Supreme Court
Case Number _____

Second Civil
Numbers B267816
and B270442

In the Supreme Court of the State of California

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS, *et al.*,

Plaintiffs and Respondents,

v.

CITY OF PALOS VERDES, *et al.*,

Defendants and Appellants,

Review of a Decision by the Court of Appeal,
Second Appellate District, Division Two,
Reversing, in Part, a Summary Judgment

PETITION FOR REVIEW

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CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS, *et al.*,

Respondent,

v.

CITY OF PALOS VERDES, *et al.*,

Petitioners,

PETITION FOR REVIEW

To the Honorable Tani Cantil-Sakauye, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Defendant Palos Verdes Homes Association ("the Association"), the governing body formed to interpret and enforce park land restrictions for the benefit of all homeowners in the City of Palos Verdes Estates, respectfully petitions for review of the Court of Appeal decision filed January 30, 2018.

The Court of Appeal affirmed, in part, the judgment in favor of plaintiffs Citizens for Enforcement of Parkland Covenants and John Harbison, granting summary judgment to plaintiffs and against the Association. Its judgment should be

reversed because it was based on an erroneous judicial finding that the Association lacked the power to transfer park land.

The Court of Appeal's decision runs afoul of *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345. Under this case, the Association clearly had the right and power to sell the property that is the subject of this litigation. The lower courts have misinterpreted the applicable governing documents and have overridden the Association's business judgment in reaching a binding settlement affecting thousands of its members, as well as a City and a school district.

This court should grant review in order to resolve important issues relating to the validity and enforceability of the governing documents of a planned development. The trial court here usurped the role of the Association when it set aside the Association's interpretation of its own governing documents and ignored its business judgment in the settlement of litigation that was dividing the community and draining the Association's resources. In doing so the court violated the important public policy in favor of settlement. This policy is especially important in cases involving cities, school districts, and homeowners associations.

The court should also address important issues of property law, relating to purported deed restrictions and the preservation of open space. Finally, it should clarify the scope of the indispensable party doctrine, which the lower courts erroneously found inapplicable.

STATEMENT OF ISSUES

Since 1923, the Palos Verdes Homes Association has had plenary authority over park land within the City of Palos Verdes, including both the ability to enforce deed restrictions and the right to dispose of park land. The present cases arises from the Association's transfer of unusable park land to protect more valuable park land within the city. The case presents important substantive issues of great concern to the Association and its members.

This litigation arises out of an earlier lawsuit filed by the Palos Verdes Unified School District (the "School District"), in which the plaintiff sought a declaration that certain deed restrictions on lots the School District received from the Association were no longer valid so that the lots could be sold for fundraising purposes. Although the Association prevailed at trial, the School District appealed. The Association chose to settle the costly litigation rather than further drain its financial resources. Ultimately, a multi-party settlement was reached by and among the City of Palos Verdes, the School District, and Robert and Dolores Lugliani (the "Luglianis").

The settlement preserved, as open space, several park land parcels owned by the School District which were not part of the litigation, in addition to the challenged parcels. One parcel that

had never been, and could *never* be, used as a public park was sold. This unusable park land, also known as Area A, was transferred to the Luglianis. Area A is a small parcel comprised of predominately of steep slopes. It lies beneath the Luglianis' property and surrounds it on three sides. [13 CT 2973.]

The plaintiffs filed an action challenging the settlement and brought a motion for summary judgment, seeking a declaration invalidating the Association's transfer of Area A to the Luglianis. The trial court granted summary judgment without addressing the unequivocal language contained in the original recorded declaration that gives the Association plenary authority over park land within its jurisdiction.

The defendant and appellant, Palos Verdes Homes Association, presents the following issues for review:

> 1. Under *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, did the Palos Verdes Homes Association have the power to sell the subject property in 2012 in accordance with a provision in the 1923 governing documents that conferred the power to sell, since the provision was never amended?
>
> 2. Did the Board of the Palos Verdes Homes Association properly interpret and exercise its powers and business judgment in entering into a settlement which maximized protection of open space, while avoiding the risk of bankruptcy, and conserving the Association's financial resources and its ability to fulfill its obligations?
>
> 3. Where a homeowners association exercises its business judgment to achieve litigation objectives through

settlement, rather than litigate to the point of bankruptcy, is the settlement binding on all of its members?

4. Is a deed restriction nothing more than a negative easement that can be extinguished when a reconveyance of the real property causes merger of title, pursuant to *Civil Code* sections 805 and 811, as occurred in this case?

5. Does the absence of a party deprive the trial court of jurisdiction to void a material term of a multilateral contract, when one of the key parties is not before the court, and complete relief cannot be afforded?

All of these questions should be answered "yes."

The express terms of the Association's governing documents provide the Association with plenary power to transfer park land. That language has never been amended and the Association's ability to transfer park land stands. An association's original declaration cannot be unilaterally altered by the declarant or its successor-in-interest after the initial declaration of covenants, conditions and restrictions has been recorded.

A homeowners association, which has been given the right to conclusively interpret its own governing documents must be allowed to do so. Judicial deference to its exercise of business judgment to enter into settlements that are in the best interest of the association and its members should be conferred. The public policy of this state in favor of settlement of litigation should be upheld, especially when one of the contracting parties is not before the court, and its presence is required in order to afford

complete relief. As to the doctrine of merger, the court should clarify the law and hold that deed restrictions are negative easements that are governed by the doctrine.

This court should grant review and decide the above issues. After further briefing and oral argument, the judgment of the Court of Appeal in favor of the plaintiffs should be reversed.

STATEMENT OF FACTS

1. The Parties.

In this action, plaintiff Citizens for the Enforcement of Parkland Covenants, an unincorporated association of residents in the City of Palos Verdes ("the City") and John Harbison challenged a land transfer made pursuant to a multi-party settlement by and among the Palos Verdes Unified School District, the City of Palos Verdes, the Palos Verdes Homes Association, and Robert and Dolores Lugliani. Plaintiff John Harbison is the neighbor of the Luglianis who spearheaded the litigation. Early on, the plaintiffs voluntarily dismissed the School District from the action. [9 CT 2162-2170.]

2. The Establishment of as a Planned Community Subject to a Declaration of Conditions, Covenants and Restrictions, and the Authority of a Homes Association to Interpret and Enforce Those Restrictions.

In 1923, the land that ultimately became the City was subject to a Declaration of Establishment of Basic Protective Restrictions, Conditions, Covenants, and Reservations (the "original declaration"), which was recorded by the Commonwealth Trust Company. [12 CT 2884-2909.] This original declaration created the Palos Verdes Homes Association and gave it the power to interpret and enforce the covenants, conditions and restrictions in the planned community. [12 CT 2885.] The original declaration contains zoning type restrictions, but *no* park land restrictions. The preamble to the original declaration states that the Association must *perpetuate the*

restrictions, referring to all of the conditions, covenants and restrictions within the document. [8 CT 1802.]

The original declarant gave the Association plenary power. This included the right to interpret and enforce all conditions, covenants, and restrictions. [12 CT 2885-2806.] The Association's interpretation is to be "final and conclusive upon all interested parties." [*Id.* at pp. 2908-2909.] Under Article II, section 4, subdivisions (a) and (i), every owner within the community is deemed to have bound himself or herself to various equitable servitudes, including the Association's *right to sell* real estate, including park land and open space. [*Id.* at pp. 2887-2888.] They have also consented to other powers conferred upon the Association that could impact park land, such as the Association's right to settle litigation, which is implicit in Article II, Sections 4(q), (t), (w) and (y). The Association's Articles of Incorporation furnish the Association with the same power to sell park land [*Id.* at pp. 2910-2912], and the Bylaws state that park land cannot be sold without the Association's consent. [*Id.* at pp. 2924.] The assumption underlying the governing documents for the Association is that the Association is indeed empowered to sell park land.

Importantly, Article II *cannot* be amended apart from the Article VI amendment procedures of the original declaration, which require a supermajority vote of the affected lot owners. [12 CT 2906.] The property owners in the City have *never* amended the Association's powers under Article II at any time.

Not long after the original declaration was recorded, the original declarant, the Commonwealth Trust Company, appointed Bank of America as its successor-in-interest. [12 CT 2877.]

