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**This motion requires you to respond.  
Please see the attached Notice to  
Responding Party.**

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

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<p>EVELYN OBERG, an individual,  Plaintiff,  v.  DIXIE SPRINGS ARCHITECTURAL CONTROL COMMITTEE, an entity organized under the laws of the state of Utah,  Defendant.</p>	<p><b>APPLICATION FOR PRELIMINARY INJUNCTION</b></p> <p>Civil No. 230500079</p> <p>Judge G. Michael Westfall</p>
<p>DIXIE SPRINGS ARCHITECTURAL CONTROL COMMITTEE, a domestic non- profit Utah corporation,  Counterclaimant,  v.  EVELYN OBERG, an individual  Counterclaim Defendant.</p>	

Defendant/Counterclaimant Dixie Springs Architectural Control Committee (the "ACC"),  
by and through its counsel of record, Jeffrey R. Miles and J. Tyler King of the law firm SNOW

JENSEN & REECE, P.C., and pursuant to Rules of Civil Procedure 7 and 65A, hereby moves the Court for a preliminary injunction and order as set forth below.

### **RELIEF REQUESTED AND GROUNDS**

**A. The ACC requests a preliminary injunction and order that the Fifth Amendment be declared invalid. The ACC also requests that Counterclaim Defendant be ordered to revoke the Fifth Amendment.**

This actions concerns the rogue recording of an amendment to the Dixie Springs community CC&Rs that purports to disband the ACC and fundamentally alter the covenants and restrictions governing the community. The rogue recording was made without authorization and has sown discord and confusion in the community, with many now refusing to follow the required covenants. Pursuant to Rule 65A of the Utah Rules of Civil Procedure, the ACC respectfully requests a preliminary injunction and order that the Fifth Amendment to Declaration of Covenants, Conditions, and Restrictions of Dixie Springs Subdivision (“Fifth Amendment”) failed to satisfy the requirements for amending the CC&Rs and is improper, invalid, has no effect, and should be revoked, rescinded or otherwise eliminated from the records of the properties subject to the CC&Rs. The ACC also requests a preliminary injunction and order Plaintiff/Counterclaim Defendant Evelyn Oberg (“Counterclaim Defendant”) to revoke, rescind, or otherwise remove the Fifth Amendment from the records of the properties that are subject to the CC&Rs.

The CC&Rs were recorded against the real property commonly known as the Dixie Springs Subdivision in Hurricane, Utah. Article VI Section 2 of the CC&Rs contains four (4) requirements that must be satisfied if Lot Owners wish to amend the CC&Rs. *See* CC&Rs at Article VI Section 2, **Exhibit 1**. On November 1, 2022, Counterclaim Defendant recorded the

Fifth Amendment. The Fifth Amendment was recorded despite the requirements not having been satisfied.

Pursuant to Rule 65A(e), to prevail on an application for preliminary injunction, the applicant must show that

- (e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
- (e)(3) The order or injunction, if issued, would not be adverse to the public interest; and
- (e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

The Fifth Amendment purports to amend the CC&Rs and rescind all authority of the ACC. *See* Fifth Amendment, **Exhibit 2**. It also purports to alter the rights and duties of approximately 1390 property owners. *Id.* The issue of whether the Fifth Amendment validly amended the CC&Rs presents an immediate threat to the ACC, 1390 property owners, and others (those looking to build or buy within the ACC).

The ACC and Lot Owners rely on and have a protectible interest in enforcing the CC&Rs. The Fifth Amendment purports to drastically alter the authority of the ACC and the rights and obligations of the Lot Owners. The ACC and the approximately 1390 Lot Owners will suffer irreparable harm unless an order and injunction issue concerning the validity of the Fifth Amendment. Furthermore, the threatened injury to the ACC and the Lot Owners far outweighs any damage to Counterclaim Defendant. It is also in the public's interest to clarify the rights and

obligations of the ACC and the Lot Owners, particularly in relation to the Lot Owners' property rights. Finally, it is substantially likely that the ACC will prevail at trial.

