Supreme Court Case No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALEX CHEVELDAVE,
Plaintiff and Appellant,

v.

TRI PALMS UNIFIED OWNERS ASSOCIATION
Defendant and Respondent.

After a Decision by the Court of Appeal
Fourth District, Division Two
No.: E066461

Appeal from an Order of the
Superior Court for Riverside County
The Honorable Harold W. Hopp, Judge Presiding

RESPONDENT TRI PALMS UNIFIED OWNERS ASSOCIATION'S PETITION FOR REVIEW

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PETITION FOR REVIEW

I.
ISSUES PRESENTED FOR REVIEW

1. Does the shared right owned by all homeowners within a subdivision to use and enjoy an appurtenant privately-owned recreational facility which was developed as part of the master planned community, with corresponding mandatory maintenance assessment responsibilities, constitute the "mutual or reciprocal easements appurtenant to the separate interests" contemplated by California Civil Code 4095, subdivision (b) as common area to support a conclusion the subdivision is a common interest development subject to the Davis Stirling Act?

2. If a subdivision is not subject to the Davis Stirling Act by operation of law, does public policy nevertheless compel the enforcement of a recorded declaration through which the subdivision owners collectively agreed to create and imbue a managing association with the same powers and duties of a homeowner association governing a common interest development under the Davis Stirling Act?

II.
REASONS SUPREME COURT REVIEW IS APPROPRIATE

This Petition raises the important question of whether the Davis Stirling Act (the "Act") will apply to a master planned community in which the common area (e.g., the property interests owned mutually by the owners) is not a fee interest but rather an easement to use appurtenant property constructed as part of the original development and for which the owners pay a mandatory maintenance fee. Equally important is the question of the power of the homeowners to organize and create a homeowner association with the same rights and duties as provided for by the Act.

The Act is a comprehensive statutory scheme enacted in 1985 to regulate the operations of both incorporated and unincorporated homeowner associations created to govern common interest developments. Now codified at California Civil Code section 4000 et seq., the Act defines the respective rights and obligations of homeowners and homeowner associations covered by the Act. In many ways, the Act operates as the functional equivalent of the Bill of Rights for California owners of property within a common interest development.

For example, the Act establishes rules providing for transparency in how a homeowner association can adopt operating rules (Civil Code section 4340 et seq.), establishes disclosure obligations of both owners and

association alike and document inspection rights of the members (Civil Code sections 4525 et seq., 5200 et seq., and 5300 et seq.), provides rules rooted in fairness governing how elections (Civil Code sections 5100 et seq.) and meetings (Civil Code sections 4900 et seq.) must be conducted, establishes property use and maintenance presumptions (Civil Code sections 4700-4790), and more. The applicability of the Act to any particular subdivision has far-reaching consequences.

Not all subdivisions created in California are automatically subject, by operation of law, to the rigors of the Act. Under California Civil Code section 4200 a common interest development subject to the Act is created whenever a separate interest coupled with an interest in "common area" or membership in the association is, or has been, conveyed provided all the following are recorded: (a) A declaration; (b) a condominium plan, if any exists. (c) a final map or parcel map…. for the common interest development. Central to the issues raised by this Petition, California Civil Code section 4201 clarifies that the Act only applies by operation of law to developments which include common area.

The question of what constitutes common area in the context of planned developments – including subdivisions like the subject of this Petition in which the development is subdivided into lots with separate interest structures as opposed to condominiums with shared walls and more

obvious common area -- has confounded both the courts and the state legislature since the enactment of the Act.

In 1991, faced with the unintended consequences arising from the Act's original, narrow definition of common area requiring fee ownership which excluded too many subdivisions from its application, the California legislature expanded the definition of common area for planned developments to extend to those subdivisions in which the owners share "mutual or reciprocal easement rights" over property "appurtenant to the separate interests." (California Civil Code section 4095, subdivision (b).) Indeed, the California Department of Real Estate, as sponsor of the bill, posited:

> The sponsor asserts there is no reason to distinguish between a planned development where a homeowners association or the homeowners own and have a duty to maintain specific identified land as common area from the projects where the only obligation of the association is maintenance of **common easements**, such as roads, walkways, and trails.

(See Accompanying Motion for Judicial Notice.)

To close that gap, the Legislature approved Civil Code section 1351, subdivision (b), now section 4095, subdivision (b), and in so doing expanded the definition of common area for planned developments to include those subdivisions where the only thing the owners own in common are easements to use appurtenant property. Under the express language of California Civil Code section 4095, subdivision (b) the "mutual or

reciprocal easements" which will constitute the common area need only be appurtenant to the separate interests.

There has been a fair amount of confusion as to what is meant by "mutual or reciprocal easements" in this unique context. As one leading treatise observed:

> The statute's use of "mutual or reciprocal easement" … is problematic because it is unclear what constitutes a mutual or reciprocal easement under Civil Code section 4095. In most developments with easement rights or offsite maintenance obligations in favor of or imposed on the association or owners, the easement rights or obligations are usually unilateral in favor of the homeowners association or the owners and are not necessarily "mutual or reciprocal," in the ordinary sense of shared obligations or rights of use.

(CEB, Forming California Common Interest Developments, §1.38.)

