No.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION P

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS
Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent,

CITY OF PALOS VERDES ESTATES and PALOS VERDES HOMES ASSOCIATION,

Real Parties in Interest.

Proceedings of the Los Angeles County Superior Court
Case No. BS142768 • Hon. Robert H. O'Brien, Judge Presiding

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF; MEMORANDUM

Jeffrey Lewis, Bar No. 183934
Kelly Broedlow Dunagan, Bar No. 210852
BROEDLOW LEWIS LLP
734 Silver Spur Road, Suite 300 • Rolling Hills Estates, CA 90274
Tel. (310) 935-4001 • Fax. (310) 872-5389 • E-Mail: Jeff@BroedlowLewis.com

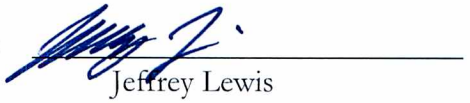
Attorneys for Petitioner
Citizens for Enforcement of Parkland Covenants

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The following entities or persons have either an ownership interest of 10% or more in the party or parties filing this certificate or a financial or other interest in the outcome of the proceeding. Cal. Rules of Court, Rule 8.208(e)(1).

Interested Person or Entity	**Nature of Interest**
Palos Verdes Peninsula Unified School District	Previously a named respondent below, financially benefited from the real estate transaction that is the subject of the below litigation.
Robert Lugliani	A named party below who is the beneficial owner of the real property that is the subject of the below litigation.
Delores Lugliani	A named party below who is the beneficial owner of the real property that is the subject of the below litigation.
Thomas Lieb	A named party below who holds in trust the real property that is the subject of the below litigation

Dated: March 10, 2014

By: 
Jeffrey Lewis

Attorney for petitioner

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INTRODUCTION

When a city accepts a real property deed with restrictions that the land be used for park purposes forever, may the city thereafter sell the park to a private party for the exclusive use of that private party? Under similar circumstances, such contrary uses of public property have been held to be an *ultra vires* act warranting issuance of a

writ of mandate. (*Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 Cal.App.3d 1003, "*Welwood.*") When the City of Palm Springs attempted a similar diversion of public property for a private purpose, the trial court issued a writ of mandate to enforce the mandatory and ministerial duty of the city to use the property for the good of the public. The Court of Appeal upheld the writ and confirmed the nature of the city's ministerial duty:

> A public trust is created when property is held by a public entity for the benefit of the general public. (Citations.) Here, title to the library property is held by City to be used by City for the benefit of the general public as a public library. Any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an ultra vires act. (Citations.) Thus, it would be proper not only to issue an injunction to enforce the obligation arising from the existence of the public trust, i.e., to enforce City's obligation to use the property as a public library, but also to prevent an ultra vires, and hence nonlegislative, act.

(*Welwood*, at 1017).

In this case, the City of Palos Verdes Estates ("City") received 849 acres of parkland from the Palos Verdes Homes Association ("Association") in 1940 to be held forever for public park purposes. One particular park was a 1.7 acre public park located adjacent to 900 Via Panorama (the "Panorama Parkland.") For decades, the original owners of 900 Via Panorama, and later owners, Dr. Robert and Delores Lugliani, encroached on the Panorama Parkland with the brazen construction of unauthorized retaining walls, driveways, storm drains, landscaping, a gazebo and a sports court. The Luglianis treated the Panorama Parkland as an extension of their own property without regard to the public and City's interests in or right to use the Panorama Parkland. The City repeatedly issued notices instructing the Luglianis to

remove the encroachments, stating they were "illegal." But the Luglianis refused to comply.

In 2012, the City and Association abandoned their historic roles as enforcers of parkland land use restrictions. In May 2012, the City, Association, the local school district and Thomas J. Lieb as trustee of a hastily prepared trust for the benefit of the Luglianis, signed a complex real property agreement in the form of a Memorandum of Understanding ("MOU.") The MOU provided for the Panorama Property to be conveyed to the trust for the benefit of the Luglianis. All their past encroachments on the Panorama Property were to be forgiven, the Luglianis obtained the City's and Association's blessing to develop the Panorama Parkland for the Luglianis' private use in return for the Luglianis' $1.5 million donation to the local school district, and a $500,000 payment to the Association (with $100,00 of that transferred to the City.)

Petitioners Citizens for Enforcement of Parkland Covenants ("CEPC") filed the below action to restore the Panorama Parkland to public use and to compel the City and Association to resume their decades long enforcement of the land use restrictions governing the Panorama Parkland.

There is no question that the conveyance and private use of the Panorama Parkland to the Luglianis violate the land use restrictions.[1] The narrower question presented by CEPC's Code of Civil Procedure section 1085 claim below and again

[1] Indeed, the CC&R's applicable to the Panorama Parkland state that once property has been designated for park purposes, the Association is without the power to allow any structures for a non-park purpose to be maintained on the property. (2 App., 424-425, §4(b).

presented by this writ, is whether the City and Association have a *ministerial duty* to enforce the land use restrictions that the Panorama Parkland be used for park purposes. In other words, as was the case in *Welwood*, once the City accepted a real property deed with land use restrictions, did the City assume a ministerial duty only to use that property for public uses and did relief pursuant to Code of Civil Procedure section 1085 lie to enjoin the City from proceeding with this illegal transction? The trial court found that no such ministerial duty existed and sustained the City and Association's demurrer to the third cause of action below. This writ seeks to reverse that determination and prevent the Luglianis' unlawful annexation and development of a public park for private purposes.

