IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, FOR ITSELF AND 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, D.R. HORTON, INC., Real Party in Interest	Case No. A52798 Clark County District Court No. A542616

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REAL PARTY IN INTEREST, D.R.HORTON'S, ANSWER OPPOSING THE ISSUANCE OF WRITS OF MANDAMUS OR PROHIBITION

JOEL D. ODOU, ESQ.
Nevada Bar No. 7468
THOMAS E. TROJAN, ESQ.
Nevada Bar No. 6852
STEPHEN N. ROSEN, ESQ.
Nevada Bar No. 10737
WOOD, SMITH, HENNING & BERMAN LLP
7670 West Lake Mead Boulevard, Suite 250
Las Vegas, Nevada 89128-6652
Attorneys for Real Party in Interest,
D.R. Horton, Inc.

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TRACIE K. LINDEMAN
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DEPUTY CLERK

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

09-02892

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

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WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

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WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ◆ FAX 702 253 6225

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nevada Revised Statute 116.001 *et seq.* does not confer standing upon the High Noon at Arlington Ranch Homeowners Association [hereinafter referred to as "Petitioner"] to assert construction defect claims over the property of the individual homeowners. Petitioner asserts that Respondent Court abused its discretion in granting Real Party in Interest, D.R. Horton, Inc.'s, [hereinafter referred to as "Real Party in Interest"] Motion for Partial Summary Judgment and finding that ***NRS*** 116.3102(1) does not provide for standing of a homeowners association in cases where individual homeowner defects are alleged. This is not the case as Respondent Court's ruling and reasoning in this regard were parallel to the language of ***NRS*** 116.001 *et seq.*; the declarations governing the Petitioner; and the public policy of this State. It is to be noted at the outset that the homes in High Noon at Arlington Ranch community are not traditional "attached homes," but rather are essentially constructed as three stand-alone residences in one building. Additionally, the CC&Rs of the Petitioner HOA provide broad ownership rights to individual homeowners, which is contrary to traditional notions of the "condominium" model.

It is axiomatic that one of the primary principles of our jurisprudence is that a party seeking redress for an alleged wrong needs to have standing to assert its rights. This Rule of Law – especially in the tort context – can only be properly maintained when the actual owners of the rights in a particular situation are the parties seeking redress. Otherwise, the fundamentals of our civil judicial system are undermined and rights are violated. Providing standing to organizations other than the actual owners of the rights allows too much room for, *inter alia*, manipulation of the system; improper influence and over or under compensation for alleged wrongdoing to the wrong parties.

These principles are evidenced in the current context. Allowing homeowners associations to bring construction defect claims in place of the individual homeowners regarding issues that affect solely their individual property, is improper under law and the public policy of this State. Recent news and allegations of improprieties with regard to construction defect lawsuits brought

by homeowners associations in Nevada demonstrate that the ideas espoused above are not mere rhetoric. Issues arise when individuals or organizations other than the true owner of a claim are allowed to usurp the true owner's rights. The more obvious pitfalls of potential double recoveries for the same or similar defect allegations and the violation of the due process of rights of individual homeowners are also evident. It is certain that our Nevada Legislature would not have intended such an inequitable result in enacting ***NRS*** 116.001 *et seq.*

Additionally, this honorable Court has already displayed its disfavor for representative-type construction defect actions through its opinion in *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 124 P.3d 530 (2005). The ills warned against in the *Shuette* decision in regard to utilizing the class action vehicle for construction defect cases are even more prevalent in the current case brought by Petitioner under ***NRS*** 116.001 *et seq.* [titled the Common Interest Ownership [Uniform Act]]. The restrictions and threshold requirements of ***NRCP*** 23 for class action treatment are not required when bringing a representative-type suit under ***NRS*** 116.000 *et seq.* It would make little sense for this honorable Court and the District Courts to disallow class action treatment for these type of cases, but allow blanket standing for homeowners associations pursuant to ***NRS*** 116.000 *et seq.*

As its relief, Petitioner seeks issuance of a Writ of Mandamus, or in the alternative, a Writ of Prohibition, determining that the Petitioner does have standing to sue in the place of the homeowners for alleged defects existing on their individually-owned property. Real Party in Interest respectfully requests that this honorable Court deny Petitioner's Petition as the District Court did not err in its judgment.

II. STATEMENT OF THE CASE

High Noon at Arlington Ranch is a 342-home planned community in Clark County, Nevada. The homes are constructed with three residences per building. The homes were constructed such that each of the three homes within each building could have essentially been built as a stand-alone residence. Real Party in Interest, D.R. Horton, Inc., was the developer of community.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

The homes in High Noon at Arlington Ranch are not "condominiums" or "attached homes." The ownership rights provided to each homeowner – in addition to the physical makeup of the structures themselves – evidence the homes' individuality and delineated separation from the common elements of the development. In this light, the governing Covenant of Conditions and Restrictions ("CC&Rs") of the High Noon at Arlington Ranch HOA were drafted so that each individual purchaser held ownership rights to the whole of their individual units. In general terms, the homeowners within the High Noon at Arlington Ranch community own to the extreme outer limits of the horizontal boundaries of the exterior of their residence and from below the ground floor to fifty feet above the ground floor.

The broad ownership rights provided to the individual homeowners allow for both the extensive rights to their domiciles and, consequently, very low monthly homeowners association dues. As such, this community structure is and has been attractive to those homeowners that desire to live in a common-interest community, but want more control over their property and do not want to pay excessive monthly dues.[1] The obvious product of the High Noon at Arlington Ranch community's structure, and the CC&Rs, is that the homeowners association itself does not own the individual units, the homeowners do. As a result, the Petitioner's interests and obligations are mostly limited to concerning the common elements of the development.