Until the Fourth District Court of Appeal, Division Two, published its decision in this matter, the questions presented have been regarding the nature of the rights inuring to the owners ("appurtenant to the separate interests") and whether the property rights in question are truly easements or something else. Decisions have been focused on whether the rights appurtenant to the separate interests were in the form of shared *use*, which would be a mutual easement, or rather in the nature of a restriction precluding the owner of the fee from doing something on the burdened property, which would be a restrictive covenant or an equitable easement. These are not the same things. See, generally, *Comm. to Save the Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92

Cal.App.4th 1247, 1269 ("Beverly Highlands"), discussing the distinctions and cautioning that easements in this context of determining whether such property interests are sufficient to constitute common area for a planned development are **not** to be confused with restrictive covenants and equitable servitudes.

Confounding the question of what type of easements will qualify as the "mutual or reciprocal easements appurtenant to the separate interests" under section 4095, the published decision in this matter creates even greater uncertainty in the law by citing to cases interpreting equitable servitudes and concluding based on those cases that: "A mutual easement has the same meaning as a reciprocal easement." (Slip Opinion, pp. 17-18.) Curiously, the Court of Appeal held that the servient tenement (which could be a road, walkway, or – as here – appurtenant recreational facilities), must have the same kind of rights to use the dominant tenement (which would be the individual lots) to qualify as common area. (Id.) As explained below, this is neither the best interpretation of section 4095, subdivision (b) nor is it consistent with existing case law or public policy.

Since the Legislature's adoption of the expanded definition of common area for a planned development to include "mutual **or** reciprocal easements appurtenant to the separate interests," suggesting they are not the same thing, the lower courts have struggled to interpret and apply this phrase consistently. The underlying published decision adds to this

confusion to suggesting that both the mutuality and reciprocity contemplated under section 4095, subdivision (b) is not intended to mean mutual among the owners, who ordinarily possess the easement rights as to a burdened parcel mutually, but that reciprocity of use must also exist with the owner of the burdened fee. (Slip Opinion, p. 17-18.) The Court essentially held it must be a two-way street between the owners within the subdivision, and the burdened property which is the subject of the easement which could be a street, walkway, or – as here – recreational facilities developed as part of the master planned community owned in fee by another.

Supreme Court review is essential to settle this important question. To that end, pursuant to California Rules of Court, Rule 8.500(b)(1), this Petition seeks review of the underlying published opinion by the California Fourth District Court of Appeal, Division Two (attached as Exhibit A), which concluded that Tri Palm Estates, a planned development in Riverside County, California, is not a common interest development because the easements that the owners possess to use appurtenant recreational facilities are not **both** mutual and reciprocal and that reciprocity of use would have to run in favor of the owner of the burdened land. The Court of Appeal so held because the owner of the appurtenant recreational facilities has no reciprocal right to use any of the separate interest lots. (Slip Opinion, p. 17-18.)

In so doing, the opinion reversed the trial court's decision granting a special motion to strike an Association owner's lawsuit against the Association challenging the Association's decision to settle certain disputes with the owner of the adjacent recreational facility developed as part of the master planned community. That resolution arose out of a lengthy, complicated dispute with the owner of the recreational facilities brought by the Association under both the statutory authority accorded homeowner associations under the Act and pursuant to the authority vested in the Association under the express language of its governing documents.

Dissatisfied with the result, an owner (Plaintiff and Appellant Alex Cheveldave) brought a complaint in the underlying proceedings challenging the Association's authority to resolve the earlier dispute with the recreational facility. Reversing the trial court's determination that the Association had statutory standing as a common interest development, the Court of Appeal held that even though all owners shared, mutually, an easement to use the appurtenant recreational facilities and paid mandatory maintenance assessments, the owner of the recreational facilities did not have the "reciprocal" right to use the owners' individual lots and so the easements did not qualify as common area under section 4095, subdivision (b). (Slip Opinion, p. 19.) As such, the Court of Appeal held that the Association's special motion to strike should have been denied because, at least under the minimal merits standard applicable to that particular motion,

the owner bringing suit to challenge the Association's resolution of the disputes concerning the recreational facilities could contest the Association's *statutory* standing to settle the suit on behalf of the homeowners under the Act since the easements do not qualify as "common area" under section 4095, subdivision (b).

For the very same reasons, the Court of Appeal also declined to enforce the recorded declaration of restrictions through which the owners within the subdivision had previously agreed to create a homeowner association to serve in the same capacity as if subject to the Act, even if it were not a common interest development by operation of law. (Slip Opinion, pp. 19-20.)

In concluding Tri Palm Estates lacked common area, the appellate court specifically rejected the idea that the homeowners' collective and shared right to access and use the appurtenant recreational facility, with corresponding maintenance assessment responsibilities in favor of the recreational facilities, were the type of "mutual or reciprocal easements" contemplated by Civil Code 4095, subdivision (b) which expands the definition of common area to certain easement rights appurtenant to the separate interests in a planned development.

The Court of Appeal's analysis of the Association's common area and legal status is in conflict with other appellate decisions touching upon this issue and does not comport with the legislative intent behind section

4095, subdivision (b), creating great uncertainty in the law as to how the expanded definition of common area should be applied. Supreme Court review of this question is critical to the governance of thousands of associations throughout the State of California and review is now necessary secure uniformity of the law. Given the breadth of the Act and its technical requirements, this is an important question crucial to the day-to-day governance of those planned developments existing throughout the State of California in which the common area consists of such easements (property use rights) appurtenant to the separate interests. Associations throughout the State of California need clear guidance on whether and under what circumstances the rules set forth in the Act will apply to them.

