, subd.
2 (b).) CEPC admits that it is not a signatory to the MOU and, therefore, has no direct privity of
3 contract with any of the parties to the MOU. CEPC merely pleads a legal conclusion that actual
4 legal controversies exist between it and the other parties. CEPC must do more than merely allege
5 that an actual controversy exists between itself and the parties it sues. CEPC must allege that the
6 controversy regards some “legal rights and duties of the respective parties” and set forth what
7 those rights and duties are. (*Alturas v. Gloster* (1940) 16 Cal.2d 46, 48; CCP § 1060.) For the
8 Court to exercise its discretion to declare the rights and duties of the parties, the controversy
9 involved must be justiciable—that is, it must be a controversy which admits of specific and
10 conclusive relief by judgment. (*Selby Realty Co. v. San Buenaventura* (1973) 10 Cal.3d 110, 117.)
11 A complaint for declaratory relief that fails to allege an actual justiciable controversy between the
12 parties fails to state facts sufficient to constitute a cause of action. (*Wilson v. Transit Authority*
13 (1962) 199 Cal.App.2d 716, 722-724.)

14 1. No Justiciable Controversy Between CEPC and Lugliani

15 The Amended Petition fails to set forth sufficient facts to establish a justiciable controversy
16 between CEPC and Lugliani. The first defect is that the Amended Petition seeks no judicial
17 declaration particular to Lugliani at all. Instead, the Amended Petition seeks judicial declarations
18 to declare the MOU invalid and the September 5, 2012 grant deeds invalid. (Amended Petition,
19 20:6-16, 26-27.) Although such judicial declarations, if made, would affect Lugliani, they do not
20 establish a justiciable controversy between Lugliani and CEPC.

21 The Amended Petition admits that CEPC is not a signatory to the MOU and, therefore, has
22 no privity of contract with Lugliani through the MOU. The Petition fails to set forth any fact that
23 any member of CEPC is bound to Lugliani by any other agreement, deed, or legal instrument—nor
24 does the Petition seek to directly enforce or declare the rights and duties within any such
25 instrument linking CEPC and Lugliani. CEPC clearly objects to the Association’s conveyance of
26 land to Lugliani and to any attempt by the City to re-zone or otherwise permit uses of such land,
27 but these objections do not give rise to a justiciable controversy between Lugliani and CEPC.
28

1 CEPC also fails to set forth any particular disputed rights or duties particular to CEPC and
2 Lugliani which the court could resolve by judicial declaration.

3 CEPC’s Amended Petition fails to plead sufficient facts to establish that CEPC has
4 standing to assert private claims to enforce private deed restrictions against Lugliani—nor does the
5 Amended Petition seek such a declaration of privately-held rights. That CEPC brings portions of
6 the lawsuit against the Association and public entities in the public interest is irrelevant to its
7 standing to bring a declaratory relief action against private citizens. An unincorporated association
8 of unidentified persons only has standing to assert private claims against private persons or entities
9 when “considerations of necessity, convenience and justice provide justification for the use of the
10 representative procedural device.” (*Tenant’s Ass’n of Park Santa Anita v. Southers* (1990) 222
11 Cal.App.3d 1293, 1304.) However, such a right is not unlimited. The pleading must establish that
12 the unincorporated association is “an ascertainable class” and there exists “a community of interest
13 in the questions of law and fact.” (*Id.*; see also *Twain Hart Homeowners Ass’n v. Patterson* (1987)
14 193 Cal.App.3d 184, 187 [Association may sue to enforce private easement because Association
15 represented only its own members, a group easily identified, and possessing a community interest
16 in the easement].)

