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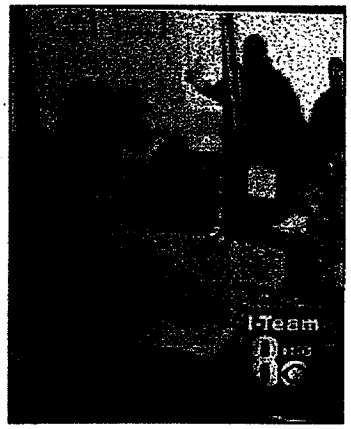
lasvegas NEWS

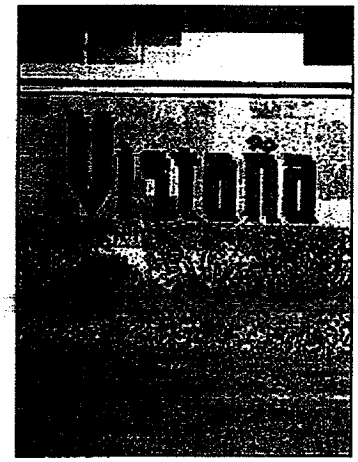
Jonathan Humbert, Investigative Reporter

I-Team: HOA Insider Breaks Silence

Updated: Oct 2, 2008 06:14 PM PDT



The tale is the videotape, and it's one tale Diane Wild wishes she could forget.



Wild has managed the Vistana and Pebble Creek Village properties.

The FBI conducted a search on Wild's

A former property manager is now coming forward saying she saw problems with the person at the center of the HOA investigations, Leon Benzer. New video and phone calls show some violent hired muscle willing to cross the line.

Allegations are flying back and forth in this case. Now there's proof it could get a lot worse.

From rigged elections and cushy contracts, to junkets to Cabo San Lucas and six tough guys acting as enforcers who would rough up anyone that would get in the way. The tale is the videotape, and it's one tale Diane Wild wishes she could forget.

"You recognize bad when you hear bad," she said.

For Wild, 35 years as a property manager means you know right from wrong, and she says a grainy black and white video proves it, "We have it on our security video camera."

Wild has been wrapped up in the HOA corruption probe since 2005, when she managed the Vistana and Pebble Creek Village properties.

She can list all the problems with the HOA leadership, "The election process, that they wanted to have full control of every operation that went on. They wanted to have their guys here, their guys there. I didn't agree with that."

Wild says developer Leon Benzer would get his friends to run for HOA board elections and then trump up defect lawsuits -- pocketing the extra money for his firm, Silver Lining Construction.

"When you see a job that costs $7,000 all of a sudden escalate to $20,000, you notice some nefarious activities going on," she said.

But they would rig the vote to get control, "They had all their players in place."

This past May, Wild protested one of the elections. After looking at the votes, something didn't add up -- all the votes seemed skewed for Frank Sutton, a retired Metro cop working with Benzer's other friends on the board.

"To have almost overwhelmingly a response and have them all be for Frank Sutton was just way too coincidental," she said.

That's where that video comes into play. After seeing the problems in May, homeowners at Pebble Creek wanted a recall election. Wild put it on the agenda. Then she got a call from the HOA board.

"Don't go to the meeting, do not send a representative to the meeting and you're fired," she said.

And then she got another call and voicemail, this time something far worse

records, looking for proof of wrongdoing. -- dangerous threats with language too graphic to air. While the recall went through, the very next day a dangerous surprise came to her door, all caught on tape.

"They immediately sent in six large Samoan gentleman, we're using that word loosely, to do us some bodily harm. They demanded the ballots, bandied about some threats," she said.

The video shows two of the muscular men demanding paperwork and then leaving.

For more than two years, Wild complained about these kinds of tactics. Because of it, she's faced smears and allegations.

Sources say Wild was involved in her own version of the same scheme, referring defect litigation to Draeger Construction, her vendor choice and a competitor of Benzer and Silver Lining. Sources say she took a free trip to Cabo san Lucas, all on the tab of Draeger.

Wild says that isn't so, "Five of us girls, one night having a cocktail decide it would just be a hoot to sneak off to Cabo and chase cabana boys and drink margaritas. That's the honest, bottom line truth."

In the end, she says reps from Draeger met in Cabo through mutual friends. She bought her own tickets.

The only gift given to Wild was a monogrammed towel still wrapped in cellophane.

After breaking her silence, Diane Wild won't let the questionable elections, innuendo and the strong arm tactics get in her way, "I decided that it was my responsibility to be the Norma Rae of the industry and step up to the plate say, 'Wait a minute, you cannot do that.'"

The FBI conducted a search on Wild's records, looking for proof of wrongdoing. Her legal team cites law enforcement sources who say Wild is not a target, she is in fact a victim. But in the murky world of real estate with shifting alliances, it seems more keeps coming to light.

Email your comments to Investigative Reporter Jonathan Humbert

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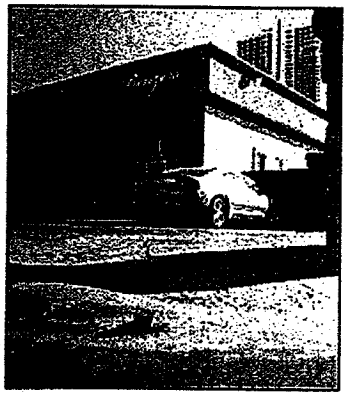
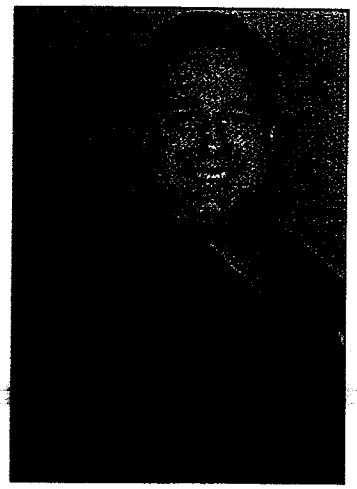
lasvegas NEWS

George Knapp, Chief Investigative Reporter

I-Team: New Details Emerge in Homeowners Association Probe



FBI Agents and Metro Detectives raided Benzers office and home on Wednesday.



The new board pushed to bring in contractor Leon Benzer to fix construction defects.

In the upscale condo development near the south Strip, owners are worried that their home investments are in grave danger and they're taking steps to retake control.

Mountains of financial and legal documents seized by a law enforcement task force are being scrutinized. FBI Agents and Metro Detectives worked into the night, serving search warrants at nine locations to find evidence of what they believe is political corruption involving local homeowner associations.

The FBI and Metro are still not talking, nor do we expect them to say anything. The investigation is just getting started and it's now obvious it stretches in many directions.

Investigators already see a pattern, whereby the same law firms file construction defect lawsuits, the same contractors are hired to do the work, the same management company oversees the whole thing, and the homeowner boards are subjected to something like a political coup.

The elections, homeowners say, are rigged.

Share Your Thoughts on the Investigation

The locks were changed Thursday afternoon at the office of the Park Avenue Homeowner Association. In the upscale condo development near the south Strip, owners are worried that their home investments are in grave danger and they're taking steps to retake control.

Like dozens of other HOA communities in the valley, Park Avenue was essentially hijacked by outsiders, residents say. Outsiders who don't even live in Park Avenue were elected to the board this summer. The new board changed everything.

At the very first meeting, the new board pushed to bring in contractor Leon Benzer to fix construction defects.

"This is nothing new. It's spread across the valley. It's corruption, definitely," said former Board President Lee Lahargoue.

FBI Agents and Metro Detectives raided Benzers office and home on Wednesday, looking for evidence of financial relationships with friends who served on other homeowner boards around the valley.

Lawmen believe Benzer and other persons conspired to take over the boards, hire Benzer to do repair work and funnel lucrative lawsuit cases to certain law firms.

Many of the same players popped up at Park Avenue, where former board members say they were voted out in a rigged election.

"They had an election and the election was fixed. Elections in the past maybe got 115 total votes. This past one there were over 300 and many were duplicate votes," said Tom Seablom.

So how was it done? For one thing, at Park Avenue, more than half the owners live elsewhere. The condos are investments, so they take little interest in board meetings.

The most recent election had twice as many ballots cast as ever before, and most were mailed from one place.

"Funny part is, in California, all the different cities, they were all mailed form Long Beach at the same time on the same date," said Dennis Noto.

"They looked like real ballots that came in. Someone duplicated ballots, duplicated envelopes and then mailed them en masse. Even in Las Vegas, they were mailed all the same day from the same place," said Lahargoue.

Elections are supposed to be overseen by the homeowner's management company, Platinum Communities, which at one point managed around 100 associations. Platinum is suspected of having a relationship with Benzer and with the same law firms that have been involved in construction lawsuits.

Platinum's office was searched by the task force Wednesday afternoon and documents were seized.

How did Platinum handle the Park Avenue election? "Platinum is collaborating with what is going on. Ballots came back in. They supplied the envelopes. Who did that?" said Barbara Noto.

The Park Avenue homeowners are thrilled the FBI and Metro are taking an interest. They say they've been ignored so far, so they are taking small steps on their own, such as changing the locks on the offices they were barred from by Platinum.

Also, while the *I-Team* was there, they fired the manager installed by Platinum and they are hoping the FBI gets around to talking with them soon.

Email your comments to Chief Investigative Reporter George Knapp

LAS VEGAS SUN

FBI, police serve search warrants in corruption probe

By *Mary Manning*

Published Wed, Sep 24, 2008 (4:33 p.m.)

Updated Wed, Sep 24, 2008 (5:31 p.m.)

A law enforcement task force served search warrants at homes, offices and clubs all across the Las Vegas Valley today as part of what might become a political corruption investigation.

The search warrants are seeking records and documents involving attorneys, homeowners associations and contractors.

FBI agents and Metro Police detectives began serving those warrants early this morning. One of the first businesses they visited was Benzer, an after-hours night club not far from the Palms Condominiums. An explosive device was used to blow open an iron gate, KLAS-TV Channel 8 reported.

The officers and agents served warrants at nine locations, FBI spokesman David Staretz told the Associated Press. He said the investigation is ongoing.

Leon Benzer, owner of the nightclub, also owns Silver Lining Construction, which was also served with search warrants.

The construction company has ties to Vistana, a Rhodes Ranch development.

Vistana homeowners sued Rhodes Ranch and got a $19 million settlement to repair faulty construction, including no flashing on homes and plumbing installed backwards, said Steve Wark, former board member of the Vistana Homeowners Association.

Wark, a political consultant, said his term on the board expired last year and he did not run for another term. He said he agreed to serve on the board because he is a long-time friend of Benzer. Wark and Benzer are business partners in a wastewater treatment venturee, Wark said.

Wark said he learned a lot about relationships between local attorneys and homeowners associations. Attorneys compete to serve a homeowners' association, he said.

"It's very competitive between attorneys and it's very competitive among contractors," Wark said.

Wark said he had not been contacted by the FBI or police. "The first time I heard of it was on Channel 8," Wark said.

At this time, search warrants are still being served.

In addition to the club and construction companies, Benzer is also a majority owner of the Courthouse Café and has a line of tequila, Benzila Tequila, made at Benzer's 1,400-acre farm in Baja, Mexico.

Benzer is also known as a philanthropist, especially when it comes to raising funds for children with autism.

Metro Police referred media calls to the FBI. The FBI did not elaborate on the enforcement activities.

Discussion: *1 comment so far...*

By Lenny_V
9/26/08 at 3:24 a.m.
Suggest removal
Benzer known as a philanthropist? He's gonna be known as a jailbird soon.

LAS VEGAS SUN

FBI searches attorney's office as political corruption probe continues

By *Mary Manning*

Fri, Sep 26, 2008 (4:45 p.m.)

The latest search warrant served in the Las Vegas Valley in the ongoing investigation of possible political corruption was at a local attorney's office.

FBI agents went to attorney Nancy Quon, whose Web site says she represents homeowners associations, and seized more records, said KLAS-TV Channel 8 today.

A law enforcement task force first served search warrants at homes, offices and clubs all across the Las Vegas Valley Wednesday as part of what might become a political corruption investigation.

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Wark said he learned a lot about relationships between local attorneys and homeowners associations. Attorneys compete to serve a homeowners' association, he said.

"It's very competitive between attorneys and it's very competitive among contractors," Wark said.

Wark said he had not been contacted by the FBI or police. "The fist time I heard of it was on Channel 8," Wark said. Before joining the homeowner's association, Wark said he disclosed his ties to Benzer.

At this time, search warrants are still being served. Neither the FBI nor Metro Police will comment on the

investigation.

In addition to the club and construction companies, Benzer is also a majority owner of the Courthouse Café and has a line of tequila, Benzila Tequila, made at Benzer's 1,400-acre farm in Baja, Mexico.

Benzer is also known as a philanthropist, especially when it comes to raising funds for children with autism.

Metro Police referred media calls to the FBI. The FBI did not elaborate on the enforcement activities.

Discussion: ***1 comment so far...***

LAS VEGAS SUN

Vegas homeowners complain of association conflicts

The Associated Press

Sun, Sep 28, 2008 (11:21 a.m.)

Homeowners in neighborhoods governed by a Las Vegas management company say they complained of possible conflicts of interest three years before the FBI and police raided nine sites in what authorities call a "public corruption" investigation.

The nine sites raided Thursday include the headquarters of management site Vistana, the office of Leon Benzer, owner of Silver Lining Construction, and six other condominium complexes.

A review of court documents by the Las Vegas Review-Journal shows that some of the developments have the same board members, with links between the neighborhoods and Benzer companies and associates.

A law enforcement source told the newspaper that authorities are investigating whether people were placed on the boards to direct business from construction defect lawsuits to certain companies.

Information from: Las Vegas Review-Journal, http://www.lvrj.com

LAS VEGAS SUN

Face to Face: The Final Take

UPDATES FROM EXECUTIVE PRODUCER DANA GENTRY

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Feds, D.A. rebuffed HOA members

By *Dana Gentry* · September 29, 2008 · 4:45 PM

The woman who brought her suspicions about collusion on her homeowners association board to the attention of the FBI says she didn't get far. Wanda Murray tells Jon on tonight's program that the feds deemed the issue a civil matter and had no interest. Ditto for the District Attorney, where Murray says she and her neighbors failed to get past the secretary.

So what got law enforcement to take notice? Tune in tonight to hear State Sen. Mike Schneider's (D-Clark) contention that the alleged activity extends beyond Nevada.

It's been reported that political consultant Steve Wark owned a less than 1 percent interest in a unit at one of the condo developments under scrutiny.

The implication is that Wark purchased the interest in order to qualify for a spot on the board. Under Nevada law, he need not go to the trouble. The law says while the majority of board members must own property within the development, the remainder need not. Schneider says the intent was to allow renters to have a say in association matters, but the law includes no residency requirements.

Discussion: *2 comments so far...*

By HOAguy
9/30/08 at 3:52 p.m.
Suggest removal

Anyone shocked by a lack of zealous enforcement of toothless statutory law (NRS 116) is laboring under a misapprehension that the industry and its players are regulated in any meaningful sense.

Reports of warrants for records fall short of making a claim of fraud. The facts taken as a whole in light of alleged collusion between a Board of Directors, Management, Counsel, and a contractor suggest conspiracy to defraud. Owners may have been denied the honest services of the parties they entrusted their affairs to. This is not anomalous.

The RJ reports the Ombudsman described Common Interest Communities as democratic. In a democracy, the people (owners as a whole) govern. In contrast, "corporate democracy" in an HOA is a myth. Recently, a prominent HOA attorney opined that owner/members have no legal authority to compel a Board of Directors to take any action or refrain from taking any action unless such right is specifically set forth in the governing documents. Remember, these are drafted by attorneys of the developer. Developer/builders have no interest in empowering owners. At best, HOA governing boards may be a "representative" form of government. Yet the fact that a majority of directors are owners does not make their collective conscience representative of owner views. Even good people may find themselves outgunned or mired once elected. When directors lack formal education and experience to govern according to law and governing documents, a paternalistic relationship with

management is typical. In theory, management should be taking instructions from the BOD. In practice, management frequently railroads an inexperienced if not incompetent BOD to serve its own interests.
In this economy, most communities have extremely high delinquency rates in assessment payments. Owners in arrears lose the right to elect or remove corrupt and dictatorial directors. A significant percentage of the vote is effectively nullified creating a minocracy. This is compounded by the universe of apathetic voters. If 10% of owners in a community participate in the electoral process, it passes for a democratic election. Given the lack of regulation to ensure adequate safeguards to protect the integrity of the electoral process, it cannot be assumed owners are provided a free and democratic election. Owners also lack the right to rid themselves of a professionally incompetent, negligent, or self serving management firm beholden to an incumbent BOD. Given the incestuous relationship or unholy alliance, can management be entrusted with preparation and custody of the ballots? The owners' only recourse is to idly watch a train wreck and wait for the next tainted election.
In sum, be careful who you vote for because the Board of Directors has management and the Association attorney to protect them from owner accountability. Removing them through the "democratic" process requires nothing short of a miracle.

By booker46
10/5/08 at 10:50 a.m.
Suggest removal
HOAs - MERELY A MICROCOSM OF WHAT SURROUNDS THEM.
Firstly, and in context, I note that more detailed media coverage is seemingly given this matter than is the $800Bn burden our legislators recently placed upon taxpayers despite advise from the taxpayers to reject such a bill as an unwarranted corporate gift package. Accordingly all should vote for third parties (particularly Nader/ Gonzalez) as indication of dissatisfaction with the current regime and its similar possible replacement from either major party.
I am personally against over codification and particularly against knee-jerk legislative reactions based upon false premises as appear suggested by a certain state senator who appears, most charitably, ill informed.
The now much (partly) quoted statute which is said to provide for HOA board members being not required to be an owner of a unit within the development is only partially accurate.
"NRS 116.31034(1)... the units' owners shall elect an executive board of at least three members, at least a majority of whom must be units' owners. Unless the governing documents provide otherwise, the remaining members of the executive board do not have to be units' owners..."
Please note that if the HOA's governing documents provide that board members shall be owners of record, non-owners may not serve on the board.
Clearly governing documents may include such language, and likely should, in order to prevent incursions by special interests not necessarily in the best interests of the HOA. There are able to exist many potentially incestuous relationships between so-called management companies and "vendors" because boards often do not accept the responsibility of management, abdicate responsibility and allow its servants (the for profit management company)to dictate policies, procedures and negotiate contracts on the board's behalf.
Board members should have (as they affirm to) sufficient understanding of the laws relating to common interest communities to be effective and to provide paid community managers

with proper direction. Proper education is the answer for both boards and so-called managers.

I would estimate that there are more well grounded construction defect lawsuits in Nevada than those which are clearly dubious.We have existing courts, laws, rules of evidence and burdens of proof. All designed with "justice" in mind.

If, as is inferred, the catalyst for such lawsuits and associated unfounded avarice is the "loading" of boards with non-owner "shills," then ensuring that your HOA's governing documents include language which limits board membership to owners will likely solve the problem without further legislation being necessary or of benefit.

reviewjournal.com

Sep. 25, 2008

FBI investigates corruption case

Source: Collusion between HOAs, firms probed

By LAWRENCE MOWER
REVIEW-JOURNAL

Federal and local law enforcement officers raided nine sites around the valley on Wednesday in a sweeping probe into possible collusion between homeowners associations and businesses benefitting from construction defect lawsuits.

The raids are part of a "pending public corruption case," according to Federal Bureau of Investigation spokesman Dave Staretz, who refused to release details. He said no arrests were made.

According to a law enforcement source, the FBI is investigating whether individuals were placed on homeowners association boards who, in turn, would direct business stemming from construction defect lawsuits to select companies.

At issue, according to the source, is whether HOA members were steering contracts to certain construction companies.

Other sources said there has long been speculation that some HOA representatives were hiring certain law firms to handle construction defect lawsuits in exchange for kickbacks.

State Sen. Mike Schneider, D-Las Vegas, a lawmaker who has been involved in homeowners association issues before the Legislature, said the speculation involved management companies steering construction defect business to law firms in exchange for kickbacks.

One of the companies raided Wednesday by FBI agents and Las Vegas police was a business in an industrial area near the Palms owned by Leon Benzer, who is involved in a variety of businesses.

The company, Benzer's, at 4246 Bertsos Drive, near Flamingo Road and Arville Street, was described by a woman who worked in a nearby business as a banquet hall that opened six months ago.

She said she's "never seen a banquet there," however.

Records show Benzer is attempting to acquire a liquor license from the county and a license for a banquet facility.

He also operates a nonprofit autism foundation out of that location, state records show, though officials in the autism community had never heard of it.

Benzer owns another company, Silver Lining Construction, which also lists the Bertsos address and which has ties to the Rhodes Ranch development of Vistana -- a development that recently won a $19 million settlement to repair construction defects.

Political consultant Steve Wark served as president on the Vistana Homeowners Association as the company fought Rhodes over faulty plumbing and other problems.

"Our problem, as a homeowners association, was that Rhodes would not repair the units ... and would not address the problem," Wark said. "And so the association was out a tremendous amount of money addressing those problems."

Wark said he has known Benzer for about 10 years and disclosed their relationship before he ran for president of the association.

Before Wark came on the board, Benzer had come to the homeowners association offering that his company would front the cost of those repairs, Wark said.

In turn, the association would grant Benzer's company the right of first refusal for the low bid when the association won a settlement, Wark said. In other words, Benzer would get the first shot at repairing the property.

The association and Benzer entered into the agreement and both parties honored it, Wark said.

"I was very conscientious when I was president to make sure that absolutely everything was above board," Wark said. "I know Leon as a good, hard businessman, (and) very, very generous. I thought that it was a heck of a risk-taking by taking an agreement with an HOA to take care of repairs knowing that the HOA couldn't pay them for those repairs (right away)."

Benzer could not be reached for comment late Wednesday.

Wark, who left the board eight months ago, said he doesn't know whether his association has become entangled in the investigation.

He said he hasn't been in contact with anybody in law enforcement.

"My problem is that I have absolutely no idea what's going on, and nobody's talking to me," he said.

He said he met Benzer while campaigning for former governor Kenny Guinn and described him as "a good, solid individual."

"The reputation that he has with me is that when he sees an injustice, he gets very angry about it," Wark said.

According to a source in Benzer's neighborhood in Anthem Country Club, a gated community with homes worth upward of $1 million, Benzer's home was raided early Wednesday morning.

One of the other companies raided Wednesday was a large homeowners association management company, Platinum Community Services.

The company manages roughly 150 community associations around the valley, including high-end communities in Summerlin and high-rises on the Strip.

As plainclothes agents and detectives walked in and out of the business, in an office at 3360 W. Sahara Ave., near Valley View Boulevard, attorney Blaine Beckstead said the company had "nothing to hide."

"I don't believe they're looking into anything we've done," he said.

Beckstead said the search warrant requested records for two of the homeowners associations the company manages. Beckstead said the search warrant did not name the company or a company employee.

He would not reveal the names of the two associations or which neighborhoods they represent.

Review-Journal writers David Kihara, Molly Ball, Antonio Planas, Adrienne Packer, Hubbie Smith, Annette Wells, John L. Smith, Jane Ann Morrison and Sean Whaley contributed to this report. Contact reporter Lawrence Mower at lmower@reviewjournal.com or 702-383-0440.

Find this article at:
http://www.lvrj.com/news/29735854.html

☐ Check the box to include the list of links referenced in the article.

Sep. 26, 2008

JOHN L. SMITH: HOA corruption investigation touches on former law enforcement

Three former Metro veterans are on the list of individuals of interest to FBI agents and police detectives in the public corruption investigation involving local homeowner associations and the construction defect business.

They are Morris Mattingly, Frank Sutton and Christopher Van Cleef. Mattingly, who retired after 20 years with Metro, was elected to the board of the Vistana homeowners association in October 2004 at a time he also worked for Silver Lining Construction, whose owner, Leon Benzer, has come under scrutiny by law enforcement in connection with the investigation.

Also on the list of those whose documents and correspondence are of interest to authorities is current Metro Lt. Ben Kim. His wife, Lisa Kim, is listed as an official with Platinum Community Services, which manages homeowners associations, including the Vistana association.

Another person of interest on the government's list is Charles Hawkins, who sources say was Mattingly's friend, a homeowners association board member and a one-time employee of Silver Lining.

NO FREE RIDE: Local personal injury attorney Edmund Botha's personal transportation issues were solved Thursday in U.S. District Court when a jury convicted him of evading $689,385 in taxes.

Although Botha claimed to drive a 15-year-old car with more than 100,000 miles on it, in reality he purchased at least 10 vehicles in his ex-girlfriend's name. Estimated value: more than $400,000. He also attempted to avoid paying taxes through a phony child-support agreement. The case was brought by the U.S. attorney's office, the Justice Department Tax Division and IRS Criminal Investigation.

Botha faces up to five years in prison and a $250,000 fine. That's the bad news.

The good news? Look at all the money he'll save on gasoline and car payments.

WRITE STUFF: There's no shortage of rough language on the tapes being played in District Judge Jackie Glass' courtroom during the armed robbery and kidnapping trial of O.J. Simpson and C.J. Stewart. To hear some of the characters' cheap patter, you'd think they were trying out for a B version of "Goodfellas."

But without question the toughest guy in the courtroom has to be 82-year-old Vanity Fair celebrity crime writer Dominick Dunne, who continues to gut out the trial despite suffering from bladder cancer and making a recent unscheduled trip to Valley Hospital Medical Center.

"Celebrity crime writer" makes it sound like the guy hacks for a supermarket tabloid. Fact is Dunne is a splendid storyteller. If you're new to his work, try "The Two Mrs. Grenvilles," "A Season in Purgatory" or "Another City, Not My Own: A Novel in the Form of a Memoir." The latter is about the Simpson murder trial.

SAHARA MEMORIES: The tributes to the old Sahara continue to flow in following the recent reunion by former employees.

No story about the former home to Louis Prima and Keely Smith (not to mention the Rat Pack after hours), would be complete without a few words from sports betting icon Lem Banker, who for many years operated the resort's health spa.

Lem says the spa was a popular meeting spot that drew everyone from casino man Kirk Kerkorian and Gov. Paul Laxalt to Sheriff Ralph Lamb and consummate green-felt insider Irving "Ash" Resnick.

Lem, of course, was no stranger to making a little book between saunas.

It's all right, Lem. The statute of limitations has run.

Attorney James Jimmerson recalls the many years his father, J.L. Jimmerson, worked the casino floor when Del Webb had the place.

"He worked there earlier in the '50s when it was called Club Bingo," Jimmerson says. "My dad and I knew some of the men mentioned in your column. The dealers there used to play after their shift a card game called 'Clobyosh,' a game using a 32-card deck, which is also known as 'Bela,' that has been largely lost over the years."

ON THE BOULEVARD: An adult industry insider tells the story of the recent robbery at a thinly veiled sex club on Sahara Avenue. I say the thief couldn't have gotten away with much loot.

After all, his victims wore no pockets.

BOULEVARD II: You can call O.J. Simpson many things, but he remains remarkably popular down at the Regional Justice Center. During a lunch break this week, Simpson visited with bailiffs and passers-by, waved to fans and signed a few autographs.

Have an item for the Bard of the Boulevard? E-mail comments and contributions to Smith@reviewjournal.com or call (702) 383-0295

Find this article at:
http://www.lvrj.com/news/29787809.html

☐ Check the box to include the list of links referenced in the article.

Sep. 26, 2008

CORRUPTION INVESTIGATION: Agents pursue HOA records

Board members, lawyers, construction firms scrutinized

By ADRIENNE PACKER
REVIEW-JOURNAL

In its sweeping investigation into homeowners associations, the federal government is digging up documents and correspondence related to association board members, attorneys and construction companies, according to a search warrant issued in the probe.

During searches of seven common-interest communities governed by homeowners associations, FBI agents sought ballot lists, ballots, envelopes and nomination forms.

Authorities are investigating whether individuals were planted on homeowners association boards to funnel business stemming from construction defect lawsuits to certain attorneys and construction companies.

In one case, according to a source close to a construction company alleging it was frozen out of the bidding process to fix construction defects, the owner of a property management company referred so many cases to the same law firm she was rewarded with a trip to Cabo San Lucas.

Agents are searching homeowners association records and ballot information dating back to 2001. The properties listed on one search warrant include Vistaña, Chateau Versailles, Pebble Creek, Park Avenue, Sunset Cliffs, Chateau Nouveau and Mission Pointe.

The government also seeks seven years of correspondence involving 43 people including Lisa Kim, president of the property management firm Platinum Community Services, which was raided by agents Wednesday. Some of the others include current and former homeowners association board members around the valley.

An attorney for Platinum, Blaine Beckstead, said Thursday that the warrant Platinum was served with on Wednesday did not include the names of Kim or any other Platinum employee. The Review-Journal verified Thursday night that Kim, who could not be reached for comment, was not listed on the warrant served at that location.

Agents are also interested in documents related to political consultant Steve Wark, who served as president of the Vistaña Homeowners Association, as well as prominent construction defect attorneys Scott Canepa and Nancy Quon.

Being named in a warrant does not necessarily mean individuals were involved in wrongdoing. No arrests were made as a result of the raids.

Canepa and Quon were unable to be reached for comment.

Wark did not sound surprised that his name was listed in the warrant. He was president of the Vistaña homeowners association between late 2005 and fall 2007, he said.

Quon was one of the attorneys who represented the association in its 2005 lawsuit against Rhodes Ranch. The company fought Rhodes over faulty plumbing and other problems.

"I was president of the association, and I would expect at some point that people need to talk to me," Wark said.

He said he wasn't involved in any wrongdoing and that he has not been contacted by law enforcement.

Search warrants were executed Wednesday on nine valley properties, including a building on Bertsos Drive, near Flamingo Road and Arville Street, which is owned by Silver Lining Construction owner Leon Benzer. Federal agents are also after contracts and invoices related to Benzer's construction company.

But a source close to Silver Lining Construction said that the company was not involved in any wrongdoing.

Instead, the source said, it was another firm, Draeger Construction, that monopolized the construction defect rehabilitation industry, freezing out other bidders.

According to the source, competitors of Draeger, including Silver Lining, are looking into filing a federal anti-trust lawsuit against the construction company, property managers and attorneys. The gist of the complaint is that Draeger has monopolized the market because it is in cahoots with the property managers and attorneys.

Draeger Construction is listed in one of the warrants.

A message left for Draeger representatives was not returned Thursday.

According to the source, one property management company, Castle Management, referred all construction defect complaints to a local law firm which would then suggest to the homeowners board that it hire Draeger Construction to do tests and make repairs.

Other competitive bidders, such as Silver Lining, are not even considered even though they may offer the best deal, the source said.

At one point, the law firm treated Castle Management owner Diane Wild on a trip to Mexico, the source said.

Wild did not return calls seeking comment.

Draeger Construction landed the jobs in part because it showered homeowners association board members with gifts, the source said. But it also pitched itself as the only company that could provide properties with certain materials, weeding out other bidders.

Review-Journal writer Lawrence Mower contributed to this report. Contact reporter Adrienne Packer at apacker@reviewjournal.com or 702-384-8710.

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Sep. 28, 2008

HOA PROBE: Owners reported suspicions

Three years later, authorities raided nine sites around valley

By LAWRENCE MOWER
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REVIEW-JOURNAL

On Aug. 22, 2005, Bill Farnsworth, Wanda Murray and three other owners of condominiums at the Rhodes Homes development of Vistaña walked into the local headquarters of the Federal Bureau of Investigation.

In their possession was a 3-inch thick, three-ring binder full of records and other papers documenting -- at the least -- what they thought were serious conflicts of interest involving their home-owners association board of directors.

At the most, they believed the records showed a possibility of collusion between members of the board, which included a former Las Vegas police lieutenant, to steer work toward a Las Vegas construction firm, Silver Lining Construction.

They left disappointed.

"We all pretty much felt defeated because we weren't getting anywhere," Murray said.

Last week, more than three years later, the FBI and Las Vegas police raided nine sites around the valley, including the headquarters of the management company Vistaña used and the headquarters of Leon Benzer, owner of Silver Lining Construction.

Federal authorities are not only looking into Vistaña. They are also looking at six other condominium complexes.

Law enforcement officials have been largely silent about the raids, but a look at court records shows some of the developments share the same board members. And there are links between developments and Benzer's companies and associates.

But the Vistaña complex on Durango Drive just south of the Las Vegas Beltway appears to be at the heart of what a law enforcement source has described as an investigation into whether individuals were placed on homeowners association boards and, in turn, directed business stemming from construction defect lawsuits to select companies.

The group of angry and diligent homeowners appears to have been onto something. The names contained in their three-ring binder largely correspond to those in a federal warrant served on Wednesday and obtained by the Review-Journal.

The warrant requests "any and all documentation, correspondence and notes" relating to 43 people, including the owners of two large homeowners association management companies and prominent construction defect lawyers.

Being named in the document does not necessarily mean the individuals or entities listed are suspected of wrongdoing or are under investigation.

One of the construction defect lawyers named, Nancy Quon, had her office raided on Friday, according to media reports.

Another lawyer listed in the warrant, Scott Canepa, was first named in the Review-Journal on Friday.

A statement by the FBI sent shortly afterward to some local media outlets, but not the Review-Journal, said neither Canepa nor his law firm are "subjects of this pending investigation."

Several calls to the FBI seeking to clarify the statement, and to receive the statement directly from the agency, were not returned.

Attempts to reach Canepa and Quon for comment have been unsuccessful.

There was little doubt that the 732-unit, 20-building Vistaña complex had significant problems. Farnsworth, who became the first president of the association in 2003, said he looked to find a solution.

Cheap tiles were brittle and would blow off in the wind, he and Murray said.

"You can just grab any tile at random and rub it with your fingers and the tile will crumble," Farnsworth said.

Walkways were also faulty. Instead of sloping away from the building, they sloped inward, causing rainwater to run into the building.

Both defects caused water damage, and mold began to form in some units.

Farnsworth and the board hired a team of lawyers and the association filed a lawsuit in July 2003. They quickly entered into mediation with Rhodes.

A construction company, Draeger Construction -- also named in the warrant -- had agreed to do emergency repairs, according to court records.

The association board wanted to keep the suit in mediation, Farnsworth said, because it's very difficult to sell and buy a property in a development engaged in a defect lawsuit that's not in mediation.

A team of inspectors from Rhodes worked with the two construction firms the association board hired and went through the entire complex, documenting problems along the way.

The process took more than a year, and the teams found the same problems, Farnsworth said.

"Rhodes did not dispute the fact there were problems out there, because their team went right along with our team, and they all found the same stuff," he said.

The settlement figure being discussed during informal talks with Rhodes was $30 million, Farnsworth and Murray said. Farnsworth said he didn't have any reason to believe Rhodes would balk from that amount.

"They were receptive to doing the work without taking it to court," Murray said. "Rhodes was willing to do the repairs and fix the place up."

Formal talks with Rhodes were set to begin in November 2004. But in October, two people were elected to the association's board of directors and began talking of sacking both the legal team the association hired and the construction company currently doing emergency repairs, Farnsworth and Murray said.

Morris Mattingly, a former Las Vegas police lieutenant and candidate for sheriff in 2006, and Charles Hawkins, who described himself as a union foreman in campaign literature for the seat on the association board, took two of the five spots on the board.

"Their résumés, they looked impeccable," Murray said. "You couldn't find anything wrong with them."

Another board member resigned unexpectedly, and Rodolfo "Rudy" Alvarez was picked by the board as the replacement.

Mattingly and Alvarez both have ties to Benzer, court records show.

In the case of Alvarez, records show the condominium he purchased a .005 percent stake in at Vistaña was previously owned by Benzer, and the two have shared property together before.

Mattingly has also shared property with Alvarez.

Federal authorities are looking for records pertaining to Mattingly, Alvarez and Hawkins, according to the search warrant. None of the three men could be reached for comment last week.

In the weeks and months after the trio got onto the board, Draeger Construction was dropped and Benzer's Silver Lining Construction was brought on to do emergency work, according to court records.

The legal team the original board hired for the construction defect case was fired, and the board hired Quon. Quon had been interviewed and rejected when the board was first formed.

The management company, CAMCO, was also fired, and Platinum Community Services, the target of one of last week's raids, was hired.

Farnsworth acknowledged he voted to hire Platinum but resigned before the new legal team was fired and Silver Lining was given a contract. He resigned in October 2004 when there was talk of firing the first legal team, he said, because he didn't want to be a part of those decisions.

"I knew that any decision the majority made I was going to have to sign, and I wasn't going to sign it," Farnsworth said.

From there, Silver Lining was granted the right of first refusal -- in essence, a guarantee of the lowest bid -- to fix the major problems in the defect lawsuit if the suit was won, Farnsworth said. Draeger Construction had no such deal with the association, Farnsworth said.

Quon brought the association out of mediation with Rhodes and refiled the lawsuit. The suit wasn't won until this year, and the settlement -- which former board members have said was $19 million -- was far less than the $30 million that Rhodes had discussed with Farnsworth's board.

Nor have the repairs been completed. Farnsworth said missing or broken tiles have been replaced with tin pieces, and the wrong-sloping walkways have been repaired with a type of sealant, which Farnsworth said is only a temporary fix.

Murray was the first to start looking into the new board members, in late 2004. Legally blind, the now 62-year-old enlisted help and began poring over county and state public records.

She and the other owners turned up ties among Mattingly, Alvarez and Benzer.

For instance, Mattingly had purchased his Vistaña condo just weeks before the October election. They found the timing suspicious.

"The more we looked, the more we found," Murray said.

After Farnsworth's resignation from the board, he and Murray, until then a temporary board member, decided to take action and in December presented a recall petition to the board with the necessary number of signatures.

When the ballots were cast to oust the board in February 2005, however, the number of votes was suspiciously lower than the number of people in the room, Murray said.

"The room was full of people," Murray said. "And when they said the total counts, we said, 'What? There's more people in this room than you just said gave votes.' We were blown away."

Farnsworth and Murray said in an interview and in court depositions they later found out that two people, a condo owner and a maintenance supervisor, saw board members disposing of ballots and opening sealed ballots a few days before the election.

The owner and supervisor later testified in depositions they had witnessed the activity.

The board refused to step down, however, and another recall campaign was launched, this time under the direction of the state ombudsman's office, which oversees such elections.

That campaign was successful, with voters choosing overwhelmingly to recall the board. But when board members again refused to step down, Farnsworth, Murray and other owners took the case to court.

They didn't know what they were getting into.

Murray said the homeowners walked into court represented by one attorney.

"In walked seven attorneys on their side. And the judge goes, 'Is this a circus?'"

"There was a lot at stake," she added.

"We were just outgunned," Farnsworth said.

They ended up losing the case after opposing attorneys managed to get a few residents to say that Murray had forged their signatures.

Murray denies the charge.

"Me, who is legally blind, is going to forge somebody's signature?" Murray said.

The situation homeowners in Vistaña experienced might have been repeated elsewhere. Allegations of voter fraud have also surfaced in lawsuits at the Pebble Creek Village and Park Avenue condominiums in Las Vegas.

Since abandoning their efforts, Murray has moved away from the complex, although she still owns a property there. Farnsworth said he still lives there because it's convenient for him and his unit, unlike others, hasn't had any construction defects.

But since 2005, they've been left wondering what happened and whether anybody would do anything about the problems they saw.

"Nobody would listen to us," Murray said. "I thought that they gave up on us."

Review-Journal writer Adrienne Packer contributed to this report. Contact reporter Lawrence Mower at lmower @reviewjournal.com or 702-383-0440.

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Sep. 28, 2008

JOHN L. SMITH: Retired LV police captain's name echoes within HOA investigation

Talk about tough luck. What were the odds that retired Metro cop Frank Sutton would have not one, not two, but three condominiums involved in construction defect litigation?

That's what I call a strange coincidence.

It appears the public corruption units of the FBI and Metro think the coincidence is strange, too.

Sutton's name is among those listed in an FBI search warrant served at several local businesses and residences Wednesday as part of an investigation into possible criminal collusion between homeowners associations and persons associated with construction defect lawsuits. Law enforcement is looking for evidence of fraud and election rigging.

It's not known whether Sutton is a criminal subject, but what is clear is that his name appears several times in connection with HOAs, construction defect litigation and the contractor whose construction company landed so much of the repair work. Finding himself mentioned even in passing in a criminal investigation is a substantial departure for a man who rose to the rank of captain at Metro and put in 25 years before retiring out of the vice/narcotics unit.

Judging from the locations where the search warrant was served, Silver Lining Construction owner Leon Benzer is a central figure in the investigation. His residence and business addresses were raided Wednesday. Silver Lining specializes in construction defect repair.

On Oct. 30, Sutton was deposed in a lawsuit pitting the High Noon Homeowners Association against developer D.R. Horton and a group of subcontractors. The homeowners were represented by an attorney with Quon, Bruce and Christensen, a law firm that specializes in HOA representation and construction defect litigation. It also has surfaced in the pending investigation.

Of Sutton's seven residential properties, according to the deposition, three were involved in construction defect lawsuits.

The coincidences didn't stop there. Sutton also was a member of the homeowners associations of the Fiesta, Mission Ridge and High Noon developments. The makeup of the High Noon board is now the subject of litigation after allegations of election fraud were raised. A lawsuit has also been generated at Pebble Creek, where Sutton attempted to become a board member.

"Why are you running for the boards?" Horton attorney Jack Juan asked.

"Because I like to have a say-so on the properties that I buy, and I just want to keep the values as high as I can because they're mostly investments," Sutton responded. "And pretty much that's it. I figure if I'm going to purchase the property, I want to have the best opportunity to have my say-so within the community. And to protect people in the Valley, and keep the area safe and keep values up."

Makes sense.

But then comes another coincidence. At the time of his deposition, Sutton was also employed by Benzer at Silver Lining, a company that makes millions repairing construction defects. He said he did consulting, security and management work for Benzer.

There's no doubting Sutton has aggressively pursued both condominium purchases and a place on the influential HOA boards. In fact, he was so motivated to purchase a condominium at the High Noon development he went ahead with the purchase despite knowing there was an alleged construction defect on the property. At High Noon, a construction defect lawsuit involving 39 homeowners (not the association) resulted in just one of 177 alleged building flaws being affirmed at trial.

Sutton was downright anxious to become a High Noon board member. In his deposition, he said he was contacted by other High Noon board members to run for a spot. He also told Juan, "I ran for all the boards wherever I purchased property." He also had a friend in the neighborhood, former Metro officer Christopher Van Cleef, who also purchased a unit.

With that we begin another coincidence. Not only did Sutton and Van Cleef purchase High Noon units together, but they also bought condominiums in the Pebble Creek and Mission Ridge developments.

After becoming a High Noon Homeowners Association board member, Sutton filed a lawsuit against two other members and the association. A recall election was ordered by the court.

