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OFFICE OF THE COUNTY COUNSEL
COUNTY OF ORANGE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

CITY OF LAGUNA HILLS, a municipal entity; BFE ASSET PARTNERS, LLC, a limited liability company; GJC PROPERTIES 8 LP, a limited partnership; SUKIN & ROSENFELD LLC, a limited liability company; and ERIK M. BLOCK, an individual,

Plaintiffs,

v.

ELITE HOSPITALITY, INC.; COUNTY OF ORANGE; BOARD OF SUPERVISORS OF THE COUNTY OF ORANGE; ORANGE COUNTY HEALTH CARE AGENCY; CEO REAL ESTATE; FRANK KIM; NICHOLE QUICK; and DOES 1 - 50, inclusive,

Defendants,

ILLUMINATION FOUNDATION, a nonprofit organization,

Real Parties in Interest.

Case No. 30-2020-01139345-CU-MC-CJC

Assigned for all purposes to:
Honorable Deborah Servino
Department C-21

COUNTY DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' *EX PARTE* APPLICATION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

[Declarations In Support of Supplemental Memorandum of Points and Authorities In Opposition filed concurrently herewith]

DATE: April 20, 2020
TIME: 10:00 a.m.
DEPT.: C-25

Action Filed: April 14, 2020
Trial: TBD

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD; ALL OTHER INTERESTED PARTIES, AND THIS HONORABLE COURT:

Defendants COUNTY OF ORANGE; BOARD OF SUPERVISORS OF THE COUNTY OF ORANGE; ORANGE COUNTY HEALTH CARE AGENCY; CEO REAL ESTATE; FRANK KIM; and NICHOLE QUICK (collectively "County" and/or "County Defendants") submit the following Supplemental Memorandum of Points and Authorities in Opposition to Plaintiffs CITY OF LAGUNA HILLS; BFE ASSET PARTNERS, LLC; GJC PROPERTIES 8 LP; SUKIN & ROSENFELD LLC; and ERIK M. BLOCK (collectively "Plaintiffs")' *Ex Parte* Application for Order to Show Cause and Temporary Restraining Order ("Application") filed on April 15, 2020, as to why this Court should not issue injunctive relief directed at Orange County's implementation of state-wide emergency orders in response to a global pandemic and to prevent the spread of COVID-19 by providing locations for isolation of at-risk individuals.

Respectfully submitted,

LEON J. PAGE, COUNTY COUNSEL
D. KEVIN DUNN, SENIOR DEPUTY

DATED: April 17, 2020 By: /S/
D. Kevin Dunn, Senior Deputy

Attorneys for Defendants
COUNTY OF ORANGE; BOARD OF SUPERVISORS OF THE COUNTY OF ORANGE; ORANGE COUNTY HEALTH CARE AGENCY; CEO REAL ESTATE; FRANK KIM; and NICHOLE QUICK

MEMORANDUM OF POINTS AND AUTHORITIES

The state Constitution gives California localities broad and flexible power to promote the public welfare. (Cal. Const., art. XI, § 7.) The police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people. (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885, 218 Cal.Rptr. 303, 705 P.2d 876; *see Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1152, 45 Cal.Rptr.3d 21, 136 P.3d 821.)

> 'The police power being in its nature a continuous one, must be reposed somewhere, and ***cannot be barred or suspended by contract or irrepealable law***. It ***cannot be bartered away even by express contract***.' [Citations.] It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that ***the sovereign always reserves to itself for the protection of peace, safety, health and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement***.
>
> (*Mott v. Cline* (1927) 200 Cal. 434, 446 [emphasis added].)

There is no legal basis for a TRO here. Yet, granting Plaintiffs' TRO would likely have a detrimental domino effect to encourage other cities and private parties to file similar suits. (See Declaration of Frank Kim ("Kim Decl") at ¶ 5.) The proposed injunction has the effect of paralyzing the County, making it nearly impossible to respond to the Governor's State of Emergency related to Project Roomkey. (*Ibid*.) It is likely the County will be unable to secure any other hotel lease in south Orange County and will likely lose the other cities who are currently cooperating with Project Roomkey or otherwise be subject to similar lawsuits. (*Ibid*. at ¶¶ 4-5.)

