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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL DISTRICT

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS and JOHN A. HARBISON,

Plaintiffs,

vs.

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

Case No.: BS142768

Assigned for all purposes to the Hon. Barbara A. Meiers, Dept. 12

DEFENDANT PALOS VERDES HOMES ASSOCIATION; ROBERT LUGLIANI AND DOLORES A. LUGLIANI, AS CO-TRUSTEES OF THE LUGLIANI TRUST; AND THOMAS J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST U/DO MAY 2, 2012'S JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OR BOTH

(Filed concurrently with Motion for Judgment on the Pleadings, Notice of Joinder in Cross Motion of City, Separate Statement of Disputed/Undisputed Facts, Evidentiary Objections, Declarations of Dan Bolton, Lore Hilburg, Sid Croft and Brant Dveirin and Compendium of Out of State Authorities)

Petition Filed:	May 13, 2013
Hearing Date:	May 29, 2015
Hearing Time:	10:30 a.m.
Department:	12

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

While the plaintiffs try to paint a very simple picture, their Motion for Summary Judgment or Adjudication ("Motion") fails on all counts. First, there are material disputed facts that, by themselves, prevent this Court from granting Plaintiffs' Motion. Second, Plaintiff John Harbison and the other Citizens for Enforcement of Parkland Covenants ("CEPC") members who are Palos Verdes Estates ("PVE") homeowners are bound by the May 2012 Memorandum of Understanding ("MOU"), and they cannot *independently* challenge the MOU or the decision of the Palos Verdes Estates Homes Association ("Association") to enter into it. Moreover, the non-PVE owner members of CEPC have no standing to challenge the MOU or the Association's actions.

Should the Court reach the merits of the Motion, the plaintiffs are wrong as a matter of law on all counts. First, the plaintiffs wrongly assert that the Court is to only look at the 1940 Deeds that conveyed Area A (the property in question) and many other parcels from the Association to the City of Palos Verdes Estates (the "City"). The plaintiffs are also wrong to focus on only a few select provisions of those deeds when determining whether (1) the conveyance of Area A from the City to the Association was valid (*it was*) and (2) the conveyance of Area A from the Association to The Via Panorama Trust U/DO May 2, 2012 ("Lugliani") was valid (*it was*). The Court must look at all of the deeds and restrictions that apply to Area A. When the Court does, as demonstrated below, it is evident that the conveyances were valid and the Motion must be denied.

In regard to the conveyance from the City to the Association, Plaintiff Harbison now admits that this was a valid transfer. Of course it was. The restrictions in the 1940 Deeds did not apply to the conveyance of Area A to the grantor, the Association. And, even if they did, as Plaintiff Harbison admits, the Association was and remains a duly-constituted body able to accept land to be used for park and recreational purposes.

In regard to the conveyance from the Association to Lugliani, the 1940 Deeds restrictions on the City did not apply to the Association when the Association re-acquired Area A. The 1940 Deeds restrictions merged out of existence when Area A came back to the grantor (the Association). The Association's subsequent conveyance of Area A to Lugliani was also not subject to those restrictions – again as they were merged away and not revived. Moreover, even if

somehow the 1940 Deed restrictions continued to apply to Area A when it was conveyed to the Association, under a fair reading of the deeds, covenants, and restrictions in the Area A chain of title, the Association has the express power to convey and sell land and to conclusively interpret its CC&Rs, and the uses permitted in the Association's conveyance to Lugliani are expressly allowed under the existing use classifications (Class F) under the Original Declarations governing PVE tracts. Further, the actions and interpretations of the Association are entitled to deference under the business judgment rule. Finally, the plaintiffs wrongly claim that they only seek to invalidate the conveyance of Area A to Lugliani – and not the MOU or any of the other deeds. The plaintiffs are belied by the prayer for relief in their Second Amended Complaint ("SAC") which clearly reaches the MOU in its request to invalidate MOU obligations. To unwind one of the mandatory obligations called for by the MOU necessarily unwinds the entire MOU, something the Court cannot do because it does not have all parties to the MOU before it.

II. FACTUAL BACKGROUND

A. Procedural History.

This lawsuit was filed on May 13, 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. The plaintiffs 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 Plaintiffs/Petitioners writ petition seeking interlocutory review of Judge O'Brien's order.

Following transfer to Department 12 and the pending demurrers to the first and second causes of action, this Court granted the plaintiffs leave to amend the complaint and, by stipulation of the parties, the plaintiffs added another plaintiff and the fourth cause of action for private nuisance between the plaintiffs and their neighbor, Lugliani (the Second Amended Complaint ("SAC"). The City's Demurrer to the SAC and Joint Motion to Strike portions of the SAC were overruled on November 4, 2014. The defendants subsequently filed their respective answers.

B. Facts Alleged.

There is no dispute as to the underlying facts in this case regarding the language of the 1923 Declaration of CC&Rs or 1940 Deeds; the following facts are taken primarily from the SAC itself. However, as demonstrated below, there are material disputes of fact concerning the 2012 Deeds, among other things.

The litigation concerns the ownership and use of undeveloped land located in what is now the City, referred to by the plaintiffs as the "Panorama Parkland" or "Area A". SAC ¶10. The property is a steep hill at the end of a cul-de-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 Association, a private corporation, subject to deed restrictions limiting the use of the properties to public schools, parks, playgrounds or recreation areas. SAC ¶14.

The City was incorporated on December 20, 1939. SAC ¶12. In 1940, the Association's open space lands were deeded to the City by the Association for park and recreational purposes. SAC ¶12. Among the properties conveyed to the City on June 14, 1940 was Area A - the land that is the focus of the this action. SAC ¶15. The 1940 Deeds contained seven restrictions imposed on the City that related to the use of the land as parkland, conveyance, and reversionary interests. SAC ¶ 15(i.) – (vii). The deeds gave the Association a reversionary interest in the event the City violated certain deed restrictions. SAC ¶ 15(vi); SAC Ex. 6 p. 9; Plaintiffs' Evidence in Support of the Motion ("Plaintiffs' Evidence") Exhibit ("Ex.") 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. (*Id.*; Ex. 6, p. 9; Ex. 7, p. 7.)

