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IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

NICDON 10663, LLC, an Arizona limited liability company,

Plaintiff,

vs.

DESERT MOUNTAIN MASTER ASSOCIATION, an Arizona nonprofit corporation,

Defendant.

No. CV 2018-015165

VERIFIED COMPLAINT

Plaintiff alleges the following:

PARTIES AND JURISDICTION

1. Plaintiff Nicdon 10663, LLC ("Nicdon") is the owner of real property located in Maricopa County with a physical address of 10663 East Fernwood Lane, Scottsdale, Arizona 85262 (the "Property") and the following legal description:

Lot 11, of **DESERT MOUNTAIN, PHASE II, UNIT TWENTY (THE VILLAGE OF DESERT FAIRWAYS)**, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, recorded in Book 402 of Maps, page 18.

2. Defendant Desert Mountain Master Association (the "Association") is, and at all times relevant hereto, a nonprofit corporation authorized to do business and doing business in Maricopa County, Arizona.

3. The events subject to this Complaint occurred in Maricopa County, Arizona.

4. Jurisdiction and venue are proper in this court.

GENERAL ALLEGATIONS

5. The Association is a homeowners' association charged with managing the planned community of Desert Mountain, which consists of approximately 2,397 residential lots or units.

6. The Association and all properties within the Desert Mountain community are subject to recorded covenants, conditions, and restrictions. The current iteration of the Desert Mountain deed restrictions is the Second Amended and Restated Master Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Desert Mountain recorded on June 21, 2011 at Recorder No. 2011-0517763 (the "Declaration"). A true and correct copy of the Declaration is attached hereto as Exhibit 1.

7. The Property is physically located within the Desert Mountain planned community and, therefore, subject to the Declaration. Nicdon is a Member of the Association.

8. Plaintiff originally purchased the Property with the intent to utilize it for unrestricted rentals, including short-term rentals. Plaintiff and its members reasonably and detrimentally relied on the Declaration in making the decision to purchase the Property. At the time Plaintiff's members originally acquired the Property, the Declaration did not prohibit short-term rentals or impose any restrictions indicating it was foreseeable that it would later adopt short-term rental restrictions within Desert Mountain that materially and substantially restrict Members from short-term rentals.

9. Specifically, Section 1.2.2 of Exhibit E to the Declaration, entitled "Leasing Restrictions," affirmed the right to lease so long as the "entire Dwelling Unit on a Lot" was leased.

10. On or about July 17, 2018, the Association recorded or caused to be recorded a Certificate of Amendment to Exhibit E of the Second Amended and Restated Master Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens,

1 Reservations and Easements for Desert Mountain at Recorder No. 2018-0540413 (the
2 "Amendment"). A true and correct copy of the Amendment is attached hereto as Exhibit 2.

3 11. The Amendment purports to amend Section 1.2.2 of Exhibit E and impose new
4 leasing restrictions on Association members prohibiting short term leases to "Ineligible
5 Renter(s) for a term of less than thirty (30) days." "Ineligible Renter(s)" refers to "individuals
6 and/or entities that are neither Members of the Association nor Members of the Desert Mountain
7 Club."

8 12. The Amendment is invalid, improper, and was not adopted in accordance with the
9 Declaration or Arizona law.

10 13. The Amendment constitutes a "Major Decision" under the Declaration. A "Major
11 Decision," according to Section 1.32 of the Declaration, is "any decision of the Master
12 Association that is subject to the approval of the Members as set forth in Section 5.20." Section
13 5.20 of the Declaration requires the following procedure for Major Decisions:

14 All Major Decisions shall first be approved by the Board of Directors through a
15 written Board resolution. Thereafter, the Master Association shall give notice to
16 all Owners of the proposed Major Decision and of their right to object to it. If no
17 more than ten percent (10%) of the Members object to the Major Decision in
18 writing within forty-five (45) days after notice is given, the Board is authorized to
19 implement the Major Decision without a meeting or vote of the Members. If,
20 however, more than ten percent (10%) of the Members object to the Major
21 Decision in writing within forty-five (45) days after notice is given, the Major
22 Decision may only be authorized if approved by eligible Members holding two-
23 thirds (2/3) of the eligible votes in the Master Association who are present in
24 person or by absentee ballot at a meeting of the Master Association called for this
25 purpose.

26 14. On or about March 12, 2018, the Association's Board of Directors proposed a Major
Decision to amend Section 1.2.2 of Exhibit E in order to limit short-term rentals. A true and
correct copy of the March 12 letter sent to Members is attached as Exhibit 3.

15. On or about April 10, 2018, the Association notified the membership of a vote on
the proposed short-term rental amendment. A true and correct copy of the April 10 letter sent to
Members is attached as Exhibit 4.

1 16. On or about April 13, 2018, the Association mailed ballots for the proposed
2 amendment to the membership. A true and correct copy of the letter and ballot is attached as
3 Exhibit 5.

4 17. Upon information and belief, though the ballot references that a "Special Meeting"
5 would take place on May 1, 2018 at 3:00 p.m., a Special Meeting was not convened on that date
6 and at that time. Rather, the May 1, 2018 at 3:00 p.m. deadline was simply the deadline for in-
7 person submission of ballots.

8 18. Defendant has not provided any documentation showing that a meeting took place.

9 19. On or about May 2, 2018, the Association represented to the membership that it had
10 received a total of 1,768 ballots for 2,397 members and that, of those ballots returned, 1,323
11 members voted in favor of the short-term rental amendment. Assuming that the Association
12 accurately tallied the ballots, therefore, just 55% of the total membership voted in favor of the
13 short-term rental restriction within the Association. A true and correct copy of correspondence
14 regarding the short-term rental amendment is attached as Exhibit 6.

15 20. The Amendment did not receive the unanimous consent of the members.

16 21. On or about July 17, 2018, the Association recorded the Amendment.

17 22. The Amendment imposes material and unreasonable restrictions on the use or
18 occupancy of or behavior within individually owned lots in a manner that is substantial and
19 unforeseeable based on the Declaration and amounts to a ban on its use and occupancy of, and
20 behavior within, the Property for the primary purpose it was purchased.

21 23. The right to lease property to generate income is a fundamental right inherent in the
22 ownership of property.

23 24. The Amendment prohibits owners from leasing their properties to "Ineligible
24 Renters for a term of less than thirty (30) days" and further provides, in part, that:

25 [N]o Owner may advertise his or her Lot, including any and all buildings located
26 thereon, as available to an Ineligible Renter(s) for a lease term of less than thirty
(30) days in duration. A Lot, including any and all buildings located thereon, may,

however, be leased to an Eligible Renter(s) for a term that is less than thirty (30) days in duration.

25. The Association has stated that it will begin enforcing the Amendment effective January 1, 2019 and has published a fine schedule charging an owner fines in \$5,000 increments for any owner who advertises property for rent to ineligible renters for a term of less than 30 days, as well as similar incremental fines to owners who actually lease their property to an "ineligible renter." The first offense merits a fine of \$5,000 or "the amount of the rent plus 20%" and subsequent violations "will increase in \$5,000 increments". A true and correct copy of correspondence regarding Short Term Rental Policies and Fines and the Resolution Establishing a Leasing Restriction Fine Schedule are attached as Exhibits 7 and 8.

