
**FIFTH DISTRICT COURT OF THE STATE OF UTAH
ST. GEORGE, WASHINGTON COUNTY
STATE OF UTAH**

Evelyn Oberg,
Plaintiff

v.
Dixie Springs Architectural Control
Committee, Inc., a Utah Corporation

Defendant

**MEMORANDUM DECISION AND ORDER
FOR PRELIMINARY INJUNCTION RE:
AMENDMENTS TO CC&Rs**

Case Number 230500079
Judge: WESTFALL, G. MICHAEL

INTRODUCTION

Defendant/Counterclaimant Dixie Springs Architectural Control Committee, (“ACC”) Inc., seeks a preliminary injunction,¹ and a consolidation and advancement of the trial on the merits, under URCP 65A (a)(2).² Plaintiff/Counterclaimant Defendant Evelyn Oberg (“Oberg”) seeks an order that the amendments to the *Declaration of Covenants, Conditions, and Restrictions of Dixie Springs: A Residential Subdivision* (“CC&Rs”) are proper, valid and binding.³ ACC asks in the alternative for a stay of application of the amendments until the hearing on the merits is held.

FINDINGS AND CONCLUSIONS

Counterclaimant ACC’s Application for preliminary injunction

¹ Application for Preliminary injunction together with Exhibits 1-5, filed on February 24, 2023. Reply Memorandum together with exhibits 6-14 filed on March 21, 2023.

² The Court conducted a scheduling conference in the matter on June 13, 2023. At the hearing the parties stipulated that the court consider and rule on the Application for Preliminary Injunction without an evidentiary hearing, relying only on the pleadings in the file.

³ Opposition to Defendant’s Application for Preliminary Injunction, together with Exhibits A-F, filed on March 10, 2023.

Oberg has not shown that she strictly followed the provision of Article VI, Section 2 of the Declaration of CC&Rs⁴ regarding the notice, time and method of voting to enact amendments to the CC&Rs. This Court finds the facts disputed regarding Oberg's compliance with the requirements for amending the Declaration. There are claims that she did *not* sufficiently adhere to a reasonable interpretation of those rules in obtaining a large majority of votes; there were votes disputed and evidence offered that the voting process was irregular. However, with the exception of very limited evidence contesting the validity of some of the votes, Defendant has not presented evidence at this stage of the proceeding to dispute Plaintiff's claims that she *did* obtain the required *number* of votes to amend the CC&Rs.

Plaintiff's plea for preliminary injunction

The Utah Rules of Civil Procedure provide, in Rule 65A(e) that a preliminary injunction may issue upon showing:

- (1) The applicant will suffer irreparable harm unless the order or injunction issues;
- (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;
- (3) The order or injunction, if issued, would not be adverse to the public interest; and
- (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.

Irreparable Harm

A Preliminary injunction is appropriate where infringement of property rights are involved.⁵ Notably, the Utah Supreme Court has held that an injunction is the appropriate remedy

⁴ "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."

⁵ "'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." In *Carrier v. Lundquist*, 2001 UT 105, 37 P.3d.1112, though 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.*" (See *Counter Claimant's Application for Preliminary Injunction*, *id.* comment added in brackets.)

“to prevent a private party from interfering with another private party’s easement.” *Carrier* ¶ 28. Oberg’s amendments specifically remove from ACC the right of access to areas to which they are entitled access under the CC&Rs.⁶ Oberg also removed the following restriction in ARTICLE IV: “There shall be no exterior fires on the Lots whatsoever, except barbecue fires contained within receptacles designed for such purpose.” Removal of that provision creates a distinct risk of harm to other members subject to the CC&Rs, which harm has a substantial likelihood of being irreparable in the event a previously prohibited exterior fire were to get out of control.

While it is not essential to satisfy the element of harm in granting a permanent injunction to enforce a restrictive covenant,⁷ this Court finds that Defendant has shown that property owners who desire to be governed by the CC&Rs as they existed before the Oberg amendment *will* suffer irreparable harm at a minimum regarding the easement and exterior fire covenants.

Weighing of Harms

This Court finds that Subsection (2) of Rule 65(A) is satisfied in that “[t]he threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined.”⁸ The “damage to the party or parties restrained in this case involves only a return to a status quo of two decades under the CC&Rs as they were originally created, or in their most recent form as established prior to this amending.

Public Interest

Finding the first two requirements met, the Court considers the public interest in the

⁶ See “ARTICLE III EASEMENTS” p. 6 of the Declaration (CCRs) which states, in Section 3: “An easement is hereby granted to the Architectural Control Committee to enter in or to cross over any Lot to perform its duties provided for herein.”

