2026 IL App (2d) 250561-U
Nos. 2-25-0561 & 2-25-0562 cons.
Order filed September 4, 2026

NOTICE: This order was filed under Illinois Supreme Court Rule 23(b) and is not precedential except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BEAR VALLEY PARTNERS, Plaintiff-Appellee,

v.

GENEVA CENTER 2015, LLC, and WAUCONDA, LLC, Defendants-Appellants.

Appeal from the Circuit Court of Kane County.
Honorable Mark A. Pheanis, Judge, Presiding.
No. 19-MR-1259

JUSTICE BIRKETT delivered the judgment of the court.
Justices Schostok and Mullen concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in denying defendants, who prevailed on summary judgment, leave to seek attorney fees under the Construction, Operation, and Reciprocal Easement Agreement applicable to the subject shopping center, where the fee-shifting provision binds plaintiff, runs with the land, and does not bar recovery of fees incurred in defending non-declaratory claims.

¶ 2 Defendants, Geneva Center 2015, LLC (Geneva Center), and Wauconda, LLC (Wauconda), appeal from an order entered by the circuit court of Kane County denying them leave to seek attorney fees from plaintiff, Bear Valley Partners (Bear Valley), as prevailing litigants under a fee-shifting provision in a Construction, Operation and Reciprocal Easement Agreement, which governs Fabyan Crossing, a commercial shopping center in Geneva, Illinois. The circuit court concluded that, although it entered summary judgment in defendants' favor, they were not entitled

to seek attorney fees because Bear Valley "is not a party to the COREA" such that the fee-shifting provision in the COREA did not apply. We reverse the court's order denying defendants leave to file petitions for attorney fees and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 This matter arises from a dispute concerning certain lots within Fabyan Crossing, a five-lot commercial shopping center located at the northwest corner of W. Fabyan Parkway and S. Randall Road in Geneva, Illinois. For clarity, we begin with a brief overview of the relevant contractual provisions governing Fabyan Crossing before delving into the circumstances giving rise to the underlying dispute. In doing so, we reproduce, where appropriate, portions of the factual background as set forth in Bear Valley Partners' prior appeal, *Bear Valley Partners v. McDonald's Corp.*, 2024 IL App (2d) 230245-U, wherein we affirmed the entry of summary judgment against Bear Valley and in favor of its tenant, McDonald's Corporation, and Bear Valley's predecessor in interest, Dial Realty Geneva, LLC.

¶ 5 A. Fabyan Crossing and the COREA

¶ 6 Fabyan Crossing was originally conceived in the early 90's, when it was developed into five lots. At that time, Venture Stores (Venture) owned Lot 1, which was the largest lot, and the developer, Joe Keim Land Corporation (Keim), owned Lots 2, 3, 4, and 5. Fabyan Crossing is subject to various restrictions and easements as recorded in a Construction, Operation, and Reciprocal Easement Agreement dated October 28, 1993, and recorded in the office of the Kane County Recorder on November 8, 1993, as document No. 93K88421 (the COREA). The COREA was executed by Venture and Keim (who, at that time, collectively owned all the lots at Fabyan Crossing) and reflected their effort "to make an integrated use of the Shopping Center Site and to

develop and improve [it] as a retail shopping center." The COREA identified Lot 1 as the "Venture Parcel" and Lots 2, 3, 4, and 5 as the "Developer Parcel."

¶ 7 Under the COREA, Lot 4 is subject to a unique combination of advantages and limitations not shared by the other lots at Fabyan Crossing. This is evidenced by several provisions. First, section 1.14 of the COREA defines "Party" as the "Developer or Venture and 'Parties' mean both of the foregoing, or any successor Person(s) to such Party acquiring any interest of a Party in or to any portion of such Party's Parcel, excluding any Person owning any Peripheral Parcel." The term "Peripheral Parcel," in turn, is defined as Lot 4. Second, the COREA imposes certain restrictions and prohibitions on the types of businesses that may operate at Fabyan Crossing. Article 13.5, titled "Limitation on Detrimental Characteristics," prohibits the use or operation of "[a]ny restaurants, bars or taverns," as well as any " 'drive thru,' 'drive up,' 'walk thru,' or 'walk up' " service or area. However, any "Peripheral Parcel" is exempt from these restrictions. Finally, Article 21, titled "Amendment," provides that the COREA may be amended "by a writing signed and acknowledged by all of the Parties and recorded in the office of the Recorder for Kane County, Illinois." The cumulative effect of these provisions is that, under the COREA, a restaurant or drive-thru may be operated only on Lot 4, but the owner of that lot lacks authority to propose, approve, or object to any proposed amendments to the COREA.

¶ 8 Importantly, although the COREA expressly excludes the owner of Lot 4 from its definition of "Party," it separately defines the term "Person." Section 1.18 provides that " 'Person' or 'Persons' means individuals, partnerships, firms, associations, corporations and any other form of business or government organization or entity, or one or more of them, as the context may require." Section 14.4, which governs "Successors," further provides that the COREA "shall run with the land as respects burdens created herein and shall be binding upon all Persons having or acquiring

an interest in [Fabyan Crossing] or any part thereof." It continues that "[t]he benefits of [the COREA] shall inure to the benefit of the respective 'Parties' and successor 'Parties' as herein defined."