26. The Plaintiff relies on the revenue generated from the Property and has already entered into several leases for 2019.

COUNT ONE
(Declaratory Judgment)

27. Plaintiff incorporates the foregoing allegations as if set forth fully herein.

28. This claim is brought pursuant to, *inter alia*, the Uniform Declaratory Judgment Act, A.R.S. § 12-1831, *et seq.*, Rule 57, Arizona Rules of Civil Procedure.

29. An actual controversy has arisen and exists between the Plaintiff and Defendant as to their respective rights, status and obligations. This controversy will continue until resolved by a court of competent jurisdiction.

30. Plaintiff requests a judicial determination that the Amendment is unlawful and invalid because it was not adopted with the unanimous consent of the Members as required by Arizona law or; alternatively, it was not adopted in accordance with the requisite percentages set forth in Sections 1.33, 5.20 and 19.1 of the Declaration; that the Association is not permitted to add new and material use restrictions that are substantial and not foreseeable from the face of

1 the then-operative declaration; and that the voting process on the Amendment was otherwise
2 defective and not in compliance with Arizona law.

3 31. Plaintiff is entitled to its attorneys' fees and costs pursuant to the terms of the
4 Declaration as well as A.R.S. §§ 12-341, 12-341.01, and 12-1831.

5
6 **COUNT TWO**
(Injunctive Relief)

7 32. Plaintiff incorporates the foregoing allegations as if set forth fully herein.

8 33. Defendant was not authorized under the Declaration to adopt the Amendment
9 without the unanimous approval of all owners or, in the alternative, was not authorized to adopt
10 the Amendment without satisfying the percentage set forth in Sections 1.33, 5.20 and 19.1 of the
11 Declaration. However, Defendant did not get the unanimous approval of all owners or even the
12 percentage set forth in Sections 1.33, 5.20 and 19.1 of the Declaration.

13 34. Defendant's actions directly impinge on Plaintiffs' right to use and enjoy their
14 property.

15 35. Defendant's actions constitute a breach of the Declaration as set forth herein that
16 presents the likelihood of irreparable harm that cannot be remedied by damages alone. Plaintiff
17 will suffer irreparable harm if Defendant is not enjoined from enforcing the Amendment
18 because it will be prohibited from using its property for the primary purpose for which it was
19 purchased and improved.

20 36. Unless a temporary restraining order and a preliminary injunction is issued, the
21 threatened injury to the Plaintiff significantly outweighs whatever nominal damage, if any, the
22 proposed order and injunction may cause to Defendant. Specifically, the harm to Defendant is
23 non-existent whereas Plaintiff will be deprived of the primary reason they purchased the
24 Property.

25 37. The issuance of a temporary restraining order and injunction is not contrary to the
26 public interest.

1 38. Plaintiff is entitled to its attorneys' fees and costs pursuant to the terms of the
2 Declaration as well as A.R.S. §§ 12-341, 12-341.01, and 12-1831.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff demands Judgment against Defendant and request (a) a
5 declaratory judgment as alleged above; (b) a preliminary and permanent injunction preventing
6 Defendant from enforcing the Amendment; (c) an award of Plaintiff's attorneys' fees and costs;
7 and (d) such other and further relief as the Court deems equitable and just.

8 DATED this 12 day of December 2018.

9 DESSAULES LAW GROUP

10
11 By: 

12 Jonathan A. Dessaules
13 Jacob A. Kubert
14 *Attorneys for Plaintiff*
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VERIFICATION

1. I am the Plaintiff in the foregoing action;
2. I have read the foregoing Verified Complaint and know the contents thereof;
3. The contents of the Verified Complaint are true and correct as to my own personal knowledge, except as to those statements made upon information and belief, and as to those, I believe them to be true and correct; and
4. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 12th day of December 2018.

NICDON 10663, LLC

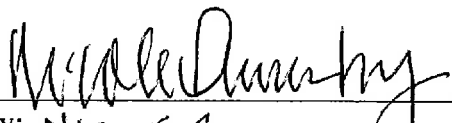

By: NICOLE ARMSTRONG
Its: OWNER

EXHIBIT 1

When recorded, return to:

Ekmark & Ekmark, LLC
6720 North Scottsdale Road
Suite 261
Scottsdale, AZ 85253



OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
2011-0517763 06/21/11 03:28 PM
1 OF 1
FLAMEC

AMENDMENT TO MASTER DECLARATION
SECOND AMENDED AND RESTATED MASTER DECLARATION OF
COVENANTS, CONDITIONS, RESTRICTIONS, ASSESSMENTS, CHARGES,
SERVITUDES, LIENS, RESERVATIONS AND EASEMENTS FOR DESERT
MOUNTAIN

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EXHIBIT 2

Unofficial 20 Document

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WHEN RECORDED RETURN TO:

The Desert Mountain Master Association
Capital Consultants Management Corporation
8360 East Via de Ventura, Suite 100 Bldg L
Scottsdale, Arizona 85258-3172

CERTIFICATE OF AMENDMENT TO EXHIBIT E OF THE SECOND AMENDED AND RESTATED MASTER DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS, ASSESSMENTS, CHARGES, SERVITUDES, LIENS, RESERVATIONS AND EASEMENTS FOR DESERT MOUNTAIN

This Certificate of Amendment Exhibit E of the Second Amended and Restated Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Desert Mountain ("the Amendment") is made as of this 16 day of July, 2018, by the Desert Mountain Mater Association, Inc., an Arizona nonprofit corporation (the "Association") and shall take effect on January 1, 2019.

RECITALS

A. The Second Amended and Restated Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Desert Mountain (the "Declaration") was recorded on June 21, 2011 at Instrument No. 2011-0517763 in the official records of the Maricopa County Recorder.

B. Article 4, Section 4.2 of the Declaration provides that the permitted uses and restrictions of the Lots, Parcels and Common Area set forth at Exhibit "E" to the Declaration may be amended, repealed or added to by the Board by recording a certificate of amendment, subject to the approval of the Members as set forth in Section 5.20 of the Declaration.

C. Article 5, Section 5.20 of the Declaration sets forth the procedure for approval of Major Decisions. All Major Decisions must first be approved by the Board of Directors. Thereafter, the Association must give notice to all Owners of the proposed Major Decision and their right to object to it. If more than ten percent (10%) of the Members object to the Major Decision in writing within forty-five (45) days after notice is given, the Major Decision may only be authorized if approved by eligible Members holding two-thirds (2/3) of the eligible votes in the Master Association who are present in person or by absentee ballot at a meeting of the Master Association called for this purpose.

D. In accordance with the foregoing procedures, this Certificate of Amendment was approved by the Board of Directors and by the eligible Members holding two-thirds (2/3) of the

eligible votes in the Master Association who were present in person or by absentee ballot at a meeting of the Master Association called for this purpose.