It is indisputable that time is of the essence and the public's health is at risk. The State clearly intended to get COVID positive individuals off the streets to avoid continued infection of others. The County has committed its staff and countless resources for weeks in an effort to comply with the State's Order and protect the safety of the public; only to now be sidelined by this action. (*Id*. at ¶¶ 3-5.) The notion that such actions are required during a global pandemic where federal, state and local emergencies have been declared is simply nonsense. Adoption of Plaintiffs' position here would lead to patently absurd results. Must a fire or police department obtain HOA approval before cordoning off a neighborhood to fight a fire or for a crime scene? Must the federal government request a Plaza Pointe HOA waiver to position troops on the streets of Laguna Hills to defend an attack against the United States? Must one seek

an HOA exemption to park a fire truck on a lawn during a blaze, or deem a helicopter dropping Phos-Chek on a fire to be a violation of the CC&Rs on the ground below? These results are absurd and dangerous in the extreme.

Further, the "use" complained of is temporary and will only be needed during the Emergency. Properties throughout the United States are being converted into COVID shelters; properties such as dorms, sporting arenas, concert halls, convention centers, hotels, that likely have similar CC&Rs or other contracts that under normal circumstances would prohibit the property owner from converting the property into a COVID shelter.

California has one of the largest populations of homeless individuals in the country, the State had no choice but to take a strong and fast approach to limit the exposure of COVID to the community by converting hotels into shelters to stop the spread. Undoubtedly, all of these hotels have CC&R's that could make similar challenges for its "improper use." (Kim Decl. at ¶ 6.) (For example, see the San Francisco's Board of Supervisors Ordinance that is discussed here: https://www.hklaw.com/en/insights/publications/2020/04/san-francisco-expands-use-of-hotels-for-vulnerable-populations.)

In the event the court finds that private contracts and restrictions, like CC&Rs, restrict the ability to use facilities under Project Roomkey, the whole program will be disrupted, possibly state-wide, and cause unnecessary delay and complications to this short term emergency use of facilities, including hotels. (Kim Decl. at ¶ 6.) The time and effort needed to investigate, review and comply with each and every private agreement applicable to a facility would eviscerate the government's ability to respond to an emergency and protect health safety and welfare. (*Ibid*.) Research on this issue has found no other circumstances related to the COVID-19 emergency where private covenants or agreements have been applied to the pandemic response to limit the State or County's ability to respond effectively and quickly. (*Id.*) The Court should not make such a dangerous precedent now.

I. EVEN OUTSIDE OF AN EMERGENCY, CC&Rs CLEARLY MUST YIELD TO GOVERNMENTAL POLICE POWER

A. Civil Code Section 4204 Provides Explicitly that the Law Prevails over Governing Documents

Civil Code section 4205, with respect to common interest developments, explicitly provides that, "[t]o the extent of any conflict between the governing documents and the law, the law shall prevail." The

Law Review Commission notes indicate, "Section 4205 is amended to clarify its meaning. The section is intended to provide guidance on how to resolve a conflict between the specified authorities." Moreover, the "amendment would conform the terminology used in Section 4205 to that used in numerous other statutory provisions that establish a rule of supremacy between authority without exhaustively specifying the circumstances in which the rule is to be applied."

B. There Is A Reservation of Governmental Police Power Implied in Every Contract of a Planned Development.

The absence of an emergency provision in the CC&Rs triggers a rule of interpretation that requires this Court to deny the TRO application. In *108 Holdings, Ltd. v City of Rohnert Park*, *supra,* 136 Cal.App.4th at 196, the court cited several cases for the general proposition that "[r]eservation of the police power is implicit in all governmental contracts and private parties take their rights subject to their reservation." Thus, courts "will not read into the contract an abrogation of the potential future exercise of the sovereign policy power." (*Id.* (citation omitted).) In reaching this decision, the *Rohnert Park* court also provided an informative discussion of the rule that a municipality may not contract away its legislative and quasi-judicial powers:

> A long line of California cases establishes that a government may not bargain away its right to exercise its police power in the future ... A contract that purports to do so is invalid as contrary to public policy if the contract amounts to a municipality's 'surrender' or 'abnegation' of its control of a municipal function... '[T]he controlling consideration in this area appears to be whether a disputed contract amounts to a local entity's "surrender," "abnegation," "divestment," "abridging," or "bargaining away" of its control of a police power or municipal function.' The inquiry thus turns on whether 'this crucial control element has been lost.'

