IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

LINDA W. SWAIN, et al., *Plaintiffs/Appellees*,

v.

BIXBY VILLAGE GOLF COURSE INC, et al., *Defendants/Appellants*.

No. 1 CA-CV 18-0397
FILED 9-19-2019

Appeal from the Superior Court in Maricopa County
No. CV2014-051035
The Honorable John R. Hannah, Judge

AFFIRMED

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OPINION

Presiding Judge Randall M. Howe delivered the opinion of the Court, in which Judge Jennifer M. Perkins and Judge David D. Weinzweig joined.

H O W E, Judge:

¶1 TTLC Ahwatukee Lakes Investors, LLC ("TTLC") appeals a final judgment granting a permanent injunction enforcing a covenant requiring the operating of a golf course on particular property. TTLC contends, among other arguments, that because the covenant was restrictive rather than affirmative, it should be interpreted to permit, but not require, the operating of a golf course on the property in question.

¶2 The Arizona Supreme Court has made clear in *Powell v. Washburn*, 211 Ariz. 553 (2006), however, that whether a covenant is deemed restrictive or affirmative, it must be interpreted according to its enactors' intent. In this case, the circumstances surrounding the creation of the covenant and the covenant's language demonstrate that its enactors intended to require the operation of a golf course on the property. Because this Court rejects TTLC's argument and the other arguments discussed below, this Court affirms the trial court's ruling granting the injunction.

FACTS AND PROCEDURAL HISTORY

¶3 Ahwatukee is a "master planned community" in Phoenix, Arizona, composed of some 5,200 homes built around the Ahwatukee Country Club Golf Course and the now-closed Ahwatukee Lakes Golf Course. Several of the homes either border or feature prominent views of at least one of the golf courses. Linda W. Swain and Eileen T. Breslin each own property abutting the Lakes Golf Course.

¶4 Chicago Title Agency of Arizona, Inc. (the "Declarant"), was the original owner of the Lakes Golf Course and at some point, acquired the Country Club Golf Course. In 1986, it recorded a deed restriction on the Lakes Golf Course. The deed restriction was made "pursuant to A.R.S.

§ 42–125.01[1], restricting the use of [the] property to use as a golf course, facilities, and improvements thereto, for ten (10) years[.]" The restriction further recited that it could be "amended, revoked or extended for any time at the discretion of the then owner of the property, subject to the provisions of A.R.S. § 42–125.01." Pursuant to this provision, the Declarant recorded two amendments to the deed restriction. The First Amendment extended the deed restriction's term one more year and the Second Amendment extended it five more years.

¶5 In November 1992, the Declarant recorded a Declaration of Covenants, Conditions, Restrictions and Easements covering both golf courses. The Declaration restated the 1986 deed restriction, along with the First and Second Amendments. It also stated that the Covenants, Conditions, and Restrictions ("CC&Rs") were established for the mutual benefit of the "Declarant and all present and future owners" and "any owner of property located within the Ahwatukee master planned community"—the "Benefitted Persons." It stated that "[b]y recording [the] Declaration, the Declarant intends to comply with the requirements and obtain the benefits of Arizona Revised Statute 42–146"—a tax valuation statute that applied a special valuation method to any property that constituted a "golf course." The Declaration provided that the property could be developed for purposes other than a golf course only if 51% of the 5,200 Ahwatukee homeowners approved of removing the deed restriction or if a court found a "material change in conditions or circumstances" that justified removing the restriction.

¶6 In June 2006, Bixby Village Golf Course, Inc.—with Wilson Gee as its president—and a group of investors purchased both golf courses for $5.6 million. Around this same time, Bixby leased the two properties to Ahwatukee Golf Properties, LLC ("AGP")—a limited liability company Gee and his wife owned. The lease agreement required AGP to operate the golf courses. It also provided, however, that Gee would receive a 30% bonus share of any net proceeds if the Lakes Golf Course sold for more than $4.2 million. With an eye to redeveloping the Lakes Golf Course, Gee met with the umbrella homeowner association for the Ahwatukee master-planned community—the Ahwatukee Board of Management ("ABM")—in fall 2008, and with a Phoenix City Councilman the following year.

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1 In 1987, A.R.S. § 42–125.01 was renumbered to A.R.S. § 42–146. 1987 Ariz. Sess. Laws, ch. 134, § 20. In 1997, section 42–146 was repealed and its substance was moved to A.R.S. §§ 42–13151 through –13154. 1997 Ariz. Sess. Laws, ch. 150, § 172.