¶ 9 Section 24.5 of the COREA, which is central to this appeal, addresses the recovery of attorney fees and costs. It provides: "In the event any Person shall institute any action or proceeding *** against any other Person relating to violations, threatened violations, or failure of performance of or under this [COREA], or any default thereunder, or to enforce the provisions thereof then, and only in that event, the prevailing Person shall be entitled to recover *** a reasonable attorneys' fee." It further provides that section 24.5 "shall not be applicable to any declaratory relief action or cause of action."

¶ 10 B. The Underlying Dispute and Ensuing Litigation

¶ 11 In 2006, Bear Valley acquired Lot 4 from Dial Realty Geneva, LLC, and currently leases it to McDonald's. A McDonald's restaurant has operated on Lot 4 since the mid-1990s. Bear Valley's lease with McDonald's contains a covenant not to compete, under which Bear Valley covenanted that no other lot within Fabyan Crossing would be used or occupied as a restaurant or food service establishment. If that covenant is breached, McDonald's is entitled under its lease to abate one-half of the rent otherwise owed to Bear Valley "for so long as such breach continues."

¶ 12 Geneva Center owns Lot 1 and Wauconda formerly owned Lot 2. On March 30, 2018, Geneva Center and Wauconda executed a "Notice of Designation of Party's Agent" pursuant to the COREA, under which Geneva Center appointed Wauconda as "Party Agent" for the successor owners of the Developer Parcel and Wauconda accepted such designation. That same day, Geneva Center and Wauconda executed an amendment to the COREA, namely the Third COREA Amendment, that, among other changes, subdivided Lot 1 to create a new outlot and permitted a

restaurant with a drive-thru to operate on the newly created parcel. The Third COREA Amendment was thereafter recorded with the Kane County Recorder's Office. Geneva Center and Oberweis Dairy, Inc., then began planning to construct a restaurant with a drive-thru on Lot 1.

¶ 13 On October 15, 2019, Bear Valley filed a 12-count complaint against Geneva Center and Wauconda, seeking to invalidate the Third COREA Amendment and prevent the opening of a restaurant on Lot 1. It asserted that the proposed restaurant on Lot 1 would cause it to breach its covenant with McDonald's and trigger McDonald's contractual right to abate half of the rent due under the lease, resulting in damages in excess of $1 million if McDonald's opted to exercise all of its options to extend its lease, as well as "substantial damage to the current and residual value of Lot 4." Bear Valley also cited section 24.5 of the COREA, which it characterized as entitling the "Prevailing Person" in litigation involving a violation of, failure to comply with, or enforcement of the COREA, to an award of attorney fees and costs.

¶ 14 Count I of Bear Valley's complaint sought a declaratory judgment that defendants lacked authority to designate or accept the designation of a Party Agent and that the Notice of Designation of Party's Agent and the Third COREA Amendment were ineffective. Count II sought injunctive relief barring the effectiveness of the Third COREA Amendment and preventing Geneva Center from permitting Oberweis Dairy to construct or operate a restaurant on any portion of Lot 1. The remaining counts were pleaded in the alternative to count II and alleged, among other causes of action, breach of fiduciary duty, breach of the duty of good faith and fair dealing, and related inducement and conspiracy claims. Bear Valley sought punitive damages in excess of $1 million, as well as attorney fees and costs under each count.

¶ 15 On December 2, 2019, Geneva Center filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2018)). It

argued that, because Bear Valley owned only Lot 4, which is a "Peripheral Parcel," Bear Valley was not a "Party" as defined in the COREA and therefore lacked certain of the rights it claimed in its complaint. In support, Geneva Center pointed to section 14.3 of the COREA, which provides that "[n]o Person other than a Party shall be entitled to make any claim against any Party or its Parcel under or by virtue of this [COREA] or any provisions hereof." Geneva Center further noted that the COREA excludes the owner of a Peripheral Parcel from participating in the process to designate a Party Agent, and that article 21 provides that "[n]o amendment or other modification of this [COREA] shall require any consent or approval on the part of any Person other than a Party." Accordingly, Geneva Center argued that Bear Valley had no right under the COREA to (1) bring any claim arising under the COREA against any Party or its parcel, (2) participate in the designation of a Party Agent, or (3) participate in the amendment process. It also claimed that Bear Valley's claims for breach of fiduciary duty and breach of the duty of good faith and fair dealing should be dismissed on the basis that it owed no such duties to Bear Valley and, even if it did, it had not breached them. Wauconda thereafter filed a motion adopting and joining Geneva Center's motion to dismiss.

¶ 16 In February 2020, the circuit court ordered the parties to participate in the mediation that had been ordered in a related case, *Bear Valley Partners v. City of Geneva, Oberweis Dairy, Inc., and Geneva Center*, Kane County case No. 2019 CH 471, in which Bear Valley challenged a zoning ordinance enacted by the City of Geneva permitting a drive-thru restaurant at Fabyan Crossing. The court also continued generally the hearing on defendants' motions to dismiss and set the matter for status on mediation. The parties thereafter participated in mediation until late 2020 but were unable to reach an agreed resolution.

