No. B267816
(Related to Case Nos. B270442 and B254841)

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

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN HARBISON,

Plaintiffs, Respondents and Cross-Appellants,

v.

CITY OF PALOS VERDES ESTATES, PALOS VERDES HOMES ASSOCIATION, ROBERT and DOLORES LUGLIANI and THOMAS J. LIEB

Defendants, Appellants and Cross-Respondents.

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

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COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' BRIEF

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CERTIFICATE OF INTERESTED PARTIES

There are no interested entities or persons to list in this certificate (Cal. R. Ct. 8.208(e)(3)).

Dated: April 18, 2017

By: _____
Jeffrey Lewis

Attorney for Respondents and Cross-Appellants

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SUMMARY OF ARGUMENT

Appellants argue that they have the absolute power to sell parkland and that their decisions are beyond judicial review. They are wrong. Although Appellant Palos Verdes Homes Association ("Homes Association") had that absolute power of sale at its inception in 1923, the power was curtailed in 1931 when Bank of America deeded parkland to the Homes Association subject to the restriction that the parkland

was "to be used and administered forever for park and/or recreation purposes." (12CT 2856 ¶ 19).[1] The Homes Association's power of sale was limited again in 1940 when the Homes Association deeded 800 acres of parkland to the Appellant City of Palos Verdes Estates ("City.") The 1940 deeds contained several restrictions that required that the parkland only be used for public park purposes. The 2012 deeds at issue in this litigation purported to convey parkland located on Via Panorama – the "Panorama Parkland" – from the City[2] to Appellant Thomas J. Lieb for the benefit of and private use by the Panorama Parkland's adjacent landowner, Appellants Robert and Delores Lugliani (the "Luglianis.") This 2012 conveyance of the Panorama Parkland violated the 1931 and 1940 deeds and constitutes an *ultra vires* action both by the Homes Association and the City.

The Homes Association cannot credibly argue that a sale of public parkland is protected from judicial review by the Business Judgment Rule or related rules of judicial deference. That defense was unpled below and was thus waived. The defense also does not apply to *ultra vires* actions by a homeowner's association. Similarly, the City cannot cloak its actions from judicial review by invoking its broad police powers. The City's immunity from judicial review does not apply when it violates the

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[1] Citations to the record take the following form: the clerk's transcript, [Vol]CT [page]; the Homes Association's Appellant's Appendix, [Vol]HA AA [page]; the City's Appellant's Appendix, [Vol]City AA [page]; the augmented record as requested by CEPC, AUG [page].

[2] Technically speaking, the transfer of property was made in two legs: first from the City to the Homes Association and then from the Homes Association to Thomas J. Lieb. But the deeds were recorded simultaneously and the City was complicit in the sale of parkland by signing the memorandum of understanding authorizing both legs of the transaction.

public trust and agrees to a sale of parkland. And while the Homes Association and the City certainly had the power to settle litigation, they did not have the legal right to agree to violate deed restrictions to accomplish the settlement. If the City wanted to rid itself of parkland, its only legal option was to deed the parkland to an organization that manages public parks such as a local land conservancy or other local government willing to take both the benefit of the property and the use restrictions that go with it. The City could no more agree to sell public parkland to the Luglianis than it could agree to the installation of an oil rig, a shopping center or a parking lot over parkland. A sale to the Luglianis, erection of an oil rig, or construction of a shopping mall would each violate the 1940 deeds restrictions. While the goal of settlement of litigation was legitimate, such ends are not justified by means that violate deed restrictions.

Appellants' opening briefs have failed to show a substantive basis requiring reversal of either the order granting summary judgment or the ensuing judgment and permanent injunction below. As an additional basis for affirming the judgments below, Appellants' opening briefs violate at least four cardinal rules of appellate practice and summary judgment procedure:

First, many of Appellants' arguments rest on facts not contained within the parties' separate statements filed below. These arguments violate the "Golden Rule of Summary Judgment" that if a fact is not contained within a separate statement the fact does not exist. (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 800 fn. 1). For example, in invoking the Business Judgment Rule, the Homes Association is required to affirmatively demonstrate that the board of

directors conducted a "reasonable investigation, in good faith and with regard for the interests" of the association and its members. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n* (2008) 168 Cal.App.4th 1111, 1122-23). The separate statements below contain no facts referring to any investigation (reasonable or otherwise). Nor do the separate statements include those facts demonstrating how or why a sale of a public park to a private party was purportedly in the best interest of the Homes Association and its members.

Second, the opening briefs contain several new arguments that were not raised below and may not be raised for the first time on appeal. For example, the Homes Association argues that it was not bound by the 1940's deed restrictions. Also, the Homes Association and the City argue that the permanent injunction contained in the judgment was overbroad. The City argues that a conservation easement is the functional equivalent of a deed restriction. These arguments are improperly raised for the first time on appeal.

Third, the appellate record is inadequate in several respects. There were two hearings held regarding the form of the final judgment, including the permanent injunction. The first was held on August 10, 2015 and the second was held on September 9, 2015. A court reporter was present for the first hearing but not the second. No transcript or its equivalent was included in the record on appeal for either hearing on the form of the judgment. This Court is left to guess as to what discussion was held between counsel and the Court on August 10, 2015 and September 9, 2015 concerning the form of the judgment and permanent injunction. Without that record of the August 10, 2015 and September 9, 2015 proceedings, Appellants cannot demonstrate that they preserved

the issues raised on appeal and cannot foreclose the possibility that they invited the very errors Appellants now complain about.

Similarly, on January 6, 2016, the trial court conducted a hearing on CEPC's motion for attorney's fees. Appellants have argued that the trial court erred in awarding fees but they have provided no reporter's transcript, settled statement, or agreed on statement for the hearing. Nor do they explain the omission or how this Court can review the exercise of the trial court's discretion in the absence of a record of oral proceedings.

Likewise, the City's memorandum of points and authorities in opposition to CEPC's motion for summary judgment is not in the appellate record. The Court cannot confirm whether the arguments presented in the City's opening brief were preserved for appellate review.

Appellants do not mention or explain these omissions in the appellate record. It is Appellants' burden to present an adequate appellate record. (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362). The failure to do so may require affirmance of the judgment (*Ibid.*) Given the number of arguments raised about the form of the judgment, Appellants have failed to meet their burden of presenting an adequate record. This is not a mere technicality, rather it is "an ingredient of the constitutional doctrine of reversible error." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [citing 3 Witkin, Calif. Procedure (1954) Appeal, § 79, pp. 2238-2239]).

Finally, Appellants' opening briefs impermissibly blend discussion of two issues: a) whether the summary judgment motion should have been granted in May 2015; and b) the scope of the permanent injunction issued as part of the final judgment entered in

September 2015. Although these are distinct subject matters with disparate standards of review, Appellants' opening briefs offer a monolithic analysis. By failing to identify and apply the appropriate standard of review to the discussion of the scope of the permanent injunction, they have failed to meet their burden on appeal. (See *Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465 [holding that "the failure to acknowledge the proper scope of review is a concession of a lack of merit."])

Each of these issues alone would warrant affirmance of the judgment. Taken together, they relieve this Court of the obligation to review the substance of Appellants' opening briefs. The judgment below should be affirmed.

STATEMENT OF APPEALABILITY

The cross-appeal challenges the January 6, 2014 order by the trial court sustaining Appellants' demurrer without leave to amend as to CEPC's petition for writ of mandate against the City and Homes Association. (4CT 923). The January 6, 2014 order did not dispose of the remaining claims by CEPC against the Homes Association and the City for declaratory relief and taxpayer's action for waste. (4CT 923). Because claims remained between the parties, no direct appeal from the January 6, 2014 order was possible at that time. (*Nerhan v. Stinson Beach County Water Dist.* (1994) 27 Cal.App.4th 536, 540). Review of the January 6, 2014 order could only be made by way of review of the final judgment between the parties. (*Ibid.; First Western Bank & Trust Co. v. Bookasta* (1968) 267 Cal.App.2d 910, 912 fn. 1).

The Luglianis filed a notice of appeal on October 16, 2015. (16CT 3913). The Homes Association filed a notice of appeal on November 13, 2015. (16CT 3935). The City filed a notice of appeal on November 13, 2015. (16CT 3940). CEPC filed a timely notice of cross-appeal on November 24, 2016. (AUG 257).

STANDARD OF REVIEW

Appellants have conflated the discussion of the applicable standard of review for: 1) the order granting summary judgment; and 2) the permanent injunction included within the ensuing judgment. The review of a summary judgment motion is subject to de novo review. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860). The decision to grant or deny a permanent injunction rests within the trial court's "sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 390; *Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 260).

STATEMENT OF THE CASE

A. The Pleadings

This matter commenced with the May 13, 2013 filing of a verified petition for writ of mandate and complaint for injunctive relief. (1CT 16). The only plaintiff was CEPC. (1CT 16). The defendants were the City, the Homes Association and the Palos Verdes Peninsula Unified School District ("School District.") (1CT 16). The real parties in interest were the Luglianis and Lieb. (1CT 216). The pleading included a request for declaratory relief, a claim for waste of public funds and a claim for peremptory writ of mandate. (1CT 16). The pleading was accompanied by a notice of related case referring to prior litigation between the School District and the Homes Association, LASC Case No. BC431020. (1CT 156).

The City, Association, School District and the Luglianis demurred to the petition. (1CT 165, 226). The trial court sustained the demurrer with leave to amend as to the writ of mandate finding that the pleadings identified no ministerial duty. (6CT 1372).

On November 7, 2013, CEPC filed a First Amended Petition. (3CT 513). The pleading added John Harbison as a plaintiff. (3CT 513). The pleading also added a cause of action for nuisance. (3CT 534). Appellants demurred and filed motions to strike. (3CT 665, 712). On January 6, 2014, the trial court sustained the demurrer without leave to amend as to the writ of mandate finding that the pleadings identified no ministerial duty. (4CT 932). The matter was transferred to a civil department for resolution of the demurrer to the three remaining claims. (4CT 932). CEPC sought appellate review in this Court of the January 6, 2014 order via discretionary writ. (4CT 970). On April 1, 2014, this

Court summarily denied that discretionary writ in *Citizens for Enforcement of Parkland Covenants v. Superior Court*, Case No. B254841. (4CT 970).

Although the January 6, 2014 minute order resolved the petition for writ of mandate, the demurrer to the other causes of action remained. On April 11, 2014, the trial court issued a minute order ruling on the demurrers and motions to strike. (9CT 2135). The order gave CEPC leave to clean up the pleadings by filing an amended pleading that omitted the claim for writ of mandate. (9CT 2135). Notably, that April 11, 2014 order indicated that there was no reason for CEPC to attack the validity of the Memorandum of Understanding to prevail on its claims. (9CT 2142 - 2143). For this reason, on May 1, 2014, CEPC filed a request for dismissal without prejudice of one of the signatories to the Memorandum of Understanding: the School District. (4CT 973). That dismissal was entered on May 5, 2014. (4CT 973).

On June 17, 2014, CEPC filed a second amended complaint. (4CT 1024). Appellants filed further demurrers and motions to strike which were denied. (8CT 1765). Appellants filed answers to the second amended complaint. (7CT 1593 [Luglianis]; 7CT 1607 [Homes Association]; 8CT 1772 [City]). The Homes Association's answer did not plead the Business Judgment Rule as an affirmative defense. (7CT 1611-12).

B. CEPC's Motion for Summary Judgment and the City's Cross-Motion for Summary Judgment

On December 5, 2014, CEPC filed a motion for summary judgment. (8CT 1795). The motion was supported by a separate statement of 137 undisputed material facts. (8CT 1798). On March 13,

2015, the City filed a "cross-motion for summary judgment." (10CT 2338). The remaining defendants filed a motion for judgment on the pleadings. (10CT 2489). The City's cross-motion and the other Appellants' motion for judgment on the pleadings were denied. (15CT 3547).

C. The City's Response to CEPC's Summary Judgment Motion

In opposition to CEPC's summary judgment motion, the City filed an opposition memorandum, but that memorandum is not included in the record. The City did not file a separate statement of facts in opposition to the summary judgment motion. The City does not explain these omissions in its opening brief nor how it may meet its burden of providing an adequate record without those documents. The City did file the declaration of City Planning Director Sheri Repp-Loadsman. (12CT 2846). None of the facts set forth in that declaration appear in the Homes Association's separate statement filed in opposition to summary judgment.

D. The Homes Association and Luglianis' Response to CEPC's Summary Judgment Motion

On May 15, 2015, the Homes Association and the Luglianis filed opposition papers to CEPC's summary judgment motion. (12CT 2841). They filed the declarations of attorneys Sidney Croft and Lore Hilburg. (12CT 2851). The Homes Association and the Luglianis also filed excerpts from CEPC's discovery responses and the deposition transcript of John Harbison. (12CT 2978). The Homes Association and the Luglianis filed a joint memorandum in opposition to the motion. (13CT 3057).

The Homes Association and Luglianis filed an opposing separate statement of facts. (HOA AA 28). Most of the facts in that opposition statement were undisputed aside from quibbling over the definition of the term "parkland." The Homes Association and Luglianis' separate statement added only four additional disputed facts that they contended warranted denial of summary judgment. (HOA AA 57-58).

E. The Reply Memorandum, Reply Separate Statement and Objections

On May 22, 2015, CEPC filed a reply memorandum in support of its summary judgment motion. (13CT 3179). CEPC also filed evidentiary objections to portions of the declarations by Croft and Hilburg. (14CT 3339). CEPC also filed a reply separate statement that provided, in three column format, CEPC's original undisputed facts, the Homes Association and Luglianis' opposition and CEPC's reply. (14CT 3380).

F. The May 29, 2015 Hearing on CEPC's Motion for Summary Judgment and June 29, 2015 Order Granting the Motion

A hearing was held on May 29, 2015. On June 29, 2015, the trial court issued a minute order granting CECP's motion and denying the City's cross-motion. (15CT 3547). The minute order was silent on the evidentiary objections raised by all parties.

G. The Preparation of the Judgment

The June 29, 2015 minute order granting summary judgment directed CEPC to prepare a draft judgment in advance of a hearing on August 10, 2015. (15CT 3576). Plaintiff submitted a proposed judgment. That proposed judgment is not in the record.

H. The August 10, 2015 Hearing on the Form of Judgment

A hearing was held on August 10, 2015. (1CT 14). No record of those proceedings appears in the record on appeal. Further proposed judgments were served and lodged after the August 10, 2015 hearing. (15CT 3634). On September 2, 2015, Appellants filed objections to the then-form of the judgment. (15CT 3611).

Notably, the form of judgment objected to by Appellants included injunctive relief affecting all parkland in the City – not just the specific parkland sold to the Luglianis. (15CT 3630 ¶¶ m, n). The September 2, 2015 objections by Appellants to the form of the judgment did not include any objection as to the scope of the injunctive relief.

I. The September 9, 2015 Hearing on the Form of Judgment and Entry of Judgment

A further hearing was held on September 9, 2015. No reporter's transcript or equivalent has been provided to this Court. On September 24, 2015, the trial court entered judgment. (15CT 3647).

J. The Notices of Appeal and Cross-Appeal

Notice of entry of judgment was served by CEPC on September 28, 2015. (16CT 3911). The Luglianis filed a notice of appeal on October 16, 2015. (16CT 3913). The Homes Association filed a notice of appeal on November 13, 2015. (16CT 3935). The Homes Association filed a notice of appeal on November 13, 2015. (16CT 3940). CEPC filed its notice of cross-appeal on November 24, 2015. (AUG 257).

K. CEPC's Motion for Attorney's Fees

On October 13, 2015, CEPC filed a motion for an award of attorney's fees. (City AA 1). A hearing was held on January 6, 2016. (1CT 14). No reporter's transcript for that hearing is included in the record. On January 25, 2016, the trial court issued a minute order granting the fee motion. (City AA 173).

STATEMENT OF FACTS

A. The History of the Homes Association and its Governing Documents

In 1913, a New York banker purchased the land of Palos Verdes. (12CT 2852 ¶ 6). He subdivided the land in the 1920's. (12CT 2853 ¶ 7). Deed restrictions were first imposed on the land in 1923 when Bank of America, the successor trustee to the Commonwealth Trust Company, trustee for the development project, drafted a trust indenture. (12CT 2853 ¶ 7).