¶7 In May 2013, Bixby closed and dismantled the Lakes Golf Course. It placed a barbed-wire fence around the perimeter, drained the lakes, shut off all power, stripped the sod off the greens, and removed hundreds of irrigation heads. Because of these actions, Swain and Breslin sued Bixby in October 2014, claiming that closing the course violated the CC&Rs.

¶8 While the lawsuit was pending, Bixby entered a contract to sell the Lakes Golf Course property to TTLC in March 2015. The contract conditioned the sale on the successful completion of a feasibility study into converting the golf course property to a residential community. Satisfied by its study, TTLC completed the transaction in June 2015, buying the property for $9 million, the value it placed on the property without the deed restriction. Under the terms of the contract, TTLC paid Bixby a $750,000 down payment and executed a non-recourse promissory note, promising to pay Bixby the remaining $8.25 million on the earlier of June 19, 2018, or 90 days "after Final Approval by the City of the Final Plat of the Real Property." The parties negotiated a non-recourse loan to protect TTLC from any substantial monetary liability if the deed restriction was not removed. The contract acknowledged that Bixby had stopped using the property as a golf course and that a lawsuit about that decision was pending.

¶9 Thereafter, Swain, Breslin, and Bixby stipulated to dismiss Bixby from the case. The trial court consequently dismissed all claims against Bixby—except for an attorneys' fees claim—without prejudice. Swain and Breslin then amended their complaint to name TTLC as the defendant and to add claims for injunctive relief, breach of contract, and breach of the covenant of good faith and fair dealing.

¶10 TTLC immediately moved for summary judgment, asserting that the Declaration did not require the owner of the Lakes Golf Course to affirmatively operate a golf course on the property. Swain and Breslin opposed the motion and cross-moved for partial summary judgment, countering that the Declaration did require a golf course. At the hearing on the motions, TTLC not only reiterated its argument that the Declaration's plain language did not require it to operate a golf course, but added that interpreting the Declaration's language to so require would violate the Thirteenth Amendment's prohibition against slavery. The court denied TTLC's motion and granted Swain and Breslin's cross-motion, finding that the Declaration requires the operation of a golf course for the benefit of those the Declaration described as Benefitted Persons and that the covenant did not violate the Thirteenth Amendment. The court also ruled that it

would conduct an evidentiary hearing to determine whether injunctive relief was appropriate.

¶11 Meanwhile, having failed to persuade the court to accept its interpretation of the Declaration, TTLC sought to persuade the Ahwatukee homeowners to modify the Declaration to eliminate the golf course requirement. TTLC proposed eliminating the golf course and redeveloping the property into "a residential community" with "30 percent open space" and "a community supported farm in conjunction with [a] school." TTLC launched a "CC&R amendment campaign" to convince the Benefitted Persons to accept the plan. It sent multiple mailings, distributed fliers, held outdoor events, and hired "professional door knockers." After campaigning for nearly two years, however, TTLC obtained approval from only 28 percent of the homeowners, far short of the 51 percent necessary.

¶12 Having failed to persuade the Ahwatukee homeowners to modify the Declaration, TTLC returned to court, filing a counterclaim alleging that it was entitled under Paragraph 6 of the CC&Rs to petition the Maricopa County Superior Court to modify the Declaration if "a material change in conditions or circumstances" to the property had occurred. It argued that such a change had occurred because maintaining a stand-alone golf course would not be profitable. It also argued that it had the discretion to decide whether a material change had occurred and that, in its exercise of that discretion, it would build a new residential community and a 9-hole par 3 golf course on the former Ahwatukee Lakes Golf Course.

¶13 The court held an evidentiary hearing to determine whether injunctive relief was appropriate and whether TTLC was entitled to have the Declaration modified to remove the covenant. During the hearing, the court heard testimony from several witnesses about the condition of the property and feasibility of operating a golf course on it. The court also received several exhibits, showing the once lush green landscape of the property now barren with overgrown weeds.

¶14 TTLC's expert asserted that restoring the golf course on the subject property would cost at least $14 million, with no certainty of ever making a profit. Swain and Breslin's expert, Buddie Johnson, disagreed. He testified that restoration would cost between $4 million and $6 million and that, based on the area's demographics, a shorter, less difficult "executive" golf course was highly likely to prosper. He explained that the property was in a "highly feasible environment" and was a "perfect site" for an executive golf course. He elaborated that the site was amid a "dense affluent

population" that would have "very easy and quick access to the golf course."

