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IN THE FIFTH JUDICIAL DISTRICT COURT
WASHINGTON COUNTY, STATE OF UTAH

EVELYN OBERG, an individual, Plaintiff, v. DIXIE SPRINGS ARCHITECTURAL CONTROL COMMITTEE, an entity organized under the laws of the state of Utah, Defendant.	**OPPOSITION TO DEFENDANT'S APPLICATION FOR PRELIMINARY INJUNCTION** Case No. 230500079 Judge: Judge G. Michael Westfall

I. INTRODUCTION

63% of the residents of Dixie Springs cast their vote to amend their subdivision's governing documents to abolish Defendant Dixie Springs Architectural Control Committee ("Defendant" or "the ACC"). Unsurprisingly, the ACC, whose power and influence over the community hangs in the balance, claims that Plaintiff Evelyn Oberg ("Plaintiff" or "Ms. Oberg") and her neighbors did not amend the governing documents correctly. The sole question to be answered by this Court is whether the Dixie Springs residents properly amended the governing documents. That question will be answered in

the affirmative.

As the Court will quickly note, the governing documents ("CC&Rs") are not without ambiguity. Notwithstanding the lack of clarity in the CC&Rs, Ms. Oberg and her neighbors complied with each and every condition precedent to amend the governing documents. Specifically, these homeowners (1) provided notice to all holders of first mortgage liens, (2) notified the first mortgage lienholders of the date by which the owners would conclude the voting on the amendment, (3) voted on the proposed amendment, and (4) recorded the amendment with the Washington County Recorder's Office.

These are the four conditions with which the ACC takes issue—incorrectly claiming that Ms. Oberg did not comply. However, as set forth herein, the *evidence* shows that the ACC's *arguments* are without merit. The ACC's arguments are based on the ACC's impermissibly narrow interpretation of the governing documents (which happens—not coincidentally—to be favorable to only the ACC, not the property owners). Ms. Oberg complied with the foregoing conditions precedent, effectuating the express desire of 63% of Dixie Springs' owners to amend the governing documents. Because the evidence shows that Amendment 5 was properly passed, the ACC's Application should be denied and a final judgment on the merits of this case can be issued in favor of Ms. Oberg.

II. CONSOLIDATION

As a preliminary matter, Ms. Oberg does not necessarily disagree with the ACC that a trial on the merits be advanced. In its Application, the ACC invokes Utah R. Civ. P. 65A(a)(2) and requests that this Court order the trial of the action on the merits to be advanced and consolidated with the hearing on the Application.[1] The ACC bases its request on its assertion that "no discovery (outside of those documents in [Ms. Oberg's] control) is ***likely*** to be necessary."[2]

[1] *See* Application at p. 4.

[2] *See id.* (emphasis added).

Generally speaking, Ms. Oberg does not disagree with the ACC on this point and, in fact, welcomes a swift resolution to this matter. Indeed, the ACC is correct—the documents in Ms. Oberg's possession and control are all that are needed to decide this matter. Therefore, if the ACC is willing to submit to an advanced trial on the merits under Rule 65A ***and*** under the condition that only the documents produced by Ms. Oberg are to be used as evidence, then Ms. Oberg does not object to the ACC's request. However, should the ACC wish to rely on its own documentary evidence (if any), then due process requires that Ms. Oberg be allowed to conduct discovery about such documents, if she so desires. This is especially true because of the timing of the ACC's Application, which requires Ms. Oberg to file this opposition brief prior to the date on which the ACC must produce its initial disclosure of documents. After all, Rule 65A "promotes judicial economy by preventing duplicative presentations of evidence submitted in an injunction proceeding that would also be admissible at trial." *Centro de la Familia de Utah v. Carter*, 94 P.3d 261, 262, 2004 UT 43, ¶5 (2004). In other words, "[t]he rule speaks to presentation of evidence only . . . ." *Id.*

In short, Ms. Oberg is more than willing to submit to the evidentiary effect of Rule 65A—i.e., that she need not re-submit evidence at trial that is submitted in conjunction with the ACC's Application. However, should the ACC produce documentary evidence after the filing of this opposition, Ms. Oberg hereby reserves her right to conduct discovery on the ACC's evidence prior to submitting to a trial on the merits. If, however, the ACC produces no such evidence after the filing of this opposition or before the hearing on the Application, then Ms. Oberg consents to an early trial on the merits.

III. **RELEVANT FACTS**

As alleged in Plaintiff's Complaint, Dixie Springs is a residential subdivision of approximately 1,390 homes located immediately to the north of Sand Hollow Reservoir in

Hurricane, Utah. Dixie Springs is governed, in part, by the CC&Rs. The requirements to amend the CC&Rs are found in one paragraph of the original CC&Rs recorded in 1998:

> [T]his Declaration may be amended . . . by an instrument signed by not less than sixty percent (60%) of the Lot Owners, which amendment shall be effective upon recordation in the Office of the Recorder of Washington County, State of Utah. Prior to any material amendment to this Declaration, written notice shall be sent to all holders of first mortgage liens, setting forth said amendment and advising them of the date that the Owners will vote on said amendment.

