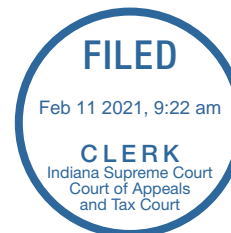


## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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Twin Mills, LLC,  
*Appellant-Respondent,*

v.

Leisure Acres Association Inc.,  
*Appellee-Petitioner.*

February 11, 2021

Court of Appeals Case No.  
20A-PL-1516

Appeal from the  
LaGrange Superior Court

The Honorable  
Lisa M. Bowen-Slaven, Judge

Trial Court Cause No.  
44D01-1907-MI-43

**Kirsch, Judge.**

[1] For many years, members of Leisure Acres Association Inc. Campground (“Leisure Acres”) used, free of charge, facilities in Twin Mills, LLC, an adjoining campground. In 2019, Twin Mills, LLC started charging fees to members of Leisure Acres who wanted to use those facilities. Leisure Acres sued Twin Mills, LLC, contending the fees violated a 1996 covenant. In response, Twin Mills, LLC claimed the 1996 covenant applied to its predecessor in interest but not to Twin Mills, LLC itself. The trial court entered summary judgment for Leisure Acres and ordered Twin Mills, LLC to follow the 1996 covenant by allowing Leisure Acres members to use Twin Mills, LLC facilities free of charge. Twin Mills, LLC now appeals and raises numerous issues, which we consolidate and restate as follows:

I. Whether Leisure Acres had standing to sue Twin Mills, LLC; and

II. Whether Twin Mills, LLC acquiesced to Leisure Acres members using its facilities free of charge and has thus forfeited the right to complain about such use of its facilities.

[2] We affirm.

## **Facts and Procedural History**

[3] In 1975, Richard Cagley and Betty Cagley (collectively, “the Cagleys”) obtained real property in LaGrange County, and in 1979 Richard Cagley and David Cagley created Twin Mills Resort, Inc. *Appellant’s App. Vol. II* at 49-50, 63, 67-68. In 1979, the Cagleys designated part of the property as Leisure Acres, a forty-lot campsite, making Leisure Acres and Twin Mills, Inc. adjacent

campgrounds. *Id.* at 69. While Twin Lakes, Inc.<sup>1</sup> has a lake, swimming pool, fishing pond, three parks, a store, and sponsors activities such as special holiday events, Leisure Acres lacks such amenities. *Appellee's App. Vol. II* at 2-3; *Appellant's App. Vol. II* at 118.

[4] In 1979, Leisure Acres Protective Covenants and Beneficial Property Restrictions (“the 1979 Covenants”) were signed by the Cagleys. *Appellant's App. Vol. II* at 69-73. The 1979 Covenants stated, inter alia, that all the owners of lots in Leisure Acres were entitled to access and use of all Twin Mills, Inc.’s facilities and that these benefits “shall run with the land for the benefit and use of and shall be binding upon each and every owner of a camping site lot in said LEISURE ACRES.” *Id.* at 70-72.

[5] In 1985, the Cagleys signed and recorded “Leisure Acres Protective Covenants and Beneficial Property Restrictions Revised Edition” (“the 1985 Covenants”), which replaced the 1979 Covenants. *Id.* at 74-78. The 1985 Covenants also provided that the covenants would run with the land: “[T]he following Protective Covenants and Beneficial Property Restrictions are made a part of said Plat and shall run with the land for the benefit and the use of and shall be binding upon each and every owner of a campsite lot in . . . LEISURE ACRES.” *Id.* at 74. The 1985 Covenants also allowed Leisure Acres lot owners to use Twin Mills, Inc.’s recreational facilities “subject to all usual and

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<sup>1</sup> Now Appellant Twin Mills, LLC.

customary fees applicable to the general public and must register with Twin Mills Resort . . . prior to the use of its facilities.” *Id.* at 76.<sup>2</sup>

