Second Civil Number B267816

In the Court of Appeal of the State of California

SECOND APPELLATE DISTRICT
DIVISION TWO

CITIZENS FOR ENFORCEMENT
OF PARKLAND COVENANTS, *et al.*,

Plaintiffs and Respondents,

v.

CITY OF PALOS VERDES ESTATES, *et al.*,

Defendants and Appellants.

APPELLANT'S REPLY AND CROSS-RESPONDENT'S BRIEF OF THE PALOS VERDES HOMES ASSOCIATION

Appeal from the Superior Court of the State of California,
For the County of Los Angeles,
Los Angeles Superior Court Case No. BS142768
Honorable Barbara A. Meiers, Judge

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Cases

Statutes and Rules

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INTRODUCTION

In this case arising out of deed restrictions contained in 1940 deeds, the trial court granted summary judgment in favor of the plaintiffs. The trial court set aside a settlement of an underlying case involving the validity of 1940 deed restrictions, which the court ruled are still in effect. The court then proceeded to cancel a quitclaim deed issued by the City of Palos Verdes Estates in accordance with the settlement, which had been fully implemented. It determined that the Palos Verdes Homes Association had the power and duty to enforce the deed restrictions in spite of the terms of the governing documents.

It found that the plaintiffs had standing to prosecute the case. It granted injunctive relief that went far beyond what was requested in the pleadings. From this judgment, the defendants have appealed.

In its appellant's opening brief, the Association demonstrated that it had the power to enter into the settlement of the underlying litigation, based on its governing documents and the business judgment rule; that the Association had the power to bind the plaintiffs with respect to the settlement and to sell property in accordance with the settlement; that the 1940 deed restrictions, if they were ever binding, were extinguished when the Association reacquired the property at issue, by operation of the doctrine of merger of title; that the plaintiffs never had standing to prosecute this case; that the trial court never had jurisdiction to grant the injunctive relief that was part of its judgment; and that the plaintiffs were not entitled to any award of attorneys' fees.

In their respondents' and cross-appellants' opening brief, the plaintiffs fail to respond adequately to the contentions advanced in the Association's appellant's opening brief. For the most part, they rely on procedural arguments, such as the "golden rule" of summary judgment law, which are simply inapplicable to the facts of this case. In many cases, they make no effort whatsoever to address dispositive legal contentions, such as the effect of the merger of title doctrine, on the merits.

In this brief, the Association will demonstrate that the procedural arguments made by the plaintiffs are erroneous. The Association will also demonstrate that it had the power to enter into the settlement of the underlying litigation; that the conveyances and sale of property that implemented the agreement were completely

legal and proper; that the plaintiffs have no standing to challenge the settlement agreement and prosecute this action; that the Association entered into the settlement in the proper exercise by its Board of its business judgment; that the merger of title in the Association of the property in dispute had the legal effect of extinguishing the deed restrictions in issue; and that the various other errors made by the trial court require reversal of the summary judgment.

The summary judgment must be reversed.

SUPPLEMENTAL STATEMENT OF FACTS

The respondent's brief is the primary vehicle for presenting persuasive arguments. Yet the plaintiffs have ignored or misinterpreted the most critical document that should determine the outcome of this appeal—the original declaration. They also claim Declaration No. 25 authorizes them to enforce the 1940 deeds.

Declaration No. 1 was recorded before any lots were sold, making it binding on every Association member. This original declaration binds every member to equitable servitudes in Article II, Section 4, whereby they have agreed that the Association "shall have the right and power" to dispose of parks. [8CT 1907.] Rather than address why this covenant is no longer binding, the plaintiffs avoid it and pass off selected language from Declaration No. 1 as if it is from *Declaration No. 25*, claiming Declaration No. 25 provides Association members a special right to enforce land use restrictions [RB 30-31.] The plaintiffs also assume these enforcement rights apply to the Association's 1940 deeds, executed decades later. Compounding these errors, the respondent's brief cites to the separate statement rather than to the evidence. [RB 30-31; 8CT 1802-1804.]

Declaration No. 25 only amends the original declaration as to newly subdivided Tract 8652 to add certain residential districts. [8CT 1900-1903.] As the declarant, Bank of America acknowledged the original declarant had recorded Declaration No. 1 against Tract 8652. [8CT 1901.] The plaintiffs ignore this point on appeal.

In this amendment, Bank of America reaffirmed the Association's plenary powers in the original declaration: "WHEREAS, the power to interpret and enforce certain of the conditions, restrictions, and charges set forth in this Declaration is to reside in Palos Verdes Homes Association, a non-profit, cooperative

association . . . created and established as provided in said Declaration No. 1." [8CT 1901.]

To effectively amend the original declaration, the bank complied with Article VI, Section 3 of the original declaration, stating:

> "WHEREAS, said Bank of America is the owner of record of two-thirds (2/3) in area of all said above described property; and
>
> "WHEREAS, said BANK OF AMERICA is the owner of record of not less than two-thirds (2/3) in area of all land held in private ownership within three hundred (300) feet in any direction of property concerning which amendment, change, or modification is herein established and which is under jurisdiction of Palos Verdes Homes Association, and by executing this document does give as such owner its written consent to the modifications, changes and amendments herein provided for;
>
> "NOW THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That pursuant to the provisions of Section 3 of Article VI of said Declaration No. 1 . . . Bank of America hereby certifies and declares that it has established and does hereby establish, subject to the approval of Palos Verdes Homes Association, a California corporation, the following amendment to said Declaration No. 20 of Establishment hereinabove mentioned . . . ." [8CT 1901.]

Later, the bank repeated these representations, noting that Tract 8652 was under the Association's jurisdiction. [8CT 1902.]

According to Declaration No. 25, the bank knew it *could not* amend the original declaration without complying with Article VI.

According to the plaintiffs, Declaration No. 25 provides Association members with a right to enforce the 1940 deeds with respect to Tract 8652, where most of Area A lies. They rely on the Association's duty to maintain parks and perpetuate restrictions which is summarized in the preamble to the original declaration. The preamble is not part of any other declaration, and it is not limited to parkland. [Compare 8CT 1802 with 1894.] They rely on land use restrictions contained within Declaration No. 25, but these restrictions pertain to the establishment of Class A and Class C-1 residential districts within Tract 8652. They have nothing to do with parkland restrictions. [Compare 8CT 1802 with 1901.]

The plaintiffs also attribute Article VI, Sections 6, 8, and 12 of the original declaration to Declaration No. 25. [Compare 8CT 1802-1804 with 1913-1915.] These provisions provide the Association and its members [lot owners] with reversionary rights [Section 6], the right to abate a nuisance [Section 8], and enforcement rights [Section 12].

But these sections enforce covenants, conditions, and restrictions contained in the original declaration, not other documents. For instance, Section 6 refers to "[e]ach and all of *said* restrictions, conditions and covenants . . .," referring to the original declaration. [8CT 1913 [emphasis added].] Section 8 refers to "[e]very act or omission, whereby any restriction, condition, or covenant *in this declaration* set forth . . . ." [8CT 1914. [emphasis added].] Section 12 states "the provisions contained in this declaration shall bind . . . ." [8CT 1915.] These sections unambiguously enforce rights contained in the original declaration. They cannot be construed to enforce restrictions in the 1940 deeds.

In support of the notion that independent enforcement rights arise from Declaration No. 25, the plaintiffs cite only to the separate statement and not to the evidence. Citation to the separate statement does not qualify as an appropriate citation to the record in a summary judgment appeal, because the separate statement is not evidence. *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4; see *State of Calif. ex rel. Standard Elevator Co. v. West Bay Builders, Inc.* (2011) 197 Cal.App.4th 963, 968, fn. 1. The opposing separate statement disputed material fact no. 41. [14CT 3421.]

LEGAL ARGUMENT

I.

The Plaintiffs' Technical Procedural Arguments Lack Merit and Seek to Divert This Court's Attention Away From Important Issues, Such as the Association's Authority to Sell Property and the Invalidity of the Deed Restrictions on Which the Plaintiffs Rely.

Plaintiffs challenge the Association for allegedly failing to present an adequate record, for raising new arguments on appeal, and for filing a deficient opposing separate statement. These invalid procedural challenges are a diversionary tactic designed to camouflage their inability to tackle the main issue—the Association's ability to dispose of parkland. The arguments are red herrings.

The failure to provide a reporter's transcript is not fatal to appellate review in this case. Appealed judgments are presumed correct, and the appellant has the burden of overcoming this presumption by affirmatively showing error on an adequate record. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140-1141. An appellant may forgo a record of oral proceedings if resolution of the appeal does not require review of oral arguments and is based on a pure legal issue arising from the evidence. *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699-700. If there is no testimonial evidence in the trial court proceedings, it is unnecessary to designate a reporter's transcript.

The Association's appeal is not dependent on the oral proceedings, and the plaintiffs fail to show why they would be relevant to the outcome of the appeal. "Having failed to provide a record sufficient to support its position, [respondent] will not now be heard to complain that the presumptively prejudicial error was harmless." *Lankster v. Alpha Beta Co.* (1983) 15 Cal.App.4th 678,

684. If any reporter's transcript was essential to determine the appeal, the plaintiffs should have designated it.

The Association has preserved appellate review of the injunctive relief and fee award because review is based on the court's rulings, not the oral proceedings. Both issues can be reviewed de novo.

Next, the plaintiffs argue the Association improperly raised new arguments on appeal. As a general rule, appellate courts generally do not consider issues raised for the first time on appeal (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222), but they do address new issues of law that turn on undisputed facts. "Although this theory was not advanced by plaintiffs in the trial court, it is settled that a change in theory permitted on appeal when a question of law only is presented on the facts in the record." *Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 6.

On appeal from the denial of a summary judgment, the Court of Appeal independently assesses the correctness of the trial court's ruling (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563), not its rationale. *Michael v. Denbested Transportation, Inc.* (2006) 137 Cal.App.4th 1082, 1093-1096. Summary judgment can be reversed based on a newly raised question of law. *Iverson*, 32 Cal.App.4th at 222.

The plaintiffs contend that the Association's arguments concerning its power to dispose of parkland are newly raised. But in the proceedings below, the plaintiffs claimed the Association was bound by all prior use restrictions incorporated into the 1940 deeds. This included the 1931 Bank deed. [13CT 3189-3190; 8CT 1936] The Association has the right to respond to arguments raised in the

reply papers below. These arguments raise questions of law based on undisputed documentary evidence. *Twentynine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1450-51 does not assist the plaintiffs on appeal, because the defendant's newly raised the theory of alter ego was dependent on disputed factual issues.

