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VIA CERTIFIED MAIL AND EMAIL

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RE: Invalid 5th Amendment to CC&Rs

To Whom it May Concern,

Please be advised that this firm has been retained to represent the Dixie Springs Architectural Control Committee (hereinafter referred to as the "ACC"). The ACC has retained our firm to investigate the recently recorded CC&R amendment. **As set forth herein, the CC&R amendment does not comply with the legal requirements for amending the CC&Rs.**

If you have retained counsel concerning this matter, please provide us their contact information so that we may communicate with them regarding the issues and explore the potential for a resolution. If you wish to discuss this matter further, we ask that you contact our office at the number, email, and address listed in the letterhead. Please do not contact the ACC regarding this matter.

THE FIFTH AMENDMENT TO THE CC&RS

The ACC has retained our firm to investigate the recently recorded Fifth Amendment to Declaration of Covenants, Conditions, and Restrictions of Dixie Springs Subdivision (the "Fifth Amendment"). The Fifth Amendment was recorded with the Washington County Recorder's Office on November 1, 2022 at 11:31 AM as Document Number 20220048624.

The properties within the Dixie Springs Subdivision are subject to the restrictive covenants set forth in the original Declaration of Covenants, Conditions, and Restrictions of Dixie Springs A Residential Subdivision (the “CC&Rs”) and its subsequent *valid* amendments. When you purchased your property, you were provided a copy of the CC&Rs and amendments thereto. Even if you do not recall being provided such documentation, by law, you were on notice of the restrictive covenants because they are recorded against your property. *See* Utah Code § 57-3-102. Furthermore, pursuant to Article V Section 5 of the CC&Rs, “An owner, by acceptance of a deed or other instrument of conveyance, ... understands and accepts all the terms contained herein.” *See* CC&Rs. By acquiring your property in Dixie Springs, you accepted the restrictive covenants.

The Supreme Court of Utah has stated the following regarding the interpretation and enforcement of restrictive covenants:

Restrictive covenants that run with the land and encumber subdivision lots form a contract between subdivision property owners as a whole and individual lot owners; therefore, interpretation of the covenants is governed by the same rules of construction as those used to interpret contracts. Generally, *unambiguous restrictive covenants should be enforced as written*. However, where restrictive covenants are susceptible to two or more reasonable interpretations, the intention of the parties is controlling. The intention of the parties is ascertained from the document itself and the language used within the document.

Swenson v. Erickson, 2000 UT 16, ¶ 11, 998 P.2d 807, 810-811 (internal citations omitted) (emphasis added).

The CC&Rs can be amended in two ways. First, Article VI Section 1 of the CC&Rs sets forth how the Declarant (as defined in the CC&Rs) can amend the CC&Rs. *Id.* This Section was amended by the Fourth Amendment to the CC&Rs recorded in February 2016. All previous amendments to the CC&Rs were made pursuant to Section 1.

Second, the CC&Rs may be amended by the Lot Owners. Article VI Section 2 sets forth several requirements that must be satisfied for Lot Owners to amend the CC&Rs. *Id.* In relevant part, the CC&Rs 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.” *See* Article VI Section 2 of the CC&Rs attached hereto as **Exhibit A** (emphasis added). The Section also requires, “*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.*” *Id.* (emphasis added). These terms are clear and unambiguous. As such, they are to be enforced as written.

Based on the foregoing, Lot Owners desiring to amend the CC&Rs must satisfy three (3) simple requirements: (1) provide written notice to all holders of first mortgage liens – said notice to include the proposed amendment(s) and advising of a date that the Owners will vote on the proposal; (2) a vote by the Lot Owners; and (3) an instrument signed by not less than 60% of the Lot Owners. ***On its face, and based on information and belief, the Fifth Amendment fails to satisfy all these requirements.***

First, there is no indication that written notice of the Fifth Amendment was provided to the holders of first mortgage liens. If you gave notice as set forth in Article VI Section 2 of the CC&Rs, please provide such evidence.

Second, if notice was provided to the holders of first mortgage liens, there is no indication that such written notice satisfied the content requirements set forth in Article VI Section 2. Again, if notice was provided, please provide the written notice sent to the holders of the first mortgage liens.

Third, based on information and belief, no vote of the Lot Owners was conducted. If a vote did occur, please provide the following (whether written, electronic, or otherwise): (1) the names, dates, ballots, and signatures of the Lot Owners who voted whether the vote was in favor of the proposal or not; (2) the proposed language provided to the Lot Owners at the time of such vote; (3) notices of the upcoming vote provided to the Lot Owners; (4) evidence that a quorum or majority of the unit owners were present at the time of the vote; (5) all evidence of proxy votes and appropriate forms; and (6) all other documents related to the vote in any way.

Fourth, the recorded Fifth Amendment has not been signed by “not less than 60% of the Lot Owners.” Rather, the Fifth Amendment baldly asserts that you serve/served as the agent of the Lot Owners. There is no mention of the names of the Lot Owners that you allegedly represented as an agent in signing the Fifth Amendment. Furthermore, there is no evidence such as an agency agreement, proxy agreement, power of attorney, or similar documentation stating that you are/were the agent for each of the alleged 63% of Lot Owners in support of the assertion. Please be advised that these failures amount to a violation of the statute of frauds¹ and render the Fifth Amendment unenforceable and void. *See* Utah Code § 25-5-1 (requiring an agent to be authorized by writing).

If documentation supporting the assertion that you are/were the agent of 63% of the Lot Owners exists, please provide such evidence. However, the existence of such evidence does not negate the errors noted above.

Based on the foregoing, the recorded Fifth Amendment is unenforceable, void, and wrongful. At a minimum, the Fifth Amendment, as currently recorded, fails to satisfy the requirement that “an instrument signed by not less than 60% of the Lot Owners” and the statute of frauds. *See* Utah Code § 25-5-1. The Fifth Amendment must be removed from the records of

¹ As the name suggests, the statute of frauds is meant to prevent parties from acting fraudulently and injuring others.

the county recorder. Demand is hereby made that you remove, revoke, nullify, or otherwise eliminate the Fifth Amendment as currently recorded by January 19, 2023.

Our Client desires to avoid any further expenses associated with this action; and therefore respectfully requests your immediate attention to this matter. Please be advised that failure to act as requested will result in further instruction from our Client to commence an action seeking injunctive relief and/or damages against you. Additionally, please be advised that, pursuant to the CC&Rs and Utah law, our Client may be awarded appropriate attorney's fees and costs. Govern yourself accordingly.

If you wish to discuss this matter further, please contact our office at the number, emails, and address set forth in the letterhead.

Respectfully,

SNOW JENSEN & REECE, P.C.

/s/ J. Tyler King

Jeff R. Miles

J. Tyler King

cc: Dixie Springs ACC