ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT in and for Clark County; and THE HONORABLE SUSAN H. JOHNSON, in her capacity as District Judge in and for Clark County, Respondents. D.R. HORTON, INC., Real-Party-In-Interest.	Case No. 52798 Clark County District Court No. A542616

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HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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Petitioner, High Noon at Arlington Ranch Homeowners Association ("Association"), pursuant to Nev. Const., Art. 6, § 4, NRS 34.320 or NRS 34.160, and NRAP 21, requests this Court to issue a writ of prohibition or mandamus. The Association respectfully submits its Petition requesting this Court order Respondents, the Eighth Judicial District of the State of Nevada and the Honorable Susan H. Johnson, to rule that the Association has standing to bring claims for construction defects located in individual condominium units. The present controversy raises urgent matters of public interest. Principles of sound judicial economy and administration favor the granting of the instant petition.

I. SUMMARY OF THE ISSUE & CONCLUSION

A. ISSUE: Whether Nevada should be the only Uniform Common Interest Ownership Act ("UCIOA") jurisdiction to deny homeowner associations standing to bring claims for construction defects located in individual units and thereby defy the plain language of the UCIOA, the express intent of its drafters, Nevada and nationwide case law, and the Restatement (Third) of Property?

B. CONCLUSION: No. This Court should overturn the lower court's decision and allow the Association standing to bring claims for construction defects located within the individual units.

II. INTRODUCTION

The Arlington Ranch Community consists of 342 attached residential units and common areas located in Clark County, Nevada. The operative declaration for the community created a common interest community governed by the Uniform Common-Interest Ownership Act ("UCIOA").

High Noon at Arlington Ranch Homeowners Association ("Association") on behalf of itself and its members, served its NRS 40.645 Notice of Construction Defects on Real Party in Interest, D.R. Horton, Inc. ("D.R. Horton") on January 19, 2008. The Association sent the Notice as the result of severe and pervasive community-wide construction defects. (*See*, Petitioner's Appendix ["**PA**"], **Vol. I, Exh. 5, pp. 157-161; Vol. I-III, Exh. 5, pp. 246-738**). The Association also filed a Complaint against D.R. Horton on June 7, 2007, bringing causes of actions primarily based on construction defects. (*See*, **PA, Vol. I, Exh. 4, pp. 13-24**). The Association brings the lawsuit on behalf of the Association and its members. (*See*, *id.*) Certain

construction defects for which Association seeks recovery are located inside the individual "units" within the Arlington Ranch community.

The UCIOA expressly and unambiguously provides standing to the HOA to bring or defend claims affecting the High Noon at Arlington Ranch "common-interest community," both for the shared amenities and the residential buildings that together make up the "common-interest community." Contrary to the express language of the UCIOA, the District Court ruled that an HOA may not maintain claims to remedy the construction defects of individual units. Such drastic limitation on the authority of HOAs contravenes the plain language of the UCIOA and eviscerates its broad purpose to empower HOAs to protect the entire community – including the most important part of that community – the buildings where owners live.

The lower court's ruling also contradicts the express intent of the drafters of the Uniform Act, stating: "This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest." Consistent with the plain language of the statute and the intent of its drafters, several Nevada District Courts have ruled that HOAs have standing under NRS 116.3102(1)(d) to pursue construction defect claims affecting the individual units of a common-interest community. In addition, every court in the nation with a similar statute considering the question of HOA standing found that HOAs have the power to bring claims affecting the entire common-interest community, including individual units. Consistent with the broad scope of NRS 116.3102(1)(d), the Declaration of Covenants, Conditions & Restrictions and Reservation of Easements for High Noon at Arlington Ranch ("CC&Rs") (**PA, Vol. IV, Exh. 6, pp. 755-848**), drafted by D.R. Horton, contain no limitation on the HOA's authority to bring construction defect claims affecting the individual units.

In contravention of the foregoing, D.R. Horton filed a motion for partial summary judgment claiming that the Association does not have standing to bring claims for construction defects located within the community's "units." (*See*, **PA, Vol. I-III, Exh. 5, pp. 25-738**). The Association opposed the motion (**PA, Vol. III-V, Exh. 6, pp. 739-1081**) and D.R. Horton filed

its reply (**PA, Vol. V, Exh. 7, pp. 1082-1098**).

Despite the clear language of the UCIOA, the official commentary thereto, and the holdings of every court considering the issue, the District Court manifestly abused its discretion and found that the Association could not bring claims for constructional defects located within the community's units (**PA, Vol. V, Exh. 8, pp. 1099-1113**).

III. STATEMENT OF RELIEF SOUGHT

The Association seeks a writ of prohibition or mandamus directing Respondent District Court to vacate its order denying homeowner associations standing to bring claims for construction defects located in individual condominium units.