**B. The ACC requests that trial on the merits be consolidated with the hearing on this Application for Preliminary Injunction.**

The ACC requests that the Court "order the trial of the action on the merits to be advanced and consolidated with the hearing of this Application for Preliminary Injunction." Utah R. Civ. P. 65A(a)(2). The sole causes of action in this matter are for Declaratory Judgment. Counterclaim Defendant seeks an order declaring that the Fifth Amendment is proper, binding, and validly amended the CC&Rs. *See* Complaint at ¶ 33, Court Docket 1. The ACC seeks an order declaring that the requirements for amending the CC&Rs have not been met and that the Fifth Amendment is therefore invalid and should be revoked. *See* Answer and Counterclaim at Prayer for Relief ¶¶ 1-2. The matter before the Court is not complex. It is a straightforward examination of whether or not the requirements for amending the CC&Rs were met. As is discussed below, the recorded document is facially deficient and the person who authorized the recording has provided no evidence that she complied with the CC&Rs.

**i. Consolidation should occur because discovery (other than the documents in Counterclaim Defendants' control) is unnecessary.**

Consolidation should occur because no discovery (outside of those documents in Counterclaim Defendant's control) is likely to be necessary. As set forth herein, there are four (4) requirements that must be met for Lot Owners to amend the CC&Rs. *See* CC&Rs at Article VI Section 2, **Exhibit 1**. The four (4) requirements are: (1) Prior to any material amendment, 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. *Id.* If these requirements were met, there would be documentary evidence indicating that the requirements were satisfied (i.e., proof of mailing, notices, voting records, signatures, authorizations, etc.). Indeed, the recorded document itself would have the required signatures. It does not and the inquiry can end there, as the document is deficient on its face.

In addition, on January 13, 2023, the ACC requested documentary evidence from Counterclaim Defendant supporting her compliance with the requirements for approving and recording the Fifth Amendment. *See* January 13, 2023 Letter to Counterclaim Defendant, **Exhibit 3**. As of the date of this Application, no such evidence has been provided. Rather than provide the evidence, Counterclaim Defendant filed this action. If Counterclaim Defendant satisfied the CC&Rs’ requirements, why not provide such evidence? Also, if she has such evidence, why would she respond by filing suit? Based on the foregoing, consolidation of the hearing on this Application with the trial on the merits would be proper.

**ii. Consolidation should occur because the ACC and approximately 1390 Lot Owners need immediate clarity as to their rights and obligations.**

The Court should consolidate the hearing on this Application with a trial on the merits because this matter affects the rights and authority not only the ACC but also the rights and duties of approximately 1390 Lot Owners. The recordation of the Fifth Amendment, amid challenges to its validity, has led to numerous questions and issues regarding the rights and duties of the ACC and Lot Owners. For example, Lot Owners are trying to sell their property and are unsure how to answer questions from prospective buyers about the CC&Rs and the ACC.

Other Lot Owners are attempting to remodel or relandscape their property and are unsure whether they need to seek authorization from the ACC. Meanwhile, others are trying to buy or build within the ACC and are unsure how or if they can proceed. As such, consolidation of the hearing on this Application and the trial on the merits should occur because it is in the public's interest to have a swift determination on the validity of the Fifth Amendment.

### **STATEMENT OF FACTS**

1. On or about May 1, 1998, the CC&Rs were recorded.<sup>1</sup>
2. A true and correct copy of the CC&Rs is attached hereto as **Exhibit 1**.
3. The CC&Rs were recorded against the real property that is commonly known as the Dixie Springs Subdivision in Hurricane, Utah. *Id.*

4. The real property subject to the CC&Rs:

[S]hall be held, sold, and conveyed subject to the following easements, restrictions, covenants, conditions, and reservations...for the purpose of protecting the value and desirability of said property. This Declaration and the Official Plat Map shall be construed as covenants of equitable servitude which shall run with the land and shall be binding to all parties having any right, title, or interest in the described property, or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each owner thereof.

*Id.* at Declaration.

5. Counterclaim Defendant owns real property subject to the CC&Rs.
6. Article VI of the CC&Rs governs amendments to the CC&Rs. *Id.* at Article VI.
7. Article VI Section 2 of the CC&Rs provides how Lot Owners may amend the CC&Rs. *Id.* at Article VI Section 2.

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<sup>1</sup> Between May 1, 1998 and October 31, 2022, the CC&Rs were amended four (4) times by the Declarant.

8. In relevant part, it states:

Subject to Section 1, this 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.

*Id.*

9. On November 1, 2022, Counterclaim Defendant recorded the Fifth Amendment with the Washington County Recorder's Office as Document Number 20220048624.

