2d Civil No. B267816
2d Civil No. B270442
Superior Court No. BS142768

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 Appellants,

v.

CITY OF PALOS VERDES ESTATES, et al.

Defendants and Appellants.

Proceedings of the Los Angeles County Superior Court, Case No. BS142768
Hon. Barbara A. Meiers, Judge Presiding

APPELLANT CITY OF PALOS VERDES ESTATES' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Second **APPELLATE DISTRICT, DIVISION** Two	Court of Appeal Case Number: B267816/B270442
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: Citizens for Enforcement of Parkland Covenants RESPONDENT/REAL PARTY IN INTEREST: City of Palos Verdes Estates, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): City of Palos Verdes Estates

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 7, 2016

Christi Hogin
(TYPE OR PRINT NAME)

▶ Christi Hogin
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Palos Verdes Estates is an entirely planned community, comprised mostly of residential neighborhoods in a parklike setting. Every property is governed by deed restrictions, which are enforced by the Palos Verdes Homes Association. A confluence of different interests presented the City with an opportunity to assist the Homes Association in fending off a threat to the enforceability of deed restrictions with respect to several properties in the City owned by the Palos Verdes Peninsula Unified School District. (5-CT-1179-1181.)[1]

Four-Party Memorandum of Understanding and Settlement (MOU)

Long story short, in 2010, the School District had filed a lawsuit against both the Homes Association and the City to advance its legal theory that, where it deemed necessary to raise revenue, the School District could (a) take advantage of Government Code section 65852.9, which affords the School District the right to rezoning of unused schoolsites under certain circumstances, then (b) sell off to private developers its holdings in Palos Verdes Estates. (5-CT-1179-1180.) The School District contended that, for public policy reasons, it was free to do so without regard to the otherwise applicable deed restrictions. (5-CT-1179).

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[1] Citations to the Clerk's Transcript are denoted, "[volume number]-CT-[page number]."

Financially desperate because of state funding cuts, the cash-strapped School District believed it could garner as much as $1.5 million from the sale of two lots (Lots C & D). The School District's lawsuit was directed at Lots C & D but the School District's legal theory potentially put all its properties in the City on the chopping block. The City and the Homes Association were concerned about the lawsuit's threat to the integrity of the community plan. (12-CT-2805, 2809.) A resolution that satisfied the differing interests was reached when the School District, the Homes Association, the City, and a private property owner (the Luglianis) entered into a four-party Memorandum of Understanding (MOU). (5-AA-1179-1196.)

The MOU resulted in, among other things, the settlement of the 2010 lawsuit, the School District receiving a $1.5 million donation, and reaffirming of the enforceability of the deed restrictions. For safe keeping, as part of the MOU, Lots C & D were transferred to the City to maintain as parkland. The City received $100,000 from the Homes Association to ease the unanticipated financial burden on the City arising from assuming responsibility for Lots C & D. In addition, the MOU provided for disposition of a separate parcel of land known as "Area A." As explained below, the transactions related to implementing the provisions of the MOU pertaining to Area A became the subject of the instant lawsuit.

The conveyances of Area A challenged in this lawsuit

This lawsuit challenges two transactions made pursuant to the MOU: (1) the City's conveyance of Area A to the Homes Association and (2) the Homes Association's subsequent conveyance of Area A to Palos Verdes Estates homeowners, the Luglianis. (5-AA-1024-1025.) In their opening brief, the Homes Association and the Luglianis address the basis for the appeal as to the latter transaction.

As to the City, this lawsuit challenges its conveyance of Area A, back to the original grantor, defendant Homes Association.

As this brief explains, it is fundamental that cities are authorized to own and dispose of property. (Gov't Code §37350.) Although the trial court allowed the transfer of ownership of Area A from the City to the Homes Association, it erroneously ordered two conditions that the City imposed on the conveyance be removed; and, based largely on the trial court's misperception of the City's motives, the trial court erroneously held that the City's action in transferring its property was "ultra vires." As explained below, the trial court's ruling must be reversed for many reasons.

Trial court's erroneous determinations and extra-jurisdictional order

Error #1: Declaring the City's reconveyance of land to the original grantor to be "ultra vires". At the top of the list of the trial court's errors is its conclusion that City's conveyance was "ultra vires." Where a city (or

any corporation) purports to take an action beyond its corporate powers, the act is ultra vires. But an improper act that may be corrected by adherence with applicable law is not ultra vires. (*Lamere v. Superior Court* (2005) 131 Cal.App.4th 1059, 1065 fn. 4.) Here, there was no improper act. The City acted within its statutory authority, which includes the power to convey property. Absent an *ultra vires* act by the City, Plaintiffs' Second Cause of Action under Code Civil Procedure section 526a fails [*see* 8-CT-1879] and the City was entitled to the judgment in its favor.

Error #2: Applying its ruling *sua sponte* to all City-owned property. The trial court's second error eclipses the first one, at least in scope. Plaintiffs' lawsuit is only about one property, Area A. (8-CT-1888.) But the trial court went far beyond the pleadings and evidence, extending its judgment to all "similarly situated" parkland owned by the City. (15-CT-3654:1-6.)

There was no legal basis for the trial court to extend the scope of this action and its jurisdiction to properties not identified in the complaint or before the court. The trial court's purported basis for improperly extending its jurisdiction--that the City somehow contemplated eventual "misuse" of Area A by future owners (15-CT-3561-3562)--did not provide any basis for its patently overbroad order.

Error #3: Enjoining future legislative acts. Just as erroneous and overbroad was the court's order enjoining the City from taking certain legislative actions, including, for example, creating a zoning district with the "purpose" of "ignoring" deed restrictions. (15-CT-3655.) In this regard, the trial court confused the City's police powers with the enforcement of covenants on real property. Deed restrictions and zoning laws derive from different sources. While a property owner must obey all applicable deed restrictions and zoning laws, each is independent. Deed restrictions govern the use of property and are binding on the property owners. Deed restrictions are not binding on the government, unless the government owns the restricted property. Deed restrictions do not govern the City's exercise of its constitutional police powers, including its zoning power. The trial court's judgment enjoining future legislative acts is against the law and violates the separation of powers principle.

Error #4: Exercising continuing jurisdiction and empowering plaintiffs to address new, future disputes *ex parte* directly with trial court. To enforce the trial court's ongoing supervision of the City's park management functions, the trial court anointed plaintiffs John Harbison and the unincorporated Citizens for Enforcement of Parkland Covenants as super-citizens, authorizing them to haul the City back before the trial judge on *ex parte* notice to compel the City—at taxpayer expense—to remove

any "structure, vegetation, or object" encroaching on *any* City-owned parkland at *any* time in the future. (15-CT-3656.) This was another clear error and overreach of judicial power.

Error #5: Enforcing use restrictions by preventing the transfer of the ownership of the property. On a fundamental level, the City should not even be in this case. The complaint was premised on deed restrictions that limit the use of Area A to parkland. The City did not misuse Area A; it conveyed Area A back to the grantor (Homes Association), subject to restrictions it added and whatever other use restrictions legally applied. Use restrictions run with the land. The City has the legal authority to convey the restricted property and the owner is bound by whatever restrictions legally apply to the property.

Error #6: Ordering the City to convey property without restrictions that the City imposed. The trial court ordered the City to reconvey the property after deleting two of the restrictions the City imposed. The court incorrectly believed the City was using those restrictions to amend the existing deed restrictions. The two restrictions invalidated by the trial court did not purport to *remove* earlier deed restrictions on use (nor could they). Rather, the City added restrictions for the benefit of the public that *reinforced* those deed restrictions which survived the reconveyance. Thus, the City retained an open space easement that would satisfy the public

interest in maintaining the ratio of structures to open space, which is the formula for maintaining the parklike setting that defines Palos Verdes Estates. The trial court invalidated the two restrictions of conveyance that the City used to insure an *additional* layer of restrictions that would operate under certain contingencies, should a future owner seek to use a portion of the property for a sport court or other accessory use. The City's action was aimed at limiting development and preserving open space. In this regard, the City acted well within its authority and consistent with its role to preserve the City's parklike residential setting.

Error #7: Concluding that the City could not reconvey property to the original grantor *which held a right of reversion*. The City conveyed Area A to the Homes Association, the very entity that years earlier conveyed the property to the City with a proviso that the Homes Association could re-take the property at any time if the use restrictions were violated. Thus, Plaintiffs paint themselves into a logical corner by invoking the deed to challenge the City's action: Plaintiffs claim that the City's reconveyance to the Homes Association violates the restriction in the deeds by which Area A was originally transferred to the City; yet that same deed provides that, in the event of violation, the property may be retaken by the Homes Association. The deed cannot logically be violated by a conveyance that the deed itself expressly permits.

