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Exempt from fees pursuant
to Government Code § 6103

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7 City of Palos Verdes Estates

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES—CENTRAL DISTRICT

11 CITIZENS FOR ENFORCEMENT OF
12 PARKLAND COVENANTS, an
unincorporated association; JOHN
13 HARBISON, an individual

14 Plaintiffs and Petitioners,

15 v.

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

18 Defendants and Respondents,
19

20 ROBERT LUGLIANI and DOLORES A.
21 LUGLIANI, as co-trustees of THE
LUGLIANI TRUST; THOMAS J. LIEB,
22 TRUSTEE, THE VIA PANORAMA TRUST
U/DO MAY 2, 2012 and DOES 1 through
23 20,

24 Defendants and Real Parties in
Interest.

CASE NO. BS142768

**CITY OF PALOS VERDES ESTATES’
NOTICE OF DEMURRER AND
DEMURRER TO FIRST AMENDED
PETITION FOR WRIT OF MANDATE
AND COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: January 3, 2014
Time: 1:30 p.m.
Dept.: 86

Hon. Joanne O’Donnell

Petition and Complaint Filed: May 13, 2013

25 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

26 PLEASE TAKE NOTICE THAT on January 3, 2014, at 1:30 p.m., or as soon thereafter
27 as the matter may be heard, in Department 86 of the Superior Court of the State of California,
28

1 Los Angeles County, located at 111 N. Hill St., Los Angeles, California, Respondent and
2 Defendant City of Palos Verdes Estates (the "City") will and hereby does demur to the
3 Verified First Amended Petition for Writ of Mandate and Complaint for Injunctive Relief
4 ("Petition" or "FAP") filed by Citizens for Enforcement of Parkland Covenants and John
5 Harbison (together, "Plaintiffs" or "Petitioners") in its entirety.

6 **DEMURRERS**

7 1. The First Cause of Action for declaratory relief fails to state a cause of action
8 because it fails to set forth the ultimate facts of a justiciable controversy on which the court
9 could grant the declaratory relief.

10 2. The Second Cause of Action to enjoin alleged waste of public funds and *ultra*
11 *vires* actions by the City does not plead facts sufficient to state a cause of action because the
12 City's actions complained of are entirely legal and within its sole discretion. Code Civ. Proc.
13 § 430.10, subd. (e).

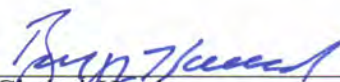
14 3. The Third Cause of Action for peremptory writ of mandate does not plead facts
15 sufficient to state a cause of action because enforcement of privately place deed restrictions is
16 not a governmental function and the City cannot be compelled to exercise its discretion in any
17 particular manner when deciding how to deal with alleged code violations. Code Civ. Proc. §
18 430.10, subd. (e).

19 The demurrers are based upon the accompanying memorandum of points and
20 authorities, all matters upon which judicial notice should or may be taken, the records,
21 pleadings, and documents on file in this action, and such further argument and evidence as
22 may be presented at the time of the hearing.

23 DATED: December 4, 2013

Respectfully submitted,

24
25 By: _____


Christi Hugin
Gregg Kovacevich
JENKINS & HOGIN, LLP
Attorneys for Respondent/Defendant
CITY OF PALOS VERDES ESTATES

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STANDARD OF REVIEW 1

III. FACTS AS ALLEGED 2

IV. ARGUMENT 4

 A. The New Allegations in the Amended Petition and Complaint Do Not
 Cure the Fatal Defects in the Original Petition and Complaint. 4

 1. Allegations relating to City’s Code Enforcement Program.. 5

 2. Allegations relating to City’s Prior Ownership of Property.. 6

 3. Allegations relating to New Estoppel Claim..... 7

 B. The FAP Fails to Plead Facts to State a Cause of Action for Declaratory
 Relief as Against the City. 7

 C. The Second Cause of Action Fails to State a Claim Against the City. 7

 D. The Third Cause of Action Fails to State a Claim Against the City. 11

 1. Plaintiffs Are Not Entitled to a Writ Commanding the City to
 Enforce Private Deed Restrictions on Area A..... 11

 2. The City Cannot Be Compelled to Address the Alleged Illegal
 Improvements On Area A in Any Particular Manner..... 12

 E. Plaintiffs’ Estoppel Theories Are Without Merit. 14

V. CONCLUSION. 15

1 **TABLE OF AUTHORITIES**

2 **Cases**

3 *AIDS Healthcare Foundation v. Los Angeles Dept. of Public Health*
4 (2011) 197 Cal.App.4th 693 11

5 *Aubry v. Tri-City Hospital Dist.*
6 (1992) 2 Cal.4th 962 6, 7

7 *BCE Development, Inc. v. Smith*
8 (1989) 215 Cal.App.3d 1142 11, 14

9 *C&H Foods Co. v. Hartford Ins. Co.*
10 (1984) 163 Cal.App.3d 1055 2

11 *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*
12 (1985) 39 Cal.3d 878 9

13 *Careau & Co. v. Sec. Pac. Business Credit, Inc.*
14 (1990) 222 Cal.App.3d 1371 2

15 *Citizens for Covenant Compliance v. Anderson*
16 (1995) 12 Cal.4th 345 11

17 *Coshow v. City of Escondido*
18 (2005) 132 Cal.App.4th 687 8, 9, 10

19 *Dix v. Superior Court*
20 (1991) 53 Cal.3d 442 14

21 *Farber v. Bay View Terrace Homeowners Ass'n*
22 (2006) 141 Cal.App.4th 1007 11

