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 Plaintiffs and Petitioners
CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN HARBISON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS, an unincorporated association and JOHN HARBISON,

Plaintiffs and Petitioners,

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 PALOS VERDES HOMES ASSOCIATION'S DEMURRER TO FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT

Hearing Date: January 3, 2014
Hearing Time: 1:30 p.m.
Department: 86

Action Filed: May 13, 2013
Trial Date: June 20, 2014

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

To be clear, the Palos Verdes Homes Association ("Association") contends that the word "shall" does not mean "shall" and that through "interpretation" of deed restrictions the Association is authorized to sell public parkland to a private citizen for exclusive private purposes such as a gazebo, barbecue, sports court and retaining wall. (Demurrer, p. 6). The Association also affirms its earlier argument, through new counsel, that it has the right but not the duty to enforce the land use restrictions at issue in this litigation. (Demurrer, p. 6). These astonishing arguments come from the Association that was formed for the very purpose of maintaining public parklands and perpetuating their land use restrictions. (Ex. 1, p. 7).[1] In addition, the Homes Association successfully fought a recent case in 2010-2011 to prevent the School District from selling land encumbered by the same protective restrictions.

II. THE DEMURRER TO THE THIRD CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE CEPC HAS ALLEGED A CLEAR, MINISTERIAL DUTY ON BEHALF OF THE ASSOCIATION TO ENFORCE THE LAND USE RESTRICTIONS

The Association argues that the writ of mandate claim is defective because CEPC failed to allege a ministerial duty owed by the Association. (Demurrer, p. 11). CEPC disagrees. The land use restrictions governing the parkland here have never been modified or repealed since the land was conveyed to the City in 1940. The land use restrictions compelling that the parkland be used perpetually for public purposes is akin to a condition of approval imposed by a planning commission for a development project. Although the decision to reject or approve a development project is a discretionary one not subject to judicial inteference, once a project is approved and conditions of approval are made,

[1] The conditions attached as an Exhibit to the amended petition relate to tract 6888 and 7331. A substantially similar set of conditions, relating to tract 8652 is attached to CEPC's request for judicial notice as Exhibit "A." A tract map demonstrating that the sold parklands falls within tract 8652 is attached to CEPC's request for Judicial Notice as Exhibit "B."

enforcement of those conditions is a ministerial duty. (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 834 [holding that Zoning Administrator had clear, ministerial duty to enforce plannning commission condition of approval requiring construction of pedestrianway].) Here, once the Association enacted restrictions calling for a reversion of title upon breach of conditions, the enforcemetn of such reversionary interests became a ministerial duty.

The case of *Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 Cal.App.3d 1003 (hereinafter, "*Welwood* is instructive. In *Welwood*, the City of Palm Springs owned real property where the city's library was situated. The library property had been acquired by private deed restricting the use of the property to library uses. Forty years later, the City entered into an agreement with a developer. The agreement contemplated moving a popular restaurant to the library property. An unincoproated association formed for the purpose of blocking the project filed a petition for writ of mandate in the Superior Court to prevent the city from conveying the library to the developer. After the lawsuit was filed, the city and developer entered into an amended agreement calling for a partial razing of the library building in lieu of a conveyance to the developer to accompodate the dining area. The trial court was poised to grant the writ and block the city's actions when the city and developer began negotations for a third agreement to allow for an easement for dining uses on library party. The trial court granted the writ of mandate and an injunction precluding the city from granting an easement or razing the library. The city appealed.

The Court of Appeal confirmed that the deed restrictions controlled the use of the property and dining uses would not directly contribute to a library use of the property. (*Welwood*, at 1012):

> The use proposed by City in no way directly contributes to these purposes, and, actually, in at least one way, is antithetical to such purposes, for the proposed use would destroy parts of the building where books are stored and used.

(*Welwood*, at 1015).

The *Welwood* court found that the city's successive developer agreements would violate the deed restrictions requiring the city to "forever maintain" the library. (*Ibid.*) On appeal,

the city argued that the writ impermissibly invaded the City's discretion. The *Welwood* court disagreed:

> The language of the writ does not prevent City from removing sections of the library, from conveying easements or other legal rights over the Library Property or from otherwise undertaking any acts *necessary for library purposes*. It merely commands City not to undertake any such actions if they are done primarily for a nonlibrary purpose or if they interfere with library use.

(*Welwood*, at 1016, emphasis in original).

Finally, the *Welwood* court concluded that the trial court's issuance of an injunction to block the City's plans was proper:

> A public trust is created when property is held by a public entity for the benefit of the general public. (Citations.) Here, title to the library property is held by City to be used by City for the benefit of the general public as a public library. Any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an ultra vires act. (Citations.) Thus, it would be proper not only to issue an injunction to enforce the obligation arising from the existence of the public trust, i.e., to enforce City's obligation to use the property as a public library, but also to prevent an ultra vires, and hence nonlegislative, act.

(*Welwood*, at 1017).

The holding of *Welwood* is applicable here. The City of Palm Spring's attempt to first convey and then raze the library to make room for a restaurant is analagous to the Association's conveyance of public parkland to the Luglianis[2] for a gazebo, barbecue and other private purposes. The issuance of a writ was upheld in *Welwood* because the proposed dining use for library property was a blatant violation of the deed restrictions. The facts of *Welwood* are not distinguishable.

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[2] Robert Lugliani, Dolores Lugliani and Thomas Lieb are referred to herein as "Lugliani" for brevity's sake.