Moreover, the deed restrictions specifically *authorize* conveyance to an entity capable of maintaining public parks. The CC&Rs for the Homes Association expressly provide that the Homes Association can hold and maintain public park land. (15-CT-3564; see also 10-CT 2414.) Indeed, the trial court found that the Homes Association fits within this category.

Error #8: Reforming the MOU without all necessary parties. The trial court further erred by reforming the settlement agreement MOU, even though all parties to the MOU were not before the court. The City conveyed Area A pursuant to the MOU. The Plaintiffs attacked part of the consideration with which they disagree (conveyances of Area A) outside the context of the MOU. The trial court explicitly (and erroneously) determined it could invalidate some MOU consideration and determine the "purpose" of the MOU unlawful without actually invalidating the MOU, or at least leave the question of the effect of the judgment on the MOU to subsequent litigation. The court materially changed the terms of the MOU, without the School District—a necessary party because a party to the MOU—before it.

Error #9: Substituting its judgment for the City Council's as to whether the public interest is served under the MOU as reformed by the court. The trial court denied Plaintiffs' request to invalidate the City's conveyance to the Homes Association, in part because the trial court was

wary of how the City might exercise its discretion in the future. (15-CT-3565.) But by reshaping the City's conveyance to the Homes Association, the trial court substituted its own judgment for that of the City's. That violated separation of powers.

The trial court expressed irritation that the City may use its legislative authority to participate in future transactions where parkland could become privately owned. The trial court made no secret of its policy preference for publicly owned open space.[2] The trial court branded as "ultra vires" the City's participation in the MOU because that agreement resulted in the Homes Association selling (heavily restricted) property to private parties. The City's conveyance to the Homes Association was made pursuant to an MOU which expressly contemplated that subsequent transaction; indeed, it was part of the consideration. The judgment impacts material portions of the MOU while expressly *not* invalidating it. The court effectively required the City to perform under the MOU while at the same

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[2]What the trial court apparently did not appreciate was that even privately-owned land deed restricted as open space cannot be developed and thereby contributes to the parklike character of the residential areas. If it is publicly owned, the taxpayers must pay for its maintenance (mostly weed abatement in fire season) and although the City may permit public access where it owns the property, because Area A is largely hillside property, it was not as suitable for park use as are Lots C & D. (*See* 3-CT-520, FAP ¶ 16; 5-CT-1056-1057; 12-CT-2861, ¶¶ 12-13.) Through the open space easement retained by the City, the conveyance of Area A relieved the taxpayers of the burden of maintenance but kept for them the benefit of open space. (12-CT-2809-10.)

time depriving it of the consideration the City bargained for.

Error #10 Treating two separate real estate transactions as if they were a criminal conspiracy. The MOU contemplated two real estate transactions, but the City was a party to only one of them. Nevertheless, in (erroneously) determining the *other* real estate transaction resulted in violation of deed restrictions, the court held the City liable for its participation in the first, entirely lawful transaction. Even assuming arguendo the second transaction—the Homes Association's conveyance of property to the Luglianis—was unlawful (a dubious assumption in light of the strong legal arguments those parties marshal to support their position), the City cannot be liable for a transaction to which it was not a party. Moreover, while liability as an "aider and abettor"—the theory relied on by the court (15-CT-3548)—is sometimes available in the context of criminal or tort law, it has no place here. A real estate conveyance is not a specific-intent crime or tort. The City had the authority to reconvey Area A to the Homes Association; that should end the analysis. The trial court tagged the City with a guilty *mens rea,* which was improper and irrelevant.

Both the Judgment and the Attorneys' Fees Order should be reversed

The City respectfully submits that the judgment in favor of Plaintiffs should be reversed and the trial court should be instructed to enter judgment in favor of the City. Because of this, and for additional reasons set out

below, the trial court's order awarding Plaintiffs' attorneys' fees should likewise be reversed.

II. STANDARD OF REVIEW

A trial court's grant of summary judgment is reviewed de novo. (*Peterson v. Wells Fargo Bank, N.A.* (2015) 236 Cal.App.4th 844, 850.)

Because the underlying material facts related to whether the City's actions were lawful are undisputed and the trial court's errors in awarding attorneys' fees are based on the construction of a statute, the standard of review of that decision is likewise *de novo*. *(Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175-1176.)

III. STATEMENT OF FACTS

This lawsuit concerns ownership of undeveloped parkland, referred to by Plaintiffs as "Panorama Parkland" or "Area A." (5-CT-1028, Second Amended Complaint ("SAC") ¶ 10.) The property is on a steep hill at the end of a cul-de-sac below a single-family home. (3-CT-520, First Amended Petition and Complaint ("FAP") ¶ 16; 5-CT-1056-1057; 12-CT-2861, ¶¶ 12-13.)

A. The Homes Association Conveyed Property with Deed Restrictions and the Power to Retake the Property if the Restrictions Were Violated

In 1913, a wealthy New York financier purchased the land that would later become the City of Palos Verdes Estates. (5-CT-1028, SAC ¶

12.) Development of the property began in the early 1920's. In 1923, deed restrictions were imposed on the land and the private corporation Palos Verdes Homes Association was organized. (*Id.*; 5-CT-1029, 1083-1087, SAC ¶ 14 and Ex. 5 at 25-29.) In 1931, lots were conveyed to the Homes Association "to be used and administered forever for park and/or recreation purposes." (12-CT-2937, 1931 Grant Deed ¶ 3).

The City of Palos Verdes Estates was incorporated in 1939. (5-CT-1029, SAC ¶ 12.) In 1940, the Homes Association deeded its park lots to the City. (*Id.*) Among the properties conveyed to the City on June 14, 1940 was the Panorama Parkland, or "Area A," the parcel that is the focus of the petition and complaint. (5-CT-1029, SAC ¶ 12; 5-CT-1031, SAC ¶ 15.) The 1940 deed contained seven restrictions related to its use as parkland, conveyance, and reversionary interests. (5-CT-1031-1032, SAC ¶ 15(i) – (vii).) For example, the deed provided that, except as otherwise provided, "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." (5-CT-1107, SAC Ex. 6 at 9, ¶4; 5-CT-1114, SAC Ex. 7 at 5, ¶4.)

The deed reserved for the Homes Association a reversionary interest in the event specified deed restrictions were violated. (5-CT-1032, SAC ¶

15(vi); 5-CT-1107, SAC Ex. 6 at 9; 5-CT-1114-1115, SAC Ex. 7 at 5-6.) Particular parties named in the deed were authorized to bring appropriate proceedings to enjoin, abate or remedy the breach of any deed restriction. (5-CT-1107, SAC Ex. 6 at 9; 5-CT-1114-1115, SAC Ex. 7 at 5-6.)

Around this same time, the Homes Association conveyed 13 properties to the School District. (13-CT-2955, 1938 Deed.) The properties were restricted to "the establishment and maintenance of public schools, parks, playgrounds and/or recreation areas." (*Id.*) Several decades later, in 2010, the School District—which was a defendant to the initial petition and complaint in this action , but for unknown reasons was later dismissed by Plaintiffs—filed a lawsuit against the City and Homes Association. (4-CT-973; 5-CT-1034, SAC ¶¶ 23, 24.) The School District sought, among other things, a declaration that the deed restrictions applicable to two of the lots conveyed from the Homes Association, namely Lots C and D of Tract 7331, were no longer enforceable. (5-CT-1034, SAC ¶¶ 23, 24.) The court entered judgment in favor of the Homes Association, finding that deed restrictions applicable to the property and set forth in deeds all remain enforceable against the School District. (5-CT-1035, SAC ¶25.) The Homes Association then brought an unsuccessful motion for attorneys' fees. (5-CT-1035, SAC ¶ 26.) The School District appealed the

judgment and the Homes Association filed a cross appeal on the attorneys' fee order. (5-CT-1035, SAC ¶ 27.)

B. The Dispute Between the Homes Association and the School District Over the Use of Property Was Resolved in a Memorandum of Understanding

In 2012, the Homes Association and the School District entered into a Memorandum of Understanding ("MOU") to resolve their disputes and obviate the need to pursue their appeals. To achieve that resolution, two additional parties with overlapping concerns were necessary to the settlement agreement. The City was also a party to the MOU, along with defendant Thomas J. Lieb, trustee, the Via Panorama Trust u/do May 2, 2012, and trusts for the benefit of related parties (collectively, "Luglianis"), owners of 900 Via Panorama in the City of Palos Verdes ("Via Panorama Property"). (5-CT-1035-1036, SAC ¶¶ 28, 29; 5-CT-1178, SAC Ex. 12.)

