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Exempt from fees pursuant to Government Code § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES—CENTRAL DISTRICT

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS, an unincorporated association; JOHN HARBISON, an individual

Plaintiffs and Petitioners,

v.

CITY OF PALOS VERDES ESTATES, a municipal corporation; PALOS VERDES HOMES ASSOCIATION, a California corporation,

Defendants and Respondents,

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

Defendants and Real Parties in Interest.

CASE NO. BS142768

CITY OF PALOS VERDES ESTATES' NOTICE OF CROSS-MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION [C.C.P. § 437C]; MEMORANDUM OF POINTS AND AUTHORITIES

[Request for Judicial Notice; Separate Statement of Undisputed Facts; and Declaration of Vickie Kroneberger; Volume of Evidence; Filed Concurrently Herewith]

Date: May 29, 2015
Time: 9:30 a.m.
Dept.: 12

Hon. Barbara A. Meiers

Petition and Complaint Filed: May 13, 2013

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on May 29, 2015, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Department 12 of the Superior Court of the State of California, Los Angeles County, located at 111 N. Hill St., Los Angeles, California, Respondent and Defendant City of Palos Verdes Estates (the "City") will and hereby does cross-move this Court for summary judgment in favor of the City on the Second Amended Complaint. The cross-motion will be made upon the grounds that there are no triable issues of fact suggested by the pleadings and supporting documents and Plaintiffs' requested relief is barred by law.

PLEASE TAKE FURTHER NOTICE that at the same time and place, the City will cross-move in the alternative for an order summarily adjudicating the following issues:

ISSUE 1: Plaintiffs' First Cause of Action for declaratory relief fails as a matter of law because 1) Area A was validly transferred to the Association by the City's actions; and 2) the City has no affirmative duty to enforce private deed restrictions or to remove improvement from Area A.

ISSUE 2: Plaintiffs' Second Cause of Action for waste of public funds/*ultra vires activity* fails because 1) the City possesses the legal authority both to convey real property under Gov't Code §37350 and to enact zoning laws; and 2) Plaintiffs cannot estop the City from exercising its legislative function in the future.

The alternative motion will be based on the grounds that there are no triable issues of material fact and the City is entitled to adjudication of these issues as a matter of law.

The motions will be based on this notice, the City's Separate Statement of Undisputed Facts, the accompanying Request for Judicial Notice, and memorandum of points and authorities, the declaration of Vickie Kroeneberger, the Second Amended Complaint, all of which are attached to

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this notice or served and filed with it, and all of the pleadings and the Court's file in this action.

DATED: March 13, 2015

Respectfully submitted,

By: _____

Christi Hogin
Tarquin Preziosi
JENKINS & HOGIN, LLP
Attorneys for Respondent/Defendant
CITY OF PALOS VERDES ESTATES

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I. INTRODUCTION

This lawsuit arises from Plaintiffs' concern over the enforcement of certain private covenants on land conveyed from the private Palos Verdes Homes Association to Plaintiffs' neighbor, the Luglianis. The City does not belong in the case. Plaintiffs named the City based on their contention that the City had a mandatory duty to hold the subject property and enforce the private CC&Rs. The Homes Association originally granted the property to the City subject to a reversionary interest. Separate Statement of Undisputed Material Facts ("SS") No. 1. Indisputably, the City had the legal authority to re-convey the property to the grantor. Plaintiffs cannot establish that the City's actions were improper; even if the City's actions violated the terms of the original grant Deeds, the property would necessarily be subject to reversion back to the grantor. Accordingly, the City is entitled to judgment as a matter of law as to the post-writ causes of action.

The allegations of the Second Amended Complaint ("SAC"), set forth Plaintiffs' opposition to certain political decisions of the City Council. Plaintiffs claim that these decisions are or would be "*ultra vires,*" beyond the City's authority. The lynchpin of Plaintiffs' contention is that the City's legislative actions might violate private deed restrictions. Through this lawsuit, Plaintiffs seek to have the court stop the City from exercising its legislative discretion in the future with respect to some possible, future zoning of property within the City and instead use its governmental authority to enforce private deed restrictions on private property in the manner that Plaintiffs see fit. Plaintiffs' legal theory is contradicted by settled law. The relief sought is unavailable and, accordingly, the City respectfully requests that its Motion for Summary Judgment be sustained without leave to amend.

II. STANDARD OF REVIEW

A motion for summary judgment shall be granted if the papers submitted show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. C.C.P. § 437c(c). A cause of action has no merit if one or more of the elements of the cause of action cannot be separately established, or a defendant establishes an

affirmative defense to the cause of action. C.C.P. § 437c(o). A respondent moving for summary judgment has the burden of showing that a cause of action has no merit. C.C.P. § 437c.