Without even serving a ***NRS*** 40.465 Notice, Petitioner filed a Complaint against the developer Real Party in Interest on June 7, 2007. (*See*, Complaint excluding exhibits, attached hereto as Exhibit "A"). The Complaint asserted causes of action for Breach of Implied and Express Warranties, Breach of Contract and Breach of Fiduciary Duty. The Petitioner then filed an ex parte motion to stay service of the Complaint, stating that it "will immediately serve Defendants with Notice of Construction Defects pursuant to ***NRS*** 40.645."

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[1] It is to be noted that each initial purchaser of the homes within the High Noon at Arlington Ranch development were provided with a copy of the CC&Rs prior to closing escrow.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

The Petitioner's Complaint states that it has brought the suit "in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowners HOA unit owners." [2] Further, the Petitioner alleges that the Real Party in Interest breached the express warranties made to the purchaser(s) of each individual unit pursuant to ***NRS*** 116.4113. To date, no individual homeowners have been named as plaintiffs in this lawsuit.

On January 21, 2008 (six months after filing suit), the Petitioner served a ***NRS*** 40.645 Notice asserting construction defect claims. Petitioner alleged defects in individual homes, including, *inter alia*, defects in the sliding glass doors, gypsum wallboard, attic access panels, windows, HVAC systems, electrical and plumbing in these homes.

According to ***NRS*** Chapter 116, a homeowners' association has the power to bring suit in its own name only "on matters affecting the 'common interest community.'" ***NRS*** 116.3102(1)(d). In this case, the Petitioner has brought defect claims which are not limited to the common interest community. Instead, Petitioner alleged defects which are exclusively related to individual homes for which **only** the unit owner would having standing to pursue at trial or release in a settlement. For example, the Petitioner is actually suing Real Party in Interest to recover damages for unit owners' shower enclosures, thermostat wiring, dishwasher outlets, toilets and tubs, among other things.

Due to the nature of the majority of defects alleged to exist within the individual homes, concurrently with responding under ***NRS*** 40.6472, Real Party in Interest, D.R. Horton, Inc. filed a Motion for Partial Summary Judgment on April 14, 2008 challenging the Petioner's standing to assert the majority of the construction defect claims. (*See*, Real Party in Interest's Motion for Partial Summary Judgment, attached hereto as Exhibit "B"). The Petitioner filed an Opposition brief and the Real Party in Interest filed a Reply. (*See*, Petitioner's Opposition, attached hereto as Exhibit "C" and Real Party in Interest's Reply, attached hereto as Exhibit "D").

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[2] See, Complaint at 2:18-19, attached hereto as Exhibit "A".

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

Petitioner's Motion for Partial Summary Judgment was heard by Judge Susan Johnson, in the Eighth Judicial District Court, Department 22 on May 27, 2008. At that time, Judge Johnson opined that: "[a]s the claims cited are the property of the individual unit owner, the CC&Rs do not confer the right or the duty upon the HOA to take these claims from the unit owners and pursue them in the name of the HOA. The right to pursue defect claims related to the units remains with the individual homeowners and these rights can not be taken away." (*See*, the Order, including the Findings of Fact and Conclusions of Law, attached hereto as Exhibit "E").

While Petitioner contends this Order was in error, ***NRS*** 116.3102 does not confer standing on a homeowners association for individual homeowner defects and expressly provides that the homeowners association's statutory powers are limited by the declaration applicable to the association. As such, the Petitioner's Petition should be denied.

III. STANDARD OF REVIEW

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control manifest abuse of discretion.[3] An abuse of discretion occurs if the District Court's decision is arbitrary and capricious or if it exceeds the bounds of law or reason.[4] "Arbitrary and capricious" is defined as a willful and unreasonable action without consideration or in disregard of the facts or law, or without a determining principle.[5] "Abuse of discretion" is also defined as the failure to exercise a sound, reasonable, and legal discretion.[6] "Abuse of discretion" is a strict legal term indicating that the appellate court is of the opinion that there was a commission of an error of law by the trial

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[3] *See, Beazer Homes, Nevada, Inc. v. Eighth Jud. Dist. Ct.,* 120 Nev. Adv. Op. 66, 97 P.3d 1132, 1135 (2004); NRS 34.160.

[4] *Crawford v. State,* 121 P.3d 582, 585 (Nev. Oct. 20, 2005) (citation omitted).

[5] *Elwood Investors Co. v. Behme,* 79 Misc.2d 910, 913, 361 N.Y.S.2d 488, 492 (N.Y. Sup. 1974).

[6] *State v. Draper,* 27 P.2d 39, 50 (Utah 1933) (citations omitted).

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

court.[7] It does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but refers to the clearly erroneous conclusion and judgment—one that is clearly against logic.[8]

Petitions for extraordinary writs are addressed to the sound discretion of the Court and may only issue where there is no "plain, speedy, and adequate remedy" at law.[9] However, "each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted."[10] A writ of prohibition is the appropriate remedy for a court's improper exercise of jurisdiction.[11] A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court.[12] "Jurisdictional rules go to the very power" of a court's ability to act.[13] Because writ petitions seek extraordinary relief, they are not "to control the proper exercise of [a district court's] discretion or to substitute the judgment of this Court for that of the lower tribunal.[14]

This Court has consistently held that an appeal is an adequate legal remedy precluding writ relief.[15] Even if the appellate process would be more costly and time consuming than a mandamus

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[7] Id.

[8] Id.

[9] *See, NRS 34.330; State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1138 (1983).

[10] *See, Jeep Corp. v. Dist. Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (citing *Shelton v. Dist. Ct.*, 64 Nev. 487, 185 P.2d 320 (1947)).

[11] *See, NRS 34.320; Smith v. Eighth Jud. Dist. Ct.,* 107 Nev. 674, 818 P.2d 849 (1991).