The Via Panorama Property is at the end of a cul de sac and adjacent to Area A. (3-CT-520, FAP ¶ 16; 5-CT-1056-1057; 12-CT-2861, ¶¶ 12-13.) The MOU recites that to the north/northwest of the Via Panorama Property the prior owner installed a series of retaining walls to stabilize the Via Panorama Property. (5-CT-1181, SAC Ex. 12.) The installation was done without a required permit. To the west of the Via Panorama Property, the Luglianis landscaped and improved a portion of Area A, including placing a gazebo and other accessory, non-habitable structures. At the City's

direction, the Luglianis removed the structures encroaching on the City's parkland. The Luglianis desired to make Area A part of the Via Panorama Property. (*Id.*)

The MOU recites that Area A is approximately the same size as the combined area of Lots C and D, although less useful for recreation because Area A is less accessible than Lots C and D. (5-CT-1181, SAC Ex. 12.) Having Lots C and D be restricted to open space is a key element of the City's General Plan. (*Id.*; 12-CT-2807, City Staff Report § A.3.)

The MOU served multiple purposes, including, to reaffirm use restrictions on all School District property conveyed by the Homes Association; resolve the lawsuit; subject future lighting on school athletic fields to the City's zoning; resolve encroachments by the Luglianis, including establishing responsibility to maintain the retaining walls; and establish Lots C and D as open space. (5-CT-1181-1182, SAC Ex. 12, Art. I, ¶ A; 12-CT-2803-2804, City Staff Report.) The MOU contemplates the donation of $1.5 million to the School District from the Luglianis. (12-CT-2807).

Each party to the MOU, including the Homes Association, affirmed its authority to enter into the MOU. (5-CT-1182, SAC Ex. 12, Art. I, ¶ B).

The City discussed and approved the MOU is an open and public meeting. Although the plaintiffs claimed residents were not given notice of

the City's meeting on the issue, members of the public attended and spoke at the meeting. (12-CT-2863.)

The MOU acknowledged that Area A and Lots C and D are subject to a right of reversion if they are not used in compliance with the deed restrictions limiting their use. (5-CT-1179, 1183-84, SAC Ex 12.) That is, the properties may revert back to the Homes Association if they are used other than for public schools, parks, playgrounds, or recreation areas.

The parties to the MOU agreed to the following land transfers: (1) Area A and Lots C and D would revert to the Homes Association pursuant to the terms of the applicable deed restrictions; (2) the Homes Association would convey Lots C and D to the City; and (3) the Luglianis would purchase Area A from the Homes Association. (5-CT-1035, SAC ¶ 29(a) – (c); 5-CT-1183-1185, SAC Ex. 12, Arts. II.C., III.B., III.D., IV.A., V.C.)

The City's conveyance to the Homes Association imposed additional deed restrictions on Area A to ensure that it could only be used as open space and that no more than the previous accessory, non-habitable structures and the existing retaining walls could be allowed in Area A under any circumstances. (12-CT-2805, 2809, City Staff Report.)

The City did not receive any money from the Luglianis. (5-CT-1035-1036, SAC ¶ 29.) Other than the payment by the Homes Association to the City of $100,000 to compensate the City for the cost of maintenance

of Lots C and D, the City received no money in connection with the MOU. (5-CT-1184, SAC Ex. 12, Art. III.C.)

C. The City Imposed an Easement for Open Space; No City Approvals Have Been Issued for Any Structure on the Property

After execution of the MOU, the parties took steps towards its implementation. (5-CT-1036-1037, SAC ¶ 33.) The City conveyed its interest in Area A to the Homes Association, subject to a conservation (open space) easement and utility and emergency access easements. (2-CT-431-432, Quitclaim Deed ¶¶ 1-6.) The deed requires the grantee to remove existing retaining walls (technically encroachments) or obtain after-the-fact approvals from the City. (2-CT-432, Quitclaim Deed ¶ 5.)

Further, the deed provides that a designated part of Area A that is not visible from public road was excluded from the ban on structures. As to structures, the deed provides that: (i) unless approved by the City, the grantee cannot construct any structure on the designated part of Area A. (2-CT-432, Quitclaim Deed ¶ 6); (ii) upon obtaining all required permits and approvals, grantee may construct "a gazebo, sports court, retaining wall, landscaping, barbeque, and/or any other accessory structure" as defined by the City municipal code but only in that designated part of the property (*Id.*); (iii) any such structure shall comply with requirements of the City, the Homes Association, and the Homes Association's Art Jury (*Id.*; 12-CT-

2894, City Staff Report); and (iv) any other applicable deed restrictions would be independently enforceable. All applications for City approvals for structures on Area A were stayed during the pendency of this litigation; the City has issued no approvals or permits. (1-CT-16; 10-CT-2376.)

D. Plaintiffs Filed Suit, Seeking to Set Aside Portions of the MOU and Related Property Conveyances, and Seeking Relief Solely With Respect to Area A; the Writ Portion of Plaintiffs' Lawsuit Was Denied

On May 13, 2013, Citizens for Enforcement of Parkland Covenants (CEPC), an unincorporated association filed a petition for writ of mandate and complaint for injunctive relief. (1-CT-16.) The vast majority of CEPC members are members of the Homes Association and reside in the City. (13-CT-3018.) Although these members were represented by their Homes Association in the School District litigation and in the settlement memorialized in the MOU, Plaintiffs named the Homes Association, City, and School District as defendants and respondents. (1-CT-16.) Plaintiffs also named the Luglianis as defendants and real parties in interest. (*Id.*)

The Petition and Complaint sought to set aside portions of the MOU and related property conveyances on the ground that they violate protective covenants, and requested the City and Homes Association be ordered to enforce those covenants. (1-CT-17, ¶ 1.) Specifically, Plaintiffs alleged that the owners of the Via Panorama Property encroached on Area A by

erecting improvements in violation of the deed restrictions. (1-CT-23, ¶¶ 18, 19.) Plaintiffs prayed for relief solely with respect to Area A. (1-CT-29-30.) Plaintiffs also directed the second cause of action against only the City under Code of Civil Procedure section 526a claiming that the City had wasted public funds and acted ultra vires by obtaining legal advice with respect to the MOU and the settlement and by entertaining applications for zoning approvals related to Area A. (1-CT-27.)

The City and the other defense parties demurred to the petition and complaint on the ground that it failed to state a cause of action. (1-CT-226; 2-CT-245.) Judge Robert O'Brien sustained the demurrers to the third (writ of mandate) cause of action with leave to amend. (RT-5:14-20.)[3] The writ court did not rule on the demurrers to the first and second causes of action, indicating instead that those matters should be resolved outside of the Writs and Receivers Department. (RT-5:20-6:1.) Plaintiffs subsequently filed the First Amended Petition ("FAP"), adding John Harbison as another petitioner and plaintiff. (3-CT-513.)

The writ court sustained the City's demurrer to the third (writ of mandate) cause of action in the FAP without leave to amend. (4-CT-923.) The writ sought an order that the City has an affirmative duty to own Area A or enforce the private land use restrictions and to remove the illegal

[3] Citations to the Reporter's Transcript are denoted, "RT-[page number]."

improvements on Area A. (*See* 3-CT-526-528, 534, FAP ¶¶ 25-30 & 57.) The writ court ruled that "[a]t this time, Plaintiff has not presented any possible amendment that would establish a ministerial duty to act as requested." (4-CT-923.) The court noted that no writ of mandate is available to compel the exercise of the City's discretion in a particular manner. Division Two of the California Court of Appeal, Second District, summarily denied Petitioners'/Plaintiffs' writ petition seeking interlocutory review of Judge O'Brien's order. (4-CT-970.)

At this point, Plaintiffs voluntarily dismissed the School District from the lawsuit. (4-CT-973.)

The case was transferred to Department 12, Judge Barbara A. Meiers presiding. The trial court heard argument on the pending demurrers to the first and second causes of action. (RT-16-38.) The trial court complained that the FAP contained a great deal of material that was not germane to the dispute and that it needed to be amended. (RT-26:13-27:2.) The trial court acknowledged that defendants were "somewhat at a disadvantage" because they were facing "a complaint that was not complete." (RT-27:5-7.) At a continued hearing on the demurrers, the trial court reiterated that it "was so disturbed at this mishmash pleading that we had." (RT-44:28-45:1). The trial court granted Plaintiffs leave to amend the complaint and, by stipulation, Plaintiffs added another cause of action for private nuisance by

Harbison against his neighbors, the Luglianis. (RT-52; 5-CT-1024, 1200-1201.) The City's Demurrer to the Second Amended Complaint ("SAC") and Joint Motion to Strike portions of the SAC were overruled. (8-CT-1765.)