Bank of America wished to amend the original declaration when it recorded Declaration No. 25 to add residential districts to newly subdivided Tract 8652. To amend the original declaration, the bank complied with Article VI, section 3 of the original declaration, memorializing its compliance within the amendment itself. [8 CT 1901.] The newly added restrictions contained in Declaration No. 25 had nothing to do with park land restrictions; they concerned residential zoning districts. [Compare 8 CT 1802 with 1901.]

3. The Grant Deed Transferring Park Land to the Association by the Original Declarant's Successor-In-Interest Purporting to Restrict the Association's Right to Transfer Park Land.

In 1931, the Bank of America conveyed land, including Area A, to the Association. Wishing to preclude the Association from ever transferring park land, the Bank placed various restrictions in the grant deed purporting to limit the Association's ability to transfer park land under Article II, Section 4. The Bank did not amend the Association's powers under Article VI of the original declaration. [12 CT 2936-2940.] Later, in 1940, the Bank quitclaimed all of its interest in the land, including its reversionary interest. [12 C 2941-2943.]

4. The Association's Conveyance of Certain Park Land to the City and to the School District.

By 1938, the Association owed significant back taxes and risked losing the park land to foreclosure in the aftermath of the Great Depression. [12 CT 2804.] The Association conveyed 13 lots on condition that the properties could only be used for school

or park purposes. The properties could only be sold to a body suitably constituted by law to hold park land and only on condition that they remained subject to the deed restrictions. [13 CT 2955.]

In 1940, the Association also conveyed park land to the City in two deeds. [8 CT 1931-1947.] A small portion of Area A lying in one tract was transferred on one of the deeds; the majority of Area A which lies in another tract, was transferred in the second deed. [8 CT 1890; 1933, 1942.] Similar restrictions were placed in the 1940 deed to the City; to wit, the property was to be used for park purposes, the City could not build any structures or convey the property except to a body suitable for holding public land, and, the Association retained a right of reversion. [13 CT 2955; 8 CT 1931-1947; 1939, 1946.] The 1940 conveyance of land to the City made Declaration No. 1 part of the conveyance. [8 CT 1937.]

5. The Encroachments on Area A, the Subject of the Present Lawsuit.

The predecessors to the Luglianis built a high retaining wall on Area A to stabilize their slope. The Luglianis later landscaped and improved Area A with a gazebo and other accessory, uninhabitable structures. [9 CT 2007; 12 CT 2809.] The encroachments were at least 30 years old and the subject of contention with the City. [9 CT 2007; 2061-2062; 2110-2111.] The City was not using Area A, except as open space, and desired to be relieved of liability or responsibility for maintaining the retaining walls and the hillside but was at an impasse. [12 CT 2810; 5/29/15 RT 23, 25.] The City was aware that removal of

the retaining wall could be detrimental to the surrounding slope. [9 CT 2110-2111.]

6. The School District's Efforts to Invalidate All Deed Restrictions, Which Led to Costly Litigation.

In 2012, the School District determined that it could not make use of two lots—Lots C and D—for their restricted purpose, and desired to raise millions of dollars by selling the lots for residential development. When the City and the Association objected, the School District filed a lawsuit seeking to invalidate the restrictions. [12 CT 2806-2807.] After a bench trial upholding the restrictions [9 CT 1997-2003; 1998-1999; 15 CT 3580-3586], the School District appealed from the judgment and the Association cross-appealed from the denial of its motion for substantial attorney's fees. [9 CT 2006.]

7. The Association's Entry Into a Multi-Party Settlement, to Achieve Its Litigation Objectives and to Avoid Costly Appeals.

There was no end in sight to the litigation which drained half of the Association's reserves. [12 CT 2860.] Rather than continuing the litigation, the Association entered into a settlement with the City, the Luglianis, and the School District while the appeal and cross-appeal were pending.

The settlement achieved five goals: (1) to reaffirm application of the restrictions on all lots owned by the School District; (2) to create a vehicle to economically resolve the litigation; (3) to subject lighting on the athletic field to City zoning and Association approval; (4) to resolve encroachments into Area A and allocate responsibility for the slope and retaining

walls to the Luglianis; and (5) to establish Lots C and D as open space within the City. [9 CT 2007-2008.]

In exchange for a dismissal of the appeal and cross-appeal, the School District conveyed Lots C and D to the Association, which were transferred to the City, along with $100,000 for maintenance of those lots. [9 CT 2010.] Although not part of the judgment, the School District agreed that its remaining lots would be subject to the deed restrictions. The City conveyed Area A to the Association, and the Association conveyed Area A to the Luglianis in exchange for $500,000. Area A was transferred to the Luglianis subject to the City's open space easement severely limiting use of Area A. [9 CT 1973-1976; 1978-1976.] As part of the settlement, the Association gave a warranty to the Luglianis that "the condition of Area A does not violate any recorded covenant, condition, or declaration enforceable by the Homes Association, which could allow the exercise of any reversionary interest to the Homes Association in Area A." [9 CT 2010.] In a separate agreement, the Luglianis transferred $1.5 million to the School District to alleviate its fiscal challenges. [9 CT 2004-2014; 1973-1976; 1978-1996.]

No further action was taken due to the filing of the present litigation. [1 CT 24-25.]

8. The Present Plaintiffs' Lawsuit to Invalidate the Settlement.

Plaintiffs filed their declaratory relief action in 2013. The second amended complaint sought a declaration that the 2012 deeds conveying Area A violated the 1940 deed restrictions, the original declaration, and Declaration No. 25. [5 CT 1868, 1892-

1930; 1024-1044; 1045-1197.] They claimed the 2012 deeds violated the "more restrictive land use restrictions" contained in the 1940 deed restrictions and triggered the reversion of Area A back to the Association. They sought a declaration that the City and the Association had a duty to enforce the restrictions and sought the removal of all encroachments on Area A. [8 CT 1868, 1881.] Ignoring the Association's power to sell park land under Article II, Section 4, and the fact that Declaration No. 25 does not address park land restrictions, the plaintiffs claimed Area A was subject to the original declaration and Declaration No. 25 and that the Association had a duty to perpetuate the restrictions. [[9 CT 1868.]

9. The Plaintiffs' Motion for Summary Judgment.

In 2014, plaintiffs filed a motion for summary judgment seeking judgment on their declaratory relief cause of action on the ground the 2012 deeds violated each of the restrictions contained in the City's 1940 deed. [8 CT 1795-1997.] In their motion, plaintiffs assumed, but never demonstrated, how the Association would be bound by restrictions it had placed in the 1940 deed of park land to the City. They never explained why the Association lacked the power to sell park land under Article II, Section 4 of the original declaration. The Association opposed the motion, arguing the plaintiffs were bound by the settlement, that they lacked standing to sue, and that relief could not be granted without the School District, which was an indispensable party to the action. Further, the Association claimed that its actions were protected by the business judgment rule, and that the 1940 deed restrictions were extinguished when the City reconveyed Area A to the Association. [13 CT 3071-3075.]

Importantly, the Association pointed out that it always had the authority to sell Area A under the original declaration. [*Id.* at pp. 3080-3087.]

The opposition was supported by the declaration of the Association's general counsel, who participated in drafting the settlement agreement. He explained the litigation had drained half of the Association's reserves and was dividing the community. The settlement provided an economic solution to the litigation by exchanging useless open space in order to preserve more useable land. [12 CT 2851-2863.] An engineer's declaration in opposition to the motion established Area A was mainly steep hillside and unsuitable for building. [13 CT 2972-2977.]

10. The Court's Order Granting Summary Judgment and a Permanent Injunction.

The trial court ruled in favor of the plaintiffs, not just as to Area A, but as to all property under the Association's jurisdiction. [15 CT 3547-3610.] Judgment for plaintiff was entered, except the court limited the injunctive relief to Area A only and provided for a recalculation of the fee award. [16 CT 3773-3911.] Plaintiffs moved for attorney's fees, and the trial court granted the motion, awarding $235,716.88 in fees against the defendants. The Association timely appealed form both the judgment and the attorney's fees order.

11. The Opinion of the Court of Appeal.

On January 30, 2018, the Court of Appeal affirmed, in part, the summary judgment in favor of plaintiffs Citizens for Enforcement of Park Land Covenants and John Harbison in an unpublished opinion. [Exhibit "A" to this petition.]