23 *Flores v. Arroyo*
24 (1961) 56 Cal.2d 492 2

25 *Gananian v. Wagstaffe*
26 (2011) 199 Cal.App.4th 1532 14

27 *Griffin v. County of Colusa*
28 (1941) 44 Cal.App.2d 915 2

Neighbors in Support of Appropriate Land Use v. County of Tuolumne
(2007) 157 Cal.App.4th 997 8

O'Rourke v. Teeters
(1944) 63 Cal.App.2d 349 9

People v. Municipal Court
(1972) 27 Cal.App.3d 193 14

Riggs v. City of Oxnard
(1984) 154 Cal.App.3d 526 13

| | | |
|----|--|----|
| 1 | <i>Roberts v. City of Palos Verdes Estates</i> | |
| 2 | (1949) 93 Cal.App.2d 545..... | 15 |
| 3 | <i>Russell v. Palos Verdes Properties</i> | |
| 4 | (1963) 218 Cal.App.2d 754..... | 11 |
| 5 | <i>Seaton v. Clifford</i> | |
| 6 | (1972) 24 Cal.App.3d 46..... | 9 |
| 7 | <i>Stanton v. Dumke</i> | |
| 8 | (1966) 64 Cal.2d 199 | 2 |
| 9 | <i>Taliaferro v. Locke</i> | |
| 10 | (1960) 182 Cal.App.2d 752..... | 14 |
| 11 | <i>Teachers Ins. & Annuity Assn. v. Furlotti</i> | |
| 12 | (1999) 70 Cal.App.4 th 1487..... | 9 |
| 13 | <i>Watson v. Los Altos School Dist.</i> | |
| 14 | (1957) 149 Cal.App.2d 768..... | 2 |
| 15 | <i>Wheeler v. Gregg</i> | |
| 16 | (1949) 90 Cal.App.2d 348..... | 9 |
| 17 | <i>Wilkman v. Banks</i> | |
| 18 | (1954) 124 Cal.App.2d 451 | 9 |
| 19 | <i>Young v. Gannon</i> | |
| 20 | (2002) 97 Cal.App.4 th 209..... | 1 |

Statutes

| | | |
|----|-------------------------|-------------|
| 21 | Code of Civil Procedure | |
| 22 | § 526a | 7, 8, 9, 10 |
| 23 | § 430.10 (e)..... | 2 |
| 24 | § 430.30(a)..... | 2 |
| 25 | § 1085 | 7, 11 |
| 26 | Government Code | |
| 27 | § 37350 | 10 |

Other Authorities

| | | |
|----|---|----|
| 28 | 5 Witkin, Civil Procedure, 4 th ed., Pleading, § 946 | 2 |
| 29 | Cal. Const. art. XIII C, § 1..... | 10 |
| 30 | Cal. Const., art. XI, § 7..... | 7 |
| 31 | Miller and Starr, 8 Cal. Real Est. § 24:25 (3d ed.) | 11 |

Palos Verdes Estates Municipal Code

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§ 1.16.010 12
§ 1.16.010(B) 12
§ 1.16.010(F)..... 13
§ 8.48.040 13
§ 8.48.060 13
§ 8.48.090 13
§ 8.48.110 13
§ 15.08.140 13
§ 15.08.150 13
§ 17.04.070 10
§ 17.04.100 9
§ 17.04.110 9, 13
§ 17.28.010 9
§ 17.28.010(C) 10
§ 17.32.05 13
§ 17.28.030 9
§ 17.32.040 13
§ 17.32.050 13
§ 17.32.060 12

1 **I. INTRODUCTION**

2 Plaintiff Citizens for Enforcement of Parkland Covenants was given leave to amend its
3 petition and complaint through which it seeks to undo a series of real property conveyances
4 among Defendants and Real Parties in Interest. The First Amended Petition and Complaint
5 (“FAP”) adds a new plaintiff (John Harbison) and, for reasons unknown, removes the Palos
6 Verdes Peninsula Unified School District (the “District”) as a defendant even though the
7 District was a key player in the transaction Plaintiffs seek to unwind. The FAP also includes
8 several new allegations, nearly all of which simply mirror unsuccessful arguments plaintiff
9 made in opposition to the initial demurrers by the City and the other parties. Consequently,
10 the new allegations add virtually nothing to the case and fail to cure the defects that rendered
11 the original petition and complaint susceptible to demurrer.

12 As discussed in the City’s demurrer to the original petition and complaint, Plaintiffs
13 oppose certain political decisions of the City Council and claims that these decisions – the
14 proposed rezoning of property and the requested approval of after-the-fact permits for
15 retaining walls – would be “*ultra vires*,” beyond the City’s authority. The lynchpin of
16 Plaintiffs’ contention is that the City’s actions might violate private deed restrictions. Through
17 this action, Plaintiffs seek to have the court stop the City from exercising its legislative
18 discretion with respect to the zoning of property within the City and instead use its
19 governmental authority to enforce private deed restrictions on private property in the manner
20 that Plaintiffs see fit. Plaintiffs’ legal theory remains unchanged from the original complaint
21 and is contradicted by settled law. The relief sought is unavailable and, accordingly, the City
22 respectfully requests that the demurrer be sustained without leave to amend.

23 **II. STANDARD OF REVIEW**

24 “A demurrer tests the sufficiency of the plaintiff’s complaint, i.e., whether it states
25 facts sufficient to constitute a cause of action upon which it may be based. (Code Civ. Proc., §
26 430.10, subd. (e)).” *Young v. Gannon* (2002) 97 Cal.App.4th 209, 220. “In determining
27 whether the complaint states facts sufficient to constitute a cause of action, the trial court may
28 consider all material facts pleaded in the complaint and those arising by reasonable implication

1 therefrom; it may not consider contentions, deductions or conclusions of fact or law.” *Id.* The
2 trial court may also consider matters of which it may take judicial notice. CCP§ 430.30(a).