See CC&Rs at Article VI, Section 2. The CC&Rs provide no further guidance or requirements to amend this governing document.

In or around September of 2022, several of the Dixie Springs lot owners, including Ms. Oberg, expressed a desire to amend the CC&Rs to abolish the ACC. Pursuant to these desires, Ms. Oberg and her neighbors began working to amend the CC&Rs.

The steps taken by Mrs. Oberg and other lot owners will be detailed below, but in sum, a two-year-long vote gathering campaign of the Dixie Springs lot owners concluded on November 1, 2022.[3] The votes were vetted by two separate individuals against the Washington County recorder's database of property owners downloaded on 10/29/2022.[4] Among the signatures and e-signatures collected are 886 qualified owners representing more than 63% of lot owners voting for Amendment 5 in the affirmative.[5] The vote and signatures are retained separately on an instrument designed as a petition-style ballot.[6]

Prior to the conclusion of owner voting, written notification of the amendment proposal was provided to all first mortgage holders of Dixie Springs properties via public notice through The Intermountain Commercial Record & The Salt Lake Tribune, and

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[3] *See* Deceleration of Evelyn Oberg attached hereto as Exhibit A at ¶2.

[4] *See Id* at ¶3.

[5] *See Id* at ¶4.

[6] *See Id* at ¶5.

The Spectrum (Saint George, UT) published on 10/16/2020, 10/5/2022, 10/12/2022, and 10/19/2022.[7]

A. Timeline of gathering votes

a. In or around August 2020, Amendment 5 to CC&Rs was drafted by a group of Dixie Springs lot owners.[8]

b. In or around September 2020, the draft of Amendment 5 was reviewed by Takos Law group.[9]

c. On September 30, 2020, a letter was mailed to all lot owners that did not have a mailing address in Dixie Springs recorded with Washington County. These are presumed to be second homes, empty lots or investment properties. Approximately 700 letters were mailed.[10]

d. In or around September and October 2020 an informational website was created. The web address is www.dixiesprings.online/a5. This site is a public facing location where informational documents, including the proposed Amendment 5, were posted.[11]

e. On October 1, 2020, a group of Dixie Springs lot owners began collecting votes using a signature petition in Dixie Springs via door to door canvasing.[12]

f. On March 26, 2021, an electronic version of the petition used for the door-to-door voting was created with the online petition site Ipetitions.com.[13]

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[7] *See Id* at ¶6.

[8] *See id* at ¶7.

[9] *See id* at ¶8.

[10] *See id* at ¶9.

[11] *See id* at ¶10.

[12] *See id* at ¶11.

[13] *See id* at ¶12; *see also* Ipetition documents attached hereto as Exhibit B.

g. On April 26, 2022, a second letter to owners who had not yet responded to in-person visits or previous mailings was sent to approximately 500 owners.[14]

h. On June 2022, hosting for the original website changed and the URL was updated. The page went to www.dixiesprings.online as the main page. Traffic to www.dixieprings.online/a5 was maintained in the event someone had an old letter and wanted to reference the page from the earlier URL. The online petition was also updated with the updated site link but maintained both for continuity.[15]

B. Notice to lot owners, first mortgage lien holders and other interested parties

a. Letters were written and mailed out at least three times to different cross-sections of the neighborhood. The letters all included links and or QR codes to access the petition online. The letters stated that they were sent to ask for the recipient's support of Amendment 5, urged them to read the document, and to sign online or to return the attached ballot stating that they were voting "YES" for the passage of Amendment 5 to the Dixie Springs CC&Rs.[16]

First, letters were sent to owners with mailing addresses outside of Dixie Springs according to Washington County records at the time of mailing about 700 letters were mailed. These included stamped, addressed envelopes to make return of the ballots easier.[17]

[14] *See* Exhibit A at ¶13.

[15] *See id* at ¶14.

[16] *See id* at ¶15.

[17] *See id* at ¶16.