After the ballots were cast, a court-ordered special master determined the counting was fraudulent after an extra box of ballots was found. In his deposition, Sutton swore he knew nothing about it.

Hey, just add it to the list of coincidences.

John L. Smith's column appears Sunday, Tuesday, Wednesday and Friday. E-mail him at Smith@reviewjournal.com or call (702) 383-0295.

reviewjournal.com

Sep. 30, 2008

JOHN L. SMITH: Friendly Vistaña board steered millions in repair work to Leon Benzer

Leon Benzer has no shortage of friends. A guy needs all the friends he can get in this world.

Trouble for Benzer is he has friends in some rather intriguing places.

Take the Vistaña Homeowners Association board as it existed in the months leading up to this year's whopping $19 million construction defect lawsuit settlement that is now part of an FBI and Metro criminal investigation. Millions in repair work was steered to Benzer's Silver Lining Construction.

When the Vistaña board voted to embrace Benzer's company, he was well acquainted with at least three of its members.

There was Steve Wark, the veteran Republican political strategist and medical spa operator. Last week following the issuance of FBI search warrants, Wark said he's known Benzer a decade and had only the highest regard for his friend, calling him "a good, solid individual" and "a good, hard businessman, very generous."

Wark clearly was comfortable vouching for Benzer and Silver Lining. In fact, Wark sounded just like a guy who has spent the past 25 years in the business of polishing political campaigns.

Friendship aside, Wark went to a lot of effort, considering he didn't actually live at Vistaña. Nor did he actually own all of the condominium in question.

Records I've obtained show Wark's Blue Sky Business Management once owned the condo, but in November 2005 he held just 1 percent of the unit. Sheila Heidt is listed as the owner of the other 99 percent. It's almost as if Wark bought back into Vistaña in order to help campaign at close range for his pal Benzer.

Maybe that's what friends are for.

If Wark owned only 1 percent of the unit, does that mean he slept there only 1 percent of the time?

That's only 3.65 days per year, or less than one official sleepover for every change of season. But winter, spring, summer, or fall, all Wark has to do is call and he knows he's got a friend in Leon Benzer.

But just so I get this straight, Wark owned 1 percent of a condominium unit. That means he owned the equivalent of 10 square feet of a 1,000-square-foot unit.

In other words, Wark owned a piece of a condo about the size of a closet -- and not a walk-in closet.

Not much of an investment for a guy on the homeowners' board, but I guess nothing in the rules prevented Wark from being a non-resident member of a board that steered so much business to a select few. Now some of them find themselves under law enforcement scrutiny these days as the FBI and Metro investigate allegations of HOA board election fixing and kickbacks.

Despite having his name dropped into some search warrant-related documents, Wark told reporters he's never been contacted by law enforcement, has done nothing wrong, and knows of nothing untoward. That's a relief because it allows us to move on to another Benzer associate who served on the Vistaña board, former Metro cop Morris Mattingly.

Mattingly, who put in 20 years with the department, was elected to the Vistaña board in October 2004 at a time when he also worked as the director of security for Benzer at Silver Lining. In a 2005 deposition, Mattingly said he also helped with accounting despite lacking any official credentials.

Benzer had no shortage of friends at Vistaña. There was Charles Hawkins, who also worked for Benzer at Silver Lining. According to Mattingly's deposition, Hawkins worked as a purchasing agent for the construction company.

Speaking of friendships, Mattingly has known Metro Lt. Ben Kim more than 20 years. Kim's wife, Lisa Kim, is an official at Platinum Community Services, which managed the Vistaña HOA at the time it was locked in that construction defect litigation with developer Rhodes Homes. I don't know if Lisa Kim is friendly with Benzer, but according to the Secretary of State's Web site a Benjamin Kim is listed as Benzer's business partner in Courthouse Café.

Then there's board member Rodolfo Alvarez. According to the Clark County Assessor's office, his condo unit was once owned by Benzer Companies.

That's a lot of friends connected to the Vistaña HOA.

In the coming months, I suspect Leon Benzer is going to need all the friends he can get.

John L. Smith's column appears Sunday, Tuesday, Wednesday and Friday. E-mail him at Smith@reviewjournal.com or call (702) 383-0295.

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Oct. 01, 2008

HOA INVESTIGATION: Retired officer found dead

Van Cleef named in warrant tied to inquiry

By LAWRENCE MOWER
REVIEW-JOURNAL

A retired Las Vegas police lieutenant whose name surfaced in connection with an ongoing FBI and police probe into possible corruption involving homeowners associations was found dead of an apparent suicide in Henderson on Tuesday.

Christopher Van Cleef was one of three former and one current Metropolitan Police Department officers named in a warrant in the investigation last week.

Being named in the warrant does not necessarily mean the person is the subject of an investigation.

Henderson police spokesman Todd Rasmussen said officers were called out at 8:48 a.m. to a desert area near the railroad tracks at Green Valley Parkway between Warm Springs Road and Windmill Parkway.

Van Cleef owns a home about a quarter of a mile away from the area.

"They discovered a man that had committed suicide," Rasmussen said.

He had suffered from a gunshot wound, Rasmussen said.

The Clark County coroner's office had not identified the body on Tuesday.

Henderson police are investigating the death and are working with the coroner's office to determine whether the death was officially a suicide, according to Rasmussen.

Van Cleef was a member of the homeowners association at Pebble Creek Village, one of seven condominium complexes around the valley named in a federal warrant obtained by the Review-Journal.

He retired in January 2005 after 25 years with the Metropolitan Police Department. His retirement came after he was arrested on a charge of drunken driving by the Utah Highway Patrol the previous fall.

Las Vegas police were called out to Van Cleef's Henderson home about 9 a.m. Tuesday.

"I think it was more of a courtesy to be with the family," Las Vegas police officer Bill Cassell said. "If there were family members (there), they were used to seeing a Metro uniform, and one showed up."

Allegations of voter fraud have surfaced in a civil lawsuit at Pebble Creek Village, near Eastern Avenue and the Las Vegas Beltway.

Van Cleef and two others named in the warrant were elected to the board in May.

Former board president Jeremy Doering said he and other owners at the complex have successfully recalled the three from their board positions, but they've refused to step down.

At least one owner at the complex has complained to the Nevada Real Estate Division's ombudsman's office of duplicate ballots being submitted during the May election.

Doering and other residents of the complex have said that although the development does not have any serious defects, Van Cleef and the other two board members had talked of filing a construction defect lawsuit.

Van Cleef, Doering said, had talked briefly at the meetings about how it "would be a good idea if we had Nancy Quon look into any defects." Quon, a prominent construction defect lawyer, had her office raided by the FBI and Las Vegas police on Friday, according to media reports.

Nine other locations around the valley last week also were raided, including the headquarters of Silver Lining Construction, owned by Leon Benzer.

The FBI was seeking "any and all documentation, correspondence and notes" relating to 43 people, including Quon, according to the warrant served at one of the nine locations and obtained by the Review-Journal.

According to a law enforcement source, the FBI is investigating whether individuals were placed on homeowners association boards and, in turn, directed business stemming from construction defect lawsuits to select companies.

The FBI did not return calls seeking comment about Van Cleef's death on Tuesday.

Contact reporter Lawrence Mower at lmower@reviewjournal.com or 702-383-0440.

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Oct. 01, 2008

JOHN L. SMITH: Ex-cop linked to HOA probe clearly carried burden before apparent suicide

In Metro Capt. Mark Tavarez's eyes, Christopher Van Cleef was a good cop and a better man.

"He was a great guy," Tavarez said Tuesday afternoon, a few hours after his friend Van Cleef was found dead from an apparently self-inflicted gunshot wound.

"He was a fantastic guy. He was a great family man who was devoted to his wife and three sons. I've known him 25 years. He was a wonderful, outstanding human being who dedicated his life to this community."

But it's clear Van Cleef also carried with him a burden he could not lay down.

The body of the retired Metro lieutenant, whose name surfaced in an FBI and police investigation into public corruption involving homeowners associations and construction defect contractors and litigators, was discovered by a man walking his dog in Henderson in the desert area near the railroad tracks west of Green Valley Parkway and Warm Springs Road, police sources said. Henderson Police Department officers and the Clark County coroner's office were called to the scene at about 8:50 a.m.

A source speaking with knowledge of the event said Van Cleef told his wife he was going to a shopping center not far from the couple's home. When she discovered he hadn't taken the family car, she called him to determine the reason. Van Cleef also called his friend, Tavarez, to ask the Metro captain to go to his home to be with his wife. Suspecting his friend was in emotional distress, a short time later Tavarez called Henderson police. By then, a body had been found and reported.

Tavarez blames recent press accounts of the FBI's HOA investigation, specifically my own column, for placing undue pressure on Van Cleef.

"I can't imagine it had anything to do with what you printed," Tavarez said sarcastically before backtracking slightly.

"It sure didn't help, though, did it?"

Defending his friend of 25 years, Tavarez said Van Cleef hadn't been questioned by the FBI in about three years and had never been subpoenaed in connection with the investigation. Tavarez was Van Cleef's captain at the time he retired.

"Chris Van Cleef was a very honorable, decent, hard-working man," Tavarez said.

Protests from friends aside, Van Cleef also found himself in the middle of an expanding public corruption investigation. Van Cleef and former Metro Capt. Frank Sutton purchased condominiums in developments whose homeowners associations are now under investigation for possible public corruption. High Noon, Pebble Creek, and Mission Ridge are the developments they had in common, Sutton said in an October 2007 deposition. The name of Sutton, who worked at Metro 25 years before retiring from the vice/narcotics unit, has also been mentioned in connection with the investigation.

Sutton and Van Cleef were present at an HOA recall election involving the High Noon development after a court-appointed special master determined voting fraud had taken place.

In his deposition under questioning by attorney Jack Juan, Sutton acknowledged the fraudulent ballot problems, but added, "I know what happened, but I left prior to that. ... I have no idea what actually occurred. Chris and I left. ... Chris Van Cleef and I. We left. We had some other stuff to do."

Sutton then detailed his version of observing the start of the recall election with Van Cleef. Questions from the attorney focused on whether an extra box of ballots was delivered to the voting area.

Sutton denied any connection.

Then the question turned to Van Cleef's possible part in the questionable ballots.

Juan: "Do you know if Van Cleef is behind those invalid ballots?"

Sutton: "You'd have to ask him. But as far as I'm concerned, he's a real honest person ..."

The High Noon elections are a piece of the strange, intriguing puzzle federal and local law enforcement are attempting to put together. It's clear Van Cleef might have been able to shed light on the goings-on at High Noon and other developments.

The fiercely loyal Tavarez bristles at any notion that his friend was involved, but when questioned he also seemed at a loss to explain the apparent suicide.

"Now his family has to go on without him," Tavarez said. "Sometimes the pressures of life are more than one person can bear."

John L. Smith's column appears Sunday, Tuesday, Wednesday and Friday. E-mail him at Smith@reviewjournal.com or call (702) 383-0295.

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of statutory authority must be one that affects the common-interest community.[23] Yacht Club II is distinguishable from the matter at hand in that Yacht Club II involved townhomes with shared construction elements. As Petitioner cites to case law that predominately deals with condominiums, it is important to note that the structures that make up townhomes and condominiums are in many ways analogous in that they share one common roof, plumbing and electrical systems. An entirely different situation exists at Monarch Estates where there are separate free-standing residences with no shared construction elements.

Despite the numerosity of the Petitioner's case citations, it simply cannot point to a single case where a homeowners' association has standing to instigate community-wide litigation for defect claims peculiar to individual single-family homes or individually owned elements. Moreover, not one of the cases cited by the Petitioner involve single-family home or claims which do not affect the common interest. To be more succinct, Petitioner has not provided one case where an association was granted standing to bring a claim that involved single-family homes where the claims involved separate property interests. Moreover, as noted above, the majority of the cases utilized by the Petitioner involve condominium specific acts.

4. Quail Hollow Supports the Sound Analysis of the District Court

Quail Hollow[24] is a case which supports the sound reasoning of JOHNSON and for the District Court as to why single-family residences and their appurtenances do not fall within the broad net of Petitioner's purported powers at Monarch Estates. Specifically, the Quail Hollow West Owners Association (hereinafter referred to as "QHWOA") commenced a construction defect claim against the developer, Brownstone Quail Hollow, LLC (hereinafter referred to as "Brownstone") pursuant to the Oregon Condominium Act for alleged damage to several exterior and interior assemblies in and surrounding the Quail Hollow townhome community.

The Quail Hollow West community was deemed a "planned community" consisting of 93 individual units. The community included related common areas, and each individual unit owner

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[23] Yacht Club II, 94 P.3d at 1180

[24] Quail Hollow West Owners Ass'n v. Brownstone Quail Hollow, LLC, 136 P.3d 1139 (Ore. App. 2006).

had a separate ownership interest in his or her lot and townhouse, including the front and rear yards. The QHWOA was responsible for the maintenance of the roofing systems, while the individual owners were responsible for the maintenance and repair of *inter alia*, the common walls.[25]

The QHWOA sought recovery for the alleged construction defects affecting the interior and exterior assemblies at Quail Hollow West. Brownstone sought to dismiss the QHWOA's complaint for a lack of standing. The trial court concluded that Brownstone was correct and held that the QHWOA had no standing under ORCP 21(A)(6)[26] as the real party in interest and dismissed said complaint.[27] The QHWOA appealed.[28]

With respect to the QHWOA's appeal, the Court of Appeals opined that in the absence of an assignment from the individual unit owner, of which there was no evidence in that case, the QHWOA could not assert any standing claim to sue Brownstone for the alleged construction defects as to non-common area claims. Specifically, because the Quail Hollow West declaration did not foreclose the ability of the unit owner to commence an action directly against Brownstone for any individual or separate interest, the QWHOA did not obtain an "implicit assignment" from the unit owner to commence litigation on his or her behalf.[29] The Court of Appeals also stated that despite the fact that the QHWOA had maintenance and repair obligations for portions of the community, it did not follow that it was the real party in interest.[30]

Most importantly, the Court of Appeals rejected the notion that the QHWOA had the ability to sue in its own name and on behalf of the individual unit owners under the Oregon Condominium Act, because its statute, which allows the homeowner association to sue "on behalf of itself or on behalf of two or more unit owners on matters affecting the condominium," "[did] not authorize the

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[25] Id., 136 P.3d at 1142.

[26] ORCP 21(A)(6) is identical to NRCP 17(a).

[27] Id.

[28] Id., 136 P.3d at 1143.

[29] Id. 136 P.3d at 1144.

[30] Id. 136 P.3d at 1146.

association to sue on behalf of the individual homeowners."[31] The Quail Hollow, decision impacts are case because Petitioner is trying to commence an action for individually owned separate property interests without obtaining an assignment form the individual homeowners, which was the same avenue the association tried in Quail Hollow. The District Court dismissed Petitioner's claim as to the CMU walls for the same reasons as in Quail Hollow that barring an assignment from the homeowners the association did not have standing to bring a claim for separately owned interests.

5. **NRS 116.3102(1)(d) Does Not Apply to Single-Family Homes**

While the Petitioner has not found one single case where a statute analogous to NRS Chapter 116 is applied in the single-family home (separate interest) context, JOHNSON has been able to identify authority to dispel the notion that the Petitioner may pursue individual interest claims under NRS Chapter 116, (i.e. individual claims for damages to areas not designated as common areas), even if more than one homeowner complains about "common" and "typical" damage to his or her residence.

a. **Creek Pointe Homeowners Ass'n., Inc. Fully Supports JOHNSON's Position.**[32]

The case of Creek Pointe Homeowner's Ass'n echoes the District Court's sound analysis and the proper decision in this matter.. Creek Pointe involved a dispute over a fence erected by the defendant and lot owner, Richard Happ.[33] An "affected" homeowner brought suit against Mr. Happ and the Creek Pointe HOA joined the suit as a plaintiff on behalf of "two or more unit owners."[34] The trial court determined that the Creek Pointe HOA did not have standing to join as a plaintiff as they were not the real party in interest and the association appealed the decision.[35]

Although, the Creek Pointe court acknowledged that "[i]n North Carolina, homeowners'

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[31] Id. 136 P.3d at 1147.

[32] Creek Pointe Homeowner's Association, Inc., v. Richard Happ 552 S.E.2d 220 (N.C. 2001).

[33] Id. at 160-161.

[34] Id. at 160-163.

[35] Id.

associations historically have enjoyed the general right to participate in litigation," and further noted that the North Carolina Planned Community Act (the "NCPCA") permits an association to "institute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community," [36] it found that the NCPCA, (which restates NRS 116.3102(1)(d) nearly verbatim) did not automatically confer standing upon the association to pursue the aforementioned litigation. The Creek Pointe court specifically reasoned as follows:

> **The association's argument is that this is a matter "affecting the planned community," and thus that the statute assures them of standing to bring this suit.**[37] However, we do not read the NCPCA as conferring an automatic right upon homeowners' associations, but rather as reiterating the common law rule that, when otherwise proper, a homeowners' association may participate in a lawsuit. Moreover, the statute makes no further attempt to resolve questions of jurisdiction or standing. It does not define the phrase "affecting the planned community," or otherwise restrict the potential range of litigation. **The statute does not employ the term 'standing' in its recitation of an association's rights; nor does it address issues of standing in any of its other provisions.** We conclude that, although the NCPCA clearly authorizes homeowners' associations as a general class to institute, defend, or intervene in litigation, **this statute does not diminish our judicial responsibility to evaluate whether the association has standing to bring this suit under the specific fact situation presented**.. . . .We find nothing in the NCPCA that is inconsistent with our common and statutory law regarding issues of jurisdiction and standing. Therefore, we hold that **the NCPCA does not automatically confer standing upon homeowners' associations in every case, and that questions of standing should be resolved by our courts** in the context of the **specific factual circumstances presented** and with reference to the "principles of law and equity as well as other North Carolina statutes" that supplement the NCPCA. Accordingly, we will examine the case *sub judice* in this manner. [38] [Emphasis Added].

The Creek Pointe court employed two separate analyses to ultimately find that the association did not have standing to maintain the litigation as a plaintiff. First, the court determined that the association did not have standing as a plaintiff in its representative capacity (to represent all the non-participating homeowners).[39] [Emphasis Added]. Secondly, it determined that the association, not in

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[36] Id. at 163.

[37]. Petitioner's Argument

[38] Id.

[39] Id. at 165. The Court applies the three prong test in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 53 L. Ed. 2d 383, 97 S.Ct. 2434 (1977):

its representative capacity had an interest in asserting *common area issues on its own behalf* since it had a duty to maintain the private roads within the Creek Pointe community and the fence crossed one of these roads.[40] [Emphasis Added].

Like Monarch Estates, the Creek Pointe matter involved single-family homes. Moreover, the NCPCA is nearly identical to NRS 116.3102(1)(d). The Creek Pointe court's ruling does not eschew the NCPCA, but points out that it is not a grant of standing, *per se*, that permits an association to commence litigation under its state's version of the common-interest ownership act and that to reach a determination of whether a suit is permissible requires a case specific analysis by the trial court. While the Petitioner argues that Creek Pointe is a minority decision with respect to whether, under similarly worded statutes, an owners' association has standing to sue for damages on behalf of the owners. JOHNSON argues that their contention is misguided because the Creek Pointe, decision dealt specifically with single-family residences. Additionally, JOHNSON asserts that the Creek Pointe decision is illustrative because it points out that the association cannot represent homeowners' individual interests when the effect of the harm applies to homeowners in varying degrees, but that the association *can* maintain an action involving *its own rights*, such as the governance of common areas. Moreover, it demonstrates that a case by case analysis is necessary.

In the instant case, Petitioner is claiming there are defects in the perimeter CMU walls, a separate property interest, an issue not contested by the Petitioner, for which there will be varying degrees of harm depending on the particular portion of the wall owned by the homeowner. One homeowner may have significant issues as to their portion of perimeter wall while another homeowner may have no problem at all with their portion. Based on the rationale in Creek Pointe,

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"An Association has standing to bring suit on behalf of itsmembers when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." It found that the association could not meet the third prong of this test since "[a]n organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof." Id. at 167, *citing* Warth v. Seldin, 422 U.S. 490, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).

[40] Id. at 168-169.

because the alleged defects in the CMU walls will affect each individual homeowner in varying degrees, the Petitioner does not have standing to represent the individual homeowners in this case. As such the District Court's ruling must be maintained and Petitioner's Writ of Mandamus and Prohibition must be denied.

b. Commentary and Case Law Indicate That Individual Lot Claims Are Not Common Claims.

The Petitioner's lack of standing to assert individual and separate interest claims of Monarch Estates is summarized in the following commentary:

> The issue of who can seek to impose liability upon the developer of a common interest community is complicated by the nature of common ownership of real estate. In a typical ***condominium community*** [unlike the case before the court], each individual who purchases a condominium unit acquires an undivided interest in all common elements within the entire community. The purchaser also becomes a member of the association of all home owners. The covenants of the community may define virtually everything within the community as common elements except for the air space within the individual units, and any wall and floor coverings or plumbing inside the walls to the individual unit.[41] Thus, for example, an individual who buys a condominium at one end of a large complex also buys an interest in the roof over units in a completely different structure at the other end of the same complex.
>
> The standing problem most commonly arises when a defect is discovered in a portion of a project which directly affects only some home owners, but which concerns all owners indirectly. **If the property were a single-family home, the owner would clearly have standing to assert any claims available to address defects in the construction of the home. However, in the context of a condominium complex or planned unit development, the same defects may affect the interests of many individuals as well as the home owner association.**[42] [Emphasis Added].

This concise statement fits squarely with JOHNSON's argument that the Petitioner has no standing to prosecute claims concerning construction defects to a home, that do not affect the common-interest community.[43]

Just as illustrative as the Creek Pointe case, *supra*, is the case of North Carolina Dept. of

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[41] *See also*, NRS 116.2102, defining "unit boundaries" that could only be constructed to apply to condominiums, a concept defined by the Nevada Uniform Common-Interest Ownership Act ("NUCIOA"), and not single-family residences, like those currently at issue.

[42] Gregory G. Sapakoff, Esq., *Home Owner Associations and Planned Unit Developments – Law and Practice: Forms*, § 9A.02[1][a] (Matthew Bender & Co., Inc. 2005) (later supplemented by Doug MacGregor, Esq. (2004).

[43] Id. at. 13.

Transportation[44] in furthering JOHNSON's position. Specifically, in that case, the Department of Transportation instituted litigation against the Stagecoach Village HOA for condemnation of certain common area property. The trial court held that the individual homeowners were indispensable parties who had to be joined and that the HOA did not have standing regarding the claim. The Appellate Court confirmed the trial court's findings, citing the trial court's conclusion as a matter of law that:

> **Each individual lot owner's claim is not common with the entire membership and is not shared equally.** Depending upon the lot owner's location in the development, the lot owner may be more or less damaged by the taking than other lot owners. **Individualized proof** on each lot owner's damages will be necessary. The proper parties to provide this proof are the **individual lot owners.**[45] [Emphasis Added].

It is important to note that the North Carolina Dept. of Transportation focused on whether the homeowners were necessary and, therefore, it did not discuss whether the NCPCA permitted the HOA to maintain suit, as was discussed in the Creek Pointe matter. What is pertinent to this matter is that it involves single-family home lots and specifically states that each lot is unique, and thus requires individualized proof of damages.[46] Similarly, litigation involving single-family homes, like those at Monarch Estates, cannot be subject to representative actions by the Petitioner, as individualized burdens of proof are required.

c. The differences between single family residences and condominiums are inherent and require a different application under NRS 116.3102(1)(d)

Issues as to common-element claims, common area boundaries, defined concepts in community's governing documents and declaration, and whether a community consists of single family homes versus townhomes or condominiums, effect whether the application of NRS 116.3102(1)(d) is appropriate. Moreover, any application of NRS 1163102(1)(d) needs to coexist and follow the governing documents for the association. For example, a single-family home

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[44] North Carolina Dept. of Transportation v. Stagecoach Village, 622 S.E.2d 142 (N.C. 2005).

[45] Id.

[46] Similar to this Court's analysis and the holding in Shuette v. Beazer Homes Holding Corp.

community with an association may have a "common element" issue with the curbs and gutters as defined by that particular community's governing documents. If the curbs and gutters are allegedly defective and are owned and maintained by the association, it makes sense for the homeowners' association to be allowed to pursue litigation for those common elements on behalf of the entire community under NRS 116.3102(1)(d). This is especially true where the homeowners' association is ultimately responsible for the maintenance of those common elements, a factor which is not present regarding the CMU walls in this matter, where the Petitioner does not have a maintenance responsibility.

By contrast, the extent of common area concerns in a single-family home community differs markedly from those in townhome or condominium-communities. NRS 116.3102 (1)(d) cannot be applied as broadly to single-family home defect suits as it can to condominium litigation. This is not relegating single-family homeowners to a "second class status" as suggested by the Petitioners but is simply a matter of practicality. Simply because a free-standing 3,000 square foot two-story home on a private lot and a 900 square foot condominium on a shared lot with a shared roof, walls and grounds both constitute "residences," this does not mean that such structures are similar or can be similarly treated from an ownership prospective.

When a person owns a single-family home, she owns the entire structure and its appurtenances up to the lot boundary. A person who owns a condominium owns a divisible portion of the structure (generally limited to the airspace with the walls), and shares an interest in certain common elements of that structure with other owners. A single-family homeowner has her own roof and is responsible for maintenance of that roof. A condominium owner does not have his own roof, but instead shares a roof with other like owners which is typically included as a common element area invoking an association's maintenance obligation. Every condominium owner collectively pays to ensure the association's ability to fund any needed upkeep of the common elements. Condominiums have shared construction (i.e., roofs, walls, electrical installation and plumbing systems), which necessitate an association or some sort of common-interest scheme to deal with

issues affecting that shared construction. On the other hand, a group and/or development of single-family homes does not necessarily require an association to assist with maintaining the basic unit of ownership (the fee simple home and its appurtenances). Homeowners' associations in single-family developments generally maintain and address non-city streets, gates, and walkways or other shared facilities, such as parks and green-belts, like the Petitioner at Monarch Estates. Their individual home involvement usually is limited to review and approval of community aesthetical concerns.

Although the above discussion seems elementary and basic, it has become mandatory to state the obvious to demonstrate how the Petitioner continues to confuse these undeniably important distinctions. The Petitioner's statements to the contrary cast a shadow over the real issues at hand and attempt to fool the Court into thinking that distinctions do not matter; that the plain meaning of NRS 116.1101 *et seq.* read as a whole does not matter, and that subtleties in the law carry no import.

Differentiating factors such as common interest versus separate interest, single-family homes versus condominiums, common area defects versus lot owners' defects are important, relevant and directly affect the application of NRS 116.3102(1)(d) in construction defect cases and in this matter. The Petitioner argues that the critical analysis is whether the claims being brought by the Petitioner (landscaping, gates, walls, etc.,) are a part of the "common interest community." By this standard, however, <u>everything</u> would be part of the "common-interest community". This rationale leads us down a dangerous slippery slope where by the homeowner will have lost his fundamental right to decide what will be done to his home, and whom to exclude and alienate from it. This heavy-handed approach is unwarranted and misapplies the true meaning behind NRS 116.1101 *et seq.* Under the Petitioner's rationale, if a construction defect in a homeowners' roof, wall, or plumbing system affects the "common interest community," then they have a right to bring a claim. However, this application was <u>not</u> intended when NRS 116.1101 *et seq* was enacted. A homeowner is still the "king of his castle". As such, he should be the one who makes the decision whether to bring a claim on matters that are personal and <u>independently owned</u> by him (in this case the CMU walls). Moreover, it is extremely unfair to push an entire community of 84 homes into litigation based solely on the whim of

the Petitioner and none of its individual members.

Additionally, while these distinctions regarding single-family homes and condominiums are important. It must be noted these distinctions are not paramount and have to be reconciled with the governing documents of the association. Which in our case state that the CMU walls are "owned" specifically by the homeowner.

B. THE PETITONER'S REQUESTED RELIEF UNDERMINES THIS COURT'S RULING IN SHUETTE V. BEAZER HOMES HOLDING CORP.,[47] AND WOULD PROVIDE A WAY TO END RUN THE CLASS CERTIFICATION PROCESS

1. The Petitioner is Seeking a Ruling Which Would Undermine the Class Certification Process for Construction Defect Cases Set Out in Shutte

No matter how one looks at it, Petitioner's request is the equivalent of asking for class certification to avoid the difficult strictures of NRCP 23. If the Petitioner's strained interpretation of NRS 116.3102(1)(d) is correct, then the Nevada Supreme Court's careful consideration and detailed analysis of the requirements for class certification in Shuette is all for naught. Any construction defect plaintiff's attorney will be able to "end run" NRCP 23 for any litigation involving a community with a homeowners association by simply garnering the support of the homeowners association's board of directors, which is typically comprised of only three to five homeowners out of an entire community. The consent and consensus of a mere fraction of homeowners[48] elected to serve the "common interest" of the community would be allowed the overreaching authority to thrust an entire community of single-family homes into construction defect litigation, regardless of the wishes of the individual owners. The Petitioner's request attempts to lead this Court down a dangerous path to erosion of individually held real property rights and the inevitable denial of due process rights afforded to JOHNSON.

As this Court is well aware: "A class action device was designed as an exception to the usual

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[47] Shuette, 121 Nev. 837 (2005)

[48] Typically, three (3) is the minimum number of persons designated to serve on a homeowners' association's board of directors - a President, Secretary and Treasurer.

rule that litigation is conducted by and on behalf of the individual-named parties only."[49] Shuette, emphasized the need for a thorough and documented NRCP 23 analysis [by the District Court], especially in complex constructional defects cases.[50] According to the Petitioner's utilization of NRS Chapter 116, however, the same result can be achieved without enduring the rigors of NRCP 23. As this Court has opined, such rigorous analysis is especially critical where, as here, imposition of a class action immediately has legal and fiscal consequences to each and every homeowner within Monarch Estates.

2. The Petitioner's Interpretation of 116.3102 (1)(d) Produces Absurd Results and Therefore should not be adopted

Petitioner claims that that the right to proceed in a representative action, not subject to class action requirements under NRCP 23, can be conferred by statute and the practice and procedures for enforcement should be left to the court. Petitioner's rationale would produce absurd results. It is a basic canon of statutory construction that "a statute should always be construed to avoid absurd results."[51] "The cardinal principal of statutory construction is to save and not destroy."[52] The Petitioner's interpretation of NRS 116.3102(1)(d) provides a mechanism to circumvent NRCP 23 and all Nevada case law regarding class certification. In essence, any homeowners' association would be akin to a "class representative" and all that the association would have to do is plead that their suit is on behalf of the entire common-interest community under its authority per NRS 116.3102(1)(d). This ludicrous result would be achieved without the benefit of: (1) motion practice; (2) District Court scrutiny; (3) notice to the homeowners; and (4) informed consent and participation through the opt-out process of class certification. Instead, "class status" would be limited to a simple averment in the initial complaint filed pursuant to NRS Chapter 116. Without question, the ability to achieve class

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[49] General Telephone Company v. Falcon, 457 U.S. 147, 156 (1979)[*internal citations omitted*].

[50] Shuette, 121 Nev. 837 at 37

[51] GES, Inc. v. Corbitt, 21 P.3d 11, 14, 177 Nev. 265 (Nev. 2001).

[52] Bedroc Ltd., LLC v. U.S., 50 F.Supp.2d 1001, 1006 (D.Nev. 1999), *rev'd on other grounds* 541 U.S. 176, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004).

certification in this fashion is clearly preferable to Petitioner, instead of moving for class certification and subjecting their claims to the rigorous analysis required by current Nevada case and NRCP 23, as dictated by Shuette. Obviously, this situation produces an extremely prejudicial result as to JOHNSON that was not intended by the Nevada Legislature nor this Court.

3. Unreasonable Prejudice Will Result to Both JOHNSON and the Homeowners.

Legal mechanisms such as class actions and NRS 116.3102 are not intended to accommodate the convenience of Petitioner, nor should they be used to circumvent legislative designs to facilitate the resolution of disputes. The Petitioner's attempt to substitute NRS 116.3102(1)(d) for class action treatment boils down to nothing more than comfort and convenience for the Petitioner. The convenience to the Petitioner's counsel is clearly the only benefit achieved through such treatment as both individual homeowners and JOHNSON will suffer great prejudice should Petitioner's position be affirmed by this Court.

The taint of community-wide construction defect litigation also impacts property values. Further, such litigation imposes disclosure burdens upon each and every homeowner in a litigated community under NRS 40.688.[53] If the Petitioner's interpretation of NRS Chapter 116 is correct, NRS Chapter116 "certification" would be achieved by improperly thrusting litigation upon 100% of the non-willing Monarch Estates homeowners without their ability to assert constitutional rights.

Petitioner's interpretation of NRS 116.3102(1)(d) would clearly render such statutes unconstitutional in violation of the United States Constitution's Fifth[54] and Fourteenth[55] Amendments – in effect allowing a third-party with no ownership rights in the individual real property to encumber

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[53] As indicated earlier, since none of the homeowners were identified as a "Plaintiff" to this action, they are entitled to decide for themselves whether they wish to take on the obligations of NRS 40.688 and the associated stigma and diminished property value by the sheer fact that construction defect litigation has landed at the gate of the Monarch Estates community.

[54] "No personal shall be...deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. art. V.

[55] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any State deprive any person of life liberty, or property, without due process of law..." U.S. Const. art. XIV, § 1.

such property and institute litigation without the property owner of record's consent. Therefore, it remains entirely inappropriate for the Petitioner to maintain any action alleging deficiencies in non-common areas.[56]

4. **JOHNSON Is Already Being Subjected to Claims Involving the CMU Fencing by Individual Homeowners at Monarch Estates.**

While Petitioner claims a right to subject JOHNSON to a lawsuit based upon a misguided interpretation of NRS Chapter 116.3102(1)(d), it must be noted by this Court that JOHNSON is currently being subjected to a competing lawsuit[57], being brought by individual homeowners in the same development for the same issue, alleged defects to the CMU fencing surrounding Monarch Estates. [58] This Court should be aware of the competing interests at stake between the individual homeowners and the Petitioner and the basic fact that the homeowners themselves agree with JOHNSON's position on standing. The essential question of who has superior standing to maintain an action regarding the CMU walls is one that JOHNSON is being forced to defend on multiple fronts. As discussed earlier in JOHNSON's pleadings. "The doctrine of 'standing' requires the party bringing suit to allege an injury to a legally protected interest, so that the court may decide only specific controversies."[59] "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[60] Based on the CC&R's for the Monarch Estates development, ownership and maintenance responsibilities for the CMU fencing lie

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[56] A homeowner would expect his homeowners association to manage litigation involving common area elements or common interest claims and is placed on notice of his shared ownership, whereas that same owner of a single-family residence has no notice of the possibility that his homeowners association may commandeer the home itself as being at issue in a construction defect lawsuit.

[57] *Marlene Ricci et al. v. Johnson Communities of Nevada, Inc. et al.*, District Court Case No. A537296

[58] Plaintiffs 'Preliminary Defect Report, dated June 30, 2008, attached hereto and incorporated herein for reference as Exhibit "B".

[59] Briarcliffe West Townhomes Owners Ass'n v. Wiseman Construction Co., 454 N.E.2d 363, 365-367 (Ill. App. 1983)(internal citations omitted).

[60] Warth v. Seiden, 422 U.S. 490 498, 95 S.Ct. 2197, 2205

with the individual homeowners [61] and not the Petitioner. Resultantly, the individual homeowners have "standing" and should be the only party allowed to bring this claim. If this Court allows Petitioner to maintain their suit and damages are found. JOHNSON could potentially be forced to defend multiple suits and pay multiple judgments. As such, Petitioner's Writ of Mandamus and Prohibition must be denied.

C. PETITIONER'S ARGUMENT THAT JOHNSON LACKED THE REQUISITE STANDING TO RAISE THE CC&RS IN DEFENSE OF THE PETITIONER'S CLAIMS WAS IMPROPERLY BROUGHT BEFORE THIS COURT.

1. Petitioner's Argument That JOHNSON Lacked the Requiste Standing to Raise the CC&R's in Defense of the Petitioner's Claims Was Not Made Before the District Court.

Petitioner's argument that JOHNSON lacked the requisite standing to raise the CC&R's in defense of the Petitioner's claims was improperly brought before this Court because the Petitioner failed to raise the issue in the pleadings and/or oral argument before the District Court. *See*, *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* (Petitioner App. Exh. 3) and *Plaintiff's Surreply to Defendant's Motion to Dismiss, or in the Alternative Motion for Summary Judgment* (Petitioner App. Exh. 6).

"[P]oints or contentions not raised, or passed over in silence on the original hearing, cannot be maintained..."[62] "A rehearing in the supreme court will not be granted in order to consider points not made in the argument upon which the case was originally submitted."[63] Here, the Petitioner has failed to raise their standing argument before the District Court. Consequently, the Petitioner has waived any right to argue that JOHNSON does not have standing to raise the CC&R's as a defense to the Petitioner's claims pertaining to the CMU walls in front of this Court.

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[61] Monarch Estates Covenants, Conditions and Restrictions, Section 9.6, Pg 32-33, attached hereto and incorporated herein for reference as Exhibit "C".

[62] Chowdry v. NLVH, Inc., 111 Nev. 560, 562, 893 P.2d 385, 387 (1995)(citing Brandon v. West, 29 Nev. 135, 85 P. 449, 88 P. 140 (1906).

[63] Beck v. Thompson, 22 Nev 419, 41 P.1 (1895) (citing Kellogg v.Cochran, 87 Cal.192, 25 P. 677 (1890)

2. **The CC&R Provisions Are Valid and JOHNSON May Rely Upon Provisions Contained in the CC&R'S**

Assuming *arguendo*, that the Petitioner can argue that JOHNSON is precluded from using provisions of the CC&R's as a defense in this matter, this argument is without merit. Petitioner and the homeowners mutually agreed upon the CC&R's and their enforcement since their recording on or about November 14, 1996. As such, a contract was formed binding the HOA and the homeowners at Monarch Estates. The Monarch Estates CC&R's read as follows:

> "The covenants, conditions, restrictions, rights, reservations, easements, and equitable servitudes set forth herein shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the properties, or any part thereof, their heirs, successors and assigns; shall inure to the benefit of every portion of the Properties and any interest therein; and shall inure to the benefit of and be binding upon, and may be enforced by, Declarant, the Association, each Owner and their respective heirs, executors and administrators, and successive Owners and assigns." [64]

Most importantly, the Petitioner does not question the validity of the the CC&R's or question whether the restrictions contained run with the land.[65] The Petitioner absurdly contends that because JOHNSON as the "declarant" no longer owns property within Monarch Estates that JOHNSON may no longer enforce provisions contained in the CC&R's. JOHNSON is not seeking to enforce provisions of the Monarch Estates CC&R's. JOHNSON is merely pointing out that the provisions regarding the ownership and maintenance of the CMU walls rests with the individual homeowners and not the HOA. The issue in this case is whether the association has the right to litigate claims belonging to an individual and pertaining only to that individual's separate property interests, not whether JOHNSON has standing to raise the CC&R's in their defense. Petitioner is attempting to confuse the issues and not dealing with the primary question in this case, which is whether the Petitioner can pursue claims for non-common area elements. Petitioner cites two cases for their proposition that JOHNSON lacks standing to raise the CC&R's. In City of Pasadena v. Gennedy[66],

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[64] Monarch Estates Declarations of Covenants, Conditions and Restrictions at p.2

[65] Petitioners Brief at p. 19:18-19

[66] City of Pasadena v. Gennedy, 125 S.W.3d 687, 698 (Tex.App.2003).

homeowners and the City of Pasadena sued Gennedy to enforce deed restrictions of the Pasadena River Oaks subdivision. In another case cited by Petitioner, Kent v. Koch,[67] a developer attempted to enforce covenants restricting a homeowner from building a fiberglass fence around his property. In both cases, either the developer or the owner was trying to enforce restrictions in the CC&R's. Here, JOHNSON is only attempting to make Petitioner adhere to the provisions set out in the CC&R's which specifically define Petitioner's powers and limitations. As such, Petitioner's argument is without merit and must be completely disregarded by this Court.

IV. CONCLUSION

Based on the foregoing, JOHNSON respectfully requests that this Honorable Court deny Petitioner's Writ of Mandamus and Prohibition.

DATED this 18th day of August, 2008.

Respectfully Submitted,

LEE, HERNANDEZ, KELSEY, BROOKS, GAROFALO & BLAKE

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[67] Kent v. Koch, 166 Cal.App. 2d 579, 333 P.2d 411 (1958).

AFFIDAVIT OF ANDRE V. FARINHA, ESQ

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

ANDRE V. FARINHA, ESQ., being first duly sworn, testifies and states as follows:

1. I am a lawyer, duly licensed to practice law in this State and before this Honorable Court. I am an attorney at the law firm of LEE, HERNANDEZ, KELSEY, BROOKS, GAROFALO & BLAKE, which has been retained to represent JOHNSON COMMUNITIES OF NEVADA, INC. in this action.

2. The instant Answer to the Monarch Estates Homeowners Association's Petition for Writ of Mandamus or Prohibition is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

3. By signing this affidavit I represent that the instant Answer to the Monarch Estates Homeowners Association's Petition for Writ of Mandamus or Prohibition complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the Motion regarding matters in the record be supported by a reference to the page of the appendix where the matter relied on is to be found.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Andre V. Farinha, Esq.

