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Exempt from fees pursuant  
to *Government Code § 6103*

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7 City of Palos Verdes Estates

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

11 CITIZENS FOR ENFORCEMENT OF  
12 PARKLAND COVENANTS, an  
unincorporated association,

13 Plaintiff and Petitioner,

14 v.

15 CITY OF PALOS VERDES ESTATES, a  
16 municipal corporation; PALOS VERDES  
HOMES ASSOCIATION, a California  
17 corporation; PALOS VERDES PENINSULA  
UNIFIED SCHOOL DISTRICT, a political  
18 subdivision of the State of California,

19 Defendants and Respondents,

20 ROBERT LUGLIANI and DOLORES A.  
21 LUGLIANI, as co-trustees of THE  
LUGLIANI TRUST; THOMAS J. LIEB,  
22 TRUSTEE, THE VIA PANORAMA TRUST  
U/DO MAY 2, 2012 and DOES 1 through  
23 20,

24 Defendants and Real Parties in  
Interest.

CASE NO. BS142768

**CITY OF PALOS VERDES ESTATES'  
NOTICE OF DEMURRER AND  
DEMURRER TO PETITION FOR WRIT  
OF MANDATE AND COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Date: October 25, 2013  
Time: 1:30pm  
Dept.: 86

Hon. Joanne O'Donnell

Petition and Complaint Filed: May 13, 2013

25 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:  
26 PLEASE TAKE NOTICE THAT on October 25, 2013, at 1:30 p.m., or as soon  
27 thereafter as the matter may be heard, in Department 86 of the Superior Court of the State of  
28

1 California, Los Angeles County, located at 111 N. Hill St., Los Angeles, California,  
2 Respondent and Defendant City of Palos Verdes Estates (the "City") will and hereby does  
3 demur to the Verified Petition for Writ of Mandate and Complaint for Injunctive Relief  
4 ("Petition") filed by Citizens for Enforcement of Parkland Covenants ("Plaintiff" or  
5 "Petitioner") in its entirety.

6 **DEMURRERS**

7 1. The First Cause of Action for declaratory relief fails to state a cause of action  
8 because it fails to set forth the ultimate facts of a justiciable controversy on which the court  
9 could grant the declaratory relief.

10 2. The Second Cause of Action to enjoin alleged waste of public funds and *ultra*  
11 *vires* actions by the City does not plead facts sufficient to state a cause of action because the  
12 City's actions complained of are entirely legal and within its sole discretion. Code Civ. Proc.  
13 § 430.10, subd. (e).

14 3. The Third Cause of Action for peremptory writ of mandate does not plead facts  
15 sufficient to state a cause of action because enforcement of privately place deed restrictions is  
16 not a governmental function and the City cannot be compelled to exercise its discretion in any  
17 particular manner when deciding how to deal with alleged code violations. Code Civ. Proc. §  
18 430.10, subd. (e).

19 The demurrers are based upon the accompanying memorandum of points and  
20 authorities, all matters upon which judicial notice should or may be taken, the records,  
21 pleadings, and documents on file in this action, and such further argument and evidence as  
22 may be presented at the time of the hearing.

23 DATED: July 16, 2013

Respectfully submitted,

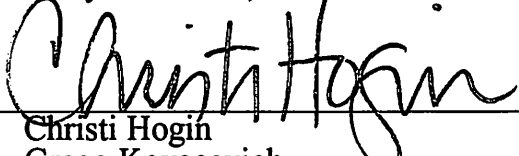
24  
25 By:   
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27 Gregg Kovacevich  
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Attorneys for Respondent/Defendant  
CITY OF PALOS VERDES ESTATES

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1 **I. INTRODUCTION**

2 Plaintiff opposes certain political decisions of the City Council and claims that these decisions  
3 – the proposed rezoning of property and the requested approval of after-the-fact permits for retaining  
4 walls – would be “*ultra vires*,” beyond the City’s authority. The lynchpin of Plaintiff’s contention is  
5 that the City’s actions might violate private deed restrictions. Through this action, Plaintiff seeks to  
6 have the court stop the City from exercising its legislative discretion with respect to the zoning of  
7 property within the City and instead use its governmental authority to enforce private deed restrictions  
8 on private property in the manner that Plaintiff sees fit. Plaintiff’s legal theory is contradicted by  
9 settled law. The relief sought is unavailable and, accordingly, the City respectfully requests that the  
10 demurrer be sustained without leave to amend.