¶ 17 On June 12, 2023, Bear Valley filed an amended complaint. It abandoned its allegations that Geneva Center lacked authority under the COREA to designate Wauconda as Party Agent, that Wauconda lacked authority to accept that designation, and that the Third COREA Amendment was ineffective. Instead, it added Fabyan Realty, LLC, which had acquired Lot 2 from Wauconda in 2019, as a defendant, and asserted six counts: two counts seeking declaratory relief based on an implied easement by necessity and an easement created by the COREA, and four counts alleging breach of fiduciary duty and breach of the duty of good faith and fair dealing against Geneva Center and Wauconda. As to the declaratory judgment counts, Bear Valley contended that declaratory relief was necessary because Geneva Center had refused to assure its tenant, McDonald's, that it would not amend the COREA to alter, remove, or otherwise affect Lot 4's easements for ingress and egress to the public road, which Bear Valley feared would render Lot 4 landlocked. Bear Valley therefore sought a declaration that its lot benefits from a permanent easement, either by necessity or under the COREA itself. As to the remaining four counts, Bear Valley alleged that defendants breached their fiduciary duties and duties of good faith and fair dealing by executing the Third COREA Amendment, which permitted a restaurant with a drive-thru on Lot 1. According to Bear Valley, the amendment caused substantial and ongoing damage to the current and residual value of Lot 4 because, after the Oberweis restaurant opened for business on Lot 1, McDonald's indeed reduced its rent by 50% pursuant to its lease and thereby diminished the fair market value of Lot 4. As in its original complaint, Bear Valley sought punitive damages in excess of $1 million and cited section 24.5 of the COREA, which provides for an award of attorney fees to the "prevailing Person" in certain circumstances. Bear Valley did not, however, expressly request an award of attorney fees in its prayers for relief.

¶ 18 On July 28, 2023, Geneva Center filed a motion to dismiss the amended complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2022). On September 29, 2023, the circuit court granted the motion, dismissed without prejudice Bear Valley's declaratory judgment and breach of fiduciary duty counts and dismissed with prejudice the claims for breach of the duty of good faith and fair dealing.

¶ 19 On October 24, 2023, Bear Valley filed a second amended complaint, again asserting two counts for declaratory judgment based on an implied easement by necessity and an easement created by the COREA, as well as two counts alleging breach of fiduciary duty against Geneva Center and Wauconda. As in its amended complaint, Bear Valley sought punitive damages of more than $1 million on the breach of fiduciary duty counts, and it again cited section 24.5 of the COREA without expressly seeking an award of attorney fees.

¶ 20 On January 4, 2024, Geneva Center moved to dismiss the second amended complaint pursuant to section 2-615 of the Code. On March 27, 2024, the circuit court denied the motion as to the two declaratory judgment counts but dismissed with prejudice the breach of fiduciary duty counts. Thereafter, Geneva Center filed an answer and asserted several affirmative defenses on April 17, 2024, and Wauconda filed its answer and affirmative defenses the following day.

¶ 21 The circuit court later granted Bear Valley leave to file a third amended complaint, which it filed on February 13, 2025. The third amended complaint was substantively identical to the second amended complaint, except for revisions to the identities of certain individuals referenced in the declaratory judgment counts to conform the pleadings to the proofs.

¶ 22 On March 7, 2025, Geneva Center and Wauconda filed updated answers and moved to dismiss the reasserted breach of fiduciary duty counts on the basis that those counts had already

been dismissed with prejudice, but Bear Valley nevertheless reasserted them without modification in its third amended complaint.

¶ 23 On May 16, 2025, Bear Valley and Geneva Center filed cross-motions for summary judgment on the two remaining counts of Bear Valley's third amended complaint, which sought declaratory judgments based on an implied easement by necessity and an easement created by the COREA. Wauconda again filed a separate motion expressly adopting and incorporating the arguments raised in Geneva Center's motion. In their prayers for relief, both defendants sought leave to file fee petitions pursuant to section 24.5 of the COREA, which they characterized as entitling the prevailing litigant to such fees and costs. Bear Valley filed a combined response in opposition to defendants' motion for summary judgment, wherein it pertinently argued that, even if defendants prevailed in the litigation, they were not entitled to attorney fees because the surviving counts in its third amended complaint sought declaratory relief, which was expressly excepted from the attorney-fee provision in section 24.5. Additionally, Bear Valley argued that its previously dismissed counts, which alleged breach of fiduciary duty, did not fall within the scope of section 24.5 because they did not relate to any violation or threatened violation of, or failure to perform under, the COREA.

¶ 24 On August 5, 2025, the circuit court granted summary judgment in favor of Geneva Center and Wauconda, finding that Bear Valley had failed to establish an actual controversy or adverse interests between the parties. Specifically, it found no evidence that Wauconda had threatened or otherwise interfered with the business dealings between McDonald's and Bear Valley or that Geneva Center had threatened or claimed authority to eliminate Lot 4's easement rights. As described by the trial court, the record instead showed that, while considering purchasing Lot 4, McDonald's briefly negotiated with Geneva Center "to be a party to the COREA" and sought

additional assurances concerning its easement rights. Geneva Center proposed a $1.5 million fee for McDonald's to "be a party to the COREA," but McDonald's responded that they were "too far apart" and the call ended. "It was less than a 5-minute phone call." McDonald's then ceased pursuing the purchase.