On February 1, 2010, the Palos Verdes Peninsula Unified School District ("District") 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. (Referred to herein as School District Litigation or District Litigation.) The District was a defendant to the initial petition and complaint in this action, although the plaintiffs later voluntarily dismissed the District and it is no longer a party. On September 22, 2011, the Court entered judgment in the School District Litigation 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 the MOU to resolve their disputes and obviate the need to pursue their appeals. The City is also a party to the MOU, along with defendant Lugliani. SAC ¶¶28, 29; SAC Ex. 12. The MOU provided for the following land transfers: (1) Area A and Lots C and D would be conveyed to the Association; (2) the Association would convey Lots C and D to the City; and (3) Lugliani would purchase Area A from the Association. SAC ¶29; SAC Ex. 12.

Following the execution of the MOU, the parties took steps towards its implementation. SAC ¶33. On September 5, 2012, the City quitclaimed its interest in Area A to the Association. SAC ¶33; SAC Ex. 9. The quitclaim includes an open space easement that requires the preservation and management of Area A as open space, but no right of public access. On the same day, the Association conveyed Area A to Lugliani, referred to by the plaintiffs as the "Area A Recipients" subject to various restrictions including the open space easement. SAC ¶33; SAC Ex. 10. As originally pled, Area A is located at the end of a cul-de-sac and is adjacent to another parcel that the plaintiffs refer to as the "Panorama Property" according to plaintiffs' earlier pleadings. See FAP ¶16. Now, confusingly, Area "A" and the Panorama Property are apparently one and the same. See SAC ¶20. 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. SAC ¶34. The commission recommended denial of the zone change request. (*Id.*) The matter proceeded to the City Council on March 12, 2013. (*Id.*) The Council held a hearing but did not take action, instead continuing the matter and directing staff to investigate other zoning options. (*Id.*)

III. STANDARD OF REVIEW

The party moving for summary judgment bears two significant burdens: 1) that there is no triable issue of material fact; and 2) that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc. §437c, subd. (a), subd. (c), subd. (o)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850). "A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc. §437c, subd. (f)(1)). "On a motion for summary adjudication, the trial court has no discretion to exercise. If a triable issue of material fact exists as to the challenged causes of action, the motion must be denied." (*Fishermans's Wharf Bay Cruise Corp. v. Superior Court of San Francisco* (2003) 114 Cal.App.4th 309, 320.) In making a determination as to whether the opposing party has met its burden of demonstrating the existence of a triable issue of one or more material facts, courts "construe the evidence of the moving party strictly and liberally construe that of the opponent." (Ibid.) Any doubts as to the propriety of granting the motion must be resolved in favor of the opposing party. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

A material fact must relate to a claim or defense at issue and "be essential to the judgment in some way." (*Riverside County Comty Facilities Dist. v. Bainbridge 17* (1999) 77 Cal.App.4th 644, 653.) Percipient facts and evidence of facts are not material facts. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 106.) The "pleadings serve as the outer measure of materiality in a summary judgment proceeding." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.) Thus, only facts alleged in the plaintiffs' SAC are considered material to the plaintiffs'

claims.

IV. ARGUMENT

A. Material Dispute of Fact Necessitates Denial of the Motion

As set forth in the Joint Response to Plaintiffs' Separate Statement of Material Facts ("SS"), a number of key facts are disputed. For example, Defendants dispute that the Association is not duly constituted to hold park lands. Plaintiffs' Motion alleges that the City's quitclaim of Area A to the Association violated the 1940 Deeds. See SS 31, 91. However, Plaintiffs now admit the Association can hold parklands and the conveyance did not violate the 1940s Deeds. See Issue 1, 2, 3, 4, 5. Defendants dispute that the 2012 Quitclaim Deed (from the City to the Association) allows for construction of buildings. (SS 67, 104.) The 2012 Quitclaim Deed simply gives certain rights to the grantee – in this case, the Association – to undertake certain actions if permits are issued by the City. See Issue 4.

Each of the above disputes, and those set forth in detail in the Joint Response to Plaintiffs' Separate Statement of Material Facts ("SSO"), are basis alone to deny the Motion.

B. The MOU Is Beyond Challenge By Any Of The Plaintiffs

1. Harbison and CEPC members who are property owners are bound by the actions of the Association And Therefore Cannot Challenge The Association's Decision To Enter Into The MOU

In California, common interest developments, also known as homeowners associations, are subject to the provisions of the Davis-Stirling Common Interest Development Act (hereafter "Davis-Stirling Act" or "Act"). (Civ. Code §§ 4000 et seq.) The Act, passed into law in 1985, consolidated in one part of the Civil Code certain definitions and other substantive provisions pertaining to common interest developments. (Stats. 1985, ch. 874, § 14, p. 2774.)

The Act enumerates the specific shared ownership arrangements that fall under the rubric "common interest development." (Civ. Code §§ 4100-4190.) It also grants to homeowners associations the powers necessary to ensure the development's long-term operation. (For example, Civ. Code §§ 4775(a)-(b), 5520, 5560, 5600-5615.) An association's powers mirror those enumerated in section 7140 of the Corporations Code, including, without limitation, the authority to "assume obligations, enter into contracts, including contracts of guarantee or suretyship, incur

liabilities, borrow or lend money or otherwise use its credit, and secure any of its obligations, contracts or liabilities by mortgage, pledge or other encumbrance of all or any part of its property and income." (Civ. Code § 4805; see also Corporations Code § 7140 subd. (i).)

The authority of an association to sue in matters concerning its property include the right to make and carry out decisions that a plaintiff or defendant would normally undertake in the course of litigation. Civil Code Section 5980 provides that an association, acting through its board, may "institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the members, in matters pertaining to the enforcement of the governing documents." (See also Civ. Code § 4150 [Governing documents include the declaration, bylaws, operating rules, articles of incorporation/association and any other documents which govern the operation of the common interest development or association].) This broad authority allows an association to enter into contracts, settlement agreements and other legally binding agreements *that will be binding upon the individual owners.*

Here, in this action, and in the previous School District Litigation, the Association represents the interest of the members of the Association, who are bound to the result in this case, as well as the prior School District Litigation.