⁷See ACC’s Application for Preliminary for Preliminary Injunction p.10, citing *South Ridge Homeowners’ Ass’n v. Brown*, 2010 UT App 23, ¶ 6, 226 P.3d 758, 761 “[T]he 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. *Fink v. Miller*, 896 P.2d 649, 655 n. 8 (Utah Ct.App., *cert. denied*, 910 P.2d 425 (Utah 1995).”

⁸ U.R.C.P. 65(A) (e)(2)

enforcement of restrictive covenants. Utah Courts have long recognized that parties have a “protectable interest in the residential integrity of their neighborhood and the enforceability of the covenants that help to sustain it.” *Liu v. Dunnigan*, 25 Md. App. 178, 333 A.2d 338 (1975); cited in *Crimmins v. Simonds*, 636 p.2d 478 (Utah1981).

Injunctive relief to enforce restrictive covenants is not adverse to the public interest; the stated purpose of the Dixie Springs Declaration of CC&Rs is to “protect[...] the value and desirability of said property” (CC&Rs p.1). The CC&Rs provide for democratic interaction between the property holders as well as lien holders who have an interest in preserving property values in the entire neighborhood. The Lot Owners purchased their property subject to and in reliance on the CC&Rs, which govern the ACC and how Lot Owners may use or change their property. The Utah Supreme Court in *Crimmins* held that “Persons who own property in a neighborhood subject to restrictive covenants are entitled to rely on the covenants according to their terms, even if some of their neighbors no longer desire their enforcement.”⁹

Granting the Injunction is not adverse to public interest.

Likelihood of Prevailing on the Merits

Regarding the final determination, the Court is ruling on the Application for Preliminary Injunction in accordance with the wishes of the parties as expressed at the hearing on June 13, 2023.

Defendant essentially presents two arguments in support of its position that Plaintiff did not comply with Article VI Section 2 when she recorded the Fifth Amendment. The first argument alleges that Defendant did not acquire the required signatures. However, there is no evidence presented at this time that contradicts Plaintiff’s claim to the contrary. Defendant also seems to argue that the recorded document must contain all of those signatures. However, the plain language of Article VI Section 2 does not require that the “instrument” be recorded. Only the Amendment need be recorded. Except as Plaintiff’s actions appear to be impacted by Utah

⁹ *id.* at 481

law relating to amendment of and /or dissolution of nonprofit corporations, as addressed hereinafter, the Defendant would not prevail on this claim as it relates to the Application for Preliminary Injunction based on the current record before the court

The Second argument focuses on notice to all holders of first mortgage liens. At this stage in the proceedings, the Court finds that Defendant is likely to prevail on this claim for the following reasons: 1) The written notice is required to be “sent.” Publication is not the same as sending it directly to the lienholders; 2) The written notice must “set forth the said amendment.” It appears that the amendment is not included in its entirety, i.e., set forth in the notice that was published; and 3) The notice must “advise [lien holders] of the date the owners will vote.”

The notice to lienholders was not even published until after many, if not most, of the owners had “voted.” Article VI Section 2 indicates that the Owners *will* vote, quite clearly indicating that the vote will occur after notice has been sent.

ORDER¹⁰

The Court, therefore, grants Defendant’s Application for Preliminary Injunction as follows:

Pending further Court Order, the Fifth Amendment to Declaration of Covenants, Conditions and Restrictions of Dixie Springs Subdivision , recorded 11/1/22, as document number 20220048624, has no effect, and the affected parties shall comply with the CC&Rs as they existed prior to the recording of that document.

¹⁰ The parties are instructed to brief issues regarding compliance with The Utah Code insofar as it pertains to the dissolution of the ACC and voting procedure to amend the Declaration of CC&Rs. Defendant claims the ACC is a nonprofit Corporation. Plaintiff claims it is a “community association.” Both are governed under the Utah Code. The validity of Plaintiff’s voting procedure may be affected by the legal nature of the ACC as one or the other.

Utah Code §16–6a -1401 governs dissolution of a nonprofit corporation. Prior to trial on the merits, counsel are instructed to prepare additional memoranda addressing application of this and related statutes relative to any procedure followed by Plaintiff in seeking to amend the CC&Rs, focusing on the voting procedure and the arguable dissolution of the ACC.

Defendant shall prepare an order for signature and entry by the court and recording with the Washington County Recorder.

Signed this 24th day of August, 2023

By the Court

Judge G Michael Westfall