3 Likewise, in ruling on the sufficiency of the petition for writ of mandate as against
4 demurrer, the court assumes to be true all material facts properly pleaded (*Flores v. Arroyo*
5 (1961) 56 Cal.2d 492, 497), disregarding conclusions of law and allegations contrary to facts
6 of which judicial notice may be taken (*Watson v. Los Altos School Dist.* (1957) 149
7 Cal.App.2d 768, 771-772; *Griffin v. County of Colusa* (1941) 44 Cal.App.2d 915, 918), and
8 considering such judicially noticed facts as though pleaded in the petition (*Watson v. Los Altos*
9 *School Dist., supra.*). See *Stanton v. Dumke* (1966) 64 Cal.2d 199, 207.

10 Under Code of Civil Procedure section 430.10 (e), a defendant is entitled to demur to a
11 cause of action if the pleading “does not state facts sufficient to constitute a cause of action.”
12 To state facts sufficient to constitute a cause of action, a plaintiff must “allege the ultimate
13 facts necessary to the statement of an actionable claim.” *Careau & Co. v. Sec. Pac. Business*
14 *Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390. In determining whether a complaint alleges
15 sufficient facts, “[d]oubt in the complaint must be resolved against the plaintiff and facts not
16 alleged are presumed not to exist.” *C&H Foods Co. v. Hartford Ins. Co.* (1984) 163
17 Cal.App.3d 1055, 1062.

18 A court should deny leave to amend a complaint after sustaining a demurrer “where the
19 facts are not in dispute, and the nature of the plaintiff’s claim is clear, but, under substantive
20 law, no liability exists.” 5 Witkin, Civil Procedure, 4th ed., Pleading, § 946. For reasons stated
21 below, the City requests that the court sustain the demurrers without leave to amend.

22 **III. FACTS AS ALLEGED**

23 For purposes of demurrer, material facts properly pleaded in the complaint are accepted
24 as true. The following facts are taken from the complaint.

25 In 1913, a wealthy New York financier purchased the land that would later become the
26 City of Palos Verdes Estates. FAP ¶ 9. Development of the property began in the early
27 1920’s. *Id.* In 1925, a number of lots were conveyed to the Palos Verdes Homes Association
28 (the “Association”) subject to deed restrictions limiting the use of the properties to public

1 schools, parks, playgrounds or recreation areas. FAP ¶ 10(c). In 1938, the Association
2 conveyed 13 of the properties to the Palos Verdes Peninsula Unified School District (the
3 “District”) subject to the same restrictions set forth in the 1925 deed. Among the properties
4 were two parcels referred to as “Lots C & D.” FAP ¶ 11. The 1938 deed included restrictions
5 that the property be used for the establishment and maintenance of public schools, parks,
6 playgrounds and/or recreation areas. FAP ¶ 11; FAP Exhibit 3, pp. 2-3.

7 The City of Palos Verdes Estates was incorporated on December 20, 1939. FAP ¶ 9(a).
8 In 1940, the Association deeded property owned and managed by it to the City. FAP ¶ 9(b).
9 Among the properties conveyed to the City in 1940 was “Area A”—the parcel that is the focus
10 of the petition and complaint. FAP ¶ 9(d). The 1940 deeds provided that the property
11 conveyed is to be used for park and/or recreation purposes for the benefit of residents and non-
12 resident property owners within Palos Verdes Estates. *Id.* The deeds further gave the
13 Association a right of reversion in the event certain deed restrictions were violated. FAP ¶
14 10(d); FAP Exhibit 2, pp. 13-14. Certain named parties also would be authorized to bring
15 appropriate proceedings to enjoin, abate or remedy the breach of any deed restriction. *Id.*;
16 FAP Exhibit 2, p. 14.

17 On February 1, 2010, the District filed a lawsuit against the City and Association
18 [LACSC Case No. BC431020], seeking, among other things, a declaration that the deed
19 restrictions applicable to Lots C & D were no longer enforceable. FAP ¶ 12. On September
20 22, 2011, the Court entered judgment finding that deed restrictions applicable to the property
21 and set forth in deeds from 1925 and 1938 all remain enforceable against the District. FAP ¶
22 13; FAP Exhibit 3. The Association thereafter brought an unsuccessful motion for attorneys’
23 fees. FAP ¶ 14. The District subsequently appealed the judgment and the Association filed a
24 cross appeal on the attorney fee issue. FAP ¶ 15.

25 In May 2012, the Association and the District entered into a Memorandum of
26 Understanding to resolve their disputes and obviate the need to pursue their appeals. The City
27 is also a party to the MOU, along with defendant/real party-in-interest Thomas J. Lieb, trustee,
28 the Via Panorama Trust U/DO May 2, 2012. FAP ¶¶ 19, 20; FAP Exhibit 4. The MOU

1 provided for the following land transfers: (1) Lots C and D would revert to the Association
2 pursuant to the terms of the applicable deed restriction; (2) the Association would swap Lots C
3 and D for Area A with the City; and (3) the Via Panorama Trust would purchase Area A from
4 the Association. FAP ¶ 20; FAP Exhibit 4.

5 Following the execution of the MOU, the parties took steps towards its implementation.
6 FAP ¶ 23. On September 5, 2012, the City quitclaimed its interest in Area A to the
7 Association. *Id.* On the same day, the Association conveyed Area A to Thomas J. Lieb,
8 trustee, the Via Panorama Trust U/DO May 2, 2012, referred to by Plaintiffs (together with
9 several Doe defendants) as the “Area A Recipients.” *Id.* Area A is located at the end of a cul-
10 du-sac and is adjacent to another parcel Plaintiffs refer to as the “Panorama Property.” FAP ¶
11 16. Plaintiffs allege that the owners of the Panorama Property have encroached on Area A by
12 erecting improvements in violation of the deed restrictions. FAP ¶¶ 16, 17.