In *Delucchi v. County of Santa Cruz* (1986) 179 Cal.App.3d 814 the court construed the contract in question to allow for future zoning changes. Otherwise, the court held, the contract would be unconstitutional as "contracting away" the county's police powers. (*Id*., at 823-24.) In accordance with this long line of authority, this Court should reject Plaintiffs' interpretation of CC&Rs that leads to an unconstitutional result. Instead, this Court should follow the holding in *Delucchi* and interpret the CC&Rs as preserving governmental police powers, thus preserving the constitutionality of these documents.

It is settled that a government entity may not contract away its right to exercise the police power in the future. (See, e.g., *Avco Community *1558 Developers, Inc. v. South Coast Regional Com.* (1976) 17

Cal.3d 785, 800, 132 Cal.Rptr. 386, 553 P.2d 546 (Avco); *County Mobilehome Positive Action Com., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727, 736–739, 73 Cal.Rptr.2d 409 (*County Mobilehome*); *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1724, 45 Cal.Rptr.2d 752 (Alameda County).) A contract that purports to do so is invalid as against public policy. (*County Mobilehome, supra,* 62 Cal.App.4th at p. 736, 73 Cal.Rptr.2d 409.)

California courts have consistently invalidated agreements that had the effect of surrendering or impairing the police power. In *Alameda County*, two cities and a county entered into a memorandum of understanding (MOU) concerning a parcel of approximately 13,000 acres of open space, portions of which were in all three jurisdictions, agreeing to use their "best efforts" to adopt into their respective general plans certain specified goals and policies concerning that land. (38 Cal.App.4th at 1719–1720.) The MOU further provided that any amendment to one of the entities' general plans concerning that land would not become effective unless the other two entities adopted parallel amendments. (*Id*. at 1720.) The plaintiffs challenged the MOU, seeking declaratory and injunctive relief. The court held the agreement invalid, stating that it constituted "a surrender of each respondent's power to amend its own general plan. . . .What the law has designed to be the exclusive power of an individual jurisdiction has become a contingent power, dependent on the concurrence of other jurisdictions." (*Id*. at 1724–1725, fn. omitted.)

Additionally, in *Avco*, a developer agreed to sell and dedicate coastal land to the county, conditioned upon the issuance of certain approvals for a building project. (17 Cal.3d at 799.) The approvals were granted, and the developer began work on the project. The developer relied on this agreement in seeking an exemption from a subsequently-enacted coastal permit requirement. (*Id*. at 788–789, 799.) Our Supreme Court held that the developer had not acquired a vested right to complete the development, either at common law or pursuant to statute. The court also rejected the developer's estoppel claim, explaining that even assuming the agreement "constituted a promise by the government that zoning laws thereafter enacted would not be applicable to [the developer's tract], the agreement would be invalid and unenforceable as contrary to public policy." (*Id*. at 800.) "Land use regulations, such as the [Coastal Zone Conservation] Act, involve the exercise of the state's police power [citation], and it is settled that the government may not contract away its right to exercise the police power in the future. [Citations.]" (*Id*. at.)

Similarly, in *Delucchi v. County of Santa Cruz* (1986) 179 Cal.App.3d 814, the plaintiff landowners

and the county entered into a land use agreement concerning coastal land. The plaintiffs sued for specific performance, damages, and attorney fees after the county adopted new zoning ordinances that conflicted with the agreement. On appeal, the court declined to interpret the agreement as precluding the city from changing its zoning, noting that if it upheld the interpretation urged by the plaintiffs, the contract would be invalid as one that purported to contract away the government's right to exercise the police power. (*Id*. at 823.)

In addition, the case of *Richeson v. Halal* (2002) 158 Cal.App.4th 268 resolves the issue before the court in County's favor. In *Halal*, there was an existing common interest development with a nonconforming existing grocery store on the location. The City extended the use permit, allowing the market to operate indefinitely subject to certain conditions. After learning the permit was of indefinite extension, respondents brought suit to compel closure of the market based on two written instruments "Agreement Imposing Restrictions on Real Property" (AIR) and "Declaration of Covenants, Conditions, Restrictions and Reservation of Easements" (CC&R's). The Court of Appeal applying these standards concluded the AIR and CC&R's did not properly lend themselves to an interpretation that would prohibit the City from changing the permitted use or zoning and, were they so construed, the AIR and CC&R's would be invalid as an attempt by the City to surrender its future right to exercise its police power respecting the property.

The Court found that the language of the documents is reasonably susceptible to the interpretation that the AIR and CC&R's do not prohibit the City from exercising its police power to enact legislation concerning future use of the property and conclude that such interpretation is the one that is "lawful, operative, definite, reasonable, and capable of being carried into effect." (Civ. Code, § 1643.)