[6] In 1996, the covenants were amended again (“the 1996 Amended Covenants”). *Id.* at 79-80. One significant change in the 1996 Amended Covenants was that Leisure Acres lot owners could use all Twin Mills Resort, Inc. facilities free of charge, except the swimming pool. *Id.* at 79. The 1996 Amended Covenants contained no language stating that they were intended to run with the land or include a statement that they bound successors or heirs of any person or entity. *Id.* In 2001, Leisure Acres officially incorporated in the State of Indiana to “establish a property owners association for landowners at the recreation area known as Twin Mills Campground in Howe, Indiana.” *Id.* at 84. In 2004, Twin Mills Resort, Inc., was sold to Twin Mills, LLC. *Id.* at 99-102. In 2006, an affiliate of Equity LifeStyle Properties, Inc. bought Twin Mills, LLC. *Id.* at 143.

[7] In a November 12, 2009 letter, Twin Mills, LLC informed Leisure Acres that its residents would be required to pay fees to enter Twin Mills, LLC’s property. *Id.* at 103. On January 26, 2010, Leisure Acres’s attorney sent a letter to Twin Mills, LLC, stating that Leisure Acres objected to Twin Mills, LLC’s decision

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<sup>2</sup> In 1986, the covenants were again amended, but the substance of that amendment is not germane to this appeal. *Appellant’s App. Vol. II* at 123.

to impose fees and arguing that imposing the fees violated the first amendment to Leisure Acres's bylaws. *Id.* at 104.

[8] In a March 29, 2010 letter, Twin Mills, LLC argued that it was not a party to Leisure Acres's bylaws and was thus not bound by any statement in the amended bylaws that members of Leisure Acres could use Twin Mills, LLC's property and facilities free of charge, except for the swimming pool. *Id.* at 111-12. However, in a May 31, 2010 letter, Twin Mills, LLC said it would follow the terms of the amended bylaws, stating in part, "we have found that [there] are [some things] that we are not able to change[;] however[,] we would like to enforce the bylaws that have been set forth by [Leisure Acres] when it pertains to Twin Mills and [its] usage." *Id.* at 113. In a June 4, 2010 letter, Leisure Acres stated it would pay for three hundred day passes for its members and \$700 per year for the gate fee. *Id.* at 114-15. In a June 25, 2010 letter, Twin Mills, LLC responded, "we intend to enforce certain rules with respect to the Twin Mills . . . Campground that are consistent with the recorded covenants and the bylaws of the Leisure Acres Association." *Id.* at 116-17.

[9] In total, from several years before November 12, 2009 until early June of 2019, residents of Leisure Acres were able to enter Twin Mills, LLC's property free of charge and were also able to use Twin Mills, LLC's facilities free of charge, except the swimming pool. *Appellant's App. Vol. II* at 103-04; *Appellee's App. Vol. II* at 3. In early June of 2019, Twin Mills, LLC began charging Leisure Acres members a daily fee of \$5.00 per person to enter Twin Mills, LLC's property and to use Twin Mills, LLC's facilities. *Appellee's App. Vol. II* at 3.

[10] On July 24, 2019, Leisure Acres sued Twin Mills, LLC. *Appellant's App. Vol. II* at 16. Leisure Acres alleged that the 1996 Amended Covenants guaranteed Leisure Acres members free access to all Twin Mills, LLC's facilities, except the swimming pool, and that Twin Mills, LLC violated that covenant when it began charging fees to members of Leisure Acres. *Id.* at 17-18. Therefore, Leisure Acres asked the trial court, among other things, to order Twin Mills, LLC to follow the terms of the 1996 Amended Covenants and to reimburse the residents of Leisure Acres for fees incurred to access Twin Mills, LLC's property and facilities. *Id.* at 20.