AMENDMENT

NOW, THEREFORE, Exhibit E to the Declaration is amended as follows, effective January 1, 2019:

Section 1.2.2 of Exhibit "E," "Leasing Restrictions," is amended and restated in its entirety as follows:

1.2.2 Leasing Restrictions. For purposes of this Section 1.2.2, the term "Eligible Renter(s)" shall refer to and include individuals and/or entities that are Members of the Association (as set forth in the Master Declaration at Section 6.1) and/or individuals and/or entities that are Members of the Desert Mountain Club. "Ineligible Renter(s)" shall refer to those individuals and/or entities that are neither Members of the Association nor Members of the Desert Mountain Club. Occupancy of an entire Lot, including any and all buildings located thereon, but not less than the entire Lot, including any and all buildings located thereon, may be granted to a tenant from time to time by the Owner, subject to the provisions of the Master Declaration and the Association Rules. Before the commencement of each lease term, the Owner of the Lot shall provide the DMMA with written notice to the DMMA of the names and contact information of the lessee(s) and each other adult person who will reside in the Lot, including any and all buildings located thereon, during the lease term, and the term of the lease, including the commencement date and expiration date.

No Lot, including any and all buildings located thereon, shall be leased to an Ineligible Renter(s) for a term of less than thirty (30) days, and no Owner may advertise his or her Lot, including any and all buildings located thereon, as available to an Ineligible Renter(s) for a lease term of less than thirty (30) days in duration. A Lot, including any and all buildings located thereon, may, however, be leased to an Eligible Renter(s) for a term that is less than thirty (30) days in duration. Home exchanges (also referred to as home swapping), through which parties offer each other lodging in each other's homes for a period of time without a monetary exchange, are permitted for a term of not less than seven (7) days. In addition, if the Board of Directors creates and/or adopts a "rental registration form", the Owner shall submit such form to the Master Association for every rental. Any agreement for the lease of a Lot, including any and all buildings located thereon, must be expressly subject to the Governing Documents of the Master Association.

Except as expressly amended by this Certificate of Amendment, Exhibit E to the Declaration shall remain in full force and effect. In the event of any conflict or inconsistency between this Certificate of Amendment and Exhibit E to the Declaration, this Certificate of Amendment shall prevail. Unless otherwise defined herein, each capitalized term used in this Certificate of Amendment shall have the meaning given to such term in the Declaration.

IN WITNESS WHEREOF, the Desert Mountain Master Association, Inc., an Arizona nonprofit corporation, has executed this Certificate of Amendment as of the day and year first above written.

DESERT MOUNTAIN MASTER ASSOCIATION, INC.,
an Arizona nonprofit corporation

By: *[Signature]*
Its: PRESIDENT

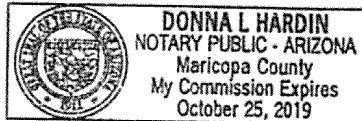
State of Arizona)
) ss.
County of Maricopa)

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 16th day of July, 2018 by Richard Sherman, the President of the Desert Mountain Master Association, Inc., an Arizona nonprofit corporation, for and on behalf of the corporation.

Unofficial Document

[Signature]
Notary Public

My Commission Expires:



SECRETARY'S ATTESTATION

I, J Derek Hill, being the duly elected Secretary of the Desert Mountain Master Association, Inc., hereby attest that the foregoing Amendment to Exhibit E was approved in accordance with the procedures set forth in Article 4, Section 4.2 and Article 5, Section 5.20 of the Declaration.

By: J Derek Hill

Secretary, Desert Mountain Master Association, Inc.

State of Arizona)
) ss.
County of Maricopa)

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 16th day of July, 2018, by James D. Hill, the Secretary of the Desert Mountain Master Association, Inc., an Arizona nonprofit corporation, for and on behalf of the corporation.

Unofficial Document

Donna L Hardin
Notary Public

My Commission Expires:

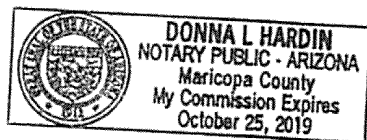


EXHIBIT 3

Desert Mountain Master Association
10550 E Desert Hills Drive
Suite 100
Scottsdale AZ 85262



1-2071

ASSOCIATION INFORMATION ENCLOSED

DESERT MOUNTAIN Master Association
10550 E. Desert Hills Dr.
Suite 100
SCOTTSDALE AZ 85262







Information for All Desert Mountain Homeowners Regarding a New Short-term Rental Proposal

Last July, the DMMA Board proposed a revision to the community's Covenants, Conditions & Restrictions (CC&Rs) following changes in state law that caused Scottsdale to rescind its long-standing 30-day rental restriction. In response to several concerned homeowners and in the interest of supporting the needs of the Desert Mountain community, the Board proposed a 60-day restriction; it also banned luxury home exchanges. The proposal included appropriate exceptions to the restrictions that enabled "eligible renters" – property owners and Club members – to rent for shorter periods to accommodate their friends and family for events like weddings, family reunions and member/guest tournaments. The intent of the proposal was to preserve home values as well as the reputation and lifestyle of our exceptional private residential community.

That proposed change generated considerable feedback, both pro and con. After engaging the community through a survey (1103 respondents), the DMMA learned that the majority (78%) favored some sort of short-term rental restriction, but many were comfortable with a shorter period, i.e., thirty (30) days – while still preserving the exceptions that allow property owners and Club members to secure a rental home for shorter periods.

Since then, detailed review and discussion of that feedback at open meetings, has caused the DMMA Board to terminate the original 60-day proposal. ***The Board has approved a new resolution that requires a minimum 30-day stay for rental properties and a 7-day restriction for luxury home exchanges. Exceptions allowing shorter stays for the friends and family of homeowners and Club members ("eligible renters") would exist as part of this amendment.*** These minimum-stay requirements are consistent with restrictions currently in place for six of our villages.

The Board believes it is prudent and appropriate for a private, residential community to control and limit short-term access primarily to persons unknown to our homeowners and Club members. Should the new amendment require a vote of DMMA members, the Board fully expects it will be supported by the community.

The DMMA formed an ad hoc committee made up of a range of property owners (including operators of rental property) who are assessing requirements to implement the restrictions effectively. The committee is also identifying (and making recommendations to mitigate) any unintended consequences that could result as the proposal is put into effect.

Please see the attached proposed wording of the CC&Rs affected by the amendment. Also see the outline of the "Major Decision Process" being followed. If you have questions, please go to <http://www.desertmthoa.com>, the DMMA website to review the FAQs (Frequently Asked Questions), which will be updated regularly. Additionally, Board members and ad hoc committee members will be holding office hours if you wish to come into the main office and discuss your questions in person.

Sincerely,

Desert Mountain Master Association Board of Directors

Desert Mountain Master Association
10550 East Desert Hills Drive, Suite 100, Scottsdale, Arizona 85262
480/635-5600, Fax 480/488-7484, Design Review, 480/635-5605

Clean Copy with accepted changes - Section 1.2.2 of the Use Restrictions at Exhibit "E."

1.2.2 Leasing Restrictions. For purposes of this Section 1.2.2, the term "Eligible Renter(s)" shall refer to and include individuals and/or entities that are Members of the Association (as set forth in the Master Declaration at Section 6.1) and/or individuals and/or entities that are Members of the Desert Mountain Club. "Ineligible Renter(s)" shall refer to those individuals and/or entities that are neither Members of the Association nor Members of the Desert Mountain Club. Occupancy of an entire Lot, including any and all buildings located thereon, but not less than the entire Lot, including any and all buildings located thereon, may be granted to a tenant from time to time by the Owner, subject to the provisions of the Master Declaration and the Association Rules. Before the commencement of each lease term, the Owner of the Lot shall provide the DMMA with written notice to the DMMA of the names and contact information of the lessee(s) and each other adult person who will reside in the Lot, including any and all buildings located thereon, during the lease term, and the term of the lease, including the commencement date and expiration date.