11 **II. STANDARD OF REVIEW**

12 “A demurrer tests the sufficiency of the plaintiff’s complaint, i.e., whether it states  
13 facts sufficient to constitute a cause of action upon which it may be based. (Code Civ. Proc., §  
14 430.10, subd. (e)).” *Young v. Gannon* (2002) 97 Cal.App.4th 209, 220. “In determining  
15 whether the complaint states facts sufficient to constitute a cause of action, the trial court may  
16 consider all material facts pleaded in the complaint and those arising by reasonable implication  
17 therefrom; it may not consider contentions, deductions or conclusions of fact or law.” *Id.* The  
18 trial court may also consider matters of which it may take judicial notice. Code Civ. Proc. §  
19 430.30(a).

20 Likewise, in ruling on the sufficiency of the petition for writ of mandate as against  
21 demurrer, the court assumes to be true all material facts properly pleaded (*Flores v. Arroyo*  
22 (1961) 56 Cal.2d 492, 497), disregarding conclusions of law and allegations contrary to facts  
23 of which judicial notice may be taken (*Watson v. Los Altos School Dist.* (1957) 149  
24 Cal.App.2d 768, 771-772; *Griffin v. County of Colusa* (1941) 44 Cal.App.2d 915, 918), and  
25 considering such judicially noticed facts as though pleaded in the petition (*Watson v. Los Altos*  
26 *School Dist., supra.*). See *Stanton v. Dumke* (1966) 64 Cal.2d 199, 207.

27 Under Code of Civil Procedure section 430.10 (e), a defendant is entitled to demur to a  
28 cause of action if the pleading “does not state facts sufficient to constitute a cause of action.”

1 To state facts sufficient to constitute a cause of action, a plaintiff must “allege the ultimate  
2 facts necessary to the statement of an actionable claim.” *Careau & Co. v. Sec. Pac. Business*  
3 *Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390. In determining whether a complaint alleges  
4 sufficient facts, “[d]oubt in the complaint must be resolved against the plaintiff and facts not  
5 alleged are presumed not to exist.” *C&H Foods Co. v. Hartford Ins. Co.* (1984) 163  
6 Cal.App.3d 1055, 1062.

7 Under rules applicable to traditional mandamus, judicial review is limited to  
8 examination of the City’s action to determine whether its action was arbitrary or capricious, or  
9 entirely lacking in evidentiary support, or whether it failed to follow legally required  
10 procedure. *Court House Plaza Co. v. City of Palo Alto* (1981) 117 Cal.App.3d 871, appeal  
11 dismissed, certiorari denied 454 U.S. 1074. On review, the trial court does not determine  
12 whether it would have taken the same action as the City; rather, the court is limited to  
13 determining whether the agency’s decision was arbitrary and capricious. See *Fullerton Joint*  
14 *Union High School Dist. v. State Bd. of Ed.* (1982) 32 Cal.3d 779, 786.

15 A court should deny leave to amend a complaint after sustaining a demurrer “where the  
16 facts are not in dispute, and the nature of the plaintiff’s claim is clear, but, under substantive  
17 law, no liability exists.” 5 Witkin, *Civil Procedure*, 4<sup>th</sup> ed., Pleading, § 946. For the reasons  
18 stated below, the City respectfully submits that the court should sustain the demurrers without  
19 leave to amend.

### 20 **III. FACTS AS ALLEGED**

21 For purposes of demurrer, material facts properly pleaded in the complaint are accepted  
22 as true. The following facts are taken from the complaint.

23 In 1913, a wealthy New York financier purchased the land that would later become the  
24 City of Palos Verdes Estates. Petition ¶ 10. A rural community was planned with some 28%  
25 of the land being dedicated to open space/parklands. *Id.* Development of the property began  
26 in the early 1920’s. *Id.* Deed restrictions were imposed on the land in 1923. *Id.* In 1925, a  
27 number of lots were conveyed to the Palos Verdes Homes Association (the “Association”)  
28 subject to deed restrictions limiting the use of the properties to public schools, parks,



1 playgrounds or recreation areas. Petition ¶ 11(c). In 1938, the Association conveyed 13 of the  
2 properties to the Palos Verdes Peninsula Unified School District (the “District”) subject to the  
3 same restrictions set forth in the 1925 deed. Among the properties were two parcels referred  
4 to as “Lots C & D.” Petition ¶ 12. The 1938 deed included restrictions that the property may  
5 not be used for any purpose other than for the establishment and maintenance of public  
6 schools, parks, playgrounds and/or recreation areas. Petition ¶ 12, Exhibit 3, pp. 2-3.