12. The Petition for Rehearing.

On February 14, 2018, defendant Palos Verdes Homes Association filed a petition for rehearing, raising the same basic issues as set forth above. On February 27, 2018, the Court of Appeal issued an order modifying the opinion, and denying the petition for rehearing. [Exhibit "B" to this petition.] The court amended its opinion by stating that the Association could not argue that the Bank of America failed to amend the original declaration because the Chairman of the Association's board consented to the terms of the Bank's deed.

13. Why Review Should Be Granted.

The five issues presented by petitioner are important issues of law as to which there is no uniformity of decision, within the meaning of rule 800.500(b)(1) of the *Rules of Court.*

Once a declaration is recorded, it may not be unilaterally amended by either the original declarant or its successor-in-interest. Both the trial court and the Court of Appeal sidestepped the issue, giving effect to the Bank of America's unilateral modification of the original declaration without having to comply with the declaration's amendment procedures. Since the trial court's injunction is limited to Area A, the issue is bound to surface again. The opinion of the Court of Appeal provides the Association no guidance for the future, creating the potential for more costly litigation. Enforcement of governing document is an important legal issue that affects homeowners associations and their members. It is a sad day when a controlling decision of this court is not followed.

A homeowners association's ability to exercise its business judgment to interpret its own governing documents and settle litigation is fundamental to the ability of such associations to make decisions in the best interests of their members. It is reversible error to invade that discretion and refuse to uphold those decisions. The law relating to these rights should be clarified, so that associations will not be deprived of their rights.

The issue regarding merger of title is also very important. This court should clarify the applicable law and hold that a merger of title occurs when a reconveyance extinguishes an easement, which includes land use restrictions, or negative easements. There is no uniformity of decision where a court refuses to apply *Civil Code* sections 805 and 811 and the cases construing these statutes.

The court should also clarify existing law by ruling that a party to a contract is indispensable where complete relief cannot be afforded in its absence. The Court of Appeal here clearly erred in holding that a trial judge has unlimited discretion to ignore a contracting party whose presence is required by law.

LEGAL ARGUMENT

I.

Under *Citizens for Covenant Compliance v. Anderson* (1995) 23 Cal.4th 345, the Palos Verdes Homes Association Had the Ability to Sell the Subject Property in 2012 in Accordance With Its Power to Transfer Park Land Under the Original Declaration, and the First Successor-In-Interest Had No Ability to Unilaterally Amend That Provision of the Recorded Declaration Apart From the Declaration's Amendment Procedures.

The Court of Appeal affirmed judgment in favor of the plaintiffs without ever considering *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345 ("*Citizens for Covenant Compliance*"). This decision, which was cited in the Association's briefs, prohibits the original declarant or one standing in the declarant's shoes from unilaterally modifying the original declaration once it has been recorded.

In *Citizens for Covenant Compliance*, this court held that a declaration of covenants, conditions, and restrictions that was recorded before the subdivider conveyed any lots in the subdivision is binding on all subsequent lot buyers even when the restrictions are not referenced in the grant deed. (*Id.* at p. 349) This court also held that the developer could only modify or rescind recorded restrictions "*before* the first sale." (emphasis added). *Id.* at p. 365.

In this case, every Association member is bound by the Association's power to transfer park land within its jurisdiction. This equitable servitude is found in two places in Article II, Section 4, and according to the original declaration, it may not be amended without complying with the amendment procedures set forth in Article VI. The original declaration granted the Association these powers when it was first recorded in 1923. Under *Citizens for Covenant Compliance*, if the original declarant or its successor-in-interest wanted to amend that Article, the amendment could not be unilateral, but in accordance with the procedures set forth in the governing documents. There is *no other means* by which the Association's powers could be amended apart from Article VI. Thus, the Bank of America's attempt to limit the Association's power to transfer park land under the original declaration after the declaration had been recorded was invalid.

In spite of *Citizens for Covenant Compliance's* unequivocal language, the Court of Appeal gave effect to the Bank's attempt to restrict the Association's Article II powers in the 1931 grant deed, restrictions the Association chose to repeat in its 1940 deed of park land to the City. While the Bank had no authority to unilaterally amend the Association's powers, the Association—as grantor—had discretion under the original declaration to impose land use restrictions on City ownership of park land. The Association retained a reversionary interest to enforce the restrictions against the City, not against itself.

In light of the Association's plenary authority under Article II, Section 4, it is puzzling that the Court of Appeal found that *Roberts v. Palos Verdes Estates* (1949) 93 Cal.App.2d 545, 547

precludes the Association's transfer of Area A to the Luglianis. *Roberts* involved the *City's* violation of park land restrictions, and the City did not violate any restrictions in this case. *Roberts* does not address an association's power to transfer park land under its governing documents, and thus, it should not be considered for a proposition not considered in the opinion. (*Neighbors in support of Appropriate Land Use v. County of Tuolume* (2007) 157 Cal.App.4th 997, 1015.)

The Bank of America could not bypass the Article VI amendment procedures. The bank complied with those procedure four years before the 1931 park land transfer. Good intentions to preserve park land cannot for the basis for a unilateral amendment of a recorded declaration. The Association received the power to transfer park land at the time it was created; this was well before the Bank became successor-in-interest to the original declarant.

Any amendment of the Association's Article II powers required a recorded amendment and there is none. *Citizens for Covenant Compliance* demonstrates that a subsequent deed restriction violating governing documents could not form the basis for the present action. This is underscored by the fact that the present judgment also disregards the Articles of Incorporation, which grant the same plenary authority over park land to the Association. [12 CT 2910-2912.]

Modifying the judgment in response to the Association's petition for rehearing, the Court of Appeal attempted to address this issue by claiming the Association could not make this argument, since its Chairman of the Board consented to the Bank's restrictions. He had no authority to do so.

If Board consent is the sole legal standard, then the 2012 deed conveying Area A to the Luglianis should be enforced, since the Board also consented to the multiparty settlement. The Association passed a resolution authorizing its president to execute the settlement, finding that it had "considered the advice of its attorneys," and had formed its "decision that signing the MOU [Memorandum of Understanding] was in the best interest of [the Association] and its members." [9 CT 2063-2064.] Surely, enforcing the plain and unambiguous language of the original declaration is to be preferred over Board consent of the homeowner's association.

The original declaration provides that a recorded amendment to the original declaration is necessary. Without one, the Association had the power and authority to transfer park land to the Luglianis.

Rather than follow *Citizens for Covenant Compliance*, the court usurped the Association's power to render a "final and conclusive" interpretation of land use restrictions under Article VI, Section 11. [12 CT 2908-2909.] Governing documents are interpreted under contract principles. (*Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 595.) Although the Court of Appeal upheld the Association's interpretation of deed restrictions under the *same original declaration* in *Butler v. City of Palos Verdes* (2005) 135 Cal.App.4th 174, 181, here, it read Bank of America's 1931 deed restrictions back into the original declaration and into Declaration No. 25. However, neither declaration contains park land restrictions, only a duty to perpetuate restrictions then in

existence, and thus, neither declaration could not be referring to park land restrictions that were created eight years later.

Likewise, Article II, Section 4(a) authorizes the Association to use its best judgment in light of the circumstances, and does not impose an absolute duty upon the Association to enforce deed restrictions on a particular piece of park land, regardless of the circumstances. There is no basis for the Court of Appeal's narrow interpretation of this section to preclude the transfer of Area A to the Luglianis because "the property would no longer be for the 'use and benefit' of the property owners." [Opinion, p. 15.] It is undisputed that Area A was never and will never be used as a public park. At a minimum, triable issues of fact exist as to whether the Association properly transferred Area A—unusable park land—to preserve deed restrictions on Lots C and D for the benefit and improvement of the property and residents.

Finally, the court's suggestion that Article II, Section 4(i) excludes the 2012 grant deeds places an unfounded limitation on exceedingly broad language. If the original declarant intended such a restriction, it would have done so expressly. The Court of Appeal's interpretation nullifies the equitable servitudes of Article II, section 4 without any legal basis for doing so.

The Court of Appeal refuses to acknowledge triable issues of material fact which are clearly apparent from the documents. Its interpretation is troubling, for it means homeowners associations have no legal right to compromise litigation challenging deed restrictions, which is absurd. The duty to enforce a deed restriction is not absolute, even if it means an association will go bankrupt. The position taken is unreasonable

and contravenes the state's public policy to encourage settlement—a settlement that was fully implemented.

