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Exempt from fees pursuant
to *Government Code* § 6103

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 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'
REPLY BRIEF IN SUPPORT OF
DEMURRER TO PETITION FOR WRIT
OF MANDATE AND COMPLAINT**

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

Petition and Complaint Filed: May 13, 2013

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

2 Plaintiff's opposition to the City's demurrer to the second cause of action fails because
3 the plaintiff has not identified any *ultra vires* actions by the City. The Complaint seeks to
4 prevent the City from processing the zoning applications; but, of course, processing the
5 applications is not only within the City's authority, it is the City's duty. In its opposition brief,
6 plaintiff asserts that conveying property and accepting a conveyance was *ultra vires*; however,
7 Government Code section 37350 expressly authorizes the City to receive and convey property.

8 Plaintiff's response to the City's demurrer to the third cause of action likewise fails to
9 provide any serious opposition, relying almost entirely on bare legal assertions without citation
10 to authority. First, plaintiff asserts that the 1940 deed allows various parties to enforce the
11 private deed restrictions and urges the court to conclude from there that it may compel the City
12 to enforce the deed restrictions. A writ of mandate may only issue to compel a ministerial
13 duty; the City is not legally obligated (nor does it possess the legal authority) to enforce the
14 private deed restrictions against a private land owner. Second, plaintiff argues that the court
15 will have the authority to issue the writ after it voids the deeds, although plaintiff offers no
16 theory as to why the deeds are invalid. Moreover, if the City owned the property, it may be
17 subject to an enforcement action but it is not subject to a writ to compel the City to enforce the
18 deed restrictions against another party. Lastly, plaintiff argues that the City's own Municipal
19 Code enforcement program in 2005 evidenced a mandatory duty to enforce the deed
20 restrictions. Plaintiff confuses enforcement of the Municipal Code with the deed restrictions.
21 These are separate legal requirements. The City's jurisdiction is limited to enforcement of the
22 Municipal Code.

23 For the reasons set forth in the City's Demurrer and herein, the City respectfully
24 requests that its demurrer be sustained without leave to amend.

25 **II. ARGUMENT**

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

28 The City of Palos Verdes Estates hereby joins in the argument of Defendants/Real

Parties-in-Interest set forth in their response to Section III of the opposition brief regarding Plaintiff's first and third causes of action.

B. Plaintiff's Second Cause of Action Fails to State a Claim for Relief Against the City.

In the second cause of action, plaintiff seeks injunctive and declaratory relief under Code of Civil Procedure section 526a to prevent the City from processing (and spending any additional funds processing) the Panorama Property Owners' applications for a zoning ordinance amendment and after-the-fact approvals for the existing improvements on Area A. Complaint ¶¶ 32, 33. Plaintiff seeks this relief on the theory that these actions are "*ultra vires*"—that is, outside the City's legal authority. As detailed in the City's moving papers, plaintiff's second cause of action fails to state a cognizable claim for relief. Not only is the processing of entitlement applications not "*ultra vires*," it is a core governmental function. In fact, the City has a ministerial obligation to process the applications in the manner prescribed by its municipal code. *See* City's Demurrer, pp. 6-7. Consequently, the City's processing of entitlement applications cannot constitute illegal conduct and form the basis of a CCP § 526a claim.¹ *Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 714 ("A cause of action under Code of Civil Procedure section 526a will not lie where the challenged governmental conduct is legal.")

The only defense of the second cause of action offered by plaintiff appears in the "Summary of Argument" section on page 4 of its opposition to the City's demurrer. There, Plaintiff explains that the "thrust of the claim" in its second cause of action is to "attack the MOU and two deeds for Area A as *ultra vires*." Under the MOU, the City's obligation is to

¹ As the City has already pointed out in its demurrer, plaintiff's attempt to enjoin the City from spending any funds to process the applications is also without merit. Applicants for entitlements and zone changes are required to pay a fee to the City in an amount that does not exceed the City's cost to process the applications. PVEMC §§ 17.04.070, 17.28.010(C); Cal. Const. art. XIII C, § 1. Consequently, the processing of such applications is generally revenue neutral to the City. The owners of Area A have paid all required application fees to the City and, unless the applications are withdrawn, they are entitled to have them processed, and decisions on them rendered, in the ordinary course of business.