In *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, a homeowners' association sought a judicial declaration of its duties under the governing CC&Rs regarding the application by a homeowner for approval of a potentially view blocking patio cover opposed by neighbors. The association sued not only the applicant but the opposing neighbors and successfully opposed the opposing neighbors' motion for judgment on the pleadings on the grounds of wanting to avoid a second lawsuit should the opposing neighbors not approve of the instant case's outcome. The trial court denied the motion for judgment on the pleadings. The court of appeal reversed stating:

> *"Lushing and Leonard Corp.* articulate principles applicable to the instant case[1]... Moreover, as in *Leonard Corp.,* there is no principled demarcation to distinguish [the

[1] *Lushing v. Riviera Estates Ass'n.* (1961) 196 Cal.App.2d 687, 690 (held, in an action to enforce CC&Rs, all other lot owners in an association are not indispendable parties to the action); *Leonard*

(Footnote Continued)

> opposing neighbors sued] from others who have not been joined in the litigation.... [I]t is unreasonable to join every nearby landowner who might conceivably be affected by this litigation. It is enough that the homeowner association, charged with the enforcement of the CC&Rs (see discussion below), and the arguably offending property owners, are in it. (*Id. at 430-1)*...
>
> Code of Civil Procedure section 374 [now Civil Code section 5980] gives an association standing to pursue "matters pertaining" to the "enforcement of the governing documents" of a "common interest development."...Code of Civil Procedure 374 specifically relieves homeowner associations from the need to join "the individual owner of the common interest development"...
>
> As long as the "matters" relate to the enforcement of the CC&Rs ...the association has standing to litigate them without joining the neighboring owners with their various viewpoints....Even though the [opposing neighbors] need not be joined as parties, there is no question as to the binding effect of this litigation on them. The policy behind Code of Civil Procedure section 374 requires that declaratory judgments brought in litigation authorized under the statute be res judicata, and binding on the individual owners, including all those who do not participate in the litigation. Unless an association's litigation is binding, the benefits of section 374 will vanish." *Id. at 432-433* (citing Comment, *Homeowner Association Standing in California: A Proposal to Expand the Role of the Unit Owner* (1986) 26 Santa Clara L.Rev. 619, 627.)

Here, Harbison and all other Association members are bound to the Judgment in the School District Litigation and the resulting MOU agreement entered into while the case was pending on appeal.[2] Under *Duffey*, all members of the Association are bound to the prior District Litigation and resulting MOU as a matter of law. Furthermore, the By-Laws of the Association in Article III state "The corporate powers of this corporation shall, except as otherwise provided herein, be vested in a Board of Directors..." Article VII provides a procedure for the recall of Directors. (*See* Declaration No. 1, By-Laws, Articles III and VII, Section 4; Croft Decl. Ex. A). Thus, the Board's entry into the MOU is binding on all members of the Association, whose provided remedy in the By-Laws is a recall petition. During the deposition of John Harbison, he admitted that he did not file a recall petition or take any other administrative action to challenge the Association's actions.

Corp. v. San Diego (1962) 210 Cal.App.2d 547, 550 (held, adjacent residential landowners were not indispensable parties in an action by a developer against the city to establish a zoning change from R1 to R4).

[2] Association meetings where the School District Litigation and the MOU were discussed and voted upon were properly noticed in accordance with the Association By-Laws. (See Croft Decl., ¶ 35.)

(Dveirin Decl., Ex. A (Harbison Depo. pg. 137 ln.8 -pg. 138 ln. 16)). This Court cannot unwind or undo the prior case or MOU, as they are a final judgment and settlement of a case by the Association that as a matter of law are binding on its members. Because of the binding effect, neither Plaintiff Harbison nor CEPC has the legal right to independently challenge the MOU.

In sum, Harbison and the other Association members were represented by the Association in both the School District Litigation and the resulting MOU. As established above, all members of the Association, including Harbison, are bound to the MOU as well as the Judgment in the School District Litigation. Any other result would be contrary to the law of the case in the School District Litigation and to the settlement embodied in the MOU.

2. All Plaintiffs are either bound to the School District litigation and MOU or do not have standing

Plaintiffs' verified Interrogatory Responses revealed that not all members of Plaintiff CEPC are members of the Association. Specifically, 10 members of CEPC are not members of the Association. *See* SSO, Defendants' Fact #1. (Dveirin Decl., Ex. A (Harbison Depo. pg. 161, ln. 20-p. 165, ln.9.)).

It is black letter law that only the homeowners can enforce their association's CC&Rs, bylaws and rules and compel homeowner association compliance with the Davis-Stirling Act. (See Section IV.B.1 above; Civ. Code § 5975 [governing document may be enforced by an owner of a separate interest against the association].) The right of enforcement is inextricable from ownership of real property. Accordingly, non-owner residents cannot compel compliance with the Act, nor may an owner assign rights or obligations under the Act to a third party. (Civ. Code § 4160 [members are defined as owners of a separate property interest]; Civ. Code § 4185 [separate interest means separately-owned unit or lot]; see also *Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1036-1038 [As renters, plaintiffs were not property owners and therefore had no standing to maintain causes of action against HOA to enforce CC&Rs]; see also *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, 1013 [Complaint brought by former owner against homeowners association to enforce CC&Rs was properly dismissed for lack of standing].)

The Association's governing documents are clear. Article I, Sections 1 and 2, of the By-Laws state that the members of this corporation shall be all who hold legal title of record or under a contract of sale. (*See* Declaration No. 1, By-Laws, Articles I, Sections 1 and 2 (Croft Decl. Ex. A).)

As shown above, Plaintiff Harbison is a member of the Association, and is bound to the MOU. Further, all except 10 members of Plaintiff CEPC are also members of the Association and are similarly bound. The 10 members identified in the Interrogatory responses[3], *who are not members of the Association,* do not have standing to sue under the CCR&S. Thus, all Plaintiffs are either bound to the MOU or do not have standing.

C. Actions By The Association Are Protected By The Business Judgment Rule

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

The California Supreme Court, in *Lamden* (21 Cal.4th at 257-259), upheld a Board's decision to spot treat termite infestation instead of fumigation. The Court held that the business judgment rule applied to the decisions of associations that are also corporations, but in the case of both corporations and unincorporated homeowner associations, courts should defer to a community association board's authority and presumed expertise, when in good faith, and with regard for the best interest of the community association and its members, the board exercises discretion within the scope of its authority. (*Id.* at 265.) The court explained that in the instance of an association that is a corporation, as is the case here, the business judgment rule insulates the association from

[3] This was confirmed by Plaintiff Harbison at his deposition. (Dveirin Decl., Exhibit A (Harbison Depo., pg. 161, ln. 20-p. 165, ln.9.)

court intervention for those management decisions that are made in good faith and in what the Association management believes is the best interest of the organization. (*Id.* at 257.) The courts do not substitute their judgment for that of the corporation's board of directors. (Ibid.)

