

2d Civil No. B267816
2d Civil No. B270442
Superior Court No. BS142768

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION TWO

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS, et al.,
Plaintiffs, Respondents, and Cross-Appellants,

v.

CITY OF PALOS VERDES ESTATES, et al.
Defendants, Appellants and Cross-Respondents.

Proceedings of the Los Angeles County Superior Court, Case No. BS142768
Hon. Barbara A. Meiers and Hon. Robert H. O'Brien, Judges Presiding

MOTION TO AUGMENT RECORD ON APPEAL

CHRISTI HOGIN, SBN 138649
GREGG W. KETTLES, SBN 170640
JENKINS & HOGIN, LLP
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, CA 90266-2436
T: (310) 643-8448 • Fax: (310) 643-8441
CHogin@LocalGovLaw.com

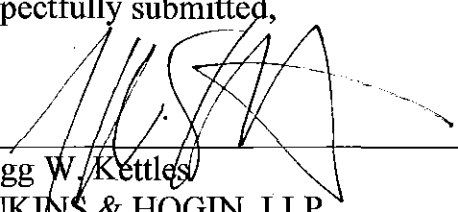
KENT LEWIS RICHLAND, SBN 51413
GREINES, MARTIN, STEIN & RICHLAND LLP
5900 Wilshire Blvd 12th FL
Los Angeles, CA 90036
Tel: (310) 859-7811 • Fax: (323) 330-1060
krichland@gmsr.com

Attorneys for Defendant and Appellant
City of Palos Verdes Estates

Pursuant to California Rules of Court, Rule 8.155, and Local Rules of the Court of Appeal, Second Appellate District, Rule 2, Appellant and Defendant City of Palos Verdes Estates (hereinafter referred to as the "City") hereby moves the Court to order the record, specifically the clerk's transcript, augmented to include an additional document filed in this case in the superior court. A copy of the document to be added to the clerk's transcript is attached to this motion. This motion is based on the attached Memorandum and Declaration of Gregg W. Kettles.

DATED: July 10, 2017

Respectfully submitted,


By: Gregg W. Kettles
JENKINS & HOGIN, LLP
Attorneys for Defendant and Appellant City of
Palos Verdes Estates

MEMORANDUM

Rule 8.155 of the California Rules of Court and Rule 2 of the Local Rules of the Court of Appeal, Second Appellate District, provide that on the motion of a party the Court of Appeal may order the record augmented to include any document filed or lodged in the case in the trial court. The City designated a clerk's transcript, relying on a list of documents filed in the matter, as posted on the superior court's website, the "Case Summary." (Declaration of Gregg W. Kettles (attached) ("Kettles Dec.") ¶¶ 5-8.) With regard to Plaintiffs' motion for summary judgment, the Case Summary lists one opposition brief. (Kettles Dec. ¶ 9.) It did not occur to the City that the Case Summary is incomplete: Two separate briefs in opposition to Plaintiffs' motion for summary judgment were filed, one by the City and a second by the other defendants.¹ (*Id.*) The City did not identify its opposition brief specifically for inclusion in the record, and thus it was inadvertently omitted from the clerk's transcript. (*Id.*)

According to Plaintiffs, the record is inadequate because the Court cannot confirm whether the arguments presented in the City's opening brief on appeal were preserved for appellate review. (Plaintiffs' Respondents' Brief ("RB") 44.) This argument is belied by the record. In addition to filing a brief in opposition to Plaintiffs' motion for summary judgment, the City also filed a cross motion for summary judgment. The City's cross

¹ The other defendants are: (1) Palos Verdes Homes Association (the "Homes Association") and (2) Robert Lugliani and Dolores A. Lugliani, as co-trustees of the Lugliani Trust, and Thomas J. Lieb, Trustee, the Via Panorama Trust u/do May 2, 2012 (collectively, the "Luglianis").

motion is part of the record. (10-CT-2338-2363.)² The arguments the City made in its opening brief on appeal are essentially the same as those made in the City's cross-motion.³ It is therefore unnecessary for the City's brief in opposition to Plaintiffs' motion for summary judgment to be in the record. Should the Court of Appeal wish to see it, however, the City brings this motion to augment the record.

The absence of the City's opposition brief from the record was not raised as an issue until Plaintiffs' filed their respondents' brief on appeal. (Kettles Dec. ¶ 12.) There was thus no reason for the City to file this motion to augment until after that. (*Id.*) This motion is not brought for the purpose of delay, and granting the motion is unlikely to result in any delay in resolution of the appeal. (*Id.* See Rules of Court, Rule 8.155, subd. (a)(1), Advisory Committee Comment (while a party may bring a motion to augment the record "at any time," "[w]hether the motion is made within a reasonable time and is not for the purpose of delay, however, are among the factors the reviewing court may consider in ruling on such a motion"). The City files this motion contemporaneously with its reply brief.

² Citations to the clerk's transcript on appeal are denoted "[volume]-CT-[page]."

³ The City argues that: (1) the City's conveyance was not ultra vires [*compare* City's Motion, 10-CT-2359, *with* City's Appellant's Opening Brief ("OB") at 40-42]; (2) the City's conveyance to the Homes Association was consistent with the deed restrictions [*compare* City's Motion 10-CT-2352 *with* OB at 44-47]; and (3) the City's zoning of Area A is independent of the deed restrictions, and the court may not enjoin future legislative acts to conform to the deed restrictions [*compare* City's Motion 10-CT-2359-2361 *with* OB at 50-51].

