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LUSHMEADOWS ASSOCIATION, INC.

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF MARIPOSA

13 LUSHMEADOWS ASSOCIATION, INC.,
14 Plaintiff,
15 v.
16 EUGENE TAGGS and DOES 1-200, inclusive,
17 Defendants.

18 CECILIA WRAY, et al.,
19 Plaintiffs,
20 v.
21 LUSHMEADOWS ASSOCIATION, INC.,
22 et al.,
23 Defendants.

24 AND RELATED CROSS-ACTION.
25
26
27
28

No. 9018
LUSHMEADOWS ASSOCIATION'S
(PROPOSED) STATEMENT OF
DECISION
CCP 632

No. 9070

Trial Date: September 8, 2008
Time: 9:00 a.m.
Dept: One
Judge: Hon. Terry A. Cole (Ret.)

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1 This cause came on regularly for trial on September 8-10, 2008, Honorable Terry
2 A. Cole presiding. Plaintiff and Cross-Defendant in Action 9018, and Defendant and
3 Cross-Complainant in Action No. 9070 Lushmeadows Association Inc. ("LMA") was
4 represented by Ann Rankin of Law Offices of Ann Rankin and by Edward Nemetz of the
5 Law Offices of Edward Nemetz. Eugene Taggs ("Taggs"), Defendant and Cross-
6 Complainant in Action No. 9018, and Norman Wray as Successor Trustee of the Robert
7 H. Wray and Cecilia K. Wray Trust dated September 5, 1995 ("Wray") and Jeffrey
8 Whalley and Mary Alice Whalley ("Whalleys"), Plaintiffs and Cross-Defendants in Action
9 No. 9070, were represented by Nanette Beaumont, Esq. of Jamison & Chappel. The
10 Court issued its Decision, filed on October 17, 2008. Within the time allowed by
11 California Code of Civil Procedure 632, a statement of Decision was requested by Taggs,
12 Wray and Whalleys ("Requesting Parties"). The Court issues the Statement of Decision
13 as follows: The issues as to which a Statement of Decision was requested by Requesting
14 Parties are identified below by number. A Statement of Decision has been rendered as
15 to each such issue.

16 **1. Statement of Facts and Procedural History.**

17 This case concerns the enforceability of 1990 and 2003 Declarations of Covenants,
18 Conditions and Restrictions ("CC&Rs") that are recorded in the chain of title of all owners
19 of property in Lushmeadows Mountain Estates ("LME") subdivision in Mariposa. The
20 Original CC&Rs for LME, recorded between 1962 and 1964, provided that they could be
21 changed, "in whole or in part" by a majority of the Owners in each of the four original
22 Units that together constitute LME. These Original CC&RS were amended in accordance
23 with their express terms in 1990. The 1990 CC&Rs also provided that they could be
24 amended "in whole or in part" by a majority of the LME Owners, and the 1990 CC&Rs
25 were so amended in 2003. The main purpose of the 1990 and 2003 amended CC&Rs
26 was to create a reasonable mechanism for maintaining and insuring the two lakes, the
27 clubhouse, and the campground and play area owned by LMA and, pursuant to the deed
28 conveying them to LMA, available for use by LME members who paid "reasonable

1 charges" and followed the rules for their use.

2 The revisions to the Original CC&Rs were needed because the original developer
3 of LME had deeded the lakes and other amenities to LMA, then a voluntary association,
4 and had obligated LMA to maintain and insure them by including such obligation in the
5 Articles of Incorporation for LMA, without providing LMA with any income stream
6 necessary to carry out its duties. The lakes, clubhouse and campground are a major
7 selling point for potential purchasers of properties within LME, according to LMA expert
8 witness Gail Spilos and according to many of the other witnesses. The lack of a reliable
9 income stream to maintain these amenities was a serious problem, according to the
10 testimony of a number of witnesses, including former LMA President Lowell Young, LMA
11 Board Member Marian Folker, and LMA expert witness Gail Spilos.

12 LMA sought to enforce the covenant to pay assessments, which is included in the
13 2003 CC&Rs, against Taggs by filing a Small Claims Court case against him. The Small
14 Claims Court case was dismissed for lack of jurisdiction after Taggs contended that the
15 2003 CC&Rs were unenforceable and that LMA had no standing to sue him. The Order
16 dismissing the Small Claims Court action was entered into evidence as Exhibit S. After
17 the Small Claims Court action was dismissed, LMA sued Taggs, seeking declaratory relief,
18 on November 29, 2006, in Action No. 9018. On January 23, 2007, Taggs answered and
19 cross-complained against LMA, contending the 1990 and 2003 CC&Rs were invalid and
20 unenforceable and constituted slander of his title and a cloud on his title which the Court
21 should remove.

22 Subsequently, on March 20, 2007, LME Owners Cecilia Wray ("Wray"), and Jeffrey
23 and Mary Alice Whalley ("Whalleys") filed suit, seeking a declaration that the CC&Rs are
24 unenforceable and claiming that the recordation of the CC&Rs constituted slander of title,
25 and asking that the alleged cloud on their title, consisting of the 1990 and 2003 CC&Rs,
26 be removed. LMA cross-complained for declaratory relief; this was action 9080. The two
27 actions were then consolidated.

28

1 Taggs and the Whalleys each own one Lot in LME and Wray owns three such Lots.
2 LMA owns Dawn Lake, Mallard Lake, and the surrounding acreage, including the
3 recreational facilities at Dawn Lake, which consist of a campground and a playground,
4 and the recreational facilities at Mallard Lake, consisting of a clubhouse which may be
5 used by the subdivision owners. LMA is required by its Articles of Incorporation to
6 maintain and repair these amenities. The Association's sole source of income is its
7 membership assessments.

8 **2. Brief History of the Current Controversy.**

9 Decker Enterprises, the original subdivider of LME, created the LME subdivision
10 and, between 1962 and 1964, encumbered all of its lots with recorded CC&Rs which
11 contained primarily use restrictions and architectural covenants. Decker Enterprises
12 recorded four sets of nearly identical Declarations of Restrictions ("the original CC&Rs")
13 covering Units 1 through 4 of the subdivision. (LME was originally developed in four
14 phases, known as Units 1-4.) These Original Declarations were entered into evidence as
15 Exhibits A-D.

16 The Original CC&Rs allowed individual Lot Owners to take other Lot Owners to
17 court to enforce the use restrictions and architectural covenants, and had no other
18 enforcement mechanism. The Developer originally selected Owners to serve on the
19 Architectural Committee; on July 23, 1965, the Developer appointed LMA to enforce the
20 Architectural Covenants. This appointment was memorialized in Exhibit H, which was
21 introduced into evidence. Although Requesting Parties contended that LMA is a
22 recreational club, and cannot function as an owners' association under the Davis-Stirling
23 Act, Requesting Parties' expert witness, Dale Bacigalupi, admitted that enforcing
24 architectural covenants is normally *not* a duty of a recreational club, but is normally a
25 duty of an owners' association.

26 Decker also incorporated LMA as a non-profit corporation, and, on February 16,
27 1966, deeded to it Dawn Lake and Mallard Lake, the surrounding acreage, the clubhouse,
28 and the campground. These Deeds were introduced into evidence as Exhibit F. The

1 deeds to Dawn Lake and Mallard Lake, on their face, require that the lakes and
2 surrounding real property and clubhouse be available to owners of Lots within LME for
3 recreational purposes, subject to reasonable rules and fees that could be imposed by
4 LMA. LMA was charged with maintaining these amenities by its Articles of Incorporation.
5 These Articles were entered into evidence as Exhibit E.

6 The evidence showed that membership in LMA was voluntary from 1963-1990;
7 therefore, during that time, LMA had no reliable stream of income to use to maintain the
8 lakes. LMA, by its Articles of Incorporation, had a right to levy assessments against its
9 members, but it had no right to require anybody to be a member.

10 This system was unworkable, and got worse over the years. Lowell Young, former
11 President of LMA, testified that the expenses associated with maintaining and insuring
12 the lakes and clubhouse have increased over time, and it was, by the 1980s, no longer
13 possible to pay such expenses through a voluntary organization.