13 On February 19, 2013, the City’s planning commission held a public hearing on an
14 application by the Panorama Property Owners to re-zone Area A and to obtain after-the-fact
15 approvals for improvements constructed thereon. FAP ¶ 24. The commission recommended
16 denial of the zone change request. *Id.* The matter proceeded to the City Council on March 12,
17 2013. *Id.* The Council held a hearing but did not take action, instead continuing the matter
18 and directing staff to investigate other zoning options. *Id.*

19 This lawsuit was filed on May 13, 2013 and the City was served on June 16, 2013. The
20 City and the other Defendants, Respondents and Real Parties in Interest demurred to the
21 petition and complaint and, on October 25, 2013, the Honorable Robert O’Brien sustained the
22 parties’ demurrers to the third cause of action with leave to amend. The court did not rule on
23 the parties’ demurrers to the first and second causes of action, indicating instead that those
24 matters should be resolved outside of the Writs and Receivers Department.

25 **IV. ARGUMENT**

26 **A. The New Allegations in the Amended Petition and Complaint Do Not Cure** 27 **the Fatal Defects in the Original Petition and Complaint.**

28 Aside from adding a plaintiff and removing a defendant, the FAP includes three groups

1 of new allegations, none of which helps to cure the fatal defects in the original petition and
2 complaint. The new allegations are summarized below:

3 **1. Allegations relating to City’s Code Enforcement Program.** In Paragraph 18 (and
4 its 17 subparagraphs a through q), Plaintiffs reference correspondence from the City to the
5 “Panorama Property Owners” between 1972 and 2011 in which the City requested or
6 demanded the removal of illegal encroachments on City-owned property. Plaintiffs also
7 reference a Municipal Code enforcement program from 2005 addressing unauthorized
8 encroachments onto City-owned properties. Based on the historical correspondence and the
9 City’s 2005 code enforcement program, Plaintiffs allege that the City has previously
10 considered the encroachment on Area A to be in violation of the applicable deed restrictions
11 and that the City has, “through conduct and statements,” taken the position that the deed
12 restrictions are mandatory and not discretionary. These allegations do nothing to help
13 Plaintiffs state a cause of action against the City.

14 First, these new allegations simply mirror arguments made by Plaintiffs in opposition to
15 the City’s original demurrer and already considered by the court. *See* Plaintiff’s Opposition to
16 Demurrer by Palos Verdes Estates at pp. 1, 11-12; City’s Reply Brief on Demurrer at p. 6.
17 Second, even if accepted as true, the new allegations in Paragraph 18 do not establish the
18 existence of a mandatory duty on the part of the City to enforce private deed restrictions on
19 property it does not even own. The only thing the allegations establish is the undisputed fact
20 that, while the City did own the property, it undertook various measures to seek the removal of
21 illegal encroachments upon it—encroachments that the City could exercise its police powers to
22 remove because they were constructed without permits *in violation of local ordinances*.
23 Contrary to Plaintiffs’ assertion, a City may not use its police power to enforce private deed
24 restrictions. The fact that the City informed neighboring property owners that their
25 encroachments violated applicable deed restrictions as well as the Municipal Code does not
26 create in the City a mandatory, ministerial obligation to enforce the deed restrictions. Indeed,
27 when the City owned the property, it was obligated to comply with the deed restrictions, as is
28 any owner of restricted property. In any event, the City no longer owns the property and

1 Plaintiffs fail to appreciate the fact that the City is not required to own Area A in order for the
2 deed restrictions to have force and effect.

3 **2. Allegations relating to City’s Prior Ownership of Property.** Paragraphs 25
4 through 30 purport to explain the genesis of an alleged “ministerial duty” on the part of the
5 City to enforce the private deed restrictions and remove the illegal encroachments on Area A.
6 *See also* FAP ¶ 57. Paragraph 25 characterizes several restrictions in the 1940 deed through
7 which the Association conveyed Area A to the City—restrictions that limit the use of the
8 property, the types of structures that may be erected on it, and to whom it may be sold or
9 conveyed, and that further provide the Association with a right of reversion in the event of a
10 breach of any of the restrictions. Paragraph 27 alleges that the City accepted the deed with all
11 of its restrictions. Paragraphs 26 and 28 through 30 consist of legal conclusions based on the
12 content of the 1940 deed and the City’s Municipal Code—legal conclusions that need not be
13 accepted as true on demurrer. *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.
14 Even if the new allegations of fact in Paragraphs 25 through 30 are accepted as true, they do
15 not help Plaintiffs to state a cause of action against the City.

16 Restrictions on the face of a deed do not create mandatory enforcement obligations on
17 the part of the government any more than they create mandatory enforcement obligations on
18 the part of private individuals. In fact, the drafters of the deed obviously recognized that the
19 City would not have a mandatory obligation to enforce the restrictions and, for that reason,
20 reserved unto the Association the right of reversion in the event of a breach of certain specified
21 restrictions (including the “no structures” restriction). FAP ¶ 25(e); FAP Exhibit 2, pp. 13-14,
22 ¶ 7. That sort of incentivization is the normal means by which deed restrictions get
23 enforced—the property owner either abides by them voluntarily or they risk suffering the
24 consequences spelled out in the deed itself. As discussed *infra*, Plaintiffs appear to confuse the
25 City’s authority to enforce its Municipal Code with a power to address violations of private
26 deed restrictions. The unpermitted improvements on Area A do constitute violations of the
27 Municipal Code. The City is addressing the code violations at the present time by entertaining
28 applications for a zone change and after-the-fact entitlements. FAP ¶ 24. If those things are

1 ultimately granted, the improvements could be legalized in place. If they are not, as explained
2 *infra*, the City may use one of several tools available for addressing the violations. On the
3 other hand, the City cannot enforce private deed restrictions on property it does not own. Even
4 if the City still owned Area A, it would not have a “mandatory duty” to enforce the
5 restrictions.

