CEPC Response to PVHA Reasons for Filing Appeal

One November 5, 2015, PVHA issued a statement stating they had decided to appeal the trial court Judgment along with their reasons for so doing. For the letter, **click here**.

We continue to be very disappointed by the irrationality of the PVHA's decisions and rationale. Addressing the letter issued by PVHA on Thursday:

- To say that "the Judgment attempts to unwind the Memorandum of Understanding" is misdirection at best and patently false at worst. The order granting summary judgment states: "The court does not need to void the contract or, in this court's view, any part of it, in order to enjoin or otherwise address as law and equity may dictate…" (May 29, 2015 MSJ Ruling, p. 17, lines 12-14). Moreover, the School District is not even a party to this lawsuit. Without the School District as a party to the lawsuit, the Judge could not even attempt to "unwind" the MOU. CEPC did not ask the Court to unwind the MOU and the Court did not do so. The PVHA's statement that "the judgment attempts to unwind the Memorandum of Understanding" is demonstrably false. Such a statement suggests the PVHA Board Members must not have read the ruling and the transcript of her comments carefully.

- The letter states the PVHA's motivation for settling its case against the School District was preventing "any future efforts to change the use of any school sites in the City." If PVHA wins on appeal on the Via Panorama Parkland issue, and wins in the subsequent trial, PVHA would be much worse off against this objective. By accepting the ruling now, the PVHA would have two court cases on the books that conclude the PVE CC&Rs and deeds cannot be challenged, and further, as the language in the CEPC case ruling covers **all** the School properties and not just the Via Panorama parkland. So to continue to say that the ruling is "a threat to the PVHA's efforts to protect open space" is inaccurate, absurd and ridiculous.

Other statements made by PVHA Board Members at their October 27th meeting also suggest that they are getting poor advice from their legal counsel and have a less than complete understanding of the situation and the legal process:

- At the beginning of the meeting, PVHA President Mark Paullin stated that the legal costs of an appeal would be born by their Title Insurance company rather than PVHA, and that they needed to appeal because "to remove the encroachments would cost $400,000 and PVHA does not have those resources." Later he stated that if the judgment stands as a result of not appealing, then $400,000 in removal of encroachments would have to be paid for by PVHA.

    - If Title Insurance is in force, then shouldn't that cover both legal costs and the costs associated with any court judgment that was based on the reliance that the transfer was consistent with deed restrictions? If Title Insurance is not in force (because of some exception such as an intentional act clause), then wouldn't both the legal costs and the remediation costs not be covered? We don't see how Mr Paullin can site one cost as covered by insurance and the other by PVHA — which serves no purpose other than improving the optics of

deciding to appeal.

- We were also quite surprised that PVHA is operating under the assumption that removing the encroachments will cost $400,000. In 2013, Bob Lugliani told us directly (in a meeting he initiated), that he had received estimates for restoring the hillside to its original slope and that it would cost $50,000-$70,000. That is a huge discrepancy compared to the cost quoted by Mr. Paullin. Did someone grossly overstate the cost perhaps to scare the PVHA into appealing?
  A reasonable person would assume that a competitive bid process would yield a cost that is a fraction of that $400,000 price tag.
- We asked why the PVHA isn't assuming that the PVHA can get reimbursed for costs of removal of encroachments since that was what was specified in the 2005 enforcement process by the CIty against the Luglianis? We would like to point out that per PVE Municipal Code and the City's Resolution R05-32 adopted in 2005 it is the encroaching property owner's responsibility to pay for the removal of encroachments (click **here for the resolution** and **here for the staff report)**. For the relevant sections of the Municipal Code on Encroachments, click **here for Section 12.04** and **here for Section 17.32**. Mr. Lugliani was cited in 2005 and then given a reminder in each of the following five years that he had to remove the encroachments. The other 37 encroaching homeowners paid for their remediation and so should Mr. Lugliani — **not** the PVHA or the City.

We were also surprised by PVHA Director Phillip Freng's comment at the October 27th meeting that an appeal would allow PVHA to "make our case" in court in a way that has not happened yet. As John tried to point out in the meeting, there have been thousands of pages of arguments and documents submitted over the past two years by all the attorneys in the case. Further, the process of an appeal would not allow new arguments (or documents/testimony) to be introduced by either side; instead, the appeal process would involve a new set of judges (three in total) who review the documents already presented; they would then come to an opinion based on that material. Finally, even if an appeal were successful, the case would then revert to trial to confirm the "facts" of the case; however, the court has already decided in the Motion for Summary Judgment that if the facts are true, then the legal grounds support the current ruling. Since the "facts" are the words in the underlying deeds and CC&Rs, no amount of testimony in a trial would override the clear language in the deeds and CC&Rs. So going down that path, is a waste of time and resources.