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, Respondents, and Cross-Appellants,

v.

CITY OF PALOS VERDES ESTATES, et al.

Defendants, Appellants and Cross-Respondents.

Proceedings of the Los Angeles County Superior Court, Case No. BS147768
Hon. Barbara A. Meiers and Hon. Robert H. O'Brien
Judges Presiding

CITY OF PALOS VERDES ESTATES' COMBINED APPELLANT'S REPLY AND CROSS-RESPONDENT'S BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs make the sensational claim that the City sold parkland to a private resident in violation of community-wide deed restrictions and in excess of the City's legal authority [*see, e.g.,* RB at 17, 43] and they managed to convince the trial court of that.

The undisputed facts show that this claim is not true.

The City did not sell parkland. The City re-conveyed the subject property (Area A) to the original grantor, the Homes Association [2-CT-431-463]. For good measure, the City retained an open space easement [2-CT-431]. The City was not paid for the property, which was subject to the Homes Association's reversionary interest anyway [5-CT-1107, 1114]. Indeed, as part of the MOU aimed at securing parkland citywide, the City assumed responsibility for maintaining other parkland parcels known as Lots C & D, which had been held by the School District and were the object of the School District's threat to sell off its holdings for residential development [5-CT-1032, SAC ¶¶23, 24; 5-CT-1179-80, 1184]. As described in the City's Opening Brief, the City effectively secured significant public benefits through the MOU, including reaffirmation of the deed restrictions to protect open space citywide.

The City's conveyance did not violate the deed restrictions. The deed restrictions explicitly reserve a reversionary interest in favor of the Homes Association, which was triggered by the retaining walls on the

property, and the deed restrictions explicitly allow the City to convey the property to the Homes Association as an entity that maintains parks [10-CT-2414]. The trial court even acknowledged this fact [15-CT-3564]. The City's conveyance of Area A was completely consistent with the deed restrictions. The conveyance was also entirely within the City's legal authority [Gov't Code §37350] and, therefore, by definition, not *ultra vires*.

Plaintiffs gloss over the fact that the City's action was lawful and authorized under the deed restrictions by arguing that the City is properly liable for the Homes Association's subsequent conveyance of Area A to the Luglianis. Plaintiffs build this argument on repeated misstatements of the facts in the record regarding the City's role in that transaction, and Plaintiffs defend the trial court's use of the "aiding and abetting" principle to ascribe the Home Association's action to the City. But "aiding and abetting" does not apply to lawful real property transactions; transferors are not responsible for post-transaction acts of transferees. Each party to the MOU warranted its own legal authority to act and each party's actions are reviewed under their respective source of authority. Plaintiffs misapply the public trust doctrine to attempt to charge the City with responsibility for the Homes Association's actions, but the public trust doctrine cannot be stretched so far to cast aspersions on the City's lawful conduct.

Area A was conveyed by the Homes Association to the Luglianis. The parties to that transaction have presented powerful arguments to this

Court why the Homes Association-to-Luglianis deed is legal and in compliance with applicable deed restrictions. But even if that conveyance were flawed, there is absolutely no reason—legally or practically—to hold the City accountable. The City's deed to the Homes Association was a separate, entirely lawful conveyance.

In its opening brief, the City identifies ten errors committed by the trial court and discusses how the correct application of the law leads to judgment in the City's favor. In their brief, Plaintiffs avoid responding to the identified errors individually. Instead, they cite the public trust doctrine as the panacea to overcome the legal infirmity of the trial court invoking private deed restrictions to constrain the City Council's exercise of its police powers. But the public trust doctrine does not apply in this setting where deed restricted property was given to a public agency subject to a reversionary interest. In fact, the doctrine evolved to address the opposite situation, where deed restrictions had no reversion mechanism to constrain the use of donated property.

Plaintiffs defend the judgment that anoints them with the authority to invoke ex parte judicial supervision over all City parkland, not just Area A which is the subject property in their lawsuit, by more reliance on the public trust doctrine. The public trust doctrine, however, certainly cannot be used to vest these Plaintiffs—private individuals and a private unincorporated association formed to bring this lawsuit—with de facto

management control of City parkland. There is no reason to trust Plaintiffs to exercise the power gifted them by the trial court in the public interest, and there is every reason to expect these private parties would enforce the judgment for their own private ends.

Apparently recognizing that the public trust doctrine is not cut out for the task they demand of it, Plaintiffs attempt to avoid the merits of the City's appeal altogether by contending that the City's arguments on appeal are procedurally barred. Plaintiffs' procedural argument ultimately rests on the notion that an appellate court record is incomplete unless it contains a copy of every piece of paper filed in the trial court and a transcript of every hearing. But the law only requires a record that provides enough information about what occurred below for the appellate court to fairly decide the issues on appeal—a standard the record here more than satisfies.

The City's conveyance of Area A to the Homes Association, which held a reversionary interest in the property, was not barred by the public trust doctrine. Plaintiffs contend that the City's deed to the Homes Association is *ultra vires* under the public trust doctrine. In the case on which Plaintiffs' principally rely, the court directly held that the public trust doctrine would not prevent the city from allowing title to revert to the grantors. (*Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 Cal.App.3d 1003, 1017 ("*Welwood*") (public entity could "allow the property to revert to the grantors' heirs.").)The case is on

point and dispositive support for the City's conveyance to the Homes Association, as the holder of the reversionary interest.

Plaintiffs attempt to use the doctrine to force the City to own Area A. The purpose of the doctrine, however, is to create a mechanism for the court to enforce conditions of property gifted to the public where no reversionary interest exists to serve that purpose. A reversionary interest functions to prevent property from being used in contravention of the grantor's conditions by providing reversion back to the grantor's ownership in such event. Absent a reversionary interest, the public trust doctrine is used to enforce use restrictions on property imposed by a donor.

All the public trust doctrine cases cited by Plaintiffs are easily distinguishable, as each involved a public entity attempting to use property owned by the entity in a way contrary to the terms of its public dedication. The public trust doctrine regulates use, creating a mechanism to enforce the conditions of a gift, regardless of who owns the property, in those instances where the grantor has not retained a reversionary interest to enforce the use restrictions.

The public trust doctrine does not make the City liable for the Homes Association's conveyance to the Luglianis. Plaintiffs' argument that the City may be held liable under the public trust doctrine for the Homes Association's conveyance to the Luglianis is unsupported by any legal authority. Plaintiffs contend that, knowing the Homes Association's

plans for the property, the City was obligated to hold the property or convey it to a different entity that would operate it as a public park. Plaintiffs' contention cannot be squared with cases holding that it is perfectly proper to allow property to revert to the grantor over the objection of the grantee, without any inquiry into whether the grantor will continue to abide by the restrictions formerly imposed on the grantee.

There is no sound reason to extend the public trust doctrine in the way demanded by Plaintiffs. The City's reconveyance to the Homes Association, which held the reversionary interest, will not discourage other property owners from making deed-restricted gifts to public entities. Nor is this a situation where a gift recipient is trying to keep the property without complying with the conditions. The policy concerns of the public trust doctrine are not implicated by these facts.

A prayer for "further relief" does not justify an overbroad injunction. Plaintiffs point to its prayer for "such other and further relief as the court deems just and proper" in its lawsuit exclusively focused on Area A [RB 89] to attempt to defend the court's *sua sponte* injunction explicitly covering all City-owned parkland and future acts related to it. Such a prayer does not give the court a blank check to order relief not supported by the evidence. In this case, the sweeping scope of the judgment beyond the court's authority is breathtaking. Plaintiffs sued to force the City to own the isolated Parcel A (itself a request of dubious breadth), but the trial court

went much further, effectively giving Plaintiffs oversight (through the judge) of all City parkland on a permanent, ongoing basis. Plaintiffs aren't subject to ethics laws or an oath of office of the sort that binds public officials to act in the public's interest. Instead, Plaintiffs argue that they may be trusted to refrain from using much, if any, of the broad powers the trial court bestowed upon them. This is hardly reassuring.

An award of attorneys' fees where Plaintiffs have a sufficient pecuniary interest to motivate the litigation and no significant public benefit is achieved is an abuse of discretion. Plaintiffs dance around the fact they filed a lawsuit over one parcel in the lead Plaintiff's neighborhood overlooking the ocean. The cost of enforcement of the deed restrictions is justified by their own property values. They have financial interest in the outcome sufficient to motivate this lawsuit. Reversal of the attorney fee award is warranted on that basis alone. Plaintiffs have not demonstrated a "substantial public benefit" conveyed by the outcome. Further, contrary to their downplayed characterization, Plaintiffs' writ petition, which was denied by the trial court, was more than just a "legal theory." This was an entire claim for relief, and no fees should be awarded for time spent on it.

There is no procedural bar to challenging the trial court's many errors. Plaintiffs try to dodge the merits of the appeal by suggesting the rejected drafts of the judgment, oral transcripts from every hearing, and the City's opposition brief to the cross-motion for summary judgment are

missing, rendering this 16-volume appellate record inadequate. (RB 43-44.) The City's arguments regarding the trial court's summary judgment order are reflected in the clerk's transcript, which includes a copy of the City's cross motion for summary judgment [10-CT-2338-2363]. Plaintiffs argue that the City's opposition brief is also required. Plaintiffs appear to be grasping at straws; the additional brief provides no arguments used in the City's opening brief on appeal. Moreover, since summary judgment review on appeal is de novo, the documents in question are of negligible value at this point. Nevertheless, should the Court of Appeal for some reason desire to see it, a copy of the City's opposition to Plaintiffs' motion for summary judgment is attached to the City's motion to augment the record, concurrently filed with this brief.

The City's arguments that the injunction is overbroad and that attorneys' fee should not have been awarded were likewise preserved for appeal. The City objected on these grounds at the first opportunity. The trial court's errors appear on the face of the record. The law is clear that an appellate court will not presume that errors were cured by matters that are not in the record. Nor will an appellate court presume that the errors were invited by the appellants where, as here, the errors are not fact-dependent.