Likewise, the scope of the court's permanent injunction is not a new issue. The Association was not required to object to the breadth of the court's judgment when the court had already decided to issue the injunction in its summary judgment ruling.

The conservation easement in the City's deed is the functional equivalent of a deed restriction and it is reviewable as a question of law based on undisputed facts in the record.

Lastly, the plaintiffs claim the judgment should be affirmed because the opposing separate statement violates the "Golden Rule" of summary judgment. The Association was not required to include undisputed facts in its separate statement which were not in the moving party's separate statement. This argument is addressed in Argument Heading II.

Each of these issues skirts the central issue whether the 1940 deeds were capable of abrogating the Association's plenary authority under the original declaration *and* releasing every Association member from their covenant to abide by that authority under Article II, Section 4. These are issues that arise from the undisputed language of the original declaration which the plaintiffs admit bind the Association's members. [14CT 3407.]

The underlying premise of the plaintiffs' case is that a party with the right to enforce deed restrictions on a particular piece of property has an absolute duty to do so, regardless of the circumstances and the interests of such a party. A corollary to this premise is that a party has no legal right to compromise litigation challenging the deed

restriction and that any such compromise is illegal, ineffective, and void. The supposed duty to enforce the deed restriction is absolute, even if a party may go bankrupt though litigating deed restrictions.

The underlying premise of the plaintiffs' case is a false one, for all of the reasons stated in the opening brief of the Association and in this brief. There is no absolute duty to enforce deed restrictions, and a party having the power to do so may compromise claims of invalidity.

The sale of the property at issue here was within the power of the Association under the controlling governing document. The decision to settle the lawsuit brought by the Palos Verdes Peninsula Unified School District was not an ultra vires act, and was proper under the business judgment rule. The record on appeal in this case shows that the Palos Verdes Homes Association never breached any legal duty. The Association always acted properly within in the scope of its authority.

Perhaps the best evidence of the propriety and wisdom of the settlement of the School District litigation is one of the documents of which this court took judicial notice on May 9, 2017. The document in question is the trial brief of the Palos Verdes Unified School District. [Augmentation, pages 2-47.] This brief shows that there were good legal grounds for invalidating the deed restrictions on which the present plaintiffs rely. Thus, it was a wise decision for the Association to settle the underlying case, to avoid further exhaustion of its financial resources, and to avoid the serious consequences of a judgment in favor of the school district. Although the School District did not succeed at trial, it could well have prevailed on appeal.

In the respondents' and cross-appellants' opening brief, the plaintiffs have failed to support their underlying premise that the defendants had an absolute duty to enforce the deed restrictions at issue, and that this duty was breached. As explained below, the

judgment of the trial court is clearly erroneous, because it rests upon a false premise, and was the result of numerous legal errors on the part of the trial court.

In addition to ignoring the Association's power to sell property under the original declaration of the City of Palos Verdes Estates, the plaintiffs make no effort to show that the deed restrictions on which their entire case is based were not extinguished in 2012 when the property in dispute was deeded by the City back to the Association. They claim that the "golden rule" of summary judgment jurisprudence requires that this court ignore the extinguishment of the deed restrictions on which the plaintiffs rely as a result of merger of title. It has no such effect.

II.

The Summary Judgment Statute Requires Review of the Opposing Party's Evidence, and the "Golden Rule of Summary Judgment" Should Not Apply to Undisputed Facts Not Set Forth in the Separate Statement, Especially Where the Moving Parties Have Failed to Sustain Their Own Burden of Proof.

The plaintiffs seek affirmance of the judgment based on the Association's failure to refer to undisputed evidence in its opposing separate statement. The summary judgment statute requires the trial court to review all of the evidence, and the party opposing summary judgment should not be required to include evidence in its separate statement that is undisputed by the moving party. This could not be more true than when plaintiffs moving for summary judgment have failed to carry their own burden of proof.

The so called golden rule of summary judgment is typically invoked when the moving party has failed to identify material facts in its separate statement. In such cases, some courts disregard those

facts. (*United Community Church v. Garvin* (1991) 231 Cal.App.3d 327, 335; *North Coast Business Park v. Nielsen Const. Co.* (1993) 17 Cal.App.4th 22, 30). Others, however, require the trial court to consider the evidence because the summary judgment statute requires courts to consider "all of the evidence set forth in the moving papers" in addition to facts set forth in declarations, exhibits and other evidence brought before the court. Code of Civ. Proc. section 437c(c); *San Diego Watercraft, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 310-311 (*San Diego Watercraft*); *Zimmerman, Rosenfeld, Girsch & Leeds LLP v. Lars*on (2005) 131 Cal.App.4th 1466, 1478; *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 437. It may be an abuse of discretion to disregard evidence that was brought to the attention of the court and the opposing party but was inadvertently omitted from the separate statement. *San Diego Watercrafts*, 102 Cal.App.4th at 316. Plaintiffs ignore this split in authority.

Additionally, *Code of Civil Procedure* section 437c(b)(3) only requires a separate statement of facts which the opposing party claims are disputed; it does not appear to require the inclusion of *undisputed* facts. It is presently unclear whether a trial court may disregard undisputed facts relied on by the opposing party that are not referenced in the opposing party's separate statement. *San Diego Watercraft*, 102 Cal.App.4th at 314-315.

Plaintiffs argue the Association's separate statement is deficient because it did not address disputed material facts pertaining to the business judgment rule, standing, merger, indispensable parties and the binding nature of the settlement. The plaintiffs fail to identify these purported disputed material facts. This is because the Association's arguments are based on *undisputed facts in the record* which the plaintiff omitted from their separate statement. The

plaintiffs provide no legal authority that undisputed facts warranting denial of summary judgment be disregarded.

Importantly, the plaintiffs overlook their own seriously flawed separate statement. As the moving party, they cannot wield this sword unless they have met their *own* burden of proof. Even if a separate statement is deficient, a court may not grant the motion unless it first determines the moving party has met its initial burden of proof. *Thatcher v. McLoughlin* (2009) 173 Cal.App.4th 1081, 1085-1086. Here, the plaintiffs have failed to meet their own burden of proof.

The plaintiffs' separate statement is filled with errors. Most glaring is their assumption that the Association bound itself to the restrictions it placed on the City in the 1940 deeds. This error appears in Material Fact No. 41, which states: "The June 14, 1940 deeds state that none of the use or ownership restrictions set forth in the June 14, 1940 deeds may be changed by the City or the Association even if the Association complies with its own internal procedures for modifying land use restrictions and obtains written consent of two-thirds of the property owners." [8CT 1812.] The 1940 deeds say no such thing. This restriction is included in the grant of land to the City. The appellant's opening brief pointed out the parkland conveyance limited the City's ability—not the Association's right—to amend or revoke the forever parks restriction. [AOB 96-97.]

If it had intended to bind itself to these restrictions, the Association would not have reserved a right of reversion for itself. [AOB 95; 8CT 1939, 1945-1946.] The plaintiffs invoked this right of reversion in their separate statement. Material Fact No. 42 states: "The June 14, 1940 deeds state any breach of the use or ownership conditions shall cause said realty to revert to the Association." [8CT 1812.] Material Facts No. 41 and No. 42 are incompatible. The Association's right of reversion makes no sense if the *Association*

breaches the 1940 deed restrictions. The Association's opposing separate statement disputed Material Fact No. 41 based on the continuing viability of its powers under the original declaration. [14CT 3421.] This was sufficient to defeat the motion. This factual dispute goes to the heart of this action, and a single material factual issue defeats the motion. California *Rules of Court*, rule 3.1350(a)(2). As discussed more fully in Argument Heading VII, the plaintiffs' interpretation of the 1940 grant deeds violates the plain meaning of the contract and should be rejected as a matter of law.

The plaintiffs have moved for summary judgment without addressing the most significant document defining the Association's rights concerning parkland. The separate statement admits the original declaration is binding, but ignores its provisions. [14CT 3391.] Even worse, it does not establish that the Association's authority over parkland is contingent upon who owns parkland, that the Association may no longer govern parkland, or that the 1940 deeds prevent the Association from exercising its Article II, Section 4 powers. The plaintiffs make these assumptions, but they have missed the mark. The separate statement is deficient as a matter of law.

The separate statement is also silent as to whether the Association's power over parkland was amended by Article VI, a critical issue on appeal. It attributes provisions in the original declaration to Declaration No. 25 and assumes they cover the 1940 deed restrictions. These errors reflect a flawed understanding of the original declaration and other documents which the plaintiffs have submitted in support of their motion.

It could not be clearer that plaintiffs' separate statement, standing alone, does not establish the Association lacked authority to transfer Area A to the Luglianis as a matter of law. The motion should have been denied, *regardless* of the Association's opposing separate statement. Denial of the Association's trial right should not

be cut short by a seriously flawed separate statement that fails to satisfy the moving party's burden of proof.

In *Thatcher v. Lucky Stores, Inc*. (2000) 79 Cal.App.4th 1081, 1086 the court observed: "While subdivision (b) of section 437c allows the court, in its discretion, to grant summary judgment if the opposing party fails to file a proper separate statement, this provision does not authorize doing so without first determining that the moving party has met its initial burden of proof." The plaintiffs are inappropriately using the "Golden Rule" of summary judgment as a sword, even though they are the moving party who submitted an impotent separate statement. This court should reject all of the plaintiffs' arguments.

III.

The Purported Deed Restrictions on Which the Plaintiffs Rely Were Extinguished in 2012 When the Land in Question Was Deeded Back to the Palos Verdes Homes Association, and the Failure of the Plaintiffs to Respond on the Merits to This Legal Contention Effectively Concedes the Issue and Perhaps the Entire Case.

In the Association's appellant's opening brief [AOB], it was demonstrated that deed restrictions on property are extinguished when title is merged, pursuant to *Civil Code* sections 805 and 811. [AOB 118-122.] The effect of the merger doctrine in this case is that any deed restrictions that existed prior to 2012, as a result of the 1940 deed from the Association to the City, were extinguished when the Association received the property in dispute by the 2012 deeds.

In their brief, the plaintiffs devote only two paragraphs to the merger doctrine, claiming that there was no reference to the 2012

deeds in the separate statement of the defendants. Presumably, they then argue that an invalid summary judgment should be affirmed, because the "golden rule" of summary judgments requires this court to uphold a clearly invalid judgment.

