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Superior Court of California
County of Los Angeles

MAY 22 2015

Sherri R. Carter, Executive Officer/Clerk
By: Glorietta Robinson, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN HARBISON,

Plaintiffs,

vs.

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

Defendants,

Case No.: BS142768

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

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

Hearing Date: May 29, 2015
Hearing Time: 9:30 a.m.
Department: 12

BY FAX

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

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MEMORANDUM OF POINT AND AUTHORITIES

I. Introduction

> …More than anything else, Palos Verdes Estates is unique because of its open spaces. A full quarter of the city's 3,015 acres is permanently protected as parkland – and has been, ever since deed restrictions were imposed on the land in 1923. Much of it runs along the unbuildable slopes of the beaches…. "The people of this city, "says Planning Commissioner Paul Peppard, "want the parkland left the way it is. They don't want it formal or manicured – or built on….We have all this free, open land," says Dr. Peppard. "From time to time, someone comes along and tries to grab on to a piece of it." So far, no one has succeeded….
>
> "**These restrictions are stronger than the U.S. Constitution**. The way they are set up, **they can hardly be amended**." [said then president of the Association. His predecessor Gaybert Little is quoted as saying] "In all these years, **we haven't lost a single foot of the parkland that we started with.** Not many communities can say the same. …Here they started with a dream and it was beautiful." Patricia Gribben (then manager of the Association) said, "You can accomplish wonders**. You just keep enforcing the restrictions on the land.**"[1]

The City and Association's attitude in 1969 are in stark contrast with the current leadership. The attitudes have changed in 45 years from not yielding "one single foot" of parkland to "parkland for sale." While the attitudes of politicians may change, deed restrictions do not. In fact, the reason the restrictions exist is to guard against the "land grab" described above. Defendants admit that the Panorama Parkland is subject to four key land use restrictions exist. (MF No. 36). It is undisputed that the Panorama Parkland:

- must be used **forever** for **park** or **recreation** purposes (MF No. 37);
- may not have **buildings** be **constructed** on it except for park purposes (MF No. 38);
- must not be transferred except **to a body suitably** constituted by law to **take, hold, maintain and regulate public parks**. (MF No. 39); and
- must not have **pathways/landscaping** on it except to **improve access**. (MF No. 40).

II. The Court is not Required to View the City Quitclaim Deed in Isolation

Defendants contend that if the Court limits its analysis to the authority of the City to sign a quitclaim deed to the Association, no violation of restrictions occurred. They urge the Court to look only at the conveyance of the property from the City to the Association and

[1] Harbison Decl., Ex. 33.

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pretend as though a $1.5 million "donation" by the Luglianis did not happen. The defendants likewise urge this Court to ignore the City's receipt of $100,000 from the sale and that the intent of the deal was to allow the Luglianis to have private, exclusive use of public lands. This approach urged by the defendants conflicts with rules for the interpretation of instruments. Civil Code section 1642 states "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." Section 1642 applies to contracts and deeds. (*Borden v. Boyvin* (1942) 55 Cal.App.2d 432, 436). The Court is entitled to view the entire MOU transaction. True, the Panorama Parkland was deeded to the Association briefly. However, it was immediately deeded to Lieb for the benefit of the Luglianis.[2] The intent of the whole transaction was to convey the parkland from the City to the Luglianis. The Association was used as a temporary, legally insignificant stopping point for that transaction to be accomplished. The City Attorney was the architect of the transaction. (Harbison Decl., ¶ 5). The City received $100,000 of the $500,000 paid by the Luglianis. (Ex. 12 Art. VII, ¶ C, p. 9).