17 CEPC’s Amended Petition does not plead the requisite facts to establish that CEPC has
18 standing to enforce private deed restrictions directly against Lugliani. CEPC merely describes
19 itself as “residents living in and around the City.” (Petition, pg. 2 ln 21-22.) The Amended
20 Petition identifies one CEPC member—John Harbison, who is a member of the Association and
21 lives down the street from Lugliani. The thrust of CEPC’s request for judicial declarations against
22 Lugliani arise out of John Harbison’s membership in the Association and Mr. Harbison’s
23 beneficial interests in the deed restrictions and real property covenants among Association
24 members. With regard to CEPC, however, the Amended Petition shows on its face that CEPC is
25 not signatory to the MOU, is not a member of the Association, and its members live “in and
26 around the City.” This description of CEPC is not sufficient. The Amended Petition fails to
27 establish an ascertainable class or a community of interest with respect to private rights and
28 controversies with a private citizens—namely the Luglianis and Thomas Lieb. The Amended

1 Petition fails to allege facts showing legally-cognizable interest held in common by the
2 unidentified members of CEPC in enforcing the private real property covenants or deed
3 restrictions among Association members. Consequently, the Amended Petition fails to allege fact
4 sufficient to show a justiciable controversy between CEPC and Lugliani.

5 On this basis, demurrer to CEPC's First Cause of Action against Lugliani should be
6 sustained and the First Cause of Action for Declaratory Relief brought by CEPC against Lugliani
7 should be dismissed without leave to amend.

8 2. No Justiciable Controversy Between John Harbison and Lugliani

9 The Court is directed to Lugliani's concurrently-filed Motion to Strike John Harbison as an
10 individual plaintiff and petitioner from the Amended Petition. Without conceding that Mr.
11 Harbison is properly joined as an individual plaintiff, the Amended Petition fails to set forth
12 sufficient facts to establish a justiciable controversy between Mr. Harbison and Lugliani. Again,
13 the first defect is that the Amended Petition seeks no judicial declaration particular to Lugliani at
14 all. Instead, the Amended Petition seeks judicial declarations to declare the MOU invalid and the
15 September 5, 2012 grant deeds invalid. (Amended Petition, 20:6-16, 26-27.) Although such
16 judicial declarations, if made, would affect Lugliani, they do not establish a justiciable controversy
17 between Lugliani and Mr. Harbison.

18 The Amended Petition admits that Mr. Harbison is not a signatory to the MOU and is not a
19 party to the September 5, 2012 grant deeds he seeks to invalidate. The Amended Petition fails to
20 seek a declaration of any right particular to Mr. Harbison, and the Amended Petition fails to seek a
21 declaration resolving any particular controversy or conflict between Mr. Harbison and Lugliani.
22 The Amended Petition makes a single veiled reference to Mr. Harbison's right, as a member of the
23 Association, to directly enforce the Historical Deed Restrictions (Amended Petition, 2:23-24), but
24 this reference is made regarding *CEPC*'s causes of action—not regarding any specific controversy
25 between Mr. Harbison and Lugliani. Although the Amended Petition states Mr. Harbison's many
26 objections to the MOU, the September 5, 2012 grant deeds, and Lugliani's use of his own land,
27 none of these objections establish a justiciable controversy or conflict of rights between Mr.
28

1 Harbison and Lugliani upon which the Court can issue a judicial declaration—nor does the
2 Amended Petition seek such a declaration.

3 On this basis, should the Court deny Lugliani’s Motion to Strike John Harbison from the
4 Amended Petition, demurrer to Mr. Harbison’s First Cause of Action against Lugliani should be
5 sustained and the cause of action dismissed without leave to amend.

6 **D. Lugliani Joins City and Association Demurrers**

7
8 Lugliani hereby joins the City’s Demurrer to the Second and Third Causes of Action in the
9 Amended Petition.

10 Lugliani hereby joins the Association’s Demurrer to the Third Cause of Action in the
11 Amended Complaint.

12 **E. John Harbison Fails to State a Cause of Action for Nuisance Per Se**

13 The Court is again directed to Lugliani’s concurrently-filed Motion to Strike John Harbison
14 as an individual plaintiff and petitioner from the Amended Petition and to strike the Fourth Cause
15 of Action in the Amended Petition because it is only brought by Mr. Harbison. Without conceding
16 that Mr. Harbison is a properly joined individual plaintiff who can properly bring the Fourth Cause
17 of Action in nuisance per se, the Amended Petition fails to set forth sufficient facts to establish a
18 cause of action in nuisance per se.

