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PALOS VERDES HOMES ASSOCIATION  
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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF LOS ANGELES, CENTRAL DISTRICT

12 CITIZENS FOR ENFORCEMENT OF  
13 PARKLAND COVENANTS, an  
unincorporated association; JOHN  
14 HARBSION, an individual

15 Plaintiff and Petitioners,

16 vs.

17 CITY OF PALOS VERDES ESTATES, a  
municipal corporation; PALOS VERDES  
18 HOMES ASSOCIATION, a California  
corporation; PALOS VERDES PENINSULA  
19 UNIFIED SCHOOL DISTRICT, a political  
subdivision of the State of California,  
20

21 Defendants and Respondents.

22 ROBERT LUGLIANI and DOLORES A.  
LUGLIANI, as co-trustees of the LUGLIANA  
23 TRUST; THOMAS J. LIEB, TRUSTEE, THE  
VIA PANORAMA TRUST,  
24

25 Defendants and Real Parties in  
Interest.  
26  
27  
28

CASE NO. BS142768

[Assigned to Hon. Joanne O'Donnell, Dept. 86]

**DEFENDANT AND RESPONDENT  
PALOS VERDES HOMES  
ASSOCIATION'S NOTICE OF HEARING  
AND DEMURRER TO THIRD CAUSE OF  
ACTION OF FIRST AMENDED  
PETITION FOR WRIT OF MANDATE  
AND COMPLAINT FOR INJUNCTIVE  
RELIEF, AND MEMORANDUM OF  
POINTS AND AUTHORITIES**

**NOTICE OF JOINDER IN DEMURRER  
OF RESPONDENT CITY OF PALOS  
VERDES ESTATES AND JOINDER IN  
DEMURRER AND MOTION TO STRIKE  
OF REAL PARTIES ROBERT  
LUGLIANI, ET. AL.**

Petition Filed: May 13, 2013

**Hearing Date:** January 3, 2014

**Time:** 1:30 p.m.

**Dept.:** 86

Trial Date: June 20, 2014

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 On January 3, 2014, at 1:30 p.m., or as soon thereafter as the matter may be heard, in  
3 Department 86 of the above-entitled court, located at 111 N. Hill Street, Los Angeles, California,  
4 Defendant and Respondent Palos Verdes Homes Association (the "Association") will demur to the  
5 Third Cause of Action of the First Amended Petition for Writ of Mandate and Complaint for  
6 Injunctive Relief (the "Amended Petition") filed by Plaintiffs and Petitioners, Citizens for  
7 Enforcement of Park Land Covenants and John Harbison (collectively "CEPC and Harbison" or  
8 "Petitioners" interchangeably).

9 The Association also moves to join in Demurrer of Defendant and Respondent City of  
10 Palos Verdes Estates, and join in the Demurrer and Motion to Strike of Real Parties Robert  
11 Lugliani, et. al.

12 **DEMURRER BY ASSOCIATION**

13 The Association demurs to the Third Cause of Action of the Amended Petition on the  
14 grounds that the Amended Petition fails to state a cause of action for the issuance of a writ of  
15 mandate because it fails to allege that the Association had a ministerial duty to enforce land use  
16 restrictions or exercise its reversionary rights.

17 The Association's Demurrer is based on the accompanying memorandum of points and  
18 authorities, any and all matters subject to judicial notice, and all documents in the file in this case,  
19 and on such argument and evidence as may be presented at the hearing.

20 DATED: December 5, 2013

**LEWIS BRISBOIS BISGAARD & SMITH LLP**

21  
22 By: 

23 Brant H. Dveirin  
24 Attorneys for Respondent and Defendant PALOS  
25 VERDES HOMES ASSOCIATION  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER**

2 **I. INTRODUCTION**

3 The Third Causes of Action of both the Original and Amended Petitions seek a writ of  
4 mandate under Code of Civil Procedure Section 1085 directing the Association to enforce land use  
5 restrictions and exercise reversionary rights in regard to a parcel of land in Palos Verdes Estates  
6 referred to as Area A.<sup>1</sup> Writs of mandate may be issued to compel the performance of acts that  
7 the respondent has a ministerial duty to perform, but may not control the discretion vested in a  
8 governing body or board. (See Code of Civil Procedure Section 1085; See also *Gong v. Fremont*  
9 (1967) 250 Cal. App. 2d 568, 572 ) The Association demurred to the Third Cause of Action of  
10 the Original Petition on the grounds that the deed restrictions and protective covenants governing  
11 the Association and its members granted the Association the authority and discretion to enforce  
12 land use restrictions and exercise its reversionary rights, but did not impose any duty on the  
13 Association other than to act in good faith, on reasonable investigation, within its authority and  
14 with due regard for the best interests of the association and its members. The court sustained the  
15 Association’s demurrer and ruled that “. . . there was no ministerial duty shown in the pleading.”  
16 (Minute Order, October 28, 2013)

