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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SAN DIEGO, CENTRAL DIVISION

13 In the matter of:

14 VISTA LA JOLLA TOWNHOMES  
15 ASSOCIATION, a California Nonprofit  
16 Mutual Benefit Corporation,

17 Petitioner.

CASE NO. 37-2018-00036591-CU-PT-CTL

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
VERIFIED PETITION TO AMEND  
DECLARATION OF RESTRICTIONS  
(CIV. CODE § 4275)**

Date: October 11, 2018

Time: 1:30 p.m.

Dept. : 903

Judge: Hon. David M. Rubin

Hearing Date: October 11, 2018

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19 Petitioner VISTA LA JOLLA TOWNHOMES ASSOCIATION (“Association”)  
20 respectfully submits its memorandum of points and authorities in support of the Verified  
21 Petition to Amend Declaration of Restrictions (“Petition”):

22 **I. THE PETITION IS AUTHORIZED PURSUANT TO CIVIL CODE § 4275.**

23 The Petition filed herein is based upon Civil Code section 4275, which states as  
24 follows:

25 (a) If in order to amend a declaration, the declaration requires  
26 members having more than 50 percent of the votes in the association,  
27 in a single class voting structure, or members having more than 50  
28 percent of the votes in more than one class in a voting structure with  
more than one class, to vote in favor of the amendment, the  
association, or any member, may petition the superior court of the

1 county in which the common interest development is located for an  
2 order reducing the percentage of the affirmative votes necessary for  
3 such an amendment. The petition shall describe the effort that has been  
4 made to solicit approval of the association members in the manner  
5 provided in the declaration, the number of affirmative and negative  
6 votes actually received, the number or percentage of affirmative votes  
7 required to effect the amendment in accordance with the existing  
8 declaration, and other matters the petitioner considers relevant to the  
9 court's determination. The petition shall also contain, as exhibits  
10 thereto, copies of all of the following:

11 (1) The governing documents.

12 (2) A complete text of the amendment.

13 (3) Copies of any notice and solicitation materials utilized in  
14 the solicitation of member approvals.

15 (4) A short explanation of the reason for the amendment.

16 (5) Any other documentation relevant to the court's  
17 determination.

18 (b) Upon filing the petition, the court shall set the matter for hearing  
19 and issue an ex parte order setting forth the manner in which notice  
20 shall be given.

21 (c) The court may, but shall not be required to, grant the petition if it  
22 finds all of the following:

23 (1) The petitioner has given not less than 15 days written  
24 notice of the court hearing to all members of the association, to any  
25 mortgagee of a mortgage or beneficiary of a deed of trust who is  
26 entitled to notice under the terms of the declaration, and to the city,  
27 county, or city and county in which the common interest development  
28 is located that is entitled to notice under the terms of the declaration.

(2) Balloting on the proposed amendment was conducted in  
accordance with the governing documents, this act, and any other  
applicable law.

(3) A reasonably diligent effort was made to permit all eligible  
members to vote on the proposed amendment.

(4) Members having more than 50 percent of the votes, in a  
single class voting structure, voted in favor of the amendment. In a  
voting structure with more than one class, where the declaration  
requires a majority of more than one class to vote in favor of the  
amendment, members having more than 50 percent of the votes of  
each class required by the declaration to vote in favor of the  
amendment voted in favor of the amendment.

(5) The amendment is reasonable.

(6) Granting the petition is not improper for any reason stated

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in subdivision (e).

(d) If the court makes the findings required by subdivision (c), any order issued pursuant to this section may confirm the amendment as being validly approved on the basis of the affirmative votes actually received during the balloting period or the order may dispense with any requirement relating to quorums or to the number or percentage of votes needed for approval of the amendment that would otherwise exist under the governing documents.

(e) Subdivisions (a) to (d), inclusive, notwithstanding, the court shall not be empowered by this section to approve any amendment to the declaration that:

(1) Would change provisions in the declaration requiring the approval of members having more than 50 percent of the votes in more than one class to vote in favor of an amendment, unless members having more than 50 percent of the votes in each affected class approved the amendment.

(2) Would eliminate any special rights, preferences, or privileges designated in the declaration as belonging to the declarant, without the consent of the declarant.

(3) Would impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries.

(f) An amendment is not effective pursuant to this section until the court order and amendment have been recorded in every county in which a portion of the common interest development is located. The amendment may be acknowledged by, and the court order and amendment may be recorded by, any person designated in the declaration or by the association for that purpose, or if no one is designated for that purpose, by the president of the association. Upon recordation of the amendment and court order, the declaration, as amended in accordance with this section, shall have the same force and effect as if the amendment were adopted in compliance with every requirement imposed by the governing documents.