[11] On February 17, 2020, Leisure Acres filed a motion for summary judgment, supporting memorandum, and designation of evidence. *Id.* at 30-125. Leisure Acres argued, in part, that even if the terms of the 1996 Amended Covenants were ambiguous, the parties clearly intended for residents of Leisure Acres to use Twin Mills, LLC's facilities free of charge. *Id.* at 45-46. On March 17, 2020, Twin Mills, LLC filed a response to Leisure Acres's motion for summary judgment and filed its own cross-motion for summary judgment. *Id.* at 126-42. In its response to Leisure Acres's motion for summary judgment, Twin Mills, LLC argued, in part, that Leisure Acres did not demonstrate that it had standing to bring a lawsuit on behalf of the individual members of Leisure Acres. *Id.* at 138-39. In its cross-motion for summary judgment, Twin Mills, LLC argued, inter alia, that 1) the 1996 Amended Covenants applied only to Twin Mills, Inc. and did not run with the land so that Twin Mills, LLC was not

bound by the 1996 Amended Covenants and 2) the 1996 Amended Covenants were not supported by consideration. *Id.* at 130-37.

- [12] On April 28, 2020, the trial court granted Leisure Acres’s motion for summary judgment and denied Twin Mills, LLC’s cross-motion for summary judgment, stating in part:

Twin Mills, LLC, is bound to the recorded . . . [1996 Amended Covenants].

Hence, [Leisure Acres’s] lot owners, and their immediate families, will be able to use all [Twin Mills, LLC’s] facilities, except the swimming pool, free of guest charges.

Furthermore, [Twin Mills, LLC] is to reimburse [Leisure Acres’s] residents for the guest charges incurred in 2019, excluding charges to use the swimming pool.

*Id.* at 14-15.

- [13] On May 26, 2020, Twin Mills, LLC filed a motion to correct error. *Id.* at 207-24. On July 31, 2020, the trial court granted the motion to correct error in part by rescinding the part of its summary judgment ruling that ordered Twin Mills, LLC to reimburse individual members of Leisure Acres for guest charges incurred since June of 2019. *Id.* at 13. However, the trial court affirmed its earlier ruling that Leisure Acres was entitled to summary judgment on its claim that Twin Mills, LLC was bound by the 1996 Amended Covenants. *Id.* The trial court also found that Leisure Acres had “associational standing” to file its action against Twin Mills, LLC.

6. Indiana recognizes associational standing, which advances two important objectives: judicial economy and efficiency. By allowing an association to act in a representational capacity on behalf of its members who were aggrieved or adversely affected, repetitive and costly actions are avoided. *Save the Valley, Inc. v. Indiana-Kentucky Elec. Corp.*, 820 N.E.2d 677 (Ind. Ct. App. 2005)[, *trans. denied*]; *Bd. of Comm'rs in [Cnty. of] Allen v. Northeastern Ind. Bldg. Trades Council*, 954 N.E.2d 937 (Ind. Ct. App. 2011)[, *trans. denied*.]

7. The members of the [Leisure Acres] have suffered or are in immediate danger of suffering direct injury as a result of the complained of conduct. Additionally, Leisure Acres Association is seeking to protect property rights of members which are germane to the Association's purpose. Lastly, with respect to the right to use the [Twin Mills, LLC's] facilities, the relief requested does not require the participation of each individual member.

....

9. [However,] Leisure Acres Association does not have associational standing to pursue money damages on behalf of each individual member of [Leisure Acres] Association, [because] the relief requested (an award of money) requires individual members to show proof of what they have been charged and paid to the [Twin Mills, LLC.]

10. For the foregoing reasons, the Court corrects its Order dated April 28, 2020, to find that [Leisure Acres] does not have associational standing to seek a money award on behalf of its individual members. More specifically, the Court hereby modifies its Order by striking the last paragraph of the Order which required [Twin Mills, LLC] to reimburse the individual members of [Leisure Acres] for guest charges incurred in 2019 since that relief requires proof of payment by individuals.



In all other respects, the Court hereby affirms its Order dated April 28, 2020 and denies [Twin Mills, LLC's] Motion to Correct Error.

*Id.* at 12-13. Twin Mills, LLC now appeals. We will provide additional facts as necessary.