On May 16, 1923, the Homes Association was formed. (8CT 1801 ¶ 77). On June 25, 1923, the Homes Association enacted its bylaws. (8CT 1801 ¶ 8). On July 5, 1923, the developer for Palos Verdes Estates recorded Declaration No. 1 establishing basic land use restrictions for real property within what would later be known as the City. (8CT 1801 ¶ 9).

On July 26, 1926, Bank of America recorded Declaration No. 25 establishing the conditions, covenants and restrictions for Tract 8652.[3] (8CT 1802 ¶ 11). Declaration No. 25 describes the purpose of the Homes Association as follows:

> To carry on the common interest and look after the maintenance of all lots …[the] Association, has been incorporated …. *It will be the duty of this body to maintain the parks … and to perpetuate the restrictions.*

(8CT 1802 ¶ 12, emphasis added).

[3] Most of the Panorama Parkland falls within Tract No. 8652. (12CT 2857 ¶ 20).

Declaration No. 25 provides that:

- The land use restrictions "are for the benefit of each owner of land..." (8CT 1802 ¶ 13).
- A breach of the restrictions shall cause the property to revert to the Homes Association. (8CT 1803 ¶ 14).
- Any breach of the restrictions can be enjoined by the Homes Association or by any property owner in the Homes Association. (8CT 1803 ¶ 15).
- A breach of the restrictions shall constitute a nuisance which may be abated by either the Homes Association or any lot owner subject to the Homes Association's jurisdiction. (8CT 1803 ¶ 16).
- The provisions of the declaration "shall bind and inure to the benefit of and be enforceable by" the Homes Association or "by the owner or owners of any property in said tract...." (8CT 1803 ¶ 17).

B. The 1931 Deed from the Bank to the Homes Association

In 1931, Bank of America, acting as trustee, deeded the Panorama Parkland, and other parklands, to the Homes Association "to be used and administered forever for park and/or recreation purposes." (12CT 2857 ¶ 19).

C. The June 1940 Deeds to the School District and the City

On June 14, 1940, the Homes Association conveyed a number of parks to the City in multiple grant deeds, including the Panorama

Parkland (the "1940 Deeds.")[4] (8CT 1807 ¶ 32). The 1940 Deeds included restrictions on the future use and ownership of the property. (8CT 1809 ¶ 36). The 1940 Deed restrictions mirrored the language of prior restrictions. Specifically, the 1940 Deeds state:

- That the transferred property "is to be used and administered forever for park and/or recreation purposes…" (8CT 1809 ¶ 37).
- That "no buildings, structures or concessions shall be erected, maintained or permitted" on the parkland "except such as are properly incidental to the convenient and/or proper use of said realty for park and/or recreation purposes." (8CT 1810 ¶ 38).
- That the transferred property "shall not be sold or conveyed, in whole or in part…except to a body suitably constituted by law to take, hold, maintain and regulate public parks…" (8CT 1810 ¶ 39).
- That, with written permission, a property owner abutting the park may construct paths or landscaping on the conveyed property as a means of improving access to or views from such property. Such improvements must not impair or interfere with the use and maintenance of said realty for park and/or recreation purposes. (8CT 1811 ¶ 40).
- That the use or ownership restrictions set forth in the 1940 Deeds may not be changed by the City or the Homes Association even if the Homes Association complies with its own internal procedures

[4] The properties conveyed included the Panorama Parkland. (8CT 1807-08 ¶¶ 33-35), Lot A of Tract 7540 (8CT 1808 ¶ 34) and Lot A of Tract 8652. (8CT 1808 ¶ 35).

for modifying land use restrictions and obtains the written consent of two-thirds of the property owners. (8CT 1811 ¶ 41).

- That any breach of the use or ownership conditions "shall cause said realty to revert to the" Homes Association. (8CT 1812 ¶ 42).
- That the deed restrictions "inure to and pass with said property and each and every parcel of land therein, and shall apply to and bind the respective successors in interest of the parties hereto, and are…imposed upon said realty as a servitude in favor of said property and each and every parcel of land therein as the dominant tenement or tenements." (8CT 1812 ¶ 43).

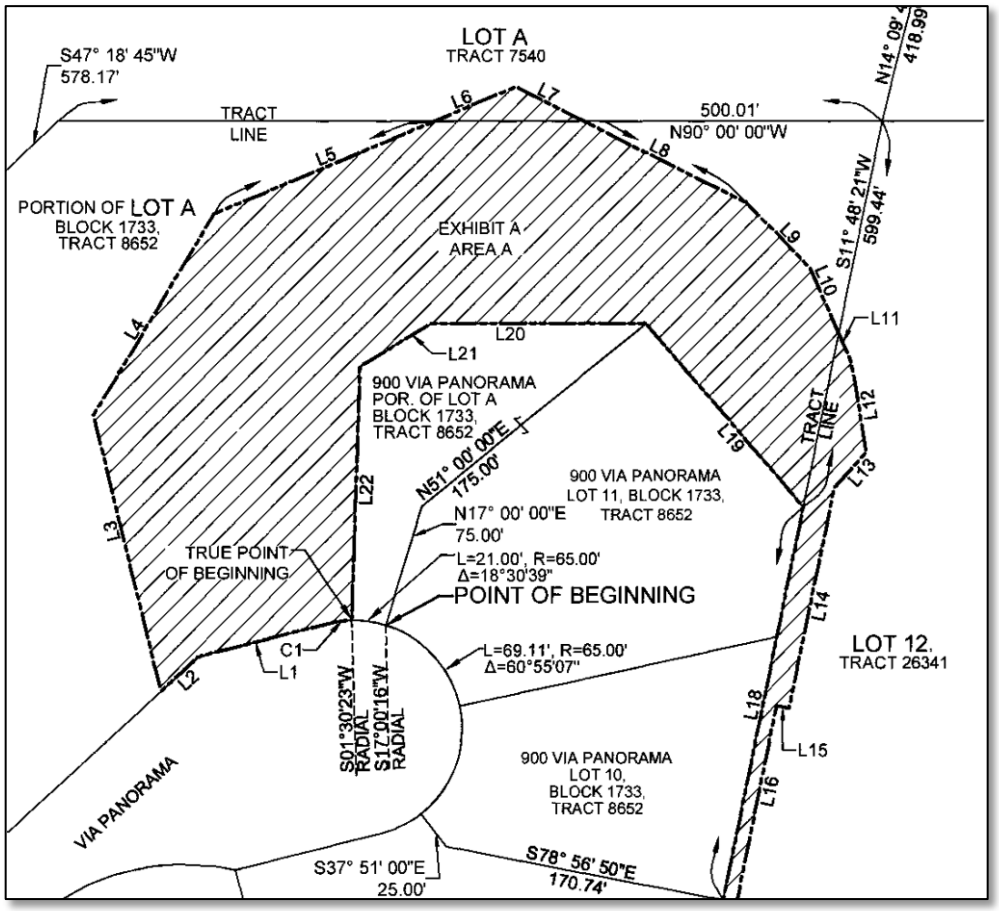
The 1940 Deeds do not contain any text or provision that authorizes the transfer of parkland to a private party for private purposes. Notably absent from the 1940 Deeds are:

- Any express provision authorizing the City or Homes Association to "swap" parkland properties. (8CT 1813 ¶ 44).
- Any express provision authorizing the City or Homes Association to convey parks as part of a resolution of litigation. (8CT 1813 ¶ 45).
- Any express provision authorizing the City or Homes Association to convey parks to fund budgetary shortfalls for school districts. (8CT 1813 ¶ 46).

The City passed Resolution No. 12 accepting the deeds and confirming the land use restrictions. (8CT 1814 ¶ 47). Notably, Resolution No. 12 re-states verbatim each of the land use restrictions set forth above. (8CT 1814 ¶ 48).

D. The Location of the Panorama Parkland

The Panorama Parkland is a crescent shaped parcel that wraps around the residential property at 900 Via Panorama. (8CT 1799-80 ¶ 3). The boundaries of the Panorama Parkland cross three different tract lines and, therefore, the Panorama Parkland falls within tract numbers 7540, 8652 and 26341. (8CT 1800 ¶ 4). The shaded section below represents the Panorama Parkland and its relationship to the surrounding tract numbers and residences. (5CT 1057). The irregular shape encompasses extensive encroachments on the Panorama Parkland.



E. The Decades of Encroachment on the Panorama Parkland

For decades, the prior and current owners of 900 Via Panorama have built and allowed encroachments to remain on the neighboring

Panorama Parkland. (8CT 1816-18 ¶¶ 52-59). These improvements include landscaping, a baroque wrought-iron gate with stone pillars and lion statues,[5] a winding stone driveway, dozens of trees (some of which are as high as 50 feet), a now-overgrown athletic field half the size of a football field, a 21-foot-high retaining wall and other retaining walls. (8CT 1818 ¶ 58).

F. The School District's Lawsuit against the Homes Association to Invalidate the Deed Restrictions

By 2010, the School District was facing a funding shortfall and wanted to sell the parkland that it had received from the Homes Association in 1940. The School District filed a lawsuit on February 1, 2010 against the Homes Association to declare the deed restrictions[6] unenforceable and, thereby, facilitate a sale of that parkland. (8CT 2005-06).[7] The School District's lawsuit was tried and a judgment was entered in the Homes Association's favor in September 2011. (15CT 3580). The judgment found that the deed restrictions limiting the use of the parkland were still enforceable. (15CT 3581-82). The School District appealed that judgment. (9CT 2006).

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[5] The pillars and statues encroach on the City's easements and right of way.

[6] The deed restrictions for the School District's parkland was substantially similar to the deed restrictions for the Panorama Parkland.

[7] That lawsuit was entitled, *Palos Verdes Peninsula Unified School District v. Palos Verdes Homes Association*, Los Angeles Superior Court Case Number BC431020.

G. The 2012 Settlement by the City, Homes Association, Lieb and the Luglianis

The City had attempted to get the owners of 900 Via Panorama to remove the encroachments on the Panorama Parkland since the 1980's. (8CT 1816-18 ¶¶ 54-57). Starting in 2006, the City intensified its efforts and set a September 2011 deadline for the Luglianis to remove the encroachments. (8CT 1816-18 ¶¶ 54 -57). When the September 2011 deadline was not met, the City was prepared to have bulldozers forcible remove the encroachments.

In 2012, the City, the Homes Association, the School District and the Luglianis conceived a settlement to resolve the School District's budget shortfall, the School District's planned appeal of the judgment it lost in September 2011 and the Luglianis' encroachments.

The settlement was documented in a Memorandum of Understanding or "MOU." (9CT 2004). The Luglianis are not signatories to the MOU. (9CT 2004). A trust was created by the Luglianis to receive the Panorama Parkland with Lieb as Trustee and the Lugliani family as beneficiaries. Lieb – not the Luglianis – signed the MOU. (8CT 1822-23).

H. The Terms of the Settlement

The MOU described the performance obligations of the School District, Homes Association, City and Lieb. The School District affirmed the continued enforceability of the parkland covenants including the right of reversion to the Homes Association for violation of parkland covenants. (9CT 2009 Art. II ¶ C). The District and the Homes Association agreed that the parkland that was subject of the 2010 lawsuit – known as "Lots C and D" – should properly revert to the

Homes Association. (9CT 2009-10 Art. II ¶ C). The School District also dismissed its appeal, leaving intact the judgment declaring the parkland covenants enforceable. (9CT 2010 Art. II ¶ D).

The Homes Association agreed to relinquish its claim for attorney's fees against the School District over the 2010 parkland covenant litigation. (9CT 2010 Art. III ¶ A). The Homes Association agreed to an exchange of parkland. The Homes Association gave the City its newly acquired "Lots C and D." (9CT 2010 Art. III ¶ B). The City gave the Homes Association – albeit temporarily – the Panorama Parkland. (9CT 2010 Art. III ¶ B). Within seconds of the Homes Association's receipt of the Panorama Parkland it was to be conveyed by the Homes Association to Lieb for $500,000 for the benefit and private exclusive use of the Luglianis. (9CT 2011 Art. V ¶ C). The Homes Association also represented that the present use and encroachments on the Panorama Parkland did not violate the deed restrictions and would not result in a reversion of the Panorama Parkland from Lieb back to the Homes Association. (9CT 2010 Art. III ¶ E).

Although documented outside the MOU, part of the settlement called for the Luglianis to donate $1.5 million to the School District to defray the very budget shortfall that prompted the 2010 litigation over parkland covenants. (12CT 2861 ¶ f). That $1.5 million "donation" together with the $500,000 paid to the Homes Association is the consideration paid by Lieb and the Luglianis in exchange for the receipt of the Panorama Parkland.

I. The Failure to Notify the Public in any Meaningful Way About the Sale of the Public Park

Cities are required to notify neighbors of public hearings about land use decisions. (Gov't Code, § 65090; 7 Miller & Starr, Cal. Real Estate (4th Ed.) § 21:14). Typically, that notice includes a newspaper notice and a mailing to neighbors. (7 Miller & Starr, Cal. Real Estate (4th Ed.) § 21:14). The City's Municipal Code also requires notification of land use hearings. (City Mun. Code § 17.04.100). It requires mailing a notice of hearing to neighbors living within three hundred feet of the affected property. (City Mun. Code § 17.04.100(3)(d)). The City is also required to post of a sign at the affected property. (City Mun. Code § 17.04.100(4)).

The City conducted a public hearing on approval of the Panorama Parkland sale on May 8, 2012. (8CT 1819 ¶ 60). Prior to that hearing, the City did not post a sign at the Panorama Parkland about the proposed sale. (8CT 1819 ¶ 61; 8CT 1857-58 ¶¶ 49-51). Nor did the City mail hearing notices to adjacent neighbors. (8CT 1819-20 ¶ 62; 8CT 1857-58 ¶¶ 49-51). Nor did the City publish a hearing notice in the newspaper. (8CT 1820 ¶ 63; 8CT 1857-58 ¶¶ 49-51).

J. The 2012 Deeds Conveying a Public Park to Lieb While the Luglianis "Donate" $1.5 million to the School District

On September 5, 2012, the Homes Association recorded a quitclaim deed conveying the Panorama Parkland from the City to the Homes Association. (9CT 1973 [deed]; 8CT 1821 ¶ 65). The Homes Association simultaneously recorded on the same day, hour and minute, a grant deed conveying the Panorama Parkland from the Homes Association to Lieb. (9CT 1978 [deed]; 9CT 1973 ¶ 66). That grant deed

provided that the Homes Association approved – subject to City permits – the continued encroachment on the Panorama Parkland. (9CT 1978 ¶ 2). The deed provided Homes Association approval of a gazebo, sports court, retaining wall, landscaping, barbecue, and other structures that the Luglianis intended to use for their new expanded backyard. (9CT 1978 ¶ 2). Of the $2 million in consideration paid by the Luglianis and Lieb, the Homes Association received $400,000, the City received $100,000 and the School District received $1.5 million. (12CT 2860-2861 ¶ 29(e), (f)).

K. The 2013 Zoning Application to Transform a Public Park into the Luglianis Expanded Backyard Catches the Public Eye

While the City did not provide any meaningful notice of the 2012 sale of the Panorama Parkland, it certainly publicized later land use proceedings for the park. In February 2013, Lieb and the Luglianis applied to the City for a zoning change and for approval of the encroachments. (15CT 3450 ¶ 74). The Luglianis intended to use the Panorama Parkland for their private, exclusive use. (15CT 3450 ¶ 73).

The Planning Commission denied the rezoning application and the Luglianis appealed that decision to the City Council. (8CT 1859 ¶¶ 59-60; 10CT 2375 ¶ 6). The lawyer for Lieb and the Luglianis stated that the intent of the application was to apply for permission to use "private land consistent with private ownership." (8CT 1859 ¶ 60; 9CT 2113 ¶ 1). The lawyer confirmed that the rezoning, if granted, would "prohibit public access" to the Panorama Parkland. (9CT 2114 ¶ 5). The City Council heard the appeal on March 12, 2013. (10CT 2375-76 ¶¶ 7-8). In response to the appeal, the City Council directed the City Attorney to come up with a new zoning scheme to allow for private ownership of

open space zoned property and that would permit the construction of the encroachments listed in the MOU. (10CT 2376 ¶ 8).

