Response to Rockey & Wahl Letter Dated March 7, 2013
Re: Rezoning of Area "A"/900 Via Panorama

March 10, 2013

Honorable Mayor and City Councilmembers,

The correspondence about the 900 Via Panorama rezoning issue was published yesterday to the PVE City website either Friday evening or on Saturday. In that package was a letter from Rockey & Wahl who, as attorney for the owners of 900 Via Panorama, made various arguments of dubious veracity. Since there will be no forum in the City Council Meeting for a direct interchange on these points, we thought it would be prudent and helpful to provide a written response in advance of the council meeting to clarify the facts on certain points made by Mr. Rockey. We understand that our response will not be in the packet online, but that you will be able review it prior to the Tuesday City Council Meeting.

Page 1: "…the permitting of certain improvements, which pre-date my client's ownership."

The myth that the major encroachments on Parcel A were done by the previous owner has been propagated by the City Attorney in her staff reports and verbal comments at both the 05/08/12 and 07/24/12 City Council meetings, as well the staff report of Assistant City Attorney Robert Smith at the 02/19/12 Planning Commission Meeting.

This erroneous information continues to be promulgated, despite the correction by Joe Barnett, former City Mayor in his verbal comments at the **05/08/12 City Council** meeting when he said

> *"I'm well familiar with that property – I was Alex Haagen's agent trying to sell that property back in the early 1970s. Dr. Lugiani knew Mr. Haagen, so he went around and bought it directly from him. But I am familiar with property in its configuration back in those days. I was up there today after getting a copy of this memorandum and seeing what was being proposed there. I was amazed at how much extra work Lugliani had done.* ***It was not work that was done by Mr. Haagen****. [emphasis ours]*
>
> *The excavations were a sports court and all of its stone walls were totally new – they were a surprise to me because I hadn't been up there. I'm surprised that we didn't have a code officer up there checking to see what was going on because there was so [much] dirt moved and stone moved. What used to be a fire road to go around the property was a fairly narrow road. Now it's a widened road, it's paved, got stone walls on the edges, got two pillars out front with a gate that would deny any access to any fire engine that may need to down to protect the parkland. So it bothers me that we are being favored to a violator of the city codes as far as the work going on at Via Panorama. And the sale of city parkland bothers me*".

At the 02/19/13 PVE Planning Committee Meeting Joe Barnett made similar remarks, and followed up by writing to the Council on 03/07/13:

> *"I would also like to take this opportunity to correct both the City Attorney and the Assistant City Attorney in their misstatements concerning who made so many changes and additions to the parkland adjacent to 900 Via Panorama. They have made the*

> *statements both in the MOU and in the discussion leading to Resolution No. PCR-2013-0656 [we believe the Resolution reference should be R12-11] for the Planning Commission that the retaining wall and other structures and disturbances were done by the prior property owner. I know these statements are false because in 1975, I was selected by Mr. Alexander Haagen, the owner of 900 Via Panorama at that time, to market his home. I consequently had the opportunity to become intimately familiar with the details of the home and grounds. There was no grading or retaining wall for a sports court, no widening and tiling of the fire road with stone walls on each side and no huge pilasters and gate in the street right of way at the entrance to the fire road, and no huge trees on the parkland to obstruct neighbor's views. All of this may be immaterial at this point, but* ***I hate to see my City making decisions based on inaccurate*** *information [emphasis ours].*

In addition, on 02/09/13, David Lugliani (son of the owner and a real estate developer) acknowledged to Renata Harbison, John Harbison and Ann Hinchliffe verbally that his family built several structures attributed to the previous owners (including the retaining wall) after they had cut into the hillside to create the sports field.

Page 1: "However, the permits could not be issued as Area A is presently zoned Open Space which zoning does not allow some improvements which presently exist on the property."

As explained by Assistant Attorney Robert Smith and City Director of Planning Allen Rigg at the 02/19/13 Planning Commission meeting, structures that currently exist can be granted permits under a separate process called a conditional use permit. So it is wrong to assert that existing structures cannot be permitted any way other than after R-1 rezoning.

Page 2: "The Planning Commission then recommended denial of the rezoning based solely on the Commissioners having little or no information on the intent of your Council in approving the MOU and contemplating the use of a zone change as the process to appropriately obtain the permits. If the Commissioners had information on your Council's intent about the correct process to follow, presumably they would have recommended approval of the application."