Plaintiffs' cross appeal is without merit; the City has no ministerial duty to enforce deed restrictions or hold title.

Notwithstanding Plaintiffs' arguments to the contrary in their cross-appeal,

the trial court's ruling sustaining the City's demurrer to Plaintiffs' writ cause of action should be affirmed. As it no longer owns Area A, the City has no ministerial duty, let alone any legal mechanism, to enforce private deed restrictions on Area A. Nor does the complaint allege facts showing that the City's conveyance is void or that the City owns Area A.

For the reasons set forth herein and in the City's Appellant's Opening Brief, the judgment in favor of Plaintiffs should be reversed and the trial court instructed to enter judgment in favor of the City. The trial court's order awarding Plaintiffs' attorneys' fees should likewise be reversed. The court order sustaining the demurrer to Plaintiffs' writ cause of action should be affirmed.

II. STATEMENT OF FACTS

The City presented a full statement of the facts in its opening brief. In their respondents' brief, Plaintiffs nit-pick the Homes Association's statement of facts and offer their own factual statements. Plaintiffs, however, misstate the record with respect to the City. They also assert as "facts" legal arguments and facts that are not pertinent to the appeal. Rather than catalogue all examples, important highlights follow.

- In connection with the Memorandum of Understanding ("MOU"), Plaintiffs claim: "The City accepted $100,000 from the Luglianis as the payoff." (RB 84.) This is false. The City did not receive any money from the Luglianis. (5-CT-1035-1036, Second Amended Complaint ("SAC") ¶

29.) The record is undisputed that the City received $100,000 *from the Homes Association*, the sole purpose of which was to help ease the unanticipated financial burden on the City of assuming responsibility for Lots C and D and maintaining them as publicly accessible open space. (5-CT-1194, SAC Ex. 12, Art. III.C.)

- Plaintiffs contend that "the City and Homes Association schemed to take $500,000." (RB 98.) This is false. Other than the $100,000 the City received from the Homes Association to maintain Lots C & D, the City received no money in connection with the MOU. (5-CT-1194, SAC Ex. 12, Art. III.C.) The Homes Association did receive $500,000 from the Luglianis as payment of the purchase price for the Homes Association's conveyance of Area A, but the City was not a party to this conveyance.

- Plaintiffs' statement of facts makes a number of legal assertions regarding the public notice requirements for public hearings. Plaintiffs claim that, before the public hearing at which the MOU was discussed and approved by the City Council, the City did not take certain steps to notify the public. (RB 38.) But the record shows no such thing, and it instead establishes that notice of the public hearing was given: members of the public attended and spoke at the meeting. (12-CT-2863.) These facts are, in any event, irrelevant. Plaintiffs' complaint did not challenge the City's notice, and the trial court made no ruling regarding the adequacy of notice of the public hearing. It is a non-issue.

• Plaintiffs claim that their voluntary dismissal of the School District was done in response to an order issued by the court on April 11, 2014. (RB 25.) This is misleading. The document issued by the court on that date was merely a tentative ruling. (9-CT-2135.). Plaintiffs voluntarily dismissed the School District from the lawsuit on May 5, 2014, more than two weeks before the court issued its May 21, 2014 final ruling on the demurrer. (4-CT-973; RT-052:15-18.) The explanation for CEPC's voluntary dismissal does not appear in the record.

III. THE CITY'S REPLY BRIEF ARGUMENTS

A. The Trial Court Erred in Reforming the City's Deed to the Homes Association and Declaring the City's Conveyance Ultra Vires.

1. No "public trust" was created by the 1940 deeds because they were subject to a reversionary interest; therefore, transferring Area A back to the grantor cannot be ultra vires (as a matter of law)

Plaintiffs argue that the City's conveyance to the Homes Association is barred by the public trust doctrine. (RB 78-85.) This argument is meritless because the public trust doctrine does not apply here. The reversionary interest in the initial deed meant that no public trust was created in the first place; under that deed, if the City violated the deed restriction, the property would simply revert to the Homes Association. No public trust is created by a conditional grant of property where the grantor retained a reversionary interest. (*Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 125-26 (holding that donated property subject to

restricted use with a reversionary interest does not create a public trust).) "An interest subject to a condition subsequent is not, because of the condition, held in trust." (*Id.* (*citing* Rest.2d Trusts, § 11, p. 32).)

The public trust doctrine does not bar a public entity from conveying the property back to the grantor. All of the cases cited by Plaintiffs are distinguishable, as they involved public entities attempting to use property that they currently owned in a way inconsistent with the terms of the dedication to the general public:

- *City of Hermosa Beach v. Superior Court* (1964) 231 Cal.App.2d 295. Held: a taxpayer had standing to maintain an action to prevent the construction of a road over property restricted from such use and dedicated "as a public pleasure ground." (*Id.* at 296.)
- *Big Sur Properties v. Mott* (1976) 62 Cal.App.3d 99. Held: state statute authorizing rights-of-way for private access across public parkland under certain circumstances is not applicable to property that has been donated to the state for exclusive use as a public park. (*Id.* at 103.)
- *County of Solano v. Handlery* (2007) 155 Cal.App.4th 566. Held: reversed summary judgment in favor of county that sought judicial determination that county owned property free of restrictions on use as "a County Fair or exposition and purposes incident thererto." (*Id.* at 569.)

- *Roberts v. City of Palos Verdes Estates* (1949) 93 Cal.App.2d 545. Held: city could not construct buildings that contributed to the use and enjoyment of park property only "indirectly," where deed restricted buildings to those "properly incidental to the convenient and/or proper use of said realty for park purposes." (*Id.* at 547-548.)
- *Griffith v. Department of Public Works* (1956) 141 Cal.App.2d 376, 380. Held: reversing judgment entered on order sustaining demurrer to complaint to enjoin city, which accepted dedication of land purely for park purposes, from using a portion of it as a freeway. (*Id.* at 381.)
- *Save the Welwood Murray Memorial Library Com. v. City Council* (1989) 215 Cal.App.3d 1003. Held: city could not commercially develop property dedicated to it to "continue and forever maintain the Palm Springs Free Public Library." (*Id.* at 1006.)
- *Kelly v. Town of Hayward* (1923) 192 Cal. 242. Held: town hall could not be constructed on property dedicated to the use of the public as a "plaza." (*Id.* at 250.)

None of the authorities cited by Plaintiffs involves a situation like that here, where the agency conveyed the property to the original grantor who held a reversionary interest. Among these cases, only *Griffith* and *Welwood* even involved a deed with a reversionary interest and, as explained below, both *Griffith* and *Welwood* support the City's position that

the public trust doctrine doesn't apply in these circumstances. [Compare *Hermosa Beach, supra*, 231 Cal.App.2d at 299 ("The deed to the City of Hermosa Beach in 1907 merely transferred a fee simple absolute to the city subject to certain restrictive covenants as to use."); *Big Sur, supra*, 62 Cal.App.3d at 104 fn. 4 ("We note that no party has challenged the finding that the restriction did not create a condition subsequent; therefore, there is no question of reversion of the property to the grantor."); *County of Solano, supra*, 155 Cal.App.4th at 578 fn. 6 (the "deed...at issue here... undisputedly provides for no power of termination"); *Roberts, supra*, 93 Cal.App.2d at 546 (stating only that the "original grantees deeded the property to the city subject to the conditions of the original deed with a few added conditions"); *Kelly, supra*, 192 Cal. at 243 (stating only that, by the filing of town plats, grantor dedicated land for use of the public as plaza) with *Griffith, supra*, 141 Cal.App.2d at 378 (if property ceased to be used as park, deed provided that the property would "revert" to the grantors or their heirs); *Welwood, supra*, 215 Cal.App.3d at 1007 (deed provided that, in the event of violation of the restrictions on use, property "shall instantly revert to the grantor").]

As noted above, *Griffith* and *Welwood* support the validity of the City's conveyance to the Homes Association. The Homes Association held a reversionary interest in the property, which interest these cases find obviates the need to invoke the public trust doctrine to enforce conditions

of the gift. *Griffith* stated that the reversionary interest held by the grantor's heir gave the grantor's heir a legal interest in the property. 141 Cal.App.2d at 379. (*See, e.g., Walton v. City of Red Bluff* (1991) 2 Cal.App.4th 117, 134 ("*Walton*") (title to property conveyed to a town for use as a library, with grantor retaining a reversionary interest, reverted to grantor's heirs after town stopped using the property as a library).) In *Welwood*, the court held that the public trust doctrine would not prevent the city from allowing title to revert to the grantors. (*Welwood, supra*, 215 Cal.App.3d at 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' heirs."). That is what happened here: the City of Palos Verdes Estates conveyed Area A back to the grantor with the reversionary interest, the Homes Association.

Notwithstanding *Welwood*'s express authorization of the sort of action the City undertook here in conveying Area A back to the Homes Association, Plaintiffs argue that *Welwood* held something different. Plaintiffs claim that it was the City of Palm Springs' "agreement to sell the library property that prompted the lawsuit and was ultimately struck down." (RB 83.) Plaintiffs' assertion to the contrary notwithstanding, the *Welwood* opinion does not say the sale was "ultimately struck down." After the *Welwood* plaintiff brought suit, the City of Palm Springs dropped its plan to

sell the library property to a third party developer. (*Welwood, supra*, 215 Cal.App.3d at 1007-1008.) Instead the city decided to retain ownership and use the property for non-library purposes, by granting the developer an easement over the property for commercial development uses inconsistent with the grant. (*Id.*)

The *Welwood* opinion does not indicate whether or not the trial court's judgment in favor of the plaintiff enjoined the city's since-abandoned plan to sell the property. In any event, the sale was not an issue raised by the city on appeal. (*Id.* at 1010-1011.) The Court of Appeal stated that the city could "allow the property to revert to the grantors' heirs." (*Id.* at 1017.) The court did not bar a city from being compensated for agreeing to the reversion, or otherwise agreeing to the conveyance of the property back to the party that held the reversionary interest.