(g) Within a reasonable time after the amendment is recorded the association shall deliver to each member, by individual delivery, pursuant to Section 4040, a copy of the amendment, together with a statement that the amendment has been recorded.

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1 **II. THE PETITION SHOULD BE GRANTED BECAUSE PETITIONER HAS**  
2 **FULFILLED ALL THE REQUIREMENTS OF CIVIL CODE § 4275.**

3 **A. Petitioner Has Given No Less Than 15 Days Written Notice to the**  
4 **Association's Members of the Court Hearing on the Petition.**

5 Civil Code section 4275(c)(1) provides that the Court may grant the Petition if it finds  
6 that the Petitioner has given not less than fifteen (15) days written notice of the court hearing to:

7 all members of the association, to any mortgagee of a mortgage  
8 or beneficiary of a deed of trust who is entitled to notice under  
9 the terms of the declaration, and to the city, county, or city and  
county in which the common interest development is located that  
is entitled to notice under the terms of the declaration.

10 Upon filing the Petition herein, Petitioner requested that the Court specify the required  
11 means of giving notice of the filing of the Petition to Association's members and parties  
12 entitled to notice. Although section 4275(c)(1) requires Petitioner to only provide at least 15  
13 days' written notice of the hearing to approve the amendment, Petitioner requested, and the  
14 court ordered, Petitioner to provide at least thirty (30) days' written notice to the members;  
15 thus requiring *more* notice than the statutory requirements. Pursuant to the court order, the  
16 Association mailed a copy of the Notice of Hearing and a Declaration of Mailing, as proof of  
17 proper service. These documents will be filed with the court, as one document, concurrently  
18 with the filing of this Memorandum of Points and Authorities, the Declaration of Carrie M.  
19 Timko, Esq., and the "Proposed" Order granting the Petition.

20 The date of mailing the Notice was September 11, 2018, as more fully set forth in the  
21 Declaration of Mailing. The notice was mailed over thirty (30) days before the scheduled date  
22 of the hearing on this Petition, thus allowing for the required fifteen (15) days' notice plus an  
23 additional ten (10) days for mailings to persons outside the State of California. In addition, the  
24 Declaration of Carrie M. Timko, filed concurrently with this Memorandum, attests to the list  
25 of names and addresses of members to whom the Notice of Hearing was mailed. The  
26 declarant (developer) no longer holds any interest in the Association, and there is no  
27 requirement that the Association notify any lender or mortgagee of the hearing on the petition  
28 (lender consent of the Proposed Amendment is discussed below). Nor is there any

1 requirement that the Association notify the city and/or county in which this Association is  
2 located.

3 **B. Balloting on the Proposed Amendment Was Conducted in Accordance**  
4 **With the Governing Documents, Davis-Stirling Act, and Applicable law.**

5 Article XIV, Section 2 of the Declaration of Restrictions (“Declaration”) (see Exhibit  
6 1 to the Petition filed herein) requires that any amendments be approved by seventy-five  
7 percent (75%) of the Association’s voting power. The balloting was conducted in accordance  
8 with all applicable laws, including the Davis-Stirling Common Interest Development Act  
9 (Civil Code sections 4000 *et seq.*), and requirements set forth in the governing documents.

10 Article XIV, Section 2 of the Declaration provides that any material change to the  
11 Declaration requires the prior written consent of 75% or more of the mortgagees of first  
12 mortgages encumbering condominiums within the project. Accordingly, the Association  
13 sought approval from the required percentage of lenders separate from the members in accordance  
14 with the procedure set forth in *Fourth La Costa Condominium Owners Association v. Seith*  
15 (2008)159 Cal.App.4th 563, 573

16 The Association, through its legal counsel, conducted a property search for each lot in the  
17 Association to identify all open encumbrances and mortgagees. Of the 117 units, 63 units had  
18 first mortgages. Consent forms were mailed to the agents for service of process for each lender.

19 On May 22, 2018, the Association, through its legal counsel, mailed a letter and consent  
20 form to each mortgagee of a lot in the Association via certified mail, return receipt requested. The  
21 letter explained the Proposed Amendment, offered to make a full copy available upon request, and  
22 informed the mortgagees that a signature on the certified mail receipt would be deemed consent of  
23 the Proposed Amendment unless the consent form was returned within 30 days. The deadline to  
24 respond to the letter and provide any opposition to the Proposed Amendment was June 25, 2018.  
25 (*See Fourth La Costa Condominium Owners Association, supra*, 159 Cal.App.4th at p. 573.) The  
26 Association timely responded to all requests from lenders for copies of the Proposed Amendment  
27 and the Declaration.