SUBSCRIBED and SWORN to before me
on this 18th day of August, 2008

NOTARY PUBLIC in and for said
COUNTY and STATE

V. GREEN
Notary Public, State of Nevada
Appointment No. 06-104342-1
My Appt. Expires Apr 2, 2010

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of August, 2008, I mailed a copy of the above and foregoing **REAL PARTY IN INTEREST JOHNSON COMMUNITIES OF NEVADA, INC.'S ANSWER TO MONARCH ESTATES HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS AND PROHIBITION** in a sealed envelope, postage prepaid to the following counsel:

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An employee of LEE, HERNANDEZ, KELSEY BROOKS, GAROFALO & BLAKE

HIGH NOON AT ARLINGTON RANCH
PUBLIC OFFERING STATEMENT

ATTACHMENT "C"

HIGH NOON AT ARLINGTON RANCH
SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS & RESTRICTIONS AND RESERVATION OF EASEMENTS

Record Sh Do Not Delete from CCRS

Recording Slip

Escrow No.: 04105382 To: Eileen D

O.K. to Record Y Call Prior to: _____

Document	Names	Recording Info.
1. CCRS DR Horton	High Noon At Arlington Ranch (SUB) 6	Time 8:10 Date MAR 25 2004 Book 20040325 Doc No. 431 Charge 106
2.		Time _____ Date _____ Book _____ Doc No. _____ Charge _____
3.		Time _____ Date _____ Book _____ Doc No. _____ Charge _____
4.		Time _____ Date _____ Book _____ Doc No. _____ Charge _____
5.		Time _____ Date _____ Book _____ Doc No. _____ Charge _____
6.		Time _____ Date _____ Book _____ Doc No. _____ Charge _____

CLARK COUNTY, NEVADA
FRANCES DEANE, RECORDER

RECORDED AT THE REQUEST OF:

UNITED TITLE OF NEVADA

03-25-2004 08:10 STX

BOOK/INSTR:20040325-00427
RESTRICTIONS
PAGE COUNT: 93

FEE: 106.00
RPTT: .00

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APN: ptn. of 176-20-701-001

WHEN RECORDED, RETURN TO:

WILBUR M. ROADHOUSE, ESQ.
Goold Patterson Ales Roadhouse & Day
4496 South Pecos Road
Las Vegas, Nevada 89121
(702) 436-2600

(Space Above Line for Recorder's Use Only)

SUPPLEMENTAL DECLARATION OF

COVENANTS, CONDITIONS & RESTRICTIONS

AND RESERVATION OF EASEMENTS

FOR

HIGH NOON AT ARLINGTON RANCH

(a Nevada Residential Common-Interest Planned Community)
CLARK COUNTY, NEVADA

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SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS & RESTRICTIONS AND RESERVATION OF EASEMENTS FOR **HIGH NOON AT ARLINGTON RANCH**

THIS SUPPLEMENTAL DECLARATION ("Declaration"), made as of the 23 day of March, 2004, by D. R. HORTON, INC., a Delaware corporation ("Declarant");

W I T N E S S E T H :

WHEREAS:

A. Declarant owns certain real property located in Clark County, Nevada, on which Declarant intends to subdivide, develop, construct, market and sell a residential triplex townhome common-interest planned community, to be known as "HIGH NOON AT ARLINGTON RANCH" ("High Noon"); and

B. A portion of said property, as more particularly described in Exhibit "A" hereto, shall constitute the property initially covered by this Declaration ("Original Property"); and

C. Declarant intends that, upon Recordation of this Declaration, the Original Property shall be a Nevada Common-Interest Community, as defined in NRS § 116.021, and a Nevada Planned Community, as defined in NRS § 116.075 ("Community"); and

D. The name of the Community shall be HIGH NOON AT ARLINGTON RANCH, and the name of the Nevada nonprofit corporation organized in connection therewith shall be HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION ("Association"); and

E. Declarant further reserves the right from time to time to add all or any portions of certain other real property, from time to time described more particularly in Exhibit "B" attached hereto ("Annexable Area");

F. The total maximum number of Units that may (but need not) be created in the Community is not to exceed three hundred forty-two (342) aggregate Units ("Units That May Be Created"); and

G. The Original Property and, following annexation from time to time, in Declarant's sole discretion, any and all Annexed Property, shall comprise the "Properties"; and

H. Declarant intends to develop and convey the Properties pursuant to a general plan and subject to certain protective covenants, conditions, restrictions, rights, reservations, easements, equitable servitudes, liens and charges; and

I. In addition to this Declaration, the Properties are subject to: (i) the Recorded Declaration of Covenants, Conditions & Restrictions and Reservation of Easements ("LMA Declaration") for ARLINGTON RANCH Landscape Maintenance Association ("LMA Association"), and (ii) the Recorded Master Declaration ("Master Declaration") for ARLINGTON RANCH NORTH Master Association ("Master Declaration") as said declarations from time to time respectively may be amended and/or restated; and

J. The Master Declaration provides that Supplemental Declarations may be recorded which affect the Districts within the Project (as such terms are defined in the Master Declaration), and that Sub-Associations may be established for the purpose of managing and administering said Districts; and

K. Declarant desires that the Properties be subject to further covenants, conditions and restrictions and reservations of easements, in addition to those set forth in the Master Declaration (taking into account certain unique aspects of the Properties), and that the Association be established (as a Sub-Association under the Master Declaration) for the purpose of assessing, managing and administering High Noon at ARLINGTON RANCH; and

L. Declarant has deemed it desirable, for the efficient preservation of the value and amenities of the Properties pursuant to the provisions of this Declaration, to organize the Association, to which shall be delegated and assigned the powers of owning, maintaining and administering the Common Elements (as defined herein), administering and enforcing the covenants and restrictions, and collecting and disbursing the Assessments and charges hereinafter created. Declarant will cause, or has caused, the Association to be formed for the purpose of exercising such functions; and

M. 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";

NOW, THEREFORE, Declarant hereby declares that all of the Original Property, and, from the date(s) of respective annexation, all Annexed Property (collectively, "Properties") shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the provisions of this Declaration and to the following protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Properties, in furtherance of a general plan for the protection, maintenance, subdivision, improvement and sale and lease of the Properties or any portion thereof. The covenants, conditions, restrictions, reservations, easements, and equitable servitudes set forth in this Declaration shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties, or any part thereof, and their heirs, successors and assigns; shall inure to the benefit of every portion of the Properties and any interest therein; and shall inure to the benefit of and be binding upon, and may be enforced by, Declarant, the Association, each Owner and their respective heirs, executors and administrators, and successive owners and assigns. All Units within this Community shall be used, improved and limited exclusively to single Family residential use.

ARTICLE 1
DEFINITIONS

Section 1.1 "Act" shall mean Nevada's Uniform Common Interest Ownership Act, set forth in Chapter 116 of Nevada Revised Statutes, as the same may be amended from time to time. Except as otherwise indicated, capitalized terms herein shall have the same meanings ascribed to such terms in the Act.

Section 1.2 "Allocated Interests" shall mean the following interests allocated to each Unit: a non-exclusive easement of enjoyment of all Common Elements in the Properties; allocation of Exclusive Use Areas, if any, pursuant to the Plat and as set forth herein; liability for Assessments pro-rata for Common Expenses in the Properties (in addition to any Special Assessments as set forth

herein); and membership and one vote in the Association, per Unit owned, which membership and vote shall be appurtenant to the Unit.

Section 1.3 "Annexable Area" shall mean all or any portion of that real property described in Exhibit "B" attached hereto and incorporated by this reference herein, all or any portion of which real property may from time to time be made subject to this Declaration pursuant to the provisions of Article 15 hereof. At no time shall any portion of the Annexable Area be deemed to be a part of the Community or a part of the Properties until such portion of the Annexable Area has been duly annexed hereto pursuant to Article 15 hereof.

Section 1.4 "Annexed Property" shall mean any and all portion(s) of the Annexable Area from time to time added to the Properties covered by this Declaration, by Recordation of Annexation Amendment(s) pursuant to Article 15 hereof.

Section 1.5 "ARC" shall mean the Architectural Review Committee created pursuant to Article 8 hereof.

Section 1.6 "Articles" shall mean the Articles of Incorporation of the Association as filed or to be filed in the Office of the Nevada Secretary of State, as such Articles may be amended from time to time.

Section 1.7 "Assessments" shall refer collectively to Annual Assessments, and any applicable Capital Assessments and Special Assessments.

Section 1.8 "Assessment, Annual" shall mean the annual or supplemental charge against each Owner and his or her Unit, representing a portion of the Common Expenses, which are to be paid in equal periodic (monthly, quarterly, or annually as determined from time to time by the Board) installments commencing on the Assessment Commencement Date, by each Owner to the Association in the manner and at the times and proportions provided herein.

Section 1.9 "Assessment, Capital" shall mean a charge against each Owner and his or her Unit, representing a portion of the costs to the Association for installation, construction, or reconstruction of any Improvements on any portion of the Common Elements which the Association may from time to time authorize, pursuant to the provisions of this Declaration. Such charge shall be levied among all Owners and their Units in the same proportion as Annual Assessments

Section 1.10 "Assessment, Special" shall mean a charge against a particular Owner and his or her Unit, directly attributable to, or reimbursable by that Owner, equal to the cost incurred by the Association for corrective action performed pursuant to the provisions of this Declaration, or a reasonable fine or penalty assessed by the Association, plus interest and other charges on such Special Assessments as provided for herein.

Section 1.11 "Assessment Commencement Date" shall mean that date, pursuant to Section 6.7 hereof, duly established by the Board, on which Annual Assessments shall commence.

Section 1.12 "Association" shall mean HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, and its successors and assigns. The Association shall be a "Sub-Association" as such term is defined in the Master Declaration.

Section 1.13 "Association Funds" shall mean the accounts created for receipts and disbursements of the Association pursuant to Article 6 hereof.

Section 1.14 "Balcony" shall mean a balcony on a Residential Unit, as constructed by Declarant on certain, but not necessarily all, Units in High Noon. No Owner or Person other than Declarant, in its sole and absolute discretion, shall have any right to construct or shall construct, a Balcony. No item whatsoever shall or may be stored on a Balcony.

Section 1.15 "Beneficiary" shall mean a Mortgagee under a Mortgage or a beneficiary under a Deed of Trust, as the case may be, and the assignees of such mortgagee or beneficiary.

Section 1.16 "Board or Board of Directors" shall mean the Board of Directors of the Association, elected or appointed in accordance with the Bylaws and this Declaration. The Board is an "Executive Board" as defined by NRS § 116.045.

Section 1.17 "Budget" shall mean a written, itemized estimate of the expenses to be incurred by the Association in performing its functions under this Declaration, prepared, and approved pursuant to the provisions of this Declaration, including, but not limited to, Section 6.4 below.

Section 1.18 "Bylaws" shall mean the Bylaws of the Association, which have or will be adopted by the Board, as such Bylaws may be amended from time to time.

Section 1.19 "Close of Escrow" shall mean the date on which a deed is Recorded conveying a Unit from Declarant to a Purchaser.

Section 1.20 "Common Elements" shall mean all portions of the Properties conveyed to and owned by the Association, and all Improvements thereon. Subject to the foregoing, Common Elements may include, without limitation: private main entryway gates for Properties; private entryway monumentation and entry landscaping areas for the Properties; Private Streets; sidewalks; perimeter walls, fences; common landscape and greenbelt areas; hardscape and parking areas (other than Garages); all water and sewer systems, lines and connections, from the boundaries of the Properties, to the boundaries of Units (but not including such internal lines and connections located inside Units); pipes, ducts, flues, chutes, conduits, wires, and other utility systems and installations (other than those located within a Unit, which outlets shall be a part of the Unit), and heating, ventilation and air conditioning, as installed by Declarant or the Association for common use (but not including HVAC which serves a single Unit exclusively). Common Elements shall constitute "Common Elements" with respect to this Community, as set forth in NRS § 116.017.

Section 1.21 "Common Expenses" shall mean expenditures made by, or financial liabilities of, the Association, together with any allocations to reserves, including the actual and estimated costs of: maintenance, insurance, management, operation, repair and replacement of the Common Elements; painting over or removing graffiti on Exterior Walls/Fences, pursuant to Section 9.15 below; unpaid Special Assessments, and/or Capital Assessments; the costs of any commonly metered utilities and any other commonly metered charges for the Units, and Common Elements (including, but not necessarily limited to, the reasonably allocated costs of master water supply and master sewage disposal, if any, and costs of master trash pickup and disposal, if any); costs of management and administration of the Association, including, but not limited to, compensation paid by the Association to the Manager, accountants, attorneys, consultants, and employees; costs of all utilities, landscaping, and other services benefiting the Properties; costs of fire, casualty and liability insurance, workers' compensation insurance, and any other insurance covering the Association, Common Elements, or Properties, or deemed prudent and necessary by the Board; costs of bonding the Board, Officers, Manager, or any other Person handling the funds of the Association; any statutorily required ombudsman fees; taxes paid by the Association (including, but not limited to, any and all unsegregated

or "blanket" real property taxes for all or any portions of the Properties); amounts paid by the Association for discharge of any lien or encumbrance levied against the Common Elements or Properties, or deemed prudent and necessary by the Board; costs of any other item or items incurred by the Association for any reason whatsoever in connection with the Properties, for the benefit of the Owners; prudent reserves; and any other expenses for which the Association is responsible pursuant to this Declaration or pursuant to any applicable provision of NRS Chapter 116.

Section 1.22 "Community" shall mean a Common-Interest Community, as defined in NRS § 116.021, and a Planned Community, as defined in NRS § 116.075.

Section 1.23 "County" shall mean Clark County, Nevada.

Section 1.24 "Declarant" shall mean D. R. HORTON, INC., a Delaware corporation, and its successors and any Person(s) to which it shall have assigned any rights hereunder by express written and Recorded assignment (but specifically excluding Purchasers, as defined in NRS §116.079).

Section 1.25 "Declarant Control Period" shall have the meaning set forth in Section 3.7 below.

Section 1.26 "Declaration" shall mean this instrument as it may be amended from time to time. This Declaration is a "Supplemental Declaration" as such is defined in the Master Declaration.

Section 1.27 "Deed of Trust" shall mean a mortgage or deed of trust, as the case may be.

Section 1.28 "Director" shall mean a duly appointed or elected and current member of the Board of Directors.

Section 1.29 "Dwelling" shall mean a Residential Unit, designed and intended for use and occupancy as a residence by a single Family.

Section 1.30 "Eligible Holder," shall mean each Beneficiary, insurer and/or guarantor of a first Mortgage encumbering a Unit, which has filed with the Board a written request for notification as to relevant matters as specified in this Declaration.

Section 1.31 "Exclusive Use Areas" shall mean the entryways, and/or parking space(s), if any, other than Garages, shown as exclusive use areas on the Plat, and allocated exclusively to individual Units, together with such HVAC designed to serve a single Unit, but located outside of the Unit's boundaries. Use, maintenance, repair and replacement of Exclusive Use Areas shall be as set forth in this Declaration. Parking in designated areas shall be limited and governed pursuant to this Declaration, including, but not limited to, Sections 2.2, 2.17, and 10.18 below.

Section 1.32 "Exterior Wall(s)/Fence(s)" shall mean the exterior only face of Perimeter Walls/Fences (visible from public streets outside of and generally abutting the exterior boundary of the Properties).

Section 1.33 "Family" shall mean (a) a group of natural persons related to each other by blood or legally related to each other by marriage or adoption, or (b) a group of natural persons not all so related, but who maintain a common household in a Dwelling, all as subject to and in compliance with all applicable federal and Nevada laws and local health codes and other applicable Ordinances.

Section 1.34 "FHA" shall mean the Federal Housing Administration.

Section 1.35 "FHLMC" shall mean the Federal Home Loan Mortgage Corporation (also known as The Mortgage Corporation) created by Title II of the Emergency Home Finance Act of 1970, and any successors to such corporations.

Section 1.36 "Fiscal Year" shall mean the twelve (12) month fiscal accounting and reporting period of the Association selected from time to time by the Board.

Section 1.37 "FNMA" or "GNMA". FNMA shall mean the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and any successors to such corporation. GNMA shall mean the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and any successors to such association.

Section 1.38 "Garage Component" or "Garage" shall mean a garage, as shown on the Plat and/or expressly designated by Declarant as a Garage, which is part of a designated Unit. Subject to Section 2.15 and other provisions of this Declaration and the Plat, the Garage Component shall mean a 3-dimensional figure (associated with a designated Unit), the horizontal and vertical dimensions of which are delineated on the Plat. A Garage Component shall not be deemed independently to constitute a Unit, but shall be a part of and appurtenant to a Unit as designated by Declarant pursuant to this Declaration.

Section 1.39 "Governing Documents" shall mean the Declaration, Articles, Bylaws, Plat, and the Rules and Regulations, (and, where applicable or required within the context, the Master Association Documents and/or LMA Association Documents) Any irreconcilable inconsistency among the Governing Documents shall be governed pursuant to Section 17.8 and 17.9, below.

Section 1.40 "HVAC" shall mean heating, ventilation, and/or air conditioning equipment and systems. HVAC, located on easements in Common Elements, which serve one Unit exclusively, shall constitute Exclusive Use Areas as to such Unit, pursuant to Sections 2.13 and 2.14, below.

Section 1.41 "Identifying Number", pursuant to NRS § 116.053, shall mean the number which identifies a Unit on the Plat.

Section 1.42 "Improvement" shall mean any structure or appurtenance thereto of every type and kind, whether above or below the land surface, located in the Properties, including but not limited to Triplex Buildings and other structures, walkways, sprinkler pipes, entry way, parking areas, walls, parking areas perimeter walls, hardscape, Private Streets, sidewalks, curbs, gutters, fences, screening walls, block walls, retaining walls, stairs, landscaping, hardscape features, hedges, windbreaks, plantings, planted trees and shrubs, poles, signs, and so on.

Section 1.43 "Living Component" shall mean the portion of a Unit other than: (a) Garage Component, and (b) (if applicable) the Yard Component.

Section 1.44 "LMA Association" shall mean ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada non-profit corporation, its successors or assigns. The rights and duties of the LMA Association are as set forth in the LMA Declaration.

Section 1.45 "LMA Association Documents" (sometimes "LMA Governing Documents") shall mean the LMA Declaration, the LMA Association Articles of Incorporation and Bylaws, and the LMA Association Rules (if any).

Section 1.46 "LMA Property" shall mean the common elements, if any, owned by the LMA Association. LMA Property shall be subject to and governed by the LMA Association Documents.

Section 1.47 "LMA Declarant" shall mean the declarant under the LMA Declaration.

Section 1.48 "LMA Declaration" shall mean the Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for ARLINGTON RANCH Landscape Maintenance Association, Recorded by LMA Declarant, as the same from time to time may be amended and/or restated.

Section 1.49 "Manager" shall mean the Person, if any, whether an employee or independent contractor, hired as such by the Association, acting through the Board, and delegated the authority to implement certain duties, powers or functions of the Association as provided in this Declaration.

Section 1.50 "Master Association" shall mean the ARLINGTON RANCH NORTH MASTER ASSOCIATION, a Nevada non-profit corporation, and its successors or assigns. The rights and duties of the ARLINGTON RANCH NORTH Master Association are as set forth in the ARLINGTON RANCH NORTH Master Declaration.

Section 1.51 "Master Association Documents" (sometimes "Master Governing Documents") shall mean the ARLINGTON RANCH NORTH Master Declaration, the ARLINGTON RANCH NORTH Master Association Articles of Incorporation and Bylaws, and the ARLINGTON RANCH NORTH Master Association Rules (if any).

Section 1.52 "Master Association Property" shall mean the common elements, if any, owned by the Master Association. Master Association Property shall be subject to and governed by the Master Association Documents.

Section 1.53 "Master Community" shall mean the ARLINGTON RANCH NORTH Master Community, subject to the Master Declaration and other Master Association Documents.

Section 1.54 "Master Declarant" shall mean the declarant under the ARLINGTON RANCH NORTH Master Declaration.

Section 1.55 "Master Declaration" shall mean the Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for ARLINGTON RANCH NORTH Master Association, Recorded by Master Declarant, as said instrument from time to time may be amended and/or restated.

Section 1.56 "Member," "Membership." "Member" shall mean any Person holding a membership in the Association, as provided in this Declaration. "Membership" shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations, including liability for Assessments, contained in this Declaration and the Articles and Bylaws.

Section 1.57 "Module" shall mean and refer to each Module as designated as such on the Plat. The Module includes all land and improvements (whether now or hereafter associated within its boundaries). Each Module typically includes one each of the Residential Units numbered 1, 2, and 3, as shown on the Plat, including associated Garage Components, and (with respect to Units 2 and 3) Yard Components associated therewith.

Section 1.58 "Mortgage," "Mortgagee," "Mortgagor." "Mortgage" shall mean any unreleased mortgage or deed of trust or other similar instrument of Record, given voluntarily by an Owner, encumbering his or her Unit to secure the performance of an obligation or the payment of a debt, which will be released and reconveyed upon the completion of such performance or payment of such debt. The term "Deed of Trust" or "Trust Deed" when used herein shall be synonymous with the term "Mortgage." "Mortgage" shall not include any judgment lien, mechanic's lien, tax lien, or other similarly involuntary lien on or encumbrance of a Unit. The term "Mortgagee" shall mean a Person to whom a Mortgage is made and shall include the beneficiary of a Deed of Trust. "Mortgagor" shall mean a Person who mortgages his or her Unit to another (i.e., the maker of a Mortgage), and shall include the trustor of a Deed of Trust. "Trustor" shall be synonymous with the term "Mortgagor"; and "Beneficiary" shall be synonymous with "Mortgagee." For purposes of this Declaration, "first Mortgage" or "first Deed of Trust" shall mean a Mortgage or Deed of Trust with first priority over other mortgages or deeds of trust on a Unit in the Properties and "first Mortgagee" or "first Beneficiary" shall mean the holder of a first Mortgage or Beneficiary under a first Deed of Trust.

Section 1.59 "Notice and Hearing" shall mean written notice and a hearing before the Board, at which the Owner concerned shall have an opportunity to be heard in person, or by counsel at Owner's expense, in the manner further provided in the Bylaws.

Section 1.60 "Officer" shall mean a duly elected or appointed and current officer of the Association.

Section 1.61 "Ordinance(s)" shall mean all applicable ordinances and rules of the County, and/or other applicable government with jurisdiction.

Section 1.62 "Original Property" shall mean that real property described on Exhibit "A" attached hereto and incorporated by this reference herein, which shall be the initial real property made subject to this Declaration, immediately upon the Recordation of this Declaration.

Section 1.63 "Owner" shall mean the Person or Persons, including Declarant, holding fee simple interest of Record to any Unit. The term "Owner" shall include sellers under executory contracts of sale, but shall exclude Mortgagees. Pursuant to Article 3 hereof, a vendee under an installment land sale contract shall be deemed an "Owner" hereunder, provided the Board has received written notification thereof, executed by both vendor and vendee thereunder.

Section 1.64 "Patio" shall mean a covered patio within a Yard Component. No Owner or Person other than Declarant (in its sole and absolute discretion) shall have any right to construct, or shall construct, a Patio.

Section 1.65 "Perimeter Wall(s)/Fence(s)" shall mean the walls and/or fences located generally around the exterior boundary of the Properties, constructed or to be constructed by or with the approval of Declarant.

Section 1.66 "Person" shall mean a natural individual, a corporation, or any other entity with the legal right to hold title to real property.

Section 1.67 "Plat" shall mean the final plat map of HIGH NOON AT ARLINGTON RANCH, on file in Book 115 of Plats, Page 21, in the Office of the County Recorder, Clark County, Nevada, and any and all other plat maps of the Community Recorded by Declarant, as said plat maps from time to time may be amended or supplemented of Record by Declarant.

Section 1.68 "Private Streets" shall mean all private streets, rights of way, street scapes, and vehicular ingress and egress easements in the Properties, shown as such on the Plat, which Private Streets shall be Common Elements.

Section 1.69 "Properties" shall mean all of the Original Property described in Exhibit "A," attached hereto, together with such portions of the Annexable Area, described in Exhibit "B" hereto, as may hereafter be annexed from time to time thereto pursuant to Article 15 of this Declaration.

Section 1.70 "Purchaser" shall have that meaning as provided in NRS § 116.079.

Section 1.71 "Record," "Recorded," "Filed," or "Recordation" shall mean, with respect to any document, the recordation of such document in the official records of the County Recorder of Clark County, Nevada.

Section 1.72 "Resident" shall mean any Owner, tenant or other person, who is physically residing in a Unit.

Section 1.73 "Residential Unit" shall mean a Unit , as set forth in Section 1.79, below.

Section 1.74 "Rules and Regulations" shall mean the rules and regulations, if any, adopted by the Board pursuant to the Declaration and Bylaws, as such Rules and Regulations from time to time may be amended.

Section 1.75 "Sight Visibility Restriction Areas" shall mean those areas, if any, which are or may be located on portions of Common Elements and/or Units, identified on the Plat as "Sight Visibility Restriction Easements," in which the height of landscaping and other sight restricting Improvements (other than official traffic control devices) shall be limited to the maximum permitted height as may be set forth on the Plat.

Section 1.76 "Triplex Building" shall mean each residential triplex building, housing the Living Components and Garage Components of three attached Residential Units within the Properties, as shown on the Plat.

Section 1.77 "Unit" or "Residential Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plat), and shall include all Improvements thereon. As set forth in the Plat, 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. Each Residential Unit shall be a separate freehold estate (not owned in common with the other Owners of Units in the Module or Properties), as separately shown, numbered and designated in the Plat. Units shall include appurtenant Garage Components, and certain (presently, Units 2 and 3 in each Module), but not all Units shall include Yard Components. Declarant discloses that Declarant has no present intention for any Unit 1 in a Module to have any Yard Component. The boundaries of each Unit are set forth in the Plat, and include the above-described area and all applicable Improvements within such area, which 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.

Section 1.78 "Units That May Be Created" shall mean the total "not to exceed" maximum number of aggregate Units within the Original Property and the Annexable Area (which Declarant has reserved the right, in its sole discretion, to create) (i.e., 342 Units), subject to Section 14.1(h) below. Such number shall not be increased without written consent of the Master Declarant.

Section 1.79 "VA" shall mean the United States Department of Veterans Affairs.

Section 1.80 "Yard Component" shall mean (typically with respect to Units 2 and 3 in each Module) a 3-dimensional figure lying outside of and contiguous to the Triplex Building in a Module, the vertical boundaries of each are identical to the Module, and the horizontal boundaries of which are as set forth on the Plat. Declarant does not presently intend to construct any Yard Component with respect to Unit 1 in any Module.

Any capitalized term not separately defined in this Declaration shall have the meaning ascribed thereto in applicable provision of NRS Chapter 116.

ARTICLE 2
OWNERS' PROPERTY RIGHTS; EASEMENTS

Section 2.1 Ownership of Unit; Owners' Easements of Enjoyment. Title to each Unit in the Properties shall be conveyed in fee to an Owner. Ownership of each Unit within the Properties shall include (a) a Residential Unit, (b) one Membership in the Association, and (c) any easements appurtenant to such Unit over the Common Elements as described in this Declaration, the Plat, and/or in the deed to the Unit. Each Owner shall have a non-exclusive right and easement of ingress and egress and of use and enjoyment in, to and over the Common Elements, including, but not limited to, Private Streets, which easement shall be appurtenant to and shall pass with title to the Owner's Unit, subject to the following:

(a) the right of the Association to reasonably limit the number of guests and tenants an Owner or his or her tenant may authorize to use the Common Elements;

(b) the right of the Association to establish uniform Rules and Regulations regarding use, maintenance and/or upkeep of the Common Elements and to amend same from time to time (such Rules and Regulations may be amended upon a majority vote of the Board), provided that such Rules and Regulations shall not irreconcilably conflict with this Declaration or the other Governing Documents;

(c) the right of the Association in accordance with the Declaration, Articles and Bylaws, with the vote of at least two-thirds (2/3) of the voting power of the Association and a majority of the voting power of the Board, to borrow money for the purpose of improving or adding to the Common Elements, and, in aid thereof, and subject further to the Mortgagee protection provisions of Article 13 of this Declaration, to mortgage, pledge, deed in trust, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred, provided that the rights of such Mortgagee shall be subordinated to the rights of the Owners;

(d) subject to any and all applicable provisions of the Master Declaration, and subject further to the voting and approval requirements set forth in Subsection 2.1(c) above, and the provisions of Article 13 of this Declaration, the right of the Association to dedicate, release, alienate, transfer or grant easements, licenses, permits and rights of way in all or any portion of the Common Elements to any public agency, authority, utility or other Person for such purposes and subject to such conditions as may be agreed to by the Members;

(e) subject to the provisions of Article 14 hereof, the right of Declarant and its sales agents, representatives and prospective Purchasers, to the non-exclusive use of the Common Elements, without cost, for access, ingress, egress, use and enjoyment, in order to show and dispose of the Properties and/or any other development(s), until the last Close of Escrow for the marketing and/or sale of a Unit in the Properties or such other development(s); provided, however, that such use shall not unreasonably interfere with the rights of enjoyment of the other Owners as provided herein;

(f) the other easements, and rights and reservations of Declarant as set forth in Article 14 and elsewhere in this Declaration;

(g) the right of the Association (by action of the Board) to reconstruct, replace or refinish any Improvement or portion thereof upon the Common Elements in accordance with the original design, finish or standard of construction of such Improvement, or of the general Improvements within the Properties, as the case may be; and if not materially in accordance with such original design, finish or standard of construction, only with the vote or written consent of Owners holding seventy-five percent (75%) of the voting power of the Association, and the vote or written consent of a majority of the voting power of the Board, and the approval of a majority of the Eligible Holders;

(h) the right of the Association, acting through the Board, to replace destroyed trees or other vegetation and to plant trees, shrubs and other ground cover upon any portion of the Common Elements;

(i) the right of the Association, acting through the Board, to place and maintain upon the Common Elements such signs as the Board reasonably may deem appropriate for the identification, marketing, advertisement, sale, use and/or regulation of the Properties or any other project of Declarant;

(j) the right of the Association, acting through the Board, to reasonably restrict access to and use of portions of the Common Elements;

(k) the right of the Association, acting through the Board, to reasonably suspend voting rights and to impose fines as Special Assessments, and to suspend the right of an Owner and/or Resident to use Common Elements, for nonpayment of any Assessment levied by the Association against the Owner's Unit, or if an Owner or Resident is otherwise in breach of obligations imposed under the Governing Documents;

(l) the obligation of all Owners to observe "quiet hours" in the Common Elements, during the hours of 10:00 p.m. until 7:00 a.m. (or such other hours as shall be reasonably established from time to time by the Board in advance) during which "quiet hours," loud music, loud talking, shouting, and other loud noises shall not be permitted (whether inside or outside a Living Component, Garage Component, and/or Yard Component, or on Common Elements);

(m) the right of all Owners to similarly use and enjoy the Common Elements, subject to the Governing Documents;

(n) the exclusive rights of individual Units (and the Owners thereof) with regard to Limited Common Elements, as set forth in this Declaration;

(o) the obligations and covenants of Owners as set forth in Article 9 and elsewhere in this Declaration;

(p) the use restrictions set forth in Article 10 and elsewhere in this Declaration;

(q) the easements reserved in this Declaration, including, but not necessarily limited to, the easements reserved in various sections of this Article 2, and/or any other provision of this Declaration; and

(r) the restrictions, prohibitions, limitations, and/or reservations set forth in this Declaration.

Section 2.2 Easements for Parking. Subject to the use restrictions set forth in Article 10, below, the Association, through the Board, is hereby empowered to establish "parking" and/or "no parking" areas within the Common Elements, to accommodate ordinary and reasonable guest parking, and to establish Rules and Regulations governing such parking and to reasonably enforce such parking limitations and rules (by all means which would be lawful for such enforcement on public streets), including the removal of any violating vehicle by those so empowered, at the expense of the Owner of the violating vehicle. If any temporary guest or recreational parking is permitted within the Common Elements, such parking shall be permitted only within any spaces and areas clearly marked for such purpose. Without limiting the foregoing, no vehicle may be parked in the same Association parking space for more than two consecutive days, and no Association parking space may be used for any storage purpose whatsoever.

Section 2.3 Easements for Vehicular and Pedestrian Traffic. In addition to the general easements for use of the Common Elements reserved herein, there are hereby reserved to Declarant and all future Owners, and each of their respective agents, employees, guests, invitees and successors, non-exclusive, appurtenant easements for vehicular and pedestrian traffic over the private main entry gate area and all Private Streets and common walkways within the Properties, subject to the parking provisions set forth in Section 2.2, above, and the use restrictions set forth in Article 10, below.

Section 2.4 Easement Right of Declarant Incident to Construction, Marketing and/or Sales Activities. An easement is hereby reserved by and granted to Declarant, its successors and assigns, and their respective officers, managers, employees, agents, contractors, sales representatives, prospective purchasers of Units, guests, and other invitees, for access, ingress, and egress over, in, upon, under, and across the Properties, including Common Elements, including but not limited to the right to store materials thereon and to make such other use thereof as may be reasonably necessary or incidental to Declarant's use development, advertising, marketing and/or sales related to the Properties, or any portions thereof, or any other project of Declarant; provided, however, that no such rights or easements shall be exercised by Declarant in such a manner as to interfere unreasonably with the occupancy, use, enjoyment, or access by any Owner, his Family, guests, or invitees, to or of that Owner's Unit, or the Common Elements. The easement created pursuant to this Section 2.4 is subject to the time limit set forth in Section 14.1(a) hereof. Without limiting the generality of the foregoing, until such time as the Close of Escrow of the last Unit in the Properties, Declarant reserves the right to control any and all entry gate(s) to the Properties, and neither the Association nor any one or more of the Owners shall at any time or in any way, without the prior written approval of Declarant in its discretion, cause any entry gate in the Properties to be closed during Declarant's marketing or sales hours (including on weekends and holidays), or shall in any other way impede, hinder, obstruct, or interfere with Declarant's marketing, sales, and/or construction activities.

Section 2.5 Easements for Public Service Use. In addition to the foregoing easements over the Common Elements, there shall be and Declarant hereby reserves and covenants for itself and all future Owners within the Properties, easements for: (a) placement, use, maintenance and/or

replacement of any fire hydrants on portions of Common Elements, and other purposes regularly or normally related thereto; and (b) local governmental, state, and federal public services, including but not limited to, the right of postal, law enforcement, and fire protection services and their respective employees and agents, to enter upon any part of the Common Elements or any Unit, for the purpose of carrying out their official duties.

Section 2.6 Easements for Water, Sewage, Utility and Irrigation Purposes. In addition to the foregoing easements, there shall be and Declarant hereby reserves and covenants for itself, the Association, and all future Owners within the Properties, easements reasonably upon, over and across Common Elements and portion of Units, for installation, maintenance, repair and/or replacement of public and private utilities, electric power, telephone, cable television, water, sewer, and gas lines and appurtenances (including but not limited to, the right of any public or private utility or mutual water and/or sewage district, of ingress or egress over the Common Elements and portions of Units; and easements for purposes of reading and maintaining meters, and using and maintaining any fire hydrants located on the Properties). There is hereby created a blanket easement in favor of Declarant and the Association upon, across, over, and under all Units and the Common Elements, for the installation, replacement, repair, and maintenance of utilities (including, but not limited to, water, sewer, gas, telephone, electricity, "smart" data cabling, if any, and master and cable television systems, if any), provided that said easement shall not extend beyond, across, over, or under any structure located on any Unit. By virtue of this easement, it shall be expressly permissible to erect and maintain the necessary facilities, equipment and appurtenances in the Properties and to install, repair, and maintain water, sewer and gas pipes, electric, telephone and television wires, circuits, conduits and meters. Notwithstanding anything to the contrary contained in this Section, no sewer, electric, water or gas lines or other utilities or service lines may be installed or relocated within the Properties until the Close of Escrow of the last Unit in the Properties, except as approved by Declarant. This easement shall in no way affect any other Recorded easements in the Properties. There is also hereby reserved to Declarant during such period the non-exclusive right and power to grant such specific easements as may be necessary in the sole discretion of Declarant in connection with the orderly development of any property in the Properties. Any damage to a Unit resulting from the exercise of the easements described in this Section shall promptly be repaired by, and at the expense of, the Person exercising the easement. The exercise of these easements shall not extend to permitting entry into the structures on any Unit, nor shall it unreasonably interfere with the use of any Unit and, except in an emergency, entry onto any Unit shall be made only after reasonable notice to the Owner or occupant thereof. Declarant further reserves and covenants for itself and the Association, and their respective agents, employees and contractors, easements over the Common Elements and all Units, for the control, installation, maintenance, repair and replacement of water and/or sewage lines and systems for watering or irrigation of any landscaping on, and/or sewage disposal from or related to Common Elements. In the event that any utility exceeds the scope of this or any other easement reserved in this Declaration, and causes damage to property, the Owner of such property shall pursue any resultant claim against the offending utility, and not against Declarant or the Association. Without limiting the foregoing, each Owner acknowledges that there will be only one sewer lateral servicing each three attached Residential Units, and that the backflow preventor and sewer cleanout for all of the Residential Units in a Triplex Building may be located in the Garage of one of the Residential Units. In the event that such backflow preventor or sewer cleanout is so located, the Owner of such Garage shall provide the Owners and/or Residents of the other two Units in the Module with reasonable rights and access within such Garage as may be necessary to reasonably use and maintain and repair such devices. In the event "emergency" access to or over a Garage is reasonably necessary, and the Owner of the Garage cannot reasonably be contacted, the Association shall have an easement over and upon such Garage, to reasonably remediate such "emergency" condition.

Section 2.7 Additional Reservation of Easements. Declarant hereby expressly reserves for the benefit of each Owner and his or her Unit, reciprocal, non-exclusive easements over the adjoining Unit(s), for the support, control, maintenance and repair of the Owner's Unit and the utilities serving such Unit. Declarant further expressly reserves, for the benefit of all of the real property in the Properties, and for the benefit of all of the Units, the Association and the Owners, reciprocal, non-exclusive easements over all Units and the Common Elements, for the control, installation, maintenance and repair of utility services and drainage facilities serving any portion of the Properties (which may be located on portions of Units), for drainage of water resulting from the normal use thereof or of neighboring Units and/or Common Elements, for the inspection, painting, any required customer service work and/or maintenance and/or repair of those Exclusive Use Areas for which the Association is expressly responsible pursuant to this Declaration, and for painting, maintenance and repair of any Unit or portion thereof, pursuant to the Declaration. In the event that any utility or third Person exceeds the scope of any easement pertaining to the Properties, and thereby causes bodily injury or damage to property, the injured or affected Owner or Resident shall pursue any and all resultant claims against the offending utility or third Person, and not against Declarant or the Association. In the event of any minor encroachment of a Unit (including Yard Component, if applicable) upon the Common Elements (or vice versa), or other Unit, as a result of initial construction, or as a result of reconstruction, repair, shifting, settlement or movement of any portion of the Properties, a valid easement for minor encroachment and for the maintenance of the same shall exist, so long as the minor encroachment exists. Declarant and each Owner of a Unit, shall have an easement appurtenant to such Unit over the Unit line to and over the adjacent Unit and/or adjacent Common Elements, for the purposes of accommodating any natural movement or settling of any Unit, any encroachment of any Unit due to minor engineering or construction variances, and any encroachment of eaves, roof overhangs, patio walls and architectural features comprising parts of the original construction of any Unit. Declarant further reserves (a) a non-exclusive easement on and/or over the Properties, and all portions thereof (including Common Elements and Units), for the benefit of Declarant and its agents and/or contractors, for any inspections and/or required repairs, and (b) a non-exclusive easement on and/or over the Properties, and all portions thereof (including Common Elements and Units), for the benefit (but not the obligation) of Declarant, the Association, and their respective agents, contractors, and/or any other authorized party, for the maintenance and/or repair of any and all landscaping and/or other Improvements located on the Common Elements and/or Units.

Section 2.8 Encroachments. The physical boundaries of an existing Unit (including Yard Component, if applicable), or of a Unit reconstructed in substantial accordance with the original plans thereof, shall be conclusively presumed to be its boundaries rather than any metes and bounds expressed in the Plat or in an instrument conveying, granting or transferring a Unit, regardless of settling or lateral movement and regardless of minor variances between boundaries shown on the Plat or reflected in the instrument of grant, assignment or conveyance and the actual boundaries existing from time to time.

Section 2.9 Easement Data. The Recording data for all easements and licenses reserved pursuant to the terms of this Declaration is the same as the Recording data for this Declaration. The Recording data for any and all easements and licenses shown on and created by the Plat is the same as the Recording data for the Plat.

Section 2.10 Owners' Right of Ingress and Egress. Each Owner shall have an unrestricted right of ingress and egress to his, Unit reasonably over and across the Common Elements, which right shall be appurtenant to the Unit, and shall pass with any transfer of title to the Unit.

Section 2.11 No Transfer of Interest in Common Elements. No Owner shall be entitled to sell, lease, encumber, or otherwise convey (whether voluntarily or involuntarily) his interest in any of the

Common Elements, or in any part of the component interests which comprise his Unit, except in conjunction with a conveyance of his Unit. No transfer of Common Elements, or any interest therein, shall deprive any Unit of its rights of access. Any attempted or purported transaction in violation of this provision shall be void and of no effect.

Section 2.12 Ownership of Common Elements. Title to the Private Streets and other Common Elements shall be conveyed to and held by the Association; provided that each Owner, by virtue of Membership in the Association, shall be entitled to non-exclusive use and enjoyment of the Private Streets and other Common Elements, subject to the Governing Documents. The Association shall own the Common Elements. Except as otherwise limited in this Declaration, each Owner shall have the right to use the Common Elements for all purposes incident to the use and occupancy of his Unit as a place of residence, and such other incidental uses permitted by this Declaration, without hindering or encroaching upon the lawful rights of the other Owners, which right shall be appurtenant to and run with the Unit.

Section 2.13 Exclusive Use Areas. Each Owner of a Unit shall have an exclusive easement for the use of the entry designed for the sole use of said Unit, as an Exclusive Use Area, appurtenant to the Unit. The foregoing easements shall not entitle an Owner to construct anything or to change any structural part of the easement area. Certain HVAC serving one Unit exclusively are also Exclusive Use Areas, as set forth in Section 2.14 below.

Section 2.14 HVAC. Easements are hereby reserved for the benefit of each Unit, Declarant, and the Association, for the purpose of maintenance, repair and replacement of any heating, ventilation, and/or air conditioning and/or heating equipment and systems ("HVAC") located in the Common Elements; provided, however, that no HVAC shall be placed in any part of the Common Elements other than its original location as installed by Declarant, unless the approval of the Board is first obtained. Notwithstanding the foregoing or any other provision in this Declaration, any HVAC which is physically located within the Common Elements, but which serves an individual Unit exclusively, shall constitute an Exclusive Use Area as to the Unit exclusively served by such HVAC, and the Owner of the Unit (and not the Association) shall have the duty, at the Owner's cost, to maintain, repair and replace, as reasonably necessary, the HVAC serving the Unit, subject to the original appearance and condition thereof as originally installed by Declarant, subject to ordinary wear and tear. Notwithstanding the foregoing, concrete pads underneath HVAC shall not constitute part of HVAC, but shall be deemed to be Common Elements.