Citing *Welwood* and also *Roberts*, Plaintiffs argue that the "1940 Deeds 'alone are controlling,'" and that "physical alterations to [Area A] contemplated by the September 2012 deeds violate the condition that the property be used 'forever' for park purposes." (RB 83.) Neither *Welwood* nor *Roberts* bars conveyances. Instead, both cases held that restrictions on the use of property may be enforced but that such enforcement will not prevent changes in ownership. *Welwood, supra*, 215 Cal.App.3d at 1007-1008; *Roberts, supra*, 93 Cal.App.2d at 546 (complaint alleged that "city has commenced the erection of certain buildings on the property to be used

for purposes in violation of the [park purposes only restriction] in that said project is a housing yard for city-owned trucks and vehicles used by the city for various purposes").)

The City's deed to the Homes Association does not authorize the contested improvements. To the contrary, the City's deed imposes additional *restrictions* on the use of the property consistent with its preservation as parkland, and it sets out a process for Area A's owner to obtain after-the-fact City approval of specific structures. (2-CT-431-432, Quitclaim Deed ¶¶ 1-6.) In its opening brief, the City explained that the deed's conditions did not purport to remove the restrictions imposed by any of the earlier deeds. (OB 49-50.) The law of deeds confirms that the conditions in the City's deed to the Homes Association are separate from, and cumulative of, any other applicable restrictions. (*Id.*)[1]

2. Plaintiffs' argument that the City may be held liable for the Homes Association's conveyance of Area A to the Luglianis is not supported by any legal authority

Plaintiffs contend that the City may be held liable for the Homes Association's conveyance of Area A to the Luglianis. Plaintiffs' theory is that the City was a "willing participant" in the agreement where the Homes Association promised to sell Area A to the Luglianis. (RB 84.) Plaintiffs' arguments in support are without merit.

[1]To the extent Plaintiffs are arguing that the City should be held accountable for the Homes Association's deed to the Luglianis, the City addresses that argument separately, below.

There is no legal authority supporting Plaintiffs' position. Plaintiffs cite the public trust doctrine cases generally. (RB 84, 97). But none of their cited cases imposes liability on a city for what the grantor does with property after the city conveys that property back to the grantor. To the extent any of these decisions touch on that subject, they support the conclusion that a city should not be held responsible. *Welwood* stated that a city may allow the property to revert to the grantors. 215 Cal.App.3d at 1017. It did not add, "but only if the city believes the grantor will continue to use the property consistent with the restrictions the grantor previously imposed on the city."

Plaintiffs argue that the Homes Association's reversionary interest was irrelevant because the Homes Association was contractually bound to reconvey the property to the Luglianis. Because of that, Plaintiffs contend, the City's "options were to either keep [Area A] or convey it to an entity that would operate it as a public park." (RB 97.)

Plaintiffs' approach is neither workable nor supported by the law. Plaintiffs allege that the City has a duty to enforce the deeds, and the improvements made to Area A by the Luglianis are in violation of the deeds. (E.g., 3-CT-520, FAC ¶¶ 16-17; 3-CT-527, FAC ¶ 28.b.) Plaintiffs also point out that the Homes Association holds a reversionary interest, and may retake the property in the event the deed restrictions are violated. (E.g., 3-CT-527, FAC ¶ 25.e.) But accepting those premises as true, if instead of

entering into the MOU, the Homes Association had demanded that the City reconvey the property to the Homes Association because of the Luglianis' activities on Area A, the City would have had no choice but to comply. That would have been so even if the City believed the Homes Association planned to use the property for something other than a public park. On what legal basis could the City refuse to reconvey the property to the Homes Association in such circumstances? There is none; certainly, Plaintiffs cite no such authority.

In fact, our courts have routinely upheld the right of grantors and others to exercise their right of reversion over the objection of grantees in breach of the conditions. [E.g., *Walton, supra,* 2 Cal.App.4th at 134 (quieting title in grantor's heir, without considering whether heir planned to continue to use the property for "library purposes"); *Rosecrans v. Pacific Elec. Ry. Co.* (1943) 21 Cal.2d 602, 609 (cause of action to quiet title stated by grantor's successors in interest, without considering whether they planned to continue to "maintain [a] railway [with] daily service"); see *City of Palm Springs v. Living Desert Reserve* (1999) 70 Cal.App.4th 613, 622 (finding reversionary interest compensable in eminent domain, without considering interest holder's intentions for the money to be paid in compensation).]

These cases do not identify the grantor's future plans as an issue. None conditions the grantor's exercise of its reversionary rights on a

commitment from the grantor to continue the same use restrictions. If the grantor's subsequent use of the property would not prevent the grantor from retaking the property from an uncooperative grantee, then it should not prevent the grantee from reconveying the property to the grantor voluntarily.

Lacking legal authority to support their argument to the contrary, Plaintiffs obfuscate. Plaintiffs affix a label to the City's argument, calling it "intellectually dishonest" (RB 84) and "disingenuous" (RB 98). Plaintiffs also misrepresent the facts. Plaintiffs claim that, "as the payoff" (presumably for "aiding and abetting" the Homes Association's conduct), the City accepted money "from the Luglianis" (RB 84), and that the City and Homes Association "schemed to take $500,000 from the sale of [Area A]" (RB 98). This is all false. As is plain from the undisputed record, the City received no money from the Luglianis. (5-CT-1035-1036, SAC ¶ 29.) The record is undisputed that Homes Association paid the City $100,000 to compensate the City for assuming responsibility for Lots C and D. (5-CT-1194, SAC Ex. 12, Art. III.C.)

3. The City's authority to convey the property to the Homes Association is confirmed by the policies underlying the Public Trust Doctrine

California's public trust doctrine is premised on two policy concerns. "[O]ne such concern is that if courts were to permit public entities to accept from donors gifts of property subject to restrictions on the

property's use, and then later jettison those restrictions on their own whim, donors would be discouraged from making such gifts in the future." (*County of Solano, supra*, 155 Cal.App.4th at 577.) "A second public policy concern is rooted in "the maxim[ ] of equity ... that '[h]e who takes the benefit must bear the burden.'... [T]he donee of a conditional gift may not keep the gift unless the donee complies with the donor's conditions." (*Id.*)

Neither of these policy concerns is jeopardized by what happened here. First, the Homes Association's 1940 conveyance to the City included a right of the Homes Association to retake the property if the use restrictions were violated. *County of Solano* expressly distinguished its facts from this situation. (*Id.* at 578 fn.6 (noting that the court was to "consider the enforceability of use restrictions set forth in a deed...that undisputedly provides for no power of termination." (emphasis added).) Second, the City reconveyed the property to the Homes Association, in the language of *County of Solano* the "donor." The City's reconveyance here neither discourages donors from making similar gifts in the future, nor constitutes a situation where the donee (the City) is trying to keep the gift without complying with the conditions. The policy rationale behind the public trust doctrine is not implicated on these facts.

4. If there is some defect in the Homes Association's conveyance to the Luglianis, there is no legal or practical reason to hold the City liable; the City's conveyance to the Homes Association is separate and entirely valid.

Whatever uses were contemplated by the Homes Association's deed to the Luglianis, the City should not be held liable for that conveyance. Even if it was promised in the same MOU, the City's deed of Area A to the Homes Association was a separate, entirely valid transaction. The issues raised by Plaintiffs regarding the validity of the Homes Association's deed to the Luglianis, and the Luglianis' compliance with the terms of that deed, are matters Plaintiffs should direct to the those parties, not the City. Any flaws in the Homes Association's deed to the Luglianis could be addressed by focusing on that conveyance. The City's deed to the Homes Association is separate and could (and should) remain intact.

B. The Judgment Exceeded the Trial Court's Jurisdiction

1. The trial court's order imposing an injunction is not entitled to deference

Plaintiffs argue that the standard of review of an order granting an injunction is abuse of discretion and, applying that standard, claim there was nothing wrong with the trial court granting broad future injunctive relief to plaintiffs with respect to all "similarly situated" parkland owned by the City. (RB 23, 88.) But asserting simply the abuse of discretion standard is an incomplete description of the relevant law. Plaintiffs' own authorities

acknowledge that the grant of an injunction is also reviewed for "lack of evidence" and "legal error." (*Robinson v. U-Haul Company of California* (2016) 4 Cal.App.5th 304, 317 (cited at RB 88).) Moreover, this injunction was granted following summary judgment, where the trial court is strictly limited to consideration of the evidence presented by the parties.

The trial court's grant of an injunction here is not entitled to deference. This is not a situation where the trial court had to exercise discretion because of the necessity of weighing evidence of encroachments at multiple parkland properties in the City. There was no evidence of encroachments at any property, other than Area A. The injunction's other errors are similarly errors of law, where no deference is owed the trial court. By empowering John Harbison, CEPC, and the trial court to manage City parkland, the injunction violates principles of separation of powers. The trial court further exceeded its legal authority by enjoining the City from taking future legislative action and improperly substituting its judgment for the City Council's and altering the consideration for the MOU without necessary parties to the contract. These errors are "largely a question of law subject to plenary appellate scrutiny." (*Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1027, disapproved on other grounds in *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 fn. 4.) As explained in the opening brief (pp. 51-57) and below, such scrutiny requires reversal of the patently overbroad judgment.

2. The trial court's ruling is improperly city-wide in scope because all that was before the court was a dispute between neighbors over a single lot

The allegations and evidence reflect a dispute between neighbors over a single lot. Notwithstanding this focus, the trial court issued an injunction that applies to all "similarly situated property owned by the City." (15-CT-3654:1-6.) Plaintiffs seek to justify this city-wide injunction by claiming that the trial court had discretion to issue such other and further relief as the trial court "deemed" just and proper. (RB 89.)