14 Mr. Young testified that prior to the recordation of the 1990 CC&Rs, LMA had no
15 steady income stream, and that this made it unreasonably difficult for LMA to maintain
16 and insure the lakes on behalf of the LME property owners, as it was required to do by
17 its Articles and by the deeds to the lakes. Many LME owners would join LMA one year
18 because they wanted to use the clubhouse, and then not join the following year.
19 Although there was a fence around the lakes, there was an opening in the fence where
20 non-members could easily enter; others jumped over the fence or borrowed their
21 neighbors' keys, and thus were able to swim in the lakes without helping to pay for their
22 upkeep. Jeffrey Whalley, Plaintiff and Cross-Defendant in Action 9070, admitted that
23 when his children were small, he borrowed a key to the gate around the lakes from one
24 of his neighbors who was an LMA member so that his children could swim in the lakes,
25 even though the family did not join LMA or pay the \$73.00 per year dues at that time. It
26 was this kind of conduct that made the original scheme of voluntary membership in LMA
27 so unworkable. Mr. Whalley also testified that his family joined LMA only one time, and
28 that was because the family wanted to use the clubhouse for a meeting; after the

1 meeting was over, the Whalleys never again voluntarily joined LMA or paid the \$73.00 a
2 year dues.

3 Mr. Young testified that LMA frequently had to hold raffles and bake sales in an
4 effort to secure funds needed to pay for its liability insurance and property insurance,
5 and to maintain and repair the amenities.

6 Because the developer's original scheme had proved to be unworkable, the
7 Owners twice recorded amended CC&Rs, as they had a right to do under the amendment
8 provisions in the Original CC&Rs and in the 1990 CC&S.

9 Annually, according to Plaintiff's witness Marian Folker, it costs LMA approximately
10 \$40,000 to maintain and insure Mallard Lake and Dawn Lake and to maintain and insure
11 the subdivision clubhouse, campground and playground. These expenses can be met
12 only by enforcing the amended CC&Rs which were recorded to ensure LMA a steady
13 stream of income to use in order to carry out its maintenance and repair responsibilities.

14 **3. 1990 Amendments.**

15 The original CC&Rs provided (at paragraph 14) that they would run with the land
16 and be binding and effective upon all subdivision owners for a period of ten years from
17 date of their original recordation in the early 1960s, and that they would *automatically*
18 *extend* for successive ten year periods unless **amended by a majority of the Lot**
19 **Owners:**

20 14. These covenants and restrictions are to run with the land and shall be
21 binding on all the parties and persons claiming under them for a period of
22 10 years from and after the date hereof, at which time said covenants and
23 restrictions shall be automatically extended for successive periods of 10
24 years, unless by a vote of the majority of the then owners of said lots, it is
agreed to change the said covenants and conditions in whole or in part.

25 By 1990, the Owners within the LME subdivision determined that it was impractical
26 for LMA to perform the functions of maintaining the lakes, clubhouse and campground
27 without the ability to impose and enforce payment of assessments to support these
28 activities, and it was impractical to have use restrictions with no organized way of

1 enforcing them. The original CC&Rs contained no covenant to pay assessments, nor did
2 they mention LMA.

3 Therefore, in 1990, the Owners of each of the four units encumbered by the
4 original CC&Rs decided, by **majority vote of the Lot Owners in each of the four**
5 **Units**, as allowed by Article 14 of each of the Original Declarations, to amend the CC&Rs
6 so that LMA would have the legal responsibility and predictable income stream required
7 for enforcing the architectural covenants and use restrictions, and for taking care of the
8 lakes, clubhouse and campground. The Court finds that in enacting the 1990 CC&Rs,
9 LMA complied with the amendment process required by the Original CC&Rs. (Request
10 for Statement of Decision, Request #2.) The legal and factual support for this finding of
11 fact and conclusion of law is as follows:

12 Although the 1990 recorded document does not say, on its face, that it is an
13 "amended" declaration, that is clearly what it is. Lowell Young testified that the 1990
14 CC&Rs, entered into evidence as Exhibit K, were prepared mainly by cutting and pasting
15 language from the Original CC&Rs into the new document, and then adding a few new
16 provisions—mainly the mandatory LMA membership for persons acquiring title after July
17 1, 1990; the covenant requiring all such Owners to pay assessments; the Recitals,
18 consolidating the four original Units so that all four were bound by the 1990 CC&Rs, and
19 the provision allowing LMA, as well as individual Owners, to enforce the CC&Rs.

20 The 1990 CC&Rs, Exhibit K, show in their Recitals that they run in the chain of title
21 of all owners of Lots within LME, and refer to the properties that were originally part of
22 the four Units created between 1962 and 1964 as "formerly Unit 1," "formerly Unit 2,"
23 etc. (The documents were not created by attorneys, but were home-made. The word
24 "formerly" is misspelled "formally". Mr. Young was surprised when he noticed the
25 misspelling; he and the other Board members had intended to use the word "formerly.")
26 In addition to recording the 1990 CC&Rs, LMA also recorded in the County Recorder's
27 Office the minutes of the meeting at which the directors of LMA counted the votes and
28 determined that the 1990 CC&Rs had passed by a vote of a majority of the lot owners.

1 A certified copy of this recorded clarification document was entered into evidence as
2 Exhibit O. This document is further evidence that the 1990 CC&Rs complied with the
3 amendment process required in the Original CC&Rs, which merely provided that the
4 Original CC&Rs for each Unit could be amended by a majority of the "then owners of said
5 lots." (Request for Statement of Decision #2)

6 Lowell Young also testified that the ballot package, consisting of the 1990 CC&Rs,
7 ballots and solicitation materials was mailed to *all Lot Owners* within the subdivision on
8 or about April 19, 1990. The ballot package was entered into evidence as Exhibit L.
9 Taggs denied getting copies of the 1990 CC&Rs. This testimony was not credible.

10 The tally sheet showing the votes on the 1990 CC&Rs was entered into evidence
11 as Exhibit N. The tally sheet showed that Mr. Taggs, who owned Lot 11 in Unit 1, voted
12 in favor of the 1990 CC&Rs. Mr. Taggs' deed was entered into evidence as Exhibit 22.
13 The tally sheet, Exhibit N, also showed that the Whalleys voted in favor of the 1990
14 CC&Rs. The Whalleys' deed to Unit 1, Lot 38 is in evidence as Exhibit 23. The voting
15 materials and the testimony of witnesses who said that every Lot Owner had received
16 the ballot package provide sufficient evidence that the voting methods used to enact the
17 1990 CC&Rs were valid, and met all requirements of the Original CC&Rs, and that the
18 resulting vote was binding on all Lot Owners within LME.

19 Mr. Taggs acknowledged, during cross-examination, that he received at least one
20 letter from POOLE (Property Owners of Lushmeadows Estates,) which was marked as
21 Exhibit R. The POOLE letters attacked the validity of the 1990 CC&Rs, using all or most
22 of the same arguments made now by Taggs, Wray and the Whalleys. Between October,
23 1990 and March, 1991, POOLE sent out letters to all owners of property within LME,
24 including Taggs, Wray and the Whalleys; hired attorneys, collected money, and
25 maintained a bank account; however, POOLE never brought any legal action to invalidate
26 the 1990 CC&Rs. The POOLE letters were authenticated by Lowell Young, who stated
27 that he and all other Lot Owners had received them; that LMA had engaged a local
28 attorney to address the issues raised by POOLE, and that POOLE never filed suit. The

1 POOLE letters state on their face that they were sent to all lot owners within LME. Since
2 all Lot Owners got the POOLE letters, and the POOLE letters reference the 1990 CC&Rs,
3 it is simply not believable that Taggs, Whalleys and Wray did not know of the 1990
4 CC&Rs until 2004, as they claim. The fact that Taggs and the Whalleys voted in favor of
5 the 1990 CC&Rs is further evidence that they knew of them. Mr. Wray testified that his
6 mother, the former Owner of the Lots that he now owns as successor trustee, never paid
7 attention to or participated in CC&R votes because she did not want to belong to LMA
8 (not because she did not receive the voting materials.)

9 After the 1990 CC&Rs were recorded, LMA sent a letter, entered into evidence as
10 Exhibit P, notifying all LME property owners of the outcome of the vote. Lowell Young
11 testified that the letter was sent to all lot owners within LME.