¶ 25 As part of its ruling, the circuit court nevertheless denied defendants' requests for leave to file petitions for attorney fees and costs. In so ruling, the court rejected defendants' reliance on section 24.5, reasoning that "only parties to a contract are bound by its terms" and that the parties agreed that Bear Valley "is not a party to the COREA." The court also cited our decision in *Bear Valley Partners v. McDonald's Corp.*, 2024 IL App (2d) 230245-U, ¶ 67, stating that we had previously "expressly found" that Bear Valley, in the circuit court's words, "is not a party to the COREA." Accordingly, the court determined that section 24.5 provided no contractual basis for an award of attorney fees against Bear Valley and that such an award was therefore barred by the "American rule," under which each party is responsible for its own litigation expenses absent statutory authority or a contractual agreement providing otherwise.

¶ 26 Defendants moved to reconsider and, on November 14, 2025, the circuit court denied those motions. The court reiterated its prior ruling and explained that, after considering the COREA as a whole and case law applying contractual fee-shifting provisions, it could "not find that the parties have 'contractually agreed otherwise' to shift attorney's fees and costs to [Bear Valley] as a non-party to the COREA." The court also cited *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002), for the proposition that "[i]t goes without saying that a contract cannot bind a nonparty."

¶ 27 Defendants timely filed notices of appeal.

¶ 28 II. ANALYSIS

¶ 29 Geneva Center, having prevailed on its motion for summary judgment, contends that it is entitled to reasonable attorney fees under section 24.5 of the COREA as a "prevailing Person" and that the circuit court therefore erred in denying its request for leave to file an attorney-fee petition. Wauconda, for its part, filed an appellate brief noting that its interests have been aligned with those of Geneva Center throughout the litigation and expressly incorporates the arguments raised in Geneva Center's brief. Together, defendants raise three principal arguments in support of their claim for attorney fees: (1) the circuit court erred by conflating the term "Party," a defined term under the COREA, with the general concept of a party to a contract; (2) section 24.5 of the COREA constitutes a covenant that runs with the land and is therefore binding on Bear Valley as the owner of Lot 4; and (3) the declaratory-relief exception in section 24.5 does not preclude an award of attorney fees.

¶ 30 The circuit court reached only the first of these issues and concluded that section 24.5 did not apply because Bear Valley is "not a party to the COREA." It therefore did not address Bear Valley's alternative arguments, raised below, that section 24.5 does not run with the land and that its declaratory-relief exception bars recovery of attorney fees. Nevertheless, we may affirm on any basis appearing in the record, regardless of whether the court relied on that basis. *Wofford v. Tracy*, 2015 IL App (2d) 141220, ¶ 38. Accordingly, we address each issue in turn.

¶ 31 In general, Illinois courts follow the "American Rule," under which, absent statutory authority or a contractual agreement to the contrary, each party is responsible for his or her own attorney fees. *In re Marriage of Kane*, 2018 IL App (2d) 180195, ¶ 14. Although parties may contract around the American Rule, courts strictly construe such provisions. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 254 (2010). In other

words, courts "construe the fee-shifting provision 'to mean nothing more—but also nothing less—than the letter of the text.' " *Id*. (quoting *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004)).

¶ 32 A. Interpretation of Section 24.5

¶ 33 In construing a contract, our primary objective is to give effect to the intent of the parties. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). To that end, a court must construe the contract as a whole, rather than focus on isolated provisions, and give unambiguous terms their plain meaning. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 637 (2008). Where the terms of a contract are clear and unambiguous, the intent of the parties must be ascertained from the language of the contract itself. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 344 (2000). Accordingly, terms in a contract are generally given their plain and ordinary meanings unless specifically defined in the contract, "in which case they will be given the meaning as defined." *Atchison, Topeka & Santa Fe Ry. Co. v. St. Paul Surplus Lines Insurance Co.*, 328 Ill. App. 3d 711, 714 (2002). See also *William Blair & Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 335 (2005) (observing that "[u]nless a contract clearly specifies its own meanings, a court must interpret the words of the contract with their common and generally accepted meanings").

¶ 34 Here, defendants' entitlement to attorney fees under section 24.5 turns on the interpretation of the COREA and therefore presents a question of law that we review *de novo*. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005). "A contract construed as a matter of law by the trial court may be construed independently by a reviewing court, unrestrained by the trial court's judgment." *Bright Horizons Children's Centers, LLC*, 403 Ill. App. 3d at 245. We begin by examining the language of section 24.5, which governs the recovery of attorney fees and costs. It provides:

> "In the event any Person shall institute any action or proceeding ("suit"), excluding any arbitration proceeding, against any other Person relating to violations, threatened violations, or failure of performance of or under this [COREA], or any default thereunder, or to enforce the provisions thereof then, and only in that event, the prevailing Person shall be entitled to recover as an element of its costs of suit, and not as damages, a reasonable attorneys' fee to be fixed by the court. The 'prevailing Person' shall be the Person which by law is entitled to recover its costs of suit, whether or not the suit proceeds to final judgment. A Person not entitled to recover its costs shall not recover attorneys' fees; provided, however, that if a Person which shall have instituted suit shall dismiss it as against another Person without the concurrence of such other Person, such other Person shall nevertheless be deemed the prevailing Person. No sum for attorneys' fees shall be counted in calculating the amount of a judgment for purposes of determining whether a Person is entitled to recover its costs or attorneys' fees. The term 'attorneys' fees' shall include fees of outside counsel and costs allocable to in-house counsel. The provisions of this section shall not be applicable to any declaratory relief action or cause of action."

