Second Civil Number B267816

In the Court of Appeal
Of the State of California

SECOND APPELLATE DISTRICT
DIVISION TWO

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

Plaintiffs and Respondents,

v.

CITY OF PALOS VERDES
ESTATES, *et al.*, *Defendants and Appellants.*

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of the State of California,
For the County of Los Angeles,
Los Angeles Superior Court Case No. BS142768
Honorable Barbara A. Meiers, Judge

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This form is being submitted on behalf of defendant and appellant Palos Verdes Homes Association. There are no interested entities or persons that must be listed on this certificate under rule 8.208 of the California *Rules of Court.*

DATED: November 9, 2016 LEWIS BRISBOIS BISGAARD & SMITH LLP

By: _____

Roy G. Weatherup

Attorneys for Defendant and Appellant PALOS VERDES HOMES ASSOCIATION

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INTRODUCTION

In this case, a trial court usurped the power and authority of a homes association, overriding the sanctity of nearly century-old documents governing parkland in the City of Palos Verdes Estates. The documents imposed deed restrictions on land sold in this planned community, and authorized the formation of the Palos Verdes Homes Association to govern the area. In 1923, the Palos Verdes Homes Association was granted power to hold, maintain, improve and sell parkland. It received the parkland in 1931 from the Bank of America, the trustee for the development. The Palos Verdes Homes Association was liable for taxes on all of the parkland, and after the market crash of 1929, it owed substantial taxes to Los Angeles County. Concerned that the parkland would be sold to pay the taxes, the Palos Verdes Homes Association voted for incorporation of the

City of Palos Verdes Estates and deeded the parkland to the new city in 1940. In order to protect the parkland, the Palos Verdes Homes Association placed several restrictions in the deeds, requiring the land was to remain "forever" parkland, and limited the city's ability to sell or improve the parkland. The deeds also contained a right of reversion in favor of the Palos Verdes Homes Association. In a separate transfer, the Palos Verdes Homes Association also deeded thirteen lots to the newly formed Palos Verdes School District, containing similar restrictions.

In 2012, the Palos Verdes School District filed an action against the City of Palos Verdes and the Palos Verdes Homes Association, seeking to invalidate the deed restrictions on two of its lots so they could be sold for private development. The City of Palos Verdes was dismissed from the action, and following a court trial, the deed restrictions on these two lots, Lots C and D, were upheld. Defending the litigation, however, drained half of the reserves of the Palos Verdes Homes Association. The matter did not end there. The Palos Verdes School District appealed the judgment, and the Palos Verdes Homes Association cross-appealed from the court's denial of its motion for attorneys' fees.

Meanwhile, the City of Palos Verdes was in communication with homeowners Robert and Dolores Lugliani concerning encroachments on parkland beneath their home known as Area A. The predecessors-in-interest to the Luglianis built retaining walls and trees on Area A to stabilize their slope above Area A, which was also a steep slope. Later, the Luglianis placed a sports court, a gazebo and other accessory structures on Area A. Some of the improvements were removed at the request of the City, but not the trees and the retaining walls.

While the appeal and cross-appeal were pending, the Palos Verdes School District, the City of Palos Verdes, the Palos Verdes

Homes Association, and the Luglianis reached a multi-party settlement of the litigation, which also resolved the encroachment into Area A. The Board of the Palos Verdes Homes Association concluded that Area A, although dedicated parkland, had never been used as a park or recreation area because it was mostly an unusable slope. It desired to protect Lots C and D, concluding they were more valuable. The Board also did not believe it would be in the best interests of its members to continue litigating the matter in the Court of Appeal.

In the settlement, embodied in the Memorandum of Understanding ("MOU"), the City of Palos Verdes obtained title to Lots C and D, and the Palos Verdes School District agreed to dismiss its appeal and uphold the restrictions on all of its remaining lots. The Palos Verdes School District received a $1.5 million donation from the Luglianis. The Luglianis paid the Homes Association $500,000, of which $100,000 was given to the City to maintain Lots C and D. In addition, the City quitclaimed Area A to the Palos Verdes Homes Association, and then Area A was conveyed to the Luglianis, subject to a permanent conservation easement that would ensure Area A would remain open space. The Palos Verdes Homes Association agreed to dismiss its cross-appeal. The settlement was approved by the City Council and the Homes Association.

Later, plaintiff John Harbison, a neighbor of the Luglianis and a homeowner in the community who was disgruntled over the settlement, formed Citizens for Enforcement of Protective Covenants and sued the parties to the MOU. He alleged the transaction violated the 1940 restrictions contained in the deeds to the City of Palos Verdes and eventually moved for summary judgment on that basis. Before moving for summary judgment, he dismissed the Palos Verdes School District from the action.

In granting the summary judgment motion, the trial court ignored the provisions of the governing documents, which were controlling, and usurped the power of the Palos Verdes Homes Association. The court voided the deed from the Palos Verdes Homes Association to the Luglianis. It also ordered the Palos Verdes Homes Association to remove at its own cost, all improvements on Area A including all hardscape and all landscape, including a row of forty foot trees, to restore Area A to its "original condition." The Palos Verdes Homes Association was enjoined from violating the 1940 deeds. But the court did not stop there. Even though the plaintiffs requested relief as to Area A only, the trial court's injunction included every parcel subject to the jurisdiction of the Palos Verdes Homes Association.

Reversal of the judgment is required because multiple issues of fact require a trial of issues critical to this community. Whether members were bound by the decision of the Palos Verdes Homes Association to settle the litigation with the Palos Verdes School District in accordance with the authority conferred under the governing documents, remains a triable factual issue. This is complicated by the fact that there are members of Citizens for Enforcement of Parkland Covenants who are residents, but not members of the Palos Verdes Homes Association. They lack standing to enforce restrictions under the governing documents.

Triable issues exist as to whether the Palos Verdes Homes Association's decision to settle rather than litigate was entitled to protection under the business judgment rule or the rule of judicial deference. The trial court abused its discretion when it struck the declaration of the Board's general counsel, Sidney Croft, describing the Board's business judgment. This is especially true where the perpetual conservation easement imposed on Area A before the

transfer to the Luglianis ensures that it will remain open space for the benefit of the community.

In addition, the 1940 grant deeds to the City of Palos Verdes reveal that the Homes Association intended to bind the City of Palos Verdes, not itself, to the various restrictions it placed in the deeds. The Palos Verdes Homes Association could not be bound by any such deed restrictions, since there has never been any amendment of its right and power to sell parkland under the Declaration No. 1. Amending the rights conferred in the Declaration No. 1 after it was recorded and after lots were sold in the community would require a vote of eighty percent of the members. The new amendment would also need to be recorded. That was never done at any time. When the City of Palos Verdes quitclaimed Area A back to the Palos Verdes Homes Association, the 1940 deed restrictions were extinguished. Alternatively, the dominant and servient tenements merged, extinguishing these negative easements as to Area A. Either way, the Palos Verdes Homes Association retained the right to hold, improve and sell parkland that it owns in accordance with the governing documents.

As a result, the trial court lacked jurisdiction to grant relief to the plaintiffs. It violated the governing documents, and interfered with the rights and duties of the Palos Verdes Homes Association outlined in those documents. The trial court also abused its discretion when it relied on principles of judicial estoppel to support the permanent injunction, where the plaintiffs never raised the issue, and where the doctrine had no application here. Moreover, the trial court erred by altering the parties' performance of the settlement in the absence of the Palos Verdes School District, an indispensable party.

The judgment should be reversed in its entirety.

STATEMENT OF FACTS

1. The Parties.

Plaintiff and respondent Citizens for the Enforcement of Parkland Covenants ("CEPC") is an unincorporated association of residents and property owners living in and around the City of Palos Verdes Estates (the "City"). [9 CT 1864.] Plaintiff and respondent John Harbison formed CEPC to spearhead this litigation. [9 CT 1864.] The defendants and appellants include the City, the Palos Verdes Homes Association (the "Homes Association") [8 CT 1864], Robert and Dolores Lugliani, the owners of 900 Via Panorama within the City, and Thomas J. Lieb, trustee of the Via Panorama Trust of May 2, 2012 (the Luglianis and Mr. Lieb are collectively referred to as the "Luglianis"). In this action, the plaintiffs challenged land transfers made pursuant to a multi-party settlement between the defendants and the Palos Verdes School District (the "School District") concerning an exchange of less usable undeveloped open space for more valuable space among the parties, resulting in the sale of Area A to the Luglianis. Area A is beneath 900 Via Panorama and surrounds it on three sides. The plaintiff voluntarily dismissed the School District from the action.

2. The Establishment of the City of Palos Verdes as a Planned Community Subject to Covenants, Conditions, and Restrictions.

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. [12 CT 2884-2909.] To accomplish this, the Commonwealth Trust Company placed various restrictions on the land in the 1920's. [12 CT 2885.] The Bank of America

became the successor-in-interest to the Commonwealth Trust Company.

In 1923, the Commonwealth Trust Company created and recorded a "Declaration of Establishment of Basic Protective Restrictions, Conditions, Covenants, Reservations, Liens, and Charges Affecting the Real Property Know As Parcels A and B" ("Declaration No. 1"). The restrictions contained in Declaration No. 1 were fashioned to preserve views, beautify the property, and ensure each homeowner that his or her neighbor "will have to build an equally attractive type of building," such that the homes "can never be damaged by an unsightly or undesirable structure either upon adjoining lots or in any part of Palos Verdes Estates." [8 CT 1893; 1904-1915.]

The following restrictions contained in Declaration No. 1 were imposed upon every lot:

> "[T]he Commonwealth Trust Company hereby certifies and declares that it has established the general plan for the protection, maintenance, improvement, and development of said property, and has fixed and does hereby fix the protective restrictions, conditions, covenants, reservations, liens and charges upon and subject to which all lots, parcels and portions of said property shall be held, leased or sold and/or conveyed by it as such owner, each and all of which is and are for the benefit of said property and of each owner of land therein, and shall inure to and pass with said property and each and every parcel of land therein and shall apply to and bind the respective successors in interest of the present owner thereof, and are and each thereof is imposed upon said realty as a servitude in favor of said property, and each and every parcel of land therein as a

dominant tenement or tenements, as follows . . ." [12 CT 2885.]

The power to interpret and enforce these conditions, covenants, and restrictions was vested in the newly created Palos Verdes Homes Association. [12 CT 2885.]

3. The Creation of the Palos Verdes Homes Association, the Governing Body With the Authority to Interpret and Enforce Restrictions as Well as Sell Parkland Under the Governing Documents.

The Palos Verdes Homes Association was formed in 1923, the year Declaration No. 1 was created and recorded. The Homes Association was "legally constituted under the restrictions as [a] perpetual bod[y] to carry out and look after, from the beginning, the best interests and highest ideals of the purchasers [and to] take care of the common and private parks . . . . " [12 CT 2868; 2910-2914; 2915-2935.]

Declaration No. 1 conferred near plenary authority upon the Homes Association. In Article I, section 4, the Homes Association was given the "right and power" to interpret and enforce all restrictions, covenants and conditions, regardless of whether they were imposed by way of Declaration, or by way of some other conveyance. [12 CT 2885-2806.]

Under Article II, section 4, every lot holder and leaseholder—that is, every resident in the City—is deemed to have consented, to the Homes Association's *right to sell parkland, open spaces, and recreation areas*, to place easements on the property, and to maintain fencing or other ornamental structures. Importantly, the Homes Association's decision to sell parkland is not subject to a membership vote. In this regard, Article II, section 4 of Declaration No. 1 provides in pertinent part:

"*Section 4.* All conveyances, contracts of sale or leases for two or more years hereafter executed by Commonwealth Trust Company are hereby made subject to the condition that the grantee, vendee and/or lessee by the acceptance of deed, contract of sale or lease covenants for himself, his heirs, assigns, executors, administrators and successors in interest that the *Homes 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 property and owners of and/or for the improvement and development of the property herein referred to.

* * *

"(i) To acquire by gift, purchase, lease or otherwise acquire to own, hold enjoy, operate, maintain, and to *convey*, *sell*, lease, *transfer*, mortgage and otherwise encumber, dedicate for public use and/*or otherwise dispose of*, *real* and/or personal *property* either within or without the boundaries of said property." [12 CT 2887-2888 (Emphasis added).]

These City residents are also deemed to have consented, on their own behalf and on behalf of their successors-in-interest, to other broadly conferred powers that could impact parkland or open space

within the City. These powers are found in Section 4(q), (t), (w) and (y) of Declaration No. 1:

> "(q) To exercise such powers of control, interpretation, construction, consent, decision, determination modification, amendment, cancellation, annulment, and/or enforcement of covenants, reservations, restrictions, liens, and charges imposed upon said property as are herein or may be vested in, delegated to, or assigned to the Homes Association and such duties with respect thereto as are herein or may be assigned to and assumed by the Homes Association, including the enforcement of State and county laws and ordinances, as far as legally may be done.
>
> ***
>
> "(t) Generally, to do any and all lawful things which may be advisable, proper, authorized and/or permitted to be done by Palos Verdes Homes Association under or by virtue of this declaration or of any restrictions, conditions, and/or covenants or laws at any time affecting said property or of any portion (including areas now or hereafter dedicated to public use) and to do and perform any and all acts which may be either necessary for, or incidental to the exercise of any of the foregoing powers or for the peace, health, comfort, safety, and/or general welfare of owners of said property, or portions thereof, or residents thereon.
>
> ***
>
> "(w) To care for, trim, protect, plant, and replant trees, shrubs, or other planting on . . . parks . . . or upon any

> property over which it may have and/or assume control or jurisdiction and/or on any property adjoining the same.
>
> ***
>
> "(y) To erect, care for, and maintain adequate signs approved by the Art Jury for marking . . . parks, or other property." [12 CT 2888-2890.]

Declaration No. 1 also designated various classes of zoning within the City. Parks fell under Class F zoning, governed by section 10, Article IV. 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 land field, or accessory aerodrome or repair shop, public art gallery, museum, library, firehouse, nursery, or greenhouse, or other public or semi-private building, or a *single family dwelling*." (Emphasis added.) [12 CT 2897.]

To preserve the beauty of the community, the Homes Association was also given exclusive decision making authority over trees. Article V, section 7 of Declaration No. 1 provides that "[n]o tree over twenty feet in height above the ground shall be trimmed, cut back, removed or killed except with the approval of the Homes Association." [12 CT 2904.]

Although the restrictions, conditions, and covenants contained in Declaration No. 1 renew automatically for successive twenty-year periods, Articles I through III and VI may be amended by a vote of eighty percent of the lot owners. Articles IV (zoning) and V (other restrictions) can be amended by a vote of two-thirds of the owners of record within 300 feet of the affected property and if the Homes Association gives its approval. [12 CT 2906.]

Sections 6, 7, 8 and 9 of Article VI provide that the restrictions, covenants, and conditions were covenants running with the land, and the Homes Association possessed a reversionary right coupled with a right of re-entry. Any lot owner or the Homes Association could enjoin any restriction which was breached. Any breach would be removed at the expense of the owner, not the Homes Association. [12 CT 2908.] Such breaches were deemed to be a nuisance. Importantly, the Homes Association "shall" construe all of the restrictions, conditions and covenants together. [12 CT 2907-2908.]

Despite the broad injunction rights, finality is conferred upon the Homes Association's interpretation of restrictions under section 11 of Article VI:

> "*Section 11*. In its own name, so far as it may lawfully do so, and/or in the name of Commonwealth Trust Company or of any lot or parcel owner subject to its jurisdiction, Palos Verdes Homes Association shall interpret and/or enforce any or all restrictions, conditions, covenants, reservations, liens, charges and agreements herein or at any time created for the benefit of the said property or in any property which may thereby be expressly made subject to its jurisdiction by the owners thereof, or to which said lots or any of them, may at any time be subject. In case of uncertainty as to meaning of said provisions of this declaration, the Homes Association shall . . . in all cases interpret the same and such interpretation shall be final and conclusive upon all interested parties." [12 CT 2908-2909.]

After Declaration No. 1 was recorded, other declarations and amendments were recorded as to various tracts in the development as it grew. Only one of them is relevant here.

In 1926, the Bank of America amended Declaration No. 25 pertaining to Tract 8652, where the majority of Area A lies. [12 CT 2877-2883.] This Amendment No. 10 designated Area A in Class F zoning. [12 CT 2879.] The Board of Directors for the Homes Association approved the Amendment. [12 CT 2882.]

The founding documents for the Homes Association likewise grant it the power to sell parkland. The Articles of Incorporation for the Homes Association contain language resembling that found in Declaration No. 1. Specifically, sections 1, 9, 13, 16, and 24 of the Articles furnish the Homes Association with the same broad power to sell parks, open spaces and recreational areas, to enforce and interpret the restrictions, and to do whatever is necessary for the general welfare of the community. [12 CT 2910-2912.]

According to the Bylaws, lot ownership is the only criteria for membership in the Homes Association. [12 CT 2910-2914.] Article 14, section (b) of the Bylaws states that park land cannot be sold *without* the consent of the Homes Association. [12 CT 2924.]

4. The Transfer of Land to the Homes Association.

In 1931, the Bank of America conveyed certain land along with Area A to the Homes Association, subject to pre-existing tax liens and the conditions, covenants and restrictions contained in Declaration No. 1. [12 CT 2936-2940.]

The grant deed imposed some additional restrictions. The property was to be used and administered forever for park and/or recreation purposes for the benefit of the residents; no buildings could be permitted except as related to the use of the property for park and recreation purposes; the Homes Association could not transfer the property without those conditions, and that any such transfer could be made only to a body suitably constituted to hold parks; and the Homes Association could permit adjoining land owners to improve the

parkland to enhance the views or access. [12 CT 2937-2938.] The Homes Association was, however, given the power to exchange the parkland for other lands and could dedicate it for "parkway or street purposes." [12 CT 2937.] If any of these "covenants running with the land" were breached, the property would revert to the Bank of America. [12 CT 2938.]

By 1940 however, the Bank of America quitclaimed all of its interest in the land, including its reversionary interests in Area A, to the Homes Association. [12 CT 2941-2943.]

5. The Homes Association's Transfer of Land to the City and to the School District.

By 1938, the Homes Association owed the state significant back taxes and risked losing the parkland to foreclosure in the aftermath of the Depression. [12 CT 2804.] At this time, the School District and nascent City played a role in saving the parkland from foreclosure sale.

In 1938, the Homes Association conveyed thirteen lots to the School District[1] for $10, subject to the pre-existing taxes. [13 CT 2955.] The transfer was made subject to existing restrictions of record, and the express condition that the properties could only be used for school or park purposes. The properties could not be sold except subject to the restrictions and only to a body suitably constituted by law to hold parkland. [13 CT 2955.]

In 1940, the Homes Association conveyed parkland to the City in two deeds. [8 CT 1931-1940; 1941-1947.] A small portion of Area A lying in Tract 7540 was transferred in one of the deeds; the majority

[1] The properties were actually conveyed to the predecessor of the School District, the Palos Verdes School District of Los Angeles County, because the City was not formed for another two years.

of Area A which lies in Tract 8652, was transferred in the second deed. [8 CT 1890; 1933; 1942.]

The Homes Association placed several restrictions on the transfer to the City. Declaration No. 1 was made a part of the conveyance, and the Homes Association repeated the same restrictions which the Bank of America placed in the 1931 deed. [8 CT 1936; 1943.]