In *Halal*, the Court went on to address an almost identical issue as this Court faces now. In addressing this, the Court stated:

> Moreover, even assuming for argument's sake that the Fair Market's continuing operation conflicts with provisions of either the AIR or the CC&Rs, ***enforcing such provisions by mandatory injunction is prohibited by considerations of public policy***. See *Loma Portal Civil Club v. American Airlines, Inc.,* 61 Cal. 2d 582, 588, 39 Cal. Rptr. 708 (1964) ("Where a prima facie case has otherwise been made out, an injunction will be granted only when such a remedy is appropriate, and in determining the availability of injunctive relief, ***the court must consider the interests of third persons and of the general public*** [citation omitted]"); and Hall v. Butte Home Health, Inc., 60 Cal. App. 4th 308, 70 Cal. Rptr. 2d 246 (1997). This second point deserves elaboration. Here, the trial court's mandatory injunction is, without question, contrary to the City's public policy to protect and preserve its

neighborhood markets in residential neighborhoods, as reflected in City legislation enacted since the AIR and CC&Rs were prepared and recorded. Injunctive relief is not available in such circumstances.
CITE

Similarly, in *Hall v. Butte Home Health, Inc*., *supra,* the trial court enjoined operation of a residential group home in a single family neighborhood on the basis of a CC&R provision restricting the property to single family home use only. On appeal, the Court of Appeal dissolved the trial court's injunction, holding that the restrictive covenant in question conflicted with subsequently enacted amendments to the State Fair Employment and Housing Act ("FEHA"). (60 Cal.App.4th at 321-23.) In so ruling, the Court of Appeal stressed the important public policy served by the FEHA amendment protecting group homes and the minimal harm to the plaintiffs as neighboring homeowners. Recognizing that the FEHA amendment impeded enforcement of the CC&Rs with respect to such group homes, the Court of Appeal found such interference to be compelled by the FEHA amendment and to be constitutional. (*Id*.) Accordingly, the trial court's injunction was unlawful and constituted a prejudicial abuse of discretion.

Injunctive relief is an equitable remedy. (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 646.) In exercising its discretion concerning whether to issue an injunction, a court must exercise reasonable discretion and not act arbitrarily. (*Dawson v. East Side Union High Sch. Dist.* (1994) 28 Cal.App.4th 998 ("If the evidence is insufficient to justify issuance of a permanent injunction, the trial court simply had no discretion to exercise"). A court is required to consider broadly all factors bearing on such a decision, including the relative harm involved ***as well as questions of public policy***. (*Hotz v. Rich*, supra; *Cola v. County of Los Angeles*, supra; and *Loma Portal Civic Club v. American Airlines, Inc*., supra, 61 Cal. 2d at 588.)

The *Hotz v. Rich* case is instructive. There, the Court of Appeal found that, although a private covenant restricting an amateur radio antenna did not conflict with federal communications law, this finding did not necessarily justify injunctive relief forcing removal of the antenna in question. The Court of Appeal reasoned: "We have concluded that the restrictions on antenna height and placement are not made unenforceable by federal regulations ... [T]herefore it is necessary to reverse the judgment and remand for further proceedings. Reversal, however, does not imply that the trial court must necessarily enforce the restrictions in full. Plaintiffs are seeking enforcement of the restrictions in equity, and the trial court has the

equitable power to refuse enforcement if it finds the restriction so unreasonable as to violate public policy. "The question to be answered is whether the public and private harm which would be caused by full enforcement of the restriction so outweighs the benefits of enforcement as to make strict enforcement in equity unjust." (4 Cal.App.4th at 1057.)

Here, moving forward with Project Roomkey to provide isolation space to recover from COVID-19 for individuals with no place to go so as to prevent wider contagion, clearly serves the important public policy objectives of public health, safety and welfare. This case is similar in this respect to *Hall v. Butte Home Health, Inc*., supra, where the Court of Appeal referenced the lack of harm to the party seeking enforcement of a CC&R provision in the course of reversing the trial court's issuance of an injunction:

> The record is devoid of evidence that plaintiffs have suffered anything more than a minimal alteration of what is assuredly a long-standing beneficial property right. The stipulated facts failed to show that suspension of the [subdivision's] restrictive covenants to accommodate defendant's six-person residential care facility has had any discernible impact on plaintiffs' property rights .... There is no evidence the operation of the facility has had any effect on property values in the area, nor is there any evidence the quality of life in the... subdivision has been degraded by the presence of defendant's group home.
>
> (60 Cal.App.4th at 320.)