¶ 35 The parties' arguments on appeal unnecessarily complicate what is, at root, a straightforward question of contract interpretation. By its plain language, section 24.5 applies when "any Person" institutes a qualifying action against "any other Person" and provides that the "prevailing Person" is entitled to recover reasonable attorney fees.

¶ 36 The COREA, in turn, defines "Person" in section 1.18 as "individuals, partnerships, firms, associations, corporations and any other form of business or government organization or entity, or one or more of them, as the context may require." Given the breadth of this definition, Bear Valley, a California limited partnership, plainly qualifies as a "Person" under the COREA, and Bear Valley

conceded this point at oral argument. The same is true of each defendant. According to Bear Valley's original complaint, Geneva Center is an Ohio limited liability company and Wauconda is an Illinois limited liability company. Thus, for purposes of section 24.5, Bear Valley and defendants are all "Persons" within the meaning of the COREA.

¶ 37 As noted, the circuit court denied defendants' requests for leave to seek attorney fees pursuant to section 24.5 on the basis that the parties agreed that Bear Valley "is not a party to the COREA." In doing so, however, the court failed to give effect to the terms that are expressly defined in the COREA, which must be given the meanings assigned to them. See *Atchison*, 328 Ill. App. 3d at 714. Critically, section 24.5 applies to a "Person," which is a term that is separately defined in section 1.18. It is not limited to a "Party," which appears nowhere in section 24.5 and is defined more narrowly in section 1.14 to include only the Developer and Venture and "any successor Person(s) to such Party acquiring any interest of a Party in or to any portion of such Party's Parcel," while excluding "any Person owning a Peripheral Parcel," meaning Lot 4. Thus, although Bear Valley's ownership of Lot 4 excludes it from the definition of a "Party," it does not exclude Bear Valley from the separate and broader definition of a "Person." Nevertheless, the court relied on our decision in *Bear Valley Partners v. McDonald's Corp.*, 2024 IL App (2d) 230245-U, for the proposition that Bear Valley is "not a party to the COREA" and, in denying defendants' motions to reconsider, emphasized that "the COREA's definition of 'party' *** excludes any person, such as [Bear Valley] who owns a peripheral parcel." In essence, the court substituted "Party" for "Person," and thereby impermissibly narrowed the class of Persons subject to section 24.5's attorney-fee provision.

¶ 38 Bear Valley devotes the bulk of the argument portion of its brief to asserting that defendants repeatedly and consistently maintained throughout the proceedings below that Bear Valley "is not

a party to the COREA" and that defendants therefore had acted disingenuously in subsequently seeking attorney fees under the COREA after prevailing on their motions for summary judgment. Bear Valley characterizes defendants' request for attorney fees under the COREA as "an about face," asserting that their requests for fees cannot be reconciled with the position they maintained throughout the proceedings below.

¶ 39 However, a review of the statements to which Bear Valley points reveals that defendants were not disclaiming the COREA's application to Bear Valley altogether. Rather, defendants were asserting that Bear Valley, as the owner of a Peripheral Parcel, does not qualify as a "Party" as that term is defined and therefore lacks certain rights that the COREA exclusively reserves for "Parties," including the right to make a claim against another "Party" under the COREA and the authority to propose, approve, or object to proposed amendments.

¶ 40 Indeed, Bear Valley itself recognized this distinction in the proceedings below, notwithstanding its apparent conflation of the two concepts on appeal. In its response to Geneva Center's motion to dismiss the original complaint, Bear Valley addressed Geneva Center's argument that, because Bear Valley was not a "Party" as that term is defined in the COREA, section 14.3 deprived it of standing to challenge Geneva Center's designation of Wauconda as the Party Agent or their decision to amend the COREA to allow a drive-thru restaurant on Lot 1. As noted, section 14.3 provides that "[n]o Person other than a Party shall be entitled to make any claim against any Party or its Parcel under or by virtue of this [COREA] or any provisions hereof." Bear Valley responded:

> "Defendants premise their standing argument on their attempt to equate a party to an agreement generally with a 'Party' under the COREA, which is a specifically defined term in the COREA. Those terms are not synonymous. Even if Plaintiff is not a 'Party' as

defined by the COREA, that does not mean it is not a party to the document at all. As the successor owner of Lot 4, which has always been one of the lots included in the development and identified in the COREA, Plaintiff has rights and obligations under the COREA and, even if not individually a signatory to the COREA, is a party to the COREA by virtue of having acquired Lot 4 from a signatory (the Developer). [Citation.] Thus, Plaintiff is a party. If it is not a party to the COREA at all as Defendants claim, Plaintiff could ignore the COREA and do as it pleases with its parcel. Certainly Defendants would take issue with Plaintiff's doing so."