10. A true and correct copy of the Fifth Amendment is attached hereto as **Exhibit 2**.

11. The Fifth Amendment purports to amend the CC&Rs pursuant to Article VI Section 2. *Id.* at pg. 2.

12. The Fifth Amendment states that, "The institution of the Architectural Control Committee and its authority is hereby rescinded." *Id.*

13. The Fifth Amendment also purports to drastically change or remove many portions of the CC&Rs and the previous four (4) amendments thereto. *See generally* Fifth Amendment, **Exhibit 2**.

14. Counterclaim Defendant signed the Fifth Amendment. *Id.* at pg. 6.

15. In the Fifth Amendment, Counterclaim Defendant claims to be the agent of "SIXTY THREE PERCENT OF DIXIE SPRINGS LOT OWNERS." *Id.* (emphasis in original).

16. On January 13, 2023, the ACC sent a letter to Counterclaim Defendant requesting documentation supporting that the requirements of Article VI Section 2 were followed prior to

recording the Fifth Amendment. *See* January 13, 2023 Letter to Counterclaim Defendant,

**Exhibit 3.**

17. On January 18, 2023, counsel for Counterclaim Defendant advised that they were collecting the requested documents.

18. On January 30, 2023, Counterclaim Defendant filed her Complaint.

19. As of the date of this Motion, the documentation requested by the ACC has not been provided.

**ARGUMENT**

Utah R. Civ. P. 65A(e) states that a preliminary injunction may issue only upon a showing that the following grounds have be met:

- (e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
- (e)(3) The order or injunction, if issued, would not be adverse to the public interest; and
- (e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

“Injunctive relief is not purely limited to cases where no other possible remedy will be available. Its broader purpose is preventive in nature. A preliminary injunction is ‘an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one.’” *Hunsaker v. Kersh*, 1999 UT 106, ¶ 8, 991 P.2d 67 (internal citations omitted). As set forth below, the ACC has met the grounds necessary for issuance of a preliminary injunction.



**A. The ACC and its Lot Owners will Suffer Irreparable Harm in the Absence of a Preliminary Injunction.**

The first requirement that must be satisfied to obtain a preliminary injunction is that the applicant “will suffer irreparable harm” unless such an order is entered. URCP 65A(e)(1). Under Utah law, this requirement is satisfied both when the threatened injury is to real property and when a party is seeking to enforce a restrictive covenant.

Utah courts have defined irreparable injury as “[w]rongs ... which occasion damages that are estimated only by conjecture, and not by any accurate standard.... Irreparable injury justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.” *System Concepts, Inc. v. Dixon*, 669 P.2d 421, 427-28 (Utah 1983) (quoting *Black’s Law Dictionary* 707 (rev. 5th ed.1973)). “With this in mind, the law presumes that the infringement of a property right is harmful, and sustains a remedy of an injunction to vindicate that right and prevent future harm.” *InnoSys, Inc. v. Mercer*, 2015 UT 80, ¶ 33, 364 P.3d 1013, 1020.

When considering the infringement of a property right, the Utah Supreme Court has “held that an injunction is the appropriate remedy to prevent a private party from interfering with another private party’s easement.” *Carrier v. Lindquist*, 2001 UT 105, ¶ 28, 37 P.3d 1112. In *Carrier*, the Defendant put on evidence that the obstruction of the property right was easily compensable in money. *Id.* ¶ 26. The Court nonetheless found irreparable injury, reasoning that there would be additional hardships stemming from difficulty making repairs to the property and improving the property. *Id.*

Likewise, when considering the enforcement of restrictive covenants, “[t]he fact that the damage suffered by plaintiffs as a consequence of defendants’ covenant violation was monetarily

minimal does not preclude plaintiff from obtaining an injunction in view of plaintiffs' protectable interest in the residential integrity of their neighborhood and the enforceability of the covenants that help to sustain it." *Crimmins v. Simonds*, 636 P.2d 478, 480 (Utah 1981). This is because "[p]ersons who own property in a neighborhood subject to restrictive covenants are entitled to rely on the covenants according to their terms." *Id.* at 481. Indeed, "the element of harm . . . is not essential to the court's decision to grant a permanent injunction to enforce a restrictive covenant. Property owners have a protectable interest in enforcing restrictive covenants through injunctive relief without a showing of harm." *S. Ridge Homeowners' Ass'n v. Brown*, 2010 UT App 23, ¶ 6, 226 P.3d 758 (cleaned up).