Equally important is the Court's inexplicable rejection of the determination by the Association's membership, as expressed in the governing documents of the Association recorded against the properties by the will and consent of the majority of the membership, to create and imbue an association with the powers and duties of a common interest development. In any event, where a homeowner association's status under the statutory definitions set in the Act is questionable, the rights of the majority of the property owners to create an association with all the powers and duties of a common interest development under the statutory definitions should be sufficient to settle the question. The rationale given by the Court of Appeal in its rejection of the express language of the recorded

declaration giving the Association the power and duty to enforce the very rights which formed the basis for the homeowner's claim is circular, relates only to the question of whether the Association is a common interest development as a matter of law, and ignores the will of the membership majority. (Slip Opinion, p. 20.) This does not comport with well-settled principles which apply to the interpretation and enforcement of the governing documents of any subdivision (whether under the Act or not) pursuant to contractual principles.

Given the extraordinarily important public policies involved, this case merits Supreme Court review to settle these issues for the State of California. These issues have far reaching consequences not just for Tri Palm Estates but for the many planned developments across the State of California where the property rights which the owners have in common are easements to use property appurtenant to the separate interests.

III.
STATEMENT OF THE CASE

A. Factual Background – Missing or Omitted Material Facts Raised in Petition for Rehearing to the Court of Appeal

The Court of Appeal's Opinion omitted or misstated many material facts concerning the development of Tri Palm Estates. These omissions or misstatements include many original development facts relating to the subdivision of the property and the developer's stated intent, the Tri Palm Estate owners' creation of the Association for specific purposes related to

management of the relationship with the owner of the appurtenant recreational facilities, discussion of all relevant provisions of the governing documents, and the extent of the Association's litigation activities for the benefit of the homeowners leading to the underlying lawsuit. In accordance with California Rules of Court, Rule 8.500, subd. (c)(2), the Association filed a Petition for Rehearing identifying these factual omissions or misstatements on October 18, 2018. The Petition for Rehearing was denied as part of the order modifying the opinion (in ways unrelated to the factual omissions or misstatements raised in the Petition for Rehearing) dated October 31, 2018 attached hereto as Exhibit B.

The following facts are either taken from the Court of Appeal's Slip Opinion or Association's Petition for Rehearing ("PRH") directed to the Court of Appeal. The Association respectfully submits that given the importance of these issues, review of the questions presented is either appropriate in this forum or at a very minimum this Court should exercise its supervisory powers and order the Court of Appeal to reconsider its opinion in light of all of the material facts summarized below.

B. Historical Development of Tri Palm Estates and the Appurtenant Recreational Facility

Tri Palm Estates is a subdivision consisting of over 1600 lots, divided in ten tracts, developed from the 1960's through the 1980's. (Slip Opinion, p. 2, 3.) There are two tiers of governing documents governing

Tri Palm Estates. In addition to the Master Declaration covering the entire subdivision (including all lots and the appurtenant recreational facilities) recorded against the properties by consent of the owners and restated in 2003, the individual tracts comprising the sub-associations within the Tri Palm Unified Owners Association are also subject to declarations of restrictions specific to each tract recorded by the original developer. (Slip Opinion, pp. 2, 3; 1 Appellant's Appendix "A.A." 14-24, 28.) Relevant here is Unit Three of Tri Palm Estates. At the time of the underlying complaint, Plaintiff and Appellant Cheveldave owned property within that tract. (1A.A.8, 14.)

Developed as part of the original Tri Palm master planned community (1A.A.14, 17-18) are recreational facilities (hereinafter "Recreational Facilities") consisting of two golf courses, a clubhouse, pools, a meeting facility, and additional facilities. (2A.A.196.) The Recreational Facilities are appurtenant to all the lots of the Tri Palm Estates subdivision, were part of the original development of the project (1A.A.17-18), and are an integral part of ownership within the Tri Palm Unified Owners Association. (1A.A.30; 3A.A.618-621.)

The 2003 Master Declaration clarifies and confirms the easements appurtenant to each lot for the use and enjoyment of the Recreational Facilities inuring to all members of the Association (Slip Opinion, p. 17; 1A.A.28-29, 37), and for the levying of assessments against Association

members to support the operations of the Association. (1A.A.32, 34-36.) The assessment obligations are mandatory and run with the land. (Id.)

The original tract declarations, including the Unit Three Declaration, also require payment by the individual owners of assessments to the owner of the Recreational Facilities for maintenance of the Recreational Facilities and these obligations are also mandatory. (1A.A.18.) The assessment revenue paid by Association members to fund the Recreational Facilities generates more than $4,200,000.00 annually. (2A.A.195.) Corresponding rights to lien and foreclose upon each lot to enforce the maintenance assessment were vested under the Declaration in the owner of the Recreational Facility. (1 A.A. 22-23.)

The original developer of Tri Palm Estates included the Recreational Facilities within the boundaries of the Tri Palm Estates development. Recorded in 1968, the Declaration of Restrictions and Charges for Tri Palm Estates Unit Three (the "Unit Three Declaration"), recites the original developer's intent to "develop and improve said tract of land, to open up and lay out the streets shown on said map, to impose on the lots [within Unit Three including Appellants' properties] and other parcels of land included in said tract **mutual and beneficial restrictions, covenants, agreements, easements, conditions and charges as hereinafter set forth, under a general plan or scheme of improvements for the benefit of all**

the lands in the tract and the future owners of said lands…." (1A.A.14, emphasis added.)

In turn, the Unit Three Declaration (and the declarations for all other Tri Palm Estates tracts) also established mutual easements in favor of all owners of land within Tri Palm Estates to use the Recreational Facilities (Slip Opinion, p. 17; 1A.A 17-18; 1A.A. 37-38) and provided for authority to bring legal action to enforce the Unit Three Declaration in the original developer or any "person, firm or corporation to whom [the original developer] may have assigned the [enforcement] right." (1A.A.22-23.)