28 The Association received signed certified mail receipts from all of the mortgagees/lenders.

1 As of the date this Petition was filed, the Association received signed certified mail receipts from  
2 all of the first mortgagees. No consent forms have been received.

3 Because Article XIV, Section 2 of the Declaration requires approval from 75% of first  
4 mortgagees, the Association has complied with this requirement by obtaining consent from 100%  
5 of the mortgagees in accordance with *Fourth La Costa Condominium Owners Association v. Seith*,  
6 *supra*, 159 Cal.App.4th at 573.

7 Additionally, the Court should not review the Petition under the notion that Article 12,  
8 Section 12.1 of the Declaration requires that any amendments be approved by members  
9 representing seventy-five percent (75%) or more of the Association's voting power. The court  
10 in *Fourth La Costa Condominium Owners Association v. Seith, supra*, 159 Cal.App.4th at p.  
11 585, when reviewing a ruling granting a petition filed pursuant to Civil Code section 4275<sup>1</sup>,  
12 acknowledged that "[o]wners have a substantial interest in the long-term viability of a  
13 condominium project, and that interest is not served when a supermajority vote requirement  
14 and voter disinterest combine to preclude or unduly hinder an association's efforts to amend  
15 outdated governing documents. (See Rest. 3d Property, Servitude, § 6.12, com. a., p. 226.)"

16 The court further stated:

17 ...the lack of a supermajority vote does not mean the vote was  
18 not conducted under the governing documents within the  
19 meaning of Civil Code section 1356, subdivision (c)(2)  
20 [amended to section 4275]. Rather, the lack of a supermajority  
affirmative vote made a petition for relief under section 1356  
appropriate." (*Id.* at 572.)

21 ...It would be rather absurd to allow the governing documents to  
22 restrict an association's ability to amend the document in  
perpetuity, even if, for instance, 100 percent of the owners  
23 preferred a majority vote rather than a supermajority vote." (*Id.*  
at 575.)

24 The very purpose of Civil Code section 4275 is to allow associations to amend their  
25 governing documents when they are unable to achieve super-majority approval. (*Blue Lagoon*  
26 *Comm. Assn. v. Mitchell* (1997) 55 Cal.App.4th 472, 477.) To disallow this relief would be  
27 contrary to the Legislature's intent (as expressed in Section 4275) to provide relief from voter

28 <sup>1</sup> The court in *Fourth La Costa Condominium Owners Association* reviewed the case under the prior Civil Code  
section 1356, which was renumbered to section 4275 as of January 1, 2014.

1 apathy at unrealistic percentage requirements. Accordingly, Petitioner has satisfied the  
2 requirements of Civil Code section 4275(c)(2) by conducting the vote in accordance with the  
3 requirements of the governing documents.

4 **C. A Reasonably Diligent Effort Was Made to Cause All Members to Vote.**

5 The Board made diligent efforts to inform all Association members of the Proposed  
6 Amendment to the Declaration and to seek their approval, as outlined in the Petition. The  
7 Association solicited voting by owners using the written communications attached to the  
8 Petition as Exhibits 4 through 17. The Association notified members in written  
9 correspondence on numerous occasions that the Association was conducting a vote, and  
10 explained in detail why the Proposed Amendment was important. The Association encouraged  
11 and reminded all members to participate throughout the balloting process. Despite the  
12 Association's best efforts, the vote was insufficient to meet the super-majority requirement in  
13 the Declaration. As such, the Board has no other choice but to petition the Court for approval  
14 of the Proposed Amendment. Accordingly, Petitioner Association has satisfied the  
15 requirements of Civil Code section 4275(c)(3).

16 **D. Owners Having More than Fifty Percent of the Votes Voted in Favor of the**  
17 **Amendment to the Declaration.**

18 As set forth in Paragraph 13 of the Petition, the results of the vote were tabulated at the  
19 Board meeting held on November 8, 2018. Of a possible 117 ballots, the Association received  
20 88 returned ballots:

- 21 • 66 ballots were cast in favor of the Proposed Amendment (56% of the voting  
22 power, and 75% of the ballots cast); and
- 23 • 27 ballots were cast against the Proposed Amendment (23% of the total voting  
24 power, and 31% of the ballots cast).