This case involves the enforcement of a restrictive covenant and the significant interference with real property rights resulting in immediate and irreparable harm. The Lot Owners within the ACC purchased their property subject to and in reliance on the CC&Rs. The CC&Rs govern the ACC and how Lot Owners may use or change their property. The ACC and the Lot Owners are "entitled to rely on the covenants according to their terms." *Crimmins*, 636 P.2d at 481. The Fifth Amendment purports to rescind all authority from the ACC and drastically alter the rights and obligations of Lot Owners. The ACC and Lot Owners have a protectable interest in the enforcement of the CC&Rs and injunctive relief should be issued.

Specifically, the ACC requests the enforcement of Article VI Section 2 of the CC&Rs, which governs how Lot Owners may amend the CC&Rs. *See* CC&Rs at Article VI Section 2, **Exhibit 1**. The Section contains four (4) requirements. *Id.* First, "[W]ritten notice shall be sent to all holders of first mortgage liens." *Id.* Second, the notice sent to the holders of first mortgage liens is to "setting forth said amendment and advising them of the date that the Owners will vote on said

amendment.” *Id.* Third, there must be a “date that the Owners will vote on said amendment.” *Id.* Fourth, to complete the amendment “an instrument signed by not less than sixty percent (60%) of the Lot Owners, which amendment shall be effective upon recordation.” *Id.* As set forth herein, Counterclaim Defendant has not satisfied these requirements.

The ACC and its Lot Owners are entitled to rely upon the foregoing restrictive covenant. Counterclaim Defendant’s recordation of the Fifth Amendment, despite her failure to abide by the plain terms of the CC&Rs, has caused the ACC harm because it has inhibited their authority and ability enforce the CC&Rs. In turn, a cloud has been cast over the Lot Owners’ rights and obligations as to their property. Additionally, Counterclaim Defendant’s actions have caused delays, confusion, and damages to prospective buyers and builders within the ACC.

Without an order and preliminary injunction that the Fifth Amendment is invalid, failed to amend the CC&Rs, and should be revoked, the ACC and its Lot Owners will continue to suffer irreparable harm. At the very least, an order and preliminary injunction should issue halting the effect of the Fifth Amendment until its validity can be determined at trial.

**B. The Threatened Injury Outweighs Whatever Damage the Proposed Order or Injunction May Cause.**

The second requirement that must be satisfied to obtain a preliminary injunction is that the threatened injury to the applicant outweighs the potential damage to the restrained or enjoined party. URCP 65A(e)(2). For purposes of the preliminary injunction, there is no threatened damage to the Counterclaim Defendant. Indeed, she has requested similar relief – a declaration as to the validity of the Fifth Amendment. *See* Complaint at ¶ 33, Court Docket 1. At worst, if the ACC’s requested relief is granted, Counterclaim Defendant must abide by the terms

of the initial CC&Rs and its subsequent valid amendments – as she has been required to do since she first purchased property subject to the CC&Rs.

On the other hand, the threatened injury to the ACC is severe. First, without the requested relief, the ACC's ability to function and its authority are in question. This is because the Fifth Amendment purportedly rescinds the ACC and its authority. Fifth Amendment at 2, **Exhibit 2**. Because the Fifth Amendment purports to rescind all authority from the ACC, the longer that it remains on the records of the Washington County Recorder's Office, the more likely it is that Lot Owners will violate the restrictions set forth in the CC&Rs. This will leave the ACC with significantly more issues to address than if the requested order and injunctive relief is issued.

In addition to the threatened injury to the ACC, the Lot Owners have been and continue to be harmed. With the Fifth Amendment's validity in question, it is unclear what the Lot Owners' property rights and obligations are. This has affected Lot Owners' ability to sell, remodel, or build on their property. These delays threaten significant injury to the Lot Owners and others. Based on the foregoing, the threatened injury to the ACC and its Lot Owners far outweighs the potential damage to Counterclaim Defendant.

**C. Granting the ACC's Application is in the Public's Interest.**

The third requirement that must be satisfied to obtain a preliminary injunction is “the order or injunction, if issued, would not be adverse to the public interest.” Utah R. Civ. P. 65A(e)(3). The ACC seeks a declaration that the Fifth Amendment was invalid and failed to amend the CC&Rs. It is in the public's interest, including the approximately 1390 property owners and those seeking to buy or build on property within the ACC, to know their rights and

obligations in relation to owning, purchasing, selling, remodeling, or building on their property. Therefore, it is in the public's interest to issue the requested order and injunction.