The Recreational Facilities eventually transferred to Andrew Stevens who owned the burdened land as of the date of the 2003 Master Declaration, and who (along with the majority of the Tri Palm Estates owners) expressly consented to the clarifications of all easements and rights inuring to the separate interests as expressed in the Master Declaration. (1A.A.17-18; 1 A.A. 28.) The Recreational Facilities are described as part of the Tri Palms Estates development in the original Declaration and are subject to the Master Declaration in the same way as all lots within the development. (Id.) Thus, the rights and obligations by and between the lot owners and the owner of the recreational facilities property are governed by the Declaration and Master Declaration with rights and responsibilities flowing both ways, reciprocally. (Id.)

C. The Homeowners Created the Association to Resolve Disputes Concerning the Recreational Facilities

As is often the case with older planned developments, the original developer did not create a homeowner association. Therefore, the Tri Palm Estates homeowners did so in order to handle the multitude of issues the owners had in common relating to (among other things) the recreational facilities. Tri Palm Unified Owners Association ("Association") is a master association created to, among other things, govern the use, establish easements, and manage the assessment responsibilities of all the owners within the many tracts within the Association. (Slip Opinion, p. 3; 1A.A. 28-29; 33.) To this end, the restated 2003 Master Declaration of Restrictions and Charges for Tri Palm Unified Owners Association ("Master Declaration") was recorded on August 18, 2003 in the official records of the County of Riverside at Document Number 2003-630806, with the consent of the membership and the owner of the recreational facilities, memorializing the rights and responsibilities of the owners and the Tri Palms Unified Owners Association viz-a-viz the Recreational Facilities and more, (Slip Opinion, p. 3; 1A.A.26; 3A.A.598.) The Master Declaration was recorded with the consent of the owners of the lots within the Association as well as the owner of the Recreational Facilities in accordance with the amendment provisions of the original Declarations. (1 A.A. 28-29.)

Among other things, the Master Declaration vests in the Association the right to "enforce the provisions of the various Declarations [including the Unit Three Declaration] and the Master Declaration." (1A.A.36.) The Master Declaration confirms the Association's right and power to participate in the creation of rules and regulations governing the use and enjoyment of the Recreational Facilities, to negotiate with the owner of the Recreational Facilities concerning the maintenance of the Recreational Facilities, and to enforce the "various Declarations" (including the Unit Three Declaration and the Master Declaration). (1A.A.36.)

The Master Declaration confers broad powers on the Association to "[e]nforce the provisions of the various Declarations and this Master Declaration, the Articles and bylaws of the Association, and other instruments relating to management, operation, and control of the Association. The Association may do all other acts and things that nonprofit mutual benefit corporations are empowered to do, which may be necessary, convenient, or desirable in the administration of its affairs and in order to carry out the powers and duties described in [the] Master Declaration, including those powers described in Section 374 of the California Code of Civil Procedure [renumbered and chaptered to Section 5980 of the California Civil Code] and, to the extent not inconsistent herewith, those powers described in Section 1350 of California Civil Code [renumbered to Section 4000 of the California Civil Code, et seq.], as those

sections may be amended from time to time." (Slip Opinion, p. 19; 1A.A.36.)

D. The Association's Enforcement of the Governing Documents

Under the Master Declaration, any disagreement between the Association and the owner of the Recreational Facilities over maintenance, and the enforcement of the various Declarations including the Unit Three Declaration and the Master Declaration, shall be resolved by the Association through mediation and subsequent arbitration or litigation unless otherwise agreed. (1A.A.39-40.) Pursuant to this authority, the Association served the membership as follows:

1. The Association's Lawsuit Against the Owner of the Recreational Facilities for Overcharging Association Members, Mismanagement, and Waste

On October 17, 2008, the Association filed a Complaint in the Riverside Superior Court, Indio Court, under Case No. INC081239 (the "Association's Lawsuit"), against The Club at Shenandoah Springs Village, Inc. ("CSSV") the owner of the Recreational Facilities at that time, for Breach of the Master Declaration and other related claims. (2A.A.143.) The Association's Lawsuit asserted that CSSV was mismanaging the Recreational Facilities, overcharging Association members, allowing for public use of the Recreational Facilities in violation of the rights of the Association's members, and wasting the Recreational Facilities. (2A.A.147-154.)

On the Association's request (2A.A.154-156), an interim receiver (Andrew Vossler) was appointed until entry of the final judgment which was ultimately in favor of the Association and issuance of the permanent injunction governing CSSV's operations. (2A.A.162.) There was never any contention the Association lacked authority to bring this lawsuit.

2. The Association Prevailed in its Action Against CSSV

In September 2011, the Association's Lawsuit against CSSV went to trial in the Riverside Superior Court in Indio, California, before the Honorable Harold W. Hopp, Judge presiding. After a three week bench trial, the trial court found in favor of the Association after determining CSSV's principals had looted the Recreational Facilities of over $850,000 and good cause existed for issuance of a permanent injunction against CSSV prohibiting any further disbursements of the assessment funds to CSSV principals. (2A.A.160-172.) The court also awarded the Association its attorneys' fees and costs. (*Ibid*.) Judgment was entered on June 18, 2012. (*Ibid.)* CSSV immediately filed an appeal and the Association filed a limited cross-appeal. (1A.A.65.) There was never a contention the judgment was not valid or that the Association lacked authority to initiate the legal proceedings.