L. Appellants' Statement of Facts are Neither Supported by the Record nor True

The Homes Association makes several assertions in its statement of facts that are not supported by the appellate record, demonstrably false, or both.

The Homes Association argues that "Plaintiff and respondent John Harbison formed CEPC to spearhead this litigation. [9CT 1864.]" (HA AOB 21).[8] There was no evidence offered below as to why CEPC was formed or who formed CEPC. There was no evidence introduced in the separate statements below to support this "fact." The citation to the record suggests only that John Harbison is a member of CEPC. (9CT 1864).

The Homes Association states as though it were irrefutable fact that the sold parkland was "less usable undeveloped open space" that was swapped "for more valuable space." (HA AOB 21). No citation to the record was given by the Homes Association for this assertion. The only evidence presented to the trial court on this subject was a declaration by Harbison establishing that the sold Panorama Parkland was more than twice the size and far more valuable than the other parkland "swapped" by the City and Homes Association. (14CT 3202, 3207 [comparing usability and size of lots 37,962 sq. ft. vs. 75,930 sq. ft.],

[8] Citations to the Homes Association's opening brief take the form of "HA AOB." Citations to the City's opening brief take the form of "City AOB." The Luglianis have not filed an opening brief but instead joined in the Homes Association's brief.

14CT 3212 [establishing value]). Whether the sold parkland was "less usable" was not a fact set forth in the separate statements below.

The Homes Association states: "plaintiffs also objected to the entirety of Mr. Croft's and Ms. Hilburg's declarations on the grounds they contained improper expert opinion. [14CT 3339-3379.]" [HA AOB 56). Untrue. CEPC only objected to portions of the two declarations. (14CT 3339). Moreover, the grounds went beyond "improper expert opinion." (14CT 3339). Attorneys Croft and Hilburg were attempting to instruct the trial court on ultimate legal issues facing the trial court: how to interpret the Homes Association CC&R's and historical deeds. The objections were also made on grounds of relevance.

The Homes Association states as fact that: "The Homes Association was, however, given the power to exchange the parkland for other lands and could dedicate it for 'parkway or street purposes.' [12CT 2937.]" (HA AOB 29). In fact, the cited portion of the record is a 1931 deed between the Bank that originally owned the parkland and the Homes Association stating that the Homes Association may not sell parkland to anyone except a park commission or "other body suitably constituted by law to take, hold, maintain and regulate public parks;" (12CT 2937 § 5). The word "exchange" does not appear in the deed. Nor does the cited portion of the 1931 deed provide for any use of parkland for street purposes.

The Homes Association states that "[w]hen the City threatened to remove the retaining walls, the Luglianis threatened to sue the City for destabilizing the slope on 900 Via Panorama. [9CT 2110-2111]." (HA AOB 32). No such fact appears in the separate statements filed below or at the cited page of the appellate record at 9CT 2110-2111.

The Court should carefully scrutinize the factual statements contained in the Homes Association's brief.

LEGAL ARGUMENT – RESPONDENTS' BRIEF

I. Introduction

For decades, the Homes Association zealously guarded every inch of the 800 acres of parkland within the City. As documented in a 1969 publication, the City and Association used to view parkland as sacrosanct:

> "The people of this city," says Planning Commissioner Paul Peppard, "want the parkland left the way it is. They don't want it formal or manicured – or built on…. We have all this free, open land," says Dr. Peppard. "**From time to time, someone comes along and tries to grab on to a piece of it." So far, no one has succeeded….**
>
> "These restrictions are stronger than the U.S. Constitution. The way they are set up, they can hardly be amended." [said then president of the Homes Association. His predecessor Gaybert Little is quoted as saying] "**In all these years, we haven't lost a single foot of the parkland that we started with.** Not many communities can say the same. …Here they started with a dream and it was beautiful." Patricia Gribben (then manager of the Homes Association) said, "**You can accomplish wonders. You just keep enforcing the restrictions on the land**."

(14CT 3338, emphasis added).

> Almost fifty years later, the Homes Association states:
>
> [T]he original declaration giving the Palos Verdes Homes Association the right and power to sell parkland has never been amended or modified …. As a result, it had the right to sell Area A to the Luglianis.

(HA AOB 13).

The City and Homes Association's attitude in 1969 are in stark contrast with the current leadership. The attitudes have changed in 47 years from not yielding "one single foot" of parkland to "parkland for sale." While the attitudes of politicians may change, deed restrictions do not. In fact, the reason the restrictions exist is to guard against the "land grab" that occurred at the direction of the Appellants. The enforceability of these restrictions is at the core of this lawsuit.

II. The Order Granting Summary Judgment Should be Affirmed Because the Appellate Record is Inadequate

It is Appellants' burden to present an adequate appellate record. (*Oliveira v. Kiesler*, *supra*, 206 Cal.App.4th at 1362). The failure to do so may require affirmance of the judgment (*Ibid.*) Given the number of arguments raised about the form of the judgment, it was incumbent on Appellants to provide this Court with all versions of the proposed judgment submitted to the trial court and a record of all hearings about the form of the proposed judgment. Appellants have failed to meet their burden of presenting an appellate record. This is not a mere technicality. Rather, it is "an ingredient of the constitutional doctrine of reversible error." (*Denham v. Superior Court*, *supra*, 2 Cal.3d 557, 564 [citing 3 Witkin, Calif. Procedure (1954) Appeal, § 79, pp. 2238-39]).

There were three significant hearings after the trial court granted summary judgment: an August 10, 2015 hearing on the form of the judgment, a September 9, 2015 hearing on the form of the judgment and a January 6, 2016 hearing on the motion for attorney's fees. Appellants have not provided this Court with a reporter's transcript for these three key hearings. During the September 9, 2015 hearing, the trial court

referred to two sets of her extensive handwritten notes to the attorneys made on the form of the proposed judgment.[9] The trial court's handwritten notes are not part of the record on appeal.[10]

There is no record of oral proceedings for the August 10, 2015 and September 9, 2015 hearing on the form of the judgment. Without that record of the August 10, 2015 proceedings, the Court is left to guess as to whether Appellants preserved the issues raised on appeal or if Appellants invited those errors by comments made to the trial court during the August 10 and September 9 hearings.

Similarly, on January 6, 2016, a hearing was held on the motion for attorney's fees. Appellants have argued that the trial court abused its discretion but they have provided no reporter's transcript. Nor do they explain the omission or how this Court can review the order in the absence of a record of oral proceedings.

Likewise, the City's memorandum of points and authorities in opposition to CEPC's motion for summary judgment is not included in the appellate record. The Court cannot confirm whether the arguments presented in the City's opening brief were preserved for appellate review without that memorandum.

Appellants do not explain these omissions in the record. The Court should conclude that the appellate record herein is inadequate and affirm judgment below on that basis.

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[9] Motion to Augment, p. 8, ¶ 3g.

[10] Although it is Appellants' burden to provide an adequate record on appeal, CEPC has submitted the trial court's handwritten notes on the two judgments as part of its motion to augment the record on appeal. (AUG 260-83). CEPC offers these documents not to cure Appellants' inadequate record but to provide a basis for CEPC's recitation of what occurred at the August 10, 2015 hearing.

III. The Order Granting Summary Judgment Should be Affirmed Because Most of the Facts Relied on by Appellants as to Seven Affirmative Defenses Were Not Included in the Separate Statement Below and Therefore Violate the "Golden Rule" of Summary Judgment

A party opposing summary judgment must file a separate statement that "responds to each of the material facts…" (Code Civ. Proc., § 437c, subd. (b)(3)).

> The separate statement is not merely a technical requirement, it is an indispensable part of the summary judgment or adjudication process.

(*Whitehead v. Habig* (2008) 163 Cal.App.4th 896, 902).

> The Homes Association argues in its opening brief that:
>
> A Summary Judgment in Favor of a Plaintiff … Must Be Reversed, Where There Are Triable Issues of Fact as to the Plaintiff's Claim, or as to Affirmative Defenses Such as Waiver, Estoppel, Lack of Standing, Merger of Interests, Failure to Join Indispensable Parties, Collateral Estoppel, and Res Judicata.

(HA AOB 70).

This is a correct statement of the law. But that statement does not apply here. The separate statement by the Homes Association does not identify any conflicting facts supporting the seven defenses of waiver, estoppel, standing, merger, indispensable parties, collateral estoppel, or res judicata.

A. Waiver

Waiver is an intentional relinquishment of a known right. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.*

(1994) 30 Cal.App.4th 54, 59). No fact is included in any separate statement identifying a known right or anyone's relinquishment of that right. Nor are any facts described anywhere in the opening brief describing how CEPC relinquished a known right.

B. Estoppel

Estoppel is a defense when a party has changed its position in reasonable reliance on another person's statement or conduct. (*Ibid.*) No fact is included in the separate statement demonstrating a change in position, reasonable reliance of the statement or conduct relied on. Nor does the opening brief describe how CEPC induced the sale of a public park.

C. Standing

CEPC's motion for summary judgment included a request for adjudication of issue number seven as to standing. (HA AA 78). The Homes Association does argue in some detail in its opening brief that CEPC lacks standing. (HA AOB 78-81). However, the Homes Association's argument on appeal does not refer to any of the facts in the separate statement.

The separate statement concerning this issue included material facts numbers 115 through 123 pertaining to Harbison's residency in the City, payment of taxes and Harbison's membership in CEPC. (HA AA 78-80). These facts were undisputed below. (HA AA 78-80). The separate statement also included fact number 124 which was a quote from the Homes Association By-Laws. (HA AA 80). The Homes Association disputed the accuracy of the quotation of the bylaws and

presented the correct quotation. (HA AA 80 ¶ 124). This was not a sufficient difference to raise a triable issue of fact. The Homes Association also added one additional fact regarding the fact that CEPC includes mostly members of the Homes Association and ten people who are not members of the Homes Association. (HA AA 85 ¶ 1). That additional fact is not sufficient to create a triable issue of fact. On Appeal, it is the Homes Association's burden to discuss material fact numbers 115 through 123 from the separate statement and demonstrate how the trial court erred in concluding that no triable issues of fact existed. The Homes Association does not mention or refer to these facts by number or in substance.

D. Merger of Interests

The Homes Association argues, without elaboration: "There are disputed factual issues regarding application of the merger doctrine." (HA AOB 118). Presumably, the Homes Association means that when the Panorama Parkland was deeded back to the Homes Association for a moment in time in 2012, the dominant estate interests held by the Homes Association and the estate of the Panorama Parkland somehow merged. Which facts in the separate statement were disputed as it relates to merger? The Homes Association does not identify such fact by reference to fact number, page number or line of the separate statements. The Homes Association does offer the following recitation of "facts" in support of its merger argument:

> Aware that the 1940 deed restrictions that had formerly existed as to Area A would extinguish by operation of law once the Homes Association owned Area A, the City imposed an open space easement upon Area A to ensure that no matter who held title to Area A, it would remain an

> open space zone in perpetuity. The Homes Association transferred Area A to the Luglianis subject to an open space easement in favor of the City. The language of 2012 deeds (sic) uniformly shows that both the City and the Homes Association had every intention of extinguishing the conditions and restrictions placed on Area A when the City quitclaimed Area A back to the Homes Association.

(HA AOB 121-122).

The foregoing "facts" were not presented to the trial court via separate statement and this Court should not consider them on appeal. No citation to the appellate record or separate statements are offered by the Homes Association for the foregoing assertion. The only evidence before the trial court was that the City reserved to itself utility easements but that the City and Luglianis were attempting to rezone the Panorama Parkland to residential zoning. (8CT 1824 ¶ 74). The February 2013 City staff report to the Planning Commission indicated the Luglianis' application was to rezone the area from "Open Space" to "Single Family Residential (R-1)." (9CT 2107).

E. Indispensable Parties

CEPC's motion for summary judgment included a request for summary adjudication of issue number eight as to indispensable parties. (HA AA 81). CEPC's separate statement included material fact numbers 125 through 137 pertaining to the parties before the court and the dismissal of the School District. (HA AA 81-84). These facts were not disputed in any meaningful way. Although the Homes Association argues that the triable issues existed below (HA AOB 70), the opening brief does not refer to material fact numbers 125 through 137 and does not explain how a triable issue of fact exists. The failure to include such

facts in the separate statement prevents the Homes Association from arguing on appeal that triable issues of fact exist.

F. Collateral Estoppel and Res Judicata

The Homes Association opening brief argues that collateral estoppel and res judicata require reversal. But Appellants have not identified which facts within CEPC's separate statement or which of the four facts added in the Homes Association's separate statement compel reversal.

In sum, the Homes Association's arguments about these seven affirmative defenses were not actually presented to the trial court in any meaningful way. Appellants have disregarded the separate statement – a mandatory tool for identifying the material facts and issues.

IV. The Order Granting Summary Judgment Should be Affirmed Because the Power of the Homes Association to Bind its Members to Settle the School District Litigation Does not Preclude Members from Litigating the Legality of One Term of the Settlement

The Homes Association argues that because the Homes Association had the power to settle earlier litigation with the School District, CEPC and Harbison were bound by that settlement and may not now challenge the legality of the settlement. (HA AOB 72). Per the Homes Association, "there are triable issues of fact as to whether the plaintiffs should be able to do an 'end run' around a binding settlement in a separate action." (HA AOB 72). As an initial procedural issue, the separate statement below contained no facts raising such triable issues. On this basis, the Court may affirm the judgment. Even if this Court

were to reach the merits, the Homes Association's analysis is, respectfully, incomplete.

CEPC does not dispute the plenary power of the Homes Association to settle litigation. The Homes Association unquestionably has such power. Nor does CEPC dispute that the policy in California favors settlement. (*Fisher v. Superior Court* (1980) 103 Cal.App.3d 434, 441). However, the Homes Association's power to settle is not absolute and a contract is not entitled to more deference simply because it is made in settlement of litigation.

Whether the Homes Association has the power to settle litigation is the start but not the end of the legal analysis. The correct analysis must include the following question: *is conveying title to parkland with deed restrictions a contract term that the Homes Association had the power to include in the settlement?* CEPC contends the answer is "no" as shown in more detail below. Moreover, if the Homes Association had settled the prior litigation with the School District using simply money or other lawful consideration, this lawsuit would not have been filed. CEPC challenges the legality of using deed-restricted parkland as a bargaining chip in the settlement and not the power of the Homes Association to settle.

A. The Homes Association's Authority to Settle Litigation was Limited by the Duty to Offer the School District Only Lawful Terms in the Settlement Agreement that did not Violate the Homes Association's Governing Documents and Deed Restrictions

A party may not agree to an *ultra vires* action to achieve the legitimate ends of litigation settlement. An illegal settlement term like the one here was discussed in *Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921, 932. In that case, a billboard company challenged a

city's settlement with two of the company's competitors to add digital displays to existing billboards. The trial court found the agreement was illegal because the city contracted away the city's police power as to fees and inspections. As is the case here, the settling parties in *Summit Media* argued that the settlement of the prior litigation could not be collaterally attacked in a subsequent action. The settling parties argued that the settlement in the first action was binding. Division 8 of this Court disagreed finding a distinction between challenging a settlement of litigation and challenging the legality of a term of the settlement. (*Summit Media LLC v. City of Los Angeles*, *supra*, 211 Cal.App.4th at 932). A contract term that violates the law may not be protected from judicial review simply because the contracting parties had the power and intent to settle litigation. (*Ibid.*)

Other cases have reached a similar result. Settlement agreements are not treated any differently than other contracts simply because they resolve litigation. (*Timney v. Lin* (2003) 106 Cal.App.4th 1121, 1126–27). "Settlement agreements are merely one type of contract and should be governed by the laws governing contracts in general." (*Nicholson v. Barab* (1991) 233 Cal.App.3d 1671, 1683). "[E]ven though there is a strong public policy favoring the settlement of litigation, this policy does not excuse a contractual clause that is otherwise illegal or unjust." (*Timney v. Lin*, *supra*, 106 Cal.App.4th at 1127).