As demonstrated above, the "golden rule" does not help the plaintiffs. It was the plaintiffs that moved for summary judgment, claiming that deed restrictions are valid and enforceable, but the evidence in the record clearly shows that this is not true. All that is necessary for application of the merger doctrine is evidence of the 2012 deeds, which was provided. Curiously, the plaintiffs do not address the law governing application of the merger doctrine. They do not even mention the two statutes and eight cases that are cited in the appellants' opening brief. [AOB 118-122.] One can only assume that the plaintiffs could find no authorities supporting the proposition that the deed restrictions survived the 2012 deeds and are still in effect.

The plaintiffs entire case depends on the validity of deed restrictions. Since the deed restrictions were extinguished, the plaintiffs entire case must be found invalid, unless the settlement of the underlying litigation was properly set aside. It was not.

IV.

Association Members Are Bound by the Association's Power to Dispose of Parkland, and Thus the Settlement Was Not an Ultra Vires Act.

On appeal, the plaintiffs do not dispute the Association "unquestionably" had "plenary power" to bind members to a settlement under the original declaration. [RB 50-51.] Nor do they dispute that settlement was a fiscally responsible solution to the School District's appeal. Yet, they claim transfer of deed-restricted parkland was illegal *under the governing documents*.

Since the plaintiffs never address the central issue on appeal, they never show the Association lacked the power to dispose of parkland under the governing documents—which include Article II, Section 4.

Under *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, a recorded declaration cannot be unilaterally changed once the first lot is sold. In this case, a recorded amended declaration was required under Article VI, Section 2 to amend the Association's Article II Section 4 powers. No such document exists in the chain of title. The 1940 deeds did not constitute such an amendment, since there is no reference to the Association's compliance with those amendment procedures. Thus, the plaintiffs cannot show the transfer of Area A was an illegal contract term because it violates the 1940 deeds.

Moreover, the plaintiffs failed to establish the Association's 1940 deeds to the City were governing documents that limited the Association's plenary power. The only basis for challenging the Board's action was to initiate a recall petition under the bylaws. In the proceedings below, it was established the plaintiffs never initiated such a petition. [8CT 1925-1926; 13CT 3073-3075.]

The plaintiffs' reliance on decisions invalidating settlements is misplaced. Cases involving forfeiture provisions in settlement agreements (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1124), settlements violating the statute of frauds (*Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1683), and settlements that contract away a municipality's police power (*Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 934) are not controlling, since none of these cases suggest why the Association's transfer of Area A violated the original declaration.

The Davis-Stirling Act [*Civil Code* section 5980] and *Duffy v. Superior Court* (1992) 3 Cal.App.4th 425 are persuasive authority that the Association's settlement is binding on its members. Avoiding litigation that will only cost association members is a public policy lauded by the courts. *Kovich v. Paseo Del Mar Homeowners' Assn.* (1977) 41 Cal.App.4th 863, 867; *Haley v. Casa Del Rey Homeowners Assn*. (2007) 153 Cal.App.4th 864, 875.

The plaintiffs concede the Association had the power to settle the litigation. Having failed to sustain their only challenge to the Board's settlement, they should not have been granted summary judgment as the Association's members were bound by the multi-party settlement.

As demonstrated above, the Association had the power to enter into the settlement agreement which included deeds that extinguished the deed restrictions on which the plaintiffs rely. As a result, the settlement was legal and proper, and the plaintiffs have no cause of action.

V.

The Plaintiffs Cannot Circumvent the Ironclad Standing Requirements Contained in the Governing Documents for the Palos Verdes Homes Association.

The plaintiffs argue that Citizens for Enforcement of Parkland Covenants enjoys associational standing to sue the Association, even though deed restrictions cannot be enforced apart from lot ownership. Relying on associational standing—an issue not developed in the proceedings below—they argue "homogeneous membership" is not required. They liken the present situation to requiring the NAACP to have only African-American members in order to maintain standing for civil rights actions. [RB 55.]

Standing presents a question of law reviewed de novo since the facts are contained in documents whose terms are undisputed. *Scott v. Thompson* (2010) 184 Cal.App.4th 1506, 1510; *Crosby v. HLC Properties, Ltd.* (2014) 223 Cal.App.4th 597, 602. It is a threshold issue to be resolved before addressing the merits. *Hernandez v. Atlantic Finance Company* (1980) 105 Cal.App.3d 65, 71. Plaintiffs must generally assert their own legal rights, not those of third parties. *Independent Roofing Contractors of California Unilateral Apprenticeship Committee v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1341.

The plaintiffs argue Citizens for Enforcement of Parkland Covenants would lack standing only if *every* member lacked standing. [RB 55.] Finding that "it only takes one," the trial court resolved this threshold issue by referring to Mr. Harbison's standing as a lot owner. [15CT 3547-3548.] But if Mr. Harbison is bound by the settlement as an Association member, non-member standing *cannot* be predicated on his position as a lot owner who no longer has standing to challenge the settlement.

Notwithstanding the lot ownership requirement, the trial court believed "some documents" provided residents the right to enforce restrictions. [15CT 3548-3560.] Since the 1920's, Association membership has been conditioned on property ownership. Membership is required to enforce deed restrictions under Article VI, Sections 8 and 12 of the original declaration [8CT 1913] and under Article I, section 3 of the Bylaws. [8CT 1922]. The 1940 deeds also limit enforcement rights to lot owners' enforcement rights.

On appeal, the plaintiffs have abandoned citizens suit (challenging illegal government activity) and public duty (spending public funds) standing that were theories argued below, opting for

associational standing under *Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673. ("*Whispering Palms*"). [RB 55.] Associational standing was not developed in the proceedings below and was not raised in the second amended complaint. [8CT 1795-1797; 13CT 3179-3192; CT 1863]

Whispering Palms involved a developer's failure to relinquish control of a residential development. 132 Cal.App.4th at 675. The group plaintiff was composed of residents from three different subdivisions within the development, but one of the subdivisions lacked standing to bring the action. 132 Cal.App.4th at 670. The appellate court found the group plaintiff could sue on behalf of its members if (1) the members would otherwise have standing to sue in their own right; (2) the interest that the association sought to protect was germane to its purpose; and (3) neither the claim asserted nor the relief requested required the members' participation in the lawsuit. 132 Cal.App.4th at 672.

Reliance on *Whispering Palms* does not establish associational standing.

First, Citizens for the Enforcement of Parkland Covenants lacks standing because it does not satisfy the second condition in *Whispering Palms.* The standing of non-residents who do not "otherwise have standing in their own right" cannot be predicated on the derivative "standing" of Association members who are now bound by the settlement. 132 Cal.App.4th at 672. No member of the group plaintiff has standing to sue in his or her own right because every Association member is bound by the settlement. Thus, the non-residents do not have derivative standing.

Second, *Whispering Palms* does not address the relationship, if any, between associational standing and governing documents. The Palos Verdes Homes Association is the de facto representative of its

members with authority to interpret and enforce the conditions, covenants, and restrictions. If it fails to do so, *only* lot owners subject to the jurisdiction of the Association may enforce those restrictions. This excludes all non-owner residents, precluding them from joining in the School District action or from filing a recall petition. *Whispering Palms* does not hold group plaintiffs can override the specific standing requirements in governing documents. Their race-based comparison with the NAACP is an emotional appeal to override the governing documents.

Finally, non-owners would also lack standing under the Davis-Stirling Act. [AOB 78-79.] The plaintiffs do not dispute this persuasive authority.

Summary judgment should have been denied because the group plaintiff lacks standing.

VI.

The Association's Exercise of Business Judgment to Settle the School District's Ongoing Challenge to Deed Restrictions Was Appropriate Since the Association Had the Authority to Dispose of Area A Under the Governing Documents.

The plaintiffs claim that the Association may not rely on the business judgment rule because it was not pleaded as an affirmative defense. They also conflate the business judgment rule and the rule of judicial deference, and claim the Association's business judgment does not immunize ultra vires acts. The one thing the plaintiffs never do is address the Association's exercise of its business judgment. None of the plaintiffs' arguments is persuasive.

An affirmative defense is a new matter the defendant must plead and prove. *Marich v. MGM/UA Telecommunications, Inc.* (2003) 113 Cal.App.4th 415, 424. An answer must contain new matters constituting a defense. *Hernandez v. Atlantic Finance Company* (1980) 105 Cal.App.3d 65, 71. A new matter goes beyond showing essential allegations in the complaint are false by raising an issue that is not responsive to those essential allegations. "Where the answer alleges facts showing that some essential allegation of the complaint is not true, those facts are not 'new matter,' but only a traverse." *Bank of New York Mellon v. Preciado* (2013) 224 Cal.App.4th Supp. 1, 8.

In *Protect Our Benefits v. City and County of San Francisco* (2015) 235 Cal.App.4th 619, 638, for example, the plaintiff alleged retired employees were entitled to a supplemental cost of living allowance under the City's retirement system. The appellate court rejected their claim that the City had waived its right to challenge the status of those retirees because the status was already an essential element of the plaintiffs' cause of action. 235 Cal.App.4th at 638.

Likewise, the Association's business judgment in settling the litigation is not a new matter. The second amended complaint alleges the Association's transfer of Area A was illegal and the Association breached its duty to enforce its reversionary interest and the land use restrictions. [1CT 25.] The Association generally denied these allegations, placing in issue the basis for the Board's decision under the original declaration. [8CT 11772-1783.] This was a traverse, not a new matter.

The evidence offered in opposition to the summary judgment motion concerning the exercise of business judgment was evidence supporting the Association's general denial of the claims of illegality and breach of duty. Thus, the business judgment rule was at issue at the time the summary judgment motion of the plaintiffs was heard.

The effect of the business judgment rule was fully briefed in the trial court, and uncontradicted evidence was presented showing that the Association's Board made a proper business decision.

The plaintiffs have not demonstrated waiver based on *Affan v. Portofino Cove Homeowners Ass'n* 2010) 189 Cal.App.4th 930, 940 or *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn*. (2008) 168 Cal.App.4th 1111, 1123. In *Affan*, there was no finding of any waiver. In *Ekstrom*, the defendant failed to raise judicial deference until after trial. The plaintiffs also rely upon *Carranza v. Noroian* (1966) 240 Cal.App.2d 481, 487-488 which recognizes that affirmative defenses embrace newly raised matters, not those arising from the allegations of the complaint.[1] Since the judgment of the Association's Board was placed in issue by the plaintiffs' second amended complaint, no waiver occurred.