Second, letters included those in the first mailing that had not responded, along with a selection people that had not responded either publicly or did not answer their door after multiple attempts or referrals from neighbors – approximately 500 were mailed.[18]

Third, letters went out to the same group as the second, minus those that had signed the amendment, or stated in one way or another that they were not interested in signing – approximately 350 were mailed.[19]

b. In addition to sending letters, neighbors paired up in groups of two or three and canvased door-to-door, one plat at a time, receiving maps with selected areas or streets to cover. This activity started in October of 2020 and run through October 2022.[20]

c. As noted above, notice was provided to the general public via the webpage at www.dixiesprings.online.

d. Written notice was provided to the first mortgage lien holders by publication through a posting in the Intermountain Commercial Record, a newspaper of general circulation printed and published each Tuesday, Wednesday and Friday in Salt Lake City. The notice was also published, via the Record, in southern Utah's Spectrum newspaper, and the Salt Lake Tribune. The notice ran on the following dates: October 05, 2022, October 12, 2022, October 19, 2022.[21]

The publication noted:

> "ATTENTION FIRST MORTGAGE HOLDERS OF DIXIE SPRINGS PROPERTIES – Lot owners in the Dixie Springs subdivision in Hurricane, Utah, will be voting on the adoption of a new amendment to the Covenants, Conditions and Restrictions that exist for the neighborhood. This new amendment will remove the ACC/HOA from the CC&Rs and eliminate their authority

[18] *See id* at ¶17.

[19] *See id* at ¶18.

[20] *See id* at ¶19.

[21] *See id* at ¶20; *see also* Receipt of Publication attached hereto as Exhibit C.

> over lot owners. The vote is expected to be concluded November 1, 2022."[22]

e. 75 yard-signs promoting Amendment 5 with the website and a QR leading to the online petition were printed and posted in owners' yards. Many were stolen or vandalized by unknown people, but others remained through to November 1, 2022.[23]

f. Owners were informed of the amendment and the ability to vote at several events including monthly Helping Hands events (a service oriented of owners who help those in need each month), a Spaghetti Dinner in the park, several public meetings at the Hurricane City Center and Dixie Springs Park, and several booths at community yard sales.[24]

g. A form was created and used throughout the effort. The sheet had a statement seen below along with 17 rows containing spaces for signatures, names, addresses and lot numbers.[25] The top of the petition had the following text at the top:

> "The Covenants, Conditions and Restrictions (CC&Rs) for the Dixie Springs subdivision in Hurricane Utah are meant to be periodically updated to better suit the needs of property owners. By signing the document below, I vote "YES" to accept the 5th Amendment to the Dixie Springs CC&Rs as it has been presented to me and as it exists online at https://www.dixiesprings.online/a5/docs/CCRA5.pdf. I acknowledge by signing below that I am a lot owner in Dixie Springs subdivision, Hurricane, Utah, I sign this of my own free will, and I will receive one vote for each lot I own."[26]

[22] *See* Exhibit C.

[23] *See* Exhibit A at ¶21.

[24] *See Id* at ¶22.

[25] *See Id* at ¶23.

[26] *See* example petition attached hereto as Exhibit D.

Each form had a place for the person collecting the signatures to sign, taking responsibility for the collection of those signatures.[27]

A petition was created March 26, 2021, using the same language as the paper version, to help collect signatures from remote owners, or those in the neighborhood that had not been contacted in the door-to-door efforts. The petition was protected from hacking/malicious activity by the petition company's security system and, to date, lot owners have never received a notification that any attempt has been made to hack the petition in any way.[28]

The petition was protected from someone stuffing the ballot box by locking out IP addresses. The security only allows a single entry from any IP address. [29]

The online petition/ballot stayed active until October 31, 2022. No votes were counted in the official count after that date despite several being made as late as January 2023.[30]

h. Mail-in ballots were also used to collect votes. Letters were mailed to owners with a ballot that could be signed, cut and mailed back to be counted with the other votes.[31]

The language of the ballot remained the same and said "

> I hereby vote "YES" in favor of approving Amendment Five (5) to the Dixie Springs Declaration of Covenants, Conditions and Restrictions as it has been described in this letter. The amendment will be filed and recorded with the Washington County Recorder's office upon 60% approval of all Lot Owners as defined in the Article VI Section 2 of the CC&Rs."[32]

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[27] *See Id.*

[28] *See Exhibit A* at ¶24.

[29] *See Id* at ¶25.

[30] *See Id* at ¶26.

[31] *See Id* at ¶27.

[32] *See* example of online petition attached hereto as Exhibit E.

Owners were told to include a vote for each property they owned.

C. Vote tracking and validation

a. Tracking of the votes was done via an Excel spreadsheet. Rather than count votes, Mrs. Oberg and others tracked the properties and they were marked with a Yes or No vote, a blank cell is technically also considered a "no" vote since an owner must explicitly state that they are in favor to vote "yes."[33]

b. The property owners' names were updated every two months with an update from the county website. Name changes were noted on the spreadsheet, and any votes that had previously been cast for the property were removed and the new owner was contacted to give them to the opportunity to vote. Many times, Mrs. Oberg was alerted of a change in ownership before doing the regular update by a new owner voting for Amendment 5 and her efforts to verify their ownership.[34]

c. Names on ballots were validated by looking at the county records for individual owners, and validating with the state of Utah for trusts and corporations. In addition, other states in which a corporation is registered were also validated. If no name could be found to match, an effort was made to contact the person who signed to verify ownership and if it could not be verified the vote was removed from the tracking sheet.[35]

d. The final update was made October 31, 2022 at 5:00 PM—the amendment was filed the next morning at 11:00 AM.[36]

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[33] *See Id* at ¶28.