In view of *Summit Media*, *Timney* and *Nicholson*, the Homes Association's argument that "Courts routinely uphold decisions of homeowner associations to forego litigation"[11] is an incomplete statement of the law. Of course, the Homes Association had the power

[11] HA AOB 74.

to settle litigation. But it could only agree to such settlement terms that did not violate the Homes Association's legal duties. The Homes Association could no more agree to sell public parkland to a private party than it could agree to the erection of a meth lab or an oil rig on the pristine, undeveloped parkland in Palos Verdes. The Homes Association cites *Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 Cal.App.4th 863, 867, *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 866, *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 864, 875 and *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.*, *supra*, 168 Cal.App.4th at 1126 for the proposition that Courts should defer to and uphold homes association decisions. (HA AOB 74). However, none of those cases involved a settlement that included a term that was alleged illegal. And while the Homes Association contends that the trial court "utterly ducked" this issue,[12] a less biased reading of the record below is that the trial court addressed this issue straight on when it observed during the summary judgment hearing that the public trust had been "sold out." (5/29/15 RT 21).

B. Civil Code Section 5980 Does not Immunize an Agreement Containing an Illegal Term from Judicial Review

The Homes Association invites this Court on an unnecessary trip down the rabbit hole by in one breath invoking Civil Code section 5980 and simultaneously conceding that section 5980 does not apply here.[13] Section 5980 is part of the Davis Stirling Act – a body of law governing homeowner's associations that own and manage common areas. The

[12] HA AOB 75.

[13] HA AOB 75.

Homes Association's opening brief concedes that because the Homes Association does not own or manage any common area, the Davis-Stirling Act does not apply to it or to this case. (HA AOB 82; 12CT 2853 ¶ 8 [Croft Declaration confirming that the Homes Association no longer owns property]). For this reason alone, the Court may properly disregard the Homes Association's entire Section 5980 analysis.

Even if it applied to the parties in this case, Section 5980 provides the Court no basis to reverse the judgment. Section 5980 merely authorizes a homeowner's association to litigate the enforcement of its governing documents without having to join every member of the association as parties. It confers standing to an organization for the benefit of all owners for the goal of protecting common property areas. Similarly, the case of *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, 428 confirms the right of a homeowner's association to litigate the merits of a dispute without joining all association members as parties.

Neither Section 5980 nor *Duffey* addresses the situation here where litigation is resolved by way of a settlement agreement that includes an illegal term. Conferring standing to a homeowner's association and removing the requirement of joining all home owners makes sense. Immunizing clearly illegal settlement terms from any form of judicial review does not.

In sum, if the prior litigation between the Homes Association and the School District had concluded without parkland changing hands, CEPC would have no legal basis to file this action and challenge the settlement. In this respect, Appellants correctly contend that the Homes Association should be able to litigate a matter only once without having to look over its proverbial shoulder for subsequent cases challenging a

settlement. This case is not about whether the prior action with the School District should have been settled. It is about whether the terms of that settlement are legal.

V. The Affirmative Defense of Standing was Properly Adjudicated in CEPC's Favor Because there were no Triable Issues of Material Fact Below Regarding CEPC's Standing

CEPC moved for summary adjudication as to Appellants' affirmative defense of standing because there were no triable issues of fact as to this defense. The separate statement included material fact numbers 115 through 124. (HA AA 78-80). Appellants did not offer any meaningful evidence to dispute those facts below. (HA AA 78-80). Instead, Appellants offered evidence that in addition to Harbison and members of the Homes Association, CEPC also included ten people who were not members of the Homes Association. (HA AA 85 ¶ 1). Appellants contend that although CEPC's 122 members[14] is comprised mostly of Homes Association members, because 10 of the 122 members are not, CEPC lacked standing to bring the claims below. (HA AOB 78).

To overcome the standing challenge at summary judgment, CEPC was only required to prove that at least one of its members had standing. (*Teamsters Local Union No. 117 v. Washington Dept. of Corrections* (9th Cir. 2015) 789 F.3d 979, 986; *National Federation of the Blind of California v. Uber Technologies, Inc.* (N.D. Cal. 2015) 103 F.Supp.3d 1073, 1078).

> The United States Supreme Court has repeatedly recognized that an association has standing to sue when "its members, *or any one of them,* are suffering immediate or threatened injury as a result of the challenged action of the

[14] The members of CEPC were identified in Exhibit "1" to the Second Amended Complaint. (5CT 1049).

> sort that would make out a justiciable case had the members themselves brought suit."

(Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc. (2005) 132 Cal.App.4th 666, 673 [emphasis in original citing *Hunt v. Washington State Apple Advertising Com'n* (1977) 432 U.S. 333, 342–43]).

CEPC established this by proof of Harbison's residency in the City and membership in the Homes Association. (8CT 1804 ¶¶ 18-22). This evidence was sufficient to shift the burden to Appellants.

Only members of the Homes Association may invoke its By-Laws and CC&R's. If CEPC consisted exclusively of non-members, CEPC would lack standing. But there is no authority cited by Appellants that the presence of 10 non-City residents among CEPC's 122 total members somehow destroys standing. There is no basis in the law for such a homogeneous membership requirement. Nor is there any good reason to create such a requirement now. Imagine in the 1950's if the NAACP was stripped of standing to bring civil rights claims because its membership did not exclusively consist of African Americans.

VI. The Order Granting Summary Judgment Should be Affirmed Because Appellants Presented no Genuine Triable Issues of Fact as to the Affirmative Defense of the Business Judgment Rule

The Business Judgment Rule is a rule of judicial deference developed to insulate the decisions of board of directors of corporations from judicial review. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 257). It applies to corporations if its board acts in good faith and in the best interests of the corporation. (*Ibid.*) The California Supreme Court held that the Business Judgment Rule is not

applicable to board decisions of homeowner's associations. (*Id.* at, 260). Instead, the Supreme Court adopted a far narrower rule holding that judicial deference should be applied to maintenance and repair decisions concerning an association's common areas. (*Id.* at p. 265; *Affan v. Portofino Cove Homeowners Ass'n* (2010) 189 Cal.App.4th 930, 940).

A. The Business Judgment Rule is a Fact-Intensive Affirmative Defense that was Waived Due to the Homeowners Association's Failure to Plead it in its Answer

The Business Judgment Rule is an affirmative defense that must be pled to avoid waiver. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n*, *supra*, 168 Cal.App.4th at 1123; *Affan v. Portofino Cove Homeowners Assn.*, *supra*, 189 Cal.App.4th at 940–941). It is a fact-intensive defense requiring that the Homes Association prove facts establishing its reasonable investigation, good faith in its decision making and a decision made in the best interests of the community association. (*Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n*, *supra*, 168 Cal.App.4th at 1123). The failure to plead the Business Judgment Rule in the answer is a waiver rendering all evidence and argument pertaining to the defense irrelevant. (*Carranza v. Noroian* (1966) 240 Cal.App.2d 481, 487–88; *California Academy of Sciences v. County of Fresno* (1987) 192 Cal.App.3d 1436, 1442 [holding that a "party who fails to plead affirmative defenses waives them."])

The summary judgment motion was filed in December 2014 and not ruled on until July 2015. At no point during the eight months that the summary judgment motion was pending, did the Homes Association seek leave to amend its answer to assert a new affirmative defense. Judgment was not entered until September 2015. At no point prior to

entry of judgment did the Homes Association seek leave to amend its answer to assert this affirmative defense. Following entry of judgment, the Homes Association did not file an affidavit of attorney fault or seek relief due to inadvertence, mistake or surprise. There were ample opportunities for the Homes Association to plead the Business Judgment Rule. The Homes Association's failure to avail itself of any one of those opportunities constitutes a waiver of the argument.

B. The Business Judgment Rule does not Apply to *Ultra Vires* Actions by a Homeowners Association

It is axiomatic that the Business Judgment Rule does not apply to *ultra vires* actions. Decisions by the Homes Association that violate its governing documents are not subject to deference. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.*, *supra*, 21 Cal.4th at 265). Invoking the Business Judgment Rule alone – without also explaining how the sale of deed-restricted parkland was consistent with the Homes Association's legal duties – is not a ground for reversal of the judgment below.

C. The Business Judgment Rule Applies only to Maintenance and Repair Decisions by Homeowners Association Boards Concerning Common Areas not to Extraordinary Decisions Such as the Sale of Public Parkland

The Business Judgment Rule only applies to homeowner's association's boards decisions about maintenance and repair of common areas. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.*, *supra*, 21 Cal.4th at 265; *Affan v. Portofino Cove Homeowners Ass'n*, *supra*, 189 Cal.App.4th at 940). The rule does not apply to decisions "involving an extraordinary situation … or one not pertaining to repair and maintenance actions…." (*Ritter & Ritter, Inc. v. Churchill Condominium*

Ass'n (2008) 166 Cal.App.4th 103, 122). The Homes Association does not own any common area. (HA AOB 82; 12CT 2853 ¶ 8). And the Homes Association's decision to approve the sale of public parkland to a private party for a private use is not subject to any deference because it does not pertain to maintenance or repairs of common areas.

The Homes Association relies on *Harvey v. Landing Homeowners Ass'n* (2008) 162 Cal.App.4th 809, 821 for the proposition that deference is due here. (HA AOB 88). But *Harvey* applied the rule of deference to a homeowner's association's decision to "maintain, control and manage the common areas…" (*Ibid.*) Unlike *Harvey*, in this dispute, there was no common area owned or managed by the Homes Association. The Homes Association deeded away all parkland in 1940. (HA AOB 29-30). After 1940, the Homes Association lost all ownership and control over parkland.[15] (12CT 2853 ¶ 8).

The Homes Association also looks to *Haley v. Casa Del Rey Homeowners Ass'n*, supra, 153 Cal.App.4th to apply a rule of deference. (HA AOB 84). But in *Haley*, the decision to apply a rule of deference was made to decisions that further the purposes of a common interest development and are consistent with the development's governing documents. (*Id.* at 875). Here, there was no evidence introduced in the separate statement below that the Homes Association is a "common interest development." Moreover, the evidence presented below was that

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[15] Arguably, in 2012, the Homes Association had common area for a moment in time when the deeds for the Panorama Parkland were recorded. The park was deeded first from the City to the Homes Association and moments later from the Homes Association to the Luglianis. But at the time the Homes Association board voted to approve the sale of the Park, May 2012, the Homes Association owned no common area and they own no common area today.

the Homes Association violated its governing documents in approving the sale of the Panorama Parkland. (8CT 1802 ¶ 12 ["it will be the duty of [the Homes Association] to maintain the parks…and to perpetuate the restrictions."] *Haley* is of no use to this Court given the evidence that the sale of parkland violated the Homes Association's governing documents.

D. The Business Judgment Rule is a Fact-Intensive Affirmative Defense that was Waived Due to the Homeowner's Association's Failure to Identify in the Separate Statement the Disputed Facts Demonstrating how and why the Defense Applies

In the context of a summary judgment motion, the trial court and appellate court's role as to the Business Judgment Rule is limited to identifying whether factual disputes exist as to the defendant's good faith and reasonableness of its investigation. (*Palm Springs Villas II Homeowners Association, Inc. v. Parth* (2016) 248 Cal.App.4th 268, 280). The Homes Association's separate statement did not identify any facts related to the Homes Association's good faith or the reasonableness of the Homes Association's investigation. The failure to include these facts in the separate statement is an independent basis to affirm the judgment below. (*Blackman v. Burrows* (1987) 193 Cal.App.3d 889, 895–96).

VII. The Order Granting Summary Judgment Should be Affirmed Because the Trial Court had the Discretion to Exclude those Portions of the Appellants' Declarations that were Opinions of Law

The Homes Association submitted the declaration of its general counsel, Sidney Croft, in opposition to the summary judgment motion. The declaration included statements like:

> Plaintiffs in this case, are essentially doing the one thing that the Association can never do, which is to focus on a single recorded document, and worse yet, focus on one or a few provisions in that one document, and then argue, based on those provisions, that there has somehow been a violation…

(12CT 2853 ¶ 10).

Such a statement is not helpful to a trial judge interpreting deeds. Croft also declared that based on his review of the deeds, the Homes Association had the exclusive authority to interpret the relevant restrictions and the Homes Association's interpretation was "conclusive." (12CT 2858 ¶ 21).

The Homes Association's opening brief does not identify which of the thirty-six paragraphs of Croft's declaration should have been considered by the trial court. Nor does the Homes Association tie the Croft declaration to any of the specific facts or separate legal issues set forth in the separate statement in support of CEPC's summary judgment. The facts set forth in the Croft declaration do not appear in the Homes Association's separate statement. The argument that the trial court abused its discretion as to the Croft declaration is incomplete without a better description of what information the trial court should have considered.

Croft, the general counsel for the Homes Association, parroted the legal arguments advanced by its litigation counsel. CEPC objected to portions of the Croft Declaration. (14CT 3355). The objections argued that the declaration was irrelevant (Evid. Code, § 210, 350-351) and improper expert opinion. (Evid. Code, § 801; *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) 221 Cal.App.4th 102, 122 [holding that "an expert may not testify about issues of law or draw legal

conclusions."])[16] Nor may an expert testify regarding the interpretation of contracts. (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395, 1401). An expert may not give opinions on matters that are within the province of the Court to decide. (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1083).

The Homes Association contends that the exclusion of the Croft declaration was an abuse of discretion. (HA AOB 89). Per the Homes Association, "it is an abuse of discretion to exclude a declaration which creates a triable issue of material fact." (HA AOB 90 [citing *Biles v. Exxon Mobil Corp.* (2004) 125 Cal.App.4th 1315, 1322]). The Homes Association has misread *Biles*.

In *Biles*, a trial court was reversed for excluding the declaration of a witness whose name had not been identified in response to interrogatories. The failure to identify a witness in response to an interrogatory was held by the Court of Appeal to be an insufficient basis to exclude the declaration. *Biles* has no application here. Portions of the Croft declaration were excluded not as a discovery sanction but because the declaration purported to instruct the trial court how to interpret legal instruments.

In the proceedings below and again on appeal, the Homes Association has never articulated why the trial court could not simply read and interpret deed restrictions and CC&R's herself without the Homes Association's general counsel whispering in her ear the proper

[16]The Homes Association also hired a title insurance attorney, Lore Hilburg, to parrot the legal arguments made by litigation counsel. (13CT 3091). Appellants apparently do not find that the exclusion of Hilburg's opinions was erroneous but do not explain why Croft's declaration was admissible but Hillburg's was inadmissible.

way to interpret legal instruments. While the Homes Association's desire to maximize its advocacy by complementing its legal memorandum with the Croft declaration is understandable, the trial court's tentative[17] decision not to consider a portion of the declaration is not reversible error.

VIII. The Order Granting Summary Judgment Should be Affirmed Because there were no Triable Issues of Fact that the Homes Association is Bound by the 1940's Deed Restrictions

The Homes Association argues for the first time on appeal that CEPC failed to meet its burden of proving that the Homes Association intended to be bound by deed restrictions limiting the use and ownership of parklands. (HA AOB 92-93). This argument was not raised below and neither CEPC nor the trial court had the opportunity to consider it.

A. Appellants may not Raise a New Argument on Appeal that the Homes Association is Not Bound by the 1940's Deed Restrictions

The Homes Association did not argue below that the Homes Association was not intended to be bound by the 1940's Deed restrictions. Nor are the facts necessary to fully develop this argument included in the separate statement. For example, statements made in newspapers and minutes of the board of directors for the Homes Association from that time period would have been relevant, material

[17] The minute order granting summary judgment was silent on evidentiary objections. It is unclear whether the declarations were even excluded.

evidence that CEPC could have introduced below had the Homes Association indicated that it intended to raise this issue.

> The appellate court can deem an argument raised in an appeal from a grant of summary judgment waived if it was not raised below and requires consideration of new factual questions.

(*Twenty-Nine Palms Enterprises Corp. v. Bardos* (2012) 210 Cal.App.4th 1435, 1450).

The Court should apply that rule here and not consider the Homes Association's new factual arguments pertaining to whether the Homes Association was intended to be bound by the 1940's deeds.

B. The Homes Association's CC&R's Evidence an Intent to Bind the Homeowners Association and Empower Each Member to Enforce CC&R's

Should the Court elect to decide this issue, the appellate record provides ample evidence to affirm the judgment. On July 5, 1923, the developer for Palos Verdes Estates recorded Declaration No. 1 establishing basic land use restrictions for real property within what would later be known as the City. (8CT 1801 ¶ 9). The land use restrictions recorded on July 5, 1923 were amended and supplemented several times after July 5, 1923. (8CT 1801 ¶ 10).