IV. REASONS WHY THE WRIT SHOULD ISSUE

A. The Importance of the Issues, the Need for Immediate Relief, and Association's Lack of Any Other Adequate Remedy Warrant this Court's Exercise of its Original Jurisdiction

1. Prohibition/Mandamus review is appropriate to consider the District Court's Order

Writs of mandamus have been issued by this Court to control the arbitrary or capricious abuses of discretion by the district courts. *See*, *Marshall v. District Court*, 836 P.2d 47, 52 (Nev. 1992). A writ of mandamus compels a government body or official to perform a legally mandated act. NRS 34.160; *Digesti v. Third Judicial Dist. Court*, 853 P.2d 118 (Nev. 1993). A writ of prohibition, on the other hand, compels a government body or government official to cease performing an act beyond its legal authority. NRS 34.320; *State ex. rel. Tidval v. Eighth Judicial Dist. Court*, 539 P.2d 456 (Nev. 1975). Such extraordinary relief has been issued to resolve issues of standing in favor of a party seeking relief. *See, e.g., State ex. rel. List v. Douglas County*, 524 P.2d 1271 (Nev. 1974).

In this matter, extraordinary relief is warranted. The Association and its members have been denied their statutory right to have their collective interests represented in a single constructional defect action. If the District Court's order stands, the Association and each of its members will be forced to bring individual actions for the same reoccurring defects throughout their community. The costs of the litigation will be enormous. The strain on judicial resources

will be extraordinary. Many homeowners may not be able to afford representation or the associated costs. Inconsistent resolutions throughout the homeowners' claims are likely due to the length and complexity of the competing efforts. Finally, many of the defects may never be addressed due to units being abandoned as a result of economic hardship. In such cases, the adjacent homeowners will suffer as defects causing water intrusion, mold, fire hazards and community depreciation will go unaddressed even though they significantly impair their own safety, value and home enjoyment.

The substantial prejudice may only be avoided by this Court issuing a writ compelling the District Court to follow the plain language of NRS 116.3102(1)(d), the holdings of every other jurisdiction addressing this standing issue, the Restatement (Third) of Property, and the official commentary of the Uniform Common Interest Ownership Act. Relief from an appeal will not rectify the substantial prejudice that the Association must first endure under the District Court's order.

2. Nevada District Courts have held that NRS 116.3012(1)(d) grants standing to an HOA to pursue claims arising from individual residences

Several Nevada District Courts have ruled that HOAs have standing under NRS 116.3102(1)(d) to pursue construction defect claims affecting the individual units and common elements of a common-interest community. (*See, e.g.*, **PA, Vol. I, Exh. 2, pp. 5-8; PA, Vol. I, Exh. 3, pp. 9-12; PA, Vol. I, Exh. 1, pp. 1-4**; and **PA, Vol. V, Exh. 9, pp. 1114-1118**). It is respectfully submitted that this Court exercise its discretion and accept the petition to resolve the contrasting decisions of the lower courts.

B. The District Court Abused its Discretion in Denying the Association's Standing

As set forth below, the District Court has abused its discretion. It strayed from the plain language of NRS 116.3102(1)(d). It dismissed the well-reasoned, thorough and consistent analysis of other jurisdictions confronting the same standing issue. The District Court placed its arbitrary interpretation of NRS 116 ahead of that reached by the Restatement (Third) of Property. Finally, this Court has compelled Nevada courts to look to the official commentary of

a model act when interpreting a statute's meaning. The District Court, however, arbitrarily and capriciously ignored the official commentary of the Uniform Common Interest Ownership Act. This Court should issue the extraordinary relief requested.

V. ARGUMENT

A. The UCIOA Expressly Authorizes an HOA to Bring or Defend All Claims Affecting the Common-Interest Community, Including Those Impacting Individual Units

The Nevada Supreme Court "has consistently held that when there is no ambiguity in a statute, there is no opportunity for judicial construction, and the law must be followed unless it yields an absurd result." *Diamond v. Swick*, 28 P.3d 1087, 1089 (Nev. 2001). "When 'the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended.'" *Harris Assocs. v. Clark Cty. Sch. Dist.*, 81 P.3d 532, 534 (Nev. 2003).

The Nevada Legislature has expressly and unambiguously granted homeowner associations standing to bring or defend claims on behalf of its homeowners for any and all matters impacting the common-interest community. Specifically, NRS 116.3102(1)(d) states:

> . . . an association may . . . [i]nstitute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.

The UCIOA explicitly includes individual "units" as part of the "common-interest community," stating: "'Unit' means **a physical portion of the common-interest community** designated for separate ownership or occupancy . . . ." NRS 116.093 (emphasis added).

Were there any doubt that a "common-interest community" means precisely what the statute states, *i.e.*, the entire residential "community" including the "units," the UCIOA defines "common-interest community" as:

> real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit.

NRS 116.021. Thus, to constitute a "common-interest community," the owners of the individual residences must simply have an obligation to pay dues to the association for "real

estate other than" his or her individual residence. Such other "real estate" may include a pool, common grounds, streets, clubhouse, parking lots, sidewalks and all other real estate owned by the association.