Section 2.15 Garages. Declarant shall convey fee title to Garages, as part of Residential Units to which appurtenant, to Owners, provided that each such Garage shall be deemed to be appurtenant to the designated Unit, and shall not be deemed to independently constitute a Unit. The boundaries and dimensions of a Garage Component shall be as set forth in the Plat, and are subject to the boundaries and dimensions of the staircase (if applicable) and other portions of the adjoining Residential Unit; provided that maintenance and repair obligations related thereto shall be as set forth in Section 9.3(a), below. Upon conveyance of a Garage by Declarant to a Purchaser in fee, the Garage shall be deemed forever after to be an inseparable part of the Unit to which appurtenant. In no event shall the Garage thereafter be conveyed, encumbered, or released from any lien except in conjunction with, and as an integral part of, the conveyance, encumbrance, or release of said Unit. Any purported conveyance, encumbrance, or release of a Garage, separate from the entire Unit, shall be void and of no effect. Each Owner of a Garage Component shall have an easement over the walls and ceiling of the neighboring Residential Unit 1 adjacent to such Garage Component for the purpose of attaching screws, fasteners, fixtures, shelves, cabinets and garage door openers to the walls and ceilings of the Garage Component, and shall have an easement over portions of the adjoining Residential Unit for purposes of reasonable access to and maintenance and repair of electrical, sewer, and other utility lines

servicing such Garage Component. Without limiting the foregoing, each Owner of a Residential Unit shall have an easement over the adjoining Garage Component for purposes of reasonable access to and maintenance and repair of the staircase or upstairs area, or electrical, sewer, and other utility lines, and sewer cleanouts, servicing or related to such Residential Unit. Additionally, each Owner of a Unit 2 and/or Unit 3 within a Triplex Building shall have an easement over the portions of Unit 1 immediately surrounding the Garage Component in Unit 2 and/or Unit 3, for reasonable usage thereof. The easement rights set forth in this Section are subject to the restrictions set forth in Article 10 (including, but not limited to, restrictions pertaining to "noise", "nuisance", and "vibrations").

Section 2.16 Driveway Areas. No parking shall be permitted in any driveway area (provided that temporary loading and unloading may be permitted on an occasional basis), unless specifically approved in advance and in writing by the Board, and then subject to: (a) Section 10.18 below, (b) any limitations or prohibitions imposed by Declarant in its sole discretion pursuant to Section 14.1 below, and/or (c) the Rules and Regulations. Neither Declarant nor the Association (nor any officer, manager, agent, or employee respectively thereof) shall be liable for damage to or theft of any vehicle or any contents thereof.

Section 2.17 Cable Television. Each Owner, by acceptance of a deed to his Unit, acknowledges and agrees that, in the event Declarant has pre-wired and installed a complete cable television system ("CATV") within the Unit (including, but not limited to, cable television outlets for the Unit), such CATV system and all components as so installed, shall not constitute the property of the Owner, but shall be the sole property of Declarant or Master Declarant (or, at their option, of a cable company selected thereby), and there shall be, and hereby is, reserved a non-exclusive easement in gross on, over, under or across the Unit for purposes of installation and maintenance of such cable television equipment, for the benefit of Declarant, Master Declarant, or such other cable company as may be selected respectively thereby. Without limiting the foregoing, Declarant or the Association may, but are in no way obligated to, provide a master antenna or cable television antenna for use of all or some Owners, and, in such event, Declarant may grant easements for maintenance of any such master or cable television service.

Section 2.18 Waiver of Use. No Owner may exempt himself from personal liability for assessments duly levied by the Association, nor release the Unit or other property owned by said Owner from the liens and charges hereof, by waiver of the use and enjoyment of the Common Elements, or any facilities respectively thereon, or by abandonment of his Unit or any other property in the Properties.

Section 2.19 Alteration of Units. Declarant reserves the right to change the interior design and arrangement of any Unit and to alter the boundaries between Units (including Garage Components and/or Yard Components, if applicable), so long as Declarant owns the Units (or Garage Component or Yard Component) so altered. No such change shall increase the number of Units nor alter the boundaries of the Common Elements.

Section 2.20 Taxes. Each Owner shall execute such instruments and take such action as may reasonably be specified by the Association to obtain separate real estate tax assessment of each Unit. If any taxes or similar assessments of any Owner may, in the opinion of the Association, become a lien on the Common Elements, or any part thereof, they may be paid by the Association as a Common Expense or paid by the Association and levied against such Owner as a Special Assessment.

Section 2.21 Additional Provisions for Benefit of Handicapped Persons. To the extent required by applicable law, provisions of the Governing Documents, and policies, practices, and services, shall be reasonably accommodated to afford handicapped Residents with equal opportunity to use and enjoy their Dwellings. Pursuant to the foregoing, Declarant may cause to be installed certain

handrails or other accommodations for the benefit of handicapped Residents, on or within areas appurtenant or proximate to certain Units, or other areas of the Properties, as may be deemed by Declarant to be reasonably necessary. Handrails in portions of driveway areas or other areas which pertain to certain designated Units shall be Exclusive Use Areas appurtenant to such Units. To the extent required by applicable law, the Association shall reasonably accommodate handicapped Residents, to afford such Residents equal opportunity to use and enjoy their Dwellings, and the Association shall permit handicapped Residents to make reasonable modifications to their living areas which are necessary to enable them to have full enjoyment of the premises. The Association shall comply with all applicable laws prohibiting discrimination against any person in the provision of services or facilities in connection with a Dwelling because of a handicap of such person. In the event of irreconcilable conflict between applicable law and any provision of the Governing Documents, applicable law shall prevail, and the Association shall not adhere to or enforce any provision of the Governing Documents which irreconcilably contravenes applicable law. Installation by Declarant of handrails in driveway areas (or installation by Declarant of other devices to reasonably accommodate handicapped Residents in other areas of the Properties) shall raise absolutely no inference that such devices are in any regard "standard" or that they will or may be installed with respect to all or any other Units or all or any other areas of the Properties.

Section 2.22 Avigation Easements. Declarant hereby reserves, for itself, and/or for the Association, for the Master Declarant, and/or for the Master Association, the unilateral right to grant avigation easements over Common Elements, to applicable governmental entity or entities with jurisdiction; and each Owner hereby covenants to sign such documents and perform such acts as may be reasonably required to effectuate the foregoing.

Section 2.23 Hose Bib Spaces. Certain parking spaces ("Hose Bib Spaces") are or may be located within or nearby High Noon and/or the neighboring communities of First Light and/or Twilight, and are intended for use by all Residents within the Master Community in connection with washing of their vehicles at Hose Bib Spaces located within the Master Association. Such Hose Bib Spaces are intended for use and enjoyment by all Residents of the ARLINGTON RANCH NORTH Master Community, and all Residents of the Master Community shall have an easement of reasonable access to and from, and use and enjoyment of, such Hose Bib Spaces for their intended purpose.

Section 2.24 Master Metered Water. Water (and/or sewage) for Common Elements and Units (including, but not limited to, Limited Components and Yard Components) at High Noon shall or may be master metered at the Master Community level, and master water (and/or master sewage, if applicable) allocated to Units within High Noon and the adjacent community of First Light. Periodic water (and or sewage) costs allocable to each Unit shall be paid by the Owner of said Unit, regardless of level or period of occupancy (or vacancy) and regardless of whether or not the Unit has an appurtenant Yard Component.

Section 2.25 Prohibition of Ownership of Multiple Units Within a Triplex Building. Notwithstanding any other provision herein, to the maximum extent allowed by applicable law, the following provisions of this Section 2.25 shall apply and be enforced. Ownership and/or occupancy by the same Person or such Owner and any Family member of more than one Unit within the same Triplex Building shall be strictly prohibited. In the event the same Person or Family should be found to own and/or occupy more than one Unit within the same Triplex Building, then such Person or Family shall be required to immediately divest ownership and/or terminate occupancy of such extra Unit(s) so that such Person and Family shall own and/or occupy no more than one Unit per Triplex Building. A Person or Family violating this Section 2.25 shall submit to the jurisdiction of a Court of competent jurisdiction, and shall not oppose any application by the Association or Declarant for a temporary restraining order, preliminary injunction, and/or permanent injunction, to enforce this Section 2.25, and/or to prohibit any

violation hereof, and such Person and/or Family shall pay all related attorneys' fees and costs of the Association and/or Declarant incurred in connection with enforcement of this Section 2.25.

ARTICLE 3
HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION

Section 3.1 Organization of Association. The Association is, or shall be, by not later than the date the first Unit is conveyed to a Purchaser, incorporated under the name of HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, or similar name, as a non-profit corporation, pursuant to NRS Chapter 82. Upon dissolution of the Association, the assets of the Association shall be disposed of as set forth in the Governing Documents, and in compliance with applicable Nevada law.

Section 3.2 Duties, Powers and Rights. 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 or proper, in operating for the peace, health, comfort, safety and general welfare of its Members, including any applicable powers set forth in NRS § 116.3102, 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. The Association shall make available for inspection at its office by any prospective purchaser of a Unit, any Owner, and any Eligible Holders, during regular business hours and upon reasonable advance notice, current copies of the Governing Documents and all other books, records, and financial statements of the Association.

Section 3.3 Membership. Each Owner (including Declarant, by virtue of owning title to any Unit), upon acquiring title to a Unit, shall automatically become a Member of the Association, and shall remain a Member until such time as his or her ownership of the Unit ceases, at which time, his or her membership in the Association shall automatically cease. Membership shall not be assignable, except to the Person to whom title to the Unit has been transferred, and each Membership shall be appurtenant to, and may not be separated from, fee ownership of the Unit. Ownership of such Unit shall be the sole qualification for Membership, and shall be subject to the Governing Documents.

Section 3.4 Transfer of Membership. The Membership held by any Owner shall not be transferred, pledged or alienated in any way, except upon the sale or encumbrance of such Owner's Unit, and then only to the purchaser or Mortgagee of such Unit. Any attempt to make a prohibited transfer is void, and will not be reflected upon the books and records of the Association. An Owner who has sold his or her Unit to a contract purchaser under an agreement to purchase shall be entitled to delegate to such contract purchaser said Owner's Membership rights. Such delegation shall be in writing and shall be delivered to the Board before such contract purchaser may vote. However, the contract seller shall remain liable for all charges and Assessments attributable to his or her Unit until fee title to the Unit sold is transferred. If any Owner should fail or refuse to transfer his or her Membership to the purchaser of such Unit upon transfer of fee title thereto, the Board shall have the right to record the transfer upon the books of the Association. Until evidence of such transfer (which may, but need not necessarily be, a copy of the Recorded deed of transfer) first has been presented to the reasonable satisfaction of the Board, the purchaser shall not be entitled to vote at meetings of the Association, unless the purchaser shall have a valid proxy from the seller of said Unit, pursuant to Section 4.6, below. The Association may levy a reasonable transfer fee against a new Owner and his or her Unit (which fee shall be added to the Annual Assessment chargeable to such new Owner) to reimburse the Association for the administrative cost of transferring the Membership to the new Owner on the records of the Association. The new Owner shall, if requested by the Board or Manager, timely attend an orientation

to the Community and the Properties, conducted by an Association Officer or the Manager, and will be required to pay any costs related to obtaining entry gate keys and/or remote controls, if not obtained from the prior Owner at Close of Escrow.

Section 3.5 Articles and Bylaws. The purposes and powers of the Association and the rights and obligations with respect to Owners as Members of the Association set forth in this Declaration may and shall be amplified by provisions of the Articles and Bylaws, including any reasonable provisions with respect to corporate matters; but in the event that any such provisions may be, at any time, inconsistent with any provisions of this Declaration, the provisions of this Declaration shall govern. The Bylaws shall provide:

(a) the number of Directors (subject to Section 3.6 below) and the titles of the Officers;

(b) for election by the Board of an Association president, treasurer, secretary and any other Officers specified by the Bylaws;

(c) the qualifications, powers and duties, terms of office and manner of electing and removing Directors and Officers, and filling vacancies;

(d) which, if any, respective powers the Board or Officers may delegate to other Persons or to a Manager;

(e) which of the Officers may prepare, execute, certify and record amendments to the Declaration on behalf of the Association;

(f) procedural rules for conducting meetings of the Association; and

(g) a method for amending the Bylaws.

Section 3.6 Board of Directors.

(a) The affairs of the Association shall be managed by a Board of three (3) Directors, all of whom (other than Directors appointed by Declarant pursuant to Section 3.7 below) must be Members of the Association. In accordance with the provisions of Section 3.7 below, upon the formation of the Association, Declarant shall appoint the Board. The Board may act in all instances on behalf of the Association, except as otherwise may be provided in the Governing Documents or any applicable provision of NRS Chapter 116 or other applicable law. The Directors, in the performance of their duties, are fiduciaries, and are required to exercise the ordinary and reasonable care of directors of a corporation, subject to the business-judgment rule. Notwithstanding the foregoing, the Board may not act on behalf of the Association to amend the Declaration, to terminate the Community, or to elect Directors or determine their qualifications, powers and duties or terms of office, provided that the Board may fill vacancies in the Board for the unexpired portion of any term. Notwithstanding any provision of this Declaration or the Bylaws to the contrary, the Owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the Owners at which a quorum is present, may remove any Director with or without cause, other than a Director appointed by Declarant. If a Director is sued for liability for actions undertaken in his or her role as a Director, the Association shall indemnify him for his losses or claims, and shall undertake all costs of defense, unless and until it is proven that the Director acted with willful or wanton misfeasance or with gross negligence. After such proof, the Association is no longer liable for the costs of defense, and may recover, from the Director who so acted, costs already expended. Directors are not personally liable to the victims of crimes occurring within the

Properties. Punitive damages may not be recovered against Declarant or the Association, subject to applicable Nevada law. An officer, employee, agent or director of a corporate Owner, a trustee or designated beneficiary of a trust that owns a Unit, a partner of a partnership that owns a Unit, or a fiduciary of an estate that owns a Unit, may be an Officer or Director. In every event where the person serving or offering to serve as an Officer or Director is not a record Owner, he shall file proof of authority in the records of the Association. No Director shall be entitled to delegate his or her vote on the Board, as a Director, to any other Director or any other Person; and any such attempted delegation of a Director's vote shall be void. Each Director shall serve in office until the appointment (or election, as applicable) of his or her successor.

(b) The term of office of a Director shall not exceed two (2) years. A Director may be elected to succeed himself or herself. Following the Declarant Control Period, elections for Directors (whose terms are expiring) must be held at the Annual Meeting, as set forth in Section 4.3 below.

(c) A quorum is deemed present throughout any Board meeting if Directors entitled to cast fifty percent (50%) of the votes on that Board are present at the beginning of the meeting.

Section 3.7 Declarant's Control of Board. During the period of Declarant's control ("Declarant Control Period"), as set forth below, Declarant at any time, with or without cause, may remove or replace any Director appointed by Declarant. Directors appointed by Declarant need not be Owners. Declarant shall have the right to appoint and remove the Directors, subject to the following limitations:

(a) Not later than sixty (60) days after conveyance from Declarant to Purchasers of twenty-five percent (25%) of the Units That May Be Created, at least one Director and not less than twenty-five percent (25%) of the total Directors must be elected by Owners other than Declarant.

(b) Not later than sixty (60) days after conveyance from Declarant to Purchasers of fifty percent (50%) of the Units That May Be Created, not less than one-third of the total Directors must be elected by Owners other than Declarant.

(c) The Declarant Control Period shall terminate on the earliest of: (i) sixty (60) days after conveyance from Declarant to Purchasers of seventy-five percent (75%) of the Units That May Be Created; (ii) five (5) years after Declarant has ceased to offer any Units for sale in the ordinary course of business; or (iii) five (5) years after any right to annex any portion of the Annexable Area was last exercised pursuant to Article 15 hereof.

Section 3.8 Control of Board by Owners. Subject to and following the Declarant Control Period: (a) the Owners shall elect a Board of at least three (3) Directors, and (b) the Board may fill vacancies in its membership (e.g., due to death or resignation of a Director), subject to the right of the Owners to elect a replacement Director, for the unexpired portion of any term. After the Declarant Control Period, all of the Directors must be Owners, and each Director shall, within ninety (90) days of his appointment or election, certify in writing that he is an Owner and has read and reasonably understands the Governing Documents and applicable provisions of NRS Chapter 116 to the best of his or her ability. The Board shall elect the Officers, all of whom (after the Declarant Control Period) must be Owners and Directors. The Owners, upon a two-thirds (2/3) affirmative vote of all Owners present and entitled to vote at any Owners' meeting at which a quorum is present, may remove any Director(s) with or without cause; provided, however that any Director(s) appointed by Declarant may only be removed by Declarant.

Section 3.9 Election of Directors. Not less than thirty (30) days before the preparation of a ballot for the election of Directors, which shall normally be conducted at an Annual Meeting, the Association Secretary or other designated Officer shall cause notice to be given to each Owner of his eligibility to serve as a Director. Each Owner who is qualified to serve as a Director may have his name placed on the ballot along with the names of the nominees selected by the Board or a nominating committee established by the Board. The Association Secretary or other designated Officer shall cause to be sent prepaid by United States mail to the mailing address of each Unit within the Community or to any other mailing address designated in writing by the Unit Owner, a secret ballot and a return envelope. Election of Directors must be conducted by secret written ballot, for so long as so required by applicable Nevada law, with the vote publicly counted (which counting may be done as the meeting agenda progresses).

Section 3.10 Board Meetings.

(a) A Board meeting must be held at least once every 90 days. Except in an emergency, the Secretary or other designated Officer shall, not less than 10 days before the date of a Board meeting, cause notice of the meeting to be given to the Owners. Such notice must be: (1) sent prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by the Owner; or (2) published in a newsletter or other similar publication circulated to each Owner. In an emergency, the Secretary or other designated Officer shall, if practicable, cause notice of the meeting to be sent prepaid by United States mail to the mailing address of each Unit. If delivery of the notice in this manner is impracticable, the notice must be hand-delivered to each Unit within the Community or posted in a prominent place or places within the Common Elements.

(b) As used in this Section 3.10, "emergency" means any occurrence or combination of occurrences that: (1) could not have been reasonably foreseen; (2) affects the health, welfare and safety of the Owners; (3) requires the immediate attention of, and possible action by, the Board; and (4) makes it impracticable to comply with regular notice and/or agenda provisions.

(c) The notice of the Board meeting must state the time and place of the meeting and include a copy of the agenda for the meeting (or the date on which and the locations where copies of the agenda may be conveniently obtained by Owners). The notice must include notification of the right of an Owner to: (1) have a copy of the minutes or a summary of the minutes of the meeting distributed to him upon request (and, if required by the Board, upon payment to the Association of the cost of making the distribution), and (2) speak to the Association or Board, unless the Board is meeting in Executive Session.

(d) The agenda of the Board meeting must comply with the provisions of NRS § 116.3108.3. The period required to be devoted to comments by Owners and discussion of those comments must be scheduled for the beginning of each meeting. In an emergency, the Board may take action on an item which is not listed on the agenda as an item on which action may be taken.

(e) At least once every 90 days, the Board shall review at one of its meetings: (1) a current reconciliation of the Operating Fund (as defined in Section 6.2 below); (2) a current reconciliation of the Reserve Fund (as defined in Section 6.3 below); (3) the actual deposits and withdrawals for the Reserve Fund, compared to the Reserve Budget for the current year; (4) the latest account statements prepared by the financial institutions in which the accounts of the Association are maintained; (5) an income and expense statement, prepared on at least a quarterly basis, for the Operating Fund and Reserve Fund; and (6) the current status of any civil action or claim submitted to arbitration or mediation in which the Association is a party.

(f) The minutes of a Board meeting must be made available to Owners in accordance with NRS § 116.3108.5.

Section 3.11 Attendance by Owners at Board Meetings; Executive Sessions. Owners are entitled to attend any meeting of the Board (except for Executive Sessions) and may speak at such meeting, provided that the Board may establish reasonable procedures and reasonable limitations on the time an Owner may speak at such meeting. The period required to be devoted to comments by Owners and discussion of those comments must be scheduled for the beginning of each meeting. Owners may not attend or speak at an Executive Session, unless the Board specifically so permits. An "Executive Session" is an executive session of the Board (which may be a portion of a Board meeting), designated as such by the Board in advance, for the sole purpose of:

(a) consulting with an attorney for the Association on matters relating to proposed or pending litigation, if the contents of the discussion would otherwise be governed by the privilege set forth in NRS §§ 49.035 to 49.115, inclusive; or

(b) discussing Association personnel matters of a sensitive nature; or

(c) discussing any violation ("Alleged Violation") of the Governing Documents (including, without limitation, the failure to pay an Assessment) alleged to have been committed by an Owner ("Involved Owner") (provided that the Involved Owner shall be entitled to request in writing that such hearing be conducted by the Board in open meeting, and provided further that the Involved Owner may attend such hearing and testify concerning the Alleged Violation, but may be excluded by the Board from any other portion of such hearing, including, without limitation, the Board's deliberation).

No other matter may be discussed in Executive Session. Any matter discussed in Executive Session must be generally described in the minutes of the Board meeting, provided that the Board shall maintain detailed minutes of the discussion of any Alleged Violation, and, upon request, shall provide a copy of said detailed minutes to the Involved Owner or his designated representative.

Section 3.12 Election of One District Director to Master Association Board. Subject to Master Declarant's control of the Master Association Board, as set forth in Section 3.7 of the Master Declaration, the Members of High Noon at ARLINGTON RANCH Homeowners Association shall elect one (1) District Director to the Master Association Board, pursuant to Article 4 (including, but not limited to, Section 4.3) of the Master Declaration.

ARTICLE 4
OWNERS' VOTING RIGHTS; MEMBERSHIP MEETINGS

Section 4.1 Owners' Voting Rights. Subject to the following provisions of this Section 4.1, and to Section 4.6 below, each Member shall be entitled to cast one (1) vote for each Unit owned. In the event that more than one Person holds fee title to a Unit ("co-owners"), all such co-owners shall be one Member, and may attend any meeting of the Association, but only one such co-owner shall be entitled to exercise the vote to which the Unit is entitled. Such co-owners may from time to time all designate in writing one of their number to vote. Fractional votes shall not be allowed. Where no voting co-owner is designated, or if such designation has been revoked, the vote for such Unit shall be exercised as the majority of the co-owners of the Unit mutually agree. No vote shall be cast for any Unit where the co-owners present in person or by proxy owning the majority interests in such Unit cannot agree to said vote or other action. The non-voting co-owners shall be jointly and severally responsible for all of the obligations imposed upon the jointly owned Unit and shall be entitled to all other benefits

of ownership. All agreements and determinations lawfully made by the Association in accordance with the voting percentages established herein, or in the Bylaws, shall be deemed to be binding on all Owners, their successors and assigns. Notwithstanding the foregoing, the voting rights of an Owner shall be automatically suspended during any time period that any Assessment levied against such Owner is delinquent.

Section 4.2 Transfer of Voting Rights. The right to vote may not be severed or separated from any Unit, and any sale, transfer or conveyance of fee interest in any Unit to a new Owner shall operate to transfer the appurtenant Membership and voting rights without the requirement of any express reference thereto. Each Owner shall, within ten (10) days of any sale, transfer or conveyance of a fee interest in the Owner's Unit, notify the Association in writing of such sale, transfer or conveyance, with the name and address of the transferee, the nature of the transfer and the Unit involved, and such other information relative to the transfer and the transferee as the Board may reasonably request, and shall deliver to the Association a copy of the Recorded deed therefor.

Section 4.3 Meetings of the Membership. Meetings of the Association must be held at least once each year, or as otherwise may be required by applicable law. The annual Association meeting shall be held on a recurring anniversary basis, and shall be referred to as the "Annual Meeting." The business conducted at each such Annual Meeting shall include the election of Directors whose terms are then expiring. If the Members have not held a meeting for one (1) year, a meeting of the Association Membership must be held by not later than the March 1 next following. A special meeting of the Association Membership may be called at any reasonable time and place by written request of: (a) the Association President, (b) a majority of the Directors, or (c) Members representing at least ten percent (10%) of the voting power of the Association, or as otherwise may be required by applicable law. Notice of special meetings shall be given by the Secretary of the Association in the form and manner provided in Section 4.4, below.

Section 4.4 Meeting Notices; Agendas; Minutes. Meetings of the Members shall be held in the Properties or at such other convenient location near the Properties and within Clark County as may be designated in the notice of the meeting.

(a) Not less than ten (10) nor more than sixty (60) days in advance of any meeting, the Association Secretary shall cause notice to be hand delivered or sent postage prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by any Owner. The meeting notice must state the time and place of the meeting and include a copy of the agenda for the meeting. The notice must include notification of the right of an Owner to: (i) have a copy of the minutes or a summary of the minutes of the meeting distributed to him upon request, if the Owner pays the Association the cost of making the distribution; and (ii) speak to the Association or Board (unless the Board is meeting in Executive Session).

(b) The meeting agenda must consist of:

(i) a clear and complete statement of the topics scheduled to be considered during the meeting, including, without limitation, any proposed amendment to any of the Governing Documents, any fees or Assessments to be imposed or increased by the Association, any budgetary changes, and/or any proposal to remove an Officer or Director; and

(ii) a list describing the items on which action may be taken, and clearly denoting that action may be taken on those items ("Agenda Items"); and

(iii) a period devoted to comments by Owners and discussion of such comments; provided that, except in emergencies, no action may be taken upon a matter raised during this comment and discussion period unless the matter is an Agenda Item. If the matter is not an Agenda Item, it shall be tabled at the current meeting, and specifically included as an Agenda Item for discussion and consideration at the next following meeting, at which time, action may be taken thereon.

(c) In an "emergency" (as said term is defined in Section 3.10(b) above), Members may take action on an item which is not listed on the agenda as an item on which action may be taken.

(d) If the Association adopts a policy imposing a fine on an Owner for the violation of a provision of the Governing Documents, the Board shall prepare and cause to be hand-delivered or sent prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by the Owner thereof, a specific schedule of fines that may be imposed for those particular violations, at least thirty (30) days prior to any attempted enforcement, and otherwise subject to Section 17.1, below.

(e) Not more than thirty (30) days after any meeting, the Board shall cause the minutes or a summary of the minutes of the meeting to be made available to the Owners. A copy of the minutes or a summary of the minutes must be provided to any Owner who pays the Association the cost of providing the copy.

Section 4.5 Record Date. The Board shall have the power to fix in advance a date as a record date for the purpose of determining Members entitled to notice of or to vote at any meeting or to be furnished with any Budget or other information or material, or in order to make a determination of Members for any purpose. Notwithstanding any provisions hereof to the contrary, the Members of record on any such record date shall be deemed the Members for such notice, vote, meeting, furnishing of information or material or other purpose and for any supplementary notice, or information or material with respect to the same matter and for an adjournment of the same meeting. A record date shall not be more than sixty (60) days nor less than ten (10) days prior to the date on which the particular action requiring determination of Members is proposed or expected to be taken or to occur.

Section 4.6 Proxies. Every Member entitled to attend, vote at, or exercise consents, with respect to any meeting of the Members, may do so either in person, or by a representative, known as a proxy, duly authorized by an instrument in writing, filed with the Board prior to the meeting to which the proxy is applicable. A Member may give a proxy only to a member of his immediate Family, a tenant of said Member residing in the Community, or another Member residing in the Community, or as otherwise may be authorized from time to time by applicable Nevada law. No proxy shall be valid after the conclusion of the meeting (including continuation of such meeting) for which the proxy was executed. Such powers of designation and revocation may be exercised by the legal guardian of any Member or by his conservator, or in the case of a minor having no guardian, by the parent legally entitled to permanent custody, or during the administration of any Member's estate where the interest in the Unit is subject to administration in the estate, by such Member's executor or administrator. Any form of proxy or written ballot shall afford an opportunity therein to specify a choice between approval and disapproval of each matter or group of related matters intended, at the time the written ballot or proxy is distributed, to be acted upon at the meeting for which the proxy or written ballot is solicited, and shall provide, subject to reasonably specified conditions, that where the person solicited specifies a choice with respect to any such matter, the vote shall be cast in accordance with such specification. Unless applicable Nevada law provides otherwise, a proxy is void if: (a) it is not dated or purports to be revocable without notice; (b) it does not designate the votes that must be cast on behalf of the Member who executed the proxy; or (c) the holder of the proxy does not disclose at the beginning of the meeting (for which the proxy is executed) the number of proxies pursuant to which the proxy holder will be

casting votes and the voting instructions received for each proxy. If and for so long as prohibited by Nevada law, a vote may not be cast pursuant to a proxy for the election of a Director.

Section 4.7 Quorums. The presence at any meeting of Members who hold votes equal to twenty percent (20%) of the total voting power of the Association, in person or by proxy, shall constitute a quorum for consideration of that matter. The Members present at a duly called meeting at which a quorum is present may continue to do business until adjournment, notwithstanding the withdrawal of enough Members to leave less than a quorum, if any action taken other than adjournment is approved by at least a majority of the Members required to constitute a quorum, unless a greater vote is required by applicable law or by this Declaration. If any meeting cannot be held because a quorum is not present, the Members present, either in person or by proxy, may, except as otherwise provided by law, adjourn the meeting to a time not less than five (5) days nor more than thirty (30) days from the time the original meeting was called, at which reconvened meeting the quorum requirement shall be the presence, in person or by written proxy, of the Members entitled to vote at least twenty percent (20%) of the total votes of the Association. Notwithstanding the presence of a sufficient number of Owners to constitute a quorum, certain matters, including, without limitation, amendment to this Declaration, require a higher percentage (e.g., 67%) of votes of the total voting Membership as set forth in this Declaration.

Section 4.8 Actions. If a quorum is present, the affirmative vote on any matter of the majority of the votes represented at the meeting (or, in the case of elections in which there are more than two (2) candidates, a plurality of the votes cast) shall be the act of the Members, unless the vote of a greater number is required by applicable law or by this Declaration.

Section 4.9 Adjourned Meetings and Notice Thereof. Any Members' meeting, regular or special, whether or not a quorum is present, may be adjourned from time to time by a vote of a majority of the Members present either in person or by proxy thereat, but in the absence of a quorum, no other business may be transacted at any such meeting except as provided in this Section 4.9. When any Members' meeting, either regular or special, is adjourned for seven (7) days or less, the time and place of the reconvened meeting shall be announced at the meeting at which the adjournment is taken. When any Members' meeting, either regular or special, is adjourned for more than seven (7) days, notice of the reconvened meeting shall be given to each Member as in the case of an original meeting. Except as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at a reconvened meeting, and at the reconvened meeting the Members may transact any business that might have been transacted at the original meeting.

Section 4.10 Membership in Master Association and LMA Association. Each Member also concurrently shall be a member of the Master Association and LMA Association respectively, and also subject to the Master Declaration and LMA Declaration respectively and other Master Association Documents and LMA Association Documents, as and to the extent set forth therein.

ARTICLE 5
FUNCTIONS OF ASSOCIATION

Section 5.1 Powers and Duties. The Association shall have all of the powers of a Nevada nonprofit corporation, subject only to such limitations, if any, upon the exercise of such powers as are expressly set forth in the Declaration, Articles and Bylaws. The Association shall have the power to perform any and all lawful acts which may be necessary or proper for, or incidental to, the exercise of any of the express powers of the Association. The Association's obligations to maintain the Common Elements shall commence on the date Annual Assessments commence on Units; until commencement

of Annual Assessments, the Common Elements shall be maintained by Declarant, at Declarant's expense. Without in any way limiting the generality of the foregoing provisions, the Association may act through the Board, and shall have:

(a) Assessments. The power and duty to levy Assessments against the Owners of Units, and to enforce payment of such Assessments in accordance with the provisions of Article 7 hereof.

(b) Maintenance and Repair of Common Elements. The power and duty to cause the Common Elements to be maintained in a neat and attractive condition and kept in good repair (which shall include the power to enter into one or more maintenance and/or repair contract(s), including contract(s) for materials and/or services, with any Person(s) for the maintenance and/or repair of the Common Elements), pursuant to this Declaration and in accordance with standards adopted by the ARC, and to pay for utilities, gardening, landscaping, and other necessary services for the Common Elements. Notwithstanding the foregoing, the Association shall have no responsibility to provide any of the services referred to in this subsection 5.1(b) with respect to any Improvement which is accepted for maintenance by any state, local or municipal governmental agency or public entity. Such responsibility shall be that of the applicable agency or public entity.

(c) Removal of Graffiti. The power to remove or paint over any graffiti from Exterior Walls/Fences, pursuant and subject to Section 9.15, below.

(d) Insurances. The power and duty to cause to be obtained and maintained the insurance coverages in accordance with the provisions of Article 12 below.

(e) Taxes. The power and duty to pay all taxes and assessments levied upon the Common Elements (except to the extent, if any, that property taxes on Common Elements are assessed pro-rata on the Units), and all taxes and assessments payable by the Association, and to timely file all tax returns required to be filed by the Association.

(f) Utility Services. The power and duty to obtain, for the benefit of the Common Elements, any commonly metered water, sewage, gas, and/or electric services (or other similar services) and/or refuse collection, and the power, but not the duty, to provide for all cable or master television service, if any, for all or portions of the Properties. The Association, by Recordation of this Declaration, and each Owner, by acquiring title to a Unit and each Resident, by occupying a Unit, acknowledge and agree that water (and/or sewage) for First Light and/or the neighboring community of High Noon shall or may be commonly metered at the Master Community level, paid by the Master Association, and allocated and billed by the Master Association to each Unit within High Noon and First Light, and that such allocated costs shall be deemed to be reasonable and necessary, regardless of the actual levels or periods of use or occupancy (or non-use or vacancy) of or by the Unit. All costs of or related to the House Panel meter for electricity for coach lights and entrance/egress lights on each Triplex Building shall be paid by the Association at time of Close of Escrow of the first Residential Unit in such Triplex Building, subject to the right of the Association to subsequently assess allocated sums to the Purchaser of each Residential Unit in such Triplex Building.

(g) Easements and Rights-of-Way. The power, but not the duty, to grant and convey to any Person, (i) easements, licenses and rights-of-way in, on, over or under the Common Elements, and (ii) with the consent of seventy-five percent (75%) of the voting power of the Association, fee title to parcels or strips of land which comprise a portion of the Common Elements, for the purpose of constructing, erecting, operating or maintaining thereon, therein and thereunder: (A) roads, streets, walks (if any), driveways and slope areas; (B) overhead or underground lines, cables, wires, conduits,

or other devices for the transmission of electricity for lighting, heating, power, television, telephone and other similar purposes; (C) sewers, storm and water drains and pipes, water systems, sprinkling systems, water, heating and gas lines or pipes; and, (D) any similar public or quasi-public Improvements or facilities.

(h) Manager. The power, subject to Section 5.5 below, but not the duty, to employ or contract with a professional Manager to perform all or any part of the duties and responsibilities of the Association, and the power, but not the duty, to delegate powers to committees, Officers and employees of the Association. Any such management agreement, or any agreement providing for services by Manager to the Association, shall be for a term not in excess of one (1) year, subject to cancellation by the Association for cause at any time upon not less than fifteen (15) days written notice, and without cause (and without penalty or the payment of a termination fee) at any time upon thirty (30) days written notice.

(i) Rights of Entry and Enforcement. The power, but not the duty, after Notice and Hearing (except in the event of bona-fide emergency which poses an (a) imminent and substantial threat to health, or (b) imminent and substantial threat (as verified by an engineer, architect, or professional building inspector, duly licensed in the State of Nevada) of material property damage; in which event of emergency, Notice and Hearing shall not be required), to peaceably enter upon any area of a Unit, without being liable to any Owner, except for damage caused by the Association entering or acting in bad faith, for the purpose of enforcing by peaceful means the provisions of this Declaration, or for the purpose of maintaining or repairing any such area if for any reason whatsoever the Owner thereof fails to maintain and repair such area as required by this Declaration. All costs of any such maintenance and repair as described in the preceding sentence (including all amounts due for such work, and the costs and expenses of collection) shall be assessed against such Owner as a Special Assessment, and, if not paid timely when due, shall constitute an unpaid or delinquent Assessment pursuant to Article 7 below. The responsible Owner shall pay promptly all amounts due for such work, and the costs and expenses of collection. Unless there exists an emergency, there shall be no entry into a Dwelling without the prior consent of the Owner thereof. Any damage caused by an entry upon any Unit shall be repaired by the entering party. Subject to Section 5.3 below, the Association may also commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of the Declaration and to enforce, by mandatory injunctions or otherwise, all of the provisions of the Declaration, and, if such action pertaining to the Declaration is brought by the Association, the prevailing party shall be entitled to reasonable attorneys' fees and costs to be fixed by the court.

(j) Other Services. The power and duty to maintain the integrity of the Common Elements and to provide such other services as may be necessary or proper to carry out the Association's obligations and business under the terms of this Declaration to enhance the enjoyment, or to facilitate the use, by the Members, of the Common Elements.

(k) Employees, Agents and Consultants. The power, but not the duty, if deemed appropriate by the Board, to hire and discharge employees and agents and to retain and pay for legal, accounting and other services as may be necessary or desirable in connection with the performance of any duties or exercise of any powers of the Association under this Declaration.

(l) Acquiring Property and Construction on Common Elements. The power, but not the duty, by action of the Board, to acquire property or interests in property for the common benefit of Owners, including Improvements and personal property. The power, but not the duty, by action of the Board, to construct new Improvements or additions to the Common Elements, or demolish existing Improvements (other than maintenance or repairs to existing Improvements).

(m) Contracts. The power, but not the duty, to enter into contracts with Owners to provide services or to maintain and repair Improvements within the Properties which the Association is not otherwise required to maintain pursuant to this Declaration, and the power, but not the duty, to contract with third parties for such services. Any such contract or service agreement must, however, provide for payment to the Association of the cost of providing such service or maintenance.

(n) Records and Accounting. The power and the duty to keep, or cause to be kept, true and correct books and records of account at the sole cost and expense of the Association in accordance with generally accepted accounting principles. Financial statements for the Association shall be regularly prepared and distributed to all Members as follows:

(i) Pro forma operating statements (Budgets), Reserve Budgets, and Reserve Studies shall be distributed pursuant to Section 6.4, below.

(ii) Reviewed or audited Financial Statements (consisting of a reasonably detailed statement of revenues and expenses of the Association for each Fiscal Year, and a balance sheet showing the assets [including, but not limited to, Association Reserve Funds] and liabilities of the Association as at the end of each Fiscal Year), and a statement of cash flow for the Fiscal Year, shall be distributed within one hundred twenty (120) days after the close of each Fiscal Year.

(o) Maintenance of Other Areas. The power, but not the duty, to maintain and repair slopes, parkways, entry structures, and Community signs identifying the Properties, to the extent deemed to be reasonable and prudent by the Board.

(p) Use Restrictions. The power and the duty to enforce use restrictions pertaining to the Properties.

(q) Licenses and Permits. The power and the duty to obtain from applicable governmental authority any and all licenses and permits reasonably necessary to carry out Association functions hereunder.

Section 5.2 Rules and Regulations. The Board, acting on behalf of the Association, shall be empowered to adopt, amend, repeal and/or enforce reasonable and uniformly applied Rules and Regulations, which shall not discriminate among Members, for the use and occupancy of the Properties, as follows:

(a) General. A copy of the Rules and Regulations, as from time to time may be adopted, amended or repealed, shall be posted in a conspicuous place in the Common Elements and/or shall be mailed or otherwise delivered to each Member and also kept on file with the Association. Upon such mailing, delivery or posting, the Rules and Regulations shall have the same force and effect as if they were set forth herein and shall be binding on all Persons having any interest in, or making any use of any part of, the Properties, whether or not Members; provided, however, that the Rules and Regulations shall be enforceable only to the extent that they are consistent with the other Governing Documents. If any Person has actual knowledge of any of the Rules and Regulations, such Rules and Regulations shall be enforceable against such Person, whether or not a Member, as though notice of such Rules and Regulations had been given pursuant to this Section 5.2. The Rules and Regulations may not be used to amend any of the other Governing Documents.

(b) Limitations. The Rules and Regulations must be:

(i) reasonably related to the purpose for which adopted;

(ii) sufficiently explicit in their prohibition, direction, or limitation, so as to reasonably inform an Owner or Resident, or tenant or guest thereof, of any action or omission required for compliance;

(iii) adopted without intent to evade any obligation of the Association;

(iv) consistent with the other Governing Documents (and must not arbitrarily restrict conduct, or require the construction of any capital improvement by an Owner if not so required by the other Governing Documents);

(v) uniformly enforced under the same or similar circumstances against all Owners; provided that any particular rule not so uniformly enforced may not be enforced against any Owner (except as, and to the extent, if any, such enforcement may be permitted from time to time by applicable law); and

(vi) duly adopted and distributed to the Owners at least thirty (30) days prior to any attempted enforcement.

Section 5.3 Proceedings. The Association, acting through the Board, shall have the power and the duty to reasonably defend the Association (and, in connection therewith, to raise counterclaims) in any pending or potential lawsuit, arbitration, mediation or governmental proceeding (collectively hereinafter referred to as a "Proceeding"). Subject to Section 17.14, below, the Association, acting through the Board, shall have the power, but not the duty, to reasonably institute, prosecute, maintain and/or intervene in a Proceeding, in its own name, but only on matters affecting or pertaining to this Declaration or the Common Elements and as to which the Association is a proper party in interest, and any exercise of such power shall be subject to full compliance with the following provisions:

(a) Any Proceeding commenced by the Association: (i) to enforce the payment of an Assessment, or an Assessment lien or other lien against an Owner as provided for in this Declaration, or (ii) to otherwise enforce compliance with the Governing Documents by, or to obtain other relief from, any Owner who has violated any provision thereof, or (iii) to protect against any matter which imminently and substantially threatens all of the health, safety and welfare of the Owners, or (iv) against a supplier, vendor, contractor or provider of services, pursuant to a contract or purchase order with the Association and in the ordinary course of business, or (v) for money damages wherein the total amount in controversy for all matters arising in connection with the action is not likely to exceed Ten Thousand Dollars ($10,000.00) in the aggregate; shall be referred to herein as an "Operational Proceeding." The Board from time to time may cause an Operational Proceeding to be reasonably commenced and prosecuted, without the need for further authorization.