**D. There is a Substantial Likelihood that the ACC Will Prevail on the Merits of the Underlying Claim.**

The fourth requirement that must be satisfied to obtain a preliminary injunction is “there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits that should be the subject of further litigation.” URCP 65A(e)(4). To satisfy this requirement, “An applicant must, at the very least, make a prima facie showing that the elements of its underlying claim can be proved.” *Water & Energy Sys. Tech., Inc. v. Keil*, 1999 UT 16, ¶ 8, 974 P.2d 821, 822; *see also Utah State Road Comm'n v. Friberg*, 687 P.2d 821, 833 (Utah 1984). The parties have each requested a declaration as to the validity of the Fifth Amendment. Counterclaim Defendant has alleged that the Fifth Amendment was proper and amended the CC&Rs. *See generally* Complaint, Court Docket 1.

The ACC has alleged that the requirements to amend the CC&Rs were not satisfied prior to or in the recording of the Fifth Amendment. *See generally* Answer and Counterclaim. As set forth below, there is a substantial likelihood that the ACC will prevail on its cause of action.

The CC&Rs are restrictive covenants that run with the land. *See* CC&Rs, **Exhibit 1**. “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.” *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807, 810–11. “Generally unambiguous restrictive covenants should be enforced as written.” *Id.* (internal citations omitted); *see also Rappoport v. Martin*, 2018 UT App. 163, ¶ 9, 432 P.3d 772, 775 (CC&Rs are

interpreted by the same rules of construction as those used to interpret contracts and terms are enforced as written). Based on the foregoing, the CC&Rs are interpreted much like a contract and if the terms are unambiguous, they must be enforced.

Here, Counterclaim Defendant has failed to follow the unambiguous language of the CC&Rs. Article VI Section 2 of the CC&Rs details how Lot Owners may amend the CC&Rs.

**Exhibit 1.** In relevant part:

[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.

*Id.*

Pursuant to the foregoing plain language, Lot Owners may amend the CC&Rs if they satisfy the following requirements: (1) Prior to any material amendment, 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.” *Id.*

Counterclaim Defendant and the Fifth Amendment failed to satisfy the foregoing requirements. First, the Fifth Amendment is not “signed by not less than sixty percent (60%) of the Lot Owners.” *Id.* Rather, Counterclaim Defendant is the sole signor of the Fifth

Amendment.<sup>2</sup> *See* Fifth Amendment at 6, **Exhibit 2**. This does not strictly correspond with the plain language of the requirement – that the instrument be signed by not less than 60% of the Lot Owners. Thus, the Fifth Amendment is invalid and the ACC will prevail on its claim.

Second, there is no indication that Counterclaim Defendant provided notice to all holders of first mortgage liens. *See* CC&Rs at Article VI Section 2, **Exhibit 1**. In practice, this would require Counterclaim Defendant to verify whether there is a first mortgage lien on approximately 1390 properties. Then Counterclaim Defendant would have had to find contact information for each first mortgage lienholder and then send notice to them. The ACC has requested evidence that Counterclaim Defendant provided such notice. *See* January 13, 2023 Letter to Counterclaim Defendant, **Exhibit 3**. To date, Counterclaim Defendant has not provided such documentation. Rather than provide such documents, Counterclaim Defendant filed her Complaint. There is a substantial likelihood that Counterclaim Defendant did not provide notice to all holders of first mortgage liens. As such, there is a substantial likelihood that the ACC will prevail on its claim.

Third, if notice was sent to all holders of first mortgage liens, there is no indication that the notice satisfied the content requirements set forth in the CC&Rs. Article VI Section 2 requires that the notice set forth the proposed amendment and the date on which the Lot Owners will vote on said amendment. *See* CC&Rs, **Exhibit 1**. The ACC requested evidence that

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<sup>2</sup> Counterclaim Defendant baldly asserts that she is the agent of 63% of the Lot Owners. *See* Fifth Amendment at 6. The Fifth Amendment does not contain the names of the Lot Owners that Counterclaim Defendant allegedly represents. *Id.* Pursuant to Utah Code § 25-5-1, no interest in, power over, or concern over real property is valid unless signed by the party(s) or their “lawful agent thereunto authorized by writing.” Thus, for Counterclaim Defendant to have properly signed and recorded the Fifth Amendment, she must have been authorized in writing by each of the 63% of Lot Owners for that purpose.