Nevada's statutory provisions thus explicitly and unambiguously empower associations to bring or defend claims affecting the buildings and individual units occupied by owners. Even if the statutory language were not so clear and explicit, the drafters of the Uniform Act have clearly stated their intent that associations have such authority.

This Act makes clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest. *Comment 3* to UCIOA § 3-102(a)(4), 7 ULA 96 (1982). A court must accept the intent of the drafters of a uniform act as the Legislature's intent when it adopts a uniform act. *See*, *Beazer Homes Nevada, Inc. v. Eighth Judicial District Court*, 97 P.3d 1132, 1137 (Nev. 2004); *Harris Assocs. v. Clark Cty. Sch. Dist.*, 81 P.3d 532, 534 (Nev. 2003) ("if a statute 'is ambiguous . . . the drafter's intent 'becomes the controlling factor in statutory construction'"); *see also*, *Hill v. DeWitt*, 54 P.3d 849, 860 (Colo. 2002) (a court should "accept the intent of the drafters of a uniform law as that of the general assembly").

The analysis thus should go no further. Not only is the UCIOA's language explicit, but the express intent of the Uniform Act's drafters puts to rest any question regarding the intended scope of an association's authority to bring construction defect claims. This Court should overturn the lower court's ruling and grant full standing to the Association in accordance with the UCIOA.

B. Fundamental Rules of Statutory Construction Demonstrate the Association's Standing Over Those Claims Excluded by the District Court

"[N]o part of a statute [may] be rendered meaningless and its language 'should not be read to produce absurd or unreasonable results.'" *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 168 P.3d 731, 738 (Nev. 2007). "[W]e 'construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.'" *Harris Assocs.*, 81 P.3d at 534.

A court may not imply a limitation that does not exist in the plain language of a statute. *See, Glenbrook Homeowners Assoc. Inc. v. Pettitt*, 919 P.2d 1061, 1063 (Nev. 1996). In *Glenbrook*, the trial court granted summary judgment against an HOA finding that a statute did not authorize it to exercise eminent domain. The Nevada Supreme Court reversed and stated: "If the legislature had intended to limit the power of eminent domain with respect to the construction of byroads, it would have expressly done so." *Id.* at 1063.

Disregarding the plain language of the UCIOA and the explicit intent of its drafters, D.R. Horton argued that the term "common-interest community" as used in NRS 116.3102(1)(d) severely restricts the authority of associations to bring or defend claims to solely the "common elements" of a common-interest community. There is nothing in the plain language of NRS 116.3102(1)(d) to support the conclusion that the term "common-interest community" means solely "common elements" to the exclusion of residential "Units." On the contrary, the Legislature expressly included individual "units" as a "portion of the common-interest community . . . ." NRS 116.095.

In asserting that an association may only bring or defend claims affecting the limited, "common elements" of a common-interest community, D.R. Horton thus argued that "common-interest community" means exactly the same thing as "common elements." "Common elements," however, is a defined term in the UCIOA meaning "all portions of the common-interest community other than the units . . . ." NRS 116.017. Thus, "common elements," like "units," is specifically defined as a portion of the greater "common-interest community" thus negating D.R. Horton's effort to read it to comprise the entire common-interest community.

D.R. Horton also cited to the definition of unit boundaries, but regardless of the boundary line, the components remain conclusively within the common interest community.

Were it the Legislature's intention to limit an association's right to institute litigation on matters affecting only the common elements of a common-interest community, it would have used the term "common elements" instead of "common-interest community" in NRS 116.3102(1)(d). It did not and the Court may not rewrite the statutory language to create such a

drastic limitation. *See*, *Glenbrook Homeowners Assoc.*, 919 P.2d at 1063.

In addition, D.R. Horton's view that the term "common-interest community" as used in NRS 116.3102(1)(d) actually means "common elements," disregards that "common-interest community" is used repeatedly in the UCIOA to mean the community at large, including the individual units. *See*, *Diamond*, 28 P.3d at 1090 ("Other words or phrases used in the statute or separate subsections of the statute can be reviewed to determine the meaning and purpose of the statute."). For example:

- "Developmental rights" means the right to "[c]reate units, common elements or limited common elements within a common-interest community." NRS 116.039.
- For "Leasehold common-interest communities," the "number of units in a common-interest community" must be disclosed. NRS 116.2106.
- The declaration must state formulas if "units may be added to or withdrawn from the common-interest community . . . ." NRS 116.2107.
- A "Public offering statement" must include "The estimated number of units in the common-interest community . . . ." NRS 116.4103(c).
- A "Public offering statement" has different disclosure requirements "[i]f a common-interest community [is] composed of not more than 12 units . . . ." NRS 116.41035.
- The "Contents of declaration" must include the "name of every county in which any part of the common-interest community is situated . . . ." NRS 116.2105(b).
- The declaration "must be recorded in every county in which any portion of the common-interest community is located . . . ." NRS 116.2101.
- The "information statement" to purchasers must include the language: "When you enter into a purchaser agreement to buy a home or unit in a common-interest community . . . ." NRS 116.41095.