[12] *See id.*

[13] *See, Pengilly v. Rancho Santa Fe HOA*, 116 Nev. 646, 5 P.3d 569 (2000).

[14] *See, Collier v. Legakes*, 98 Nev. 307, 310, 646 P.2d 1219, 1221 (1982) (quoting *Kochendorfer v. Board of Co. Comm'rs.*, 93 Nev. 419, 566 P.2d 1131 (1977); see also Office of *Washoe County Dist. Atty. v. Second Jud. Dist. Ct.*, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000)).

[15] *Pan v. Dist. Ct.,* 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

proceeding, it is still an adequate remedy.[16] In that regard, this Court avoids piecemeal appellate review and seeks to review possible errors only after the district court has entered a final judgment.[17] Further, it is within the complete discretion of this Court to determine if a petition will be considered.[18] Petitioners always bear the burden of demonstrating that extraordinary relief is warranted.[19]

In the instant case, the District Court did not manifestly abuse its discretion or exceed its jurisdiction. In any event, Petitioner has an adequate remedy through an appeal from a final judgment. Therefore, this Court should deny Petitioner's Writ Petition.

IV. ARGUMENT

A. NRS 116.001 *et seq.* DOES NOT CONFER STANDING UPON A HOMEOWNERS ASSOCIATION TO ASSERT CONSTRUCTION DEFECT CLAIMS SOLELY CONCERNING INDIVIDUAL UNITS.

Real Party in Interest is aware that the interpretation of ***NRS*** 116.3102 is squarely before this honorable Court through a Petition for Writ of Mandamus filed by the Monarch Estates Homeowners Association in Supreme Court Case No. 51942 [hereinafter referred to as "*Monarch Estates HOA case*"]. In fact, Real Party in Interest, D.R. Horton, Inc., has filed an Amicus Curiae Brief in Support of Real Parties in Interest in the *Monarch Estates HOA case*. (*See*, Real Party in Interest's Amicus Curiae Brief, attached hereto as Exhibit "F"). Many of the issues in the current Petition are similar to those discussed in the briefing in the *Monarch Estates HOA case*. However, not all of the issues are identical. The Petition in the *Monarch Estates HOA case* concerns primarily the statutory interpretation of ***NRS*** 116.3102. While the current Petition does concern the statutory interpretation of ***NRS*** 116.3102, Petitioner also asserts that Respondent Court abused its discretion when it opined that the language and apparent intent of the High Noon at Arlington

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[16] *See, Co. of Washoe v. City of Reno*, 77 Nev. 152, 156, 360 P.2d 602 (1961).

[17] *Moore v. Dist. Ct.*, 96 Nev. 415, 417, 610 P.2d 188, 189 (1980).

[18] *Smith v. Dist. Ct.*, 107 Nev. 674, 818 P.2d 849 (1991).

[19] *Pan*, 120 Nev. at 228, 88 P.3d at 844.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

Ranch HOA's declaration limited the association's standing to common element claims[20]. Real Party in Interest agrees with the District Court's interpretation of the CC&Rs and asserts that no error in judgment was made.

However, Real Party of Interest disagrees with the Monarch Estates HOA's arguments regarding the interpretation of ***NRS*** 116.001 *et seq*. The Petitioner forwarded similar arguments – and cited similar authorities – within their Opposition to Real Party in Interest's Motion for Partial Summary Judgment at issue in the current Petition. In regard to the *Monarch Estates HOA case*, Real Party in Interest also disagrees with Johnson Communities of Nevada, Inc. in one primary respect: the insinuation in its Answering Brief that attached homes should receive different treatment than detached homes under ***NRS*** 116.3102(1)(d). There is no such limitation found within ***NRS*** 116.001 *et seq*. Additionally, as Johnson Communities of Nevada, Inc. recognized in their Answering Brief in the *Monarch Estates HOA case*, "any application of ***NRS*** 116.3102(1)(d) needs to coexist and follow the governing documents for the association." (*See*, Real Parties In Interest Johnson Communities of Nevada, Inc.'s Answering Brief, at 17, attached hereto as Exhibit "G"). This point is of extreme import to the current Petition. Real Party of Interest asserts that homeowners associations do not have standing to assert claims concerning solely individual homeowner interests pursuant to ***NRS*** 116.001 *et seq*., and the powers conferred to a homeowners association under ***NRS*** 116.3102 are to be further defined by the declaration creating that association.

1. The High Noon at Arlington Ranch HOA Lacks Standing to Assert Individual Homeowner Construction Defect Allegations Pursuant to the Text of *NRS* 116.3102.

Homeowners associations cannot seek recovery in their own names for defects exclusively related to individual homes that do not affect the common-interest community. It is axiomatic that only the real party in interest may prosecute an action. *See*, ***NRCP*** 17(a)("Every action shall be prosecuted in the name of the real party in interest"). As such, the individual homeowners

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[20] *See*, Exhibit "E".

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

themselves are the only people that can seek remedy for any alleged conditions that concern elements within the boundaries of the homes. *See, Deal v. 999 Lakeshore Association*, 94 Nev. 301 (1978). Real Party in Interest does not contend that homeowners associations cannot institute litigation on behalf of the association for claims concerning property the homeowners association owns. Real Party in Interest simply asserts that the right to seek redress for construction defects related solely to individual homes lies with the owner of the particular property interest at issue. A review of ***NRS*** 116.001 *et seq.* and the CC&Rs governing the Petitioner HOA demonstrates that only the individual homeowners within the community have the requisite ownership interest to maintain claims concerning defect allegations within individual homes.

The following sets forth the framework of the interplay between ***NRS*** 116.001 *et seq.* and the High Noon at Arlington Ranch community CC&Rs. The framework demonstrates Petitioner's rights in regard to litigating issues concerning individual homeowner interests.