Plaintiffs filed a motion for summary judgment and the City filed a cross motion for summary judgment. (8-CT-1795; 10-CT-2338.)

The City argued,[4] regarding the first cause of action for declaratory relief, that there was no justiciable controversy that involved the City. (10-CT-2351.) Specifically, the City argued (1) because Plaintiffs claimed violation of the 1940 deed restrictions that govern use, not ownership, the 2012 quitclaim deed from the City to the Homes Association did not violate the terms of the deed; (2) if the 1940 deed restrictions were violated by the City's 2012 quitclaim deed, the only remedy would be to trigger the Homes Association's reversionary interest; (3) because the City no longer owned the property, the City had no authority, much less a duty, to enforce private deed restrictions; and (4) because the City has discretion regarding how to legislate and enforce its municipal code, the City had no duty to exercise its police powers in the manner asserted by Plaintiffs. (10-CT-2352-2358.) Regarding the second cause of action for waste of public funds/ultra vires

[4]The Homes Association and the Luglianis opposed Plaintiffs' motion for summary judgment as to the first cause of action. (13-CT-3057-3090.)

activity, the City argued that the City possessed the legal authority both to convey real property under Government Code section 37350 and to enact zoning laws. (10-CT-2358-2359.) The City also argued that the City could not be enjoined from exercising its legislative power in the future. (10-CT-2359-2361.)

Plaintiffs argued, regarding the first cause of action for declaratory relief, that (1) the City's quitclaim deed to the Homes Association was invalid because the Homes Association is not an entity that holds, maintains, or regulates public parks; (2) the City authorized a private party to construct private use improvements on public parkland; (3) voiding the City's quitclaim deed to the Homes Association would return the property to the City; and (4) reversion to the Homes Association is not the exclusive remedy for violation of deed restrictions. (12-CT-2835-2840.)

Regarding their second cause of action, Plaintiffs argued that California law recognizes such a cause of action where a city attempts to divert a public park from public use. Plaintiffs also argued that there were material disputed facts about whether the City was a party to the conveyance of Area A to the Luglianis, whether the City received consideration from the sale of parkland, and whether Area A on the one hand and Lots C and D on the other were equivalent in size. (12-CT-2840-2845.)

E. The Trial Court Granted Plaintiffs' Motion for Summary Judgment and Denied the City's Cross-Motion for Summary Judgment

The trial court held a hearing on the cross motions for summary judgment. Apparently mistakenly believing that the City and School District were one and the same and that the City received more than just $100,000 to maintain Lots C and D, the trial court asked at the outset of the hearing: "Isn't the school district a part of the city?" (RT-98:10-11.)

Even after it was made clear to the trial court that the City and the School District were separate, the trial court appeared mistakenly to believe that the City received the $1.5 million that actually went to the School District, stating: "This was not some, 'Oh, Let's do it for the public good, this lot is better used for so-and-so.' A lot of money, a lot of money passed hands." (RT-98:4-20; 115:4-13.)

The trial court continued to focus on this theme in its summary judgment order, which erroneously states that Area A and Lots C and D were conveyed under the MOU "in return for other consideration including but not limited to the payment of a substantial sum of money ($2,000,000) from private landowners, Mr. Lieb and the Luglianis." (15-CT-3551:28-3552:2.)

After recounting the history of City orders to the Luglianis to remove the encroachments, the trial court concluded that the City could not

be trusted with the property. (15-CT-3564:22-3565:3.) The trial court determined to keep title to Area A in the hands of the Homes Association, partly because the trial court was concerned about the discretionary nature of City decisions regarding parkland management. (15-CT-3565:3-9.) An order "to make the City act to remove improper constructions and trees... might not be effective since a Writs and Receivers court might conclude that how a City is to comply with such an order, involving issues such as how many trees are to be removed and in what manner, etc., involves too many 'discretionary decisions' to be the subject of a writ." (*Id.*)

At the summary judgment hearing, the trial court also speculated that the City entered into a contract with the Homes Association promising to hold title forever. (RT-99:18-20; RT-100:17-18 ["So tentatively, in this court's view, the City was wearing its private citizen hat and entering into whatever contract it had with Palos Verdes."]). The court stated: "You didn't give me the facts. I don't know what's going on with that." (RT-101:10-11.) The court stated that, with "the City acting like a private contractor in a contract," the City would be prevented from rezoning the area. (RT-105:26-106:3.) "So my feeling at this moment, I hate to talk about feelings in making rulings, but my feeling at this moment is probably the City would get estopped by this court through an injunctive order for trying to re-zone this or do anything else that would interfere with these

restrictions or do anything else that would interfere with these restrictions on the property or the enforceability thereof." (RT-107:3-9.)

Near the end of the hearing the trial court stated that it might want more briefing regarding "a city as a private contracting party and the differences that develop from that and what the city qua city instead of city qua private citizen can or cannot do that would disrupt or interfere with the proper conduct of the contract." (RT-131:27-132:4.) No further briefing was ultimately requested or provided.

The court imported this view of the City-as-private-contractor into the summary judgment order: "Deeds are also deemed to be contracts of a sort, and by their actions, the City and Association were acting to breach their contractual obligations as title owners under these deeds not only to the party from whom the deed was obtained and from whom the deed was accepted along with an acceptance of all of its conditions and restrictions, but also to all of the other property owners in the Palos Verdes development as, if you will, third party beneficiaries and indirect parties to these 'deed contracts.'" (15-CT-3563:6-11.)

Although Plaintiffs had sought a declaration that the conveyance of Area A by the City was void (5-CT-1037:25-26), this was not ordered by the trial court. The City was not barred from conveying Area A to the Homes Association. (*See* 15-CT-3564:2-13.) In the trial court's view, the

problem was with the conveyance from the Homes Association to the Luglianis. (15-CT-3548:19-22.) The trial court stated that the City and the Homes Association "both engaged in ultra vires acts, with the City '*aiding and abetting*' and acting in arrangement and effort to see Area A, the land use in issue in this case, transferred to a private party in violation of the deed restrictions on that parcel and the duty owed to all other landowners in the City." (*Id.* [emphasis added].)

The trial court found that Judge O'Brien's earlier order denying the writ of mandate portion of the case did not prevent it from granting summary judgment in favor of Plaintiffs. Because in the trial court's view the writ petition was unclear, "the ruling on the mandate petition was also unclear." (15-CT-3552:15.) The writ petition was also "premature and confused because it was mixed in with civil claims to have the validity of the settlement contract [MOU] adjudicated, which really needed to be decided first, before any mandamus effort on the theories that plaintiff was advancing, could be pursued." (15-CT-3553:24-27.)

The summary judgment order runs 30 pages. (15-CT-3547-3576.) It cites only three cases, all in support of a single noncontroversial proposition, that a city may act in either a sovereign capacity (enacting legislation) or a non-sovereign capacity (entering into contracts). (15-CT-3562:10-17.)

F. The Judgment Extended Beyond Area A, To All "Similarly Situated Property Owned By the City," and Gave Plaintiffs Authority to Bring the City Before the Court on Ex Parte Notice to Compel the City to Remove from Parkland Any "Structure, Vegetation, or Object"

The trial court entered judgment in favor of Plaintiffs and against the City and the other defendants. (15-CT-3648.) The trial court granted declaratory relief as to the first cause of action. (15-CT-3648-3655.) Among other things, the trial court held that the City's quitclaim deed to the Homes Association was ultra vires. (15-CT-3648:20-21.) The trial court ordered the City to issue a new deed to the Homes Association without two of the conditions the City imposed in accordance with the MOU. (15-CT-3648:21-22.) The two conditions required the grantee either to remove or obtain permits from the City for the existing retaining walls and provided certain restrictions on any potential accessory structures. (2-CT-432, ¶¶ 5, 6.) The MOU contemplated that the grantee, the Homes Association, would in turn convey the property to the Luglianis. (5-CT-1184, Arts. III.D, IV.A.) The two conditions ordered removed by the court were consideration provided by the Homes Association and the Luglianis to the City in the MOU (in exchange for which the School District was receiving certain benefits and accepting certain burdens). (5-CT-1184-1185, Arts. III.D, IV.A, V.C.) The trial court ordered these conditions removed even

though all parties to the MOU were not before the court. (4-CT-973; 5-CT-1178.)