1 allow the transfer of ownership of Area A (deed restrictions and all) to the Association and to
2 accept ownership of Lots C & D (deed restrictions and all). Complaint, Exhibit 4, p. 7.
3 Indisputably, the City possesses the legal authority to “purchase, lease, receive, hold, and
4 enjoy real and personal property, and control and dispose of it for the common benefit.” Gov’t
5 Code §37350. Accordingly, plaintiff offers no defense at all. Plaintiff cannot state a claim
6 that the City’s transfer of ownership of property was *ultra vires*; indeed, state law expressly
7 grants that authority to the City.

8 Plaintiff cites and inexplicably relies heavily on *City of Hermosa Beach v. Superior*
9 *Court* (1964) 231 Cal.App.2d 295 to support its second cause of action. That case held that a
10 taxpayer had standing to maintain an action to prevent the construction of a road over property
11 restricted from such use and dedicated “as a public pleasure ground.” *Hermosa Beach, supra*,
12 231 Cal.App.2d at 296. In this case, however, plaintiff is not challenging how the City uses
13 the property but rather whether the City owns it. Neither the *Hermosa Beach* case nor any
14 authority cited by plaintiff compels the City to own the property. Thus, neither the deeds
15 accomplishing the transfer of ownership nor the MOU that contemplates them is *ultra vires*.
16 Because plaintiff has not pled an *ultra vires* act, it fails to state a cause of action under CCP
17 section 526a. For that reason, the City respectfully requests that its demurrer to the second
18 cause of action be sustained without leave to amend.²

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23 ² It is evident from plaintiff’s opposition brief that its primary concern centers on its desire to
24 see the private deed restrictions applicable to Area A enforced. Given that, plaintiff appears to
25 be confused on a fundamental point. The applications for a zone change and after-the-fact
26 entitlements that would have the effect of legalizing the improvements on Area A remain
27 pending, but even if they are ultimately approved by the City that would not impair the
28 enforceability of the deed restrictions at all. *Seaton v. Clifford* (1972) 24 Cal.App.3d 46, 52;
Wilkman v. Banks (1954) 124 Cal.App.2d 451, 455. Therefore, if plaintiff or anyone else
possesses any enforceable rights or remedies by virtue of the deed restrictions applicable to
Area A, those rights or remedies will not be affected by any action the City may take on the
applications. The most a zone change and after-the-fact entitlements can do is bring Area A
into conformance with the Municipal Code. They cannot cure any violation of a private
covenant or restriction if, in fact, any such violation exists.

1 **C. Plaintiff's Third Cause of Action Fails to State a Claim for Relief Against**
2 **the City.**

3 In its third cause of action, Plaintiff seeks a writ of mandate compelling the City to
4 enforce deed restrictions applicable to the Area A parcel and to “use all legal means” to
5 remove the illegal improvements from Area A and restore it to its original state. Petition ¶ 38.
6 In its demurrer, the City argued in part that plaintiff’s third cause of action for writ of mandate
7 fails to state a cause of action because (1) the City has no ministerial duty, let alone any legal
8 standing, to enforce private deed restrictions on property it does not own, and (2) the City has
9 several options available to it to address code violations (the alleged illegal structures on Area
10 A) and cannot be compelled to pursue any one enforcement mechanism in particular, let alone
11 all of them simultaneously as plaintiff prays for in its complaint. Complaint, p. 14. In
12 response, plaintiff offers three arguments (Sections IV, V and VI of the Opposition), none of
13 which has any merit.