PETITION FOR WRIT OF MANDATE

OR OTHER APPROPRIATE RELIEF

1. **Authenticity of Exhibits**. Exhibits "1" through "12," accompanying this petition in a two volume appendix are true and correct copies of original documents on file with respondent Los Angeles County Superior Court. The exhibits are incorporated herein by reference as though fully set forth in this petition. The exhibits are paginated consecutively from page 1 through page 510, and page references in this petition are to the consecutive pagination.

2. **Beneficial Interest of Petitioner; Capacities of Respondent and Real Parties in Interest.**

a. Petitioner CEPC is the plaintiff and petitioner in the below Superior Court proceeding, Los Angeles County Superior Court Case No. BS142768.

b. The below proceedings are presently pending before respondent Los Angeles County Superior Court.

c. The real parties in interest for this petition are two of the five named defendants and respondents below, the City and the Association.

d. Additional named parties below who are not directly the subject of the instant petition are Robert Lugliani, Delores Lugliani and Thomas Lieb.

3. **Procedural History of Case.** On May 13, 2013, CEPC filed a verified petition for writ of mandate and complaint for injunctive relief against the real parties in interest. A true and correct copy of the petition is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "1."** The

petition included a third cause of action seeking a writ of mandate pursuant to Code of Civil Procedure, section 1085, subdivision (a) against the City and Association.

4. On July 15, 2013, the Association, the Luglianis and Lieb filed a demurrer to the petition. On or about July 16, 2013, the City filed a demurrer to the petition. CEPC opposed the demurrers. The trial court held oral argument on October 25, 2013, took the matter under submission and then issued a minute order on October 28, 2013. The minute order sustained the demurrers solely as to CEPC's third cause of action below for a writ of mandate pursuant to Code of Civil Procedure section 1085. The minute order provided CEPC leave to amend. A true and correct copy of the October 28, 2013 minute order is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "2."**

5. On November 7, 2013, CEPC filed a first amended petition. A true and correct copy of the first amended petition is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "3."** The amended petition included a third cause of action seeking a writ of mandate pursuant to Code of Civil Procedure, section 1085, subdivision (a) against the City and Association.

6. On December 4, 2013, the City filed a demurrer to the first amended petition. A true and correct copy of the City's demurrer and supporting points and authorities is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "4."**

7. On December 19, 2013, CEPC filed a memorandum of points and authorities in opposition to the City's demurrer. A true and correct copy of CEPC's opposition brief is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "5."**

8. On December 26, 2013, the City filed a reply brief in support of its demurrer. A true and correct copy of the City's reply brief is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "6."**

9. On December 5, 2013, the Association filed a demurrer to the first amended petition. A true and correct copy of the Association's demurrer and supporting points and authorities attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "7."**

10. On December 19, 2013, CEPC filed a memorandum of points and authorities in opposition to the Association's demurrer. A true and correct copy of CEPC's opposition brief is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "8."** CEPC also filed a request for judicial notice in opposition to the Association's demurrer. A true and correct copy of CEPC's request for judicial notice is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "9."**

11. On December 26, 2013, the Association filed a reply brief in support of its demurrer. A true and correct copy of the Association's reply brief is attached to

the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "10."**

12. On January 3, 2014, the trial court conducted a hearing on the demurrers to the first amended petition. Following oral argument, the court took the matter under submission. On January 6, 2014, the trial court issued a minute order sustaining the demurrer to the third cause of action in the first amended petition. The Luglianis served notice of the ruling on January 9, 2014. A true and correct copy of the January 9, 2014 notice of the January 6 minute order is attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "11."**

13. On September 16, 2013, Robert Lugliani provided responses to CEPC's requests for admission. A true and correct copy of the responses to the requests for admission are attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "12."**

14. Attached to the two volume appendix filed concurrently herewith and incorporated herein as **Exhibit "13**" is a photograph that fairly and accurately depicts the view of the California coastline from the parkland property adjacent to 900 Via Panorama.

15. **Basis for Writ Relief.** This proceeding concerns the illegal conveyance of 1.7 acres of public parkland to a private party for private use. The public views and right to enjoy this undeveloped public park property are at risk if this Court does not intervene. There are four claims asserted below. This writ concerns the third cause of

action asserted below seeking issuance of a writ of mandate pursuant to Code of Civil Procedure, section 1085. An appeal does not lie from the trial court's January 6, 2014 order sustaining the demurrer to this claim because other issues remain to be tried against the City and Association. (*Nerhan v. Stinson Beach County Water Dist.* (1994) 27 Cal.App.4th 536, 540 [holding that denial of petition for writ of mandate is not an appealable order if other causes of action remain between the parties].)

16. **Absence of Other Remedies.** Since 1925, the Panorama Parkland has existed for the benefit of the residents of Palos Verdes Estates and the neighboring cities. It provides an unparalled view of the California coastline in an undeveloped setting. Absent this Court's intervention, the Luglianis will develop the Panorama Parkland for their private, exclusive use to the detriment of the public.

PRAYER

Petitioner respectfully prays for the following relief:

1. Issuance of an alternative writ directing respondent to: a) vacate its January 6, 2014 sustaining the demurrer below or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandate and/or prohibition or such other extraordinary relief as is warranted, directing respondent superior court to set aside and vacate its order of January 6, 2014; and

2. Such other relief as may be just and proper.

Dated: March 10, 2014

By: 
Jeffrey Lewis
Attorney for petitioner

VERIFICATION

I, Jeffrey Lewis, declare as follows:

1. I am a partner in Broedlow Lewis LLP, attorneys for the petitioner herein.

2. I have read the foregoing **PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RLIEF** and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than petitioner, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 10th day of March 2014 at Rolling Hills Estates, California.