6 **3. Allegations relating to New Estoppel Claim.** Paragraphs 37 through 41 purport to
7 allege that the City is “estopped from denying the efficacy of the land use restrictions in the
8 1940 deeds.” These paragraphs consist entirely of legal conclusions that need not be accepted
9 as true on demurrer. *Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at 967. In any event,
10 these new allegations precisely mirror unsuccessful arguments made by Plaintiffs in opposition
11 to the City’s original demurrer and already considered by the court. *See* Plaintiff’s Opposition
12 to Demurrer by Palos Verdes Estates at pp. 12-13; City’s Reply Brief on Demurrer at pp. 7-8.
13 Moreover, estoppel is of no value in this case; the scope of the police power and the
14 (non)existence of a ministerial duty within the meaning of CCP §1085 are questions of law
15 that may be resolved by this court on demurrer.

16 None of the above-described amendments alleges ultimate facts that cure the
17 deficiencies in the original complaint. Consequently, the First Amended Petition and
18 Complaint fails to state a cause of action against the City.

19 **B. The FAP Fails to Plead Facts to State a Cause of Action for Declaratory**
20 **Relief as Against the City.**

21 The City hereby joins in the argument of Defendants/Real Parties-in-Interest Robert and
22 Dolores A. Lugliani, as co-trustees of the Lugliani Trust, and the Palos Verdes Homes
23 Association set forth in their individual demurrers to the first and third causes of action.

24 **C. The Second Cause of Action Fails to State a Claim Against the City.**

25 Plaintiffs’ second cause of action is brought pursuant to Code of Civil Procedure
26 section 526a and seeks to enjoin the City from spending additional public funds in furtherance
27 of the Panorama Property Owners’ applications for a zoning ordinance amendment that would
28 affect the uses on Area A permitted by the City’s zoning ordinance and for after-the-fact

1 approval of a retaining wall on Area A. The FAP also adds one twist not included in the
2 original complaint—the allegation that “to the extent the September 2012 deeds are deemed
3 valid, the conveyance of public parkland to a private party is also a waste of public funds and
4 an ultra vires act.” FAP ¶¶ 24, 51, 52; Prayer for Relief ¶¶ 3, 4. Because zoning is a valid
5 exercise of the City’s police powers and the City’s conveyance of Area A was to the
6 Association which held a right of reversion in the property, Plaintiffs cannot state a claim
7 under CCP § 526a on either theory.

8 “Under Code of Civil Procedure section 526a, a taxpayer may challenge wasteful or
9 illegal government action that otherwise would go unchallenged because of standing
10 requirements. To state a claim, the taxpayer must allege specific facts and reasons for the
11 belief the expenditure of public funds sought to be enjoined is illegal. General allegations,
12 innuendo, and legal conclusions are not sufficient. [¶] A cause of action under Code of Civil
13 Procedure section 526a will not lie where the challenged governmental conduct is legal.
14 Conduct in accordance with regulatory standards is a perfectly legal activity. Further, a
15 taxpayer is not entitled to injunctive relief under Code of Civil Procedure section 526a where
16 the real issue is a disagreement with the manner in which government has chosen to address a
17 problem because a successful claim requires more than an alleged mistake by public officials
18 in matters involving the exercise of judgment or wide discretion.” *Coshov v. City of*
19 *Escondido* (2005) 132 Cal.App.4th 687, 714 (internal citations and quotations omitted.)

20 The first portion of Plaintiffs’ second cause of action is premised on the theory that
21 City’s actions—its consideration of applications for a zoning amendment and after-the-fact
22 entitlements—are “*ultra vires*” (i.e., beyond the City’s legal authority and, therefore, illegal)
23 because they allegedly violate deed restrictions applicable to the Area A property. FAP ¶ 51.
24 The theory contradicts settled law.

25 The zoning authority of local governments derives from article XI, section 7 of the
26 California Constitution. *Neighbors in Support of Appropriate Land Use v. County of*
27 *Tuolumne* (2007) 157 Cal.App.4th 997, 1005. “Under the police power granted by the
28 Constitution, counties and cities have plenary authority to govern, subject only to the

1 limitation that they exercise this power within their territorial limits and subordinate to state
2 law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the ‘police power [of a county or
3 city] under this provision ... is as broad as the police power exercisable by the Legislature
4 itself.’ [Citation.]” *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39
5 Cal.3d 878, 885, 218.

6 It is well established that no person has a vested right in the exercise of the police
7 power and that a municipality’s exercise of the police power may not be limited by private
8 contracts or restrictive covenants. *Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70
9 Cal.App.4th 1487 1496-97; *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 367. Private
10 agreements restricting the use of property are simply immaterial to the validity of a particular
11 zoning ordinance.¹ *O’Rourke v. Teeters* (1944) 63 Cal.App.2d 349, 352. Consequently, the
12 City’s exercise of its police power in considering amendments to its zoning ordinance and
13 processing a permit application cannot constitute illegal conduct and form the basis of a CCP §
14 526a claim. *Coshov v. City of Escondido, supra*, 132 Cal.App.4th at 714.