(b) Any and all pending or potential Proceedings other than Operational Proceedings shall be referred to herein as a "Non-Operational Controversy" or "Non-Operational Controversies." To protect the Association and the Owners from being subjected to potentially costly or prolonged Non-Operational Controversies without full disclosure, analysis and consent; to protect the Board and individual Directors from any charges of negligence, breach of fiduciary duty, conflict of interest or acting in excess of their authority or in a manner not in the best interests of the Association and the Owners; and to ensure voluntary and well-informed consent and clear and express authorization by the Owners, strict compliance with all of the following provisions of this Section 5.3 shall be mandatory with regard to any and all Non-Operational Controversies commenced, instituted or maintained by the Board:

(i) The Board shall first endeavor to resolve any Non-Operational Controversy by good faith negotiations with the adverse party or parties. In the event that such good faith negotiations fail to reasonably resolve the Non-Operational Controversy, the Board shall then endeavor in good faith to resolve such Non-Operational Controversy by mediation, provided that the Board shall not incur liability for or spend more than Two Thousand Dollars ($2,000.00) in connection therewith (provided that, if more than said sum is reasonably required in connection with such mediation, then the Board shall be required first to reasonably seek approval of a majority of the voting power of the Members for such additional amount for mediation before proceeding to arbitration or litigation). In the event that the adverse party or parties refuse mediation, or if such good faith mediation still fails to reasonably resolve the Non-Operational Controversy, the Board shall not be authorized to commence, institute or maintain any arbitration or litigation of such Non-Operational Controversy until the Board has fully complied with the following procedures:

(1) The Board shall first investigate the legal merit, feasibility and expense of prosecuting the Non-Operational Controversy, by obtaining the written opinions of each and every one of: (A) a licensed Nevada attorney regularly residing in Clark County, Nevada, with a Martindale-Hubbell rating of "av", expressly stating that such attorney has reviewed the underlying facts and data in sufficient, verifiable detail to render the opinion, and expressly opining that the Association has a substantial likelihood of prevailing on the merits with regard to the Non-Operational Controversy, without substantial likelihood of incurring any material liability with respect to any counterclaim which may be asserted against the Association ("Legal Opinion"); (B) a reputable appraiser and/or real estate consultant regularly conducting business in Clark County, Nevada, expressly opining that the marketability and market value of Units will not be substantially or materially affected by such Non-Operational Controversy ("Appraiser's Opinion"); and (C) a senior executive from a reputable lender in the business of regularly making residential loans in Clark County, Nevada, that financing and refinancing of Units will not be affected by such Non-Operational Controversy, and that such financing and refinancing will be readily available ("Lender's Opinion"). (The Legal Opinion, Appraiser's Opinion, and Lender's Opinion are sometimes collectively referred to herein as the "Opinions). The Board shall be authorized to spend up to an aggregate of Two Thousand Dollars ($2,000.00) to obtain such Opinions, including all amounts paid to said attorney therefor, and all amounts paid to any consultants, contractors and/or experts preparing or processing reports and/or information in connection therewith. The Board may increase said $2,000.00 limit, with the express consent of seventy-five percent (75%) or more of all of the Members of the Association, at a special meeting called for such purpose.

(2) The Legal Opinion shall also contain the attorney's best good faith estimate of the aggregate maximum "not-to-exceed" amount of legal fees and costs, including, without limitation, court costs, costs of investigation and all further reports or studies, costs of court reporters and transcripts, and costs of expert witnesses and forensic specialists (all collectively, "Quoted Litigation Costs") which are reasonably expected to be incurred for prosecution to completion (including appeal) of the Non-Operational Controversy. Said Legal Opinion shall also include a draft of any proposed fee agreement with such attorney. If the attorney's proposed fee arrangement is contingent, the Board shall nevertheless obtain the Quoted Litigation Costs with respect to all costs other than legal fees, and shall also obtain a written draft of the attorney's proposed contingent fee agreement. (Such written Legal Opinion, including the Quoted Litigation Costs, and also including any proposed fee agreement, contingent or non-contingent, are collectively referred to herein as the "Attorney Letter").

(3) Upon receipt and review of the Attorney Letter, the Appraiser's Opinion, and the Lender's Opinion, if two-thirds (2/3) or more of the Board affirmatively vote to proceed with the institution or prosecution of, and/or intervention in, the Non-Operational Controversy, the Board thereupon shall duly notice and call a special meeting of the Members. The written notice to each Member of the Association shall include a copy of the Attorney Letter, including the Quoted Litigation

Costs and any proposed fee agreement, contingent or non-contingent, the Appraiser's Opinion, and the Lender's Opinion, together with a written report ("Special Assessment Report") prepared by the Board: (A) itemizing the amount necessary to be assessed to each Member ("Special Litigation Assessment"), on a monthly basis, to fund the Quoted Litigation Costs, and (B) specifying the probable duration and aggregate amount of such Special Litigation Assessment. At said special meeting, following review of the Attorney Letter, Quoted Litigation Costs, and the Appraiser's Opinion, Lender's Opinion, and Special Assessment Report, and full and frank discussion thereof, including balancing the desirability of instituting, prosecuting and/or intervening in the Non-Operational Controversy against the desirability of accepting any settlement proposals from the adversary party or parties, the Board shall call for a vote of the Members, whereupon: (x) if not more than seventy-five percent (75%) of the total voting power of the Association votes in favor of pursuing such Non-Operational Controversy and levying the Special Litigation Assessment, then the Non-Operational Controversy shall not be pursued further, but (y) if more than seventy-five percent (75%) of the total voting power of the Association (i.e., more than seventy-five percent (75%) of all of the Members of the Association) affirmatively vote in favor of pursuing such Non-Operational Controversy, and in favor of levying a Special Litigation Assessment on the Members in the amounts and for the duration set forth in the Special Assessment Report, then the Board shall be authorized to proceed to institute, prosecute, and/or intervene in the Non-Operational Controversy. In such event, the Board shall engage the attorney who gave the opinion and quote set forth in the Attorney Letter, which engagement shall be expressly subject to the Attorney Letter. The terms of such engagement shall require (i) that said attorney shall be responsible for all attorneys' fees and costs and expenses whatsoever in excess of one hundred ten percent (110%) of the Quoted Litigation Costs, and (ii) that said attorney shall provide, and the Board shall distribute to the Members, not less frequently than monthly, a written update of the progress and current status of, and the attorney's considered prognosis for, the Non-Operational Controversy, including any offers of settlement and/or settlement prospects, together with an itemized summary of attorneys fees and costs incurred to date in connection therewith.

(4) In the event of any bona fide settlement offer from the adverse party or parties in the Non-Operational Controversy, if the Association's attorney advises the Board that acceptance of the settlement offer would be reasonable under the circumstances, or would be in the best interests of the Association, or that said attorney no longer believes that the Association is assured of a substantial likelihood of prevailing on the merits without prospect of material liability on any counterclaim, then the Board shall have the authority to accept such settlement offer. In all other cases, the Board shall submit any settlement offer to the Owners, who shall have the right to accept any such settlement offer upon a majority vote of all of the Members of the Association.

(c) In no event shall any Association Reserve Fund be used as the source of funds to institute, prosecute, maintain and/or intervene in any Proceeding (including, but not limited to, any Non-Operational Controversy). Association Reserve Funds, pursuant to Section 6.3 below, are to be used only for the specified replacements, painting and repairs of Common Elements, and for no other purpose whatsoever.

(d) Any provision in this Declaration notwithstanding: (i) other than as set forth in this Section 5.3, the Association shall have no power whatsoever to institute, prosecute, maintain, or intervene in any Proceeding, (ii) any institution, prosecution, or maintenance of, or intervention in, a Proceeding by the Board without first strictly complying with, and thereafter continuing to comply with, each of the provisions of this Section 5.3, shall be unauthorized and ultra vires (i.e., an unauthorized and unlawful act, beyond the scope of authority of the corporation or of the person(s) undertaking such act) as to the Association, and shall subject any Director who voted or acted in any manner to violate or avoid the provisions and/or requirements of this Section 5.3 to personal liability to the Association for all costs and liabilities incurred by reason of the unauthorized institution, prosecution, or maintenance

of, or intervention in, the Proceeding; and (iii) this Section 5.3 may not be amended or deleted at any time without the express prior written approval of both: (1) Members representing not less than seventy-five percent (75%) of the total voting power of Association, and (2) not less than seventy-five percent (75%) of the total voting power of the Board of Directors; and any purported amendment or deletion of this Section 5.3, or any portion hereof, without both of such express prior written approvals shall be void.

Section 5.4 Additional Express Limitations on Powers of Association. The Association shall not take any of the following actions except with the prior vote or written consent of a majority of the voting power of the Association:

(a) Incur aggregate expenditures for capital improvements to the Common Elements in any Fiscal Year in excess of five percent (5%) of the budgeted gross expenses of the Association for that Fiscal Year; or sell, during any Fiscal Year, any property of the Association having an aggregate fair market value greater than five percent (5%) of the budgeted gross expenses of the Association for that Fiscal Year.

(b) Enter into a contract with a third person wherein the third person will furnish goods or services for the Association for a term longer than one (1) year, except (i) a contract with a public or private utility or cable television company, if the rates charged for the materials or services are regulated by the Nevada Public Service Commission (provided, however, that the term of the contract shall not exceed the shortest term for which the supplier will contract at the regulated rate), or (ii) prepaid casualty and/or liability insurance policies of no greater than three (3) years duration.

(c) Pay compensation to any Association Director or Officer for services performed in the conduct of the Association's business.

Section 5.5 Manager. The Association shall have the power to employ or contract with a Manager, to perform all or any part of the duties and responsibilities of the Association, subject to the Governing Documents, for the purpose of operating and maintaining the Properties, subject to the following:

(a) Any agreement with a Manager shall be in writing and shall be for a term not in excess of one (1) year, subject to cancellation by the Association for cause at any time upon not less than fifteen (15) days written notice, and without cause (and without penalty or the payment of a termination fee) at any time upon not more than thirty (30) days written notice. In the event of any explicit conflict between the Governing Documents and any agreement with a Manager, the Governing Documents shall prevail.

(b) The Manager shall possess sufficient experience, in the reasonable judgment of the Board, in managing residential subdivision projects, similar to the Properties, in the County, and shall be duly licensed as required from time to time by the appropriate licensing and governmental authorities (and must have the qualifications, including education and experience, when and as required for the issuance of the relevant certificate by the Nevada Real Estate Division pursuant to the provisions of NRS Chapter 645 and/or NRS §116.700, or duly exempted pursuant to NRS § 116.725.6). Any and all employees of the Manager with responsibilities to or in connection with the Association and/or the Community shall have such experience with regard to similar projects. (If no Manager meeting the above-stated qualifications is available, the Board shall retain the most highly qualified management entity available, which is duly licensed by the appropriate licensing authorities).

(c) No Manager, or any director, officer, shareholder, principal, partner, or employee of the Manager, may be a Director or Officer of the Association.

(d) As a condition precedent to the employ of, or agreement with, a Manager, the Manager (or any replacement Manager) first shall be required, at its expense, to review the Governing Documents, Plat, and any and all Association Reserve Studies, and inspection reports pertaining to the Properties.

(e) By execution of its agreement with the Association, each and every Manager shall be conclusively deemed to have covenanted: (1) in good faith to be bound by, and to faithfully perform all duties (including, but not limited to, prompt and full and faithful accounting for all Association funds within the possession or control of Manager) required of the Manager under the Governing Documents (and, in the event of any irreconcilable conflict between the Governing Documents and the contract with the Manager, the Governing Documents shall prevail); (2) that any penalties, fines or interest levied upon the Association as the result of Manager's error or omission shall be paid (or reimbursed to the Association) by the Manager; (3) to comply fully, at its expense, with all applicable regulations of the Nevada Real Estate Division; (4) to refrain, without specific prior written direction of a majority of the voting power of the Board, from referring or introducing to the Association, or contacting directly or indirectly for or on behalf of the Association, any attorney regarding any matter in any way related to the Community or any portion thereof; (5) prior to time of hire, and from time to time thereafter upon request of the Board: (a) to disclose to the Board, in writing, the identities of any and all other communities, managed by Manager (at such time, and within the three year period preceding such time), and involved in litigation involving any claim of construction defect, and the current status of any and all such litigation, and (b) to certify in writing to the Board that Manager, and its then current and prior employees, have had no relationship to, and have received no benefit or thing of value from, the attorney(s) commencing and/or prosecuting such litigation, and/or any attorney referred to the Association at the specific written direction of the Board (or if there was or is any such relationship or benefit, to disclose and identify the same); and (6) at Manager's sole expense, to promptly turn over, to the Board, possession and control of all funds, documents, books, records and reports pertaining to the Properties and/or Association, and to coordinate and cooperate in good faith with the Board in connection with such turnover, in any event not later than ten (10) days of expiration or termination of the Association's agreement with Manager (provided that, without limiting its other remedies, the Association shall be entitled to withhold all amounts otherwise due to the Manager until such time as the Manager turnover in good faith has been completed).

(f) Upon expiration or termination of an agreement with a Manager, a replacement Manager meeting the above-stated qualifications shall be retained by the Board as soon as possible thereafter and a limited review performed, by qualified Person designated by the Board, of the books and records of the Association, to verify assets.

(g) The Association shall also maintain and pay for the services of such other personnel, including independent contractors, as the Board shall determine to be necessary or desirable for the proper management, operation, maintenance, and repair of the Association and the Properties, pursuant to the Governing Documents, whether such personnel are furnished or employed directly by the Association or by any person with whom or which it contracts. Such other personnel shall not all be replaced concurrently, but shall be replaced according to a "staggered" schedule, to maximize continuity of services to the Association.

Section 5.6 Inspection of Books and Records.

(a) The Board shall, upon the written request of any Owner, make available the books, records and other papers of the Association for review during the regular working hours of the

Association, with the exception of: (1) personnel records of employees (if any) of the Association; and (2) records of the Association relating to another Owner.

(b) The Board shall cause to be maintained and made available for review at the business office of the Association or other suitable location: (1) the financial statements of the Association; (2) the Budgets and Reserve Budgets; and (3) Reserve Studies.

(c) The Board shall cause to be provided a copy of any of the records required to be maintained pursuant to (a) and (b) above, to an Owner or to the Nevada State Ombudsman, as applicable, within 14 days after receiving a written request therefor. The Board may charge a fee to cover the actual costs of preparing such copy, but not to exceed 25 cents per page (or such maximum amount as permitted by applicable Nevada law).

(d) Notwithstanding the foregoing, each Director shall have the unfettered right at any reasonable time, and from time to time, to inspect all such records.

Section 5.7 Continuing Rights of Declarant. Declarant shall preserve the right, without obligation, to enforce the Governing Documents (including, without limitation, the Association's duties of maintenance and repair, and Reserve Study and Reserve Fund obligations). After the end of Declarant Control Period, throughout the term of this Declaration, the Board shall deliver to Declarant notices and minutes of all Board meetings and Membership meetings, and Declarant shall have the right, without obligation, to attend such meetings, on a non-voting basis. Declarant shall also receive notice of, and have the right, without obligation, to attend, all inspections of the Properties, or any portion(s) thereof. The Board shall also, throughout the term of this Declaration, deliver to Declarant (without any express or implied obligation or duty on Declarant's part to review or to do anything) all notices and correspondence to Owners, all inspection reports, the Reserve Studies prepared in accordance with Section 6.3 below, and audited or reviewed annual reports, as required in Section 5.1(n), above. Such notices and information shall be delivered to Declarant at its most recently designated address.

Section 5.8 Compliance with Applicable Laws. The Association and its governance shall comply with all applicable laws (including, but not limited to, applicable laws prohibiting discrimination against any person in the provision of services or facilities in connection with a Dwelling because of a handicap of such person) relating thereto. The provisions of the Governing Documents shall be upheld and enforceable to the maximum extent permissible under applicable federal or state law or applicable Ordinance. Subject to the foregoing, in the event of irreconcilable conflict between applicable law and any provision of the Governing Documents, the applicable law shall prevail, and the affected provision of the Governing Document shall be deemed amended (or deleted) to the minimum extent reasonably necessary to remove such irreconcilable conflict. In no event shall the Association adhere to or enforce any provision of the Governing Documents which irreconcilably contravenes applicable law.

ARTICLE 6
COVENANT FOR MAINTENANCE ASSESSMENTS

Section 6.1 Personal Obligation for Assessments. Each Owner of a Unit, by acceptance of a deed therefor, whether or not so expressed in such deed, is deemed to covenant and agree, to pay to the Association: (a) Annual Assessments, (b) Special Assessments, and (c) any Capital Assessments; such Assessments to be established and collected as provided in this Declaration. All Assessments, together with interest thereon, late charges, costs, and reasonable attorneys' fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit against

which such Assessments are made. Each such Assessment, together with interest thereon, late charges, costs and reasonable attorneys' fees, shall also be the personal obligation of the Person who was the Owner of such Unit at the time when the Assessment became due. This personal obligation cannot be avoided by abandonment of a Unit or by an offer to waive use of the Common Elements. The personal obligation only shall not pass to the successors-in-title of any Owner unless expressly assumed by such successors. Each Owner's obligation to pay assessments hereunder shall be in addition to the Owner's obligation to pay all required Master Association and LMA Association capital contributions and assessments, as and to the extent, if any, required under the Master Association Documents and LMA Association Documents respectively.

Section 6.2 Association Funds. The Board shall establish at least the following separate accounts (the "Association Funds") into which shall be deposited all monies paid to the Association, and from which disbursements shall be made, as provided herein, in the performance of functions by the Association under the provisions of this Declaration. The Association Funds shall be established as accounts, in the name of the Association, at a federally or state insured banking or savings institution and shall include: (1) an operating fund ("Operating Fund") for current expenses of the Association, and (2) a reserve fund ("Reserve Fund") for capital repairs and replacements, as set forth in Section 6.3, below, and (3) any other funds which the Board may establish, to the extent necessary under the provisions of this Declaration. To qualify for higher returns on accounts held at banking or savings institutions, the Board may commingle any amounts deposited into any of the Association Funds (other than Reserve Fund which shall be kept segregated), provided that the integrity of each individual Association Fund shall be preserved on the books of the Association by accounting for disbursements from, and deposits to, each Association Fund separately. Each of the Association Funds shall be established as a separate savings or checking account, at any federally or state insured banking or lending institution, with balances not to exceed institutionally insured levels. All amounts deposited into the Operating Fund and the Reserve Fund must be used solely for the common benefit of the Owners for purposes authorized by this Declaration. The Manager shall not be authorized to make withdrawals from the Reserve Fund. Withdrawals from the Reserve Fund shall require signatures of both the President and Treasurer (or, in the absence of either the President or Treasurer, the Secretary may sign in place of the absent Officer). The President, Treasurer, and Secretary must all be Directors and (after the Declarant Control Period) must also all be Owners.

Section 6.3 Reserve Fund; Reserve Studies.

(a) Any other provision herein notwithstanding: (i) the Association shall establish a reserve fund ("Reserve Fund"); (ii) the Reserve Fund shall be used only for capital repairs, restoration, and replacement of major components ("Major Components") of the Common Elements, (iii) in no event whatsoever shall the Reserve Fund be used for regular maintenance recurring on an annual or more frequent basis, or as the source of funds to institute, prosecute, maintain and/or intervene in any Proceeding, or for any purpose whatsoever other than as specifically set forth in (ii) above, (and any use of the Reserve Fund in violation of the foregoing provisions shall be unauthorized and ultra vires as to the Association, and shall subject any Director who acted in any manner to violate or avoid the provisions and/or requirements of this Section 6.3(a) to personal liability to the Association for all costs and liabilities incurred by reason of the unauthorized use of the Reserve Fund), (iv) the Reserve Fund shall be kept in a segregated account, withdrawals from which shall only be made upon specific approval of the Board subject to the foregoing, (v) funds in the Reserve Fund may not be withdrawn without the signatures of both the President and the Treasurer (provided that the Secretary may sign in lieu of either the President or the Treasurer, if either is not reasonably available); and (vi) under no circumstances shall the Manager (or any one Officer or Director, acting alone) be authorized to make withdrawals from the Reserve Fund.

(b) The Board shall periodically retain the services of a qualified reserve study analyst ("Reserve Analyst"), with sufficient experience with preparing reserve studies for similar residential projects in the County, to prepare and provide to the Association a reserve study ("Reserve Study").

(c) The Board shall cause to be prepared a Reserve Study at such times as the Board deems reasonable and prudent, but in any event **initially within one (1) year** after the Close of Escrow for the first Unit within the Properties, and thereafter at least **once every five (5) years** (or at such other intervals as may be required from time to time by applicable Nevada law). The Board shall review the results of the most current Reserve Study **at least annually** to determine if those reserves are sufficient; and shall make such **adjustments** as the Board deems reasonable and prudent to maintain the required reserves from time to time (i.e., by increasing Assessments). It shall be an obligation of the Manager to timely remind the Board in writing of these Reserve Study requirements from time to time as applicable.

(d) Each Reserve Study must be conducted by a person qualified by training and experience to conduct such a study (including, but not limited to, a Director, an Owner or a Manager who is so qualified) ("Reserve Analyst"). The Reserve Study must include, without limitation: (1) a summary of an inspection of the Major Components which the Association is obligated to repair, replace or restore; (2) an identification of the Major Components which have a remaining useful life of less than 30 years; (3) an estimate of the remaining useful life of each Major Component so identified; (4) an estimate of the cost of repair, replacement or restoration of each Major Component so identified during and at the end of its useful life; and (5) an estimate of the total Annual Assessment that may be required to cover the cost of repairing, replacement or restoration the Major Components so identified (after subtracting the reserves as of the date of the Reserve Study). The Reserve Study shall be conducted in accordance with any applicable regulations promulgated from time to time by the Nevada Real Estate Division.

(e) Each Reserve Study shall be prepared in accordance with any legal requirements from time to time as applicable, applied in each instance on a prospective basis. Subject to the foregoing sentence, the Association (upon Recordation of this Declaration) and each Owner (by acquiring title to a Unit) shall be deemed to have unequivocally agreed that the following, among others, shall be deemed reasonable and prudent for and in connection with preparation of each Reserve Study: (i) utilization, by a Reserve Analyst, of the "pooling" or "cash flow" method, or other generally recognized method, and/or (ii) utilization or reliance, by a Reserve Analyst, of an assumption that there will be future annual increases in amounts from time to time allocated to the Reserve Fund (provided that, subject to and without limiting Sections 6.4 or 6.5 below, no assumption shall be made of such future increases in excess of 10% per year plus a reasonable annual inflationary factor), with corresponding increases in Assessments.

Section 6.4 Budget; Reserve Budget.

(a) The Board shall adopt a proposed annual Budget (which shall include a Reserve Budget) at least forty-five (45) days prior to the first Annual Assessment period for each Fiscal Year. Within thirty (30) days after adoption of any proposed Budget, the Board shall provide to all Owners a summary of the Budget, and shall set a date for a meeting of the Owners to consider ratification of the Budget. Said meeting shall be held not less than fourteen (14) days, nor more than thirty (30) days after mailing of the summary. Unless at that meeting the proposed Budget is rejected by at least seventy-five percent (75%) of the voting power of the Association, the Budget shall be deemed ratified, whether or not a quorum was present. If the proposed Budget is duly rejected as aforesaid, the annual Budget for

the immediately preceding Fiscal Year shall be reinstated, as if duly approved for the Fiscal Year in question, and shall remain in effect until such time as a subsequent proposed Budget is ratified.

(b) Notwithstanding the foregoing, except as otherwise provided in subsection (c) below, the Board shall, not less than 30 days or more than 60 days before the beginning of each Fiscal Year, prepare and distribute to each Owner a copy of:

(1) the Budget (which must include, without limitation, the estimated annual revenue and expenditures of the Association and any contributions to be made to the Reserve Fund); and

(2) the Reserve Budget, which must include, without limitation:

(A) the current estimated replacement cost, estimated remaining life and estimated useful life of each Major Component;

(B) as of the end of the Fiscal Year for which the Reserve Budget is prepared, the current estimate of the amount of cash reserves that are necessary, and the current amount of accumulated cash reserves that are set aside, to repair, replace or restore the Major Components;

(C) a statement as to whether the Board has determined or anticipates that the levy of one or more Capital Assessments will be required to repair, replace or restore any Major Component or to provide adequate reserves for that purpose; and

(D) a general statement describing the procedures used for the estimation and accumulation of cash reserves pursuant to subparagraph (B) above, including, without limitation, the qualifications of the Reserve Analyst.

(c) In lieu of distributing copies of the Budget and Reserve Budget, the Board may distribute to each Owner a summary of those budgets, accompanied by a written notice that the budgets are available for review at the business office of the Association or other suitable location and that copies of the budgets will be provided upon request.

Section 6.5 Limitations on Annual Assessment Increases. The Board shall not levy, for any Fiscal Year, an Annual Assessment which exceeds the "Maximum Authorized Annual Assessment" as determined below, unless first approved by the vote of Members representing at least a majority of the voting power of the Association. The "Maximum Authorized Annual Assessment" in any fiscal year following the initial budgeted year shall be a sum which does not exceed the aggregate of (a) the Annual Assessment for the prior Fiscal Year, plus (b) a twenty-five percent (25%) increase thereof. Notwithstanding the foregoing, if, in any Fiscal Year, the Board reasonably determines that the Common Expenses cannot be met by the Annual Assessments levied under the then-current Budget, the Board may, upon the affirmative vote of a majority of the voting power of the Association and a majority of the voting power of the Board, submit a Supplemental Annual Assessment, applicable to that Fiscal Year only, for ratification as provided in Section 6.4, above.

Section 6.6 Capital Contributions to Association. At the Close of Escrow for the sale of a Unit by Declarant, the Purchaser of such Unit shall be required to pay an initial capital contribution to the Association, in an amount equal to the greater of: (a) One Hundred Dollars ($100.00), or (b) two (2) full monthly installments of the initial or then-applicable Annual Assessment. Such initial capital contribution is in addition to, and is not to be considered as, an advance payment of the Annual

Assessment for such Unit, and shall be deposited at each Close of Escrow into the Association Reserve Fund, and used exclusively to help fund the Association Reserve Fund, and shall not be applied to non-Reserve Fund items. Additionally, at the Close of Escrow for each resale of a Unit by an Owner (other than Declarant), the Purchaser of such Unit shall be required to pay a resale capital contribution to the Association, in an amount equal to the greater of: (a) One Hundred Dollars ($100.00), or (b) two (2) full monthly installments of the then-applicable Annual Assessment. Such resale capital contribution is in addition to the foregoing described initial capital contribution, and is further in addition to, and is not to be considered as, an advance payment of the Annual Assessment for such Unit, and may be applied to working capital needs and/or the Reserve Fund, in the Board's business judgment.

Section 6.7 Assessment Commencement Date. The Board, by majority vote, shall authorize and levy the amount of the Annual Assessment upon each Unit, as provided herein. Annual Assessments shall commence on Units on the respective Assessment Commencement Date. The "Assessment Commencement Date" hereunder shall be: (a) with respect to Units in the Original Property, the first day of the calendar month following the Close of Escrow to a Purchaser of the first Unit in the Original Property; and (b) with respect to each Unit within Annexed Property, the first day of the calendar month following the date on which the Annexation Amendment for such Unit is Recorded; provided that Declarant may establish, in its sole and absolute discretion, a later Assessment Commencement Date, uniformly as to all Units by agreement of Declarant to pay all Common Expenses for the Properties up through and including such later Assessment Commencement Date. From and after the Assessment Commencement Date, Declarant may, but shall not be obligated to, make loan(s) to the Association, to be used by the Association for the sole purpose of paying Common Expenses, to the extent the budget therefor exceeds the aggregate amount of Annual Assessments for a given period, provided that any such loan shall be repaid by Association to Declarant as soon as reasonably possible. The first Annual Assessment for each Unit shall be pro-rated based on the number of months remaining in the Fiscal Year. All installments of Annual Assessments shall be collected in advance on a regular basis by the Board, at such frequency and on such due dates as the Board shall determine from time to time in its sole discretion. The Association shall, upon demand, and for a reasonable charge, furnish a certificate binding on the Association, signed by an Officer or Association agent, setting forth whether the Assessments on a Unit have been paid. At the end of any Fiscal Year, the Board may determine that all excess funds remaining in the operating fund, over and above the amounts used for the operation of the Properties, may be retained by the Association for use in reducing the following year's Annual Assessment or for deposit in the reserve account. Upon dissolution of the Association incident to the abandonment or termination of the maintenance of the Properties, any amounts remaining in any of the Association Funds shall be distributed proportionately to or for the benefit of the Members, in accordance with Nevada law.

Section 6.8 Capital Assessments. The Board may levy, in any Fiscal Year, a Capital Assessment applicable to that Fiscal Year only, for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital Improvement or other such addition upon the Common Elements, including fixtures and personal property related thereto; provided that any proposed Capital Assessment shall require the advance consent of a majority of the voting power of the Association.

Section 6.9 Uniform Rate of Assessment. Annual Assessments, and any Capital Assessments shall be assessed at an equal and uniform rate against all Owners and their Units. Each Owner's share of such Assessments shall be a fraction, the numerator of which shall be the number of Units owned by such Owner, and the denominator of which shall be the aggregate number of Units in the Original Property (and, upon annexation, of Units in portions of the Annexed Property).

Section 6.10 Exempt Property. The following property subject to this Declaration shall be exempt from the Assessments herein:

(a) all portions, if any, of the Properties dedicated to and accepted by, the United States, the State of Nevada, the County, or any political subdivision of any of the foregoing, or any public agency, entity or authority, for so long as such entity or political subdivision is the owner thereof, or for so long as such dedication remains effective; and

(b) the Common Elements owned by the Association in fee.

Section 6.11 Special Assessments. The Association may, subject to the provisions of Article 7, Section 9.3 and Section 11.1 (b) hereof, levy Special Assessments against specific Owners who have caused the Association to incur special expenses due to willful or negligent acts of said Owners, their tenants, families, guests, invitees or agents. Special Assessments also shall include, without limitation, late payment penalties, interest charges, fines, administrative fees, attorneys' fees, amounts expended to enforce Assessment liens against Owners as provided for herein, and other charges of similar nature. Special Assessments, if not paid timely when due, shall constitute unpaid or delinquent Assessments, pursuant to Article 7, below.

Section 6.12 Subsidies and/or Advances by Declarant. Declarant shall have the right, in its sole and absolute discretion, from time to time during the Declarant Control Period, to: (a) subsidize the Association, by direct payment of any and all Excess Common Expenses ("Declarant Subsidies"); and/or (b) advance funds and/or make loan(s) to the Association, to be used by the Association for the sole purpose of paying Excess Common Expenses ("Declarant Advances"). "Excess Common Expenses" for purposes of this Section 6.12 shall mean such amount, if any, of Common Expenses in excess of Assessments and non-Reserve funds reasonably available at such time to pay Common Expenses. The aggregate amount of any and all Declarant Subsidies and/or Declarant Advances, or portions from time to time respectively thereof, together with interest thereon at the rate of eighteen percent (18%) per annum, shall be repaid by Association to Declarant as soon as non-Reserve funds are reasonably available therefor (or, at Declarant's sole and absolute discretion, may be set off and applied by Declarant from time to time against any and all past, current, or future Assessments and/or contributions to Reserve Funds, to such extent, if any, Declarant is obligated to pay any such amounts under this Declaration or under applicable Nevada law). Each Owner, by acceptance of a deed to his or her Unit, shall be conclusively deemed to have acknowledged and agreed to all of the foregoing provisions of this Section 6.12, whether or not so stated in such deed.

Section 6.13 LMA and Master Association Assessments and Capital Contributions. Additionally, each Owner, by acceptance of a deed to a Unit (whether or not so expressed in such deed) shall be deemed to agree to pay all required LMA and Master Association capital contributions and assessments, as and to the extent required under applicable provisions of the LMA Association Documents and Master Association Documents respectively, and that the LMA and Master Association each shall have the same rights and remedies against Owners hereunder as the LMA and Master Association have against the "Owners" (as said term is defined in the LMA Declaration and Master Declaration respectively) with respect to the enforcement of the assessments described above. Notwithstanding any provision of this Declaration to the contrary, the terms of this Section 6.13 may not be amended, altered, suspended, or superseded without the express written consent of Declarant, in its sole discretion, which consent shall be acknowledged in a Recorded document.

ARTICLE 7
EFFECT OF NONPAYMENT OF ASSESSMENTS; REMEDIES OF THE ASSOCIATION

Section 7.1 Nonpayment of Assessments. Any installment of an Annual Assessment, Special Assessment, or Capital Assessment, shall be delinquent if not paid within thirty (30) days of the due date as established by the Board. Such delinquent installment shall bear interest from the due date until paid, at the rate of eighteen percent (18%) per annum (or such lower rate as may be approved from time to time by the Board in its business judgment), but in any event not greater than the maximum rate permitted by applicable Nevada law, as well as a reasonable late charge, as determined by the Board, to compensate the Association for increased bookkeeping, billing, administrative costs, and any other appropriate charges. No such late charge or interest on any delinquent installment may exceed the maximum rate or amount allowable by law. The Association may bring an action at law against the Owner personally obligated to pay any delinquent installment or late charge, or foreclose the lien against the Unit. No Owner may waive or otherwise escape liability for the Assessments provided for herein by nonuse of the Common Elements or by abandonment of his Unit.

Section 7.2 Notice of Delinquent Installment. If any installment of an Assessment is not paid within thirty (30) days after its due date, the Board may mail a notice of delinquent Assessment to the Owner and to each first Mortgagee of the Unit. The notice shall specify: (a) the amount of Assessments and other sums due; (b) a description of the Unit against which the lien is imposed; (c) the name of the record Owner of the Unit; (d) the fact that the installment is delinquent; (e) the action required to cure the default; (f) the date, not less than thirty (30) days from the date the notice is mailed to the Owner, by which such default must be cured; and (g) that failure to cure the default on or before the date specified in the notice may result in acceleration of the balance of the installments of such Assessment for the then-current Fiscal Year and sale of the Unit. The notice shall further inform the Owner of his right to cure after acceleration. If the delinquent installment of Assessments and any charges thereon are not paid in full on or before the date specified in the notice, the Board, at its option, may declare all of the unpaid balance of such Assessments levied against such Owner and his Unit to be immediately due and payable without further demand, and may enforce the collection of the full Assessments and all charges thereon in any manner authorized by law or this Declaration.

Section 7.3 Notice of Default and Election to Sell. No action shall be brought to enforce any Assessment lien herein, unless at least sixty (60) days have expired following the later of: (a) the date a notice of default and election to sell is Recorded; or (b) the date the Recorded notice of default and election to sell is mailed in the United States mail, certified or registered, return receipt requested, to the Owner of the Unit. Such notice of default and election to sell must recite a good and sufficient legal description of such Unit, the Record Owner or reputed Owner thereof, the amount claimed (which may, at the Association's option, include interest on the unpaid Assessment as described in Section 7.1 above, plus reasonable attorneys' fees and expenses of collection in connection with the debt secured by such lien), the name and address of the Association, and the name and address of the Person authorized by the Board to enforce the lien by sale. The notice of default and election to sell shall be signed and acknowledged by an Association Officer, Manager, or other Person designated by the Board for such purpose, and such lien shall be prior to any declaration of homestead Recorded after the date on which this Declaration is Recorded. The lien shall continue until fully paid or otherwise satisfied.

Section 7.4 Foreclosure Sale. Subject to the limitation set forth in Section 7.5 below, any such sale provided for above may be conducted by the Board, its attorneys, or other Person authorized by the Board in accordance with the provisions of NRS §116.31164 and Covenants Nos. 6, 7 and 8 of NRS §107.030 and §107.090, as amended, insofar as they are consistent with the provisions of NRS §116.31164, as amended, or in accordance with any similar statute hereafter enacted applicable to the

exercise of powers of sale in Mortgages and Deeds of Trust, or in any other manner permitted by law. The Association, through its duly authorized agents, shall have the power to bid on the Unit at the foreclosure sale and to acquire and hold, lease, mortgage, and convey the same. Notices of default and election to sell shall be provided as required by NRS §116.31163. Notice of time and place of sale shall be provided as required by NRS §116.311635.

Section 7.5 Limitation on Foreclosure. Any other provision in the Governing Documents notwithstanding, the Association may not foreclose a lien by sale for the assessment of a Special Assessment or for a fine for violation of the Governing Documents, unless the violation is of a type that substantially and imminently threatens the health, safety, and welfare of the Owners and Residents of the Community. The foregoing limitation shall not apply to foreclosure of a lien for an Annual Assessment, or Capital Assessment, or any portion respectively thereof, pursuant to this Article 7.

Section 7.6 Cure of Default. Upon the timely cure of any default for which a notice of default and election to sell was filed by the Association, the Officers thereof shall Record an appropriate release of lien, upon payment by the defaulting Owner of a reasonable fee to be determined by the Board, to cover the cost of preparing and Recording such release. A certificate, executed and acknowledged by any two (2) Directors or the Manager, stating the indebtedness secured by the lien upon any Unit created hereunder, shall be conclusive upon the Association and, if acknowledged by the Owner, shall be binding on such Owner as to the amount of such indebtedness as of the date of the certificate, in favor of all Persons who rely thereon in good faith. Such certificate shall be furnished to any Owner upon request, at a reasonable fee, to be determined by the Board.

Section 7.7 Cumulative Remedies. The Assessment liens and the rights of foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies which the Association and its assigns may have hereunder and by law or in equity, including a suit to recover a money judgment for unpaid Assessments, as provided above.

Section 7.8 Mortgagee Protection. Notwithstanding all other provisions hereof, no lien created under this Article 7, nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Unit, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Unit by judicial foreclosure, other foreclosure, or exercise of power of sale, such Unit shall remain subject to this Declaration and the payment of all installments of Assessments accruing subsequent to the date such Beneficiary or other Person obtains title. The lien of the Assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit. The release or discharge of any lien for unpaid Assessments by reason of the foreclosure or exercise of power of sale by the First Mortgagee shall not relieve the prior Owner of his or her personal obligation for the payment of such unpaid Assessments.

Section 7.9 Priority of Assessment Lien. Recording of the Declaration constitutes Record notice and perfection of a lien for Assessments. A lien for Assessments, including interest, costs, and attorneys' fees, as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for: (a) liens and encumbrances Recorded before the Declaration was Recorded, (b) a first Mortgage Recorded before the delinquency of the Assessment sought to be enforced, and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. The sale or transfer of any Unit shall not affect an Assessment lien. However, the sale or transfer of any Unit pursuant to judicial or nonjudicial foreclosure of a First Mortgage shall extinguish the lien of such Assessment as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Unit from lien rights for any Assessments which thereafter become due. Where the Beneficiary of a First Mortgage of Record or other purchaser of a Unit obtains title pursuant to a judicial

or nonjudicial foreclosure or "deed in lieu thereof," the Person who obtains title and his or her successors and assigns shall not be liable for the share of the Common Expenses or Assessments by the Association chargeable to such Unit which became due prior to the acquisition of title to such Unit by such Person. Such unpaid share of Common Expenses and Assessments shall be deemed to become expenses collectible from all of the Units, including the Unit belonging to such Person and his or her successors and assigns.

ARTICLE 8
ARCHITECTURAL AND LANDSCAPING CONTROL

Section 8.1 ARC. The Architectural Review Committee, sometimes referred to in this Declaration as the "ARC," shall consist of three (3) committee members; provided, however, that such number may be increased or decreased from time to time by resolution of the Board. Notwithstanding the foregoing, Declarant shall have the sole right and power to appoint and/or remove all of the members to the ARC until such time as Declarant no longer owns any property in, or has any power to annex, the Annexable Area or any portion thereof; provided that Declarant, in its sole discretion, by written instrument, may at any earlier time turn over to the Board the power to appoint the members to the ARC; thereafter, the Board shall appoint all members of the ARC. A member of the ARC may be removed at any time, without cause, by the Person who appointed such member. Unless changed by resolution of the Board, the address of the ARC for all purposes, including the submission of plans for approval, shall be at the principal office of the Association as designated by the Board.

Section 8.2 Review of Plans and Specifications. The ARC shall consider and act upon any and all proposals, plans and specifications, drawings, and other information or other items (collectively in this Article 8, "plans and specifications") submitted, or required to be submitted, for ARC approval under this Declaration and shall perform such other duties as from time to time may be assigned to the ARC by the Board, including the inspection of construction in progress to assure conformance with plans and specifications approved by the ARC.

(a) With the exception of any such activity of Declarant, no construction, alteration, grading, addition, excavation, removal, relocation, repainting, demolition, installation, modification, decoration, repair or reconstruction of an Improvement, including Dwelling and landscaping, or removal of any tree, shall be commenced or maintained by any Owner, until the plans and specifications therefor showing the nature, kind, shape, height, width, color, materials and location of the same shall have been submitted to, and approved in writing by, the ARC. No design or construction activity of Declarant shall be subject to ARC approval. The Owner submitting such plans and specifications ("Applicant") shall obtain a written receipt therefor from an authorized agent of the ARC. The ARC shall approve plans and specifications submitted for its approval only if it deems that: (1) the construction, alterations, or additions contemplated thereby in the locations indicated will not be detrimental to the appearance of the surrounding area or the Properties as a whole; (2) the appearance of any structure affected thereby will be in harmony with other structures in the vicinity; (3) the construction will not detract from the beauty, wholesomeness and attractiveness of the Common Elements or the enjoyment thereof by the Members; (4) the construction will not unreasonably interfere with existing views from other Units; and (5) the upkeep and maintenance will not become a burden on the Association.

(b) The ARC may condition its review and/or approval of plans and specifications for any Improvement upon any one or more or all of the following conditions: (1) such changes therein as the ARC deems appropriate; (2) agreement by the Applicant to grant appropriate easements to the Association for the maintenance of the Improvement; (3) agreement of the Applicant to reimburse the Association for the costs of maintenance; (4) agreement of the applicant to submit "as-built" record

drawings certified by a licensed architect or engineer which describe the Improvements in detail as actually constructed upon completion of the Improvement; (5) payment or reimbursement, by Applicant, of the ARC and/or its members for their actual costs incurred in considering the plans and specifications; and/or (6) agreement by the Applicant to furnish to the ARC a cash deposit or other security acceptable to the ARC in an amount reasonably sufficient to (A) assure the completion of such Improvement or the availability of funds adequate to remedy any nuisance or unsightly conditions occurring as a result of the partial completion of such Improvement, and (B) to protect the Association and the other Owners against mechanic's liens or other encumbrances which may be Recorded against their respective interests in the Properties or damage to the Common Elements as a result of such work; (7) payment, by Applicant, of the professional fees of a licensed architect or engineer to review the plans and specifications on behalf of the ARC, if such review is deemed by the ARC to be necessary or desirable; and/or (8) such other conditions as the ARC may reasonably determine to be prudent and in the best interests of the Association. The ARC may further require submission of additional plans and specifications or other information prior to approving or disapproving materials submitted. The ARC may also issue rules or guidelines setting forth procedures for the submission of plans and specifications, requiring a fee to accompany each application for approval, or stating additional factors which it will take into consideration in reviewing submissions. The ARC may provide that the amount of such fee shall be uniform, or that the fee may be determined in any other reasonable manner, such as based upon the reasonable cost of the construction, alteration or addition contemplated or the cost of architectural or other professional fees incurred by the ARC in reviewing plans and specifications. Also, with respect to plans and specification which may involve or which may have a direct impact on one or more neighbors of the applicant, the ARC in its sole discretion may require a Neighbor Impact Statement (in such form as may be required from time to time by the ARC), with written approval signed by all such involved neighbors, to be submitted by applicant to the ARC together with the relevant plans and specifications.

(c) The ARC may require such detail in plans and specifications submitted for its review as it deems proper, including without limitation, floor plans, site plans, drainage plans, landscaping plans, elevation drawings and descriptions or samples of exterior materials and colors. Until receipt by the ARC of any required plans and specifications, the ARC may postpone review of any plans and specifications submitted for approval. **Any application submitted pursuant to this Section 8.2 shall be deemed disapproved, unless written approval by the ARC shall have been transmitted to the Applicant within forty-five (45) days after the date of receipt by the ARC of all required materials.** The ARC will or may condition any approval required in this Article 8 upon, among other things, compliance with Declarant's (a) design criteria, (b) Improvement standards and (c) development standards, as amended from time to time, all of which are incorporated herein by this reference.