III. The *Wellwood Murray* and *Roberts* Cases Are on Point

The defendants contend that the case of *Save the Welwood Murray Memorial Library Committee v. City Council of the City of Palm Spring* (1989) 215 Cal.App.3d 1003 ("*Welwood*") is not applicable to this dispute because the original instrument donating property in that case was a trust. (Opp'n, p. 20). That is a distinction without significance. They relied on by *Wellwood* involved instruments that were deeds (as opposed to trusts) and came to the same result as *Welwood*. The deed of property for public purposes in *City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295, 299 created a public trust and gave a taxpayer the right to sue if the city diverted the property from public use. Similarly, in *County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, 575 it was two deeds (and not a trust document) that gave rise to the duty of the City to use the public property for the purposes described in the deed. This

[2] The instrument numbers assigned to the deeds are consecutive 20121327414 and 20121327415. The deeds were recorded on September 5, 2012, at 8:00 a.m. See Exs. 9 and 10. The MOU required the property transactions to occur simultaneously. (MOU, Ex. 12, p. 9, Art. VII, ¶ C).

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Court has already reviewed the *Wellwood* case in connection with defendants' unsuccessful demurrers and found that "[a]uthority for plaintiffs' *ultra vires* theories and citations to the concomitant 'public trust' doctrine is to be found in plaintiffs' Opposition cases including but not limited to the Hermosa Beach, Welwood Library, County of Solano and Big Sur cases. (MF No. 45). The Court was correct in its assessment then.

Defendants also attempt to distinguish *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d 545. (Opp'n, p. 22). *Roberts* and the present controversy are identical in the sense that both cases involve two city councils attempting to use public property for uses in violation of deed restrictions.

Defendants also attempt to apply the case of *Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117 to this matter. In that case property was donated for a library, the City unquestionably ceased using it as such and the heir of the original grantor of the property sought to exercise his rights of reversion to reclaim the property. The *Walton* case confirmed the continuing efficacy of the deed restrictions that the property be used as a library and ordered the property returned. According to the Defendants, because the donative instrument in *Walton* contained a right of reversion, no public trust was recognized by the court. The facts of *Walton* are distinguishable from the instant controversy. The only remedy specified in the donative instrument in *Walton* was the immediate reversion of title. (*Walton* at 137-138). In *Walton* there was no right of injunction nor mention of the legal rights of third parties. In the instant case, the 1940 deeds provide a right of injunction to the Association and to all property owners as intended beneficiaries of the restrictions. The 1940 deeds cannot be described as providing reversion as the primary remedy as was the case in *Walton*.

Defendants argue that *Walton*, when read with the Marketable Record Title Act of 1982 means that the 1940 deeds could not create a trust. (Opp'n, p. 22, li. 1-3). However, the *Wellwood Murray* case was published in 1989 well after the Marketable Record Title Act was enacted in 1982. The *Wellwood Murray* case recognizes the long line of cases establishing a public trust:

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> A public trust is created when property is held by a public entity for the benefit of the general public. (Citations.) …Any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an ultra vires act.

(*Welwood Murray*, at, 1017).

The *Walton* decision does not meaningfully discuss the long line of cases recognizing the public trust in the context of a city that accepts real property with specific restrictions:

> 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 failure of *Walton* to discuss these cases renders *Walton* little use to this Court.

IV. Defendants' Arguments about Whether to Call the Sold Property "Parkland" do not Create a Triable Issue of Fact nor Justify Denial of this Motion

Defendants' opposing separate statement argues with quite a few of plaintiffs' material facts but defendants offer scant evidence to oppose those facts. Defendants dispute the plaintiffs' use of the term "parkland" to describe the subject property. (Def. Separate Statement, p. 1, li. 7). Plaintiffs did not invent that term. "Parkland" was the term used by the Association and the City between 1972 and 2011 to describe the property that is the subject of this case. (Exs. 16-20). Moreover, the term "parkland" is used by all the defendants

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in the MOU. Specifically, the real property at issue was described by the parties in factual recitals as: "City-owned parkland." (MOU, Ex. 12, p. 4). Similarly the parties stated in the recitals that: "At the City's direction, Property Owners removed the structures encroaching on the City's parkland." (*Id.*) Having, described the sold property as "City-owned Parkland," these factual recitals in the contract are binding on the defendants. "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest…" (Evid. Code, § 622). More importantly, the fact that the defendants dispute the label of "parkland," does not give rise to any disputed material fact.