The Court has discretionary authority under Rule 8.155 of the Rules of Court “to augment the appellate record with documents contained in the trial court record that were omitted by the parties, through mistake or neglect, in order to assist [the Court] in reviewing appeals on their merits.” (*State Comp. Ins. Fund v. WallDesign Inc.* (2011) 199 Cal.App.4th 1525, 1529, fn 1.) The Court of Appeal has before exercised this discretion to augment a record with papers filed in connection with a motion for summary judgment. (*Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 522 fn. 10 (on its own motion, the Court of Appeal augmented the record on appeal with a party’s separate statement of undisputed material facts, which was filed in support of its motion for summary judgment).)

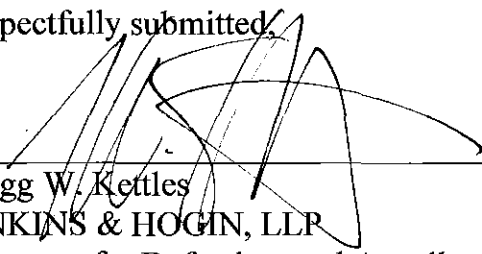
The Court may determine that the City’s brief in opposition to Plaintiffs’ motion for summary judgment is necessary to evaluate the issues raised in the appeal. For this reason and by this motion, the City seeks to augment the clerk’s transcript with the following document filed with the superior court:

Document Title and Description	Date of Filing
City’s Memorandum of Points and Authorities Opposing Plaintiff’s Motion for Summary Judgment or Summary Adjudication or both; and Joinder in Portions of Co-Defendants’ Opposition, Separate Statement and Evidentiary Objections.	May 15, 2015

Attached as Exhibit A is a true and correct copy of the document on file with the superior court in the underlying action, Los Angeles Superior Court Case No. BS142768. (Kettles Dec. ¶ 14.) The document has been consecutively numbered beginning with page number 1. (*Id.*)

DATED: July 10, 2017

Respectfully submitted,


By: _____
Gregg W. Kettles
JENKINS & HOGIN, LLP
Attorneys for Defendant and Appellant City of
Palos Verdes Estates

DECLARATION OF GREGG W. KETTLES

I, Gregg W. Kettles, declare:

1. I am over the age of eighteen and am an attorney of record for Appellant and Defendant the City of Palos Verdes Estates (the “City”) in the above-entitled action. My business address is 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, California. I am personally familiar with the materials that are the subject of this motion to augment the record on appeal.

2. This appeal, in large part, arises out the trial court’s ruling on the cross-motions for summary judgment filed by plaintiffs John Harbison and Citizens for Enforcement of Parkland Covenants (“Plaintiffs”) and the City. (8-CT-1795;⁴ 10-CT-2338; 15-CT-3547; OB 39-58⁵.) The trial court granted Plaintiffs’ motion for summary judgment and denied the City’s motion for summary judgment. (15-CT-3547.)

3. Following entry of judgment, Defendants Robert Lugliani and Dolores A. Lugliani, as co-trustees of The Lugliani Trust, and Thomas J. Lieb, as trustee of The Via Panorama Trust (collectively, the “Luglianis”), filed notice of their appeal and notice of designating the record, including the clerk’s transcript and reporter’s transcript. (16-CT-3913-3929.)

4. Shortly after that Palos Verdes Homes Association (“Homes Association”) and the City separately filed notices of appeal. (16-CT-3940-3939.) Later the City and Homes Association filed separate notices designating the clerk’s transcript in the record. (16-CT-3944-3952, City’s Notice; 16-CT-3953-3963, Homes Association’s Notice.)

⁴ References to the clerk’s transcript on appeal are denoted, “[volume]-CT-[page].”

⁵ References to the City’s opening brief on appeal are denoted, “OB [page].”

5. I was primarily responsible for identifying the documents to be included in the City's notice designating records to be included in the clerk's transcript on appeal. It was my intention to include all documents relevant to the Court of Appeal's consideration of the issues the City intended to raise. These issues included the trial court's order granting Plaintiffs' motion for summary judgment and denying the City's cross motion for summary judgment.

6. To identify the documents, in November of 2015 I printed out a copy of the list of documents filed in the matter, as posted on the superior court's website. A copy of the list, dated March 3, 2016 ("Case Summary"), is part of the administrative record. (1-CT-1-15.) Papers filed in connection with motions for summary judgment, from the first-filed motion for summary judgment to the court's order on the cross motions for summary judgment, were filed between December 2014 (1-CT-8, Plaintiffs' Motion for Summary Judgment) and June 2015 (1-CT-5, Summary Judgment Ruling on Cross Motions). With the exception of proposed orders, notices of change of address, and proofs of service, I designated every document on the Case Summary filed during this period for inclusion in the clerk's transcript. (Compare 1-CT-5-8, Case Summary 12/5/14 to 6/29/15, with 16-CT-3945-3950, City's Designation of Record, document nos. 9 – 53.)