"There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion *in accordance with the applicable standard of proof.*" *Chateau Chamberay Homeowners Ass'n v. Associated Intern. Ins. Co.* (2001) 90 Cal.App.4th 335, 344-345 (emphasis in original); *see also Catholic Healthcare West v. California Ins. Guarantee Ass'n* (2009) 178 Cal.App.4th 15, 24. "An issue of fact becomes one of law and loses its triable character if the undisputed facts leave no room for a reasonable difference of opinion." *Chateau Chamberay,* 90 Cal.App.4th at 345.

A motion for summary adjudication may be brought concurrently with, or in the alternative to, a motion for summary judgment and may rely on the same evidence. C.R.C. Rule 3.1350(b). Such a motion may be used to resolve a cause of action or dispose of an asserted affirmative defense. C.C.P. § 437c(f)(1); *McCaskey v. California State Automobile Association* (2010) 189 Cal.App.4th 947, 975.

Either party may rely on admissions of fact contained in the opposing party's pleadings as evidence. *24 Hour Fitness, Inc. v. Sup.Ct. (Munshaw)* (1998) 66 Cal.App.4th 1199, 1211; *Valerio v. Andrew Youngquist Const.* (2002) 103 Cal.App.4th 1264, 1271. Unequivocal admissions in pleadings are treated as "judicial admissions"—i.e., they are conclusive and *cannot be controverted* by the pleader. See *Heater v. Southwood Psychiatric Ctr.* (1996) 42 Cal.App.4th 1068, 1079–1080, fn. 10; Cal. Prac. Guide Civ. Pro. Before Trial Ch. 10-B.

III. PROCEDURAL HISTORY AND FACTS AS ALLEGED

A. Procedural History

This lawsuit was filed on May 13, 2013 and the City was served on June 16, 2013. The City and the other Defendants, Respondents and Real Parties in Interest demurred to the petition and complaint and, on October 25, 2013, the Honorable Robert O'Brien sustained the parties' demurrers to the third (writ petition) cause of action with leave to amend. The court did not rule on the parties' demurrers to the first and second causes of action, indicating

instead that those matters should be resolved outside of the Writs and Receivers Department. Plaintiff subsequently filed the First Amended Petition ("FAP").

On January 6, 2014, the Honorable Robert O'Brien sustained the City's demurrer to the third (writ of mandate) cause of action in the FAP without leave to amend. The writ sought an order that the City has an affirmative duty to enforce the private land use restrictions and to remove the illegal improvements on the Area A property. See FAP ¶ ¶25-30 & 57. The court ruled that "[a]t this time, Plaintiff has not presented any possible amendment that would establish a ministerial duty to act as requested." See Minute Order, Dept. 86, case BS142768, January 6, 2014. On April 1, 2014, Division 2 of the California Court of Appeal issued an order summarily denying Plaintiff/Petitioners writ petition seeking interlocutory review of Judge O'Brien's order.

Following transfer to Department 12 of this case and the pending demurrers to the first and second causes of action, this court granted Plaintiffs leave to amend the complaint and, by stipulation of the parties, Plaintiffs added a plaintiff and the fourth cause of action for private nuisance between the Plaintiffs and their neighbor Real Parties in Interest, the Luglianis. The City's Demurrer to the SAC and Joint Motion to Strike portions of the SAC were overruled on November 4, 2014. The City's Answer was filed on November 24, 2014.

B. Facts Alleged

There is no dispute as to the underlying facts in this case regarding the language of the relevant documents; the following facts are taken primarily from the SAC itself and are not disputed by the City for purposes of this motion.

The litigation concerns the ownership and use of undeveloped parkland located in what is now the City, referred to by Plaintiffs as the "Panorama Parkland" or "Area A". SAC ¶10. The property is a steep hill at the end of a cul-du-sac. In 1913, a wealthy New York financier purchased the land that would later become the City of Palos Verdes Estates. SAC ¶ 12. Development of the property began in the early 1920's. *Id.* Deed restrictions were imposed on the land in 1923. *Id.* In 1925, a number of lots were conveyed to the private corporation Palos Verdes Homes Association (the "Association") subject to deed restrictions limiting the

use of the properties to public schools, parks, playgrounds or recreation areas. SAC ¶14.