Stating that the Planning Commissioners had little or no information on intent about rezoning in the MOU is not only incorrect, it is trying to again justify something by twisting the facts. In the 02/19/13 session, there was specific dialogue on this point, and **one of the Commissioners specifically asked** (**according to the recording I made at the meeting** as allowed by the Brown Act) "*I didn't read anything in the MOU or any of the other documentation that said that the City had agreed to a zone change so that is not discussed as part of the lawsuit?*"

Assistant City Attorney Robert Smith then responded with (according to the recording I made at the meeting) "*The specific mechanism by which the applicant sought to approve those structures is not specified, so the applicant has come forward with a zone change which has the effect of doing what was contemplated in the MOU as permitting them to seek that right to build the accessory structures in parcel 3. But the particular mechanism by which they went forward and did that wasn't contemplated*."

Further, a review of the comments by each of the Commissioners when they provided summaries of their concerns prior to voting does not indicate that the lack of mention of rezoning in the MOU was the "sole" reason for their recommended denial. They discussed other options, including the availability of other processes to obtain permits.

Page 2: "**The evidence of your Council's intent to allow rezoning does exist….While the discussion about the alternative processes for permitting the requested uses continued during and after the MOU was executed, rezoning remained an alternative for the City and the property owners. Furthermore, the deeds that transferred the property from the City specifically referenced the need for my client to "seek a zone change to permit the accessory uses."**

There are several very important problems with this statement.

Nothing in the approved MOU or the signed Deed transferring the Parkland to the Via Panorama Trust states that rezoning was contemplated. To cite a reference in the deed from the City of PVE to the PVHA to rezoning is bogus since the deed was prepared after the 07/24/12 City Council meeting, or at least it was not provided to the City Council or the public at the time of the 07/24/12 City Council approval (see Staff Report submitted). Also that reference disappeared in the deed which passed the property from PVHA to the Luglianis the following day. This series of insertion and deletion of a reference to rezoning is evidence of a lack of a meeting of the minds among the parties at the time the MOU was signed.

Finally, in the opinion of some real estate developers and appraisers, a change from OS to R-1 (even with the other easements in place) significantly increases the value of the acquired property.

If there had been intent to rezone, **not disclosing that in the MOU is the omission of a very material fact**, resulting in a windfall of profit to the new owners, at the expense of the public since the property was sold at a price that assumed it would remain OS. This would be a very serious omission, and one that puts the parties approving the transaction at serious jeopardy in terms of failing to perform their fiduciary duties as government representatives and possibly subjects the transactions to review by the IRS.

If it were "intent", and not disclosed intentionally, then that will likely trigger a Citizens recall initiative and perhaps legal liability for those colluding.

Page 3 #2: "The deed restrictions affecting the property transferred ("Area A") specifically limit the types of improvements which are allowed and do not allow a residential structure. The deed restrictions also expressly prohibit any merger with adjoining lands."

It is understandable why those who oppose rezoning do not trust the oversight of City Council, the City of PVE, or the PVHA to honor these deed restrictions after having:

1) Violated the deed restrictions in the 1924 Bank of America Trust Indenture, and 1940 quit claim deed to the PVHA and lastly the resolution of the PVE City Council of June 1940 accepting all title to all parklands, etc., including all "restrictions, covenants, et al", which specifically prohibit sale of parkland without taking the actions provided for in Sections 8 or 9 of the Protective Restrictions Palos Verdes Estates. There is no question the land was intended to remain public open space forever, and
2) Tolerated the encroachment of all these structures for many years along with the use of those structures as part of the Luglianis' private playground built illegally on this public parkland property for that entire period.

Trust has been violated, and hence citizens are concerned as to whether they can rely on the City Council, the City of PVE and the PVHA to protect the open space in the city unless you now move to enforce Section 12 of the Protective Restrictions Palos Verdes Estates, which requires effecting Reversion of Title in the pertinent transaction

Page 3 #4: "The MOU resulted in more land protected as Open Space than was the case prior to the sale of Area A."

It is amazing that the advocates of this deal keep making this statement – they must be math challenged. First, Lots C & D (37,962 sq. ft. combined) were both zoned open space before and after the transaction, so there is absolutely no increase. The Superior Court ruled in favor of the PVHA thus protecting the parkland.

The 1.7 acres (75,930 sq. ft.) purchased illegally per the Protective Restrictions by the Luglianis were open space before, and are now, something less than that (until "Reversion of Title"). With R-1 zoning the acreage would clearly no longer be open space. **So how can A be more than A + B + C?** Further, all the land under open space and controlled by the PVPUSD was and remains zoned open space; so no increase there.