First, the City was required to use the property for park purposes:

> "3. That, except as hereinafter provided, said realty is to be used and administered forever for park and/or recreation purposes only (any provisions of the Declarations of Restrictions above referred to, or of any amendments thereto, or of any prior conveyances of said realty, or of any laws or ordinances of any public body applicable thereto, to the contrary notwithstanding), 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" . . . under such regulations consistent with the other conditions set forth in this deed as may from time to time hereafter be established by said municipality or other body suitably constituted by law to take, hold, maintain and regulate public parks, for the purpose of safeguarding said realty and any and any vegetation and/or of said improvements thereon from damage or deterioration, and for the further purpose of protecting the residents said Palos Verdes Estates from any uses of or conditions in or upon said realty which are, or may be, detrimental to the amenities of the neighborhood . . ." [8 CT 1937; 1944.]

Second, the Homes Association required that "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." [8 CT 1939, 1945.]

Third, the property could not be conveyed by the City "[e]xcept subject to the conditions, restrictions and reservations set forth and/or referred to herein and except to a body suitably constituted by law to take, hold, maintain and regulate public parcels . . . ." [8 CT 1939, 1945.]

Fourth, an adjoining lot owner would be allowed to "construct or maintain paths, steps, and/or other landscape improvements, as a means or egress from and ingress to said lot or for the improvement of views therefrom, in such a manner and for such a length of time and under such rules and regulations as will not, in the opinion of said municipality or other body and of Palos Verdes Art Jury, impair or interfere with the use and maintenance of said realty for park and/or recreation purposes, as hereinbefore set forth." [8 CT 1939, 1945.]

The Homes Association also added a provision preventing the City from utilizing Article VI of Declaration No. 1 to abolish or amend any of these deed provisions. [12 CT 2906-2907.]

The deeds provided that the property "shall" revert to the Homes Association if any of the conditions were breached, and gave both the Homes Association and lot owners the right to enjoin any such breaches. [8 CT 1939, 1946.] The City Council approved the conveyances by way of a resolution. [8 CT 1948-1968; 9 CT 1969-1972.]

6. The Longstanding Encroachment On to City Land Known as "Area A," by Adjacent Property Owners, the Luglianis.

At some point in time which is unclear from the record, the predecessors to the Luglianis built retaining walls on Area A in order to stabilize the slope on 900 Via Panorama without a permit. [9 CT 2007; 12 CT 2809.] Later, the Luglianis landscaped and improved Area A with a gazebo and other accessory, non-inhabitable structures. [9 CT 2007.]

In 1972, the Homes Association notified the City that the driveway and gate belonging to 900 Via Panorama were inconsistent with the deed restrictions. [9 CT 2055A.] Over thirty years later, in 2003, the City wrote to the Luglianis, indicating that back in 1973, the City Council required closure of the driveway and gate constructed on Area A, which had not been done. The City asked the Luglianis to contact the City Planning and Public Works Office. [9 CT 2055b.]

Thereafter, in 2009, the City wrote to the Luglianis, asking them to "remove unauthorized encroachments," including fences, walls, and hardscape," but not landscaping or trees. [9 CT 2061.] In 2011, a "final notice" was sent requesting "removal of all non-permitted encroachments." The City specified that "[r]estoration includes but is not limited to the grading and soil stabilization of all affected areas and the removal of all debris. Compliance of this notice must include the removal of any fences, walls, hardscape, tree houses, and any other man-made items beyond your property line." [9 CT 2062.] The Luglianis complied by removing everything except the slope-stabilizing retaining walls. [9 CT 2007.]

7. The City's Potential Liability for Causing Slope Instability on the Luglianis' Property Should Certain Encroachments be Removed.

The retaining walls which remained on Area A vary in height from seven feet to twenty-one feet. [9 CT 2107.] When the City threatened to remove the retaining walls, the Luglianis threatened to sue the City for destabilizing the slope on 900 Via Panorama. [9 CT 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 or the hillside. [12 CT 2810; 5/29/15 RT 23, 25.]

8. The School District's Efforts to Invalidate All Deed Restrictions, Resulting in Litigation Costly to the Homes Association.

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 two million dollars by selling the lots for residential development. [12 CT 2806-2807.] When the City and the Homes Association objected to the School District's plan, the School District filed a lawsuit against the City and the Homes Association for quiet title and declaratory relief as to whether the deed restrictions and reversionary interest were still valid. [12 CT 2806.] Eventually, the City was dismissed from the action. [2 CT 254-261; 15 CT 3587.]

Following a bench trial, the court entered judgment in favor of the Homes Association, finding that there was still a binding contract between the School District and the Homes Association and that the 1938 grant deeds were still enforceable. [9 CT 1997-2003; 1998-1999; 15 CT 3580-3586.] The School District appealed from the judgment, and the Homes Association cross-appealed from the court's denial of its motion for substantial attorneys' fees. [9 CT 2006.]

9. The Settlement Resolving Both the School District Litigation, and the Encroachment on Area A, By and Among the School District, the City, the Homes Association, and the Luglianis.

A. *The Memorandum of Understanding.*

In 2012, while the appeal and cross-appeal were pending in the appellate court, the School District, the City, the Homes Association, and the Luglianis, entered into a Memorandum of Understanding to achieve five goals. The first goal was to reaffirm application of all restrictions on all School District-owned properties. [9 CT 2004, 2007-2008.] The second goal was to create a vehicle to economically resolve the School District litigation. The third goal was to subject future lighting on the athletic field for Palos Verdes High School to City zoning and Homes Association approval. The fourth goal was to resolve encroachments into Area A and to allocate responsibility for the slope and retaining walls to the Luglianis. The fifth goal was to establish Lots C and D as open space within the City. [9 CT 2007-2008.]

The recitals to the settlement revealed other issues. Even though the judgment only applied to Lots C and D, it extended to all of the School District properties. Additionally, the School District could still "vote to exempt itself from compliance with City zoning so that it could light up the athletic fields in such a way that would cause "adverse land use impacts" for residents who wanted "darker skies." [9 CT 2006-2007.] Keeping Lots C and D restricted to open space was a "key element of the City's general plan," while Area A was useful only as open space. [9 CT 2007.]

In the Memorandum of Understanding, the School District agreed that Lots C and D would revert to the Homes Association, that the deed restrictions set forth in the judgment would apply to all

School District properties, and that the lights on the high school football field would be subject to City's zoning and Homes Association approval. [9 CT 2008-2010.] The School District also agreed to dismiss its appeal and allow the judgment to become final. [9 CT 2010.] The Homes Association agreed to dismiss its cross-appeal. [9 CT 2010]

The Homes Association agreed to transfer ownership of Lots C and D to the City along with $100,000 to defray maintenance costs in exchange for Area A. [9 CT 2010.] The Homes Association would not exert jurisdiction as to the School District's improvement of the 1938 properties so long as they were consistent with the deed restrictions. [9 CT 2008.]

The Homes Association agreed to transfer Area A to the Luglianis for $500,000. [9 CT 2010.] The Homes Association also provided a warranty regarding Area A, as follows: "*E. Warranty of Title Transferred.* As of the date of the transfer of Area A, the Homes Association represents and warrants to Property Owners [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 (Emphasis in original).]

The Luglianis agreed to apply for after-the-fact permits for the retaining walls and to obtain appraisals for Lots C and D and for Area A. [9 CT 2011.] In a separate donative agreement, they also contributed $1.5 million to the School District to alleviate its fiscal challenges. [12 CT 2807.] The settlement stated that "[n]othing in this MOU is intended to create duties or obligations to or rights in third parties to this MOU." [9 CT 2014.]

B. *The City's Quitclaim of Area A to the Homes Association.*

In accordance with the settlement, the City quitclaimed Area A to the Homes Association, placing an open space easement upon Area A, which did not include a right of public access and precluded the Homes Association from performing or allowing others "to perform, any act on or affecting the Property that was inconsistent with the open space restriction." [9 CT 1973-1976.] The City also reserved for itself various utility easements, including a fire access easement. [9 CT 1974.]

The Homes Association was required to remove encroachments inconsistent with the open space use within six months, or alternatively, it was to seek and obtain an after-the-fact permit for the retaining walls, and a zone change for accessory uses on the property. [9 CT 1974.] The City also precluded the construction of any structures in the open space, save a permitted and approved gazebo, sports court, retaining wall, landscaping, barbeque, and/or other accessory structures permissible under the City's municipal code, and only in areas specified in the deed. [9 CT 1974.] Finally, the deed restrictions contained in the City's quitclaim deed were intended to run with the land and could be enjoined in the event of breach. [9 CT 1975.]

C. *The Grant Deed to the Luglianis of Area A By the Homes Association.*

Subsequently, the Homes Association conveyed Area A to the Luglianis in a grant deed that was expressly made subject to the applicable covenants set forth in the City's quitclaim deed. [9 CT 1978-1996.] The Luglianis agreed they could not place structures on the open space property except for a gazebo, sports court, retaining wall, landscaping, barbeque, and/or other uninhabitable "accessory

structure," as defined by the City's municipal code, and as illustrated on topographical maps attached to the deed. The Luglianis were to seek approval of such structures from the City in accordance with applicable covenants, ordinances, and codes, and not to perform any "inconsistent" act on or affecting the Property. [9 CT 1978-1979.]

The grant deed incorporated all of the original restrictions, including those imposed by the City's deed, and provided the Homes Association the power to enforce the restrictions by way of an injunction. The Luglianis also agreed to be solely responsible for landscaping Area A. [9 CT 1979.] Exhibit "B" to the deed identified the location of the retaining walls and accessory structures on Area A, and Exhibit "C" provided the location of the proposed accessory structures. [9 CT 1992, 1996.]

The Homes Association's deed to the Luglianis was recorded just after the City's quitclaim deed was recorded. [9 CT 1977-1996.] The Homes Association passed a resolution authorizing its president to execute the Memorandum of Understanding, finding that it had "considered the advice of its attorneys," and had formed its "decision that signing the MOU [was] in the best interest of [the Homes Association] and its members." [9 CT 2063-2064.]

D. *No Action Taken By the City.*

Thereafter, the Luglianis submitted a zone change application to the City as well as an application to allow an after-the-fact approval for the preexisting retaining walls. [9 CT 2107-2111; 2112-2116.] In reviewing the application, the City Attorney's Office made several observations. It observed "regardless of whether Parcel A is zoned R-1 or Open Space, no additional structures will be permitted on the majority of Parcel A." [9 CT 2108.] It also noted that "this transfer of ownership relieved the City of any liability or responsibilities relating to the retaining walls or the hillside, while retaining the open

space benefits on undisturbed portions of Parcel A . . . . The existing retaining walls, which will be maintained by the current owner, stabilize a steep hillside that may otherwise be subject to geologic instability or erosion. . . . The retaining walls exist at the site and removal could be detrimental to the surrounding slope." [9 CT 2110-2111.]

The City Attorney's office analyzed the project for consistency to be "consistent with the General Plan," observing:

> "The application is part of a larger multi-party agreement which results in the preservation of vital open space of Lots C and D in the City. Further, while the project would result in the construction of small accessory structures on a portion of the property, the structures would be installed on property previously disturbed by prior development, and the majority of the property would be restricted to remain open space in perpetuity. The minimal development contemplated as part of the MOU reflects the City Council's legislative choice to allow a minor deviation from the City's open space restrictions in return for certainty that other PVPUSD parcels would remain subject to PVHA deed restrictions, in addition to other public benefits obtained for City residents pursuant to the MOU. There are no applicable specific plans." [9 CT 2111.]

Later, counsel for the Luglianis presented a formal letter to the City Council concerning their application, clarifying the scope of their building and permitting requests. [9 CT 2112-2116.] Both the City Council and the City Planning Commission heard the Luglianis' application, but no further action was taken because of the filing of this lawsuit. [1 CT 24-25.]

10. The Unsuccessful Petition for a Writ of Mandate by Citizens for the Enforcement of Parkland Covenants and John Harbison to Invalidate the Settlement.

Not long after the ink dried on the multi-party agreement, an uphill neighbor to the Luglianis, and a member of the Homes Association, John Harbison, formed Citizens for Enforcement of Parkland Covenants to file a lawsuit against the City, the Homes Association, the School District, and the Luglianis, in order to undo the settlement. [1 CT 16-150; 171; 182.] The pleading alleged declaratory relief and waste of public funds [as to the City only] causes of action, and sought a peremptory writ of mandate.

Specifically, CEPC sought a declaration that the portion of the multi-party settlement authorizing the conveyance of Area A, as well as the City's and the Association's deeds effecting the conveyance, violated the land use restrictions and triggered the reversion of Area A back to the Homes Association. It also sought a declaration that the City and the Homes Association had a duty to enforce the restrictions and compel the removal of all encroachments. [1 CT 26-27.] The declaratory relief cause of action echoed the writ of mandate. [1 CT 28.]

The plaintiff also claimed the City's participation in the settlement and future efforts to sanction the encroachments were ultra vires acts. [1 CT 27-28.]

All of the defendants demurred, contending the declaratory relief cause of action was improper because it anticipated an issue which could be determined by way of the writ cause of action. [1 CT 165-187; 188-200; 175-178; 201-225; 226-244; 2 CT 245-250.] Moreover, a writ could not be issued because the very documents attached to the petition established the absence of ministerial duties. [1 CT 180-181.]

Disputing all of the defendants' contentions, the plaintiff opposed the demurrers and requested that the court judicially notice various documents relating to the School District action. [2 CT 251-297; 299-319; 320-342; 343-390.]

In their reply papers, the defendants reiterated the contentions they raised in their initial demurrers. [2 CT 391-408; 409-420; 421-425; 426-486; 487-492; 3 CT 493-496; 497-503; 504-507.] Thereafter, the plaintiff filed an amended petition raising the same causes of action, dropping the School District as a defendant, but adding Mr. Harbison as a plaintiff. [3 CT 513-664.]

This was followed by another round of demurrers based on the same grounds set forth in the previous round of demurrers [3 CT 665-676; 677-689; 690-711; 712-734; 735-741; 742-843]. The plaintiffs filed opposition [4 CT 844-851; 852-861; 862-868; 869-870], and the defendants replied. [4 CT 871-885; 886-894; 895-910; 911-920; 5 CT 1203-1230.] The Luglianis also filed a motion to strike the addition of John Harbison as a plaintiff without seeking leave of court. [3 CT 677-689.]

At the hearing on the second round of demurrers, the trial court sustained the demurrer to the writ of mandate cause of action without leave to amend. It also granted the motion to strike Mr. Harbison as a plaintiff without prejudice to seeking leave of court to add him as a plaintiff. [4 CT 921-927; 7 CT 1527-1539.] The trial court observed: "At this time, Plaintiff has not presented any possible amendment that would establish a ministerial duty of the city to act as requested." [4 CT 923.]

Thereafter, Citizens exercised its right to a peremptory challenge and appealed the denial of its petition for a writ of mandate. After the Court of Appeal summarily denied the petition, the defendants filed a notice of demurrer to the remaining causes of action

before the newly assigned Los Angeles Superior Court Judge, the Honorable Barbara A. Meiers. [4 CT 928-938; 939-943; 968-977.] The City also sought clarification of the demurrer ruling, and the trial court requested supplemental briefing as to the prior judge's demurrer ruling. [5 CT 978-984; 987-990; 5 CT 991-995; 1003-1009; 1010-1023; 9 CT 2146-2161.]

Thereafter, the trial court issued a ruling directing the plaintiffs to streamline the complaint and clarify standing. [9 CT 2136-2143.] It remarked: "The parties to the MOU made a deal and took the risk that what they were doing would not be challenged, or, if challenged, the challenge would not be successful. That challenge is what they are now facing, but the MOU, in this court's view, does not need to be vacated or set aside for the restrictions allegedly tied to Area A to be enforced if they have been or are being violated. The private agreement of parties to the MOU does not bind others with an interest or preclude a court from acting." [9 CT 2142-2143.]

The parties stipulated that Citizens could file an amended complaint adding Mr. Harbison as a plaintiff and a nuisance cause of action against the Luglianis. [5 CT 1200-1202.] Thereafter, the plaintiff dismissed the School District. [9 CT 2162-2168; 2169-2170.]

11. The Plaintiffs' Second Amended Complaint to Invalidate the Settlement.

CEPC and Mr. Harbison filed a verified second amended complaint alleging declaratory relief, waste of public funds/ultra vires and nuisance. [5 CT 1024-1044; 1045-1197.] They generally alleged that the action was brought "to set aside a portion of a well-intentioned yet clearly illegal settlement of land disputes" among the City, the Association, the nonparty School District, and the Luglianis. [9 CT 1863-1864.] They also alleged that as a result of the settlement,

the City and the Association "abandoned their historic and clearly defined duties to enforce protective covenants to preserve the character of the CITY, to preserve the CITY's open space and prevent private parties from erecting improvements on public parkland." [9 CT 1864.] They also claimed that the "tangible benefits" each settling party received "were obtained at the substantial expense of the residents of the CITY and in breach of the … covenants." [9 CT 1864.]

The plaintiffs attached a "partial list" of 130 people opposing the settlement. [5 CT 1047-1049.] They alleged they had standing to sue based on Mr. Harbison right to assert a taxpayer's action, the "citizen's suit" doctrine, and Mr. Harbison's status as a beneficiary of the deed restrictions as a member of the Homes Association. [9 CT 1866.]

The plaintiffs alleged that the land which was incorporated as the City was formerly governed by the Homes Association, which subsequently deeded the parkland, including Area A to the new City after residents voted for incorporation, fearing that the parklands would be sold to pay substantial taxes owed to Los Angeles County.[2] [9 CT 1876-1868.]

The plaintiffs based their declaratory relief claim upon the 1920's land use restrictions imposed by the original developer, the "more restrictive land use restrictions" contained in the June 1940 deeds conveying the parkland to the City, and the City's municipal code. [8 CT 1868.]

With regard to the original restrictions imposed by the developer, the plaintiffs alleged that Area A was subject to

[2] By transferring the parkland to the new City, the outstanding taxes were forgiven. [12 CT 2805.]

Declaration Nos. 1 and 25, together with the Association's Articles of Incorporation and Bylaws. [8 CT 1868; 1892-1930.] They further alleged that one of the purposes of the Homes Association was to "perpetuate the restrictions," which were "for the benefit of each owner of land" and which could not be modified without a vote of a majority of the property owners. A breach in any of the restrictions was a nuisance and was grounds for automatic reversion to the Homes Association. Any such breach could be abated by the Homes Association or by any lot owner. [9 CT 1869.]

The plaintiffs also alleged that the 1940s deeds contained "seven key land use restrictions," including (1) the "forever parks" restriction; (2) the "no structures" restriction; (3) the "no sale or conveyance" restriction; (4) the "improve access and views" restriction; (5) the "no modifications" restriction; (6) the "reversion on breach" restriction; and (7) the "running with the land" provision. [8 CT 1871; 1931-1940; 1941-1947.] The City confirmed the restrictions when it approved the deeds in a resolution. [8 CT 1871; 1948-1968; 9 CT 1969-1972.] Ignoring the plenary authority given to the Homes Association under Declaration No. 1, the plaintffs also alleged that there was no "discretion to use the parklands for non-park purposes, to 'swap' parks, to convey the parks as part of the settlement of litigation, to fund budgetary shortfalls for school districts, or to sell the parklands." [8 CT 1871.]

The plaintiffs further alleged the City was required to abate nuisance under its municipal code. [8 CT 1872.]

With regard to the Luglianis, the plaintiffs alleged they erected "illegal improvements on parkland and the CITY rights-of-way," including "landscaping, a baroque wrought-iron gate with stone pillars and lion statutes, a winding stone driveway, dozens of trees (some of which are as high as fifty feet) a gazebo, a now-over-grown athletic

field half the size of a football field, a 21-foot-high retaining wall and other retaining walls." [8 CT 1872.]