The City of Palos Verdes Estates was incorporated on December 20, 1939. SAC ¶12. In 1940, the Association's parks were deeded to the City by the Association. SAC ¶12. Among the properties conveyed to the City on June 14, 1940 was the Panorama Parkland - the parcel that is the focus of the petition and complaint. SAC ¶ 15. The 1940 deeds contained seven restrictions related to their use as parkland, conveyance, and reversionary interests. SS--SAC ¶ 15(i.) –(vii). The deeds gave the Association a reversionary interest in the event certain deed restrictions were violated. SAC ¶ 115(vi); SAC Ex. A, p. 9; Exhibit 7, p. 6. Certain parties named therein also would be authorized to bring appropriate proceedings to enjoin, abate or remedy the breach of any deed restriction. SAC Ex. 6, p. 9; Ex. 7, p. 7.

On February 1, 2010, the Palos Verdes Peninsula Unified School District ("District") - who was a defendant to the initial petition and complaint but for unknown reasons is no longer a party - filed a lawsuit against the City and Association seeking, among other things, a declaration that the deed restrictions applicable to Lots C & D were no longer enforceable. SAC ¶ 23, 24. On September 22, 2011, the Court entered judgment finding that deed restrictions applicable to the property and set forth in deeds from 1925 and 1938 all remain enforceable against the District. SAC ¶ 25. The Association thereafter brought an unsuccessful motion for attorneys' fees. SAC ¶ 26. The District subsequently appealed the judgment and the Association filed a cross appeal on the attorney fee issue. SAC ¶ 27.

In May 2012, the Association and the District entered into a Memorandum of Understanding to resolve their disputes and obviate the need to pursue their appeals. The City is also a party to the MOU, along with defendant/real party-in-interest Thomas J. Lieb, trustee, the Via Panorama Trust U/DO May 2, 2012. SAC ¶¶ 28, 29; SAC Ex. 12. The parties to the MOU agreed to the following land transfers: (1) Area A and Lots C and D would revert to the Association pursuant to the terms of the applicable deed restriction; (2) The Association would convey Lots C and D to the City; and (3) the Via Panorama Trust would purchase Area A from the Association. SAC ¶ 29; SAC Ex. 12. Area A is the property that is the subject of this litigation.

Following the execution of the MOU, the parties took steps towards its implementation. SAC ¶ 33. On August 8, 2012, the City conveyed its interest in Area A to the Association, subject to a conservation easement and utility and emergency access easements. SS No. 12. Area A is located at the end of a cul-du-sac and is adjacent to another parcel Plaintiffs refer to as the "Panorama Property" according to Plaintiffs' earlier pleadings. See FAP ¶ 16. Plaintiffs allege that the owners of the Panorama Property (Robert Lugliani and Delores A. Lugliani, as co-trustees of the Lugliani Trust, referred to by Plaintiffs as the "Panorama Property Owners") and/or the Area A Recipients have encroached on Area A by erecting improvements in violation of the deed restrictions. SAC ¶¶ 20, 21.

On February 19, 2013, the City's planning commission held a public hearing on an application by the Panorama Property Owners to re-zone Area A and to obtain after-the-fact approvals for improvements constructed thereon. SS--SAC ¶ 34. The commission recommended denial of the zone change request. *Id.* The matter proceeded to the City Council on March 12, 2013. SS--*Id.* The Council held a hearing but did not take action, instead continuing the matter and directing staff to investigate other zoning options. SS--*Id.*

IV. ARGUMENT

A. City's Re-Conveyance of Area A to the Grantor-HOA Was Proper

There are no material facts that would establish grounds for the requested relief against the City. The 1940 Deeds contain several restrictions through which the Association conveyed Area A to the City—restrictions that limit the use of the property, the types of structured that may be erected on it, and to whom it may be sold or conveyed, and that further provide the Association with a reversionary interest in the event of a breach of any of the restrictions. SS Nos. 1-11. For purposes of this motion, the City does not dispute that it accepted the deeds with all of its restrictions. The language of the 1940 Deeds do not prohibit the City from re-conveying Area A to the original grantor, Defendant Homes Association. Restrictions on the face of a deed do not create mandatory enforcement obligations on the part of the government any more than they create mandatory enforcement obligations on the part of private