Lamden relied on *Nahrstedt,* 8 Cal.4th at 374, which addressed the issue of what standard governs the enforceability of covenants in CC&Rs. The Court held there, consistent with the *Lamden* decision, that "generally, courts will uphold the decision made by the governing board of an owners association, so long as they represent good faith efforts to further the purpose of the common interest development..." In *Haley v. Casa Del Rey Homeowner's Assn.* (2007) 153 Cal.App.4th 863, 875, the court ruled that *Lamden*'s rule of judicial deference to community board decision making was not limited to ordinary maintenance decisions but extended to board decisions regarding the best means to enforce the development's covenants and restrictions without resorting to litigation.

As shown in the Declaration of the Association's General Counsel Sid Croft, the Association exercised its discretion under the governing documents, and weighed the facts and factors in entering in to the MOU which included that (1) there was no express prohibition under the CC&Rs and other restrictions against transferring Area A to a private party, Lugliani; (2) the Association was preserving far superior parkland, Lots C and D, which is accessible and used regularly, as opposed to the inaccessible mostly hill property that is Area A; (3) the School District agreed in settlement to preserve as open space 11 other parcels that the District owned; and (4) the settlement secured payment of the Association's attorneys fees and costs incurred in the litigation with the School District. As stated in the Croft Declaration, the Association acted in the best interest of its membership.

Plaintiff Harbison in his recent deposition agreed that the Association could "consider financial considerations as well as ethical and moral and legal and all those things in making a decision [to enter into the MOU]." (Dveirin Decl., Exhibit A (Harbison Depo., pg. 191, ln. 21-pg. 193 ln. 2.)).

This type of exercise of discretion by the Association is entitled to deference from the Court, and the Court cannot and should not step into the shoes of the Association and exercise the

its discretion in place of the Association. Further, what reasonable investigation the Association undertook before exercising its discretion, and what factors the Association considered in exercising its discretion, are all material issues of fact, and, on this basis alone, the Court cannot enter judgment.

D. The Reconveyance of the Property from the City to the Association Extinguished the 1940 Deed Restrictions

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) 166 Cal.App.4th 615, 623. The Association was the owner of Area A when it imposed the restrictions contained in the 1940 Deeds on the City, subject to a right of reverter in the event of a breach. When the Association reacquired Area A as a result of the City's 2012 Quitclaim Deed, there were no longer any outstanding interests in Area A other than the Association's, and merger occurred. (*Id.*) As a result of the merger, the restrictions of the 1940 Deeds were no longer in effect. Nor were the restrictions contained in the 1940 Deeds revived upon the conveyance of Area A by the Association to Lugliani. The prior restrictions must be "newly created" by an "express stipulation" or by "implication of the circumstances" of the further conveyance. *Zanelli*, 166 Cal.App.4th at 634. It is clear from a plain reading of the 2012 Grant Deed from the Association to Lugliani that the Association did not intend to revive the restrictions in their prior form. Plaintiffs do not argue, nor can they, that the 2012 Quitclaim Deed violated the terms of Declaration No. 1, which governed Area A following the merger of the 1940 Deeds restrictions. Thus, the Court need look no further at the issue of application of the 1940 Deeds restrictions as they simply no longer apply to Area A.

E. Assuming The 1940 Deeds Restrictions May Apply To Area A, The Law Governing the Interpretation of Deeds and Covenants Disfavors Plaintiffs' Claims – The 1940 Deeds are Not Solely Controlling

1. Invalidation of Deeds is Disfavored

The plaintiffs seek the extraordinary relief of invalidating the 2012 Deeds to which they were not a party in an attempt to enforce the 1940 Deeds restrictions (also deeds to which the

plaintiffs are not a party). "A deed is a sacred instrument... 'We must exercise great caution in weighing the sufficiency of the facts alleged to warrant reformation of the deed, lest we lay a foundation for an inequitable, unjust and legally unsupportable forfeiture of the title of defendants.'" (*Girard v. Miller* (1963) 214 Cal.App.2d 266, 274 *quoting Lestrade v. Barth* (1862) 19 Cal. 660, 675.) A condition involving forfeiture must be strictly interpreted against the party for whose benefit it is created. (Civ. Code, § 1442.) Conditions which result in the forfeiting of title to land or property are not favored, and are strictly construed against the party in whose favor they are created. (*Cullen v. Sprigg* (1890) 83 Cal. 56.) Where a forfeiture is sought for breach of a restriction on use of real property, the law requires a clear expression of intent. (*Springmeyer v. City of South Lake Tahoe* (1982) 132 Cal.App.3d 375, 380.)

Here, the plaintiffs seek a judicial declaration from the Court invalidating recorded deeds to which the plaintiffs are not a party, and divesting title from the current rightful owners. Since the settled law is that reformation of deeds is disfavored even when reformation is sought by a party to the deed in question, the plaintiffs' plea to invalidate deeds to which they are not parties is doubly suspect.

In this case, no party to any deed seeks reformation. To the contrary, the Association, the City, and Lugliani are of one mind. The consensus of the City and the Association is memorialized in the 1940 Deeds, and the consensus of the City, the Association, and Lugliani is memorialized in the 2012 Deeds. The plaintiffs cite no authority justifying the extraordinary result of invalidation or reformation which none of parties to the deeds seeks.