¶15 Johnson added that the golf course "should not have failed" under Bixby's control; it failed only because it was "very poorly operated" and "not appropriately marketed[.]" He noted that, in the last two and a half years, at least five "substantial [and] capable" buyers had expressed a "strong interest" to him in purchasing the Lakes Golf Course property as a stand-alone golf course.

¶16 Swain and Breslin also testified. Swain testified that she had bought her home because it "overlooked a lush green fairway and had a view of the Superstition Mountains and Four Peaks." She also testified that, at the time, "[t]here was a $26,000 premium" on the lot that she purchased because it "had a beautiful view." She recounted how that the Lakes Golf Course had progressively deteriorated in appearance since 2006; the grass had withered and died, and the lakes became so drained that the wildlife began to perish. She explained further the property began emitting an "overwhelming" stench. She also noted that the condition of the property was "very upsetting" to her and her neighbors because they had "put their money into their dream retirement home" and they were now seeing the property "deteriorating" and "looking at that view from a chain link fence."

¶17 Breslin testified that she was aware of the CC&Rs when she had purchased her home. She also recalled Gee, in 2008, "proposing to build some more housing developments in the area." She further recalled the day that the Lakes Golf Course was "finished off," describing it as "a very sad day because they put up these horrible chain link fences and it felt like we were in prison." She also noted that the condition of the property had worsened since the golf course's closing. She described the once-illustrious property behind her home as a dead, desolate "wasteland."

¶18 In May 2018, the trial court declared that TTLC was not entitled to modify the Declaration's deed restriction and entered a mandatory injunction ordering TTLC to restore and operate a golf course on the property. The court found that TTLC had breached both the CC&Rs and the implied covenant of good faith and fair dealing, "which required [it] to not impair the rights of the other to receive benefits of the agreement." The court further found that by accepting fee title to the property, TTLC had bound itself to comply with the Declaration's provisions. The court noted in addition that TTLC's determination of a "material change" was not binding or entitled to deference. The court found that the evidence did not show that Bixby was unable to operate the golf course profitably, with

adequate maintenance, at any point in time before it closed the course. TTLC timely appealed.

DISCUSSION

1. Interpretation of the 1992 Deed Restriction

¶19 TTLC argues that the trial court erred in granting Swain and Breslin's cross-motion for summary judgment and ruling that the Declaration requires the owner of the Lakes Golf Course to affirmatively operate a golf course on the property. We review de novo a trial court's grant of summary judgment, viewing the facts in the light most favorable to the party against which summary judgment was entered. *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 140 ¶ 26 (App. 2006). We also review the interpretation of restrictive covenants and other contracts de novo. *Coll. Book Ctrs., Inc. v. Carefree Foothills Homeowners' Ass'n*, 225 Ariz. 533, 537 ¶ 11 (App. 2010).

¶20 The covenant in Paragraph 2 of the Declaration provides in pertinent part that

> [t]he Property shall be used for no purposes other than golf courses and such improvements and facilities (including without limitation, clubhouses, restaurants, pro shops, overnight lodging facilities, resort and connected recreational facilities, bars, parking areas and golf cart trails) and uses as are reasonably related to, convenient for or in furtherance of golf course use or the accommodation of golf course patrons and guests[.]

TTLC contends that this is a "restrictive covenant" that restricts activity rather than an "affirmative covenant" that imposes an affirmative duty on the owner to actively operate a golf course on the property. According to TTLC, the covenant's terms allow it to choose to maintain a golf course or to let the property remain "idle." Practically speaking, this would mean that the property may be left barren and overgrown with weeds, emitting what Swain and Breslin characterize as an "overwhelming stench," yet comply with the covenant.

¶21 TTLC's argument, however, runs counter to the principles governing the interpretation of restrictive covenants in Arizona. Although earlier Arizona decisions stated that restrictive covenants must be strictly construed in favor of free use of the land and against any restriction, the Arizona Supreme Court held in *Powell* that restrictive covenants should be

construed "to give effect to the intentions of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." 211 Ariz. at 556–57 ¶¶ 12–13 (quoting Restatement (Third) of Property: Servitudes § 4.1(1)). This rule is consistent with "long-standing Arizona case law holding that enforcing the parties' intent is the 'cardinal principle' in interpreting restrictive covenants," *id.* (quoting A*rizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 449 (1993)), and recognizes the benefits of restrictive covenants, *id.* at 557 ¶ 16. Applying the *Powell* rule to this case, the covenant must be interpreted to require the owner of the Lakes Golf Course property—TTLC in this case—to maintain and operate a golf course on the property.