individuals. In fact, the drafters of the 1923 and the 1940 deeds included a self-executing provision which provided that, in the event of a breach of certain specified restrictions (including the "no structures" restriction), the Association would have a right of reversion. SS No. 9 (as to the 1940 Deeds); SAC ¶ 14.iv-v; SAC Ex. 5, pp. 22-23; SAC ¶15.vi, Ex. 6, p. 9, Ex. 7, p. 6. The potential for reversion is a normal means by which private deed restrictions get enforced—the property owner either abides by them voluntarily or they suffer the consequences spelled out in the deed itself. As discussed *infra*, Plaintiffs appear to be confusing the City's authority regarding enforcement of its Municipal Code under its inherent police power with its power to address alleged violations of private deed restrictions that were also independently violations of the Municipal Code. Ultimately, code violations either could be brought into compliance with the code (for example, by obtaining an after-the-fact permit), or as explained *infra*, the City may use one of several tools available for addressing the violations. On the other hand, the City cannot enforce private deed restrictions on property it does not own. Even if the City still owned Area A, it would be obligated to comply with the deed restrictions or suffer the Association's potential exercise of its right of reversion, as would any property owner with property subject to the PVE CC&Rs. The City as a governmental entity would not have a mandatory duty to enforce the restrictions.

Plaintiffs allege that the City has previously considered the encroachment on Area A to be in violation of the applicable deed restrictions and a "nuisance" that the City has, "through conduct and statements," taken the position that the deed restrictions are mandatory and not discretionary. SAC ¶22. These (erroneous) legal conclusions alleged in the complaint do nothing to help Plaintiffs state a cause of action against the City. First, these allegations simply mirror arguments made by Plaintiffs in opposition to the City's original demurrer and already considered by the court. *See* Plaintiff's Opposition to Demurrer by Palos Verdes Estates at pp. 1, 11-12; City's Reply Brief on Demurrer at p. 6. Second, even if accepted as true factual allegations, the allegations in Paragraph 22 do not establish the existence of a mandatory duty on the part of the City to enforce private deed restrictions on private property. The only thing the allegations establish is the undisputed fact that, while the City did own the

property, it undertook various measures to seek the removal of illegal encroachments upon it—encroachments that the City could utilize its police powers to remove because they were constructed on publicly owned land without permits *in violation of local ordinances*.

The City no longer owns the property and Plaintiffs fail to appreciate the fact that the City is not required to own Area A in order for the deed restrictions to have force and effect. The deed restrictions run with the land and bind whoever owns the property.

B. There is No Justiciable Controversy that Involves the City Set Forth in the First Cause of Action.

In their first cause of action, Plaintiffs seeks a judicial declaration 1) that the September 2012 deeds are void, illegal, and unenforceable (SAC ¶ 40(a)-(c); and 2) that the City and the Association have the right and affirmative duty to enforce the deed restrictions applicable to Area A and to remove the illegal improvements from Area A and restore it to its original state. SAC ¶ 36(d), 40(d).

Plaintiffs' alleged controversy is over whether the Association could sell Area A to the Luglianis. SAC ¶40. The City was not a party to that transaction.[1] *See* Exhibit 10 to SAC (Grant Deed from Association to Luglianis). Whether or not *that* transaction was permissible, the City's reconveyance to the Association was valid. Plaintiffs do not allege a single fact or advance a single viable legal theory to suggest otherwise. Tellingly, Plaintiffs do not challenge or seek to invalidate the underlying MOU that provided for the various properties' transfer. In failing to do so, they cannot now "unwind" the City's 2012 quitclaim deed to the Association in order to force the City to hold title to the Property.

The Association originally granted the property to the City, subject to a right of reversion and various deed restrictions. SAC ¶¶15, 36(b). The Association's deed to the City expressly contemplated the possibility of the Association again holding title. This case questions whether *the Association* could sell Area A to *the Luglianis*. The City should not be in this case.

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[1]And the City did not receive any money from the Luglianis. SAC ¶29.

1. If The 1940 Deed Restrictions Were Violated by The City's 2012 Quitclaim Deed, The Only Remedy Would Be To Trigger The Association's Reversionary Interest.

As set forth in the SAC, if the 2012 grant deed from the City to the Association violated the terms of the 1940 deeds, Area A would necessarily be subject to the Association's power of termination. SAC ¶15.vi. However, the 2012 grant deed effectuated the Association's reversionary interests in the Property by granting it back to the Association. Because the City no longer holds title to the Property, the declaratory relief cause of action is moot. There is no present justiciable controversy within the meaning of C.C.P. section 1060 relating to the City. See *Pittenger v. Home Sav. and Loan Ass'n of Los Angeles* (1958) 166 Cal.App.2d 32, 36 (where questions presented are or have become moot and no actual or justiciable controversy exists, court has no duty to proceed to determine rights and duties of the parties). Because no facts have been presented to show that the conduct would continue (nor can it, since the City no longer owns the property) the action is moot. *Id.*