The Court of Appeal has violated the spirit and express intent of the Association's governing documents.

The fact that the Association had the power to sell the property in question to the Luglianis in 2012 cannot be disputed. That power could be altered or restricted only in accordance with the governing documents, which remain in effect. There never was any legally binding alteration or restriction in this case. The Association had every right to rely on its governing documents and act accordingly, guided by the best interests of the Association.

II.

The Board of the Palos Verdes Homes Association Properly Exercised Its Power to Interpret the Governing Documents and Its Business Judgment in Agreeing to a Settlement Which Avoided the Risk of Bankruptcy, Maximized the Preservation of Open Space, and Conserved the Financial Resources of the Association.

The Court of Appeal's failure to consider the *Citizens for Covenant Compliance* case led to the erroneous conclusion the settlement was "not entitled to any sort of deference." (Opinion, p. 13.)

Under Article II, Sections 4(n) and 4(t), settlement of litigation is clearly in view. The uncontroverted declaration of the Association's general counsel, Sydney Croft, who was a witness

to the settlement, raised triable issues whether the multi-party settlement was a matter of the Association's sound business judgment that was entitled to judicial deference.

The Association's decision to transfer Area A to the Luglianis was born out of a desire to preserve more centrally located Lots C and D, as well as the remaining lots owned by the School District. All that had to be given up was land that had *never* been used as a park, was steep and could never be a public park, and land which imposed liability upon the City for maintenance of both a slope and 21 foot high retaining walls.

The trial court never explained why Mr. Croft's declaration failed to raise triable issues, which is required under the summary judgment statute. (*Code of Civil Procedure* section 437c, subd. (g).)) The Court of Appeal ignores the issue.

Although the Association won the battle, it did not wish to lose the war. To fully achieve its litigation objectives meant fighting until the bitter end on appeal, even though it had already depleted half of its reserves to uphold the deed restrictions at the trial level. Certainly, there are triable issues whether the land trade was for the greater good of the whole community and for the greater good of the Association.

It is well established that a court may alter property interests in the course of resolving property disputes, solely based on equitable principles. (*Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 563.) This can be done by balancing the hardships imposed on litigants by strict adherence to common law. (*Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1008.)

Here, the lower courts have ignored the equities the settling parties balanced in resolving the litigation. They have dismantled a settlement involving a city, a school district, and a homeowner's association, on behalf of thousands of members, and seemingly impose an absolute duty to enforce deed restrictions, even to the point of bankrupting a homeowners association. In addition, they seemingly hold that a title issue can never be compromised or that a party has an obligation to hold land forever, regardless of the circumstances. The positions taken by the lower courts have troubling implications.

The lower courts apparently believed that all deed restrictions are sacrosanct, and that a litigant has no power to change them in order to settle litigation, even where the best interests of all concerned support settlement. It is unfortunate that one disgruntled neighbor was determined to dismantle modest improvements on property now owned by the Luglianis, where the cost of doing so could have resulted in development of other property subject to deed restrictions, loss of open space, and bankruptcy of the Palos Verdes Homes Association. It is respectfully submitted that the Association had the right to weigh competing interests, and enter into a settlement that was clearly in the best interests of the members of the Association as a whole.

III.

A Homeowners Association's Exercise of Its Business Judgment to Achieve Its Litigation Objectives Through Settlement Rather Than Litigating to the Point of Bankruptcy, Is Binding on Dissenting Members Who Failed to Intervene in the Action or Invoke the Recall Procedures Set Forth in the Association's Bylaws.

By not following the rule in *Citizens for the Covenant Compliance,* the Court of Appeal dismantled a multiparty settlement which benefitted the City, the School District, and thousands of Association members. The settlement ended litigation involving the enforcement of governing documents in a way that was binding upon all Association members, including those who brought the present action.

Duffy v. Superior Court (1992) 3 Cal.App.4th 425 holds that a homeowners association may undertake litigation to enforce the governing documents in its own name without joining individual members. If dissenting members do not intervene to vigorously press their own interests, they are bound by the outcome resolving the litigation. (*Id.* at pp. 423-433.) The result is corollary to the principle that a homeowners association does not have a duty to continue litigating an issue at the expense of its own financial stability and at considerable cost to its members. (*Kovich v. Paseo Del Mar Homeowners' Association* (1977) 41 Cal.App.4th 863, 867; *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 864, 875.)

In this case, it was the School District which sued the Association to invalidate deed restrictions. Under *Duffy*, Association members who did not believe it was in the best interests of the membership to settle an action that had drained half of the Association's reserves, and which had divided the Palos Verdes Estates community, needed to intervene in the action. Even after learning of the proposed settlement, plaintiffs chose not to file the present action until after settlement of the costly dispute had been achieved. Having chosen to do nothing until after settlement had been accomplished, the plaintiffs were bound by the settlement.

Alternatively, the plaintiffs could have invoked the recall petition procedures set forth in the Bylaws, which bind every Association member. [8 CT 1925-1926; 13 CT 3073-3075.] The Bylaws provide *no other mechanism* for challenging Board decisions, and the governing documents *do not* require membership approval for the Board's settlement of the action. The plaintiffs never invoked the procedure. The Court of Appeal claimed objecting members were given no mechanism for challenging the settlement, but it chose to ignore these points, which were raised in the Association's petition for rehearing.

By disregarding the binding settlement, the lower courts have required the Association to hold park land even though Article II, Section 4 empowers the Association to transfer park land. This is a restraint on alienation. As it stands, the court's opinion means no settlement is ever final, even when a party is forced to defend its members' interests in protracted litigation. The Court of Appeal's opinion contravenes public policy regarding the finality of settlements in this state.

The Court of Appeal apparently believes that one disgruntled member of the Association should have been given the right to speak out against the settlement and that all of the members of the Association should have voted on it. The law does not support any such view. The plaintiffs in this case did not intervene in the litigation involving the school district, and they did not circulate a recall petition. The Board of the Palos Verdes Homes Association was empowered to make decisions concerning the best interests of the Association, and it did so. The settlement that the Board adopted was binding on all members.

IV.

A Deed Restriction Is Nothing More Than a Negative Easement That Can Be Extinguished Upon a Reconveyance of the Real Property Which Causes Merger of Title, and the Deed Restrictions at Issue Here Were Extinguished.

In 1940, the Association transferred Area A to the City, subject to certain deed restrictions and the Association's reversionary interest. When the City conveyed Area A in 2012 back to the original grantor, the Association held fee title, and the restrictions imposed on the City's deed were extinguished as a matter of law under the merger doctrine.

The Court of Appeal skirted the issue by claiming—without analysis—that deed restrictions are not easements. But easements, by definition, do not always confer positive rights. They also impose negative restrictions. California court have long recognized equitable servitudes, or deed restrictions, as

negative easements. (*Sackett v. Los Angeles City School District of Los Angeles County* (1931) 118 Cal.App.254, 257; *Griesen v. City of Glendale* (1930) 209 Cal.524, 531.

Sackett and *Griesen* remain the law today. More recently, the Court of Appeal recognized that equitable servitudes, or "conservation easements" of *Civil Code* sections 815.1, 815.2, 1353, and 1354 "are negative easements that impose specific restrictions on the use of the property." (*Wooster v. Department of Fish and Game* (2012) 211 Cal.App.4th 1020, 1026.) Unlike a conservation easement, which is a perpetual statutory land use restriction in favor of the state, the land use restrictions contained in the City's 1940 deed were not perpetual. They terminated as to Area A the moment the Association regained title.

Under *Save the Welwood Murray Memorial Library Committee v. City Council of the City of Palm Springs* (1989) 215 Cal.App.3d 1003, 1012-1016, a city is free to transfer deed restricted property back to the original grantor if the city no longer wishes to use the property in accordance with the deed restrictions. That is what happened here.

When the City reconveyed Area A back to the Association, the Association regained fee title and the 1940 deed restrictions extinguished by operation of law. *No provision* in the Association's governing documents precludes the Association from transferring park land or requires the Association to hold park land in perpetuity.