[34] *See Id* at ¶29.

[35] *See Id* at ¶30.

[36] *See Id* at ¶31.

D. Requirements for filing signatures with Washington County

Mrs. Oberg met with the Washington County Recorder's Office on the morning of November 1, 2022. Mrs.[37] Oberg brought with her the vote documents constituting 63% of the Lot Owners in Dixie Springs. Upon recommendation from County Recorder's Office and in accordance with the requirements laid outlined the CC&Rs, Mrs. Oberg signed as representative for the signers.[38] Copies of the ballots are being held with Takos Law Group.

Mrs. Oberg and the other lot owners that have voted yes to Amendment 5 have met all requirements listed in the CC&Rs for effectuating a proper amendment. Specifically, pursuant to the CC&Rs Mrs. Oberg obtained the requisite signatures necessary to amend the CC&Rs. Further, Mrs. Oberg provided written notice of the proposed amendment to all first mortgage lien holders as required by the CC&Rs.

As stated above, on or about November 1, 2022, Mrs. Oberg recorded the Fifth Amendment to the Covenants Conditions and Restrictions of Dixie Springs A Residential Subdivision in the Washington County Recorder's Office as Document Number 20220048624 (the "Amendment 5").[39] Now, Defendant seeks to enjoin Mrs. Oberg despite Amendment 5 being entirely proper.

IV. ARGUMENT

A. Legal Standard

Utah R. Civ. P. 65A(e) states that a preliminary injunction may issue only upon a

[37] *See Id* at ¶32.

[38] *See Id* at ¶33.

[39] *See* Fifth Amendment attached hereto as Exhibit F.

showing that the following grounds have be met: (e)(1) there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim; (e)(2) the applicant will suffer irreparable harm unless the order or injunction issues; (e)(3) the threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined; AND (e)(4) the order or injunction, if issued, would not be adverse to the public interest (emphasis added).

B. Defendant fails to demonstrate any likelihood of success and, in fact, the likelihood of success on the merits rests squarely with Ms. Oberg.

Plaintiff respectfully submits that she clearly followed the requirements set forward in Article VI Section 2 of her subdivision CC&Rs for amending the document. In the Application, Defendant contends that various formalities were not followed.[40] Importantly however, Defendant provides no indication of how these alleged deficiencies should be remedied. The reason Defendant does not provide the correction for each of Plaintiff's alleged failures is that the CC&Rs are silent as to the particulars related to voting, notice, and recording the amendment. As noted above, the only guidance given in the CC&Rs is Article VI Section 2, which is just a few sentences long. And although the Motion is written with an undertone of feigned authority on the matter, Defendant has no more authority than Plaintiff when it comes to interpreting Article VI Section 2. In fact, if one party is to be given more weight than the other, it seems reasonable that the lot owners themselves would be that party—the ACC being an outside business entity which does not own any lots in the subdivision.

Accordingly, the Application should be denied because Defendant has failed to demonstrate a likelihood of success on the merits of its claims because its claims are based on an unauthoritative interpretation of a document with absolutely zero evidence to

[40] *See* Application at p.14-16.

support such a position. The undisputed facts show that there is no convincing evidence that Defendant is more likely to prevail. In fact, the exact opposite is true. As such, Defendant has not met its burden of showing that it is entitled to the extraordinary relief of a preliminary injunction. The purpose of a preliminary injunction is to preserve the status quo pending a final resolution of the dispute on the merits. However, because Defendant has not shown a likelihood of success on the merits, the balance of equities does not weigh in its favor and a preliminary injunction cannot be granted under Utah law. *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶ 8, 974 P.2d 821, 822("An applicant must, at the very least, make a prima facie showing that the elements of its underlying claim can be proved").

Ignoring for a moment that Defendant provides zero evidence to substantiate its position, Plaintiff still satisfied the requirements to amend even using Defendant's subjective interpretation of the CC&Rs. According to Defendant, the four requirements are: (1) prior to any material amendment, the lot owners must send written notice to all holders of first mortgage liens; (2) the notice to holders of first mortgage liens must state the amendment and advise of "the date that the Owners will vote on said amendment"; (3) a vote of the Lot Owners must be held on a date regarding the proposed amendment; and (4) record an instrument "signed by not less than sixty percent (60%) of the Lot Owners with the Washington County Recorder's Office.[41] As set forth in detail below, Plaintiff has satisfied these subjective requirements laid out by Defendant. Therefore, Defendant's Application for Preliminary Injunction should be denied.

i. Written notice was provided to all holders of first mortgage liens.