The defined term "common-interest community" cannot mean fundamentally different things depending on where it shows up in the UCIOA. Rather, it has one, and only one, meaning – the "common-interest community" includes all the real estate within it, including the individual units.

Recognizing that its interpretation is contrary to the plain language of NRS 116.3102(1)(d), D.R. Horton patently misconstrued the unambiguous definition of "common-interest community." As noted above, "common-interest community" means "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate

other than that unit." NRS 116.021.

D.R. Horton asserted that the Legislature's use of the language "obligated to pay for real estate other than the unit" somehow limits the term "common-interest community" to the few common elements owned by the Association. D.R. Horton's argument is nonsensical where the words "obligated to pay for real estate other than the unit" are plainly and simply meant to describe a community where individual owners pay for the maintenance and use of commonly owned real estate, *i.e.*, a community pool, in addition to their individual unit. D.R. Horton also ignored that the UCIOA explicitly includes individual "units" as part of the "common-interest community," stating: "'Unit' means a physical portion of the common-interest community designated for separate ownership or occupancy . . . ." NRS 116.093.

Notably absent from D.R. Horton's unfounded interpretation was any explanation how its view squares with the drafters' explicit statement that an "association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest." *Comment 3* to UCIOA § 3-102(a)(4), 7 ULA 96 (1982). Even if NRS 116.3102(1)(d) could be viewed as ambiguous, which it plainly is not, the rule that a legislative body adopts the interpretation given the uniform law by its drafters negates D.R. Horton's interpretation. *See*, *Harris Assocs.*, 81 P.3d at 534 ("if a statute 'is ambiguous . . . the drafter's intent 'becomes the controlling factor in statutory construction'").

D.R. Horton's interpretation contradicts the express provisions of the UCIOA and eviscerates an association's ability to protect the most important part of a "common-interest community" – the buildings where owners reside. As the Legislature made absolutely clear, as long as a matter affects the "common-interest community," an association has the power to "[i]nstitute, defend or intervene in litigation or administrative proceedings" – including those matters impacting individual units. NRS 116.3102(1)(d). The District Court's Order should not stand.

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C. Every Jurisdiction Adopting the UCIOA Holds that HOAs Have Standing to Bring Claims Affecting to Individual Residences

Nevada's Chapter 116 is an implementation of the Uniform Common Interest Ownership Act. Nevada courts are under a legislative mandate to apply and construe the provisions of NRS Chapter 116 "so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2). The same UCIOA has been adopted in multiple other jurisdictions and all other jurisdictions recognize that the express language of the UCIOA authorizes HOAs to bring construction defect claims for entire common-interest community – including individual residences.[1]

1. Colorado's UCIOA is materially identical to Nevada's UCIOA and its decisions are instructive

Colorado's UCIOA includes language identical to Nevada's 116.3102(1)(d) and states that an association may: "[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community." CRS § 38-33.3-101. Likewise, Colorado and Nevada's definition of "common-interest community" are materially indistinguishable. Colorado defines "common interest community" as: "real estate described in a declaration with respect to which a person, by virtue or such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration." *Id.* at § 38-33.3-103. Both definitions simply require that to be a "common interest community" the owner of a unit must also pay for common property other than his unit.

Yacht Club II Homeowners Ass'n, Inc. v. A.C. is highly instructive here because it involves virtually identical language found in Colorado's version of the Uniform Common Interest Ownership Act. *Yacht Club II Homeowners Ass'n, Inc. v. A.C.,* 94.P.3d 1177 (Colo.

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[1] Besides Nevada, five other jurisdictions have adopted the Uniform Common Interest Ownership Act. These jurisdictions are: Alaska (Alaska Stat. §§ 34.08.010 to 34.08.995); Colorado (CRS §§ 38-33.3-101 to 38-33.3-319); Connecticut (Conn. Gen. Stat. §§ 47-200 et seq.); Minnesota (Minn. Stat. Ann. §§ 515B.1-101 to 515B.4-118); and West Virginia (W. Va. Code §§ 36B-1-101 to 36B-4-120).

App. 2003). In *Yacht Club II*, the defendant builder asserted that "the CCIOA does not confer standing upon the HOA to raise damage claims related to individual units." *Id.* at 1179. The builder, like D.R. Horton here, argued that "[c]laims of that nature are not . . . 'matters affecting the common interest community.'" *Id.* The Court rejected the builder's arguments and held "the trial court erred in ruling that the HOA lacked standing to assert damage claims for construction defects to numerous individual townhome units." *Id.*

To reach its holding, the *Yacht Club II* court engaged in a comprehensive statutory analysis. It began by finding that "[u]nder the CCIOA, individual units are a part of the 'common interest community.'" *Id.* (defining "unit" as "a physical portion of the common interest community which is designated for separate ownership or occupancy and the boundaries of which are described in or determined from the declaration"). Nevada's UCIOA has the identical definition of "Unit." NRS 116.095. Based on language identical to that found in Nevada's UCIOA, the Colorado Court ruled:

> Recognizing the underlying purpose of [the Act], giving the phrase "common interest community" the meaning ascribed to it by [the Act] and realizing that an exception should not be read into a statute that its plain language does not suggest, warrant, or mandate, we conclude that [the Act] confers standing upon associations to pursue damage claims on behalf of two or more unit owners with respect to matters affecting their individual units.