The defendants offer unmeritorious evidentiary objections and argument but no actual evidence to contradict the facts in plaintiffs' separate statement. With the exception of fact numbers 31 and 44, there are no true conflicts in the evidence. And as to those two facts:

Fact 31 states that the Association is no longer a body that takes, holds, maintains and regulates public parks and has not done so since 1940. Defendants contend there is a dispute based on plaintiffs' deposition testimony. Not so. The defendants admit as undisputed that "the City has taken on both the ownership of and stewardship of the parks." (MF No. 27). The Association's in house counsel declared that "in 1940, the Association transferred its interest and responsibility for maintaining the open space…to the new city…" (Croft Decl., ¶ 8). "Thus, in 1940, the Association deeded all lands under its control to the new City, and the City thereafter took over the maintenance obligations of the property." (Croft Decl., ¶ 20). Taken together, the failure to dispute Fact No. 27 and Croft's declaration establishes that by 2012, the Association was no longer an entity that was "suitably constituted by law to take, hold, maintain, and regulate public parks." (1940s Deed, (MF No. 39).

None of the plaintiff's deposition testimony contradicts this point. Plaintiff testified at deposition that the Association is "not a body that takes, holds, maintains and regulates parks." (Dveirin Declaration, Ex. A, p. 45, li. 6). He also testified that the Association "is no longer" maintaining parks and it is "unlikely" that the Association will ever do so in the future. (Dveirin Decl., Ex. A, p. 46, li. 5). There is no true dispute here. However, even if the Association was presently a party that currently owns and manages parks, that would only

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address one of the land use restrictions contained in the 1940's deeds. The "forever parks," "no structures," and "no pathways or landscaping" land use restrictions are not implicated by the Association's ability or inability to hold public parks.

Fact 44 states that the 1940 deeds do not contain any express provision authorizing the City or Association to "swap" parkland properties. Defendants offer no contrary evidence. Instead, defendants rely on completely different documents, signed earlier in time and provide more general powers of the Association to convey properties. Specifically, defendants rely on 1931 deeds for this "swap" authority. (MF No. 44). Plaintiffs do not dispute the fact that the Association had broad powers in 1931 to swap properties. The Association self-limited that "swap" power nine years later in 1940 when it deeded the Panorama Parkland to the City.

V. The Defendants' Reliance on the Business Judgment Rule does not Apply to this Case and was Waived by the Failure to Plead it as an Affirmative Defense

Defendants argue that the Association's decisions are beyond the reach of the Court's under the business judgment rule. (Opp'n, p. 10). They are mistaken:

First, the defendants failed to plead the defense and that constitutes a waiver. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n* (2008) 168 Cal.App.4th 1111, 1123).

Second, the business judgment rule does not apply outside the context of a corporation's board of directors. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 258). The California Supreme Court held that the business judgment rule is not applicable to board decisions of homeowner associations. (*Id.* at, 260). Instead, the Supreme Court adopted a far narrower rule holding that judicial deference should be applied to maintenance and repair decisions concerning common areas. (*Id.* at p. 265; *Affan v. Portofino Cove Homeowners Ass'n* (2010) 189 Cal.App.4th 930, 940). The rule does not apply to decisions "involving an extraordinary situation …or one not pertaining to repair and maintenance actions…." (*Ritter & Ritter, Inc. v. Churchill Condominium Ass'n* (2008) 166 Cal.App.4th 103, 122).