In this case, personal service to each first mortgage lien holder was not feasible, and Article VI Section 2 of the CC&Rs does not require any specific method of notice, therefore notice by publication is a permissible and reasonable method of providing notice

[41] *See Id* at p. 4-5.

to all interested parties. Importantly, Defendant does not suggest in its Motion any alternative method of notice.

Federal law prohibits first mortgage lien holders from providing private information to third parties, making it difficult for lot owners to obtain current contact information for lien holders. Under the Gramm-Leach-Bliley Act (GLBA), a third party cannot obtain private information from a first mortgage lien holder about the mortgagor without the consent of the mortgagor. The GLBA, also known as the Financial Modernization Act, requires financial institutions to protect the privacy of their customers' personal information. This includes mortgage lenders who hold private information about their borrowers. Disclosure of such information without the borrower's consent would violate the GLBA, and the lender could face penalties and legal consequences for doing so. *See* GLBA VIII.Privacy Definitions and Key Concepts and VIII 1.4.[42] Therefore, a third party cannot obtain private information from a first mortgage lien holder about the mortgagor without violating the GLBA or prior consent from the mortgagor. Thus, publication in a local newspaper is a reasonable method of providing notice that is accessible to all interested parties.

Furthermore, Utah law explicitly allows for notice by publication in certain circumstances and setting precedent of reasonableness for publication as a method of notification. *See for example* Utah Code § 45-1-101 (providing that notice may be given by publication when personal service cannot be obtained or when the law expressly authorizes publication as a method of notice).

[42] "Before a financial institution discloses nonpublic personal information about a consumer to a nonaffiliated third party under the exception in section 13, the financial institution must provide to the consumer an initial notice of its privacy policies and practices. Under the exception in section 13, the financial institution must also enter into a contractual agreement with the third party that prohibits the third party from disclosing or using the information other than to perform services for the institution or functions on the institution's behalf, including use under an exception in sections 14 or 15 in the ordinary course of business to carry out those services or functions."

Here, despite making a diligent effort to locate and notify lien holders, Plaintiff was unable to directly identify the appropriate entity or confirm the identity of mortgagors and therefore took reasonable steps to provide notice through alternative means. As is commonly done in similar context, the plaintiff published a notice in the association notices section of various newspapers, which was the most reasonable course of action. Written notice was provided to the first mortgage lien holders by publication through a posting in the Intermountain Commercial Record, a newspaper of general circulation printed and published each Tuesday, Wednesday and Friday in Salt Lake City. The notice was also published, via the Record, in southern Utah's Spectrum newspaper, and the Salt Lake Tribune. The notice ran on the following dates: October 05, 2022, October 12, 2022, October 19, 2022.[43]

Plaintiff respectfully requests that the court find that she complied with the notice requirements of Article VI Section 2 of the CC&Rs and that the proposed amendment is valid and enforceable.

ii. The notice provided to holders of first mortgage liens did in fact set forth said amendment and advise them of the date that the Owners would conclude voting on said amendment.

As detailed more fully below, Defendant attempts to impose a draconian requirement not found in the CC&Rs—that the vote to the amendment only be appropriate if it is conducted on a single "date" in time.[44] In other words, any vote involving online voting, absentee ballots, and/or multiple days of voting would be inappropriate to Defendant. It seems Defendant want 1,390 lot owners to gather in a non-existent club house and vote "yea or nay." Such a requirement is not only unreasonable but is simply not required by the CC&Rs.

[43] *See* Exhibit A at ¶20; *see also* Exhibit C.

[44] *See* Application on p.16 ("there is no date on which the Lot Owners voted on the Fifth Amendment").

But even taking Defendant's unnecessarily strict reading of Article VI Section 2, the first mortgage lien holders were provided notice of the date the voting would be concluded—clearly fulfilling the purpose of the provision. The notice to lien holders stated, "[t]his new amendment will remove the ACC/HOA from the CC&Rs and eliminate their authority over lot owners [t]he vote is expected to be concluded November 1, 2022."[45]

Plaintiff provided notice to holders of first mortgage liens of the date that lot owners would conclude voting on Amendment 5. Accordingly, Defendant is no more likely to succeed on the merits of its claim than Plaintiff and the Application should be denied.

iii. A vote of the lot owners was conducted.

Again, it appears there is a misconception by Defendant that a vote must be taken on a specific date, with all members of the voting body present. However, it is important to understand that in certain circumstances, a vote should be taken over an extended period of time.