15 Not only are the City’s actions that Plaintiffs seek to enjoin perfectly legal, they are
16 required by law. The consideration of a zoning ordinance amendment and after-the-fact
17 approvals are pending as the result of applications made by the Panorama Property Owners.
18 FAP ¶ 24. The City must process those applications in the manner set forth in its ordinance.
19 Palos Verdes Estates Municipal Code (“PVEMC”) § 17.28.010² *et seq.* (describing process for
20 consideration of zoning ordinance amendments); § 17.28.030 (“The city council, after receipt
21 of the recommendation of the planning commission, shall hold a final hearing upon the
22 proposed amendment and take such action as it deems appropriate.”); § 17.04.110 (authorizing
23 after-the-fact applications); § 17.04.100 (describing process for entitlement applications,
24 _____

25 ¹Likewise, a change in zoning does not impair the enforceability of existing deed restrictions. *Seaton*
26 *v. Clifford* (1972) 24 Cal.App.3d 46, 52; *Wilkman v. Banks* (1954) 124 Cal.App.2d 451, 455.
27 Therefore, if Plaintiffs possess any enforceable rights or remedies by virtue of the deed restrictions
28 applicable to Area A, those rights or remedies will not be affected by any action the City may choose
to take on the pending applications for a zoning ordinance amendment and after-the-fact entitlements.

²The PVE Municipal Code may be found at <http://www.codepublishing.com/ca/palosverdesestates>

1 including after-the-fact applications.) Therefore, the injunction sought by Plaintiffs in
2 connection would actually prevent the City from carrying out its obligation to process the
3 applications in the manner required by law.³

4 The second part of Plaintiffs' second cause of action—the contention that the City's
5 conveyance of Area A to the Association was an *ultra vires* act—is also without merit. In
6 accordance with the MOU, the City allowed the transfer of ownership of Area A (deed
7 restrictions and all) to the Association and accepted ownership of Lots C & D (deed
8 restrictions and all). FAP, Exhibit 4, p. 7. Indisputably, the City possesses the legal authority
9 to “purchase, lease, receive, hold, and enjoy real and personal property, and control and
10 dispose of it for the common benefit.” Gov't Code §37350. Therefore, conveyance of the
11 property was a lawful exercise of the City's power. For that reason alone, Plaintiffs cannot
12 state a claim under section 526a. *Coshov v. City of Escondido, supra*, 132 Cal.App.4th at 714.
13 In any event, the transaction was not even a “waste” in the colloquial sense because the City
14 ended up receiving title to Lots C & D—property roughly equivalent in size and value to Area
15 A yet far more useful as parkland due to its location and accessibility. FAP, Exhibit 4, p. 4.

16 Because the City's police power may not be limited by private covenants regarding the
17 use of land, its consideration of a zoning code amendment and an after-the-fact permit
18 application is perfectly legal and Plaintiffs cannot plead facts sufficient to state a cause of
19 action against the City under CCP § 526a. Furthermore, because the Legislature has invested
20 cities with the power to control and dispose of real property for the common benefit, and
21 because the transaction yielded a piece of property even better suited for public parkland,
22 Plaintiffs cannot claim that the conveyance of Area A was an illegal and wasteful act under
23 section 526a. Accordingly, the City respectfully requests that its demurrer to the second cause
24 of action be sustained without leave to amend.

25 _____
26
27 ³It should be noted as well that applicants for zoning amendments and after-the-fact entitlements are
28 required to pay a fee for the applications. PVEMC §§ 17.04.070, 17.28.010(C). Pursuant to
Proposition 26, the amount of the fee may not exceed the reasonable cost of processing the
applications. Cal. Const. art. XIII C, § 1.

1 **D. The Third Cause of Action Fails to State a Claim Against the City.**

2 In its third cause of action, Plaintiffs seek a writ of mandate commanding the City to
3 enforce the deed restrictions applicable to Area A and to remove the illegal improvements
4 from Area A and restore it to its original state. FAP ¶ 57. Citing Code of Civil Procedure
5 section 1085, Plaintiffs allege that the City has a clear, present and ministerial duty to enforce
6 deed restrictions on the property it no longer owns. FAP ¶¶ 54, 57.

7 “Generally, mandamus is available to compel a public agency’s performance or to
8 correct an agency’s abuse of discretion when the action being compelled or corrected is
9 ministerial. A ministerial act is an act that a public officer is required to perform in a
10 prescribed manner in obedience to the mandate of legal authority and without regard to his or
11 her own judgment or opinion concerning such act’s propriety or impropriety, when a given
12 state of facts exists.” *AIDS Healthcare Foundation v. Los Angeles Dept. of Public Health*
13 (2011) 197 Cal.App.4th 693, 700-701 (internal citations and quotations omitted.)

14 As detailed further below, Plaintiffs cannot demonstrate a legal entitlement to a writ.
15 The City has no ministerial duty, let alone any legal mechanism, to enforce private deed
16 restrictions on property that it does not own. With respect to the alleged illegal improvements
17 on Area A, the City has several options available for dealing with code violations and cannot
18 be compelled to pursue any one enforcement mechanism in particular.

19 **1. Plaintiffs Are Not Entitled to a Writ Commanding the City to**
20 **Enforce Private Deed Restrictions on Area A.**

21 Unless a clear intention to allow enforcement by others is expressed in the deed
22 restriction, a party must have a legal interest in the benefitted property in order to have
23 standing to enforce the restriction. *BCE Development, Inc. v. Smith* (1989) 215 Cal.App.3d
24 1142, 1146-1147; Miller and Starr, 8 Cal. Real Est. § 24:25 (3d ed.) The seller or transferor of
25 the benefitted property cannot enforce the deed restrictions after conveying away title to
26 another absent a showing that the original covenanting parties intended to allow enforcement
27 by one who is not a landowner. *Farber v. Bay View Terrace Homeowners Ass’n* (2006) 141
28 Cal.App.4th 1007, 1011; *Russell v. Palos Verdes Properties* (1963) 218 Cal.App.2d 754, 764-
765 (disapproved of on other grounds by *Citizens for Covenant Compliance v. Anderson*

1 (1995) 12 Cal.4th 345.) In any case, enforcement of the terms of a private deed restriction is
2 not a governmental function.