14 In Section IV of its Opposition, plaintiff insists that the Court may order the City to
15 enforce the “land use restrictions” on Area A. The “land use restrictions” plaintiff refers to are
16 the restrictions contained in the 1940 deed. Complaint, ¶ 11(d); Opp. Brief pp. 1-2. In its
17 moving papers, the City explained that it no longer owns Area A³ and, consequently, has no
18 authority (let alone a mandatory duty) to enforce the deed restrictions. Demurrer, pp. 8-9. The
19 City further explained that the deed in question did not impose a mandatory duty on any party
20 to enforce its restrictions; rather, it merely *authorized* certain parties to do so. *Id.* The City
21 cited ample authority in support of its conclusions, including case law on point and the plain
22 language of the 1940 deeds themselves. *Id.* Plaintiff offers only legal assertions in opposition
23 and cites no authority in support. Opp. Brief, p. 10. Therefore, for the reasons explained in
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26 ³ In its Opposition Brief, plaintiff oddly asserts that “the City sold Area A for \$1.5 million.” That is
27 not accurate, as plaintiff well knows, and directly contradicts its own Complaint. As alleged in the
28 Complaint, and as demonstrated by the terms of the MOU attached to the Complaint, the City did not
 sell Area A to anyone. Rather, the City conveyed Area A to the Palos Verdes Homes Association.
 The Association conveyed to the City Lots C and D. Complaint ¶ 21; Complaint, Exhibit 4, p. 7
 (MOU, p. 7.) The Association then sold Area A for \$500,000. *Id.*

1 the moving papers, the City respectfully requests that its demurrer to plaintiff's third cause of
2 action be sustained without leave to amend.

3 In Section V of the Opposition, plaintiff concedes that it does not presently have a
4 claim for a writ of mandate. The viability of its third cause of action for a writ commanding
5 the City to enforce the deed restrictions is contingent on the court first declaring the deeds void
6 and the City regaining ownership of Area A. Opp. Brief, p. 11 ("At *that* point, mandamus will
7 lie...") (emphasis added.) Therefore, by plaintiff's own admission, if the Complaint fails to
8 state a cause of action to void the deeds, its mandate claim must also fail. Regardless, as
9 detailed in the City's moving papers, plaintiff cannot state a cause of action for mandate under
10 any circumstances because even if the City still owned Area A it would be under no
11 mandatory obligation to enforce the deed restrictions. Demurrer, pp. 7-9. Plaintiff sometimes
12 confuses this fact with any property owners' obligation to comply with the deed restrictions.
13 The 1940 deed authorized certain parties to enforce the restrictions. Demurrer, pp. 8-9. It did
14 not impose a mandatory duty on any party to enforce them.⁴ *Id.* Plaintiff's terse, unsupported
15 legal conclusions are insufficient to overcome the City's demurrer and plaintiff has failed to
16 show there is any reasonable possibility of curing the defects in its third cause of action by
17 amendment. See Opp. Brief, pp. 10-11. Consequently, the City respectfully requests the third
18 cause of action be dismissed without leave to amend. See *Durell v. Sharp Healthcare* (2010)
19 183 Cal.App.4th 1350, 1371.

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22 ⁴ Plaintiff also appears to argue that mandamus will be appropriate to require the City to enforce its
23 municipal code if it can convince the court to void the subject deeds. Opp. Brief at 11:1-2. Plaintiff's
24 confusion is apparent. The City's authority to enforce its zoning regulations is unaffected by the
25 change in ownership. The City still has precisely the same police power (and corresponding
26 discretion) that it had when it owned the underlying fee interest in Area A. However, as explained in
27 the moving papers, the Court may not compel the city to exercise its discretion in any particular
28 manner. Moving Papers, pp. 9-11; *Riggs v. City of Oxnard* (1984) 154 Cal.App.3d 526, 530. Even if
the court had such authority, it would be premature at this point because, as plaintiff alleged,
applications are pending before the City which, if ultimately approved, would have the effect of
legalizing the improvements on Area A. Complaint, ¶ 24. It would be a senseless waste of public
resources for the City to simultaneously pursue legal remedies to compel removal of the improvements
while applications to legalize them in place remain pending.