7 The City of Palos Verdes Estates was incorporated on December 20, 1939. Petition ¶  
8 10(a). In 1940, the Association deeded property owned and managed by it to the City.  
9 Petition ¶ 10(b). Among the properties conveyed to the City in 1940 was “Area A”—the  
10 parcel that is the focus of the petition and complaint. Petition ¶ 10(d). The 1940 deeds  
11 provided that the property conveyed is to be used for park and/or recreation purposes for the  
12 benefit of residents and non-resident property owners within Palos Verdes Estates. *Id.* The  
13 deeds further gave the Association a reversionary interest in the event of a breach by the City.  
14 Petition ¶ 11(d); Petition Exhibit 2, pp. 13-14. Certain named parties also would be authorized  
15 to bring appropriate proceedings to enjoin, abate or remedy the breach of any deed restriction.  
16 *Id.*; Petition Exhibit 2, p. 14.

17 On February 1, 2010, the District filed a lawsuit against the City and Association  
18 seeking, among other things, a declaration that the deed restrictions applicable to Lots C & D  
19 were no longer enforceable. Petition ¶ 13. On September 22, 2011, the Court entered  
20 judgment finding that deed restrictions applicable to the property and set forth in deeds from  
21 1925 and 1938 all remain enforceable against the District. Petition ¶ 14, Petition Exhibit 3.  
22 The Association thereafter brought an unsuccessful motion for attorneys’ fees. Petition ¶ 15.  
23 The District subsequently appealed the judgment and the Association filed a cross appeal on  
24 the attorney fee issue. Petition ¶ 16.

25 In May 2012, the Association and the District entered into a Memorandum of  
26 Understanding to resolve their disputes and obviate the need to pursue their appeals. The City  
27 is also a party to the MOU, along with Thomas J. Lieb, trustee, the Via Panorama Trust U/DO  
28 May 2, 2012. Petition ¶¶ 20, 21; Petition Exhibit 4. The MOU provided for the following

1 land transfers: (1) Lots C and D would revert to the Association pursuant to the terms of the  
2 applicable deed restriction; (2) the Association would swap Lots C and D for Area A with the  
3 City; and (3) the Via Panorama Trust would purchase Area A from the Association. Petition ¶  
4 21; Petition Exhibit 4.

5 Following the execution of the MOU, the parties took steps towards its implementation.  
6 Petition ¶ 23. On September 5, 2012, the City quitclaimed its interest in Area A to the  
7 Association. *Id.* On the same day, the Association conveyed Area A to Thomas J. Lieb,  
8 trustee, the Via Panorama Trust U/DO May 2, 2012, referred to by Plaintiff (together with  
9 several Doe defendants) as the “Area A Recipients.” *Id.* Area A is located at the end of a cul-  
10 du-sac and is adjacent to another parcel Plaintiff refers to as the “Panorama Property.”  
11 Petition ¶ 18. Plaintiff alleges that the owners of the Panorama Property (Robert Lugliani and  
12 Delores A. Lugliani, as co-trustees of the Lugliani, referred to by Plaintiff as the “Panorama  
13 Property Owners”) and/or the Area A Recipients have encroached on Area A by erecting  
14 improvements in violation of the deed restrictions. Petition ¶¶ 18, 19.

15 On February 19, 2013, the City’s planning commission held a public hearing on an  
16 application by the Panorama Property Owners to re-zone Area A and to obtain after-the-fact  
17 approvals for improvements constructed thereon. Petition ¶ 24. The commission  
18 recommended denial of the zone change request. *Id.* The matter proceeded to the City  
19 Council on March 12, 2013. *Id.* The Council held a hearing but did not take action, instead  
20 continuing the matter and directing staff to investigate other zoning options. *Id.*

21 This lawsuit was filed on May 13, 2013 and the City was served on June 16, 2013.

22 **IV. ARGUMENT**

23 **A. The Complaint Fails to Plead Facts to State a Cause of Action for**  
24 **Declaratory Relief as Against the City.**

25 The City of Palos Verdes Estates hereby joins in the argument of Defendants/Real  
26 Parties-in-Interest Robert Lugliani and Dolores A. Lugliani, as co-trustees of the Lugliani  
27 Trust , Palos Verdes Homes Association, and Palos Verdes Peninsula Unified School District  
28 set forth in their joint and several demurrer to Plaintiff’s first and third causes of action.