7. These 45 documents designated by the City include, for example:

a. Plaintiffs' motion for summary judgment (1-CT-8, Case Summary, "12/05/2014 Motion for Summary Judgment [¶] Filed by Attorney for Plaintiff/Petitioner;" 16-CT-3950, City's Designation of Record, document no. 53, "Plaintiffs' Motion for Summary Judgment");

b. the City's cross motion for summary judgment (1-CT-7, Case Summary, "03/13/2015 Motion for Summary Judgment [¶] Filed by Attorney for Defendant/Respondent;" 16-CT-3949, City's Designation of Record, document no. 34, "Defendant's Motion for Summary Judgment); and

c. the trial court's ruling on the cross motions for summary judgment (1-CT-5, Case Summary, "06/29/2015 Miscellaneous-Other (Summary Judgment Ruling on Cross Motions for Summary Judgment/Adjudication) [¶] Filed by Court;" 16-CT-3945, City's Designation of Record, document no. 9, "Summary Judgment Ruling on Cross Motions for Summary Judgment".)

8. The 45 documents designated by the City also included a document identified on the superior court's Case Summary as "05/15/2015 Opposition Document [¶] Filed by Attorney for Defendant/Respondent." (1-CT-6.) It is identified on the City's Designation of Record as "Defendants' Opposition." (16-CT-3949, document no. 30.) At the time I prepared the City's designation of record, I believed that the superior court's Case Summary reflected every document that had been filed in the case. I believed that the "05/15/2015 Opposition Document" on the Case Summary referred to an opposition brief to Plaintiffs' motion for summary judgment.

9. It did not occur to me that two separate opposition briefs to Plaintiffs' motion for summary judgment had been filed, one by the City, and a second joint opposition by the Homes Association and the Luglianis. I did not realize that the superior court's Case Summary identified only one of these two separate briefs. I did not realize that one of the opposition briefs was missing from the Case Summary. I failed fully to compare the superior court's Case Summary with my law firm's own records of what had

been filed. Accordingly, instead of identifying the two opposition briefs separately, I identified a single opposition brief. It appears that the clerk who assembled the clerk's transcript interpreted the City's designation to refer to the joint opposition brief of the Homes Association and the Luglianis and not to the opposition brief of the City. My failure to identify the City's opposition brief specifically was inadvertent.

10. I believe the absence of the City's opposition brief from the record is of no consequence for purposes of the evaluation of this case by the Court of Appeal. The arguments the City made in its opening brief on appeal are essentially the same as those argued in the City's cross-motion, which is included in the record. (10-CT-2338-2363.) The City argues that: (1) the City's conveyance was not ultra vires (compare City's Motion, 10-CT-2359, with City's Appellant's Opening Brief ("OB") at 40-42); (2) the City's conveyance to the Homes Association was consistent with the deed restrictions (compare City's Motion 10-CT-2352 with OB at 44-47); and (3) the City's zoning of Area A is independent of the deed restrictions, and the court may not enjoin future legislative acts to conform to the deed restrictions (compare City's Motion 10-CT-2359-2361 with OB at 50-51).

11. The rest of the City's arguments in its opening brief are in response to the court's summary judgment order and final judgment, which went beyond what Plaintiffs' complaint alleged or prayed for, and the award of attorneys' fees to Plaintiffs. (See OB at 48-50 (trial court incorrectly invalidated two conditions in the City's conveyance and substituted its judgment for the City's legislative choices), 51-62 (the judgment exceed the trial court's jurisdiction, and Plaintiffs are not entitled to attorneys' fees).)

12. The absence of the City’s opposition brief from the record was not raised as an issue until Plaintiffs’ filed their respondents’ brief on appeal. There was thus no reason for the City to file this motion to augment until after that. The motion is not brought for purposes of delay, and granting the motion is unlikely to result in any delay in resolution of the appeal. According to Plaintiffs, the record is inadequate because Court cannot confirm whether the arguments presented in the City’s opening brief were preserved for appellate review. (Plaintiffs’ Respondents’ Brief (“RB”) 44.) For the reasons set out above, I disagree. The City’s arguments were preserved in the City’s cross motion for summary judgment, which is part of the record. I do not believe that it is necessary for the City’s memorandum of points and authorities in opposition to Plaintiffs’ motion for summary judgment to be in the record. The Court has all it needs to evaluate the issues raised by the appeal. Plaintiffs do not claim they have been prejudiced by the absence of the City’s brief from the record. Its omission was, in any event, inadvertent. Should the Court of Appeal wish to see it, I have filed this motion to augment the record concurrently with the City’s reply brief.

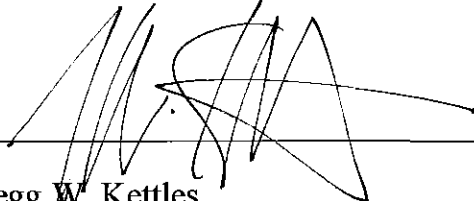
13. For this reason and by this motion, the City seeks to augment the clerk’s transcript with the following document filed with the superior court:

Document Title and Description	Date of Filing
City’s Memorandum of Points and Authorities Opposing Plaintiff’s Motion for Summary Judgment or Summary Adjudication or both; and Joinder in Portions of Co-Defendants’ Opposition, Separate Statement and	May 15, 2015

Evidentiary Objections.

14. This document may be necessary for the Court to evaluate the issues raised by the City. Attached to this motion as Exhibit A is a true and correct copy of the document on file with the superior court in the underlying action, Los Angeles Superior Court Case No. BS142768. The document has been consecutively numbered beginning with page number 1.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 10, 2017, at Manhattan Beach, California.