To say that the benefit of the transaction was to keep the PVPUSD from converting other properties from open space in the future misses the point that a Court just reaffirmed that the PVPUSD cannot do that (pending appeal). The deed restrictions are the protection, not a promise by the PVPUSD not to violate the deed restrictions. The "Protective Restrictions of Palos Verdes Estates" incorporated in the deed is the protection, not a promise by an entity to not act illegally.

Page 3 #5: "There was never any express authorization by the City allowing public access to Parcel A when it was owned by the City."

It's ironic that the attorney representing the Luglianis is making this point when his client has been shamelessly and illegally encroaching on and usurping this public property for over 30 years. It is an explicit admission of culpability, and a strange point to make given the Luglianis' history of reshaping the topography, building on the property, and utilizing this public land for their own personal playground.

As residents of PVE we do not need "express" authorization to access any and all open space in our beautiful city. The obvious intent of open space is for all of the residents of PVE to enjoy.

Page 3 #6: "The appraisal for Area A was equivalent in value to the appraisal for Parcels C and D. A well-known, local certified appraiser appraised the land based on all of the factors affecting the property, including the restrictive open space easement."

The appraisal was done on the basis of property that (at the time of the transfer) was zoned as OS (Open Space). Had it been appraised as R-1 (even with the open space easement), most assuredly the value would have been higher. We have spoken with real estate developers and another appraiser in PVE and they confirm that the property is worth much more than $500,000 if zoned R-1. It is very possible the California Franchise Tax Board and the IRS may be interested in following up on this transaction.

The Owner of 900 Via Panorama more than doubled the size of their fiefdom at the expense of all PVE residents. The three lots that comprise the current 900 Via Panorama address combine for a total of 71,105 sq. ft. This 71,105 sq. ft. (along with the parkland purchased) create an estate of 147,035 sq. ft., almost 3.4 acres. Doubling the size of their estate would logically increase its value by more than $500,000.

Page 4 #7: "PVE City Council approved the MOU in a noticed public meeting on May 8, 2012. In that meeting the Council approved the MOU, which detailed the entire transaction. The City Council meeting and the decision to approve the MOU was the subject of a *Daily Breeze* article, which included graphics detailing the results of the agreement."

First, to cite an article in the Daily Breeze that was published on 05/14/12 as appropriate notification of a meeting on 05/08/12 is patently ridiculous unless one is in possession of a time machine.

From our perspective, the City failed to provide appropriate or adequate notice of the meetings on 05/08/12 and 07/24/12 and we believe the intentions of Public Notice, as stated in the Brown Act requiring Public Notice, are in accord with our opinion. We don't know whether notice was made in buildings with 24-hour access, or in newspapers, but **we would like to be told what specific steps were taken to fulfill notification requirements**. Whatever methods were used, they were clearly ineffective since no one in the Via Panorama/Via Mirada neighborhood (other than the Luglianis) were aware of the transaction in 2012; and judging by the 90+ signatures expressing opposition to the rezoning effort this past month compared to no correspondence and only one voice speaking out at the Council meetings last year, the notification process was extraordinarily ineffective (no doubt by design).

For both meetings, no signs were posted at the property and no letters were sent to anyone in the affected neighborhood, even though this is standard procedure in PVE for any significant transactions. This is not the fault of the Luglianis but it is the fault of the City. The Brown Act requires specific notifications, and it is inadequate to defend the lack of notification by indicating that the City has no process for selling parkland and hence no requirement to follow the procedure for more routine transactions.

Page 4 #7: "The City, HOA and the School District each have the legal authority to enter into such agreement."

All these entities most certainly do not have the legal authority to ignore deed restrictions. Please refer to the 3 page Summary attached that very clearly defines the PVHA and PVE City fiduciary responsibilities per the "Protective Restrictions Palos Verdes Estates" and successor Quit Claim deed and 1940 resolution of the PVE City Council accepting title to the Parklands. These restrictions and covenants by the City Attorney's own admission "*run with the land*" (Staff Report on 03/09/13 and bind all grantors and grantees. The only way for "Duration of Restrictions" or "Modifications" to be effected is by one of two processes described in the "Protective Restrictions Palos Verdes Estates" deed indenture of 1940 as described in the pertinent sections in those booklets.