Likewise here, this is temporary situation, and not a permanent change of use of the property. Under the state's existing health orders, individuals are to stay at home (except for essential tasks) and distance socially to a minimum of six feet. As such, during this temporary period during an emergency where individuals generally are not to be congregating, the transient impact to property values would be negligible, at worst.

C. CC&Rs Must Be "Reasonable" or Be Found to Be Unconstitutionally Void as Against Public Policy and Unenforceable

Per Civil Code section 1354, "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, ***unless unreasonable***, and shall inure to the benefit of and bind all owners of separate interests in the development." (Italics added.) (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 378.) CC&Rs that are unreasonable are unenforceable. (Civ. Code, § 5975.) Reasonableness is determined by reference to the CID as a whole, not just the facts underlying the individual opposing homeowner (i.e., courts determine whether the CC&Rs are reasonable as applied to the particular CID in its entirety, not just their application to a particular set of facts surrounding an individual homeowner's

objection). (*Nahrstedt v. Lakeside Village Condo Assn.* (1994) 8 Cal.4th 361.) Courts will enforce an association's CC&Rs unless they "are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use affected land that far outweighs any benefit." (*Nahrstedt* at 382.) Similarly, an association may not enforce the CC&Rs in such a way "that would violate statutory or common law." (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499 fn. 6.). "Enforcement of [CC&Rs] must be in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied." (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610.)

Private use restrictions *will not be enforced*, even if more restrictive than public controls, where the private covenant violates a fundamental public policy. Public police power regulations can validly abrogate preexisting private covenants where justified by broad societal interests. (*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987); *Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361, 382 (1994); *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 42, (1902); *Barrett v. Dawson*, 61 Cal. App. 4th 1048 (1998); *Hall v. Butte Home Health, Inc.*, 60 Cal. App. 4th 308 (3d Dist. 1997); *Broadmoor San Clemente Homeowners Assn. v. Nelson*, 25 Cal. App. 4th 1, 6 (1994); *Welsch v. Goswick*, 130 Cal. App. 3d 398, 405 (1982) (disapproved of by, *Barrett v. Lipscomb*, 194 Cal. App. 3d 1524, 240 Cal. Rptr. 336 (3d Dist. 1987)).

It is settled that a government entity may not contract away its right to exercise the police power in the future. (See, e.g., *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 800 (Avco); County Mobilehome Positive Action Com., Inc. v. County of San Diego (1998) 62 Cal.App.4th 727, 736–739 (County Mobilehome); Alameda County Land Use Assn. v. City of Hayward (1995) 38 Cal.App.4th 1716 (Alameda County).) A contract that purports to do so is invalid as against public policy. (County Mobilehome, supra, 62 Cal.App.4th at 736.)

> Thus, when enforcing equitable servitudes, courts are generally disinclined to question the wisdom of agreed-to restrictions. (Note, Covenants and Equitable Servitudes in California, supra, 29 Hastings L.J. at p. 577, citing Walker v. Haslett (1919) 44 Cal.App. 394, 397-398 [186 P. 622].) ***This rule does not apply, however, when the restriction does not comport with public policy***. (Ibid.) (9) ***Equity will not enforce any restrictive covenant that violates public policy***. (See Shelley v. Kraemer (1948) 334 U.S. 1 [92 L.Ed. 1161, 68 S.Ct. 836, 3 A.L.R.2d 441] [racial restriction unenforceable]; § 53, subd. (b) [voiding property use restrictions based on 'sex, race, color, religion, ancestry, national origin, or disability'].) Nor will courts enforce as equitable servitudes those restrictions that are arbitrary, that is, bearing no rational relationship to the protection, preservation, operation or purpose of the affected land. (See Laguna Royale Owners Assn. v. Darger, supra, 119 Cal.App.3d 670, 684.)

(*Nahrstedt v. Lakeside Vill. Condo. Assn*. (1994) 8 Cal.4th 361, 381 [emphasis added].)