Gregg W. Kettles

EXHIBIT A

MAY 15 2015

Sherri R. Carter, Executive Officer/Clerk
By Shaunya Bolden, Deputy

1 CHRISTI HOGIN, State Bar No. 138649
City Attorney, City of Palos Verdes Estates
2 TARQUIN PREZIOSI, State Bar No. 198014
JENKINS & HOGIN, LLP
Manhattan Towers
3 1230 Rosecrans Avenue, Suite 110
Manhattan Beach, California 90266
4 Telephone: (310) 643-8448
Facsimile: (310) 643-8441
5 Email: CHogin@LocalGovLaw.com

6 Attorneys for Defendant/Respondent
City of Palos Verdes Estates
7

Exempt from fees pursuant
to Government Code § 6103

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES—CENTRAL DISTRICT
10

11 CITIZENS FOR ENFORCEMENT OF
PARKLAND COVENANTS, an
12 unincorporated association; JOHN
HARBISON, an individual

13 Plaintiffs and Petitioners,
14

15 v.

16 CITY OF PALOS VERDES ESTATES, a
municipal corporation; PALOS VERDES
17 HOMES ASSOCIATION, a California
corporation,

18 Defendants and Respondents,
19
20
21
22
23

CASE NO. BS142768

**CITY'S MEMORANDUM OF POINTS
AND AUTHORITIES OPPOSING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT OR
SUMMARY ADJUDICATION OR
BOTH; AND JOINDER IN PORTIONS
OF CO-DEFENDANTS' OPPOSITION,
SEPARATE STATEMENT AND
EVIDENTIARY OBJECTIONS**

[Filed concurrently with Request for Judicial
Notice in Support of Opposition; Declaration of
Sheri Repp-Loadsman]

Date: March 25, 2015
Time: 10:30 a.m.
Dept.: 12

Hon. Barbara A. Meiers

Petition and Complaint Filed: May 13, 2013

24 ROBERT LUGLIANI and DOLORES A.
LUGLIANI, as co-trustees of THE
25 LUGLIANI TRUST; THOMAS J. LIEB,
TRUSTEE, THE VIA PANORAMA TRUST
26 U/DO MAY 2, 2012 and DOES 1 through
27 20,

28 Defendants and Real Parties in
Interest.

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1 **I. INTRODUCTION & SUMMARY OF ARGUMENT**

2 This lawsuit arises from Plaintiffs' concern over the enforcement of certain private
3 covenants on land conveyed from the private Palos Verdes Homes Association
4 ("Association") to Plaintiffs' neighbor, the Luglianis. The City does not belong in the case.
5 Plaintiffs named the City based on their contention that the City had a mandatory duty to
6 hold the subject property and enforce the private CC&Rs. Plaintiffs' claims sounded in
7 mandate and Plaintiffs' theory was rejected as a matter of law by the Writs and Receivers
8 Department. In 1940, the Association originally granted the subject property to the City
9 subject to a reversionary interest in the event that any of the deed restrictions were violated.
10 In 2012, the City reconveyed the property back to the Association. Indisputably, the City
11 had the legal authority to reconvey the property to the grantor, which had retained a
12 reversionary interest

13 Nevertheless, in the instant Motion for Summary Judgment ("Motion"), Plaintiffs
14 focus their efforts on the 2012 deeds and glibly claim that the September 2012 deeds violate
15 the 1940 deed restrictions. Plaintiffs ignore the fact that these deeds are separate documents:
16 the Motion offers no facts or valid argument that show that the City's 2012 quitclaim deed to
17 the Association is in any way illegal. Paradoxically, if, as Plaintiffs contend, the City's
18 quitclaim deed violated the 1940 deed, the only remedy under the terms of the deed – and as
19 pled in the SAC - would be for the Association to exercise its power of termination to revert
20 the property back to itself.

21 Further, the Motion misapplies the "public trust" doctrine in this case because the City
22 simply returned the property back to the original grantor. The public trust doctrine governs
23 use, not ownership, of park property. In any event, no public trust is created by a conditional
24 grant where grantor retained a reversionary interest. In essence, Plaintiffs claim, without
25 support, that the City must be compelled to own the property forever. In addition, Plaintiffs
26 claim that the City is somehow "estopped" from raising its arguments by the 1949 case
27 *Roberts v. Palos Verdes Estates* is simply misplaced. *Roberts* was decided on distinctly

1 different issues and facts. The relief sought is unavailable and, accordingly, the City
2 respectfully requests that Plaintiffs' Motion be denied.

3
4 **II. JOINDER IN CO-DEFENDANTS' FACTS, STANDARD OF REVIEW,
5 SEPARATE STATEMENT OF UNDISPUED FACTS, OPPOSITION TO THE
6 FIRST CAUSE OF ACTION (ISSUES 1-4), AND EVIDENTIARY
7 OBJECTIONS**

8 The City joins in sections II (Factual Background) and III (Standard of Review) of the
9 Opposition to the Motion for Summary Judgment, the entirety of the Joint Evidentiary
10 Objections to the Declaration of John Harbison, and the entirety of the Separate Statement of
11 Disputed and Undisputed Additional Material Facts in Opposition to Plaintiffs' Motion for
12 Summary Judgment or Summary Adjudication or Both filed by Defendants Robert Lugliani
13 and Dolores A. Lugliani, as co-trustees of The Lugliani Trust, Thomas J. Lieb, Trustee, The
14 Via Panorama Trust, and Palos Verdes Homes Association (collectively, co-defendants).
15 The City also joins in section IV (Argument) of the co-defendants' Opposition as it pertains
16 to the validity of the transfer of Area "A" to the Association and the affirmative defense of
17 failure to join an indispensable party. The City raises only those arguments that are unique
18 to City in the first cause of action, below.