1           **B.     The Second Cause of Action Fails to State a Claim for Relief Against the**  
2           **City.**

3           Petitioner's second cause of action is brought pursuant to Code of Civil Procedure 526a  
4 and seeks to enjoin the City from spending additional public funds in furtherance of the  
5 Panorama Property Owners' applications for a zoning ordinance amendment that would affect  
6 the permissible uses on Area A and for after-the-fact approval of improvements on Area A.  
7 Petition ¶¶ 24, 32, 33; Prayer for Relief ¶¶ 3, 4. The planning commission has already acted  
8 on the applications and the matter is presently pending before the city council. Petition ¶ 24.

9           "Under Code of Civil Procedure section 526a, a taxpayer may challenge wasteful or  
10 illegal government action that otherwise would go unchallenged because of standing  
11 requirements. To state a claim, the taxpayer must allege specific facts and reasons for the  
12 belief the expenditure of public funds sought to be enjoined is illegal. General allegations,  
13 innuendo, and legal conclusions are not sufficient. [¶] A cause of action under Code of Civil  
14 Procedure section 526a will not lie where the challenged governmental conduct is legal.  
15 Conduct in accordance with regulatory standards is a perfectly legal activity. Further, a  
16 taxpayer is not entitled to injunctive relief under Code of Civil Procedure section 526a where  
17 the real issue is a disagreement with the manner in which government has chosen to address a  
18 problem because a successful claim requires more than an alleged mistake by public officials  
19 in matters involving the exercise of judgment or wide discretion." *Coshov v. City of*  
20 *Escondido* (2005) 132 Cal.App.4<sup>th</sup> 687, 714 (internal citations and quotations omitted.)

21           Plaintiff's entire second cause of action is premised on the theory that City's actions—  
22 its consideration of applications for a zoning amendment and after-the-fact entitlements—are  
23 "ultra vires" (i.e., beyond the City's legal authority and, therefore, illegal) because they  
24 allegedly violate deed restrictions applicable to the Area A property. Petition ¶ 32. The theory  
25 contradicts settled law.

26           The zoning authority of local governments derives from article XI, section 7 of the  
27 California Constitution. *Neighbors in Support of Appropriate Land Use v. County of*  
28 *Tuolumne* (2007) 157 Cal.App.4<sup>th</sup> 997, 1005. "Under the police power granted by the

1 Constitution, counties and cities have plenary authority to govern, subject only to the  
2 limitation that they exercise this power within their territorial limits and subordinate to state  
3 law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the ‘police power [of a county or  
4 city] under this provision ... is as broad as the police power exercisable by the Legislature  
5 itself.’ [Citation.]” *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39  
6 Cal.3d 878, 885, 218.

7 It is well established that no person has a vested right in the exercise of the police  
8 power and that a municipality’s exercise of the police power may not be limited by private  
9 contracts or restrictive covenants. *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70  
10 Cal.App.4<sup>th</sup> 1487 1496-97; *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 367. Private  
11 agreements restricting the use of property are simply immaterial to the validity of a particular  
12 zoning ordinance.<sup>1</sup> *O’Rourke v. Teeters* (1944) 63 Cal.App.2d 349, 352. Consequently, the  
13 City’s exercise of its police power in considering amendments to its zoning ordinance and  
14 processing a permit application cannot constitute illegal conduct and form the basis of a CCP §  
15 526a claim. *Coshow v. City of Escondido, supra*, 132 Cal.App.4<sup>th</sup> at 714.