12 The 1990 CC&Rs were never challenged until January, 2007, when Taggs filed his
13 Cross-Complaint and when Wray and the Whalleys filed their Complaint on March 20,
14 2007. All claims that the 1990 CC&Rs were invalid were time barred, and also barred by
15 the equitable doctrines of waiver, estoppel and laches. (Request for Statement of
16 Decision #3) Requesting Parties waited more than four years after the recordation of
17 the 1990 CC&Rs to challenge them. All the information required for Requesting Parties
18 to understand how the votes were solicited and counted was available in recorded
19 instruments, including Exhibit K and Exhibit O, and in the POOLE letters. The 1990
20 CC&Rs remained in force until they were replaced by the 2003 CC&Rs. During that
21 thirteen and a half year period, dozens of lots within LME were purchased in reliance on
22 the enforceability and validity of the 1990 CC&Rs. Requesting Parties waited far too long
23 to challenge the 1990 CC&Rs.

24 The vote on the 1990 CC&Rs was a vote of the Lot Owners, not a vote of the LMA
25 Members. The testimony of Lowell Young, the voting materials, Exhibit L, the list of lot
26 owners for the tally sheet, Exhibit M, the tally sheet of votes counted, Exhibit N, the
27 letter from LMA to the property owners, Exhibit P, the LMA minutes, Exhibit O, and the
28 letter from LMA to the title company, Exhibit Q, all show that this was a vote of all lot

1 owners, pursuant to Paragraph 14 of each of the Original CC&Rs, Exhibit A-D, and not a
2 vote just of LMA members. Lot Owners were allowed to vote whether or not they were
3 members in good standing of LMA. The voting methods were valid and complied with
4 the Original CC&Rs, Paragraph 14 Exhibits A-D. (Request for Statement of Decision #1)

5 The 1990 CC&Rs also combined the four original Units into one development, and
6 they provided that, thereafter, a majority of the Owners in the development as a whole
7 could amend the 1990 CC&Rs. Exhibit L, the voting materials, explained that the intent
8 of the 1990 CC&Rs was to combine the four Units into one subdivision so that voting
9 would thereafter be done by the entire subdivision, and not unit by unit. Lowell Young
10 testified that the intent of the 1990 CC&Rs, Exhibit K, was to combine all four Units into
11 one subdivision. (Request for Statement of Decision, Request No. 13)

12 The amendment provisions of the Original CC&Rs, Exhibits A-D, Paragraph 14, and
13 of the 1990 CC&Rs, Exhibit K, Paragraph 17, provided that they could be amended by a
14 vote of a majority of the "Owners," not a vote of a majority of the "Lots." If the Original
15 CC&Rs or the 1990 CC&Rs had meant that a majority of the "Lots" had to vote to amend
16 them, they could have said so, but they did not. Historically, a few Owners had more
17 than one Lot. Based on the clear wording of the Original CC&Rs and 1990 CC&Rs, each
18 Owner, both in 1990 and again in 2003, received one ballot, regardless of the number of
19 Lots owned. However, the 1990 ballots were signed by the Owners, and it was therefore
20 possible to determine which Owners in each of the four Units had approved the CC&Rs,
21 and to determine that a majority of the Owners in each of the four original Units had
22 approved them. The 1990 CC&Rs were valid because they complied with the
23 amendment procedure of the Original CC&Rs, and the voting methods used were
24 appropriate under the Original CC&Rs. (Request for Statement of Decision, Requests #1
25 and #2)

26 After the 1990 vote count, in addition to recording the 1990 CC&Rs, Exhibit K, and
27 the supplement, Exhibit O, consisting of the vote count, LMA also prepared and sent a
28 letter to the local title company, setting forth the vote count for each of the four Units

1 and showing that a majority of the Owners in each Unit had approved the 1990 CC&Rs.
2 This letter, authored by then-Board President Peggy Kains, was accepted into evidence
3 as Exhibit Q. This letter is additional evidence that the 1990 CC&Rs were valid because
4 the vote complied with the amendment process required by the Original CC&Rs.
5 (Request for Statement of Decision #2)

6 Once the 1990 CC&Rs were approved and recorded, LME met the legal definition
7 of a "common interest development." (Civil Code § 1352, which is a portion of the Davis-
8 Stirling Common Interest Development Act). Civil Code § 1352 provides, "This title
9 applies and a common interest development is created whenever a separate interest
10 coupled with an interest in the common area or membership in the association is, or has
11 been, conveyed, provided, all of the following are recorded: (A) A declaration; (b) A
12 condominium plan, if any exists; (c) A final map or parcel map..." LME has always had
13 recorded declarations that run in the chain of title of all the Lots, (beginning with the
14 Original CC&Rs, Exhibits A-D) and there has always been a recorded parcel map, entered
15 into evidence as Exhibit G. There is, of course, no condominium plan, since the Lots
16 have, since 1990, been a planned development, rather than a condominium project.
17 (Civil Code 1351(k) (1)) Since 1990, the CC&Rs have provided that the Owners of the
18 Lots (which are the separate interests, Civil Code § 1351(l) (3)) are required to belong to
19 LMA, so all requirements of Civil Code § 1352 have been met. (Request for Statement of
20 Decision, Request #7, Request # 9)

21 Because of the application of the Davis-Stirling Act, Civil Code §§ 1350-1378, the
22 Owners of interests in LME are afforded numerous legal protections; for example, Civil
23 Code § 1366 limits the ability of the Board of Directors to increase assessments except as
24 allowed by that code section; Civil Code § 1365 gives the Owners the right to review
25 financial information about LMA; Civil Code § 1363.03, enacted effective July 1, 2006,
26 now requires voting by secret ballots counted in public by inspectors of election.

27 The Original CC&Rs, Exhibits A-D, gave the Lot Owners the power to amend the
28 Original CC&Rs "in whole or in part." This included the power to amend the Original

1 CC&Rs, which consisted mainly of architectural covenants and use restrictions, so as to
2 create a common interest development within the meaning of the Davis-Stirling Act, Civil
3 Code § 1350 et. seq. The Original CC&Rs said they could be amended "in whole or in
4 part," and contained *no* written limitation on what types of changes were permissible, so
5 long as a "majority of the then-owners of the lots" approved of the changes. (Request for
6 Statement of Decision, Request #11) The vote for the 1990 CC&Rs was a vote of the Lot
7 Owners, not a vote of LMA. (See Exhibits K, L, O, P and Q)

8 These 1990 CC&Rs remained in force for thirteen and a half years, until they were
9 again amended in 2003. Although the dissenting Owners claimed that the 1990 CC&RS
10 constituted a "cloud on title," the 1990 CC&Rs constituted no impediment to the sales of
11 lots; dozens of lots were sold between 1990 and 2003, and Requesting Parties presented
12 no evidence showing that the 1990 CC&Rs kept them from conveying title to their
13 properties or from selling their properties. The 1990 CC&Rs were valid and binding, and
14 did not constitute a cloud on title and did not slander the title to the properties owned by
15 Requesting Parties. (Request for Statement of Decision #17 and #18). The Court finds
16 that the 1990 CC&Rs were not "wholly arbitrary or in violation of public policy and law,"
17 and were not "unreasonable." The Court finds that the 1990 CC&Rs constituted a
18 reasonable method for LMA to maintain the lakes, campground and clubhouse, as it was
19 required to do in its Articles of Incorporation, for the benefit of all lots within LME
20 according to the deeds, (Exhibit F) by requiring all LME Lot Owners who purchased their
21 properties on or after July 1, 1990 to belong to LMA and to pay assessments. The court
22 finds that the 1990 CC&Rs went a long way toward correction of the problems created by
23 the original Developer when he deeded the recreational amenities to LMA without
24 providing for any reliable stream of income that could be used to maintain, repair,
25 replace, restore and insure those amenities. The burden imposed by the 1990 and 2003
26 CC&Rs was reasonable in relationship to the benefit it conferred on the Lot Owners. The
27 Original CC&Rs always contained architectural covenants and use restrictions; all original
28 lot owners purchased their interests knowing that they would have to comply with these

1 covenants, and that the Original CC&Rs could be amended, "in whole or in part" by a
2 "majority of the then-owners of the lots." Very little additional burden was imposed by
3 the 1990 and 2003 CC&Rs. Originally, the testimony showed, the LMA assessments were
4 only \$73.00 per year, and even now, they are only \$120.00 per year for improved lots,
5 and \$60.00 per year for unimproved lots, as explained in Marian Folker's testimony. This
6 is a small price to pay for the maintenance, repair, replacement, restoration and
7 insurance of these valuable amenities. It was unreasonable of the Developer to expect
8 LMA to take care of these recreational amenities without the steady stream of income
9 that was provided by the 1990 CC&Rs. (Request for Statement of Decision # 8)