19 **III. ARGUMENT**

20 **A. Because the 1940 Deed Restrictions Govern Use, not Ownership, the 2012
21 Deed from the City to the Association does not Violate the Terms of the
22 Deed (Issues Nos. 1 – 4).**

23 Declaratory relief requires an *actual* controversy between the parties. Not one of the
24 restrictions stated in the Motion is supported by any legal theory that would give rise to a
25 justiciable controversy involving the City. Plaintiffs' theory appears to be that the 2012 deed
26 from the City to the Association (2012 City Deed) permits the grantee to undertake actions
27 that are not authorized by the 1940 deeds. Assuming, *arguendo*, that the 1940 deeds are still
28 controlling, the 2012 City Deed simply limits the grantee (here, the Association) with respect
to potential improvements. This limitation is one of several sources of limitations on use of
property including City zoning laws and the CC&R's administered by the Association.

1 **The Forever Parks restriction** affects the use of the property not its ownership. The
2 reconveyance of Area A from the City to the Association affected only ownership.
3 Plaintiffs' reliance on *Save the Welwood Murray Memorial Library Com. v. City Council*
4 (1989) 215 Cal.App.3d 1003 ("*Welwood*") is misplaced here. *Welwood* involved a city
5 affirmatively trying to *use* property for something other than library purposes - ultimately by
6 granting a third party developer an easement over the property for commercial development
7 uses inconsistent with the purposes of the grant. *Id.* at 1005-8. *Welwood* has no application
8 to this case. The 2012 City Deed is not a use of property; it is simply a change in ownership,
9 the return of the property to the original grantor – an action specifically approved by
10 *Welwood*. See *id.* at 1017 ("An injunction will not lie to prevent City from making an
11 express legislative determination that it would be in the best interests of City and its citizens
12 to cease using the property for library purposes, and to allow the property to revert to the
13 grantors' heirs").

14 **The No Structures restriction** has no application to the City because the SAC does
15 not allege (nor could it) that the City has constructed structures on the property. To the
16 extent structures violate the deed restrictions, those violations are the responsibility of the
17 property owner and the City is not precluded from reconveying property to the Association
18 that includes unpermitted structures. In fact, the SAC specifically alleges that the effect of
19 unpermitted structures or any violation of a restriction is "to trigger the reversion of title to
20 AREA A back to the ASSOCIATION." SAC¶36(b). Nevertheless, 2012 quitclaim deed
21 only authorizes that which is allowed by the City pursuant to its police power.

22 **No Sale or Conveyance "Except to a Body Suitably Constituted by Law to Take,**
23 **Hold, Maintain and Regulate Public Parks" restriction:** is not at issue because the SAC
24 specifically alleges that Declaration 25 charges the Association with the duty to "maintain
25 the parks" of the City. SAC¶14(i). The SAC alleges the Association is a qualified recipient.
26 Plaintiffs disingenuously now attempt to avoid the unqualified admission in the SAC that the
27 "land use restrictions established by Declaration Nos. 1 and 25 remain in effect today"
28 [SAC¶14(ii); SS 12] by claiming in the SS that the Association "is no longer a body that

1 takes, holds and maintains and regulates public parks SS 31. Plaintiffs' admission cannot
2 now be controverted.¹ See *Heater v. Southwood Psychiatric Ctr.*, supra, 42 Cal.App.4th at
3 1079-80. Further, their position ignores the fundamental rule that the provisions of the deed
4 itself control. Plaintiffs cannot cherry pick those provisions in the deeds that suit their
5 purpose and disregard the rest. Whether or not the Association currently holds any parks is
6 irrelevant. The 1923 declaration - which the SAC admits is still binding - specifically
7 charges the Association with the duty to maintain parks.

8 **Improve Access and Views restriction** affects the use and improvement of the
9 property. The reconveyance of Area A to the Association affected only ownership. Further,
10 as detailed in Plaintiffs' argument [Motion, pg. 13], improvements are allowed with the
11 written approval of the Association and a permit from the City. Despite Plaintiffs'
12 contention, the City's quitclaim deed does not *authorize* the contested improvements. It
13 simply sets forth the procedure (that would be required in any event under the PVEMC) to
14 permit certain items.

15 Plaintiffs have not set forth facts to establish an actual, justiciable controversy with
16 the City over whether and which deed restrictions apply to Area A because the City does not
17 own Area A and the private deed restrictions are not enforced by the government. These
18 restrictions identified in its Motion demonstrate that the issues in this case are between the
19 Plaintiffs and the property owner. Moreover, Plaintiffs offer absolutely no fact and offer no
20 viable legal theory to suggest that there was any infirmity in the City's reconveyance of Area
21 A to the grantor.

22 ///

23 ///

24 ///

27 ¹ In fact, Plaintiffs have specifically admitted in deposition that the transfer from the City back to the
28 Association was permissible under the 1940 deeds. See Declaration of Brant Dveirin, Exhibit B
(Harbison Depo., pg. 45, lns. 19-25; 46:1-6.)