25 The Association received in excess of majority approval from the members as required  
26 pursuant to Civil Code section 4275(c)(4), but short of the seventy-five percent (75%)  
27 approval required to approve the Proposed Amendment under the Declaration.  
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1           **E.     The Amendment to the Declaration is Reasonable.**

2           The court in *Fourth La Costa Condominium Owners Association v. Seith, supra*, 159  
3 Cal.App.4th at p. 576, in determining the reasonableness of proposed amendments to the  
4 association’s declaration of restrictions brought under Section 4275, stated:

5                     The term ‘reasonable’ in the context of restrictions has been  
6                     variously defined as ‘not arbitrary or capricious,’ (*Ironwood*  
7                     *Owners Assn. IX v. Solomon* (1986) 178 Cal. App. 3d 766, 772  
8                     [224 Cal.Rptr. 18]; see *Lamden v. La Jolla Shores*  
9                     *Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 266  
10                    [87 Cal.Rptr.2d 237, 980 P.2d 940]), ‘rationally related to the  
11                    protection, preservation or proper purposes of the Association as  
12                    set forth in its governing instruments,’ and ‘fair and  
13                    nondiscriminatory.’ (*Laguna Royale Owners Assn. v. Darger*  
14                    (1981) 119 Cal.App.3d 670, 680 [174 Cal.Rptr. 136].)

11           Therefore, to determine whether the Proposed Amendment is “reasonable,” it must only be  
12           rationally related to a proper purpose and non-discriminatory.

13                     It is also important to note that while homeowner apathy is often a cause of an  
14                     association’s failure to achieve super-majority approval, it is not a prerequisite for the granting  
15                     of court approval to amend an association’s governing document under Civil Code section  
16                     4275. (2 Sproul, Howell & Rosenberry, *Advising Cal. Common Interest Communities* 2d Ed.  
17                     (Cont. Ed. Bar 2015) § 9.31.) Civil Code section 4275 does not require that the lack of votes  
18                     received result from “homeowner apathy.” However, apathy could have been a factor here  
19                     based on the Association’s diligent efforts in obtaining votes, and actually receiving votes  
20                     from less than the total membership.

21                     It is reasonable to amend the Declaration to bring the documents up to date with  
22                     current law, and to delete Declarant references that are no longer relevant since the developer  
23                     has not been involved in the community for many years. It is also reasonable to amend the  
24                     Declaration to better address issues that have become apparent after the community was  
25                     developed that were not contemplated by the developer when the Declaration was originally  
26                     drafted. Revising the Declaration to better address the needs of the community and comply  
27                     with the changes in the law is in the best interest of the community.

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1           **F.       The Amendment to the Declaration Complies with the Requirements of**  
2                           **Civil Code Section 4275(e).**

3           Civil Code section 4275(e) empowers the court to grant this Petition if the Proposed  
4 Amendment is not contrary to the provisions of subsection (e). Subsection (e) prohibits  
5 approval of an amendment if such amendment:

6                           (1) Would change provisions in the declaration requiring the  
7 approval of members having more than 50 percent of the votes  
8 in more than one class to vote in favor of an amendment, unless  
9 members having more than 50 percent of the votes in each  
10 affected class approved the amendment.

11                           (2) Would eliminate any special rights, preferences, or privileges  
12 designated in the declaration as belonging to the declarant,  
13 without the consent of the declarant.

14                           (3) Would impair the security interest of a mortgagee of a  
15 mortgage or the beneficiary of a deed of trust without the  
16 approval of the percentage of the mortgagees and beneficiaries  
17 specified in the declaration, if the declaration requires the  
18 approval of a specified percentage of the mortgagees and  
19 beneficiaries.

20           The Proposed Amendment is consistent with the requirements set forth in each subparagraph  
21 of Civil Code section 4275(e).

22           The Association only has one voting class, and a majority of the members (including a  
23 super-majority of voting members) have approved the Proposed Amendment. The Declarant  
24 has long sold its interest in the property, and no longer has voting rights in the Association.  
25 Further, the Proposed Amendment does not impair the security interest of a mortgagee or  
26 beneficiary of a deed of trust, and the Association complied with the lender approval  
27 requirement for amendment as discussed in more detail above. Therefore, the Proposed  
28 Amendment is in compliance with the requirements of Civil Code section 4275(e).

29           **III.    CONCLUSION**


30           Based upon the Petition, this Memorandum of Points and Authorities, and the  
31 Declarations submitted in support of the Petition and Ex Parte Application, Petitioner  
32 respectfully requests that, pursuant to Civil Code section 4275, the Court confirm the Proposed  
33 Amendment as being validly approved based upon the 56% approval received from the

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members.

Dated: Sept. 10, 2018

EPSTEN GRINNELL & HOWELL, APC

By:   
Carrie M. Timko  
Attorneys for Petitioner  
VISTA LA JOLLA TOWNHOMES  
ASSOCIATION