10 The validity of the 1990 and 2003 CC&Rs is also upheld by California Civil Code §
11 1355(a), which provides that governing documents can be amended in two different
12 ways: **"The declaration may be amended pursuant to the governing documents**
13 **or this title. Except as provided in California Civil Code § 1356, an amendment is**
14 **effective after (1) the approval of the percentage of owners required by the**
15 **governing documents has been given, (2) that fact has been certified in a**
16 **writing executed and acknowledged by the officer designated in the**
17 **declaration or by the association for that purpose, or, if no one is designated,**
18 **by the president of the association, and (3) that writing has been recorded in**
19 **each county in which a portion of the common interest development is**
20 **located."** (Emphasis supplied) All three requirements have been met. Exhibit O, the
21 recorded Supplement to the 1990 CC&Rs, as clarified by the Peggy Kains letter, Exhibit
22 Q, shows that the required number of Lot Owners in each Unit had voted to amend the
23 Original CC&Rs. Exhibits K and O show that the 1990 CC&Rs as supplemented by the
24 minutes setting forth the vote in favor of the 1990 CC&Rs were recorded in the Official
25 Records of Mariposa County on July 2, 1990 (CC&Rs, Exhibit K) and on August 12, 1990
26 (Minutes supplement, Exhibit O).

27
28

1 **4. 2003 CC&Rs**

2 The system of mandatory membership in LMA for owners who acquired their lots
3 after July 1, 1990 and of voluntary membership in LMA for pre-July 1, 1990 Lot Owners
4 proved unfair and impractical. According to testimony of Marian Folker and Ed Drechsler,
5 each year, LMA had no way of predicting how many pre-1990 Owners of Lots in LME
6 would join LMA and pay assessments, because the pre-1990 owners could join and quit
7 the Association as they wished. As a result, some subdivision owners were responsible
8 to maintain the recreational amenities which benefit all owners and some subdivision
9 Owners could decide each year whether or not to join the LMA and pay assessments.
10 This caused an unfair burden on Owners who acquired their interests after July 1, 1990
11 and created an unpredictable income stream for LMA.

12 Therefore, in 2003, the subdivision Owners *again amended the CC&Rs, by a vote*
13 **of a majority of the then-owners of lots**, and at that time, membership in LMA
14 became mandatory for all Owners of any lots within the subdivision, regardless of when
15 they acquired their lots. (2003 CC&Rs, Exhibit BB, Paragraph 3.1 and 6.1) The 2003
16 CC&Rs provide that they supersede any prior versions of the CC&Rs. (2003 CC&Rs, p. 1,
17 Recital B) They also provided that each Owner of a Lot within LME *shall* be a Member of
18 LMA. Membership shall be appurtenant to each Lot and the holding of an ownership
19 interest in the fee title to a Lot shall be the sole qualification for membership. 2003
20 CC&Rs, Paragraphs 3.1 and 6.1. The 2003 CC&Rs also require payment of assessments
21 by all Association members. (2003 CC&Rs, Exhibit BB, Paragraphs 5.3 and 7.1)

22 Taggs, Wray and Whalleys contend the 2003 vote count was improper because
23 (1) Persons having multiple Lots received only one vote, and (2) Lot Owners who were
24 not LMA members in good standing were not allowed to vote.

25 These contentions are unmeritorious.

26 (1) Lowell Young testified that he and the other property owners who drafted
27 the 1990 CC&Rs intended by including Paragraph 17 of those CC&Rs, (Exhibit K) that
28 each property owner within LME would receive one vote, regardless of the number of lots

1 owned. Mr. Young testified that the purpose of this provision was to prevent a developer
2 from acquiring a large number of Lots and using his votes to change the character of the
3 development. There is no language in any of the governing documents that indicates
4 any ambiguity in this plain language. The court interprets Paragraph 17 of the 1990
5 CC&Rs in accordance with the intent of the drafters. The practice of giving one vote to
6 each owner was consistent with Paragraph 17 of the 1990 CC&Rs. Also, Marian Folker
7 testified that prior to the recordation of the 2003 CC&Rs each Lot Owner was billed for
8 only one annual assessment (then \$73.00 per year) regardless of the number of lots
9 owned. The voting methods used to adopt the 2003 CC&Rs were valid. (Request for
10 Statement of Decision #4, #6, #15, #16) Cf (*Diamond Bar Development Corporation v.*
11 *the Superior Court of Los Angeles County* (1976) 60 Cal. App. 3d 330) In the *Diamond*
12 *Bar* case, the document was drafted by the developer and the Court relied on the
13 developer's intent in construing the language, and also relied on the fact that other
14 language in the governing documents indicated that each lot should have one vote. In
15 the case at bar, Lowell Young testified about the intentions of the drafters of the 1990
16 CC&Rs, and the uncontradicted evidence was that they intended the amendment
17 provisions to mean that each Owner had one vote, regardless of the number of lots
18 owned. This language was consistent with the practice of LMA to charge each Lot Owner
19 only one assessment, prior to 2003, regardless of the number of lots owned. Moreover,
20 the court in the *Diamond Bar* case relied on language in another clause of the governing
21 documents there at issue which language provided that the voting strength of the
22 Association was allocated based upon the number of lots owned. No such language
23 exists in the governing documents here at issue. Thus, the language of the amendment
24 provision here at issue is unambiguous, and must be interpreted according to its plain
25 meaning. Moreover, the amendment at issue in the *Diamond Bar* case was approved in
26 1975 and was promptly challenged in 1976; there is no suggestion of the kind of lengthy
27 delay that occurred in the case at bar.

28

1 (2) Marian Folker and Ed Drechsler both testified that LMA had two types of
2 votes. When LMA held a vote to elect directors of the LMA corporation, as it did in July,
3 2003, only Members in good standing of LMA were allowed to vote; this was a vote of
4 the shareholders of the corporation. However, when a vote of the Lot Owners on
5 amending the CC&Rs was taken, all Lot Owners were allowed one vote each, whether or
6 not they were in good standing. The evidence showed that the ballot package and the
7 President's Letter were sent to all Lot Owners, not just to those who were LMA members
8 in good standing. (Exhibits U, Z, EE, EE-1)

9 Jim Roulo testified in his deposition that an Owner had to be in good standing to
10 vote on the 2003 CC&Rs, but he retracted that testimony in his Declaration in Support of
11 LMA's Reply to the Opposition to its Summary Judgment Motion, and explained that he
12 had been confused because there was a corporate vote for directors in July, 2003, which
13 did require good standing in order to be eligible to vote, and a Lot Owner vote on the
14 CC&Rs in September, 2003, which required only that a voter be a Lot Owner. Mr. Roulo
15 died prior to trial and was thus unavailable to testify at trial. Jim Jensen, who is very ill
16 and is awaiting a lung transplant, testified in his deposition that he thought that in order
17 to vote on the 2003 CC&Rs, a voter had to be a member in good standing of LMA;
18 however, on further examination, he testified that he did not recall whether the good
19 standing requirement pertained to the CC&R vote or only to elections of directors. Marian
20 Folker testified that, by reviewing her list of non-members of LMA for 2003, she was able
21 to determine that thirty non-LMA members had voted on the 2003 CC&Rs. The vote for
22 the 2003 CC&RS was a vote of the Lot Owners, not a vote of the corporation LMA, and
23 no "good standing" requirement was utilized by LMA. (Request for Statement of
24 Decision, Request No. 14)

25 In 2003, LME had pre-July 1, 1990 Owners, some of whom were LMA members
26 (voluntarily) and others of whom were not LMA members, and also had post-July 1, 1990
27 Owners, all of whom were LMA members. The evidence shows that all Lot Owners were
28 allowed to vote, and that this was a Lot Owner vote, not a corporation vote. Therefore,

1 Corporations Code 7513 was inapplicable to that vote; Corp. Code 7513 applies to a vote
2 of the Corporation on matters such as election of directors and amendment of By-Laws.
3 (Request for Statement of Decision #12, #14).

4 The 2003 CC&Rs were valid because they complied with the amendment process
5 set forth in the 1990 CC&Rs. (Request for Statement of Decision #6, #13) The 2003
6 CC&Rs did not need to comply with the amendment process as stated in the Original
7 CC&Rs because the 1990 CC&Rs were properly enacted, and they superseded the
8 Original CC&Rs as provided in Exhibit K. (Request for Statement of Decision #5, #13).