¶ 41 Our decision in Bear Valley's prior appeal likewise reflects this distinction. Early in that decision, we expressly recognized that the COREA defines the term "Party" to include the Developer, Venture, and certain successors, while excluding "any Person owning any Peripheral Parcel," and explained that the consequence of Lot 4's exclusion from that definition was that its owner lacked any authority to propose, approve, or object to amendments to the COREA. *Bear Valley Partners v. McDonald's Corp.*, 2024 IL App (2d) 230245-U, ¶ 7. We reiterated this point elsewhere in our decision, explaining that "neither the owner of Lot 4 nor McDonald's is a 'Party' under the COREA and, as a result, neither entity is empowered under the COREA to propose, approve, or object to any amendments thereto." *Id.* ¶ 67. Read in context, our references to Bear Valley's status as not a "Party" plainly referred to the COREA's specifically defined term and the particular rights attendant to that status.

¶ 42 Thus, Bear Valley itself expressly recognized below, and our prior decision reflects, that being a party to the COREA generally and qualifying as a "Party" under the COREA's specific definition are distinct concepts. The COREA itself demonstrates the distinction by expressly extending some provisions to "Persons" while reserving others to "Parties." Section 24.5 falls into

the former category. The circuit court thus erred when it concluded that Bear Valley is "not a Party to the COREA" and, on that basis, denied defendants leave to file attorney-fee petitions.

¶ 43 B. Covenants Running with the Land

¶ 44 Although the circuit court did not reach the issue, Bear Valley alternatively contends that we may affirm the denial of defendants' requests for leave to file fee petitions because section 24.5 is not a covenant running with the land and therefore does not bind Bear Valley as a subsequent owner. We may affirm the circuit court's judgment on any basis supported by the record. *Wofford*, 2015 IL App (2d) 141220, ¶ 38. Because the relevant facts are not in dispute and resolution of this issue turns on the interpretation of the COREA and the legal effect of its provisions, we may resolve it as a matter of law. *5247 S. Clinton, LLC v. Westloop Equities,* LLC, 2014 IL App (1st) 131401, ¶ 28.

¶ 45 Section 14.4 expressly addresses the extent to which the COREA binds subsequent owners in Fabyan Crossing. Titled "Successors," it identifies the Persons upon whom the burdens created by the COREA are binding. It provides:

> "This [COREA] shall run with the land as respects burdens created herein and shall be binding upon all Persons having or acquiring an interest in [Fabyan Crossing] or any part thereof. The benefits of this [COREA] shall inure to the benefit of the respective 'Parties' and successor 'Parties' as herein defined."

Bear Valley acquired Lot 4 in 2006 and thus has an interest in Fabyan Crossing. It therefore falls within the class of "Persons" upon whom section 14.4 makes the burdens created by the COREA binding. Article 21 reinforces this conclusion by expressly providing that "Persons having or acquiring an interest" in Fabyan Crossing are bound by any amendments or modifications to the COREA.

¶ 46 The question thus becomes whether the fee-shifting provision in section 24.5 constitutes such a burden that runs with the land. Where a covenant runs with the land, the benefit or obligation of the covenant will pass with ownership. *Village of Kirkland v. Kirkland Properties Holdings Co., LLC I*, 2022 IL App (2d) 200780, ¶ 32. A covenant runs with the land if three criteria are met: (1) the grantor and grantee intended the covenant to run with the land; (2) the covenant touches and concerns the land; and (3) there is privity of estate between the party claiming the benefit of the covenant and the party resting under the burden of the covenant. *United City of Yorkville*, 2019 IL App (2d) 180230, ¶ 132; *Standlee v. Bostedt*, 2019 IL App (2d) 180325, ¶ 52. Conversely, a "covenant is personal, and therefore does not run with the land, where it is collateral and personal and not immediately concerning the thing granted." *C-B Realty & Trading Corporation v. Chicago and North Western Ry. Co.*, 198 Ill. App. 3d 926, 930 (1990). Bear Valley contends that section 24.5 does not run with the land because the provision fails to satisfy the first two criteria, but it does not dispute that the third criterion, privity of estate, is satisfied by virtue of its ownership of Lot 4.

¶ 47 We agree with defendants that section 24.5 is a covenant that runs with the land. Looking first to the express terms of the COREA, which provide the most reliable indication of the parties' intent (*Streams Sports Club v. Richmond*, 99 Ill. 2d 182, 188 (1983)), section 14.4 states that the COREA "shall run with the land as respects burdens created herein and shall be binding upon all Persons having or acquiring an interest in [Fabyan Crossing] or any part thereof." This language reflects an express intent that the COREA's burdens run with the land as to all "Persons." Other courts have found similar language sufficient. See *Bank of America, N.A. v. Cannonball LLC*, 2014 IL App (2d) 130858, ¶ 23 (parties intended covenants to run with the land where agreement provided it "shall be binding upon *** the respective successors and assigns of the parties");

Nassau Terrace Condo Ass'n, Inc. v. Silverstein, 182 Ill. App. 3d 221, 224-25 (1989) (holding that the parties to a lease intended the covenants to run with the land where the lease provided it was "binding upon all future owners, and the heirs, executors, and assigns of the Lessor," and that it was "the intention of the parties hereto that this Lease run with the land").