3. CSSV Petitioned for Bankruptcy Protection and the Association Filed a Claim as a Secured Creditor

On December 3, 2012, while the appeal was pending, CSSV initiated a Chapter 11 Petition in the United States Bankruptcy Court, Central

District of California, Riverside Division, under Case No. 6:12-bk-36723-MH. (2A.A.195.) The Association timely filed a claim in the bankruptcy proceeding as a secured creditor of CSSV. (1A.A.64.) There was never a contention the Association's assertion of a claim in the bankruptcy proceedings was without authority.

4. CSSV Increased the Maintenance Assessments

Shortly after filing its bankruptcy petition, CSSV commissioned a study of the maintenance fees / assessments charged to the Association owners, determined there was a shortfall in the Consumer Price Index "CPI" increases of the assessments permitted under the Declaration, and based on that study increased the maintenance fee assessments by 6.5% to conform to what it believed it should be imposing under the original Declaration. (3A.A.619.) CSSV sought to impose an assessment increase for the shortfall. (*Ibid*.)

5. Association Obtained Relief from Bankruptcy Stay

In response to CSSV's notice of the fee increase, the Association obtained relief from the Bankruptcy Stay, and thereafter the Association and CSSV engaged in mediation to resolve the further dispute over CSSV's recalculation of the maintenance fees under the Declaration. (1A.A.65.) Mediation of the maintenance fee dispute was required under Section 6A of the Master Declaration. (2A.A.118.) Cheveldave makes no contention his complaint or on appeal that the Association's initiation of mediation under

the Master Declaration to resolve disputes concerning the assessment structure was without authority.

6. Association Initiated Arbitration To Resolve Maintenance Fee Dispute

The Association and CSSV mediated the dispute over maintenance fees before the Honorable David Valesquez (Ret'd.) in January 2014 (1A.A.65), but the issue was not resolved. Under Section 6A of the Master Declaration, the Association then invoked arbitration against CSSV, seeking resolution of the dispute over CSSV's recalculation of the maintenance fees. (1A.A.65.) Cheveldave made no contention in its complaint or on appeal that the Association's initiation of mediation under the Master Declaration to resolve disputes concerning the assessment structure was without authority.

7. CSSV Filed Motion for Bankruptcy Court Approval to Sell Recreational Facilities to Third Party (K&S)

Soon after the arbitration was initiated, CSSV filed a motion in the Bankruptcy Court for an order authorizing the sale of substantially all of the assets of the estate, including the Recreational Facilities (and the maintenance fees that were paid under the governing documents) to a third party. (2A.A.174-522.) The proposed sale required holdover of the sum of $850,000 from the sales price for improvements to the Recreational Facilities to conform to the Statement of Decision in the Association's Riverside Lawsuit against CSSV, finding that CSSV made disbursements

of over $858,000 to its principals which had financially crippled the Recreational Facilities. (2A.A. 170:5, 2A.A. 175:23-25.) Both CSSV and the prospective buyer acknowledged the obligation to pay the additional judgment in favor of the Association for the sum of $365,648.88 as a secured claim. (2A.A.212)

8. Bankruptcy Court Approved CSSV's Sale to K&S and the Association's Settlement Agreement Resolving All Outstanding Disputes.

Deeply embroiled in the complex and lengthy history over the maintenance and operations of the Recreational Facilities by this time, the Association negotiated with the prospective buyer of the Recreational Facilities to resolve all pending disputes on terms which the Association's Board of Directors carefully considered, after weighing the pros and cons, to be in the best interests of the Association. (3A.A.619-621.) First, as prospective owner of the Recreational Facilities, K&S agreed to apply $850,000, representing the amount the trial court had determined in the Association's Riverside Lawsuit had been improperly disbursed to CSSV's principals (2A.A. 170:4-6), directly to the Recreational Facilities for immediate repairs. (2A.A.230:24-25.) K&S also agreed to infuse an additional $2,500,000 toward capital improvements to the Recreational Facilities and to fund a capital reserve account, further accomplishing the Association's goal of ensuring proper ongoing (and future) maintenance of the Recreational Facilities. (1A.A.66.) Regarding the assessment increase

implemented by CSSV to address the shortfall identified by CSSV, K&S also agreed to amortize that over four years rather than imposing a single year increase. (1A.A.65; 3A.A.599, 611-615, 620.) As the Association pointed out in its communications to the Association's membership, it viewed the alternatives of continued and protracted litigation with CSSV (by then embroiled in bankruptcy proceedings), were not in the Association's best interests because resolution of those issues was distant and uncertain while the Recreational Facilities continued to waste away. (3A.A.619-621.) On the other hand, the Association's Board of Directors concluded it *was* in the best interests of the Association and its members to approve a settlement which:

- facilitated the sale of the Recreational Facilities to a cooperative new owner would mean immediate repayment of the $850,000 sum looted from the facility by CSSV to restore the Recreational Facilities;
- guaranteed an important commitment for immediate repairs and future maintenance of the Recreational Facilities with the infusing of an additional sum of $2,500,000 for that purpose; and
- resolved the use and maintenance fee dispute by controlling the timing of the CPI assessment increases by amortizing the assessment shortfall.

(3A.A.620.)

The Bankruptcy Court approved the sale to K&S on June 12, 2014. (2A.A.523-543.) In its order, the Bankruptcy Court specifically acknowledged the Association's Riverside Lawsuit and the challenge of the increased maintenance fees and further acknowledged that a Settlement Agreement had been entered into between the Association and K&S [as successor-in-interest to CSSV] regarding the issues asserted in the Association's Riverside Lawsuit and the Recreational Facility maintenance fee dispute. (2A.A.529-530.) The court also noted that "But for the agreement by K&S to the K&S Settlement Agreement, the [Association] takes the position that it would not have consented to the sale of the Purchased Assets …" (2A.A.530.)