2. Interpretation of Deeds and Restrictions are Governed by Traditional Rules of Contract Interpretation Taking Into Consideration All of the Deeds and Restrictions to Give Effect to the Intention of the Parties

Plaintiffs' Motion depends on an impermissibly narrow interpretation of only the 1940 Deeds and a self-serving selection of provisions of those Deeds. This approach is contrary to the settled law in interpreting deeds, deed restrictions, and covenants. Courts must apply traditional rules of contract interpretation. Generally, "[i]n the construction of deeds, as in construing other writings, courts seek to ascertain and give effect to the real intention of the parties, as such intention

may be gathered from the language of the whole instrument." (*Farquhar v. United States*, 1990 U.S. App. LEXIS 27758, 6; *citing Downing v. Rademacher* (1901) 133 Cal. 220, 226; *see Los Angeles City Employees Union, Local 347 v. City of El Monte* (1985) 177 Cal.App.3d 615, 622.) As summarized by respected commentators, deed restrictions and covenants, conditions, and restrictions should be read according to the usual rules for the interpretation of contracts, with a view toward enforcing the reasonable intent of the parties. (8 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 24: 16, p. 57.) The parties' "intent" usually refers to that of the original grantor and grantee. (*Soman Properties v. Rikuo Corp.* (1994) 24 Cal.App.4th 471, 484.) The primary objective in interpreting a deed is to ascertain and carry out the intent of the parties. (*Machado v. S. Pac. Transp. Co.* (1991) 233 Cal.App.3d 347, 352.)

These rules apply in construing CC&R's and deed restrictions:

> "The overriding rule of contract interpretation is to construe the restrictions to apply the intent of the parties in order to give effect to the purposes and objectives of the restrictions to protect the aesthetics and value of the property subject to the restrictions. The restrictions are interpreted by applying a test of reasonableness to give a just and fair application of the restrictions as would be understood and intended by an objective standard in the mind of the reasonable person. . . . There is a presumption of validity of the restriction and the person challenging the restriction must prove that it is unreasonable." (Miller & Starr, Cal. Real Estate, Cal. Real Estate (3d ed. 2001) § 24:16, p. 57.)

The rules governing interpretation of contracts equally apply to declarations of covenants, conditions and restrictions. (*Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n.* ["*Ticor*"] (1986) 177 Cal.App.3d 726, 730; *Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 8-10.) It is "our duty to interpret a declaration of covenants, conditions and restrictions in a way that is both reasonable and carries out the intended purpose of the contract." (*Dieckmeyer v. Redevelopment Agency of Huntington Beach* (2005) 127 Cal.App.4th 248, 259.) "Like any promise given in exchange for consideration, an agreement to refrain from a particular use of land is subject to contract principles, under which courts try 'to effectuate the legitimate desires of the covenanting parties.' [Citation.]" (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 380-381.)

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) "[W]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will

give effect to all." (Code Civ. Proc., § 1858.) (1 Witkin, *Summary of Cal. Law* (10th ed. 2005) Contracts, § 746, pp. 834-835.) "A court must view the language in light of the instrument as a whole and not use a 'disjointed, single-paragraph, strict construction approach'. [Citation.] If possible, the court should give effect to every provision. [Citations.]" (*Ticor,* 177 Cal.App.3d at 730.)

Applying the requisite contract interpretation principles to the controversy created by the plaintiffs, it is clear that the 1940 Deeds and the restrictions contained in those deeds cannot be read in a vacuum as the plaintiffs invite this Court to do. Rather, all the documents in the chain of title – the Declarations of CC&Rs, deeds previous to the 1940 Deeds, and the 2012 Deeds – must all be considered in interpreting the intention of the parties.

F. The Clear Intention of the Parties to the 1940 Deeds and the 2012 Deeds Contradicts and Negates Plaintiffs' Claims

1. The 1940 Deeds Expressly Preserved the Association's Powers and Incorporated All Previous Declarations

The clear intention of the parties to the 1940 Deeds contradicts the plaintiffs' sole reliance on them for summary judgment. The plaintiffs cite portions of the 1940 Deeds that require the City to maintain the property as "public parkland" as extinguishing any Association powers, rights, conditions or covenants contained in previous deeds and declarations. This is essentially the entire basis of the plaintiffs' Motion and it is directly contradicted by other express language in the 1940 Deeds that the plaintiffs overlook or ignore.

The express language of the 1940 Deeds manifests the City's and the Association's intent to preserve all of the Association's rights and powers, and clearly contemplates that the Association may again one day own the property. (Plaintiffs' Evidence, Ex. 6, p.6) Thus, it cannot be that the parties to the 1940 Deeds intended that the 1940 Deeds establish perpetual "public parkland" that extinguished every other covenant, restriction or right previously applicable to the property. (*Id.*) Specifically, the 1940 Deeds expressly incorporate all previous declarations, covenants, and restrictions—thereby preserving the Association's broadly enumerated powers. The 1940 Deeds expressly provide that "Each and every provision, condition, restriction…contained in the previous Declarations [identified by Book and page numbers] are hereby made a part of this conveyance and

expressly imposed upon said realty as fully and completely as if herein set forth in full." (*See* Plaintiffs' Evidence, Ex. 6 p.6 and Ex. 7 p.3, ¶ 21; Declaration of Lore Hilburg ("Hilburg Decl.") ¶ 4.) Thus, it was the express intent of Association and the City that the 1940 Deeds did *not* nullify any of the Association's powers enumerated in the previous Declarations. Amendment No. 1 dated Nov. 26, 1923 et.al. ("Declaration No. 1") grants the Association specific rights to dispose of property and the *exclusive* power to interpret the meaning of deed restrictions. (Declaration No. 1 Article II, Section 4 (Croft Decl., Ex. A); Croft Decl. ¶¶ 14, 15; Hilburg Decl. ¶¶ 8, 9.) Declaration No. 1 bestowed upon the Association the right and power to devise and adopt and care for and maintain a system of parks, regulation and open space, under the overall direction of the Association's Board. (Declaration No. 1 Art. XIV (Croft Decl., Ex. A); Croft Decl. ¶ 17.) The 1940 Deeds from the Association also state that the Association retains a right of reverter—clearly indicating the consensus of the parties that the Association could ultimately regain ownership of the land conveyed to the City—and providing the primary remedy for any breach of the 1940 Deeds. (Plaintiffs' Evidence Ex. 6, page 9 of 10.)

All of these powers, rights, and remedies must be read as being included in the 1940 Deeds. The plaintiffs' narrow reliance on select language in the 1940 Deeds therefore fails.