## Discussion and Decision

### Standard of Review

[14] We review the grant or denial of a motion to correct error under an abuse of discretion standard. *Spaulding v. Cook*, 89 N.E.3d 413, 420 (Ind. Ct. App. 2017), *trans. denied*. We will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Further, upon reviewing a motion to correct error, we consider the standard of review for the underlying ruling, here the trial court's ruling that granted Leisure Acres's motion for summary judgment and denied Twin Mills, LLC's cross-motion for summary judgment. *See Luxury Townhomes, LLC v. McKinley Props, Inc.*, 992 N.E.2d 810, 815 (Ind. Ct. App. 2013), *trans. denied*.

[15] Our standard of review for summary judgment ruling is well settled. We review such rulings *de novo*, applying the same standard as the trial court: "Drawing all reasonable inferences in favor of . . . the non-moving parties, summary judgment is appropriate 'if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law.’” *Williams v. Tharp*, 914 N.E.2d 756, 761 (Ind. 2009) (quoting Ind. Trial Rule 56(C)). “A fact is material if its resolution would affect the outcome of the case, and an issue is genuine if a trier of fact is required to resolve the parties’ differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.” *Id.* (internal citations and quotations marks omitted). The initial burden is on the movant to “demonstrate [ ] the absence of any genuine issue of fact as to a determinative issue,” at which point the burden shifts to the non-movant to “come forward with contrary evidence” showing an issue for the trier of fact. *Id.* at 761-62 (internal quotation marks and substitution omitted). “Although the non-moving party has the burden on appeal of persuading us that the grant of summary judgment was erroneous, we carefully assess the trial court’s decision to ensure that he was not improperly denied his day in court.” *McSwane v. Bloomington Hosp. & Healthcare Sys.*, 916 N.E.2d 906, 909-10 (Ind. 2009) (internal quotation marks omitted). “[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” T.R. 56(E). When the defendant is the moving party, the defendant must show that the undisputed facts negate at least one element of the plaintiff’s cause of action or that the defendant has a factually unchallenged affirmative defense that bars the plaintiff’s claim. *Dible v. City of Lafayette*, 713 N.E.2d 269, 272 (Ind. 1999). “Just as the trial court does, we resolve all questions and view all evidence in the light most favorable to the non-moving party, so as to not improperly deny

him his day in court.” *Allredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1259 (Ind. 2014) (internal citations omitted).

[16] “Our standard of review is not altered by the fact that the parties filed cross-motions for summary judgment. Instead, we consider each motion separately to determine whether the moving party is entitled to judgment as a matter of law.” *Flaherty & Collins, Inc. v. BBR-Vision I, L.P.*, 990 N.E.2d 958, 966 (Ind. Ct. App. 2013) (internal citations omitted), *trans. denied*. We may affirm a grant of summary judgment upon any theory supported by the designated evidence. *Miller v. Danz*, 36 N.E.3d 455, 456 (Ind. 2015).

## **I. Did Leisure Acres Have Standing to Sue Twin Mills, LLC?**

[17] Twin Mills, LLC argues that the trial court erred in finding that Leisure Acres had standing to file the underlying lawsuit under the doctrine of associational standing. An association must satisfy a three-part test to be able use associational standing to represent its members:

This court has held an association has standing on behalf of its members if it can satisfy a three-part test articulated by the United States Supreme Court and adopted by a number of other states. . . . The three requirements are: 1) the association’s members would otherwise have standing to sue in their own right; 2) the interests the association seeks to protect are germane to its purpose; and 3) neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit.

*Bd. of Comm'rs in Cnty. of Allen v. Ne. Ind. Bldg. Trades Council*, 954 N.E.2d 937, 941 (Ind. Ct. App. 2011) (internal citations omitted), *trans. denied*. We have ruled that associational standing serves important objectives: 1) allowing an association to represent its members' interests promotes judicial economy and efficiency; 2) associational standing allows members, who would have standing in their own right, to pool their financial resources and legal expertise to help ensure complete and vigorous litigation of the issues; and 3) associations are generally less susceptible than individuals to retaliations by officials responsible for executing the challenged polices. *Save The Valley, Inc. v. Ind.-Ky. Elec. Corp.*, 820 N.E.2d 677, 680-81 (Ind. Ct. App. 2005), *trans. denied*.