Yacht Club II, 94 P.3d at 1180.

In reaching its conclusion, the Colorado Court also relied on the Uniform Act's drafters "whose stated purpose was to make 'clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest.'" *Id.*, *citing*, UCIOA § 3-102, cmt. 3.

Another division of the Colorado Court of Appeals reached the same conclusion and held that "the CCIOA's plain language including individual units in the common interest community and *Yacht Club II* make clear that the Association has standing to assert claims of individual unit owners." *Heritage Village Owners Ass'n Inc. v. Golden Heritage Investors, Ltd.*, 89 P.3d 513, 515 (Colo. App. 2004). The *Heritage* court also rejected the builder's

reliance on its CC&Rs that imposed maintenance duties on the individual owners for items within their units, holding that such provisions "have no bearing on the Association's standing under the CCIOA." *Id.*

The standing provision of Connecticut's Common Interest Ownership Act also is identical to Nevada's NRS 116.3102(1)(d). It likewise states than an HOA has the right to institute litigation "on behalf of itself or two or more unit owners on matters affecting the common interest community." *Winthrop House Association, Inc. v. Brookside Elm, Ltd.*, 451 F. Supp. 2d 336, 340 (D. Conn. 2005) (quoting Conn. Gen. Stat. § 47-244(a)(4)). The federal district court in *Winthrop* held that an HOA enjoyed broad standing to sue a developer for construction defects in the common elements and the units. *Id.* at 341. The *Winthrop* court noted that any other conclusion regarding the construction of the broad standing conferred by the Connecticut statute would amount to "judicial legislation" by adding an exception to the statute that was not intended by the Connecticut legislature when it adopted the Uniform Common Interest Ownership Act. *Id.*

Consistent with all case law on the subject, the Restatement (Third) of Property likewise recognizes that an HOA has standing to sue for defects to property for which it has no ownership interest, including individually owned units. Section 6.11 states:

> Except as limited by statute or the governing documents, the association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community.

Comment "a." to Section 6.11 explains that "[t]he rule stated in this section . . . makes clear that an association may sue or defend suits even though the suit involves only property in which the association has no ownership interest." Restatement § 6.11 includes the following illustration:

> Association sues developer over damage to common areas and individually owned units resulting from construction defects. . . . The association includes claims for damage to individual units as well as for damage to the common areas. The association has standing to do so.

Id. (emphasis added). Like NRS 116.3102(1)(d), Section 6.11 is modeled on UCIOA

§ 3-102(a)(4). *See*, Restatement (Third) of Property § 6.11, cmt. a.

This Court should not stray from the well-established common law established by other jurisdictions adopting the UCIOA. The District Court below should have followed suit.

2. All other states to consider HOA standing have concluded that an HOA has authority to bring claims affecting individual residences

The following states have adopted the Uniform Condominium Act whose standing provisions are materially indistinguishable from the UCIOA. All conclude that HOAs have the authority to bring claims on behalf of individual residences.

In *Milton v. Council of Unit Owners of Bentley Place*, 729 A.2d 981 (Md. App. 1999), the homeowners association sought damages from the developer for construction defects in the common areas and in the plumbing and HVAC systems in many of the individual residences. There, as here, the developer disputed the standing of the association to recover for defects in the individual units. The language before the court of appeals was virtually identical to NRS 116.3102(1)(d). It stated that the association has the power "[t]o sue and be sued, complain and defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." *Id.* at 989. The court held that the association "could sue on behalf of the unit owners for claims based on the plumbing and HVAC defects that were common to many individual units at Bentley Place." *Id.* at 990.

The Utah Supreme Court analyzed statutory provisions indistinguishable from Nevada's. The Court likewise concluded that the HOA had statutory authority "to sue with respect to any cause of action relating to the common areas and facilities or more than one unit." *Brickyard Homeowners' Assoc. Management Committee v. Gibbons Realty Co.*, 668 P.2d 535, 542 (Utah 1983). As here, the homeowners association in *Brickyard* sued for construction defects occurring in the common areas and the individually owned units. *Id.*

All other jurisdictions to consider the question of Association's standing to bring claims for defects in individual units have answered the question in the affirmative. *See, e.g., Ass'n of Unit Owners of Bridgeview Condos. v. Dunning*, 69 P.3d 788, 798 (Or. App. 2003) (finding

association had standing to bring claims for construction defects in individual units); *Sandy Creek Condo. Assoc. v. Stolt and Egner, Inc.*, 642 N.E.2d 171, 176 (Ill. App. 1994) (finding that association enjoys standing to sue on behalf of individual unit owners for fraudulent misrepresentation by builder and developer that buildings were constructed in compliance with building codes and in a good and workmanlike manner). This Court should remain consistent with every other jurisdiction examining similar statutes to NRS Chapter 116.