1 **B. Plaintiffs Are Not Entitled to Summary Adjudication on Their Waste of**
2 **Public Funds/*Ultra Vires* Cause of Action Against the City.**

3 **1. The City did Not Violate the “Public Trust” by Quitclaiming Area**
4 **A Back to the Association (Issue No. 5).**

5 The Motion seeks summary adjudication as to the waste of public funds/*ultra vires*
6 cause of action based on the 2012 quitclaim deed from the City back to the Association. The
7 second cause of action for “waste of public funds” is based on two allegedly *ultra vires* acts:
8 (1) “transfer of public parkland to a private party was an *ultra vires* act because of land use
9 restrictions for that land. (2AC, ¶43)” and (2) “the City’s ongoing attempts to create a new
10 ‘open space, privately owned’ zoning district solely for the benefit of the Luglianis is also
11 *ultra vires* (2AC, ¶43).” Plaintiffs do not now seek summary adjudication as to this latter
12 theory.

13 With respect to the transfer of ownership, the SAC itself alleges facts to establish that
14 the applicable restrictions not only allowed, but under some circumstances provided for the
15 reconveyance of Area A from the City to the Association. The SAC specifically alleges that
16 Declaration 25 of the Association’s CC&Rs charges the Association with the duty to
17 “maintain the parks” of the City and restricts sale or conveyance of the Property “except to a
18 body suitably constituted by law to take, hold, maintain and regulate public parks.” SAC
19 ¶14(i). Thus, Plaintiffs admit that that the Association is a qualified recipient of Area A and
20 offer no basis to conclude that the City’s reconveyance of Area A was inconsistent with the
21 land use restrictions.

22 As a matter of law, neither the transfer of Area A to the Association nor the
23 consideration of a rezone application constitutes an *ultra vires* act within the meaning of the
24 statute prohibiting the waste of public funds. Plaintiffs’ reliance on authorities involving the
25 misuse of public property is of no import. The SAC does not allege that the City is currently
26 using Area A for any purpose inconsistent with the deed restrictions, nor could it. The City
27 is not using the property at all. Instead, Plaintiffs attempt to state a claim based on the fact
28 that the City is simply not owning Area A. In point of fact, the case relied upon most heavily

1 by Plaintiff throughout this litigation for their “ultra vires” argument - *Welwood* -
2 specifically states that a city’s decision to allow property to revert to the grantor cannot be
3 “ultra vires”. *Save the Welwood Murray Memorial Library Com. v. City Council, supra*, 215
4 Cal.App.3d at 1017.

5 The cases cited by Plaintiffs are not on point here. All involved public entities
6 attempting to actually use property that they currently owned in a manner inconsistent with
7 terms of the dedication to the general public. See *County of Solano v. Handlery* (2007) 155
8 Cal.App.4th 566 (county sought to make alternative use of land that had been quitclaimed to
9 it for public fairground purposes with no reversionary interest); *Big Sur Properties v. Mott*
10 (1976) 62 Cal.App.3d 99 (state statute authorizing rights-of-way for private access across
11 public parkland under certain circumstances is not applicable to property that has been
12 donated to the state for exclusive use as a public park; no reversionary interest); *City of*
13 *Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295 (holding that a taxpayer had
14 standing to maintain an action to prevent the construction of a road over property restricted
15 from such use and dedicated “as a public pleasure ground”); *Save the Welwood Murray*
16 *Memorial Library Com. v. City Council, supra*, 215 Cal.App.3d 1003 (city could not
17 commercially develop property dedicated to it to “continue and forever maintain the Palm
18 Springs Free Public Library”); *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal. App.
19 2d 545 (action challenging interpretation of deed restrictions placed on park land regarding
20 placement of buildings for park purposes); *Griffith v. Dep't of Pub. Works* (1956) 141 Cal.
21 App.2d 376 (action to enjoin City, that accepted dedication of land purely for park purposes,
22 from using portion of it as a freeway).

23 None of the cases cited by Plaintiffs stand for the proposition that the City cannot
24 transfer deed restricted property back to the grantor. The circumstances under which a
25 public entity’s use of property in contravention of deed restrictions may be an *ultra vires* act
26 is not before this court. Suffice it to say that, *where the grantor does not retain a right of*
27
28

1 reversion, courts may imply a public trust to assure the wishes of the grantor.² The deed at
2 issue here, however, includes a right of reversion. But more to the point, this lawsuit does
3 not challenge the City's use of the property; it challenges its right to return the property to
4 the original grantor.

5 Plaintiffs have not cited authority in support of their claims. The conveyance of Area
6 A by the City to the grantor Association is not illegal conduct that can form the basis of a
7 CCP § 526a claim for waste of public funds. The City is authorized by law to control and
8 dispose of real property for the common benefit. Gov't Code § 37350. The legislative body
9 acted well within its authority.

10 **2. Collateral Estoppel Is Inapplicable: the Issue Decided by *Roberts v.***
11 ***City Of Palos Verses Estates in 1949 Is Completely Different from***
12 ***that Raised Here (Issue No. 6).***

13 In order for Plaintiffs to prevail on their collateral estoppel claim, the issue (1) must
14 be identical to that decided in the former proceeding, (2) must have been actually litigated in
15 the former proceeding, (3) must have been necessarily decided in the former proceeding, (4)
16 the decision must have been final and on the merits, and (5) the party against whom
17 preclusion is sought must be the same as, or in privity with, the party in the former
18 proceeding. See, e.g., *Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc.* (2014) 231 Cal.
19 App.4th 134, 179.