The authorities Plaintiffs cite in support of this broad assertion do not support it and are not cases involving summary judgments. (RB 89-90, citing *Reinsch v. City of Los Angeles* (1966) 243 Cal.App.2d 737, 748; *Staley v. Board of Medical Examiners* (1952) 109 Cal.App.2d 1, 6.) *Reinsch* declared a prescriptive easement over the property of a single landowner. 243 Cal.App.2d at 748. *Staley* upheld an injunction with respect to the right of a single individual to carry on his business. 109 Cal.App.2d at 6.

An injunction may be reversed for "lack of evidence." *Robinson, supra*, 4 Cal.App.5th at 317. An injunction that goes beyond the evidence is overbroad and must be narrowed. (See *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084 (portion of injunction barring association of churches and an association employee from interfering in member church's business meetings was

overbroad in absence of any evidence that association either attempted to interfere or had any intent to do so).)

Here there is no evidence regarding the alleged improper use of property in the City, other than Area A. There is no evidence even identifying other parcels owned by the City.

3. The injunction is also overbroad because Plaintiffs have no legal obligation to use the judgment only in the public's interest

Plaintiffs argue that the judgment is not as extreme as the City makes out and, in any event, that Plaintiffs may be trusted to enforce the judgment responsibly. (RB 90-93.) Plaintiffs' arguments are unavailing.

Plaintiffs' mischaracterization of the import of the judgment rests on half-truths and wishful thinking. For example, Plaintiffs quibble with the statement in the City's opening brief that Plaintiffs may appear on 24-hour ex parte notice to force the City to remove parkland encroachments "immediately." (RB 90.) Plaintiffs argue that the word, "immediately," does not appear in the judgment with respect to removal of parkland encroachments. (*Id.*) Yet there is no dispute that the judgment expressly provides for relief "ex parte." (*Id.*) The whole point of ex parte relief is to obtain relief immediately. (6 Witkin, Cal. Proc., Proceedings Without Trial § 58 (5th ed. 2008) (ex parte relief typically available when either authorized by statute or "[w]here there is pressing necessity for immediate relief"); see *Sole Energy Company v. Hodges* (2005) 128 Cal.App.4th 199,

207 (rules allowing for ex parte relief are an exception to the rule that "[n]otice of any motion must generally be provided 21 days before the date of the hearing.").)

Plaintiffs do not dispute that, unlike public officials, Plaintiffs are not subject to ethics laws or an oath of office to control how Plaintiffs chose to implement the judgment. (See OB 54.) Instead, Plaintiffs argue that their conduct is governed by other rules, namely the judgment itself, which "only enjoins those parkland encroachments that violate the Homes Association's CC&Rs or the 1940's deeds." (RB 90.) This misses the point. Plaintiffs are a private unincorporated association and a private individual. Lacking the constraints that bind public officials, there is nothing to prevent the Plaintiffs from seeking to enforce the judgment—City-wide in scope—in ways that are not in the public interest. For example, Plaintiffs could offer to refrain from exercising their judge-made power if a resident wanting to avoid such action compensated Plaintiffs. The imagination doesn't stop there.

Plaintiffs dispute that the judgment gives them control over the City's management of parkland, arguing that "the City and Homes Association remain the entities who enforce the restrictions." (RB 91.) Yet there is no dispute that the judgment invests Plaintiffs with the authority to force the City to remove any "structure, vegetation, or object" encroaching on parkland anywhere in the City. (15-CT-3654:1-6; 15-CT-3656:14-15.)

These unelected Plaintiffs are thus empowered to second guess the choices made by the City Council and other City officials regarding how various types of encroachments should be addressed. What kinds of encroachments should be prioritized? For specific encroachments, what steps short of litigation should be taken before legal action is filed? How long should the offending property owner be given to comply? This is management control. Also, where other residents who might question the appropriateness of a City action must seek judicial review in the Writs Department through Code of Civil Procedure §1094.5, Plaintiffs have a fast track to challenge the action in Judge Meiers' courtroom.

All but conceding that the judgment gives Plaintiffs excessive authority, Plaintiffs' ultimate argument is "trust us." Plaintiffs admit that in the event of a violation of the injunction, Plaintiffs could seek enforcement. (RB 91.) Plaintiffs claim, however, that they are focused on the sale of parkland property and that "[s]uch a scenario is not likely in light of the public outcry over the sale of the Panorama Parkland." (*Id.*) Plaintiffs are essentially saying, "Don't worry. We're just interested in parkland sales, not encroachments." Such assurances are meaningless. An injunction that is overbroad cannot be saved by vague promises that its enforcement will not be abused.

On a similar note, Plaintiffs claim that the "ex parte" provision of the judgment does nothing to change the background rules governing ex parte

relief, that ex parte relief is only available in cases of irreparable injury and true emergencies. (RB 91. See, e.g., Cal. Rules of Court, Rule 1202.2, subd. (c) (party seeking ex parte relief must show evidence of "irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte").) The judgment, however, suggests ex parte relief will not be so limited by Judge Meiers.

This is not a lawsuit where, for example, a builder might risk losing an incentive if the project is further delayed (*Black Historical Society v. City of San Diego* (2005) 134 Cal.App.4th 670, 676), or where a judgment creditor might risk not collecting from an insolvent judgment debtor (*California Retail Portfolio Fund GmbH & Co. KG v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, 857). In those cases the risk of irreparable injury warranting ex parte relief is clear. Not so here. None of the matters at issue in this lawsuit—changes in ownership, and construction of improvements such as walls, a gazebo, etc.—poses such a risk. Property can be reconveyed. Walls and a gazebo can be removed. The fact that the trial court expressly prescribed ex parte relief in the judgment suggests that the trial court mistakenly believes that these are the types of facts that threaten "irreparable harm" or constitute an "immediate danger." This view is not supported by law.

4. Plaintiffs' argument that the City's exercise of its legislative authority may be enjoined is wrong and unsupported by any legal authority

Plaintiffs contend that the judgment properly enjoins the City from rezoning the property or taking certain other legislative action. Plaintiffs argue they had good reason to be "concerned" about potential rezoning by the City, that any such legislative action would be *ultra vires*, and that these factors support the trial court's broad order enjoining the City's exercise of its police powers through zoning activity. (RB 91-92.) These arguments are meritless.

Plaintiffs' concerns are misplaced. No legislation adopted by the City could have any impact on the enforceability of deed restrictions on property not owned by the City. "In an unbroken line of cases, California courts have held that a change in the zoning restrictions in an area does not impair the enforceability of existing deed restrictions." (*Seaton v. Clifford* (1972) 24 Cal.App.3d 46, 52 ("while re-zoning makes possible a change in the character of an area, it cannot in and of itself create the change").)

Conversely, no deed restrictions can render a zoning ordinance invalid. "Private agreements imposing restrictions are not to be considered when determining the validity of a zoning ordinance for the reason that such private agreements are immaterial." (*City and County of San Francisco v. Safeway Stores* (1957) 150 Cal.App.2d 327, 332 fn.1.) Therefore the deeds could not provide a basis for the trial court's judgment

enjoining the City from adopting a zoning ordinance or taking other legislative action regarding Area A.

The trial court's injunction is also invalid for a separate, independent reason: the City's exercise of its legislative authority in the future may not be enjoined. (Code Civ. Proc. § 526, subd. (b) ("An injunction cannot be granted…[t]o prevent a legislative act by a municipal corporation.").) Plaintiffs argue that a city may be enjoined when a legislative act is shown to be invalid. (RB 92.) But the authorities cited by Plaintiffs bear no resemblance to the situation here. (RB 92, citing *Agnew v. City of Los Angeles* (1961) 190 Cal.App.2d 820, 828; *Ebel v. City of Garden Grove* (1981) 120 Cal.App.3d 399, 410; *Rico v. Snider* (C.C.N.D. Cal. 1905) 134 F. 953, 958.) Two of them upheld local legislative authority. (See *Agnew, supra*, 190 Cal.App.2d at 828 (challenged portions of the municipal code were valid); *Rico, supra*, 134 F. at 958 (denying motion for preliminary injunction against board of supervisors from exercising legislative power to divide reclamation districts).) The remaining case enjoined enforcement of an existing ordinance. (*Ebel, supra*, 120 Cal.App.3d at 410.) It did not enjoin the city from adopting legislation. (*Id.*) This a court may not do.

5. The trial court erred in altering the consideration for the MOU

In its opening brief, the City argued that the injunction is overbroad for another reason: By removing two restrictions from the City's deed to

the Homes Association, the trial court changed the consideration supporting the MOU, even though a party to the MOU and an indispensable party to this action, the School District, is absent from the suit. (OB 56-57.) Plaintiffs do not seriously dispute any of this. Instead, Plaintiffs raise three arguments, none of which has merit.

Plaintiffs first argue that the School District was not a party to the 2012 deeds Plaintiffs sought to void. (RB 94.) This contention misses the point. By removing some of the consideration for the MOU to which the School District was a party, the court's injunction materially impacted the interests of the School District.

Plaintiffs further argue that it is "speculative" that the Luglianis might seek a refund of money they paid to the School District based on the trial court's overbroad injunction. (RB 95.) Plaintiffs ignore the fact that the trial court removed consideration for the MOU itself, two restrictions in the City's deed to the Homes Association, and that in such a circumstance all parties to the contract must be joined in the suit.