Jeffrey Lewis

MEMORANDUM

I. THE COURT SHOULD ISSUE A WRIT DIRECTING THE TRIAL COURT TO VACATE ITS ORDER SUSTAINING THE DEMURRER BECAUSE THE CITY OWES ITS RESIDENTS THE MINISTERIAL DUTY TO ENFORCE THE RESTRICTIONS FOR THE PANORAMA PARKLANDS

The trial court sustained the demurrers by the Association and the City on the grounds that CEPC failed to present facts "that would establish a ministerial duty of the [C]ity to act as requested." (2 App.,[2] 475). Presumably the trial court made the same conclusion as to the Association although the order is silent on this issue. (2 App. 475). Because the order sustaining the demurrer did not address which arguments by the City and Association were accepted by the trial court, all their major arguments are all discussed below. Regardless of the rationale, the ruling was contrary to well established law in light of the following facts pled below which cannot seriously be disputed and in any event must be assumed true for purposes of the demurrer. (*Kiseskey v. Carpenters' Trust for So. California* (1983) 144 Cal.App.3d 222, 228).

A. The City and Association's Creation and Assumption of Duties to Protect Parklands

The City was incorporated in 1939. (FAP, ¶ 9a, 1 App. 143). Twenty-eight percent of the City's land was decidated to permanent open space. (*Ibid.*) A series of

[2] Concurrent with the filing of this petition, CEPC has filed a two-volume appendix of exhibits. All references herein to "App." are to the volume, page and, where applicable, line number or paragraph of that appendix.

restrictive conditions ("CC&R's") as well as deeds recorded in the 1920's and 30's established land use restrictions and the respective rights and obligations of the City, Association and property owners. (FAP, ¶ 10, 1 App. 144). These documents limited the use of the City parkland, including the Panorama Parkland, to be used as "public shools, parks, playgrounds and/or recreation areas." (FAP, ¶ 10(c), 1 App. 144).

The Association was formed for the purpose of enforcing the land use restrictions in the City:

> To carry on the common interest and look after the maintenance of all lots and the welfare of all lot owners right from the beginning…Palos Verdes Homes Association, has been incorporated…It will be the duty of this body to maintain the parks, street planting and other community affairs, and to perpetuate the restrictions.

(Summary of Protective Restrictions for Palos Verdes Estates, 2 App., 368)

Following the Great Depresssion, the Assocation faced an enormous tax debt to Los Angeles County. (FAP, ¶ 9(b), 1 App. 143:17-25). To avoid a possible sale of parklands to satisfy that tax debt, the City voted to be incorporated in 1939, and in 1940 the Association's 849 acres of parkland, including the Panorama Parkland, were deeded to the City. (FAP, ¶ 9(b), App., 143:17-25). The conveyance from the Association to the City did not alter the land use restrictions; and in fact the restrictions were explicitly affirmed and accepted by the City in the transfer documents and minutes of the City Council Meeting accepting the property conveyance

The Association has rules by which land use restrictions contained in a recorded deed may be changed. One procedure requires that the Association obtain the written consent of 90 percent of the property owners. ([["Modification of Basic

Restrictions"] § 2, App, 407). The other procedures state that such a modification may proceed with the written and recorded consent of two-thirds of the property owners within 300 feet of the affected property. (["Modification of Other Restrictions"] § 3, App, 407). If the Association wanted to alter the land use restrictions that were imposed on the Panorama Parklands by virtue of the CC&R's in the 1920's and 1930's or the use restrictions imposed by the grant deed conveying the parkland to the City, the Association was required to obtain either the consent of two-thirds of the property owners within 300 feet of the Panorama Parkland or 90 percent of the the property owners. No such consent has been sought or obtained. (FAP, ¶ 36, 1 App., 154:24-26).

The applicability of these land use restrictions to the Panorama Parkland is not disputable. The illegal deed conveying the Panorama Parkland to the Luglianis' trust in September 2012 acknowledges, for example, the application and enforceability of CC&R's recorded in 1923 and 1926. (Grand Deed, § 10, 2 App, 445). In the demurrer proceedings below, the City unequivocally affirmed that "the deed restrictions remain binding upon whoever owns the [Panorama Parklands]." (2 App., 331:24-25).

The CC&R's governing the Panorama Parkland also provide that once property has been accepted for park purposes, the Association may not allow structures to be maintained on the property. (2 App., 424-425, § 4(b)).

B. The Luglianis' Illegal Encroachment on the Panorama Parkland

The Luglianis have owned the property at 900 Via Panorama since 1975. (FAP, ¶ 7, 1 App. 142). The Luglianis and/or the predecessors in interest encroached on the Panorama Parklands by erecting the following illegal improvements: landscaping, a baroque wrought-iron gate with stone pillars and lion statutes, a winding stone driveway, dozens of trees (some of which are as high as 50 feet), a gazebo, a now-overgrown atheltic field half the size of a football field, a 21 foot-high retaining wall and other retaining walls. (FAP, ¶ 16, 1 App. 146:9-18).

Prior to May 2012, the City and Association viewed the above encroachments as unlawful and in violation of the land use restrictions governing the Panorama Parkland. By way of example:

- On November 22, 1972, the Association wrote to the then owners of 900 Via Panorama citing "the apparent use of dedicated parkland to serve" private property "and the possible illegal location of the new garage structure." (FAP, ¶ 18(a), 1 App. 147).
- On November 22, 1972, the City wrote to the then owners of 900 Via Panorama to complain about illegal construction on public parkland. (FAP, ¶ 18(b), 1 App. 147).
- On December 19, 1972, the Association wrote to the City about the illegal improvements to the Panorama Parklands and complained that "the use of parkland for the benefit of a single private residence is not consistent with the

intent of the deed restrictions and such use should be disallowed..." (FAP, ¶ 18(c), 1 App. 147).