The plaintiffs described the School District litigation, and the resulting judgment, culminating with the Memorandum of Understanding, and the conveyance, claiming the School District litigation involved the "identical" land use restrictions, which the City and the Homes Association had previously viewed as mandatory. [8 CT 1872; 9 CT 1873-1876.] They alleged that the only reason the Luglianis made a $1.5 million donation to the School District was for the conveyance of Area A and the City's subsequent approval of the illegal encroachments. [9 CT 1875.] They further alleged that the City's approval of the settlement was "not well-publicized," and that the City Council was planning on creating a new designation called "Open Space, Privately Owned" land use designation. [8 CT 1876.]

Specifically, with regard to their declaratory relief cause of action, the plaintiffs claimed the 2012 deeds violated the 1940 deed restrictions from the Association to the City. They sought a judicial declaration that the 2012 deeds from the City to the Homes Association and from the Homes Association to the Luglianis were "illegal, void, and of no legal effect;" that the conveyance of Area A by the Homes Association triggered reversion of title back to the Homes Association; that the City and the Association had the right and the affirmative duty to enforce the land use restrictions and to remove the illegal improvements from Area A; and that the Homes Association had the right and affirmative duty to enforce its reversionary interest in Area A. [8 CT 1881.]

The plaintiffs also sought a declaration that the City's conveyance was an ultra vires act and that the City should be enjoined from creating a special zoning district. They also requested a permanent injunction enjoining the Luglianis from using Area A and

compelling them to restore the parkland to its natural state. [8 CT 1882.]

Attached to the second amended complaint were twelve exhibits, including various property maps and descriptions, the 1940 and 2012 deeds, the School District judgment, and the Memorandum of Understanding. Only selective portions of Declaration No. 1 were included. Declaration No. 23, which governs Tract 7333, which is *not* a part of Area A, was included. [Compare 8 CT 1891 with 1895-1899.] They also included Amendment 10 to Declaration No. 20, which does govern Area A, but they only included four pages of the lengthy amendment, excluding the provisions declaring Area A was to be classified as a Zone F property. [8 CT 1900-1903.]

12. The Unsuccessful Challenges to the Second Amended Complaint.

The City demurred to the second amended complaint on the grounds that it could not be compelled to enforce private deed restrictions. [7 CT 1569-1592.] The defendants also jointly moved to strike allegations that the City and the Homes Association had mandatory duties, contending these allegations violated the court order dismissing the writ of mandate. [7 CT 1552-1568; 6 CT 1231-1476; 7 CT 1477-1549.]

The plaintiffs opposed the demurrer [7 CT 1617-1628; 1639-1722; 8 CT 1723-1730] and the joint motion to strike [7 CT 1629-1638], and the City filed a reply brief. [8 CT 1731-1746.] Joint replies were filed in support of the motion to strike. [8 CT 1747-1760.] The trial court overruled the City's demurrer and denied the motion to strike. It reasoned that while the writ of mandate was properly dismissed, that ruling did not deprive the court from reaching the merits. [8 CT 1761-1771.]

The Homes Association answered the complaint generally denying the allegations and raising affirmative defenses, including lack of standing, waiver, estoppel, merger of deeds, res judicata/collateral estoppel, and the failure to join a necessary party/indispensable party. [7 CT 1607-1616.]

In its answer, the City raised affirmative defenses, including discretionary action supported by substantial evidence, mootness, ripeness, estoppel, public policy, standing, compliance with laws, merger of deeds, res judicata/collateral estoppel, and the failure to name a necessary party. [8 CT 1772-1783.]

The Luglianis also answered the second amended complaint, generally denying the allegations and raising affirmative defenses such as laches, lack of standing, failure to exhaust administrative remedies waiver, estoppel, and that the action was not brought in the public interest. [7 CT 1593-1606.]

13. The Plaintiffs' Motion for Summary Judgment and the Supporting Evidence.

Shortly after the case was at issue, the plaintiffs filed a motion for summary judgment/summary adjudication. [8 CT 1795-1997.] They contended they were entitled to judgment as a matter of law on their declaratory relief cause of action on the grounds that the 2012 deeds violated each of the 1940 deed restrictions, including the forever park provision [Appendix of the Palos Verdes Homes Association ("HAA") HAA 14-17.]; the "no structures" provision [HAA 16-17]; the restraint on alienation [HAA 18-19]; and the "no landscape" restriction. [HAA 20.]

In making these arguments, the plaintiffs merely assumed, without demonstrating why, the Homes Association was bound by the restrictions *it had placed* in the 1940 deed to the City, and failed to

support the claim that the Homes Association had no right to sell Area A under Declaration No. 1.

With regard to its waste of public funds/ultra vires cause of action against the City, the plaintiffs contended that the City's acceptance of the deeds created a public trust, and that the City was forever required to hold the land for public purposes. The City was also claimed to be collaterally estopped from taking a different position based on *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d 545. [HAA 21-23.]

With regard to the nuisance claim, the plaintiffs conceded that if summary adjudication was granted as to the other causes of action, the third cause of action would be moot. [HAA 23.] They offered no argument in connection with this cause of action.

In addition, the plaintiffs claimed there were no triable issues as to the standing and indispensable party's affirmative defenses. Mr. Harbison's standing as a member of the Homes Association and his membership in Citizens were sufficient to create standing for the unincorporated plaintiff. The plaintiffs also contended the failure to join the School District in the action was inconsequential, since the School District was only a party to the settlement, not the conveyances, and no one objected to the dismissal of the School District or brought a cross-complaint to add it as a party when the second amended complaint was filed. [HAA 25-27.] The plaintiffs claimed the trial court agreed with this determination when it overruled the City's demurrer. [HAA 26-27; 9 CT 2138.] A separate statement of undisputed material facts was submitted in support of the motion, along with a request to judicially notice City municipal code sections concerning nuisance and opening space zoning. [8 CT 1798-1847; 1784-1794.] The City's municipal code provides that "[t]he purpose of the open space (OS) zone is to preserve, promote and enhance valuable natural and open space resources in the city." The

open space zone includes "all publicly owned land including all city-owned land, including parklands . . . and all land owned or which could be owned by the Palos Verdes Homes Association as a result of the exercise of any reversionary rights." [8 CT 1790.]

Mr. Harbison and plaintiff's counsel submitted thirty exhibits with their declarations. [8 CT 1848-1850; 1851-1859; 1860-1862; 1863-1968; 9 CT 1969-2170.] These exhibits included the following: maps, deeds, governing documents of the Homes Association, and court documents. [8 CT 1863-1968; 9 CT 1969-2170.]

In his declaration, Mr. Harbison made various factual assertions concerning the Homes Association and the litigation. He claimed there was some significance to the fact that there have never been any signs posted on Area A restricting access to City resident or Homes Associations members. [8 CT 1853.] He also assumed that because the Homes Association deeded land to the City to avoid tax liabilities, it no longer had the authority to hold parks. [8 CT 1854.]

Mr. Harbison also assumed without demonstrating that the Homes Association purported to bind itself to the 1940 deed restrictions. He argued from silence that because the deeds did not address the question of swapping parkland or conveying land to resolve litigation or to fund budgetary shortfalls, such transfers were prohibited. [8 CT 1855-1856.] He made no attempt to address the Homes Association's right to sell parkland as set forth in Declaration No. 1, or that fact that all residents subject to a deed or lease agreed to be bound by the Homes Association's right to sell parkland.

Mr. Harbison also gave his perspective of the historical encroachments, the School District litigation, and the resulting settlement. [8 CT 1856-1858.] He claimed the City failed to notify residents of the City Council's meeting concerning the pending sale of Area A. [8 CT 1857-1858.]

14. The Opposition to the Summary Judgment Motion and the Supporting Evidence.

The joint opposition to the plaintiffs' motion by the Homes Association and the Luglianis raised seven main contentions. [13 CT 3057-3090.]

First, under the Davis-Stirling Act, Mr. Harbison and every other member of the Homes Association was bound by its settlement embodied in the memorandum of understanding of the School District's ongoing and costly litigation. This included every member of CEPC who was also a member of the Homes Association. Those who were not Homes Association members lacked standing to challenge the agreement. [13 CT 3071-3075.] They also demonstrated that as a corporate entity, the Homes Association's actions to reduce acrimony among the City's residents in the aftermath of the School District litigation, and to forestall the continued depletion of their reserves, was in the best interests of all of the Homes Association members. [13 CT 3077.]

Second, the defendants showed how the 1940 deed restrictions were extinguished through the doctrine of merger when the City reconveyed Area A to the Homes Association, which held a reversionary right and was formed to hold the parkland. [13 CT 3077.]

Third, the Homes Association and the Luglianis demonstrated that even if the 1940s deed restrictions were still applicable, they could not be interpreted in a vacuum, without regard to all of the governing documents, or the parties' intentions. [13 CT 3077-3080.]

Fourth, the defendants explained how the language of the deeds showed that reconveyance of the property to the Homes Association was always contemplated, and the Homes Association always had the authority to sell Area A under Declaration No. 1. [13 CT 3080-3087.]

Fifth, the settlement was not barred by the doctrine of collateral estoppel simply because the City was involved in unrelated litigation over deed restrictions in the 1949 *Roberts* case. [13 CT 3087.]

Sixth, the defendants explained why relief could not be granted without joining the School District as a party to the action. [13 CT 3087-3089.]

Seventh, the defendants highlighted the fact that the plaintiffs did not seek judgment as to their third cause of action for nuisance. [13 CT 3090.]

The motion was supported by the declaration of Sidney Croft, the Homes Association's longstanding general counsel, who had participated directly in the drafting of the Memorandum of Understanding. [12 CT 2851-2863.]

According to Mr. Croft, the plaintiffs were attacking the Homes Association's business judgment by ignoring the governing documents and focusing solely on the 1940s deeds. [12 CT 2853.] Mr. Croft traced the history of all of the relevant documents, explained the broad powers conferred upon the Homes Association, and described from his own personal knowledge how the multi-party settlement resolved multiple problems facing the Homes Association. [12 CT 2852-2861.]

Mr. Croft detailed the Homes Association's exercise of business judgment in entering into the settlement. He explained that the "regular and consistent practice of the Association, when tasked with interpretation of deed language and its meaning," was to review the relevant Declarations and deeds to ascertain before determining what would be in the best interests of the Homes Association members. [12 CT 2858.] This was in accordance with Section 9 of Article VI of Declaration I, which requires that all restrictions "shall be construed together." [12 CT 2858.] According to Mr. Croft, the

sale of Area A was in essence a land exchange that preserved more useable parkland for the members:

> "The terms of the MOU resolved many issues for the City and the Association. The Association's express decision to enter into the MOU was an exercise of its business judgment to settle the litigation with School District, which at the time was on appeal. The significant additional benefit of the MOU was that the Association and the City were able to preserve more usable land for park space (areas known as Lots C and D under the MOU) in exchange for allowing the Luglianis to use the small portion of adjacent hillside property for recreational use (Area A). In addition, and also of substantial importance, the School District affirmed the application of all protective and use restrictions to all properties conveyed in 1938." [12 CT 2859.]

Mr. Croft also explained that the transfer of Area A would secure the status of additional parkland parcels that were hanging in the balance. [12 CT 2859.] He observed:

> "The Association spent nearly two years in expensive litigation, incurred significant legal fees and costs of over $450,000, representing approximately half of the Association's reserves at the time. PVHA faced a long road of appeal expenses in the foreseeable future, as well as continued controversy that was dividing the Palos Verdes community. The parties, the District, Association, City, and the real parties in this case, the Luglianis, decided to enter into a complex settlement agreement . . . to resolve many issues that posed significant challenges to the Palos Verdes Community, including the District litigation." [12 CT 2860.]

Mr. Croft was personally aware of the greater value Lots C and D had as opposed to Area A:

> "Area A is much less useful as open space than Lots C and D. I know this about Area A as I have visited the property and walked Area A with [the Association's] counsel of record in this case. Area A is largely steep and inaccessible to the public. Contrasted with Lots C and D, which are relatively flat and much more usable as open space. My office is in Palos Verdes Estates, and I regularly drive by Lots C and D, and I have witnessed school age children regularly crossing the Lots which are next to a school. In contrast, Area A is inaccessible to the public, due to the steep grade and the fact that it is located behind the Luglianis' residence. *No such constant use of the public is made of the steep area behind the Luglianis' home*." [12 CT 2861 [Emphasis added].]

Mr. Croft shed important light on why the Homes Association believed it was not bound by the 1940 deed restrictions contained in the City's deed:

> "As part of the Association's review, evaluation, balancing of interests, and business judgment, the Association interpreted the relevant documents as a whole to provide that the restrictions in the 1931 Deed and those placed upon the City in the 1940s Deeds by the Association no longer applied to Area A as a result of the conveyance of Area A to the Association, which either imposed the restrictions itself in the first instance or was the successor to the entity that did. The Association's interpretation was that the restriction in these Deeds were not intended to apply to the Association should it

reacquire Area A, as the Association required the discretion—subject to the various Declarations discussed above—to respond to changing circumstances just as it did when it conveyed Area A to the City because of financial distress in 1940. This interpretation is distinguishable from the position taken by the Association in the School District litigation, which was that the restrictions at issue continued to apply to Lots C and D so long as they were owned by the District or by any private party (i.e., other than the Association) to whom the District may have sought to transfer Lots C and D. The Association further interpreted the relevant documents to provide that the remaining restrictions applicable to Area A (as to the Association and the Luglianis) were the Class F restrictions (as set forth in Declaration Nos. 1 and 25) and that the uses set forth in the 2012 Grant Deed from the Association to the Luglianis were consistent with the Class F applicable restrictions. Moreover, all the restrictions taken together did not preclude the Luglianis, as property owners, from making recreational use of adjacent mostly-inaccessible hill property subject to a restrictive open space easement. The lack of any express prohibition, taken together with the fact that the Association was exchanging Lots C and D for Area A, and School District was agreeing to preserve 11 other School District lots from development, weighed heavily in favor of the Association's approval of the MOU. The Association would not have proceeded with the transactions contemplated by the MOU without its determination that these transactions were consistent with the applicable restrictions." [12 CT 2862.]

Mr. Croft explained that each of these reasons led the Homes Association to formally approve the settlement. [12 CT 2862-2863.] Contrary to the plaintiffs' claim that residents were not given notice of the Homes Association Board's and City's meetings on the issue, Mr. Croft confirmed that notice of the Board meeting was provided as allowed for under the CCR's and provided previously, and he attended and spoke at the City meeting. Indeed, he personally heard residents express their views for and against the multi-party settlement. [12 CT 2863.]

Mr. Croft also attached to his declaration complete copies of the governing documents that were not submitted with the plaintiff's motion. [12 CT 2864-2952; 13 CT 2953-2971.]

The opposition was also supported by the declaration of Ms. Lore Hilburg, a title insurance expert whom has reviewed hundreds of historic chains of title. [13 CT 3091-3104.] Interpreting the 1940 deeds in light of the initial governing documents, she concluded that on the one hand, the Homes Association rightfully opposed the School District's challenge to the restrictions because they would adversely affect the general plan for the area. [13 CT 3097.] On the other hand, she determined that the Homes Association was not fettered by the restrictions it imposed on the City in the 1940s deeds, and that the 2012 deeds sufficiently protected Area A. Ms. Hilburg observed:

> "Once the Association regained ownership of Area A, it had the right to interpret the restrictions consistent with the preservation of the overall general plan or if doing so would advance the interest and overall objectives as set forth in all the conveyancing documents and in consideration of the conditions and circumstances it then faced. Those requirements were met by the easements, regulations, and zoning and building restrictions listed in the deed from the City to the Association . . . and from

> the Association to the owners of 900 Via Panorama. . . . They protected Area A in accordance with the parameters set forth in Declaration Nos. 1 and 25. Whether or not the Association would have expected the restrictions it placed upon the City under the 1940 Deeds to apply to it should it ever reacquire the property in view of the circumstances under which it transferred the property to the City in 1940, the Association would have rightly expected to have the ability, consistent with Declaration Nos. 1 and 25, to interpret the restrictions to serve the community's best interests and undertake appropriate land exchanges and to have that interpretation be conclusive on all interested parties, including plaintiffs." [13 CT 3097-3098.]

The opposition was also supported by the declaration of Dan Bolton, a licensed civil engineer who the Luglianis engaged to survey 900 Via Panorama and Area A. [13 CT 2972-2977.] Mr. Bolton prepared a topographical map of Area A and concluded that Area 1, containing "relatively steep slopes," would be the most difficult to develop. [13 CT 2973.] Area 2 contained moderate, varying slopes, and Area 3, the smallest area, was predominantly a flat pad. [13 CT 2973; 2977.]

Evidence was submitted with counsel's declaration showing that some members of CEPC were not actually members of the Homes Association. [13 CT 2978-3056.]

A compendium of non-California authorities was also filed in support of the opposition, along with joint evidentiary objections to Mr. Harbison's declaration, which the plaintiffs opposed. [13 CT 3105-3153; 3156-3165; 3193-3200.]

The Homes Association and the Luglianis also filed a motion for judgment on the pleadings based on the arguments made in the summary judgment/summary adjudication motion. The plaintiffs opposed the motion [11 CT 2489-2491; 13 CT 3166-3178], and the Homes Association and the Luglianis submitted a reply to the opposition. [15 CT 3522-3526.]

15. The Plaintiffs' Inappropriate Reply in Support of the Motion.

The plaintiffs filed a reply in support of their motion. [13 CT 3179-3192.] Mr. Harbison submitted a second declaration in support of the motion, styled as a "reply declaration," adding exhibits and facts that were never submitted with the motion, along with a "reply separate statement." [14 CT 3201-3204; 3205-3338; 3380-3444; 15 CT 3445-3503.] The City, the Homes Association, and the Luglianis filed joint evidentiary objections and moved to strike this declaration. [15 CT 3527-3539.]

The plaintiffs also objected to the entirety of Mr. Croft's and Ms. Hilburg's declarations on the grounds they contained improper expert opinion. [14 CT 3339-3379.]

Once again, the plaintiffs ignored the plenary authority given to the Homes Association to sell parkland. [13 CT 3179-3192.] The reply also failed to address let alone show why the Homes Association lacked authority to bind all of its members when it settled the School District litigation, even though it had the power to do so under the Davis-Stirling Act and under the governing documents. Instead, the plaintiffs claimed the defendants were viewing the City's quitclaim deed in isolation, and trying to create a triable issue as to whether Area A was parkland or not. [13 CT 3182-3187.] They claimed the business judgment rule did not apply or was waived, and that the Homes Association's power to interpret deeds was limited by

common sense and the 1940 deed language - all issues of disputed fact. [13 CT 3187-3190.] They claimed no merger resulted because the parties never intended one and unity of interest was lacking. [13 CT 3190-3191.]

16. The City's Cross-Motion for Summary Judgment.

The City filed a cross-motion for summary judgment/summary adjudication. [10 CT 2338-2363.] It contended that it had authority to transfer Area A to the Homes Association and upon doing so, there was no duty to enforce private deed restrictions. [10 CT 2349-2358.] Because it had legal authority to convey property and enact zoning laws, its actions were not ultra vires. [10 CT 2358-2361.]

The City submitted a separate statement of undisputed material facts along with and the City Clerk's declaration authenticating the 1940 deeds, the City resolution, and the 2012 quitclaim deed. [10 CT 2364-2378.] She explained the actions of the City's Planning Commission, the City Council, and the City Attorney following the City's execution of the Memorandum of Understanding. [10 CT 2364-2378; 2375-2376; 2379-2431.]