When there is a failure to join a necessary or indispensable party, the law does not require certainty that a contract will in fact unravel or that a subsequent litigation action will ensue. It is enough that the interests of an absent party are impacted. (*Dreamweaver Andalusians, LLC v. Prudential Insurance Co. of America* (2015) 234 Cal.App.4th 1168, 1173 (a person is a "necessary party" if, inter alia, the person has an interest "relating to the

subject of the action" and "his absence may...leave any of the persons already parties subject to a substantial risk of incurring ...inconsistent obligations by reason of his claimed interest"); *Save Our Bay, Inc. v. San Diego Unified Port Dist.* (1996) 42 Cal.App.4th 686, 693 ("*Save Our Bay*") ("a judgment in an action not naming an indispensable party . . . might well be inadequate because it is subject to later collateral attack by the nonjoined indispensable party"). By removing consideration from the MOU, the trial court has created a risk that a party or parties will refuse to live up to their promises. Were the MOU to unravel, the School District might bring suit to enforce its terms, and thereby collaterally attack the judgment. This risk demonstrates the injunction's overbreadth.

Plaintiffs argue that none of the defendants objected when the Plaintiffs dismissed the School District. (RB 95.) But the Defendants have argued below that the Plaintiffs could not attack the MOU without all the parties to the MOU being included in the litigation. (15-CT-3518.) Defendants were under no obligation to stop Plaintiffs from destroying their own case.

Plaintiffs contend that even if the School District is an indispensable party, that only means that the District is not bound by the judgment, and this would not compel reversal of the judgment. (RB 95-96.) The concept of an "indispensable party" wouldn't have much content if that were its only consequence. Indeed, one of Plaintiffs' own cited authorities

demonstrates that Plaintiffs' assertion is not the law. *Save Our Bay*, cited in Plaintiffs' brief, affirmed the entry of summary judgment in favor of defendants because an indispensable party was not joined. (*Save Our Bay, supra*, 42 Cal.App.4th at 699.)

6. Because the injunction is premised on undisputed facts and its overbreadth cannot be cured by balancing competing interests, the judgment must be reversed

Without citation to any authority, Plaintiffs argue that, even if the injunction is overbroad, the remedy should be remand to fashion a narrower injunction, not reversal. (RB 92-93.) But remand is appropriate only where there are issues of fact that must be resolved or competing interests that must be balanced. (*Korean Philadelphia, supra*, 77 Cal.App.4th at 1085 (remanding to trial court to determine whether a need for an injunction to prevent trespass on church property still existed, and whether narrower language could be formulated that would block improper conduct by third parties but not discourage those with valid rights to enter the property to worship or express their views about the property).) Where, as here, the material facts are not in dispute and there is no way to remove overbreadth by balancing interests, the appropriate remedy is reversal with directions. (*O'Connell v. Superior Court* (2012) 141 Cal.App.4th 1452, 1483 (reversing trial court order granting statewide preliminary injunction enjoining the Superintendent of Public Instruction and State Board of Education from enforcing statute mandating passage of a high school exit

exam for award of a diploma, in part because injunction was "overbroad in scope").)

C. Plaintiffs are not entitled to attorneys' fees under the private attorney general statute

1. The trial court's order awarding fees is not entitled to deference

Plaintiffs argue that the trial court's order awarding attorneys' fees should be reviewed for abuse of discretion. (RB 101, citing *Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 152 ("*Collins*").) It does not follow, however, that in exercising its discretion the trial court can ignore the applicable legal standards. No deference is owed where the trial court failed to act "in accordance with the governing rules of law." *Collins, supra*, 205 Cal.App.4th at 152. Because the trial court did not follow the law, no deference is due.

2. Plaintiffs do not dispute that they have a financial interest in the outcome; reversal is warranted on this basis alone

In the City's opening brief, the City pointed out that Plaintiffs have a "substantial financial stake" in the outcome of the case. (OB at 59.) The City argued that Plaintiffs failed to demonstrate that the cost of the lawsuit transcended that financial stake, as required by law. (*Id.*) Plaintiffs do not dispute this. (*See generally* RB 100-103.) This by itself justifies reversal of the attorneys' fees award. (*California Ins. Guar. Assn. v. Workers' Comp. App. Bd.* (2005) 128 Cal.App.4th 307, 316 fn. 2 (contention raised in

opening brief to which respondent makes no reply in its brief "will be deemed submitted on appellant's brief").)

3. There is no evidence of a "substantial public benefit."

Even assuming Plaintiffs had demonstrated that the cost of the lawsuit transcended their financial stake in the outcome, the fee award should still be reversed. Plaintiffs failed to establish that the lawsuit conferred a "significant benefit" on the public. Plaintiffs claim the public benefitted because Plaintiffs protected a "public park," citing *Friends of the Trails v. Blasius* ((2000) 78 Cal.App.4th 810 ("*Friends of the Trails*") (RB 102)). This case is completely different.

Friends of the Trails upheld the public's right to use a road, access to which a landowner blocked with locked gates. (*Id.* at 819.) There, 19 witnesses testified that the road was used by each of them and others over the course of more than twenty years for a variety of uses, including "walking, jogging, riding bicycles or horses, and fishing." (*Id.* at 819.) Plaintiffs' lawsuit is not premised on public access. Instead, Plaintiffs' suit is based on the Luglianis' construction of improvements on Area A and subsequent conveyances of that property. There are no allegations, much less evidence, that any member of the public ever used or even desired to use Area A, which is steep and largely inaccessible. The City retained an open space easement to maintain the property's visual benefits to the public. (2-CT-431-432, Quitclaim Deed ¶¶ 1-6; 12-CT-2809-2010, City

Staff Report § C.b.) There are no allegations, much less evidence in the record, of encroachments at properties other than Area A.

Plaintiffs' brief presents a list of items, claiming that it shows the litigation resulted in a significant benefit to the public. (RB 102.) The items on the list, whether considered individually or collectively, fail to demonstrate this:

- Plaintiffs claim: "800 acres were set aside at the City's founding." (RB 102.) This is irrelevant. No allegations were made or evidence presented regarding unlawful encroachments of parkland at any property other than Area A. Area A is approximately 75,930 square feet, or 1.7 acres. (5-CT-1181.)
- Plaintiffs claim: "Appellants' actions threatened not only the public's use of [Area A] but all of the similarly protected parkland in the City." (RB 102.) Plaintiffs do not provide a citation to the record. For good reason: No such allegation or evidence was presented to the trial court.
- Plaintiffs claim: "The lawsuit was widely covered in the local press demonstrating public interest in the dispute." (RB 102, citing City's Appendix of Record ("City AA") at 61-68.) As the National Enquirer can attest, public "interest" in a dispute does not necessarily equate to public benefit from the litigation result obtained. The cited news article confirms that objections to the

MOU came from the Luglianis' "neighbors." (City AA-061 ("[N]eighbors, who feel cheated by the deal [the MOU], are not happy.").)

- Plaintiffs claim: "While Appellants insist this was simply a dispute between one neighbor (Harbison) against another (Lugliani), the truth is that over ninety City residents supported the lawsuit." (RB 102, citing 1-CT-104.) The citation to the record provided by Plaintiffs is a portion of the bylaws of the Homes Association. (*Id.*) It does not support Plaintiffs' claim.
- Plaintiffs claim: "As a result of the litigation, the City and Homes Association may no longer sell parkland to raise money." This statement is misleading.
    - The only money the City received in connection with the MOU was $100,000 from the Homes Association, for the purpose of easing the previously unanticipated financial burden on the City from assuming responsibility for Lots C and D. (5-CT-1194, SAC Ex. 12, Art. III.C.) There is no evidence that the City's participation in the MOU was motivated by a desire to "raise money." Instead, the evidence demonstrates that the City entered the MOU for a variety of other, non-pecuniary reasons, including: to reaffirm use restrictions on School District property; resolve the lawsuit between the School District on the

one hand and the City and Homes Association on the other; subject future lighting on school athletic fields to City 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 sought to prevent the School District from selling parkland to raise money. (5-CT-1181, SAC Ex. 12, Art. I, ¶ A; 12-CT-2803-2804, City Staff Report.) By defending the trial court's overbroad injunction, which removes consideration from the MOU without the School District in the case, Plaintiffs risk causing the MOU to unravel and enabling the School District to sell parkland to raise money.

Plaintiffs fail to demonstrate that the litigation resulted in a significant benefit to the public.

4. Plaintiffs' writ petition was denied

Plaintiffs argue that the fee award should be affirmed because Plaintiffs were not required to prevail on every "legal theory" to obtain a full fee award. (RB 103.) Plaintiffs confuse "legal theories" with "claims for relief." Plaintiffs did not just fail to prevail on a legal theory. Plaintiffs' entire writ petition was denied. (See *Sokolow v. County of San Mateo* (1989) 213 Cal.App.3d 231, 250 ("Where plaintiffs are entirely successful

on all their claims for relief, it is not important that some of the legal theories used to support those claims were not found meritorious, so long as the plaintiffs did prevail.") (emphasis added).) Plaintiffs' citation to *Sundance v. Municipal Court* ((1987) 192 Cal.App.3d 268) in inapposite and does not compel a different result. (*Id.* at 274 (remanding and leaving it "to the discretion of the trial court to determine whether time spent on an unsuccessful legal theory was reasonably incurred") (emphasis added).)

If the court's denial of Plaintiffs' petition for writ of mandate were just another "legal theory" that would not have changed the result, there would be no reason for Plaintiffs to have filed a cross-appeal of the court's order denying their petition. It was a separate cause of action. Indeed, a different department of the Superior court heard the petition for writ of mandate and the complaint was heard separately by Judge Meiers. Because it was denied, Plaintiffs may not recover fees for time spent on it.

D. There is no procedural bar to challenging the trial court's errors

Plaintiffs argue that the court's judgment and award of attorneys' fees should be affirmed because the record is inadequate. Not so. The record on appeal contains all the papers from below necessary to frame the issues and resolve them. Plaintiffs have not, and cannot, claim that they have been prejudiced by the record on appeal as presently constituted.