(d) Any Owner aggrieved by a decision of the ARC may appeal the decision to the ARC in accordance with procedures to be established by the ARC. Such procedures would include the requirement that the appellant has modified the requested action or has new information which would in the ARC's opinion warrant reconsideration. If the ARC fails to allow an appeal or if the ARC, after appeal, again rules in a manner aggrieving the appellant, the decision of the ARC is final. The foregoing notwithstanding, after such time as the Board appoints all members of the ARC, all appeals from ARC decisions shall be made to the Board, which shall consider and decide such appeals.

(e) Notwithstanding the foregoing or any other provision herein, the ARC's jurisdiction shall extend only to the external appearance or "aesthetics" of any Improvement, and shall not extend to structural matters, method of construction, or compliance with a building code or other applicable legal requirement. ARC approval shall be subject to all applicable requirements of applicable

government authority, drainage, and other similar matters, and shall not be deemed to encompass or extend to possible impact on neighboring Units.

Section 8.3 Meetings of the ARC. The ARC shall meet from time to time as necessary to perform its duties hereunder. The ARC may from time to time, by resolution unanimously adopted in writing, designate an ARC representative (who may, but need not, be one of its members) to take any action or perform any duties for and on behalf of the ARC, except the granting of variances pursuant to Section 8.8 below. In the absence of such designation, the vote of a majority of the ARC, or the written consent of a majority of the ARC taken without a meeting, shall constitute an act of the ARC.

Section 8.4 No Waiver of Future Approvals. The approval by the ARC of any proposals or plans and specifications or drawings for any work done or proposed or in connection with any other matter requiring the approval and consent of the ARC, shall not be deemed to constitute a waiver of any right to withhold approval or consent as to any similar proposals, plans and specifications, drawings or matters subsequently or additionally submitted for approval or consent.

Section 8.5 Compensation of Members. Subject to the provisions of Section 8.2(b) above, members of the ARC shall not receive compensation from the Association for services rendered as members of the ARC.

Section 8.6 Correction by Owner of Nonconforming Items. Subject to all applicable requirements of governmental authority, ARC inspection (which shall be limited to inspection of the visible appearance of the size, color, location and materials of work), and Owner correction of visible nonconformance therein, shall proceed as follows:

(a) The ARC or its duly appointed representative shall have the right to inspect any Improvement ("Right of Inspection") whether or not the ARC's approval has been requested or given, provided that such inspection shall be limited to the visible appearance of the size, color, location, and materials comprising such Improvement (and shall not constitute an inspection of any structural item, method of construction, or compliance with any applicable requirement of governmental authority). Such Right of Inspection shall, however, terminate sixty (60) days after receipt by the ARC of written notice from the Owner of the Unit that the work of Improvement has been completed. If, as a result of such inspection, the ARC finds that such Improvement was done without obtaining approval of the plans and specifications therefor or was not done in substantial compliance with the plans and specifications approved by the ARC, it shall, within sixty (60) days from the inspection, notify the Owner in writing of the Owner's failure to comply with this Article 8 specifying the particulars of noncompliance. If work has been performed without approval of plans and specifications therefor, the ARC may require the Owner of the Unit in which the Improvement is located, to submit "as-built" record drawings certified by a licensed architect or engineer which describe the Improvement in detail as actually constructed. The ARC shall have the authority to require the Owner to take such action as may be necessary to remedy the noncompliance.

(b) If, upon the expiration of sixty (60) days from the date of such notification, the Owner has failed to remedy such noncompliance, the ARC shall notify the Board in writing of such failure. Upon Notice and Hearing, the Board shall determine whether there is a noncompliance (with the visible appearance of the size, color, location, and/or materials thereof) and, if so, the nature thereof and the estimated cost of correcting or removing the same. If a noncompliance exists, the Owner shall remedy or remove the same within a period of not more than forty-five (45) days from the date that notice of the Board ruling is given to the Owner. If the Owner does not comply with the Board ruling within that period, the Board, at its option, may Record a notice of noncompliance and commence a lawsuit for damages or injunctive relief, as appropriate, to remedy the noncompliance, and, in addition,

may peacefully remedy the noncompliance. The Owner shall reimburse the Association, upon demand, for all expenses (including reasonable attorneys' fees) incurred in connection therewith. If such expenses are not promptly repaid by the Owner to the Association, the Board shall levy a Special Assessment against the Owner for reimbursement as provided in this Declaration. The right of the Association to remove a noncomplying Improvement or otherwise to remedy the noncompliance shall be in addition to all other rights and remedies which the Association may have at law, in equity, or in this Declaration.

(c) If for any reason the ARC fails to notify the Owner of any noncompliance with previously submitted and approved plans and specifications within sixty (60) days after receipt of written notice of completion from the Owner, the Improvement shall be deemed to be in compliance with ARC requirements (but of course shall remain subject to all requirements of applicable governmental authority).

(d) All construction, alteration or other work shall be performed as promptly and as diligently as possible and shall be completed within one hundred eighty (180) days of the date on which the work commenced.

Section 8.7 Scope of Review. The ARC shall review and approve, conditionally approve, or disapprove, all proposals, plans and specifications submitted to it for any proposed Improvement, alteration, or addition, solely on the basis of the considerations set forth in Section 8.2 above, and solely with regard to the visible appearance of the size, color, location, and materials thereof. The ARC shall not be responsible for reviewing, nor shall its approval of any plan or design be deemed approval of, any proposal, plan or design from the standpoint of structural safety or conformance with building or other codes. **Each Owner shall be responsible for obtaining all necessary permits and for complying with all governmental (including, but not necessarily limited to County) requirements.**

Section 8.8 Variances. When circumstances such as topography, natural obstructions, hardship, or aesthetic or environmental considerations may require, the ARC may authorize limited variances from compliance with any of the architectural provisions of this Declaration, including without limitation, restrictions on size (including height and/or floor area) or placement of structures, or similar restrictions. Such variances must be evidenced in writing, must be signed by a majority of the ARC, and shall become effective upon Recordation. If such variances are granted, no violation of the covenants, conditions and restrictions contained in this Declaration shall be deemed to have occurred with respect to the matter for which the variance was granted. **The granting of any such variance by the ARC shall not operate to waive any of the terms and provisions of this Declaration for any purpose except as to the particular property and particular provision hereof covered by the variance, nor shall it affect in any way the Owner's obligation to comply with all governmental laws, regulations, and requirements affecting the use of his or her Unit, including but not limited to zoning ordinances and Unit set-back lines or requirements imposed by the County, or other public authority with jurisdiction.** The granting of a variance by the ARC shall not be deemed to be a variance or approval from the standpoint of compliance with such laws or regulations, nor from the standpoint of structural safety, and the ARC, provided it acts in good faith, shall not be liable for any damage to an Owner as a result of its granting or denying of a variance.

Section 8.9 Non-Liability for Approval of Plans. The ARC's approval of proposals or plans and specifications shall not constitute a representation, warranty or guarantee, whether express or implied, that such proposals or plans and specifications comply with good engineering design or with zoning or building ordinances, or other governmental regulations or restrictions. By approving such proposals or plans and specifications, neither the ARC, the members thereof, the Association, the Board, nor Declarant, assumes any liability or responsibility therefor, or for any defect in the structure

constructed from such proposals or plans or specifications. Neither the ARC, any member thereof, the Association, the Board, nor Declarant, shall be liable to any Member, Owner, occupant, or other Person or entity for any damage, loss, or prejudice suffered or claimed on account of (a) the approval or disapproval of any proposals, plans and specifications and drawings, whether or not defective, or (b) the construction or performance of any work, whether or not pursuant to the approved proposals, plans and specifications and drawings.

Section 8.10 Architectural Guidelines. The ARC, in its sole discretion, from time to time, may, but is not obligated to, promulgate Architectural and Landscape Standards and Guidelines for the Community.

Section 8.11 Declarant Exemption. The ARC shall have no authority, power or jurisdiction over Units owned by Declarant, and the provisions of this Article 8 shall not apply to Improvements built by Declarant, or, until such time as Declarant conveys title to the Unit to a Purchaser, to Units owned by Declarant. This Article 8 shall not be amended without Declarant's written consent set forth on the amendment.

Section 8.12 LMA Declaration; Master Declaration. The foregoing architectural and landscaping control provisions shall be in addition to, and cumulative with, any and all expressly applicable architectural and landscaping control provisions of the LMA Declaration and/or Master Declaration respectively. In the event of any irreconcilable conflict, the provisions of the LMA Declaration and/or Master Declaration shall prevail.

ARTICLE 9
MAINTENANCE AND REPAIR OBLIGATIONS

Section 9.1 Maintenance and Repair Responsibilities of Association. No Improvement, excavation or work which in any way alters the Common Elements shall be made or done by any Person other than initially by Declarant, or by the Association or its authorized agents after the completion of the construction or installation of the Improvements thereto by Declarant. Subject to this Declaration (including, but not limited to the provisions of Sections 9.3 and 11.1(b) hereof), upon the Assessment Commencement Date, the Association shall provide for the periodic maintenance, repair, and replacement of the Common Elements. The Common Elements shall be maintained in a safe, sanitary and attractive condition, and in good order and repair. The Association shall also provide for any utilities serving the Common Elements, and shall ensure that any landscaping on the Common Elements is regularly and periodically maintained in good order and in a neat and attractive condition. The Association shall not be responsible for the maintenance of any portions of the Common Elements which have been dedicated to and accepted for maintenance by a state, local or municipal governmental agency or entity. All of the foregoing obligations of the Association shall be discharged when and in such manner as the Board shall determine in its business judgment to be appropriate. Without limiting the foregoing, the Association's obligations hereunder shall include, but not necessarily be limited to, the following:

(a) Painting. The Board and/or Manager shall cause all Improvements in the Common Elements to be repaired and/or repainted as necessary to maintain the original appearance thereof (normal wear and fading excepted).

(b) Utilities. The Board and/or Manager shall cause to be maintained properly and in good condition and repair all utilities and utility systems in the Common Elements. The Board and/or Manager shall cause all water and/or sewer infrastructure, as set forth herein, to be inspected at least

quarterly, and at least one such inspection each year shall be done by a licensed and qualified contractor or architect with expertise in the construction and maintenance of such water/sewer infrastructure, who shall provide a written report to the Board and/or Manager. Common Element sewer lines may be cleaned annually (or on such other periodic frequency as deemed reasonably prudent by the Board), from each Triplex Building to the street. Common Element water lines may be "exercised" once each year (or on such other periodic frequency as deemed reasonably prudent by the Board), by turning each valve off and on several times in succession. The Board and/or Manager shall cause any and all necessary or prudent repairs to be undertaken and completed without delay in a manner and to the extent necessary to prevent avoidable deterioration or property damage.

(c) Drainage; Landscaping; Irrigation. The Board and/or Manager shall cause all drainage systems, landscape installations, and irrigation systems within the Common Elements to be inspected at least monthly. In particular, the Board and/or Manager shall inspect for any misaligned, malfunctioning or nonfunctional sprinklers, or blocked drainage grates, basins, lines, and systems, which could cause damage to Improvements on the Properties. At least one such inspection each year shall be done by a licensed and qualified contractor or architect with expertise in the construction and maintenance of such drainage and landscape installations, who shall be required to promptly provide a written report to the Board. The written reports shall identify any items of maintenance or repair which either require current action by the Association, or will need further review and analysis, and shall specifically include a review of all irrigation and drainage systems on the Properties. The Board and/or Manager shall cause any and all necessary or prudent repairs to be promptly undertaken and completed, to prevent avoidable deterioration or property damage. Without limiting the following, all landscaping shall be maintained as per the following minimum maintenance standards:

(1) lawn and ground cover shall be kept mowed and/or trimmed regularly;

(2) plantings shall be kept in a healthy and growing condition; fertilization, cultivation, spraying and tree pruning shall be performed as part of a regular landscaping program;

(3) stakes, guys and ties on trees shall be checked regularly, to ensure the correct function of each; ties shall be adjusted to avoid creating abrasions or girdling of the trunk or stem;

(4) damage to plantings shall be ameliorated within thirty (30) days of occurrence; and

(5) irrigations systems shall be kept in sound working condition; adjustment, replacement of malfunctioning parts, and cleaning of systems, shall be an integral part of the regular landscaping program.

(d) Hardscape; Private Streets. The Board and/or Manager shall cause all Common Elements hardscape, paved areas, and Private Streets within the Properties to be inspected at least quarterly. At least one such inspection each year shall be done by a licensed and qualified contractor or architect with expertise in the construction and maintenance of such hardscape and paved areas, who shall be required to promptly provide a written report to the Board. The written reports shall identify any items of maintenance or repair which either require current action by the Association, or will need further review and analysis. The Board and/or Manager shall cause any and all necessary or prudent repairs to be promptly undertaken and completed, to prevent avoidable deterioration or property damage. Without limiting the foregoing, the Board and/or Manager shall cause all Common Element asphalt to be sealed and re-striped at least as frequently as may be required per County standards, or more frequently, if so required, using two coats of a guard top or walk top type sealer.

(e) Inspections. After the end of the Declarant Control Period, the Board and Manager shall conduct inspections of the Common Elements as set forth above, and shall provide Declarant with at least ten days' prior written notice of each such inspection. Declarant shall have the option, in its sole discretion, without obligation, to attend each such inspection.

(f) Reports. Throughout the term of this Declaration, the Board and the Manager shall promptly deliver to Declarant information copies of all written inspections and reports rendered pursuant to the Association's maintenance and repair responsibilities hereunder (without any obligation whatsoever of Declarant to review such documents or to take any action in connection therewith).

(g) Other Responsibilities. Without limiting the generality of any of the foregoing, the Association shall also be responsible for:

(1) replacement of burned-out light bulbs and broken fixtures on "coach lights" located at or near the front door of the Unit, pursuant to Section 9.3, below, in the event that the Owner of the affected Unit does not immediately make such replacement, and to assess such Owner the sum of not less than Fifty Dollars ($50.00) for each such replacement, as a Special Assessment.

(2) removing any trash, garbage, or debris from Common Elements; and

(3) cleaning and making necessary repairs and replacement to and of the perimeter walls and/or fencing.

(h) Failure to Maintain. The Association shall be responsible for accomplishing its maintenance and repair obligations fully and timely from time to time, as set forth in this Declaration. Failure of the Association to fully and timely accomplish such maintenance and repair responsibilities may result in deterioration and/or damage to Improvements, and such damage and/or deterioration shall in no event be deemed to constitute a constructional defect.

Section 9.2 Inspection Responsibilities of Association. Within thirty (30) days after the date which is one (1) year after the first Close of Escrow of a Unit, and annually thereafter, the Board (and, so long as Declarant owns any portion of the Properties, a representative of Declarant) shall conduct a thorough walk-through inspection of the Common Elements. If, at the time of such inspection, there are no Directors other than those appointed by Declarant, up to two (2) Owners, other than Declarant, shall be permitted to accompany such inspection. At the Board's option, the inspection may be videotaped. Following the inspection, the Board shall prepare a detailed written description of the then-existing condition of all such areas, facilities and buildings, including a checklist of all items requiring repairs or special attention. A similar checklist shall be prepared and signed by the Board and/or Manager within thirty (30) days after the election of the first Board elected following the end of the Declarant Control Period. It shall at all times be an express obligation of the Association to properly inspect (as aforesaid), repair, maintain, and/or replace such items, facilities, structures, landscaping and areas as are required to maintain the Common Elements in as good condition thereof as originally constructed by Declarant (reasonable wear and tear, settling and deterioration excepted). The Board shall report the contents of such written reports to the Members, at the next meeting of the Members following receipt of such written report, or as soon thereafter as reasonably practicable, and shall include such written reports in the minutes of the meeting. The Board shall promptly cause all matters identified as requiring attention to be maintained, repaired, or otherwise pursued in accordance with prudent business practices, and the recommendations of the inspectors. If requested by Declarant, copies of such reports shall also be delivered to Declarant. The foregoing notwithstanding, neither Declarant nor the Board shall be liable for any failure or omission under this Section 9.2, so long as

Declarant and/or the Board (as may be applicable) has acted in good faith and with reasonable due diligence in carrying out its responsibilities hereunder.

Section 9.3 Maintenance and Repair Obligations of Owners. It shall be the duty of each Owner, at his or her sole cost and expense, subject to the provisions of this Declaration requiring ARC approval, to maintain, repair, replace and restore all Improvements located on his or her Unit, the Unit itself, and any Exclusive Use Area pertaining to his or her Unit, in a neat, sanitary and attractive condition, except for any areas expressly required to be maintained by the Association under this Declaration. If any Owner shall permit any Improvement, the maintenance of which is the responsibility of such Owner, 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 which the Association may have. 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 Owner. Said cost shall be a Special Assessment, enforceable as set forth in this Declaration. Without limiting the foregoing, each Owner shall be responsible for the following:

(a) maintenance, repair, and/or replacement of all exterior walls, and all roof area of the Triplex Building (including the exteriors of exterior walls of Yard Components) in which the Owner's Unit is located, respectively appurtenant to said Unit, (provided that the portions of ground floor exterior wall immediately above and adjacent to the Garage Components of Units 2 and 3 shall be the responsibility of the Owners of Units 2 and 3 respectively, who shall have an easement to maintain, repair, and paint such portions) in conformity with the original construction thereof; without limiting the foregoing, exterior painting of Triplex Buildings shall be the responsibility of the Owners of the Units in each Triplex Building, and if two (2) of the three (3) such Owners agree that such exterior painting is required, they shall have the right, following reasonable notice to the third such Owners, to proceed with such painting and to require such third Owner to equally or equitably share the cost of such painting. All such painting shall match as closely as possible the original color of the Triplex Building (subject to variation only if approved in advance in writing by the Board in its sole and absolute discretion), and shall be accomplished by a duly licensed contractor.

(b) periodic painting, maintenance, repair, and/or replacement of the front doors to the Owner's Units, and Garage sectional roll-up doors;

(c) annual inspection and repair or replacement of heat sensors, as originally installed in certain (but not necessarily all) of the Owner's Unit;

(d) cleaning, maintenance, repair, and/or replacement of any and all plumbing fixtures, electrical fixtures, and/or appliances (whether "built-in" or free-standing, including, by way of example and not of limitation: water heaters (and associated pans), furnaces, plumbing fixtures, lighting fixtures, refrigerators, dishwashers, garbage disposals, microwave ovens, washers, dryers, and ranges), within the Owner's Unit;

(e) cleaning, maintenance, painting and repair of the interior of the front door of the Owner's Unit; cleaning and maintenance of the exterior of said front door, subject to the requirement that the exterior appearance of such door shall not deviate from its external appearance as originally installed by Declarant;

(f) cleaning, maintenance, repair, and/or replacement of all windows and window glass within or exclusively associated with, the Owner's Unit, including the metal frames, tracks, and

exterior screens thereof, subject to the requirement that the exterior appearance of such items shall not deviate from its external appearance as originally installed by Declarant;

(g) cleaning, and immediate, like-kind replacement of burned-out light bulbs, and broken light fixtures, with respect to the "coach lights" at or near the front door of the Owner's Unit; in the event that the Owner does not immediately accomplish his or her duties under this subsection (g), the Association shall have the rights set forth in Section 9.1(h), above.

(h) cleaning, maintenance, repair, and replacement of the HVAC, located on an easement within the Common Elements, serving such Owner's Unit exclusively (but not the concrete pad underneath such HVAC), subject to the requirement that the appearance of such items shall not deviate from their appearance as originally installed by Declarant:

(i) maintenance, repair, and replacement of Garage remote openers, subject to the requirement that any replacement therefor be purchased by the Owner from the Association; and

(j) without limiting any of the foregoing: cleaning, maintenance, repair, and replacement of the door opener and opening mechanism located in the Owner's Garage (provided that any replacement door opener shall be a "quiet drive" unit, at least as quiet as the unit originally installed by Declarant), so as to reasonably minimize noise related to or caused by an unserviced or improperly functioning Garage door opener and/or opening mechanism.

Section 9.4 Restrictions on Alterations.

(a) No Owner shall make any alterations or additions to any portion of the exterior of the Triplex Building in which such Owner's Unit (including Garage) is located, or to the Yard Component. Without limiting the foregoing, no Owner shall add concrete to a Yard Component, or install a patio or cover on the Yard Component. Notwithstanding the foregoing, flower pots and/or "planters" (in which the roots of plants does not extend past the planter into the ground or below ground level) may be permitted in Yard Components, subject to prior approval by the ARC, provided that no automated irrigation or sprinkler system shall be permitted in connection with such flower pots and/or planters, which must be watered by hand.

(b) Nothing shall be done in or to any part of the Properties which will impair the structural integrity of any part of the Properties except in connection with the alterations or repairs specifically permitted or required hereunder.

(c) Anything to the contrary herein notwithstanding, there shall be no alteration or impairment of, the structural integrity of, or any plumbing or electrical work within, any common wall without the prior written consent of the Board and all Owners of affected Units, which consent shall not be unreasonably withheld. Each Owner shall have the right to paint, wallpaper, or otherwise furnish the interior surfaces of his Unit as he sees fit.

(d) No improvement or alteration of any portion of the Common Elements shall be permitted without the prior written consent of the Board.

(e) No Owner shall change or modify the condition or appearance of any exterior window or door or any portion thereof, as viewed from any portion of the Properties, without the prior written consent of the Board.

(f) Notwithstanding any other provision herein, the Board, in compliance with applicable law, shall give prompt consideration to, and shall reasonably accommodate, the request of any Resident who suffers from visual or hearing impairment, or is otherwise physically handicapped, to reasonably modify his or her Unit (including, but not necessarily limited to, the entrance thereto through Common Elements, the front door thereof, and/or appropriate features of a Garage), at the expense of such handicapped Resident, to facilitate access to the Unit, or which are otherwise necessary to afford such handicapped Resident an equal opportunity to use and enjoy his or her Dwelling.

(g) The foregoing provisions shall not apply to the initial construction activities of Declarant.

Section 9.5 Reporting Responsibilities of Owners. Each Owner shall promptly report in writing to the Board any and all visually discernible items or other conditions, with respect to his Unit (including Garage), Triplex Building and areas adjacent to his Unit, which reasonably appear to require repair. Delay or failure to fulfill such reporting duty may result in further damage to Improvements, requiring costly repair or replacement.

Section 9.6 Disrepair; Damage by Owners. If any Owner shall permit any Improvement, which is the responsibility of such Owner to maintain, to fall into disrepair so as to create a dangerous, unsafe, unsightly or unattractive condition, the Board, and after affording such Owner reasonable notice, shall have the right but not the obligation to correct such condition, and to enter upon such Owner's Unit, for the purpose of so doing, and such Owner shall promptly reimburse the Association for the cost thereof. Such cost may be assessed as a Special Assessment pursuant to Section 6.11 above, and, if not paid timely when due, shall constitute unpaid or delinquent assessments for all purposes of Article 7, above. The Owner of the offending Unit shall be personally liable for all costs and expenses incurred by the Association in taking such corrective acts, plus all costs incurred in collecting the amounts due. Each Owner shall pay all amounts due for such work within ten (10) days after receipt of written demand therefor. Any other provision herein notwithstanding, the cost of any cleaning, maintenance, repairs, and/or replacements by the Association within the Common Elements or any other Unit, arising out of or caused by the willful or negligent act of an Owner, his or her tenants, or their respective Families, guests or invitees shall, after Notice and Hearing, be levied by the Board as a Special Assessment against such Owner pursuant to Section 6.11, above, and, if not paid timely when due, shall constitute unpaid or delinquent assessments pursuant to Article 7, above.

Section 9.7 Damage by Owners to Common Elements. The cost of any maintenance, repairs or replacements by the Association within the Common Elements arising out of or caused by the willful or negligent act of an Owner, his or her tenants, or their respective Families, guests or invitees shall, after Notice and Hearing, be levied by the Board as a Special Assessment against such Owner as provided pursuant to Section 6.11, above, and if not paid timely when due, shall constitute unpaid or delinquent assessments pursuant to Article 7 above.

Section 9.8 Pest Control Program. If the Board adopts an inspection, prevention and/or eradication program ("pest control program") for the prevention and eradication of infestation by wood destroying pests and organisms, the Association, upon reasonable notice (which shall be given no less than fifteen (15) days nor more than thirty (30) days before the date of temporary relocation) to each Owner and the Residents of the Unit, may require such Owner and Residents to temporarily relocate from the Unit in order to accommodate the pest control program. The notice shall state the reason for the temporary relocation, the anticipated dates and times of the beginning and end of the pest control program, and that the Owner and Residents will be responsible, at their own expense, for their own accommodations during the temporary relocation. Any damage caused to a Unit or Common Elements

by the pest control program shall be promptly repaired by the Association. All costs involved in maintaining the pest control program, as well as in repairing any Unit or Common Elements shall be a Common Expense, subject to a Special Assessment therefor, and the Association shall have an easement over the Units for the purpose of effecting the foregoing pest control program.

Section 9.9 Damage and Destruction Affecting Dwellings and Duty to Rebuild. If all or any portion of any Unit or Dwelling is damaged or destroyed by fire or other casualty, it shall be the duty of the Owner of such Unit to rebuild, repair or reconstruct the same in a manner which will restore the Unit substantially to its appearance and condition immediately prior to the casualty or as otherwise approved by the ARC. The Owner of any damaged Unit shall be obligated to proceed with all due diligence hereunder, and such Owner shall cause reconstruction to commence within three (3) months after the damage occurs and to be completed within six (6) months after the damage occurs, unless prevented by causes beyond his or her reasonable control. A transferee of title to the Unit which is damaged shall commence and complete reconstruction in the respective periods which would have remained for the performance of such obligations if the Owner at the time of the damage still held title to the Unit.

Section 9.10 Yard Walls/Fences. Each wall which is built as a part of the original construction by Declarant and placed approximately between a Yard Component and Common Elements shall constitute a "Yard Wall/Fence". The cost of repair and maintenance of a Yard Wall/Fence shall be borne by the Owner ("Wall Owner") of the Unit whose Yard Component abuts the Yard Wall/Fence. The cost of reasonable repair and maintenance of Yard Walls/Fences shall be shared by the Owners who use such Yard Wall/Fence in proportion to such use (e.g., if the Yard Wall/Fence is the boundary between two Owners, then each such Owner shall bear half of such cost). Notwithstanding any other provision in this Declaration, in the event that any Yard Wall/Fence as originally constructed by Declarant, is not constructed exactly on the property line or as shown on the Plat, the Owners (and/or Association) affected shall accept the Yard Wall/Fence as the property boundary, and shall have no claim whatsoever against Declarant, the Association, or any other Owner as a result thereof or in connection therewith. If a Yard Wall/Fence is destroyed or damaged by fire or other casualty, the Yard Wall/Fence shall be promptly restored, to its condition and appearance before such damage or destruction, by the Wall Owner. Subject to the foregoing, in the event the Wall Owner does not fulfill his obligations, the Association shall have the right, but not the obligation, and an easement, to restore Yard Wall/Fence to its condition and appearance before such destruction or damage, and may assess the costs thereof a Special Assessment against the Wall Owner pursuant to Section 6.11 above, and may enforce the same pursuant to Article 7, above. Any other provision herein notwithstanding, no Owner shall alter, add to, or remove any Yard Wall/Fence constructed by Declarant, or portion of such wall or fence, without the prior written consent of the Declarant (during the Declarant Control Period), and prior written approval of the ARC. In the event of any dispute arising concerning a Yard Wall/Fence under the provisions of this Section 9.10, each party shall choose one arbitrator, each such arbitrator shall choose one additional arbitrator, and the decision of a majority of such panel of arbitrators shall be binding upon the Owners which are a party to the arbitration.

Section 9.11 Additional Wall/Fence Provisions. Units initially may be developed by Declarant and conveyed to Purchasers with or without Yard Components and/or Yard Walls/Fences. In the event one or more Units is or are initially developed and conveyed without such walls or fences (i.e., "open landscaping"), Declarant reserves the right (but not the obligation) thereafter at any time, in its discretion, following notice to the Owners thereof, to enter upon such Units and Common Elements and to construct thereon Yard Walls/Fences (and Declarant expressly reserves an easement upon all Units and Common Elements for itself, and its agents, employees, and contractors, for such purpose). Construction by Declarant of a Yard Wall/Fence on any Yard Component shall raise absolutely no presumption or obligation to construct a similar or any wall or fence on any other Yard Component. Walls or fences initially installed by Declarant shall not be added to, removed, modified, changed, or

obstructed by any Owner absent prior written approval of the ARC, and shall not in any manner or degree relieve any Owner of his or her obligation to maintain the entire Unit, regardless of the location of such wall or fence, as well as such wall or fence.

Section 9.12 Installed Landscaping.

(a) Declarant shall or may install certain landscaping in Yard Components ("Installed Landscaping"). Each Owner shall be responsible, at his sole expense, for: (1) maintenance, repair, replacement, and watering of all Installed Landscaping on his Yard Component in a neat and attractive condition; and (2) maintenance, repair, and/or replacement of any and all sprinkler or irrigation or other related systems or equipment pertaining to such landscaping, as initially installed by Declarant, subject to Subsection 9.12(b) below. An Owner shall not be entitled to change, alter, delete, or add to, the Installed Landscaping in such Owner's Yard Component in the absence of prior written consent of the ARC, in its sole and absolute discretion.

(b) To help prevent and/or control water damage to foundations and/or walls, each Owner covenants, by acceptance of a deed to his Unit, whether or not so stated in such deed, to not cause or permit spray irrigation water or sprinkler water or drainage on his Yard Component to seep or flow onto, or to strike upon, any foundation, slab, side or other portion of Dwelling, wall (including, but not necessarily limited to, Triplex Building wall and/or Yard Wall/Fence), and/or any other Improvement. Without limiting the generality of the foregoing or any other provision in this Declaration, each Owner shall at all times ensure that: (1) there are no unapproved grade changes (including, but not necessarily limited to, mounding) within three (3) feet of any such foundation or wall located on or immediately adjacent to the Owner's Unit; and (2) only non-irrigated desert landscaping or drip (and not spray or sprinkler) irrigated landscaping is located on the Owner's Unit or Yard Component within three feet of any foundation, slab, side or other portion of Dwelling or Yard Wall/Fence and/or any other Improvement.

(c) Each Owner covenants to pay promptly when due all water bills for his or her Unit, and (subject to bona-fide force majeure events) to not initiate or continue any act or omission which would have the effect of water being shut off to the Unit. In the event that all or any portion of landscaping and/or related systems is or are damaged because of any Owner's act or omission, then such Owner shall be solely liable for the costs of repairing such damage, and any and all costs reasonably related thereto, and the Association may, in its discretion, perform or cause to be performed such repair, and to assess all related costs against such Owner as a Special Assessment, and the Association, and its employees, agents and contractors, shall have an easement over Units to perform such function.

Section 9.13 Modification of Improvements. Maintenance and repair of Common Elements shall be the responsibility of the Association, and the costs of such maintenance and repair shall be Common Expenses; provided that, in the event that any Improvement located on Common Elements is damaged because of any Owner's act or omission, such Owner shall be solely liable for the costs of repairing such damage and any and all costs reasonably related thereto, all of which costs may be assessed against such Owner as a Special Assessment under this Declaration. Without limiting Section 9.14, below, each Owner covenants, by acceptance of a deed to his Unit, whether or not so stated in such deed, to not: add to, remove, modify, change, obstruct, or landscape, all or any portion of: (a) the Common Elements; (b) Yard Component; (c) Installed Landscaping; (d) Yard Wall(s)/Fence(s); (e) Triplex Building; and/or (f) any other Improvement; without prior written approval of the ARC.

Section 9.14 Certain Other Improvements. Notwithstanding Section 9.13 or any other provision of this Declaration: (a) only Declarant, in its sole and absolute discretion, and no other Owner

or other Person, shall have the right to construct, or shall construct, a Patio or Balcony (and Declarant discloses that, as of the date of Recordation hereof, Declarant does not presently intend to construct any Patios or Balconies); and (b) only Declarant, in its discretion, and no other Owner or other Person, may add additional concrete in or to a Yard Component.

Section 9.15 Graffiti Removal. The Association may, at its discretion, remove or paint over any graffiti from or on Exterior Walls/Fences (the costs of which shall be a Common Expense).

Section 9.16 Maintenance of Coach Lights. Each Owner shall at all times maintain in good and operating condition any and all coach lights ("Coach Lights") installed by Declarant on the exterior of the Owner's Dwelling or Garage. Such Owner maintenance shall include, but not be limited to, immediate replacement of burnt-out light bulbs and broken coach light fixtures, and prompt periodic replacement of photoelectric cells in the Coach Lights, when and as needed. Absent prior written approval of the ARC, in its sole discretion, no Owner may delete, modify, or change any Coach Light or part thereof as initially installed by Declarant. If any Owner shall fail to so maintain such Coach Lights, or permit such lighting to fall into disrepair, or delete or modify such lighting without prior approval of the ARC, the Association shall have the right to correct such condition, and the Owner shall be solely liable for the costs thereof and any and all costs reasonably related thereto, all of which costs may be assessed against such Owner as a Special Assessment under this Declaration. Without limiting the foregoing, in the event that an Owner does not immediately replace a burnt-out Coach Light bulb, the Association shall have the right to enter upon the Unit and to replace such light bulb, and to assess the Owner the sum of not less than Fifty Dollars ($50.00) for each such replacement, as a Special Assessment. Nothing in this Section 9.16 shall be construed as requiring or mandating initial installation by Declarant of Coach Lights.

ARTICLE 10
USE RESTRICTIONS

Subject to the rights and exemptions of Declarant as set forth in this Declaration, and subject further to the fundamental "good neighbor" policy underlying and controlling the Community and this Declaration, all real property within the Properties shall be held, used and enjoyed subject to the limitations, restrictions and other provisions set forth in this Declaration. The strict application of the limitations and restrictions set forth in this Article 10 may be modified or waived in whole or in part by the ARC in specific circumstances where such strict application would be unduly harsh, provided that any such waiver or modification shall not be valid unless in writing and executed by the ARC. Furthermore, violation of, or noncompliance with, a provision set forth in this Article 10 (unless it substantially threatens the health and welfare of the Owners and Community), shall not be enforced absent written complaint from one or more of the immediate neighbors of the alleged offending Owner (provided that Declarant, in its sole discretion, shall conclusively be deemed an "immediate neighbor" of all Units for so long as Declarant owns any Unit in the Properties). Any other provision herein notwithstanding, neither Declarant, the Association, the ARC, nor their respective directors, officers, members, agents or employees shall be liable to any Owner or to any other Person as a result of the failure to enforce any use restriction or for the granting or withholding of a waiver or modification of a use restriction as provided herein.

Section 10.1 Single Family Residence. Each Unit shall be improved and used solely as a residence for a single Family and for no other purpose. No part of the Properties shall ever be used or caused to be used or allowed or authorized to be used in any way, directly or indirectly, for any business, commercial, manufacturing, mercantile, primary storage, vending, "reverse engineering", destructive construction testing, or any other nonresidential purpose; provided that Declarant may

exercise the reserved rights described in Article 14 hereof. The provisions of this Section 10.1 shall not preclude a professional or administrative occupation, or an occupation of child care, provided that the number of non-Family children, when added to the number of Family children being cared for at the Unit, shall not exceed a maximum aggregate of five (5) children, and provided further that there is no nuisance under Section 10.5 below, and no external evidence of any such occupation, for so long as such occupation is conducted in conformance with all applicable governmental ordinances and are merely incidental to the use of the Dwelling as a residential home. This provision shall not preclude any Owner from renting or leasing his or her entire Unit by means of a written lease or rental agreement subject to this Declaration and any Rules and Regulations; provided that no lease shall be for a term of less than six (6) consecutive months.

Section 10.2 No Further Subdivision. Except as may be expressly authorized by Declarant, no Unit or Common Element may be further subdivided (including, without limitation, any division into time-share estates or time-share uses) without the prior written approval of the Board; provided, however, that this provision shall not be construed to limit the right of an Owner: (1) to rent or lease his or her entire Unit by means of a written lease or rental agreement subject to the restrictions of this Declaration, so long as the Unit is not leased for transient or hotel purposes; (2) to sell his or her Unit; or (3) to transfer or sell any Unit to more than one person to be held by them as tenants-in-common, joint tenants, tenants by the entirety or as community property. The terms of any such lease or rental agreement shall be made expressly subject to the Governing Documents. Any failure by the lessee of such Unit to comply with the terms of the Governing Documents shall constitute a default under the lease or rental agreement. No two or more Units in the Properties may be combined in any manner whether to create a larger Unit or otherwise, and no Owner, without the approval of the ARC, in the ARC's discretion, may remove any wall or other intervening partition between Units.

Section 10.3 Insurance Rates. Without the prior written approval of the ARC and the Board, nothing shall be done or kept in the Properties which will increase the rate of insurance on any Unit or other portion of the Properties, nor shall anything be done or kept in the Properties which would result in the cancellation of insurance on any Unit or other portion of the Properties or which would be a violation of any law. Any other provision herein notwithstanding, neither the ARC nor the Board shall have any power whatsoever to waive or modify this restriction.

Section 10.4 Animal Restrictions. All Owners shall comply fully in all respects with all applicable Ordinances and rules regulating and/or pertaining to animals and the maintenance thereof on the Owner's Unit and/or any other portion of the Properties. Without limiting the foregoing, an Owner or Resident shall be permitted to keep in his or her Unit a reasonable number (normally not to exceed an aggregate total of two) of dogs, cats, and/or other animals, not more than forty (40) pounds in weight each, and generally considered to be "indoor" household animals; provided that the keeping of such household animals may be prohibited or restricted by the ARC if it reasonably determines that such household animals constitute a nuisance. Each person bringing or keeping a pet within the Properties shall be absolutely liable to other Owners and their Invitees for any damage to persons or property caused by any pet brought upon or kept upon the Properties by such person or by members of his or her family, his or her guests or Invitees and it shall be the duty and responsibility of each such Owner to immediately clean up after such animals which have deposited droppings or otherwise used any portion of the Properties or public street abutting or visible from the Property. Animals belonging to Owners or Invitees of any Owner must be kept within an enclosure or on a leash held by a person capable of controlling the animal.

Section 10.5 Nuisances. No rubbish, debris, or animal feces of any kind shall be placed or permitted to accumulate anywhere within the Properties, and no odor shall be permitted to arise therefrom so as to render the Properties or any portion thereof unsanitary, unsightly, or offensive. No

noise or other nuisance shall be permitted to exist or operate upon any portion of a Unit so as to be offensive or detrimental to any other Unit or to occupants thereof, or to the Common Elements. Without limiting the generality of any of the foregoing provisions, no horns, whistles, bells or other similar or unusually loud sound devices (other than security devices used exclusively for safety, security, or fire protection purposes), noisy or smoky vehicles, large power equipment or large power tools (excluding lawn mowers, edgers, and other equipment normally utilized in connection with ordinary landscape maintenance), inoperable vehicle, unlicensed off-road motor vehicle or other item which may unreasonably disturb other Owners or Residents, or any equipment or item which unreasonably interferes with regular television or radio reception within any Unit, or the Common Elements, shall be located, used or placed on any portion of the Properties without the prior written approval of the ARC. No unusually loud motorcycles, dirt bikes or other loud mechanized vehicles may be operated on any portion of the Common Elements without the prior written approval of the ARC, in its sole discretion. Alarm devices used exclusively to protect the security of a Dwelling and its contents shall be permitted, provided that such devices do not produce frequently occurring false alarms in a manner annoying to neighbors. The Board shall have the right to determine if any noise, odor, or activity or circumstance reasonably constitutes a nuisance. Each Owner and Resident shall comply with all of the requirements of the local or state health authorities and with all other governmental authorities with respect to the occupancy and use of a Unit, including Dwelling. Each Owner and Resident shall be accountable to the Association and other Owners and Residents for the conduct and behavior of children and other Family members or persons residing in or visiting his or her Unit; and any damage to the Common Elements, personal property of the Association or property of another Owner or Resident, caused by such children or other Family members, shall be repaired at the sole expense of the Owner of the Unit where such children or other Family members or persons are residing or visiting.

Section 10.6 Exterior Maintenance and Repair; Owner's Obligations. No Improvement anywhere within the Properties shall be permitted to fall into disrepair, and each Improvement shall at all times be kept in good condition and repair. If any Owner or Resident shall permit any Improvement, the maintenance of which is the responsibility of such Owner or Resident, to fall into disrepair so as to create a dangerous, unsafe, or unsightly condition, the Board, after consulting with the ARC, and after affording such Owner or Resident reasonable notice, shall have the right but not the obligation to correct such condition, and to enter upon such Owner's Unit, for the purpose of so doing, and such Owner or Resident shall promptly reimburse the Association for the cost thereof. Such cost may be assessed as a Special Assessment pursuant to Section 6.11 above, and, if not paid timely when due, shall constitute an unpaid or delinquent Assessment for all purposes of Articles 6 and 7, above. The Owner and/or Resident of the offending Unit shall be personally liable for all costs and expenses incurred by the Association in taking such corrective acts, plus all costs incurred in collecting the amounts due. Each Owner and/or Resident shall pay all amounts due for such work within ten (10) days after receipt of written demand therefor.

Section 10.7 Drainage. By acceptance of a deed to a Unit, each Owner agrees for himself and his assigns that he will not in any way interfere with or alter, or permit any Resident to interfere with or alter, the established drainage pattern over any Unit, so as to affect said Unit, any other Unit, or the Common Elements or LMA Property or Master Association Property, unless adequate alternative provision is made for properly engineered drainage and approved in advance and in writing by the ARC, and any request therefor shall be subject to Article 8 above, including, but not necessarily limited to, any condition imposed by the ARC pursuant to Section 8.2(b) above, and further shall be subject to the Owner obtaining all necessary governmental approvals pursuant to Section 8.7, above. For the purpose hereof, "established drainage pattern" is defined as the drainage which exists at the time that such Unit is conveyed to a Purchaser from Declarant, or later grading changes which are shown on plans and specifications approved by the ARC.

Section 10.8 Water Supply and Sewer Systems. No individual water supply system, or cesspool, septic tank, or other sewage disposal system, or exterior water softener system, shall be permitted on any Unit unless such system is designed, located, constructed and equipped in accordance with the requirements, standards and recommendations of any water or sewer district serving the Properties, and any applicable governmental health authorities having jurisdiction, and has been approved in advance and in writing by the ARC.