Turning to the merits, the plaintiffs conflate the business judgment rule and the rule of judicial deference. They incorrectly argue the business judgment rule does not apply to the Association and that the rule of judicial deference only protects maintenance and repair decisions. But the Association's Board's decision was governed by the business judgment rule, which governs *corporate* board decisions, and is *not limited* to maintenance and repair decisions.

Courts uphold the business judgment of corporate boards. *Beehan v. Lido Community Assn.* (1977) 70 Cal.App.3d 858, decided before the Davis-Stirling Act, emphasizes the binding nature of board settlements under corporate law. In *Beehan*, the appellate court observed:

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[1] *California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442, another case cited by the plaintiffs, addresses waiver in the context of traditional affirmative defenses—waiver and estoppel—not the business judgment rule.

> "[N]either a court nor minority shareholders can substitute their business judgment for that of a corporation where its board of directors has acted in good faith and with a view to the best interests of the corporation and all its shareholders. [Citations.] The power to manage the affairs of a corporation is vested in the board of directors. [Citations omitted.] Where a board of directors, in refusing to commence an action to redress an alleged wrong against a corporation, *acts in good faith within the scope of its discretionary power and reasonably believes its refusal to commence the action is good business judgment in the best interest of the corporation, a stockholder is not authorized to interfere with such discretion by commencing the action*. . . . 'Every presumption is in favor of the good faith of the directors. Interference with such discretion is not warranted in doubtful cases.'" 70 Cal.App.3d at 865 (emphasis added).

In their brief, the plaintiffs have failed to address the business judgment rule on the merits. [Respondent's Brief ("RB"), pages 56-57.] They merely claim that the rule must be pleaded as an affirmative defense, but this contention is simply erroneous, as noted above.

The decision of the Association's Board was subject to the business judgment rule. Deference has already been afforded to the Association under the original declaration in *Butler v. City of Palos Verdes* (2005) 135 Cal.App.4th 174, 178-179. In 2005, the Second Appellate District deferred to the Association's decision to allow peafowl in the City's parks. *Butler* illustrates the type of deference called for here. *Butler* also dispels the notion the Association lost

control of all parkland in 1940. The respondent's brief does not address *Butler*.

Aside from corporate law, the Association also appealed to the rule of judicial deference applied in cases arising under the Davis-Stirling Act. Even under the rule of judicial deference, courts have deferred to discretion of homeowners associations to select the means of enforcing or remedying violations of governing documents without resorting to expensive and time consuming litigation. *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 864, 875 and *Harvey v. the Landing Homeowners Assn.* (2008) 162 Cal.App.4th 809, 820-822. While the Association is not bound by this rule, it remains persuasive authority.

The plaintiffs claim the business judgment rule cannot shield ultra vires acts that violate the 1940 deeds, without explaining why the 1940 deeds abrogate the Association's authority over parkland under Article II, Section 4 of the original declaration. [RB 57.] Moreover, the second amended complaint does not allege the Association committed an ultra vires act. [Compare CT 1876-1878 with 1879-1880.]

Although the Board's general counsel, Sidney Croft, detailed the Association's business judgment [AOB 86; 12 CT 2859-2860], the plaintiffs claim such evidence was missing. They argue Area A was not less useful than Lots C and D [RB 40], despite evidence of the superior location of Lots C and D. [AOB 52; 12 CT 2861-2862;13 CT 2973, 2977.] The evidence was undisputed.

The plaintiffs do not dispute that the School District's action had drained the Association's resources, or that there was no foreseeable end to the litigation. Nor could they dispute the existence of encroachments on Area A for nearly forty years without complaint from residents that the land had not been transformed into a public

park. There is no evidence the Association's business decision to transfer unusable land as part of a much needed settlement lacked good faith or was not made in the best interests of its members. The settlement ended the drain on City resources and brought resolution to a situation that had caused division in the community.

The Association met its burden showing the settlement was an appropriate exercise of its business judgment to act in the best interests of its members. Summary judgment should have been denied.

VII.

The Trial Court Abused Its Discretion In Failing to Consider Undisputed Evidence of the Association's Business Judgment in Opposition to the Summary Judgment Motion.

The declaration of Sidney Croft opposing summary judgment articulated the Board's reasons for transferring Area A as part of the settlement. The plaintiffs fail to establish Mr. Croft was offering an expert opinion because he was a percipient witness to the settlement agreement. The undisputed evidence was detailed in several places in the opening brief and it was the only evidence from a settling party. [AOB 50-54, 86, 92.]

During the hearing on the motion, the trial court tentatively struck the Croft declaration [5/29/15 RT 36-37], but it never addressed why it lacked evidentiary value in its ruling. [15CT 3647-3656.] As detailed in the appellant's opening brief, the court attached some of the evidence submitted with Mr. Croft's declaration to its final judgment. [AOB 65.]

The purpose of summary judgment is to discover whether the parties possess evidence which demands a trial. *Colvin v. City of*

Gardena (1992) 11 Cal.App.4th 1270, 1275. In determining whether the parties have met their respective burdens, the court must consider all of the evidence and reasonable inferences, viewing the evidence in the light most favorable to the opposing party (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th at 844–845) and liberally construing the opposing party's evidence. *Herberg v. California Institute of the Arts* (2002) 101 Cal.App.4th 142, 148. It is an abuse of discretion to exclude a declaration that creates a triable issue of fact. *Biles v. Exxon Mobile Corp*. (2004) 125 Cal.App.4th 1315, 132.

The trial court abused its discretion in declining to liberally construe Mr. Croft's testimony without explaining why such evidence was insufficient to raise a triable issue under the summary judgment statute, especially where his testimony was relevant and undisputed. *Code of Civil Procedure* section 437c(g); see *Truck Ins. Exchange v. Amoco Corp.* (1995) 35 Cal.App.4th 814, 829.

The Croft declaration creates a triable issue whether the settlement is protected by the business judgment rule. The trial court abused its discretion by failing to meaningfully consider only the testimony from a settling party.

VIII.

The Plain Language of the 1940 Deeds Shows the Association Only Intended to Bind the City to Deed Restrictions, and Thus It Did Not Violate the 1940 Deed Restrictions.

Although the plaintiffs admit the Association "had that absolute power of sale at its inception in 1923," they never establish the Association lost that power. [RB 16.] The language of the 1940 deeds does not and cannot abrogate the equitable servitudes under

Article II, Section 4 of the original declaration, which remain binding on every lot owner.

Throughout the respondents' brief, the plaintiffs urge the court to accept certain assumptions without proof. They assume the Association's right to govern parkland was lost when parkland was conveyed to the City in 1940; that the City breached the 1940 deeds by either not holding all parkland forever, or by transferring it to the Association; that the 1940 deeds are governing documents for the Association; that the 1925 Declaration provides special enforcement rights as to the 1940 deeds; and, that the Association bound itself to the City's 1940 deed restrictions. Each of these assumptions is unreasonable in light of the documentary evidence. Each of them is wrong.

The Association *never* lost its ability to govern parkland. Neither the original declaration, nor any subsequent declaration, conditions the Association's power to dispose of or govern parkland upon the Association's *ownership* of parkland. The Second Appellate District has already deferred to the Association's authority to govern parkland in *Butler v. City of Palos Verdes*, 135 Cal.App.4th 174, at a time when the Association owned no parkland. The source of this authority is the original declaration.

The 1940 deeds conveying parkland to the City are *not governing documents* in the sense that they limit the Association's own authority under the original declaration, its bylaws, or its articles of incorporation. The 1940 deeds provide the Association with a right of reversion if the *City* violates a land use restriction which the *Association imposed* on the parkland held by the City. Thus, the deeds are governing documents which fix the City's duties and responsibilities so long as it owns parkland.

In addition, the plaintiffs have never established the 1940 deeds limit the Association's ability to dispose of parkland. As already addressed in the appellant's opening brief, the 1940 deed language shows the Association conditioned the parkland transfer upon the City's agreement to uphold various restrictions. Principles of contract interpretation do not support the argument that the Association included itself within those restrictions. Courts will not strain to create an ambiguity in a contract where none exists. *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18-19. Moreover, there is no express statement that the Association was intending to bind itself to restrictions it imposed on the City. Such a statement would be unusual. Courts will not imply restrictions, much less so ones that contradict a recorded declaration. See *Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444-445. The plaintiffs never address *Hannula*, which is binding authority.

The plaintiffs' interpretation of the 1940 deeds renders other language in the deeds meaningless. There would be no point for the Association to retain a reversionary interest if it was the breaching party, only to have the property revert back to itself. Likewise, it would make no sense for the Association to incorporate the original declaration into the 1940 deeds if it was intending to relinquish control. The better interpretation is the Association incorporated the original declaration because it intended to exert control over the transferred parkland under Article II, Section 4, regardless of ownership.

The circumstances surrounding the transaction also weigh against this interpretation. There would be no reason the Association would surrender its control over parkland when the conveyance was motivated by a desire to extinguish a substantial real estate property tax owed to the County of Los Angeles.

Even if there was some evidence the Association intended to bind itself to the deed restrictions, there are triable issues whether it could do so. The original declaration *does not permit* unilateral amendments. A vote would be required under Article VI before the Association could revoke its powers under Article II, Section 4. No recorded declaration amending the Association's powers has been offered into evidence.

The plaintiffs' assertion the Association had no right to convey Area A based on the 1940 deeds is meaningless in light of their failure to address the original declaration. At a minimum, the Association's explanation of the deed language raises a triable issue of material fact, defeating summary judgment. The plaintiffs had the burden of showing the Association was bound by the 1940 deed restrictions as a matter of law. Its position on appeal is undermined by unwarranted assumptions concerning the 1940 deeds and its failure to address the Association's powers under Article II, Section 4 of the original declaration.

As explained in the Association's appellant's opening brief, the Association has the final authority over the interpretation and enforcement of all restrictions, conditions, and covenants concerning property in its jurisdiction. [AOB 27; 12CT 2908-2909.] In advancing their own interpretation of the 1940 deed restrictions, the plaintiffs erroneously refuse to abide by the interpretation given by the Association. In their brief, they offer no authority supporting their right to interpret the documents in question.