¶22 The circumstances surrounding the covenant's creation and the covenant's language show that the covenant was intended to require the continuous operation of a golf course on the property. The Lakes Golf Course was a part of the original development of Ahwatukee from the 1970s and was an important amenity for Ahwatukee homeowners. Its importance was documented in 1986, when the Declarant created a restriction on the property's deed limiting the use of the property to a golf course for 10 years. The Declarant amended the restriction twice, first adding one year to the restriction's time period and then adding five more years to it. In 1992, the Declarant included the restriction as a term of the CC&Rs of the property. These circumstances show the original owner intended that a golf course should be maintained on the property.

¶23 The covenant's language confirms its twin purposes: first, to maintain the property so that it qualifies for the tax benefits under A.R.S. §§ 42–125.01 and 42–146, and second, to protect the Benefitted Persons' interest in living next to, or having views of, a golf course. As for the tax benefits, the 1986 document specifically created the deed restriction "pursuant to A.R.S. § 42–125.01" and imposed the requirement that any amendment to the restriction be made "subject to the provisions of A.R.S. § 42–125.01[.]" The Declaration further provides that "the Declarant intends to comply with the requirements and obtain the benefits of Arizona Revised Statutes Section 42–146 regarding the valuation and taxation of golf courses." This purpose can be achieved only if golf can be played or practiced on the property. *See Phxaz Ltd. P'ship v. Maricopa Cty.*, 192 Ariz. 490, 494 ¶¶ 20–22 (App. 1998) (finding that land is not a "golf course" within the meaning of section 42–146 if golf cannot be practiced or played on the property on the valuation date).

¶24 As for protecting the Benefitted Persons' interest in living next to a golf course, the Declaration states that the CC&Rs were created in part for the benefit of the Benefitted Persons and that those individuals could affirmatively enforce the CC&Rs. The Benefitted Persons thus have the right to ensure that they have a golf course next to, or within view of, their homes. Interpreting the covenant to allow the current owner to leave the property "idle" completely frustrates this purpose. TTLC presents the options neutrally, as between a golf course or no golf course. But the option of no golf course does not leave the property merely without a golf course, but—as Swain and Breslin testified—a dead, desolate "wasteland" with overgrown weeds, ringed by a chain-link fence. The choice of such an alternative destroys the covenant's purpose and could not be within the original owner's intention in creating the covenant.[2]

¶25 TTLC argues, however, that certain language in Paragraph 2 specifically grants it the right to cease operating a golf course. One clause of Paragraph 2 states that the Declarant reserves the right to redesign or reconfigure the golf course or "remove, modify, alter, relocate, replace, expand, abandon, demolish, cease the use of or rebuild any of the improvements or facilities related to the use of the [p]roperty for golf courses[.]" But this clause does not support TTLC's argument. The first part gives TTLC the right to abandon, demolish or cease to use any of the improvements or facilities related to the use of the property as a golf course, not the course itself. The second part then confirms the point, giving TTLC the right only to "redesign or reconfigure" the golf course, not to remove it. Accordingly, in context of that language, the authority to cease use of improvements or facilities on the property does not empower TTLC to completely cease using the entire property as a golf course.

¶26 TTLC next argues that Paragraph 2 also expressly provides for an "exception" to the restriction, granting it the right to leave the property "essentially undeveloped property." The phrase on which TTLC focuses provides that the property may be used for "easements[,] . . . pedestrian trails and walks, cables, utilities, drainage and other similar easements and rights of way[.]" Nothing in this language, however,

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[2] TTLC also argues that, because the Benefitted Persons do not have the right to use the property for golf, "it only makes sense" that they cannot compel the owner to provide a golf course. This argument fails because the issue is not whether the homeowners play golf on the golf course, but whether they have the right to have a golf course next to or within view of their homes.

suggests that the property may remain "essentially undeveloped property."

¶27 Under the *Powell* rule, the circumstances surrounding the creation of the covenant and the covenant's language itself demonstrate that covenant must be interpreted to require the owner of the Lakes Golf Course property to operate a golf course on the property. The trial court thus correctly granted Swain and Breslin's cross-motion for partial summary judgment and denied TTLC's motion for summary judgment.