NRS 116.3102 provides, in pertinent part,

> Except as otherwise provided in subsection 2, **and subject to the provisions of the declaration**, the association may…
>
> (d) Institute, 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**…[emphasis added].[21]

Under ***NRS*** 116.021, "common-interest community" is defined 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 the unit**…" [emphasis added]. Thus, reading ***NRS*** 116.3102 in conjunction with the definitions of "common-interest community" compels the conclusion that ***NRS*** 116.3102 unambiguously concerns all the areas of the community "other than the unit" and does not provide the Petitioner with any standing to institute legal proceedings above and beyond those areas. The most certain precept of statutory construction is that when a statute is clear and unambiguous on its face, a court may not go beyond the plain meaning to determine legislative intent. *See, Roberts*

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[21] *See*, ***NRS*** 116.3102.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

v. State of Nevada, 104 Nev. 33, 37, 752 P.2d 221 (1988). The text of both ***NRS*** 116.3102 and ***NRS*** 116.021 unambiguously demonstrate that homeowners associations lack standing in this context. As such, the honorable Court should not go beyond the plain meaning of the statutes themselves.

Notwithstanding the clarity of the text, Petitioner forwarded numerous inapplicable out-of-state authorities in opposition to the underlying Motion at issue in an apparent attempt to portray some form of uniformity of interpretation regarding the Uniform Common Interest Ownership Act.[22] However, none of these cases can be used to inform a Nevada Court's interpretation of the language of ***NRS*** 116.001 *et seq.* enacted by the Nevada Legislature in this context. The primary provision at issue -- ***NRS*** 116.021, which is the definition of "common-interest community" -- is markedly different than the equivalent provisions from the other state's statutes that the Petitioner relies on.[23] Specifically, none of the definitions of "common-interest community" interpreted in the cases from the other jurisdictions contain the phrase ". . . **other than the unit**."

Further, this Court pronounced in *Albios v. Horizon Communities, Inc.,* 122 Nev. 409, 132 P.3d 1022 (2006) that the Court will interpret a rule or statute in harmony with other rules or statutes, **but will construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage.**[24] It is to be noted that the Uniform Common Interest Ownership Act's definition of "common interest community" -- within the version considered by the Nevada

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[22] The Petition in the *Monarch Estates HOA case* has relied upon most of the same out-of-state authorities. Real Party in Interest, Johnson Communities of Nevada, Inc., through its Answering Brief and D.R. Horton through its Amicus Curiae Brief demonstrated the inapplicability of this caselaw and the dissimilar textual contents of the statutes at hand. Real Party in Interest asserts that these cases do not apply given the addition of the phrase "other than the unit" to Nevada's definition of "common-interest community."

[23] *See*, Exhibit "C".

[24] *See*, *id.*, at 1028 ("'Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes.' And when possible, we construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage.")[internal citation omitted].

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

Legislature -- did not contain the phrase "other than the unit." This was a creation of our Nevada Legislature. Certainly, the Nevada Legislature clearly intended to have the phrase "other than the unit" considered in any interpretation of ***NRS*** 116.021.

Respondent Court acknowledged that the Nevada definition of "common-interest community" differed from the Uniform Act's definition and opined to the same in its Findings of Facts and Conclusions of Law. The Respondent Court recognized that the text of ***NRS*** 116.3102 in conjunction with the definition of "common-interest community" demonstrates that homeowners associations do not have standing to assert claims concerning solely individual homeowner interests. Real Party in Interest asserts that both provisions – ***NRS*** 116.3102 and ***NRS*** 116.021 – are unambiguous in this regard and consideration of Legislative intent is unnecessary. Nonetheless, if this Court finds an ambiguity in the text of those to pertinent sections, the Nevada Legislature's deviation from the text of the Uniform Act and inclusion of the phrase "other than the unit" demonstrate that homeowners associations do not have standing in this context.

2. The Petitioner's Case Citations Do Not Support Its Position.

The Petitioner cites to a line of Colorado cases which purport to support its notion that it can assert whatever claim it desires on behalf of a unit owner. The Petitioner attempts to confuse the issue by arguing that because Nevada and Colorado have similar definitions of "common elements," then this Court must also interpret the phase "common interest community" in both statutes as being identical. **The Petitioner ignores the fact that the Colorado Legislature adopted a completely different definition of "common interest community" than did Nevada**. Colorado's definition is found in the decision *Heritage Village Owners v. Golden Heritage Investors,* 89 P.3d 513, 514 (Colo. App. 2004), wherein the court quotes CRS 38-33.3-103(8). **Notably, Colorado's "common interest community" definition does not include Nevada's key phrase: "other than that unit."**

As Colorado never has had the occasion to decide the scope of Nevada's definition of "common-interest community," the entire line of Colorado cases after the state's adoption of its CCIOA (*Yacht Club II* and *Heritage Village*) are irrelevant as to this issue.

Petitioner then attempts to further confuse the issue by arguing that Connecticut has an

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

identical standing provision so this Court should follow the federal district court in *Winthrop House Association, Inc. v. Brookside Elm, Ltd.*, 451 F.Supp 2d 336 (D. Conn. 2005) and hold that Petitioner has standing to pursue claims involving the property owned solely by each individual unit owner. However, this argument fails for much of the same reason that the entire line of Colorado cases fail. Namely, Connecticut's "common interest community" definition also does not include Nevada's key phrase: "other than that unit." Since the definitions of a "common interest community" are substantially different, so is the interpretation of the homeowners associations' standing rights in each state.

The Petitioner's other case citations are misleading. In *Association of Unit Owners of Bridgeview Condominiums v. Dunning*, 187 Ore App. 595, the court addressed a statute that did not have the phrase "common-interest community." Instead, the Oregon statute - 100.405(4)(e) - expressly allows suits by an association broadly for **any matter "affecting the condominium"**.