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Third, the rule only protects those decisions that are within the board's authority. Defendants acknowledge this important limitation on the rule. (Opp'n, p. 10, li. 23-24). In the *Ekstrom* case, an association had CC&R's that required all owners to trim trees to preserve views. The association passed a rule exempting palm trees from trimming. The owners with views sued. The association raised the deference rule in defense. The Court of Appeal held that the rule was not applicable because a rule exempting palm trees from trimming conflicted with the "plain meaning" of the governing documents. Such decisions by an association are "not entitled to judicial deference. (*Ekstrom*, at, 1123).

Here, like the board in *Ekstrom*, the Association claims to have the unfettered discretion to interpret its own documents. But when the "interpretation" conflicts with the plain language of the restrictions that the property be maintained as a park "forever," the no deference is due. While boards should be presumed to have better expertise than courts when it comes to matters of termite abatement and lawn watering, the same justification for a rule of deference does not apply to the extraordinary act of selling parkland.

Fourth, proving the elements of the rule of deference rests on the defendants. (*Affan v. Portofino Cove Homeowners Ass'n* (2010) 189 Cal.App.4th 930, 940). The burden of proof is on them to prove the elements of the defense including their good faith. (*Ibid*). Plaintiffs were not required to disprove all of the defendants' defenses to prevail in this motion. (*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.* (2009) 170 Cal.App.4th 554, 565). Defendants half-heartedly raise this issue in their brief alone. (Opp'n, p. 11:27-12:4). The opposing separate statement is silent on this subject. The opposing separate statement contains only four additional facts and none of them relate to the rule of deference. The statement in the opposition brief that there are "material issues of fact" concerning the Association's investigation is legally irrelevant to this motion absent evidence in the separate statement. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163 [party opposing summary judgment required to use "responsive evidence" and not speculation].) The failure of the defendants to identify facts in the separate statement related to the unpled defense of judicial deference affords this Court the opportunity to disregard the argument and grant the motion.

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(*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co.*, *supra*, 170 Cal.App.4th 554, 567)

Defendants would have been unable to prove their good faith decision making in the separate statement. For example, defendants have repeatedly asserted that the land swapped as part of the MOU settlement were "roughly equivalent" in size, value and other attributes. (Harbison Reply Decl., ¶ 2, Ex. 31). That is demonstrably false and negates any possible finding of good faith. (Harbison Reply Decl., ¶ 2, Ex. 31).

VI. The Association's Power to Interpret Deeds and Rules is Limited by Common Sense, Plain Language and the 1940 Deed Language

The Association does have the power to interpret its governing documents and related deeds. However, like the board in *Ekstrom*, the Association has offered an interpretation of its governing documents that is irreconcilable with the "forever parks," "no structures," "no pathways or landscaping" and "conveyances to entity that holds parks" deed restrictions. Because the defendants were desirous to settle litigation and to enable the $1.5 million donation to the non-party school district, they jumped through hoops to approve the settlement. However, the law does not allow a City or Association to use illegal means to achieve even a well-intentioned settlement.

The defendants take great lengths to argue that the 1940s deeds be analyzed in light of the instruments that <u>preceded</u> the 1940 deeds. Defendants argue that once the Panorama Parkland returned to Association ownership, it had the power under Article II, Section 4 of Declaration 1 to dispose of the property at whim. (Opp'n, p. 18, li. 13-24). Defendants likewise claim broad powers to develop, improve or maintain parkland pursuant to Section 3 of the 1931 Deed. (Opp'n, p. 18, li. 3-11). Defendants also argue that the Panorama Parkland is properly classified as "Class F" property under Article IV, Zoning, Section 10 of the Declaration No. 1. (Opp'n, p. 19 li. 15-22).

The flaw in these arguments is that the 1940s deeds expressly reference all prior use restrictions[3] and state that the Panorama Parkland "is to be used and administered forever for park and/or recreation purposes only (any provisions of the Declarations of Restrictions

[3] See page 6 of 1940 deed, p. 2 describing the prior declarations including Declaration No. 1.

