NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

OSCA DEVELOPMENT COMPANY, Plaintiff and Appellant, v. RONALD W. BLEHM et al., Defendants and Respondents.	E032843 (Super.Ct.No. INC 019869) TENTATIVE OPINION

APPEAL from the Superior Court of Riverside County. Charles E. Stafford, Jr., Judge. Reversed.

Peters & Freedman, Simon J. Freedman, Steven R. Napoles and Keenan A. Parker for Plaintiff and Appellant.

Law Offices of Michael Zitomer, Michael Zitomer and Christopher R. Green for Defendants and Respondents.

John F. Sheehy for Defendants and Respondents as Amicus Curiae.

1. Introduction

This dispute is between defendants, who were residents of the Desert Crest mobile

home park, and plaintiff OSCA Development Company (OSCA), who owned and operated the adjacent Desert Crest Country Club. The parties disagreed over a provision in the Desert Crest Community Association's (the Association) declaration of covenants, conditions, and restrictions (CC&R's) that required membership in the country club and the payment of maintenance fees. After this court previously held that, under the original version of article 19 of the CC&R's, the payment of maintenance fees was voluntary, the Association by majority vote amended this provision by stating explicitly that the payment of fees was mandatory. The sole question in this case is whether the amendment was a valid and enforceable covenant running with the land.

In resolving this question, we conclude that the Association adopted the amendment in accordance with the governing documents. The amendment, which required club membership and the payment of fees, benefited the homeowners by increasing their property values and providing access to the recreational facilities. Because we conclude that article 19 was a covenant running with the land, OSCA was entitled to enforce its lien for unpaid assessments.

2. Factual and Procedural History

In 1963, the original developer, upon subdividing the property, recorded a declaration of restrictions, which created the Association and provided that all the subsequent owners of the property, which included 281 residential lots, must be members of the Association and subject to all the provisions of the CC&R's.{CT 10-14} Both OSCA and defendants (homeowners) owned subdivided lots of the subject property and

Desert Crest Hot Springs shall maintain and care for such Community Areas, and shall install and maintain such improvements, planting, and landscaping on such portions of said subdivision as Desert Crest Hot Springs shall deem desirable. Members of the Desert Crest Community Association shall have the right, by the payment of fees as set forth below, to use the facilities of Desert Crest Hot Springs in accordance with the rules and regulations as set forth by said Desert Crest Hot Springs.

"Members of the Desert Crest Community Association shall pay to Desert Crest Hot Springs, as compensation for the privileges herein granted and for the services furnished or secured by Desert Crest Hot Springs, such amount as may be assessed ratably against said member by Declarant each month, provided, however, that the aggregate amount as assessed per member shall not at any time exceed One Hundred Eighty Dollars ($180.00 per year, provided that this maximum may be increased by Desert Crest Hot Springs in the same proportion as the cost of living index of the United

States Department of Labor increases above such index on the date of recording these restrictions.

"Said fees, however, shall not include the privilege of playing golf on the golf course owned by Desert Crest Hot Springs. Golf playing privileges are hereby extended to the members of the Desert Crest Community Association on a non-exclusive basis by the payment of such fees as may from time to time be set by Desert Crest Hot Springs. . . ."{CT 12}

Beginning in 1994, a dispute arose between OSCA and the homeowners over whether article 19 established a voluntary or mandatory requirement to pay fees. In resolving the dispute, the trial court found that the mobile home park was not governed by the Davis-Stirling Common Interest Development Act.[1] Based primarily on principles of contract interpretation, the court found that article 19 allowed for the voluntary payment of fees in exchange for the use and benefit of the country club.{CT 163-165} OSCA appealed the court's decision. In our unpublished opinion, we affirmed the court's judgment and held that the plain meaning of the language of article 19 did not support a mandatory requirement to pay a maintenance fee.[2]{CT 172, 174}

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[1] Civil Code section 1350 et seq. All further statutory references will be to the Civil Code unless otherwise stated.

[2] *OSCA Development Company v. Elkin* (May 5, 2000, F023835) [nonpublished opinion].