The City's motion was also supported by the declaration of the City's Planning and Building Director explaining that the City's Parklands Committee was an advisory body without the ability to enforce deed restrictions, and that Homes Association, which operated separately from the City, was the only body with the power to enforce these restrictions. [12 CT 2846-2850.] The City also asked the court to judicially notice various sections of its municipal code pertaining to nuisance, after-the-fact permits, penalties, administration, enforcement, and the open space zone. [10 CT 2432-2460; 11 CT 2461-2488; 2494-2519.]

The Homes Association and the Luglianis joined in the City's cross-motion. [11 CT 2492-2493; 13 CT 3154-3155; 15 CT 3504.] In

opposition, the plaintiffs have raised the same arguments contained in their motion adding that the City could not transfer Area A to the Homes Association because it was no longer an appropriate body to hold parkland. [12 CT 2829-2845.] The plaintiffs submitted similar evidence in opposition to the cross-motion, adding portions of a City staff report outlining the City's reasons for approving the multi-party agreement. [11 CT 2520-2522; 2523-2531; 2532-2533; 2534-2706; 12 CT 2707-2828.] That report echoed reasons for embracing the multi-party settlement similar to those raised by the Homes Association. [12 CT 2803-2813.]

The City filed a reply in support of its cross-motion. [15 CT 3508-3521.]

17. The Court's Order Granting Summary Judgment and Denying the City's Cross-Motion.

Following a hearing on the motion and cross-motion, the trial court granted the plaintiffs' summary judgment motion in a thirty page opinion and denied the City's cross-summary judgment motion. [5/29/15 RT; 15 CT 3547-3610.]

Although the plaintiffs never pleaded that the Homes Association engaged in any ultra vires acts, the trial court concluded that both the City and the Homes Association had done so. [15 CT 3548.] The court enjoined the City from issuing any permit, voided the Homes Association's deed to the Luglianis, and ordered the Luglianis to transfer title back to the Association. The Luglianis were enjoined from any future actions that would violate the deed restrictions. The Homes Association was enjoined from ever transferring Area A to a private party, and it was ordered to remove all the encroachments at its own expense. The City and the Homes Association were permanently enjoined from entering into any future

contracts or taking any actions to eliminate deed restrictions as to any property subject to the governing documents. [15 CT 3548-3550.]

The court claimed "the documents establishing the land grant" gave "residents" the right to enforce parkland deed restrictions, not just lot owners. [15 CT 3548.]

The court provided a lengthy "discussion and rationale" for its ruling. [15 CT 3551-3576.] In doing so, it relied upon very selective portions of documents in the chain of title, and one document that did not impact Area A. For instance, the court referenced Declaration No. 23, which governs Tract 7333. Area A does not lie within Tract 7333. [Compare 15 CT 3555-3556 with 15 CT 3678 and 16 CT 3693.] It referenced a single page of Amendment 10 to Declaration No. 20, which does govern Tract 8652 [where Area A lies], but the rest of the amendment designating Area A as a Zone F property, was ignored. [Compare 15 CT 3556 with 12 CT 2897.] Most importantly, as to Declaration No. 1, the key governing document, the trial court focused solely on provisions setting forth how restrictions are amended, ignoring the numerous provisions granting the Homes Association's power to sell parkland, and the provision requiring every resident—not just lot owners—to be bound by the Homes Association's power of sale. [15 CT 3556-3557.]

The trial court assumed that the man who founded Palos Verdes Estates never intended the Homes Association to have the ability to sell parkland, even though Declaration No. 1 and the Articles of Incorporation expressly provided the Homes Association with that very right. [15 CT 3559-3560.] The court also presumed every lot owner had the unfettered right to abate a nuisance or enforce deed restriction, regardless of the Davis-Stirling Act. [15 CT 3560; 5/29/16 RT 11.]

Without explaining how it reached the conclusion that the Homes Association violated deed restrictions on Area A, and without identifying which restrictions were violated, the trial court concluded that the actions of the Homes Association were void under the governing documents because it did not submit the sale of Area A to a membership vote. [15 CT 3561.] The court further concluded that transferring Area A with an open space easement to the Luglianis while permitting them to construct accessory structures was an "attempt to eliminate the parkland restrictions" and was an ultra vires act on the part of the Homes Association, even though the deed specifically stated that open space restrictions remained in full force and effect. [15 CT 3561-3562.]

The court, however, rejected the plaintiffs' argument that the City's conveyance to the Homes Association was an ultra vires act because the Homes Association was no longer a body duly constituted to hold or maintain parkland. Although the court noted that it could order return the property to the City, it decided not to invalidate the City's deed to the Association, finding that to pass title back to the City would be a useless act, since the City never enforced the restrictions, and the plaintiffs would have no choice but to sue for enforcement. [15 CT 3564-3565; 3567.]

In essence, the court fashioned a remedy the plaintiffs never sought. It required the Luglianis to quitclaim Area A back to the Homes Association and then it deemed Area A to have all of the restrictions on it when the Homes Association first received the land, ignoring the Bank of America's quitclaim deed in 1940, the Association's deed to the City in 1940, and the City's 2012 reconveyance, as if those conveyances never occurred. It required the Association to remove all of the encroachments, including trees, contrary to the express language contained in the governing documents. There was no discussion as to how removal of the

retaining walls would affect the stability of the Luglianis' slope, but the court invited the parties to consider whether the retaining walls were of benefit to the public, even though there is no such provision mentioned in the deed. [15 CT 3565.][3]

The court specifically rejected the argument that Homes Association members were bound by the multi-party settlement, believing that every member had an unfettered right to enforce the restrictions, albeit the way they saw it. There was no discussion of the Davis-Stirling Act.[4] [15 CT 3567-3568.] The court likewise rejected the argument that the Homes Association's settlement was protected by the business judgment rule, finding there was no "business judgment" to apply. [15 CT 3573.] There was no discussion of the analysis provided by Mr. Croft or Ms. Hilburg.

The court understood not every member of CEPC had standing, but overlooked the issue because Mr. Harbison did have standing: "[I]t may be that the gap between pleading and fact cannot be overlooked in this manner, but 'it only takes one.'" [15 CT 3547, 3548.]

The court did not believe merger of title occurred when the City reconveyed Area A to the Homes Association because these were deed restrictions, not easements. It further reasoned that the original grantor of City land never intended for the Association to be able to rely upon the merger doctrine in order to remove restrictions. [15 CT 3569-3572; 5/29/15 RT 14.]

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[3] The court acknowledged that it was unclear whether the retaining wall was entirely on Area A, and sought to obtain further documentation. The record contains no evidence that such documentation was ever provided. [15 CT 3549.]

[4] The record indicates the trial court may not have been familiar with the Davis-Stirling Act. [5/29/15 RT 35.]

Even though the governing documents give the Homes Association the exclusive right to interpret those documents, the court concluded that the Homes Association was judicially estopped from taking a position that was at variance with the position it had taken in the School District litigation, even though in that litigation, the School District was flagrantly trying to declare those restrictions to be null and void. The court ruled that every lot owner had the unfettered right to act on the deed restrictions at any time. [15 CT 3572; 3580-3610.]

The court also concluded that even though the School District received a $1.5 million donation, restricted eleven of its properties, and agreed to keep its football field unlighted, it was not an indispensable party because the court was enjoining the performance of promised actions of other parties. [15 CT 3573; 5/29/15 RT 34.]

At the hearing, when the court was informed that the decision would undo the multi-party-settlement, the court stated "[I] don't care," because the parties to the settlement would have to "fight it out now amongst [themselves]." [5/29/15 RT 34.]

In granting summary judgment in favor of the plaintiffs, the court also rejected the Homes Association's other arguments, including the sanctity of the 2012 deeds and the zoning for Area A. When the court was made aware of the fact that the plaintiffs' motion was solely based upon the 1940s deeds to the exclusion of all other documents in the chain of title, it proceeded to grant them relief anyway: "Defendants argue that the plaintiff relies only on the transfer documents of 1940 from the Association to the City. If it does, it is in error. All of the documents relating to this development, some of which neither side has decided to present to this court, are material." [15 CT 3574.]

Absent was any discussion of the equities of the situation, the indispensable party doctrine, or a concern for the financial

ramifications to the Homes Association of undoing performance under the settlement agreement. [15 CT 3566.] On balance, the court ignored the fact that the encroachments on Area A had been around for some forty years, and also ignored the legal effect of the 2012 deeds, deeming every lot owner to be a third party beneficiary, even though that concept was expressly disclaimed in the 2012 deed from the Homes Association.

The trial court tentatively struck the declarations of Mr. Croft and Ms. Hilburg as inadmissible expert opinions. [5/29/15 RT 36-37.]

The City, the Homes Association, and the Luglianis filed joint objections to the proposed judgment. [15 CT 3611-3646.]

18. The Final Judgment, Which Was in Excess of the Court's Jurisdiction.

In its judgment of September 21, 2015, the trial court cancelled the City's quitclaim deed to the Homes Association and voided the Homes Association's grant deed of Area A to the Luglianis as an "ultra vires" act. [15 CT 3647-3656.] The court ordered the City to execute a new deed to the Homes Association, "deleting" paragraphs five and six, which authorized the Luglianis to seek after-the-fact permits and a zone change, and prohibited the construction of the previously allowed accessory structures on Area A. It also ordered the Luglianis to execute a quitclaim deed conveying title back to the Homes Association. The plaintiffs were ordered to record the judgment so it would appear in the chain of title. [15 CT 3648.]

The court stated that Declaration No. 1, Declaration No. 23, Amendment 10 to Declaration No. 20, the Articles of Incorporation, and the Bylaws of the Homes Association (together referred to as the "Establishment Documents"), and the 1940 deeds from the Homes Association were enforceable as to Area A. [15 CT 3649-3650.] It declared that the Association and the City had "the right and the

affirmative duty to enforce the Establishment Documents and the 1940 Deed Restrictions."

Within ninety days of entry of the judgment, the Association was required at its own expense, and contrary to the governing documents, to return the sports field to its original hillside slope; to remove all landscaping and structures on the property that violate the Establishment Documents, including the row of over forty foot trees if privately placed on the property; to remove any other trees or bushes planted privately with landscaping to be restored; to remove the pillars, statues and wrought iron gates erected at the entrance of the driveway of the property; and to remove the driveway unless the Court was satisfied that it was a fire road. [15 CT 3652-3653; 5/29/15 RT 13.] The City was ordered to issue permits for the required work, and the Homes Association was ordered to provide photographic evidence of the removal and restoration to all parties. [15 CT 3653.]

The judgment permitted view-enhancing landscape, and did not address the Homes Association's right to recover the cost of encroachment removal. [15 CT 3654.] The court also enjoined the Luglianis from placing structures on Area A or altering the landscape. [15 CT 3654.]

The court enjoined the Homes Association from conveying Area A other than to an entity constituted to hold parkland or from entering into any contract permitting private parties the right to use Area A in violation of the establishment documents or the 1940s deed restrictions. [15 CT 3654.]

The court's judgment was not limited to Area A, but included all "similarly situated" City property that was subject to the Establishment Documents or the 1940 deed restrictions. [15 CT 3654.] The City and the Homes Association were enjoined from entering into any contracts or taking any actions to eliminate or

modify deed restrictions that were not in compliance with the amendment procedures set forth in Declaration No. 1. The court required all deeds to contain a court-drafted disclaimer that the property would be subject to enforceable land use restrictions dating back to 1923. The disclaimer needed to reference the School District litigation and the present litigation, and state: "The ownership and use of this conveyed property is subject to those land use restrictions as enforced in the judgments entered in those two cases." [15 CT 3655.]

The court also enjoined the City from creating an open space, and a privately owned zoning district, from taking any other action that nullifies the Establishment Documents or 1940 deed restrictions, or from removing parkland restrictions from Area A, absent compliance with amendment procedures. [15 CT 36546.]

The court attached various documents to the judgment, including the legal description for Area A and a map of the property [15 CT 3658-3662]; the 2012 grant deed from the Homes Association to the Luglianis [15 CT 3665-3683]; the City's 2012 quitclaim deed to the Association [15 CT 3686-3688]; pages 13 through 24 of Declaration No. 1 [15 CT 3690-16 CT 3691-3692; 3702-3713]; pages 4 through 8 of Declaration No. 23 [16 CT 3693-3697]; pages 9 through 12 of Amendment No. 10 to Declaration No. 20 [16 CT 3698-3701]; the Articles of Incorporation and Bylaws for the Homes Association [16 CT 3714-3718; 3719-3728; the 1940s deeds to the City; and the City's resolution. [16 CT 3730-3739; 3741-3747; 3749-3772.]

19. The Notice of Entry of Judgment and the Award of Attorneys' Fees.

The notice of entry of judgment was filed on September 28, 2015. [16 CT 3773-3911.]. The plaintiffs later filed a motion to be determined the prevailing party and sought an order of attorneys' fees. [Appendix of the City of Palos Verdes Estates ("AA"), pages 1-95.]

The defendants filed joint opposition to the fee motion. [AA 104-126.] They also submitted objections to the declaration of plaintiff John Harbison. [AA 127-131.] The plaintiffs replied. [AA 132-157.]

The trial court granted the plaintiffs' fee motion in full, including a multiplier of 2.5. [AA 171-176.] The total amount awarded was $235,716.88. From this award, all of the defendants appealed. [AA 177-216.]

20. The Notices of Appeal.

The Homes Association filed a notice of appeal from the whole judgment and from all intermediate orders and rulings embraced within it, including the order denying the motion for judgment on the pleadings on November 13, 2015. [16 CT 3935-3939.] The City filed a notice of appeal on November 13, 2015 from the whole judgment and from all intermediate actions and rulings embraced within it, including the order denying the City's cross-motion for summary judgment. [16 CT 3940-3943.] The Luglianis filed a notice of appeal from the judgment after an order granting summary judgment on October 16, 2015. [16 CT 3913-3917.]

21. The Issues on Appeal.

The issues on appeal may be framed as follows:

1. Is reversal of a summary judgment in favor of plaintiffs required, in a case involving restrictive covenants, where the trial court granted relief beyond its jurisdiction, where it proceeded without an indispensable party, where the plaintiffs lacked standing, where the court erroneously struck competent evidence, where the court refused to consider the fact that an open space easement is more equitable than antiquated restrictive covenants, where excessive attorney's fees were awarded without a public benefit, where the doctrine of judicial estoppel was improperly invoked, and where there are triable issues of fact relating to merger of interests, the judicial deference doctrine, the alleged violation of restrictive covenants, and the business judgment rule?

2. Where a homeowners association has authority to defend and settle litigation on behalf of its members, but does so in its own name, are there triable issues of fact as to whether the association's members are bound by the settlement negotiated on their behalf?

3. Does an unincorporated association of residents of a city, which includes persons who do not own property in the city, lack standing to enforce deed restrictions?

4. Is the decision of the Palos Verdes Homes Association to settle a lawsuit entitled to the protection of the judicial deference doctrine and the business judgment rule?

5. Is it prejudicial error for a judge considering a summary judgment motion to strike a declaration concerning evidence of a party's customs and practices, where such evidence is relevant to the interpretation of documents at issue and to the conduct of the party under the business judgment rule?

6. Did the trial court err in finding that the Palos Verdes Homes Association intended to bind itself to restrictive covenants contained in its own prior deeds of parkland after it reacquired Area A and then sold it?

7. Did the plaintiffs fail to prove that the Palos Verdes Homes Association violated restrictive covenants when it sold Area A to the Luglianis?

8. Was it reversible error for the court to invoke the doctrine of judicial estoppel, where the doctrine was never raised by the plaintiffs in the trial court, and where the party held estopped never changed its position with respect to factual issues?

9. Did the trial court exceed its jurisdiction in granting injunctive relief against the Palos Verdes Homes Association in violation of the association's governing documents and in excess of the scope of the pleadings?

10. Is the judgment void because of the absence of the Palos Verdes School District, which was an indispensable party?

11. Under the doctrine of merger, were all of the restrictive covenants at issue now that may have once have existed on Area A extinguished, when the Palos Verdes Homes Association reacquired the property?

12. Does the perpetual conservation easement imposed on Area A satisfy the legitimate purposes of the previous restrictive covenants without imposing inequitable and unnecessary burdens?

13. Is the award of attorneys' fees under *Code of Civil Procedure* section 1021.5 excessive and improper, because the judgment confers no public benefit, and because the multiplier used by the court is too high?

All of these questions should be answered "yes." The summary judgment must be reversed, if any one of them is answered affirmatively.

LEGAL ARGUMENT

I.

A Summary Judgment in Favor of a Plaintiff Is Subject to De Novo Review, and Must Be Reversed, Where There Are Triable Issues of Fact as to the Plaintiff's Claim, or as to Affirmative Defenses Such as Waiver, Estoppel, Lack of Standing, Merger of Interests, Failure to Join Indispensable Parties, Collateral Estoppel, and Res Judicata.

A trial court's summary judgment rulings are subject to de novo review. *Dore v. Arnold Worldwide, Inc*. (2006) 39 Cal.4th 384, 388-389. Under this standard of review, the appellate court decides the issues anew, and does not defer to the trial court's analysis. *Ghirardo v. Antoniolo* (1994) 8 Cal.4th 791, 799.

When ruling on the motion for summary judgment, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom, and must view such evidence and such inferences, in the light most favorable to the opposing party." *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.

Although summary judgment provides courts with a mechanism to cut through the parties' pleadings to determine whether trial is necessary to resolve their dispute, the Supreme Court has warned it is a "drastic" procedure and "should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact." *Eagle Oil & Ref. Co. v. Prentice* (1942) 19 Cal.2d 553, 556. Thus, "declarations of the moving party are strictly construed, those of the opposing party are liberally construed, and all doubts as to whether a summary judgment should be granted must be resolved in favor of the opposing party. The court focuses on finding issues of fact; it does not resolve them. The court seeks to find contradictions in the evidence or inferences reasonably deducible

from the evidence that raise a triable issue of material fact." *Trop v. Sony Pictures Entertainment Inc.* (2005) 129 Cal.App.4th 1133, 1143-44.

Only when inferences are indisputable may a court decide issues as a matter of law; factual issues must be resolved by trial if the evidence in is conflict. *Schacter v. Citigroup, Inc.* (2008) 159 Cal.App.4th 10, 17. Due to the drastic nature of summary judgment, any doubt about the propriety of granting the motion must be resolved in favor of the party opposing the motion. *Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 355.

A triable issue of material fact arises if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion. *Aguilar*, 25 Cal 4th at 850.

Evidentiary rulings, such as the exclusion of the opposing party's supporting declarations, are reviewed for abuse of discretion. *Biles v. Exxon Mobil Corp.* (2004) 125 Cal.App.4th 1315, 1322; See *Juarez v. Boy Scouts of America, Inc*. (2000) 81 Cal.App.4th 377, 388-389.

A Court of Appeal independently reviews a summary judgment motion under the same three-pronged test engaged in by the trial court. That procedure is set forth in *AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065. First, in ruling on a motion for summary judgment, the factual issues are fixed by reference solely to the pleadings. 179 Cal.App.3d at 1064. Next, the court determines whether the moving party's showing "has established facts which negate the opponent's claim and justify a judgment in [the] movant's favor." 179 Cal.App.3d at 1064. If the motion shows that a judgment would be justified, the third step "is to determine whether the opposition demonstrates the existence of a triable, material factual issue." 179 Cal.App.3d at 1065.

Based on the undisputed evidence contained in the record, this court should find triable issues of fact that warrant reversal of the judgment. In addition, there were serious errors of the law, the correction of which requires reversal of the summary judgment.

II.

Where a Homeowners Association Has Authority to Defend and Settle Litigation on Behalf of Its Members in Its Own Name, Triable Issues of Material Fact Exist as to Whether the Association's Members Are Bound by the Settlement Negotiated on Their Behalf.