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above referred to, or of any amendments thereto, or of any prior conveyances of said realty of any laws or ordinances of any public body applicable thereto, to the contrary notwithstanding)…" (1940 Deed, Ex. 6, p. 7, ¶ 3). In other words, the Association of 1940 was aware of the admittedly broad powers described above, mentioned them in the 1940 deed and declared that "notwithstanding" those broad powers, the property was to be parkland "forever." The 1940s deeds also prevent the Association from modifying the restrictions. (1940 Deed, Ex. 6, p. 7, ¶ 7). If the Association, in 1940, had intended to reserve for itself the power to abolish the "forever park" and other restrictions, the Association would never have included paragraphs 3 and 6. The defendants' arguments would render paragraphs 3 and 6 meaningless. There was no reason for the Association to reference all the prior declarations in the 1940's deed unless the Association intended to limit the Association's powers that predated 1940.

VII. The Defendants' Merger Arguments Fail Because the Parties to the Deed Did Not Intend a Merger and there was Never a Unity of Interest

Defendants argue that for the fleeting moment when the Panorama Parklands was owned by the Association in September 2012, a merger occurred and "the restrictions of the 1940 Deeds were no longer in effect. (Opp'n, p. 12, li. 13-15). According to the defendants the 1940 deeds "simply no longer apply…" (Opp'n, p. 12, li. 21-22). This argument fails:

First, the suggestion that the Association took "possession" of the parkland is a fiction. The deeds were recorded simultaneously.

Second, the face of the 2012 quitclaim deed states that: "This Deed shall not cause the Property to be merged with any adjacent lot and any such merger shall be prohibited." (MF No. 32). Clearly the signatories of the 2012 quitclaim deed intended for no merger to occur.

Third, for the merger doctrine to apply, the two estates to be merged must be identical. However, before the 2012 transaction, the property was subject to the 1940 deed restrictions in favor of all property owners. All of the property owners in the City are dominant interest holders. Only those property owners had the power to release those deed restrictions. (*Leggio v. Haggerty* (1965) 231 Cal.App.2d 873, 884 [finding merger did not apply

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to quitclaim deed when less than all owners of easement were parties to quitclaim deed]); see also *Tract Development Services, Inc. v. Kepler* (1988) 199 Cal.App.3d 1374, 1384).

Fourth, a party urging the application of the affirmative defense of merger has the burden of proof of establishing an intent to effect a merger. (*Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 362). The defendants have offered no evidence in their papers as to the intent of the parties concerning merger. The only evidence now before the Court is the statement in the quitclaim deed itself that "[t]his Deed shall not cause the Property to be merged with any adjacent lot and any such merger shall be prohibited." Given the evidence, the defendants cannot meet their burden of proof on the affirmative defense of merger.

Finally, California courts will not apply the merger doctrine where to do so would work an injustice, injury or prejudice to a third party. (*Kolodge v. Boyd* , *supra*, 88 Cal.App.4th at p. 362). If the merger doctrine were applied here, each property owner in the City would suffer irreparable injury and prejudice due to the loss of parkland.

VIII. The Croft and Hilburg Declarations are Inadmissible

Defendants offer the expert testimony of their general counsel Sid Croft and their retained expert attorney Lore Hilburg. The testimony of these two lawyers simply parrots the argument advanced by the defendants' litigation counsel. The Court does not need two additional lawyers to instruct it on how to interpret a deed. "[A]n expert may not testify about issues of law or draw legal conclusions…" (*Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) 221 Cal.App.4th 102, 122). Nor may an expert testify regarding the interpretation of contracts. (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395, 1401). An expert may not give opinions on matters that are within the province of the Court to decide. (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1083). The Court should sustain plaintiffs' objections.

IX. Conclusion

For the foregoing reasons, plaintiffs respectfully request that the Court grant its motion for summary judgment.

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DATED: May 22, 2015

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By: _____
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