1 In Section VI of the Opposition, Plaintiff suggests that the City's own 2005 Municipal
2 Code enforcement program to remove illegal encroachments proves that "the City has a duty
3 to enforce the land use restrictions affecting Area A." Opp. Brief, pp. 11-12. Again, plaintiff
4 neglects to account for the fact that the City does not own Area A. The City certainly has a
5 duty to comply with deed restrictions on property that it owns. Such is true of all property
6 owners, public or private. However, at this point, plaintiff seeks a writ of mandate to compel
7 the City to enforce private deed restrictions on privately owned property. Such relief is
8 unavailable as a matter of law and sufficient grounds to sustain the City's demurrer to the third
9 cause of action.

10 Secondly, the 2005 Municipal Code enforcement program to remove illegal
11 encroachments addressed unpermitted encroachments on City-owned land. As discussed in
12 the City's Demurrer at pages 9-10, the City has a range of enforcement options from which to
13 choose. The 2005 program was developed by the City in order to create a fair but effective
14 program and the program assigned certain actions to various city departments. The program is
15 not, as plaintiff suggests, evidence that the City believed it had a mandatory duty to enforce
16 the deed restrictions in the particular way that the 2005 program did. If anything, it shows the
17 opposite: if the law required the City to do that, the 2005 program would have been
18 superfluous. Instead, the program was the expression of the City's enforcement choice at that
19 time. The unpermitted improvements on Area A are being addressed in a different manner,
20 equally within the City's authority.

21 The City's 2005 program did not create a duty beyond its four corners and was subject
22 to amendment, repeal and interpretation by the City. The 2005 program also did not – and
23 could not – direct prosecutorial discretion, as discussed on page 11 of the City's moving
24 papers.

25 Finally, plaintiff inexplicably fails to appreciate the fact that the City is not required to
26 own Area A for the deed restrictions to have real effect. The deed restrictions run with the
27 land, requiring compliance from whoever owns the property.

1 **D. Plaintiff’s Unpleaded Estoppel Theories Have No Merit.**

2 In Section VII of its opposition, plaintiff raises two distinct estoppel theories, neither of
3 which was pleaded in the Complaint. A demurrer tests the validity of the complaint and courts
4 should look exclusively to the facts alleged in the complaint. *Childs v State of California*
5 (1983) 144 Cal.App.3d 155, 159. A defendant need only address the issues raised by the
6 complaint and the plaintiff cannot bring up new, unpleaded issues in its opposition. Cf.
7 *Government Employees Ins. Co. v. Superior Court* (2000) 79 Cal.App.4th 95, 98-99, fn. 4;
8 *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 332-333. In any
9 event, it is clear that neither estoppel theory has any merit and pleading them would not cure
10 the fatal defects on the face of the Complaint. Consequently, plaintiff should not be granted
11 leave to amend to allege facts in support of them.

12 Plaintiff first estoppel theory suggests that because the City accepted title to Area A in
13 1940 subject to numerous deed restrictions, it is “estopped from now denying the efficacy of
14 the entire deed, including the land use restrictions.” Plaintiff misses the point yet again. The
15 City does not, and has not, denied that Area A is subject to deed restrictions that limit its use.
16 The City no longer owns Area A (Complaint, ¶ 21) and, therefore, it is without standing to
17 enforce those private deed restrictions.⁵ *BCE Development, Inc. v. Smith* (1989) 215
18 Cal.App.3d 1142- 1146-47; Miller and Starr, 8 Cal. Real Est. § 24:25 (3d ed.) Even if the City
19 still owned Area A it would be under no mandatory obligation to enforce the deed restrictions,
20 although as property owner it would be subject to them. Demurrer, pp. 7-9.