Here there were several reasons why this was necessary, including accommodating lot owners who are unable to attend on a designated date, ensuring that all lot owners had sufficient time to consider the matter being voted on, and enable a more efficient and streamlined voting process. This style of voting made the process more accessible for all voters.

As noted above, the ACC has tried to read into the CC&Rs a requirement that all amendments be considered on a specific date and time, but it is important to recognize that there is no such requirement in the CC&Rs, likely because a vote taking place on a specific date would almost certainly not attract the attention of the entire subdivision. It is for this reason that the extended voting period was both necessary and beneficial under the circumstances. Many lot-owners do not live in the subdivision full time and by allowing for

[45] Exhibit C.

absentee voting or early voting, all lot owners were given an equal opportunity to participate in the decision-making process.

The ballots contained specific language indicating this to the lot owners. On the ballots it stated: "By signing the document below, I vote "YES" to accept the 5th Amendment to the Dixie Springs CC&Rs as it has been presented to me and as it exists online at https://www.dixiesprings.online/a5/docs/CCRA5.pdf. I acknowledge by signing below that I am a lot owner in Dixie Springs subdivision, Hurricane, Utah, I sign this of my own free will, and I will receive one vote for each lot I own."[46] Additionally, lot owners were notified through various methods of the voting process and timeline.[47]

Accordingly, Plaintiff has conducted a "vote" as required by the CC&Rs. The vote resulted in the approval of Amendment 5 and Defendant has provided no evidence to the contrary. Thus, the Application should be denied.

i. Ms. Oberg did, in fact, record an instrument that was signed by "not less than sixty percent (60%) of the Lot Owners"—she just did not record the more than 350 pages of signatures, at the instruction of the Washington County Recorder's Office.

One of Defendant's principal arguments is that Amendment 5 is not valid because it is not signed by more than sixty percent of the Dixie Springs lot owners.[48] Defendant claims that Ms. Oberg is the "sole signor of the Fifth Amendment."[49] The truth, however, lays bare Defendant's disingenuous argument.

First, as to this argument, the CC&Rs state as follows: "[T]his Declaration may be amended . . . by an instrument signed by not less than sixty percent (60%) of the Lot Owners, which amendment shall be effective upon recordation in the Office of the

[46] *See* Exhibit D.

[47] *See* Exhibit A at ¶21 and ¶22.

[48] *See* Application at p. 14.

[49] *Id.*

Recorder of Washington County, State of Utah." In other words, this sentence identifies two requirements that must be met in order to amend the CC&Rs: (1) there must be an instrument signed by not less than 60% of the lot owners, and (2) the amendment shall be effective upon recordation in the Office of the Recorder of Washington County.

Here, the ACC is very clear about what it is claiming: "First, the Fifth Amendment is not 'signed by not less than sixty percent (60%) of the Lot Owners.' Rather, [Ms. Oberg] is the sole signor of the Fifth Amendment."[50] These statements are simply not true.

Amendment 5 *is, in fact*, signed by 63% of the Dixie Springs lot owners. This fact is evidenced by the more than 350 pages of signatures Ms. Oberg took with her to the Washington County Recorder's Office on the morning of November 1, 2022, when she recorded Amendment 5.[51]

What Defendant is trying to argue, but cannot, is that Amendment 5 is invalid because although 886 Dixie Springs residents signed the amendment, this Court should strike it down because Ms. Oberg did not record each of the more than 350 pages of signatures with the county recorder. The reason the ACC does not clearly state this argument is because the CC&Rs do not explicitly require that each signature be recorded. Rather, the CC&Rs only state that the instrument be signed by not less than 60% of the lot owners, and that the amendment be recorded with the county recorder.[52] And both of these conditions were met. The amendment was signed by more than 60% of the lot owners, and Ms. Oberg recorded the amendment.

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[50] *Id.* at pp. 14-15.

[51] *See* Oberg Decl. at ¶¶ 32-33. Additionally, on March 9, 2023, counsel for Ms. Oberg disclosed to counsel for the ACC the more than 350 pages of signatures, which included copies of signature sheets, Ipetition pages, and a signature tracking spreadsheet. These documents were produced by Plaintiff "for Attorneys' Eyes Only," for fear of retaliation by the ACC against homeowners who signed Amendment 5. Counsel for the parties have an understanding that such production is appropriate at this juncture, but that the "for Attorneys' Eyes Only" designation may be the subject of further motion practice by the parties at a later date. Accordingly, the more than 350 pages of signatures will not be included as an exhibit to this opposition brief, but will be produced to the Court upon request and under appropriate protections.

[52] See CC&Rs at Article VI, Section 2.

The reason Ms. Oberg did not record the more than 350 pages of signatures is simple—the Washington County Recorder's Office told her not to. Upon reviewing the vast amount of signature pages, the recorder's office directed Ms. Oberg to file only the amendment and sign it as agent for the lot owners.[53] In other words, the amendment, which had been signed by more than 60% of the lot owners, was properly recorded pursuant to the instructions from the Washington County Recorder's Office—just without the superfluous signatures.