[18] Twin Mills, LLC makes two arguments in contending that Leisure Acres did not have associational standing. First, Twin Mills, LLC contends that Leisure Acres cannot show it satisfied the second element of the associational standing doctrine because the interests that Leisure Acres sought to protect through its lawsuit against Twin Mills, LLC were not germane to Leisure Acres's purposes. Twin Mills, LLC argues that according to Leisure Acres's bylaws, Leisure Acres's purpose was to represent Leisure Acres members only as to disputes regarding land *within* Leisure Acres, not land outside Leisure Acres, such as Twin Mills, LLC's property. Leisure Acres's bylaws provide, in part:

In furtherance of such purposes, [Leisure Acres] shall promote and maintain the safety, *property values and general well-being of the members* of [Leisure Acres] *and the property of the members located within . . . Leisure Acres* at Twin Mills Campground in Howe, Indiana (*the "Development"*) [. . .] *[Leisure Acres] is organized to*

*represent its members with respect to matters now or hereafter concerning one or more of its members regarding property located within the Development. [. . .]*

*Appellant's App. Vol. II* at 86 (emphasis added). Thus, Twin Mills, LLC argues, “[Leisure Acres’s] bylaws make perfectly clear that [Leisure Acres’s] purpose does not include pursuing suits against third parties related to land outside the Leisure Acres’s plat. [Leisure Acres], therefore, cannot satisfy the second requirement for associational standing.” *Appellant's Br.* at 32-33.

[19] Twin Mills, LLC makes a similar argument regarding the 1985 Covenants, contending that the 1985 Covenants restricted Leisure Acres’s purposes to matters concerning land within Leisure Acres and matters regarding Leisure Acres members. Twin Mills, LLC observes that the 1985 Covenants state that the covenants apply to “a total of 40 campsite lots [in Leisure Acres].” *Appellant's App. Vol. II* at 74. Leisure Acres is given the authority to “promulgate rules and regulations providing for the improvement, security, and use of all of the property under its control . . .” *Id.* Section 3 of the 1985 Covenants allows the Association to “bring any action at law or in equity to collect the [homeowners association dues for a site located in Leisure Acres] and may bring any action at law or in equity to collect the same. . .” *Id.* at 74-75. Twin Mills, LLC correctly observes that the 1985 Covenants are silent on the authority to sue people or entities other than Leisure Acres members and does not explicitly provide the right to sue for anything related to the property outside Leisure Acres.

[20] Second, Twin Mills, LLC argues that Leisure Acres cannot satisfy the third element of associational standing – neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit – because in addition to seeking prospective/injunctive relief, Leisure Acres also sought monetary damages allegedly sustained by individual lot owners in Leisure Acres. In making this argument, Twin Mills, LLC refers to language from two cases from this court:

The Appellees' claim that the Commissioners acted unlawfully in the adoption of a wage scale does not involve or implicate individual union workers in determining the operative facts. *And because the relief sought is prospective and injunctive in nature and does not include an award of money damages, there is no need for individual union workers to provide particularized proof or otherwise participate in fashioning a remedy.*

*Bd. of Comm'rs in Cnty. of Allen*, 954 N.E.2d at 942 (emphasis added).

Third, the Appellants only sought review of the granting of a permit *and not an award of monetary damages*, which would have required individualized proof. Thus, the three requirements of the *Hunt* test are satisfied.

*Save The Valley, Inc.*, 820 N.E.2d at 682 (emphasis added).

Thus, Twin Mills, LLC argues that because Leisure Acres initially sought damages on behalf of its individual members, Leisure Acres did not satisfy the third element of associational standing, i.e., “neither the claim asserted nor the

relief requested requires participation of individual members in the lawsuit.”

*See Bd. of Comm'rs in Cnty. of Allen*, 954 N.E.2d at 941.