Similar critical distinctions exist in the Petitioner's citations to *Brickyard Homeowners' Association Management Committee v. Gibbons,* 668 P.2d 535 (Utah 1983) (involved a uniform act which did not have a standing limitation for associations for common interest community); *Sandy Creek Condominium Ass'n v. Stolt & Egner, Inc.,* 642 N.E. 2d 171 (App. Ct. Ill. 2d Dist. 1994) (statute allows association to sue on behalf of unit owners "as their interests appear" without any limitation); *Milton v. Council of Unit Owners of Bentley Place,* 729 A.2d 981 (Md. App. 1999) (state did not adopt uniform act and Court, without limitations of uniform act, gave homeowners association broad power to sue over "matters affecting the condominium" without any mention of the common-interest community).

B. THE POWERS OF A HOMEOWNERS ASSOCIATION ARE SPECIFICALLY AND UNAMBIGUOUSLY LIMITED BY THE DECLARATION PURSUANT TO *NRS 116.3102.*

As stated above, a homeowners association's standing to "institute, defend or intervene in litigation . . . on matters affecting the common-interest community" is "**subject to the provisions of the declaration**" *See*, ***NRS*** 116.3102. Respondent Court clearly acknowledged that the power

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

to sue is subject to the declaration under the plain language of the statute. As such, Respondent Court opined consistent with the contents of the declaration, ruling that homeowners associations do not have a broad-blanket right to sue pursuant to ***NRS*** 116.3102 for defects contained within the individual units.[25]

NRS 116.3102 could not be any clearer that the declaration determines what property ownership interests are provided to the homeowners association and the individual homeowners and what rights flow from those interests. Again, when a statute is clear and unambiguous on its face, a court may not go beyond the plain meaning to determine legislative intent. *See, Roberts v. State of Nevada,* 104 Nev. 33, 37, 752 P.2d 221 (1988). A statute is ambiguous only where it lends itself to two or more reasonable interpretations. *See, State v. Catanio,* 120 Nev. 1030, 1033, 102 P.3d 588 (2004). There is absolutely no room for ambiguity in the Legislative limitation that the powers of a homeowners association are "**subject to the provisions of the declaration.**"

Respondent Court's clear consideration of the definitions contained within the declaration of the High Noon at Arlington Ranch HOA led to the correct result of denying the Petitioner free reign to sue for alleged defects in individual homeowners' property. As such, Respondent Court properly considered the declaration in its analysis and found that the declaration vests standing to initiate litigation with the individual homeowners only, and not the homeowner association.

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[25] Petitioner argued that a particular comment to the Uniform Common Interest Ownership Act demonstrates the drafters of the Uniform Act intended for homeowners associations to be able to institute litigation on behalf of individual homeowners. (*See*, Petition at 9:12-14). Specifically, comment 3 to Uniform Common Interest Ownership Act §3-102 provides, "[t]his 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 . . ." However, Petitioner fails to mention comment 1 to the Uniform Act's equivalent to ***NRS*** 116.3102, which provides, **"[t]his section permits the declaration . . . to include limitations on the exercise of any of the enumerated powers."** Comment 1 demonstrates that CC&Rs can provide for broader powers of an individual homeowner and limit powers of a homeowners association. Any perceived intent that can be garnered from comment 3 to the Uniform Act is nullified by the unambiguous language of comment 1 to the Uniform Act; ***NRS*** 116.3102, and the CC&Rs of the High Noon at Arlington Ranch HOA.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 • FAX 702 253 6225

NRS 116.037 defines "declaration" as "any instruments, however, denominated, that create a common-interest community, including any amendments to those instruments." Section 1.25 of the CC&R's defines "declaration" as "this instrument as it may be amended from time to time." (*See,* High Noon at Arlington Ranch HOA's CC&R's, attached hereto as Exhibit "H"). Therefore, a reviewing Court must look to the CC&R's of the High Noon at Arlington Ranch HOA to determine what limitations have been imposed on the association's enumerated powers under ***NRS*** 116.3102 .[26]

1. The Declaration of the High Noon at Arlington Ranch HOA Does Not Provide for Standing on Behalf of Homeowners for Alleged Construction Defects Within the Individual Homes.

As stated above, Respondent Court forwarded its belief that the High Noon at Arlington Ranch HOA's CC&Rs restrict standing of the Petitioner to claims concerning common elements. The Respondent Court recognized the limits of the CC&Rs in holding that "[a]s the claims cited are the property of the individual unit owner, the CC&Rs do not confer the right or the duty upon the HOA to take these claims from the unit owners and pursue them in the name of the HOA."[27]

Real Party in Interest forwards the following discussion of the CC&Rs simply to demonstrate the clarity of the pertinent provisions, which further support the assertion that Respondent Court did not abuse its discretion. The intent of Real Party in Interest was to develop

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[26] The High Noon of Arlington Ranch HOA's CC&Rs also expressly limit the powers of the association to the declaration. Section 3.2 of Article 3 of High Noon of Arlington Ranch CC&R's states the following:

> Duties, powers and rights of the Association are those set forth in this Declaration, the Articles and Bylaws, together with its general and implied powers as a non-profit corporation, generally to do any and all things that a corporation organized under the laws of the State of Nevada may lawfully do which are necessary and proper, in operating for the peace, health, comfort, safety and general welfare of its Members, **including any applicable powers set forth in *NRS* §116.3102, 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.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

a set of CC&Rs that fosters and supports the property rights of the individual owners of the community is also demonstrated.[28]