Before this court issued its final opinion, the Association by majority vote adopted an amendment to article 19. The amendment includes the following paragraph: "Each owner by acceptance of the deed to the Owner's Residential Lot, is deemed to covenant and agree to pay to OSCA Development Company or its successor in interest the maintenance assessments duly levied by OSCA Development Company pursuant to these CC&R's. The maintenance assessments and any late charges, reasonable costs of collection and interest, as assessed by OSCA Development Company in accordance with this paragraph shall also be a personal debt of the owner of the residential lot at the time that the maintenance assessment and other charges are levied. The assessment and late charges, costs of collection, and interest shall be in accordance with the Collection Policy of OSCA Development Company, which shall be separately provided to each owner of a residential lot. **The owner may not waive, opt out of, or otherwise escape liability for these assessments by nonuse of the Community Area or any of its facilities or improvements, or nonuse or abandonment of the owner's residential lot.**"{CT 18}

Many homeowners refused to pay the maintenance fee and, on October 20, 2000, OSCA filed the current lawsuit for breach of covenant and declaratory relief against these homeowners.{CT 1-9} By stipulation, the parties agreed to submit trial briefs with supporting documents in lieu of a trial.{CT 108-111} After considering the parties' briefs and oral argument, the court concluded that the 1999 amendment was unreasonable and invalid, and therefore unenforceable. The court specifically found that club membership was by personal contract, not under any covenant running with the land.

The court also found that the amendment only benefited OSCA and not the homeowners.{CT 301-303} "The personal covenant, contractual nature, of optional Club membership, cannot be made into a mandatory obligation and covenant running with the land without consideration and acquiescence of all the contractual parties, and cannot be charged by a simple majority of an Association that has no ownership interest in the Country Club."{CT 303}

3. Discussion

The primary issue in this appeal is whether the mandatory country club membership requirement in article 19, as amended, constituted a covenant running with the land. In addressing this issue, we must determine first whether the Association had the authority to amend article 19 by majority vote. We then consider whether article 19, as amended, was a covenant running with the land by applying the criteria set forth in section 1468.

A. Standard of Review

The facts are undisputed and the issues present pure questions of law, including the interpretation of the CC&R's.[3] Under these circumstances, the appropriate standard of review is de novo.[4]

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[3] See *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 771.

[4] See *Battram v. Emerald Bay Community Assn.* (1984) 157 Cal.App.3d 1184, 1189; *White v. Dorfman* (1981) 116 Cal.App.3d 892, 897.

In interpreting the CC&R's, we apply the standard rules for construing written instruments.[5] Paramount among these rules of construction is the consideration of the parties' intent and purpose.[6] When the main purpose is unclear, the courts must construe the contract to make it lawful, operative, and reasonable, and avoid an interpretation that is inequitable or absurd.[7]

B. Amendment

We first consider whether the Association had the authority to amend article 19 by majority vote. OSCA argues that the CC&R's specifically required the support of the homeowners of only a majority of the lots to adopt an amendment. The homeowners argue, however, that because article 19 was a personal covenant between OSCA and each individual homeowner, a unanimous vote or the agreement of every homeowner was required to turn the voluntary payment of dues into a mandatory requirement.

In his amicus curiae brief, John Sheehy also challenges the association's authority to adopt the amendment by majority vote. Although Sheehy offers other arguments, we will confine our review to the issues raised below.[8]

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[5] *14859 Moorpark Homeowner's Assn. v. VRT Corp.* (1998) 63 Cal.App.4th 1396, 1410.

[6] *14859 Moorpark Homeowner's Assn. v. VRT Corp., supra,* 63 Cal.App.4th at page 1410.

[7] *National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1070.

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The CC&R's authorized amendment under article 24. Article 24 provided: "The covenants herein contained run with the land, and, unless otherwise terminated by the Declarant in accordance with the provisions herein contained, shall bind all persons in interest, all owners of lots, blocks or parcels in said subdivision and their heirs, legal representative, successors and assigns until January 1, 2002, at which time said covenants shall be automatically extended for successive periods of ten (10) years each unless, by mutual agreement between the Declarant and the owners of a majority in number of lots at or prior to the end of the initial term or any successive period of ten (10) years, said covenants shall be amended, changed, or terminated in whole or in part. Such amendments, changes or terminations shall be effected by instruments in recordable form executed by the Declarant and filed in the proper office of record."{CT 140}

In 1999, 300 homeowners voted in favor and 213 homeowners voted against the article 19 amendment. Based on the majority vote rule, the Association adopted and recorded the amendment.{CT 144-146, 194}

An association's authority to amend the provisions of the CC&R's depends on the terms of the document itself.[9] "As a rule, the language of an instrument must govern its

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[8] See *Consumer Advocacy Group, Inc. v. Exxon Mobil Corp.* (2002) 104 Cal.App.4th 438, 446, footnote 10; see also *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 60, footnote 7. We deny amicus curiae's request for judicial notice.