- On August 11, 2003[3], Allan Rigg, the City's then Public Works Director, wrote a staff report detailing, in his words, "the illegal improvements on the parklands adacent to 900 Via Panorama." Mr. Rigg's August 11, 2003 report details that the land restrictions governing the Panorama Parkland "legally bind the City to keep these areas free of fences, walls, or any other private usage." (FAP, ¶ 18(g), 1 App. 147).
- On October 25, 2005, Mr. Rigg authored another City memo in support of a City policy to remove unauthorized encroachments on City parkland. Mr. Rigg's October 25, 2005 memo describes how the parkland was conveyed to the City "subject to the deed restrictions that these areas must be perpetually maintained for the public to enjoy…The City wholeheartedly accepted this condition, recognizing the value to the community in preserving its open space." Mr. Rigg's memo states that existing encroachments on City parkland "violate the City code and the deed restrictions, but most importantly they rob the community of public land which exists for the use and enjoyment of all." (FAP, ¶ 18(h), 1 App. 148).

[3] The City's file for 900 Panorama is replete with dozens of notices and correspondence between 1972 and 2003 concerning the illegal encroachments by the owners of 900 Via Panorama on the Panorama Parkland. For brevity's sake, they are omitted from this petition.

C. The City's 2005 Resolution to Remove Parkland Encroachments

On November 8, 2005, the City passed resolution R05-32 which adopted a policy for the removal of unauthorized encroachments in the City's parklands. The resolution noted that the "city owns 849 acres of parklands that comprise much of the open space and are deed-restricted to remain open for the public's use…" The new policy required staff to stake steps to notify property owners of illegal encroachments. If the owner did not comply, the City was to "immediately" remove the encroachment, bill and lien the owner and cite the owner for an infraction. None of the language in the resolution conferred discretion on City staff. (FAP, ¶ 18(i), 1 App. 148). Further, the City's Municipal code specifically defines "Must" and "shall" to have mandatory meanings while "may" has a permissibe meadning. (City of PVE Mun. Code, § 1.014.010). When Resolution R05-32 and the City's Municipal Code are read together, there is no question that the enforcement of deed restrictions for parklands is absolutely mandatory.

D. The City's Annual Notices to the Luglianis Requesting Removal of Illegal Encroachments that Violated Binding Deed Restrictions

Following the passage of resolution R05-32, the City commenced issuing annual notices to the Luglianis. (FAP, ¶ 18(l)-(p), 1 App. 148-149). These annual notices each stated that the Luglianis must remove the illegal encroachments on the Panorama Parklands because they "violate the deed restrictions, which the City must legally comply with…" (FAP, ¶ 18(l)-(p), 1 App. 148-149). Notices were sent to the

Luglianis in 2006, 2007, 2008, 2009, 2010. (*Ibid.*) Hence, between 2006 and 2010, the City took the position that the Luglianis' encroachments on the Panorama Parkland were illegal and violated the deed restrictions which the City was duty bound to comply with. Prior to 2010, the City did not inform the Luglianis or take the position that the deed restrictions were optional. By September 2011, the Luglianis had not complied and the City brought in bulldozers to commence nuisance abatement procedures. (FAP, ¶ 18(q), 1 App. 149). The City removed some but not all the structures. (*Ibid.*)

E. In May 2012, Two Million Dollars Convinced the City to Abruptly Reverse its Stance on the Deed Restrictions

Eight months and two million dollars later, the City abruptly altered course. The City and Association signed an MOU that forgave the Luglianis' encroachments and conveyed public property, the Panorama Parkland, to the Luglianis.[4] (FAP, ¶¶ 19-22, App. 150-151). As part of this transaction, the Luglianis "donated" $1.5 million to the Palos Verdes Peninsula School District, paid $500,000 to the Association, which in turn conveyed $100,000 to the City. (*Ibid.*). While labled a "donation" perhaps for the Luglianis' tax purposes, in discovery in this matter, the

[4] Technically, the Panorama Parkland was conveyed by the City to the Association and then, minutes later, by the Association to Thomas Lieb who holds the property as trustee for a trust hastily formed in May 2012 in which the Luglianis are the beneficiaries.

Luglianis admitted that the $1.5 million was a quid pro payment for their ability to annex and use the Panorama Parkland as their private backyard. (2 App., 505:11-16).

F. The Trial Court's Conclusion that the City Owes no Ministerial Duty to Enforce Parkland Restrictions was Contradicted by this Court's 1949 Decision Eliminating the City's Discretion in Using Public Parks

The trial court concluded that the enforcement of land use restrictions is not a ministerial duty owed by the City. Put differently, the trial court concluded that the City had the discretion to not enforce the land use restrictions. Sixty-four years ago this Court confirmed that the City no discretion to use public parks for purposes that violate deed restrictions. In the 1940's, the City attempted to use one particular parkland property to construct a building dedicated for vehicle storage. In the ensuing lawsuit against the City and its council, *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d. 545, this Court ruled that the deed restrictions trumped the City's desires to use the land for another purpose. This Court has already conclusively established that the City's desires for "better" uses for parkland are immaterial:

> Courts have guarded zealously the restrictive covenants in donations of property for public use …. Such an effort on the part of a municipality if successful may be but the opening wedge and, as stated in *Kelly v. Town of Hayward*, *supra* [192 Cal. 242, 219 P. 750], 'some future board might claim that under their discretion a corporation yard and rock pile for the employment of prisoners, and other very useful adjuncts to the administration of the economic affairs of the town, might be located thereupon, until the entire space was fully so occupied.' What a city council or board of trustees would like to do under whatever guise it may be proposed is not the test as to the validity of the proposal. The terms of the deed alone are controlling.