The trial court applied its judgment to all "similarly situated property owned by the City" (15-CT-3654:1-6), even though neither the SAC, FAC, nor the original petition and complaint raised any claim regarding property other than Area A. (1-CT-16-31; 3-CT-513-538; 5-CT-3654:1-6.) Moreover, the evidence submitted in connection with the motions for summary judgment regarding alleged encroachments did not go beyond these properties. (E.g., see generally 8-CT-1798-1847, Plaintiffs' Separate Statement of Facts; 8-CT-1848 to 9-CT-2170, Evidence in Support of Plaintiff's Motion for Summary Judgment.) As was true of the original petition and complaint and the FAP, other than a boilerplate prayer for "such other and further relief as the Court may deem just and proper," the relief Plaintiffs requested was focused solely on Area A. (1-CT-29-30; 3-CT-536-537; 5-CT-1042-1043.)

Concerned about the City's potential for making future decisions affecting the management of parkland with which the court might disagree, the trial court decreed an ongoing role for the trial court and the Plaintiffs with respect to parkland in the City other than Area A. The trial court retained jurisdiction to enforce the judgment by *ex parte* application. (15-CT-3656:14-15.) The trial court's judgment empowers Plaintiffs to seek *ex*

parte orders to enforce the terms of the judgment. (*Id.*) This includes compelling the City to remove any "structure, vegetation, or object" encroaching in the future on any City-owned parkland. (15-CT-3654:1-6.)

The judgment did not address the second cause of action for waste of public funds/ultra vires action explicitly. Plaintiffs asserted that the City wasted taxpayer money entering into the MOU and considering zoning applications that apply to Area A. (5-CT-1040, SAC ¶¶43-45.) The trial court did not find any waste of public funds. The trial court, however, enjoined the City from taking certain legislative actions regarding zoning. (15-CT-3655:23-3656:8.) For example, the court enjoined the City from creating a zoning district that has the "purpose" of "ignoring" deed restrictions. (15-CT-3655:23-26.)

Plaintiffs' third cause of action, a private nuisance claim against the Luglianis, was dismissed at Plaintiffs' request. (15-CT-3656:9-11.)

G. After Judgment Was Entered, the Court Awarded Plaintiffs Attorneys' Fees; Timely Notices of Appeals Were Filed as to the Judgment and Fee Order, and the Appeals Were Consolidated

After judgment was entered, Plaintiffs' moved for an award of attorneys' fees. Over the objection of the City and other defendants, the court awarded Plaintiffs the full amount of their request, $235,716.88,

which included a multiplier of 2.5. (City's Appellant's Appendix in Lieu of Clerk's Transcript ("AA") AA-2, 14, 173.)

The City and other defendants timely appealed from the judgment and the attorneys' fees order. (16-CT-3913, 3935-3937, 3941; AA-178, 186, 197-198.) By stipulation and order of the Court of Appeal, the appeals of the judgment and attorneys' fees order were consolidated.

IV. LEGAL ARGUMENT

A. The City Legally May Convey Back Property to the Grantor and May Impose Additional Restrictions on Property it Conveys; Thus, the Trial Court Erred in Reforming the Deed and Declaring the City's Conveyance *Ultra Vires*

The material facts relating to the City's conveyance are undisputed. Plaintiffs challenged the City's conveyance of Area A to the Homes Association as an *ultra vires* act and a violation of the deed restrictions. As a matter of law, the City has the statutory power to convey property, so its conveyance cannot be *ultra vires*. The deed restrictions both expressly allowed the City to convey the property to the Homes Association because it can maintain parks and implicitly allowed the conveyance because the Homes Association held a reversionary interest in the property, so the deed contemplated the possibility that the Homes Association could again own Area A. As explained in more detail below, under the circumstances and because the matter was before the trial court on cross-motions for summary

judgment, the judgment should be reversed and the case remanded to the trial court with direction to enter judgment in the City's favor.

1. The City's Conveyance of Area A Pursuant to the MOU Was Not *Ultra Vires*

As a matter of black letter law, a city is authorized to convey property generally. By statute, a city has the legal authority to "purchase, lease, receive, hold, and enjoy real and personal property, and control and dispose of it for the common benefit." (Gov't Code § 37350.) An act is "ultra vires" when it is beyond the authority of a city and cannot be cured by adherence to the law. (*G.L. Mezzetta, Inc. v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1092 ["A contract entered into by a local government without legal authority is 'wholly void,' ultra vires, and unenforceable."]); *Poway Royal Mobilehome Owners Ass'n v. City of Poway* (2007) 149 Cal.App.4th 1460, 1473 [same].) Therefore, contrary to Plaintiffs' assertion, the City's conveyance of the property could not be an *ultra vires* act; its action was undeniably within the express authority of the municipality.

If a city conveys property incorrectly or improperly, its conveyance may be held ineffective under the law. But that is not the same as acting ultra vires. (See *Lamere v. Superior Court* (2005) 131 Cal.App.4th 1059, 1065 fn. 4 ["A corporation may act within its lawful power, but in violation

of the governing law; such an act will not be held ultra vires and although it is wrongful, it can be ratified or validated by conformance to the statutes."]; *Whitney v. Sherman* (1918) 178 Cal. 435, 440 [quieting title in plaintiff; sheriff's deed to defendant ineffective to pass title].).

The distinction is significant because the second cause of action against the City was based on Code of Civil Procedure section 526a and entirely predicated on a waste of public funds from an *ultra vires* act. Because the City's conveyance was not *ultra vires*, the claim failed as a matter of law:

> As noted in our discussion of the limitations placed by the appellate courts, section 526a is properly used where "some illegal expenditure or injury to the public fisc is occurring or will occur." (*Waste Management, supra,* 79 Cal.App.4th at p. 1240, 94 Cal.Rptr.2d 740.) Other appellate courts have phrased the necessary predicate for the application of the statute as being when the state is "guilty of illegally spending public funds" (*Sagaser, supra,* 176 Cal.App.3d at p. 310, 221 Cal.Rptr. 746) or where the complaint endeavors to "control [ ] illegal governmental activity" (*Connerly, supra,* 92 Cal.App.4th at p. 29, 112 Cal.Rptr.2d 5) or attack an alleged "illegal expenditure of funds." (*Brown, supra,* 30 Cal.App.4th at p. 1281, 36 Cal.Rptr.2d 404; see also *Cowett, supra,* 221 Cal.App.3d at p. 513, 270 Cal.Rptr. 527.) Put another way, a section 526a action "will not lie where the challenged governmental conduct is legal." (*Coshow, supra,* 132 Cal.App.4th at p. 714, 34 Cal.Rptr.3d 19.)

(Humane Soc. of U.S. v. State Bd. of Equalization (2007) 152 Cal.App.4th 349, 361.) Here, Plaintiffs challenge the City's conveyance of property. It

is legal for the City to convey property, so challenges to any particular conveyance will not give rise to a claim under section 526a.

The trial court erred in holding that a real estate transaction can be judicially nullified based on the grantor's purported motives. The court stated that the City and the Homes Association "both engaged in ultra vires acts, with the City '*aiding and abetting*' and acting in arrangement and effort to see Area A, the land use in issue in this case, transferred to a private party in violation of the deed restrictions on that parcel and the duty owed to all other landowners in the City." (15-CT-3548:19-22 [emphasis added].)

The City is not an "aider and abettor." Aiding and abetting liability is available in the context of a violation of the criminal law and in tort. (E.g., *People v. Carrasco* (2014) 59 Cal.4th 924, 968 (criminal law); *Gerard v. Ross* (1989) 204 Cal.App.3d 968, 983 (tort).) The City has found no case applying that concept to a basic civil real estate transaction and (perhaps unsurprisingly) no case holding that grantee's reconveyance of real property to grantor who has a right of reversion can impose on the grantee aider and abettor liability for what grantor subsequently does with the property. Neither Plaintiffs nor the trial court cited any authority for this proposition. A real estate transaction is not a specific intent crime or a tort. The City's motive for reconveyance is irrelevant.

It made no sense to impose aiding and abetting liability here. Each party to the MOU, the Homes Association included, affirmed its authority to enter into the MOU, thereby asserting its independence. (5-CT-1182, MOU Art. I.B.) In light of this, and the fact that the Homes Association was the original grantor of Area A to the City, the City reasonably believed – based on the Association's warranties – that the Homes Association had the authority to meet its obligations under the MOU and that the City's performance under the MOU was not part of any illegal transaction.