[9] See *Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (hereafter *Ticor*) (1986) 177 Cal.App.3d 726, 730; see also *Lakeland Property Owners Assn. v. Larson* (1984) 121

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214 Cal. 194, 198-199; see also *Stevens Sports Corp., Ltd. v. McClintock* (1983) 99 III.2d 182, 192-193.

[12] *Sharp, supra,* 214 Cal. 194.

interpretation if the language is clear and explicit."[10] Naturally, in determining the applicable voting standards and procedures for amending any provision of the CC&R's, courts look to the language of the provision that authorizes amendment.[11]

In *Sharp*,[12] the original deeds authorized the owners of adjoining residence lots to abrogate, rescind, or annul the restrictions, conditions, and covenants governing their properties. In accordance with the requirements for abrogation or annulment, the owners of more than 16 lots signed and recorded an instrument to void all the building restrictions. Afterwards, the plaintiff, one of the owners who did not sign the instrument, filed an action to enforce one of the building restrictions.

The court observed that: "The plaintiff contends that inasmuch as the improvements of the defendants were constructed before said instrument of abrogation was executed, a vested right attached in her behalf to the perpetual enforcement of said

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Ill.App.3d 805, 810 ("Where a deed contains restrictive covenants but also permits their future alteration, the language employed determines the extent and scope of that provision.").

[10] See *Ticor*, *supra*, 177 Cal.App.3d at page 730.

[11] See *B.C.E. Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142, 1149-1150; *Ticor, supra*, 177 Cal.App.3d at pages 730-731; *Battram v. Emerald Bay Community Assn., supra,* 157 Cal.App.3d at page 1189; *Diamond Bar Dev. Corp. v. Superior Court* (1976) 60 Cal.App.3d 330, 334; *Sharp v. Quinn* (hereafter *Sharp*) (1931) 214 Cal. 194, 195-196; see also *Streams Sports Club, Ltd. v. Richmond* (1983) 99 Ill.2d 182, 192-193.

[12] *Sharp, supra,* 214 Cal. 194.

restrictions which could not be affected by the subsequent abrogation without her consent. With this contention we cannot agree. When the plaintiff acquired her lot she became equally bound by the restriction plan with all of its incidents, one of which was that when the owners of sixteen lots agreed, and evidenced their agreement in the manner provided in her deed and all the other deeds, to the effect that said restrictions shall no longer be binding, the plaintiff was bound by said agreement. In reality she was a party to the agreement that the restrictions might be abrogated in the manner provided and when such abrogation was so accomplished she must be deemed to have consented thereto and be bound thereby, even though she did not sign the instrument of abrogation."[13]

Based on the court's reasoning in the *Sharp* case, the following rule emerges: A person who buys property subject to the CC&R's is bound not only by the existing provisions, including the provision authorizing amendment, but also every lawful amendment enacted in compliance with that provision. The terms of the provision authorizing amendment and, if unclear, the interpretation of that provision, is the critical first step in determining whether the amendment is valid and enforceable.[14]

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[13] *Sharp, supra*, 214 Cal. at page 197.

[14] See *Sharp, supra*, 214 Cal. at page 197; *Ticor, supra*, 177 Cal.App.3d at pages 732-734.

In this case, article 24 of the CC&R's specifically allowed the homeowners to amend, change, or terminate the covenants with the support of the owners of at least a majority of the lots. The only other requirement under article 24 was that the amendment be made by a recorded, written instrument. The record shows that all the terms required under the provision authorizing amendment were satisfied. In complying with these terms, the Association properly adopted the amendment to article 19.

The homeowners nevertheless contend that article 19 was a personal covenant that could be amended only by unanimous vote. Homeowners contend that, before the amendment, OSCA was already obligated to maintain the facilities for the benefit of the homeowners.{RB 9} Homeowners therefore contend that the Association had no authority to impose a mandatory fee without offering the homeowners some additional benefit in return.