As addressed above, Declaration No. 25 cannot be used as a basis for plaintiffs' right to enforce the 1940 deed restrictions. That declaration established residential districts within Tract 8652, where most of Area A lies. The enforcement rights they rely upon are actually set forth in Article VI in the original declaration, giving Association members the right to enjoin breaches, abate nuisances and

otherwise enforce the original declaration. [Compare 8CT 1900-1903 with 1904-1915.] These rights do not extend to the 1940 deeds, and do not trump the Association's Article II, Section 4 powers. The 1940 deeds only gave residents a right to enforce the *City's* breach of the restrictions. The failure to accurately interpret the language of the original declaration and Declaration No. 25 underscore the plaintiffs' failure to satisfy their burden of proof as the moving party.

The plaintiffs also claim various recitals in the 1940 deeds and in the 1931 Bank of America deed limit the Association's powers under the original declaration. [RB 68-70.] They argue the 1940 quitclaim from the Bank could only extinguish the Bank's interests, but not the equitable servitudes in favor of pre-existing lot owners. [RB 75-76.] They also argue the Association reaffirmed the 1931 deed restrictions by incorporating the deed in the 1940 deeds.

The fundamental problem is that each of these arguments run afoul of *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345. Regardless of its intentions, Bank of America as successor-in-interest to the original declarant—the Commonwealth Trust Company—could not modify or rescind the original declaration after the first lot was sold. In *Citizens for Covenant Compliance*, the Supreme Court observed: "Only when the developer conveys a parcel subject to the declaration do the servitudes become effective. The servitudes are not effective, that is, they do not 'spring into existence,' until an actual conveyance subject to them is made. The developer could modify or rescind any recorded restrictions before the first sale." 12 Cal.4th 345, quoting *Werner v. Graham* (1919) 181 Cal.174, 183.

Bank of America had no ability to unilaterally alter the original declaration after the first lot had been sold. The first sale must have occurred by 1925, because the Bank complied with Article VI to amend the original declaration. [8CT 1901.] Thus, the Bank would

have been required to comply with Article VI in 1931, since it was purporting to revoke the Association's ability to dispose of and manage parkland under Article II, Section 4. The *only means* by which the Bank could do this was by way of Article VI, Section 3, which governs amendment of the Associations Article II powers. Respectfully, restrictions in the Bank's 1931 deed purporting to amend the original declaration are legally ineffective under *Citizens for Covenant Compliance.* On appeal, the plaintiffs have ignored *Citizens for Covenant Compliance.*

As such, the 1931 Bank deed could not create equitable servitudes giving City residents the right to enforce land use restrictions. Each purchaser of a lot is deemed to be bound by the covenant in Article II, Section 4, to be subject to the Association's plenary power to dispose of parkland. Since that article has never been amended, recitations in subsequent deeds purporting to create such rights would violate *Citizens for Covenant Compliance* and are therefore invalid.

For the same reason, the recitals in either the 1940 deeds or the 1931 Bank deed that all of the land use restrictions were binding on successors could not abrogate the Article II equitable servitudes imposed on every lot owner.

By incorporating the 1931 deed into *one* of the 1940 deeds, the Association made *the City's title* conditional upon the various deed restrictions. It did not abrogate Article II, Section 4 powers. Even so, incorporating invalid provisions into a subsequent deed does not make those provisions valid in the new deed. The fact remains that the original declaration could not be amended by a grant deed that did not comply with Article VI.

The plaintiffs claim arguments concerning the 1931 Bank deed are newly raised. Not so. They informed the trial court that all prior

land use restrictions—including the 1931 deed—were binding on the Association in their reply papers. [12CT 2937; 13CT 3189-3190.] The Association has the right to respond to each of the arguments the plaintiffs raised below.

Moreover, neither Mr. Croft nor Ms. Hilburg made binding representations concerning the effect of the 1931 deeds. They highlighted the Association's ability to construe its power under the governing documents and recited certain provisions of the 1931 deed. They did not make binding representations concerning the 1931 deed. [Compare RB 71 with 13CT 3095-3096.]

The language in the 1940 deeds on which the plaintiffs rely was intended to bind the City, but not the Association. Since the Association has final authority over interpretation of the deeds and other documents, the plaintiffs and the trial court should have deferred. In any event, as demonstrated above, the deed restrictions at issue disappeared, by operation of the doctrine of merger, when the Association reacquired the property in dispute in 2012.

On a final note, the plaintiffs' argument that they were denied the opportunity to introduce extrinsic evidence of newspaper articles and board minutes from 1940 relevant to intent in a 77-year old deed [the 1931 deed] is not well taken. The Supreme Court has rejected the admission of parol evidence to vary deed restrictions. A contrary rule "would make important questions of the title to real estate largely dependent upon the uncertain recollection and testimony of interested witnesses." *Citizens for Covenant Compliance v. Anderson*,12 Cal.4th 345, 348. The plaintiffs themselves relied on the objective language of the 1940 deeds in the trial court proceedings.

The 1940 deeds were binding upon the City, not the Association. The Association was free to convey Area A to the Luglianis in settlement of the School District litigation in accordance with the original declaration.

IX.

The Public Trust Cases Do Not Preclude the Transfer of Area A to the Luglianis.

There are three fundamental distinctions between the public trust cases the plaintiffs claim are controlling and the present case. The plaintiffs repeatedly fail to address these distinctions on appeal.[2]

First, the fact Area A has been traditionally called parkland does not mean it is a public park. For purpose of this action, the plaintiffs have coined the name "Panorama Parkland" to describe the land surrounding the Luglianis' home. The very name implies Area A has traditionally been perceived and used as a public park, which the City and the Association have conspired to sell to the Luglianis. There is *no evidence* Area A was ever used as a public park. It is undisputed Area A is slopey, unusable land with forty-year old encroachments. [13CT 2973; 9CT 2055A.] Nor was evidence admitted showing public concern over longstanding encroachments or any demand that Area A be used as a public park before the transaction occurred. Simply because Area A was part of a greater conveyance of parkland does not mean it has ever functioned as a public park.

Second, the plaintiffs never show the Association required the City to *own* parkland forever. Condition number 5 in the 1940 deeds clearly contemplates the City's conveyance to an entity capable of

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[2] Plaintiffs claim the Association did not address the City's sale of a public park as an ultra vires act. This argument was covered in the appellant's opening brief, as well as in this brief.

holding parkland [8CT 1939, 1945] and both deeds anticipate successors in interest. The plain language of the 1940 deeds required the City to perpetually *use* and administer the land; not to perpetually own it. The plaintiffs even admit the City's options were to keep Area A *or* "convey it to an entity that would operate it as a park." [RB 97.]

Third, the City did not breach any deed restriction to hold title forever by transferring Area A to the Association. Even the trial court rejected the idea the Association could no longer hold or govern parkland by ordering Area A to be held by the Association. [15CT 3564.] The transfer of Area A back to the original grantor was not an ultra vires act prohibited by the 1940 deeds. The deeds contemplate such a transfer. Evidence the City breached the deed restrictions would include a City proposal to use Area A contrary to the restrictions. No such evidence was presented.

For each of these reasons, none of the public trust cases cited in the plaintiffs' respondents' brief are relevant. See *City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295, 296; *County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, 575-576, and *Save the Welwood Memorial Library Committee v. City Council of the City of Palm Springs* (1989) 215 Cal.App.3d 1004. These cases only require cities holding deed-restricted property to comply with land restrictions, not hold the land in perpetuity. The plaintiffs' argument that the City remains bound by the land restrictions under the public trust cases applies so long as the City retained title to Area A. None of those cases require municipalities to hold property forever. Even the trial court did not return Area A to the City.

Likewise, these public trust cases do not apply to the Association, which is governed by the original declaration, as amended. The plaintiffs provide no authority showing these public trust cases abrogate the Association's Article II, Section 4 powers.

Once the Association regained title to Area A, the Association had the power to decide what was in the best interests of its members. The exercise of that discretion is set forth in Mr. Croft's declaration. Neither those public trust cases, nor the governing documents, required the Association to transform Area A into a public park, remove existing structures and landscaping, or place limits upon the transfer. The public trust cases do not apply to the City under the circumstances of this case and they do not curtail the Association's exercise of its Article II, Section 4 powers.

X.

Collateral Estoppel Was Never Raised Below as to the Association and the Doctrine Cannot Be Invoked.

Emboldened by the trial court's decision to invoke judicial estoppel to grant summary judgment, the plaintiffs raise the doctrine of collateral estoppel for the first time on appeal. This new argument must be rejected.

The plaintiffs moved for summary judgment claiming *the City* was collaterally estopped from challenging the 1940 deed restrictions based on *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d 545. Collateral estoppel was *never raised* as to the Association. [8CT 1795-1997; 13CT 3179-3192.] The plaintiffs attempt to adjudicate collateral estoppel for the first time on appeal by augmenting the record with excerpts from the School District litigation that were never before the trial court in this case.

Raised for the first time, this fact-driven theory based on matters outside the record should be rejected. However, even if this court uses its discretion to entertain this new theory, the doctrine of collateral estoppel is inapplicable.

The doctrine of collateral estoppel applies where an issue necessarily decided in an earlier action may be conclusively determined against the parties in a subsequent action. *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828, quoting *Teitelbaum Furs, Inc. v. Dominion* (1962) 58 Cal.2d 601, 604. An issue is actually litigated when it is properly raised by the pleadings or otherwise, is submitted for determination and actually determined. A determination may be based on a failure of proof. *People v. Sims* (1982) 32 Cal.3d 468, 484.

The issue to be precluded must be identical to the one decided in an earlier proceeding. *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341. The relevant question is whether "'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." *Ibid*.

Identical factual allegations were not decided in the School District action. The Association sought to enforce deed restrictions against the School District. The court never addressed or determined whether the Association was bound by any deed restriction, or whether it could transfer parkland. The judgment only found the School District properties remained subject to the land use restrictions. [15CT 358-3583.] Here, the City is not attempting to violate deed restrictions, and the plaintiffs are challenging the Association's ability to dispose of parkland. Whether the Association could transfer parkland is an issue that was not at stake or necessarily decided in the earlier litigation.

The judgment in the School District action demonstrates that it was never determined that the Association was bound by any deed restriction. For this reason, the newly raised argument should be rejected.

XI.

Summary Judgment Could Not Be Based on Judicial Estoppel Because the Association Did Not Raise the Issue Whether Various Deeds Curtailed Its Powers Under the Governing Documents.

On appeal, the plaintiffs contend the Association's position in the present action is inconsistent with its position in the School District litigation. They claim the trial court properly invoked the doctrine sua sponte.