As a general principle, an issue can hardly be said to affect the "common-interest community" when it only involves a few homes out of 342 and concerns solely the individual homeowner interests. Petitioner's position that the entire community should pay for litigation intended to improve the property of just a handful of homeowners places an unfair burden on the remainder of the individual owners and the community. This is especially true given the nature of the definition of "unit" within the High Noon at Arlington Ranch HOA's CC&Rs. "Unit" is defined in CC&Rs as follows:

> A "Unit" shall mean a 3-dimensional figure: (a) the horizontal boundaries of which are delineated on the Plat and are intended to terminate at the extreme outer limits of the Triplex Building envelope and include all roof areas, eaves and overhangs; and (b) the vertical boundaries of which are delineated on the Plat and are intended to extend from an indefinite distance below the ground floor finished flooring elevation to 50.00 feet above said ground floor finished flooring, except in those areas designated as Garage Components, which are detailed on the Plat....[Units] may include, without limitation, bearing walls, columns, floors, roofs, foundations, footings, windows, central heating and other central services, pipes, ducts, flues, conduits, wires and other utility installations.[29]

By contrast, the term "common elements" refers only to those areas on the plat owned by the association, which by necessity excludes roofs, foundations, central heating, utility installations, and all other components which are included within the definition of "unit." (*See, id.*, at Section 1.20). Respondent Court was correct in determining that the CC&Rs limit homeowner association standing "unless that complaint deals with common elements." CC&Rs do provide broad property rights to the individual owners. The language of the CC&Rs and Respondent

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[27] See, the Order of the respondent court at 10:18-22.

[28] ***NRS*** 116.001 *et seq.* supports a developer's rights to create a community that promotes the individual property rights of the homeowners and that keeps monthly association dues to a minimum. Specifically, ***NRS*** 116.3102 unambiguously limits the "powers of the association" to the terms of the CC&Rs.

[29] *See,* High Noon at Arlington Ranch CC&Rs, at §1.77, attached hereto as Exhibit "H".

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

Court's interpretation of that language required that Respondent Court deny standing to Petitioner pursuant to ***NRS*** 116.3102.

In its Petition, the Petitioner claims that the CC&Rs confer a duty upon the homeowners association to preserve the beauty, desirability and property value of the units. As such, the homeowners association believes that a duty as contemplated by ***NRS*** 40.610(2) is triggered thereby conferring standing upon the homeowners association to assert claims for defects within the individual units. In its Opposition to the underlying Motion, Petitioner argued that the CC&Rs impose a "duty" upon the homeowners association with regard to defects within the individual units. Petitioner argued that this provision "charges the Association with the **duty** and responsibility of preserving Arlington Ranch's beauty, desirability and property values."[30] However, the actual language of the CC&Rs at paragraph M sets forth as follows:

> This Declaration is intended to set forth a dynamic and flexible plan for governance of the Community, and for the overall development, administration, maintenance and preservation of a unique residential community, in which the Owners enjoy a quality life style as "good neighbors"
> *See*, CC&Rs, p. 2, ¶ M.

Nothing in the quoted language sets forth any duty of the homeowners association. Paragraph M is utterly void of establishing any duty of the homeowners association with regard to defects within the individual units.

Further, citing to Section 9.3, Petitioner maintained that the CC&Rs give it the authority to enter a unit to cure defective conditions and thus a duty exists as contemplated by ***NRS*** 40.670. However, Section 9.3, Maintenance and Repair Obligations of Owners, describes the maintenance obligations of the unit owners and provides in pertinent part as follows:

> . . . In addition, the Board shall have the right, **but not the duty**, after Notice and Hearing as provided in the Bylaws, to enter upon such Unit and/or Exclusive Use Area to make such repairs or to perform such maintenance and to charge the cost thereof to the

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[30] *See* Petitioner's Opposition, at 6: 6-11, attached hereto as Exhibit "C".

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

Owner.[31]

Section 9.3 not only fails to confer upon the homeowners association a duty, **it specifically provides that no such duty exists**. In the absence of any duty delineated by the CC&Rs upon the homeowners associaiton as to defects within the individual units, Petitioner failed to rebut D.R. Horton's showing that it lacks standing to pursue the claims. The Respondent Court recognized the limits of the CC&Rs in holding that "[a]s the claims cited are the property of the individual unit owner, the CC&Rs do not confer the right or the duty upon the HOA to take these claims from the unit owners and pursue them in the name of the HOA. The right to pursue defect claims related to the units remains with the individual homeowners and these rights can not be taken away."[32]

C. REAL PARTY IN INTEREST, D.R. HORTON, INC., HAS STANDING TO CHALLENGE THE PETITIONER, HIGH NOON AT ARLINGTON RANCH HOA'S, STANDING.

The Petitioner's argument that the Real Party in Interest, D.R. Horton, lacks standing to challenge the scope of the Association's claim is without merit. In challenging Petitioner's standing, the Real Party in Interest is asserting that the High Noon at Arlington Ranch HOA is not a real party in interest as required by ***NRCP*** 17 and does not have an express grant of statutory authority to assert claims for defects located on property which it does not own, as required by this Court in *Deal v. 999 Lakeshore Association*.[33]

Petitioner asserts that because only a homeowner can request dismissal of a civil action commenced by the association on the ground that the association failed to comply with any provision of ***NRS*** 116.31088, the Real Party in Interest does not have standing to challenge the association's standing under ***NRS*** 116.31088(3). However, ***NRS*** 116.31088(3) is irrelevant here. The Real Party in Interest is not seeking a dismissal of the entire case and did not base its standing

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[31] *See*, CC&Rs, p. 49, Section 9.3, attached hereto as Exhibit "H".

[32] See, the Order of the respondent court at 10:18-22.

[33] 94 Nev. 301, 579 P.2d 775 (1978).