17 The Petitioners have filed an Amended Petition and added a Section H, entitled  
18 “Association’s Ministerial Duties to Enforce the Parkland Covenants and Enforce Its Reversionary  
19 Rights” (Amended Petition, page 16.) These new allegations, however, are mere conclusions of  
20 law and do not alter the previous determination of the court that the documents governing the  
21 Association and its members, which are incorporated into the Original and Amended Petitions,  
22 continue to show that the Association’s board has the authority and discretion to take the actions  
23 that it took and that there continues to be no ministerial duty shown in the pleadings. For that  
24

25  
26 <sup>1</sup> The Amended Petition, identical to the Original Petition, alleges a chronology of historical deeds  
27 and covenants, and restrictions (“Historical Deed Restrictions”) that establish and govern the  
28 Association and establish conditions, covenants and agreements, as well as deed restrictions,  
relative to the properties identified in the Amended Petition as “Lots C & D” and “Area A”  
(Original Petition 4:24-7:14 and Amended Petition 5:5-7:10).

1 reason, the Association’s demurrer to the Third Cause of Action of the Amended Petition should  
2 be sustained without leave to amend.

3 **II. FACTUAL BACKGROUND**

4 The Amended Petition seeks to void an admittedly “well-intentioned” agreement that  
5 settled a lawsuit brought by the Palos Verdes Peninsula Unified School District (“School District”)  
6 against the Association and the City of Palos Verdes Estates (“City”). In that lawsuit, the School  
7 District sought to have the court declare land use restrictions obligating the School District to hold  
8 two of its properties (“Lots C and D”) for school purposes to be unenforceable so that the School  
9 District would be able to raise needed funds by selling those lots for residential development.

10 The settlement agreement is Exhibit 4 to the Amended Petition and is incorporated by  
11 reference. The agreement expressly provides the School District’s acknowledgement that Lots C  
12 and D, as well as all of its other lands within the City, continue to be subject to the Historical Land  
13 Use Restrictions for school and related purposes. (*See* MOU, Art. II, Sub A, Amended Petition,  
14 Exhibit 4, p. 5) The agreement further provides for Lots C and D to revert to the Association in  
15 accordance with the Historical Land Use Restrictions. (*Id.*, Art. II, Sub. C, pp.6-7; and MOU  
16 Recitals, p. 2.) Under the settlement agreement, the Association agreed to convey Lots C and D to  
17 the City to be maintained by the City as open space. (*Id.* p.7) In exchange, the City conveyed  
18 another parcel of land, referred to as “Area A,” then restricted as open space, to the Association.  
19 (*Id.*, Art. III, Sub. B and C, p. 7) The agreement then provided for Area A to be conveyed as open  
20 space to the Real Parties in Interest, who are adjacent property owners (the “Luglianis”). (*Id.*,  
21 Sub.D, p. 7) Area A is roughly the same size as Lots C and D, and under the settlement  
22 agreement, was found by the Association and the City to be less useful as parkland than Lots C  
23 and D because Area A was less accessible than Lots C and D. (*Id.*, MOU, Recitals, p.4)

24 The Luglianis’ predecessor in interest had constructed unpermitted retaining walls on Area  
25 A that provided support for the Lugliani residence and, pursuant to the settlement agreement, the  
26 Luglianis agreed to assume the duty to maintain the retaining walls. Also located on Area A were  
27 a gazebo and other non-habitable structures, which have since been removed. (*Id.* Recitals p. 4.)

28 Except as described above, there is no allegation in the Amended Petition that the Petitioners or

1 others have ever entered or used Area A; nonetheless, the Association reserved an open space  
2 easement over Area A in favor of the City that required the Luglianis to maintain the retaining  
3 walls and allowed certain non-habitable structures to be constructed subject to the City's zoning  
4 and permitting processes. (*Id.*, Art. V Sub. D, p.7.)