Since its formation in 1923, the Palos Verdes Homes Association possessed broad powers to act on behalf of its members. In 2012, it exercised that authority to settle litigation with the School District after the School District decided to appeal the court judgment upholding deed restrictions that benefitted the entire community. The settlement was reached on behalf of every member of the Homes Association and was therefore binding upon them. At a minimum, there are triable issues of fact as to whether the plaintiffs should be able to do an "end run" around a binding settlement in a separate action.

The Homes Association had discretion under the governing documents to settle the School District litigation rather than defend an appeal that would further deplete its reserves. Since there was no extrinsic evidence interpreting the governing documents, the issue should be reviewed de novo, applying ordinary contract principles. See *ASP Properties Group v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266-1267.

The interpretation of a contract "must be fair and reasonable, not leading to absurd conclusions. [Citation.]" *Transamerica Ins. Co. v. Sayble* (1987) 193 Cal.App.3d 1562, 1566. "The court must avoid

an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable. [Citation.]" *Strong v. Theis* (1986) 187 Cal.App.3d 913, 920–921. "They will not strain to create an ambiguity in a contract where none exists." *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18–19.

Articles II and VI of the original declaration empowered the Homes Association to both defend and settle the School District litigation on behalf of its members. Article II, section 4(n) of Declaration No. 1 authorized the Homes Association to enforce the restrictions "at any time created for the benefit of lots or parcels over which the Homes Association has jurisdiction and to which said lots at any time may be subject, and to pay all expenses incidental thereto. . . ." [12 CT 2889.]

Section 4(t) of Article II authorized the Homes Association "to do any and all lawful things which may be advisable, proper, authorized, and/or permitted to be done by Palos Verdes Homes Association under or by virtue of this declaration or of any restrictions, covenants and/or conditions or laws at any time affecting said property or any portion thereof (including areas now or hereafter dedicated to public use) and to do and perform any and all acts which may be either necessary for, or incidental to the exercise of any of the foregoing powers or for the peace, health, comfort, safety, and/or general welfare of owners of said property . . . ." [12 CT 2889-2890.]

Under Article VI, section 6, the Homes Association had the right to "enjoin, abate, or remedy" any breach in the restrictions. Section 6 states in part: "the continuance of any such breach *may be enjoined, abated, or remedied by appropriate proceedings* by . . . the Homes Association." [12 CT 2908 [Emphasis added].] Article VI, section 9 of the governing documents requires these provisions to be "construed together." [12 CT 2908.]

Plainly, the Board of the Homes Association had authority to represent the interests of its members when the School District threatened the validity of restrictions placed on thirteen lots that had been transferred to the School District. Certainly, enjoining, abating or remedying "by appropriate proceedings" is broad enough to include a negotiated settlement. The settlement provided a fiscally responsible solution that benefitted its members, fulfilling the fiduciary duty owed to its members. *Kovich v. Paseo Del Mar Homeowners' Assn.* (1996) 41 Cal.App.4th 863, 867. Courts routinely uphold decisions of homeowner associations to forego litigation. *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 866; *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 864, 875; *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn*. (2008) 168 Cal.App.4th 1111, 1126.

The governing documents provide no mechanism for members to raise after-the-fact challenges to the Board's settlement of litigation. Members may amend the original declaration by vote under Article VI, section 2, or they may act if the Board fails to act for ninety consecutive days to perform its duties under Article II, section 5. [12 CT 2890, 2906.] This has rarely occurred.

Not only did the original declaration confer broad authority upon the Homes Association to resolve litigation, every member of the Homes Association agreed to subject themselves to that jurisdiction when they became property owners. Article VI, section 6 states that "[e]ach grantee . . . by acceptance of a deed . . . accepts the same subject to . . . all of such restrictions, conditions, covenants, reservations, liens and charges, and the *jurisdiction, rights and powers* of the Art Jury and of the Homes Association." [12 CT 2908 (Emphasis added).]

The governing documents raise a triable issue of fact as to whether Homes Association members are bound by the multi-party settlement—an issue the trial court utterly ducked, but that this Court can resolve in Appellant's favor based on the presented evidence. The Homes Association did not initiate the litigation; it was the School District that sued the Homes Association seeking to invalidate deed restrictions on two valuable, undeveloped lots. In the aftermath, the Homes Association had incurred hundreds of thousands of dollars in attorneys' fees defending the action. While it achieved its litigation objectives, the Homes Association lost its motion to recover attorneys' fees and was facing the long road of an appeal and cross-appeal. As discussed more fully under Argument Heading IV, the Homes Association concluded that it was in the best interests of all of its members to settle the litigation in a way that preserved the restrictions without further expense. Certainly, the authority to remedy a breach of restrictions by "appropriate proceedings" is broad enough to include a multi-party settlement that put an end to costly litigation that had bitterly divided the community.

In the context of a common interest development, members of a homeowners association are bound by the association's settlement of litigation. Although this is not binding authority here, it is persuasive. *Civil Code* section 5980 grants a common interest homeowners association standing to settle litigation "in its own name as the real party in interest and without joining with it the members, in matters pertaining to the following: (a) Enforcement of the governing documents." *Civil Code* section 5980.

The Court of Appeal recognized the normal res judicata effect of *Civil Code* section 5980 in *Duffy v. Superior Court* (1992) 3 Cal.App.4th 425, 428-435. In *Duffy*, a homeowners association sought a judicial declaration of its duties under the governing documents concerning a member's application for approval of a patio cover. The

association named the homeowner and two complaining neighbors who claimed the patio cover would block their view. The neighbors wanted out of the litigation, but the association refused to dismiss them because it wanted to avoid a subsequent suit "if they did not approve of the outcome." 3 Cal.App.4th at 428.

The Court of Appeal found the neighbors could not be kept in the litigation involuntarily because the common interest development was subject to the Davis-Stirling Act. Under the Act, the association was authorized to defend litigation regarding the enforcement of governing documents in its own name without joining individual homeowners. On the other hand, the homeowners had the right, alongside that of the association, to enforce the covenants, conditions, and restrictions as equitable servitudes. 3 Cal.App.4th 423-433.

The Court of Appeal observed: "Civil Code section 1354 [now section 6856] gives [the neighbors] the right to join the litigation to enforce the CC&R's if they so desire. If they are at all concerned that the homeowner association will not vigorously press their interpretation of the CC&R's to the trial court, now is the time for them to exercise their rights under Civil Code section 1354 and do so." 3 Cal.App.4th at 432. The association was not required to join the neighbors because they had the right to intervene. As they chose not to do so, the litigation between the association and the homeowner would be binding on the neighbors. 3 Cal.App.4th at 433.

In *Duffy*, the Court of Appeal made it crystal clear that all members were bound by the outcome of litigation:

> "'[A]s long as the matters relate to the enforcement of the CC&Rs . . . the association has standing to litigate them without joining the neighboring owners with their various viewpoints . . . Even though the [opposing neighbors] need not be joined as parties, there is no question as to

> the binding effect of the litigation on them. The policy behind Code of Civil Procedure section 374 [now *Civil Code* section 5980] requires that declaratory judgments brought in litigation authorized under the statute be res judicata. Unless an association's litigation is binding, the benefits of section 374 will vanish." 3 Cal.App.4th at 428-435.

Duffy is persuasive authority and should guide the court's resolution of the issue presented here. As in *Duffy*, the multi-party settlement reached here was res judicata as to every member of the Homes Association. The Homes Association was defending its interpretation of restrictions that bound the School District. Although they prevailed at trial, the School District appealed, and the Homes Association found that it was necessary to settle the action. Any members disagreeing with the manner in which the Homes Association chose to settle the litigation needed to voice their concerns *before* the settlement was approved. They had an opportunity to do so before the settlement was formally approved. [12 CT 2863.] After that point, the settlement was binding on every member of the Homes Association.

Unless Mr. Harbison and every member of the Homes Association who is also a member of CEPC is bound by the terms of the multi-party settlement embodied in the Memorandum of Understanding, there will be no end to this litigation—litigation which the Homes Association was forced to defend on behalf of its members.

Triable issues exist as to whether every member of the Homes Association was bound by the Homes Association's settlement of the School District litigation. Summary judgment should have been denied for this reason alone.

III.

An Unincorporated Association of Residents Lacks Standing to Challenge the Actions of a Homeowners Association, Because Some of the Residents Are Not Lot Owners Entitled to Membership in the Homeowners Association.

Although the governing documents for Palos Verdes Estates confer standing to enforce restrictive covenants only on lot owners, the trial court found that Mr. Harbison's standing as a lot owner was sufficient for CEPC, which includes individuals who are not members of the Homes Association. CEPC lacked standing to enforce the restrictions as a matter of law.

The governing documents for Palos Verdes Estates limit enforcement of deed restrictions to lot owners in Article VI, section 6. [12 CT 2907-2908.] Article I, section 3 of the Bylaws for the Homes Association also states that membership in the Homes Association is created by acceptance of a deed or contract of sale covering real property. [12 CT 2916.] These governing documents are interpreted under ordinary principles of contract law. *Bear Creek Planning Committee v. Ferera* (2011) 193 Cal.App.4th 1178, 1183. Clearly, the Declaration 1 and the Bylaws provide standing to enforce restrictions to lot owners only.

This position finds support in the common law and under the Davis-Stirling Act. It has long been held that ownership of real property benefitted by a restriction is a prerequisite to standing in a court of equity. *Kent v. Koch* (1958) 166 Cal.App.2d 579, 586. When the situation arises in common interest developments, the same result follows. *Civil Code* section 6856 of the Davis-Stirling Act mirrors the governing documents for Palos Verdes Estates. *Civil Code* section 6856, subdivision (a) states in pertinent part that:

> "[T]he covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes *may be enforced by any owner* of a separate interest or by the association, or by both." *Civil Code* section 1354, subd. (a) (Emphasis added.)

For instance, former owners lack standing to enforce restrictions. In *Farber v. Bay View Terrace Homeowners Assn.* (2006) 141 Cal.App.4th 1007, a former owner's action to enforce the restrictions was dismissed for lack of standing. The court observed that "[o]ne who no longer owns land in a development subject to reciprocal restrictions cannot enforce them, absent showing the original covenanting parties intended to allow enforcement by one who is not a landowner." 141 Cal.App.4th at 1011.

Likewise, non-owners also lack standing. In *Martin v. Bridgeport Community Association, Inc.* (2009) 173 Cal.App.4th 1024, a case involving a lot line dispute with a non-owner occupier of property within a common development, the Court of Appeal observed that "ownership in the Property is a prerequisite to standing to assert each of the causes of action . . . What is bound by an equitable servitude under CC&R's is a parcel, a lot, in a subdivided tract, not an individual who has no ownership interest in the lot. . . the right of enforcement is inextricable from ownership of real property—a parcel, a lot—in a planned development . . . ." 173 Cal.App.4th at 1032, 1036-1037.

Here, it was not enough for the plaintiffs to simply assert that CEPC had standing based on Mr. Harbison's membership in the Homes Association.

Since less than all of the members of CEPC own property in Palos Verdes Estates, CEPC lacked standing to enforce restrictions. It was therefore error for the trial court to grant permanent injunctive relief to CEPC.

In their summary judgment motion, the plaintiffs attempt to circumvent the standing issue by relying on undeveloped "citizen's suit" and third party beneficiary theories. [HAA 24.] These theories are unavailing.

A citizen's suit permits a taxpayer to bring an action to prevent the illegal expenditure of money or to control illegal government activity under *Code of Civil Procedure* section 526a. Section 526a provides in relevant part:

> "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." *Code of Civil Procedure* section 526a.

This standing theory provides a general citizen remedy for controlling illegal government activity. *Leider v. Lewis* (2016) 243 Cal.App.4th 1078, 1095-1096. The City's reconveyance of Area A to the Homes Association was expressly provided for under the 1940 deeds; it was not illegal government activity.

The plaintiffs cited to *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 129 for the proposition that they have standing to enforce a public duty and raise questions concerning

public rights, but the case is inapposite because they fail to mention that the taxpayer action must involve actual or threatened expenditures of public funds. The plaintiffs' moving papers were based on innuendo and legal conclusions, without argument or analysis.

The plaintiffs also asserted "third party" standing based on *Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.* (2005) 132 Cal.App.4th 666, 673, where an association of residents in two subdivisions had standing to sue the developer after it refused to surrender control of the architectural committee. However, standing of that resident association was not limited to lot owners as it is here. The plaintiffs cannot rely on *Whispering Palms* to circumvent the ironclad standing requirements in the governing documents.

Simply stated, any non-owner members of CEPC lacked standing to enforce restrictions under the governing documents. Those members of CEPC who are also members of the Homes Association did have standing, but as set forth under Argument Heading II above, they were bound by the multi-party settlement negotiated on behalf of all of the Homes Association members. Triable issues as to the standing on the part of CEPC should have defeated summary judgment.

IV.

Triable Issues of Material Fact Exist as to Whether a Homeowners Association's Settlement of Litigation Is Entitled to Judicial Deference or Protection Under the Business Judgment Rule, When the Settlement Conserved the Association's Depleted Reserves, and Preserved the Open Space Nature of Undeveloped Parkland for the Benefit of the Association's Members.

In this appeal, triable issues of fact exist as to whether the Homes Association's settlement of the School District litigation was entitled to judicial deference or protection by the business judgment rule, and the trial court erred when it granted summary judgment without any meaningful consideration of these issues.

Although the Homes Association has broad discretion concerning the City's parkland, it does not have common areas, and therefore, the Davis-Stirling Act may not be binding although it is still persuasive authority. In any event, decisions by the Board of the Homes Association would be governed by the business judgment rule. See *Corp. Code* section 309. Since the judicial deference rule is derived from the business judgment rule applicable to directors of corporations, under either approach, the decision to settle costly litigation in exchange for land that was never going to be used as a public park raises triable issues as to these defenses that should have defeated plaintiffs' summary judgment motion.

Preliminarily, the plaintiffs' argument that these defenses were waived because they were not raised in the answer is not well taken. In the case relied upon by the plaintiffs, *Ekstrom v. Marquesa at Monarch Beach Homeowners Association* (2008) 168 Cal.App.4th 1111, 1123, waiver occurred after a homeowners association failed to

raise the defense for the first time until after trial. Here, the defenses were presented to the trial court in the proceedings below.

A. *The Business Judgment Rule.*

Since the Homes Association is a California corporation, the business judgment rule applies to the decisions of its duly elected Board and protects its business judgment from breach of fiduciary duty claims. *Finely v. Superior Court* (2000) 80 Cal.App.4th 1152, 1161. The business judgment rule presumes that corporate directors act in good faith, on an informed basis, and in the honest belief that any action taken is in the best interest of the corporation. See *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366; see also *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174.

"The business judgment rule is premised on the notion that those to whom the management of the corporation has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is one which is . . . helpful to the conduct of corporate affairs. . . ." *Barnes v. State Farm Mut. Auto Ins. Co.* (1993) 16 Cal.App.4th 365, 378. Even a good faith mistake in judgment or arguably erroneous decision made by a homeowners association's volunteer directors, within the scope of their authority, is not actionable. *Beehan v. Lido* (1977) 70 Cal.App.3d 858, 865-866. The Supreme Court has observed that courts have applied the common law business judgment rule to shield from scrutiny qualifying decisions made by a corporation's board of directors. *Lamden v. La Jolla Shores Clubdominium Homeowners Association* (1999) 21 Cal.4th 249, 259.

In *Ekstrom*, the Court of Appeal explained that the business judgment rule "insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. A hallmark of the

business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors." 168 Cal.App.4th at 1122, *citing Lamden*, 21 Cal.4th at 257.

Homeowners associations enjoy broad discretion in exercising business judgment in deciding how to remedy encroachments, and courts are reticent to mandate that they engage in expensive and wasteful measures. In *Haley v. Casa Del Rey Homeowners Association* (2007) 153 Cal.App.4th 864, homeowners sued the association for allowing other owners to build improvements encroaching into the common area. The Court of Appeal held in favor of the association, rejecting the argument the association was engaging in selective enforcement because it chose not to enforce every violation. Relying on *Lamden*, the reviewing court concluded the association "had discretion to select among means for remedying violations of the CC&RS without resorting to expensive and time-consuming litigation, and the courts should defer to that discretion." *Id.* at 875.

Likewise, in *Beehan v. Lido Isle Community Association* (1977) 70 Cal.App.3d 858, the Court of Appeal held an association could exercise prudent business discretion in deciding whether to sue for a violation of the governing documents. In that action, a homeowner obtained approval from the association to build a home with a four-foot setback requirement, even though the governing documents were amended to provide for a minimum six-foot setback. 70 Cal.App.3d at 862. The board believed the amendment might not have been adopted in a legal manner, and declined to sue the homeowner. When the plaintiff owner sued the association, the Court of Appeal concluded that the board acted properly in weighing the cost of litigation and given the unclear outcome in deciding not to sue the owner. 70 Cal.App.3d at 866.

The Court of Appeal in *Ekstrom* observed: "In current economic times, it might make little economic sense for the Association to pursue costly litigation against individual homeowners who refuse to comply with the CC&RS, particularly since it is the homeowners, including Plaintiffs, who will ultimately bear the cost of the litigation." *Ekstrom*, 168 Cal.App.4th 1111, 1126.

This Court previously upheld the business judgment of the Palos Verdes Homes Association in interpreting its own restrictions in *Butler v. City of Palos Verdes* (2005) 135 Cal.App.4th 174. In *Butler*, the trial court enjoined the City from allowing peafowl in the parks and canyons, finding that it was in violation of the deed restrictions against keeping animals on the property without approval of the Homes Association. 135 Cal.App. at 178-179.

Two weeks later, the Homes Association adopted a resolution, noting the trial court bypassed its right to interpret the restrictions, and the Board granted the city permission to keep the peafowl. 135 Cal.App.4th at 179-180. When the city moved for a new trial, the court found the Board of the Homes Association lacked authority to pass the resolution because the resolution did not apply to every lot owner. 135 Cal.App.4th at 180.

The Court of Appeal found the trial court erred as a matter of law, deferring to the Board's interpretation of the deed restrictions as a matter of contract. The court accorded "deference to the elected bodies that together govern Palos Verdes Estates—the elected city officials and the elected board of the homes association." 135 Cal.App.4th at 181. It reasoned that the "deed restriction at issue is a matter of contract, and words of a contract are to be understood in their ordinary and popular sense." 135 Cal.App.4th at 181. The court found that it would defy common sense to conclude the city was "keeping peafowl in violation of the deed restrictions" on parkland rather than acting in accordance with its own management program.

135 Cal.App.4th at 183. It also relied on the fact that the program was endorsed by the Palos Verdes Homes Association, noting that its "interpretation of 'any and all" deed restrictions is described in the declaration of those restrictions as 'final and conclusive.'" 135 Cal.App.4th at 184.

In this case, as in *Butler*, the Board of the Homes Association exercised its discretion in this matter to settle the School District litigation in exchange for unused parkland. The declaration of the Board's general counsel, Sidney Croft, demonstrates that litigation had drained the Homes Association's reserves, and more funds were being used to defend against the School District's appeal and a cross-appeal for attorneys' fees. Not only did the settlement cut those losses, the Board's decision to sell Area A, which had never been used as active parkland, preserved restrictions the Homes Association had placed on the remaining lots owed by the School District, while preserving Area A as open space consistent with the master plan of the community. [12 CT 2859-2860.] That exercise of business judgment should not be disturbed.