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

argument on the Petitioner's failure to properly ratify the Board's decision to institute a lawsuit[34]. Rather the Real Party in Interest challenges the Petitioner's standing based upon its failure to demonstrate that it is a real party in interest under ***NRCP*** 17 and failure to demonstrate that it has an express grant of statutory authority as required by *Deal*. Thus, the Real Party in Interest is a proper party to challenge the High Noon at Arlington Ranch HOA's standing.

D. ALLOWING STANDING IN THIS CASE IS CONTRARY TO THE ASSERTED PUBLIC POLICY OF THIS STATE.

1. This Honorable Court Has Pronounced Its Negative Opinion of Representative-Type Actions in Regard to Construction Defect Cases.

The pronounced public policy of this State weighs heavily in support of Real Party in Interest's position regarding a homeowners association's lack of standing. This honorable Court demonstrated its critical opinion of representative-type, construction defect cases in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005). The analysis and conclusion of the Court in the *Shuette* opinion demonstrated that construction defect cases "will rarely be appropriate for class action treatment." *See, Shuette*, 124 P.3d at 542. The Court stated,

> As pointed out by the California Supreme Court, class actions involving real property are often "incompatible with the fundamental maxim that each parcel of land is unique." Although, as that court recognized, the uniqueness-of-land principle was developed at common law in response to concerns that did not involve class action issues, the rule "take[s] on added significance in this modern era of development. Simply stated, there are now more characteristics and criteria by which each piece of land differs from every other." Allowing class actions to proceed on issues, especially those of liability, that involve variables particular to "unique" parcels of land would require either an alteration of this principle or an extensive subclassification system that would effectively defeat the purpose of the class action altogether. Like the California court, we recognize that, where specific characteristics of different land parcels are concerned, "these uniqueness factors weigh heavily in favor of requiring independent litigation of the liability to each parcel and its owner."
> *See id.*

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[34] ***NRS*** 116.31088.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702.222.0625 ♦ FAX 702.253.6225

Here, the representative nature of the action proposed by Petitioner is even more extreme than the class action vehicle discussed in *Shuette*. Petitioner's defect allegations within the individual homes present a clear gap in logic: a representative action without the filtering controls of a class action [***NRCP*** 23 requirements of numerosity, typicality, commonality, predominance and superiority] would be available under Nevada law thereby rendering the *Shuette* case above, meaningless.

Additionally, the unnamed claimants in a class action type setting would have the opportunity to opt-out or opt-into the class depending on how the case was proceeding. This protection is not available in the homeowner association-type lawsuit. Each individual homeowner's interests are thrust into litigation, sometimes likely unwittingly.

This Court's disposition of the *Shuette* case presents a clear indication that the litigation vehicle forwarded by Petitioner is contrary to the public policy of this State, and perhaps binding caselaw. Real Party in Interest declares that to permit Petitioner to assert these claims would be to permit an unlawful end-run around the requirements of class actions pursuant to ***NRCP*** 23 and joinder actions pursuant to ***NRCP*** 20.

2. Recent News and Allegations of Improprieties in Regard to Construction Defect Lawsuits Brought by Homeowners Associations in Nevada Demonstrate That This Type of Suit Violates the Public Policy of This State and Is an Absurd Result of the Improper Broadening of the Powers of an Association to Sue.

As recent news and allegations have shown, giving a homeowners association power over construction defect lawsuits and taking the claims away from the homeowners, can lead to corruption, greed and abuse of authority.[35] These events have exposed severe cracks and

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[35] *See*, Search Warrants Served in Corruption Probe, KLAS-8 Las Vegas Now, September 25, 2008, attached hereto as Exhibit "I"; Defect: Lawsuits Impede Sales of Property, KLAS-8 Las Vegas Now, September 25, 2008, attached hereto as Exhibit "J"; More Search Warrants Served in HOA Probe, KLAS-8 Las Vegas Now, September 28, 2008, attached hereto as Exhibit "K"; Subject of HOA Investigation Commits Suicide, KLAS-8 Las Vegas Now, September 30, 2008, attached hereto as Exhibit "L"; HOA Insider Breaks Silence, KLAS-8 Las Vegas Now, October 2,

weaknesses in any public policy argument in favor of a broadening of the statutory standard regarding homeowners association standing.

During the week of September 22, 2008, the Federal Bureau of Investigation executed search warrants on locations across the Las Vegas valley, including homeowners associations, construction companies, and law firms. The reports have stated that the FBI believes there is a corruption scheme occurring where "contractors, lawyers, management companies and others have siphoned away millions of dollars **from homeowners** and developers." (*See,* Search Warrants Served in Corruption Probe, George Knapp, Las Vegas Now, dated September 25, 2008, attached hereto as Exhibit "I"). (Emphasis added)

The allegations revolve around the following scenario: certain individuals purchase at least a minimal ownership interest in the governed property, those individuals then run for the board of the homeowners association, those individuals then push for the hiring of a law firm in order to