5 On or about July 15, 2013, the respondents and defendants filed a joint demurrer to the  
6 Original Petition ("Original Demurrer"). On or about October 25, 2014, the Court, the Honorable  
7 Robert H. O'Brien presiding, heard the Original Demurrer, and a Demurrer by the City of Palos  
8 Verdes Estates, and ruled on October 28, 2013 as follows:

9 The Demurrers to the Third Cause of Action for Writ of Mandate  
10 are sustained with leave to amend on the ground that there is no  
ministerial duty shown in the pleading.

11 On or about November 7, 2013, the Petitioners served their Amended Petition. The  
12 Amended Petition added several paragraphs that are incorporated into its Third Cause of Action,  
13 characterizing the Association's authority to enforce and interpret land use restrictions as  
14 ministerial duties. Those allegations (Paragraphs 31 through 34 of the Amended Petition) are  
15 mere conclusions of law and do not alter the legal effect of various provisions of the land use  
16 restrictions attached as Exhibit 1. Paragraphs 35 and 36 allege non-compliance with a purported  
17 requirement to obtain the affirmative vote of two-thirds of the owners within 300 feet, although  
18 that alleged requirement, however, does not apply. (*See* below, section III, C.)

19 In addition to the conclusions of law described above, the Amended Petition continues to  
20 incorporate the Historical Deed Restrictions for Palos Verdes Estates as Exhibit 1, the deeds  
21 applying those restrictions to the relevant parcels as Exhibit 2, the judgment in the School District  
22 lawsuit as Exhibit 3, and the settlement agreement as Exhibit 4. The Amended Petition therefore  
23 adds no new ultimate facts that would support a showing of a ministerial duty on the part of the  
24 Association.

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4841-4217-4999.2

1 **III. ANALYSIS**

2 **A. The Exhibits Attached to the Amended Petition Establish that the Association**  
3 **Has Discretion in Enforcing the Deed Restrictions and the Disposing of**  
4 **Property.**

5 As explained in the Original Demurrer and Reply, the documents governing the  
6 Association, which are again attached and are now incorporated, in part, into the Amended  
7 Petition, expressly contradict the Petitioners' allegations that the Historical Deed Restrictions  
8 impose upon the Association, "the clear, present, and ministerial right and affirmative duty to  
9 enforce its reversionary rights as to Area A..." and "to enforce the land use restrictions."  
10 (Amended Petition 22:6-11.) As shown in the Original Demurrer, the documents governing the  
11 rights, duties, and powers of the Association do not impose any such duty, but merely confer a  
12 right to do so, while also granting the Association broad discretion to convey and dispose of land  
13 and interpret the Historical Deed Restrictions. (See Amended Petition, Exhibit 1, pp. 28-30, 48-  
14 50.)

15 Facts appearing in exhibits to a complaint overrule inconsistent factual claims in pleadings.  
16 (*Holland v. Morse Diesel International, Inc.* (2001) 86 Cal. App. 4<sup>th</sup> 1443, 1447.) The overriding  
17 facts of the Amended Petition show that the Association has the power to enter into the MOU and  
18 to convey Area A to the Luglianis, particularly in the context of an exchange for more accessible  
19 and more useful parkland. The very exhibits that Petitioners rely on show that the Association has  
20 the right to exercise its reversionary and re-entry interests in Area A, but not the unambiguous  
21 duty to so.

22 In its Amended Petition, the Petitioners quote language from the same exhibits attached to  
23 the Original Petition that "The 1925 and 1928 deeds demonstrate that the very purpose of the  
24 creation of the ASSOCIATION was to 'maintain the parks...and to perpetuate the restrictions.'"  
25 (Amended Petition, p. 16:10-12, citing Exhibit 1, p.7.) But that language must be read together  
26 with other express powers of the Association to "convey, sell or otherwise encumber...for public  
27 use and/or otherwise dispose of real property..." and the "right and power to ...dispose of parks,  
28 parkways, playgrounds, open space and recreation areas." (Amended Petition, Exhibit 1, pp. 28-  
4841-4217-4999.2

1 29.) The power to dispose of park and open space clearly grants the Association the authority to  
2 convey Area A to the Luglianis, particularly when the purpose of that conveyance is to accomplish  
3 an exchange for more accessible and more useful parkland.

4 The Petitioners appear to assume incorrectly the word “shall,” as used in the governing  
5 documents expresses or signifies a mandatory duty. (Amended Petition, page 16, paragraph 32-  
6 34.) It is recognized, however, that the word “shall” is ambiguous, has as many as eight different  
7 meanings, and that the courts “in virtually every English-speaking jurisdiction have held—by  
8 necessity—that *shall* means *may* in some contexts and vice-versa.” (Bryan A. Garner, A  
9 Dictionary of Modern Legal Usage, Second Edition, p. 939).