The CC&R's however contain no provision requiring a unanimous vote. The majority rule requirement applies to all the covenants included in the original CC&R's. By demanding a unanimous vote, the homeowners are attempting to take article 19 out of the CC&R's, thereby creating an independent contract between OSCA and the individual homeowners who choose to be members of the country club. Although, in our prior opinion, we interpreted article 19 as offering the homeowners voluntary, as opposed to mandatory, membership in the country club, we did not conclude that article 19 was a personal covenant, or a covenant that fell outside of the CC&R's. To do so would be the equivalent of declaring article 19 to be null and void. One of the fundamental canons of

contract interpretation is to give effect to every provision, and not to render any part to be redundant or useless.[15] Regardless of whether article 19 makes club membership voluntary or mandatory, it remains a part of the CC&R's. As such, article 24 sets forth the standards for amendment, including the majority rule requirement.

We conclude that, under the provision governing amendment in the CC&R's, the Association had the authority to make changes to article 19. In effect, by purchasing property subject to the CC&R's, the homeowners consented to the provision governing amendment, including the majority vote requirement. The homeowners therefore are bound by article 19, as amended, unless the provision is unenforceable on some other ground.

C. Covenant Running with the Land

The homeowners argue that article 19, as amended, was invalid and unenforceable on the ground that the club membership fees provision was not a covenant running with the land.

Before stating what law applies, it is useful to consider what law does not apply. As stated in our prior unpublished opinion, the subject property does not constitute a common interest development under the Davis-Stirling Common Interest Development Act.[16] While resembling a common interest development, the Desert Crest Community

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[15] See *Ticor*, *supra*, 177 Cal.App.3d at page 730.

[16] Sections 1350 to 1376.

does not have a "common area" as defined under that statutory scheme.[17] Thus, the cases applying the Davis-Stirling Common Interest Development Act, or any judicially-established criteria for determining enforceability of a particular covenant under the Act, do not govern our analysis here.[18]

We turn therefore to the general rules for covenants that run with the land. In California, the only covenants that run with the land are those specified by statute.[19] Covenants that run with the land are those that are "contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them."[20] In other words, a covenant runs with the land if it binds not only the original parties, but also their successors in interest.[21]

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[17] See section 1351, subdivision (b); see also section 1351, subdivision (k)(1) and (2); *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn.* (2001) 92 Cal.App.4th 1247, 1270-1271.

[18] See, e.g., *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361; *Portola Hills Community Assn. v. James* (1992) 4 Cal.App.4th 289.

[19] Section 1461; *Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 526.

[20] Section 1460.

[21] *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 353.

Section 1468 provides the criteria for determining whether a restrictive covenant that both benefits and burdens the property runs with the land. In his amicus curiae brief, one of the homeowners, John Sheehy, contends that section 1468 does not apply because the declaration of restrictions was adopted before section 1468 was amended in 1968. Even if section 1468 does not apply retroactively, article 19 may be enforceable as an equitable servitude so long as the homeowners had notice of the restriction.[22] As this court previously has held, homeowners had notice of this particular restriction.[23] For our purposes, the current rule under section 1468 and the doctrine of equitable servitudes involve the same general analysis—i.e., the consideration of mutual benefit—and would produce the same result.[24] Therefore, rather than resorting to a pre-1969 common law approach, we will proceed with our analysis by applying the statutory approach as set forth in section 1468.

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[22] See 7 Miller & Star, Current Law of Cal. Real Estate (3d ed. Supp. 2000) Covenants and Restrictions, section 24:2, pages 6-14; *Citizens for Covenant Compliance v. Anderson, supra*, 12 Cal.4th at pages 354-355; *Nahrstedt v. Lakeside Village Condominium Assn., supra*, 8 Cal.4th at page 375; *B.C.E. Development, Inc. v. Smith, supra*, 215 Cal.App.3d at page 1146.

[23] *Mackinder v. OSCA Development Co.* (1984) 151 Cal.App.3d 728, 736-737; see also *Citizens for Covenant Compliance v. Anderson, supra*, 12 Cal.4th at pages 349, 363 (holding recording alone sufficient to establish constructive notice).