19 Nuisance per se arises when a legislative body with appropriate jurisdiction, in the exercise
20 of the police power, expressly declares a particular object or substance, activity, or circumstance,
21 to be a nuisance. (CCP § 3479; *People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512.)
22 Nuisances per se are so termed because no proof is required, beyond the actual fact of their
23 existence, to establish that they are nuisances. No proof of ill effects is necessary. (*City of*
24 *Claremont v. Kruse* (2009) 177 Cal.App.4th 1153.) By way of example, encroachment onto a
25 public highway or street, unauthorized by legislative action, has been deemed a public nuisance
26 per se. (*People v. Henderson* (1948) 85 Cal.App.2d 653 [shed on state's right of way].) Likewise,
27 blocking a public sidewalk constitutes a public nuisance per se. (*Kempton v. City of Los Angeles*
28

1 (2008) 165 Cal.App.4th 1344.) However, the mere violation of a zoning ordinance is not by itself
2 a nuisance per se. (*Stegner v. Bahr & Ledoyen, Inc.* (1954) 126 Cal.App.2d 220.) In short, a
3 nuisance per se is an action that violates a law that declares the action a nuisance.

4 Mr. Harbison argues that Lugliani's current use of Area A (as described in Amended
5 Petition, Paragraph 16) is a nuisance per se because Lugliani's current use of Area A allegedly
6 violates the private covenants in the Historic Deed Restrictions and allegedly violates City of Palos
7 Verdes Estates Municipal Code Section 17.32.050. (Amended Petition, 23:18-28.) These
8 allegations and Mr. Harbison's unsupported legal conclusions fail to establish the requisite
9 elements of a cause of action in nuisance per se.

10 City Municipal Code Section 17.32.050 reads in its entirety:

11 **17.32.050 Violation – Nuisance.**

12 Any building or structure erected or maintained, or any use of property, contrary
13 to the provisions of this title and PVEMC Title 18 shall be unlawful and a public
14 nuisance and the city attorney shall, upon order of the city council, immediately
15 commence action or actions, proceeding or proceedings for the abatement,
16 removal and enjoinder thereof, in the manner provided by law, and shall take
17 such other steps and shall apply to such court or courts as may have jurisdiction
18 to grant such relief as will abate or remove such building, structure or use, and
19 restrain and enjoin any person from setting up, erecting or maintaining such
20 building or structure, or using any property contrary to the provisions of this title
21 and PVEMC Title 18. It shall be the right and duty of every citizen to participate
22 and assist the city officials in the enforcement of the provisions of this title and
23 PVEMC Title 18. (Ord. 700 § 2 (Exh. 1), 2012; Ord. 84 § 10.5, 1948)

19 The Amended Petition fails to allege any facts showing that Lugliani's current private use
20 of Area A, which Lugliani owns, is contrary to any section of PVEMC Titles 17 or 18. Mr.
21 Harbison's citation to PVEMC Section 18.16.020 (Amended Petition, 15:26 and 23:26) appears to
22 be erroneous or mistaken. That section of the code appears to refer to "amateur radio antennas."

23 Furthermore, the claim of nuisance per se in the Amended Petition characterizes the
24 nuisance as an illegal private use of *public* parkland. However, Mr. Harbison admits elsewhere in
25 the Amended Petition that Area A is no longer public parkland, but is now privately owned by
26 Lugliani. Clearly, he and CEPC would like Area A returned to public parkland and may still think
27 of Area A as public parkland, but the alleged facts of Mr. Harbison's own Amended Petition
28 establishes that Area A is no longer public parkland. Therefore, the Amended Petition fails to

1 establish that a legislative body, i.e., the City, with appropriate jurisdiction, in the exercise of its
2 police power, expressly declared Lugliani's current use of Lugliani's own private land a nuisance.