16 Not only are the City’s actions that Plaintiff seeks to enjoin perfectly legal, they are  
17 required by law. The consideration of a zoning ordinance amendment and after-the-fact  
18 approvals are pending as the result of applications made by the Panorama Property Owners.  
19 Petition ¶ 24. The City has ministerial duty to process those applications in the manner set  
20 forth in its ordinance.<sup>2</sup> Palos Verdes Estates Municipal Code (“PVEMC”) § 17.28.010<sup>3</sup> *et seq.*

21  
22  
23 <sup>1</sup>Likewise, a change in zoning does not impair the enforceability of existing deed restrictions. *Seaton*  
24 *v. Clifford* (1972) 24 Cal.App.3d 46, 52; *Wilkman v. Banks* (1954) 124 Cal.App.2d 451, 455.  
25 Therefore, if Plaintiff possesses any enforceable rights or remedies by virtue of the deed restrictions  
26 applicable to Area A, those rights or remedies will not be affected by any action the City may choose  
27 to take on the pending applications for a zoning ordinance amendment and after-the-fact entitlements.

28 <sup>2</sup>It should be noted as well that applicants for zoning amendments and after-the-fact entitlements are  
required to pay a fee for the applications. PVEMC §§ 17.04.070, 17.28.010(C). Pursuant to  
Proposition 26, the amount of the fee may not exceed the reasonable cost of processing the  
applications. Cal. Const. art. XIII C, § 1.

<sup>3</sup>The PVE Municipal Code may be found at <http://www.codepublishing.com/ca/palosverdesestates>

1 (describing process for consideration of zoning ordinance amendments); § 17.28.030 (“The  
2 city council, after receipt of the recommendation of the planning commission, shall hold a  
3 final hearing upon the proposed amendment and take such action as it deems appropriate.”); §  
4 17.04.110 (authorizing after-the-fact applications); § 17.04.100 (describing process for  
5 entitlement applications, including after-the-fact applications.) Therefore, the injunction  
6 sought by Plaintiff in connection with its second cause of action would actually prevent the  
7 City from carrying out its mandatory, ministerial obligation to process the applications in the  
8 manner required by law.

9 Because the City’s police power may not be limited by private covenants regarding the  
10 use of land, its consideration of a zoning code amendment and an after-the-fact permit  
11 application is perfectly legal and Plaintiff cannot plead facts sufficient to state a cause of  
12 action against the City under CCP § 526a. Accordingly, the City respectfully requests that its  
13 demurrer to the second cause of action be sustained without leave to amend.

14  
15 **C. The Third Cause of Action Fails to State a Claim for Relief Against the  
City.**

16 In its third cause of action, Petitioner seeks a writ of mandate commanding the City to  
17 do two things: (1) enforce the deed restrictions applicable to Area A, and (2) “use all legal  
18 means” to remove the illegal improvements from Area A and restore it to its original state.  
19 Petition ¶ 38. Citing Code of Civil Procedure section 1085, Petitioner alleges that the City has  
20 a clear, present and ministerial duty to do both of these things. Petition ¶¶ 35, 38.

21 “Generally, mandamus is available to compel a public agency’s performance or to  
22 correct an agency’s abuse of discretion when the action being compelled or corrected is  
23 ministerial. A ministerial act is an act that a public officer is required to perform in a  
24 prescribed manner in obedience to the mandate of legal authority and without regard to his or  
25 her own judgment or opinion concerning such act’s propriety or impropriety, when a given  
26 state of facts exists. Discretion is the power conferred on public functionaries to act officially  
27 according to the dictates of their own judgment. Mandamus does not lie to compel a public  
28 agency to exercise discretionary powers in a particular manner, only to compel it to exercise

1 its discretion in some manner.” *AIDS Healthcare Foundation v. Los Angeles Dept. of Public*  
2 *Health* (2011) 197 Cal.App.4<sup>th</sup> 693, 700-701 (internal citations and quotations omitted.)

3 As detailed further below, Petitioner cannot demonstrate a legal entitlement to a writ.  
4 The City has no ministerial duty, let alone any legal mechanism, to enforce private deed  
5 restrictions on property that it does not own. With respect to the alleged illegal improvements  
6 on Area A, the City has several options available for dealing with code violations and cannot  
7 be compelled to pursue any one enforcement mechanism in particular nor, as Petitioner herein  
8 demands, to pursue all of them simultaneously.