Aware that the 1940 deed restrictions would be extinguished upon reconveyance of Area A to the Association, the City placed an open space, or conservation easement, on Area

A to preserve the open space character of the property for the benefit of the community, regardless of ownership. This was done in accordance with *Palos Verdes Municipal Code* section 18.16.010, which provides for open space zoning. The Association transferred Area A to the Luglianis in a deed containing this same easement to ensure that Area A remains open space. The City's conservation easement on Area A must be construed liberally to effectuate the purpose of the statute. (*Civil Code* section 816.)

The Court of Appeal hastily distinguished easements from deed restrictions based on semantics, not the law. The opinion also disregards a municipality's decision to impose a conservation easement under its own ordinance, raising troubling implications for parties settling real estate disputes affecting City residents and homeowners' association members.

A deed restriction is simply one type of easement, within the meaning of *Civil Code* sections 805 and 811. The effect of these statutes, as applied to this case, is that title was merged in the Association, when the Association reacquired Area A. The parties to the settlement of the school district litigation relied on the law of merger. In setting aside the settlement, the lower courts here refused to follow the law. There is no uniformity of decision where a court fails to follow an important rule of law, a rule that is embodied in statutes, as well as case law.

V.

A Court Has No Jurisdiction to Void a Contract Where One of the Parties to the Contract Is Not Before the Court, Under the Indispensable Parties Doctrine.

Both the trial court and the Court of Appeal embrace the notion that it was possible to void the 2012 deeds yet uphold the settlement. This is pure fiction. When the lower courts voided these deeds, they voided the entire settlement, and they did so without the presence of a key player—the School District that had sued the Association, lost at trial, and was appealing the judgment. Even worse, the plaintiffs dismissed this key player from the present action.

Whether a party's contractual interests have been impaired presents a question of law (*Van Zant v. Apple, Inc.* (2014) 229 Cal.App.4th 965, 974) that can be decided at any time. (*Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 522.) Courts are to engage in the indispensability analysis outlined in *Deltakeepers v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1106.

The lower court have provided no basis for voiding a multiparty contract in the absence of one of the contracting parties. One of the factors ignored for determining indispensability is the prejudice that will result from a judgment rendered in the parties' absence. (*Code of Civil Procedure* section 389, subd. (b).)

Courts are typically reticent to adjudicate the rights of parties to a contract when less than all of the parties are before

the court. (*Deltakeeper*, 14 Cal.App.4th at pp. 1106-1107; *Martin v. City of Corning* (1972) 25 Cal.App.3d 165, 169.) Contracting parties are indispensable parties, since their interests would invariably be affected by a judgment rendering the contract void. (*Martin*, 25 Cal.App.3d at p. 169.)

When a court voids a contract, it must restore the parties to the position they were in before they entered into the contract, by restoring consideration. (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 921.) Here, the Luglianis *might* seek the return of monetary consideration paid to the School District, and the Association *might* seek to remove the obligations assumed in the settlement.

The present judgment was the unmaking of the settlement without placing the parties back into the position where they were in before they entered into the settlement. This would have been impossible, since the School District and the Association dismissed their appeals and allowed the judgment in the School District action to become final. Moreover, to say that the 2012 deeds could be voided without voiding the entire transaction elevates form over substance. The 2012 grant deeds constituted non-monetized consideration rendered in exchange for the School District's performance. By invalidating the deeds, the lower courts have frustrated the parties' performance of contract obligations, altering the economic, legal, and political expectations of the parties, in the absence of the School District.

The Association, the City, and the Luglianis would never have been in a position of having to settle anything if the School District had not challenged park land restrictions in the first place. The land exchange was conditioned on the performance of

all of the parties, each of which made various concessions. To say that the School District was not an indispensable party to the settlement ignores the reality of the transaction, the litigation that was dividing City residents, and the drain on the Association's resources. The plaintiffs created the problem by voluntarily dismissing the School District from the action, yet the resulting lack of jurisdiction was ignored by the lower courts.

The City's and the Association's performance of the settlement should not have been enjoined without the presence of the School District as a party to the action. The lower courts improperly invalidated the settlement when a key party to the contract was not even before the court.

Under some circumstances, finding that a party is indispensable may involve disputed facts and the exercise of discretion. Here, the facts relating to the contract that resulted in settlement of the school district litigation are clear and undisputed. Such a contract cannot be set aside without the participation of all parties to the contract, where their material rights are affected. Here, it is now impossible to restore all of the consideration that was part of the settlement. The school district was an indispensable party, and the lower courts had no jurisdiction to declare any part of the settlement void, thus setting aside the entire settlement. It is important to the entire legal community that the law relating to indispensable parties be correctly applied.

VI.
Conclusion.

The Palos Verdes Homes Association respectfully requests pursuant to California Rules of Court, rule 8.500, subdivision (b)(1), that this court grant review to settle the important issues set forth above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204

I, the undersigned, Roy G. Weatherup, declare that:

1. I am an attorney and partner in the firm of Lewis, Brisbois Bisgaard & Smith LLP, counsel of record for petitioner Palos Verdes Homes Association.

2. This certificate of compliance is submitted in accordance with rule 8.204 of the California Rules of Court.

3. This petition for review was produced with a computer. It is proportionately spaced in 15 point Times New Roman typeface. The petition contains 6,945 words, including footnotes.

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

Executed at Los Angeles, California, on March 9, 2018.

/s/ Roy G. Weatherup
Roy G. Weatherup

EXHIBIT A

OPINION OF THE COURT OF APPEAL OF

January 30, 2018

Citizens for Enf't of Parkland Covenants v. City of Palos Verdes Estates

Court of Appeal of California, Second Appellate District, Division Two

January 30, 2018, Opinion Filed

B267816 (c/w B270442)

Reporter
2018 Cal. App. Unpub. LEXIS 663 *; 2018 WL 618787

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS et al., Plaintiffs and Appellants, v. ***CITY OF PALOS VERDES*** ESTATES et al., Defendants and Appellants.

Prior History: [*1] APPEALS from a judgment and orders of the Superior Court of Los Angeles County, No. BS142768, Barbara Ann Meiers, Judge.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

deeds, trial court, restrictions, school district, Declaration, deed restriction, settlement, transferred, conveyed, summary judgment, plaintiffs', homeowner, parkland, attorney's fees, summary judgment motion, covenants, binding, issues, purposes, triable, City's, conditions, realty, real property, argues, transfer of property, overly broad, set forth, cross-appeal, recreation

Counsel: Law Office of Greg May, Gregory T. May; Broedlow Lewis, Jeffrey Lewis and Kelly B. Dunagan for Plaintiffs and Appellants Citizens for Enforcement of Parkland Covenants and John Harbison.

June Babiracki Barlow, Neil Katlin and Jenny Li for California Association of Realtors as amicus curiae on behalf of Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Brant H. Dveirin and Allison A. Arabian, for Defendant and Appellant Palos Verdes Home Association.

Jenkins & Hogin, Christi Hogin, Gregg W. Kettles; Greines, Martin, Stein & Richland and Kent Lewis Richland for Defendant and Appellant City of Palos Verdes Estates.

Armbruster Goldsmith & Delvac and Damon Mamalakis for Defendants and

Appellants Robert Lugliani, Dolores A. Lugliani, Thomas J. Lieb and the Via Panorama Trust.

Judges: ASHMANN-GERST, Acting P. J.; CHAVEZ, J., GOODMAN, J.* concurred.

Opinion by: ASHMANN-GERST, Acting P. J.

Opinion

In an effort to resolve litigation, the City of Palos Verdes Estates (the City), the Palos Verdes Homes Association (the Association), the **[*2]** Palos Verdes Peninsula Unified School District (the School District), and one Palos Verdes Estates homeowner, Robert and Dolores A. Lugliani (the Luglianis),[1] entered into a multifaceted and complicated settlement agreement that resulted in exchanges of money and certain real estate. Plaintiff John Harbison (Harbison), a neighbor of the Luglianis and Palos Verdes Estates homeowner, disapproved of the settlement, prompting him and Citizens for Enforcement of Parkland Covenants (CEPC) to file suit, challenging the transfers in that settlement. The trial court agreed with plaintiffs that the settlement violated deed restrictions governing the subject land and entered judgment in favor of plaintiffs and against the City, the Association, and the Luglianis.