3 As alleged in the Petition, the City no longer owns Area A. FAP ¶ 6. It is owned by
4 Thomas J. Lieb, Trustee, the Via Panorama Trust. *Id.* Even if the City remained authorized to
5 enforce the deed restrictions in question, it has no mandatory duty to enforce them. There is
6 no authority to support Plaintiffs suggestion that a public officer becomes obligated by law to
7 take certain actions by virtue of the placement by a private party of restrictions on the face of a
8 deed. Furthermore, the 1940 deed in question gave the Association a right of reversion in the
9 event of a breach by the City. FAP ¶ 10(d); FAP Exhibit 2, pp. 13-14. In addition to that, it
10 authorized (but did not obligate) certain other benefitted parties to pursue remedies. FAP,
11 Exhibit 2, p. 14 (“...the breach of any [covenant] or the continuance of any such breach may
12 be enjoined, abated or remedied by appropriate proceedings by the Grantor herein [the
13 Association] or its successors in interest, or by such other lot or parcel owner, and/or by any
14 other person or corporation designated in said Declarations of Restrictions.” (Emphasis
15 added.)) Therefore, Plaintiffs have not alleged facts, and cannot allege facts, establishing a
16 mandatory duty on the part of the City to enforce private deed restrictions applicable to Area
17 A.⁴

18 **2. The City Cannot Be Compelled to Address the Alleged Illegal**
19 **Improvements On Area A in Any Particular Manner.**

20 To the extent Plaintiffs seek to force the City to employ specific code enforcement
21 mechanism to deal with the encroachments on Area A, such relief is not available in mandate.
22 If improvements have been constructed on Area A in violation of the City’s zoning ordinance,
23 the City has a number of tools in its belt for achieving compliance. Zoning violations may be
24 prosecuted criminally as a misdemeanor. PVEMC §§ 1.16.010, 1.16.010(B), 17.32.060. In
25 additional to criminal penalties, the City may declare any violation of its code a public

26
27 ⁴Section 12 (“Right to Enforce”) of the “Declaration of Establishment of Basic Protective
28 Restrictions” states that the restrictions are enforceable by “Commonwealth Trust Company, Palos
Verdes Homes Association, by the owner or owners of any property in said tract, their and each of
their, legal representatives, heirs, successors and assigns.” FAP, Exhibit 1, p. 50.

1 nuisance and subject it to abatement. PVEMC §§ 1.16.010(F), 17.32.040, 17.32.050.
2 Nuisance abatement offers several options to the City, including the issuance of an abatement
3 order directing the property owner to abate the nuisance. PVEMC §§ 8.48.040 *et seq.*,
4 17.32.050. If the property owner fails to comply, the City may seek an abatement warrant and
5 cause the nuisance to be abated with its own workforce or that of a private contractor.
6 PVEMC § 8.48.060. The City through a lien or a special assessment on the property may
7 recoup costs associated with abatement and the City has the additional option of seeking a
8 court order for treble costs of abatement. PVEMC §§ 8.48.090, 8.48.110. The City may also
9 achieve compliance by legalizing unpermitted improvements as opposed to forcing their
10 removal. For example, the City always has the option of amending its zoning ordinance to
11 authorize previously unpermitted uses. After-the-fact permits may also be issued for
12 improvements authorized in the zone.⁵ PVEMC §§ 15.08.140, 15.08.150, 17.04.110. With a
13 number of options available to achieve code compliance, the City may not be compelled to
14 pursue any one in particular.

15 The court in *Riggs v. City of Oxnard* (1984) 154 Cal.App.3d 526 considered and
16 rejected a petition seeking to command the city to exercise its code enforcement discretion in a
17 particular manner. There, Appellant sought a petition for writ of mandate compelling the city
18 to close down a transmission shop operating in the C-2 zone where such uses were clearly
19 prohibited and to issue its owners a criminal citation for violating the zoning ordinance. The
20 City had erroneously issued the transmission shop a zone clearance, allowing it to open. After
21 the lawsuit was filed, the Oxnard City Council amended its zoning ordinance to authorize
22 transmission shops in the C-2 zone subject to a special use permit. Although the legislative
23 amendment rendered the remedy Appellant sought (enforcement of the zoning ordinance)
24 moot, the court nevertheless considered Appellant's argument that a writ should lie to enforce

25 _____
26 ⁵Private covenants and deed restrictions are not enforced by a city through its police power. While
27 private covenants and restrictions may be more restrictive than the applicable zoning regulations, they
28 do not constrain a city's police power to zone and grant permits consistent with its zoning ordinance.
If private covenants/deed restrictions are violated, the remedy lies in the courts with benefitted
property owners or others specifically authorized to seek relief according to the deed restrictions.

1 a clear public duty. *Id.* at 530. The court held that municipalities have broad discretion to
2 determine the most appropriate mode of enforcing ordinances and that a writ of mandate will
3 not issue to compel that discretion be exercised in a particular way. *Id.* at 530. The court
4 recognized that a city retains the police power to zone and rezone property as it sees fit and
5 that rezoning to accommodate an existing use was within the city’s power. *Id.* at 531.