2. The 1940 Deeds Do Not Prohibit the City from Conveying Property Back to the Association

Nothing in the 1940 Deeds prohibited the City from conveying Area A back to the Association. Although the 1940 Deeds precluded the City from transferring Area A except to a body suitably constituted to take, hold, maintain, and regulate parks, no reasonable interpretation of the parties' intent could conclude that the City and the Association meant this restriction to preclude the City from re-conveying the property back to the Association (and the Association was and is a suitably constituted body, as plaintiffs admit (Dveirin Decl., Ex. A (Harbison Depo. pg. 45, lns. 19-25; 46:1-6). The only reasonable interpretation of the intention underlying this language in the 1940s Deed restrictions is to prevent the City from unilaterally transferring the property to private ownership or private development without consent of the Association, as the District sought to do in the dispute that gave rise to the District Litigation. As previously stated, the Association

maintained a right of reverter as a remedy to enforce the 1940 Deeds restrictions applicable to the City. If the main remedy for a violation of this provision is reversion of title to the Association, then clearly the parties did not contemplate that conveyance back to the Association could ever be considered a breach of the restriction. Yet the plaintiffs ask this court to ignore reason and instead accept the absurd Kafka-esque irony that would result from the plaintiffs' proffered interpretation.

Furthermore, the Association *is* an entity suitably constituted to take, hold, maintain, and regulate parks under Declaration No. 1—which are expressly preserved and incorporated into the 1940 Deeds. Declaration No. 1 specifically enumerates the Association's powers to devise and adopt and care for and maintain a system of parks, regulation and open space, which were expressly incorporated in the 1940 Deeds. As noted above, the plaintiffs now admit this.

Moreover, as set forth in the SAC, if the 2012 Quitclaim 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.) Thus, the 2012 Quitclaim Deed effectuated the Association's reversionary interests in Area A by granting it back to the Association. Because the City no longer holds title to Area A, a declaration as to this issue is moot. Indeed, there is no present justiciable controversy within the meaning of Code of Civil Procedure section 1060 relating to this issue. See *Pittenger v. Home Sav. & Loan Asso.* (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 were presented to show that the conduct would continue (nor can it, since the City no longer owns Area A) the action is moot. (*Id.*)

Finally, the plaintiffs do not allege any defect in the 1940 Deeds. Instead, the plaintiffs appear to assert that the City is required to own the property; but the very deeds that the 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. Pacific E. R. Co.* (1943) 21 Cal.2d 602, 605; Miller & Starr, Cal. Real Estate (3d ed. 2001) § 9:6. As such, the Association

would have to exercise its right of termination[4]. *Rosecrans v. Pacific E. R. Co.,* supra, 21 Cal.2d at 605; Miller & Starr, Cal. Real Estate (3d ed. 2001) § 9:8. 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, the only possible remedy if the conditions of the 1940 Deeds were violated by such a transfer, would be for the Association to exercise its power of termination to revert the property back to the Association.[5] SAC ¶ 15.vi; Plaintiffs' Evidence Ex. 6, p. 9, Ex. 7, p. 6.

3. The 2012 Deeds Do Not "Violate" the 1940 Deeds Park Restriction

The 1940 Deeds clearly manifest the intent of the City and the Association to preserve all of the Association's powers. Once Area A was transferred back to the Association in 2012, all of the Association's enumerated powers applied. The Association's powers include all those powers enumerated in Article II, Section 4 of Declaration No. 1, including:

> "The Association shall have the right and power to do and/or perform any of the following things, for the benefit, maintenance and improvement of the property and owners thereof at any time within the jurisdiction of the Homes Association, to wit: (a). To maintain, purchase, construct, improve, repair, prorate, care for, own/and or dispose of parks, parkways, playgrounds, open space and recreational areas....for the use and benefit of the owners of and/or for the improvement and development of the property herein referred to...(i) To acquire, by gift, purchase, lease or otherwise acquire and to own, hold, enjoy, operate, maintain, and to convey, sell, lease, transfer, mortgage and otherwise encumber, dedicate for public use and/or otherwise dispose of, real and/or personal property either within or without the boundaries of said property...(q) To exercise such power of control, interpretation, construction, consent, decision, determination, modification, amendment, cancellation, annulment, and/or enforcement of covenants, reservations, restrictions, liens, and charges imposed upon said property as are herein or may be vested in, delegate to, or assigned to the Homes Association..." and
>
> "Palos Verdes Homes Association shall interpret and/or enforce any or all restrictions, conditions, covenants, reservations, liens, charge and agreements herein or any time created for the benefit of the said property or in any property which may thereby be expressly made subject to its jurisdiction by the owners thereof, or to which said lots or any of them, may at any time be subject. In case of uncertainty as

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

[5] See the Marketable Records Title Act, Civ. Code § 885.030 and the City's Motion For Summary Judgment, page 9, footnote 3.

> to meaning of said provisions or of any provisions of this declaration, the Homes Association shall (except as to the provisions of Article III hereof, which shall be interpreted by the Art Jury) in all cases interpret the same and such interpretation shall be final and conclusive upon all interested parties." (Croft Decl. ¶ 14, Ex. A.)

The Association's powers also include all those powers enumerated in Section 3 of the 1931 Deed, including: (a) the right of the Association (through its Park and Recreation Board) to establish regulations governing the use of the property; (b) in Section 3(a), a reservation by the grantor of the right to "enter upon, develop, plant, improve, or maintain any part or all of said realty for the benefit of all of Palos Verdes Estates in a manner not inconsistent with the purposes for which said realty is hereby conveyed after due notice to/and consultation with the Park and Recreation Board" of the Association; and (c) in Section 5, the right of the Association to enter into exchanges of this property for other land. (Croft Decl. ¶ 19, Ex. B.)

The 1940 Deeds manifest the intent of the City and Association to preserve Declaration No. 25. Once Area A was re-conveyed to the Association, the use restrictions applicable to Area A under Declaration No. 25governed the use of that property. Section 2(d) of Declaration 25 designated Lot A of Tract 8652, which includes most of Area A, as a Business and Public Use District of Class F. (Croft Decl. ¶¶ 13, 18, Ex. A.) Land uses permitted on "Class F" properties are set forth in under Article IV, Zoning, Section 10 of Declaration No. 1. Section 10 states as to property in this classification:

> "no building, structure or premises shall be erected, constructed or designed or intended to be used for any purpose other than that of a public or private school, playground, park, aeroplane or dirigible landing field or accessory aerodrome or repair shop, public art gallery, museum, library, firehouse, nursery, or greenhouse or other public or semi-public building, or a single family dwelling." (Croft Decl. ¶ 13, Ex. A.)