The SAC does not allege any defect in the 1940 deeds. Instead, Plaintiffs appear to assert that the City is required to own the property; but the very deeds that Plaintiffs seek to enforce provide for loss of ownership should the City violate the deed restrictions. Clearly, the City accepted the property in 1940. SAC ¶15 & 17. The 1940 deeds to the City created a condition subsequent in favor of the Association. See *Rosecrans v. Pac. Elec. Ry. Co.* (1943) 21 Cal.2d 602, 605; Miller and Starr, 3 Cal. Real Est. § 9:6 (3d ed.) As such, the Association would have to exercise its right of termination[2]. *Rosecrans v. Pac. Elec. Ry. Co,* supra, 21 Cal.2d at 604-5; Miller and Starr, 3 Cal. Real Est. § 9:8 (3d ed.). Even where one of the enumerated conditions occurs, the City's estate is divested if, and only if, the Association as grantor elects to exercise the power of termination. Id. The City quitclaimed Area A to the Association in 2012. SAC ¶33. Accordingly, based on the face of both the 1940 deeds and the SAC, the only possible remedy if the conditions of the 1940 deeds were violated by such a transfer, would

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[2] Right of reentry and similar terms are now referred to as a "power of termination" under the Marketable Record Title Act ("MRTA"). See Civil Code. § 885.010.

be for the Association to exercise its power of termination to revert the property back to the Association.[3] SAC ¶ 15.vi; SAC Ex. 6, p. 9, Ex. 7, p. 6.

Further, under the merger doctrine, when the dominant and servient tenement are combined in a single owner, the servitudes thereon are extinguished. See Civil Code § 805 & 811; *Zanelli v. McGrath* (2008) 82 Cal.Rptr.3d 835, 841-2. The rationale underlying sections 805 and 811 is "to avoid nonsensical easements—where they are without doubt unnecessary because the owner owns the estate." *Beyer v. Tahoe Sands Resort* (2005) 129 Cal.App.4th 1458, 1475. If the fee ownership of either a dominant or servient tenement is subject to a power of termination, reversion, or executory interest, the future non-possessory interests are unaffected by any extinguishment of the easement by merger. See *Zanelli v. McGrath*, supra, 82 Cal.Rptr.3d at 846 (discussing the Restatement 3rd, Property, Servitudes § 7.5). Here, however, the fee ownership of the City was subject to these future non-possessory interests held by the Association – as opposed to a third party. When the Association's interest in the Property became possessory, there were no longer any outstanding interests, and merger occurred. See id. Because of the City's quitclaim deed to the Association, the restrictions of the 1940 deed were no longer in effect.

Because the City no longer holds title to the Property, the cause of action for declaratory relief in not properly directed to the City.

2. Because the 1940 Deed Restrictions Govern Use, not Ownership, the 2012 Quitclaim Deed from the City to the Association does not Violate the Terms of the Deed.

This is not enough to state a claim for declaratory relief, which requires an *actual* controversy between the parties. Not one of the restrictions stated in the SAC is supported by

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[3] Under the MRTA, the power of termination expires thirty years after the date the instrument reserving, transferring, or otherwise evidencing the power of termination is recorded. Civ. Code § 885.030. Unless a notice to preserve the power of termination is recorded within that time, the power of termination expires. Id; see also *Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 128. However, if the restriction is also an equitable servitude alternatively enforceable by injunction, "[s]uch an equitable servitude shall remain enforceable by injunction and any other available remedies, but shall not be enforceable by a power of termination..." Civil Code § 885.060. Accordingly, the Association retains at least the right to enforce the condition.

any legal theory that would give rise to a justiciable controversy involving the City. Plaintiffs' may argue that the 2012 quitclaim deed permits the grantee to undertake actions that are not authorized by the 1940 deeds. Assuming, *arguendo*, that the 1940 deeds are still controlling, the 2012 conveyance deed simply states that the grantee (here, the Association), may undertake certain improvements *if* permits are issued by the City. This is nothing more than a recitation of general land use principals as applied to a private landowner (the Association) and the City as a governmental entity.

Plaintiffs have not set forth facts to establish an actual, justiciable controversy with the City over whether and which deed restrictions apply to Area A because the City does not own Area A and the private deed restrictions are not enforced by the government. These restrictions identified in its SAC demonstrate that the issues in this case are between the Plaintiffs and the property owner. Moreover, the SAC offers absolutely no fact and offer no viable legal theory to suggest that there was any infirmity in the City's reconveyance of Area A to the grantor.

3. The City has No Duty to Either Enforce Private Deed Restrictions, or to Exercise its Police Powers in the Manner Asserted by Plaintiffs.