9 **1. Petitioner is Not Entitled to a Writ Commanding the City to Enforce**  
10 **Private Deed Restrictions on Area A.**

11 Unless a clear intention to allow enforcement by others is expressed in the deed  
12 restriction, a party must have a legal interest in the benefitted property in order to have  
13 standing to enforce the restriction. *BCE Development, Inc. v. Smith* (1989) 215 Cal.App.3d  
14 1142, 1146-1147; Miller and Starr, 8 Cal. Real Est. § 24:25 (3d ed.) The seller or transferor of  
15 the benefitted property cannot enforce the deed restrictions after conveying away title to  
16 another absent a showing that the original covenanting parties intended to allow enforcement  
17 by one who is not a landowner. *Farber v. Bay View Terrace Homeowners Ass’n* (2006) 141  
18 Cal.App.4<sup>th</sup> 1007, 1011; *Russell v. Palos Verdes Properties* (1963) 218 Cal.App.2d 754, 764-  
19 765 (disapproved of on other grounds by *Citizens for Covenant Compliance v. Anderson*  
20 (1995) 12 Cal.4<sup>th</sup> 345.) In any case, enforcement of the terms of a private deed restriction is  
21 not a governmental function.

22 As alleged in the Petition, the City no longer owns Area A. Petition ¶ 7. It is owned by  
23 Thomas J. Lieb, Trustee, the Via Panorama Trust. *Id.* And, even if the City remained  
24 authorized to enforce the deed restrictions in question, it has no mandatory duty to enforce  
25 them. The 1940 deed in question gave the Association a reversionary interest in the event of a  
26 breach by the City. Petition ¶ 11(d); Petition Exhibit 2, pp. 13-14. In addition to that, it  
27 authorized (but did not obligate) certain other benefitted parties to pursue remedies.  
28 Complaint, Exhibit 2, p. 14 (“...the breach of any [covenant] or the continuance of any such

1 breach may be enjoined, abated or remedied by appropriate proceedings by the Grantor herein  
2 [the Association] or its successors in interest, or by such other lot or parcel owner, and/or by  
3 any other person or corporation designated in said Declarations of Restrictions.”<sup>4</sup> (Emphasis  
4 added.)) Therefore, Petitioner has not alleged facts, and cannot allege facts, establishing a  
5 mandatory duty on the part of the City to enforce private deed restrictions applicable to Area  
6 A.

7  
8 **2. The City Cannot Be Compelled to “Use all Legal Means” to Address the  
9 Alleged Illegal Improvements On Area A.**

10 If improvements have been constructed on Area A in violation of the City’s zoning  
11 ordinance, the City has a number of tools in its belt for achieving compliance. Zoning  
12 violations may be prosecuted criminally as a misdemeanor and the City may seek fines of up  
13 to \$1,000 per violation and/or up to six months imprisonment. PVEMC §§ 1.16.010,  
14 1.16.010(B), 17.32.060. In additional to criminal penalties, the City may declare any violation  
15 of its code a public nuisance and subject it to abatement. PVEMC §§ 1.16.010(F), 17.32.040,  
16 17.32.050. Nuisance abatement offers several options to the City, including the issuance of an  
17 abatement order directing the property owner to abate the nuisance. PVEMC §§ 8.48.040 *et*  
18 *seq.*, 17.32.050. If the property owner fails to comply, the City may seek an abatement  
19 warrant and cause the nuisance to be abated with its own workforce or that of a private  
20 contractor. PVEMC § 8.48.060. The City through a lien or a special assessment on the  
21 property may recoup costs associated with abatement and the City has the additional option of  
22 seeking a court order for treble costs of abatement. PVEMC §§ 8.48.090, 8.48.110. The City  
23 may also achieve compliance by legalizing unpermitted improvements as opposed to forcing  
24 their removal. For example, the City always has the option of amending its zoning ordinance

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27 <sup>4</sup>Section 12 (“Right to Enforce”) of the “Declaration of Establishment of Basic Protective  
28 Restrictions” states that the restrictions are enforceable by “Commonwealth Trust Company, Palos  
Verdes Homes Association, by the owner or owners of any property in said tract, their and each of  
their, legal representatives, heirs, successors and assigns.” Petition, Exhibit 1, p. 50.

1 to authorize previously unpermitted uses. And, after-the-fact permits may also be issued for  
2 improvements authorized in the zone. PVEMC §§ 15.08.140, 15.08.150, 17.04.110.