20 Here, despite Plaintiffs' improper attempt to characterize this as an undisputed "fact"
21 [see SS 112], the issue actually decided in *Roberts* bears no resemblance to that at issue here.
22 In *Roberts*, the issue was whether or not the City could use parkland in a certain manner –
23 i.e., the erection of building for the storage and maintenance of City trucks used for various
24 purposes. The deed at issue there expressly provided for some discretion by the City in
25

26 ²*Welwood, supra*, (1989) 215 Cal.App.3d 1003, based its holding in part on Code of Civil Procedure
27 section 526(a)(7) which allows an injunction where the obligation arises from a "trust" as an
28 exception to Civil Code section 3423 prohibition against enjoining legislative acts. However,
Welwood was decided before *Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 125-126, which
held that a grant of property subject to a reversionary interest does not create a "trust".

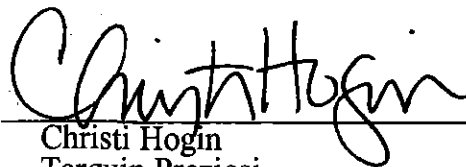
1 determining whether the use was incidental to the use of the property for park purposes. See
2 *Roberts v. City of Palos Verdes Estates, supra*, 93 Cal.App.2d 545. Further, *Roberts* was not
3 actually decided on the merits as presented by Plaintiff – instead, it was remanded back to
4 the trial court to determine if the buildings constructed by the City were in fact permissible
5 under the deed. *Id.* at 548. Here, of course, the issue is not the City’s use of property – it is
6 the City’s decision to quitclaim the property back to the original grantor. As such, the City is
7 in no way collaterally estopped under *Roberts* from litigating this issue.

8 **IV. CONCLUSION**

9 For the above reasons, the City requests that the Plaintiffs’ Motion for Summary
10 Judgment or, in the alternative, Summary Adjudication as to Issues Nos. 1 through 6,
11 inclusive, be denied.
12

13 Dated: May 14, 2015

Respectfully submitted,

14
15 By: 
16 Christi Hogin
17 Tarquin Preziosi
18 JENKINS & HOGIN, LLP
19 Attorneys for Defendant/Respondent
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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 110,
Manhattan Beach, CA 90266.

5 On May 15, 2015, I served the foregoing documents described as:

6 **CITY'S MEMORANDUM OF POINTS AND AUTHORITIES OPPOSING**
7 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY**
8 **ADJUDICATION OR BOTH; AND JOINDER IN PORTIONS OF CO-**
9 **DEFENDANTS' OPPOSITION, SEPARATE STATEMENT AND EVIDENTIARY**
10 **OBJECTIONS**

11 on the interested party or parties in this action by placing the original thereof enclosed in sealed
12 envelopes with fully prepaid postage thereon and addressed as follows:

13 *PLEASE SEE SERVICE LIST ATTACHED*

- 14 **VIA EMAIL.** I caused such document as described above, to be transmitted via E-Mail
15 to the offices of the addressee(s).
- 16 **VIA FACSIMILE.** I caused such document to be transmitted via facsimile to the offices
17 of the addressee(s).
- 18 **VIA OVERNIGHT DELIVERY.** I enclosed the documents in an envelope or package
19 provided by an overnight delivery carrier and addressed to the person(s) at the address(es)
20 stated above. I placed the envelope or package for collection and overnight delivery at a
21 regularly utilized drop box of the overnight delivery carrier.
- 22 **VIA U.S.MAIL.** I enclosed the above described documents in a sealed envelope or
23 package addressed to the person(s) listed above or on the attached; caused such envelope
24 with postage thereon fully prepared to be placed in the United States mail at Los Angeles,
25 California.

26 *I am readily familiar with the Jenkins & Hogin, LLP's practice of collection and processing correspondence for
27 outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with
28 postage thereon prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that
on motion of the 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.*

- 29 **STATE.** I declare under penalty of perjury under the laws of the State of California
30 that the above is true and correct.
- 31 **FEDERAL.** I declare that I am employed in the office of a member of the Bar of this
32 Court at whose direction the service is made.

33 Executed this 15th day of May, 2015, at Manhattan Beach, California.

34 Wendy Hoffman
35 WENDY HOFFMAN

SERVICE LIST

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

Attorneys for Petitioner
*Citizens for Enforcement of Parkland
Covenants
Via Hand Delivery*

Terry Tao
Scott J. Sachs
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Drive
Suite 300
Cerritos, CA 90703
Tel: (562) 653-3000
Fax: (562) 653-3333
TTao@AALRR.com
SSachs@AALRR.com

Attorneys for Respondent
*Palos Verdes Peninsula Unified School
District*

Sidney F. Croft
LAW OFFICE OF SIDNEY CROFT
314 Tejon Place
Palos Verdes Estates, CA 90274
Tel: (310) 849-1992
SFCroftLaw@aol.com

Attorney for Respondent
Palos Verdes Homes Association

LEWIS BRISBOIS BISGAARD & SMITH LLP
Daniel V. Hyde
Brant H. Dveirin
221 N. Figueroa Street, Suite 1200
Los Angeles, CA 90012
Tel: (213) 250-1800
Fax: (213) 250-7900
Daniel.Hyde@lewisbrisbois.com
Brant.Dveirin@lewisbrisbois.com

Attorneys for Respondent
Palos Verdes Homes Association

Damon P. Mamalakis
R.J. Comer
Armbruster Goldsmith & Delvac
11611 San Vicente Boulevard
Suite 900
Los Angeles, CA 90049
Tel: (310) 254-9026
Fax: (310) 254-9046
Damon@agd-landuse.com
rj@agd-landuse.com

Attorneys for Real Parties in Interest
*Robert Lugliani and Dolores E. Lugliani, as
co-trustees of THE LUGLIANI TRUST;
THOMAS J. LIEB, TRUSTEE, THE VIA
PANORAMA TRUST*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
 SECOND APPELLATE DISTRICT
 DIVISION TWO

2DCA-05

Citizens for Enforcement of Parkland
 Covenants et al

vs.