D. The CC&Rs Drafted by D.R. Horton Likewise Establish that the HOA Has Authority to Bring Claims for Construction Defects Beyond the "Common Elements"

1. The CC&Rs define the common-interest community as the entirety of High Noon at Arlington Ranch

The developers of "common-interest communities," such as D.R. Horton, draft the CC&Rs. They define the rights and responsibilities of the homeowners association and the future owners of residences. Future homeowners have no say in the content of the CC&Rs.

The CC&Rs here charge the Association with the duty and responsibility of preserving the community's beauty, desirability and property values. (*See*, **PA, Vol. IV, Exh. 6, pp. 755-848** at ¶ L.) The CC&Rs recognize that the Association generally has the power "to do any and all things . . . which are necessary or proper, in operating for the peace, health, comfort, safety and general welfare of its Members, including any applicable powers set forth in NRS § 116.3012, subject only to the limitations upon the exercise of such powers as are expressly set forth in the Governing Documents, or in any applicable provision of NRS Chapter 116." (*Id.* at § 3.2).

Contrary to its litigation position that "common-interest community" actually means only "common elements," D.R. Horton's CC&Rs leave no doubt that the "common-interest community" means the entirety of High Noon at Arlington Ranch. In the CC&Rs, a "Unit" means "that residential portion of this Community to be separately owned by each Owner . . . ." (*Id.* at § 1.73) Thus, the term "common-interest community" in both NRS 116 and the CC&Rs mean precisely the same thing – the entire High Noon at Arlington Ranch "Community" – the individual "Units," the "Exclusive Use Areas," and the "Common Elements."

There is nothing in the CC&Rs limiting the High Noon at Arlington Ranch "common-interest community" to only the "common elements," or excluding the residential units from the "community." There likewise is no statement anywhere in the CC&Rs that remotely divests the Association of authority to bring claims to remedy construction defects in individual units. This Court should prevent the lower court from inserting such drastic limitation from the CC&Rs – particularly where such limitation directly conflicts with the Legislature's express authorization for HOAs to have the power to bring or defend claims affecting the entire community-interest community.

2. The CC&Rs grant the Association the right to repair individual units

D.R. Horton has argued that because owners have certain obligations to maintain their units, the Association is somehow divested of its right to bring claims to remedy construction defects in (or outside) of the Units. Such argument has been squarely rejected by the Colorado Court of Appeals when considering identical provisions of its Uniform Act, stating that such maintenance duties "have no bearing on the Association's standing under the CCIOA." *Heritage Village Owners Ass'n Inc. v. Golden Heritage Investors, Ltd.*, 89 P.3d 513, 515 (Colo. App. 2004). Moreover, the *Heritage Village* court recognized that even if a conflict existed, "the CCIOA prevails over any inconsistent provision in the Declaration." *Id.*

Nevada's UCIOA contains the identical conflict resolution language, stating: "In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this chapter." NRS 116.2103(3). Thus, even if the maintenance duties of the CC&Rs created a conflict with the standing provision of the UCIOA (which they do not), the UCIOA prevails.

D.R. Horton's reliance on the maintenance obligations of owners to limit the powers of the HOA also is misplaced because the CC&Rs expressly grant the Association the right to enter individual Units to correct "unsafe," "unsightly," "unattractive," or "dangerous" conditions:

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> 9. If any Owner shall permit any Improvement . . . to fall into disrepair or to become unsafe, or unsightly, or otherwise to violate this Declaration, the Board shall have the right to seek any remedies at law or in equity the Association may have. In addition, the Board shall have the right, but not the duty, . . . to enter upon such Unit and/or Limited Common Element to make such repairs or to perform such maintenance . . . .

(PA, Vol. Vol. IV, Exh. 6, pp. 755-848 at § 9.3).

D.R. Horton's own CC&Rs thus are entirely consistent with the UCIOA's grant of authority for the HOA to bring or defend claims involving the residential buildings and individual units. The fact that the residences have zero lot lines fabricated into the CC&Rs does not shield the defects from affecting the common interest community.

The need for homeowners associations to be able to bring or defend claims impacting residential units is also evident in the present housing market. This has resulted in some residential units being abandoned by owners or foreclosed on by lending institutions. If there is no viable owner of a unit due to abandonment or foreclosure, or if an owner refuses to seek a remedy, the Association must be able to take action to ensure that the individual residence does not negatively impact the community. This is particularly true where, as here, there are multiple units in a single building sharing walls, floors, roofs, foundations, plumbing, and electrical systems. If plumbing in an upper unit is defective and causes leaks to the unit below, the homeowners association must have the right to bring claims against the developer to fix the problem for the benefit of all owners in the building and the community. Or, if a firewall shared between two units is defective, the homeowners association must have the right to bring claims to repair both sides of the firewall.