The trial court abused its discretion by ruling on an unbriefed issue before granting the Association a hearing on the matter. When a party's motion shows undisputed material facts entitling it to judgment as a matter of law, a court can grant summary judgment on grounds not raised in the moving papers so long as the opposing party is given an opportunity to respond. That opportunity may be denied only when the record shows the opposing party could not have shown a triable issue of material fact. *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69.[3]

Here, the trial court did not have the augmented record on appeal to properly evaluate the Association's arguments in the School District action. [15CT 3550; 3580-3583.] The court based judicial estoppel on the final judgment in the School District action. That judgment found the land use restrictions contained in the deeds to be

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[3] The plaintiffs also argued judicial estoppel was properly raised at the demurrer stage rather than in their own summary judgment motion. Raising judicial estoppel in response to the Association's demurrer, but not in the motion for summary judgment, is not enough. Their reliance on *MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc*. (2005) 36 Cal.4th 412, 422 is misplaced. The plaintiff in that case did raise estoppel arguments in the summary judgment motion. 36 Cal.4th at 420.

binding on property owned by the School District, but never addressed whether the Association was also bound. The court below simply did not have enough information to determine whether the Association had argued it was bound by every restriction such that it could no longer dispose of parkland. Without more information, it was an abuse of discretion to decide the issue without a hearing.

The augmented record reveals the Association did not take an inconsistent position in this action. The School District challenged the restrictions contained in the Association's 1930 deed conveying various lots subject to school or park purposes. [Aug 2-27.] In addition, they claimed the rights of Bank of America in an earlier deed had merged into the 1938 deed from the Association to the School District, transferring the restricted lots. [Aug 12-13.]

The Association responded by arguing the School District was still bound by the Bank's deed. [Aug 166.] That deed was binding on the School District because the Association transferred the deed restricted property to the School District *before* the Bank executed a quitclaim to the Association, extinguishing its interests. [Compare Aug 213-215 with Aug 223.] The Association contended those restrictions were applicable to the School District; the Association never took the position those deeds limited its own ability to dispose of parkland. [Aug. 239-244.] The Association's position in this case is not inconsistent; it is based on a separate set of facts arising from different deeds, recorded at different times.

These factual distinctions between the earlier and the present action arise because the parties were not litigating the Association's right to dispose of parkland in the earlier action. The Association was focused upon whether the School District was bound by land use restrictions. Its own ability to dispose of parkland was never challenged.

Even if an inconsistent position had been taken in the earlier action—which was not the case—for public policy reasons, the doctrine of judicial estoppel should not be invoked to override the Association's authority over parkland. The original declaration requires amendments to the Association's powers to be submitted to a vote. Restrictions purporting to override a recorded declaration should not be implied. *Hannula*, 34 Cal.2d at 444-445. Yet, plaintiffs' estoppel argument essentially overrides the equitable servitudes of Article II, Section 4.

Moreover, the Association has not been unjustly enriched; it has not manipulated the judiciary. The School District settlement preserved restrictions on valuable parkland, used by City residents, including parkland not covered by the judgment, in exchange for an inaccessible lot. All of this was in accordance with the Association's powers under the original declaration.

The doctrine of judicial estoppel is inapplicable. At a minimum, the Association was entitled to a hearing to address the contentions raised in both actions.

XII.

The Trial Court's Permanent Injunction Usurps the Power of the Palos Verdes Homes Association and Effectively "Rewrites" the Original Declaration Without Complying With the Article VI Amendment Procedures.

The trial court's injunction is overbroad. It rewrites the governing documents and usurps the Association's authority under the original declaration.

The plaintiffs claim the Association may not challenge the scope of the injunction because it never raised the issue below. They

rely on *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264. *Keener* involved a failure to object to the trial court's failure to poll a juror on a special verdict question. The situation here is not analogous.

After granting the motion, the trial court indicated it would issue an injunction that was far beyond the present controversy, directing the plaintiffs to prepare a final judgment in accordance with its ruling. [15CT 3576.] The court intended to "include in its declaratory relief ruling an injunction prohibiting the City and the Association from entering into any future contracts and from taking any other actions in the future to eliminate the deed restrictions as to all properties governed by the 'establishment documents' described below. . . . ." [15CT 3549.] This decision was fueled by its conclusion that judicial estoppel applied: "The court is inclined to include this relief because this is now the second lawsuit involving exactly the same issues where exactly the same pronouncements and rulings as to the inviolability of the deed restrictions in issue have had to be made, at great cost to the courts and property owners and others giving rise to a situation where the need for such litigation ought to be or must be brought to an end. No one should again have to litigate to establish the binding and significant nature of the deed restrictions in the Palos Verdes development." [15CT 3550.]

It is beyond dispute the court was determined to issue an injunction prohibiting the Association from exercising its Article II, Section 4 powers with regard to the parkland. The only appropriate response was for the Association to appeal the judgment.

Apart from this meritless procedural argument, substantive challenges to the breadth of the injunction are missing from the plaintiffs' brief. Since the facts concerning the injunction arise out of a series of written documents that are undisputed, this court may review the injunction de novo. *Eastern Columbia, Inc. v. Waldman* (1947) 30 Cal.2d 268, 273.

The injunction violates the original declaration by ordering the Association to exercise its discretion in only one way, essentially enjoining it from exercising its Article II, Section 4 powers concerning parkland. The Association not only has the right to dispose of parkland, it has discretion to manage structures and landscaping. [8CT 1907, 1911.] There are no limits in the original declaration requiring the Association to only dispose of parkland by transferring it a body suitable to hold parkland. The trial court invaded the Association's powers by amending the original declaration apart from the Article VI amendment procedures. The court lacked authority to issue such an injunction.

The equities do not favor a permanent injunction. Encroachments on Area A had existed for decades. The record shows no one had complained about the encroachments or had used Area A as a public park. The plaintiffs only became vocal over the transfer of Area A to the Luglianis after the settlement occurred.[4] Their protest is more about land ownership than it is about land use, since Area A was transferred to the Luglianis with the same restrictions in place.

The injunction should be reversed as a matter of law.

VIII.

Indispensability Should Have Been Resolved by Evaluating the Impaired Contract Rights of the Litigating Parties.

The trial court should have determined whether the School District was an indispensable party with reference to the impairment of the City's and the Association's contract rights under *Code of Civil Procedure* section 389, subdivision (b). Instead, the court incorrectly concluded the transfer of Area A was a breach of the City's

[4] See *pveopenspace.com*.

obligations under the 1940 deeds. Although the court claimed it was not voiding the settlement, its ruling, practically speaking, did just that.

Indispensability depends on undisputed facts, since the plaintiffs admit they voluntarily dismissed the School District. Whether the party's interests have been impaired may be reviewed de novo. *Van Zant v. Apple, Inc.* (2014) 229 Cal.App.4th 965, 974. The issue may be raised at any time and may be raise sua sponte by the Court of Appeal. *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 522.

Plaintiffs provide no authority allowing a court to dismantle a multi-party contract in the absence of one of the contracting parties. The fact the School District was not a party to the deeds is irrelevant because the deeds represented the City's and the Association's consideration for settlement of the School District litigation.

Dismantling the settlement subjects all of the parties to another round of litigation over each of the issues the settlement was designed to resolve. The present judgment is inadequate because it is subject to later attack by the School District, which is not bound by the judgment. One of the factors for determining indispensability is the prejudice that will result from a judgment rendered in the party's absence. *Code of Civil Procedure* section 389, subd. (b).

In the respondents' brief, the plaintiffs ignore the legal standard for determining whether the trial court impaired the party's interests in the Memorandum of Understanding. Incredibly, plaintiffs parade such facts before the court, claiming "the Luglianis or Lieb could easily file a legal action for breach of the MOU against the other parties due to the Homes Association and City's representations in the MOU that they had the authority to sell a public park to a private party." [RB 94.] Yet courts are hesitant to adjudicate the rights of parties to a

contract when less than all of the parties are before the court. *Deltakeeper*, 14 Cal.App.4th at 1106-1107; *Martin v. City of Corning* (1972) 25 Cal.App.3d 165, 169. The plaintiffs ignore these cases on appeal.

The 2012 deeds constituted non-monetized consideration rendered in exchange for the School District's performance. Although declaratory relief was limited to invalidating the deeds, it frustrated the City's and the Association's performance of contract obligations, altering economic, legal and political expectations of the parties in the absence of the School District.

The plaintiffs fail to establish the legal significance of their voluntary dismissal of the School District based on the trial court's comments, other than to firmly establish that they created the situation and allowed the statute of limitations to run.

Essentially, the judgment was the unmaking of the settlement without placing the parties back into the position which they were in before they entered into the contract. This would have been impossible, since the School District and the Association dismissed their appeals and allowed the judgment in the School District action to become final.

Since the School District is not bound by the present judgment, "[i]t is for reasons of equity and convenience, and not because it is without power to proceed, that the court should not proceed with a case where it determines that an 'indispensable' party is absent and cannot be joined." *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 693; *Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 364. For reasons of equity, the court should not have enjoined the City's and the Association's performance of the settlement without the presence of the School District in the action.

The trial court improperly invalidated deeds representing consideration for the settlement without weighing the prejudice caused to all of the settling parties.

XIV.

The Association Transferred Area A Subject to a Conservation Easement That Maintains the Open Space Character of Area A, Regardless of Private Ownership.

On appeal, plaintiffs do not address the merits of the Association's argument that the conservation easement imposed on Area A was the functional equivalent other than to argue equivalency is missing because they lack a private right of enforcement. [RB 96-97.]

Any breach of the open space easement contained in the City's quitclaim deed to the Association as to Area A can be enjoined by residents, since the City expressly prohibited the addition of structures in the open space other than those set forth in the deed. [9CT 1975.] Relief could be obtained pursuant to *Code of Civil Procedure* section 1085.

XV.

The Governing Documents Establish the Absence of Any Public Benefit Necessary to Sustain the Fee Award Under a Private Attorney General Theory.

The plaintiffs claim preservation of 800 acres from future fundraising activities of the City and the Association through the sale of parkland is a sufficiently important public right to warrant the fee award. They also claim the Association failed to preserve an adequate record for appellate review. Neither argument is well taken.

Addressing the procedural challenge first, an appellant has the burden to furnish a reporter's transcript if a plaintiff intends to raise an issue requiring consideration of the oral proceedings in the trial court. *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476. Such a transcript would be required to review a trial court's determination of reasonableness of attorneys' fees (*Vo v. Las Virgines Municipal Water Dist.* (2000) 70 Cal.App.4th 440, 447) or to ascertain whether the trial court based its award on the lodestar method. *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295. However, an appellate court may proceed without a reporter's transcript to decide a purely legal issue and where none of the parties are relying upon the oral argument before the trial court. *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 699.