On January 13, 2023, the ACC requested evidence that she was the authorized by 63% of Lot Owners to sign and record the Fifth Amendment on their behalf. *See* January 13, 2023 Letter to Counterclaim Defendant, **Exhibit 3**. Rather than provide such evidence (which still has not been provided) Counterclaim Defendant filed suit.

Counterclaim Defendant provided notice that satisfied these content requirements. *See* January 13, 2023 Letter to Counterclaim Defendant, **Exhibit 3**. To date, Counterclaim Defendant has not provided such documentation. Rather than provide such documents, Counterclaim Defendant filed her Complaint. There is no rational explanation for not providing such notice other than none exists. There is a substantial likelihood that the notice (if any) did not satisfy the content requirements set forth in the CC&Rs. As such, there is a substantial likelihood that the ACC will prevail on its claim.

Finally, for Lot Owners to amend the CC&Rs there must be a date on which the Owners voted on such amendment. *See* CC&Rs at Article VI Section 2 (The notice sent to the holders of first mortgage liens must advise of the date the Lot Owners will vote on the amendment). There is no date on which the Lot Owners voted on the Fifth Amendment. Knowing this, in her Complaint, Counterclaim Defendant purposefully did not allege that a vote occurred. *See generally* Complaint, Court Docket 1. Rather, over a prolonged period of time, Counterclaim Defendant allegedly gathered signatures.<sup>3</sup> *Id.* This does not satisfy the plain language of Article VI Section 2, which requires a date on which the Owners vote on the proposed amendment.<sup>4</sup> As such, the Fifth Amendment is invalid and the ACC is likely to prevail on its claims.

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<sup>3</sup> Counterclaim Defendant's signature gathering presents a number of issues. For example, what representations about the CC&Rs, ACC, and proposed amendments were made? Did Lot Owners actually sign or was it simply whoever was present at the time? Did the Lot Owners have an opportunity to review the proposed amendment? Did the proposed amendment change over time during the signature gathering process (i.e., did the first Lot Owner agree to a different amendment than was ultimately recorded)?

<sup>4</sup> Again, the ACC requested documentation that a vote of the Lot Owners occurred. *See* January 13, 2023 Letter to Counterclaim Defendant, **Exhibit 3**. The ACC requested the names, dates, ballots, and signatures of the Lot Owners, the proposed language provided to the Lot Owners at the time of the vote, notices given to the Lot Owners of the vote, evidence of the number of votes cast, evidence of proxy votes and appropriate forms, and all other documents related to the vote. Counterclaim Defendant responded to this request by filing suit.



**E. No Security is Necessary.**

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.

**F. Request for Attorney's Fees and Costs.**

In the event that the ACC is the prevailing party in this matter, it respectfully requests its reasonable attorney's fees and costs. The ACC's request is supported by Article V Section 6(i) of the Third Amendment to the CC&Rs which states:

In addition to the fines/assessments the Owners will be liable to pay any and all costs and fees, including a reasonable attorney's fee incurred in connection with any enforcement or collection action related to the Owner's violation of the CC&Rs.

*See* Third Amendment to the CC&Rs at Article V Section 6(i), **Exhibit 4**.

In the present matter, Counterclaim Defendant, who is owns a property subject to the CC&Rs, violated the terms of the CC&Rs by recording the Fifth Amendment without first satisfying the requirements of Article VI Section 2. Her actions have resulted in significant damages and loss to the ACC and the Lot Owners. The ACC has had to retain legal counsel to enforce the terms of the CC&Rs against Counterclaim Defendant and her actions. As such, the ACC respectfully requests an award of its attorney's fees and costs. Upon the issuance of a judgment is entered in this matter, the ACC will prepare its motion for attorney's fees and costs pursuant to Rule 73 of the Utah Rules of Civil Procedure.