No Lot, including any and all buildings located thereon, shall be leased to an Ineligible Renter(s) for a term of less than thirty (30) days, and no Owner may advertise his or her Lot, including any and all buildings located thereon, as available to an Ineligible Renter(s) for a lease term of less than thirty (30) days in duration. A Lot, including any and all buildings located thereon, may, however, be leased to an Eligible Renter(s) for a term that is less than thirty (30) days in duration. Home exchanges (also referred to as home swapping), through which parties offer each other lodging in each other's homes for a period of time without a monetary exchange, are permitted for a term of not less than seven (7) days. In addition, if the Board of Directors creates and/or adopts a "rental registration form", the Owner shall submit such form to the Master Association for every rental. Any agreement for the lease of a Lot, including any and all buildings located thereon, must be expressly subject to the Governing Documents of the Master Association.

THE DESERT MOUNTAIN MASTER ASSOCIATION

OUTLINE OF “MAJOR DECISION” PROCESS

The Second Amended and Restated Master Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Desert Mountain (the “Declaration”) identifies certain decisions of the Association as “Major Decisions.” The Declaration at Article 5, Section 5.20(b) identifies amending, repealing or adding to the Use Restrictions found in Exhibit “E” of the Declaration as one such “Major Decision.” The following is an outline of the Major Decision Process:

STEP 1: BOARD RESOLUTION.

Pursuant to Section 5.20 of the Declaration, the Board must approve a Major Decision via a written Board Resolution.

STEP 2: NOTICE TO MEMBERS.

Once the Board has approved the written Resolution, the Association must give notice to all Owners of the Proposed Major Decision, and of the right to object to it.

STEP 3: MEMBER OBJECTION PERIOD

If no more than 10% of the Members object to the Proposed Major Decision in writing within forty-five (45) days after the notice is given, the Board may proceed to implement the Major Decision without a meeting or vote of the Members.

STEP 4: MEMBER MEETING [IF NECESSARY]

If more than 10% of the Members object to the Proposed Major Decision in writing within forty-five (45) days after the notices is given, then the Board may call a Meeting of the Members to vote on the Proposed Major Decision.

- Pursuant to the Bylaws at Article II, Section 4, Members shall be given not less than ten (10) nor more than fifty (50) days’ notice of the Special Meeting by mail, email or wireless communication.
- Pursuant to the Bylaws at Article II, Section 7, Quorum for the Meeting is twenty-five percent (25%) of the Members present in person or by absentee ballot.
- In order for the Proposed Major Decision to be approved, eligible Members holding two-thirds (2/3) of the eligible votes in the Association who are present in person or by absentee ballot at the Meeting must approve the Major Decision.

EXHIBIT 4



VOTE SCHEDULED ON AMENDMENT TO LIMIT SHORT-TERM RENTALS

Dear Owners,

In early March the Desert Mountain Master Association (DMMA) Board of Directors mailed you a proposed change to our Covenants, Conditions and Restrictions (CC&Rs) that would:

- Allow rental periods of less than 30 days only to Members of DMMA or the Club. For example, if a member of DMMA or the Club is hosting a wedding, they would be able to rent a home in Desert Mountain for their guests for a few days or weeks.
- Limit home exchanges (home swapping) to 7 days or more.

A vote of Association Members is required to officially pass this amendment. A **YES** vote means that you support the amendment to the CC&Rs as described above; a **NO** vote means that you do not support this amendment, and you want the CC&Rs to remain as they are. Your Board of Directors believes the proposed rental agreement amendment is in the best interest of both our community and the Club, and we encourage you to vote **YES**.

The requirements for the vote are:

- One vote per lot
- At least 600 (25%) of lot owners must vote in order to have a quorum
- Two-thirds (2/3) of eligible voters voting in the election must approve the amendment in order for it to go into effect .

On April 13, 2018 we will be mailing a ballot to the billing address that we have on file for you. The ballot will include instructions on how to use Election Buddy, our electronic voting platform. If you are not going to be at your billing address and want to vote electronically, please send us an email at hoa@desertmthoa.com and we will send you the unique voter key that is included in the mailing. We encourage you to vote electronically, but you may also:

- Bring your ballot into the HOA office at 10550 E. Desert Hills Drive, Suite 100,
- Fax it to 480-488-7484,
- Complete your ballot, sign it, take a clear photo of it, and email the photo as an attachment to hoa@desertmthoa.com, or
- Mail it to Desert Mountain Master Association, 10550 E. Desert Hills Drive, Suite 100, Scottsdale, AZ 85262.

All ballots must be received no later than **Tuesday, May 1, 2018, 3 pm, Mountain Standard Time.**

If you have questions about this vote, in lieu of a town hall meeting, we encourage you to meet with a Board Member personally at one of the following times at the HOA Office:

| | | |
|---------------------|--------|--------------|
| Tuesday, April 17 | 3-5 pm | Saguaro Room |
| Wednesday, April 18 | 3-5 pm | Agave Room |
| Tuesday, April 24 | 3-5 pm | Saguaro Room |
| Wednesday, April 25 | 3-5 pm | Agave Room |

If you live in one of the six villages that already has this 30-day restriction (Cochise-Geronimo, Haciendas, Lone Mountain II, Lost Star, Saguaro Forest, Seven Arrows), your village-specific restriction will not change no matter the outcome of the vote. **However, we still need your vote!**

This is an important decision that will have long-term impact on our community. LET YOUR VOICE BE HEARD. If you would like to review the communications we have sent previously, please click [HERE](#).

Thank you.

Desert Mountain Master Association
Board of Directors

[Visit our Website](#)

EXHIBIT 5

Desert Mountain Master Association
10550 E Desert Hills Drive, Suite 100
Scottsdale AZ 85262

Desert Mountain Master Association
Voting Information Enclosed

GARY MOSELLE
9809 E MIRAMONTE DR
SCOTTSDALE, AZ 85262

Voting Instructions

ELECTRONIC VOTING (E-VOTING) is available for this election. We encourage Owners to vote electronically. E-voting is safe, secure, anonymous and far more cost effective. Instructions are on the backside of the ballot enclosed. If you prefer to vote via paper ballot, please see instructions below.

For paper ballot voting, please follow these instructions for mailing in your Ballot:

- 1) Complete Yellow Ballot.
- 2) Tear off the bottom portion of this sheet containing the DMMA address
- 3) Insert the bottom portion of this sheet and the completed Yellow Ballot into the white window envelope (make sure the address shows through the window of the envelope)

GARY MOSELLE
9821 E MIRAMONTE DR
X624-K9VM-3N2X-B97V

Desert Mountain Master Association
10550 E Desert Hills Drive, Suite 100
Scottsdale AZ 85262



April 13, 2018

Dear Neighbors,

Over the past few weeks you have received much communication regarding the amendment the Board is proposing that would limit short-term rentals in our beautiful community only to people who own property or are members of the Club. Some of you may have also received misleading emails from those who oppose this amendment.