While a post-trial award of attorneys' fees is usually reviewed for abuse of discretion, "de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs have been satisfied amounts to statutory construction and a question of law." *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177, quoting *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.

In this case, the plaintiffs' recovery of attorneys' fees under the public benefit doctrine turns on the application of law to undisputed facts set forth in the original declaration. *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1397 [entitlement to attorney fees under statute is a legal question subject to de novo review.]

Fees awarded to a successful party under *Code of Civil Procedure* section 1021.5, must have "resulted in the enforcement of an important right affecting the public interest." *Vasquez v. State of California* (2003) 45 Cal.4th 243, 250-251. Whether a public benefit was conferred is directly tied to the interpretation of the original

declaration, which grants the Association the power to manage and dispose of parks and open space. Since no extrinsic evidence was admitted to alter the interpretation of the original declaration, the facts below are undisputed. Likewise, since none of the parties are relying on oral argument presented at the hearing, the plaintiffs' right to attorneys' fees can be determined under the de novo standard of review, and therefore no reporter's transcript was necessary for resolution of the issue.

Turning to the substantive issue, the undisputed facts show the plaintiffs' action conferred no public benefit. In support of their motion, the plaintiffs introduced no evidence that Area A —a steep, slopey and inaccessible lot—was useable public parkland by City residents at any time. Area A may have been originally designated as parkland in Bank of America's deed, but practically speaking, it has never been utilized as such due to its topography and location. It is of limited public value.

Furthermore, the plaintiffs failed to demonstrate a public interest sourced in any constitutional, statutory or other source. Every lot owner is deemed to have consented to the equitable servitude in Article II, Section 4, to be bound by the Association's authority to dispose of parkland. Here, the Association had discretion to dispose of parkland under the original declaration—a right that property owners in the City have never abrogated. *Friends of the Trials v. Blasius* (2000) 78 Cal.App.4th 810, 833, which is cited in the plaintiffs' brief, is irrelevant, since it involved public acquisition of property through adverse possession, not protection of parkland as plaintiffs claim. [RB 102.]

The settlement involved Area A only. *All* remaining parkland conveyed under the 1940 deeds is protected by the deed restrictions that remain in effect against City-owned parkland. Yet, the plaintiffs

claim the court's overbroad injunction somehow achieved this result. It did not.

The notion that the present action will prevent the City and the Association from selling parkland to raise money is ludicrous. The transfer of Area A from the Association to the Luglianis was not for fundraising. Rather, it was done to put an end to expensive litigation fueled by the School District. The augmented record illustrates the Association's vigorous defense of deed restrictions on School District-owned property. The School District was prevented from selling deed-restricted lots for residential development. The transfer of Area A to resolve this financially draining litigation was not a sell out of the public trust. The settlement avoided further financial draining of the resources of the City and the Association. It preserved Area A as open space.

This present action has caused the City and the Association to incur additional litigation costs and it subjects both entities to future uncertainty concerning the settlement with the School District and the Luglianis. There is no public benefit in draining the resources of the City, which impacts City residents, and resources of the Association, which harms property owners in the City.

The website *pveopenspace.com* reveals this action is more about one neighbor's personal animus than the protection of the so called "Panorama Parkland." Mr. Harbison spearheaded the litigation, working hard to garner support among other City residents for the present action. Mr. Harbison is the uphill neighbor to the Luglianis, disgruntled over the transfer of Area A. The website reveals Mr. Harbison solicited financial support to fund the litigation, asking that checks be sent directly to him. The website contains multiple letters and presentations authored by Mr. Harbison and his wife, and clearly demonstrate he led the charge.

In 2013, he presented his concerns to the Palos Verdes Estates Planning Commission. [See Harbison Presentation at *pveopenspace.com*.] He told the commission: "We've written a seven-page letter summarizing our concerns, and it has been signed by over two dozen PVE residents, including nearly everyone in the immediate neighborhood." [See Comments from PVE Residents-John Harbison, at Harbison Presentation at *pveopenspace.com*.]

No evidence was submitted below establishing Mr. Harbison or anyone else used Area A as a public park at any time. Only 72 letters were submitted to the City Council purportedly opposing the transaction out of several thousand homeowners living in the City. [3CT 661.] Restoring ownership of Area A to the Association under the present judgment will not cause Area A to be used as a public park.

Based on these facts, the public never benefitted from the litigation through protection of a "public park," and there is no basis for awarding attorneys' fees under the private attorney general theory.

XVI.

Conclusion.

The plaintiffs failed to sustain their burden of proof to warrant summary judgment. It cannot be said that as a matter of law that the Palos Verdes Homes Association lacked the ability to transfer Area A to the Luglianis based on the powers conferred upon it under the original declaration.

Respectfully submitted,

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DEFENDANT'S AND CROSS-RESPONDENT'S BRIEF

INTRODUCTION

The plaintiffs' cause of action for a peremptory writ of mandate fails for the same reasons as set forth in the main appeal. Neither the City nor the Palos Verdes Homes Association had a ministerial duty to perform any particular act mandated by *Code of Civil Procedure* section 1085.

The City was not required to hold Area A in perpetuity under the 1940 deeds. *Save the Welwood Murray Library Committee v. City Council of the City of Palms Springs* (1989) 215 Cal.App.3d 1003 (*Welwood Murray*) does not compel such a result. Requiring the City to hold Area A in perpetuity constitutes an unreasonable restraint on alienation.

The Association did not have a ministerial duty to enforce parkland restrictions imposed on the City. Once the City conveyed Area A back to the Association, it reverted to the Association, and the Association was able to exercise its discretion under the original declaration. The plaintiffs misinterpret the 1940 deeds and ignore the original declaration, which dispose of their cause of action as a matter of law. They identify no other documents from which a ministerial duty arises.

No abuse of discretion occurred in denying further leave to amend. On appeal, plaintiffs fail to identify other allegations that would warrant granting leave to amend for a third time.

STATEMENT OF FACTS ON CROSS-APPEAL

1. The Third Cause of Action for a Peremptory Writ of Mandate.

The plaintiffs' third cause of action for a peremptory writ of mandate against the City and the Association conclusory alleged both "have the clear, present and ministerial right and affirmative duty to enforce the land use restrictions and use all legal means to remove the legal improvements from AREA A to the state it was in prior to the unlawful use by the AREA A RECIPIENTS and the PANORAMA PROPERTY OWNERS . . . [which] they do not have the discretion to disclaim responsibility. . . ." [1CT 28.]

All of the defendants demurred to the third cause of action. [1CT 165-187; 226-244.] The Association demurred on the ground the plaintiffs' failed to state a cause of action because the exhibits submitted in support of the petition controvert the existence of the duties the plaintiffs alleged as a basis for a writ of mandate. [1CT 166.]

The plaintiffs opposed the demurrers [2CT 299-319; 320-342] and the trial court sustained the demurrers with leave to amend. The court concluded "there was no ministerial duty shown in the pleading." [6CT 1372.] Thereafter, plaintiffs filed a first amended petition for writ of mandate. [3CT 513-664.] The plaintiffs' amended pleading added allegations claiming the City and the Association had previously viewed Area A encroachments to be illegal. [3CT 520-524.] The terms of the May 2012 global settlement between the School District, the City, the Association and the Luglianis were also added. [3CT 524-525.] Lastly, the plaintiffs claimed the City and the Association had ministerial duties under the 1940 deeds to abstain from using parkland for non-park purposes, to enforce the deed restrictions against encroachments on parkland, and "to abstain from

selling or conveying the parkland to a private party for a non-parkland purpose." [3CT 527.] In the event of breach the property "shall" revert to the Association. [3CT 527.] They alleged the Association had a ministerial duty to reclaim Area A and had a duty to put the issue to a vote of the owners before dispensing with the restrictions. [3CT 528.]

In making these arguments, the plaintiffs relied on the wrong tracts—tracts that did not include Area A. [3CT 556.] In support of the peremptory writ of mandate, the plaintiffs attached as exhibits the Conditions, Covenants and Restrictions for Tract 6888 and Tract 7331. Area A lies in different tracts. [Compare 3CT 540-558; 559-563 with [the map].] The plaintiff also relied upon the original declaration [3CT 564-589], the Association's Articles of Incorporation [3CT 595-616] and the Association's Bylaws. [3CT 595-616.] Plaintiffs also included a quitclaim deed from the Bank of America to the Association pertaining to tracts 440, 6885, 10320 and 10624, which once again, had nothing to do with Area A, since it lies in different tracts [3CT 619-632.] The plaintiffs also submitted the judgments in the School District litigation [3CT 634-637], the memorandum of understanding [3CT 639-657] and evidence of homeowner opposition to the transfer of Area A to the Luglianis. [3CT 659-661.]

2. The Sustaining of the Demurrer to the Plaintiffs' Cause of Action for a Peremptory Writ of Mandate.

The Association and the Luglianis jointly demurred to the first amended petition for writ of mandate. [3CT 665-676.] The City filed a separate demurrer. [3CT 712-734.] The Association demonstrated the restrictions attached as an exhibit to the complaint contradicted the plaintiff's claim there was a ministerial duty to enforce those restrictions in light of the express discretionary authority conferred under the governing documents. [3CT 670-671.] The Association

also demonstrated the plaintiffs' reliance on local restrictions applicable to Tract 6888 did not impose a two-thirds voting requirement for modifying deed restrictions, since Area A was not part of Tract 6888. [3CT 673-674.]

The plaintiffs opposed the demurrer claiming a public trust was created when the City accepted the 1940 deeds based on *Welwood Murray*. [4CT 845-851.] They also argued the original declaration precluded the Association from modifying the restrictions without consent of two-thirds of the adjacent property owners and that the Association had a mandatory duty to exercise its reversionary interest. [4CT 848-850.] The plaintiffs also opposed the City's demurrer [4CT 852-861] and the Luglianis' demurrer. [4CT 862-868.]

All of the parties filed replies to the plaintiffs' opposition, reiterating the arguments raised in the initial pleadings. [4CT 895-910 (City); 911-920 (Association).]