On July 26, 1926, Bank of America recorded Declaration No. 25 establishing the conditions, covenants and restrictions for Tract 8652.[18] (8CT 1802 ¶ 11). Declaration No. 25 describes the purpose of the Homes Association as follows:

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[18] Most of the Panorama Parkland falls within Tract No. 8652. (12CT 2857 ¶ 20).

> To carry on the common interest and look after the maintenance of all lots …[the] Association, has been incorporated …. *It will be the duty of this body to maintain the parks … and to perpetuate the restrictions.*

(8CT 1802 ¶ 12, emphasis added).

Declaration No. 25 also provides that:

- The land use restrictions "are for the benefit of each owner of land..." (8CT 1802 ¶ 13).
- A breach of the restrictions shall cause the property to revert to the Homes Association. (8CT 1803 ¶ 14).
- Any breach of the restrictions can be enjoined by the Homes Association or by any property owner in the Homes Association. (8CT 1803 ¶ 15).
- A breach of the restrictions shall constitute a nuisance which may be abated by either the Homes Association or any lot owner subject to the Homes Association's jurisdiction. (8CT 1803 ¶ 16).
- The provisions of the declaration "shall bind and inure to the benefit of and be enforceable by" the Homes Association or "by the owner or owners of any property in said tract...." (8CT 1803 ¶ 17).

The fact that each owner within the Homes Association, such as Harbison, have the independent right to enjoin breaches, abate nuisances and otherwise enforce the CC&R's is ample evidence that the Homes Association intended to bind itself to the CC&R's. Otherwise, there would have been no reason to empower lot owners to enforce the CC&R's.

C. The 1931 Deed from Bank of America to the Homes Association is Evidence of an Intent in 1931 to Bind the Homeowners Association to the Restrictions and to Empower Each Member to Enforce the Parkland Deed Restrictions

In 1931, Bank of America deeded the Panorama Parkland, and other parklands, to the Homes Association. (12CT 2857 ¶ 19 [Croft Declaration]). The deed was conditional:

> This conveyance is made and accepted and said realty is hereby granted, **subject to** taxes now a lien, **and upon and subject to the following provisions, conditions, restrictions and covenants**…

(12CT 2936, emphasis added).

The Homes Association's acceptance of the 1931 deed from Bank of America demonstrates an intent by the Homes Association to be bound by all of the restrictions contained in the 1931 deed. (*Marshall v. Standard Oil Co. of California* (1936) 17 Cal.App.2d 19, 29; *Aller v. Berkeley Hall School Foundation* (1940) 40 Cal.App.2d 31, 37).

Condition two of the 1931 deed included the condition that all the protective declarations enacted by the developer be accepted. (12CT 2936 ¶ 2). All such prior protective conditions "are hereby made a part of this conveyance, and expressly imposed upon said realty as fully and completely as if herein set forth in full." (12CT 2937 ¶ 2).

Condition three in the 1931 deed to the Homes Association was that the parkland was "to be used and administered forever for park and/or recreation purposes." (12CT 2857 ¶ 19 [Croft Declaration]; 12CT 2937 ¶ 3 [1931 Deed]).

Condition four of the 1931 deed forbid building structures on parkland. (12CT 2937 ¶ 3 [1931 Deed]).

Condition five of the 1931 deed forbids the Homes Association from ever selling or conveying the parkland except to a body that could hold and maintain the parkland as a public park. (12CT 2937 ¶ 5 [1931 Deed]).

The strongest evidence of the Homes Association's intent to be bound by the foregoing deed restrictions appears at the end of the 1931 deed:

> Provided, also, that **by the acceptance of this conveyance the Grantee agrees with the Grantor that the reservations, provisions, conditions, restrictions, liens, charges and covenants** set forth or mentioned are a part of the general plan for the improvement and development of the property described and/or referred to in said Declarations hereinbefore referred to, and **are for the benefit of all of said property** as described and/or referred to **and each owner of any land** therein, **and shall inure to and pass with said property and each and every parcel of land therein**, and **shall apply to and bind the respective successors in interest** of the parties hereto, and are, and each therefore, is imposed upon said realty as a servitude in favor of said property and each and every parcel of land therein as the dominant tenement or tenements.

(12CT 2938, emphasis added).

One can hardly think of any clearer statement of intent than the above statement that the Homes Association, by accepting the parkland, agreed the restrictions in the 1931 Deed concerning the use and ownership of parkland.

D. The "Land Exchange" Condition of the 1931 Deed from Bank of America to the Homes Association did not Authorize the 2012 Sale of the Panorama Parkland

The Homes Association argues that condition five of the 1931 Deed permitted the Homes Association to swap lands. (HA AOB 29; 12CT 2857 li. 1-3 [Croft Declaration]). CEPC disagrees.

Condition five of the 1931 deed permits a conveyance of parkland "in exchange for other lands." (12CT 2937). However, the exchange can only be done for purposes of creating streets or fixing boundaries and even then, an exchange can only be done if the grantor of the 1931 deed, Bank of America, or its successor in interest, receives lands in exchange for the land given. The full language of condition five of the 1931 Deed relied on by the Homes Association provides:

> That except as provided in paragraph 3 hereof, **no part of said realty shall be sold or conveyed** by Palos Verdes Homes Association except subject to the terms and conditions hereof; provided, however, that said realty, or any portion thereof, **may be conveyed** by said Palos Verdes Homes Association subject to the same conditions as herein contained with respect to the purpose for which said realty may be used, **to a PARK CONCESSION, or other body suitably constituted by law, to take, hold, maintain and regulate public parks**; provided, further, that **Palos Verdes Homes Association may dedicate to the public portions of said realty for parkway or street purposes and/or for the purpose of rectification of boundaries**, re-convey title to portions of said realty to Bank of America National Trust and Savings Association, or its successors in interest, **in exchange for other lands**.

(12CT 2937, emphasis added).

The real property conveyances below involving the Panorama Parkland were not for the purposes of making a street. Nor were the conveyances made to rectify a boundary. Nor did Bank of America or its

successors in interest receive land in exchange for the sale of the Panorama Parkland. The parkland owned by the School District that was the subject of other litigation – "Lots C and D" – resulting in a 2011 judgment provided for the School District's parkland to be deeded to the City. The City was not the grantor of the 1931 Deed and was not a successor in interest to the Grantor of the 1931 Deed. Hence, the exception in condition five of the 1931 Deed permitting an exchange for "other lands" does not authorize the sale of a public park to the Luglianis.

E. The Homes Association Intended to be Bound by the 1940's Deed Restrictions

The Homes Association argues "[g]laringly absent from the deed language is any indication the Homes Association intended to bind itself to this restriction…" (HA AOB 95). Respectfully, the face of the 1931 and 1940's Deeds contain express language. The Homes Association as the Grantee of the 1931 Deed and as the Grantor of the 1940's Deeds intended that the restrictions "shall apply to and bind the respective successors in interest of the parties hereto." (12CT 2938 [1931 deed]; 8CT 1940 [1940 deed]).

The 1940's deeds conveying the Panorama Parkland from the Homes Association to the City contain language demonstrating that the Homes Association intended to be bound by the deed restrictions.

The 1940's Deeds, like the 1931 Deed, were conditional grants of land. The 1940's deeds contained a number of conditions including condition two that incorporates by reference all of the governing documents dating back to 1923 establishing the Homes Association and the restrictive covenants. The documents described in (and incorporated

into) the 1940's Deeds includes the 1931 Deed. Condition two describes the following instrument as part of the historical restrictions to be incorporated into the 1940's Deeds: "…those certain conveyances executed by Bank of American National Trust and Savings Association to Grantor herein and recorded in Book 10494, page 360…" (8CT 1943). The Homes Association's title expert, Lore Hilburg, confirmed at the summary judgment stage below that the conveyance from Bank of America to the Homes Association and recorded at Book 10494, page 360 is the 1931 Deed. (13CT 3095 ¶ 11).

The foregoing establishes that the 1940's Deeds included and incorporated the 1931 Deed Restrictions. But what evidence was before the trial court that the Homes Association intended to be bound by any of the establishment documents dating back to 1923, the 1931 Deed restrictions or the 1940's Deeds restrictions?

The final paragraph of the 1940's Deeds state:

> **PROVIDED, ALSO, that by the acceptance of this conveyance the Grantee agrees with the Grantor** that the reservations, provisions, conditions, restrictions, liens, charges and covenants herein set forth or mentioned are a part of the general plan for the improvement and development of the property described and/or referred to in said Declarations of Restrictions, and are for the benefit of all of said property as described and/or referred to and each owner of any land therein, and shall inure to and pass with said property and each and very parcel of land therein, **and shall apply to and bind the respective successors in interest of the parties hereto, a**nd are, and each thereof is, imposed upon said realty as a servitude in favor of said property and each and every parcel of land therein as the dominant tenement or tenements."

(8CT 1940, emphasis added).

Below that statement is the signature of the Chairman of the Homes Association's board indicating that the Homes Association "expressly approves and consents to the execution of the foregoing deed." (8CT 1940).

If the Homes Association did not want to be bound by the 1931 and 1940 deed restrictions, it would have been a simple matter to have the deed bind the Grantee (i.e., the City) only. The 1940's Deeds could have concluded that only the Grantee and the Grantee's successors in interest would be bound. But that is not what the deeds actually say. The Homes Association's 1940's Deeds stated that all of the restrictions, including the restrictions going back to 1923, the 1931 Deed restrictions and the 1940's Deed restrictions "shall apply to and bind the respective successors in interest of the parties hereto." (8CT 1940). The expansive term "parties" includes both grantee (City) and grantor (Homes Association).

IX. The Order Granting Summary Judgment Should be Affirmed Because There were no Triable Issues of Fact Below that the Homes Association Violated the Restrictive Covenants

The Homes Association requests that the judgment be reversed because it was premised "on the faulty assumption that the Homes Association could not transfer" the Panorama Parkland to the Luglianis. (HA AOB 96). The Homes Association argues that Bank of America was impotent in 1931 to impose parkland restrictions. (HA AOB 101). The Homes Association also argues that a 1940 quitclaim deed released and extinguished the restrictions. (HA AOB 101). Both arguments fail for the reasons set forth below.

A. The Court Should not Entertain for the First Time on Appeal the New Argument About the Effectiveness of Bank of America's 1931 Deed and the Impact of the 1940's Quitclaim Deed

The Homes Association's arguments that Bank of America's 1931 Deed was ineffective and the 1940's quitclaim deed extinguished certain rights are new. These arguments were not raised below. The facts pertaining to these arguments were not presented in the separate statement below. For example, in its opening brief, the Homes Association argues that the 1931 Deed restrictions have no effect because Bank of America did not use the proper procedures to amend the governing documents. (HA AOB 99-100). The Homes Association also argues that a quitclaim deed executed in 1940 by Bank of America to the Homes Association released and extinguished all land use restrictions. (HA AOB 101).

The Homes Association's brief in opposition to the summary judgment motion below included a one paragraph recitation of the history of the deeds in Palos Verdes. (13CT 3068). The Homes Association did not argue in its papers put before the trial court that summary judgment should be denied because the Homes Association was not bound by the 1931 and 1940's deeds. To the contrary, the declaration of the Homes Association's attorney, Sid Croft, indicated that the 1940's deeds did restrict the Panorama Parkland. (12CT 2857-2858 ¶ 22 [describing the 1931 and 1940's deeds as "applicable."]) Also, the declaration of the Homes Association's title expert, Lore Hilburg, suggested that the 1931 deed was effective and created binding servitudes on the parkland. (13CT 3095-96 ¶¶ 11-12).

The Homes Association argues that "the successor-in-interest to the Commonwealth Trust Company, never recorded an amendment to Declaration No. 1 curtailing the Article II, section 4 rights and powers of the Homes Association before it deeded the parkland to the Association in 1931." (HA AOB 99). This is a fact that was not raised below and is not within the separate statement. The Homes Association argues for the first time on appeal that the bank's actions in 1931 were "void and of no effect because the bank failed to comply with the Article VI amendment procedures." (HA AOB 99). Again, this is a new fact not mentioned below and not included in any separate statement. The Homes Association should not be permitted to raise new facts and arguments to this Court which were not presented to the trial court.

B. The Homes Association is Collaterally Estopped from Arguing that the 1931 Deed is Defective Because the Issue has Been Litigated

In 2011, the Homes Association was in litigation with the School District regarding the enforceability of parkland deed restrictions. In the course of that litigation, the Homes Association successfully argued that the deed restrictions were valid and enforceable. In 2011, Judge Richard Fruin held that land restrictions in grant deeds from Bank of America to the Homes Association were enforceable. (14CT 3581). Judge Fruin held that the parkland could not be used for any purpose other than a school or park. (14CT 3581-82).

Under principles of collateral estoppel, the Homes Association may not litigate the issue a second time. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341). Collateral estoppel applies when the same issue was litigated in two actions. (*Ibid.*) The issue must have been actually and

necessarily litigated in the prior action. (*Ibid.*) The prior action must have reached a final conclusion and on the merits. (*Ibid.*) In addition, "the party against whom collateral estoppel is asserted was a party to the prior proceeding…" (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82).

In the prior litigation between the Homes Association and School District, the parties litigated whether identical deed restrictions were enforceable. (9CT 1997-2000; 12CT 2859 ¶ 26). The enforceability of the restrictions was actually and necessarily decided. (9CT 1999 ¶¶ 5-8). The prior action resulted in a final judgment on September 22, 2011, following a bench trial on the merits. (9CT 1997). The Homes Association was a party to the prior litigation with the School District. (9CT 1997-2000; 12CT 2859 ¶ 26). As a result, principles of collateral estoppel preclude the Homes Association from re-litigating the issue of the enforceability of the parkland covenants.

C. The Homes Association is Judicially Estopped from Arguing that the 1930 and 1940's deeds are not Binding Because it Successfully Argued the Opposite in the 2011 Litigation with the School District

In the 2011 litigation between the Homes Association and the School District, the Homes Association successfully argued that deed restrictions from the 1930's and 1940's were valid and enforceable. (15CT 3581-83). In 2011, Judge Richard Fruin held that land restrictions in grant deeds from Bank of America to the Homes Association were enforceable. (15CT 3581).

The Homes Association now wishes to make the opposite argument. This is the very type of "fast and loose" argument that the doctrine of judicial estoppel was designed to prevent. The doctrine's

purpose is to protect the integrity of the court system. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181-82). The doctrine applies where a party takes two different positions in judicial proceedings, the party was successful in the first action, the two positions are totally inconsistent and the first position was not taken as a result of ignorance, fraud or mistake. (*Id.* at 183).

All the foregoing elements are satisfied here. In the School District case, judgment was entered in the Homes Association's favor. (15CT 3581). The Homes Association argued that all of its CC&R's and deeds from the 1920's, 1930's and 1940's were valid and enforceable. (AUG 166).[19] In the School District case, the Homes Association argued that "[f]or over seventy years, everyone has consistently treated the restrictions as binding…" . (AUG 166). The Homes Association argued that parkland was protected by deed restrictions "to preserve the community's interests in these properties as neighborhood parks and playgrounds, even if they should not, at some future time, be desired for school or other purposes…" (AUG 170). In the School District lawsuit, the Homes Association argued that the restrictions were enforceable as equitable servitudes. (AUG 172). The Homes Association's arguments

[19] The Homes Association did not argue below that the 1930's and 1940's deeds were – from their inception in the 1930's and 1940's – never binding on the Homes Association. Had it made these arguments below, CEPC would have offered additional evidence to the trial court on this point. To the extent that the Court entertains this new argument on appeal (that the 1930's and 1940's deeds were not binding from their inception), CEPC offers the pleadings and briefs filed by the Homes Association in the School District litigation to meet this new argument on appeal. CEPC has filed a motion to augment the record on appeal with these court records previously filed by the Homes Association. This Court need only grant the motion and consider these materials if the Court considers the Homes Association's new arguments on appeal.

were all accepted by Judge Fruin who found that all of the historical CC&R's and deeds from the 1920's, 1930's and 1940's were valid and enforceable. (15CT 3581-82). The hard-fought arguments made by the Homes Association before Judge Fruin are totally inconsistent with the positions now advanced in this appeal. This Court should find that the doctrine of judicial estoppel applies to the argument that the 1930's and 1940's deeds were not binding.