9 All issues concerning the validity of the voting, balloting, and vote count were
10 considered by the court, and, after weighing the evidence and the credibility of the
11 witnesses, the court resolved these issues in favor of LMA. It was unnecessary for the
12 court to determine if LMA used the correct number of "lots" in counting the votes; the
13 court finds that the governing documents called for a majority of the "then owners" of
14 the lots, not a majority of lots, by their plain language.

15 Moreover, the Court considered the fact that, although the 2003 CC&Rs were
16 adopted in October, 2003 and were recorded in December, 2003, no legal challenge to
17 them was ever posed until January, 2007, when Taggs cross-complained against LMA in
18 response to LMA's efforts to collect assessments from him. By the time Taggs challenged
19 the balloting, voting and vote count, more than three years had passed since the voting
20 and recordation of these documents. Numerous lots had been sold, and the local realtors
21 had provided buyers with copies of these recorded instruments, which the buyers had
22 relied upon. This reliance was explained in the testimony of LMA's expert Gail Spilos.
23 She explained that it had been her practice, and the practice of the other local realtors,
24 to provide prospective buyers of separate interests within LME with copies of the
25 applicable Declaration of Covenants, Conditions, and Restrictions, and that in her
26 experience, the existence of a mandatory association and of a reliable stream of income
27 for the association to utilize in maintaining the common areas were important to the
28 buyers. She acknowledged that she worked with buyers who did not want to own

1 property in a common interest development, and that she and other realtors in Mariposa
2 showed such individuals properties that were not encumbered by CC&Rs. Ms. Spilos
3 testified that the rescission of the 2003 CC&Rs would defeat the reasonable expectations
4 of all the Owners who had purchased lots within LME subsequent to the December, 2003
5 recordation of those instruments.

6 The court considered the fact that numerous buyers and their agents had relied
7 on the 2003 CC&Rs long before Taggs challenged them. The evidence showed that
8 Taggs himself had counted the ballots for the 2003 vote count in 2004, and had not, as a
9 result of that vote count, found any discrepancy or mounted any legal challenge. The
10 Minutes showing the Ballot Recount by Taggs was entered into evidence as Exhibit CC.
11 The Court finds that the equitable doctrines of laches, waiver and estoppel apply here. If
12 Requesting Parties thought there was something wrong with the balloting, voting or vote
13 count in 2003, they should have said so immediately after the election, rather than
14 waiting for more than three years and raising these issues long after the election, and
15 only when legal action was finally taken against them because of their persistent failure
16 to pay assessments to LMA. (See, e.g., *Property Controllers, Inc., v. Shewfelt* (1966)
17 245 Cal. App. 2d 755, 54 Cal. Rptr. 218; *Concerned Citizens of Palm Desert, Inc. v. Board*
18 *of Supervisors* (1974) 38 Cal. App. 3d. 257, 265, 113 Cal. Rptr. 328; *San Bernardino*
19 *Audubon Society v. City of Moreno Valley* (1996) 44 Cal. App. 4th 593, 607, 51 Cal. Rptr.
20 2d 897) In each of these cases, an equitable action was barred because it was not
21 brought in time to avoid prejudice to individuals or entities who reasonably relied on a
22 vote or other decision—even though the action might not have been barred by the
23 applicable statute of limitations.

24 For example, in *Property Controllers, Inc., supra*, the Court utilized the doctrine of
25 laches to grant summary judgment to the buyers of real property where the prior owner
26 had executed an unrecorded lease, agreeing to build a shopping center and to lease a
27 portion of it to plaintiff. The lease was not disclosed by the seller and was unrecorded;
28 the shopping center was never built. After the buyer purchased the property and spent

1 considerable amounts of money on it, the lessee sued for specific performance of its
2 lease. The court granted summary judgment in favor of the buyer, based in part on the
3 doctrine of laches and on the prejudice that would result to the buyer if specific
4 performance were granted after the buyer spent money on the property without knowing
5 about the lease. (*Id. at pp. 762-763*)

6 In the *Concerned Citizens of Palm Desert* case, a plaintiff citizens' organization
7 sought a writ of mandate to challenge the county's approval of a development project,
8 alleging the developer had failed to comply with CEQA. The Court of Appeal held, in
9 part, that the organization's petition was barred by the doctrine of laches because the
10 organization had waited nine months to file suit, during which time the developer had
11 incurred financing liabilities. (*Id. at p. 266*).

12 Similarly, in the case of *San Bernardino Valley Audubon Society v. City of Moreno*
13 *Valley, supra*, an environmental group challenged an order of the Superior Court of
14 Riverside County denying plaintiff's petition for a writ of administrative mandamus to
15 challenge an administrative board's decision authorizing taking of the kangaroo rat,
16 which is an endangered species. The court found that although the Endangered Species
17 Act disallowed the granting of the permit, the group's action was barred by the doctrine
18 of laches, because the developer had already taken substantial steps to acquire the
19 kangaroo rat habitat.

20 The existence of laches is generally a factual question, and the Court has great
21 discretion to determine whether to apply laches to bar relief. The key question is whether
22 defendants have demonstrated prejudice, making it unjust to grant relief to plaintiffs.

23 Here, the prejudice is clear. LMA sent out explanations of the changes made by
24 the 2003 CC&Rs to all the Lot Owners, and conducted the voting by secret ballot. These
25 explanations were received into evidence as Exhibits U, Z, EE, FF, and GG. Requesting
26 Party Eugene Taggs counted the votes in 2004 and got the same total that LMA's
27 committee that counted the votes had obtained. Taggs' vote count was memorialized in
28 Exhibit CC. He took no action to challenge the vote, and, as a result, numerous Lot

1 Owners purchased properties in reliance on the 2003 CC&Rs. It was only in January,
2 2007 that Taggs challenged the 2003 CC&Rs, and this was only after LMA had filed its
3 action for declaratory relief. Wray and the Whalleys did not challenge the 2003 CC&Rs
4 until March 20, 2007 when they filed their action for declaratory relief. LMA expert Gail
5 Spilos testified that she and other local realtors had distributed the 2003 CC&Rs to all
6 potential purchasers of lots within LME since the 2003 CC&Rs were recorded on
7 December 10, 2003; a copy of an example of her disclosure package was entered into
8 evidence as Exhibit II. A delay of more than three years in challenging the 2003 CC&Rs
9 clearly caused prejudice to LMA and to the Lot Owners who purchased their properties in
10 reliance on the 2003 CC&Rs; Requesting Parties' claims are barred by the doctrines of
11 laches, waiver and estoppel.

12 Moreover, although the 2003 vote was a vote of the Lot Owners and not a vote of
13 the corporation, the State Legislature's decisions regarding the length of time available in
14 which an election within a common interest development association may be challenged
15 is persuasive to this court. The state legislature allows a time period of only nine months
16 to challenge such a vote.

17 Corporations Code § 7527, Statute of Limitations; Action to Challenge Validity of
18 Election, states, "An action challenging the validity of any election, appointment, or
19 removal of a director or directors must be commenced within nine (9) months after the
20 election, appointment or removal. If no such action is commenced, in the absence of
21 fraud, any election, appointment or removal of a director is conclusively presumed valid
22 nine months thereafter." This code section was added in 1978 and was operative January
23 1, 1980.

24 At the same time, in the same chapter and section (567 § 6, 1978, Operative
25 January 1, 1980) the legislature passed Corporations Code § 7616, Actions to Determine
26 Validity of Election or Appointment; Notice to Attorney General; Intervention; Hearings;
27 Findings. While Civil Code § 7616 provides a procedural vehicle for challenging an
28 election, it does not create any substantive rights. (*Kaplan vs. Fairway Oaks Homeowners*

1 *Association* (2002) 98 Cal. App. 4th 715, 719).