Having clearly manifested the intent to preserve all these Association powers and conditions in the 1940 Deeds, the 2012 Deeds cannot reasonably be interpreted as the Association "violating" the 1940 Deeds but rather as the Association exercising the powers and restrictions the 1940 Deeds expressly preserved. The Association exercised those powers with due consideration for the prior status of Area A by accepting an open space easement and stringent building limitations in the 2012 Quitclaim Deed, which effectively limited the use of Area A to recreational purposes.

Specifically, the Association possessed the express power to convey Area A to Lugliani. The Association (along with the City) possessed the power to permit the structures and uses on Area A as set forth in Sections 2 and 10 of the 2012 Deed to Lugliani:

> "Unless expressly provided for herein, Grantee shall not construct any structure on the Property and the Property shall be restricted to Open Space. It is the intent of the parties, subject to compliance with the requirements for such development of accessory structures of the City and Grantor, that Grantee may construct the following: a gazebo, sports court, retaining wall, landscaping, barbeque, and/or any other uninhabitable "accessory structure" as defined in Palos Verdes Estates Municipal Code ("PVEMC") Section 18.32.010D within [Area A].... Grantee shall apply for approval of any such permitted structures by Grantor and the City in accordance with standard procedure and in conformance with applicable covenants, ordinances, and codes. Any such structure shall comply with any and all requirements of City, Grantor, and the Art Jury including but not limited to height, size, orientation, design, and setback. Grantee shall not perform, or allow others to perform, any action or affecting the Property that is inconsistent with this paragraph." (Plaintiffs' Evidence Ex. 10, p.2-3.)

The final sentence of Paragraph 10 of the 2012 Deed from the Association reads: "It is the intent of the parties that the structures permitted under Section 2 hereof are permitted under the conditions, restrictions and reservations cited herein, subject to the compliance with the application and approval requirements of Section 2." (Plaintiffs' Evidence Ex. 10, p.4.)

Because these provisions in the 2012 Deed to Lugliani are completely consistent with the enumerated powers of the Association and range of land uses permitted in the underlying declarations—which were expressly preserved in the 1940 Deeds—the 2012 Deeds cannot reasonably be interpreted as "violating" the 1940 Deeds.

4. CEPC's Reliance On *Save the Welwood Murray Memorial Library Committee v. City Council of Palm Springs* is Misplaced

The plaintiffs rely on *Save the Welwood Murray Memorial Library Committee v. City Council of Palm Springs* (1989) 215 Cal.App.3d 1003 ("*Welwood*"), to support their proposition that the property transfer of Area A from the City to the Association and/or from the Association to Lugliani was a direct violation of the 1940 Deeds restrictions that the Area A "forever" remain park and recreation uses and should result in a reversion of the property interest to the Association. The plaintiffs fail to distinguish, however, that the original deed to the property in *Welwood* was itself a trust, and was therefore subject to the public trust doctrine. (*Id.* at 1017.) *Welwood* states that no

action will lie to enjoin a city's decision to allow the property to revert to the grantor. (*Id.*)

Two years after *Welwood*, the Court of Appeal decided *Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117 ("*Walton*"). In *Walton*, the City of Red Bluff, like the City of Palm Springs, had been deeded property for use as a library. (*Id.* at 121-122.) The City of Red Bluff ceased to use the property in question as a library, and an heir of the original donor sued to obtain title. (*Id.*) While the heir sued on the basis of trust, the Court found no trust. (*Id.* at 123.) Citing the Restatement on Trusts, the Court noted that "[w]here the owner of property transfers it … 'upon condition' that it be dealt with in a manner beneficial to a third person, a trust is created if the transferor manifested an intention that the transferee should be subject to a duty to use it for the benefit of such third person, *rather than that he should be divested of his interest if he should fail to perform the specified act.*'" (*Id.* at 125 [emphasis added]; *see also* FN 9 at 125 ["*In re Application of Mareck* (1960) 257 Minn. 222 [100 N.W.2d 758[6]]… the deed actually contained the word 'trust,' but because of the words of reversion, the court construed the grant as a fee simple condition subsequent."].)

The *Walton* Court found the language of conveyance was the language of a fee grant, not a trust, because the deed language included a right of reversion as follows: "the grant and conveyance herein made shall cease and terminate, and title to the said property…shall at once revert to the party of the first part or to her heirs or assigns." (*Id.*)

A right of reversion is the main remedy set forth in the 1940 Deeds. Thus, no trust is created by the 1940 Deeds and *Walton*—not *Welwood*—serves as the applicable controlling authority. The 1940 Deeds read in part, "[that any breach of the use or ownership conditions] shall cause said realty to revert to the [Association]," it is clear that the 1940 Deeds are not a trust, but fee grants subject to conditions subsequent. (Plaintiffs' Evidence, Ex. 6 and Ex. 7.)

California law "abolished" reversionary interests with the adoption of Cal. Civil Code section 885.010 in 1982. (*Walton*, 2 Cal.App.4th at 126). Instead, California law now treats the

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[6] In *Mareck*, the grant was made "in trust, nevertheless, to have, hold administer and maintain the same as a public park; . . . and if said land shall cease to be a public park . . . the title thereto shall revert to the above named grantor, . . . his heirs of assigns." (100 N.W. 2d at 760). (*Mareck* is attached to Defendants' Compendium of Non-State Authorities filed concurrently herewith.)

1940 Deeds restriction as a grant subject to condition subsequent. (*Id.*) Nevertheless, for purposes of interpreting the intent of the parties in 1940, the *Walton* case instructs that the reversionary interest in the 1940 Deeds created a grant in fee, not in trust.

G. Collateral Estoppel Is Inapplicable: The Issue Decided By *Roberts v. City Of Palos Verses Estates* In 1949 Is Completely Different From That Raised Here

In order for the plaintiffs to prevail on their collateral estoppel claim, the issue (1) must be identical to that decided in the former proceeding, (2) must have been actually litigated in the former proceeding, (3) must have been necessarily decided in the former proceeding, (4) the decision must have been final and on the merits, and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party in the former proceeding. See, e.g., *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal. App.4th 134, 179.