> These limitations on the equitable enforcement of restrictive servitudes that are either arbitrary or violate fundamental public policy are specific applications of the general rule that ***courts will not enforce a restrictive covenant when "the harm caused by the restriction is so disproportionate to the benefit produced" by its enforcement that the restriction "ought not to be enforced***." (Rest., Property, § 539, com. f, pp. 3229-3230; see also 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 4944 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 494, pp. 671-672; Note, Covenants and Equitable Servitudes in California, supra, 29 Hastings L.J. at pp. 575-576.) When a use restriction bears no relationship to the land it burdens, or violates a fundamental policy inuring to the public at large, the resulting harm will always be disproportionate to any benefit.

(*Id*.)

County's legal position is further reinforced by the rule of interpretation that written instruments are to be construed to render them consistent with constitutional rules whenever possible. (See Civ. Code § 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties"). (See also *Delucchi v. Count, of Santa Cruz*, supra, 179 Cal. App. 3d at 823, n.9 (applies this statutory rule of interpretation to avoid an unconstitutional interpretation of a public regulatory agreement).)

As recognized in *Delucchi v. County of Santa Cruz*. supra, cities are constitutionally prohibited from entering into agreements that "contract away" their police powers. (179 Cal. App. 3d at 823.) As a matter of constitutional principle, the government retains the authority to make future changes to land use to address changing circumstances. To the extent a city purports to enter an agreement that "contracts away" this power, such an agreement is unconstitutional. Thus, courts will make every effort to construe agreements in a fashion that avoids this constitutional dilemma.

The Court of Appeal explained this approach at length in *Delucchi v. County of Santa Cruz*, *supra*:

> "Land use regulations, including the power to zone, involve the exercise of the sovereign's police power. A government 'may not contract away its right to exercise the police power in the future.' Moreover, contracts purporting to do so are invalid and unenforceable as contrary to public policy.' " ... It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health and morals. Its effect cannot be nullified in advance by making contracts inconsistent with its enforcement ....' " Thus, taking heed of the long-established rule that a contract must, if possible, be interpreted so as to make it 'lawful, operative, definite, reasonable, and capable of being carried into effect,' we point out that were we to uphold the interpretation urged by plaintiffs, i.e., that the contract effectuated a wholesale freeze of zoning neither contemplated nor authorized by the Williamson Act, we would be compelled to find the agreement herein invalid.

Finally, as to this issue, injunctive relief is not available if such relief is contrary to public policy. See *Hotz v. Rich*, 4 Cal. App. 4th 1048, 1057 (1992); and *Cota v. County of Los Angeles*, 105 Cal. App. 3d 282, 292 (1980). Here, injunctive relief is contrary to public policy preserving and protecting the health safety and welfare of the citizens of California under a declaration of emergency in the face of a pandemic. See *County of Del Norte v. City of Crescent City*, supra, 71 Cal. App. 4th at 973 (an injunction is only available "to restrain action which, if carried out, would be unlawful").

D. The CC&Rs themselves Do Not Prohibit Project Roomkey, but Rather, Support This Action

This Court should, of course, examine the applicable CC&Rs to determine whether, as asserted, the language used in these instruments shows a clear and explicit intent that the government may not exercise its police powers in an emergency at Plaza Pointe. The Plaza Pointe CC&Rs here contain no such prohibition. See Civ. Code §§ 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit") and *County of San Diego v. Ace Property & Cas. Ins. Co*. (2005) 37 Cal.4th 406, 415) ("If contractual language is clear and explicit, it governs"). See *County of Del Norte v. City of Crescent City*, *supra,* 71 Cal. App. 4th at 973 (an injunction is only available "to restrain action which, if carried out, would be unlawful").

As was mentioned previously, County has leased LHI to provide homeless individuals who cannot isolate with a place to stay during the COVID-19 pandemic. Regardless of the picture painted by the Plaintiffs, the Laguna Hills Inn has not and will not be converted to anything but what it currently is—a hotel. In fact, Plaintiffs have failed to provide this Court with any evidence that the use of the hotel has changed. The only evidence they have relied upon is that the hotel will be primarily occupied by the most vulnerable people who have tested positive for COVID-19 but do not need hospitalization.