2 Civil Code § 1363.03 was added by statutes and became operative July 1, 2006.
3 It was not in force at the time of the 2003 election, but it was in force by the time the
4 instant lawsuit and related cross-complaints were filed. Earlier decisions from our Court
5 of Appeals, pre-Civil Code § 1363.03 that attempted to differentiate between
6 Corporations Code § 7527 and Corporations Code § 7616 held that Corp. Code 7527
7 applied only to elections of directors, and not to other votes. The controlling case prior to
8 the enactment of Civil Code § 1363.03 was *Committee to Save Beverly Highlands vs.*
9 *Beverly Highlands HOA* (2001) 92 Cal. App. 4th 1247. This case was initially cited by
10 Requesting Parties in their Opposition to Summary Judgment, but for an unrelated issue.
11 They cited the case to support their assertion that the Davis-Stirling Act is inapplicable to
12 the instant case as there are no intended common areas. LMA rebutted this assertion
13 because Requesting Parties' reliance on the case was misplaced. In the *Beverly Hills*
14 case, the development in question was created with no common area and a later vote of
15 the owners to acquire the common area lot failed. In the case at bar, the recreational
16 amenities, lakes, acreage, and other facilities have been owned by LMA since 1966,
17 according to the deeds, Exhibit F, and the deeds required LMA to maintain the lakes and
18 other recreational amenities for the benefit of all the LME owners. LMA, pursuant to the
19 1990 and 2003 CC&Rs, manages and maintains these common areas, thus triggering the
20 application of the Davis-Stirling Act. (*Civil Code § 1352*)

21 The reasoning behind the Court's decision in the *Beverly Hills* case became
22 inapplicable with the enactment of Civil Code § 1363.03, which took effect on July 1,
23 2006. Code Section § 1363.03(h) provides that the nine month statute of limitations set
24 forth in Corp. Code § 7527 now applies to all voting in common interest developments on
25 issues of election of directors, amendment of governing documents, enactment of special
26 assessments in excess of the dollar amount that can be approved by the board members,
27 and changing of common areas to exclusive use common areas.

28

1 This logic of the court's opinion in the Beverly Hills case became inapplicable after
2 the enactment of Civil Code § 1363.03(h) for the following reasons:

3 1. The Digest for SB 61 is clear that Civil Code § 1363.03 applies to elections
4 within a common interest development regarding assessments, selection of members of
5 the association board of directors, **amendments to the governing documents**, or the
6 grant of exclusive use of common area property;

7 2. Civil Code § 1363.03(h) sets the time by which an election can be
8 challenged, as defined in the Digest for SB 61 as "the time allowed by section 7527 of
9 the Corporations Code for challenging the election has expired" (within nine (9) months
10 after the election, appointment or removal);

11 3. Corporations Code § 7527 and Corporations Code § 7616 were promulgated
12 at the same time, both were statutorily in place a decade before the 1990 election and
13 twenty-three (23) years before the 2003 election;

14 4. The court in (*Kaplan vs. Fairway Oaks Homeowners Association* (2002) 98
15 Cal. App. 4th 715, 719) established that while Corporations Code § 7616 provides a
16 procedural vehicle for challenging an election, it does not create any substantive rights
17 (such as a statute of limitations);

18 5. The legislature could have chosen Corporations Code § 7616 by which to
19 challenge an election, but chose Corporations Code § 7527 because of the statute of
20 limitations embodied within it;

21 6. Civil Code § 1363.03(h) establishes that Corporations Code § 7527 has
22 always been the statute that sets the time by which an election can be challenged, and,
23 at least after July 1, 2006, it controls the time in which an election to amend the
24 governing documents can be challenged.

25 This is a sensible decision, as is shown by the case at bar. It would be
26 extraordinarily disruptive to the reasonable expectations of property owners if an election
27 to amend the governing documents could be set aside years after recordation of the
28 amendment for some technicality. In the case at bar, the Requesting Parties tried to set

1 aside the 1990 CC&Rs nearly seventeen years after they were recorded, and tried to set
2 aside the 2003 CC&Rs more than three years after they were recorded. The absurdity of
3 this position and its prejudicial effect on property owners is obvious.

4 **5. Both the 1990 and 2003 CC&Rs Were “Reasonable” Within the**
5 **Meaning of California Law.**

6 As noted in the factual summary above, the amendments which have been
7 adopted (by majority vote) were necessary to correct deficiencies in the original
8 development plan and are reasonable and enforceable. As the Supreme Court noted in
9 *Nahrstedt v. Lakeside Village Condominium Association* (1994) 8 Cal 4th 361, recorded
10 covenants and restrictions are presumed reasonable, and owners challenging them have
11 the burden of proving they are unreasonable.

12 In the *Nahrstedt* case, an owner of a separate interest in a common interest
13 development challenged a restriction on keeping pets as being arbitrary and
14 unenforceable. The court rejected the owner's argument as follows:

15 Under the holding we adopt today, the reasonableness or
16 unreasonableness of a condominium use restriction that the Legislature has
17 made subject to section 1354 is to be determined *not* by reference to facts
18 that are specific to the objecting homeowner, but by reference to the
19 common interest development as a whole. As we have explained, when, as
20 here, a restriction is contained in the declaration of the common interest
21 development and is recorded with the county recorder, the restriction is
22 presumed to be reasonable and will be enforced uniformly against all
23 residents of the common interest development *unless* the restriction is
24 arbitrary, imposes burdens on the use of lands it affects that substantially
25 outweigh the restriction's benefits to the development's residents, or
26 violates a fundamental public policy.
27 Accordingly, here *Nahrstedt* could prevent enforcement of the Lakeside
28 Village pet restriction by proving that the restriction is arbitrary, that it is
substantially more burdensome than beneficial to the affected properties,
or that it violates a fundamental public policy. For the reasons set forth
below, *Nahrstedt's* complaint fails to adequately allege any of these three
grounds of unreasonableness.
Nahrstedt, at p. 1290 (emphasis added).

26 In the case at bar, a majority of the subdivision owners voted in 1990 to provide a
27 steady stream of income to maintain the lakes, campground and clubhouse and to
28 provide a consistent method of enforcing the use restrictions and architectural
covenants. The change was reasonable, and was required because a majority of the Lot

1 Owners had recognized that the Developer's original idea of requiring a voluntary
2 organization with no predictable income stream to maintain valuable properties didn't
3 work and didn't make sense. Taggs and the Whalleys voted in favor of the 1990 CC&Rs,
4 which required new Owners to pay for the upkeep and insurance of the valuable lakes,
5 and did not require Taggs or the Whalleys to pay. Cecilia Wray did not care one way or
6 the other about the 1990 CC&Rs, since they did not require her to pay. (Request for
7 Statement of Decision, Request No. 8)

8 In 2003, a majority of the Lot Owners again amended the CC&Rs. According to
9 the Major Change Summary, Exhibit EE-1, the following were the major changes from
10 the 1990 CC&RS:

- 11 (1) The Recitals were changed to update the list of recorded
12 instruments that affect title to the properties within LME;
- 13 (2) Section 4.9 was amended to allow an LME Owner to place a
14 trailer or mobile home on his/her property during construction
15 of a permanent residence; this was needed, according to Mr.
16 Drechsler's testimony, because many Owners thought it was
17 unfair that under the previous CC&Rs, they could not live on
18 their own property while constructing a permanent residence;
- 19 (3) Section 4.10 was added to prohibit time shares. Time shares
20 had not been a problem in the early 1960s or in 1990, but as
21 they became more popular, a majority of the Owners wanted to
22 prohibit them to avoid having a large transient population
23 within the development;
- 24 (4) Section 5 was added to require LMA to distribute financial
25 reports to all Owners, as required by Civil Code 1365;
- 26 (5) Section 6.1 was added to require all LME lot owners to belong
27 to LMA; this was because LMA was told by its attorney that
28 associations may not have more than one class of membership;

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each Owner was to hold only one membership, regardless of the number of Lots owned;

(6) Section 7.1 was added, requiring all LME owners to pay assessments, in order to create a more predictable income stream for the upkeep of the common areas and to avoid the unfairness of allowing pre-July 1990 Owners to enjoy the benefits of the common amenities without paying any share in the cost of their upkeep; and

(7) Article XI was amended to require LMA to provide Owners' lenders with the governing documents and financial reports; this is a requirement of Civil Code 1368, and is needed in order to facilitate sales.