6 It is also firmly established that a writ may not lie to compel an agency to initiate
7 criminal prosecution. The principle of prosecutorial discretion is rooted in separation of
8 powers and due process and is basic to the framework of the criminal justice system.
9 *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543. An unbroken line of cases has
10 recognized that prosecutorial discretion is not subject to judicial control. *Id.* at 1545-46; *Dix v.*
11 *Superior Court* (1991) 53 Cal.3d 442, 451; *People v. Municipal Court* (1972) 27 Cal.App.3d
12 193, 207; *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 755-56.

13 Here, the City has options for addressing the alleged illegal improvements on Area A
14 and the corresponding discretion; Plaintiffs are not entitled to a writ compelling the City to
15 exercise its discretion in any particular manner.

16 **E. Plaintiffs’ Estoppel Theories Are Without Merit.**

17 In paragraph 37 through 41 of the FAP, Plaintiffs plead the estoppel theories that
18 they raised in opposition to the City’s initial demurrer and which have already been considered
19 and rejected by the court. Plaintiffs’ first estoppel theory suggests that because the City
20 accepted title to Area A in 1940 subject to numerous deed restrictions, it is “estopped from
21 now denying the efficacy of the entire deeds, including the land use restrictions.” FAP ¶ 39.
22 Plaintiffs miss the point again. The City does not, and has not, denied that Area A was subject
23 to deed restrictions that limited its use when the City owned the property. The City no longer
24 owns Area A (FAP ¶¶ 6, 23) and, therefore, it is without standing to enforce those private deed
25 restrictions. *BCE Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142- 1146-47; Miller
26 and Starr, 8 Cal. Real Est. § 24:25 (3d ed.) Even if the City still owned Area A it would be
27 under no mandatory obligation to enforce the deed restrictions, although as property owner it
28 would be subject to them.

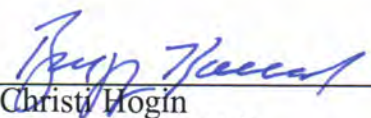
1 For its second theory, Plaintiffs cite *Roberts v. City of Palos Verdes Estates* (1949) 93
2 Cal.App.2d 545 for the proposition that the City is “estopped to deny the mandatory nature of
3 the land use restrictions due to prior litigation of this very issue.” FAP ¶ 40. In *Roberts*, the
4 issue was whether the City could erect a building to store city-owned maintenance vehicles
5 and equipment on property subject to a deed restriction that prohibited the erection of any
6 structures unless they were “properly incidental to the convenient and/or proper use of said
7 realty for park purposes.” *Roberts*, 93 Cal.App.2d at 546. The court ruled that terms of the
8 deed alone are controlling, not the desires of the City, and remanded the case to the trial court
9 to determine whether the proposed buildings would be “necessary and appropriate, and hence,
10 ‘incidental to the convenient and/or proper use of said realty for park purposes.’” *Id.* at 548.
11 The case has no application here. The City is not making use of Area A and does not propose
12 to make use of Area A. The City’s point is simply that it may not be compelled to use its
13 police power to enforce private deed restrictions applicable to property it does not own.
14 Plaintiffs can offer no legal authority to contradict the City’s position on that point.
15 Consequently, the City requests that the court sustain the demurrer to the third cause of action
16 without leave to amend.

17 **V. CONCLUSION**

18 For the foregoing reasons, the City respectfully requests that this Court sustain
19 the City’s demurrer without leave to amend.

20 Dated: December 4, 2013

Respectfully submitted,

21
22 By: 
23 Christi Hogn
24 Gregg Kovacevich
25 JENKINS & HOGIN, LLP
26 Attorneys for Defendant/Respondent
27 CITY OF PALOS VERDES ESTATES
28

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 1230 Rosecrans Avenue, Suite 110,
Manhattan Beach, CA 90266.

5 On December 6, 2013, I served the foregoing documents described as:

6 **CITY OF PALOS VERDES ESTATES' NOTICE OF DEMURRER AND
7 DEMURRER TO FIRST AMENDED PETITION FOR WRIT OF MANDATE AND
8 COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
9 THEREOF;**

10 on the interested party or parties in this action by placing the original thereof enclosed in sealed
11 envelopes with fully prepaid postage thereon and addressed as follows:

12 *PLEASE SEE SERVICE LIST ATTACHED*

- 13 **VIA EMAIL.** I caused such document as described above, to be transmitted via E-Mail
14 to the offices of the addressee(s).
- 15 **VIA FACSIMILE.** I caused such document to be transmitted via facsimile to the offices
16 of the addressee(s).
- 17 **VIA OVERNIGHT DELIVERY.** I enclosed the documents in an envelope or package
18 provided by an overnight delivery carrier and addressed to the person(s) at the address(es)
19 stated above. I placed the envelope or package for collection and overnight delivery at a
20 regularly utilized drop box of the overnight delivery carrier.
- 21 **VIA U.S.MAIL.** I enclosed the above described documents in a sealed envelope or
22 package addressed to the person(s) listed above or on the attached; caused such envelope
23 with postage thereon fully prepared to be placed in the United States mail at Los Angeles,
24 California.

25 *I am readily familiar with the Jenkins & Hogin, LLP's practice of collection and processing correspondence for
26 outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with
27 postage thereon prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that
28 on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is
more than one day after date of deposit for mailing in affidavit.*

- 29 **STATE.** I declare under penalty of perjury under the laws of the State of California
30 that the above is true and correct.
- 31 **FEDERAL.** I declare that I am employed in the office of a member of the Bar of this
32 Court at whose direction the service is made.

33 Executed this 6th day of December, 2013, at Manhattan Beach, California.

34 
35 WENDY HOFFMAN

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