The Homes Association already had the right to exercise the reversionary interest. The MOU acknowledged that Area A and Lots C and D were subject to a right of reversion if they were not used in compliance with the deed restrictions limiting their use.[5] (5-CT-1179, 1183-1184.) That is, the properties could revert to the Homes Association if they were used by the City (as to Area A) or the School District (as to Lots C and D) for purposes other than public schools, parks, playgrounds, or recreation areas. The City's reconveyance to the Homes Association was made in the shadow of this authority.[6] Put another way, the Homes Association had a

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[5] Right of reentry and similar terms are now referred to as a "power of termination" under the Marketable Record Title Act ("MRTA"). (See Civil Code. § 885.010.)

[6] Under the MRTA, the power of termination expires thirty years after the date the instrument reserving, transferring, or otherwise evidencing the

right to Area A under certain circumstances; so the City cannot be held liable as an "aider and abettor" for reconveying it to the Homes Association.

2. The City's Actions Were Consistent With the Deed Restrictions

In addition to the City's general authority to convey property, the City was specifically allowed to convey back Area A to the grantor that held a reversionary interest. The City accepted the property from the Homes Association in 1940. (10-CT-2403; 5-CT-1031-1032, SAC ¶¶ 15 & 17.) The 1940 deed provided that, in the event of a violation of certain specified restrictions, including the "no structures" restriction, the property could revert to the Homes Association's ownership. (10-CT-2414; 5-CT-1032, SAC ¶ 15(vi); 5-CT-1107, SAC Ex. 6 at 9; 5-CT-1114-1115, SAC Ex. 7 at 5-6.) This reversionary provision created a "condition subsequent" in favor of the Homes Association. (See *Rosecrans v. Pac. Elec. Ry. Co.*

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power of termination is recorded. (Civ. Code § 885.030.) Unless a notice to preserve the power of termination is recorded within that time, the power of termination expires. (*Id.*; see also *Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 128.) However, if the restriction is also an equitable servitude alternatively enforceable by injunction, "[s]uch an equitable servitude shall remain enforceable by injunction and any other available remedies, but shall not be enforceable by a power of termination..." (Civ. Code § 885.060.) Accordingly, the Homes Association retains at least the right to enforce the condition. The MOU expressly reaffirms the reversionary interests as to the School District property as part of its consideration.

(1943) 21 Cal.2d 602, 605; Miller and Starr, 3 Cal. Real Est. § 12:6 (4th ed.).) "The remedy for breach of a condition is forfeiture of the burdened land." (Miller and Starr, 6 Cal. Real Est. § 16.1 (4th ed.).) At the time of the City's conveyance, Area A had unpermitted retaining walls that are "structures" within the meaning of the deed restrictions. (*See* 12-CT-2809.) As such, the Homes Association could have exercised its right of reentry, or "power of termination." (*Rosecrans v. Pac. Elec. Ry. Co, supra*, 21 Cal.2d at 604-5; Miller and Starr, 4 Cal. Real Est. § 12:8 (4th ed.); Civ. Code § 885.010.) Under the very deed restrictions Plaintiffs invoke to prevent the transfer, the Homes Association had a right to retake Area A.

The Homes Association's reversionary interest in Area A was one legal basis by which the City could (and did) lawfully convey back the property to the Homes Association. The City's decision to allow deed restricted property to revert to the grantor cannot be "*ultra vires.*" (*Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 Cal.App.3d 1003, 1017. ["An injunction will not lie to prevent City from making an express legislative determination that it would be in the best interests of City and its citizens to cease using the property for library purposes and to allow the property to revert to the grantors heir"].)[7]

[7]*Welwood* involved a city affirmatively trying to use property for something other than library purposes - ultimately by granting a third party developer

Another legal basis for the conveyance of Area A is the fact that the Homes Association qualified in its own right as a "body suitably constituted by law to take, hold, maintain and regulate public parks" within the meaning of the 1940 restrictions, which the trial court specifically found to be so.[8] (15-CT-3564; see also 10-CT-2414.) Plaintiffs specifically alleged that Declaration 25 of the CC&Rs charges the Association with the duty to maintain the parks of the City. (5-CT-1030:3-8, SAC SAC ¶14(i).)

The deed expressly permitted the City to convey the property to a category of recipients, of which the Homes Association was one. Thus, the

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an easement over the property for commercial development uses inconsistent with the purposes of the grant. (215 Cal.App.3d at 1005-8.) The City's quitclaim deed at issue here is not a use; it is simply a return of the property to the original grantor – an action specifically approved by *Welwood.*

[8]The trial court summed up the basis for rejecting the argument that the City's conveyance was ultra vires on its own as follows: "Plaintiff argues that the transfer to the Homes Association from the City was itself 'ultra vires,' etc. and should be reversed, saying that the Homes Association is not now equipped to manage parkland and that, this being the case, it is an unacceptable transferee under the language of the restrictions, but the court has no evidence of that fact other than plaintiff's arguments. To the contrary, all of the documents before the court, including the Association's 'charter' and by-laws reflect that the Homes Association has the power to levy assessments from homeowners within the Homes Associations purview in order to do all that it is charged with doing with regard to all of the properties governed by the Homes Association and/or held by it. The actions that this court will now be requiring of it are clearly acts within its purview to perform, indeed, based on all of the documents before the court, it has an affirmative duty to perform them and cannot do otherwise. This in the court's view would make acts to restore the parkland in accordance with the restrictions a proper subject of an assessment of some sort."(15-CT-3564.)

Homes Association was eligible to receive Area A under a plain reading of the deed.

The conveyance of Area A from the City to the Homes Association was consistent with the deed restrictions either way: because the Homes Association was a qualified recipient or because the Homes Association held a right to retake. The trial court did not find any defect in the 1940 deed by which Area A was conveyed by the Homes Association to the City and which designated a category of entities to which the City could transfer ownership of the property, which category includes the Homes Association. (15-CT-3558:21-26.) The City quitclaimed Area A back to the Homes Association. (10-CT-2399-2402; 5-CT-1036, SAC ¶33.) Based on the face of both the 1940 deed and the SAC, if the City's transfer of ownership to the Homes Association violated the conditions of the 1940 deed, a remedy would be for the Homes Association to exercise its power of termination to revert the property back to the Homes Association's ownership. (5-CT-1031:6-12; 5-CT-1107, 1114-1115.) In sum, the City's conveyance to the Homes Association was authorized by the deed restrictions and, even if the conveyance violated the deed restrictions, such violation could result in the Homes Association re-taking ownership of Area A. All roads lead to the Homes Association's ownership.

Because the City had the legal authority to convey the property and because the deed restrictions under which the City held the property did not prohibit conveyance to the Homes Association, the City respectfully submits that, the judgment denying the City's motion for summary judgment should be reversed and the trial court should be ordered to enter judgment in the City's favor.

3. The Trial Court Incorrectly Invalidated the Two Conditions in the City's Conveyance and Substituted Its Judgment for the City's Legislative Choices

By its deed to the Homes Association, the City reserved an open space easement over most of Area A (10-CT-2399 Quitclaim Deed ¶1) and reserved utility, storm drain, and fire road/emergency access easements (10-CT-2400 Quitclaim Deed ¶¶2, 3 and 4). The conveyance was also conditioned on the property owner assuming weed abatement responsibility and the property not being merged with the adjacent property. (10-CT-2400 Quitclaim ¶¶7, 8.) The trial court's ruling left undisturbed these conditions as well as the conditions reinforcing the applicability of these restrictions on successors-in-interest and their enforceability by the City.

The conditions the trial court ordered be removed were Condition No. 5, which required the grantee either to remove all encroachments or obtain all required approvals and permits from the City and the Homes Association for the existing retaining wall and any accessory uses; and

Condition No. 6, which restricted the property to open space use and identified a portion of the property on which the grantee could seek approvals for accessory structures. (10-CT-2400; 2-CT-432, ¶¶ 5, 6.)

The conditions do not purport to remove any restrictions imposed by the 1940 deed or any of the other deeds. Nor could they. A grantor may convey the *entirety* of what the grantor owns or *less* than what the grantor owns, such as by imposing additional restrictions on use. (*See* Miller and Starr, 3 Cal. Real Est. § 8.58 (4th ed.) [grantor may convey the property "while reserving or excluding… some other portion of the 'bundle of sticks' that is the subject of the conveyance"].) But "[i]t is axiomatic that a deed cannot convey more than is owned by the grantor." (*Id.*) A quitclaim deed ""transfers only whatever interest the grantors possess at the time of the conveyance." (*In re Marriage of Gioia* (2004) 119 Cal.App.4th 272, 280.)