One of the fundamental reasons individuals choose to live in a "common-interest community" is precisely because an HOA has the duty to maintain the integrity and value of the community. Should one or more units face serious construction defects that harm its value, the HOA must be able to act to correct the defects to protect the value of the surrounding residences and the community. To eliminate the HOA's ability to protect the most essential part of the community – the residences where people live – would eviscerate the fundamental purpose of an HOA in a "common-interest community."

The experts in this matter have identified pervasive defects that plague High Noon at Arlington Ranch. These defects not only affect the unit in which the defect is situated, but they also threaten the life, safety and property values of adjacent and nearby unit owners with water intrusion, electrocution, fire and a less desirable place to live. (*See*, **PA, Vol. I, Exh. 5, pp. 157-161; Vol. I-III, Exh. 5, pp. 246-738**). Construction defects, wherever they may occur within the common-interest community, negatively affect the property values, safety, attractiveness and desirability of High Noon at Arlington Ranch. D.R. Horton's interpretation of the UCIOA, and its CC&Rs, eliminates the ability of the Association to carry out its fundamental purpose. This is yet another reason the lower court must be overturned.

3. A developer does not have the power to dictate the scope of NRS 116.3102(1)(d)

D.R. Horton drafted the CC&Rs for High Noon at Arlington Ranch to drastically minimize the "common elements" of the community. Under its interpretation of NRS 116.3102(1)(d), the rights of the Association to bring or defend claims has been extraordinarily diminished.

Under D.R. Horton's view, because it has shifted to each individual owner, the duty to maintain and repair the foundation, footings and roof of a building it shares with other owners, it has divested the Association of authority to bring claims for building defects. As a practical matter, must all owners collectively bring claims if the foundation of their building cracks and sinks, or if the roof leaks? Or, may one owner bring claims for all owners? Even if a single owner could bring a claim for other owners, it would be extremely difficult for a single owner to foot the cost of such litigation over shared defects impacting a building as a whole. Moreover, the manner in which any recovery is spent creates a multitude of issues amongst the homeowners. Such burden is likely insurmountable for an individual owner and D.R. Horton's interpretation thus insulates it from the most serious defect claims.

D.R. Horton's interpretation of NRS 116.3102(1)(d) to limit an HOA's standing to "common elements" thus results in granting a developer with authority to dictate the scope of the UCIOA by how it defines "common elements" in CC&Rs that it drafts. The Legislature

does not intend to give a party, to whom its legislation regulates, the unfettered ability to define the scope of the regulation. This Court should reject D.R. Horton's attempt to usurp the authority of Legislature and to grant itself the power to define those claims that the HOA may bring against it.

E. D.R. Horton May Not Challenge the Association's Standing

The lower court should not even have considered D.R. Horton's Motion for partial summary judgment because D.R. Horton lacks standing to raise the issue of Association's standing. Although most often applied to claims, the standing requirement applies equally to defenses and precludes a defendant from invoking a defense meant for the protection of another. *See, e.g., In re Noblit*, 72 F.3d 757, 759 (9th Cir. 1995) (transferees lacked standing to raise debtor's homestead exemption as defense to bankruptcy trustee's proceeding to recover preferential transfer of proceeds from homestead's sale); *In re Estate of D'Agosto*, 139 P.3d 1125, 1130-31 (Wash. 2006) (in probate proceedings, deceased insured's estate lacked standing to challenge beneficiaries' insurable interest under insured's life insurance policy, only insurer could raise defense of lack of insurable interest). Below, D.R. Horton attempted to raise the standing defense for the supposed protection of the homeowners. Only High Noon at Arlington Ranch owners have standing to raise this issue.

"Condominium unit owners comprise a little democratic sub society[.]" *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. App. 1975). This democracy is evident in NRS Chapter 116 which provides, in effect, for voter referendums on a variety of topics. Among these is litigation: an owners' association may not commence, or in certain instances maintain, a civil suit without a vote of unit owners.

NRS Chapter 116 thus makes it the unit owners' decision whether their association has authority to maintain suit on their behalf. The statute makes it solely the decision of the owners and their Board. their decision. NRS 116.31088(3) declares that "[n]o person other than a unit's owner may request the dismissal of a civil action commenced by the association on the ground that the association failed to comply with any provision of this section" (emphasis added).

Whether an owners' association is authorized to represent individual owners is a question whose answer has no effect on the rights of non-owners. In particular, non-owners lack standing to challenge an owners' association's authority under NRS 116.3102(1)(d). This conclusion is directly supported by the Restatement (Third) of Property (Servitudes) § 6.11 (2000), which states as follows:

> Except as limited by statute or the governing documents, the association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common interest community on matters affecting the community.

And comment "a." to Section 6.11 is directly on point here: "If either the members on behalf of whom the association sues or the association meets normal standing requirements, the question whether the association has the right to bring a suit on behalf of the members is an internal question, which can be raised only by a member of the association." It gives the following example:

> Association sues developer over damage to common areas and individually owned units resulting from construction defects. Common areas are owned by unit owners as tenants in common. Association does not hold title to common property. Developer moves to dismiss the complaint on the ground that Association lacks standing. Developer is not a member of the association. Developer's motion should be denied because Association has standing to sue on behalf of its members.