At the hearing on the demurrers, the court pointed out more than once it had specifically considered plaintiffs' arguments based on *Welwood Murray* [7CT 1529-1530; 1534-1535], but had concluded "there was a lot of discretion floating around. And so it just doesn't work for 1085 petition." [7CT 1535.] Although the court's tentative was to deny further leave to amend, it took the matter under submission. [7CT 1534-1538.] Later, the court sustained the demurrer to the third cause of action without leave to amend, observing: "At this time, Plaintiff has not presented any possible amendment that would establish a ministerial duty of the city to act as requested." [7CT 1544.] The Association was not mentioned but presumably, the court intended to include it in the minute order.

3. The Court of Appeal's Summary Denial of the Plaintiffs' Writ Petition.

The Court of Appeal summarily denied the plaintiffs' petition for a writ of mandate on April 1, 2014. [4CT 970.]

LEGAL ARGUMENT ON CROSS-A`PPEAL

I.

The City Had No Ministerial Duty to Hold Title to Area A in Perpetuity and the Transfer to the Association Was Not an Ultra Vires Act.

In its cross-appeal, plaintiffs' claim that the City was required to hold Area A forever. The 1940 deeds, the *Welwood Murray* case, and the law against unreasonable restraints on alienation show otherwise.

A ministerial act is an act a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his or her own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.

Grant deeds, like any other contract, are governed by ordinary rules of contract interpretation to give effect to the parties' intent. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." *Civil Code* section 1643. A contract's meaning is derived from the whole "with individual provisions interpreted together, in order to give effect to all provisions and to avoid rendering some meaningless." *Zalkind v. Ceradyne, Inc.* (2011) 194 Cal.App.4th 1010, 1027. Each clause helps to interpret the other. See Civ. Code section 1641.

In the 1940 deeds, the Association transferred parkland imposing parkland use restrictions. The deeds did not require the City to hold title to the parkland in perpetuity. Rather, parkland could not

be conveyed by the City "[e]xcept subject to the conditions, restrictions and reservations set forth and/or referred to herein and except to a body suitably constituted by law to take, hold, maintain and regulate public parcels. . . ." [8CT 1939, 1945.] This would obviously include a transfer back to the Association, which was specifically created for that purpose. Even the trial court agreed the Association could hold parkland. [15CT 3564.]

This case could be contrasted with *County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, where the grant deed provided the City *no option* of ever transferring the deeded land to another party. Based on the language of the deed, the appellate court concluded the City was indeed required to retain the property: "By limiting County's use of the property and precluding it from ever selling, assigning or transferring the property—terms without expiration and expressly agreed to by County—we conclude the original parties to the deed intended the use restrictions to permanently continue in effect for the benefit of the public, at least until such time as they become obsolete or otherwise unjustified." 155 Cal.App.4th at 578.

The 1940 grant deeds clearly and explicitly state the City could transfer parkland to a body suitable, such as the Association. Any other interpretation would violate the intent of the grantor—the Association—and thus, should be rejected.

Case law supports this view. In plaintiffs' favorite public trust case, *Welwood Murray*, the appellate court pointed out the City could surrender title to the library property and it would not "prevent [the] City from making an express legislative determination that it would be in the best interests of the City and its citizens to cease using the property for library purposes, and to allow the property to revert to the grantors' heirs . . . ." *Welwood Murray*, 215 Cal.App.3d 1117.

Here, the City of Palos Verdes made an express legislative determination that it would no longer be in the best interests of the City and City residents if it continued to hold title to Area A. The City transferred Area A to the Association in accordance with the 1940 deed. The City's deeds of Area A to the Association—the original grantor—were expressly permissible under the 1940 deeds. The transfer were not an ultra vires act, because the City was not required to hold Area A forever. As a result, the City's past efforts to enforce parkland restrictions as to Area A did not preclude the City from transferring Area A back to the Association in 2012. The City's Municipal Code cannot be violated if the City has relinquished ownership.

The plaintiffs assert *Terminal Plaza Corp. v. City* (1986) 186 Cal.App.3d 816 is controlling. There, a zoning administrator had a ministerial duty to enforce a resolution that was clear and unambiguous. 186 Cal.App.3d at 834. While this may have been true when the City owned Area A, it no longer applies once the transfer to the Association occurred.

The plaintiffs' position the City owed a ministerial duty to enforce the deed restrictions by holding Area A "forever" is an unreasonable restraint on alienation. *Civil Code* section 711 provides: "Conditions restraining alienation, when repugnant to the interest created, are void." *Civil Code* section 711. The Supreme Court has stressed that "this rule is not absolute in its application but forbids only *unreasonable* restraints on alienation. [citation.] Reasonableness is determined by comparing the justification for a particular restraint on alienation with the quantum of restraint actually imposed by it." *Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488. "[T]he greater the quantum of restraint that results from enforcement of a given clause, the greater must be the justification for that

enforcement." *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943, 949.

As drafted, the restraint on the City only requires it to use Area A for park purposes—restrictions the City did not violate. The 1940 deeds do not prevent the City from transferring Area A back to the Association, the only other body with discretionary powers over parkland under Article II, Section 4 of the original declaration. The plaintiffs fail to demonstrate why greater restraint would be reasonable or justified.

The City had no ministerial duty to own Area A forever.

II.

The Palos Verdes Homes Association Had No Ministerial Duty Under the Governing Documents to Enforce Deed Restrictions on Land It Reacquired as Original Grantor.

The Association did not have a ministerial duty to enforce deed restrictions contained in the 1940 deeds once the City quitclaimed Area A to the Association.

The original declaration was created to give the Association plenary powers conveying parkland and open space within what would become the City of Palos Verdes. When the Association conveyed deed restricted parkland to the City, it did so to preserve the character of the parkland. However, as addressed in the Association's appellant's opening brief (pages 92-96), the Association was not limiting its powers under the original declaration. Nor could it.

On appeal, as well as below, the plaintiffs merely assert the Association has a ministerial duty to enforce "the restrictions," but they have nothing to say about the Association's Article II, Section 4

power to dispose of parkland and open spaces. The original declarant tasked the Association with the authority to enforce all restrictions, not just parkland restrictions. It also granted the Association authorization to dispose of parkland, requiring it to use its discretion to manage and enforce restrictions in accordance with its Article II powers. The Association's Article II, Section 4 power to dispose of parkland has never been amended under Article VI. Thus, denial of the peremptory writ of mandate cause of action was proper.

On appeal, the plaintiffs invoke language from Article XIV, Section 4(b) of the Association's bylaws and claim the Association cannot dispose of parkland without first obtaining the approval of the Parks and Recreation Board. [XRB at p. 110; 3CT 604.]

The plaintiffs never raise the argument below. [3CT 513-664.] The argument is also without merit. The plaintiffs point to no evidence in the record—because there is none—that Area A was subject to the jurisdiction of the Parks and Recreation Board. Area A had been governed by the City, not by the Parks and Recreation Board.

The fact that the original declaration requires a mandatory reversion of parkland to the Association does not further the plaintiffs' position. The City never used Area A contrary to the 1940 deed restrictions to trigger an automatic reversion. If a reversion were to occur, it would merely place Area A in the hands of the Association, which has the power to dispose of parkland. When the City transferred Area A to the Association, the transfer reverted the property back to the Association. The Association's Article II, Section 4 powers allow the Association to transfer Area A to the Luglianis under the circumstances presented in this case.

None of the other documents attached to plaintiff's first amended cause of action for a writ of mandate demonstrate ministerial

duties as the complaint alleges. In fact, the exhibits contradict the pleading allegations.

The trial court found *Welwood Murray* did not implicate ministerial duties here because, in that case, a historical library would be impacted, whereas Area A is unused land. [7CT 1529-1530; 1534-1535.] Even the *Welwood Murray* court was sensitive to how the developer's plan would impact the use of a pre-existing library by preventing the construction of additional library wings or rooms should they be needed. 215 Cal.App.3d at 1016. The court found this proposed plan conflicted with deed restrictions, which required the City to "forever maintain" the library "in and on buildings which are not or may be hereafter placed on the Property." 215 Cal.App.3d at 1016.

A ministerial duty is a governmental decision involving little or no personal judgment by the public officers as to the wisdom or manner of carrying out a decision. The Association was afforded discretion to do just that in transferring Area A, which was unused and unusable as a public park.

III.

The Trial Court Did Not Abuse Its Discretion in Denying Plaintiffs Leave to Amend the Peremptory Writ of Mandate Cause of Action a Third Time.

On appeal, the plaintiffs do not sustain their burden of proof to show the trial court abused its discretion by denying leave to amend. The denial of leave to amend is reviewed for abuse of discretion. *Jackson v. Pacific Gas & Electric Co.* (1949) 95 Cal.App.2d 207, 208.

At the hearing, the trial court listened the plaintiffs' arguments showing why leave to amend should be granted, and the court took the issue under submission. [7RT 1527-1538.] On appeal, the plaintiffs

have failed to show how their peremptory writ of mandate cause of action could be amended, or even what documents could be added, to establish that leave to amend is warranted. Based on the record, no abuse of discretion has been demonstrated, and the trial court's order sustaining the demurrers to the third cause of action for a peremptory writ of mandate without leave to amend should be affirmed.

IV.

Conclusion.

Neither the City nor the Association had ministerial duties as plaintiffs allege. The plain language of the 1940 deeds provided the City the right to transfer Area A back to the Association. The original declaration gave the Association the right to transfer Area A to the Luglianis as part of the multi-party settlement. The trial court properly sustained the Association's demurrer to the first amended peremptory writ of mandate without leave to amend.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, the undersigned, Roy G. Weatherup, declare that:

I am a partner in the law firm of Lewis Brisbois Bisgaard & Smith LLP, counsel of record for defendant and appellant Palos Verdes Homes Association.

This certificate of compliance is submitted in accordance with rule 8.204 (c) of the California *Rules of Court*.

This reply to cross-respondent's brief was produced with a computer. It is proportionately spaced in 14 point Times Roman typeface. This brief contains 16,478 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California on July 28, 2017.

s/ Roy G. Weatherup

CALIFORNIA STATE COURT PROOF OF SERVICE

Citizens for Enforcement of Parkland and Covenants v. City of Palos Verdes Estates (Case No. Second Civil B267816)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, California 90071.

On July 28, 2017, I served the following document(s): **DEFENDANT AND APPELLANT'S PALOS VERDES HOMES ASSOCIATION'S REPLY TO CROSS-RESPONDENT'S BRIEF** on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and:

☒ Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 28, 2017, at Los Angeles, California.

Tina Wallace

SERVICE LIST

Citizens for Enforcement of Parkland Covenants v. Lugliani
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