The City, the Association, and the Luglianis appeal. We agree with the City that judgment should not have been entered against it; triable issues of fact exist as to whether the transfer of property between the City and the Association was proper. We do not agree with the Association and the Luglianis that their actions were proper; the transfer of property from the Association to the Luglianis violated certain deed restrictions. Thus, **[*3]** the trial court properly found for plaintiffs on this point. But, the judgment entered was overly broad. We remand the matter so that the judgment can be refashioned consistent with the allegations of plaintiffs' operative pleading. In light of our findings, we also reverse and remand the issue of attorney fees to the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Initially purchased by a wealthy financier, the unincorporated area that became the City of Palos Verdes Estates was placed into the hands of the Commonwealth Trust Company for the development of a planned residential community. To accomplish this, the Commonwealth Trust Company placed various restrictions on the land in the 1920's.

Establishment Documents; Restrictions on

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] It appears that the Luglianis are cotrustees of the Lugliani Trust, which owns the real property located at 900 Via Panorama in the City. Thomas J. Lieb is the trustee of the Via Panorama Trust U/DO May 2, 2012, which seems to own Parcel A. Like the parties, we refer collectively to all of these persons and entities as the Luglianis.

the Property

In 1923, the Commonwealth Trust Company created and recorded a Declaration of Establishment of Basic Protective Restrictions, Conditions, Covenants, Reservations, Liens and Changes Affecting the Real Property to be Known as Palos Verdes Estates—Parcels A and B (Declaration No. 1).[2] After Declaration No. 1 was recorded, other declarations and amendments were recorded as to various tracts in the development as it grew.

On July **[*4]** 26, 1926, Bank of America, the successor-in-interest to the Commonwealth Trust Company, recorded Declaration No. 25, establishing the conditions, covenants, and restrictions for Parcel A. The declaration provides, in relevant part: "It will be the duty of [the Association] to maintain parks . . . and to perpetuate the restrictions."

Later, Bank of America amended Declaration No. 25 pertaining to Tract 8654, where the majority of Parcel A lies. This amendment designated Parcel A as Class F zoning. In areas zoned Class F, "no building, structure or premises shall be erected, constructed, altered or maintained which shall be used 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."

In 1931, Bank of America conveyed certain land along with Parcel A to the Association, subject to the restrictions contained in Declaration No. 1. The grant deed imposed some additional restrictions. Specifically, the "realty is to **[*5]** be used and administered forever for park and/or recreation purposes, for the benefit of the persons residing or living within the boundaries of" Palos Verdes Estates. Moreover, "no buildings, structures or concessions shall be erected, maintained or permitted upon said realty except such as . . . are properly incidental to the convenient and/or proper use of said realty for park and/or recreation purposes." Finally, "no part of said realty shall be sold or conveyed by [the Association] except subject to the terms and conditions hereof; provided, however, that said realty, or any portion thereof, may be conveyed by [the Association] subject to the same conditions as herein contained with respect to the purposes of which said realty may be used, to a PARK COMMISSION, or other body suitably constituted by law, to take, hold, maintain and regulate public parks."

In 1940, Bank of America quitclaimed all of its interest in the land to the Association.

Meanwhile, in 1938, the Association conveyed 13 lots to the School District. That transfer was made subject to the existing restrictions of record, including the express condition that the properties be used only for school or park purposes. **[*6]**

In 1940, the Association conveyed land to

[2] The Association was formed in 1923, the year Declaration No. 1 was created and recorded.

the City in two deeds. A small portion of Parcel A was transferred in one of the deeds; the majority of Parcel A was transferred in a second deed. The Association placed several restrictions on these transfers to the City. Declaration No. 1 was made a part of the conveyance, and the Association repeated the same restrictions which Bank of America placed in the 1931 deed. As is relevant to this litigation, the City was required to use the property for park purposes; no buildings could be constructed on the property; the property could not be conveyed by the City unless the conveyance was subject to the restrictions or to a body suitably constituted to maintain public land. Moreover, Parcel A was subject to a right of reversion if not used in compliance with the deed restrictions limiting its use.

School District Litigation

In 2010, the School District determined that it could not make use of Lots C and D for their restricted purpose and it desired to raise at least $2 million by selling the lots for residential development. When the City and the Association objected to the School District's plan, the School District filed a lawsuit against the **[*7]** City and the Association for quiet title and declaratory relief as to whether the deed restrictions and reversionary interest were still valid.

The City was later dismissed from the lawsuit. Then, following trial, the trial court entered judgment in favor of the Association, finding that there was still a binding contract between the School District and the Association and that the 1938 deeds were still enforceable. The School District appealed from the judgment, and the Association cross-appealed from the trial court's order denying its request for attorney fees.

Memorandum of Understanding

In 2012, while the School District's appeal and the Association's cross-appeal were pending, the School District, City, Association, and the Luglianis entered into a memorandum of understanding (MOU) that settled the School District litigation. In exchange for a dismissal of the appeal and cross-appeal, the following transfers occurred: (1) The School District gave Lots C and D to the Association; (2) The Association gave Lots C and D, along with $100,000, to the City; (3) The City transferred Parcel A to the Association; (4) The Association transferred Parcel A to the Luglianis for $500,000; and **[*8]** (5) In a separate donative agreement, the Luglianis contributed $1.5 million to the School District.

II. Procedural Background

Plaintiffs filed suit on May 13, 2013. The second amended complaint (SAC), which is the operative pleading, alleges three causes of action against the City, the Association, and the Luglianis:[3] (1) Declaratory relief against all of the defendants, pursuant to

[3] Originally, the lawsuit named the School District as a defendant. Plaintiffs voluntarily dismissed their complaint without prejudice against the School District on May 5, 2014.

which plaintiffs seek a declaration that the 2012 deeds are invalid for violating the land use restriction that the property remain parkland; (2) Waste of public funds/ultra vires actions against the City; and (3) Abatement of nuisance per se against the Luglianis. The SAC specifically sought relief related to Parcel A, although it also requested in general, generic terms, "such other and further relief as the Court may deem just and proper."

Plaintiffs' Motion for Summary Judgment

On December 5, 2014, plaintiffs filed a motion for summary judgment or summary adjudication against all defendants. They argued, inter alia, that the 2012 deeds violate the 1940 deed restrictions precluding structures on the panorama parkland and by conveying property to the Luglianis for private purposes, as opposed to for public **[*9]** parks.

Defendants opposed the motion. Among other things, they argued that plaintiffs were either bound by the actions of the Association or do not have standing, the actions of the Association are protected by the business judgment rule, and the reconveyance of the property from the City to the Association extinguished the 1940 deed restrictions under the merger doctrine.

The City's Cross-Motion for Summary Judgment

In its motion for summary judgment, the City argued that its transfer of Parcel A to the Association was permissible. In so arguing, the City noted that it was "not required to own [Parcel] A in order for the deed restrictions to have force and effect. The deed restrictions run with the land and bind whoever owns the property."

The Association and Luglianis joined in the City's motion.

Trial Court Order and Judgment

After entertaining oral argument, the trial court issued a lengthy and detailed ruling granting plaintiffs' motion for summary judgment and denying the City's motion.

Judgment for plaintiffs was entered. As is relevant to the issues raised in this appeal, the judgment pertains to more than Parcel A; in particular, the judgment provides: "As to all real property located **[*10]** within the City and Association's jurisdiction that are subject to the same land use restrictions set forth in the Establishment Documents or the 1940 Deed Restrictions, the City and Association are enjoined from entering into any contracts or taking any actions to eliminate or modify those deed restrictions unless the Association first complies with the" certain amendment procedures set forth in the establishment documents.

Defendants timely appealed.

Plaintiffs' Motion for Attorney Fees

Later, plaintiffs moved for attorney fees "jointly and severally against all defendants." The trial court granted their motion, awarding plaintiffs $235,716.88 in attorney fees against all defendants.

Defendants timely appealed from this order as well.

DISCUSSION

I. *Standard of review on summary judgment*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (*Code Civ. Proc., § 437c, subd. (c)*.) We review the trial court's decision de novo." (*Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476, 110 Cal. Rptr. 2d 370, 28 P.3d 116*.)

