

1 **CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP**

2 Attorneys at Law

3 1400 E. Southern Avenue, Suite 400

4 Tempe, Arizona 85282-5691

5 (480) 427-2800, Facsimile (480) 427-2801

6 minuteentries@carpenterhazlewood.com

7 (Curtis S. Ekmark – SBN 014773)

8 curtis.ekmark@carpenterhazlewood.com

9 (Gregory A. Stein – SBN 030746)

10 greg.stein@carpenterhazlewood.com

11 CAU.DESMTNMA.0003

12 Attorneys for Defendants

13 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

14 **IN AND FOR THE COUNTY OF MARICOPA**

15 **NICDON 10663, LLC, an Arizona limited
liability company,**

16 **Case No. CV2018-015165**

17 **Plaintiff,**

18 **v.**

19 **DESERT MOUNTAIN MASTER
ASSOCIATION, an Arizona nonprofit
corporation,**

20 **DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

21 (Assigned to the
Honorable Colleen French)

22 **(ORAL ARGUMENT REQUESTED)**

23 **Defendant.**

24 **I. Introduction**

25 1,323 Owners voted in favor of limiting certain short term rentals within the
26 community. Despite Plaintiff and a few others waging a vigorous and misleading
27 campaign, these 1,323 Owners who voted yes represented over 75% of the vote. These
28 1,323 voters voted yes in order to protect their property values and the standard of living
at Desert Mountain, one of the premier communities in the entire world.

29 Plaintiff demands that the Court ignore the will of the people who voted.
30 However, the recorded Declaration specifically provides a mechanism for amending the

1 Use Restrictions. Because the Association followed that process, the Court must dismiss
2 Plaintiff's complaint.

3

4 II. Facts

5 In 2017, the community became concerned about short term rentals. After
6 discussions at several open Board meetings, the nine-member Board unanimously voted
7 to propose an amendment to the Use Restrictions. The entire Membership was notified
8 of this in July of 2017. After gathering input from the community, the Board in March
9 of 2018 notified the entire community that it was proposing an amendment to the Use
10 Restrictions that would allow all rentals that were for a period of more than thirty days.
11 Rentals under thirty days would be allowed if the property was rented to either another
12 Owner at Desert Mountain or a Member of the Desert Mountain Club. Thus, the only
13 rentals prohibited are those for less than thirty days to people with no connection to the
14 community.

15 In April of 2018, the Board noticed a special meeting for May 1, 2018 at 3 p.m.
16 and provided ballots. 1,323 Owners voted in favor of the amendment. Over 73% of the
17 Owners voted. Over 75% of those voting voted in favor of the amendment.

18

19 III. Legal Analysis

20 Section 4.2 of the Declaration is titled "Permitted Uses and Restrictions." This
21 section begins by pointing out that Use Restrictions are set forth in Exhibit E.
22 Importantly, the second sentence warns prospective purchasers that "the Board shall have
23 the right, from time to time, to amend, repeal **or add to the restrictions** in Exhibit E . . .
24 . ." This power is not limited to amendments to existing restrictions. Rather, this provision

specifically warns that new restrictions may be added. Thus, no purchaser can claim surprise that a new restriction is added.

In order to amend the Use Restrictions, the Board follows the process for Major Decisions set forth in section 5.20 of the Declaration. This process sometimes requires that the amendment be approved by two-thirds of the Owners who vote. The present case required such an approval.

In this case, over two-thirds of the Owners voting voted in favor of the amendment to the Use Restrictions. Thus, the amendment passed pursuant to the process set forth in section 5.20. Because section 4.2 allows amendments and additions to the Use Restrictions if they are done pursuant to section 5.20, the amendment is valid.

IV. Conclusion

The Declaration contains Use Restrictions. Section 4.2 of the Declaration specifically states that the Use Restrictions can be amended and that new restrictions can be added pursuant to the process set forth in section 5.20. Section 5.20 requires approval of two-thirds of those voting. Because over 75% of those voting voted in favor of the amendment, the amendment is valid.

RESPECTFULLY SUBMITTED this 14th day of January, 2019.

CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP

By:

Curtis S. Ekmark, Esq.
Gregory A. Stein, Esq.
1400 E. Southern Ave., Suite 400
Tempe, AZ 85282
Attorneys for Defendant

1 THE FOREGOING electronically filed
2 this 14th day of January 2019, with

3 Clerk of Court
4 Maricopa County Superior Court
5 www.AZTurboCourt.gov

6 COPY of the foregoing hand delivered,
7 and delivered via TurboCourt E-Service Notification
8 this 14th day of January, 2019, to:

9 Jonathan A. Dessaules, Esq.
10 Jacob A. Kubert, Esq.
11 Dessaules Law Group
12 5353 North 16th Street, Suite 110
13 Phoenix, Arizona 85016
14 jdessaules@dessauleslaw.com
15 jkubert@dessauleslaw.com
16 *Attorney for Plaintiff*

17 
18 By: Vicki Haslin