I, and the entire DMMA Board of Directors, ask you to vote YES on this amendment. You elected us to represent you on the Board, and we take that responsibility seriously. Desert Mountain is one of the finest residential communities anywhere. Our goals are to protect our *privacy, the peaceful enjoyment of our homes and club, as well as our investments.*

The few opposed have created a campaign that has included much misinformation. We are asking that you look objectively at their financial interests versus those of us who have chosen to make Desert Mountain our homes. What could Desert Mountain become over the next few years if we allow more and more short term rentals, potentially compromising this exclusive community we have chosen to call home?

Enclosed is the ballot where we finally decide this issue. While we don't ask you to vote often, when we do, it is really important that you take the time to do so. Based upon our surveys and communication, we believe that most homeowners are in support of the proposed amendment.

We know that many of you may be in transition from one home to another, or may be traveling. We have given you several ways to vote. Please review the enclosed ballot and VOTE YES TODAY.

Sincerely,

Rich

Rich Sherman
President, DMMA Board of Directors



SPECIAL MEETING NOTICE & ABSENTEE BALLOT

Date: May 1, 2018 **Time:** 3:00 PM

Location: 10550 E Desert Hills Dr. Scottsdale AZ 85262, Fairways Conference Center, Saguaro Room

Pursuant to the Major Decision Process set forth in the Second Amended and Restated Master Declaration of Covenants, Conditions, Restrictions, Assessments, Charges, Servitudes, Liens, Reservations and Easements for Desert Mountain (the "Declaration"), a Special Meeting has been scheduled as set forth above in order for the members to vote on the following proposed Major Decision:

The Board proposes to amend the Use Restrictions at Exhibit "E" to the Declaration, Section 1.2.2 "Leasing Restrictions." Please see the enclosed proposed wording of the amended Section 1.2.2 of the Use Restrictions.

- **Note:** The purpose of this Special Meeting will be the collection and counting of ballots
- The **Quorum Requirement** for the Special Meeting: 25% of the Members
- Eligible Members holding two-thirds (2/3) of the eligible votes in the Association who are present in person or by absentee ballot at the Special Meeting must vote in favor of the Proposed Major Decision in order for the Proposed Action to pass.
- Voting Instructions: One ballot for each Lot owned
- **Note:** If you own your Lot in the name of a trust, partnership, corporation or other entity, you must indicate the name of the entity and the capacity in which you are signing on behalf of such entity.
- **Note:** If you do not want to vote on the Proposed Major Decision but wish to be counted toward the quorum requirement, check the abstain box.

Please select **one** of the following:

- ☐ YES, I **approve** the Proposed Major Decision described above.
- ☐ NO, I **do not approve** the Proposed Major Decision described above.
- ☐ I wish to **abstain**, but want to be counted toward the Quorum requirement.

Record Owner Information:

Name: _____

Signature: _____

Address: _____

Owner's Capacity (if applicable): _____

MAILING INSTRUCTIONS: Return completed ballot in the enclosed envelope. Mail-in ballots must be received by staff no later than Tuesday, May 1, 2018 at 3:00 pm. Ballots may be delivered to the HOA office located at 10550 E. Desert Hills Drive, Suite 100, Scottsdale, AZ 85262.

Please see reverse side of page for online voting instructions.

Desert Mountain Master Association
10550 E. Desert Hills Drive, Suite 100 Scottsdale, AZ 85262
480-635-5600 P ♦ 480-488-7484 F



ELECTRONIC VOTING INSTRUCTIONS

ELECTRONIC VOTING (E-VOTING) is available for this vote on the Proposed Major Decision. We encourage Owners to vote electronically. E-voting is safe, secure, and far more cost effective.

Note: Do not vote both electronically and by paper ballot. If both media are used, the electronic ballot will override the paper ballot.

- E-Voting Opens: Monday April 16, 2018 at 12:00 AM Arizona time.
- E-Voting Closes: Monday April 30, 2018 at 11:59 PM Arizona time.

The E-Voting system will only be available during this period.

Instructions:

1. Enter into your Internet browser <https://electionbuddy.com/vote>. This will take you to the *Electionbuddy* voting system.
2. Your secure Voting Key is

X624-K9VM-3N2X-B97V
3. Enter the 16-character voting key, including the dashes, into the voting box. Enter the key EXACTLY as it appears above. Click on the Submit button. The Ballot will appear.
4. Vote by clicking on the appropriate box (approve, do not approve, or abstain). If you do not wish to vote on the Proposed Major Decision, but wish to be counted toward the quorum requirement, select the abstain box.
5. Click on the Verify Your Selection button.
6. You will receive a Verify Screen. Check to make sure you voted as intended. Make any necessary changes and then click on the Submit button.
 - a. Note: if you try to make more than one selection, you will receive an error message.
 - b. Once you submit your electronic vote, it is final. No changes are possible.
7. You will receive an *Electionbuddy* screen that reads "Thank you. You're done. Your ballot choice has been registered."
8. Exit *Electionbuddy* and close the web browser.

If you have any voting issues or would like to comment about the e-voting system, please contact our staff at hoa@desertmthoa.com.

Proposed Language

Section 1.2.2 of the Use Restrictions at Exhibit "E."

1.2.2 Leasing Restrictions. For purposes of this Section 1.2.2, the term "Eligible Renter(s)" shall refer to and include individuals and/or entities that are Members of the Association (as set forth in the Master Declaration at Section 6.1) and/or individuals and/or entities that are Members of the Desert Mountain Club. "Ineligible Renter(s)" shall refer to those individuals and/or entities that are neither Members of the Association nor Members of the Desert Mountain Club. Occupancy of an entire Lot, including any and all buildings located thereon, but not less than the entire Lot, including any and all buildings located thereon, may be granted to a tenant from time to time by the Owner, subject to the provisions of the Master Declaration and the Association Rules. Before the commencement of each lease term, the Owner of the Lot shall provide the DMMA with written notice to the DMMA of the names and contact information of the lessee(s) and each other adult person who will reside in the Lot, including any and all buildings located thereon, during the lease term, and the term of the lease, including the commencement date and expiration date.

No Lot, including any and all buildings located thereon, shall be leased to an Ineligible Renter(s) for a term of less than thirty (30) days, and no Owner may advertise his or her Lot, including any and all buildings located thereon, as available to an Ineligible Renter(s) for a lease term of less than thirty (30) days in duration. A Lot, including any and all buildings located thereon, may, however, be leased to an Eligible Renter(s) for a term that is less than thirty (30) days in duration. Home exchanges (also referred to as home swapping), through which parties offer each other lodging in each other's homes for a period of time without a monetary exchange, are permitted for a term of not less than seven (7) days. In addition, if the Board of Directors creates and/or adopts a "rental registration form", the Owner shall submit such form to the Master Association for every rental. Any agreement for the lease of a Lot, including any and all buildings located thereon, must be expressly subject to the Governing Documents of the Master Association.

EXHIBIT 6



Sign up for GateAccess.net to modify your guestlist. Contact Vicky Harjung at vharjung@desertmthoa.com to get started!