D. The 1940 Quitclaim Deed did not Extinguish the Protective Covenants Because Property Owners Retained Rights that Survived the Quitclaim

The Homes Association argues that 1940 quitclaim deeds by Bank of America to the Homes Association extinguished the land use restrictions. (HA AOB 101). The Homes Association cites *Werner v. Graham* (1919) 181 Cal.174 for the proposition that "restrictive covenants contained in a deed were extinguished when the grantor executed a quitclaim deed." (HA AOB 101). But a release by the owner of only part of the dominant estate or estates will only effect a release of *that* owner's interest and will have no effect on the rights of other owners. (*Leggio v. Haggerty* (1965) 231 Cal.App.2d 873, 884). Here, the 1931 Deed created equitable servitudes and dominant tenements in favor of all property owners in the City – not just the Homes Association and not just Bank of America. Even if the bank could somehow terminate its own property rights via the 1940's quitclaim deed of parkland it certainly could not terminate the equitable servitudes held by the other property owners back in 1931. Bank of America had no power to give up the

rights of the dominant tenements held by individual property owners, which rights were established by the 1931 Deed.[20]

E. Even if the 1940 Quitclaim Deed Extinguished the Protective Covenants, the 1940 Deeds from the Homes Association to the City Incorporated and Reaffirmed the 1931 Deed Restrictions

Even if the 1940 Quitclaim Deed by Bank of America somehow terminated the 1931 deed restrictions, those deed restrictions were revived. The 1940 Deeds from the Homes Association to the City refer to, incorporate and reaffirm all prior land use restrictions including the 1931 deed. (8CT 1936 [deed as to tract 7540]; 8CT 1943 [deed as to tract 8652]). The prior land use restrictions recorded since the 1920's were, in the 1940 Deeds from the Homes Association to the City "made a part of this conveyance and expressly imposed upon said realty as fully and completely as if herein set forth in full." (8CT 1937, 1943).

The effect of the 1940 Quitclaim deed was a momentary release, at best, of the 1931 Deed Restrictions. After the 1940 quitclaim deed by Bank of America, the Homes Association was a party to later deeds in 1940 that restated and reaffirmed the continued validity of the deed restrictions.

[20] This argument in Part D is adapted in substantial part from the Homes Association's own trial brief in its successful litigation against the School District in defense of the enforceability of parkland covenants. (AUG 240).

F. The 1940 Quitclaim Deed did not Extinguish the Protective Covenants Because the Bank did not own all of the Dominant Estates

The Homes Association argues that 1940 quitclaim deeds by Bank of America to the Homes Association extinguished the land use restrictions.[21] (HA AOB 101). The Homes Association cites *Werner v. Graham*, *supra*, 181 Cal. for the proposition that "restrictive covenants contained in a deed were extinguished when the grantor executed a quitclaim deed." (HA AOB 101). Under *Werner*, the owner of the dominant lots could surrender servitudes. (HA AOB 101 citing *Werner* at 182). *Werner* does not apply here because at the moment Bank of America executed quitclaim deeds, the Bank was not the owner of the dominant servitudes. Thirteen years before the quitclaim deeds were executed, the 1925 use restrictions on those same lots had created dominant tenements in favor of all property owners in Palos Verdes Estates – not only the Homes Association and the bank. (8CT 1801-04 ¶¶ 9-17; 5CT 1066 [holding that 1925 Declaration shall benefit and be enforceable by the Bank, Homes Association and all property owners]). The effectiveness of the 1925 use restrictions were not disputed below. (14CT 3391-99 ¶¶ 9-17). *Werner* would only support the Homes Association's arguments here if Bank of America *and* all property owners in Palos Verdes Estates executed quitclaim deeds. That simply did not happen.

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[21] The Homes Association's appellate argument is directly opposite to what the Homes Association successfully argued previously in the School District litigation where the Homes Association argued to Judge Fruin: "BofA had no power to give up the rights of the dominant tenements, which rights were established by the 1925 Grant Deed." (AUG 240). Judicial estoppel applies, again.

Similarly, the Homes Association's reliance on *McCaffrey v. Preston* (1984) 154 Cal.App.3d 422[22] is misplaced because the Homes Association was not the sole and exclusive owner of the dominant equitable servitudes in the 1940's. The property owners of Palos Verdes Estates were and have been since the 1920's. (8CT 1801-04 ¶¶ 9-17; CT 1066 [holding that 1925 Declaration shall benefit and be enforceable by the Bank, Homes Association and all property owners]).

G. Independent of the Enforceability of the 1931 Deed Restrictions, the Public Trust Cases Preclude a City from Selling a Public Park to a Private Party for Private Uses

As an independent basis for affirming the judgment below, the prohibition against selling a public park to a private party for exclusive use is barred by common law. California has a long line of cases recognizing and enforcing a public trust when a public entity accepts a conditional gift of real property for a public purpose.

1. The *Hermosa Beach* Public Trust Case

In *City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295, 296, in 1907, the city was deeded beach property for recreational purposes and prohibiting traffic. Fifty years later, when the city erected a fence and constructed a road on the deeded property, a city resident sued the city to enforce the 1907 deed restriction. The city demurred on the ground that only the attorney general could enforce the land restrictions. The demurrer was overruled and the city sought writ relief. In denying writ relief, the court of appeal confirmed that when a municipality is deeded land for public purposes:

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[22] HA AOB 102.

> the municipality owes the public a duty to employ the property in a certain way and that the members of the public can proceed in equity to compel the municipality to live up to this part of its governmental obligations

(*City of Hermosa Beach v. Superior Court*, *supra*, 231 Cal.App.2d at pp. 298-99).

The court went on to hold that once a city accepts a deed with restricted public purposes, the city must continue to use that land for public purposes. (*Id.* at 300). The city, in such a circumstance "is without the power of a municipality to divert or withdraw the land from use for park purposes." (*Ibid.*) A city that attempts to use a property in violation of the deed restrictions "would be an ultra vires act." (*Ibid.*; see also *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 104). Notably, the *City of Hermosa Beach* case specifically approved the procedure of asserting a claim asserting *ultra vires* acts under Code of Civil Procedure, section 526a to protect parkland. (*City of Hermosa Beach v. Superior Cour*t, *supra*, 231 Cal.App.2d, at p. 300).

2. The *County of Solano* Public Trust Case

The *City of Hermosa Beach* case is not an aberration:

California courts have been loath to cast aside use restrictions contained in deeds:

> "'It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose. (*Roberts v. City of Palos Verdes Estates* [(1949)] 93 Cal.App.2d 545, 547 [209 P.2d 7]; *Griffith v. Department of Public Works* [(1956)] 141 Cal.App.2d 376, 380 [296 P.2d 838].)' " (*Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 103, 132

Carper. 835 [*Big Sur Properties*]; see also *Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 Cal.App.3d 1003, 1012, 263 Cal.Rptr. 896 [*Welwood Murray*]).

Likewise, California courts have often held that:

"'[w]here a tract of land is donated to a city with a restriction upon its use—as, for instance, when it is donated or dedicated solely for a park—the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant.' (Citations.) Further, where, as here, property is acquired by a public entity through private dedication, the deed is strictly construed. (Citations.) As several California courts have observed: "Courts have guarded zealously the restrictive covenants in donations of property for public use...." (Citations.) In fact, where property has been donated for public use, some courts have concluded such property "is held upon what is loosely referred to as a 'public trust,' and any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto is an ultra vires act. (Citations.)

(*County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, 575-76).

3. The *Palm Springs Welwood Murray Library* Public Trust Case

A similar result was reached in *Save the Welwood Murray Memorial Library Committee v. City Council of the City of Palm Spring*, *supra*, 215 Cal.App.3d ("*Welwood Murray*.") In *Welwood Murray*, a dispute existed regarding the use of library property in Palm Springs. The City of Palm Springs obtained the property by two grant deeds in 1938. The first deed conveyed the property on the condition that Palm Springs or the Library association "continue and forever maintain the Palm Springs Free Public Library above mentioned in and on buildings which are now or may be

hereafter placed on the property hereby conveyed." (*Welwood Murray*, at 1006). The deed went on to state that in the event the condition was violated "this deed and the conveyance thereby made shall be void and no effect and all title to the property and rights hereby conveyed shall instantly revert to the grantor…" (*Id.*, at 1006-07). The second deed conveyed property to Palm Springs on the condition that a free public library be established in buildings to be erected on the property. (*Id.* at 1007). In the event the condition was breached, the conveyance was to be "void and of no effect" and title to the property "shall instantly revert to the grantor…." (*Ibid.*).

Thereafter, a building was constructed and a library was maintained for decades. In 1986, Palm Springs entered into a series of development agreements whereby a local restaurant was to be relocated to the library. A local citizens group filed a petition for writ of mandate to challenge the agreements on the grounds that the proposed non-library use of the grounds violated the deed restrictions. The trial court granted a petition for writ of mandate and issued injunctive relief enjoining Palm Springs from conveying title or taking any acts intending to use the property for non-library uses.

Palm Springs challenged the judgment on appeal arguing that the proposed use of the property was consistent with the deeds, that the trial court interfered with the government's discretion and the trial court abused its discretion. The Court of Appeal rejected each of these arguments. The *Welwood Murray* court began its analysis by examining *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d 545 ("R*oberts*.") In *Roberts*, the Court of Appeal held that "where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be

used for another and different purpose." (*Roberts*, at 547).

> Courts have guarded zealously the restrictive covenants in donations of property for public use as the foregoing cited decisions will reveal. Such an effort on the part of a municipality if successful may be but the opening wedge and, as stated in *Kelly v. Town of Hayward*, *supra*, [(1923) 192 Cal. 242, 219 P. 749], 'some future board might claim that under their discretion a corporation yard and rock- pile for the employment of prisoners, and other very useful adjuncts to the administration of the economic affairs of the town, might be located thereupon, until the entire space was fully so occupied.'
>
> What a city council or board of trustees would like to do under whatever guise it may be proposed is not the test as to the validity of the proposal. The terms of the deed alone are controlling.
>
> Unless the buildings directly contribute to the use and enjoyment of the property in question for park purposes, there exists a violation of the restrictions.

(*Id.*, at p. 548).

The *Welwood Murray* court, relying on *Roberts*, held that to be valid, a proposed use of property must directly contribute to the use of the enjoyment of the property for library purpose. The Court of Appeal held that the proposed use as a dining area did not contribute to the library and in fact was "antithetical" to library purposes to the extent parts of the building used for book storage would be destroyed. (*Id.* 1015). Importantly, the Court of Appeal also held that even permitting dining activity by way of a mere easement (and not a conveyance of title) would "clearly" violate the 1938 deed restrictions requiring the City to "forever maintain" the library. (*Id.,* at 1016).

The facts of the *Welwood Murray* case are directly on point here. One need only substitute the word "park" for "library" and then apply the holding here. Notably, the City of Palm Springs argued that the injunction precluding it from undertaking any acts done primarily for a non-library purpose unduly invaded the discretionary power of a city to

decide the "best use" of the property. (*Ibid.)* The Court of Appeal rejected this argument and upheld the breadth of the injunction because the City retained the full discretion to make decisions to implement a use of the property so long as that use was necessary for library purposes. (*Ibid.*) Under *Welwood Murray* and *Roberts*, the terms of the 1940 Deeds "alone are controlling." The physical alterations to the Panorama Parkland contemplated by the September 2012 deeds violate the condition that the property be used "forever" for the public for park purposes.

The Homes Association argues that the foregoing public trust cases do not apply here "because the cities retained title to the deed restricted property and intended to use it or allow it to be used for another purpose, which the courts would not allow." (HA AOB 102). However, *Wellwood Murrary* does not fit that fact pattern. In *Wellwood Murray,* the City of Palms Springs planned to sell the library property to a real estate developer. (*Wellwood Murray,* at 1007). It was Palm Springs' agreement to sell the library property that prompted the lawsuit and was ultimately struck down, in addition to a later agreement providing the developer an easement.

4. Appellants' Arguments that the City Merely Allowed the Panorama Parkland to Revert to the Homes Association is a Distinction Without Significance of the Public Trust cases

The City's opening brief does not contain any meaningful discussion of *Welwood Murray*. In a drive-by comment in a footnote, the City attempts to distinguish *Welwood Murray* by arguing that the City of Palm Springs was attempting to use property for a non-library purpose

by allowing a third-party developer to commercially develop the property while the City in this case was merely allowing the Panorama Parkland to revert to the Homes Association. (City AOB 45-46, fn 7). The Homes Association makes a similar argument: "the City never attempted to use Area A or sell Area A to the Luglianis." (HA AOB 104).

That argument might have credence if the only document in existence was the 2012 deed conveying the Panorama Parkland from the City to the Homes Association. However, there are other documents – including the 2012 deed conveying the Panorama Parkland from the Homes Association to the Luglianis' trust,[23] MOU,[24] the Declaration of Sid Croft[25] and the City's staff report[26] all demonstrating that the City was a willing participant in the larger transaction among the Homes Association, the City and the Luglianis, authorizing the sale of a public park to a private party (the Luglianis) for their exclusive use. The City accepted $100,000 from the Luglianis as the pay off. (9CT 2012 ¶ C). The suggestion that all the City did was to allow property to revert to the Homes Association is not an intellectually honest argument.

The Public Trust cases confirm that a city that accepts deeds with land use restrictions remains bound by those land restrictions. Because there were no triable issues of fact raised below concerning the City's acceptance of the deed restrictions and the violation of those conditions, the judgment below may be independently affirmed on the basis of these

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[23] 9CT 1977.

[24] 9CT 2004.

[25] 12CT 2851.

[26] 9CT 2107.

Public Trust cases.

X. The Order Granting Summary Judgment Should be Affirmed Because the Trial Court had the Discretion to Apply the Doctrine of Judicial Estoppel

In Part IX, above, CEPC argues that the doctrine of judicial estoppel applies to a new argument raised by the Homes Association for the first time on appeal. In a similar but different argument, the judicial estoppel doctrine also applies to a justification made by the trial court for granting summary judgment. In granting the motion for summary judgment, the trial court found that an additional independent reason for granting the motion was the inconsistent positions taken by the Homes Association in earlier litigation with the School District. (15CT 3550).

The trial court noted this inconsistency between the Homes Association's current arguments and the arguments it advanced against the School District. (15CT 3550). The trial court was "astonished" that Judge Fruin had previously ruled on these issues and that the Homes Association was now making one argument in this case that was the opposite of the School District case. (15CT 3550). The trial court found that the doctrine of judicial estoppel "prohibits such reverse and inconsistent contentions..." (15CT 3550). On appeal, the Homes Association now argues that the trial court erred in applying the judicial estoppel doctrine.

A. The Doctrine of Judicial Estoppel is not a Legal Theory that Must be Pled by a Party Before a Court may Apply it

The Homes Association contends that the trial court erred in concluding that judicial estoppel prevents the Homes Association from

making arguments that contradict the arguments made in the prior litigation between the Homes Association and the School District. (HA AOB 105). Appellants argue that the issue was never raised in the papers and the trial court applied the doctrine without notice. (HA AOB 105).

The doctrine of judicial estoppel was raised below. In opposition to the demurrer by Appellants, CEPC argued:

> The District and Association may not now re-litigate the question. As a matter of judicial estoppel, this Court should not countenance the Association seeking to enforce the parklands restrictions for purposes of earlier litigation and now taking the exact opposite position on the identical issue.

(2CT 338).

To suggest that this argument was not previously raised is not accurate. Moreover, there is no known authority requiring that the doctrine of judicial estoppel be pled by a party. It is an equitable doctrine invoked at the discretion of the trial court to maintain the integrity of the judicial system. (*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422). As an equitable doctrine invoked by the courts to protect the courts, it is not required that a party plead the doctrine.