The Settlement Agreement between the Association and K&S provides at Paragraph 2 that "the effectiveness of this Agreement and the terms and conditions set forth herein are conditioned upon and subject to (1) the Bankruptcy Court's entry of a final, … court order …" (1A.A.65.) The Settlement Agreement further provides at Paragraph 3 that "in order to resolve the [Association's] [Riverside Lawsuit and the Arbitration . . . regarding the CPI increase and assessment shortfall] the Parties agree that K&S may charge increased Usage and Maintenance Fees for each Lot Owner …[according to the amortized schedule over four years]." (1A.A.65-66.)

The Settlement Agreement also provides at Paragraph 10 that the Bankruptcy Court shall retain jurisdiction to enforce or interpret the terms of the Agreement. (1A.A.69.) The Settlement Agreement also provides that none of its terms shall be construed to amend the Master Declaration (1A.A.68.)

In exchange for all the agreements reached under the Settlement Agreement, the Arbitration proceeding and the appeal and cross-appeal filed with respect to the Riverside Lawsuit were dismissed. (1A.A.68.) The Bankruptcy Court approved the Settlement Agreement (2A.A.529-530.) On July 16, 2014, a Memorandum of Settlement Agreement was recorded in the Official Records of Riverside County. (2A.A.545-546.)

In its order approving the sale of the Recreational Facilities to K&S, the Bankruptcy Court made specific findings, including:

1. That the Bankruptcy Court has jurisdiction to hear and determine the Motion and to grant the relief set forth therein;

2. That the Order constitutes a final and appealable order;

3. That K&S agrees to be bound by the terms of the Settlement Agreement entered into between the Association and K&S;

4. That K&S is a good faith/bona fide purchaser and entitled to all of the protections afforded under federal law;

5. That holders of claims who did not object to the sale and the Motion are deemed to have consented to it (emphasis added);

6. That the debtor is authorized to sell the Recreational Facilities to K&S, including the payment obligations due under the Governing Documents of the Association;

7. That the CC&Rs will continue to run with the land; and

8. That the Bankruptcy Court will retain jurisdiction "to interpret, enforce, and implement the terms of this Order …" (2A.A.523-543.)

The Court's Slip Opinion, at page 5, mistakenly states that the Association entered into the Settlement Agreement because it was worried that the bankruptcy court would soon grant Shenandoah's motion to sell the recreational facility. Quite the contrary, the record shows the Association was pleased by the sale of the Recreational Facilities to the proposed third party on such terms as it deemed favorable to the owners and in the best interests of the Association and its members. (3A.A.619-620.)

The Court's Opinion, at page 5 also mistakenly states that the Agreement only required the buyer to maintain the Recreational Facility as required by the state trial court's 2012 injunction, and to forbear for increasing fees retroactive to an earlier date than that set forth in the Agreement. In fact, there was much more to the Agreement which was favorable to the Association. The Agreement represented a favorable compromise of CSSV's claimed right to increase maintenance fees under the original Declarations and eliminated the risk that the assessment

increase might be much higher following the arbitration of that dispute. (3A.A.619-620.) The Agreement also brought to a close a five-year long dispute with that owner (CSSV) which had resulted in a judgment for the Association and against CSSV for mismanagement and looting, followed by CSSV's bankruptcy proceeding, during which protracted proceedings the Recreational Facilities continued to languish and waste. The Agreement facilitated the sale of the Recreational Facilities to a much more cooperative third party than Shenandoah who would properly maintain the Recreational Facilities, honor CSSV's obligation to restore $850,000 in looted funds for deferred repairs needed to the Recreational Facilities, and resolve other issues over use of the Recreational Facilities and maintenance fee disputes. For all of these reasons, the Association was in favor of the sale to the third party and that sale (and the Agreement requiring the third party buyer to do all of these things) was deemed by the Association to be in the best interests of the Association. (3A.A.620-621.)

E. The Underlying Trial and Appellate Court Proceedings

After all this, Alex Cheveldave filed suit against the Association for entering into the settlement agreement. (Slip Opinion, p. 6.) The trial court granted the Association's special motion to strike and dismissed the complaint. (Slip Opinion, pp. 6-7.) On Cheveldave's appeal, the Fourth District Court of Appeal, Division Two, reversed the judgment on grounds the Association was not a common interest development and lacked both

statutory and contractual standing to resolve the disputes with the owner of the Recreational Facility. The Association filed a Petition for Rehearing articulating, among other things, many omitted and misstated material facts germane to the underlying conclusions. The Court of Appeal denied the Petition for Rehearing on October 31, 2018.

The Association now seeks review.

IV.
ARGUMENT

A. Review Is Necessary to Settle Important Issues of Law Concerning The Applicability of the Davis Stirling Act to Associations Where the Common Area Constitutes Easement Rights Appurtenant to the Separate Interests

1. The Issues in this Case Will Affect Millions of Property Owners

Due to the increasing prevalence of common interest developments in California, issues concerning them affect a great many citizens and necessarily involve questions of significant public interest. (*Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914, 921-22.) When *Chantiles* was decided, common interest developments in California numbered in the tens of thousands. (*Id*. at 921.) By 2002, the total had risen to 33,000 developments housing 9 million people (Stats. 2002, ch. 1116, § 1(a), p. 7156.); current estimates are 52,000 developments housing more than 14 million people. (Assembly Committee on Housing and Community Development, Hearing on Sen. Bill No. 1265 (2017-2018 Reg. Sess.) June 20, 2018, at p. 4.)