¶ 48 Bear Valley maintains, however, that section 14.5, which immediately follows section 14.4, demonstrates that only covenants of a "Party" were intended to run with the land. Specifically, section 14.5 provides that:

> "the covenants, easements, agreements, promises and duties of each Party as set forth in this [COREA] shall be construed as covenants and not as conditions, and that, to the fullest extent legally possible, all such covenants shall run with the land and constitute equitable servitudes as between the Parcel of the respective covenantor, as the servient tenement, and the Parcel of the respective convenantee, as the dominant tenement, binding upon the servient tenement and benefitting the dominant tenement; provided, however, that such benefits shall be enforceable only by the Party as to the dominant Parcel."

Bear Valley's reading of section 14.5 overlooks the distinction that section 14.5, itself, draws between burdens and benefits. Although this section provides that the benefits of a covenant are enforceable only by a "Party" as to the dominant parcel, it separately provides that the covenant is "binding upon the servient tenement." This distinction is consistent with section 14.4, which provides that the COREA's burdens are binding upon "all Persons having or acquiring an interest" in Fabyan Crossing, while its benefits inure to the benefit of the "Parties" and successor "Parties." The distinction is likewise consistent with section 14.3, which provides that "[n]o Person other than a Party shall be entitled to make any claim against any Party or its Parcel under or by virtue of this [COREA]." Read together, these provisions demonstrate that the COREA's limitation on

who may claim its benefits does not limit the class of "Persons" upon whom its burdens may be imposed. In other words, the fact that Bear Valley is not a "Party," as that term is defined in the COREA, limits its ability to enforce the benefits of the COREA, but it does not exempt Bear Valley, as a "Person" with an interest in Fabyan Crossing, from the burdens that run with the land.

¶ 49 Concerning the second criterion, a covenant touches and concerns the land if it affects the use, value, and enjoyment of the property. *Cannonball*, 2014 IL App (2d) 130858, ¶ 24. Here, section 24.5 is not a generic fee-shifting mechanism or a freestanding promise to reimburse litigation expenses. Rather, it applies exclusively to litigation involving "Persons" having an interest in Fabyan Crossing and "relating to violations, threatened violations, or failure of performance of or under [the COREA], or any default thereunder, or to enforce the provisions thereof." The right of a prevailing "Person" to recover attorney fees thus arises only in connection with the enforcement of the COREA's substantive covenants governing Fabyan Crossing, which themselves undoubtedly affect the use, value, and enjoyment of the property.

¶ 50 Despite Bear Valley's characterization of section 24.5 as being "entirely divorced from any substantive enhancement of the property," it nevertheless affects the value of Fabyan Crossing by facilitating the enforcement of the COREA's covenants to the benefit of each lot. Bear Valley's reliance on *Streams Sports Club, Ltd. v. Richmond*, 99 Ill. 2d 182 (1983), does not persuade us otherwise. It is true that the covenant at issue there required condominium owners to pay fees for recreational facilities that physically benefited the development. *Id*. at 189-90. But, contrary to Bear Valley's reading, *Streams* did not hold that a covenant requiring the payment of funds touches and concerns the land only if, as Bear Valley asserts, the payment has "a substantive, physical nexus to the burdened parcels." Although the court in *Streams* relied on the recreational facilities' physical relationship to the condominium development in concluding that the covenant touched

and concerned the land, it did not purport to make such a physical nexus a prerequisite for monetary covenants. See *Streams*, 99 Ill. 2d at 189-90.

¶ 51 Indeed, several cases applying *Streams* have held that monetary covenants may touch and concern the land even if the payments do not fund a physical improvement or amenity. See *Cannonball*, 2014 IL App (2d) 130858, ¶ 29 (holding that financial covenant concerning tax reimbursement and lien rights touched and concerned the land because it directly affected the properties' value and was "not simply a personal financial obligation between the parties"); *Yorkshire Village Community Ass'n v. Sweasy*, 170 Ill. App. 3d 155, 163 (1988) (holding that condominium declarations and by-laws were covenants running with the land and that "[t]he same is true of a covenant to pay attorney fees for the enforcement of other covenants").

¶ 52 These authorities support the same conclusion here. An attorney fee provision tied to the enforcement of covenants affecting the property is not divorced from those covenants, but rather, serves to make their enforcement economically more practical. Without such a provision, a successor in interest would ordinarily have to bear the full cost of enforcement, thereby diminishing the practical value of the covenants to the benefited estate and potentially discouraging their enforcement. Moreover, courts have held similar attorney fee provisions to run with the land. See *334 Barry in Town Homes, Inc. v. Farago*, 205 Ill. App. 3d 846, 849-50 (1990) (upholding an attorney-fee award where condominium declaration authorized the recovery of attorney fees and costs incurred in legal proceedings necessary to enforce the declaration); *2424 Chicago Condominium Ass'n v. Revite Corp.*, 2021 IL App (1st) 200906-U (applying *Yorkshire Village* and holding that a condominium declaration's covenant requiring a defaulting unit owner to pay attorney fees incurred in enforcing the declaration runs with the land). Other payment obligations lacking a physical nexus to the burdened property have likewise been held to run with the land.