Separately, it is given that when the state of emergency is declared, the governor of the state of California has a power to commandeer property. "In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof." (Gov. Code, § 8572.) It is therefore illogical to assume that the governor can commandeer property that

has CC&R, and yet would not be able to use it for the purpose he commandeer it, if he cannot comply with the CC&R. If the governor had to get a title report to make sure that he will comply with the commandeered property's CC&Rs it would undermine the underlying foundation of the emergency power, which is absolute and not limited. Private conditions and contracts such as CC&R do not and cannot impede the power of the state to commandeer the property. The fact that the owner is cooperative is irrelevant. State would not have more or less power because owner is cooperative. Here, County is acting as the state agent and under its direction and in essence is commandeering the hotel by providing the reasonable cost to the hotel owner. Granting this TRO, would suggest that, any private contract and CC&R takes precedent over the state, and its initiatives, and it can impede the powers of the state and the state initiatives, which would halt the state wide initiative program and will costs lives during this pandemic.

The governing documents here provide:

Operations and uses that are neither specifically prohibited nor specifically authorized by this Declaration, including the Planned Community Regulations as incorporated herein, may be permitted in a specific case if (i) such operations or uses are first approved by the County of Orange or such other governmental entity then having jurisdiction and (ii) written operational plans and specifications for such operations or uses, containing such information as may be requested by the Development Committee, which approval shall be based upon analysis of the anticipated effect of such operations or uses upon other Lots, upon other real property in the vicinity of the Properties, and upon the occupants thereof, but shall be in the sole discretion of the Development Committee, as further provided in Article III of the Declaration. (TRO RJN #1.)

As an initial matter, there is no requirement for Defendant Elite or County to get approval from the City. Plaintiffs require Defendants to receive approval from the City while an approval from the County suffices. In fact, the very CC&R that Plaintiff claims was breached suggests that Defendant Elite only needed to obtain approval of "County of Orange." As such the argument that City's approval was not obtained fails in the light of the CC&R's language. Specifically then the City Plaintiff would not have a standing to argue as City Plaintiff is not an owner and need to approve any operation or use of the hotel's property. The County is the approving the agency and in fact approved the use of the hotel to have homeless individuals using the hotel for its intended use.

Owner Plaintiffs may argue that the second prong was not met as the Defendant Elite did not receive approval from the Development Committee to make changes to the fence. Based on the arguments provided by Plaintiffs in their TRO and the language of the CC&R, it is clear that Development Committee need to approve the plans and specifications for the operations and use as further described in Article III. Article III talks simply about the improvements to the land, landscape and the property. CC&R specifically allows for the Development Committee to take up to 30 days to approve such specification. (Article III, section 3.02(b).) As an initial matter, it is unreasonable to assume that in order to put up a temporary fence during the pandemic, this Court will grant an injunction instead of saving lives of the people who have no place to go and have no roof over the head, and have no chance of social distancing, washing their hand, and doing laundry. Second, there is no development committee for the County to go and obtain approval. In fact, in past decades there have not been any development committee. (Declaration of Kevin) CC&R argument therefore, is nothing but a pretext to avoid homeless individuals to be able to rent a hotel during the time that their lives depend on it more than ever. Furthermore, the putting a temporary fence or a temporary masking the sign is not considered improvement with any stretch of imagination.

III. CONCLUSION

Project Roomkey is authorized to move forward, and its temporary implementation does not conflict with the CC&Rs properly construed. Moreover, even assuming for argument's sake that Project Roomkey conflicts with provisions of the CC&Rs, enforcing such provisions by mandatory injunction is prohibited by considerations of public policy. Accordingly, this Court should reject Plaintiffs' interpretation of the law and CC&Rs because it leads to an unconstitutional result. Instead, this Court should follow the holding in *Delucchi* and interpret the CC&Rs as preserving governmental police powers, thus preserving the constitutionality of these documents. Plaintiffs' Application should be denied.

Respectfully submitted,

LEON J. PAGE, COUNTY COUNSEL
D. KEVIN DUNN, SENIOR DEPUTY

DATED: April 16, 2020 By: /S/
D. Kevin Dunn, Senior Deputy

Attorneys for Defendants
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COUNTY OF ORANGE

HEALTH CARE AGENCY; CEO REAL ESTATE; FRANK KIM; and NICHOLE QUICK

PROOF OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 10 Civic Center Plaza, 4th Floor, Santa Ana, California 92701; and, my email address is simon.perng@coco.ocgov.com. I am not a party to the within action.

On **April 17, 2020**, I served the foregoing **COUNTY DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER** on all other parties to this action in the following manner:

[**X**] BY ELECTRONIC SERVICE: Pursuant to California Rules of Court, rule 2.251(c)(2), (3), I caused an electronic version of the document(s) to be sent to the person(s) listed below.

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

DATED: **April 17, 2020**

/S/
Simon Perng

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