Importantly, the plaintiffs ignored the Board's plenary authority to sell parkland. They never demonstrated that Article II, section 4 of the Declaration No. 1 granting that power was modified in accordance with the Article VI, section 2 amendment procedures. Rather they simply claim the Homes Association did not comply with those procedures. The trial court also mistakenly concluded that the restrictions contained in the 1940 deeds trumped the authority granted to the Homes Association in the original governing documents.

Since there is no evidence the Board acted in bad faith or that it attempted to enforce a rule that is inconsistent with the governing documents, there are material factual issues concerning whether the business judgment rule is a complete defense to this action.

B. *The Judicial Deference Rule.*

Similarly, triable issues of material fact exist as to whether the Board's decision was entitled to judicial deference. Homeowners associations under the Davis-Stirling Act have discretion to choose how to enforce governing documents. "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." *Nahrstedt v. Lakeside Village Condominium Association, Inc.* (1994) 8 Cal.4th 361, 374 (1994); *Lamden v. La Jolla Shores Clubdominium Homeowners Association* (1999) 21 Cal.4th 249, 264. Individual property rights are subordinated to "the collective judgment of the owners association" and the goals of the entire development. *Nahrstedt*, 8 Cal.4th at 374; *Dolan-King v. Rancho Santa Fe Association* (2000) 81 Cal.App.4th 965, 975.

Nahrstedt upheld the validity of pet restrictions and stands for the proposition that covenants, conditions and restrictions, whether contained in an original set of governing documents or in an amended version, are entitled to a presumption of validity, which may be rebutted only if the owner can carry the heavy burden of showing they are unreasonable when applied to the development as a whole. 8 Cal.4th at 379-388. A homeowners association's decisions are generally afforded substantial deference from the courts. Because the covenants, conditions and restrictions represent land use rules that the collective body has premised its community on, "courts are generally disinclined to question the wisdom" of the "agreed-to" rules. *Nahrstedt*, 8 Cal.4th at 381.

Under *Civil Code* section 6856, subdivision (a), the provisions of the governing documents are presumed to be enforceable unless the owner can carry the heavy burden of showing a lack of

reasonableness. Association decisions enjoy a presumption of reasonableness and shift the burden to the party challenging the association's decision. *Nahrstedt*, 8 Cal.4th at 380; *Dolan-King*, 81 Cal.App.4th at 979.

Judicial deference was accorded to an association's method of enforcing governing documents in *Harvey v. The Landing Homeowners Association* (2008) 162 Cal.App.4th 809. There, the association's board allowed owners of units adjacent to common area attic space to use the space for exclusive storage. 162 Cal.App.4th at 812. The use did not unreasonably interfere with other owners' use of the property, and the decision was consistent with the authority granted to the board in the governing documents, which expressly allowed the board to designate storage areas in the common area for an owner's use. 162 Cal.App.4th at 820-822.

In the proceedings below, the plaintiffs argued that the Supreme Court's judicial deference rule only applies to ordinary maintenance decisions. But homeowner's associations have discretion to handle violations of the governing documents even in cases not involving ordinary maintenance decisions.

Importantly, in *Harvey*, judicial deference was not limited to ordinary maintenance decisions, but extended to "the [b]oard's authority and presumed expertise regarding its sole and exclusive rights to maintain control and manage the common areas. …" 162 Cal.App.4th at 821

Likewise, in *Haley v. Casa Del Rey Homeowners Association* (2007) 153 Cal.App.4th 863, the Court of Appeal deferred to an association's decision to amend its governing documents rather than file litigation. The court observed: "*Lamden* is not directly on point as this case does not concern ordinary maintenance decisions. However, we believe it also reasonably stands for the proposition that the

Association had discretion to select among means for remedying violations of the CC&Rs without resorting to expensive and time-consuming litigation and the courts should defer to that discretion." 153 Cal.App.4th at 875.

Under the judicial deference rule, triable issues of material fact exist as to whether the Board of the Homes Association could exercise its discretion to resolve both the School District litigation and the encroachment issue on Area A, for the same reasons set forth above with respect to the business judgment rule.

Under either rule, summary judgment should have been denied, since each would be a complete defense to the action.

V.

Striking the Declaration of an Expert for a Party Opposing Summary Judgment Is an Abuse of Discretion Where the Declaration Contains Facts Raising Triable Issues of Fact as to Various Defenses.

The plaintiffs raised objections to Mr. Croft's declaration as irrelevant and inadmissible expert opinion. The court tentatively struck the declaration in its entirety as improper expert opinion. The declaration provided evidence as to the business judgment of the Board of the Homes Association, and it was an abuse of discretion for the trial court to ignore the testimony.

The facts alleged in declarations of the party opposing summary judgment must be accepted as true. *Zeilman v. County of Kern* (1985) 168 Cal.App.3d 1174, 1179, fn. 3. They are to be liberally construed to determine the existence of triable issues of fact. *Podolsky v. First Healthcare Corp*. (1996) 50 Cal.App.4th 632, 642. An appellate court reviews the trial court's evidentiary rulings on summary judgment for abuse of discretion. *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.

While it is true that expert opinion is generally not admissible on the legal interpretation of contracts (*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395, 1401), Mr. Croft was not giving legal interpretations, or improper or conclusory opinion testimony. Mr. Croft is the general counsel to the Board of Directors to the Homes Association. His sworn testimony set forth facts within his personal knowledge that was competent evidence of the Board's sound business judgment. The declaration complied with the statutory requirement that "opposing affidavits or declarations shall be made by any person on personal knowledge. . . ." *Code of Civil Procedure* section 437c, subd. (d). It is an abuse of discretion to exclude a declaration which creates a triable issue of material fact. *Biles v. Exxon Mobil Corp.* (2004) 125 Cal.App.4th 1315, 1322.

Here, the court struck the declaration in its entirety, and did not address why the declaration of Mr. Croft failed to raise a triable issue of material fact. If there is opposition evidence, the court's order should state why such evidence fails to create a triable issue of fact. *Code of Civil Procedure* section 437c, subdivision (g), requires the trial court, in granting summary judgment, to "specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and, if applicable, in opposition to, the motion which indicates that no triable issue exists. The court shall also state its reasons for any other determination." *Code of Civil Procedure* section 437c, subd. (g).

In striking the declaration of Mr. Croft, the court appeared unaware of principles of contract interpretation and the evidence relevant to interpretation. *Civil Code* section 1647 states that: "[a] contract may be explained by reference to the *circumstances* under which it was made, and *the matter to which it relates*." (Emphasis added.) Under *Civil Code* section 1646, "[a] contract is to be interpreted according to the *law and usage* of the place where it is to

be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." (Emphasis added.) According to *Civil Code* section 1644, "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." *Civil Code* section 1645 provides that "[t]echnical words are to be interpreted as usually understood by persons in the professional business to which they relate, unless clearly used in a different sense."

The declaration of Mr. Croft relates, in many cases, to technical words that should be interpreted according to the practices of real estate conveyance, management of homeowners associations, and municipal law. Mr. Croft is well qualified to address understanding and usage in all of these areas.

In *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 62, the defendants and appellants contended that the trial judge committed reversible error in allowing an expert witness to testify as to the meaning of various legal terms, including "meeting of the minds" and "guaranteed compensation." He even expressed the opinion that "the liquidated damages clause [at issue] was not a fair and reasonable forfeiture." 154 Cal.App.4th at 62. Nonetheless, the Court of Appeal rejected the contentions of evidentiary error. It reasoned as follows:

> "The record reveals Sloane's [the expert's] testimony related primarily to the customs and practices of the entertainment industry, specifically, the music concert business. Because these customs and practices are sufficiently beyond common experience, Sloane's expert opinion was admissible to assist the trier of fact." 154 Cal.App.4th at 63.

The declaration of Mr. Sidney Croft clearly included admissible evidence. It referred to the circumstances of the drafting of the governing documents of the Palos Verdes Homes Association, and how such documents are administered and understood by professionals involved in homeowners associations. The declaration also related to the usage of particular language in deeds and other real estate documents. The Croft declaration contained appropriate evidence concerning custom and practice. Mr. Croft's declaration was also admissible to show why the Board settled the School District litigation. The evidence goes to the heart of the Homes Association's business judgment in bringing an end to the expensive litigation and resolving the City's liability for unused parkland that would remain open space. Mr. Croft had personal knowledge of these facts. He was involved in the decision to settle the litigation involving the School District, the City, the Luglianis and the Homes Association. His declaration raises a triable issue of material fact as to whether the multi-party settlement was protected by the business judgment rule/judicial deference rule; it should not have been excluded *in toto* as impermissible expert opinion.

VI.

The Summary Judgment Must Be Reversed Because the Plaintiffs Failed to Establish That the Palos Verdes Homes Association Intended to Bind Itself to the Restrictive Covenants Contained in Its Own Deeds of Undeveloped Parkland to the City.

Summary judgment was granted in favor of the plaintiffs based on the notion that the Homes Association surrendered its right and power to sell parkland in the 1940 conveyance to the City. The plain language of the 1940 grant deeds dispels such an interpretation.

Grant deeds are interpreted in the same manner as any other contract. *Civil Code* section 1066. "The whole of a contract is to be

taken together, so as to give effect to every party, if reasonably practicable, each clause helping to interpret the other." *Civil Code* section 1641. "The task of the reviewing court has been described as placing itself in the position of the contracting parties in order to ascertain their intent at the time of the grant." *Machado v. Southern Pacific Transportation* (1991) 233 Cal.App.3d 347, 352. This means the deed must be interpreted in the context of the facts which existed at the time the deed was conveyed. *Soman Properties v. Rikuo Corporation* (1994) 24 Cal.App.4th 471, 486.

In construing grant deeds, the intentions of the parties ascertained from the four corners of the instrument must govern. *Basin Oil Co. v. City of Inglewood* (1954) 125 Cal.App.2d 661, 663. If the intent of the parties can be derived from the deed's language, technical rules of construction need not be invoked. *Concord & Bay Point Land Co. v. City of Concord* (1991) 229 Cal.App.3d 289, 294. "When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party. If it is not, the case is over." *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 705. Grants are interpreted in favor of the grantee, but a reservation of a grant is to be interpreted in favor of the grantor. *Civil Code* section 1069. Fee simple title is presumed to be intended unless it appears from the grant that a lesser estate was intended. *Civil Code* section 1105.

The plaintiffs never met their burden of proof showing why the 1940 conveyance to the City was binding upon the Homes Association as the grantor which retained reversionary rights.

The 1940 conveyance of parkland to the City was like every other deed restricted conveyance; it was only intended to bind the City in order to maintain parkland for the benefit of City residents. The conveyance of parkland expressly limited the City's use of the

parkland. The deed states: "[T]his conveyance is made and accepted and said realty is hereby granted . . . upon and subject to each of the following provisions, conditions, restrictions, and covenants . . ." [8 CT 1936; 1942.] Thereafter, the deed lists seven restrictions, which were subject to a reversionary right of the Homes Association if the City breached any of the restrictions. [8 CT 1936-1939; 1943-1945.]

Along with its right of reversion, the Homes Association granted lot owners the right to enjoin or abate the City's breach of any of these conditions, so long as the City owned the parkland. That right still exists so long as the City owns the parkland. [8 CT 1939; 1946.] The plain language is clear that these restrictions apply to a grant of parkland to the City, not to the Homes Association. The deed states:

> "PROVIDED, that a breach of any of the provisions, conditions, restrictions, reservations, liens, charges and covenants set forth in paragraphs 2 to 7, inclusive, hereof, shall cause said realty to revert to the Grantor herein, or its successor in interest, as owner of the reversionary rights herein provided for . . . shall in like manner cause said realty to revert to the Grantor herein or its successor in interest, and the owner of such reversionary rights shall have the right of immediate re-entry upon said realty in the event of any such breach . . ." [8 CT 1939; 1945-1946.]

Nevertheless, the plaintiffs claimed the Homes Association bound itself to hold all parkland forever—regardless of its broad powers under Article II, section 4.

The forever park restriction from the City deed states:

> "3. That, except as hereinafter provided, said realty is to be used and administered forever for park and/or recreation purposes only (any provisions of the

> Declarations of Restrictions above referred to, or of any amendments thereto, or of any prior conveyance of said realty, or of any laws or ordinances of any public body notwithstanding), 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" . . . ." [8 CT 1937; 1944.]

In the context of the grant of parkland to the City, the Homes Association was limiting the City's ability to amend the restriction. Another meaning should not be read into the deed. Courts should not read use restrictions not intended by the parties into the 1940 deed. "Restrictions on the use of land will not be read into a restrictive covenant by implication, but if the parties have expressed their intention to limit the use, that intention should be carried out, for the primary object in construing restrictive covenants, as in construing all contracts, should be to effectuate the legitimate desires of the covenanting parties." *Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442, 444–445.

Glaringly absent from the deed language is any indication the Homes Association intended to bind itself to this restriction. Rather, the parenthetical language reflects the intent of the Homes Association to prevent the City from rezoning the parkland or from utilizing the Article VI amendment procedures to do so.

Moreover, the intent of the parties must be evaluated in light of the circumstances that exist. Faced with substantial tax liabilities, the Homes Association wanted to enjoy the benefit of debt forgiveness without risking the sale of the parkland. The Homes Association had no reason to limit its own Article II, section 4 rights and powers which it had enjoyed for nearly twenty years. If it had intended to do so, it would have said so in the grant deed. As addressed more fully in Argument Heading VII, the Homes Association was unable to

unilaterally amend its Article II, section 4 powers by fiat. Those rights could only be amended in accordance with Article VI of Declaration No. 1.

In view of the financial hardship which led the Homes Association to convey the parkland to the City, it could not have been, and was not, the Homes Association's intent that it would be bound to bear the burden of operating a park should the parkland revert to its ownership. The trial court ignored this point.

Because there are triable issues as to whether the Homes Association intended to bind itself to the 1940 deed restrictions, summary judgment must be reversed.

VII.

The Summary Judgment Must Be Reversed Because the Moving Party Failed to Establish That the Palos Verdes Homes Association Violated the Restrictive Covenants.

The permanent injunction is based on the faulty assumption that the Homes Association could not transfer Area A to the Luglianis because it was bound by the 1940s deed restrictions. But the 1940 deed restrictions did not amend the original declaration, which gave the Homes Association the right and power to sell parkland. The Article II, section 4 rights and powers contained in the original declaration were equitable servitudes binding upon every lot owner. Since the Homes Association's Article II powers were never amended, the plaintiffs could not establish any violation of the 1940 deed restrictions, and the summary judgment in their favor should be reversed.

Covenants, conditions and restrictions are traditionally analyzed under the doctrine of equitable servitudes. *Citizens for Covenants Compliance v. Anderson* (1995) 12 Cal.4th 345, 354. In this regard,

the Supreme Court has held that these equitable servitudes are binding upon every lot owner:

> "[I]f a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan; the restrictions, therefore, are not unenforceable merely because they are not *additionally* cited in a deed or other document at the time of the sale." *Citizens*, 12 Cal.4th at 349. [Emphasis in original.]

In reaching this conclusion, the court observed: "Having a single set of recorded restrictions that apply to the entire subdivision would also no doubt fulfill the intent, expectations, and wishes of the parties and community as a whole." 12 Cal.4th at 364.

A similar result applies with respect to common interest developments. In *Pinnacle Museum Tower Association v. Pinnacle Market Development, LLC* (2012) 55 Cal.4th 223, 237, the Supreme Court observed that a declaration is "one of the primary documents governing the development's operation," which *must* set forth "the covenants and use restrictions that are intended to be enforceable equitable servitudes." The Court also observed that "[o]nce the first buyer manifests acceptance of the covenants and restrictions in the declaration by purchasing a unit, the common interest development is created [citation], and all such terms become "enforceable equitable servitudes, unless unreasonable" and "'inure to the benefit of and bind all owners of separate interests in the development.'" 55 Cal.4th at

237. A developer may amend recorded restrictions before the first sale, but not afterwards. *Citizens*, 12 Cal.4th 345, 365.

Governing documents are interpreted with the same rules applicable to contracts. *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, 575. An appellate court will read the governing documents as a whole and adopt the construction that gives effect to every part of the governing documents. *Bear Creek Planning Committee v. Ferwerda* (2011) 193 Cal.App.4th 1178, 1183.

Mr. Harbison and every other owner within Palos Verdes Estates cannot avoid the impact of *Citizens and Pinnacle*, based on the plain meaning of the governing documents. When they purchased their homes, they were bound by the initial declaration, Declaration No. 1, which was recorded in 1923, before any of the lots were sold. Article II, section 4 expressly states that the original grantees covenanted on behalf of their successors in interest that the "Homes 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 . . . ." [12 CT 2887.] Sections 4(a) and 4(i) authorize the Homes Association to sell parkland. [12 CT 2884; 2888.]

Mr. Harbison and all other owners within Palos Verdes Estates are bound by the Homes Association's right to sell parkland. If they wished to amend that right, they needed to comply with the Article VI, section 2 procedures. [12 CT 2906.] This would require a vote of eighty percent of the members, reflected in a recorded amendment.

According to Article VI, section 2, "Amendment, change, modification, or termination of any of the conditions, restrictions, reservations, covenants, liens, or charges set forth and established in Articles I, II, III and IV hereof . . . may be made by Commonwealth

Trust Company or its successors in interest . . . by mutual written agreement with the then owners of record . . . of not less than ninety (90) percent in area of said property of all of the then owners of record title of said property with the Homes Association, duty executed and placed of record in the office of the County Recorder of Los Angeles County, California." [8 CT 1912; 12 CT 2906.] The conditions, restrictions and covenants contained in Article II cannot be changed without the written consent of eighty percent of the members. Any approved amendment must be recorded with the county. [12 CT 2906.]

Moreover, there is no provision allowing the developer, or its successor-in-interest, the power to unilaterally amend the original declaration's provisions once they have been recorded by way of a deed, or other instrument. This is significant because the Bank of America, the successor-in-interest to the Commonwealth Trust Company, never recorded an amendment to Declaration No. 1 curtailing the Article II, section 4 rights and powers of the Home Association before it deeded the parkland to the Association in 1931. [12 CT 2936-2938.] The bank's attempt to limit the rights and powers of the Homes Association in the 1931 deed to sell parkland were therefore void and of no effect because the bank failed to comply with the Article VI amendment procedures.

Importantly, the Bank of America was aware it had to comply with the Article VI amendment procedures. Before it deeded the parkland, the bank executed one such amendment, stating that it was authorized to amend the declaration because it was the majority owner of the affected parcels. The bank stated it was amending the declaration *in accordance with Article VI* and the amendment was recorded. [8 CT 1901.]

The various restrictions the bank placed in the 1931 deed mandating that the Homes Association to hold the parkland forever,

the restraint on alienation, and the various limitations concerning the placement of improvements on parkland, directly conflict with the broad authority the Homes Association enjoys under Article II, section 4. The bank's attempt to amend the authority of the Homes Association by imposing deed restrictions, rather than by amending the original declaration in accordance with Article VI, section 2, was of no effect. While those restrictions were invalid, the conveyance was still valid, since the law abhors a forfeiture absent a "clear expression of the grantor's intent." *Springmeyer v. City of South Lake Tahoe* (1982) 132 Cal.App.3d 375, 379–380. Moreover, "[a] servitude will be strictly construed, any doubt being resolved in favor of the free use of the land." *Wing v. Forest Lawn Cemetery Assn.* (1940) 15 Cal.2d 472, 479.

A somewhat analogous situation was presented in *Ekstrom*, (2008) 168 Cal.App.4th 1111, where the Board of a homeowners association adopted rules that directly conflicted with the plain meaning of the governing documents. 168 Cal.App.4th at 1123-1124. The reviewing court found that the Association was not free to fashion rules that rendered the covenants, conditions, and restrictions meaningless. 168 Cal.App.4th at 1124.