City of Palos Verdes Estates, et al.

2d No. B267816 & B270442

(Super. Ct. No. BS142768)

ORDER
Re: AUGMENTATION

The City's motion to augment the record on appeal is granted. The record on appeal is ordered augmented with:

- document(s) filed with the motion to augment as [exhibit(s)] _____
- trial court exhibit(s) _____;
- the superior court file;
- the transcripts described below.

The clerk of the superior court is ordered to have prepared (an) augmented reporter's transcript(s) as set forth below. The moving party is to deposit with the civil appeals section within **10 days** of this order the approximate cost of the transcript(s), or to submit a waiver of deposit signed by the reporter(s).

	REPORTER'S NAME	DEPT.	DATE	NATURE OF PROCEEDINGS
1.				
2.				
3.				<input type="checkbox"/> see additional page(s)

The clerk of the superior court is ordered to prepare an augmented clerk's transcript consisting of the following:

	DATE	DOCUMENT DESCRIPTION
1.	05/15/15	City's Memorandum of Points and Authorities Opposing Plaintiff's Motion for Summary Judgment
2.		
3.		<input type="checkbox"/> see additional page(s)

An original and _____ copies of the above transcripts are to be prepared within 30 days of this order. No requests for extensions of time will be granted. **THE ORIGINAL AND ALL COPIES OF SEALED PROCEEDINGS ARE TO BE SENT TO THE COURT OF APPEAL ONLY.** Otherwise, the original is to be delivered to the Court of Appeal and one copy to each party listed below:

_____ is to be filed within _____ days of the filing of the augmented record.

This Order continues on _____ additional page(s). _____/_____/_____

 Presiding Justice

CASE NAME: Citizens for Enforcement of Parkland Covenants et al v. Ci	CASE NUMBER: B267816 & B270442
	SUPER. CT. NO.: BS142768

Augmented Reporter's Transcript continued from page 1

	REPORTER'S NAME	DEPT.	DATE	NATURE OF PROCEEDINGS
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Augmented Clerk's Transcript continued from page 1

	DATE	DOCUMENT DESCRIPTION
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, CA 90266.

On July 10, 2017, I served the foregoing documents described as:

CITY OF PALOS VERDES ESTATES' MOTION TO AUGMENT RECORD ON APPEAL

on the interested party or parties in this action by placing the original thereof enclosed in sealed envelopes with fully prepaid postage thereon and addressed as follows:

PLEASE SEE SERVICE LIST ATTACHED

- VIA OVERNIGHT DELIVERY.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) stated above. I placed the envelope or package for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.
- VIA U.S.MAIL.** I enclosed the above described documents in a sealed envelope or package addressed to the person(s) listed above or on the attached; caused such envelope with postage thereon fully prepared to be placed in the United States mail at Los Angeles, California.

I am readily familiar with the Jenkins & Hogin, LLP's practice of collection and processing correspondence for outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that on motion of the 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.

Executed this 10th day of July, 2017, at Manhattan Beach, California.



WENDY HOFFMAN

SERVICE LIST

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

Attorneys for Plaintiffs,
Respondents and Cross-
Appellants
*Citizens for Enforcement of
Parkland Covenants*

Greg May
Law Office of Greg May
P.O. Box 7027
Oxnard, CA 93031
Tel: (805) 824-5120
Fax: (805) 832-6145
greg@gregmaylaw.com

Attorneys for Plaintiffs,
Respondents and Cross-
Appellants
*Citizens for Enforcement of
Parkland Covenants*

Sidney F. Croft
LAW OFFICE OF SIDNEY CROFT
314 Tejon Place
Palos Verdes Estates, CA 90274
Tel: (310) 849-1992
SFCroftLaw@aol.com

Attorney for Respondent
Palos Verdes Homes Association

LEWIS BRISBOIS BISGAARD & SMITH
LLP
Roy Weatherup
633 W. 5th Street, Suite 4000
Los Angeles, CA 90071
Tel: (213) 250-1800
Fax: (213) 250-7900
Roy.Weatherup@lewisbrisbois.com

Attorneys for Respondent
Palos Verdes Homes Association

Damon P. Mamalakis
Armbruster Goldsmith & Delvac
12100 Wilshire Boulevard
Suite 1600
Los Angeles, CA 90025
Tel: (310) 209-8800
Fax: (310) 209-8801
Damon@agd-landuse.com

Attorneys for Real Parties in
Interest
*Robert Lugliani and Dolores E.
Lugliani, as co-trustees of THE
LUGLIANI TRUST; THOMAS J.
LIEB, TRUSTEE, THE VIA
PANORAMA TRUST*

Superior Court of California
County of Los Angeles
Honorable Barbara A. Meiers
Judge Presiding, Department 12
111 North Hill Street
Los Angeles, CA 90012

Via regular mail

Superior Court of California
County of Los Angeles
Honorable Robert H. O'Brien
111 North Hill Street
Los Angeles, CA 90012

Via regular mail

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Via electronic service