Given these numbers, it is axiomatic that the question of whether the Act applies to a particular subdivision, depending on the nature of the shared property interests of the owners, affects a large number of property owners within the state. It is equally axiomatic that the myriad rights and obligations established by the Act make the determination of whether the Act applies to those planned developments where the common area consists of homeowner easements to use certain property developed as part of a subdivision an important question of law which should be settled by this Court.

2. The Court of Appeal's Opinion Creates Conflict Among the Intermediate Courts of Appeal on The Definition of Common Area in a Planned Development

The Court of Appeal's conclusion that Tri Palm Estates is not a common interest development under the Act by operation of law turns on an assumption that California Civil Code section 4095, subdivision (b) requires the shared easement comprising the common area for purposes of a planned development such as Tri Palm be *both* mutual and reciprocal viz-a-viz the owner of the burdened fee. (Slip Opinion, p. 16-17.) However, Civil Code Section 4095, subdivision (b) plainly provides that the easements may be mutual *or* reciprocal, suggesting these things are not the same, and by the plain language of the statute the easement need only be appurtenant to the separate interests.

As discussed in a leading treatise on formation of common interest developments:

> "The common area in a planned development may consist only of intangible rights of use or an easement and obligation to maintain land or improvements owned by a third party, such as a city-owned parkway, a flood control or drainage easement, or a street or right-of-way connecting the project to a public street. If so, the [original] definition of common area in Civil Code 4095 ("the entire common interest development except the separate interest therein) does not fit. In anticipation of this problem, the statutory definition of a planned development is "the common area for a planned development . . .may consist of mutual or reciprocal easement rights appurtenant to the separate interests." (Civil Code section 4095, 4175.)"

(CEB, Forming California Common" Interest Developments, §1.36.)

There is nothing in the applicable case law or the legislative history suggesting that the owner of the servient estate (here, the recreational facilities) must have a reciprocal right to use the separate interest lots in order for the easements in question to constitute common area for a planned development subject to the Act. This simply makes no sense, especially considering that the expanded definition of common area reaches public and privately owned land alike. The fee owners of the burdened properties rarely, if ever, have reciprocal rights to use the separate interest lots. The Court of Appeal's holding to this effect would limit application of section 4095, subdivision (b) to the exclusion of the more classic paradigm in which the fee of the burdened property is owned by a public entity (e.g., roads and walkways). The better view is summarized in the Restatement

(Third) of Property. As discussed in the Restatement (Third) of Property: Servitudes § 6.2(1) (Am. Law Inst. 2000), comment (b):

> . . . .
>
> Subdivisions with detached housing are often designed to include social and recreational facilities built on land that is conveyed in fee simple to the owners' association. Condominiums are often set up so that everything outside the interior walls of the individually owned units is common property, owned as tenants in common by all the units These two forms are typical, but there are many variations. **Recreational property may be owned by a third party and leased by the association, or the interests of the owners or the association may be easement rights rather than possessory rights.**

The present case is exactly the type of common interest development contemplated by the Restatement – a subdivision where the owners possess an easement to use appurtenant recreational facilities developed as part of the subdivision and owned by a third party. In the Slip Opinion, the Fourth District Court of Appeal, Division Two, cites to two decisions analyzing restrictive covenants and equitable servitudes, suggesting "a mutual easement has the same meaning as a reciprocal easement." (Slip Opinion, p. 17.) However, easements and equitable servitudes are different in ways material to this issue.

As the Second District Court of Appeal, Division One, explained in *Committee to Save the Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247:

> An easement differs from a covenant running with the land and from an equitable servitude, in that these are created by promises concerning the land, which may be enforceable by or binding upon successors to the estate of either party, while an easement is an interest in the land, created by grant or prescription." (4 Witkin, Summary of Cal. Law, supra, Real Property, § 434, p. 615, italics omitted.) A covenant running with the land is created by language in a deed or other document showing an agreement to do or refrain from doing something with respect to use of the land. (*Id*., § 484, pp. 661-662.) An equitable servitude may be created when a covenant does not run with the land but equity requires that it be enforced. (Id., § 493, p. 670.)

(*Comm. to Save the Beverly Highlands Homes Ass'n v. Beverly Highlands Homes Ass'n* (2001) 92 Cal.App.4th 1247, 1269 ("*Beverly Highlands*").)

Applying these distinct principles to the question presented also here, whether certain rights and restrictions as to a separately owned parcel of land may constitute common area under section 4095, subdivision (b), the reviewing Court in *Beverly Highlands* held that an essential quality of an easement is the right in the owners to actually use the separately owned property. Where, as with the easements contemplated by Section 4095, subdivision (b), an easement is required only to be appurtenant to the separate interests, *Beverly Highlands* instructs: "An easement appurtenant to the land is 'attached to the land of the owner of the easement, and benefits him as the owner or possessor of that land.'" (*Beverly Highlands*, citing 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 435, p. 615.) There is simply no requirement that the owner of the servient tenement must have use rights over the dominant tenement.