We have been told by the PVHA that the Protective Restrictions Palos Verdes Estates" booklets all contain the same language on these restrictions. The complete printing of the Bank of America Deed of Indenture of 1940 includes the following:

1) No Change of Duration of Restrictions

"*unless within the six months prior to the expiration of any successive twenty-year period thereafter a written agreement (is) executed by the then record owners of more than one-half in area of said property et al, or (Source:* Declaration 14. Page 14 Section 8 **"Duration of Restrictions**")

2) No Modifications

"no changes or modifications shall be made without the written consent duly executed and recorded of not less two-thirds in area of all lands held in private ownership within 300 feet in any direction of the property concerning which a change or modification is sought to be made." (Source: Declaration 14, Page 15, Section 9 "**Modification of Restrictions**")

Neither of these processes to change the deed restrictions was effected or even attempted.

Hence neither the City nor the PVHA had a right to approve or even consider the transaction.

Page 4 #9: "There are other instances of PVE city land zoned Open Space, which have been transferred to private parties. We have identified at least four parcels of Open Space city land that were transferred to private owners."

We would like to know the dates and parcels involved so we can research them properly and make them known to all residents and property owners. These cannot be legitimate precedents if they did not fulfill the requirement of "*written consent duly executed and recorded of not less two-thirds in area of all lands held in private ownership within 300 feet in any direction of the property concerning which a change or modification is sought to be made*" – so was that accomplished?

Finally, any precedent does not negate the deed restrictions – only by completing one of the two processes in the Protective Restrictions can the duration of or modifications of deed restrictions be changed.

Page 4 #10: "There are no trails which evidence that the public ever used the steep parcel and certainly not on a regular basis. The MOU and the deed restrictions recites that Area A is not readily accessible to the public."

The City Attorney and other advocates of the transaction have repeatedly asserted that the area is "inaccessible". It makes no difference either way. It is public parkland – end of story. Just because the MOU and Deed now say that it is inaccessible does not make it so, nor does it make any actual difference. This whole discussion area is not pertinent in any event, as only meeting the requirements of the Protective Restrictions is what is pertinent.

But to address the statements about inaccessibility, we point out that while parkland below the current 900 Via Panorama property is steep, the field near the road starts out flat and is definitely, clearly and irrefutably accessible. Anyone who walks along Via Panorama can observe how the repeated claims of inaccessibility are ridiculously false – there are about 50 yards of Parcel A that run right along Via Panorama and nothing prevents anyone from walking onto the open field. For anyone not willing or able to visit the site, photos are posted on www.pveopenspace.com that show easy access from the road. For example, it is a popular gathering point every Fourth of July for people from all over PVE to watch the fireworks in the beach communities; people set up folding chairs on the parkland and enjoy the spectacle below. Unfortunately, access to part of that parkland has been restricted by the Luglianis through their landscaping and hardscaping on parkland/City right of way for many years.

Further, the assertion that there "*are no trails which evidence that the public ever used the steep parcel*" is wrong. Several of our neighbors have lived in the neighborhood longer than the Luglianis, and one of them sent us an email from their son that confirms usage of this open space:

> From: **Ronald Wasserman** <rwasserman@iddoctors.com>
> Date: Sat, Mar 9, 2013 at 7:57 PM
> Subject: Re: 900 Via Panorama-Agenda and Full Package are on line
> To: Karl Wasserman <kaygee31@aol.com>
> Cc: Gail Wasserman <gcwasserman@gmail.com>
>
> To Whom It May Concern -
>
> During the decade from 1967 to 1976, my brother and I frequently played in the open space adjacent to 900 Via Panorama. Many children of the neighborhood joined us. During our years at Malaga Cove Middle School, we would walk through this land to Malaga Cove Library and on to School.
> Respectfully,
> Ronald B. Wasserman (Son of Karl and Gail Wasserman)

We hope these clarifications have been helpful; we would be happy to engage in an open dialogue about any of these points at any time. We are available to discuss the specifics further.

Respectfully Submitted,

John Harbison
916 Via Panorama
March 10, 2013

Renata Harbison
916 Via Panorama
March 10, 2013

CC: Jay Rockey, Rockey & Wahl LLP

Attachment: 3 Page Summary Explanation of the City's Fiduciary Responsibilities per the "Protective Requirements Palos Verdes Estates" (Original Bank of America Deed Indenture of 1924) plus Successor Quit Claim Deed to PVHA of 1940 and City Resolution of 1940 accepting title as recorded.