[24] See generally *Soman Properties, Inc. v. Rikuo Corp.* (1994) 24 Cal.App.4th 471, 483-484, disapproved on other grounds in *Citizens for Covenant Compliance v. Anderson, supra*, 12 Cal.4th at page 366; *B.C.E. Development, Inc. v. Smith, supra*, 215 Cal.App.3d 1142.

Section 1468 states in part: "Each covenant, made by an owner of land with the owner of other land or made by a grantor of land with the grantee of land conveyed, or made by the grantee of land conveyed with the grantor thereof, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee and shall, except as provided by Section 1466, or as specifically provided in the instrument creating such covenant, and notwithstanding the provisions of Section 1465, benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby and upon each person having any interest therein derived through any owner thereof where all of the following requirements are met:

"(a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants;

"(b) Such successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee;

"(c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof, or if the land owned by or granted to each consists of undivided interests in the same parcel or parcels,

the suspension of the right of partition or sale in lieu of partition for a period which is reasonable in relation to the purpose of the covenant;

"(d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situated."

This case revolves around the third requirement that the covenant must relate to the use of the land, or, in other words, must touch and concern the land.[25] As a general rule, maintenance fees for common facilities touch and concern the land.[26]

Several cases demonstrate this rule. In a case decided by this court, *Anthony v. Brea Glenbrook Club*,[27] the homeowners of single-family residences were members of the Brea Glenbrook Club homeowners association. The Brea Glenbrook Club owned and operated a recreational area consisting of a clubhouse, swimming pool, and common grounds. The declaration of restrictions required membership in the club and the payment of membership dues.

In determining whether the membership requirement was a covenant running with the land, the court in *Anthony* noted that a covenant directly benefits the land if it

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[25] 7 Miller & Star, Current Law of Cal. Real Estate (3d ed. Supp. 2000) Covenants and Restrictions, section 24:3, page 22; 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, section 488, page 665.

[26] See *Streams Sports Club, Ltd. v. Richmond, supra*, 99 Ill.2d at page 189; *Ebbe v. Senior Estates Golf and Country Club* (1983) 61 Or.App. 398, 407.

[27] *Anthony v. Brea Glenbrook Club* (hereafter *Anthony*) (1976) 58 Cal.App.3d 506.

enhances or increases the value of the property.[28] The court made the following observation: "Manifestly, the maintenance of a well-kept clubhouse, recreational area and swimming pool in this tract enhanced the value of each home therein. In the Southern California area it would be reasonable for a court to take judicial notice of the obvious fact that there are a great many swimming pools attached to private residences. The availability of such a facility at the Brea Glenbrook Club would make it unnecessary for any homeowner to invest a considerable amount of money in a swimming pool for the use of his family. Also, it would be a fair deduction from the agreed statement of facts that the availability of the clubhouse and grounds provided opportunities for playground activities and other forms of family and community recreation within the Glenbrook Hills project. Thus, it would seem that the so-called 'burden' of maintaining membership in this association would in reality be an asset to each and every property owner in the use of his land."[29] Based on the direct and mutual benefit derived from the membership requirement, the court held that the covenant was valid and enforceable as a covenant running with the land.[30]

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[28] *Anthony, supra*, 58 Cal.App.3d at page 511, citing 16 Cal.Jur.3d Supp., section 14, page 24; see also 7 Miller & Star, Current Law of Cal. Real Estate (3d ed. Supp. 2000) Covenants and Restrictions, section 24:3, page 22.

[29] *Anthony, supra*, 58 Cal.App.3d at page 511.

[30] *Anthony, supra*, 58 Cal.App.3d at page 512.

In another case, *Oceanside Community Assn. v. Oceanside Land Co.*,[31] the homeowners association leased the common areas to Oceanside Land Company (Developer) and assessed the individual homeowners for their share of the lease. In the declaration of covenants, conditions, and restrictions, the Developer included a provision that certain property adjacent to the residential development would be used as a golf course and that homeowners would be entitled to use the golf course at a reduced rate. When the current owner of the golf course failed to maintain the land, the homeowners association filed a lawsuit to enforce the current golf course owner's obligation to operate and maintain the golf course.