[21] We address Twin Mills, LLC's arguments in turn. First, Leisure Acres's bylaws appear, at first blush, to narrowly proscribe Leisure Acres's purposes to internal matters regarding property only within the Leisure Acres plat. However, the bylaws state that “[Leisure Acres] shall promote and maintain the safety, property values and *general well-being of the members* of [Leisure Acres].” *Appellant's App. Vol. II* at 86 (emphasis added). We find that the phrase “general well-being” is broad enough to encompass Leisure Acres's objective of stopping Twin Mills, LLC from charging fees to Leisure Acres residents. Moreover, Twin Mills, LLC's interpretation that Leisure Acres's bylaws and the 1985 Covenants do not authorize lawsuits against third parties is too restrictive. Under Twin Mills, LLC's theory, Leisure Acres could never sue third parties, whether Twin Mills, LLC or other third parties.

[22] Second, we reject Twin Mills, LLC's claim that Leisure Acres cannot satisfy the third element of associational standing because it initially sought damages for individual members of Leisure Acres. Twin Mills, LLC is correct that associational standing requires that an entity like Leisure Acres not seek individual damages. However, we reject Twin Mills, LLC's argument because even though Leisure Acres initially sought damages for individual members of Leisure Acres, it has abandoned this claim. *Appellee's Br.* at 12, 29.

[23] Moreover, declaring that Leisure Acres did not have standing to sue Twin Mills, LLC would undermine the important public policies behind associational standing, which most assuredly apply here: 1) judicial economy (not requiring individual members to bring a multitude of individual lawsuits; 2) allowing individual members that have standing in their own right to pool their financial resources and legal expertise to help ensure complete and vigorous litigation of the issues; and 3) associations are generally less susceptible than individuals to retaliations by officials responsible for executing the challenged polices. *See Save the Valley, Inc.*, 820 N.E.2d at 680-81. Accordingly, we find that Leisure Acres had standing to sue Twin Mills, LLC under the associational standing doctrine.

## **II. Has Twin Mills, LLC Forfeited the Right to Argue the 1996 Amendment Did Not Run with the Land?**

[24] Twin Mills, LLC argues that the 1996 Amended Covenants did not run with the land. First, Twin Mills, LLC correctly notes that when David Cagley signed the 1996 Amended Covenants, he did so as president of Twin Mills, Inc., Twin Mills, LLC's predecessor in interest, not as president of Twin Mills, LLC. *See Appellant's App. Vol. II* at 79. Next, Twin Mills, LLC correctly observes that restrictive covenants are generally disfavored in the law and are strictly construed by the courts, and all doubts should be resolved in favor of the free use of property and against such restrictions. *See Howell v. Hawk*, 750 N.E.2d 452, 456 (Ind. Ct. App. 2001). Twin Mills, LLC is also correct that because covenants are a form of express contract, we apply the same rules of



construction; therefore, where the parties' intent cannot be determined within the four corners of the document, a factual determination is necessary to give effect to the parties' reasonable expectations. *Id.* Analysis of a covenant to determine whether it runs with the land typically involves two inquiries: (1) whether the covenant is one which, under any circumstances, may run with the land; and (2) whether it was the intention of the parties as expressed in the agreement that it should run with the land. *Columbia Club, Inc. v. Am. Fletcher Realty Corp.*, 720 N.E.2d 411, 418 (Ind. Ct. App. 1999), *trans. denied*.

[25] Applying this precedent, Twin Mills, LLC contends that the requirement in the 1996 Amended Covenants that Twin Mills, Inc. allow members of Leisure Acres to use nearly all of Twin Mills, Inc. facilities free of charge did not run with the land to Twin Mills, LLC. More specifically, Twin Mills, LLC contends, *inter alia*, that the parties did not intend that the 1996 Amended Covenants run with the land and that the 1996 Amended Covenants, as a contract, lacked consideration for Twin Mills, LLC.

[26] For at least thirteen years, Twin Mills, LLC acquiesced to the use of its facilities by Leisure Acres members and, thus, has forfeited the right to argue that the 1996 Amended Covenants did not run with the land. *See Appellant's App. Vol. II* at 103-04; *Appellee's App. Vol. II* at 3.