See *U.S. Fidelity & Guarantee Co. v. Old Orchard Plaza Ltd. Partnership*, 284 Ill. App. 3d 765, 777 (1996) (holding that a covenant requiring landlord to pay a termination fee if tenant did not exercise an option to extend the lease directly affected the value of both the leasehold and the property). Accordingly, because section 24.5 facilitates the enforcement of the covenants governing the use, value, and enjoyment of Fabyan Crossing, it likewise touches and concerns the land.

¶ 53 As to the third criterion, Bear Valley concedes that the requisite privity of estate exists, and we therefore need not address that criterion. Accordingly, section 24.5 runs with the land and binds Bear Valley by virtue of its ownership of Lot 4.

¶ 54 C. The Declaratory-Relief Exception

¶ 55 Bear Valley advances an additional ground for affirmance that the circuit court did not reach. It contends that, even if section 24.5 otherwise binds it, defendants are not entitled to attorney fees because that section excludes fee-shifting for "any declaratory relief action or cause of action." According to Bear Valley, because its third amended complaint asserted only claims for declaratory relief, this exception precludes defendants from recovering their attorney fees. Bear Valley also characterizes the litigation below, and its primary litigation objective, as seeking "to preserve the rights of the easement and obtain a declaration of these rights from the court."

¶ 56 We are unpersuaded. Bear Valley's argument overlooks the procedural history of this case and rests on the flawed premise that defendants incurred attorney fees solely in connection with the declaratory relief claims that the circuit court adjudicated on the merits. Although only the two declaratory judgment counts ultimately remained for adjudication on the merits, Bear Valley's third amended complaint also reasserted its claims for breach of fiduciary duty against both defendants. Moreover, Bear Valley's earlier complaints were grounded in purported violations of the COREA,

asserted numerous non-declaratory causes of action, and sought injunctive relief, compensatory and punitive damages, and attorney fees under section 24.5. Defendants were required to defend against those claims and incurred attorney fees in doing so before the claims were dismissed or superseded by subsequent complaints.

¶ 57 Specifically, the original complaint asserted 12 counts and sought, among other forms of non-declaratory relief, an injunction preventing the Third COREA Amendment from taking effect and barring Geneva Center from allowing Oberweis Dairy to construct or operate a restaurant on any portion of Lot 1. The amended complaint likewise asserted six counts, two seeking declaratory relief concerning Lot 4's easement rights and four counts alleging breaches of fiduciary duty and the duty of good faith and fair dealing arising from defendants' execution of the Third COREA Amendment, and it sought compensatory and punitive damages. The second amended complaint similarly asserted four counts, two seeking declaratory relief concerning Lot 4's easement rights and two alleging breaches of fiduciary duty arising from defendants' execution of the Third COREA Amendment, with Bear Valley again seeking punitive damages in excess of $1 million on the latter counts. Even the third amended complaint, itself, was not limited to claims for declaratory relief. In addition to the two declaratory judgment counts, Bear Valley reasserted, without modification, its previously dismissed breach-of-fiduciary-duty claims against Geneva Center and Wauconda. Although the circuit court had previously dismissed those claims with prejudice, defendants were nevertheless required to respond to their reassertion. Geneva Center moved to dismiss count III, the fiduciary-duty claim asserted against it, while Wauconda separately moved to dismiss count IV, the corresponding fiduciary-duty claim asserted against it. Thus, even considering only Bear Valley's third amended complaint, defendants incurred attorney fees in connection with defending non-declaratory relief claims.

¶ 58 Nor are we persuaded by Bear Valley's characterization of its primary litigation objective as merely seeking "to preserve the rights of the easement and obtain a declaration of these rights from the court." The record belies that characterization. Bear Valley commenced this suit in 2019 by seeking to invalidate the Third COREA Amendment and enjoin the construction and operation of a restaurant on Lot 1, alleging that the amendment violated the COREA and would cause it substantial economic harm. It subsequently pursued claims alleging that defendants breached fiduciary duties and duties of good faith and fair dealing by executing that amendment, and it sought compensatory and punitive damages for the resulting decrease in Lot 4's value. In light of this procedural history, the litigation below cannot reasonably be characterized as merely an action to obtain a declaration concerning Lot 4's easement rights, much less as litigation unrelated to the enforcement of or alleged violations of the COREA.

¶ 59 We therefore hold that, although section 24.5 precludes defendants from recovering attorney fees incurred in connection with Bear Valley's claims for declaratory relief, it does not preclude them from recovering fees incurred in defending against Bear Valley's non-declaratory claims. The circuit court shall determine the amount of such recoverable fees on remand.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we reverse the judgment of the circuit court of Kane County denying defendants leave to file petitions for attorney fees and remand for the circuit court to determine the amount of recoverable attorney fees and costs that they, as prevailing Persons under section 24.5 of the COREA, are entitled to recover from Bear Valley.

¶ 62 Reversed and remanded.