While this case did not involve the homeowners' obligation to pay fees, but rather the golf course owner's reciprocal responsibility to maintain the grounds, the court addressed the same essential question of whether such covenants ran with the land. In applying the former version of section 1468, the court stated that the golf course benefited the homeowners by increasing their property value and providing recreational benefits.[32]

In addressing the current golf course owner's contention that the covenant was a personal contract, rather than a covenant running with the land, the *Oceanside* court

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[31] *Oceanside Community Assn. v. Oceanside Land Co.* (1983) 147 Cal.App.3d 166 (hereafter *Oceanside*), disapproved on other grounds in *Citizens for Covenant Compliance v. Anderson, supra*, 12 Cal.4th at page 366.

[32] *Oceanside, supra*, 147 Cal.App.3d at page 175.

noted that, "[a] personal covenant is one that by its nature is a mere personal undertaking, and not intended to have any binding effect beyond the immediate parties to the instrument. [Citation.]"[33] The court held that the covenant to maintain the golf course was not a personal covenant because the CC&R's expressly stated the intent that the covenant would bind their successors and the evidence indicated that the parties understood that the land, and not just the original owner, was to be burdened.[34] The court held, therefore, that the covenant was one that ran with the land.[35]

Other jurisdictions have enforced similar covenants as covenants running with the land. In *Boyle v. Lake Forest Property Owners Association, Inc.*,[36] the plaintiffs purchased property within a resort land development operated by Lake Forest, Inc. The common property included a clubhouse, golf course, tennis courts, and a marina. The restrictive covenants required that the homeowners be members of the homeowners association and pay recreational fees as well as any other assessments. When the homeowners association sought to purchase the common facilities from Lake Forest, Inc.

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[33] *Oceanside, supra*, 147 Cal.App.3d at page 175.

[34] *Oceanside, supra*, 147 Cal.App.3d at page 175.

[35] *Oceanside, supra*, 147 Cal.App.3d at page 175.

[36] *Boyle v. Lake Forest Property Owners Association, Inc.* (1982) 538 F.Supp. 765, (hereafter *Boyle*).

and levy against each lot a $250 purchase assessment. plaintiffs refused to pay the assessment and sought to withdraw their membership.

The court in *Boyle* noted that, "[a] developer, when he is carrying out a uniform plan of development for a residential subdivision may arrange for provision of certain services to the subdivision and for the maintenance of the facilities devoted to common use, and may bind the lot purchasers in that subdivision to pay for these items. [Citation.]"[37] The court concluded that such restrictions touch and concern the land.[38] The court not only found that the covenant enhanced the value of the property, but also noted that setting aside the covenant would diminish the value of the property.[39]

Also instructive is the Illinois case, *Streams Sports Club, Ltd. v. Richmond*.[40] There, the original developer established a sports club, which consisted of a club house, a swimming pool, tennis courts, and a private lake adjacent to a condominium complex. The declaration and CC&R's required membership in the sports club and the payment of club fees. About five years after the original developer filed the original declaration, the homeowners amended the CC&R's to make club membership voluntary, as opposed to

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[37] *Boyle, supra*, 538 F.Supp. at page 769.

[38] *Boyle, supra*, 538 F.Supp. at page 770.

[39] *Boyle, supra*, 538 F.Supp. at page 770.

[40] *Streams Sports Club, Ltd. v. Richmond, supra*, 99 Ill.2d 182 (hereafter *Streams*).

mandatory. Although the court held that the record contained insufficient evidence to determine whether the amendment passed in accordance with the voting requirements, the court concluded that the club membership provision was a covenant running with the land.[41]

The Illinois court considered various criteria for covenants running with the land, including the criteria that the covenant touch and concern the land. The court made these observations: "The recreational facility that is the subject of this lawsuit is adjacent to the condominium units and is used by the residents of the condominiums. The sports club is part of a common building plan that the defendant was aware of at the time she purchased her unit. Condominium owners can enjoy the benefits of convenient sports facilities and also have the burden of furnishing the $216 annual fee."[42] Based on the reciprocal relationship between the sports club and the other lots, the court held that the covenant satisfied the requirement that the covenant touch and concern the land.[43]

The court in *Streams* also observed that, "[n]early every jurisdiction that has reviewed the question of assessments for condominium recreational facilities has held them to be binding covenants running with the land. [Citations.]"[44] A survey of the

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[41] *Streams, supra*, 99 Ill.2d at pages 187-188, 193.