Likewise, in *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, the Court of Appeal held that the board of directors of a homeowners association was not authorized to enact setback regulations different than those contained in the covenant which required any such changes or amendments to be approved by two-thirds of the affected homeowners. 177 Cal.App.3d at 732-733. Based on the voting requirement contained in the governing documents, the Court of Appeal concluded: "We do not believe the covenanting parties intended the Board to have such unfettered powers by the process of 'interpretation.'" 177 Cal.App.3d at 734. The Court of Appeal construed the words "changed" and "modified"

to include the board's reductions or increase in requirements under the governing documents, finding that those documents could have included additional language allowing the provisions to be changed or modified unilaterally by the board. 177 Cal.App.3d at 732-733.

In this case, the Bank of America could not bypass the Article VI, section 2 amendment procedures by placing restrictions in the 1931 parkland deed. If it wanted to restrict the ability of the Homes Association to sell parkland, the bank was required to submit the matter to a majority vote and have the successful amendment recorded, or record an amendment stating that it was the majority owner. Short of following that procedure, the deed restrictions were invalid.

Regardless of this invalid attempt to limit the powers of the Homes Association, the Bank of America eventually quitclaimed all of the parkland to the Homes Association in 1940. The quitclaim operated as a release and extinguished the restrictions. "A quitclaim deed, being a transfer and release to the grantee of whatever present title or interest the grantor has in the property quitclaimed, when made by the owner of an easement to the owner of the servient tenement operates as a release and extinguishment." *Westlake v. Silva* (1942) 49 Cal.App.2d 476, 478.

Long ago, in *Werner v. Graham* (1919) 181 Cal.174, the Supreme Court held that restrictive covenants contained in a deed were extinguished when the grantor executed a quitclaim deed. The Supreme Court observed: "In like fashion it is plain that there is no servitude over the plaintiff's lot in favor of those lots which [the grantor] still retained when he gave the quitclaim deed of 1905 and with which he parted subsequently. If a servitude had previously existed in favor of those lots, he, as their owner, had the right to surrender it and undoubtedly did so by his quitclaim deed." 181 Cal. at 182.

More recently, in *McCaffrey v. Preston* (1984) 154 Cal.App.3d 422, the Court of Appeal held that a deed restriction limiting use of the property to single family residence were destroyed when the original grantor executed a quitclaim deed conveying his reversionary interest 154 Cal.App.3d at 429, 434-435.

Those restrictions were extinguished in 1940 when the parkland was quitclaimed to the Homes Association. By the time the Homes Association transferred all of the parkland to the City, it owned the parkland in fee simple absolute, subject to no covenants, conditions, or restrictions, other than those set forth in the original governing documents, as amended. Those 1940 deeds only required the City to comply with the restrictions so long as the City held the property, and the Homes Association retained a reversionary interest in the parkland, to prevent the City from doing what the School District attempted to do.

As discussed in depth in Argument Heading VI, the Homes Association never intended to curtail its own rights under Article II, section 4 of the Declaration No. 1, which is evident from the language of the deed itself. Even if it wanted to, the Homes Association lacked the authority to do so, because it would be bypassing the Article VI amendment procedures.

Since the Homes Association was never bound by the deed restrictions on which the plaintiffs rely, it was free to convey Area A to the Luglianis after regaining title.

In the proceedings below, the plaintiffs relied on a line of cases involving city/state attempts to use "park only" property for other purposes, claiming that the land was conferred as a "public trust." *Roberts v. City of Palos Verdes* (1949) 93 Cal.App.2d 545, 546-548; *Save the Welwood Murray Memorial Library Committee v. City Council of the City of Palm Springs* (1989) 215 Cal.App.3d 1003,

1012-1016 ("*Welwood*"); *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99, 104-105 ("*Big Sur*"); *City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295, 299 ("*Hermosa Beach"*); *County of Solano v. Handlery* (2007) 155 Cal.App.4th 566, 575 ("*Solano*").

In each of those cases, the appellate courts strictly construed the deed language and upheld the restrictions against the municipalities. This invalid argument is an attempt to circumvent the binding provisions of the governing documents.

Each of these cases is inapposite because 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.

Roberts concerned the very deed restriction at issue here, where the City was using parkland to store vehicles. In *Welwood*, the city struck a deal with a developer to introduce a café on or near the city library, on property dedicated to library purposes only. In *Big Sur*, a homeowner wanted an access road across a state park. *Hermosa Beach* involved a city's attempt to divert beach property for roads. *Solano* involved a county's attempt to divert the use of a county fair. These cases would be controlling authority only if the City was trying to use Area A in violation of the 1940 deed restrictions. They do not apply to the Homes Association.

None of these cases is binding authority because none addresses the situation presented here. A case is not authority on an issue not presented in it. *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1015.

Here, the City never attempted to use Area A or sell Area A to the Luglianis. A key distinction missed by the plaintiffs is that the 1940 deeds only required the land "to be used and administered forever for park or recreation purposes." The deed did not require the City to hold title to all of the parkland forever, especially where the Homes Association was formed to take care of the parkland, and the parkland was transferred to address tax liabilities.

Similarly, in *Welwood*, the court noted that, if the city no longer wished to use the property as a library, it could allow the property to revert to the original owner. Reversion was the proper remedy.

Even where a deed restriction required a party to allow a railroad to run across the land "perpetually," and the railway ceased to run, the breach could cause a reversion of the grant, not an injunction to perform the condition in perpetuity. See *Rosecrans v. Pacific Electric Railway Co.* (1943) 21 Cal.2d 602, 608-609. Here, the City could transfer parkland to anybody suitable for holding parkland. In all likelihood, this would be the Homes Association. Although the plaintiffs took the outrageous position that the Homes Association was no longer a body suitable to hold the parkland, this position directly contradicts the governing documents. Even the trial court rejected that contention.

Once the land was quitclaimed to the Homes Association, the Homes Association was *not bound* by any deed restriction as to Area A that were binding on the City, because it was the grantor which authored the restrictions and it retained the power and authority conferred to it under the governing documents.

Since the Home Association had authority to sell the parkland, it was free to transfer Area A once it regained title. The Homes Association's interpretation of the governing documents was consistent with the plain meaning of the documents. The plaintiffs failed to establish the Homes Association violated the 1940 deed restrictions, and the judgment should be reversed.

VIII.

The Trial Court Erroneously Applied the Doctrine of Judicial Estoppel, a Doctrine Not Briefed by Any Party, and the Doctrine Is Clearly Inapplicable, Because It Applies Only to Factual Contentions, Not Positions on Issues of Law.

In the action below, the trial court invoked principles of judicial estoppel to support its decision to grant summary judgment in favor of the plaintiffs, even though that doctrine was never raised in the complaint or in the moving papers. This was inappropriate. The doctrine has no application here, because the Homes Association did not take inconsistent positions as to factual contentions in these judicial proceedings.

The trial court should not have invoked the doctrine of judicial estoppel *sua sponte*. In determining whether the plaintiffs met their initial summary judgment burden, it is the complaint and the answer which frame and define the issues presented in the summary judgment proceedings. *Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 829. The pleadings serve as the "outer measure of materiality," and the motion may not be granted or denied on issues not raised by the pleadings. *Hutton v. Fidelity National Title Company* (2013) 213 Cal.App.4th 486, 493. Here, the court improperly based a permanent injunction on judicial estoppel, an issue never raised by the plaintiffs.

The trial court was not at liberty to grant summary judgment based on a theory not framed in the plaintiffs' complaint or in the moving papers. This error was compounded by the fact that the doctrine of judicial estoppel could not be properly invoked here.

Judicial estoppel precludes a party from taking inconsistent positions in separate judicial proceedings. It "is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process . . . Judicial estoppel is 'intended to protect against a litigant playing fast and loose with the courts.'" *The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841.

For the doctrine of judicial estoppel to apply, five requirements must be met: " '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citation.]" 183 Cal.App.4th 831, 842. The fifth element is required because the gravamen of judicial estoppel "is the intentional assertion of an inconsistent position that perverts the judicial machinery." *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.

The doctrine is designed to protect the integrity of the court. *Ibid.* Even after all of these requirements have been met, application of the doctrine is discretionary. *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170.

The doctrine of judicial estoppel is not remotely applicable to the facts here because the Homes Association has not taken an inconsistent position concerning factual contentions raised in the School District litigation. The School District challenged deed

restrictions placed on lots conveyed to it by the by the Homes Association in the 1930's so that it could sell the lots to cover a revenue shortfall. Lots C and D were not reconveyed to the Homes Association. Rather, the School District retained title to those lots and was seeking to directly violate the "school/park purposes only" restriction.

Here, an entirely different set of facts is involved. The City was not attempting to violate any of the deed restrictions. It quitclaimed Area A back to the Homes Association, which has plenary authority to sell parkland under the governing documents. To invoke the doctrine of judicial estoppel, the trial court voided the City's quitclaim deed and ignored the plenary powers conferred to the Homes Association in the governing documents. The two cases involve entirely different factual contentions.

The only similarity between the School District litigation and the present case is the fact that the Homes Association made similar conveyances of restricted parkland to the School District and to the City. But once the Homes Association, the entity duly constituted to hold parkland, regained ownership of Area A, the similarity ended. As explained under Argument Heading VII, the 1940s deed restrictions applied to the City so long as the City held the parkland. The restrictions were extinguished once Area A was reconveyed to the Homes Association. Since the Homes Association was free to sell the parkland, it was not taking an inconsistent position as to the 1940s deeds to the City. The City, not the Homes Association, was bound by those restrictions.

To construe the 1940s deeds as limiting the power of the Homes Association would violate the Article VI amendment provisions of the governing documents. Any such construction lacks merit.

On a final note, even where this court has the authority to entertain an issue or theory not raised by either party, it should remand the matter to allow the party opposing it to develop factual defenses that were not presented the first time around in the trial court. *Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227-1228. An appellate court may reverse or remand to allow the parties to present additional evidence or conduct discovery on the issue. See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 100-101 n2.

It was an abuse of discretion to invoke judicial estoppel when it was never raised below. The doctrine does not apply to the circumstances of this case. At the very least, the Homes Association is entitled to rehearing and an opportunity to brief the propriety of granting summary judgment based on the doctrine of judicial estoppel.

IX.

The Trial Court Lacked Jurisdiction to Order the Palos Verdes Homes Association to Enforce Deed Restrictions in a Certain Way as to Area A or as to Every Parcel, in Violation of the Association's Governing Documents, and Where Relief was Only Requested as to "Area A."

In its judgment, the trial court granted the plaintiffs a permanent injunction that was not limited to Area A, which was the only relief the plaintiffs requested. In addition, the court usurped the functions of the Palos Verdes Homes Association as to all parkland within the City, including Area A, ordered the Homes Association to take actions that violated the governing documents, and bypassed the Article VI amendment procedures by rewriting the powers of the Homes Association.

The Supreme Court has gone so far as to state that "[w]hether a permanent injunction should issue becomes a question of law where the ultimate facts are undisputed and in such a case the appellate court may determine the issue without regard to the conclusion of the trial court." *Eastern Columbia, Inc. v. Waldman* (1947) 30 Cal.2d 268, 273.

Without describing why the Homes Association was bound by the 1940 deed restrictions, the trial court's permanent injunction ordered the Homes Association to take actions that specifically violated its powers and authority under the governing documents.

For instance, the court ordered the Homes Association to, at its own expense, return the sports field on Area A to its original hillside slope condition, to remove all landscaping and structures that violate the 1940 deed restrictions, to remove a row of forty foot trees, and to remove all artificially planted bushes, pillars, statues, and wrought iron, including a paved driveway.

The order violates multiple provisions of the governing documents. In Article II, section 4, every member of the Homes Association has agreed that the Homes Association has the right and power to "maintain, purchase, construct, improve, repair, prorate, care for, own, and/or dispose of parks . . . open spaces and recreation areas. . . . appropriate for the use and benefit of and/or for the improvement and development of the property . . . ." [12 CT 2887.] An injunction to remove all of this landscaping and related man-made structures contradicts the broad discretion of the Homes Association to leave these improvements alone. Nothing in Article II, section 4 requires Area A to be restored to its original condition. In essence, the trial court has ordered the Homes Association to commit waste upon the property. *Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 999-1000.

In addition, the injunction orders the Homes Association to violate the governing documents. Article V, section 7 states that no tree over twenty feet shall be removed or killed except with the approval of the Homes Association. [12 CT 2904.] Trees that exceed twenty feet may be "cut back," but not removed, if the Homes Association is of the opinion that this "is warranted to maintain the view and protect adjoining property." [12 CT 2905.]

The injunction forces the Homes Association to undertake the destruction of trees which are to be protected. Nothing in section 7 requires the removal of trees that have been planted by an adjoining homeowner. Moreover, Declaration No. 1 provides that view corridors must be balanced against the stability of the adjoining homeowner's property, an issue the trial court did not address.

Finally, the Homes Association is not required to fund remediation of purported breaches. Article VI, section 7 places this burden on the offending homeowner. [12 CT 2908.] The trial court ordered the Homes Association to take these measures at its own expense without addressing indemnification rights.

Rather than exercise judicial deference in favor of the Board's settlement which retained Area A as an open space zone, the trial court usurped the function of the Homes Association, and did so in violation of the express terms of the governing documents. Courts routinely uphold and enforce the plain meaning of such documents. The Court of Appeal has already done so with regard to this very Homes Association in recent litigation involving the interpretation of the governing documents. See *Butler v. City of Palos Verdes* (2005) 135 Cal.App.4th 174; 183-184. What courts do not do is override the plain meaning in favor of their own interpretation.

In addition to violating the Board's discretion with regard to Area A, the trial court extended the injunction to all City-owned

parkland, effectively preventing the Homes Association from exercising its authority under Article II, section 4 if its actions would violate the 1940 deed restrictions. While the trial court may not have appreciated the conflict between the documents, the 1940 deed restrictions directly conflict with the governing documents, and they are not binding.

Simply stated, Article II, section 4 grants the Homes Association the right to sell or improve parkland. Those rights and powers have never been amended in accordance with the amendment procedures outlined in Article VI. The 1940 deed restrictions which the Homes Association placed on the parkland when it transferred it to the City do not "amend" the Homes Association's Article II powers.

By requiring the City and the Homes Association to insert language in every property conveyance referencing the judgment in School District litigation and the judgment in this case, the trial court was attempting to rewrite the Homes Association's Article II rights and powers, bypassing the Article VI amendment procedures. Moreover, extending the injunction to all parkland was not only impermissible, it is not warranted, since the 1940 deed restrictions are still applicable to the City with respect to all City-owned parkland.

Apart from usurping the authority of the Homes Association and crafting a de facto amendment of its powers over parkland, the trial court enjoined the City from placing open space easements on Area A, which facilitated the preservation of Area A as an open space zone. As explained under Argument Heading XII, it is the public policy of this state to encourage conservation easements with the transfer of land.

The trial court's judgment also imposes premises liability upon the Homes Association which neither prudence, nor the governing documents, require. It is unlikely the Homes Association, now with

limited reserves, wishes to shoulder liability for maintaining the retaining walls supporting the Luglianis' slope, which were placed on Area A by the Luglianis' predecessor.

Landowners are no longer immunized from liability for harm caused by the natural condition of the land to persons outside the premises. Rather, the landowner's liability exposure is determined by reference to ordinary principles of negligence, and the question is whether a possessor of land has acted as a reasonable person under the circumstances. *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 362. The owner of property is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 122. These tasks can prove to be expensive.

Simply stated, the trial court lacked power to issue a permanent injunction that usurped the discretionary power of the Homes Association and curtailed its rights without complying with the amendment procedures articulated in the governing documents. It was also improper for the court to force the Homes Association to shoulder potential premises liability.

For each of these reasons, the trial court's judgment should be reversed.

X.

A Trial Court Cannot Grant Summary Judgment, So as to Invalidate a Fully Performed Multi-Party Settlement Agreement, Where an Indispensable Party, the School District, Is Missing From the Action.

The trial court found the School District was not an indispensable party to the action because it did not void the settlement. But the court destroyed the contractual expectations of the School District in its complete and total absence.

While the trial court's indispensability determination is reviewed for an abuse of discretion (*County of San Joaquin v. State Water Resources Control Board* (1997) 54 Cal.App.4th 1144, 1153), if its determination as to whether a party's interests are impaired involves a question of law, the Court of Appeal will review the issue de novo. *Van Zant v. Apple, Inc.* (2014) 229 Cal.App.4th 965, 974. Since it is mandatory that indispensable parties be before the court, the issue may be raised at any time and may even be raised *sua sponte* by the appellate court. *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 522.

Code of Civil Procedure section 389, which governs the compulsory joinder of parties, requires in subdivision (a) the joinder of:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action ... if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair

> or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest...." *Code Civil Procedure* section 389, subd. (a).

Subdivision (b) of the statute provides:

> "If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to consider by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff ... will have an adequate remedy if the action is dismissed for nonjoinder." *Code Civil Procedure* section 389, subd. (b).

Indispensability is determined by assessing the four factors enumerated in Section 389, subdivision (b). *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1106 ("*Deltakeeper*"). These factors are not arranged in order of importance and each factor is of equal weight. *County of San Joaquin v. State Water Resources Control Bd.* (1997) 54 Cal.App.4th 1144, 1149.

The *first* factor is "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties."

Code Civil Procedure section 389, subd. (b)(1). This is essentially the same assessment made under *Code of Civil Procedure* section 389, subdivision (a) "in determining whether a party's absence would impair or impede that party's ability to protect his or her interests, and determining whether proceeding to judgment would subject existing parties to inconsistent obligations." *Deltakeeper*, 94 Cal.App.4th at 1107.

By prohibiting the transfer of Area A to the Luglianis, the court impaired the contract rights of all of the parties. Without title to Area A, the Luglianis might want the return of the substantial sums of money paid to other parties to the Memorandum of Understanding. This could result in the unwinding of the Memorandum of Understanding, including the School District seeking to cancel its conveyance of Lots C and D to the Homes Association, the status of the remaining eleven lots owned by the School District remaining uncertain, and the School District continuing to exempt itself from City zoning with respect to the football field, a matter which was impacting all of the City's residents.

Additionally, the Homes Association might become responsible for the retaining walls on Area A that stabilize the Luglianis' slope and Area A. They could become exposed for potential liability should any invitees or trespassers sustain injuries on Area A, a situation which would be exacerbated by the court's order that a substantial number of mature trees on Area A be destroyed. The Homes Association would lose the recovery of $300,000 to rebalance reserves lost to defend itself in the School District litigation, with no way to recoup those costs, having dismissed its appeal on the issue of its fees when it settled the case.

The *second* factor asks whether there are protective measures in the judgment by which prejudice can be lessened or avoided. *Code Civil Procedure* section 389, subd. (b)(2). This factor was not and

could not be considered, because the trial court rendered its summary judgment without addressing the equities as to the various parties.

The *third* factor considers whether the judgment entered in the absence of the School District would be adequate. *Code Civil Procedure* section 389, subd. (b)(3). The test for determining the ability to protect an absent party's interest is whether existing and absent parties' interests are sufficiently aligned that the absent party's rights necessarily will not be affected or impaired by the judgment or proceeding. *Save Our Bay, Inc. v. San Diego Unified Port Dist*. (1996) 42 Cal.App.4th 686, 695-696. In *Save Our Bay*, the appellate court found that the judgment in the action seeking to stop a development might well be inadequate because it was subject to later collateral attack by non-joined indispensable party. 42 Cal.App.4th at 697–698.