Thus, while *Terry v. Jones* (1977) 72 Cal.Appl3d 438, 442 ("*Terry*") cited by the Court of Appeal in the underlying opinion on the very different question of the enforceability of equitable servitudes correctly summarized principles pertaining to the creation of enforceable equitable servitudes in a subdivision through the vehicle of a recorded declaration, that case misses the mark. *Terry* did not address the very different question of whether, under section 4095, subdivision (b), certain easement rights owned in common or mutually by and among property owners as to burdened parcel of land within the same development project may constitute the common area necessary to support a conclusion that the subdivision is a common interest development. Equally unhelpful is the Court of Appeal's reliance on *Welsch v. Goswick* (1982) 130 Ca.App.3d 398, 405, which similarly analyzed a property use restriction and equitable servitude and did not deal with the much different question of whether an easement to use a parcel of land within the development shared by the owners in common with one another burdening a servient tenement can constitute common area under section 4095, subdivision (b).

Thus, the Court of Appeal's opinion that the easements must be both mutual and reciprocal **with the third party fee owner** is in conflict with the opinion of the Second District Court of Appeal, Division One, in *Beverly Highlands* and does not reflect the majority view regarding this issue as reflected in the Restatement (Third) of Property: Equitable

Servitudes. Review by this Court is essential to clarify this important point of law.

B. Review Is Necessary to Vindicate the Public Policy Favoring The Formation of Homeowner Associations to Serve the Community

The Davis-Stirling Act is, in large measure, a consumer protection statutory scheme drafted largely to protect owners and to provide stability and predictability in terms of the operations of a subdivision. (*Pinnacle Museum Tower Assn .v. Pinnace Marker Development (US) LLC* (2012) 55 Cal.4th 223, 238-239; *Huntington Continental Townhouse Assn., Inc. v. Miner* (2014) 230 Cal.App.4th 590, 605.)

The Court of Appeal's rejection of the Association's contractual authority to enter into the settlement agreement under the express terms of the Master Declaration (providing that the Association was empowered to enforce the Declarations and the Master Declaration to resolve disputes with the Recreational Facility and to have all the powers of a homeowner association under the Act) was an extension of the Court's conclusion Tri Palm Estates is not a common interest development as a matter of law. Ignoring the will of the membership majority, the Court concluded it would be inconsistent for the Association to be imbued with the powers of a homeowner association under the Davis Stirling Act if the Act did not apply as a matter of law. (Slip Opinion, p. 20.)

Public policy favors the creation of a homeowner association to manage the affairs of subdivisions such as Tri Palm Estates, precisely in the manner set forth in the Master Declaration. The Court of Appeal's rejection of this violates this public policy. The Restatement (Third) of Property: Servitudes § 6.3 (1) (Am. Law Inst. 2000) provides:

> If creation of an association has not otherwise been provided for in a common-interest community, and has not been expressly excluded by the declaration . . . the owners of a majority of the lots … may create an association to manage the common property and enforce the servitudes contained in the declaration. All members of the common interest community are automatically members of the association, which is governed by this Chapter.

As this Court has consistently explained, "[C]ondominiums, cooperatives, and planned-unit developments with homeowners associations have become a widely accepted form of real property ownership. These ownership arrangements are known as 'common interest' developments. [Citations.] The owner not only enjoys many of the traditional advantages associated with individual ownership of real property, but also acquires an interest in common with others in the amenities and facilities included in the project. It is this hybrid nature of property rights that largely accounts for the popularity of these new and innovative forms of ownership … ." (*Golden Rain Foundation v. Franz* (2008) 163 Cal.App.4th 1141, 1147, citing *Nahrstedt v. Lakeside Village Condominium Assn*. (1994) 8 Cal.4th 361, 370.)

Indeed, the Court of Appeal's rejection of the majority of the owners' creation of an Association with the same powers as if under the Act violates the public policy favoring enforcement of the express terms of a recorded instrument. (See *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 358-359 "'[T]he recording statutes operate to protect the expectations of the grantee and secure to him the full benefit of the exchange for which he bargained." The Court's rejection of the membership majority's expression of intent to create an association with the same powers and authority of an association under the Davis Stirling Act violates that public policy and destabilizes the expectations of property owners, the majority of whom clearly wanted an association empowered to do all that this Association has done for Tri Palm Estates.

V.
CONCLUSION

Association respectfully submits these issues are matters of great importance to property owners throughout the State of California, and that

review by this Court is appropriate to resolve the confusion in both the trial courts and intermediate courts of appeal.

Respectfully submitted,

Dated: November 13, 2018

EPSTEN GRINNELL & HOWELL, APC

By:_____

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TRI PALM UNIFIED OWNERS ASSOCIATION

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8 .204(c)(1), I certify that the attached Petition for Review filed with this Court on November 13, 2018, contains 8073 words as counted by Microsoft Word version 2010 word processing program, and does not exceed 8,400 words, including footnotes.

Respectfully submitted,

Dated: November 13, 2018

EPSTEN GRINNELL & HOWELL, APC

By:_____

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Cheveldave et al. v. Tri Palms Unified Owners Association
Supreme Court No.
Court of Appeal No. E066461

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 10200 Willow Creek Road, Suite 100, San Diego, CA 92131.

I, the undersigned, hereby certify that I electronically filed the foregoing with the Clerk of the Court of Appeal – Fourth Appellate District, Division Two by using the appellate EFS system on November 13, 2018:

RESPONDENT TRI PALMS UNIFIED OWNERS ASSOCIATION'S PETITION FOR REVIEW

Participants in the case who are registered EFS users and will be served by the appellate EFS system.

I further certify that some of the participants in the case are not registered for the Electronic Filing System (EFS) TrueFiling Portal. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-EFS participants:

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Dated: November 13, 2018

_____
Stephanie Hart