21 For its second theory, plaintiff cites *Roberts v. City of Palos Verdes Estates* (1949) 93
22 Cal.App.2d 545 for the proposition that the City is “estopped to deny the mandatory nature of
23 the land use restrictions due to prior litigation on this very issue.” In *Roberts*, the issue was
24 whether the City could erect a building to store city-owned maintenance vehicles and

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26 ⁵ It is unclear what significance plaintiff attaches to the fact that the Association avoided tax liability
27 by transferring property to the City in 1940 or how that is relevant to the issue in the case. Regardless,
28 plaintiff does not explain how the lawful conveyance of land and cancellation of a tax debt that
occurred 73 years ago “intentionally and deliberately led” an unincorporated association formed 73
years later to act upon it to its detriment.

1 equipment on property subject to a deed restriction that prohibited the erection of any
2 structures unless they were “properly incidental to the convenient and/or proper use of said
3 realty for park purposes.” *Roberts*, 93 Cal.App.2d at 546. The court ruled that terms of the
4 deed alone are controlling, not the desires of the City, and remanded the case to the trial court
5 to determine whether the proposed buildings would be “necessary and appropriate, and hence,
6 ‘incidental to the convenient and/or proper use of said realty for park purposes.’” *Id.* at 548.
7 The case has no application here. The City is not making use of Area A and does not propose
8 to make use of Area A. In addition, the City acknowledges the existence and enforceability of
9 the deed restrictions applicable to Area A. The City’s point is simply that it may not be
10 compelled to use its police power to enforce private deed restrictions applicable to property it
11 does not own. Demurrer, pp. 8-9. Plaintiff’s opposition brief cites no legal authority to
12 contradict the City’s position on that point. Consequently, the City requests that third cause of
13 action be dismissed without leave to amend.

14
15 **E. Plaintiff Has Failed to Show that the Defects in Its Complaint Can be Cured
by Amendment.**

16 Plaintiff bears the burden of establishing that defects in its complaint can be cured by
17 amendment. *Durell v. Sharp Healthcare, supra*, 183 Cal.App.4th at 1371; *Campbell v. Regents*
18 *of University of California* (2005) 35 Cal.4th 311, 320. In Section VIII of its Opposition,
19 plaintiff cursorily argues that should the Court sustain the City’s demurrer it should be
20 afforded leave to amend to allege “additional historical facts” regarding the City’s “past
21 admissions and conduct giving rise to the duty to enforce the restrictions an supporting the
22 doctrine of estoppel.” Opp. Brief, p. 14. Plaintiff does not discuss any particular allegations
23 of the proposed amended complaint or explain how those supplemental allegations would cure
24 the Complaint’s fundamental defects. Consequently, plaintiff has failed to meet its burden and
25 the City’s demurrer to the second and third causes of action should be sustained without leave
26 to amend. *Durell, supra*, 183 Cal.App.4th at 1371. In any event, whether the City has such a
27 duty is a question of law squarely before this court at this time; further facts will not change
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1 the legal conclusion that the City has no present duty to enforce the deed restrictions against
2 private property owners. That is the right of the Association and others.

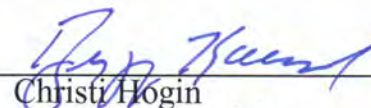
3 **III. CONCLUSION**

4 For the foregoing reasons, the City respectfully requests that the Court sustain the
5 City's demurrer without leave to amend.

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8 Dated: October 17, 2013

Respectfully submitted,

9
10 By: _____


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CITY OF PALOS VERDES ESTATES

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On October 18, 2013, I served the foregoing documents described as:

**CITY OF PALOS VERDES ESTATES' REPLY BRIEF IN SUPPORT OF
DEMURRER TO PETITION FOR WRIT OF MANDATE AND COMPLAINT;**

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

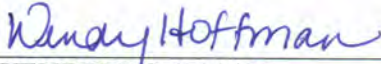
PLEASE SEE SERVICE LIST ATTACHED

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

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

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

Executed this 18th day of October, 2013, at Manhattan Beach, California.


WENDY HOFFMAN

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