That the ACC would go so far as to misrepresent the facts and falsely claim that less than 60% of Dixie Spring lot owners did not sign Amendment 5 and that "[Ms. Oberg] is the sole signor of the Fifth Amendment"[54] highlights the lengths to which the ACC will go to interpret the CC&Rs in a way that will preserve its power. But such an interpretation is not only incorrect, but it is the ultimate example of Defendant's "form over substance" approach to this case. The reality is, over 60% of the lot owners signed Amendment 5, and Amendment 5 was recorded with the Washington County Recorder's Office. At the express instruction of the Recorder's Office, Ms. Oberg did not record the signatures. But the fact that the signatures were not recorded does not mean that Amendment 5 was not signed by more than 60% of the lot owners, as Defendant would have this Court believe. Because these two conditions were met, Defendant's argument as to the insufficiency of signatures or the recording fail.

C. The ACC will not suffer any harm whatsoever in the absence of a preliminary injunction and no lot owners apart from Mrs. Oberg are a party to this matter.

[53] *See* Exhibit A at ¶¶ 32-33.

[54] *Id.* at pp. 14-15.

Utah law is clear, grounds for a "restraining order or preliminary injunction may issue *only* upon a showing by the applicant that…the *applicant* will suffer irreparable harm unless the order or injunction issues." U.R.C.P. 65A(e)(2) (emphasis added).

In the Application, Defendant outlines the alleged harm that Amendment 5 is causing Dixie Springs property owners.[55] Noticeably lacking in the Application are arguments concerning the potential harm of Amendment 5 to the ACC itself.[56] In fact, only a few sentences in the entire Application attempt to explain the harm to the ACC. Specifically, the ACC claims the alleged misfiling of Amendment 5 "has caused the ACC harm because it has inhibited their authority and ability enforce the CC&Rs."[57] It is strange, if not disturbing on some level, that the ACC as an entity experiences "harm" when it loses authority. The ACC is not the embodiment of lot owners who oppose Amendment 5. To the contrary, the ACC is an outside entity, created to serve *every* lot owner in Dixie Springs, including the 63% who voted to pass Amendment 5. It tracks, therefore, that the ACC would answer and counterclaim for declaratory relief because it aligns with its interest as fiduciary of Dixie Springs to ensure that its authority is not revoked incorrectly. However, in the context of a preliminary injunction, if the ACC ceases enforcement for a time, such a result is not irreparable harm to the ACC. Its authority and enforcement power can simply be restored should Amendment 5 be found invalid. Amendment 5 does not dissolve the actual entity known as the ACC, the entity still exists with the Utah Secretary of State's office.

The ACC's lack of harm seems to be why the Motion focuses so heavily on the alleged harm to lot owners. However, Defendant fails to cite any legal authority that allows the applicant for a preliminary injunction to satisfy the requirements of URCP 65A(e)(2) showing that harm to someone else will be irreparable. Even though it is believed that

[55] *See* Application at pp.10-11.

[56] *See id.*

[57] *See id* at p.11.

Nancy Crowley is the lot owner most in favor of opposing Amendment 5, her alleged harm cannot be transmuted to the entity known as the ACC. Ms. Crowley is not a party to this action and she is not the applicant for the preliminary injunction. Accordingly, her declaration attached as Exhibit 5 of the Motion should have no bearing on the Court's analysis.

Because the ACC cannot show irreparable harm to itself as an entity and provides no legal authority to support the proposition that irreparable harm to third parties can be considered in this analysis, the ACC has failed to satisfy the URCP 65A(e) and the Application should be denied.

D. There is No Threatened Injury to the Applicant.

As described above, the ACC is not at risk of any injury. While this lawsuit is pending, the ACC can function entirely properly by simply waiting on the outcome. The ACC only exists to enforce specific provisions in the CC&Rs to the extent the lot-owners want those specific provisions enforced. Again, the ACC only exists by the consent of the lot-owners.

Defendant makes the bald argument that without the preliminary injunction, the ACC will have significantly more issues to address if/when Amendment 5 is revoked.[58] Not only does this "harm" assume success in the lawsuit on the part of Defendant, but it is also not actually harm at all. Indeed, having a greater number of fines to collect at certain times is just part of operating an association and its simply not an irreparable harm.

The ACC has failed to establish a necessary element of its Application, injury to the ACC that outweighs injury to Mrs. Oberg. Nowhere is this more apparent than in the Application itself. Indeed, Defendant states in its argument that no security is necessary:

[58] *See* Application at p.12.