Section 10.9 No Hazardous Activities. No activities shall be conducted, nor shall any Improvements be constructed, anywhere in the Properties which are or might be unsafe or hazardous to any Person, Unit, or Common Elements or LMA Property or Master Association Property.

Section 10.10 No Unsightly Articles. No unsightly articles, shall be permitted to remain on any Unit so as to be visible from any street, or from any other Unit, or Common Elements. Without limiting the generality of the foregoing, refuse, garbage and trash shall be kept at all times in covered, sanitary containers or enclosed areas designed for such purpose. Such containers shall be exposed to the view of the neighboring Units only when set out for a reasonable period of time (not to exceed twenty-four (24) hours before and after scheduled trash collection hours). There shall be no exterior fires whatsoever, except barbecue fires, and except as specifically authorized in writing by the ARC (and subject to applicable ordinances and fire regulations).

Section 10.11 No Temporary Structures; No Stucco Block Walls. Unless required by Declarant during the construction of Dwellings and other Improvements, or unless approved in writing by the ARC in connection with the construction of authorized Improvements: (a) no outbuilding, shed, tent, shack, or other temporary or portable structure or Improvement of any kind shall be placed upon any portion of the Properties; and (b) no stucco block walls shall be permitted anywhere in the Properties.

Section 10.12 No Drilling. No oil drilling, oil, gas or mineral development operations, oil refining, geothermal exploration or development, quarrying or mining operations of any kind shall be permitted upon, in, or below any Unit or the Common Elements, nor shall oil, water or other wells, tanks, tunnels or mineral excavations or shafts be permitted upon or below the surface of any portion of the Properties. No derrick or other structure designed for use in boring for water, oil, geothermal heat, natural gas, or other mineral or depleting asset shall be erected.

Section 10.13 Alterations. There shall be no excavation, construction, alteration or erection of any projection which in any way alters the exterior appearance of any Improvement from any street, or from any other portion of the Properties (other than minor repairs or rebuilding pursuant to Section 10.6 above) without the prior approval of the ARC pursuant to Article 8 hereof. There shall be no violation of the setback, or other requirements of local governmental authorities, notwithstanding any approval of the ARC. This Section 10.13 shall not be deemed to prohibit minor repairs or rebuilding which may be necessary for the purpose of maintaining or restoring a Unit to its original condition.

Section 10.14 Signs. Subject to the reserved rights of Declarant contained in Article 14 hereof, no sign, poster, display, billboard or other advertising device or other display of any kind shall be installed or displayed to public view from any Unit or any other portion of the Properties, except for permitted signs of permitted dimensions in such areas of the Common Elements as shall be specifically designated by the Board for sign display purposes, subject to Rules and Regulations. **Notwithstanding the foregoing, or any other provision in this Declaration, subject to applicable law, there shall be no "for rent" sign(s) shall be posted or displayed on or from any Unit or anywhere else in the Properties.** The foregoing restriction shall not limit traffic and other signs installed by Declarant as part of the original construction of the Properties, and the replacement thereof (if necessary) in a professional and uniform manner.

Section 10.15 Antennas and Satellite Dishes. No exterior radio antenna or aerial, television antenna or aerial, microwave antenna, aerial or satellite dish, "C.B." antenna or other antenna or aerial of any type, which is visible from any street or from anywhere in the Properties, shall be erected or maintained anywhere in the Properties. Notwithstanding the foregoing, "Permitted Devices" (defined as antennas or satellite dishes: (a) which are one meter or less in diameter and designed to receive direct broadcast satellite service; or (b) which are one meter or less in diameter or diagonal measurement and designed to receive video programming services via multi-point distribution services) shall be permitted, provided that such Permitted Device is located within the Unit, so as not to be visible from outside the Unit, or, if such location is not reasonably practicable, then attached to or mounted on the least conspicuous alternative location in a Yard Component, where an acceptable quality signal can be obtained; provided that Permitted Devices shall be reasonably screened from view from any other portion of the Properties, so long as such screening does not unreasonably increase the cost of installation, or use of the Permitted Device.

Section 10.16 Installation. No exterior addition, change or alteration to the exterior of any Residential Unit, other than as may be constructed by Declarant as part of the initial construction of the Properties, shall be commenced without the prior written approvals required under Article 8 of this Declaration; provided, however, that Owners shall be permitted to install screen doors in the exterior doors of such Owner's Residential Unit which conforms to any design, style, and quality standards for screen doors which may be adopted by the Board from time to time. No deck covers, wiring, or installation of air conditioning, water softeners, or other machines shall be installed on the exterior or within any other portion of the Residential Unit or be allowed to protrude through the walls or roofs of the Triplex Building (with the exception of those items installed during the original construction of the Properties), unless the prior written approvals required under Article 8 of this Declaration have been obtained. Nothing shall be done in or to any Unit or Triplex Building which will or may tend to impair the structural integrity of any other attached Unit or other Improvement in the Properties or which would structurally alter any such Triplex Building, except as otherwise expressly provided herein. No Owner shall cause or permit any mechanic's lien to be filed against any portion of the Properties for labor or materials alleged to have been furnished or delivered to the Properties or any for such Owner, and any Owner who does so shall immediately cause the lien to be discharged within five (5) days after notice to the Owner from the Board. If any Owner fails to remove such mechanic's lien, the Board may discharge the lien and charge the Owner a Special Assessment for such cost of discharge.

Section 10.17 Other Restrictions.

(a) No Owner or Resident shall keep or store any item in the Common Elements (subject to the right of such Person reasonably to store items in any private storage area exclusively allocated to such Person's Unit, subject to the Rules and Regulations), and nothing shall be altered, or constructed or planted in, or removed from, the Common Elements, without the written consent of the Board. No article shall be kept or stored in Yard Components, except reasonable quantities (in reasonable sizes) of patio furniture and house plants, subject to the "nuisance" provisions of Section 10.5, above. Any such patio furniture and/or house plants must be maintained in an attractive condition, and the care and watering of such plants must not damage or soil any other Unit, or any portion of the Common Elements.

(b) No item whatsoever shall or may be kept or stored on a Balcony.

(c) All utility and storage areas and all laundry rooms, including all areas in which clothing or other laundry is hung to dry, must be completely covered and concealed from view from other areas of the Properties and other neighboring properties. Subject to the foregoing, no clothes,

clothesline, sheets, blankets, laundry of any kind or any other article shall be hung out or exposed on any external part of the Units or Common Elements.

(d) No Owner shall cause or permit anything to be placed on the outside walls of his Unit (including Garage and Yard Component), and no sign, awning, canopy, window air conditioning unit, shutter, or other fixture shall be affixed to any part thereof.

(e) Any treatment of windows or glass doors (including, but not limited to, interior shutters), other than draperies, curtains or blinds, if any, of the type and color originally installed by Declarant, shall be subject to the prior written approval of the Board. Aluminum foil and similar material shall not be permitted in any exterior window or glass door. Screens on doors and windows, other than any which may be installed by Declarant in its sole discretion, are permitted only if approved in advance by the Board.

(f) Holiday decorations which may be viewed from other portions of the Properties may only be installed inside the windows of a Unit, provided that such installment shall be done in such manner as not to compromise or damage the surface or item to which installed or attached. Such decorations must be installed and removed in a reasonably seasonal manner, and, during the appropriate period of display, shall be maintained in a neat and orderly manner.

(g) All Units and Common Elements shall be kept clear of rubbish, debris and other unsightly materials.

(h) No spa, jetted tub, hot tub, water bed, or similar item (except for any bathroom tub installed by Declarant as part of the original construction of a Unit) shall be permitted or located within any Unit (including, but not limited to, Garage Component or Yard Component). The foregoing notwithstanding, upon prior written approval of the Board, an Owner may have such original bathroom tub professionally replaced, if necessary, in a size and capacity not to exceed said original bathroom tub, provided that the Owner shall be solely responsible for any and all damages caused thereby or arising in connection therewith. The Board may require the Owner to produce a reasonable bond or applicable insurance before permitting any replacement bathroom tub to be installed in a Unit.

Section 10.18 Parking and Vehicular Restrictions.

(a) No Person shall park, store or keep anywhere within the Properties any vehicle (which term for purposes herein shall include any vehicle, boat, aircraft, motorcycle, golf cart, jet ski, motor home, recreational vehicle, trailer, camper, other motorized item, vehicular equipment, and/or other item used in connection with or pertaining to any of the foregoing, whether mobile or not), which is deemed by the Board to be a nuisance. Subject to, and without limiting, the foregoing, no Person shall park, store or keep anywhere on the Properties, any large commercial-type vehicle (including, but not limited to, any dump truck, cement mixer truck, oil or gas truck or delivery truck); any recreational vehicle (including, but not limited to, any camper unit, house car or motor home); any bus, trailer, trailer coach, camp trailer, boat, aircraft or mobile home; or any inoperable vehicle or any other similar vehicle; provided that any truck up to and including one (1) ton when used normally for everyday-type personal transportation, may be kept by an Owner or Resident.

(b) No maintenance or repair of any vehicle shall be undertaken within the Properties. No vehicle shall be left on blocks or jacks, except within a fully closed two car Garage, subject to Sections 10.5, 10.19, and 10.20, hereof. No washing of any vehicle shall be permitted anywhere within the Properties, except only in specifically designated areas (Hose Bib Spaces pursuant to Section 2.23, above), subject to Rules and Regulations.

(c) Subject to the "nuisance" provisions of Section 10.5, above, no Person shall park, store or keep anywhere in the Properties any unregistered or inoperable vehicle, except only within a fully closed two car Garage.

(d) No parking whatsoever shall be permitted in any designated "no parking" area, any entry gate area of the Properties, or any courtyard within the Properties. No parking of any vehicle shall be permitted along any curb or otherwise on any street within the Properties, except only for temporary guest parking, subject to Rules and Regulations established by the Board, and subject further to all applicable laws and ordinances.

(e) The Association shall have the right to tow vehicles parked in violation of this Declaration and/or the Rules and Regulations.

(f) Parking is prohibited on Arlington Ranch Boulevard and/or Richmar Avenue.

(g) These parking restrictions shall not be interpreted in such a manner as to permit any activity which would be prohibited by applicable Ordinance.

Section 10.19 Garages. Garages shall be used exclusively for the parking of vehicles, and shall not be used solely for items other than vehicles. Ordinary household goods may be stored in addition to vehicles, provided that: (i) no flammable, dangerous, hazardous or toxic materials shall be kept, stored, or used in any Garage, and (ii) doors to Garages shall be kept fully closed at all times except for reasonable periods during the removal or entry of vehicles or other items therefrom or thereto. Owners and Residents of Units 2 and 3 in each Triplex Building understand and acknowledge that their respective Garage Components are located directly below the Living Component of Unit 1, and, by acquisition of title to a Unit, or occupancy of a Unit, shall be deemed to covenant not to violate any "quiet hour" restrictions or rules, or any other noise, nuisance or vibration provisions of the Governing Documents. No Garage may be used for a permanent or temporary Dwelling, and no animal shall be housed or kept in any Garage. The foregoing notwithstanding, Declarant may convert a Garage owned by Declarant into a sales office or related purposes. Garages are to be used for parking of operable vehicles only, with the exception that one space in a two car Garage may be utilized to store an inoperable or unregistered vehicle, subject to Sections 10.5, and 10.18 through 10.20, inclusive, hereof. Any Owner reasonably requiring "emergency" access to or over another Owner's Garage Component, and who cannot reasonably contact such other Owner, shall contact the Board and/or Manager.

Section 10.20 Additional Vibrations and Noise Restrictions. Except for the garage door opener, no Owner shall attach to the walls or ceilings of any Garage Component any fixtures or equipment, which will cause vibrations or noise to the adjacent Residential Units. Any garage door opener which is replaced by an Owner shall be insulated with the same or better quality of sound insulation materials as provided by Declarant at the time of the initial installation or with any improved insulation materials which insulate sound and vibration from such garage door opener. Additionally, "hard surface flooring" (e.g., wood, tile, vinyl, or linoleum, or similar non-carpet flooring) shall not be permitted on more than approximately twenty-one (21%) percent of the interior floor surface of the upstairs floor of a Living Component ("Upstairs Floor"), further subject to any Rules and Regulations governing same, and the remainder of the floor surface of the Upstairs Floor shall be carpeted. Additionally, there shall be no speakers, sound equipment, television sets, or similar items mounted directly to or on or against a wall of a Unit. Such items may be permitted on shelves, provided that such shelves are carpeted so as to provide insulation from sound or vibration. Without limiting the foregoing, each Owner shall fully comply with all applicable County ordinances.

Section 10.21 Exterior Lighting. Any exterior electrical, gas or other artificial lighting installed on any Residential Unit shall be positioned, screened, or otherwise directed or situated and of such controlled focus and intensity so as not to unreasonably disturb the residents of any other Residential Unit(s). The exterior lighting initially installed on the Residential Units shall not be modified or altered by the Owner and shall be maintained, repaired and replaced by the Owners as necessary, to provide lighting of the same character and quality (including light bulb wattage) as was initially installed in the Properties. Further rules regarding exterior lighting may be promulgated by the Board.

Section 10.22 Exterior Painting. All exterior painting of a Residential Unit shall be subject to the approval of the Board, unless the painting is of the same color as the then current color of the exterior of the Residential Unit. In no event shall any Owner be permitted to paint the exterior of his or her Residential Unit in any manner which is not harmonious with the colors of the other two attached Residential Units.

Section 10.23 Post Tension Slabs. The concrete slab for certain Residential Units in the Properties are or may be reinforced with a grid of steel cables which were installed in the concrete and then tightened to create very high tension. This type of slab is commonly known as a "Post Tension Slab." Cutting into a Post Tension Slab for any reason (e.g., to install a floor safe, to remodel plumbing, etc.) is very hazardous and may result in serious damage to the Unit and/or personal injury. By accepting a deed to a Unit in the Properties, each Owner specifically covenants and agrees that: (a) such Owner shall not cut into or otherwise tamper with any Post Tension Slab; (b) such Owner shall not knowingly permit or allow any person to cut into or tamper with the Post Tension Slab so long as such Owner owns any interest in the Residence; (c) such Owner shall disclose the existence of the Post Tension Slab to any tenant, lessee or subsequent purchaser of the Unit; and (d) such Owner shall indemnify and hold Declarant and its respective officers, employees, contractors and agents, free and harmless from and against any and all claims, damages, losses, or other liability (including attorneys' fees) arising from any breach of this Section.

Section 10.24 Sight Visibility Restriction Areas. The maximum height of any and all Improvements (including, but not necessarily limited to, landscaping), on all Sight Visibility Restriction Areas, shall be restricted to a maximum height not to exceed such height set forth in the Plat ("Maximum Permitted Height").

Section 10.25 Prohibited Direct Vehicle Access. Any other provision herein notwithstanding, as and to the extent indicated on the Plat, and/or prohibited by the County, there shall be no direct vehicular access from any abutting Unit to a dedicated thoroughfare (other than over Private Streets and Common Element entry ways, which shall be permitted in a normal manner, subject to the provisions set forth in this Declaration, and/or over public streets).

Section 10.26 Abatement of Violations. The violation of any of the Rules and Regulations, or the breach of this Declaration, shall give the Board the right, in addition to any other right or remedy elsewhere available to it:

(a) to enter into a Unit in which, or as to which, such violation or breach exists, and to summarily abate and remove, at the expense of its Owner, any structure, thing or condition that may exist therein contrary to the intent and meaning of the provisions of any of the foregoing documents, and the Board shall not be deemed to have trespassed or committed forcible or unlawful entry or detainer; and/or

(b) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach.

All expenses of the Board in connection with such actions or proceedings, including court costs and attorneys' fees and other fees and expenses, and all damages, liquidated or otherwise, together with interest thereon at the rate set forth in Section 7.1, above, until paid, shall be charged to and assessed against such defaulting Owner, and the Board shall have the right to lien for all of the same upon the Unit of such defaulting Owner. Any and all of such rights and remedies may be exercised at any time and from time to time, cumulatively or otherwise, by the Board.

Section 10.27 Yard Components. Without limiting any other provision herein, no spa, jetted tub or hot tub (whether in-ground or above-ground), and no shed, gazebo, or storage structure, shall be permitted or located in any Yard Component.

Section 10.28 No Waiver. The failure of the Board to insist in any one or more instances upon the strict performance of any of the terms, covenants, conditions or restrictions of this Declaration, or to exercise any right or option herein contained, or to serve any notice or to institute any action, shall not be construed as a waiver or a relinquishment for the future of such term, covenant, condition or restriction, but such term, covenant, condition or restrictions shall remain in full force and effect. The receipt by the Board or Manager of any Assessment from an Owner with knowledge of the breach of any covenant hereof shall not be deemed a waiver of such breach, and no waiver by the Board or Manager of any provision hereof shall be deemed to have been made unless expressed in writing and signed by the Board.

Section 10.29 Declarant Exemption. Each Unit owned by Declarant shall be exempt from the provisions of this Article 10, until such time as Declarant conveys title to the Unit to a Purchaser, and activities of Declarant reasonably related to Declarant's development, construction, advertising, marketing and sales efforts, shall be exempt from the provisions of this Article 10. This Article 10 may not be amended without Declarant's prior written consent.

Section 10.30 LMA Declaration; Master Declaration. The foregoing use restrictions and provisions shall be in addition to, and cumulative with, any and all expressly applicable use restrictions and provisions of the LMA Declaration and/or Master Declaration. In the event of any irreconcilable conflict, the provisions of the LMA Declaration and/or Master Declaration shall prevail.

ARTICLE 11
DAMAGE OR CONDEMNATION OF COMMON ELEMENTS

Section 11.1 Damage or Destruction. Damage to, or destruction or condemnation of all or any portion of the Common Elements shall be handled in the following manner:

(a) Repair of Damage. Any portion of this Community for which insurance is required by this Declaration or by any applicable provision of NRS Chapter 116, which is damaged or destroyed, must be repaired or replaced promptly by the Association unless: (i) the Common-Interest Community is terminated, in which case the provisions of NRS §§ 116.2118, 116.21183 and 116.21185 shall apply; (ii) repair or replacement would be illegal under any state or local statute or ordinance governing health or safety; or (iii) eighty percent (80%) of the Owners, including every Owner of a Unit that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a Common Expense. If the entire Community is not repaired or replaced, the proceeds attributable to the damaged Common Elements must be used to restore the damaged area

to a condition compatible with the remainder of the Community, (A) the proceeds attributable to Units that are not rebuilt must be distributed to the Owners of those Units; and (B) the remainder of the proceeds must be distributed to all the Owners or lien holders, as their interests may appear, in proportion to the liabilities of all the Units for Common Expenses. If the Owners vote not to rebuild any Unit, that Unit's allocated interests are automatically reallocated upon the vote as if the Unit had been condemned, and the Association promptly shall prepare, execute and Record an amendment to this Declaration reflecting the reallocations.

(b) Damage by Owner. To the full extent permitted by law, each Owner shall be liable to the Association for any damage to the Common Elements not fully reimbursed to the Association by insurance proceeds, provided the damage is sustained as a result of the negligence, willful misconduct, or unauthorized or improper installation or maintenance of any Improvement by said Owner or the Persons deriving their right and easement of use and enjoyment of the Common Elements from said Owner, or by his or her respective Family and guests, both minor and adult. The Association reserves the right, acting through the Board, after Notice and Hearing, to: (1) determine whether any claim shall be made upon the insurance maintained by the Association; and (2) levy against such Owner a Special Assessment equal to any deductible paid and the increase, if any, in the insurance premiums directly attributable to the damage caused by such Owner or the Person for whom such Owner may be responsible as described above. In the case of joint ownership of a Unit, the liability of the co-owners thereof shall be joint and several, except to any extent that the Association has previously contracted in writing with such co-owners to the contrary. After Notice and Hearing, the Association may levy a Special Assessment in the amount of the cost of correcting such damage, to the extent not reimbursed to the Association by insurance, against any Unit owned by such Owner, and such Special Assessment may be enforced as provided herein.

Section 11.2 Condemnation. If at any time, all or any portion of the Common Elements, or any interest therein, is taken for any governmental or public use, under any statute, by right of eminent domain or by private purchase in lieu of eminent domain, the award in condemnation shall be paid to the Association. Any such award payable to the Association shall be deposited in the operating fund. No Member shall be entitled to participate as a party, or otherwise, in any proceedings relating to such condemnation. The Association shall have the exclusive right to participate in such proceedings and shall, in its name alone, represent the interests of all Members. Immediately upon having knowledge of any taking by eminent domain of Common Elements, or any portion thereof, or any threat thereof, the Board shall promptly notify all Owners and all Eligible Holders.

Section 11.3 Condemnation Involving a Unit. For purposes of NRS § 116.1107.2(a), if part of a Unit is required by eminent domain, the award shall compensate the Unit's Owner for the reduction in value of the Unit's interest in the Common Elements. The basis for such reduction shall be the extent to which the occupants of the Unit are impaired from enjoying the Common Elements. In cases where the Unit may still be used as a Dwelling, it shall be presumed that such reduction is zero (0).

ARTICLE 12
INSURANCE

Section 12.1 Casualty Insurance. The Board shall cause to be obtained and maintained a master policy of fire and casualty insurance with extended coverage for loss or damage to all insurable Improvements of the Association on the Common Elements, for the full insurable value replacement cost thereof without deduction for depreciation or coinsurance, and, in the Board's business judgment, shall obtain insurance against such other hazards and casualties, as the Board deems reasonable and prudent. The Board, in its reasonable judgment, may also insure any other property, whether real or

personal, owned by the Association or located within the Properties, against loss or damage by fire and such other hazards as the Board may deem reasonable and prudent, with the Association as the owner and beneficiary of such insurance. The insurance coverage with respect to the Common Elements shall be maintained for the benefit of the Association, the Owners, and the Eligible Holders, as their interests may appear as named insured, subject however to the loss payment requirements as set forth herein. Premiums for all insurance carried by the Association are Common Expenses included in the Annual Assessments levied by the Association.

The Association, acting through the Board, shall be the named insureds under policies of insurance purchased and maintained by the Association. All insurance proceeds under any policies shall be paid to the Board as trustee. The Board shall have full power to receive and receipt for the proceeds and to deal therewith as deemed necessary and appropriate. Except as otherwise specifically provided in this Declaration, the Board, acting on behalf of the Association and all Owners, shall have the exclusive right to bind such parties with respect to all matters affecting insurance carried by the Association, the settlement of a loss claim, and the surrender, cancellation, and modification of all such insurance. Duplicate originals or certificates of all policies of insurance maintained by the Association and of all the renewals thereof, together with proof of payment of premiums, shall be delivered by the Association to all Eligible Holders who have expressly requested the same in writing.

Section 12.2 Liability and Other Insurance. The Association shall have the power and duty to and shall obtain comprehensive public liability insurance, including medical payments and malicious mischief, in such limits as it shall deem prudent (but in no event less than $1,000,000.00 covering all claims for bodily injury and property damage arising out of a single occurrence), insuring the Association, Board, Directors, Officers, Declarant, and Manager, and their respective agents and employees, and the Owners and Residents of Units and their respective Families, guests and invitees, against liability for bodily injury, death and property damage arising from the activities of the Association or with respect to property maintained or required to be maintained by the Association including, if obtainable, a cross-liability endorsement insuring each insured against liability to each other insured. Such insurance shall also include coverage, to the extent reasonably available and reasonably necessary, against liability for non-owned and hired automobiles, liability for property of others, and any other liability or risk customarily covered with respect to projects similar in construction, location, and use. The Association may also obtain, through the Board, Worker's Compensation insurance (which shall be required if the Association has one or more employees) and other liability insurance as it may deem reasonable and prudent, insuring each Owner and the Association, Board, and any Manager, from liability in connection with the Common Elements, the premiums for which are a Common Expense included in the Annual Assessment levied against the Owners. All insurance policies shall be reviewed at least annually by the Board and the limits increased in its reasonable business judgment.

Section 12.3 Fidelity Insurance. The Board shall further cause to be obtained and maintained errors and omissions insurance, blanket fidelity insurance coverage (in an amount at least equal to 100% of the Association Funds from time to time handled by such Persons) and such other insurance as it deems prudent, insuring the Board, the Directors, and Officers, and any Manager against any liability for any act or omission in carrying out their respective obligations hereunder, or resulting from their membership on the Board or on any committee thereof, if reasonably feasible, in the amount of not less than $1,000,000.00. Said policy or policies of insurance shall also contain an extended reporting period endorsement (a tail) for a six-year period, if reasonably available. The Association shall require that the Manager maintain fidelity insurance coverage which names the Association as an obligee, in such amount as the Board deems prudent. From and after the end of the Declarant Control Period, blanket fidelity insurance coverage which names the Association as an obligee shall be obtained by or on behalf of the Association for any Person handling funds of the Association, including but not limited to, Officers, Directors, trustees, employees, and agents of the Association, whether or not such

Persons are compensated for their services, in such an amount as the Board deems prudent; provided that in no event may the aggregate amount of such bonds be less than the maximum amount of Association Funds that will be in the custody of the Association or Manager at any time while the policy is in force (but in no event less than the sum equal to one-fourth (¼) of the Annual Assessments on all Units, plus Reserve Funds) (or such other amount as may be required by FNMA, VA or FHA from time to time, if applicable).

Section 12.4 Other Insurance Provisions. The Board shall also obtain such other insurances customarily required with respect to projects similar in construction, location, and use, or as the Board may deem reasonable and prudent from time to time, including, but not necessarily limited to, Worker's Compensation insurance (which shall be required if the Association has any employees). All premiums for insurances obtained and maintained by the Association are a Common Expense included in the Annual Assessment levied upon the Owners. All insurance policies shall be reviewed at least annually by the Board and the limits increased in its sound business judgment. In addition, the Association shall continuously maintain in effect such casualty and liability insurance and fidelity insurance coverage necessary to meet the requirements for similar developments, as set forth or modified from time to time by any governmental body with jurisdiction, except to the extent such coverage is not reasonably available or has been waived by the applicable agency.

Section 12.5 Insurance Obligations of Owners. Each Owner is required, at Close of Escrow on his Unit, at his sole expense to have obtained, and to have furnished his Mortgagee and the Board (or, in the event of a cash transaction involving no Mortgagee, then to the Board) with duplicate copies of a homeowner's policy of fire and casualty insurance with extended coverage for loss or damage to all insurable Improvements and fixtures originally installed by Declarant on such Owner's Unit in accordance with the original plans and specifications, or installed by the Owner on the Unit, for the full insurance replacement cost thereof without deduction for depreciation or coinsurance. By acceptance of the deed to his Unit, each Owner agrees to maintain in full force and effect at all times, at said Owner's sole expense, such homeowner's insurance policy, and shall provide the Board with duplicate copies of such insurance policy at Close of Escrow, and periodically thereafter prior to expiration from time to time of such policy, and upon the Board's request. In the event any Owner has not furnished such copies of insurance policies to the Board at any time within fifteen (15) days when due from time to time, then the Board shall have the right, but not the obligation, to purchase such insurance coverage for the Unit, and to assess the Unit Owner, as a Special Assessment (enforceable pursuant to Article 7 above), the cost of such insurance, plus an administrative fee of One Hundred Dollars ($100.00) for each month, or portion thereof, during which such Owner has not provided the Board with copies of such policies upon the Board's request. Nothing herein shall preclude any Owner from carrying any public liability insurance as he deems desirable to cover his individual liability, damage to person or property occurring inside his Unit or elsewhere upon the Properties. Such policies shall not adversely affect or diminish any liability under any insurance obtained by or on behalf of the Association, and duplicate copies of such other policies shall be deposited with the Board upon request. If any loss intended to be covered by insurance carried by or on behalf of the Association shall occur and the proceeds payable thereunder shall be reduced by reason of insurance carried by any Owner, such Owner shall assign the proceeds of such insurance carried by him to the Association, to the extent of such reduction, for application by the Board to the same purposes as the reduced proceeds are to be applied. Notwithstanding the foregoing, or any other provision herein, each Owner shall be solely responsible for full payment of any and all deductible amounts under such Owner's policy or policies of insurance.

Section 12.6 Waiver of Subrogation. All policies of physical damage insurance maintained by the Association shall provide, if reasonably possible, for waiver of: (1) any defense based on coinsurance; (2) any right of set-off, counterclaim, apportionment, proration or contribution by reason

of other insurance not carried by the Association; (3) any invalidity, other adverse effect or defense on account of any breach of warranty or condition caused by the Association, any Owner or any tenant of any Owner, or arising from any act, neglect, or omission of any named insured or the respective agents, contractors and employees of any insured; (4) any rights of the insurer to repair, rebuild or replace, and, in the event any Improvement is not repaired, rebuilt or replaced following loss, any right to pay under the insurance an amount less than the replacement value of the Improvements insured; or (5) notice of the assignment of any Owner of its interest in the insurance by virtue of a conveyance of any Unit. The Association hereby waives and releases all claims against the Board, the Owners, Declarant, and Manager, and the agents and employees of each of the foregoing, with respect to any loss covered by such insurance, whether or not caused by negligence of or breach of any agreement by such Persons, but only to the extent that insurance proceeds are received in compensation for such loss; provided, however, that such waiver shall not be effective as to any loss covered by a policy of insurance which would be voided or impaired thereby.

Section 12.7 Notice of Expiration Requirements. If available, each of the policies of insurance maintained by the Association shall contain a provision that said policy shall not be canceled, terminated, materially modified or allowed to expire by its terms, without thirty (30) days' prior written notice to the Board and Declarant and to each Owner and each Eligible Holder who has filed a written request with the carrier for such notice, and every other Person in interest who requests in writing such notice of the insurer. All insurance policies carried by the Association pursuant to this Article 12, to the extent reasonably available, must provide that: (a) each Owner is an insured under the policy with respect to liability arising out of his interest in the Common Elements or Membership; (b) the insurer waives the right to subrogation under the policy against any Owner or member of his Family; (c) no act or omission by any Owner or member of his Family will void the policy or be a condition to recovery under the policy; and (d) if, at the time of a loss under the policy there is other insurance in the name of the Owner covering the same risk covered by the policy, the Association's policy provides primary insurance.

ARTICLE 13
MORTGAGEE PROTECTION

In order to induce FHA, VA, FHLMC, GNMA and FNMA and any other governmental agency or other Mortgagees to participate in the financing of the sale of Units within the Properties, the following provisions are added hereto (and to the extent these added provisions conflict with any other provisions of the Declaration, these added provisions shall control):

(a) Each Eligible Holder, upon its specific written request, is entitled to written notification from the Association of any default by the Mortgagor of such Unit in the performance of such Mortgagor's obligations under this Declaration, the Articles of Incorporation or the Bylaws, which default is not cured within thirty (30) days after the Association learns of such default. For purposes of this Declaration, "first Mortgage" shall mean a Mortgage with first priority over other Mortgages or Deeds of Trust on a Unit, and "first Mortgagee" shall mean the Beneficiary of a first Mortgage.

(b) Each Owner, including every first Mortgagee of a Mortgage encumbering any Unit which obtains title to such Unit pursuant to the remedies provided in such Mortgage, or by foreclosure of such Mortgage, or by deed or assignment in lieu of foreclosure, shall be exempt from any "right of first refusal" created or purported to be created by the Governing Documents.

(c) Except as provided in NRS § 116.3116.2, each Beneficiary of a first Mortgage encumbering any Unit which obtains title to such Unit or by foreclosure of such Mortgage, shall take title

to such Unit free and clear of any claims of unpaid Assessments or charges against such Unit which accrued prior to the acquisition of title to such Unit by the Mortgagee.

(d) Unless at least sixty-seven percent (67%) of Eligible Holders (based upon one (1) vote for each first Mortgage owned) or sixty-seven percent (67%) of the Owners (other than Declarant) have given their prior written approval, neither the Association nor the Owners shall:

(i) subject to Nevada non-profit corporation law to the contrary, by act or omission seek to abandon, partition, alienate, subdivide, release, hypothecate, encumber, sell or transfer the Common Elements and the Improvements thereon which are owned by the Association; provided that the granting of easements for public utilities or for other public purposes consistent with the intended use of such property by the Association as provided in this Declaration shall not be deemed a transfer within the meaning of this clause.

(ii) change the method of determining the obligations, Assessments, dues or other charges which may be levied against an Owner, or the method of allocating distributions of hazard insurance proceeds or condemnation awards;

(iii) by act or omission change, totally waive or abandon any scheme of regulations, or enforcement thereof, pertaining to the architectural design of the exterior appearance of the Dwellings and other Improvements on the Units, the maintenance of Exterior Walls/Fences or common fences and driveways, or the upkeep of lawns and plantings in the Properties;

(iv) fail to maintain Fire and Extended Coverage on any insurable Improvements on Common Elements on a current replacement cost basis in an amount as near as possible to one hundred percent (100%) of the insurance value (based on current replacement cost);

(v) except as provided by any applicable provision of NRS Chapter 116, use hazard insurance proceeds for losses to any Common Elements for other than the repair, replacement or reconstruction of such property; or

(vi) amend those provisions of this Declaration or the Articles of Incorporation or Bylaws which expressly provide for rights or remedies of first Mortgagees.

(e) Eligible Holders, upon express written request in each instance therefor, shall have the right to (1) examine the books and records of the Association during normal business hours, (2) require from the Association the submission of an annual audited financial statement (without expense to the Beneficiary, insurer or guarantor requesting such statement) and other financial data, (3) receive written notice of all meetings of the Members, and (4) designate in writing a representative to attend all such meetings.

(f) Eligible Holders, who have filed a written request for such notice with the Board shall be given thirty (30) days' written notice prior to: (1) any abandonment or termination of the Association; and/or (2) the effective date of any termination of any agreement for professional management of the Properties following a decision of the Owners to assume self-management of the Properties. Such first Mortgagees shall be given immediate notice: (i) following any damage to the Common Elements whenever the cost of reconstruction exceeds Ten Thousand Dollars ($10,000.00); and (ii) when the Board learns of any threatened condemnation proceeding or proposed acquisition of any portion of the Properties.

(g) First Mortgagees may, jointly or singly, pay taxes or other charges which are in default and which may or have become a charge against any Common Elements and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for Common Elements, and first Mortgagees making such payments shall be owed immediate reimbursement therefor from the Association.

(h) The Reserve Fund described in Article 6 above must be funded by regular scheduled monthly, quarterly, semiannual or annual payments rather than by large extraordinary Assessments.

(i) The Board shall require that any Manager, and any employee or agent thereof, maintain at all times fidelity bond coverage which names the Association as an obligee; and, at all times from and after the end of the Declarant Control Period, the Board shall secure and cause to be maintained in force at all times fidelity bond coverage which names the Association as an obligee for any Person handling funds of the Association.

(j) When professional management has been previously required by a Beneficiary, insurer or guarantor of a first Mortgage, any decision to establish self-management by the Association shall require the approval of at least sixty-seven percent (67%) of the voting power of the Association and of the Board respectively, and at least fifty-one percent (51%) of the Eligible Holders.

(k) So long as VA is insuring or guaranteeing loans or has agreed to insure or guarantee loans on any portion of the Properties, then, pursuant to applicable VA requirement, for so long as Declarant shall control the Association Board, Declarant shall obtain prior written approval of the VA for any material proposed: action which may affect the basic organization, subject to Nevada nonprofit corporation law, of the Association (i.e., merger, consolidation, or dissolution of the Association); dedication, conveyance, or mortgage of the Common Elements; or amendment of the provisions of this Declaration, the Articles of Incorporation, Bylaws, or other document which may have been previously approved by the VA; provided that no such approval shall be required in the event that the VA no longer regularly requires or issues such approvals at such time.

In addition to the foregoing, the Board of Directors may enter into such contracts or agreements on behalf of the Association as are required in order to reasonably satisfy the applicable express requirements of Mortgagees, so as to allow for the purchase, insurance or guaranty, as the case may be, by such entities of first Mortgages encumbering Units. Each Owner hereby agrees that it will benefit the Association and the Membership, as a class of potential Mortgage borrowers and potential sellers of their Units, if such agencies approve the Properties as a qualifying subdivision under their respective policies, rules and regulations, as adopted from time to time. Mortgagees are hereby authorized to furnish information to the Board concerning the status of any Mortgage encumbering a Unit.

ARTICLE 14
DECLARANT'S RESERVED RIGHTS

Section 14.1 Declarant's Reserved Rights. Any other provision herein notwithstanding, pursuant to NRS § 116.2105.1(h), Declarant reserves, in its sole discretion, the following developmental rights and other special Declarant's rights, on the terms and conditions and subject to the expiration deadlines, if any, set forth below:

(a) Right to Complete Improvements and Construction Easement. Declarant reserves, for a period terminating on the fifteenth (15th) anniversary of the Recordation of this

Declaration, the right, in Declarant's sole discretion, to complete the construction of the Improvements on the Properties and an easement over the Properties for such purpose; provided, however, that if Declarant still owns any property in the Properties on such fifteenth (15th) anniversary date, then such rights and reservations shall continue, for one additional successive period of ten (10) years thereafter.

(b) Exercise of Developmental Rights. Pursuant to NRS Chapter 116, Declarant reserves the right to annex all or portions of the Annexable Area to the Community, pursuant to the provisions of Article 15 hereof, for as long as Declarant owns any portion of the Annexable Area. No assurances are made by Declarant with regard to the boundaries of those portions of the Properties which may be annexed, or the order in which such portions may be annexed. Declarant also reserves the right to withdraw real property from the Community.

(c) Offices, Model Homes and Promotional Signs. Declarant reserves the right to maintain signs, sales and management offices, and models in any Unit owned or leased by Declarant in the Properties, and signs anywhere on the Common Elements, for the period set forth in Section 14.1(a) above, and Declarant further expressly reserves the right during such period to use said signs, offices and models, in connection with marketing and sales of other projects of Declarant in Clark County.

(d) Appointment and Removal of Directors. Declarant reserves the right to appoint and remove a majority of the Board as set forth in Section 3.7 hereof, during the Declarant Control Period.

(e) Amendments. Declarant reserves the right to amend this Declaration from time to time, as set forth in detail in Article 18 below, and any other provision of this Declaration, during the time periods set forth therein.

(f) Appointment and Removal of ARC. Declarant reserves the right to appoint and remove the ARC, for the time period set forth in Section 8.1 hereof.

(g) Easements. Declarant has reserved certain easements, and related rights, as set forth in this Declaration.

(h) Certain Other Rights. Notwithstanding any other provision of this Declaration, Declarant additionally reserves the right (but not the obligation), in its sole and absolute discretion, at any time and from time to time, to unilaterally: (1) supplement and/or modify of Record all or any parts of the descriptions set forth in the exhibits hereto; and/or (2) modify, expand, or limit, by Recorded instrument, the maximum total number of Units which may be constructed in the Community (i.e., the Units That May Be Created).

(i) Other Rights. Declarant reserves all other rights, powers, and authority of Declarant set forth in this Declaration, and, to the extent not expressly prohibited by NRS Chapter 116, further reserves all other rights, powers, and authority, in Declarant's sole discretion, of a declarant under NRS Chapter 116.

(j) Control of Entry Gates. Declarant reserves the right, until the Close of Escrow of the last Unit in the Master Community, to unilaterally control all entry gates, and to keep all entry gates open during such hours established by Declarant, in its sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities.

(k) Restriction of Traffic. Declarant reserves the right, until the Close of Escrow of the last Unit in the Master Community, to unilaterally control, restrict and/or re-route all pedestrian and vehicular traffic within the Properties, in Declarant's sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities; provided that no Unit shall be deprived of access to a dedicated street adjacent to the Properties.

(l) Control of Parking Spaces. Declarant reserves the right to control parking spaces near the model complex during Declarant's regular business or marketing hours, and to tow unauthorized vehicles at the Owner's expense, for as long as Declarant is conducting marketing or sales activities in the Master Community or any portion thereof.

(m) Marketing Names. Declarant reserves the right, for so long as Declarant owns or has any interest in any of the Annexable Area, to market and/or advertise different portions of the Properties under different marketing names.

(n) Certain Property Line Adjustments. Declarant reserves the right to adjust the boundary lines between certain Yard Components and Common Elements shown on the Plat.

(o) Additional Reserved Rights. Declarant reserves all other rights, powers, and authority of Declarant set forth in this Declaration, including, but not limited to, those set forth in Article 15, 16, and/or 17 below, and, to the maximum extent not expressly prohibited by NRS Chapter 116, further reserves all other rights, powers, and authority, in Declarant's sole discretion, of a declarant under NRS Chapter 116 (including, but not limited to, all Developmental Rights and all Special Declarant Rights as set forth or referenced therein).

(p) Article 15 Rights. Declarant reserves the annexation and other rights set forth in Article 15, below.

Section 14.2 Exemption of Declarant. Notwithstanding anything to the contrary in this Declaration, the following shall apply:

(a) Nothing in this Declaration shall limit, and no Owner or the Association shall do anything to interfere with, the right of Declarant to complete excavation and grading and the construction of Improvements to and on any portion of the Properties, or to alter the foregoing and Declarant's construction plans and designs, or to construct such additional Improvements as Declarant deems advisable in the course of development of the Properties, for so long as any Unit owned by Declarant remains unsold.

(b) This Declaration shall in no way limit the right of Declarant to grant additional licenses, easements, reservations and rights-of-way to itself, to governmental or public authorities (including without limitation public utility companies), or to others, as from time to time may be reasonably necessary to the proper development and disposal of Units; provided, however, that if FHA or VA approval is sought by Declarant, then the FHA and/or the VA shall have the right to approve any such grants as provided herein.

(c) Prospective purchasers and Declarant shall have the right to use all and any portion of the Common Elements for access to the sales facilities of Declarant and for placement of Declarant's signs.

(d) Without limiting Section 14.1(c) above, or any other provision herein, Declarant may use any structures owned or leased by Declarant, as model home complexes or real estate sales

or management offices, for this Community or for any other project of Declarant and/or its affiliates, subject to the time limitations set forth herein, after which time, Declarant shall restore the Improvement to the condition necessary for the issuance of a final certificate of occupancy by the appropriate governmental entity.

(e) All or any portion of the rights of Declarant in this Declaration may be assigned by Declarant to any successor in interest, by an express and written Recorded assignment which specifies the rights of Declarant so assigned.

(f) The prior written approval of Declarant, as developer of the Properties, shall be required before any amendment to the Declaration affecting Declarant's rights or interests (including, without limitation, this Article 14) can be effective.

(g) The rights and reservations of Declarant referred to herein, if not earlier terminated pursuant to the Declaration, shall terminate on the date set forth in Section 14.1(a) above.

Section 14.3 Limitations on Amendments. In recognition of the fact that the provisions of this Article 14 operate in part to benefit the Declarant, no amendment to this Article 14, and no amendment in derogation of any other provision of this Declaration benefitting the Declarant, may be made without the written approval of the Declarant, and any purported amendment of Article 14, or any portion thereof, or the effect respectively thereof, without such express prior written approval, shall be void; provided that the foregoing shall not apply to amendments made by Declarant.