(*Roberts v. City of Palos Verdes Estates*, *supra*, 93 Cal.App.2d at p. 548).

Here, the City may have genuinely believed that selling the Panorama Parkland to the Luglianis was in the best interests of the City. That genuine belief "is not the test" under *Roberts*. The terms of the deed alone control and here, the terms of the deed compel that the Panorama Parkland remain a public park and not be annexed to the Luglianis' property for their private use. Nor may the City, having litigated and lost this issue decades ago, relitigate the issue of their discretion here. (*Proctor v. Vishay Intertechology, Inc.* (2013) 213 Cal.App.4th 1258, 1274 [holding that doctrine of collateral estoppel may be asserted to prevent party from relitigating issue previously decided after a full and fair hearing on the merits].)

G. The Trial Court's Conclusion that the City Owes no Ministerial Duty to Enforce Parkland Restrictions is Contrary to the Weight of California Decisions Construing a City's Duty to Protect Public Lands

The City argued below, and the trial court agreed, that the City owes no ministerial duty to enforce the land use restrictions for the Panorama Parkland. However, under California law, a City does owe a ministerial duty to enforce land use restrictions for real property dedicated to a public purpose. (*Welwood*, at 1017). Although the City retains discretion in the manner in which the property is used consistent with the restrictions it has no discretion to simply withdraw the property from public use altogether. (*Ibid.*)

1. The City's Claim that it Owes No Ministerial Duty Because it no Longer Owns the Panorama Parkland has no Merit Because the September 2012 Deeds were Illegal and Void.

The City argued below that because it no longer owns the Panorama Parklands it owes no duty of any kind to its residents concerning the property. (2 App., 308). This argument ignores the fact that the FAP alleges that the City's conveyance of the Panorama Parkland was illegal and void. (FAP, ¶ 44, 1 App., 157:2-7). Although a municipality such as the City generally has the power to buy and sell property, that power is limited where it receives property via deed containing use restrictions. "[L]and which has been dedicated as a public park must be used in conformity with the terms of the dedication, and it is without the power of a municipality to divert or withdraw the land from use for park purposes." (*City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295, 300). City use of a property in violation of the deed restrictions "would be an *ultra vires* act." (*Ibid.*; see also *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 104). "It is well settled that where a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose." (*Roberts v. City of Palos Verdes Estates*, *supra*, 93 Cal.App.2d at p. 547). Given that the illegal deeds conveying the Panorama Parkland are void, the City cannot credibly argue, at least at the demurrer stage, that it has no obligation to enforce the land use restrictions.

2. The City's Attempted Conveyance of the Panorama Parkland Violated the City's Ministerial Duty to Refrain from Diverting the Panorama Parkland from Public Use

The City argued below that any duty it owed was not of a ministerial nature. (2 App., 307:14-18). The City argued that its ability to use or dispose of the Panorama Parkland was discretionary. (2 App., 310:13-15). CEPC respectfully disagrees. As a matter of law, a city has no discretion to divert a public park from public use. The land use restrictions compelling that the parkland be used perpetually for public purposes is akin to a condition of approval imposed by a planning commission for a development project. Although the decision to reject or approve a development project is a discretionary one not subject to judicial inteference, once a project is approved and conditions of approval are made, enforcement of those conditions is a ministerial duty. (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 834 [holding that Zoning Administrator had clear, ministerial duty to enforce plannning commission condition of approval requiring construction of pedestrianway].) Here, once the City made the discretionary decision in 1940 to "wholeheartedly" accept the deed restrictions, the enforcement of those restrictions by city officials became a clear, minsterial duty.

The *Welwood* case is also instructive. In *Welwood*, the City of Palm Springs owned real property where the city's library was situated. The library property had been acquired by private deed restricting the use of the property to library uses. Forty years later, the City entered into an agreement with a developer. The agreement

contemplated moving a popular restaurant to the library property. An unincoproated association (formed for the purpose of blocking the project) filed a petition for writ of mandate in the Superior Court to prevent the city from conveying the library to the developer. After the lawsuit was filed, the city and developer entered into an amended agreement calling for a partial razing of the library building in lieu of a conveyance to the developer to accomodate the dining area. The trial court was poised to grant the writ and block the city's actions when the city and developer began negotiations for a third agreement to allow for an easement for dining uses on library party. The trial court granted the writ of mandate and an injunction precluding the city from granting an easement or razing the library. The city appealed.

The Court of Appeal confirmed that the deed restrictions controlled the use of the property and dining uses would not directly contribute to a library use of the property. (*Welwood*, at 1012):

> The use proposed by City in no way directly contributes to these purposes, and, actually, in at least one way, is antithetical to such purposes, for the proposed use would destroy parts of the building where books are stored and used.

(*Welwood*, at 1015).

The *Welwood* court found that the city's successive developer agreements would violate the deed restrictions requiring the city to "forever maintain" the library. (*Ibid.*) On appeal, the city argued that the writ impermissibly invaded the City's discretion. The *Welwood* court disagreed:

> The language of the writ does not prevent City from removing sections of the library, from conveying easements or other legal rights over the Library Property or from otherwise undertaking any acts *necessary for library purposes*. It merely commands City not to undertake any such actions if they are done primarily for a nonlibrary purpose or if they interfere with library use.