2. Modification of the Declaration

¶28 TTLC argues that the trial court erred in finding that TTLC's determination that a "material change" existed was neither binding nor entitled deference. TTLC asserts that, as a successor to the Declarant, Paragraph 6 to the Declaration gives it unfettered discretion to determine whether a "material change in conditions or circumstances" has occurred and that the court must defer to its determination and then evaluate its proposed modification under a reasonableness standard. Paragraph 6 provides in pertinent part that

> if Declarant or Developer (including their successors or assigns) determines that there has been a material change in conditions or circumstances affecting the Property or the [CC&Rs] . . . Declarant or Developer may petition the Maricopa County Superior Court or any other court or adjudicative body of competent jurisdiction for modification of this Declaration.

¶29 TTLC's interpretation of the provision is incorrect because it would make the court's role in the modification process superfluous. Had the drafters of the provision intended for the property owners' discretion to be absolute, they would not have required that the party seeking modification petition the court to request approval of what it determined to be a "material change" in conditions or circumstances. Moreover, the provision's language implies that the original drafters intended that the established common law rules for modifying a restrictive covenant apply. Had the drafters intended that the court apply a different standard of review, they would have said so or otherwise explicitly provided unfettered discretion to the property owner or a definition for "material change." TTLC's determination about whether a "material change" existed is therefore not entitled deference.

¶30 TTLC argues that if this Court holds that it is not entitled to absolute deference in its determination of a "material change" of circumstances, this Court should adopt the deferential standard of review articulated in *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195 (App. 2007). That decision adopted the rule from the Restatement (Third) of Property: Servitudes § 6.13 that requires challengers to a proposed action establish that the action is unreasonable. *Id.* at 201 ¶¶ 26–27. But *Tierra Ranchos* is inapposite because it involved a CC&R that explicitly provided a community association "sole and absolute discretion[]" to determine whether a proposed modification to property "violates any provision of [the] Declaration [] Guidelines" or "is unsatisfactory or aesthetically unacceptable." *See id.* at 197 ¶ 5. The provision here, however, does not grant the declarant, developer, or successor absolute discretion to determine whether a "material change" exists or to modify the Declaration. Moreover, *Tierra Ranchos* involved the discretionary decisions of community associations concerning modifications to property, while the issue here involves a successor's decision regarding modification to a covenant. *See id.* at 201 ¶ 23 (noting that the issue before the court was "what deference, if any, should be given to a community association's discretionary decisions concerning modifications or improvements to property.").

¶31 To obtain relief from the covenant, then, TTLC needed to prove that changes occurred that were "so fundamental or radical" that they "defeat[ed] or frustrate[d]" the covenant's purposes. *Decker v. Hendricks*, 97 Ariz. 36, 41 (1964). The trial court correctly found that no such changes had occurred. TTLC argued that economic conditions made operating a stand-alone golf course unprofitable. Even if that were true, TTLC could not rely on that fact because the alleged unprofitability was a fact known when TTLC bought the property. TTLC cannot buy a business already failing because of economic conditions and then claim that its unprofitability is a "material change" in circumstances justifying the vitiation of a covenant on the property.

¶32 Even if TTLC could be allowed to so claim, however, the evidence does not support that a material change had occurred. TTLC did present expert testimony that operating a stand-alone golf course would be unprofitable. But Swain and Breslin presented their own expert who testified that a golf course would be profitable. The trial court weighed the conflicting evidence and found that Swain and Breslin's evidence was more credible, and we defer to the trial court's factual findings, *see FL Receivables Trust 2002-A v. Ariz. Mills, L.L.C.*, 230 Ariz. 160, 166 ¶ 24 (App. 2012), and will not "reweigh the credibility of expert testimony on appeal," *A*

Tumbling-T Ranches v. Flood Control Dist. of Maricopa Cty., 222 Ariz. 515, 535 ¶ 59 (App. 2009). The trial court did not err in declining to modify the covenant.

3. Grant of Permanent Injunction

¶33 TTLC argues that the trial court erred in granting Swain and Breslin a permanent injunction because restoring the golf course is economically unfeasible. We review the trial court's grant of an injunction for an abuse of discretion. *Cheatham v. DiCiccio*, 240 Ariz. 314, 317 ¶ 8 (2016). If substantial evidence supports an injunction, we will not substitute our judgment for the trial court's. *Wood v. Abril*, 244 Ariz. 436, 438 ¶ 6 (App. 2018). Whether a covenant should be enforced depends on equitable considerations, such as the parties' relative hardships, the parties' misconduct, public interest, and adequacy of other remedies. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47 ¶ 10 (App. 2007).