These allegations of affirmative duty contradict well settled law. The City has no ministerial duty, let alone any legal mechanism, to enforce private deed restrictions on private property. Deed restricts are private contracts. With respect to the alleged illegal improvements on Area A, the City has several options available for dealing with code violations and cannot be compelled to pursue any one enforcement mechanism in particular. Nor can it be compelled to act at all because the City is fully vested with the discretion in how to exercise its police powers.

a. Plaintiffs Are Not Entitled to a Declaration that the City has an Affirmative Duty to Enforce Private Deed Restrictions.

Unless a clear intention to allow enforcement by others is expressed in the deed restriction, a party must have a legal interest in the benefitted property in order to have standing to enforce the restriction. *BCE Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142, 1146-1147; Miller and Starr, 8 Cal. Real Est. § 24:25 (3d ed.) The seller or transferor of

the benefitted property cannot enforce the deed restrictions after conveying away title to another absent a showing that the original covenanting parties intended to allow enforcement by one who is not a landowner. *Farber v. Bay View Terrace Homeowners Ass'n* (2006) 141 Cal.App.4th 1007, 1011; *Russell v. Palos Verdes Properties* (1963) 218 Cal.App.2d 754, 764-765 (disapproved of on other grounds by *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345.) In any case, enforcement of the terms of a private deed restriction is not a governmental function.

City no longer owns Area A. SS No. 12; SAC ¶ 33. It is now owned by Thomas J. Lieb, Trustee, of the Via Panorama Trust. SAC ¶33, Ex. 10. Even if the City remained authorized to enforce the deed restrictions in question, it has no mandatory duty to enforce them. The 1940 Deeds in question gave the Association a reversionary interest (a power of termination) in the event of a breach by the City. SS No. 9; SAC ¶ 15.vi; SAC Ex. 6, p. 9, Ex. 7, p. 6. In addition, it authorized (but did not obligate) certain other benefitted parties to pursue remedies. SS No. 11; SAC, Ex. 6, p. 9 ("...the breach of any [covenant] or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by the Grantor herein [the Association] or its successors in interest, or by such other lot or parcel owner, and/or by any other person or corporation designated in said Declarations of Restrictions."[4] (Emphasis added.) Therefore, there are no facts - nor can there be - establishing a mandatory duty on the part of the City to enforce private deed restrictions applicable to Area A.

b. The City Cannot Be Compelled to Address the Alleged Illegal Improvements On Area A in Any Particular Manner.

To the extent Plaintiffs seek to force the City to employ specific code enforcement mechanism to deal with the encroachments on Area A, such relief is not available. If improvements have been constructed on Area A in violation of the City's zoning ordinance,

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[4]Section 12 ("Right to Enforce") of the "Declaration of Establishment of Basic Protective 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." SAC, Ex. 5, p. 41.

the City has a number of discretionary tools in its belt for achieving compliance. Zoning violations may be prosecuted criminally as a misdemeanor and the City may seek fines of up to $1,000 per violation and/or up to six months imprisonment. PVEMC §§ 1.16.010, 1.16.010(B), 17.32.060 (Request for Judicial Notice [RJN], Ex. A & E.) In additional to criminal penalties, the City may declare any violation of its code a public nuisance and subject it to abatement. PVEMC §§ 1.16.010(F), 17.32.040, 17.32.050. RJN, Ex. A & E. Such nuisance abatement under the PVEMC is purely discretionary: "the city attorney shall, upon order of the city council...". See PVEMC § 17.32.050. RJN, Ex. F.

Nuisance abatement offers several options to the City, including the issuance of an abatement order directing the property owner to abate the nuisance. PVEMC §§ 8.48.040 *et seq.*, 17.32.050. (RJN, Ex. B & E.) If the property owner fails to comply, the City may seek an abatement warrant and cause the nuisance to be abated with its own workforce or that of a private contractor. PVEMC § 8.48.060. RJN, Ex. B. The City through a lien or a special assessment on the property may recoup costs associated with abatement and the City has the additional option of seeking a court order for treble costs of abatement. PVEMC §§ 8.48.090, 8.48.110. (RJN, Ex. B.) The City may also achieve compliance by legalizing unpermitted improvements as opposed to forcing their removal. For example, the City always has the option of amending its zoning ordinance to authorize previously unpermitted uses. And, after-the-fact permits may also be issued for improvements authorized in the zone. [5] PVEMC §§ 15.08.140, 15.08.150, 17.04.110. (RJN, Ex. C & D.) With a number of options available to achieve code compliance, the City may not be compelled to pursue any one in particular.