(*Welwood*, at 1016, emphasis in original).

Finally, the *Welwood* court concluded that the trial court's issuance of an injunction to block the City's plans was proper:

> A public trust is created when property is held by a public entity for the benefit of the general public. (Citations.) Here, title to the library property is held by City to be used by City for the benefit of the general public as a public library. Any attempt to divert the use of the property from its dedicated purposes or uses incidental thereto would constitute an ultra vires act. (Citations.) Thus, it would be proper not only to issue an injunction to enforce the obligation arising from the existence of the public trust, i.e., to enforce City's obligation to use the property as a public library, but also to prevent an ultra vires, and hence nonlegislative, act.

(*Welwood*, at 1017).

The holding of *Welwood* is applicable here. The City of Palm Spring's attempt to first convey and then raze the library is analagous to the City's conveyance of public parkland to the Luglianis. The issuance of a writ was upheld in *Welwood* because the proposed dining use for library property was a blatant violation of the deed restrictions. The facts of *Welwood* are not distinguishable.

3. The City's Argument that its Duties are Discretionary and not Mandatory are Contradicted by the Municipal Code

The City argued below that it had no "mandatory duty" to enforce the land use restrictions for the Panorama Parkland. (2 App., 307:14-18). That argument is belied by the City's own ordinances and municipal code. The City's municipal code makes it clear that a private person's use of public parkland for private purposes is a city nuisance. (City of PVE Mun. Code, §§ 17.32.050, 18.16.020). The City Municipal Code declares it is the "right and duty" of all residents to "participate and assist the city officials" in the enforcement of the CITY's zoning and requires the city attorney to commence legal proceedings and take other legal steps to remove illegal structures and abate illegal uses of public parklands. (*Ibid.*).

In addition to the City's municipal code, the City's own resolutions demonstrate the mandatory nature of the City's duty. On November 8, 2005, the City passed resolution R05-32 adopting a policy for the mandatory removal of unauthorized encroachments in the City's parklands. The new policy required staff to take steps to notify property owners of illegal encroachments. If the owner did not comply, the City was to "immediately" remove the encroachment, bill and lien the owner and cite the owner for an infraction. None of the language in the resolution conferred discretion on City staff. (FAP, ¶ 18(i), 1 App. 148).

Finally, the City contended throughout the proceedings below that the phrase "shall" did not have a mandatory meaning when used in reference to enforcement of

land use restrictions. However, the City's municipal code confirms that the term "shall" has a mandatory meaning. (City of PVE Mun. Code, §§ 1.04.010(I).)

H. The City is Estopped by is own Conduct from Denying that the Deed Restrictions are Binding and the City has no Discretion in their Enforcement

For decades, the City has acted and stated that the deed restrictions on public parkland are legally binding and require the City to keep parklands free of illegal structures and private usage. (FAP, ¶ 18(a), (c), (d), (e), (g), 1 App., 147) The City has previously taken the position that the City "wholeheartedly accepted" and was legally bound by the restrictions contained in the deeds conveying the parkland to the City. (FAP, ¶ 18 (h), 1 App., 148). The City, having accepted the deed restrictions in 1940 and publicly pronouncd that they were legally binding as support for citywide parkland enforcement efforts, is now estopped from denying the binding nature of those deed restrictions. (*Chapman v. Gillett* (1932) 120 Cal.App. 122, 126-27 [holding that plaintiff took deed of conveyance reciting existence of prior deed of trust is estopped from denying validity of prior deed of trust].) Estoppel principles apply to claims against the government, "particularly where the application of the doctrine would further public policies and prevent injustice." (*US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 131).

II. THE COURT SHOULD ISSUE A WRIT DIRECTING THE TRIAL COURT TO VACATE ITS ORDER SUSTAINING THE DEMURRER BECAUSE THE ASSOCIATION OWES ITS RESIDENTS THE MINISTERIAL DUTY TO ENFORCE THE RESTRICTIONS FOR THE PANORAMA PARKLANDS

The FAP also sought relief against the Association pursuant to Code of Civil Procedure section 1085. The FAP alleged the existence of a ministerial duty to enforce the land use restrictions set forth in the CC&R's recorded in the 1920's and 30's and affirmed in the subsequent deeds granting the parkland from the Association to the City. (1 App., 154).

The Association demurred on the grounds that there was no ministerial duty. (2 App., 345). The minute order by the court is silent regarding the Association's duty but given that the demurrer was sustained without leave to amend, it can be inferred that the trial court found that the Association also did not owe a ministerial duty to members of the Association. This conclusion is erroneous. The very purpose of the Association's existence is to enforce land use restrictions. The Association was formed:

> To carry on the common interest and look after the maintenance of all lots and the welfare of all lot owners right from the beginning…Palos Verdes Homes Association, has been incorporated…It will be the duty of this body to maintain the parks, street planting and other community affairs, and to perpetuate the restrictions.

(Summary of Protective Restrictions for Palos Verdes Estates, 2 App., 368).

Moreover, with respect to parkland, the Association was given the duty, not the discretion, to prevent the mainteance of any structures on parkland that are for a non-parkland purpose. (2 App., 424-425, § 2(b).) The CC&R's do not confer any

discretion on the Association to allow a private party to annex parkland for the private, exclusive use of a private party.

A. The Trial Court's Order Sustaining the Demurrer Should be Reversed Because the term "Shall" is Mandatory in the Context of the Association's Reversionary Interest in the Panorama Parklands.

CEPC alleged below that the Association had a reversionary interest in the Panorama Parkland and had the right to assert that interest in response to the City's failure to enforce the land use restrictions. The Association did not dispute the existence of the reversionary interest below but did dispute that it had any mandatory duty to exercise that interest.