There is no procedural bar to reversing the trial court's judgment and award of attorneys' fees.

1. The City's arguments in its opening brief were preserved for appeal

Plaintiffs argue that the absence of the City's memorandum of points and authorities filed in opposition to Plaintiffs' motion for summary judgment from the appellate record prevents the Court from confirming whether the arguments presented in the City's opening brief were preserved for appellate review. (RB 44.) This argument is patently without merit.

The City brought a cross motion for summary judgment, which is included in the record on appeal. (10-CT-2338-2363.) That document confirms that the City preserved for appellate review all the arguments it raised in the City's opening brief. The arguments the City makes on this appeal are essentially the same as those argued in the City's cross-motion. The City argues that: (1) the City's conveyance was not ultra vires [*compare* City's Motion, 10-CT-2359, *with* City's Appellant's Opening Brief ("OB") at 40-42]; (2) the City's conveyance to the Homes Association was consistent with the deed restrictions [*compare* City's Motion 10-CT-2352 *with* OB at 44-47]; and (3) the City's zoning of Area A is independent of the deed restrictions, and the court may not enjoin future legislative acts to conform to the deed restrictions [*compare* City's Motion 10-CT-2359-2361 *with* OB at 50-51].

The rest of the City's arguments in its opening brief are in response to the court's summary judgment order and final judgment, which went beyond what Plaintiffs' complaint alleged or prayed for, and the award of attorneys' fees to Plaintiffs. [*See* OB at 48-50 (trial court incorrectly invalidated two conditions in the City's conveyance and substituted its judgment for the City's legislative choices), 51-62 (the judgment exceeds the trial court's jurisdiction, and Plaintiffs are not entitled to attorneys' fees).]

Even if the City had not raised the arguments regarding summary judgment in the trial court, the Court of Appeal could still reach them. As is typical for cross motions for summary judgment, there are no material disputes of fact. (*See* Younger on California Motions § 8:25 (West 2d ed. 2016) ("While counsel may not quite stipulate to all the facts, chances are that there will be very little disagreement over the 'material' facts in cross-motion [for summary judgment] situations.").) The issues between Plaintiffs and the City are questions of law. This Court always has discretion to consider a theory or issue raised for the first time on appeal where it presents a pure question of law on undisputed facts or a matter affecting the public interest. (*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1324; *Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 244, citing 9 Witkin, Cal. Procedure (3d ed. 1985), Appeal, § 315, p.

326, disapproved on other grounds in *People v. Freeman* (2010) 47 Cal.4th 993, 1006 fn. 1.) Moreover, review on appeal is de novo.

Plaintiffs' cited authorities in support of its argument on the adequacy of the record are off-point. (RB 43.) They turned on the sufficiency of the evidence rather than questions of law. (*Id.*, citing *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1363 (appellant presented no record of the evidence regarding "the question before [the court,] whether the evidence presented at trial constituted substantial evidence in support of the court's finding"); *Denham v. Superior Court* (1970) 2 Cal.3d 557, 563 (question was whether there was an entire absence of any showing constituting good cause presented in the trial court upon the hearing of the motion to dismiss for lack of prosecution).)[2]

For similar reasons, the fact that the City did not file a separate statement of facts in opposition to Plaintiffs' motion for summary judgment is of no consequence. An opposing party's failure to file a separate statement does not affect its right to dispute legal issues. (*Assad v. Southern Pac. Transp. Co.* (1996) 42 Cal.App.4th 1609, 1615.) Plaintiffs' dispute with the City turns only on legal issues. Nonetheless, the City joined the

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[2]For the reasons discussed herein, the City believes that it is unnecessary for the City's memorandum of points and authorities in opposition to Plaintiffs' motion for summary judgment to be in the record. Its omission was, however, inadvertent. Should the Court of Appeal wish to see it, however, the City has filed a motion to augment the record with that document concurrently with this brief.

separate statement of facts filed by the Homes Association and the Luglianis in opposition to Plaintiffs' motion for summary judgment with respect to certain issues. This is reflected in the City's memorandum of points and authorities in opposition to Plaintiffs' motion for summary judgment. (Motion to Augment, Exhibit A (City's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment 2:6-16).)

2. The City's arguments that the injunction is overbroad were preserved for appeal

Plaintiffs argue that the City's arguments that the injunction is overbroad are procedurally barred. Plaintiffs' point to the facts that one proposed judgment submitted by Plaintiffs and transcripts of two hearings on the form of the judgment are not in the record. (RB 27-28, 43-44.) As a result, according to Plaintiffs, the Court cannot confirm that the City's arguments were preserved for appeal and that the City did not invite the trial court's error. (RB 43-44.) Plaintiffs' contentions are meritless.

The record contains a judgment proposed by Plaintiffs and the City's objections to it. (15-CT-3611-3646.) The Court's judgment was premised on Plaintiffs' proposed judgment. [*Compare* 15-CT-3634-3644 (redline of Plaintiffs' proposed judgment) *with* 15-CT-3647-3656 (court's judgment).] The absence from the record of an earlier draft judgment proposed by Plaintiffs and hearing transcripts is of no import.

Where the record does not contain all of the superior court documents and oral proceedings, there is a general presumption that the abbreviated record "includes all matters material to deciding the issues raised." (Rules of Court, Rule 8.163. See *Hillman v. Leland E. Burns, Inc.* (1989) 209 Cal.App.3d 860, 864 (rejecting argument that record incomplete without reporter's transcript).) The court will not presume that the absence of error would have been shown by something that is not in the record. If the error appears on the face of the record, the appellate court will not presume that the error was cured by some proceeding not appearing in the reporter's transcript. (*Stauffacher v. Stauffacher* (1964) 227 Cal.App.2d 735, 737 (lack of a finding on the face of the judgment roll cannot be cured by any presumption).)

The doctrine of invited error does not apply here. It typically applies where the appellant was itself responsible for the circumstance claimed on appeal to be error—for example, the invited error doctrine bars appellants from challenging jury instructions appellants themselves requested. (See 21 Cal.Jur.3d Criminal Law: Trial § 324 ("The doctrine of invited error bars a defendant from challenging a jury instruction given by a trial court when the defendant has made a conscious and deliberate tactical choice to request the instruction.").)

Invited error is a species of estoppel. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) Generally the party relying on the doctrine of

estoppel bears the burden of demonstrating the estoppel. (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1318.) If Plaintiffs contend that the City invited the trial court to enter the form of judgment challenged on this appeal, Plaintiffs must point to evidence supporting their claim in the record. They have not done so. No such evidence (in or out of the record) exists.

In a similar vein, Plaintiffs contend the City failed to object to the judgment on grounds of overbreadth and are therefore barred from challenging it on that ground now. (RB 88-89.) Plaintiffs' contention is belied by the record. The City raised the overbreadth argument at the earliest opportunity. Other than a throw-away prayer for "such other and further relief as the court may deem just and proper," Plaintiffs did not seek relief other than with respect to Area A and made no claim with respect to any other property. (1-CT-29-30; 3-CT-536-537; 5-CT-1042-1043.)

Nonetheless, the trial court ordered relief far beyond what was sought by Plaintiffs. The court ordered the issuance of "an injunction prohibiting the City and the Homes Association from entering into any future contracts and from taking any other actions in the future to eliminate the deed restrictions as to all properties governed by the 'establishment documents' described below." (15-CT-3549:18-21.) The court also ordered the City to re-deed Area A to the Homes Association with the restrictions from the 1930s intact and "with absolutely no modifications or diminution

of those restrictions." (15-CT-3565:13-15.) As is typical, the court directed the prevailing parties (Plaintiffs) to draft a proposed judgment "consistent with what is expressed herein [the summary judgment order]." (15-CT-3576:5-6.)

The overbroad injunction is contained in the judgment. The City objected to the judgment proposed by Plaintiffs where it was inconsistent with the court's order. (15-CT-3611.) That was the proper time for objections based on form, not substance. (See 1 Cal. Judges Benchbook Civ. Proc. Trial Chapter 2, § 2.44 ("Most judges direct the prevailing party to prepare the proposed judgment and to submit it to the other parties for approval as to form before submitting it to the court.").) That was not the time to challenge the injunction for overbreadth. The court's order was itself overbroad, and the proposed judgment was not inconsistent with it.

The trial court went even farther. The court entered a judgment with terms even broader than those proposed by Plaintiffs. For example, Plaintiffs' proposed judgment stated: "the Association shall not allow any new structure, vegetation or object to be maintained on the Property [Area A] if it would violate the Establishment Documents or the 1940 Deed Restrictions." (15-CT-3640:26-3641:1, redline of Plaintiffs' Proposed Judgment, ¶ 2(f)(iv) (citations omitted).) The court's judgment extended this language. The court extended the obligation beyond the Homes Association to the City too. The court also broadened the scope of the

injunction to embrace all "similarly situated property owned by the City." (15-CT-3654:1-6, Judgment, ¶ 2(f)(iv) ("[N]either the Association nor the City as to similarly situated property owned by the City that is subject to the Establishment Documents or the 1940 Deed Restrictions shall allow any new structure, vegetation or object to be maintained on the Property if it would violate the Establishment Documents or the 1940 Deed Restrictions.").)

The trial court also added a provision allowing plaintiffs John Harbison and CEPC the power to enforce the foregoing restrictions in Judge Meiers' courtroom on 24 hours ex parte notice. (15-CT-3654:1-6, Judgment, ¶ 2(f)(iv); 15-CT-3656:14-15, Judgment, ¶ 7.) This provision was not in the judgment proposed by Plaintiffs. (*See generally* 15-CT-3634-3644, Plaintiffs' Proposed Judgment.) The court further restricted the City's ability to take future legislative actions regarding zoning. (*Compare* 15-CT-3643:18-3644:1, redline of Plaintiffs' Proposed Judgment, ¶ 3, subds. (b) and (c), *with* 15-CT-3655:23-3656:8, Judgment, ¶¶ 3 and 4 (additionally conditioning exercise of the City's legislative authority on the Homes Association's compliance "with all requirements in the Establishment Documents and the 1940 Deed Restrictions").)