B. The Doctrine of Judicial Estoppel Applies Because the Homes Association Successfully Took One Position Regarding the Enforceability of the Deeds in a Prior Lawsuit with the School District and Took the Opposite Position Here

In 2010 and 2011, the Homes Association litigated a case with the School District over the enforceability of deed restrictions limiting the use and ownership of parkland. (9CT 2005). The School District argued that the deed restrictions were no longer enforceable. (9CT 2005). The

Homes Association argued that the deed restrictions were enforceable. (9CT 2006). The School District argued that a quitclaim deed by Bank of America to the Homes Association eliminated earlier deed restrictions. The Homes Association replied: "BofA had no power to give up the rights of the dominant tenements…" (AUG 240.) The Homes Association further argued that the Bank of America's release of "only part of the dominant estate" does not affect the rights of the other owners – the Homes Association property owners. (AUG 240). The bank could only extinguish the bank's own interest – not the interest held by members of the Homes Association. (AUG 240). The Homes Association concluded "use restrictions were given for the benefit of all lot owners within Palos Verdes Estates, such that BofA's quitclaim deed had no ability to remove those restrictions." (AUG 240). The Homes Association made the foregoing arguments in 2011.

The Homes Association now adopts in 2017 the very same arguments that the School District unsuccessfully made. The Homes Association now argues: "the Bank of America eventually quitclaimed all of the parkland to the Homes Association in 1940. The quitclaim operated as a release and extinguished the restrictions." (HA AOB 101).

This Court should not permit the Homes Association to change arguments to suit its fancy. Allowing the Homes Association to argue that the quitclaim was a release sullies the judicial system and it should not be permitted. The trial court's invocation of the judicial estoppel doctrine was proper and should be affirmed.

XI. The Order Granting Summary Judgment Should be Affirmed Because the Trial Court had the Discretion to Fashion Appropriate Injunctive Relief

The trial court granted the motion for summary judgment in June 2015. (15CT 3550). Thereafter, extensive proceedings were held on the form of the judgment, including the scope of the permanent injunction. Assuming that the Court reaches the merits of these arguments, the trial court did not abuse its discretion in issuing injunctive relief. The trial court's grant of a permanent injunction "rests within the trial court's sound discretion and will not be disturbed on appeal absent a showing of a clear abuse of discretion." (*Robinson v. U–Haul Company of California* (2016) 4 Cal.App.5th 304, 314).

A. Appellants May not Raise the Overbreadth Argument for the First Time on Appeal

Appellants argue that the trial court lacked jurisdiction to issue relief as to any property other than the Panorama Parkland. (HA AOB 108; City AOB 51). This issue was not raised below. A party may not urge reversal on appeal a point not raised at the trial level. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846). The purpose of this requirement is to encourage parties to bring errors to the attention of the trial court so that they may be corrected or avoided. (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264).

The trial court's June 29, 2015 ruling on summary judgment announced the trial court's intent to order permanent injunctive relief as to all properties in Palos Verdes Estates, not just the Panorama Parkland. (15CT 3549, li. 17-21). The trial court announced that it was doing so "pursuant to the prayer [in CEPC's complaint] for such

additional relief as the court deems proper and just…" (15CT 3549, li. 17-21). None of the Appellants ever commented on or objected to this aspect of the trial court's ruling.

CEPC proposed a form of judgment as directed by the trial court. An additional hearing was held on August 10, 2015. A further proposed judgment was served by CEPC and Appellants all objected. (15CT 3611). The proposed judgment contained provisions affecting all parkland in the City. (15CT 3630 ¶¶ m, n). Appellants did not object to the breadth of the judgment or advise the trial court of their objections. A further hearing was held on September 9, 2015 on the form of the judgment. At no point did Appellants raise the issue of overbreadth or jurisdiction. If Appellants wanted to argue that the form of the proposed injunction was too broad, it should have raised the issue to the trial court first.

B. The Trial Court had Discretion to Issue Such Other and Further Relief as the Trial Court Deemed Just and Proper

One of the causes of action by CEPC was for declaratory relief. (5CT 1037). CEPC sought declaratory relief regarding the enforceability of the 1940 deeds. (5CT 1037-38). CEPC sought declaratory relief that the City and Homes Association have the right and duty to enforce land use restrictions. (5CT 1038 ¶ 36(d).) CEPC asked for declaratory and injunctive relief. (5CT 1042-43). CEPC also asked for "such other and further relief as the Court may deem just and proper." (5CT 1043). In a declaratory relief action, the "proper function of the trial court is to make a full and complete declaration, disposing of all questions of rights or other legal relations involved in the controversy." (*Reinsch v. City of Los Angeles* (1966) 243 Cal.App.2d 737, 748). In exercising its discretion in

issuing declaratory relief, an injunction may also issue. (*Staley v. Board of Medical Examiners* (1952) 109 Cal.App.2d 1, 6).

C. The City's Overbreadth Argument – that CEPC has Authority over City's Management of Parkland – is a Misreading of the Judgment

The City argues that the judgment gives CEPC a "roving commission over the City's management of parkland." (City AOB 24). The City argues that CEPC can whimsically appear on 24 hours' notice to force the City to "immediately" remove any encroachment from parkland. (City AOB 54). The City's argument is hyperbole and rests on a misreading of the judgment. The judgment does require that the Homes Association restore the Panorama Parkland to the condition it was in before the Luglianis encroached on it. (15CT 3653). The judgment also states that neither the Homes Association nor the City are to allow structures, vegetation or objects to be maintained at the Panorama Parkland, if that would violate the Homes Association's CC&R's or the 1940's deed restrictions. (15CT 3653-54 ¶ (f)(4)). The judgment also states that the trial court retains jurisdiction to enforce the judgment "and any party may bring an ex parte to the Court if necessary." (15CT 3656 ¶7).

Nowhere in the judgment is CEPC given the right to seek "immediate" removal of parkland encroachments on an arbitrary basis. While the City complains CEPC has "no rules" to govern the enforcement of the judgment below, that again, is a misreading of the judgment. (City AOB 54). The judgment only enjoins those parkland encroachments that violate the Homes Association's CC&R's or the 1940's deeds. (15CT 3653-54). Although the City argues that parkland

management has been "handed over" to CEPC, the judgment makes no such delegation. The City and Homes Association remain the entities who enforce deed restrictions. To be sure, if the City or Homes Association ever sell a public park again, the injunction would be violated and CEPC could seek enforcement. Such a scenario is not likely in light of the public outcry over the sale of the Panorama Parkland.

The City has offered a torturted reading of the "ex parte" provision of the injunction. Caselaw and statute provide that ex parte proceedings may only be brought to avoid irreparable injury and in cases of true emergencies. There is nothing in the judgment that disrupts those principles. CEPC can no more bring an ex parte proceeding to immediately remove a parkland encroachment than the City can bring an ex parte proceeding against CEPC absent good cause and a true emergency.

D. The City's Overbreadth Argument – that the City may not Legislatively Fix the Sale to the Luglianis – is Without Merit

Before this action was filed, the City Planning Commission denied the Luglianis' application to re-zone the Panorama Parkland from Open Space to Residential (R-1). (9CT 2113). CEPC was concerned that following granting of summary judgment in this matter, that the City might proceed with its pre-litigaiton plan to issue legislation declaring the Panorama Parkland a special zone for the purpose of allowing the Luglianis to have de facto exclusive use of a public park. The judgment in this matter forecloses such a solution by the City. It states:

> The court hereby enjoins the City from creating an "open space, privately owned" zoning district or from making any other order, ordinance, promulgation, or other action

> which has the purpose or effect of removing the Property from use for park and/or recreational purposes…"

(15CT 3656, 4).

The City argues that the injunction violates the doctrine of separation of powers. The City would be correct – if the City had the absolute power to sell parkland as it contends in this appeal. But the trial court concluded that the City has no such power and the scope of that power is at issue on appeal. If this Court affirms the trial court's judgment that the City engaged in an *ultra vires* act by removing the Panorama Parkland from public use, then it is beyond cavil that the trial court had the power to enjoin the City from taking legislative actions to effect an illegal purpose.

The City contends that Code of Civil Procedure, section 526, subdivision (b)(7) barred the injunction against the City. (City AOB 55). That statute forbid injunctions against municipal corporation's legislative acts. But the City neglects to brief this Court on important cases limiting this prohibition. A city may be enjoined where the legislative act is shown to be invalid. (*Agnew v. City of Los Angeles* (1961) 190 Cal.App.2d 820, 828; *Ebel v. City of Garden Grove* (1981) 120 Cal.App.3d 399, 410; *Rico v. Snider* (C.C.N.D. Cal. 1905) 134 F. 953, 958).

E. Even if the Injunction Fashioned by the Trial Court was Overbroad, that Error Does not Require Reversal of the Summary Judgment Order

If the trial court's injunction was overly broad, the appropriate remedy is to remand the matter to fashion a narrower injunction. There is no reason that the scope of the injunction should have any bearing on whether the summary judgment motion should have been granted. The Homes Association's argument that an over broad injunction merits

reversal of the summary judgment order rather than simply modification of the judgment should be rejected.

XII. The Order Granting Summary Judgment Should be Affirmed Because there were no Triable Issues of Fact Establishing that the School District was an Indispensable Party

A. There are no Facts or Supporting Evidence in the Separate Statement Demonstrating a Triable Issue of Fact as to the Affirmative Defense of Indispensable Party

In the separate statement below, CEPC moved for summary judgment because there were no triable issues of fact as to the affirmative defense of non-joinder. (15CT 3495-3500 ¶¶ 125-137). The separate statement included a reference to the trial court's finding that resolution of CEPC's claims "do not depend, in this Court's view, on the MOU and who were or were not parties to it." (15CT 3496-97 ¶ 129). The separate statement included the fact that CEPC dismissed the School District from this action without prejudice. (15CT 3498 ¶ 131). CEPC also provided a stipulation to all parties that CEPC would stipulate to leave for any party to file a cross-complaint against the School District to bring the School District back into the case. (15CT 3499 ¶ 134). None of the Appellants accepted CEPC's stipulation to file a cross-complaint against the School District. (15CT 3499-500 ¶¶ 135-137).

Appellants did not dispute any of the foregoing facts with evidence. Nor did they add to their separate statement any facts demonstrating that the School District was an indispensable party. (15CT 3495-3500). On appeal, the Homes Association describes four factors of Code of Civil Procedure, section 389. (HA AOB 114-117). None of the facts set forth in the indispensability analysis appears in the

separate statement in opposition to summary judgment. For example, the Homes Association argues:

> the Luglianis might want the return of the substantial sums of money paid to other parties to the Memorandum of Understanding. This could result in the unwinding of the Memorandum of Understanding, including the School District seeking to cancel its conveyance of Lots C and D to the Homes Association, the status of the remaining eleven lots owned by the School District remaining uncertain, and the School District continuing to exempt itself from City zoning with respect to the football field, a matter which was impacting all of the City's residents.

(HA AOB 115).

The facts undergirding all of these speculative arguments are absent from the separate statement. Under the "Golden Rule of Summary Judgment," this Court may properly disregard these facts. (*O'Byrne v. Santa Monica-UCLA Medical Center*, *supra*, 94 Cal.App.4th at 800 fn. 1). To the extent the Court accepts the Homeowners Association's invitation to speculate, one could just as equally speculate that the Luglianis would never seek to recover it's $1.5 million "donation" to the School District, given the tax consequence of such a request. Moreover, 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. (5CT 1182 ¶ B).

B. The School District was not a Party to Either of the 2012 Illegal Deeds and is Therefore not an Indispensable Party

The pleadings below sought to void the 2012 deeds of the Panorama Parkland. The School District was not a party to those deeds.

It did not grant and it did not receive that parkland. The $1.5 million "donation" by the Luglianis to the School District was intentionally structured such that the Luglianis are not parties to the MOU and the $1.5 million "donation" is not a contract term of the MOU. To argue here that the Luglianis might seek a refund of the $1.5 million "donation" is speculative and runs counter to the definition of a donation.

C. The School District was Dismissed Based on the Trial Court's Directions and None of the Appellants Filed a Cross-Complaint against the School District, Objected to the Dismissal or Moved to Dismiss the Action

The Homes Association, the Luglianis and the City all had the opportunity to file a cross-complaint against the School District for indemnity or other relief in the event that CEPC prevailed in its case. None of the parties availed themselves of that opportunity. The fact that the Luglianis, the City and Homes Association did not actually file a cross-complaint is a compelling argument that they did not view the School District as a necessary party.

D. Even if the School District was Indispensable that does not Provide a Basis to Reverse the Judgment, it Merely Provides that the School District is not Bound by the Judgment

If the Court concludes that the School District was a necessary party, that conclusion does not compel reversal of the judgment. That conclusion would only mean that the School District is not bound by the determination in this action.

> Failure to join an 'indispensable' party is not 'a jurisdictional defect' in the fundamental sense; even in the absence of an 'indispensable' party, the court still has the power to render a decision as to the parties before it which will stand. It 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. (Citation).

(*Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 693).

The absence of the School District did not deprive the trial court of the power to proceed against Appellants. (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 364).

XIII. The Order Granting Summary Judgment Should be Affirmed Because the Conservation Easement has Nothing to do with the Deed Restrictions

Appellants raise for the first time on appeal the argument that a conservation easement imposed in 2012 on the Panorama Parkland foreclosed the trial court from granting summary judgment. (HA AOB 123; City AOB 26). Appellants should not be permitted to raise this issue for the first time on appeal. The facts pertaining to the conservation easement argument are not within the separate statements below. On the merits, the argument does not compel reversal. The 1940's deed restrictions together with the Homes Association CC&R's provide the legal right of every resident of Palos Verdes Estates to bring an action to enjoin encroachments of parkland. This is an important right especially during those times when the City Council and Homes Association Board of Directors lack the will, funds or both to enforce parkland covenants.

There is no private right of enforcement of a conservation easement. Nor is there any guarantee that a future City Council, looking to fund a budget shortfall, would not simply revoke the easement and sell parkland. For this reason, the conservation easement is not the functional equivalent of the deed restrictions and does not require reversal of judgment below.

XIV. The Order Granting Summary Judgment as to the City Should be Affirmed Because the 2012 Deeds Selling Parkland to the Luglianis were *Ultra Vires*

The pleadings below raised unique arguments by and against the City not addressed in the Homes Association's brief. One such argument was whether the City's participation in the sale of a public park to a private resident in exchange for $100,000 was an *ultra vires* act. The City contends that it had the unfettered power to convey a public park to whomever it wants and real property conveyances by the City can never be *ultra vires*. (City AOB 39-40).

CEPC agrees that property conveyances are within a city's normal police power. That power is tempered by the Public Trust cases that impose a duty on cities that accept deed-restricted property for public purposes. Under those cases, once the City accepted the Panorama Parkland, its options were to either keep it or convey it to an entity that would operate it as a public park.

The City suggests that it operated under the "shadow" of the Homes Association to demand reversion of the Panorama Parkland if the City ever misused the property. (City AOB 43). While that is an interesting argument, no evidence was presented at the trial court level that the Homes Association ever accused the City of misusing the

property or that the Homes Association made an actual demand on the City to revert title to the Panorama Parkland. The only evidence presented to the trial court was that the City and Homes Association schemed to take $500,000 for the sale of the Panorama Parkland for the Luglianis' private use. Put differently, there was no aspect of the real estate transactions below that would have permitted the Homes Association to simply receive the Panorama Parkland as a reversionary interest and retain it. The Homes Association was contractually bound to convey that Panorama Parkland immediately to the Luglianis. To suggest that all the City did was allow reversion to occur is disingenuous.

XV. The Order Denying the City's Cross-Motion for Summary Judgment Should be Affirmed Because on the Merits the City is Wrong and the City has Failed to Meaningfully Brief the Issues

The City's opening brief contains a few references to its cross-motion for summary judgment[27] and requests that in addition to reversal, that this Court direct the trial court to grant the City's cross-motion and summarily enter judgment against CEPC on remand. (City AOB 39-40, 63). This argument was woefully undeveloped on appeal. CEPC opposed the City's cross-summary judgment motion below on six substantive grounds. (12CT 2833-34). None of those grounds are discussed, developed or argued by the City in the context of the cross-motion.

[27] There is no such thing in California as a "cross-motion" for summary judgment. Nonetheless, because the parties and trial court referred to the City's motion as a "cross-motion," CEPC uses that naming convention here.

XVI. The Order Granting Summary Judgment as to the City Should be Affirmed Because the Trial Court did not "Reform" any Instruments

CEPC did not seek and the trial court did not award reformation of the MOU as a remedy in this case. Yet, the City argues on appeal that the trial court erred by granting such reformation. (City AOB 17, 56). It is not at all clear where or if the City preserved this issue for argument on appeal. However, the gist of the City's argument is that the economics of the MOU were altered when the trial court confirmed what most citizens already knew: a City cannot sell a public park to a private party. What the City fails to appreciate is that neither the pleadings nor the judgment sought any relief as to the MOU. CEPC sought declaratory relief that the two 2012 deeds for the Panorama Parkland were illegal and void and that the City and Homes Association violated their duties to enforce parkland covenants.