Like the trial court, "[w]e first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established **[*11]** facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon (1992) 3 Cal.App.4th 831, 836, 5 Cal. Rptr. 2d 52*.) "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co. (1993) 14 Cal.App.4th 16, 19, 17 Cal. Rptr. 2d 356*.)

II. *The trial court erroneously granted plaintiffs' motion for summary judgment against the City*

The trial court granted plaintiffs' motion for summary judgment against the City on the grounds that the transfer of property (Parcel A) from the City to the Association amounted to an ultra vires act. We agree with the City that this was error. Pursuant to the 1940 deed, the City was specifically allowed to reconvey Parcel A to the Association. And, the 1940 deed permitted the City to convey the property to a category of recipients, of which the Association was one. Because the Association was eligible to receive Parcel A under the plain language of the deed, the City may not have done anything wrong by transferring Parcel **[*12]** A to it. (*Humane Society of the United States v. State Bd. of Equalization (2007) 152 Cal.App.4th 349, 361, 61 Cal. Rptr. 3d 277* [because the City's action was legal, it could not violate *Code Civ. Proc., § 526a*].)

But we cannot agree with the City that it was entitled to summary judgment. The circumstances surrounding the complicated transfer of property, specifically Parcel A, and money are curious. While the City *may* have had the right to transfer Parcel A to the Association, it may not have had the right to do so if it knew that the Association was going to transfer Parcel A to the Luglianis. And it is disputed whether the City used and/or will continue to use public monies to fund alleged illegal efforts, namely those that violate the deed restrictions. Because it is disputed whether the City had the right to transfer Parcel A under the circumstances presented here, we conclude that neither plaintiffs nor the City was entitled to summary judgment.

III. *The trial court rightly granted plaintiffs' motion for summary judgment against the Association, but issued an overly broad judgment*

In the first cause of action, plaintiffs seek a declaration that the 2012 deeds purporting to convey Parcel A to the Luglianis are void because they violate the restriction that Parcel A be used exclusively as a park for the use and benefit **[*13]** of City residents. The trial court granted plaintiffs summary adjudication of this cause of action, and we agree.

As set forth above, the Association owned the subject property until June 14, 1940. On that date, the Association deeded the property to the City. The June 14, 1940, deeds contain multiple restrictions, including the restriction that the "realty is to be used and administered forever for park and/or recreation purposes only . . . for the benefit of the (1) residents and (2) non-resident property owners within the boundaries of the property heretofore commonly known as 'Palos Verdes Estates.'"

In spite of that undisputed language, the Association transferred the property to the Luglianis as part of the MOU. The September 2012 deeds conveying the property authorize the construction of "a gazebo, sports court, retaining wall, landscaping, barbeque, and/or any other uninhabitable 'accessory structure.'" Moreover, the property would not be accessible by the public. Such a transfer violates the restrictions in the original deeds.

A. Association's power to enter into a binding settlement

In urging reversal, the Association argues that triable issues of material fact exist as to whether **[*14]** its members were bound by the settlement negotiated on their behalf. While the Association may have had the power to defend and settle the school district litigation, it offers no authority in support of its contention that it could transfer Parcel A to the Luglianis to accomplish that objective.

The Association relies upon *Duffey v. Superior Court (1992) 3 Cal.App.4th 425, 4 Cal. Rptr. 2d 334* (*Duffey*) for the proposition that the MOU was binding upon every member of the Association. The Association's reliance upon *Duffey* is misplaced. *Duffey* does not hold that an Association may enter into any sort of settlement on behalf of its homeowner members. Nothing in *Duffey* suggests that any settlement that a homeowners association enters, even if it contradicts the plain restrictions of grant deeds, is binding on every member of that homeowners association.

The Association further argues that anyone who disagreed with the settlement as reflected in the MOU "needed to voice their concerns before the settlement was approved. They had an opportunity to do so *before* the settlement was formally approved. [Citation.] After that point, the settlement was binding on every member of the" Association. We cannot agree. There is no evidence that the homeowners had an

opportunity **[*15]** to object to the MOU,[4] and the Association offers no legal authority to support its proposition that a homeowner must object to an illegal term of a contract or else forever waive their objection.

B. CEPC's standing

The Association further argues that CEPC lacked standing to enforce the restrictive covenants because not all CEPC members own property in the City. But, it is undisputed that at least one member of CEPC—Harbison—does own property in Palos Verdes Estates. So long as one member of CEPC has standing, CEPC does as well. (*Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc. (2005) 132 Cal.App.4th 666, 673, 33 Cal. Rptr. 3d 845*.)

C. Business judgment rule/judicial deference

Next, the Association argues that triable issues of material fact exist as to whether the Association's settlement is entitled to judicial deference or protection under the business judgment rule.[5] Quite simply, by disregarding the express restrictions on the grant deed, the Association's decision to enter into the MOU is not entitled to any sort of deference. Because of the express restrictive language in the grant deeds, *Haley v. Casa Del Rey Homeowners Assn. (2007) 153 Cal.App.4th 863, 63 Cal. Rptr. 3d 514* and *Beehan v. Lido Isle Community Assn. (1977) 70 Cal.App.3d 858, 137 Cal. Rptr. 528* are readily distinguishable.

Butler v. City of Palos Verdes Estates (2005) 135 Cal.App.4th 174, 37 Cal. Rptr. 3d 199 (*Butler*) does not compel a different conclusion. In *Butler*, residents of Palos Verdes Estates sued the City and its officials, opposing a peafowl management program **[*16]** that permitted a minimum peafowl population on City property. Looking at the words of the City's deed restrictions, and understanding them in their ordinary and popular sense, the Court of Appeal concluded that the City, like any other property owner, could not raise peafowl on its property. But the restriction could not be understood to mean that the City could not count, trap, and remove feral peafowl and otherwise act in accordance with the City's peafowl management program. (*Id. at pp. 183-184*.)

Like the *Butler* court, we too have looked at the deed restrictions at issue, understanding them in their ordinary and popular sense. And we conclude that the deed restrictions mean what they say—Parcel A is intended to be parkland for the community.

D. Trial court's order tentatively striking expert declarations

As for the Association's challenge to the trial court's order "tentatively str[iking]" its experts' declarations, it is not appealable. (*Bianco v. California Highway Patrol (1994) 24 Cal.App.4th 1113, 1121, fn. 3, 29 Cal. Rptr. 2d 711*.)

E. Association's intent to bind itself to covenants

[4] Mr. Sidney Croft, general counsel to the Association declared that he and "numerous residents" expressed opinions for and against the MOU. If homeowners spoke up against the MOU, the Association does not explain why their comments would not amount to an objection to the MOU.

[5] We reach the merits of this argument without deciding whether the Association waived it.

The Association further argues that there are triable issues of fact as to whether it intended to bind itself to the restrictive covenants contained in its own deeds of undeveloped parkland to the City. Aside from the fact **[*17]** that this argument has been forfeited on appeal because it was not raised below (*Twenty-Nine Palms Enterprises Corp. v. Bardos (2012) 210 Cal.App.4th 1435, 1450, 149 Cal. Rptr. 3d 52)*, it fails on the merits.

On July 5, 1923, the developer for Palos Verdes Estates recorded Declaration No. 1, establishing basic land use restrictions for the real property located in what later would be known as the City. On July 26, 1926, Bank of America recorded Declaration No. 25, establishing certain conditions, covenants, and restrictions. Declaration No. 25 sets forth one purpose of the Association: "It will be the duty of this body to maintain the parks . . . and to perpetuate the restrictions." In 1931, Bank of America deeded Parcel A to the Association, subject to certain conditions, restrictions, and covenants. One of those conditions was that the parkland "be used and administered forever for park and/or recreation purposes." Another condition forbids the Association from selling or conveying the parkland except to a body that could hold and maintain the parkland as a public park. In light of these facts and this history, there is no triable issue of fact as to whether the Association intended to bind itself to the restrictive covenants.

F. Association's alleged right to sell parkland

Furthermore, **[*18]** the Association argues that, pursuant to Article II, Section 4, it has the "right and power to sell parkland." We disagree. Article II, Section 4 provides, in relevant part, that 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 spaces and recreation areas . . . for the use and benefit of the owners of and/or for the improvement and development of the property herein referred to." Transferring Parcel A to the Luglianis does not fall within the scope of this language as the property would no longer be for the "use and benefit" of the property owners.