The full breadth of the injunction was thus not revealed until after the judgment was entered. The City could not have challenged it for being overbroad until this appeal.

In addition, the City's challenge to the injunction on grounds of overbreadth raises only questions of law. There is no evidence of encroachments on properties other than Area A. The injunction gives excessive authority to plaintiffs John Harbison and CEPC and the court over the City's management of parkland, and enjoins the City from taking legislative action. The trial court lacked legal authority to award this relief. (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1473 (injunctive relief inappropriate when it might result in "harm to the public interest"); Code Civ. Proc. 526(b) ("An injunction cannot be granted . . . [t]o prevent a legislative act by a municipal corporation.").) As such, the City's challenge to the injunction on grounds of overbreadth may be raised for the first time on appeal. (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1065 ("Because a motion for judgment on the pleadings, like a demurrer, raises only questions of law, we may consider new theories on appeal to challenge or justify the trial court's ruling."); *JRS Products, Inc. v. Matsushita Elec. Corp. of America* (2004) 115 Cal.App.4th 168, 179 ("the viability of a tort claim is a question of law that could have been raised for the first time on appeal").)

Plaintiffs' cited authorities are plainly distinguishable. They all involve disputes that are fact-dependent rather than, as here, pure issues of law. (RB 88, citing *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846

("Appellant failed to make court appearances below, failed to keep in contact with his attorney, failed to object to the challenged reports below, and failed to provide the trial court with evidence supporting his position."); *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 267 (incomplete polling of juror at time of verdict could have been corrected in the trial court).)

3. The City's arguments against the award of attorneys' fees were preserved for appeal

Plaintiffs argue that the absence of a reporter's transcript or settled statement for the hearing on Plaintiffs' motion for attorneys' fees means that the record is inadequate. This argument is without merit.

Again, the general rule is that where the error appears on the face of the record, the appellate court will not presume that the error was cured by some proceeding not appearing in the reporter's transcript. (*Stauffacher v. Stauffacher* (1964) 227 Cal.App.2d 735, 737.) Here the error is shown by the order awarding fees and other orders and pleadings in the clerk's transcript. The sole authority cited by Plaintiffs is distinguishable. (RB 101, citing *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 ("*Riles*").) In *Riles* defendants challenged the award of attorneys' fees on the ground that the court did not make findings regarding the lodestar figure for attorneys' fees based on the time spent and reasonable hourly compensation for each attorney. (*Riles, supra,* 43 Cal.3d at 1293.) *Riles* held that while the trial

court's fee order failed to specify the basis for its award, the trial court may have done so orally at the hearing. (*Id* at 1295.) Defendants should have provided a settled statement but did not. (*Id.*)

Here the City does not argue that the trial court failed to make findings. Instead, the City contends that Plaintiffs failed --as a matter of law on the undisputed record-- to establish the legal requirements for an award of attorneys' fees under the private attorney general doctrine. As a matter of law, the lawsuit did not confer "significant benefit" on the public, nor did the financial burden of private enforcement makes the award appropriate because there were "insufficient financial incentives to justify the litigation in economic terms." (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1211.) The City also contends that the trial court erred by awarding Plaintiffs an extraordinary multiplier of two and half times their actual fees. Nothing Plaintiffs (or anyone else) said at the hearing on Plaintiffs' motion for attorneys' fees could have corrected these errors.

The absence of a reporter's transcript or settled statement for the hearing cannot bar the City from challenging the fee award.

E. Conclusions

Plaintiffs' opposition to the City's appeal rests principally on three arguments: 1) public trust doctrine cases that, if they are applicable at all, support the City's reconveyance to the Homes Association; 2) a contention that the City may be held liable for what the grantor with the reversionary

interest—the Homes Association—subsequently did with the property, a contention that is completely unsupported by any legal authority; and 3) a baseless claim that the City's arguments are procedurally barred. Plaintiffs' claims against the City are baseless.

Plaintiffs' beef is with the Luglianis, who seek to maintain the improvements on Area A, and the Homes Association, who conveyed the property to the Luglianis. The City does not believe that the Luglianis or Homes Association have done anything wrong. But if they have, that is private matter stemming from private deed restrictions involving private parties. The City should be left out of it.

More importantly, as set forth in the City's Opening Brief (p. 24), this lawsuit attacks a small piece of a comprehensive four-party agreement that reaped significant public benefits, including reaffirming the use restrictions on all School District properties throughout the City, resolving a lawsuit, subjecting the School District's future athletic field lights to the City's zoning regulations, transferring Lots C & D to preserve them as open space, and resolving issues of encroachments and retaining walls on Area A. (5-CT-1181-1182, SAC Ex. 12, Art. I, ¶ A; 12-CT-2803-2804, City Staff Report.) Plus, the School District received $1.5 million from the Luglianis as contemplated in the MOU. (12-CT-2807). While the Plaintiffs may disagree with the City's political judgments, the City was acting in the

public interest and the MOU addressed matter aimed at benefitted the public.

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

IV. THE CITY'S CROSS-RESPONDENT'S BRIEF ARGUMENT

Plaintiffs sought a writ of mandate commanding the City to own Area A or enforce the private land use restrictions and remove the illegal improvements on Area A. (3-CT-526-528, 534, FAP ¶¶ 25-30 & 57.) The trial court sustained the City's demurrer to this petition for writ of mandate. (4-CT-923.) That determination should be affirmed.

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

To state a cause of action, the petition for writ of mandate was required to allege facts showing that the City has a clear, present, and ministerial duty to enforce deed restrictions on Area A. "Generally, mandamus is available to compel a public agency's performance or to correct an agency's abuse of discretion when the action being compelled or corrected is ministerial. A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his or her own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*AIDS Healthcare Foundation v. Los Angeles Dept. of Public Health* (2011) 197 Cal.App.4th 693, 700-701 ("*AIDS Healthcare*") (internal citations and quotations omitted).)

A. As it no longer owned the property, the City had no ministerial duty, let alone any legal mechanism, to enforce private deed restrictions on Area A

Unless a clear intention to allow enforcement by others is expressed in the deed restriction, a party must have a legal interest in the benefitted property in order to have standing to enforce the restriction. (*B.C.E. Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142, 1146-1147.) The seller or transferor of the benefitted property cannot enforce the deed restrictions after conveying title to another absent a showing that the original covenanting parties intended to allow enforcement by one who is not a landowner. (*Farber v. Bay View Terrace Homeowners Assn.* (2006)

141 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* (1995) 12 Cal.4th 345, 360.)

As alleged in the Petition, the City no longer owns Area A and did not own it at the time the Petition was filed. (3-CT-515, FAP ¶ 6.) It is and was owned by Thomas J. Lieb, Trustee, the Via Panorama Trust. (*Id.*) Lacking an ownership interest, the City lacked standing, much less a ministerial duty, to enforce the private deed restrictions on Area A.

Plaintiffs argue that the City owes a ministerial duty to enforce "land use restrictions for real property dedicated to a public purpose," citing *Welwood*. (RB 106.) For the reasons stated above, *Welwood* is distinguishable. Most importantly, for purposes of this argument, in that case the City of Palm Springs still owned the property. (*Welwood, supra,* 215 Cal.App.3d at 1007-1008.) Here, by contrast, Area A is no longer owned by the City.

B. The FAP does not allege facts showing that the City's conveyance to the Homes Association is void and that the City owns Area A

Plaintiffs alternatively contend that the First Amended Petition (FAP) alleges facts showing that the City's conveyance of the property was void. (RB 106.) Indeed, Plaintiffs conceded below that, unless this

conveyance was void, Plaintiffs could not proceed with their writ claim.[3] Plaintiffs have not alleged facts showing that the City's conveyance to the Homes Association was void.

Plaintiffs argue that the City's obligation to hold the property "perpetually" is "akin to a condition of approval imposed by a planning commission for a development project." (RB 106.) The metaphor is inapt. The case cited in its support is distinguishable. (*Id.*, citing *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 834 ("*Terminal Plaza*").) *Terminal Plaza* held only that a zoning administrator lacked the power to countermand particular conditions of approval imposed by the city planning commission. (*Terminal Plaza, supra*, 186 Cal.App.3d at 834.) The opinion acknowledged the discretionary authority enjoyed by a city council or commission to set policy in the first instance and, by implication, the authority of the city planning commission to amend conditions of approval. (*Id.* at 831.) The opinion did not address a conveyance of property of any kind, much less a conveyance of property to the grantor that holds a reversionary interest.

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[3] In opposition to the City's demurrer, Plaintiffs conceded that they had not stated a claim for writ of mandate and that the viability of Plaintiffs' third cause of action for a writ commanding the City to enforce the deed restrictions was, at a minimum, contingent on the court first declaring the deeds void and the City regaining ownership of Area A. (2-CT-313:1-2, Opp. to Original Demurrer, p. 11 ("At that point, mandamus will lie...") (emphasis added).) In other words, by Plaintiffs' own admission if the Complaint failed to state a cause of action to void the deeds, the mandate claim must also fail (although it fails for independent reasons as well).

Plaintiffs further argue that the City's conveyance is barred by *Welwood*. (RB 107.) In stretching to make the analogy, Plaintiffs again misstate the facts, pointing to "the City's conveyance of public parkland to the Luglianis." (RB 108.) The City did not convey property to the Luglianis. The City conveyed property—Area A—to the Homes Association, the grantor that held a reversionary interest. (2-CT-431-464, Quitclaim Deed.)