10 Exhibit 1 to the Amended Petition grants the Association the power “to interpret, modify,  
11 amend, cancel, annul and/or enforce the deed restrictions.” (Amended Petition, Exhibit 1, p. 30.)  
12 The power to interpret clearly implies the exercise of discretion. The power to “enforce” deed  
13 restrictions is also expressed as an alternative to the powers to “modify, amend, cancel,” and  
14 “annul” those restrictions. This language clearly implies that there must be an exercise of  
15 discretion before making a determination to enforce the deed restrictions.

16 The Association exercised its discretion to interpret the deed restrictions in the MOU as  
17 follows:

18 As of the date of the transfer of Area A, the Homes Association  
19 represents and warrants to Property Owners that the condition of  
20 the Area A does not violate any recorded covenant, condition or  
21 declaration enforceable by the Homes Association, which could  
allow the exercise of any reversionary interest to the Homes  
Association in Area A. (MOU, Art. III, Sub. E, Amended  
Petition, Exhibit 4, p. 7.)

22 The Association also exercised its discretion to interpret the deed restriction in the deed  
23 conveying Area A from the Association to the Luglianis. (*See* Joint Request for Judicial Notice in  
24 Support of Original Reply, Ex. B [Grant Deed Instrument Number 20121327415].) In Paragraph  
25 2 of that deed, the Association expressly sets forth what structures would be permitted in Area A  
26 and requires that any necessary City approvals be obtained. Paragraph 10 then memorializes the  
27 Association’s interpretation of the deed restrictions stating:

28 It is the intent of the parties that the structures permitted under

1 Section 2 hereof are permitted under the conditions, restrictions  
2 and reservations cited herein [the deed restrictions], subject to  
3 compliance with application and approval requirements of Section  
4 2. (*Id.*)

5 The Petitioners have failed to allege facts showing that the Association had no right to  
6 issue such discretionary determinations. Furthermore, Section 11 of Exhibit 1 to the Amended  
7 Petition expressly grants the Association a right to interpret or enforce the deed restrictions and  
8 that the Association's interpretation "shall be final and conclusive upon all interested parties."  
(Amended Petition, Exhibit 1, p. 50.)

9 The Petitioners have therefore failed to plead the facts necessary to show that the  
10 Association has any required mandatory duty to exercise its reversionary rights, or take any action  
11 against the Luglianis to enforce deed restrictions that the Association, in its discretion, has  
12 determined have not been violated. For this reason, the Amended Petition fails to establish any  
13 affirmative duty supporting the issuance of a writ of mandate. Since this is the Petitioners second  
14 failed attempt to plead a mandatory duty, the Association's demurrer should be sustained without  
15 leave to amend.

16 **B. Case Law Holds that Community Associations Have Discretion in**  
17 **Determining How to Enforce Their CCRs and Courts Generally Defer to the**  
18 **Decisions of their Governing Boards.**

19 When a duly-constituted community association board on reasonable investigation, in good  
20 faith, with due regard for the best interests of the association and its members, exercises its  
21 discretion on matters within its authority, the courts will defer to the board's authority and  
22 presumed expertise. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999), 21  
23 Cal.4<sup>th</sup> 249, 265; *Narstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4<sup>th</sup> 361, 374  
24 [Anyone who buys in a common interest development with knowledge of the discretionary powers  
25 of the homeowners' association accepts "the risk of that the power may be used in a way that  
26 benefits the commonality but harms the individual . . ."])

27 The California Supreme Court, in *Lamden* 21 Cal. 4<sup>th</sup> at 257-259, upheld a Board's  
28 decision to spot treat termite infestation instead of fumigation. The Court held that the business



1 judgment rule applied to the decisions of associations that are also corporations, but in the case of  
2 both corporations and unincorporated homeowner associations, courts should defer to a  
3 community association board's authority and presumed expertise, when in good faith, and with  
4 regards for the best interest of the community association and its members, the board exercises  
5 discretion within the scope of its authority. (*Id.* at 265.) The Court explained that in the instance  
6 of an association that is a corporation, as is the case here, the business judgment rule insulates the  
7 association from court intervention for those management decisions that are made in good faith  
8 and in what the Association management believes is the best interest of the organization. (*Id.* at  
9 257.) The courts do not substitute their judgment for that of the corporation's board of directors.  
10 (*Id.*)

11 *Lamden* relied on *Nahrstedt* 8 Cal. 4<sup>th</sup> at 364-365, which addressed the issue of what  
12 standard governs the enforceability of covenants in CCRS. The Court held there, consistent with  
13 the *Lamden* decision, that "courts generally will uphold the decision made by the governing board  
14 of an association, so long as they represent good faith efforts to further the purpose of the common  
15 interest development..."