Having received the property subject to a reversionary interest, the City could only reconvey the property subject to that same condition subsequent. The conditions in the City's deed to the Homes Association do not purport to replace the restrictions in the 1940 deed or any of the earlier deeds. The conditions in the City's deed to the Homes Association are separate. They are separate restrictions on use, in addition to any other

applicable conditions. Whatever conditions survived the reconveyance are cumulative and, as a practical matter, the most restrictive apply.

Given that the City had the legal authority to impose conditions, the trial court had no legal basis to order the property conveyed without the conditions. The trial court could interpret their legal effect, of course; but the trial court lacks the authority to decide for the City that the property will be conveyed without the invalidated conditions.

4. The Zoning of Area A Is Independent of the Deed Restrictions; the Trial Court Erred By Enjoining Future Legislative Acts to Conform to Deed Restrictions

Deed restrictions are entirely separate and distinct from zoning regulations. Every property owner must comply with the applicable zoning laws and the applicable deed restrictions. Hypothetically, if the City were to rezone the property for heavy manufacturing and grant permits for a tannery on the site, this zoning action would not impact the restrictions on use imposed on the property by earlier deeds. A change in zoning does not impair the enforceability of existing deed restrictions. (*Seaton v. Clifford* (1972) 24 Cal.App.3d 46, 52 [state law requiring certain care facilities to be treated as "residential use" for purposes of local zoning does not bar enforcement of private covenants prohibiting such uses].)

Therefore, if Plaintiffs possessed any enforceable rights or remedies by virtue of the deed restrictions applicable to Area A, those rights or

remedies would not be affected by any action the City might choose to take on applications for a zoning ordinance amendment and after-the-fact entitlements. Because restraint of the City's future exercise of its legislative authority is not an appropriate remedy for alleged violation of deed restrictions (see CCP §526(b) and *infra* section B(3)), the trial court's injunction against the City should be reversed and the trial court should be directed to enter judgment in the City's favor.

B. The Judgment Exceeded the Trial Court's Jurisdiction

The judgment exceeds the trial court's jurisdiction because the injunction (1) applies to all parkland property in the City, even though the allegations and evidence were confined to alleged encroachments at a single property, Area A; (2) empowers Plaintiffs to seek ex parte orders to compel the City to remove any "structure, vegetation, or object" encroaching on parkland anywhere in the City; (3) enjoins the City from taking future legislative action; and (4) orders the City to issue a new deed to the Homes Association without two restrictions that were consideration for the MOU, even though not all parties to the MOU were before the court.

1. This Case Is About Area A, But the Judgment Applies to All Parkland Property in the City

As reflected in their multiple petitions and complaints, Plaintiffs focused their lawsuit on alleged encroachments on a single piece of park

property, Area A. The original combined petition and complaint made allegations about Area A, and Lots C and D, for which Area A was exchanged. (1-CT-23, Petition and Complaint, ¶¶ 18, 19.) Plaintiffs prayed for relief solely with respect to Area A. (1-CT-29-30.) The first amended combined petition and complaint and second amended complaint were the same in this regard. (3-CT-536-537, FAP; 5-CT-1042-1043, SAC.) The evidence was likewise limited to the one property, Area A. (E.g., see generally 8-CT-1798-1847, Plaintiffs' Separate Statement of Facts; 8-CT-1848 to 9-CT-2170, Evidence in Support of Plaintiff's Motion for Summary Judgment.) Without citing any legal authority, the court went far beyond this. The judgment applies itself to all "similarly situated property owned by the City." (15-CT-3654:1-6.) The trial court manufactured a "case or controversy" from its own skeptical view of the City's motives and, on that basis alone, expanded the scope of the case to include all City parkland, subjecting it to the expedited review procedure it created that Plaintiffs alone are empowered to invoke.

There is no basis in law or fact for the court's judgment. "The obvious purpose of a judgment is to definitely determine the claims of the contending parties in conformity with the pleadings filed." (*Jew Fun Him v. Occidental Life Ins. Co.* (1948) 88 Cal.App.2d 246, 250. ["[T]he court may grant the plaintiff any relief consistent with the case made by the

complaint and embraced within the issue."]; Code Civ. Proc. §580, subd. (a); see also *Furia v. Helm* (2008) 111 Cal.App.4th 945, 959 [upholding demurrer to complaint because plaintiff failed to allege facts showing defendant caused him damage].)

The judgment is in error because it goes far beyond what was pleaded and proved. (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084 ["An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future[, but] must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity."]; *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1479-1480 [trial court's statewide preliminary injunction, barring the denial of diplomas to any members of the class of 2006 who were otherwise eligible for graduation in 2006 but had not passed both parts of the California high school exit exam (CAHSEE) as required by statute, was overbroad in that it included students who failed to pass the CAHSEE for reasons other than those attributable to the state's alleged violation of students' right to education].)

2. The Trial Court Erred by Giving Plaintiffs (and Itself) Excessive Authority Over the City's Management of Parkland

The judgment also goes too far in giving Plaintiffs a roving commission over the City's management of parkland. The judgment grants Plaintiffs John Harbison and the unincorporated association CEPC the special power to return to Judge Meiers' courtroom on 24-hour *ex parte* notice to force the City—at taxpayer expense—to remove immediately any "structure, vegetation, or object" encroaching on parkland anywhere in the City. (15-CT-3654:1-6; 15-CT-3656:14-15.) The judgment empowers Mr. Harbison and CEPC to do this whenever either of them decides to seek such "enforcement." (*Id.*)

This excessive aspect of the judgment is patently in error. Plaintiffs may decide to exercise their special power or not. They are completely unaccountable for this decision. Unlike public officials subject to ethics laws (see, e.g., Gov't Code §81000, et seq., §1090, et seq.) and bound to public interest by their oath of office (Cal. Const. art. 20 §3), Plaintiffs have no rules to govern their private decisions about whether to exercise their fast-track access to Judge Meiers' courtroom. It is a circumstance that invites mischief. A parkland encroachment may be inadvertent or deliberate, small or large, inconspicuous or not. Local governance allows parkland management to be governed by common sense judgment, fiscal

responsibility, and community accountability, exercised in accordance with state and local procedural rules and protections. The court's judgment here replaces local governance with rule by court-created "super-citizens."

Injunctive relief is inappropriate when it might result in "harm to the public interest." (*Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1473 [affirming denial of request for preliminary injunction against state board's imposition and use of lake pollution mitigation fee].) By handing City parkland management over to Mr. Harbison and CEPC, the court's judgment is against the public's interest.

3. The City Cannot Be Enjoined from Taking Future Legislative Action

The trial court enjoined the City from taking future legislative actions regarding zoning. (15-CT-3655:23-3656:8.) The trial court enjoined the City from creating a zoning district that has the "purpose" of "ignoring" deed restrictions. (15-CT-3655:23-26.)

The relief ordered by the court is prohibited by statute. Code of Civil Procedure section 526(b) reads, in part, "An injunction cannot be granted in the following cases: ... (7) To prevent a legislative act by a municipal corporation." The basis for this statutory provision is the doctrine of separation of powers. (*City of Los Angeles v. Superior Court*

(1959) 51 Cal.2d 423, 430 [granting writ of prohibition in favor of city to restrain superior court from enjoining the certification of the result of a referendum election].) The court has no authority to usurp the legislative function of the City by enjoining the City from creating a zoning district. The judicial branch may evaluate the legality of existing laws. It may not command or prohibit the exercise of the legislative function. (*Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 235.)

4. The Trial Court Improperly Substituted Its Legislative Judgment for the City Council's and Altered the Consideration of the MOU Without Necessary Parties (Parties to the Contract)

The trial court ordered the City to issue a new deed to the Homes Association without two restrictions. (15-CT-3648:17-22.) But these restrictions were *consideration* from the Homes Association and the Luglianis to the City in the MOU. (2-CT-432; 5-CT-1184-1185, MOU Arts. III.D, IV.A, V.C.) Under the MOU, the School District was receiving consideration from the Luglianis, the balance of which was altered by the trial court's decision. The trial court ordered these conditions removed even though all parties to the MOU are not party to the lawsuit. (4-CT-973; 5-CT-1178.)

By invalidating material consideration, the trial court undermined the entire MOU. The School District has a unique interest in the MOU, as

the MOU resolves a litigation matter between the School District and the Homes Association and requires the School District to convey Lots C and D to the City. (5-CT-1182-1184, MOU Arts. II.A, II.C, II.D, III.A, III.B.) The City joins the argument of the Homes Association that the School District was an indispensable or, at least, a necessary party. The School District has a separate and unique interest not represented by any other party to the MOU or in the litigation. The absence of the School District further demonstrates that the court's remedy goes too far.