The Association similarly directs us to Article II, Section 4, subdivision (i), which provides, in relevant part, that the Association has the right "[t]o 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 **[*19]** and/or personal property either within or without the boundaries of said property." This language does not give the Association the right to dispose of any and all property within the City. Rather, it allows the Association to dispose of real property that it acquires by a means other than via the subject grant deeds.

Moreover, common law precludes a city

from selling a public park to a private party. (See *Hermosa Beach v. Superior Court of Los Angeles (1964) 231 Cal.App.2d 295, 296, 41 Cal. Rptr. 796*; *County of Solano v. Handlery (2007) 155 Cal.App.4th 566, 575-576, 66 Cal. Rptr. 3d 201*; *Save the Welwood Murray Mem'l Library Com. v. City Council (1989) 215 Cal.App.3d 1003, 1016, 263 Cal. Rptr. 896*.) The Association attempts to distinguish these cases on the grounds that "the cities retained title to the deed restricted property and intended to use it or allow it to be used for another purpose, which the courts would not allow. Moreover, none of them involved challenges to the rights and duties of a homeowners association operating under governing documents, or a quitclaim to the grantor." We cannot agree with the Association. As set forth in *Roberts v. Palos Verdes Estates (1949) 93 Cal.App.2d 545, 547, 209 P.2d 7*: "[W]here a grant deed is for a specified, limited and definite purpose, the subject of the grant cannot be used for another and different purpose." Rather, "[t]he terms of the deed alone are controlling." (*Id. at p. 548*.) Here, the terms of the deed mandate that Parcel A be used as parkland; Parcel A could not have been transferred to a private homeowner **[*20]** like the Luglianis.

G. Judicial estoppel

We reach this conclusion without making any determination regarding the doctrine of judicial estoppel.

H. Indispensable party

The Association asserts that summary judgment was improper because an indispensable party—the School District—is not a party to this litigation. We conclude that the trial court did not abuse its discretion in finding that the School District is not an indispensable party. (*County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal.App.4th 1144, 1153, 63 Cal. Rptr. 2d 277*.) As pointed out by plaintiffs, the Association's argument rests entirely upon speculation: "[T]he Luglianis might want" the monies paid to others returned; "This could result in the unwinding of the" MOU.

Moreover, plaintiffs' SAC seeks to void the 2012 deed transferring Parcel A. The School District is not a party to that transfer. While the undoing of the transfer of Parcel A will impact the Luglianis, it is conjecture whether the Luglianis will seek a refund of their $1.5 million "donation" to the School District. Speculation is insufficient to deny summary judgment.

I. Merger doctrine

Next the Association contends that triable issues of material fact exist as to whether the doctrine of merger extinguished encumbrances on Parcel A. Pursuant to the merger **[*21]** doctrine, when both the dominant and servient tenements come under common ownership, any easement on the servient tenement is extinguished as a matter of law. (*Zanelli v. McGrath (2008) 166 Cal.App.4th 615, 623, 82 Cal. Rptr. 3d 835*.) The rationale underlying this doctrine is "to avoid nonsensical easements—where they are without doubt unnecessary because the owner owns the estate." (*Beyer v. Tahoe Sands Resort (2005) 129 Cal.App.4th 1458, 1475, 29 Cal. Rptr. 3d 561*.)

Although not entirely clear, it seems that the Association is arguing that when the City transferred Parcel A back to the Association in 2012, the deed restrictions, which are easements, were extinguished. Like the trial court, we cannot agree. The deed restrictions are not easements.

J. Relief granted is overly broad

Even though we agree with the trial court that summary judgment was proper, we find that the trial court's injunction and judgment were overly broad. In the SAC, plaintiffs sought relief regarding Parcel A only. Yet the trial court went beyond the requested relief and made orders regarding "all real property" in the City. Even though the SAC asks for "such other and further relief as the Court may deem just and proper," the trial court did not have discretion to issue a judgment beyond the scope of the issues raised in the SAC. (*Wright v. Rogers (1959) 172 Cal.App.2d 349, 367-368, 342 P.2d 447*.) Stated otherwise, the judgment **[*22]** is not just and proper. Therefore, we remand the matter to the trial court to modify the judgment by fashioning a new injunction consistent with plaintiffs' demand in the SAC.

IV. *Attorney Fees*

Defendants challenge the award of attorney fees awarded to plaintiffs.

Code of Civil Procedure section 1021.5 provides, in relevant part: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons [and] (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate." We review a trial court's award of attorney fees for abuse of discretion. (*Collins v. City of Los Angeles (2012) 205 Cal.App.4th 140, 152, 139 Cal. Rptr. 3d 880*.)

Here, the public did benefit from this litigation—namely through the protection of a public park. (*Friends of the Trails v. Blasius (2000) 78 Cal.App.4th 810, 833, 93 Cal. Rptr. 2d 193*.) And, defendants have not argued or demonstrated how the amount of fees awarded was inappropriate. But, as set forth, *ante*, (1) plaintiffs were not entitled to summary judgment against the City, and (2) the judgment is overly broad and must be refashioned on remand. **[*23]** It follows that we reverse the attorney fee award against the City. As against the Association and the Luglianis, the issue of attorney fees is remanded to the trial court for recalculation.

V. *The Cross-appeal is moot*

In light of our decision on defendants' appeal, as plaintiffs concede, the issues raised in plaintiffs' cross-appeal are moot.

DISPOSITION

The order granting plaintiffs' summary judgment against the City is reversed. The order denying the City's motion for summary judgment is affirmed. The order granting summary judgment to plaintiffs

and against the Association and the Luglianis is affirmed. The matter is remanded to the trial court so that a judgment consistent with the relief requested by plaintiffs in the SAC may be fashioned. The order awarding attorney fees to plaintiffs and against all defendants is reversed and remanded to be recalculated at this point as against the Association and the Luglianis only. The parties are to bear their own costs on appeal.

ASHMANN-GERST, Acting P. J.

We concur:

CHAVEZ, J.

GOODMAN, J.*

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

EXHIBIT B

FEBRUARY 27, 2018 COURT OF APPEAL ORDER MODIFYING THE OPINION

Citizens for Enforcement of Parkland Covenants v. City of Palos Verdes Estates

Court of Appeal of California, Second Appellate District, Division Two

February 27, 2018, Opinion Filed

B267816 (c/w B270442)

Reporter
2018 Cal. App. Unpub. LEXIS 1384 *

CITIZENS FOR ENFORCEMENT OF PARKLAND COVENANTS et al., Plaintiffs and Appellants, v. ***CITY OF PALOS VERDES*** ESTATES et al., Defendants and Appellants.

Prior History: [*1] Los Angeles County Super. Ct. No. BS142768.

Core Terms

petition for rehearing, no change, MODIFYING, terms

Opinion

ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING

[NO CHANGE IN JUDGMENT]

THE COURT[*].—IT IS ORDERED that the opinion filed herein on January 30, 2018, be modified as follows:

On page 15, first full paragraph, Section F, third line down, after the sentence "We disagree." add as footnote 6 the following footnote:

[6]The Association argues that it had the right to transfer the parkland to the Luglianis because this original declaration was never properly amended. But, the Chairman of the Association's board expressly consented to the terms of the 1940 deed. By expressly agreeing to those terms, the Association cannot now argue that Bank of America had no power to include them.

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[*] ASHMANN-GERST, Acting P. J., CHAVEZ, J., GOODMAN, J. +

+ Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

There is no change in the judgment.

The petitions for rehearing filed by defendants and appellants Palos Verdes Home Association, Robert Lugliani, Dolores A. Lugliani, Thomas J. Lieb, and the Via Panorama Trust are denied.

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CALIFORNIA STATE COURT PROOF OF SERVICE

Citizens for Enforcement of Parkland and Covenants v. City of Palos Verdes Estates (Case No. Second Civil B267816)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, California 90071.

On March 9, 2018, I served the following document(s): **PETITION FOR REVIEW** on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

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

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

☒ (BY ELECTRONIC SERVICE VIA TRUEFILING) Based on a court order, I caused the above-entitled document to be served through TrueFiling, addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the TrueFiling

Receipt/Confirmation will be filed, deposited, or maintained with the original

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

Executed on March 9, 2018 at Los Angeles, California.

/s/ Tina Wallace
Tina Wallace

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