While it is true that the School District submitted a joint opposition to the plaintiffs' initial petition for a writ of mandate, "a common litigation objective is not enough to establish adequacy of representation by the named parties. Since predicting how named parties would conduct litigation requires clairvoyance beyond the trial court's expertise, courts instead consider the interests of both the named and unnamed parties." *County of Imperial v. Superior Court* (2007) 152 Cal.App.4th 13, 38.

The variety of interests represented by the parties diverge on important issues. The Homes Association was embroiled in litigation with the School District concerning the validity of the deed restrictions. The School District sought to invalidate those restrictions. The School District was also challenging the City's zoning regulations. Before settling, the School District had appealed the judgment, which addressed only Lots C and D, not the School District's remaining eleven undeveloped lots. The divergent and conflicting interests of the named and unnamed parties support the conclusion that the School District is an indispensable party. Like the

unnamed party in *Save Our Bay*, the judgment enjoining the transfer of Area A to the Luglianis might well be inadequate because it could be subject to later collateral attack by the School District. While the trial court proclaimed that it was not voiding the Memorandum of Understanding, by voiding the 2012 deeds, that is exactly what it did.

The *fourth* and final factor, whether the plaintiffs would have an adequate remedy if the action were dismissed, would be the only factor weighing against dismissing the action had the plaintiffs not created the situation. *Code Civil Procedure* section 389, subd. (b)(4). The plaintiffs voluntarily dismissed the School District without prejudice before amending their complaint and filing the summary judgment motion. Since this action was filed in May of 2013, the statute of limitations for joining more parties ran in May 2016 under *Code of Civil Procedure* section 583.210, which requires the complaint to be served on all parties within three years after the action is commenced.

A voluntary dismissal does not toll the statute of limitations. "[A] party's voluntary dismissal without prejudice does not come equipped by law with an automatic tolling or waiver of all relevant limitations periods; instead, such a dismissal includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action." *Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 984.

The above analysis comports with other decisions involving unnamed parties in actions seeking to adjudicate contract rights. Where the rights involved in litigation arise upon a contract, courts ordinarily refuse to adjudicate the rights of some of the parties to the contract if the other parties are not before it. *Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1106-1107. In an action seeking declaratory judgment that a contract is void, a party to the

contract is indispensable since his interests inevitably would be affected by the judgment rendering the contract void. *Martin v. City of Corning* (1972) 25 Cal.App.3d 165, 169. This is especially true where the plaintiff seeks to enjoin performance of a contract and one of the contracting parties is not a party to the action. *Holt v. College of Osteopathic Physicians and Surgeons* (1964) 61 Cal.2d 750, 760.

The plaintiffs' assertion that the question of indispensability turns upon whether the School District was a party to the deeds transferring Area A, and the trial court's belief that the question could be altogether avoided because it was not voiding the multi-party settlement, impermissibly dodges the balancing of the various factors, and ignores the totality of the Memorandum of Understanding. The trial court's ruling on this affirmative defense should be reversed.

XI.

In an Action Involving Restrictive Covenants, Triable Issues of Material Fact Exist as to Whether the Doctrine of Merger Extinguished Encumbrances on Reacquired Land, Where All of the Benefits and Burdens of the Servitude Were Once Again Vested in the Same Party, and Where Equity Requires Application of the Doctrine.

The trial court was not persuaded that the restrictions in the 1940 deed to the City were extinguished when the City reconveyed Area A to the Homes Association, because it concluded the restrictions were not easements, and that evidence was lacking to show the parties intended to extinguish them. There are disputed factual issues regarding application of the merger doctrine. Deed restrictions, which are negative easements, are extinguished under the merger doctrine when property is reconveyed to the original owner. Moreover, the City's quitclaim deed reveals the parties understood the reconveyance would extinguish the restrictions because the City

imposed a conservation easement upon Area A in order to preserve the open space nature of Area A.

Under the merger 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. *Civil Code* sections 805 and 811; see also *Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 623. Since no one else has an interest in enforcing the servitude, the servitude terminates. Accordingly, the previously-burdened property is freed of the servitude.

A servitude is a "land burden" which, when "attached to other land as incidents or appurtenances . . . are then called easements." *Civil Code* section 801. As relevant here, *Civil Code* section 811 provides that "[a] servitude is extinguished by the vesting of the right to the servitude and the right to the servient tenement in the same person." Servitudes such as deed restrictions and equitable servitudes are also known 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. Similarly, *Civil Code* section 805 states that "[a] servitude thereon cannot be held by the owner of the servient tenement."

The rationale of the merger 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. In other words, "a person does not need an easement in his or her own land, because all the uses of an easement are already included in the general right of fee ownership." *Id.* at 1473.

As Miller and Starr explain, because "by definition an easement is the right to use or prevent the use of the land of another, a person cannot have an easement on his or her own land. Therefore, an

easement usually is extinguished when the same person acquires the fee title to both the dominant and servient tenements." *Miller and Starr California Real Estate*, 3rd Ed., at section 15:75 (2006).

In order for the merger doctrine to apply, there need only be a unity of title to the real property. "[T]he ownership of the two estates should be coextensive and equal in validity, quality, and all other circumstances of right." *Beyer*, 129 Cal.App.4th at 1473-1474. For example, where one person has fee simple in either the dominant or servient tenement, but a lesser estate in the other, such as a leasehold or life estate, the easement is only suspended during the duration of the lesser estate. *Zanelli*, 166 Cal.App.4th at 629.

Courts in California consistently apply *Civil Code* sections 805 and 811 to extinguish an easement when the subject properties have come under common ownership. In *Rosebrook v. Utz* (1941) 45 Cal.App.2d 726, 727 a seven-acre parcel had an express easement to use a roadway over an adjacent six-acre parcel. After the previous owners of the respective parcels created the easement, the entire 13-acre tract came under the ownership of one owner. Carleton, 45 Cal.App.2d at 728. The Court of Appeal held that "the original easement over the six-acre parcel. . . became extinguished when Carleton became the owner of both the six-acre parcel and seven-acre parcel." *Ibid.* The Court further stated that "[n]o easement exists, so long as there is a unity of ownership." 45 Cal.App.2d at 729. In support of its ruling, the Court of Appeal relied on *Civil Code* sections 805 and 811. 45 Cal.App.2d at 728-729.

Similarly, in *Drake v. The Russian River Land Co.* (1909) 10 Cal.App. 654, 666, the court rejected the claim of a landowner who asserted the right to an easement over the riverbed bordering his property. At the time the easement was allegedly created, the landowner's predecessor owned both the dominant and servient tenement. The court held that an express easement could not have

been created by the landowner's predecessor, because the dominant and servient tenements fell under common ownership. *Ibid.* Citing *Civil Code* sections 805 and 811, the appellate court stated: "[A] servitude cannot be held by the owner of the servient tenement (Civil Code, sec 805), and the vesting of the right to the servitude and the right to the servient tenement in the same person extinguishes the servitude (Civil Code, sec 811); that is, the merger of the estates extinguishes the servitude." *Ibid.*

Here, the undisputed evidence shows that Area A was originally owned by the Homes Association until 1940, when it was transferred to the City, subject to deed restrictions. When Area A was reconveyed to the Homes Association in 2012, it held fee simple title to Area A. The deed restrictions imposed upon Area A in 1940 were extinguished when the property was reconveyed to the Homes Association, the original grantor.

Contrary to the decision of the trial court, the parties intended to extinguish the restrictions. "The question is one of intention, actual or presumed, of the person in whom the interests are united. …" *Ito v. Schiller* (1931) 213 Cal. 632, 635. The parties' intent to extinguish the deed restrictions is evident from the face of the quitclaim deed. A quitclaim deed transfers whatever present right or interest the grantor has in the property, and can extinguish an easement under the merger doctrine. *Leggio v. Haggerty* (1965) 231 Cal.App.2d 873, 880-881 (1965).

Aware that the 1940 deed restrictions that had formerly existed as to Area A would extinguish by operation of law once the Homes Association owed Area A, the City imposed an open space easement upon Area A to ensure that no matter who held title to Area A, it would remain an open space zone in perpetuity. The Homes Association transferred Area A to the Luglianis subject to an open space easement in favor of the City. The language of 2012 deeds

uniformly shows that both the City and the Homes Association had every intention of extinguishing the conditions and restrictions placed on Area A when the City quitclaimed Area A back to the Homes Association.

The plaintiffs may claim that the merger doctrine does not apply because under the City deed, all property owners in the City are dominant interest holders. But the plain language of the 1940 deed only gives those property owners and the Homes Association the right to abate or enjoin the *City's* breach of those restrictions, a right which still exists to this day. The restrictions in the 1940 deeds did not operate to limit the rights of the Homes Association under Article II, section 4, because a recorded amendment was required to do that under Article VI.

As with the 1931 Bank of America deed, the 1940 deeds to the City could not impose deed restrictions that would amend or modify the powers and abilities of the Homes Association as outlined in Declaration No. 1, without first submitting the issue to a vote among the members under Article VI.

Finally, the plaintiffs may contend that the merger doctrine would be inequitable here. However, they cannot show injustice, injury, or prejudice will exist as a matter of law if the merger doctrine operates to extinguish the 1940 deed restrictions. *Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 362. It is undisputed that Area A has never been developed or used as park by City residents or homeowners. The transfer of Area A to the Luglianis will not deprive the residents of the City of parkland, nor will it impair the existing view corridors, since Area A will remain open space.

Since triable issues exist as to whether the merger doctrine extinguished these restrictive easements, the motion for summary judgment should not have been granted.

XII.

The Perpetual Conservation Easement Imposed on the Property Deeded to the Luglianis Is the Functional Equivalent of the Restrictive Covenants Previously Placed on "Area A," Because the Object of Both is to Protect the Open Space and Scenic Character of the Property in Perpetuity, and Such Easements Are to be Construed Liberally Without Imposing Any Unnecessary Burden on the Palos Verdes Homes Association

In accordance with its own municipal code, which permits open space zoning, the City of Palos Verdes placed an open space conservation easement upon Area A before it was reconveyed to the Homes Association. This negative easement was the functional equivalent of the 1940 deed restrictions which were extinguished when the land was retransferred, because it preserved the open space character of the property in perpetuity.

A conservation easement is not really an easement at all. Similar to a development's recorded declaration of covenants, conditions, and restrictions, it is an artifice created by California statutory law to render certain restrictions on use enforceable as equitable servitudes. See *Civil Code* sections 815.1, 815.2, 1353, and 1354.

This becomes obvious by the way that the Legislature chose to define conservation easements. *Civil Code* section 815.1 defines the term as meaning "any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural,

scenic, historical, agricultural, forested, or open-space condition." *Civil Code* section 815.2 provides that a conservation easement shall be perpetual in duration. These provisions "shall be liberally construed in order to effectuate the policy and purpose of Section 815." *Civil Code* section 816.

The Court of Appeal recognized that conservation easements 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; see also *Johnston v. Sonoma County Agricultural Preservation and Open Space Dist.* (2002) 100 Cal.App.4th 973, 976.

The Legislature enacted the conservation easement statutes in 1979. *Civil Code* section 815, et seq. In *Civil Code* section 815, the Legislature found and declared "hat the preservation of land in its natural, scenic, agricultural, historical, forested, or open-space condition is among the most important environmental assets of California." *Civil Code* section 815. Conservation easements are perpetual in duration and cities may acquire and hold conservation easements. *Civil Code* sections 815.2, subd. (b) and 815.3, subds. (a) and (b).

In addition to the conservation easement statute, the Legislature has encouraged municipalities to create open space zones by enacting the Open-Space Easement Act of 1974. *Government Code* section 51070, et seq. It did so to provide "a means whereby any county or city may acquire or approve an open-space easement in perpetuity or for a term of years for the purpose of preserving and maintaining open space." *Government Code* section 51070. The Legislature also made several declarations concerning the preservation of open space in this state. It has found that "the rapid growth and spread of urban development is encroaching upon, or eliminating open-space lands," and that "open space lands, if preserved and maintained, would

constitute important physical, social, economic or aesthetic assets to existing or pending urban development." *Government Code* sections 51071, and 51072.

Here, the City's municipal code provided for open space zoning. *Palos Verdes Municipal Code* section 18.16.010 provides that "[t]he purpose of the open space (OS) zone is to preserve, promote and enhance valuable natural and open space resources in the city. . . . The open space zone land consists of all publicly owned land including all city-owned land, including parklands and street rights-of-way, except any land within the coastal zone as defined by the California Coastal Commission, all school site utilized or owned by the Palos Verdes Unified School District, all sites utilized or owned by the Palos Verdes Peninsula Library District, and all land owned or which could be owned by the Palos Verdes Homes Association as a result of the exercise of any reversionary rights."

The statutorily created conservation easement placed on Area A prior to transferring Area A to the Luglianis was the functional equivalent of the restrictions contained in the 1940 deeds because it performs the same function—preserving the open space nature of the land for benefit of the community—by way of a conservation easement rather than a deed restriction. The statute creating conservation easements defines the open space easement as a "restriction" and the appellate courts have recognized they are negative easements. The conservation easement on Area A ensures that Area A must remain open space, regardless of ownership. This conservation easement must be construed liberally to effectuate the purpose of the statute. *Civil Code* section 816.

Despite the fact that Area A will remain an open space zone in perpetuity for the benefit of every resident, the plaintiffs are troubled by the fact that the Luglianis own Area A. But the plaintiffs fail to acknowledge that the Homes Association possesses the right to sell

parkland, a right that predates the transfer of the parkland to the Homes Association. They ignore the fact that this power has never been amended or modified in accordance with the Article VI amendment procedures set forth in Declaration No. 1.

As such, their concern that the City and Homes Association have schemed to sell off parkland is not well taken. The transfer to the Luglianis stopped the financial depletion of reserves caused by litigation initiated by the School District, and the liability created in part by the predecessors of the Luglianis. Area A was never used as parkland; it has always been open space. The transfer of title to the Luglianis shifted premises liability issues away from the City while preserving Area A as open space, which furthers the public policy of this state.

It is well established that a court may alter property interests in the course of resolving property disputes, solely on the basis of 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.

When the lawsuit brought by the Palos Verdes School District was settled, the district, the Palos Verdes Homes Association, the Luglianis, and the City of Palos Verdes Estates balanced the relevant burdens and interests of all parties. They settled their differences in a manner so as to accommodate, to the extent possible, the interests of all concerned. In granting summary judgment, the trial court ignored the equities, overturned the settlement agreement, and rendered an inequitable judgment. In doing so, it committed numerous legal errors, overlooked dispositive triable issues of fact, and exceeded its jurisdiction.

The trial court erred when it voided the 2012 deeds, and the judgment should therefore be reversed.

XIII.
The Award of Attorneys' Fees to the Plaintiffs Should Be Reversed Since the Lawsuit Conferred No Public Benefit.

In addition to granting summary judgment, the trial court gave the plaintiffs a massive award of attorneys' fees. If the summary judgment is reversed, the fee award also must be reversed. *Friends of the Hastain Trail v. Coldwater Development LLC* (2016) 1 Cal.App.5th 1013, 1037; *Samples v. Brown* (2007) 146 Cal.App.4th 787, 811.

While it is disappointing the trial court found the Homes Association violated the deed restrictions it placed in the City's deed, the disappointment does not stop there. Applying a 2.5 multiplier, the court awarded $235,716.88 in attorneys' fees to the plaintiffs based on a private attorney general theory. This fee award cannot stand because there are significant triable factual issues precluding summary judgment. However, even if the judgment is allowed to stand, there is no basis for awarding fees because no public benefit was conferred, and the cost of victory does not transcend the plaintiffs' personal interests. *Code of Civil Procedure* section 1021.5 authorizes court-awarded attorneys' fees under a private attorney general theory. *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 925. A court can abuse its discretion by awarding fees "where no reasonable basis for the action is shown." *Westside Community for Independent Living, Inc. v. Obledo* (1983) 33 Cal.3d 348, 355.

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 . . . ." *Code Civil Procedure* section 1021.5. The rationale of the private attorney general theory is to encourage the presentation of meritorious claims affecting large numbers of people by providing successful litigants attorneys fees incurred in public interest lawsuits. *Serrano v. Priest* (1977) 20 Cal.3d 25, 44–48.

Aside from failing to carry their burden on a number of issues material to their declaratory relief action, the plaintiffs have not alleged or shown how this action, spearheaded by Mr. Harbison, who is hostile to his neighbors, the Luglianis, conferred a significant benefit to the residents of the City. Aside from the personal nature of this lawsuit, only a single parcel of land is involved: land that has never been used for park or recreation purposes, due to its steep location. The plaintiffs cannot dispute that Area A is best used as open space, not as a public park. The conservation easement on Area A ensured its open space nature for all of the residents, for all time, regardless of whether Area A is owned by the Luglianis, the Homes Association, or the City. That restriction was in place after the multi-party Memorandum of Understanding was executed, not because the plaintiffs brought this action.

Thus, it was the settlement that preserved Area A in accordance with the public policy of this state as articulated in the conservation easement statute and the Open Space Law of 1974. The plaintiffs did not convey any public benefit on City residents, let alone any substantial benefit. In fact, the opposite occurred. The plaintiffs have dragged the City and the Homes Association into litigation to enforce a restriction that does not bind the Homes Association, incurring costs

that will ultimately be borne by the City residents they are claiming to help.

The failure to confer a significant public benefit by itself is reason to reverse the fee award, but a plaintiff seeking a fee award based on a private attorney general theory also bears the burden of establishing that that their litigation costs transcended their personal interests. *Ibid.* The plaintiffs have not alleged or evidenced that the financial burden of their attorneys fees are out of proportion to their personal stake in litigating the case.

Lastly, application of a multiplier of two and a half times the plaintiff's actual fees was not warranted in light of lower multipliers used in similar contingency fee cases. These multipliers range from 1.42 to 1.85. See, e.g., *Serrano v. Priest (1977) 20 Cal.3d* 25, 49 (1.43 multiplier used in action challenging constitutionality of education funding statutes); *Cates v. Chiang* (2013) 213 Cal.App.4th 791, 797 (1.85 multiplier in action to enforce statutory duty to collect gambling revenue belonging to the state from Indian tribes)*; Building a Better Redondo v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 873 (1.25 multiplier in case compelling city to submit a local coastal program amendment to public vote in compliance with charter); *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 897 (1.5 multiplier in action challenging Environmental Impact Report); and *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1174, 1217 (1.65 multiplier in action challenging contractor's wage practices as violating city law).

Based on the foregoing, the fee award to the plaintiffs should be reversed.

XIV.
Conclusion.

While the complexity of these historical real estate transactions cannot be overstated, the fact remains that the original declaration giving the Palos Verdes Homes Association the right and power to sell parkland has never been amended or modified in accordance with Article VI. As a result, it had the right to sell Area A to the Luglianis to resolve contentious and expensive litigation. The Homes Association and the City should be commended for resolving this dispute while at the same time preserving the unique scenic beauty of Palos Verdes Estates.

For all of the above reasons, the Palos Verdes Homes Association respectfully requests that the judgment be reversed in its entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

I am a partner in the law firm of Lewis Brisbois Bisgaard & Smith LLP, counsel of record for *Attorneys for Defendant and Appellant PALOS VERDES HOMES ASSOCIATION*.

This certificate of compliance is submitted in accordance with rule 8.204 (c) of the California *Rules of Court*.

This appellant's opening brief was produced with a computer. It is proportionately spaced in 14 point Times Roman typeface. This brief contains 32,565 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 November 9, 2016.

Roy G. Weatherup

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 November 9, 2016, I served the following document(s): **APPELLANT'S OPENING BRIEF** 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.

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

Executed on November 9, 2016 at Los Angeles, California.

Tina Wallace

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