If the parkland use restrictions are violated, the property "shall" revert to the Association. (FAP, Ex. 1, Art. VI, § 6, 1 App., 213 ["A breach of any of the restrictions, conditions and covenants hereby established shall cause the real property upon which such breach occurs to revert…"]; see also Art. VI, § 6, 2 App., 408 [identical reversion language for Tract 8652].)[5] The common sense meaning of the term "shall" is mandatory. "Ordinarily, the term 'shall' is interpreted as mandatory and not permissive. Indeed, "the presumption [is] that the word 'shall' in a statute is

[5] CEPC erroneously attached as Exhibit 1 to the petition below and FAP the CC&R's for other parkland located within the City and not the Panorama Parkland. The CC&R's that apply to the Panorama Parkland, governing Tract 8652 within the City, were attached to CEPC's Request for Judicial Notice below as Exhibit "A" in opposition to the demurrer. (2 App. 360, 363). The language of the two sets of CC&R's are identical and do not alter the analysis.

ordinarily deemed mandatory and 'may' permissive." (*People v. Standish* (2006) 38 Cal.4th 858, 869). Ordinarily, the word "may" connotes a discretionary or permissive act; the word "shall" connotes a mandatory or directory duty. (*Woodbury v. Brown-Dempsey* (2003) 108 Cal.App.4th 421, 433).[6]

If the Court were to interpret the reversionary language to be permissive, it would lose all meaning and effect. Consider the following: "A breach of any of the restrictions may cause the real property to revert…" versus "A breach of any of the restrictions shall cause the real property to revert." The permissive use of "shall" in this context renders the entire reversionary interest completely ineffective. The common sense and widely accepted interpretation of "shall" as mandatory should be adopted by the Court as it is the only meaning that gives the reversionary language the intended effect.

Moreover, the CC&R's governing the use of parkland, including the Panorama Parkland provide that:

> nor shall any land or any portion of said property be acquired or leased by the Homes Association, nor any property once subject to the jurisdiction of the Park and Recreation Commission be at any time sold, conveyed, mortgaged, leased, encumbered, or in any way disposed of except with the approval of the Park and Recreation Board. No building or structure for any purpose other than a park purpose shall be erected, constructed, altered or maintained upon any land subject to the jurisdiction of the Homes Association, when such land has been accepted for park purposes only.

(Art. XIV, § 4(b), 2 App. 425).

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[6] Although these decisions arise in the context of interpretation of statutes, there is no reason it cannot apply to the interpretation of legal instruments as well.

The CC&R's state that once the Panorama Parkland was "accepted for park purposes only," the Association no longer had the discretion to allow any building or structure for a non-park purpose. (Art. XIV, § 4(b), 2 App. 425). This land use restriction applies regardless of whether the City, the Association or the Luglianis ultimately are held to own the Panorama Parkland. Even if the conveyance to the Luglianis was lawful, the property remains subject to the jurisdiction to the Association and the prohibition on non-park related structures remains in full force and effect.

B. The Association's Decision to Agree to the MOU is not Subject to Deference Because the Rule of Judicial Deference does not Apply to Acts Taken Outside the Power of an Association

The Association argued below that its decision to enter into the MOU is not subject to judicial review. The Association contends that its decisions are entitled to judicial deference when it acts "within its authority." (2 App., 347:18-26; *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 265). CEPC agrees. As a corollary to that rule, actions taken outside of an association's authority are entitled to no deference:

> And *Lamden* did not purport to extend judicial deference to board decisions that are outside the scope of its authority under its governing documents. *Lamden* specifically reaffirmed the principle that, " 'Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration.

(*Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n* (2008) 168 Cal.App.4th 1111, 1122).

The Association's conveyance of public parkland to a private party for private purposes was outside the scope of its authority. Nor was the Association entitled to take no action to enforce the parkland restrictions. Even if the conveyance was lawful, the erection of structures (Gazebo, driveways, retaining walls) for non park purposes violates the absolute, mandatory land use restrictions set forth in the CC&R's. (2 App., 424-425, Art. XIV, § 4(b).) The Panorama Parkland was accepted for park purposes only by the City in the 1940's. Once that restriction was put into place, the Association lost its discretion to allow any non-park uses or structures on the Panorama Parkland. (2 App., 424-425, Art. XIV, § 4(b).)

The rule of judicial deference for homeowners associations was developed for lawful decisions made by an association's board wthin the powers conferred by the CC&R's. Given that both the conveyance and the Association's approval of non-parkland related strucutres on the Panorama Parkland fall outside the scope of the CC&R's, no deference is warranted here.

C. Regardless of Who Owns the Panorama Parkland, the Association owes Ministerial Duties to Enforce the Land Use Restrictions

Although there is some dispute about the current ownership of the parkland purportedly conveyed to the Luglianis, there is no dispute that the parkland conveyed to the Luglianis is subject to land use restrictions. All parties agree that the attempt to convey title from the City to the Association and then to the Luglianis did not modify

the land use restrictions that the parkland be used for park purposes in perpetuity. Indeed, the September 2012 deed conveying the parkland from the Association to the Luglianis reaffirms the efficacy of those land use restricitons. (2 App., 445, ¶ 10 [acknowledging the application of Declaration No. 1 and 25]. Those land use restrictions include provisions to modify any of the restrictions. (2 App., 182, § 9 [concerning tract 6888 and 7331; 2 App. 407, Art. VI, § 3 [substantially identical language[7] concerning tract 8652].). Under the terms of the land use restrictions, no such modification may occur:

> without the written consent duly executed and recorded of the owners of record of not less than two-thirds in area of all lands held in private ownership within three hundreed feet in any direction of the property concerning a change or modifcation is sought to be made…

(1 App., 182, § 9; 2 App. 407, Art. VI, § 3).