As explained above, *Welwood* does not render the City's conveyance to the Homes Association void. *Welwood* addressed the *use* of property, property that was still held by the grantee, the City of Palm Springs. (*Welwood, supra,* 215 Cal.App.3d at 1007-1008.) The writ was upheld not because of a proposed conveyance, but because of the city's proposed use. (*Id.* at 1006.) The case authorized a conveyance back to the grantor, stating that the city could "allow the property to revert to the grantors' heirs." (*Id.* at 1017.) That is what happened here.

C. Even assuming the City still owned Area A, the City would be under no mandatory obligation to enforce the deed restrictions

Plaintiffs conflate the right of a party to enforce deed restrictions with the obligation of a property owner to comply with deed restrictions. The encroachments of which Plaintiffs complain were not put there by the City. The encroachments were put there by private individuals. (3-CT-

520:9-21, FAP ¶¶ 16-17.) Plaintiffs seek to compel the City to enforce the deed restrictions against private individuals.

The 1940 deed in question gave the Association a right of reversion in the event of a breach by the City. (3-CT-518:27-519:10, FAP ¶ 10(d); 3-CT-630-631, FAP Exhibit 2, pp. 13-14.) In addition to that, the 1940 deed authorized certain other benefitted parties to pursue remedies.[4] (3-CT-631, FAP, Exhibit 2, p. 14 ("...the breach of any [covenant] or the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by the Grantor herein [the Homes Association] or its successors in interest, or by such other lot or parcel owner, and/or by any other person or corporation designated in said Declarations of Restrictions.") (emphasis added).) The deed did not impose a mandatory duty on anyone, landowner or not, to enforce the deed restrictions. (*Id.*)

D. No ministerial duty is created by city ordinances or resolutions

Plaintiffs argue that by the City's own ordinances and a city resolution, the City imposed upon itself a ministerial duty to "enforce land use restrictions for [Area A]." (RB 107.) This claim is not supportable in

[4] Section 12 ("Right to Enforce") of the "Declaration of Establishment of Basic Protective 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." (3-CT-589, FAP, Exhibit 1, p. 50.)

mandate. The City may not be compelled to employ a specific code enforcement mechanism to deal with the encroachments on Area A.

1. Mandate will not lie to compel a city to achieve compliance with its zoning ordinance in any particular way

If improvements have been constructed on Area A in violation of the City's zoning ordinance, the City *may* pursue compliance by employing a variety of tools.

- Zoning violations may be prosecuted criminally as a misdemeanor. (Palos Verdes Estates Municipal Code ("PVEMC") §§ 1.16.010, 1.16.010, subd. (B), 17.32.060.)[5]
- The City may declare any violation of its code a public nuisance and subject it to abatement. (PVEMC §§ 1.16.010, subd. (F), 17.32.040, 17.32.050.) Abatement may proceed down a number of paths:
    - Nuisance abatement offers several options to the City, including the issuance of an abatement order directing the property owner to abate the nuisance. (PVEMC §§ 8.48.040 et seq., 17.32.050.)
    - If the property owner fails to comply, the City may seek an abatement warrant and cause the nuisance to be abated with

[5] The City's Municipal Code may be found at http://www.codepublishing.com/ca/palosverdesestates

its own workforce or that of a private contractor. (PVEMC § 8.48.060.)

- The City through a lien or a special assessment on the property may recoup costs associated with abatement, and the City has the additional option of seeking a court order for treble costs of abatement. (PVEMC §§ 8.48.090, 8.48.110.)

- The City may legalize unpermitted improvements. This may be done in a variety of ways. For example:
  - The City may amend its zoning ordinance to authorize previously unpermitted uses.
  - The City may issue after-the-fact permits for improvements authorized in the zone.[6] (PVEMC §§ 15.08.140, 15.08.150, 17.04.110.)

With a number of options available to achieve code compliance, the City may not be compelled to pursue any one in particular.

The court in *Riggs v. City of Oxnard* (1984) 154 Cal.App.3d 526 considered and rejected a petition seeking to command the city to exercise

[6]Private covenants and deed restrictions are not enforced by a city through its police power. While private covenants and restrictions may be more restrictive than the applicable zoning regulations (*Seaton, supra,* 24 Cal.App.3d at 52), they do not constrain a city's police power to zone and grant permits consistent with its zoning ordinance (*Safeway Stores, supra,* 150 Cal.App.2d at 332 fn.1.). 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.

its code enforcement discretion in a particular manner. There, appellant sought a petition for writ of mandate compelling the city to: 1) close down a transmission shop operating in the C-2 zone, where such uses were clearly prohibited; and 2) issue the shop owners a criminal citation for violating the zoning ordinance. (*Id.* at 528.) The City had erroneously issued the transmission shop a zone clearance, allowing it to open. (*Id.* at 528-529.) After the lawsuit was filed, the city council amended its zoning ordinance to authorize transmission shops in the C-2 zone subject to a special use permit. (*Id.* at 529-530.) Although the legislative amendment rendered the remedy appellant sought (enforcement of the zoning ordinance) moot, the court nevertheless considered appellant's argument that a writ should lie to enforce a clear public duty. (*Id.* at 530.) The court held that municipalities have broad discretion to determine the most appropriate mode of enforcing ordinances and that a writ of mandate will not issue to compel that discretion be exercised in a particular way. (*Id.*) The court recognized that a city retains the police power to zone and rezone property as it sees fit and that rezoning to accommodate an existing use was within the city's power. (*Id.* at 531.)

It is also firmly established that a writ may not lie to compel an agency to initiate criminal prosecution. The principle of prosecutorial discretion is rooted in separation of powers and due process, and is basic to the framework of the criminal justice system. (*Gananian v. Wagstaffe*

(2011) 199 Cal.App.4th 1532, 1543.) An unbroken line of cases recognize that prosecutorial discretion is not subject to judicial control. (*Id.* at 1545-46; *Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; *People v. Municipal Court* (1972) 27 Cal.App.3d 193, 207; *Taliaferro v. Locke* (1960) 182 Cal.App.2d 752, 755-56.)

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

2. A mandatory duty to pursue a single enforcement strategy has not been assumed by the City

In the face of this authority, Plaintiffs argue that the City has, through its own ordinances and a city resolution, imposed on itself a mandatory duty to pursue a single enforcement strategy. None of these factors support Plaintiffs' argument. The City's approach in dealing with zoning violations is discretionary.

Plaintiffs cite municipal code sections regarding allowed uses in areas zoned open space and nuisance abatement. (RB 107, citing PVEMC §§ 17.32.050, 18.16.020.) In the event of a use not allowed in the zone, the city attorney "shall" take certain steps. (PVEMC § 17.32.050.) This language is tempered in number of ways, which demonstrate that the particular enforcement choices selected are discretionary. First, the city

attorney shall commence action or proceeding for abatement, removal, and enjoyment, only "upon order of the city council." (*Id.*) Second, the list is non-exclusive, providing that the city attorney "shall take such other steps" as will cause the unlawful activity to cease. (*Id.*)

In this context, the use of the word, "shall" does not create a mandatory duty. That "shall" is defined by the City's municipal code as "mandatory" changes nothing. (RB 108, citing PVEMC § 1.04.010, subd. (I).) "Even if mandatory language appears in [a] statute creating a duty, the duty is discretionary if the [public entity] must exercise significant discretion to perform the duty." (*AIDS Healthcare, supra,* 197 Cal.App.4th at 701 (affirming judgment of dismissal of petition for writ of mandamus following order sustaining demurrer, even though statute provided that official "shall" take measures to prevent the spread of disease).) In light of the multiple enforcement tools at her disposal, the city attorney's duty to perform code enforcement activity is discretionary.

Nor did the City impose on itself a mandatory duty by adoption of a resolution by the City Council. The FAP alleges that the City adopted a policy where, in the event a property owner failed to remove an illegal encroachment, the City was to immediately remove it, bill and lien the owner, and cite the owner for an infraction. (3-CT-522:20-523:2, FAP ¶ 18(i), citing City Resolution R05-32.)

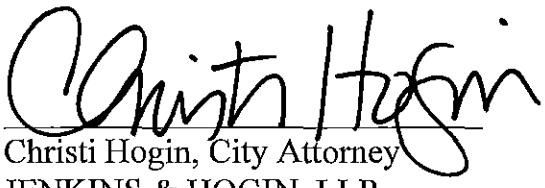
The actual City policy is more nuanced. Resolution R05-32 was adopted to summarize existing policies for the removal of encroachments, and "to add a requirement for the removal of encroachments when the adjacent private property changes ownership."[7] (City Resolution R05-32, Exhibit 1, preamble.) The language cited by Plaintiffs states that the City "will immediately" remove an offending encroachment. (*Id.* § 6.) It is at the end of a list of enforcement options. (*Id.*) For example, after receiving notice of the illegal encroachment from the City, if the property has not been sold, the property owner has five years to remove the encroachment. (*Id.* § 4.) The policy puts the public on notice regarding how the City intends to handle encroachments. It does not impose a mandatory duty on the City to take any particular steps.

E. Conclusion

For the foregoing reasons, the City respectfully requests that the trial court's order denying Plaintiffs' writ of mandate be affirmed.

DATED: July 10, 2017

Respectfully submitted,



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[7] The City's Resolution R05-32 may be found at http://www.pvestates.org/home/showdocument?id=1656.

CERTIFICATE OF WORD COUNT

(California Rules of Court, 8.204(c))

I certify that the text of this Appellant's Reply/Cross Respondent's Brief, including footnotes but excluding face page, table of contents, table of authorities, and the Certificate of Word Count, consists of 14,936 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 July 10, 2017, I served the foregoing documents described as:

CITY OF PALOS VERDES ESTATES' COMBINED APPELLANT'S REPLY AND CROSS-RESPONDENT'S BRIEF

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 10th day of July, 2017, at Manhattan Beach, California.

Wendy Hoffman

WENDY HOFFMAN

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