Taggs, Wray and the Whalleys object only to new sections 6.1 and 7.1. Although Taggs, Wray and Whalleys object vociferously to the 1990 and 2003 CC&Rs, Norman Wray and Jeff Whalley both acknowledged that they had never read either the 1990 or the 2003 CC&Rs. Moreover, their expert, Dale Bacigalupi, admitted on the witness stand that there was nothing unusual or abnormal about these CC&Rs, and that if they were properly enacted, the one Owner/one vote provision would be acceptable. These CC&RS are entitled to judicial deference and must be upheld by the Court unless the Court finds, as a matter of law, that they are "arbitrary" that they are "substantially more burdensome than beneficial to the affected properties", or those they "violate a fundamental public policy." See *Nahrstedt, supra*, at p. 381. Taggs, Wray and the Whalleys have not met this burden. (Request for Statement of Decision, Request No. 10)

The *Nahrstedt* court specifically held that in making the determination of whether a covenant is arbitrary, has burdens that outweigh the benefits, or violates a public policy, the court must not look at how the covenant affects the owner who is challenging the covenant, but at the impact of the covenant on the development as a whole. The *Nahrstedt* court also pointed out that courts defer to the owners' wishes in making such

1 decisions. "Thus, when enforcing equitable servitudes, courts are generally disinclined to
2 question the wisdom of agreed-to restrictions." (*Emphasis supplied*) (*Id. at p. 381*) This
3 is reasonable; courts should defer to the decisions of the property owners affected by the
4 restrictions, except in unusual cases; courts have neither the time nor the expertise to
5 micro-manage common interest developments and to overturn amendments that are
6 enacted by a majority of the Owners.

7 Each of the three tests for "unreasonableness" articulated by the *Nahrstedt* Court
8 is discussed below.

9 **A. The Court has determined that the 1990 and 2003 CC&Rs**
10 **are not "Arbitrary".**

11 The reasons why the Original CC&Rs needed to be amended were articulated in
12 the 1990 Ballot Package, Exhibit L, and in the testimony of Lowell Young and Marian
13 Folker. The reasons why the 1990 CC&Rs needed to be amended were articulated in the
14 Major Change Summary and in Ed Drechsler's September letter to Owners, Exhibits EE
15 and EE-1, and in testimony of Marian Folker and Ed Drechsler. As required by the
16 *Nahrstedt* case, the Court should defer to the wishes of the majority of the property
17 owners. (Request for Statement of Decision, Requests 8 and 9)

18 **B. The Burden on Property Owners is Slight in Comparison**
19 **to the Benefits of the 1990 and 2003 CC&Rs.**

20 The burden on the property owners of having to belong to LMA and pay
21 assessments is slight compared to the benefit conferred by the 1990 and 2003 CC&Rs.
22 All lot owners had to comply with use restrictions and with architectural covenants from
23 the very beginning, on account of language in the Original CC&Rs. The LMA dues are
24 only \$120.00 per year for improved lots and only \$60.00 a year for unimproved lots
25 according to Marian Folker's testimony. Civil Code 1366 limits the dollar amount of any
26 assessment increases without a vote of the Owners. Under the 1990 and 2003 CC&Rs,
27 the property owners benefit from the availability of the lakes, acreage, campground and
28 clubhouse; from having a steady stream of income to maintain, repair and replace these

1 valuable amenities and their components, and from the availability of liability insurance
2 that protects LMA and the LME Owners from the potential for adverse monetary
3 judgments that could cause the loss of these significant assets. Thus, the 1990 and
4 2003 CC&Rs are not "arbitrary" and must be upheld. (Request for Statement of
5 Decision, Request # 10)

6 The *Nahrsted* Court explained that a use restriction would not be enforced if "a
7 change in surrounding properties effectively defeats the intended purpose of the
8 restriction, rendering it of little benefit to the remaining property owners. *{Citations}*"
9 (*Id. at p. 381*) In the case at bar, the opposite is true. The Original Declarations and
10 Lake Deeds were recorded by the developer with no regard to how LMA would get the
11 income needed to pay for the required maintenance and insurance of the common
12 property. Times changed, insurance premiums increased, and a majority of the lot
13 Owners voted to change the CC&Rs to address the changes in maintenance and repair
14 costs. The benefits of maintaining these facilities clearly outweigh the nominal burden of
15 requiring the Owners of the 338 Lots to share the maintenance, repair and insurance
16 costs associated with the lakes and other common property. (Request for Statement of
17 Decision, Request #8, #10)

18 In discussing the concept that CC&Rs will not be enforced if their harmful effects
19 are disproportionate to their benefit, the *Nahrstedt* court explained, *Id. at p. 382*:
20 "Application of the test requires the accommodation of two policies that sometimes
21 conflict: One of these is that persons should live up to their promises; the other is that
22 land should be developed to its normal capacity. (*Ibid.*) Reconciliation of these policies
23 in determining whether the burdens of a recorded use restriction are so disproportionate
24 to its benefits depends on the effect of the challenged restriction on 'promoting or
25 limiting the use of land in the totality.'" (*Emphasis supplied*) In our case, the Court
26 considered the fact that in purchasing their lots, Taggs, the Whalleys and Wray took title
27 subject to recorded CC&Rs that, by their own terms, could be amended by a vote of a
28 majority of the then-Owners of the lots; these owners need to keep their promises to

1 abide by such covenants as amended. The 2003 CC&Rs do not limit the use of the
2 affected land; they just require the Owners who have the right to use the lakes, pursuant
3 to the deed from Decker Enterprises to LMA, to pay nominal annual fees for their
4 upkeep. As explained by LMA's expert Gail Spilos, the CC&Rs, rather than unreasonably
5 burdening the Lots, confer a significant benefit. Properties within LME are desirable
6 mainly because LMA consistently enforces the use restrictions and takes excellent care of
7 the common property, and because owners of lots within LME are able to use the two
8 lakes and the other recreational facilities for a nominal cost. Taggs, Wray and the
9 Whalleys have utterly failed to meet their burden of proving that the 1990 and 2003
10 CC&Rs are arbitrary; that their burdens on the affected properties outweigh their
11 benefits, or that they violate any public policy. (Request for Statement of Decision,
12 Request No. 10)

13 **C. There is no public policy that militates against the**
14 **adoption of these CC&Rs.**

15 The 2003 CC&Rs do not violate any public policy. For example, they contain no
16 language that discriminates against any legally protected class. See 2003 CC&Rs, Exhibit
17 BB. (Request for Statement of Decision, Request No. 10.)

18
19 **6. Defendants failed to challenge the 1990 amendment to the CC&Rs**
20 **within the time allowed by law, and are barred from doing so now.**

21 Among other things, the 1990 amendment made two important changes within
22 the subdivision: the amendment required some members to join the LMA and pay
23 assessments *and it directed the LMA to enforce all of the provisions of the CC&Rs.*
24 Paragraph 18 of the 1990 CC&Rs provides:

25 Enforcement of these CC&Rs shall be by proceedings at law or in equity
26 against any person or persons violating or attempting to violate any
27 covenant either to restrain violation or to recover damages for the violation.
28 Actions to enforce any provision may be instigated by the owners, any one
of them, the Lushmeadows Association Directors or any one of them, and
such entity instigating the action to enforce any of these provisions shall be
entitled to reasonable attorneys' fees and costs from the violating party for

1 expenses incurred for bring[ing] the action (emphasis added).

2 The 1990 CC&Rs provided that from 1990 forward, the LMA could enforce all
3 provisions of the CC&Rs. See 1990 CC&Rs, Paragraph 18. If lot owners believed that
4 this new enforcement power was improper for any reason, *they were required to*
5 *challenge the 1990 amendment*. They failed to mount any challenge to the 1990
6 amendment, even though some of the dissident owners, making the same claims now
7 advanced by Taggs, Wray and Whalleys, alerted all property owners to these issues by
8 circulating letters about these issues and by engaging legal counsel. See POOLE letters,
9 Exhibit R. Taggs, Wray and Whalleys are barred by applicable limitation periods from
10 challenging the 1990 CC&Rs now. Moreover, Taggs and the Whalleys are estopped from
11 challenging the 1990 CC&Rs; the Tally Sheet, Exhibit N, showed that Taggs and
12 Whalleys voted in favor of the 1990 CC&Rs. (Request for Statement of Decision,
13 Request No. 3)

14 Defendants' cause of action for slander of title is likewise time-barred and should
15 have been brought by 1993 for the 1990 CC&Rs and by December, 2006 for the 2003
16 CC&Rs. Code of Civil Procedure § 338G. **Moreover, the statute of limitations for**
17 **rescinding a void instrument is four years.** Requesting Parties' efforts to rescind
18 the 1990 CC&Rs are also barred by this statute. (Code of Civil Procedure § 343;
19 *Robertson v. Superior Court* (2001) 90 Cal. App. 4th 1319, 109 Cal. Rptr. 2d 650).
20 (Request for Statement of Decision, Requests #3, #17, #18)

21 **7. All subdivision owners are subject to amended restrictions**

22 If new restrictions are properly adopted and recorded, then they are enforceable
23 against all Owners, including Taggs, Wray and Whalleys, even if an individual Owner
24 such as Taggs, Wray and Whalleys did not vote for the amendment and even if that
25 individual took title to his or her lot *prior to adoption of the new restriction*. This concept
26 is reasonable and necessary to promote uniform enforcement of rules and restrictions
27 within any given development. Having new rules apply only to new owners would defeat
28 the purpose of creating a community with uniform use restrictions, architectural

1 covenants, and the like.