Moreover, by ordering the City to convey the property without its additional conditions, the trial court steps into the shoes of the City Council to decide that the City must convey the property absent the agreement. Almost realizing that the judgment waded into murky waters, the trial court revealed that – although it had upheld the City's conveyance and decided that Area A is somehow better off in the custody of the Homes Association – the City must stand by as a backup in case the trial court got it wrong:

> "Moreover, should the court be in error in letting the title pass now back into the Association and in being able to require it to enforce the deed restrictions as opposed to the City, then as a part of the Declaratory Relief action, with a finding having been made of an ultra vires transfer by the City, it might well then be that the appellate court would choose to return title to the City. The City should not be out of this case. There are also remaining issues between the property owners and the City with regard to restricted properties which need to be definitively resolved now before further litigation ensues."

(15-CT-3566-3567.) With that comment, the trial court effectively found that the City's conveyance was not *ultra vires,* but ruled that it was anyway in case the appellate court found her wrong with respect to the Homes Association. And, because the City was in the case, the trial court preempted any future litigation over parkland by extending its ruling to all city-owned property and creating a short-cut for judicial review. The trial court unquestionably overstepped its bounds.

C. Plaintiffs Are Not Entitled to Attorneys' Fees

Because the underlying judgment in favor of Plaintiffs should be reversed, Plaintiffs are not entitled to an award of attorneys' fees. For this reason alone the trial court's order awarding attorneys' fees should be reversed.

Alternatively, even assuming arguendo the underlying judgment is not error, the trial court's order awarding attorneys' fees should still be reversed. Plaintiffs failed to establish two requirements for an attorneys' fees award: that the lawsuit (1) conferred a "significant benefit" on the public, or (2) that the financial burden of private enforcement makes the award appropriate because there were "insufficient financial incentives to justify the litigation in economic terms." (Code Civ. Proc. § 1021.5; *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1211.) The trial court misinterpreted the statute to allow members of a homeowners association to

recover fees against the City for enforcement of their private covenants and deed restrictions. No significant benefit on the *public* was conferred, as there were no allegations, much less evidence, regarding supposed deed violations at properties other than the single property at Area A.

Plaintiff CEPC is comprised mostly of members of the Homes Association who reside in the City. (13-CT-3018:24-28.) The expansive reach of the judgment to all City parkland creates a substantial financial stake in the outcome for Plaintiffs. (*Norberg v. Cal. Coastal Com.* (2013) 221 Cal.App.4th 535, 546 "it is the party seeking private attorney general fees who bears the burden [of establishing that its litigation costs transcend its personal interest"].) Plaintiffs failed to demonstrate that the cost of the lawsuit transcends their financial stake.

In any event, Plaintiffs should not have been permitted to recover for time spent on Plaintiffs' unsuccessful writ cause of action. "[W]hen a plaintiff has achieved limited success, or has failed with respect to distinct and unrelated claims, . . . a reduction from the lodestar is appropriate." (*Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1369.)

A reduced fee award is appropriate when a claimant achieves only limited success, does not prevail on all its causes of action, or does not obtain all the results sought. (*See Greene v. Dillingham Construction N.A.,*

Inc. (2002) 101 Cal.App.4th 418, 423 [court awarded fees "for a reduced number of hours, including reductions for time spent on claims on which [the claimant] did not prevail"]; *Hammond v. Agran* (2002) 99 Cal.App.4th 115, 136-37, *disapproved on other grounds, In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1226 n.4; *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250 [because plaintiffs failed to "obtain[] all the *results* they sought" on remand trial court should take into consideration their "limited success"] [emphasis in original].)

Nor should Plaintiffs have been awarded an extraordinary multiplier of two and a half times their actual fees. "The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132.) The Supreme Court explains:

> A more difficult legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate. . . .Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be

> unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party.

(*Id.* at 1138-1139.) It is one thing to argue that a multiplier should be applied. It is quite another to award a multiplier so large as 2.5. The sole authority offered by Plaintiffs in support of such a high multiplier was *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 255. That case resulted in Apple Computer agreeing to reinstate free live technical support and refund fees collected to a nationwide class of customers. The multiplier cases *Wershba* cited also involved class actions. (*Id.,* citing *Coalition for Los Angeles County Planning in the Public Interest v. Board of Supervisors* (1977) 76 Cal.App.3d 241, 250 [action on behalf of class resulted in judgment that invalidated amendments to county general plan; 2.04 multiplier], and *Arenson v. Chicago Board of Trade* (N.D. Ill. 1974) 372 F.Supp. 1349, 1352, 1359 [antitrust class action on behalf of 400,000, resulted in an "entire industry (being) restructured," and saved class at least $800 million; 4 multiplier].) Even though *Wershba* was also a class action, the trial court awarded a fee multiplier of only 1.42. (*Wershba, supra*, 91 Cal.App.4th at 255.)

Wershba's use of a 1.42 multiplier is within the zero to 1.85 range of multipliers applied in a number of non-class action, contingency fee cases. (See, e.g., *Serrano III, supra*, 20 Cal.3d at 49 [action challenging constitutionality of education funding statutes; 1.43 multiplier]; *Save Our*

Environment, supra, 235 Cal.App.4th at 1188 [action alleging violation of California Environmental Quality Act and local zoning ordinances in granting conditional use permit; zero multiplier]; *Cates v. Chiang* (2013) 213 Cal.App.4th 791, 797 [action to compel defendants to discharge statutory duty to collect money derived from gambling belonging to the state from various Indian tribes; 1.85 multiplier]; *Building a Better Redondo v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 873 [order compelling city to submit a local coastal program amendment to public vote in compliance with charter; 1.25 multiplier]; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 897 [action challenging Environmental Impact Report; 1.5 multiplier]; *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1174, 1217 [action challenging wage practices as violating city law; 1.65 multiplier].)

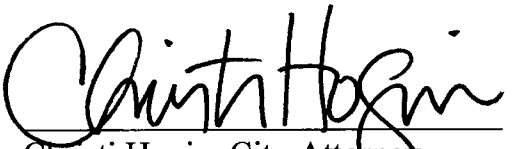
V. CONCLUSION

Preservation of City-owned parkland and the parklike setting of the City's residential neighborhoods enhanced by open space is among the City's highest priorities. The City's decision to convey Area A, subject to open-space restrictions, in exchange for Lots C and D was a legislative decision made by City officials who are accountable to the community. Citing the court's "feelings" and almost no legal authority, the court substituted its own judgment for that of the elected representatives of the

community. In further disregard of separation of powers, the court deputized one resident and an unincorporated association to compel the City to remove any "structure, vegetation, or object" encroaching on any City-owned parkland at any time in the future.

The City respectfully requests that the judgment and attorneys' fees order be reversed and that the case be remanded to the trial court with instructions that judgment be entered in favor of the City, or, alternatively, remanded to the trial court for further proceedings.

DATED: November 7, 2016 Respectfully submitted,



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CERTIFICATE OF WORD COUNT

(California Rules of Court, 8.204(c))

I certify that the text of this Appellant's Brief, including footnotes but excluding face page, table of contents, table of authorities, and the Certificate of Word Count, consists of 12,491 words as counted by the Microsoft Word 2010 (version 14) word-processing program used to generate the brief. This brief is printed in 13-point Times New Roman font.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On November 7, 2016, I served the foregoing documents described as:

APPELLANT CITY OF PALOS VERDES ESTATES' OPENING BRIEF; APPELLANT'S APPENDIX IN LIEU OF CLERK'S TRANSCRIPT

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

PLEASE SEE SERVICE LIST ATTACHED

[X] **VIA OVERNIGHT DELIVERY.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) stated above. I placed the envelope or package for collection and overnight delivery at a regularly utilized drop box of the overnight delivery carrier.

[X] **VIA U.S.MAIL.** I enclosed the above described documents in a sealed envelope or package addressed to the person(s) listed above or on the attached; caused such envelope with postage thereon fully prepared to be placed in the United States mail at Los Angeles, California.

I am readily familiar with the Jenkins & Hogin, LLP's practice of collection and processing correspondence for outgoing mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid at Manhattan Beach, California, in the ordinary course of business. I am aware that 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.

[X] **STATE.** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 7th day of November, 2016, at Manhattan Beach, California.

s / Wendy Hoffman
WENDY HOFFMAN

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