> "No security should be required of the ACC. If the ACC's request for an order and injunction is granted, ***none of the parties will incur or suffer costs, attorney fees, or damage as a result of any wrongful order or injunction***, and therefore, under Rule 65A(c)(1), the Court has discretion to dispense with the bond requirement."[59]

By its own admission neither party will suffer damage as result of a wrongful injunction. If follows, then that neither party will be damaged by a non-injunction. Accordingly, the Application should be denied.

E. Denying the ACC's Application has no impact on the public.

The impact on the public is the same whether the Application is granted or denied. If denied, those seeking to buy or build on property within the ACC know their rights and obligations in relation to owning, purchasing, selling, remodeling, or building on their property. They will operate with the understanding that there is currently not an ACC in the neighborhood but that there is a pending lawsuit that may affect that. The same is true but in the reverse if the Application were granted. Therefore, it has no impact on the public's interest to issue the requested order and injunction. Accordingly, Defendant has failed to meet its burden and the Application should be denied.

F. Defendant's request for attorneys' fees is unfounded and sanctionable itself.

Defendant ends its Application with a petition for attorneys' fees.[60] Interestingly, Defendant requests fees not only pursuant to the Third Amendment to the CC&Rs at Article V, Section 6(i) (which will be addressed below), but also pursuant to Utah Code § 78B-5-825(1). Under this section, the Court can award attorneys fees to a prevailing party where there is a determination that the action or defense was without merit or not brought

[59] Application at p.17 (emphasis added).

[60] *See* Application at pp. 17-18.

or asserted in good faith. *See* Utah Code § 78B-5-825(1). Respectfully, Defendant's request for attorneys' fees is brought in bad faith and should be sanctioned in its own right with an award of attorneys' fees to Ms. Oberg.

Here, Defendant requests fees under sub section (i) to Section 6 of the Third Amendment to the CC&Rs.[61] However, in its request for fees the ACC fails to read Section 6 as a whole. Specifically, Section 6 gives the ACC "the right and authority to enforce the CC&Rs as set forth in this Section." *See* Third Amendment to the CC&Rs at Article V, Section 6. Subsection (a) specifically says, "The ACC will provide written notice ***of the violation*** to the Owner of the Lot which is in violation." *Id.* at Section 6(a). The subsequent sections outline, among other things, an owner's right to a hearing with the ACC, how the owner can remedy the violation, that the ACC must provide the owner with a second violation notice if the "Owner fails to submit a plan to remedy a violation," and so forth. *Id.* at Section 6(a) – (h). At the very end of Section 6, the amendment provides that the "Owner will be liable to pay any and all costs and fees, including a reasonable attorney's fee incurred in in [sic] connection with any enforcement or collection action related to the Owner's ***violation*** of the CC&Rs." *Id.* at Section 6(i).

Here, the ACC invokes Section 6(i) as the basis for its request for attorneys' fees, but fails to even suggest that Ms. Oberg has been provided with written notice of her so-called "violation" pursuant to Section 6(a). Nor does the ACC present the Court with evidence that it has complied with any of the subsequent sections of Section 6 (a second notice, for example).

In other words, while claiming that Ms. Oberg failed to comply with the CC&Rs to pass Amendment 5, the ACC itself ironically failed to comply with Section 6 of the Third Amendment to the CC&Rs when requesting an award of attorneys' fees in its favor. Respectfully, this is the type of bad faith argument Utah Code § 78B-5-825(1) is designed

[61] *See id* at p. 17.

to protect against. Accordingly, not only should Defendant's request be denied, but the Court should consider an appropriate sanction on the ACC for its meritless argument.

V. CONCLUSION

There is no question that 63% of the residents of Dixie Springs support Amendment 5 and want to abolish the ACC. And, as set forth above, there is also no question that Ms. Oberg properly amended the CC&Rs because she provided notice to all holders of first mortgage liens, notified the first mortgage lienholders of the date by which the residents would vote on the amendment, held a vote on the proposed amendment, and recorded the amendment with the Washington County Recorder's Office. And although the ACC claims that Ms. Oberg did not follow these requirements, the ACC's arguments are based on impermissibly narrow interpretations of the governing documents, favorable to only the ACC, not homeowners who may want to amend their CC&Rs from time to time.

When the Court properly examines the requirements of the CC&Rs, it is clear that Ms. Oberg properly complied, and that Amendment 5 is valid. Accordingly, the ACC's Application should be denied and the Court should issue a judgment on the merits in favor of Ms. Oberg.

DATED this 10th day of March, 2023.

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Certificate of Service

I certify that on March 10, 2023, I served a copy of this OPPOSITION TO DEFENDANT'S APPLICATION FOR PRELIMINARY INJUNCTION via electronic service pursuant to Rule 5(b)(3)(A) and by electronic mail pursuant to Rule 5(b)(3)(B) at the following address:

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