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2008, attached hereto as Exhibit "M"; New Details Emerge in Homeowners Association Probe; KLAS-8 Las Vegas Now, attached hereto as Exhibit "N"; FBI, police serve search warrants in corruption probe, Las Vegas Sun, September 24, 2008, attached hereto as Exhibit "O"; FBI searches attorney's office as political corruption probe continues, Las Vegas Sun, September 26, 2008, attached hereto as Exhibit "P"; Vegas homeowners complain of association conflicts, Las Vegas Sun, September 28, 2008, attached hereto as Exhibit "Q"; Face-to-Face: The Final Take Feds, D.A. rebuffed HOA members, Las Vegas Sun, September 29, 2008, attached hereto as Exhibit "R"; FBI Investigates corruption case, Las Vegas Review Journal, September 25, 2008, attached hereto as Exhibit "S"; HOA corruption investigation touches on former law enforcement, Las Vegas Review Journal, September 26, 2008, attached hereto as Exhibit "T"; Corruption Investigation: Agents pursue HOA records; Board members, lawyers, construction firms scrutinized, Las Vegas Review Journal, September 26, 2008, attached hereto as Exhibit "U"; HOA Probe: Owners reported suspicions; Three years later, authorities raided nine sites around valley, Las Vegas Review Journal, September 28, 2008, attached hereto as Exhibit "V"; Retired LV police captain's name echoes with HOA investigation, Las Vegas Review Journal, September 28, 2008, attached hereto as Exhibit "W"; Friendly Vistana board steered millions in repair work to Leon Benzer, Las Vegas Review Journal, September 30, 2008, attached hereto as Exhibit "X"; HOA Investigation: Retired office found dead; Van Cleef named in warrant tied to inquiry, Las Vegas Review Journal, October 1, 2008, attached hereto as Exhibit "Y"; and Ex-cop linked to HOA probe clearly carried burden before apparent suicide, Las Vegas Review Journal, October 1, 2008, attached hereto as Exhibit "Z".

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

bring a construction defect lawsuit, the board then hires a construction company to make the repairs by giving it a contract for right of first refusal. The articles and reports provide that it has become apparent that the relationship between the individuals and companies involved is interconnected.

The reoccurring theme is that the same individuals are on homeowners association boards; the same attorneys are instituting construction defect lawsuits; the same management companies are managing the properties; and the same construction companies are obtaining contracts for repairs of the properties. The board members have apparent ties to the construction companies hired to make the repairs so much that it appears -- from the very beginning step of purchasing an interest in the property -- that a construction defect lawsuit is being planned and orchestrated in order for certain individuals to profit, none of which include the actual homeowners in the development.

Real Party in Interest is not asserting that the scenario alleged in the recent reports occurs in every construction defect lawsuit brought by a homeowners association. Rather, Real Party in Interest is asserting that the broadening of the powers of the association provided within ***NRS*** 116.3102 and the declarations that govern the association can lead to the ills presented in these recent allegations. This would injure the interests of the non-party homeowners and homebuilders alike. This is certainly contrary to the public policy of this State in addition to well-established canons of statutory construction.

V. CONCLUSION

The High Noon at Arlington Ranch CC&Rs are not restrictive; they are expansive in vesting rights and ownership interests upon the individual homeowners. They allow homeowners to determine their own destiny as it relates to their property rather than having their rights hijacked as has recently occurred in other homeowner associations in the Las Vegas valley.

For all of the foregoing reasons, Real Party in Interest respectfully submits that Respondent Court did not abuse its discretion, given that ***NRS*** 116.3102 does not confer standing on a homeowners association for individual homeowner defects and that

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

NRS 116.3102 expressly provides that the homeowners association's statutory powers are limited by the declaration applicable to the association. As such, Real Party in Interest respectfully requests that Petitioner's Petition for a Writ of Mandamus or, in the alternative, Writ of Prohibition, to overturn Respondent Court's May 27, 2008 ruling, be denied.

DATED: January 29, 2009

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

JOEL D. ODOU, ESQ.
Nevada Bar No. 7468
THOMAS E. TROJAN, ESQ.
Nevada Bar No. 6852
STEPHEN N. ROSEN, ESQ.
Nevada Bar No. 10737
WOOD, SMITH, HENNING & BERMAN LLP
7670 West Lake Mead Boulevard, Suite 250
Las Vegas, Nevada 89128-6652
Attorneys for Real Party in Interest,
D.R. Horton, Inc.

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

PROOF OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

I am employed in the County of Clark, State of Nevada. I am over the age of eighteen years and not a party to the within action; my business address is 7670 West Lake Mead Boulevard, Suite 250, Las Vegas, Nevada 89128-6652.

On January 29, 2009, I served the following document(s) described as **REAL PARTY IN INTEREST, D.R.HORTON'S, ANSWER OPPOSING TO THE ISSUANCE OF WRITS OF MANDAMUS OR PROHIBITION** on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED LIST

BY MAIL: I am "readily familiar" with Wood, Smith, Henning & Berman's practice for collecting and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at Las Vegas, Nevada, on that same day following ordinary business practices.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 29, 2009, at Las Vegas, Nevada.

Angela A. Monegain

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

SERVICE LIST
Case No. 52798

Honorable Judge Susan H. Williams Regional Justice Center District Court, Dept. 22 200 Lewis Avenue Las Vegas, NV 89101	Respondent
George T. Bouchanis, Esq. George T. Bouchanis, Ltd. 631 South Ninth Street Las Vegas, NV 89101	Attorneys for Amicus Curiae Nevada Justice Association
Norberto Cisneros Cisneros & Thompson 630 South Third Street Las Vegas, NV 89101	Attorneys for Amicus Curiae Safe Homes Nevada
Nancy Quon, Esq. Jason W. Bruce, Esq. James R. Christensen Quon Bruce Christensen 2330 Paseo del Prado, Suite C-101 Las Vegas, NV 89102 Phone: (702) 942-1600 Attorneys for Plaintiffs	Attorneys for High Noon at Arlington Ranch Homeowners Association

WOOD, SMITH, HENNING & BERMAN LLP
Attorneys at Law
7670 WEST LAKE MEAD BOULEVARD, SUITE 250
LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702 222 0625 ♦ FAX 702 253 6225

Form 9. 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 N.R.A.P. 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 requirements of the Nevada Rules of Appellate Procedure.

Dated this 29th day of January, 2009

(Signature of Attorney)

7468
(Nevada Bar Identification No.)

Wood Smith Henning & Berman
(Law Firm)

7670 W. Lake Mead Blvd, #250
(Address)

702-222-0625
(Telephone Number)