III. THE DEMURRER TO THE THIRD CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE THE LAMDEN RULE OF JUDICIAL DEFERENCE DOES NOT APPLY TO ACTS TAKEN OUTSIDE THE POWER OF AN ASSOCIATION

The Association contends that its decisions are entitled to judicial deference when it acts "within its authority." (Demurrer, p. 8; *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 265). CEPC agrees. As a corollary to that rule, actions taken outside of an association's authority are entitled to no deference:

> And *Lamden* did not purport to extend judicial deference to board decisions that are outside the scope of its authority under its governing documents. *Lamden* specifically reaffirmed the principle that, " 'Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration.

(*Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n* (2008) 168 Cal.App.4th 1111, 1122).

As set forth in Part II above, the Association's conveyance of public parkland to a private party for private purposes was outside the scope of its authority. Nor was the Association entitled to take no action to enforce the parkland restrictions. No deference is required here.

IV. THE DEMURRER TO THE THIRD CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE REGARDLESS OF OWNERSHIP, THE LAND USE RESTRICTIONS ARE STILL IN PLACE AND THE ASSOCIATION MUST ENFORCE THEM

Although there is some dispute about the current ownership of the parkland purportedly conveyed to the Luglianis, there is no dispute that the parkland conveyed to the Luglianis is subject to land use restrictions. All parties agree that the attempt to convey title from the City to the Association and then to the Luglianis did not modify the land use restrictions that the parkland be used for park purposes in perpetuity. Indeed, the September 2012 deed conveying the parkland from the Association to the Luglianis confirms the efficacy

of those land use restricitons. (Request for Judicial Notice ("RFJN"), Ex. C, p. 4, ¶ 10 [acknowledging the application of Declaration No. 1 and 25]. Those land use restrictions include provisions to modify any of the restrictions. (FAP, Ex. 1, p. 17, § 9 [concerning tract 6888 and 7331; RFJN, Ex. A, p.. 45, Art. VI, § 3 [substantially identifical language concerning tract 8652].). Under the terms of the land use restrictions, no such modification may occur

> without the written consent duly executed and recorded of the owners of record of not less than two-thirds in area of all lands held in private ownership within three hundreed feet in any direction of the property concerning a change or modifcation is sought to be made…

(FAP, Ex. 1, p. 17, § 9; RFJN, Ex. A, p.. 45, Art. VI, § 3).

No such consent was sought or obtained by the Association or the Luglianis prior to the attempted conveyance of the parkland to the Lugianis in September 2012. As a result, regardless of whether the parkland is now owned by the Luglianis (as the Luglianis contend) or the City (as CEPC contends due to the void nature of the September 2012 deeds), the land use restrictions existing prior to September 2012 preventing anything other than park use continue today to apply to the parkland.

The Association attempts to skirt the failure to obtain consent by labeling its actions as "interpretation" rather than "modification" of the restrictions. The Association contends that by the insertion of paragraph 2 in the deed to the Luglianis,[3] allowing for the presence of the Luglianis' private gazebos, sports courts, retaining walls, barbecues, etc. on parkland, the Association has merely "intepreted" the land use restrictions. (Demurrer, pp. 7-8). CEPC contends that, in fact, the Association's insertion of paragraph 2 into the deed is not an "interpretation" of the restrictions but instead is a modification of the restrictions requiring consent of two-thirds of the owners within 300 yards. (Req For Judic. Nocie, Ex. P. 45, Art. VI, § 3). Any fair reading of the changed deed conditions is that the Luglianis obtained a modification of conditions (in exchange for their payment of $2 million) and not an

[3] The September 2012 deed purporting to convey title to public parklands from the Association to the Luglianis is attached as Exhibit "C" to CEPC's request for judicial notice filed concurrently herewith.

"interpretation." For these reasons, the Court should disregard the Association's argument that it has acted within its authority in executing the September 2012 deed to the Luglianis.

V. THE DEMURRER TO THE THIRD CAUSE OF ACTION SHOULD BE OVERRULED BECAUSE "SHALL" IS MANDATORY IN THE CONTEXT OF THE ASSOCIATION'S REVERSIONARY INTEREST IN THE PARKLANDS

If the parkland use restrictions are violated, the property "shall" revert to the Association. (FAP, Ex. 1, p. 48, Art. VI, § 6 ["A breach of any of the restrictions, conditions and covenants hereby established shall cause the real property upon which such breach occurs to revert…"]; see also RFJN, Ex. A, pp. 46-47, Art VI, § 6 [identical reversion language for Tract 8652].) The common sense meaning of the term "shall" is mandatory. "Ordinarily, the term 'shall' is interpreted as mandatory and not permissive. Indeed, "the presumption [is] that the word 'shall' in a statute is ordinarily deemed mandatory and 'may' permissive." (*People v. Standish* (2006) 38 Cal.4th 858, 869). Ordinarily, the word "may" connotes a discretionary or permissive act; the word "shall" connotes a mandatory or directory duty. (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 433).[4]

The Association cites no legal decisions but instead relies on attorney Bryan Garner for the proposition that the term "shall" is ambiguous. In some contexts, that might be true. In this context, it is not. If the Court were to interpret the reversionary language to be permissive, it would lose all meaning and effect. Consider the following: "A breach of any of the restrictions *may* cause the real property to revert…" versus "A breach of any of the restrictions *shall* cause the real property to revert." The permissive use of "shall" in this context renders the entire reversionary interest completely ineffective. The common sense and widely accepted interpretation of "shall" as mandatory should be adopted by the Court as it is the only meaning that gives the reversionary language the intended effect.

[4] Although these decisions arise in the context of interpretation of statutes, there is no reason it cannot apply to the interpretation of legal instruments as well.

VI. CONCLUSION

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

DATED: December 19, 2013

BROEDLOW LEWIS LLP

By: _____
Jeffrey Lewis

Attorneys for Plaintiffs and Petitioners CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN HARBISON