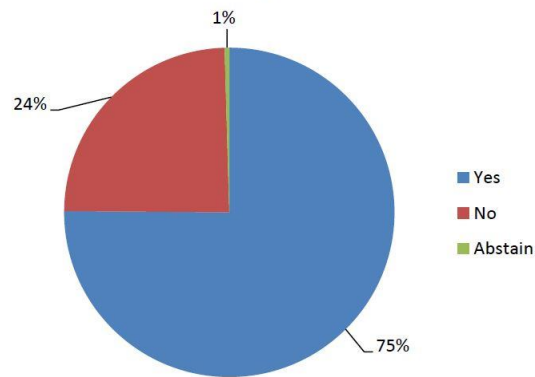


The Short-Term Rental Amendment Has Passed

The auditing firm, Butler Hansen PLC, has [certified the results](#) of the vote to amend our CC&Rs to restrict short-term rentals (less than 30 days) only to members of DMMA or the Club and limit home exchanges to 7 days or more.

The proposal passed by a margin of 75.13%. A total of 1,761 (73%) property owners voted, which exceeded the quorum requirement of 600. Of those voting, 1,323 (75.13%) voted in favor of the amendment, and 430 (24.42%) voted against it. There were 8 abstentions. The Association needed a margin of 66% in favor to pass the proposed amendment.

Voting Results



Clearly there are a significant number of property owners who disagree with this decision. Please know that we respect your point of view. We will be working to enhance the opportunity for property owners to make their homes available to club members and other owners, thus reducing the potential negative impact of this change.

The new restrictions will go into effect on January 1, 2019. The DMMA Board and staff will begin immediately to develop the necessary policies and procedures to ensure that this change is implemented fully and effectively.

We would like to thank everyone who worked so tirelessly in support of this initiative. The Club Board and staff were instrumental in communicating the positive impact of this change. Mike Dings' ad hoc committee spent months interviewing people and researching the current situation in our community. The village leaders made sure their respective owners were informed, many social and golf groups expressed their support and encouraged their members to vote, and many individual volunteers spread the word and mobilized their friends and neighbors. Our thanks go out to all of you!

Desert Mountain is a truly special place. Thank you for your involvement and support. Through an active association and owner involvement, we will continue to make our community one of the finest private residential communities anywhere.

DMMA Board of Directors

Visit our Website

Your HOA's new communication tool is Constant Contact. Please add this email address to your contact list thus avoiding messages appearing as spam.

Desert Mountain Master Association
10550 E. Desert Hills Dr. Suite 100 * Scottsdale, AZ 85262
480-635-5600 HOA@desertmthoa.com

EXHIBIT 7

Desert Mountain Homeowners Association



Sign up for GateAccess.net to modify your guestlist. Contact Vicky Harjung at vharjung@desertmthoa.com to get started!



Short Term Rental Policies and Fines

What You Need to Know if You Are Planning to Lease or Swap Your Home

On May 1, 2018 an amendment to the CC&Rs was approved by property owners that changed our governing documents regarding short-term rentals and home swapping. These changes go into effect on January 1, 2019. Unless you have a rental agreement that was signed before May 1, 2018, you may not rent your home for less than 30 days to anyone who doesn't own property at Desert Mountain or who isn't a member in good standing at Desert Mountain Club. If you have a short-term rental agreement signed before May 1, 2018 for a 2019 rental, please notify the HOA/Desert Mountain Master Association (DMMA) office in writing by November 1, 2018. You can drop it off, mail it, email it or fax it to us.

EFFECTIVE JANUARY 1, 2019

For Property Owners Who Want to Lease Their Homes for Less Than 30 Days

- Your home cannot be located in the villages of: Cochise-Geronimo, Haciendas, Lone Mountain II, Lost Star, Seven Arrows or Saguaro Forest, as rentals for less than 30 days are prohibited in these villages. Please note, eligible renters and those agreements made prior to May 1, 2018 do not apply in these villages.
- If you have a home that you want to advertise on the DMMA website to eligible renters, you must complete the form titled: Desert Mountain Short-term Home Rentals, which is available on the DMMA website at www.desertmthoa.com —> Rental & Home Exchange. You will be able to include pictures of your property, pricing, location, restrictions, etc. Eligible renters will be able to go to that location

and determine if your property is a good fit for them. You will negotiate with them directly.

- In order to be a eligible renter, the person/s leasing your home must own property at Desert Mountain or must be a member in good standing with the Desert Mountain Club.
- Agents and/or owners are asked to register their renters' information by completing the [Access Authorization Form](#) and the [Rental/Home Exchange Property Form](#), which are available on the DMMA website at www.desertmthoa.com —> Rental & Home Exchange. We would like to have this information at least 72 hours before the tenants arrive, so it can be uploaded to the security system and will allow easy access at the gate.
- All tenants must abide by the published rules of our community. Please advise them about timing of trash pickup, parking, gate access, wildlife, obeying the speed limit, etc. If your tenant receives a violation/speeding ticket and does not respond, you will be responsible for their violation.
- We strongly encourage you to contact a real estate professional when leasing your home—even to people you know. A signed leasing agreement will create a common understanding of expectations, and could protect you from liability if something unexpected happens.

For Property Owners Who Want to Lease Their Homes for 30 Days or More

- If you intend to rent your home, we would like you to register this information with DMMA by completing the [Access Authorization Form](#) and the [Rental/Home Exchange Property Form](#), which are available on the DMMA website at www.desertmthoa.com —> Rental & Home Exchange. We would like to have this information at least 72 hours before the tenants arrive, so it can be uploaded to the security system and will allow easy access at the gate. We want your tenants to have a positive first impression when they enter our community.
- You may not advertise Club amenities when advertising your home. The only unaccompanied guest pass that is available is for specified family members as defined by the Club's by-laws—not renters.
- All tenants must abide by the published rules of our community. Please advise them about timing of trash pickup, parking, gate access, obeying the speed limit, information about wildlife, etc. If your tenant receives a violation/speeding ticket and does not respond, you will be responsible for their violation.
- We strongly encourage you to contact a real estate professional when leasing your home.

For Homeowners Who Want to Exchange/Swap Their Homes

- Your home exchange/swap must be for a period of 7 days or more.
- When you exchange/swap your home, we would like you to register with DMMA by completing the [Access Authorization Form](#) and the [Rental/Home Exchange Property Form](#), which are available on the DMMA website at www.desertmthoa.com —> Rental & Home Exchange. We would like to have the completed forms at least 72 hours before the tenants arrive, so it can be uploaded to the security system and will allow easy access at the gate.
- You may not advertise Club amenities when exchanging/swapping your home. The only unaccompanied guest pass that is available is for specified family members as defined by the Club's by-laws—not renters.

- All tenants and temporary residents must abide by the published rules of our community. Please advise them about timing of trash pickup, parking, gate access, speed limits, wildlife, etc. If the person/s living in your home receives a violation/speeding ticket and does not respond, you will be responsible for their violation.
- We strongly encourage you to contact a professional real estate agent when exchanging/swapping your home.