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The ACC's request is also supported by Utah Code § 78B-5-825(1), which states:

(1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

Counterclaim Defendant's action was brought in bad faith. The Fifth Amendment, on its face, fails to follow the simple requirement that it be signed by more than 60% of the Lot Owners. *See* CC&Rs at Article VI Section 2, **Exhibit 1**. Furthermore, Counterclaim Defendant filed this action despite knowing that she failed to provide (and very likely does not have) the requested documentary evidence to support her claims. Therefore, Counterclaim Defendant's action was brought without merit and not asserted in good faith. As such, the ACC is entitled to an award of attorney's fees and costs. The ACC will prepare a motion for attorney's fees and costs pursuant to Rule 73 of the Utah Rules of Civil Procedure once a judgment in its favor has been entered.

### **CONCLUSION**

Based on the foregoing, the ACC is and will continue to suffer irreparable harm. Granting the ACC's requested relief will not damage the Counterclaim Defendant (she has requested a declaration that the Fifth Amendment is valid) and is in the public interest. Finally, there is a substantial likelihood that the ACC will prevail on the merits of its claim.

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By way of this Application, the ACC requests that the hearing on this Application be consolidated with a trial on the merits. Additionally, the ACC requests a preliminary injunction and order that the Fifth Amendment failed to satisfy the requirements for amending the CC&Rs and is improper, invalid, has no effect, and should be revoked, rescinded or otherwise eliminated from the records of the properties subject to the CC&Rs. The ACC requests that this Court order Counterclaim Defendant to revoke, rescind, or otherwise remove the Fifth Amendment from the records of the properties that are subject to the CC&Rs.

DATED: February \_\_, 2023.

SNOW JENSEN & REECE, P.C.

By: \_\_\_\_\_  
Jeffrey R. Miles  
J. Tyler King  
*Attorneys for Counterclaimant*

**CERTIFICATE OF SERVICE**

I hereby certify that on February \_\_\_\_, 2023, I caused a true and correct copy of the foregoing **ANSWER** to be served upon the following by the method indicated:

Zackary P. Takos	<input checked="" type="checkbox"/>	Electronic Filing
Steven R. Hart	<input type="checkbox"/>	Email
<b>TAKOS LAW GROUP, LTD.</b>	<input type="checkbox"/>	U.S. Mail
<a href="mailto:zach@takoslaw.com">zach@takoslaw.com</a>		
<a href="mailto:steven@takoslaw.com">steven@takoslaw.com</a>		
<i>Attorney for Plaintiff</i>		

/s/ \_\_\_\_\_  
Paralegal

**Notice to responding party**

You have a limited amount of time to respond to this motion. In most cases, you must file a written response with the court and provide a copy to the other party:

- within 14 days of this motion being filed, if the motion will be decided by a judge, or
- at least 14 days before the hearing, if the motion will be decided by a commissioner.

In some situations a statute or court order may specify a different deadline.

If you do not respond to this motion or attend the hearing, the person who filed the motion may get what they requested.

See the court’s Motions page for more information about the motions process, deadlines and forms: [utcourts.gov/motions](http://utcourts.gov/motions)



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**Finding help**

The court’s Finding Legal Help web page ([utcourts.gov/help](http://utcourts.gov/help)) provides information about the ways you can get legal help, including the Self-Help Center, reduced-fee attorneys, limited legal help and free legal clinics.



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**Aviso para la parte que responde**

Su tiempo para responder a esta moción es limitado. En la mayoría de casos deberá presentar una respuesta escrita con el tribunal y darle una copia de la misma a la otra parte:

- dentro de 14 días del día que se presenta la moción, si la misma será resuelta por un juez, o
- por lo menos 14 días antes de la audiencia, si la misma será resuelta por un comisionado.

En algunos casos debido a un estatuto o a una orden de un juez la fecha límite podrá ser distinta.

Si usted no responde a esta moción ni se presenta a la audiencia, la persona que presentó la moción podría recibir lo que pidió.

Vea la página del tribunal sobre Mociones para encontrar más información sobre el proceso de las mociones, las fechas límites y los formularios:



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[utcourts.gov/motions-span](http://utcourts.gov/motions-span)

**Cómo encontrar ayuda legal**

La página de la internet del tribunal Cómo encontrar ayuda legal ([utcourts.gov/help-span](http://utcourts.gov/help-span)) tiene información sobre algunas maneras de encontrar ayuda legal, incluyendo el Centro de Ayuda de los Tribunales de Utah, abogados que ofrecen descuentos u ofrecen ayuda legal limitada, y talleres legales gratuitos.



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