[42] *Streams, supra*, 99 Ill. 2d at page 189.

[43] *Streams, supra*, 99 Ill.2d at page 189.

[44] *Streams, supra*, 90 Ill.2d at page 189.

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cases addressing this issue reveals the same result.[45] While a minority of courts have held that the payment of recreational fees burdens the land without any corresponding benefit,[46] such an approach completely disregards the social and economic benefits of having recreational facilities located within or adjacent to one's residential community. These cases directly contradict this court's holding in *Anthony*, which has established the standard in California and other jurisdictions for addressing the question of whether a membership fee requirement is a covenant running with the land.[47]

Nevertheless, in this case, the trial court found that article 19 was not a covenant running with the land because it did not benefit the homeowners or the Association, but only benefited OSCA. Mandatory club membership, however, benefits the individual homeowners by providing access to the recreational facilities and enhancing the value of each lot. As said of swimming pools and tennis courts, the availability of a golf course

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[45] See *Regency Homes Assn. v. Egermayer* (1993) 498 N.W.2d 783, 792-793; *Homsey v. University Gardens Racquet Club* (1987) 730 S.W.2d 763, 764-765; *Rittenhouse Park Community Assn. v. Katznelson* (1987) 223 N.J.Super. 595, 597-598; *Inwood North Homeowners' Assn., Inc. v. Harris* (1987) 736 S.W.2d 632, 635-636; *Selected Lands Corp. v. Speich* (1985) 702 S.W.2d 197, 199; *Four Seasons Homeowners Assn., Inc. v. Sellers* (1983) 62 N.C.App. 205, 210-211; *Starkey Point Property Owners' Assn. v. Wilson* (1978) 96 Misc.2d 377, 380; *Chimney Hill Owners' Assn. v. Antignani* (1978) 136 Vt. 446, 455; *Lincolnshire Civic Association, Inc. v. Beach* (1975) 46 A.D.2d 596, 598.

[46] See, e.g., *Raintree Corp. v. Rowe* (1978) 248 S.E.2d 904; 669-671; *Chesapeake Ranch Club v. C.R.C. United Members, Inc.* (1984) 483 Md.App. 609, 616-617.

[47] See *Regency Homes Association v. Egermayer* (1993) 243 Neb. 286, 295.

and country club would make it unnecessary for the homeowners to invest a considerable amount of money for the use of such facilities by the homeowner and his family.[48] The location of the development next to the golf course also increases the value of the property and may provide other related incidental benefits.[49] Thus, the court erroneously concluded the mandatory club membership did not benefit the homeowners.

Furthermore, the intent of the parties, as evident in the declaration of restrictions and the subsequent amendment to article 19, reveals that the membership fee, whether voluntary or mandatory, was intended to be a covenant running with the land. The declaration provides that the CC&R's are for the benefit of OSCA (Desert Crest's successors) and the homeowners. The declaration also states that the CC&R's will run with the land and be binding on any future homeowner.{CT 137} The original CC&R's established the Desert Crest community, including parts designated for sale as residential lots and parts reserved as community areas.{CT 139} The map of the community shows that the clubhouse is located at one end of the property and the golf course is located toward the other end of the property with residential lots between the two facilities. While most of the residential lots are located in this center region, there are several

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[48] *Anthony, supra*, 58 Cal.App.3d at page 511; see also *Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610-1611.

[49] 7 Miller & Star, Current Law of Cal. Real Estate (3d ed. Supp. 2000) Covenants and Restrictions, section 24:3, page 22; see also *Regency Homes Assn. v. Egermayer, supra*, 243 Neb. at pages 301-302.

residential lots located on the other side of the golf course.{CT 158} The map indicates that the original subdivider intended the recreational facilities to be an integral part of the Desert Crest community.

The 1999 amendment to article 19 provides that the homeowners must pay a maintenance assessment for the community areas.{CT 144-145} The Association eliminated language that suggested the maintenance assessment was contingent upon the use of the facilities and replaced it with language that clearly provided that nonuse of the facilities did not entitle the homeowner to waive or otherwise avoid the fee.{CT 145} The Association also stated that it adopted the amendment for the mutual benefit of both OSCA and the homeowners.{CT 144} Although the amended version of article 19 required the payment of $840 in annual fees, the majority of the homeowners voted in favor of the amendment, thereby acknowledging the value of having a golf course and country club within the community.