Here, despite the plaintiffs' improper attempt to characterize this as an undisputed "fact" [see SS 112], the issue actually decided in *Roberts* bears no resemblance to that at issue here. In *Roberts*, the issue was whether or not the City could use parkland in a certain manner – i.e., the erection of building for the storage and maintenance of City trucks used for various purposes. The deed at issue there expressly provided for some discretion by the City in determining whether the use was incidental to the use of the property for park purposes. See *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d 545. Further, *Roberts* was not actually decided on the merits – instead, it was remanded back to the trial court to determine if the buildings constructed by the City were in fact permissible under the deed. (*Id.* at 548.) Here, of course, the issue is not the City's use of property as it conveyed it back to the Association (the original grantor). As such, neither the City nor any other defendant to this action is collaterally estopped under *Roberts*.

H. All Parties To The MOU Must Be Before The Court As The Relief Plaintiffs Seek Necessarily Opens Up The Entire MOU

The plaintiffs' Declaratory Relief cause of action fails because the School District is an indispensable party in this action because the School District is a party to the MOU. As with the plaintiffs' inappropriately narrow reading of the 1940 Deeds and their fiction that no other instruments in the chain of title for Area A are applicable, the plaintiffs inappropriately assert that

they are no longer seeking to invalidate the entire MOU, rather just to invalidate two of the deeds specifically called for by the MOU. The plaintiffs demand that the 2012 Deeds regarding Area A (from the City to the Association and from the Association to Lugliani) be declared "illegal, void and of no legal effect." (SAC p.19, Prayer For Relief 1(a) and 1(b).) To unwind the conveyances specifically called for and in some cases paid for under the MOU unquestionably places the MOU at issue and seeks to invalidate certain mandatory obligations in the MOU. As such, all parties to the MOU are necessarily indispensable parties to this action. Furthermore, this Court's demurrer ruling is not law of the case as the indispensable party issue was not properly before the Court and in any event it is properly raised in the Motion.

It is black letter law that "if a court attempts to proceed in an action without the presence of indispensable parties it acts beyond its jurisdiction and may be restrained by prohibition.[7] *(Bank of California, Nat'l Assoc. v. Superior Court of San Francisco* (1940) 16 Cal.2d 516, 523.) Civil Code of Procedure § 389 governs necessary and indispensable parties. One may be an indispensable party if his interest in the subject matter of the controversy is of such nature that a final decree cannot be rendered between the other parties to the suit without inevitably affecting that interest. (*Peabody Seating Co. v. Superior Court of Los Angeles* (1962) 202 Cal.App.2d 537, 543 [absent party not indispensable because it was not a party to any of the contracts].) While Code of Civil Procedure § 389(b) sets forth the factors to be considered by the Court in determining if a party is indispensable, case law provides that parties to a contract (here, the MOU is a contract), are by definition indispensable parties. "In an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Crouse-Hinds Co. v. InterNorth, Inc.,* (2d Cir. N.Y. 1980) 634 F.2d 690, 701[8]; *Mastercard Int'l., Inc. v. Visa Int'l. Serv.*

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[7] Note, even when the absent party is found to be necessary, proceeding in its absence is not a jurisdictional issue but may be in error, depending on the circumstances. (*Harrington v. Evans* (1950) 99 Cal.App.2d 269, 271.)

[8] Since the language of Code of Civil Procedure § 389 tracks the language of its federal counterpart, Fed Rules Civ Proc R 19, California courts look to federal precedents applying the federal rule as a guide to application of § 389. (*Van Zant v. Apple Inc.* (2014) 229 Cal.App.4th 965, 974.) The federal cases are attached to the Compendium of Non-State Authorities.

Ass'n. (2d Cir. N.Y. 2006) 471 F.3d 377, 386 ["No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."]; *Lomayaktewa v. Hathaway* (9th Cir. 1975) 520 F.2d 1324, 1325 [actions involving rights under a contract should include all contract parties].) Furthermore, even parties who do not own any interest in the property at issue are indispensable parties if a ruling will affect their rights in relation to that property. (See *Hardie v. Chew Fish Yuen* (1968) 258 Cal. App. 2d 301, 305.)

Here, the SAC states that it seeks to invalidate the 2012 Deeds from the City to the Association, and from the Association to Lugliani. (SAC p. 19, Prayer For Relief 1(a) and 1(b).) A simple reading of the MOU, however, shows that if the 2012 Deeds are voided, then the entire MOU will need to be voided as well – the conveyances are key obligations in the MOU and the MOU does not contain a severance provision. (Plaintiffs' Evidence Ex. 12 (MOU).) Thus, the voiding or invalidating of any of the specified obligations in the MOU necessarily voids or invalidates the entire MOU and is clear evidence of frustration of purpose and contradicts the parties' intent. At the very least, by the terms of the MOU, if the 2012 Deeds are voided, the entire "deal" falls apart: Lugliani will lose title to Area A, which will be returned to the Association. Lugliani will be entitled to the return of the $500,000 paid to the Association as well as the $1.5 million that Lugliani provided to the School District. The District will want back Lots C and D, and will want out of its obligation to not put lights on the football field and the obligation to similarly restrict the other sites it owns. The Association will then want the $100,000 back it paid to the City. In sum the voiding of the 2012 Deeds in the MOU necessarily voids the entire MOU.

The Court unquestionably needs *all* of the parties to the MOU before it should this Court grant the "limited" relief that the plaintiffs request. Otherwise, the other parties to this lawsuit would be left with no alternative but to initiate subsequent lawsuits, which would include the District. Therefore, any relief this Court grants pursuant to plaintiffs' Declaratory Relief cause of action would not result in a final determination of the rights of the interested parties. This reason alone is sufficient to establish the District as an indispensable party and the dismissal of the District by the plaintiffs from this action as fatal to the relief they seek.

I. Plaintiffs' Motion Does Not Seek Judgment As To Its Third Cause of Action

The plaintiffs did not include the Third Cause of Action alleging nuisance in its Motion. The plaintiffs' Proposed Order includes no proposed order addressing the Third Cause of Action. The plaintiffs do not provide a Separate Statement of Undisputed Facts or argument for summary judgment or adjudication relative to the Third Cause of Action. The Memorandum only states that if the Court grants summary adjudication at to the First and Second Causes of Action, then the Third Cause of Action is moot and should be dismissed. (Motion ¶ G, p.16.) Thus, no basis exists for the Court to address the Third Cause of Action in the context of plaintiffs' Motion.

V. CONCLUSION

For reasons stated, the Motion should be denied.

Dated: May 15, 2015

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