3 In praying for a writ directing the City to “use all legal means to remove the illegal  
4 improvements from AREA A,” Petitioner literally seeks to have the court order the City to  
5 pursue all of its options simultaneously. Not only would pursuing “all legal means” of having  
6 the allegedly illegal improvements removed necessitate a waste of public resources on  
7 duplicative enforcement mechanisms, it ignores the fact that it remains within the City’s  
8 discretion to amend its zoning ordinance to authorize uses that may presently be unpermitted  
9 within Area A and process after-the-fact permits.<sup>5</sup>

10 The court in *Riggs v. City of Oxnard* (1984) 154 Cal.App.3d 526 considered and  
11 rejected a similar request for relief. There, Appellant sought a petition for writ of mandate  
12 compelling the city to close down a transmission shop operating in the C-2 zone where such  
13 uses were clearly prohibited and to issue its owners a criminal citation for violating the zoning  
14 ordinance. The City had erroneously issued the transmission shop a zone clearance, allowing  
15 it to open. After the lawsuit was filed, the Oxnard City Council amended its zoning ordinance  
16 to authorize transmission shops in the C-2 zone subject to a special use permit. Although the  
17 legislative amendment rendered the remedy Appellant sought (enforcement of the zoning  
18 ordinance) moot, the court nevertheless considered Appellant’s argument that a writ should lie  
19 to enforce a clear public duty. *Id.* at 530. The court held that municipalities have broad  
20 discretion to determine the most appropriate mode of enforcing ordinances and that a writ of  
21 mandate will not issue to compel that discretion be exercised in a particular way. *Id.* at 530.  
22 The court recognized that a city retains the police power to zone and rezone property as it sees

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26 <sup>5</sup>Private covenants and deed restrictions are not enforced by a city through its police power. While  
27 private covenants and restrictions may be more restrictive than the applicable zoning regulations, they  
28 do not in any way constrain a city’s police power to zone and grant permits consistent with its zoning  
restrictions. If private covenants/deed restrictions are violated, the remedy lies in the courts with  
benefitted property owners or others specifically authorized to seek relief according to the deed  
restrictions.



1 fit and that rezoning to accommodate an existing use was within the city's power and in no  
2 way arbitrary, capricious or unreasonable. Id. at 531.

3 It is also firmly established that a writ may not lie to compel an agency to initiate  
4 criminal prosecution. The principle of prosecutorial discretion is rooted in separation of  
5 powers and due process and is basic to the framework of the criminal justice system.  
6 *Gananian v. Wagstaffe* (2011) 199 Cal.App.4<sup>th</sup> 1532, 1543. An unbroken line of cases has  
7 recognized that prosecutorial discretion is not subject to judicial control. *Id.* at 1545-46; *Dix v.*  
8 *Superior Court* (1991) 53 Cal.3d 442, 451; *People v. Municipal Court* (1972) 27 Cal.App.3d  
9 193, 207; *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 755-56.

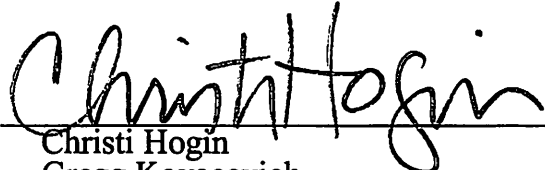
10 Here, because the City has a number of options for dealing with the alleged illegal  
11 improvements on Area A, and the corresponding discretion to choose the option it sees fit,  
12 Petitioner is not entitled to a writ compelling the City to exercise its discretion in any  
13 particular manner.

14  
15 **V. CONCLUSION**

16 For the foregoing reasons, the City respectfully requests that this Court sustain the  
17 City's demurrer without leave to amend.

18  
19  
20 Dated: July 16, 2013

Respectfully submitted,

21  
22 By:   
23 Christi Hogin  
24 Gregg Kovacevich  
25 JENKINS & HOGIN, LLP  
26 Attorneys for Defendant/Respondent  
27 CITY OF PALOS VERDES ESTATES  
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

5 On July 16, 2013, I served the foregoing documents described as:

6 **CITY OF PALOS VERDES ESTATES' NOTICE OF DEMURRER AND  
7 DEMURRER TO PETITION FOR WRIT OF MANDATE AND COMPLAINT;  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;**

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

10 *PLEASE SEE SERVICE LIST ATTACHED*

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

19 *I am readily familiar with the Jenkins & Hogin, LLP's practice of collection and processing correspondence for outgoing  
20 mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid  
at Manhattan Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service  
is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing  
in affidavit.*

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

25 Executed this 16th day of July, 2013, at Manhattan Beach, California.

26   
27 \_\_\_\_\_  
28 WENDY HOFFMAN

**SERVICE LIST**

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