3 Secondly, the private covenants within the Historical Deed Restrictions are not legislative
4 mandates made pursuant to the exercise of the police power. They are private covenants and
5 agreements. Even if Lugliani's current use of his own land violates the private covenants in the
6 Historic Deed Restrictions, the Historic Deed Restrictions cannot form the basis of a cause of
7 action in nuisance per se, and Mr. Harbison cites no legal authority to support this theory of
8 nuisance per se. Nuisance per se must arise from a violation of a *law* declaring an activity a
9 nuisance, not from alleged violations of a private agreement. Counsel for Lugliani conducted
10 numerous legal searches and found no published authority addressing, much less upholding, a
11 nuisance per se claim based on a private agreement—there is none.

12 On this basis, should the Court deny Lugliani's Motion to Strike John Harbison and the
13 Fourth Cause of Action from the Amended Petition, demurrer to Mr. Harbison's Fourth Cause of
14 Action against Lugliani should be sustained and the cause of action dismissed without leave to
15 amend.

16 **IV. CONCLUSION**

17 For all the aforementioned reasons, the Court should grant this Demurrer and dismiss
18 CEPC's First and Fourth Causes of Action without leave to amend.

19 DATED: December 6, 2013

20 Respectfully submitted,
ARMBRUSTER GOLDSMITH & DELVAC LLP

21 By: 

22 R.J. COMER

23 Attorneys for Real Parties in Interest, ROBERT
24 LUGLIANI and DOLORES A. LUGLIANI, as co-
25 trustees of THE LUGLIANI TRUST; THOMAS J. LIEB,
26 TRUSTEE, THE VIA PANORAMA TRUST
27
28

PROOF OF SERVICE

I am a resident in the State of California. I am over the age of 18 and not a party to the within action. My business address is 11611 San Vicente Blvd., Suite 900, Los Angeles, California 90049. On December 6, 2013, I served the within Documents:

(1) DEFENDANTS AND REAL PARTIES IN INTEREST ROBERT LUGLIANI AND DOLORES A. LUGLIANI, AS CO-TRUSTEES OF THE LUGLIANI TRUST, THOMAS J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST'S NOTICE OF DEMURRER AND DEMURRER TO FIRST AND FOURTH CAUSES OF ACTION IN THE VERIFIED FIRST AMENDED PETITION FOR PEREMPTORY WRIT OF MANDATE & COMPLAINT FOR INJUNCTIVE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

- By transmitting the document(s) listed above via facsimile from sending facsimile machine number 310.209.8801 to the fax number(s) set forth on the attached Service List on this date before 5:00 p.m. and receiving confirmed transmission reports indicating that the document(s) were successfully transmitted.
- By transmitting the document(s) listed above via email to the person(s) named on the attached Service List at the respective email addresses next to their names, on this date before 5:00 p.m. and receiving confirmed transmission reports indicating that the document(s) were successfully transmitted.
- By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth on the attached Service List, to each of the persons named on the attached Service List.
- By causing overnight delivery by Federal Express of the document(s) listed above, addressed as set forth on the attached Service List, to each of the person(s) named on the attached Service List.
- By causing personal delivery by messenger service of the document(s) listed above, addressed as set forth on the attached Service List, to each of the person(s) named on the attached Service List.
- By personally delivering the document(s) listed above to each of the person(s) named on the attached Service List, at their respective addresses set forth on the attached Service List.

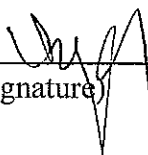
SEE ATTACHED SERVICE LIST

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 6, 2013 at Los Angeles, California.

Bogdana Koiso
(Type or print name)


(Signature)

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DOCUMENT(S) SENT

1. Defendants and Real Parties in Interest Robert Lugliani and Dolores A. Lugliani, as Co-Trustees of the Lugliani Trust, Thomas J. Lieb, Trustee, the Via Panorama Trust's Notice of Demurrer and Demurrer to First and Fourth Causes of Action in the Verified First Amended Petition for Peremptory Writ of Mandate & Complaint for Injunctive Relief; Memorandum of Points and Authorities in Support Thereof
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