If the economics of the MOU were altered by the trial court's confirmation that the sale was illegal, there are remedies available to the parties to the MOU. The Luglianis may sue the City and Homes Association for representing and warranting in the MOU that the City and Homes Association could lawfully sell a public park. The Luglianis, the City and the Homes Association could file a lawsuit for legal malpractice against the lawyers that advised them that it was appropriate to enter into a real estate transaction that most citizens would recognize was facially illegal. Or, the parties to the MOU could simply renegotiate a new deal that includes only legal terms. Whatever means the parties to the MOU choose to deal with the fallout of this litigation, the parties' altered economic positions do not provide a legal basis for reversal of

the summary judgment motion. The fact that the Luglianis are now out of pocket $2 million does not somehow render an illegal action, legal.

XVII. The Order Awarding Attorney's Fees Should be Affirmed Because the Amount Awarded was Well Within the Trial Court's Broad Discretion and the Appellants Failed to Procure an Adequate Record

Following entry of judgment, CEPC moved for an award of fees under the Private Attorney General Act ("PAGA") doctrine. (Code Civ. Proc., § 1021.5). The trial court awarded CEPC's pro bono counsel $235,716.88. (City AA 173). The award was based on 226.65 hours in attorney time and 42.4 hours in paralegal time at an hourly rate of $395 for CEPC's attorney and $75 for CEPC's paralegal. (City AA 121). The award included an enhancement of the lodestar figure. The legal tasks accomplished by CEPC's counsel over 30 months included:

- Filing an original, first and second amended complaint;
- Opposing multiple demurrers and motions to strike the pleadings;
- Filing a petition for writ of mandate in the Court of Appeal;
- Propounding and responding to discovery;
- Filing CEPC's motion for summary judgment;
- Opposing the City's motion for summary judgment;
- Opposing Appellants' motion for judgment on the pleadings; and
- Appearing at multiple hearings on the form of the judgment.

Appellants seek reversal of the attorney's fee award. However, they failed to provide this Court a reporter's transcript or settled statement of the hearing determining the amount of fees. It was Appellants' burden to furnish an adequate record of the proceedings pertaining to the fee award and their failure to do so warrants affirmance. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–96).

The City contends that CEPC "failed" to demonstrate how it conferred a "significant benefit" or that the financial burden of private enforcement made a fee award appropriate. (City AOB 58). The Homes Association similarly argues "there is no basis" for the fee award. (HA AOB 127). None of the Appellants mention or apply the relevant standard of review – abuse of discretion. (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 152). While the Homes Association argues that the fee award must be reversed "because the Lawsuit conferred no public benefit,"[28] that is not the standard. The relevant appellate standard is whether the trial court abused its discretion.

Notably, Appellants offered no evidence in opposition to the fee motion below. They did not submit a single declaration or request for judicial notice in opposing the motion. Nor did Appellants argue that the hourly rates or amount of time spent on the lawsuit were unreasonable. Instead, Appellants focused below on their argument that no public benefit was conferred, that no fees should be awarded for unsuccessful legal theories and that the requested fee enhancement multiplier was too high. They repeat those arguments on appeal.

[28] HA AOB 127.

A. The Court Should Affirm the Fee Award Because the Trial Court did not Abuse its Discretion in Finding that the Litigation Conferred a Substantial Public Benefit

CEPC argued below that the public benefitted from the litigation through the protection of a public park. (City AA 8). The protection of a public park has been found to be a sufficiently important public right to warrant a fee award under PAGA. (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 833). CEPC cited to *Friends of the Trails* in the fee motion below but none of the Appellants mention, discuss or distinguish the *Friends of the Trails* case. In addition to the law, CEPC provided evidence to the trial court concerning the significant benefit obtained by the litigation:

- 800 acres of parkland were set aside at the City's founding;
- Appellants' actions threatened not only the public's use of the Panorama Parkland but all of the similarly protected parkland in the City;
- The lawsuit was widely covered in the local press demonstrating public interest in the dispute. (City AA 61-68);
- While Appellants insist this was simply a dispute between one neighbor (Harbison) against another (Lugliani), the truth is that over ninety City residents supported the lawsuit. (1CT 104); and
- As a result of the litigation, the City and Homes Association may no longer sell parkland to raise money.

Under those facts, the trial court's conclusion that a public benefit was conferred by the litigation is hardly an abuse of discretion.

B. The Court Should Affirm the Fee Award Because the Trial Court did not Abuse its Discretion in Awarding all of the Requested Fees

Appellants argued below that CEPC should not have been awarded fees for legal theories that CEPC did not win, namely, the petition for writ of mandate filed in this Court following Judge O'Brien's sustaining of a demurrer to CEPC's initial petition. (City AOB 59). CEPC was not required to prevail on every legal theory to obtain a full fee award:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. (Citation.) Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

(*Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273–74 [citations and internal quotations omitted]).

The trial court did not abuse its discretion in awarding the full amount of fees requested including the amount spent by CEPC's counsel in preparing a petition for writ of mandate in this Court. An award of $235,716.88 for 30 months of litigation is reasonable and certainly did not constitute an abuse of discretion.

CONCLUSION AS TO RESPONDENTS' BRIEF

The order granting summary judgment should be affirmed because the City and Homes Association sold a public park to a private party for their exclusive private use. That is an illegal action. Likewise, the order granting CEPC's motion for attorney's fees should be affirmed.

LEGAL ARGUMENT

CROSS-APPELLANTS' OPENING BRIEF

I. Introduction

CEPC has filed a cross-appeal on one issue: the trial court's denial of the petition for writ of mandate. Should this Court affirm the judgment in this matter and deny all of the arguments raised in Appellants' opening briefs, this cross-appeal is moot and the Court need not reach the below arguments.

The writ of mandate portion of the case was pled by CEPC based on the *Wellwood Murray* case. In *Wellwood Murray*, the City of Palm Springs planned to sell deed restricted property. The trial court granted relief to the plaintiff opponents of the sale as to a writ of mandate claim. The pleadings below alleged that the City and Homes Association owed a ministerial duty to enforce the "forever parks," "no structures," "no sale or conveyances" and "no modifications" provisions of the 1940 Deeds. (3CT 526-528). CEPC alleged under Code of Civil Procedure, section 1085, that the City and Homes Association should enforce those deed restrictions. (3CT 533-534).

The standard of review for an order sustaining a demurrer is de novo. (*Stearn v. County of San Bernardino* (2009) 170 Cal.App.4th 434, 439-40). Denial of leave to amend is reviewed for abuse of discretion. (*Blank v. Kirwan* (1985) 39 Ca.3d 311, 318).

A. The Trial Court Erred in Sustaining the Demurrer Because the City Owes a Ministerial Duty to Enforce Parkland Restrictions

The City argued below, and the trial court agreed, that the City owes no ministerial duty to enforce the land use restrictions for the Panorama Parkland. However, under California law, a City does owe a ministerial duty to enforce land use restrictions for real property dedicated to a public purpose. (*Welwood Murray*, at 1017). Although the City retains discretion in the manner in which the property is used consistent with the restrictions it has no discretion to simply withdraw the property from public use altogether. (*Ibid.*)

B. The Trial Court Erred in Sustaining the Demurrer Because the City's Attempted Conveyance of the Panorama Parkland Violated the City's Ministerial Duty to Refrain from Diverting the Panorama Parkland from Public Use

The City argued below that any duty it owed was not of a ministerial nature. The City argued that its ability to use or dispose of the Panorama Parkland was discretionary. (3CT 728-30). CEPC respectfully disagrees. As a matter of law, a city has no discretion to divert a public park from public use. The land use restrictions compelling that the parkland be used perpetually for public purposes is akin to a condition of approval imposed by a planning commission for a development project. Although the decision to reject or approve a development project is a discretionary one not subject to judicial interference, once a project is approved and conditions of approval are made, enforcement of those conditions is a ministerial duty. (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 834 [holding that Zoning Administrator had clear, ministerial duty to enforce planning

commission condition of approval requiring construction of pedestrian way]). Here, once the City made the discretionary decision in 1940 to wholeheartedly accept the deed restrictions, the enforcement of those restrictions by city officials became a clear, ministerial duty.

The holding of *Welwood Murray* is also applicable here. The City of Palm Spring's attempt to first convey and then raze the library is analogous to the City's conveyance of public parkland to the Luglianis. The issuance of a writ was upheld in *Welwood Murray* because the proposed dining use for library property was a blatant violation of the deed restrictions. The facts of *Welwood Murray* are not distinguishable.

C. The Trial Court Erred in Sustaining the Demurrer Because the Municipal Code Confirms that the City's Duties are Ministerial

The City argued below that it had no "mandatory duty" to enforce the land use restrictions for the Panorama Parkland. (3CT 728-29). That argument is belied by the City's own ordinances and municipal code. The City's municipal code makes it clear that a private person's use of public parkland for private purposes is a city nuisance. (City of PVE Mun. Code, §§ 17.32.050, 18.16.020). The City Municipal Code declares it is the "right and duty" of all residents to "participate and assist the city officials" in the enforcement of the City's zoning and requires the city attorney to commence legal proceedings and take other legal steps to remove illegal structures and abate illegal uses of public parklands. (*Ibid.*)

In addition to the City's municipal code, the City's own resolutions demonstrate the mandatory nature of the City's duty. On November 8, 2005, the City passed resolution R05-32 adopting a policy for the mandatory removal of unauthorized encroachments in the City's

parklands. The new policy required staff to take steps to notify property owners of illegal encroachments. If the owner did not comply, the City was to "immediately" remove the encroachment, bill and lien the owner and cite the owner for an infraction. None of the language in the resolution conferred discretion on City staff. (3CT 522 ¶ 18(i)).

Finally, the City contended throughout the proceedings below that the phrase "shall" did not have a mandatory meaning when used in reference to enforcement of land use restrictions. However, the City's municipal code confirms that the term "shall" has a mandatory meaning. (City of PVE Mun. Code, §§ 1.04.010(I)).

D. The Trial Court Erred in Sustaining the Demurrer Because the Homes Association Owes a Ministerial Duty to Enforce Parkland Restrictions

CEPC also sought relief against the Homes Association pursuant to Code of Civil Procedure, section 1085. CEPC alleged the existence of a ministerial duty to enforce the land use restrictions set forth in the CC&R's recorded in the 1920's and 30's and affirmed in the subsequent deeds granting the parkland from the Homes Association to the City. (3CT 533-34).

The Homes Association demurred on the grounds that there was no ministerial duty. (3CT 666). The minute order by the court is silent regarding the Homes Association's duty but given that the demurrer was sustained without leave to amend, it can be inferred that the trial court found that the Homes Association also did not owe a ministerial duty to members of the Homes Association. This conclusion is erroneous. The very purpose of the Homes Association's existence is to enforce land use restrictions. The Homes Association was formed:

> To carry on the common interest and look after the maintenance of all lots …[the] Association, has been incorporated …. *It will be the duty of this body to maintain the parks … and to perpetuate the restrictions.*

(8CT 1802 ¶ 12, emphasis added).

E. The Trial Court Erred in Sustaining the Demurrer Because the term "Shall" is Mandatory in the Context of the Homes Association's Reversionary Interest in the Panorama Parkland.

CEPC alleged below that the Homes Association had a reversionary interest in the Panorama Parkland and had the right to assert that interest in response to the City's failure to enforce the land use restrictions. The Homes Association did not dispute the existence of the reversionary interest below but did dispute that it had any mandatory duty to exercise that interest.

If the parkland use restrictions are violated, the property "shall" revert to the Homes Association. (3CT 587-88, Art. VI, § 6, ["A breach of any of the restrictions, conditions and covenants hereby established shall cause the real property upon which such breach occurs to revert…"]). The common sense meaning of the term "shall" is mandatory. "Ordinarily, the term 'shall' is interpreted as mandatory and not permissive. Indeed, "the presumption [is] that the word 'shall' in a statute is ordinarily deemed mandatory and 'may' permissive." (*People v. Standish* (2006) 38 Cal.4th 858, 869). Ordinarily, the word "may" connotes a discretionary or permissive act; the word "shall" connotes a

mandatory or directory duty. (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 433).[29]

If the Court were to interpret the reversionary language to be permissive, it would lose all meaning and effect. Consider the following: "A breach of any of the restrictions may cause the real property to revert…" versus "A breach of any of the restrictions shall cause the real property to revert." The permissive use of "shall" in this context renders the entire reversionary interest completely ineffective. The common sense and widely accepted interpretation of "shall" as mandatory should be adopted by the Court as it is the only meaning that gives the reversionary language the intended effect.

Moreover, the CC&R's governing the use of parkland, including the Panorama Parkland provide that:

> nor shall any land or any portion of said property be acquired or leased by the Homes Association, nor any property once subject to the jurisdiction of the Park and Recreation Commission be at any time sold, conveyed, mortgaged, leased, encumbered, or in any way disposed of except with the approval of the Park and Recreation Board. No building or structure for any purpose other than a park purpose shall be erected, constructed, altered or maintained upon any land subject to the jurisdiction of the Homes Association, when such land has been accepted for park purposes only.

(3CT 604, Art. XIV, § 4(b)).

The CC&R's state that once the Panorama Parkland was "accepted for park purposes only," the Homes Association no longer

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

had the discretion to allow any building or structure for a non-park purpose. (3CT 604, Art. XIV, § 4(b).). This land use restriction applies regardless of whether the City, the Homes Association or the Luglianis ultimately are held to own the Panorama Parkland. Even if the conveyance to the Luglianis was lawful, the property remains subject to the jurisdiction of the Homes Association and the prohibition on non-park related structures remains in full force and effect.

CONCLUSION AS TO

CROSS-APPELLANTS' OPENING BRIEF

The trial court's January 6, 2014 order sustaining the demurrer should be reversed.

CONCLUSION

For the foregoing reasons, Respondents and Cross-appellants respectfully request that the Court:

1. Affirm the judgment;
2. Affirm the post-judgment award of attorney's fees;
3. Alternatively, reverse the January 6, 2014 minute order sustaining the demurrer without leave to amend; and
4. Such further and different relief as this Court may deem just and proper.

Dated: April 18, 2017 By: 

Jeffrey Lewis

Attorney for Respondents and Cross-Appellants

CERTIFICATE OF WORD COUNT

I certify that the word count for the foregoing **COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' OPENING BRIEF** is 26,919 as counted by Microsoft Word, which was used to produce this brief.

Dated: April 18, 2017 By:_____
Jeffrey Lewis

Attorney for Respondents and Cross-Appellants

PROOF OF SERVICE

Citizens for Enforcement of Parkland Covenants
v.
City of Palos Verdes Estates, et al.
Los Angeles Superior Court Case No. BS142768
Court of Appeal Case. No. B267816

I, Jason R. Ebbens, declare that I am over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 734 Silver Spur Road, Suite 300, Rolling Hills Estates, CA 90274.

On **April 18, 2017**, I served the foregoing:

1. **COMBINED RESPONDENTS' BRIEF AND CROSS-APPELLANTS' BRIEF**

on the interested parties in this action by placing ☐ the original ☒ a true copy thereof, enclosed in a sealed envelope with postage pre-paid, addressed as follows:

** See Attached Service List **

☐ BY MAIL. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the U. S. Postal Service. The within correspondence will be deposited with the U. S. Postal Service on the same day shown on this affidavit, in the ordinary course of business. I am the person who sealed and placed for collection and mailing the within correspondence on this date at Rolling hills Estates, California, following ordinary business practices.

☒ BY GOLDEN STATE OVERNIGHT. The within correspondence will be deposited with Golden State Overnight delivery service on the same day shown on this affidavit, in the ordinary course of business. I am the person who sealed and placed for collection and mailing the within correspondence on this date at Rolling Hills Estates, California, following ordinary business practices.

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

Executed on **April 18, 2017**, in Rolling Hills Estates, California.

Jason R. Ebbens
Jason R. Ebbens

SERVICE LIST

Citizens for Enforcement of Parkland Covenants, et al.
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