The court in *Riggs v. City of Oxnard* (1984) 154 Cal.App.3d 526 considered and rejected a petition seeking to command the city to exercise its code enforcement discretion in a

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[5]Private covenants and deed restrictions are not enforced by a city through its police power. While private covenants and restrictions may be more restrictive than the applicable zoning regulations, they do not in any way constrain a city's police power to zone and grant permits consistent with its zoning ordinance. 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.

particular manner. There, Appellant sought a petition for writ of mandate compelling the city to close down a transmission shop operating in the C-2 zone where such uses were clearly prohibited and to issue its owners a criminal citation for violating the zoning ordinance. The City had erroneously issued the transmission shop a zone clearance, allowing it to open. After the lawsuit was filed, the Oxnard City Council amended its zoning ordinance to authorize transmission shops in the C-2 zone subject to a special use permit. Although the legislative amendment rendered the remedy Appellant sought (enforcement of the zoning ordinance) moot, the court nevertheless considered Appellant's argument that a writ should lie to enforce a clear public duty. *Id.* at 530. The court held that municipalities have broad discretion to determine the most appropriate mode of enforcing ordinances and that a writ of mandate will not issue to compel that discretion be exercised in a particular way. *Id.* at 530. The court recognized that a city retains the police power to zone and rezone property as it sees fit and that rezoning to accommodate an existing use was within the city's power and in no way arbitrary, capricious or unreasonable. *Id.* at 531.

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

Here, because the City has a number of options for dealing with the alleged illegal improvements on Area A, and the corresponding discretion to choose the option it sees fit, Plaintiffs are not entitled to a declaration compelling the City to exercise its discretion in any particular manner.

The City does not deny that Area A is subject to deed restrictions that limit its use. The City no longer owns Area A (SS No. 12; SAC ¶¶ 6, 23) and, therefore, it is without standing to

enforce those private deed restrictions. *BCE Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142- 1146-47; Miller and Starr, 8 Cal. Real Est. § 24:25 (3d ed.) Even if the City still owned Area A it would be under no mandatory obligation to enforce the deed restrictions, although as property owner it would be subject to them. Its failure to do so would simply cause the possible reversion of the property to the grantor.

C. The Second Cause of Action Fails to State a Claim for Declaratory Relief Against the City.

Plaintiffs' second cause of action is brought pursuant to Code of Civil Procedure section 526a and seeks an order declaring that the attempted conveyance of AREA A by the City was a waste of taxpayer funds and an *ultra vires* act. Plaintiffs allege two separate theories. First, that "City's participation in the MOU and the September 2, 2012 deeds was an *ultra vires* act because those deeds violate the land use restrictions ... Second, that "[m]oreover, the contemplated threatened spot zoning or other legislative solution to achieve after the fact permission for the existing and proposed AREA A improvements are also *ultra vires*." Further, the SAC alleges that "to the extent the September 2012 deeds are deemed not to violate the deed restrictions and public trust doctrines, the conveyance of public parkland to a private party is also a waste of public funds and an *ultra vires* act." SAC ¶¶ 43, 44; Prayer for Relief ¶¶ 3, 4. The second cause of action accordingly seeks "an order enjoining the City from expending additional staff time, city attorney time, or spending taxpayer funds to study or enact a special 'open space privately owned' zoning district for the sole benefit... or other legislative solution authorizing the erection and maintenance or improvements on AREA A." Prayer for Relief ¶4. Plaintiffs cannot state a claim under CCP § 526a on either theory.

> Under Code of Civil Procedure section 526a, a taxpayer may challenge wasteful or illegal government action that otherwise would go unchallenged because of standing requirements. To state a claim, the taxpayer must allege specific facts and reasons for the belief the expenditure of public funds sought to be enjoined is illegal. General allegations, innuendo, and legal conclusions are not sufficient. [¶] A cause of action under Code of Civil Procedure section 526a will not lie where the challenged governmental conduct is legal. Conduct in accordance with regulatory standards is a perfectly legal activity. Further, a taxpayer is not entitled to relief under Code of Civil Procedure section 526a where the real issue

> is a disagreement with the manner in which government has chosen to address a problem because a successful claim requires more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion.

Coshow v. City of Escondido (2005) 132 Cal.App.4th 687, 714 (internal citations and quotations omitted).

The first part of Plaintiffs' second cause of action—the contention that the City's participation in the MOU and the conveyance of Area A to the Association was an *ultra vires* act and a waste of public funds—is without merit.