Short-term Rental/Home Swapping Enforcement and Fines

- We will be monitoring the websites that advertise home rentals in our community. Please make sure your advertisement adheres to the new restrictions. In order to enforce these restrictions, the staff and security patrols will be monitoring rental activity, and will respond to any concerns expressed by homeowners.
- To ensure that all property owners comply with the short-term rental/home swapping restrictions, the Board of Directors has approved the following schedule of fines:
 - If a property owner advertises property for rent to ineligible renters for a term less than 30 days, the property owner will receive a violation notice by registered mail. The property owner will be required to terminate such advertisement within 48 hours of the receipt of the violation notice.
 - If the property owner fails to terminate the advertising within 48 hours, or advertises a second time, a \$5,000 fine will be assessed. For any additional advertisements, the fine will increase in \$5,000 increments, for example, \$10,000 for the second advertisement, \$15,000 for the third, etc.
 - If a property owner rents property to an ineligible renter for a term of less than 30 days, the property owner will be fined \$5,000, or the amount of the rent plus 20%, whichever is greater.
 - For any additional rental violations, the fine will increase in \$5,000 increments, as described above.

These fines and enforcement procedures were adopted by the DMMA Board of Directors in order to keep Desert Mountain a premier residential community. If you have any questions please call or visit us at the DMMA office.

Desert Mountain Master Association (DMMA)
10550 East Desert Hills Drive, Suite 100
Scottsdale, AZ 85262
Office: 480-635-5600
Fax: 480-488-7484

DMMA Staff Phone Numbers:

Main Gate: 480-635-5630
Main Office Line: 480-635-5600
Main Office Fax: 480-488-7484
Design Review: 480-635-5605
Owners Services (OSB): 480-635-5610
DHE Gate: 480-635-5635



REMEMBER: Download the full HOA [list](#) of phone numbers with Email addresses and print for easy reference.

Design Review Meetings

Design Review Meetings are scheduled on the first and third Thursday of every month. They take place at 8:00am at the HOA Office, which is located at 10550 East Desert Hills Drive, Suite 100. Please send an [email request](#) or call 480-635-5605 to be included on the meeting schedule.

Your HOA's new communication tool is Constant Contact. Please add this email address to your contact list thus avoiding messages appearing as spam.

Desert Mountain Master Association
10550 E. Desert Hills Dr. Suite 100 * Scottsdale, AZ 85262
480-635-5600 HOA@desertmthoa.com

EXHIBIT 8

**Restatement Third, Property (Servitudes)
American Law Institute 2000**

March 25, 2007

(See legal Disclaimer)

Selected sections

Note: The Restatement, formerly the Restatement of Laws, is not statutory law but common law, which is court made law as a result of prior court opinions. States first look to statutory law and in the absence of pertinent laws will look to common law for persuasive authority. The Restatement is the work of lawyers under the publisher, ALI, who “summarize” numerous court opinions into a workable, understandable set of guidelines to be applied to issues to be decided by the courts. As “persuasive authority”, such restatements are not binding upon the court.

The Restatement consists of two volumes for a total of 1348 pages, replete with case law. Not all of the contents within a chapter, section, subsection, comment or Reporter’s Note have been included in this document.

a. Chapter 1, Definitions

§ 1.3 Covenant running with the land

(1) A covenant is a servitude if either the benefit or the burden runs with the land.

b. Chapter 2, Creation of Servitudes

c. Chapter 3, Validity of Servitude Arrangements

§ 3.1 Validity of Servitudes: General Rule

A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy

Servitudes that are invalid because they violate public policy include, but are not limited to:

- (1) a servitude that is arbitrary, spiteful, or capricious;
- (2) a servitude that unreasonably burdens a fundamental constitutional right;

- (3) a servitude imposes an unreasonable restraint on alienation under § 3.4 or § 3.5;
- (4) a servitude that imposes an unreasonable restraint on trade or competition under §3.6; and
- (5) a servitude that is unconscionable under § 3.7.

[comment h, p.359]. The question whether a servitude unreasonably burdens a fundamental constitutional right is determined as a matter of property law, and not constitutional law.

§ 3.4 Direct restraints

Reasonableness is determined by weighing the utility of the restraint against injurious consequences of enforcing the restraint.

§ 3.5 Indirect restraints

- (2) A servitude that lacks a rational justification is invalid.

§ 3.7, Unconscionability

A servitude is invalid if it is unconscionable.

....

[Comment c, p. 485]. Unconscionable transactions contain an element of overreaching, unfairness, surprise, or harshness that leads to the conclusion that the servitude should not be enforced, even though the disadvantaged party could have protected him- or herself through the exercise of proper precautions.

d. Chapter 4, Interpretation of Servitudes

§ 4.1 Interpretation of servitudes [in part]

- (2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy.

e. Chapter 5, Succession to benefits and burdens of servitudes

f. Chapter 6, Common Interest Communities

§ 6.3 Power to Create a Common Interest Community Association

- (1) If creation of an association has not otherwise been provided for in a common-interest-community, and has not been expressly excluded by the declaration . . . the owners of a majority of the lots or units not owned by the developer may create an association to manage the community and enforce the servitudes. All members of the common-interest-community are automatically members

- (2) If necessary for the management of common property, the court, on petition of owners of less than a majority of the lots may authorize the creation of an association.

§ 6.5 Power to Raise Funds: Assessments, Fees, and Borrowing

- (1) Except as limited by statute or the declaration:
- (b) assessments may be allocated among the individually owned properties on a reasonable basis, and are secured by a lien against individually owned properties.
- (2) Unless expressly authorized by the declaration, fees for services rendered, or for the use of common property, must be reasonably related to the costs of providing the service, or providing and maintaining the common property, or the value of the use of service.

Comment b. Scope and rationale. . . . Common –interest communities play an increasingly important role in American housing. Both the private-property owners in the community and the public have stakes in the association’s ability to maintain the comm. Property and both may be affected by the association’s ability to carry out its other functions. . . . The assessment power is critical to the financial viability of most common-interest communities.

Comment d. Lien securing assessment obligation. Because assessments are vital to the economic health of a common-interest community, the governing documents normally provide that the assessment obligation is secured by a lien against individually owned property.

Case law issues: Assessments may be invalid if board fails to comply with required procedures (meeting notice; illegal board election; existence of a quorum, etc.); collection of assessments (FDCPA); assessment obligation is independent of association duties (cannot use statutory right of setoff as contravention of public policy; failed to maintain; pay under protest, and sue; grievance cannot offset);

§ 6.7 Power to adopt rules governing property

- (3). Absent specific authorization in the declaration, the common-interest community does not have the power to adopt rules, other than those designed to protect the common property, that restrict the use or occupancy of, or behavior within, individually owned lots or units.

Comment b. Rationale. Rules are not valid unless also reasonable. . . . Even in the absence of an express grant of authority, an association enjoys an implied power to make rules in furtherance of its power of the common property. The association has no inherent power to regulate use of the individually owned properties, however, except as implied by its responsibility for management of the common property.

§ 6.8 Enforcement Powers

In addition to seeking court enforcement, the association may adopt reasonable rules and procedures to encourage compliance and deter violations

Comment a. Rationale. The procedures adopted by the association accordingly must be reasonable and the association must act reasonably in applying them.

Comment b. Enforcement methods. Fines and penalties . . . are particularly potent enforcement tools if the amount is secured by the association's lien for unpaid assessments and charges against the property. . . . The amounts must be reasonable, and the procedures adopted must provide property owners with notice of their potential liabilities and a reasonable opportunity to present facts and any defenses they may have.