No such consent was sought or obtained by the Association or the Luglianis prior to the attempted conveyance of the parkland to the Lugianis in September 2012. As a result, regardless of whether the parkland is now owned by the Luglianis (as the Luglianis contend) or the City (as CEPC contends due to the void nature of the September 2012 deeds), the land use restrictions existing prior to September 2012 preventing anything other than park use continue today to apply to the parkland.

The Association attempted to skirt the failure to obtain consent by labeling its actions as "interpretation" rather than "modification" of the restrictions. The Association contends that by the insertion of paragraph two in the deed to the

[7] See Footnote 5, above.

Luglianis,[8] allowing for the presence of the Luglianis' private gazebos, sports courts, retaining walls, barbecues, etc. on parkland, the Association has merely "intepreted" the land use restrictions. (2 App., 347:5-8). CEPC contends that, in fact, the Association's insertion of paragraph two into the deed is not an "interpretation" of the restrictions but instead is a modification of the restrictions requiring consent of two-thirds of the owners within 300 yards. (2 App., 407, Art. VI, § 3). Any fair reading of the changed deed conditions is that the Luglianis obtained a modification of conditions (in exchange for their payment of $2 million) and not an "interpretation." Moreover, regardless of who owns the Panorama Parklands, the CC&R's establish that the Association has the "duty" to ensure that once property has been desiganted for parkland purposes, no structures may be erected on the property for a non-park purpose. (2 App., 424-425, § 4(b) ["No building or structure for any purpose, other than a park purpose shall be erected, constructed, altered or maintained upon any land subject to the jurisdiction of the Homes Association, when such land has been accepted for park purposes only."] Given the express prohibition of non-park uses for the Panorama Parkland, the Association is without any power to "interpret" the CC&R's to allow for the Luglianis' to use the Panorama Parkalnd for private purposes.

[8] The September 2012 deed purporting to convey title to public parklands from the Association to the Luglianis is attached as Exhibit "C" to CEPC's request for judicial notice filed concurrently herewith.

For these reasons, the Court should disregard the Association's argument that it has acted within its authority in executing the September 2012 deed to the Luglianis.

III. THE COURT SHOULD ISSUE A WRIT DIRECTING THE TRIAL COURT TO VACATE ITS ORDER SUSTAINING THE DEMURRER BECAUSE THE ASSOCIATION AND CITY ARE ESTOPPED FROM DENYING THE MANDATORY DUTY TO ENFORCE PARKLAND COVENANTS

In 1940, the City accepted the parkland conveyance from the Association, including the land use restrictions, for the purposes of cancelling the substantial tax debt impairing the properties. (FAP, ¶ 9(b), 1 App. 143:17-25). The County of Los Angeles subsequently cancelled that tax debt. Evidence Code, section 623 provides:

> Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.

The City, having taken possession of the parkland property and the Association, by avoiding the tax debt by affirming the deeds, led the City of Los Angeles taxing authorities, the residents of the City and the members of the Association, that the parklands were conveyed to the City with the land use restrictions intact, including the restrictions on the Panorama Parkland. By their conduct, the City and Association are estopped from now denying the efficacy of the entire deeds, including the land use restrictions. (Evid. Code., § 623).

The City has also led the State of California to believe that the parklands are subject to mandatory land use restrictions. In its 2012-2013 Housing Element[9]

[9] The Housing Element was submitted by the City following the filing of the pleadings below.

presented to the State of California, the City represented that parklands are subject to "legally binding private restrictions" that preclude development for housing. According to the City's representations to the State, parkland is not available for other uses. The City has represented to the State that it "has no authority to alter or override the deed restrictions.…" Having made such representations to the State for purposes of obtaining approval of its housing element and general plan and retaining its planning authority, the City should be estopped from now claiming that it has the discretion to "override the deed restrictions" for Panorama Parkland.

The Association is likewise barred from re-litigating the question of the enforceability of the Panorama Parkland restrictions. The Los Angeles Superior Court entered judgment against the District in September 2012 declaring the covenants enforceable. (FAP ¶ 13, 1 App., 145-146). The Association may not now re-litigate the question. As a matter of judicial estoppel, this Court should not countenance the Association seeking to *enforce* the parklands restrictions for purposes of earlier litigation and now taking the exact opposite position on the identical issue.

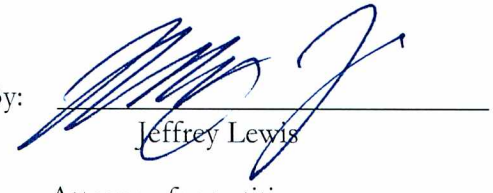
CONCLUSION

For the foregoing reasons, petitioner CEPC respectfully requests the following relief:

1. Issuance of an alternative writ directing respondent to: a) vacate its January 6, 2014 order; or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandate and/or prohibition or such other extraordinary relief as is warranted, directing respondent superior court to set aside and vacate its order of January 6, 2014; and

2. Such other relief as may be just and proper.

Dated: March 10, 2014

By: 

Jeffrey Lewis

Attorney for petitioner

CERTIFICATE OF WORD COUNT

I certify that the word count for the foregoing **PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF; MEMORANDUM** is 9,226 as counted by Microsoft Word for Mac 2011, which was used to produce this brief.

Dated: March 10, 2014

By: _____
Jeffrey Lewis
Attorney for petitioner