Restatement (Third) of Property § 6.11, Illus. 1. The lower court should not have even considered D.R. Horton's Motion.

F. The District Court Should Have Rejected D.R. Horton's Other Arguments

1. D.R. Horton's purported concern for individual owners was misplaced

Under NRS Chapter 116, "the officers and members of the executive board are fiduciaries" who must act on behalf of all owners. NRS 116.3103(1). Each owner has the right to seek appropriate action against any person, including officers and members of the executive board, who violate the provisions of NRS Chapter 116. *See*, NRS 116.745 to NRS 116.795. Further, NRS 116.31088 provides, in pertinent part, that: "Except as otherwise provided in this

subsection, the association may commence a civil action only upon a vote or written agreement of the owners of units to which at least a majority of the votes of the members of the association are allocated."

Thus, a homeowners association must not only act as a fiduciary to its members, but its members also have authority to decide if a lawsuit is warranted.

2. Res judicata protects a defendant builder from multiple claims for the same defects

Developers routinely argue against an association's standing to bring construction defect claims for individual residences because of purported concerns of multiple or inconsistent judgments. This argument disregards the many instances in the law where there can be two or more parties with standing to raise a claim for relief and that res judicata protects a defendant from multiple judgments for the same injury.

In *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998), the Court laid out the three pertinent elements for res judicata to apply: "1) the issue decided in the prior litigation must be identical to the issue presented in the current action; 2) the initial ruling must have been on the merits and have become final; and 3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation." *Id.* at 835. Applying the three elements here, if an association or an owner obtains a judgment on a construction defect claim, the principles of res judicata would preclude the other from litigating an identical claim because the association and owner are in privity with each other.

In addition, D.R. Horton's precise argument regarding the risk of multiple judgments was considered and rejected by the Utah Supreme Court:

> If any unit owner represented here . . . subsequently seeks to raise the same issues which are now advanced by the management committee, res judicata would protect these defendants from that subsequent litigation. Where the management acts as the legal representative with respect to the claims here litigated, present and successive owners asserting identical claims would be barred from subjecting the defendants to multiple suits.

Brickyard Homeowners' Assoc., 668 P.2d 535 at 541. The *Brickyard* court observed that "[i]n

many cases the unit owners are best represented by the management committee since the amount of damage suffered to each individual owner may not warrant the legal expense each would incur in seeking redress." *Id.* at 542. "In a nutshell, inasmuch as res judicata could be relied upon in any subsequent action by the defendants, we see no basis for concern that they will be exposed to multiple and inconsistent judgments." *Id.*

VI. CONCLUSION

The Legislature made absolutely clear, as long as a matter affects the "common-interest community," a homeowners association has the power to "[i]nstitute, defend or intervene in litigation or administrative proceedings" – including those matters impacting individual Units. NRS 116.3102(1)(d). The Court should not read into NRS 116.3102(1)(d) a drastic limitation that is not present in the statute and that is contrary to the explicit intent of its drafters. The Association respectfully requests that this Court overturn the District Court and find that the Association has standing to bring claims for all of the construction defects alleged in the action below.

Dated this 19th day of November, 2008.

Respectfully submitted,

QUON BRUCE CHRISTENSEN

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

DATED this 19th day of November, 2008.

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High Noon at Arlington Ranch Homeowners Association

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of QUON BRUCE CHRISTENSEN, and that on the 19th day of November, 2008, I caused the attached **HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR PROHIBITION OR MANDAMUS** to be served by placing a true and correct copy of the same in the U.S. Mail at Las Vegas, Nevada, first class postage was fully prepaid to the addresses listed below:

Honorable Judge Susan H. Johnson
Regional Justice Center
District Court, Dept. 22
200 Lewis Avenue
Las Vegas, NV 89101

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SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, FOR ITSELF AND FOR ALL OTHERS SIMILARLY SITUATED,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND, THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
D.R. HORTON, INC.,
Real Party in Interest.

Supreme Court No. 52798
District Court Case No. A542616

RECEIPT FOR DOCUMENTS

TO: Susan Johnson , District Judge
Quon Bruce Christensen Law Firm and Jason W. Bruce and James R. Christensen and Nancy E. Quon
Wood, Smith, Henning & Berman, LLP and Joel D. Odou and Stephen N. Rosen

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

11/20/08	Received Filing Fee. $250.00 from Quon Bruce Christensen check no. 5382.
11/20/08	Filed Petition for Writ. High Noon at Arlington Ranch Homeowners Association's Petition for Writ of Prohibition or Mandamus.
11/20/08	Filed Appendix to Petition for Writ. Volume 1.
11/20/08	Filed Appendix to Petition for Writ. Volume 2.
11/20/08	Filed Appendix to Petition for Writ. Volume 3.
11/20/08	Filed Appendix to Petition for Writ. Volume 4.
11/20/08	Filed Appendix to Petition for Writ. Volume 5.

DATE: November 20, 2008

Tracie Lindeman, Clerk of Court