Under the MOU, the City's obligation is to allow the transfer of ownership of Area A (deed restrictions and all) to the Association and to accept ownership of Lots C & D (deed restrictions and all). SAC, Ex. 12, p. 7 (Article A.). Indisputably, the City possesses the legal authority to "purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit." Gov't Code §37350. Therefore, conveyance of the property was clearly a lawful exercise of the City's power. For that reason alone, Plaintiffs cannot state a claim under section 526a. *Coshow v. City of Escondido, supra,* 132 Cal.App.4th at 714. In any event, the transaction was not even a "waste" in the colloquial sense because the City ended up receiving title to Lots C & D—property roughly equivalent in size and value to Area A (which is a steep slope with a view) yet far more useful as parkland due to its location and accessibility; in addition, "having Lots C & D be restricted to open space is a key element of the City's General Plan." SAC, Ex. 12, p. 4.

The second portion of Plaintiffs' second cause of action is premised on the theory that City's actions— that the contemplated "threatened spot zoning or other legislative solution" to achieve alleged after the fact approval for existing and proposed Area A improvements—are "*ultra vires*" (i.e., beyond the City's legal authority and, therefore, illegal) because they allegedly violate deed restrictions applicable to the property. SAC ¶¶ 43, 44. These allegations – and the relief sought - must fail since they attempt to restrict the City from exercising its legislative function in the future. The judicial branch has no power to usurp the legislative function of the City by granting the requested prospective relief. To do so would be a clear violation of the separation of powers doctrine. The judicial branch is limited to

evaluating the legality of existing laws – it has no power to command or prohibit the exercise of the legislative function. See, e.g., *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 235, citing *Nickerson v. San Bernardino* (1918) 179 Cal. 518, 522.

In any case, this theory contradicts settled law. Plaintiff has conceded that accepting and processing entitlements filed by the Area A recipients and/or the 900 Via Panorama Owners, conducting past planning commission and city council meetings to consider these applications were neither a waste of public funds nor *ultra vires*. See SAC ¶45. At best, this is a general allegation and a legal conclusion (if not simply innuendo) – the implication is that "spot zoning" is illegal. This allegation fails both under section 529a, and the rules applicable to demurrers that this court need not accept legal conclusion as true. *Aubry v. Tri-City Hospital Dist.*, (1992), 2 Cal.4th 962.

The zoning authority of local governments derives from article XI, section 7 of the California Constitution. *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1005. "Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the 'police power [of a county or city] under this provision ... is as broad as the police power exercisable by the Legislature itself.' [Citation.]" *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885, 218.

It is well established that no person has a vested right in the exercise of the police power and that a municipality's exercise of the police power may not be limited by private contracts or restrictive covenants. *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487 1496-97; *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 367. Private agreements restricting the use of property are simply immaterial to the validity of a particular

zoning ordinance.[6] *O'Rourke v. Teeters* (1944) 63 Cal.App.2d 349, 352. Consequently, the City's exercise of its police power in considering amendments to its zoning ordinance and cannot constitute illegal conduct and form the basis of a CCP § 526a claim. *Coshow v. City of Escondido, supra,* 132 Cal.App.4th at 714.

Because the City's police power may not be limited by private covenants regarding the use of land, its consideration of a zoning amendment or other legislative solution is perfectly legal and Plaintiffs cannot plead facts sufficient to state a cause of action against the City under CCP § 526a. Furthermore, because the Legislature has invested cities with the power to control and dispose of real property for the common benefit, and because the transaction yielded a piece of property even better suited for public parkland, Plaintiffs cannot claim that the conveyance of Area A was an illegal and wasteful act under section 526a. Finally, the court is without power to grant the requested relief. Accordingly, the City respectfully requests that its demurrer to the second cause of action be sustained without leave to amend.

V. CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court grant the City's Motion for Summary Judgment, or, in the alternative, the Motion for Summary Adjudication.

Dated: March 16, 2015

Respectfully submitted,

By: _____

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CITY OF PALOS VERDES ESTATES

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[6]Likewise, a change in zoning does not impair the enforceability of existing deed restrictions. *Seaton v. Clifford* (1972) 24 Cal.App.3d 46, 52; *Wilkman v. Banks* (1954) 124 Cal.App.2d 451, 455. Therefore, if Plaintiffs possess 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 choose to take on the pending applications for a zoning ordinance amendment and after-the-fact entitlements.

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 March 13, 2015, I served the foregoing documents described as:

CITY OF PALOS VERDES ESTATES' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION [C.C.P. § 437C]; MEMORANDUM OF POINTS AND AUTHROITIES

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

[X] **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.

[X] **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.

[X] **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 13th day of March 13, 2015, at Manhattan Beach, California.

LISA WHITEMAN

SERVICE LIST

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