Case law: Fine not a common expense; imposition of a fine is a governmental power; enforcement by legal means – shutting off water or electricity.

§ 6.9 Design-Control Powers

Except to the extent provided by statute or authorized by the declaration, a common-interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property; or on the design, materials, colors, or plants that may be used.

Comment a. Rationale. Although design controls are a common feature of common-interest communities, they are not necessary to the effective functioning of the community. . . . Design controls may contribute to the maintenance of property values, but they may also interfere with freedom of expression and contribute to the creation of communities lacking in variety or architectural interest.

Comment c. Validity and interpretation of express design controls. By imposing a requirement that design controls be exercised reasonably, courts validated discretionary design controls that might otherwise have violated public policy under principles set forth in § 3.1.

Comment d. Discretionary design controls must be reasonably exercised. Challenges to design-control decisions are governed by the rule set out in § 6.13 that the member challenging the decision bears the burden to show that it is unreasonable. . . . If the property owner establishes a prima facie [i.e., obvious] case of unreasonableness, the burden shifts to the association to establish that the decision is both fair and reasonable. Failure to consider relevant facts or to permit interested property owners to present relevant information may also shift the burden to the association to establish that it acted reasonably.

§6.10 Power to Amend the Declaration.

- (3) Except as otherwise expressly authorized by the declaration, and except as provided in (1) [deals with majority vote for amendments] unanimous approval is required (a) to prohibit or materially restrict the use or occupancy of, or behavior within, individually owned units, or (b) to change the basis for allocating voting rights or assessments among community members.

Comment a. Rationale. The declaration for a common-interest community functions like a constitution for the community.

Comment d. Implied amendment powers; prohibition of nuisances. Under this section, the community also enjoys an implied power to amend the declaration to impose restrictions on

individually owned lots or units to prevent harm to and unreasonable interference with the reasonable use of both common property and individually owned property in the community.

Comment g. Unanimous consent required for amendments that deprive individual owners of significant property or civil rights.

§6.11 Association's Standing to Sue and Defend

§6.12 Judicial Power to Excuse Compliance with requirements of the Governing Documents

A court may excuse compliance with any of the following provisions in a governing document if it finds that the provision unreasonably interferes with the community's ability to manage the common property, or carry out any other function set forth in the declaration, and that compliance is not necessary to protect the legitimate interests of the members or lenders holding security interests.

- (1) a provision limiting the amount of any assessment that can be levied against individually owned property;
- (4) a requirement that an amendment to the declaration be signed by the members;
- (5) a quorum requirement for meetings of the members.

Comment a. Rationale. The public and the property owners have substantial interests in the long-term viability of the common-interest community.

§6.13 Duties of a Common-Interest Community to Its members

- (1) In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common-interest community;
 - (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control;
 - (b) to treat members fairly;
 - (c) to act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers;
- (2) A member challenging an action of the association has the burden of proving a breach of duty by the association . . . [and] that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common-interest community.

Comment a. Rationale. Because the organizational form [i.e., nonprofit corporation] is simply a tool to facilitate operation of the property relationship among community members, in the event of a conflict between servitudes law and the law applicable to the association form, servitudes law should control.

Comment b. Relationship to "reasonableness" and "business" judgment rule. It seems more likely, however, that adoption of the business judgment rule is intended to reduce the ease with which disgruntled members can obtain judicial review of association decisions and to discourage judges from substituting their judgment for that of the association. The rules in §6.14 govern the relationship between the directors and officers and the association.

In the law of business corporations, where it developed, the business-judgment rule is designed to encourage entrepreneurial risk-taking by protecting directors from personal liability for losses due to erroneous business judgments

There are three significant differences between business corporations and other types of nonprofit corporations and common-interest community associations, however, which suggest that there may be a greater need for judicial review of common-interest community decisions than of decisions of other corporations or associations. First, the stakes of association members are generally much higher than those of shareholders in business corporations. . . . Second, the range of power the association holds over the member's well-being and the range of decisions the association is called on to make is significantly broader than on the business corporation. . . . The third difference is that the association members cannot ordinarily sell their homes as easily as they can sell shares of stock in a business corporation. Association members are more like shareholders in a closely held corporation where liquidity is absent;

§6.14 Duties of Directors and Officers of an Association

The directors and officers of an association have a duty to act in good faith, to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions.

Comment a. Rationale. In determining whether a director or officer has breached a duty imposed by this section, the standard should be that of an ordinary reasonable director of a common-interest community.

Comment b. Duty to act in good faith and deal fairly. The primary functions of the community association are to protect property values and quality of life by managing the common property

Comment c. Duty to use ordinary care and prudence. Failure to do so may result in personal liability to the association or members to the association.

§ 6.15 Liability of Members for Association Torts

§ 6.16 Representative Government

The board is entitled to exercise all the powers of the community except those reserved to the members.

Comment a. Rationale. If creation of an association is not provided for, however, or if no governance structure is specified, this section provides for the election of a board to exercise powers of the community.

Comment b. Powers expressly reserved to members. Implementing the assumption that the board is intended to be the governing body of the community, the rule in this section states that the board has all the powers that are not expressly reserved to the members. The remedy of

members dissatisfied with the board's actions is removal or replacement of the board members through the election process.

Comment c. Election of the governing body. Except as otherwise authorized by statute, election procedures must provide a reasonable opportunity for eligible members to become candidates for election and to make their views known to the electorate, and a reasonable opportunity for eligible voters to cast their votes.

§6.17 Voting Rights

Unless a contrary interpretation is required by statute or by the governing documents, a requirement for approval by a certain percentage of "owners" means approval by that percentage of votes.

Comment b. Interpretation of majority- or percentage-vote requirements. Under the rule stated in this section, the developer is not entitled to votes for lots or units that are not subject to assessments unless the governing documents specifically permit it.

§ 6.18 Meetings and Elections

Except when the board properly meets in executive session, members of the association are entitled to attend meetings of the board of directors and to a reasonable opportunity to present their views to the board.

Comment a. Rationale. [A] servitude [i.e., covenant] that substantially denied community members the ability to participate in the governance of the association would be invalid as against public policy under the rule stated in § 3.1.

§ 6.19 Developer's Duty to Create an Association and Turn Over Control

Comment c. Transfer of common property. The common property that must be transferred includes all real and personal property intended for the community, including the governing documents of the community, rules and regulations, insurance policies, funds for the association, and the records of the association from its inception.

§ 6.20 Developer's Duty to the Community

Until the developer relinquishes control of the association to the members, the developer owes the following duties of the association and its members:

- (1) to use reasonable care and prudence . . .
- (2) to establish a sound financial basis for the association . . .
- (3)
- (4) to maintain records and to account for the financial affairs of the association . . .
- (5) to comply with and enforce the terms of the governing documents . . .
- (6) to disclose all material facts . . . affecting the condition of the property . . .
- (7) to disclose all material facts . . . affecting the financial condition of the association

§ 6.21 Developer's Power to Waive Provisions of the Declarations

A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or the burdens on the existing community members unless the declaration fairly appraises purchasers that the power could be used for the kind of change proposed.

Chapter 7, Modification and Termination of Servitudes

Chapter 8, Enforcement of Servitudes

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