16 In *Haley v. Casa Del Rey Homeowner's Assn.* (2007) 153 Cal. App. 4<sup>th</sup> 863, 875, the court  
17 ruled that *Lamden's* rule of judicial deference to community board decision making was not  
18 limited to ordinary maintenance decisions but extended to board decisions regarding the best  
19 means to enforce the development's covenants and restrictions without resorting to litigation.

20 As shown above, the Association exercised its discretion under the governing documents  
21 and entered into the settlement to transfer Area A to the Luglianis in exchange for securing Lots C  
22 and D as parkland. The Petitioners cannot show that any mandatory duty has been breached. The  
23 Association's demurer should be sustained.

24 **C. The Petitioners' Reference to a Two-Thirds Vote Requirement for**  
25 **Modification of Deed Restrictions Does Not Apply to the Area A property.**

26 The Amended Petition, paragraph 35, relies on Section 9, page 17, of the protective  
27 conditions, Exhibit 1, to allege that two-thirds of the owners within 300 feet must vote to modify  
28 any of the land use restrictions. **Exhibit 1, Section 9, page 17 refers only to a portion of the**

1 local restrictions applicable to Tract 6888, which does not involve any of the subject  
2 property in this case. Exhibit 1, page 10, is the title page for Declaration No. 8 which states that  
3 it is the "Establishment of local protective restrictions, conditions, covenants, reservations, liens  
4 and charges affecting the real property known as TRACT 6888 – LUNADA BAY – PALOS  
5 VERDES ESTATES. It is undisputed in this case that the property that is subject of the  
6 Amended Petition is not part of Tract 6888.

7 D. The Association Joins In The Demurrer of Defendant and Respondent City of  
8 Palos Verdes Estates And The Demurrer And Motion To Strike of Real  
9 Parties Robert Lugliani, et. al.

10 The Association joins in the Demurrer of Defendant and Respondent City of Palos Verdes  
11 Estates and joins in both the Demurrer and Motion to Strike of Real Parties Robert Lugliani et. al.

12 IV. CONCLUSION

13 For the reasons stated, the Court should sustain this Demurrer to the Amended Petition  
14 without leave to amend.

15 DATED: December 5, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

16  
17 By: 

18 Brant H. Dveirin  
19 Attorneys for Respondent and Defendant PALOS  
20 VERDES HOMES ASSOCIATION

1 CALIFORNIA STATE COURT PROOF OF SERVICE

2 File No. 50013.1840

3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 At the time of service, I was over 18 years of age and not a party to the action. My  
5 business address is 221 North Figueroa Street, Suite 1200, Los Angeles, CA 90012.

6 On December 5, 2013, I served the following document(s):

- 7 **▪ DEFENDANT AND RESPONDENT PALOS VERDES HOMES ASSOCIATION'S**
- 8 **NOTICE OF HEARING AND DEMURRER TO THIRD CAUSE OF ACTION OF**
- 9 **FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT**
- 10 **FOR INJUNCTIVE RELIEF, AND MEMORANDUM OF POINTS AND**
- 11 **AUTHORITIES**
- 12 **▪ NOTICE OF JOINDER IN DEMURRER OF DEFENDANT AND RESPONDENT**
- 13 **CITY OF PALOS VERDES ESTATES AND JOINDER IN DEMURRER AND**
- 14 **MOTION TO STRIKE OF REAL PARTIES ROBERT LUGLIANI, ET. AL.**

15 I served the documents on the following persons at the following addresses (including fax  
16 numbers and e-mail addresses, if applicable):

17 **SEE ATTACHED SERVICE LIST**

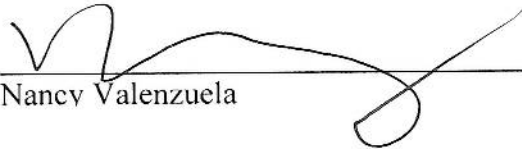
18 The documents were served by the following means:

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

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

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

28 Executed on December 5, 2013, at Los Angeles, California.

29   
Nancy Valenzuela

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