¶34 The trial court did not abuse its discretion in enforcing the covenant. The evidence showed that Swain and Breslin would continue to suffer considerable hardship if the injunction were denied. Swain and Breslin had purchased their homes relying on the fact that the owner of the Lakes Golf Course property would maintain and operate it as a golf course. By affirmatively destroying the golf course and refusing to rebuild it, Bixby and its successor, TTLC, have replaced Swain's and Breslin's views of grass and lakes with a barren stench-filled "wasteland" of overgrown weeds ringed by a chain-link fence. And no remedy but an injunction will protect Swain and Breslin from the continuation of this harm.

¶35 The hardship TTLC suffers from the covenant's enforcement, in contrast, does not compare. TTLC argues that forcing it to rebuild and maintain a golf course is inequitable because a golf course is not economically viable. Mere economic struggles, however, cannot serve as a basis for abrogating a restrictive covenant and rendering its enforcement inequitable. *See Shalimar Ass'n v. D.O.C. Enters., Ltd.*, 142 Ariz. 36, 45 (App. 1984). And in any event, TTLC did not establish that a golf course on the property would be economically unviable. *See supra* at ¶ 32.

¶36 Moreover, whatever hardship will come from requiring the rebuilding of the golf course TTLC brought upon itself. As the trial court found, TTLC knowingly violated the covenant. TTLC purchased the property with the sole intent to redevelop it into a lucrative residential development and allowed the property to further deteriorate while pursuing that goal. TTLC knew before it purchased the property that

several homeowners opposed any changes to the restriction. In fact, it was entirely aware of a pending lawsuit to enforce the deed restriction. Nevertheless, TTLC took a calculated risk when it decided to buy the property and wage a costly and aggressive campaign to modify the Declaration. Permitting TTLC to now claim that an enforcement of the restriction works a hardship on it would indeed be inequitable: "[N]o court will allow the perpetrator of a wrong to rely upon the contention of relative hardship." *Decker*, 97 Ariz. at 41. TTLC acted at its peril, and its inequitable conduct in the face of opposition supports the granting of the injunction.

¶37 Enforcing the deed restriction through a permanent injunction also preserves public policy and is in the public interest. The ABM community has about 5,200 homes, and many of those homeowners relied on the continued enforcement of the covenants and restrictions. Moreover, Arizona's public policy is to protect those who have purchased property relying on restrictions from the invasion of those who attempt to break down the guaranties of home enjoyment under the guise of business necessities. *Cont'l Oil Co. v. Fennemore*, 38 Ariz. 277, 286 (1931). The trial court therefore did not abuse its discretion in requiring that TTLC restore and operate a golf course on the property.

¶38 In a related argument, TTLC asserts that an injunction would violate the Thirteenth Amendment to the United States Constitution. The Thirteenth Amendment declares that neither slavery nor involuntary servitude shall exist, and the term "involuntary servitude" was intended to cover those forms of compulsory labor akin to "African slavery[.]" *Butler v. Perry*, 240 U.S. 328, 332 (1916).

¶39 We reject TTLC's Thirteenth Amendment argument. TTLC voluntarily entered a contract to purchase the Lakes Golf Course property, with full knowledge of the risks involved in the transaction. Moreover, despite its voluntary choice to purchase the encumbered property, its argument fails because a covenant—whether affirmative or negative—is enforceable against subsequent purchasers who take their ownership with notice of the restriction. *See Shalimar,* 142 Ariz. at 43–44 (enforcing by mandatory injunction an implied covenant to maintain property as a golf course, despite its purported unprofitability). The trial court's ordering an injunction therefore did not violate the Thirteenth Amendment.

4. Attorneys' Fees

¶40 Because we do not reverse the trial court, we need not vacate its award of attorneys' fees. Both parties, however, request an award of

attorneys' fees and costs incurred on appeal. Generally, we enforce a contractual attorneys' fees and costs provision according to its terms. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 13 ¶ 17 (App. 2011). The Declaration provides, in relevant part:

> In the event of any violation or breach of, or default under, the provisions of this Declaration, . . . any Benefitted Person entitled to enforce this Declaration may . . . seek injunctive relief against the then owners, occupants or users of the [p]roperty causing the breach, default or violation . . . and[] if . . . such Benefitted Person enforcing this Declaration prevails, . . . such Benefitted Person shall be entitled to reimbursement of all court costs and reasonable attorneys' fees from said defaulting owner, occupants or users.

Because the Benefitted Persons have prevailed in this appeal, Swain and Breslin may recover reasonable attorneys' fees and taxable costs upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶41 For the foregoing reasons, we affirm.

AMY M. WOOD • Clerk of the Court
FILED: pjl