2 In *Villa de Las Palmas Homeowners' Assn. v. Terifaj* (2004) 33 C 4th 73, an owner
3 objected to an *unrecorded* "no pets" rule. While arbitration concerning the enforceability
4 of the unrecorded rule was pending, *the members voted to amend the CC&Rs to prohibit*
5 *pets*. This amendment was recorded and the Court held that it was enforceable against
6 the owner even though it was clearly adopted long after she purchased her home and
7 despite her argument that she purchased her home in reliance on the belief that she
8 would be able to have pets in her home. Restrictions found in recorded declarations are
9 enforceable equitable servitudes, and are binding upon all owners, regardless of whether
10 the restrictions are found in the original declaration *or in subsequent amendments*
11 *thereto*. In *Villa de Las Palmas*, the Supreme Court grappled with the question of the
12 fairness of such a rule and turned to the legislative history behind California Civil Code §
13 1355(b) in making its decision to enforce the later-enacted restrictions. The Court
14 stated:

15 Section 1355(b)'s legislative history supports the conclusion that all
16 homeowners are bound by amendments adopted and recorded subsequent
17 to purchase. (*Jarrow Formulas, Inc. v. LaMarche*) (2003) 31 Cal.4th 728,
18 736...Subdivision (b) of section 1355 was not part of the bill enacting the
19 Davis-Stirling Act, but was added three years later in 1988... An enrolled bill
20 report from the Department of Real Estate states that "[m]embers of a
21 homeowners' association ... should not forever be saddled with provisions
22 they desire to change." ... Significantly, the report recommended approval
23 of Assembly Bill No. 4426, despite acknowledging that current homeowners
24 may have relied on the restrictions in place at the time they made their
25 purchase, stating: "The failure to include a provision for amendment may
26 indicate an intentional omission. Additionally, some changes may provide
27 for inconsistent uses which were not previously permissible. Many owners
28 may have acquired their interest in the subdivision because of such a
restriction limiting use. To permit an amendment would affect their
reasonable expectations." (Enrolled Bill Rep. on Assembly Bill No. 4426,
supra, p. 2.) The Legislature was thus aware that amendments could affect
settled or reasonable expectations of some homeowners, but it did not limit
the language of section 1355(b) to exempt those homeowners from
subdivision (b)'s operation. Tellingly, nothing in the text of section 1355(b)
indicates the Legislature intended only subsequent purchasers or
homeowners who voted for an amendment to be bound by a use restriction

1 so enacted.

2 The Court in the *Villa de las Palmas* case explained that applying amendments
3 only to owners who acquire title after adoption of the amendment could lead to
4 inconsistency and would defeat the purpose of having CC&Rs in the first place: that is, to
5 create a community where all owners within the community live under the same
6 guidelines for the benefit of all owners. In the case at bar, subdivision Owners who
7 purchased their lots long ago were not required to be members of the LMA or to pay
8 assessments. Circumstances have changed, however, and it is now reasonable that such
9 membership is in fact mandatory. (Request for Statement of Decision #19, #20)

10 **8. Taggs, Wray and Whalleys Are subject to the provisions of the**
11 **2003 CC&Rs**

12 Because the 2003 Amended and Restated Declaration was properly adopted by a
13 majority of the subdivision owners and was properly recorded, its provisions are binding
14 and enforceable against all Lot owners, including Taggs, Wray and Whalleys. California
15 Civil Code § 1355(a) provides that governing documents may be amended “pursuant to
16 the governing documents or to this title” (referencing Civil Code § 1355(b), which applies
17 to governing documents which lack amendment provisions; this sub-section does not
18 apply, since the Original Declarations, Article 14, and the 1990 CC&Rs, Article 17 both
19 permit amendment by a majority of the Lot Owners). Under Civil Code § 1355(a), the
20 amendment is enforceable so long as the appropriate percentage of Owners approves
21 the amendment; that fact has been certified in a writing executed and acknowledged by
22 the officer designated in the declaration or by the association for that purpose, or if no
23 one is designated, by the president of the Association, and that writing has been
24 recorded in the county where the subdivision is located. These requirements were all
25 met when the 2003 CC&Rs were adopted. (Request for Statement of Decision #4, #12,
26 #19, #20)

27 Section 6.1 of the 2003 CC&Rs make membership in LMA mandatory for **all**
28 Owners of interests in LME. Section 7.1 of the Amended and Restated Declaration

1 requires the payment of assessments by Taggs, Wray and Whalleys. California Civil Code
2 § 1353 (a) (1) sets forth certain required contents of governing documents; Civil Code §
3 1353 (b) provides, "The declaration may contain any other matters the original signatory
4 of the declaration or the owners consider appropriate." The 2003 CC&Rs contain all the
5 provisions required by California Civil. Code § 1353(a). (Request for Statement of
6 Decision #19, #20)

7 **9. Conclusion**

8 Taggs, Wray and the Whalleys purchased residential lots which have from the
9 inception, been encumbered by certain recorded instruments; these instruments have
10 always been subject to amendment. LMA has established as a matter of law that these
11 instruments have in fact been amended on two occasions. Taggs, Wray and the Whalleys
12 are bound by these amended restrictions and may not ignore them at their pleasure.
13 To allow Taggs, Wray and Whalleys to rescind the 1990 CC&Rs eighteen years after they
14 were recorded would defeat the reasonable expectations of LME property owners; would
15 destroy LMA's income stream, and would cause the loss of the lakes, campground and
16 clubhouse. Even Dale Bacigalupi, the expert witness for Taggs, Wray and the Whalleys,
17 could testify to no facts or case law that would provide a precedent for such a draconian
18 judicial act as rescinding these recorded instruments.

19 To allow Taggs, Wray and Whalleys to rescind the 2003 CC&Rs five years after
20 they were recorded would also defeat the reasonable expectations of LME property
21 owners; would severely diminish LMA's income stream, and would return the
22 development to a condition in which pre-1990 Owners could use the lakes without
23 helping to pay the expense of keeping them up by borrowing their neighbors' keys or
24 jumping over the fence. Not even Dale Bacigalupi, the expert engaged by Taggs, Wray
25 and the Whalleys, could provide any facts or case law to support such an unprecedented
26 result as the rescission by the court of these recorded instruments that have been relied
27 on by many property owners and their lenders since 2003. Taggs, Wray and Whalleys
28 failed to promptly challenge the recordation of the 2003 CC&Rs, but instead never raised

1 any issues with them until 2007, after LMA sought to collect the assessments to which it
2 was entitled. The court considered the doctrines of laches, waiver and estoppel in finding
3 against Requesting Parties.

4 This Court's Decision upholds the reasonable expectations of the LME property
5 owners and their lenders and protects their property values by ruling that the 1990 and
6 2003 CC&Rs are valid, enforceable equitable servitudes and that Taggs, Wray and
7 Whalleys are bound by them.

8 LMA is entitled to its costs of suit and reasonable attorneys' fees, as provided by
9 Civil Code § 1354 (c), which provides that in an action to enforce recorded declarations
10 of covenants, conditions and restrictions, the prevailing party *shall* recover its attorneys'
11 fees. The language in the statute is mandatory and not permissive. LMA has successfully
12 enforced the covenants set forth in the valid 2003 CC&Rs including the covenants
13 requiring Requesting Parties to belong to LMA and to pay assessments, and is entitled to
14 its fees and costs in accordance with a Memorandum of Costs to be filed with the Court
15 after judgment is entered.

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Dated: November _____, 2008.

By: _____
Honorable Terry A. Cole, Retired
Sitting by Special Assignment