[27] Several cases guide our resolution of this issue. In *Ellis v. George Ryan Co.*, 424 N.E.2d 125, 127 (Ind. Ct. App. 1981), we held that in the context of a party's failure to enforce building restrictions, the right to enforce such restrictions may

be lost by acquiescence to prior violations. In *Roberts v. Henson*, 72 N.E.3d 1019, 1030 (Ind. Ct. App. 2017), we provided a more detailed analyses of the circumstances under which a party acquiesces to the conduct of another party:

When analyzing a defense of acquiescence, the focus is the effect of the alleged prior violations upon the ability of the proponent of the restriction to enjoy the benefits of the covenant, compared to the potential abridgement of the proponent's enjoyment of the covenant's benefit caused by the violation sought to be enjoined. Three factors are particularly significant to this analysis: 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.

*Id.* at 1030. Here, Leisure Acres' situation with Twin Mills, LLC satisfies these three criteria. First, the land where Leisure Acres members wish to conduct activities and the land upon which Twin Mills, LLC seeks to enjoin activity is one and the same – the Twin Mills, LLC campground and facilities. *See id.* Second, the nature of the activities of Leisure Acres members on Twin Mills, LLC's campground *before* Twin Mills, LLC started charging the fees and *after* Twin Mills, LLC started charging fees are identical – using Twin Mills, LLC's facilities. *See id.* Third, members of Leisure Acres often used Twin Mills, LLC's facilities free of charge, except for the swimming pool, for at least thirteen years. *See id.*; *see also Appellant's App. Vol. II* at 103-04; *Appellee's App. Vol. II* at 3. Twin Mills, LLC acquiesced to the use of its facilities by Leisure Acres members. It cannot now argue that it should not be required to let

Leisure Acres members use Twin Mills, LLC facilities because the benefits to Leisure Acres members from the 1996 Amended Covenants did not run with the land.

[28] Acquiescence is normally a question of fact. *See Roberts*, 72 N.E.3d at 1030. Here, the undisputed facts establish as a matter of law that Twin Mills, LLC acquiesced to the use of its facilities free of charge, except the swimming pool. Between November of 2009 and spring of 2010, Twin Mills, LLC threatened to start charging fees to Leisure Acres members; by May 2010, Twin Mills, LLC had dropped that threat. *Appellant's App. Vol. II* at 103-04, 111-17.<sup>3</sup> After dropping its threat to charge fees, in a March 29, 2010 letter Twin Mills, LLC advised Leisure Acres that it “would like to enforce the bylaws that have been set forth by [Leisure Acres] when it pertains to Twin Mills and [its] usage.” *Id.* at 113. In a June 25, 2010 letter, it reiterated this point but also said it would abide by the recorded covenants: “we intend to enforce certain rules with respect to the Twin Mills[, LLC] Campground that are consistent with the recorded covenants and the bylaws of [Leisure Acres.]” *Id.* at 116. Twin Mills, LLC acquiesced, as a matter of law, to the free use of its facilities, except its swimming pool, by Leisure Acres members and cannot now contend that the

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<sup>3</sup> Neither party directs us to designated evidence that Twin Mills, LLC actually charged such fees during this period, opposed to merely threatening to charge such fees. Therefore, as stated above, the designated evidence establishes that Twin Mills, LLC acquiesced to the use of its facilities free of charge, except the swimming pool, for thirteen years. *See Appellant's App. Vol. II* at 103-04; *Appellee's App. Vol. II* at 3. However, even if Twin Mills, LLC did not begin to acquiesce to free use of its facilities until May of 2010 and then began charging fees in June of 2019, *see Appellee's App. Vol. II* at 3, that nine-year period of not charging fees constitutes acquiescence as a matter of law.

1996 Amended Covenants did not run with the land. We affirm the trial court's ruling on Twin Mills, LLC's motion to correct error, and we likewise affirm its granting of summary judgment to Leisure Acres, as modified in its motion to correct error order, and its denial of Twin Mills, LLC's cross motion for summary judgment.

[29] Affirmed.

Bradford, C.J., and May, J., concur.