The homeowners, however, argue that article 19 is unreasonable because the maintenance assessment is not paid to the association, but rather to a privately-owned golf course and country club. This court has found no authority, and the homeowners have failed to provide any, to support the argument that the CC&R's cannot require the payment of membership fees to a privately-owned recreational facility located within or adjacent to the residential community.

The cases indicate that the validity and enforceability of a covenant to pay recreational fees rests entirely on whether the membership requirement satisfies the

criteria for a covenant running with the land, irrespective of whether the recreational facilities are owned and operated by the homeowners association,[50] owned by the homeowners association and operated by, or leased to, a third party,[51] or entirely owned and operated by a third party.[52] Courts also have not drawn distinctions based on whether the facilities are open to the public or operated for profit.[53]

In *Homsey v. University Gardens Racquet Club*, the covenant of restrictions required the homeowner to pay fees directly to the racquet club. In *Homsey*, although homeowners were voting members of the club, there is no indication that the club also functioned as the homeowners association. The racquet club was open to the homeowners and to other members of the public. In addressing the homeowners' complaint that the club was not operated for their exclusive benefit, the court noted that other courts appeared unconcerned with this distinction.[54] The court concluded that, ". . .

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[50] See, e.g., *Anthony, supra*, 58 Cal.App.3d at page 509.

[51] See, e.g., *Oceanside, supra*, 147 Cal.App.3d at page 172.

[52] See, e.g., *Homsey v. University Gardens Racquet Club, supra*, 730 S.W.2d at pages 764-765.

[53] See, e.g., *Streams, supra*, 99 Ill.2d at page 189-190; *Homsey v. University Gardens Racquet Club, supra*, 730 S.W.2d at pages 764-765.

[54] *Homsey, supra*, 730 S.W.2d at page 765 (hereafter *Homsey*).

the nonexclusivity of the club is not a material factor since the question is whether landowners are benefited, not if others are also benefited."[55]

In this case, article 19, as amended, requires the homeowners to pay OSCA a mandatory maintenance assessment. As stated above, the membership requirement touched and concerned the land and was a covenant running with the land. By purchasing property within the Desert Crest community, the homeowners accepted article 19, even as amended in accordance with the majority vote standard established by the declaration of restrictions, and are bound by the membership fees requirement. Nothing prevents the homeowners from making further attempts to change the language in either article 19 or the provision authorizing amendment.[56] As it stands, the declaration of restrictions and the CC&R's govern the parties' relationship, and the current version of the CC&R's imposes a mandatory maintenance assessment.

Mandatory assessments for recreational facilities are not uncommon. OSCA submitted the declaration of Robert Gilmore, an employee of 29 years with the California Department of Real Estate (DRE), whose duties include the creation and enforcement of DRE policy decisions in Southern California. In his declaration, Gilmore made the following statement: "The DRE allows subdividers to adopt and record Covenants, Conditions, and Restrictions ("CC&R's") that shift a certain amount of expense to

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[55] *Homsey, supra*, 730 S.W.2d at page 765.

[56] *Streams, supra*, 99 Ill.2d at page 193; *Homsey, supra*, 730 S.W.2d at page 764.

homeowners and homeowners associations for the operation of privately held country clubs which are integrally related, or immediately adjacent to the Association. These CC&R's can require the homeowners to pay mandatory dues to the operator of the Country Club. These particular dues are sometimes referred to as proprietary dues. This is a common practice."{CT 292-293}

We conclude that the CC&R's for a residential development that require the payment of a mandatory assessment for a country club located adjacent to or within the development create a mutual relationship of corresponding benefits and burdens, and, therefore, is a covenant that touches and concerns the land. We also conclude that, upon satisfying the criteria for a covenant that runs with the land, there is no additional requirement that the recreational facilities must be owned by the homeowners or the homeowners association in order to establish its validity or enforceability. As in this case, a privately-owned country club may demand payment of the fees and enforce its lien for unpaid fees under the CC&R's.

4. Disposition

We reverse the trial court's judgment and its award of attorney's fees. We award OSCA its costs on appeal.

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