Section 14.4 LMA Declaration; Master Declaration. The foregoing developmental rights and special Declarant's rights shall be in addition to, and cumulative with, any applicable developmental rights and special declarant's rights reserved by the LMA Declarant under the LMA Declaration and/or reserved by the Master Declarant under the Master Declaration. In the event of any irreconcilable conflict, the provisions of the LMA Declaration and/or Master Declaration shall prevail.

ARTICLE 15
ANNEXATION

Section 15.1 Annexation. Declarant may, but shall not be required to, at any time or from time to time, add to the Properties covered by this Declaration all or any portions of the Annexable Area then owned by Declarant, by Recording an annexation amendment ("Annexation Amendment") with respect to the real property to be annexed ("Annexed Property"). Upon the recording of an Annexation Amendment covering any portion of the Annexable Area and containing the provisions set forth herein, the covenants, conditions and restrictions contained in this Declaration shall apply to the Annexed Property in the same manner as if the Annexed Property were originally covered in this Declaration and originally constituted a portion of the Original Property; and thereafter, the rights, privileges, duties and liabilities of the parties to this Declaration with respect to the Annexed Property shall be the same as with respect to the Original Property and the rights, obligations, privileges, duties and liabilities of the Owners and occupants of Units within the Annexed Property shall be the same as those of the Owners and occupants of Units originally affected by this Declaration. By acceptance of a deed from Declarant conveying any real property located in the Annexable Area, in the event such real property has not theretofore been annexed to the Properties encumbered by this Declaration, and whether or not so expressed in such deed, the grantee thereof covenants that Declarant shall be fully empowered and entitled (but not obligated) at any time thereafter (and appoints Declarant as attorney in fact, in accordance with NRS §§ 111.450 and 111.460, of such grantee and his successors and assigns) to

unilaterally execute and Record an Annexation Amendment, annexing said real property to the Community, in the manner provided for in this Article 15.

Section 15.2 Annexation Amendment. Each Annexation Amendment shall conform to the requirements of NRS § 116.211, and shall include:

(a) the written and acknowledged consent of Declarant;

(b) a reference to this Declaration, which reference shall state the date of Recordation hereof and the County, book and instrument number and any other relevant Recording data;

(c) a statement that the provisions of this Declaration shall apply to the Annexed Property as set forth therein;

(d) a sufficient description of the Annexed Property; and

(e) assignment of an Identifying Number to each new Unit created;

(f) a reallocation of the allocated interests among all Units; and

(g) a description of any Common Elements created by the annexation of the Annexed Property.

Section 15.3 FHA/VA Approval. In the event that, and for so long as, the FHA or VA is insuring or guaranteeing loans (or has agreed to insure or guarantee loans) on any portion of the Annexable Area with respect to the initial sale by Declarant to a Purchaser of any Unit, then a condition precedent to any annexation of any property other than the Annexable Area shall be written confirmation by the FHA or the VA that the annexation is in accordance with the development plan submitted to and approved by the FHA or the VA; provided, however, that such written confirmation shall not be a condition precedent if at such time the FHA or the VA has ceased to regularly require or issue such written confirmations.

Section 15.4 Disclaimers Regarding Annexation. Portions of the Annexable Area may or may not be annexed, and, if annexed, may be annexed at any time by Declarant, and no assurances are made with respect to the boundaries or sequence of annexation of such portions. Annexation of a portion of the Annexable Area shall not necessitate annexation of any other portion of the remainder of the Annexable Area. Declarant has no obligation to annex the Annexable Area or any portion thereof.

Section 15.5 Expansion of Annexable Area. In addition to the provisions for annexation specified in Section 15.2 above, the Annexable Area may, from time to time, be expanded to include additional real property, not as yet identified. Such property may be annexed to the Annexable Area upon the Recordation of a written instrument describing such real property, executed by Declarant and all other owners of such property and containing thereon the approval of the FHA and the VA; provided, however, that such written approval shall not be a condition precedent if at such time the FHA or the VA has ceased to regularly require or issue such written approvals.

Section 15.6 Contraction of Annexable Area; Withdrawal of Real Property. So long as real property has not been annexed to the Properties subject to this Declaration, the Annexable Area may be contracted to delete such real property effective upon the Recordation of a written instrument describing such real property, executed by Declarant and all other owners, if any, of such real property,

and declaring that such real property shall thereafter be deleted from the Annexable Area. Such real property may be deleted from the Annexable Area without a vote of the Association or the approval or consent of any other Person, except as provided herein.

ARTICLE 16
ADDITIONAL DISCLOSURES, DISCLAIMERS AND RELEASES

Section 16.1 Additional Disclosures, Disclaimers, and Releases of Certain Matters. Without limiting any other provision in this Declaration, by acceptance of a deed to a Unit, or by possession of a Unit, each Owner (for purposes of this Article 16, and all of the Sections hereof, the term "Owner" shall include the Owner, and the Owner's Family, guests and tenants), and by residing within the Properties, each Resident (for purposes of this Article 16, the term "Resident" shall include each Resident, and their guests) shall conclusively be deemed to understand, and to have acknowledged and agreed to, all of the following:

(a) There are presently, and may in the future be other, major electrical power system components (high voltage transmission or distribution lines, transformers, etc.) from time to time located within or nearby the Properties, which generate certain electric and magnetic fields ("EMF") around them; and Declarant specifically disclaims any and all representations or warranties, express and implied, with regard to or pertaining to EMF.

(b) The Unit and other portions of the Properties from time to time are or may be located within or nearby certain airplane flight patterns, and/or subject to significant levels of airplane traffic and noise; and Declarant hereby specifically disclaims any and all representations or warranties, express and implied, with regard to or pertaining to airplane flight patterns, and/or airplane noise.

(c) The Unit and other portions of the Properties are or may be located adjacent to or nearby Blue Diamond Highway and other major roads, all of which may, but need not necessarily, be constructed, reconstructed, or expanded in the future (all collectively, "roadways"), and subject to high levels of traffic, noise, construction, maintenance, repair, dust, and other nuisance from such roadways; and Declarant hereby specifically disclaims any and all representations or warranties, express and implied, with regard to or pertaining to roadways and/or noise, dust, and other nuisance related thereto.

(d) The Unit and other portions of the Properties are or may be located adjacent to or nearby major water and drainage facilities, channel(s) and/or washes (all, collectively, "Facilities"), the ownership, use, regulation, operation, maintenance, improvement and repair of which are not necessarily within Declarant's control, and over which Declarant does not necessarily have jurisdiction or authority, and, in connection therewith: (1) the Facilities may be an attractive nuisance to children; (2) maintenance and use of the Facilities may involve various operations and applications, including (but not necessarily limited to) noisy electric, gasoline or other power driven vehicles and/or equipment used by Facilities maintenance and repair personnel during various times of the day, including, without limitation, early morning and/or late evening hours; and (3) the possibility of damage to Improvements and property on the Properties, particularly in the event of overflow of water or other substances from or related to the Facilities, as the result of nonfunction, malfunction, or overtaxing of the Facilities or any other reason; and (4) any or all of the foregoing may cause inconvenience and disturbance to Owner and other persons in or near the Unit and/or Common Elements, and possible injury to person and/or damage to property.

(e) Construction or installation of Improvements by Declarant, other Owners, or third parties, or installation or growth of trees or other plants, may impair or eliminate the view, if any, of or from any Unit and/or Common Elements.

(f) Residential subdivision and home construction is an industry inherently subject to variations and imperfections, and items which do not materially affect safety or structural integrity shall be deemed "expected minor flaws" (including, but not limited to: reasonable wear, tear or deterioration; shrinkage, swelling, expansion or settlement; squeaking, peeling, chipping, cracking, or fading; touch-up painting; minor flaws or corrective work; and like items) and not constructional defects.

(g) The finished construction of the Unit and the Common Elements, while within the standards of the industry in the Las Vegas Valley, Clark County, Nevada, and while in substantial compliance with the plans and specifications, will be subject to variations and imperfections and expected minor flaws. Issuance of a Certificate of Occupancy by the relevant governmental authority with jurisdiction shall be deemed conclusive evidence that the relevant Improvement has been built within such industry standards.

(h) Indoor air quality of the Unit may be affected, in a manner and to a degree found in new construction within industry standards, including, without limitation, by particulates or volatiles emanating or evaporating from new carpeting or other building materials, fresh paint or other sealants or finishes, and so on.

(i) Installation and maintenance of a gated community and/or any security or traffic access device, operation, or method, shall not create any presumption or duty whatsoever of Declarant or Association (or their respective officers, directors, managers, employees, agents, and/or contractors) with regard to security or protection of person or property within or adjacent to the Properties; and each Owner, by acceptance of a deed to a Unit, whether or not so stated in the deed, shall be deemed to have agreed to take any and all protective and security measures and precautions which such Owner would have taken if the Properties had been located within public areas and not gated. Gated entrances may restrict or delay entry into the Properties by law enforcement, fire protection, and/or emergency medical care personnel and vehicles, and each Owner, by acceptance of a deed to a Unit, whether or not so stated in the deed, shall be deemed to have voluntarily assumed the risk of such restricted or delayed entry.

(j) The Las Vegas Valley contains a number of earthquake faults, and that the Properties or portions thereof may be located on or nearby an identified or yet to be identified seismic fault line; and that Declarant specifically disclaims any and all representations or warranties, express or implied, with regard to or pertaining to earthquakes or seismic activities; and that Owner hereby releases Declarant from any and all claims arising from or relating to earthquakes or seismic activities.

(k) The Unit and other portions of the Properties from time to time may, but need not necessarily, experience problems with scorpions, bees, ants, spiders, termites, pigeons, snakes, rats, and/or other insect or pest problems (collectively, "pests"); and Declarant hereby specifically disclaims any and all representations or warranties, express and implied, with regard to or pertaining to any pest, and each Owner must make its own independent determination regarding the existence or non-existence of any pest(s) which may be associated with the Unit or other portions of the Properties.

(l) There is a high degree of alkalinity in soils and/or water in the Las Vegas Valley; that such alkalinity tends to produce, by natural chemical reaction, discoloration, leaching and erosion or deterioration of concrete walls and other Improvements ("alkaline effect"); that the Unit and other

portions of the Properties may be subject to such alkaline effect, which may cause inconvenience, nuisance, and/or damage to property; and the Governing Documents require Owners other than Declarant to not change the established grading and/or drainage, and to not permit any sprinkler or irrigation water to strike upon any wall or similar improvement.

(m) There are and/or will be various molds present within the Unit and other portions of the Properties. Molds occur naturally in the environment, and can be found virtually everywhere life can be supported. Dwellings are not and cannot be designed or constructed to exclude mold spores. Not all molds are necessarily harmful, but certain strains of mold may result in adverse health effects in susceptible persons.

(n) The Properties are located adjacent or nearby to certain undeveloped areas which may contain various species of wild creatures (including, but not limited to, coyotes and foxes), which may from time to time stray onto the Properties, and which may otherwise pose a nuisance or hazard.

(o) The Properties, or portions thereof, are or may be located adjacent to or within the vicinity of certain other property zoned to permit the owners of such other property to keep and maintain thereon horses or other "farm" animals, which may give rise to matters such as resultant noise, odors, insects, and other "nuisance"; additionally, certain other property located or nearby the Properties may be zoned to permit commercial uses, and/or shall or may be developed for commercial uses. Declarant makes no other representation or warranty, express or implied, with regard or pertaining to the future development or present or future use of property adjacent to or within the vicinity of the Properties.

(p) Certain portions of land ("Neighboring Developments") outside, abutting and/or near the Perimeter Wall have not yet been developed, and in the future may or will be developed by third parties over whom Declarant has no control and over whom the Association has no jurisdiction, and accordingly, there is no representation as to the nature, use or architecture of any future development or improvements on Neighboring Developments; and such use, development and/or construction on Neighboring Developments may result in noise, dust, or other "nuisance" to the Community or Owners, and may result in portions of Perimeter Wall/Fence and/or Exterior Wall/Fence being utilized by third persons who are not subject to this Declaration or the Governing Documents; and Declarant and Association specifically disclaim any and all responsibility liability thereof.

(q) Each Purchaser acknowledges having received from Declarant information regarding the zoning designations and the designations in the master plan regarding land use, adopted pursuant to NRS Chapter 278, for the parcels of land adjoining the Properties to the north, south, east, and west, together with a copy of the most recent gaming enterprise district map made available for public inspection by the jurisdiction in which the Unit is located, and related disclosures. Declarant makes no further representation, and no warranty (express or implied), with regard to any matters pertaining to adjoining land or uses thereof or to any gaming uses or issues. Each Purchaser is hereby advised that the master plan and zoning ordinances, and gaming enterprise districts, are subject to change from time to time. If additional or more current information concerning such matters is desired, Purchaser should contact the appropriate governmental planning department. Each Purchaser acknowledges and agrees that its decision to purchase a Unit is based solely upon Purchaser's own investigation, and not upon any information provided by any sales agent.

(r) Although the Plat may show Unit 1 as owning portions of the ground floor of the Triplex Building immediately adjacent to and/or surrounding the Garage Components of Units 2 and 3 respectively, the Owners of Units 2 and 3 shall have an easement over such portions, including exterior

wall, below the upstairs level, and shall be responsible, pursuant and subject to the Declaration, for painting maintenance, and repair such areas.

(s) Sewer cleanouts for all three Units within a Triplex Building are or may all be located within the Garage Component of one Unit, and the Owners of the other Units in the Triplex Building shall have an easement over and across said Garage Component, for purposes of reasonably inspecting and cleaning their respective sewer cleanouts.

(t) Water (and/or sewage) for this Project shall or may be master metered and from time to time initially paid by the Master Association, subject to monthly or other periodic assessment of allocated amounts to the Owners of Units in this Project. Each Owner shall be required to promptly pay such allocated water assessments, regardless of actual levels or periods of use of such water (i.e., regardless of occupancy or vacancy of the Unit, and regardless of family size, regardless of whether or not the Unit has an appurtenant Yard Component).

(u) The House Panel meter electricity charges for each Triplex Building shall from time to time be initially paid by the Association, subject to monthly or other periodic assessment of allocated amounts to the Owners of Residential Units for each applicable Triplex Building. Each Owner shall be required to promptly pay such allocated electrical assessments, regardless of actual levels or periods of use of such electricity (i.e., regardless of occupancy or vacancy of the Unit, and regardless of family size, regardless of whether or not the Unit has an appurtenant Yard Component).

(v) No Owner shall be permitted to add concrete or to alter, modify, expand, or eliminate any improvements (including ground cover) installed by Declarant as part of its initial construction. No patio covers shall be permitted.

(w) Owners are prohibited from changing the external appearance of any portion of a Triplex Building, and subject to the foregoing, are required to coordinate with the other Owners in their Triplex Building for painting, maintenance and repair from time to time of the roof and exterior walls of their Triplex Building, as set forth in further detail in the Declaration.

(x) The Garage Components of Units 2 and 3 are located directly below the Living Component of Unit 1 within each Triplex Building. The Owners of Units 2 and 3 are subject to "quiet hours", and the noise, vibration, and other nuisance provisions set forth in the Declaration with respect to use of and activities within their respective Garage Components. Additionally, the "quiet" door opener mechanism of a Garage Component must be maintained by its Owner in its original "quiet" condition, and, in the event such door opening mechanism should require replacement, the Owner shall replace it with a new door opening mechanism which is at least as quiet as the one as originally installed by Declarant.

(y) Certain "bare-floor" limitations and restrictions are set forth in this Declaration with respect to upstairs areas of Living Components.

(z) Other matters, limitations, and restrictions, uniquely applicable to this semi-attached triplex townhome residential Community, are set forth in the Declaration, and may be supplemented from time to time by Rules and Regulations. Each Owner in this Community is expected to behave in a reasonable and cooperative "good neighbor" manner at all times, particularly with respect to the other Owners of Units in the same Triplex Building.

(aa) Declarant presently plans to develop only those Units which have already been released for construction and sale, and that Declarant has no obligation with respect to future phases,

plans, zoning, or development of other real property contiguous to or nearby the Unit; (1) that proposed or contemplated residential and other developments may have been illustrated in the plot plan or other sales literature in or from Declarant's sales office, and/or Purchaser may have been advised of the same in discussions with sales personnel; however, notwithstanding such plot plans, sales literature, or discussions or representations by sales personnel or others, Declarant is under no obligation to construct such future or planned developments or units, and such developments or units may not be built in the event that Declarant, for any reason whatsoever, decides not to build the same; (2) Purchaser is not entitled to rely upon, and in fact has not relied upon, the presumption or belief that the same will be built; and (3) no sales personnel or any other person in any way associated with Declarant has any authority to make any statement contrary to the provisions set forth in the foregoing or any provision of the written purchase agreement.

(ab) The Unit is one of three Units in a Triplex Building, located in close proximity to other Units and Triplex Buildings, and private street and parking areas in the Properties, and, accordingly, is and will be subject to substantial levels of sound and noise.

(ac) Declarant shall have the right, from time to time, in its sole discretion, to establish and/or adjust sales prices or price levels for new homes and/or Units.

(ad) Model homes are displayed for illustrative purposes only, and such display shall not constitute an agreement or commitment on the part of Declarant to deliver the Unit in conformity with any model home, and any representation or inference to the contrary is hereby expressly disclaimed. None of the decorator items and other items or furnishings (including, but not limited to, decorator paint colors, wallpaper, window treatments, mirrors, upgraded flooring, decorator built-ins, model home furniture, model home landscaping, and the like) shown installed or on display in any model home are included for sale to Purchaser unless an authorized officer of Declarant has specifically agreed in a written Addendum to the Purchase Agreement to make specific items a part of the Purchase Agreement.

(ae) Residential subdivision and new home construction are subject to and accompanied by substantial levels of noise, dust, construction-related traffic and traffic restrictions, and other construction-related "nuisances". Each Owner acknowledges and agrees that it is purchasing a Unit which is within a residential subdivision currently being developed, and that the Owner will experience and accepts substantial levels of construction-related "nuisances" until the subdivision (and other neighboring portions of land being developed) have been completed and sold out, and thereafter, in connection with repairs or any new construction.

(af) Declarant shall have the right (but not the obligation), at any time and from time to time, in its sole and absolute discretion, to: (a) design and/or to build different or varying product types or designs for new homes in the Community; (b) establish and/or adjust sales prices or price levels for homes and/or Units; (c) supplement and/or modify of Record all or any parts of the descriptions set forth in the exhibits hereto; and/or (d) unilaterally modify and/or limit, by Recorded instrument, the maximum total number of Units which may be constructed in the Community; and that the Annexable Area may, but need not necessarily, from time to time be annexed hereto.

(ag) Master Declarant reserves the right, until the Close of Escrow of the last Unit in the Properties, to unilaterally control the entry gate(s), and to keep all such entry gate(s) open during such hours established by Declarant, in its sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities.

(ah) Declarant reserves the right, until the Close of Escrow of the last Unit in the Properties, to unilaterally enter upon, and/or to control, restrict and/or re-route all pedestrian and vehicular traffic within the Properties, in Declarant's sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities; provided that no Unit shall be deprived of access to a dedicated street adjacent to the Properties.

(ai) Declarant reserves the right to correct or repair any Improvement, as set forth in Section 17.13 below.

(aj) Certain mandatory arbitration provisions are set forth in this Declaration, including, but not necessarily limited to, Section 17.14 below.

(ak) Declarant has reserved certain easements, and related rights and powers, as set forth in this Declaration. Declarant also reserves, to the extent not expressly prohibited by NRS Chapter 116, all other rights, powers, and authority, in Declarant's sole discretion, of a declarant under NRS Chapter 116 (including, but not necessarily limited to, all special declarant's rights referenced in NRS § 116.089).

(al) Each Purchaser understands, acknowledges, and agrees that Declarant has reserved certain rights, powers, authority and easements in the Declaration, and LMA Declarant has reserved certain rights, powers, authority and easements in the LMA Declaration, and Master Declarant has reserved certain rights, powers, authority and easements in the Master Declaration, all or any of which may limit certain rights of the Association and Owners other than Declarant, LMA Declarant and/or Master Declarant, respectively.

Section 16.2 Releases. By acceptance of a deed to a Unit, each Owner, for itself and all Persons claiming under such Owner, shall conclusively be deemed to have understood, acknowledged and agreed to all of the disclosures and disclaimers set forth herein, and to release Declarant and the Association and all of their respective officers, managers, agents, employees, suppliers, and contractors from any and all claims, causes of action, loss, damage or liability (including, but not limited to, any claim for nuisance or health hazard, property damage, bodily injury, and/or death) arising from or related to all and/or any one or more of the conditions, activities, occurrences, reserved rights, or other matters described in the foregoing Section 16.1.

ARTICLE 17
GENERAL PROVISIONS

Section 17.1 Enforcement. Subject to Sections 5.2 and/or 5.3 above, and Section 17.14 below, the Governing Documents may be enforced by the Association, as follows:

(a) Enforcement shall be subject to the overall "good neighbor" policy underlying and controlling this Declaration and this Community (in which the Owners seek to enjoy a quality lifestyle), and the fundamental governing policy of courtesy and reasonability.

(b) Breach of any of the provisions contained in this Declaration or the Bylaws and the continuation of any such breach may be enjoined, abated or remedied by appropriate legal or equitable proceedings instituted, in compliance with applicable Nevada law, by any Owner, including Declarant so long as Declarant owns a Unit, by the Association, or by the successors-in-interest of the Association. Any judgment rendered in any action or proceeding pursuant hereto shall include a sum for attorneys' fees in such amount as the court may deem reasonable, in favor of the prevailing party,

as well as the amount of any delinquent payment, interest thereon, costs of collection and court costs. Each Owner shall have a right of action against the Association for any material, unreasonable and continuing failure by the Association to comply with material and substantial provisions of this Declaration, or of the Bylaws or Articles.

(c) The Association shall have the right to enforce the obligations of any Owner under any material provision of this Declaration, by assessing a reasonable fine as a Special Assessment against such Owner or Resident, and/or suspending the right of such Owner to vote at meetings of the Association and/or the right of the Owner or Resident to use Common Elements, (other than ingress and egress over Private Streets, by the most reasonably direct route, to the Unit), subject to the following:

(i) the person alleged to have violated the material provision of the Declaration must have had written notice (either actual or constructive, by inclusion in a Recorded document) of the provision for at least thirty (30) days before the alleged violation; and

(ii) such use and/or voting suspension may not be imposed for a period longer than thirty (30) days per violation, provided that if any such violation continues for a period of ten (10) days or more after actual notice of such violation has been given to such Owner or Resident, each such continuing violation shall be deemed to be a new violation and shall be subject to the imposition of new penalties;

(iii) notwithstanding the foregoing, each Owner shall have an unrestricted right of ingress and egress to his Unit by the most reasonably direct route over and across the relevant streets;

(iv) no fine imposed under this Section may exceed the maximum amount(s) permitted from time to time by applicable provision of Nevada law for each failure to comply. No fine may be imposed until the Owner or Resident has been afforded the right to be heard, in person, by submission of a written statement, or through a representative, at a regularly noticed hearing (unless the violation is of a type that substantially and imminently threatens the health, safety and/or welfare of the Owners and Community, in which case, the Board may take expedited action, as the Board may deem reasonable and appropriate under the circumstances, subject to the limitations set forth in Section 5.2 and/or 5.3 above);

(v) if any such Special Assessment imposed by the Association on an Owner or Resident by the Association is not paid or reasonably disputed in writing delivered to the Board by such Owner or Resident (in which case, the dispute shall be subject to reasonable attempts at resolution through mutual discussions and mediation) within thirty (30) days after written notice of the imposition thereof, then such Special Assessment shall be enforceable pursuant to Articles 6 and 7 above; and

(vi) subject to Section 5.3 above and Section 17.14 below, and to applicable Nevada law (which may first require mediation or arbitration), the Association may also take judicial action against any Owner or Resident to enforce compliance with provisions of the Governing Documents, or other obligations, or to obtain damages for noncompliance, all to the fullest extent permitted by law.

(d) Responsibility for Violations. Should any Resident violate any material provision of the Declaration, or should any Resident's act, omission or neglect cause damage to the Common Elements, then such violation, act, omission or neglect shall also be considered and treated as a

violation, act, omission or neglect of the Owner of the Unit in which the Resident resides. Likewise, should any guest of an Owner or Resident commit any such violation or cause such damage to Common Elements, such violation, act, omission or neglect shall also be considered and treated as a violation, act, omission or neglect of the Owner or Resident. Reasonable efforts first shall be made to resolve any alleged material violation, or any dispute, by friendly discussion in a "good neighbor" manner, followed (if the dispute continues) by informal mediation by the ARC or Board (and/or mutually agreeable or statutorily authorized third party mediator). Fines or suspension of voting privileges shall be utilized only as a "last resort", after all reasonable efforts to resolve the issue by friendly discussion or informal mediation have failed.

(e) The result of every act or omission whereby any of the provisions contained in this Declaration or the Bylaws are materially violated in whole or in part is hereby declared to be and shall constitute a nuisance, and every remedy allowed by law or equity against a nuisance either public or private shall be applicable against every such result and may be exercised by any Owner, by the Association or its successors-in-interest.

(f) The remedies herein provided for breach of the provisions contained in this Declaration or in the Bylaws shall be deemed cumulative, and none of such remedies shall be deemed exclusive.

(g) The failure of the Association to enforce any of the provisions contained in this Declaration or in the Bylaws shall not constitute a waiver of the right to enforce the same thereafter.

(h) If any Owner, his or her Family, guest, licensee, lessee or invitee violates any such provisions, the Board may impose a reasonable Special Assessment upon such Owner for each violation and, if any such Special Assessment is not paid or reasonably disputed in writing to the Board (in which case, the dispute shall be subject to reasonable attempts at resolution through mutual discussions and mediation) within thirty (30) days after written notice of the imposition thereof, then the Board may suspend the voting privileges of such Owner. Such Special Assessment shall be collectible in the manner provided hereunder, but the Board shall give such Owner appropriate Notice and Hearing before invoking any such Special Assessment or suspension.

Section 17.2 Severability. Invalidation of any provision of this Declaration by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

Section 17.3 Term. The covenants and restrictions of this Declaration shall run with and bind the Properties, and shall inure to the benefit of and be enforceable by the Association or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successive Owners and assigns, until terminated in accordance with NRS § 116.2118.

Section 17.4 Interpretation. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development of a residential community and for the maintenance of the Common Elements. The article and section headings have been inserted for convenience only, and shall not be considered or referred to in resolving questions of interpretation or construction. Unless the context requires a contrary construction, the singular shall include the plural and the plural the singular; and the masculine, feminine and neuter shall each include the masculine, feminine and neuter.

Section 17.5 No Public Right or Dedication. Nothing contained in this Declaration shall be deemed to be a gift or dedication of all or any part of the Properties to the public, or for any public use.

Section 17.6 Constructive Notice and Acceptance. Every Person who owns, occupies or acquires any right, title, estate or interest in or to any Unit or other portion of the Properties does hereby consent and agree, and shall be conclusively deemed to have consented and agreed, to every limitation, restriction, easement, reservation, condition and covenant contained herein, whether or not any reference to these restrictions is contained in the instrument by which such person acquired an interest in the Properties, or any portion thereof.

Section 17.7 Notices. Any notice permitted or required to be delivered as provided herein shall be in writing and may be delivered either personally or by mail. If delivery is made by mail, it shall be deemed to have been delivered three (3) business days after a copy of the same has been deposited in the United States mail, postage prepaid, addressed to any person at the address given by such person to the Association for the purpose of service of such notice, or to the residence of such person if no address has been given to the Association. Such address may be changed from time to time by notice in writing to the Association.

Section 17.8 Priorities and Inconsistencies. Subject to Section 5.8 above, and Section 17.9 below: (a) the Governing Documents shall be construed to be consistent with one another to the extent reasonably possible; (b) if there exist any irreconcilable conflicts or inconsistencies among the Governing Documents, the terms and provisions of this Declaration shall prevail (unless and to the extent only that a term or provision of this Declaration fails to comply with provision of NRS Chapter 116 applicable hereto; (c) in the event of any inconsistency between the Articles and Bylaws, the Articles shall prevail; and (d) in the event of any inconsistency between the Rules and Regulations and any other Governing Document, the other Governing Document shall prevail.

Section 17.9 LMA Declaration; Master Declaration. The provisions of this Declaration shall supplement, but shall not supersede, any and all applicable provisions of the LMA Declaration and/or Master Declaration, respectively. Applicable provisions of the LMA Declaration and/or Master Declaration shall control in the event of any irreconcilable conflict with the provisions of this Declaration, although such documents shall be construed to be consistent with one another to the maximum extent possible. The inclusion in this Declaration of covenants, conditions, restrictions, land uses, and limitations which are more restrictive or more inclusive than the restrictions contained in the LMA Declaration and/or Master Declaration shall not be deemed to constitute a conflict with the provisions of the LMA Declaration and/or Master Declaration. Nothing herein shall be construed as relieving any Owner or Unit within the Properties therefrom, or as limiting or preventing any and all applicable rights of enforcement granted or available to the LMA Association and/or Master Association by virtue thereof.

Section 17.10 Limited Liability. Except to the extent, if any, expressly prohibited by applicable Nevada law, none of Declarant, Association, ARC, LMA Declarant, LMA Association, Master Declarant, and/or Master Association, and none of their respective directors, officers, any committee representatives, employees, or agents, shall be liable to any Owner or any other Person for any action or for any failure to act with respect to any matter if the action taken or failure to act was reasonable or in good faith. The Association shall indemnify every present and former Officer and Director and every present and former Association committee representative against all liabilities incurred as a result of holding such office, to the full extent permitted by law.

Section 17.11 Business of Declarant. Except to the extent expressly provided herein or as required by applicable provision of NRS Chapter 116, no provision of this Declaration shall be applicable to limit or prohibit any act of Declarant, or its agents or representatives, in connection with or incidental to Declarant's improvement and/or development of the Properties, so long as any Unit therein owned by Declarant remains unsold.

Section 17.12 Declarant's Right to Repair. Whether or not so stated in the deed, each Owner, by acquiring title to a Unit, and the Association, by acquiring title to any Common Element, shall conclusively be deemed to have agreed: (a) to promptly provide Declarant with specific written notice from time to time of any Improvement requiring correction or repair(s) for which Declarant is or may be responsible, and (b) following delivery of such written notice, to reasonably permit Declarant (and/or Declarant's contractors and agents) to inspect the relevant Improvement, and to take reasonable steps, if necessary or appropriate, to undertake and to perform corrective or repair work, and (c) to reasonably permit entry by Declarant (and Declarant's contractors and agents) upon the Unit or Common Element (as applicable) from time to time in connection therewith and/or to undertake and to perform such inspection and such work; and (d) that Declarant shall unequivocally be entitled (i) to specific prior written notice of any such corrective or repair work requested (and shall not be held responsible for any corrective or repair work in the absence of such written notice), (ii) to inspect the relevant Improvement, and (iii) to take reasonable steps, in Declarant's reasonable judgment, to undertake and to perform any and all necessary or appropriate corrective or repair work. The foregoing portion of this Section 17.13 shall not be deemed to modify or toll any applicable statute of limitation or repose, or any contractual or other limitation pertaining to such work.

Section 17.13 Arbitration. Any dispute that may arise between the Association, subject to the procedural requirements set forth in Section 5.3, above, and/or Owner of a Unit, and Declarant or any person or entity who was involved in the construction of any Common Element or any Unit shall be resolved by submitting such dispute to arbitration before a mutually acceptable arbitrator who will render a decision binding on the parties which can be entered as a judgment in court pursuant to NRS 38.000 et. seq. The arbitration shall be conducted according to the provisions of the Construction Industry Arbitration Rules of the American Arbitration Association. If the parties to the dispute fail to agree upon an arbitrator within forty-five (45) days after an arbitrator is first proposed by the party initiating arbitration, either party may petition the American Arbitration Association for the appointment of an arbitrator. Declarant has the right to assert claims against any contractor, subcontractor, person or entity, who may be responsible for any matter raised in the arbitration and to name said contractor, subcontractor, person, or entity as an additional party to the arbitration. Upon selection or appointment of the arbitrator, the parties shall confer with the arbitrator who shall establish a discovery schedule which shall not extend beyond ninety (90) days from the date the arbitrator is selected or appointed unless for good cause shown such period is extended by the arbitrator or such period is extended by the consent of the parties. If Declarant asserts a claim against a contractor, subcontractor, person, or entity, the discovery period may be extended, at the discretion of the arbitrator, for a period not to exceed one hundred twenty (120) days. The arbitration of a dispute between the Declarant, the Association, or any Owner of a Unit shall not be consolidated with any other proceeding unless Declarant chooses to consolidate the same with another similar proceeding brought by the Association or any Owner of a Unit. The arbitrator shall convene the arbitration hearing within one hundred twenty days (120) from the time the arbitrator is selected or appointed. Upon completion of the arbitration hearing, the arbitrator shall render a decision within ten (10) days. The date for convening the hearing may be adjusted by the arbitrator to accommodate extensions of discovery and the addition of parties or by consent of the parties. However, unless extraordinary circumstances exist, the hearing shall be convened no later than one hundred eighty (180) days from the date the arbitrator is appointed. To the extent practicable, any hearing convened pursuant to this provision shall continue, until completed, on a daily basis. The prevailing party shall be entitled to recover its attorney's fees and costs. The costs of the arbitration shall be borne equally by the parties thereto.

ARTICLE 18
AMENDMENT

Section 18.1 Amendment By Declarant. Until the first Close of Escrow for the sale of a Unit, Declarant shall have the right to terminate or modify this Declaration by Recordation of a supplement hereto setting forth such termination or modification. Any amendment to this Declaration pursuant to the exercise of any Developmental Rights reserved herein may be made by Recordation of a written instrument executed and acknowledged by Declarant, setting forth such amendment, in conformity with NRS § 116.211. Notwithstanding any other provision herein, for so long as Declarant owns a Unit, Declarant shall have the power from time to time to unilaterally amend this Declaration to correct any scrivener's errors, to clarify any ambiguous or potentially inconsistent or contradictory provision, to modify or supplement Exhibit "B" hereto, and otherwise to ensure that the Declaration is consistent and conforms with the requirements of applicable law. Additionally, by acceptance of a deed from Declarant conveying any real property located in the Annexable Area (Exhibit "B" hereto), in the event such real property has not theretofore been annexed to the Properties encumbered by this Declaration, and whether or not so expressed in such deed, the grantee thereof covenants that Declarant shall be fully empowered and entitled (but not obligated) at any time thereafter, and appoints Declarant as attorney in fact, in accordance with NRS §§ 111.450 and 111.460, of such grantee and his successors and assigns, to unilaterally execute and Record an Annexation Amendment, adding said real property to the Community, in the manner provided for in NRS § 116.211 and in Article 15 above.

Section 18.2 Amendment of Plat. By acceptance of a deed conveying a Unit encumbered by this Declaration, whether or not so expressed in such deed, the grantee thereof covenants that Declarant shall be fully empowered and entitled (but not obligated) at any time thereafter, and appoints Declarant as attorney in fact, in accordance with NRS §§ 111.450 and 111.460, of such grantee and his successors and assigns, to unilaterally execute and Record from time to time amendment(s) to the Plat, provided that any such amendment shall relate only to such property which at such time have not yet been annexed to the Properties by Recorded Annexation Amendment.

Section 18.3 Amendment By Members. Except as otherwise may be provided by the Master Association Documents or by this Declaration (including, but not limited to Sections 18.1 or 18.2 above), the provisions of this Declaration may be amended only by Recordation of a certificate, signed and acknowledged by the President or Secretary of the Association, setting forth the amendment and certifying that such amendment has been approved by both: (a) Members representing not less than sixty-seven percent (67%) of the total voting power of the Association, and (b) the consent of a majority of the Board of Directors; and, in the case of those amendments which this Declaration requires to be approved by Eligible Mortgagees, (c) the requisite percentage of Eligible Mortgagees and Eligible Insurers. Such amendment shall be effective upon Recordation. Except as permitted by the Act, no amendment may change the boundaries of any Unit, change the uses to which any Unit is restricted or change the allocated interests of a Unit, without the unanimous consent of all Owners whose Units are so affected. Notwithstanding the preceding portion of this Section 18.3 or any other provision of this Declaration, the provisions of Section 5.3 ("Proceedings"), Section 17.13 ("Declarant's Right to Repair"), Section 17.14 ("Arbitration") above, and/or this Section 18.3, may not be amended unless such amendment has been approved by both: (i) Members representing not less than seventy-five percent (75%) of the total voting power of the Association, and (ii) the consent of not less than seventy-five percent (75%) of the Board of Directors.

Section 18.4 Approval of Eligible Mortgagees. Anything to the contrary herein notwithstanding, any of the following amendments, to be effective, must be approved by sixty-seven percent (67%) of all Eligible Mortgagees and Eligible Insurers at the time of such amendment, based upon one (1) vote for each first Mortgage owned or insured:

(a) Any amendment which affects or purports to affect the validity or priority of encumbrances or the rights or protections granted to holders, insurers, and guarantors, of first Mortgages as provided herein.

(b) Any amendment which would necessitate an encumbrancer after it has acquired a Unit through foreclosure to pay more than its proportionate share of any unpaid assessment or assessment accruing after such foreclosure.

(c) Any amendment which would or could result in an encumbrance being canceled by forfeiture, or in the individual Unit not being separately assessed for tax purposes.

(d) Any amendment relating to the insurance provisions or to the application of insurance proceeds as set out in Article 12 hereof, or to the disposition of any money received in any taking under condemnation proceedings.

(e) Any amendment which would or could result in termination or abandonment of the Properties or partition or subdivision of a Unit, in any manner inconsistent with the provision of this Declaration.

(f) Any amendment materially and substantially affecting: (i) voting rights; (ii) rights to use the Common Elements; (iii) reserves and responsibility for maintenance, repair and replacement of the Common Elements; (iv) leasing of Units; (v) establishment of self-management by the Association where professional management has been required by any Beneficiary, insurer or guarantor of a first Mortgage; (vi) boundaries of any Unit; (vii) Declarant's right and power to annex or de-annex property to or from the Properties; and (viii) assessments, assessment liens, or the subordination of such liens.

Any approval by an Eligible Holder required under this Article 18, or required pursuant to any other provisions of this Declaration, shall be given in writing: provided that prior to any such proposed action, the Association or Declarant, as applicable, may give written notice of such proposed action to any or all Eligible Holders, and for thirty (30) days following the receipt of such notice, such Eligible Holders shall have the power to disapprove such action by giving written notice to the Association or Declarant, as applicable. If no written notice of disapproval is received by the Association or Declarant, as applicable, within such thirty (30) day period, then the approval of such Eligible Holder shall be deemed given to the proposed action, and the Association or Declarant, as applicable, may proceed as if such approval was obtained with respect to the request contained in such notice.

A certificate, signed and sworn to by two (2) Officers that Members representing sixty-seven percent (67%) of the voting power of the Association have voted for any amendment adopted as provided above, when recorded, shall be conclusive evidence of that fact. The certificate reflecting any termination or amendment which requires a written consent of Declarant or approval of Eligible Holders shall include a certification that the requisite approval of Declarant or Eligible Holders (as applicable) has been obtained or waived. The Association shall maintain in its files, for a period of at least four (4) years, the record of all such votes and Eligible Holder consent solicitations and disapprovals.

Section 18.5 Notice of Change. If any change is made to the Governing Documents, the Secretary (or other designated Officer) shall, within 30 days after the change is made, prepare and cause to be hand-delivered or sent prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by the Owner, a copy of the change made.

IN WITNESS WHEREOF, Declarant has executed this Declaration the day and year first written above.

DECLARANT:

D. R. HORTON, INC.,
a Delaware corporation

By: _____
James Frasure, Vice President

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

This instrument was acknowledged before me on this 23 day of March, 2004, by James Frasure, as Vice President of D. R. HORTON, INC., a Delaware corporation.

_____
NOTARY PUBLIC
(Seal)

(wmr\1422.127\1.CCRS.02.wpd)

JULIA GRIFFIN
Notary Public, State of Nevada
Appointment No. 93-3691
My Appt. Expires Nov. 18, 2004

EXHIBIT "A"

ORIGINAL PROPERTY

ALL THAT REAL PROPERTY SITUATED IN THE COUNTY OF CLARK, STATE OF NEVADA, DESCRIBED AS FOLLOWS:

1. MODULE Two (2), and UNITS 1 - 3, inclusive, in said Module, including all GARAGE COMPONENTS and any and all YARD COMPONENTS appurtenant respectively thereto, and (b) Common Elements lying within the boundaries of said Module 2; all as shown by final map of HIGH NOON AT ARLINGTON RANCH on file in Book 115 of Plats, Page 21, Official Records, Clark County, Nevada (hereinafter, "Plat");

2. Any Exclusive Use Areas appurtenant to the foregoing Units, as shown by the Plat and as set forth in the foregoing Declaration;

3. TOGETHER WITH a non-exclusive easement appurtenant respectively thereto for use and enjoyment over, across and of, all Private Streets and other Common Elements, pursuant and subject to the foregoing Declaration.

EXHIBIT "B"

ANNEXABLE AREA

[ALL, OR ANY PORTIONS, FROM TIME TO TIME MAY, BUT NEED NOT NECESSARILY, BE ANNEXED BY DECLARANT TO THE PROPERTIES]

All of the real property in HIGH NOON AT ARLINGTON RANCH, as shown by final map thereof, on file in Book 115 of Plats, Page 21, in the Office of the County Recorder, Clark County, Nevada; EXCEPTING THEREFROM: the Original Property, as described in the foregoing Exhibit "A".

[NOTE: DECLARANT HAS SPECIFICALLY RESERVED THE RIGHT FROM TIME TO TIME TO UNILATERALLY ADD TO OR MODIFY OF RECORD ALL OR ANY PART(S) OF THE FOREGOING DESCRIPTIONS]

When Recorded, Return To:

WILBUR M. ROADHOUSE, ESQ.
Goold Patterson Ales Roadhouse & Day
4496 South Pecos Road
Las Vegas, Nevada 89121
(702) 436-2600

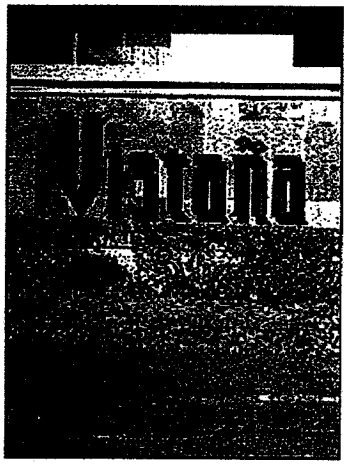
<<Back

lasvegas NOW NEWS

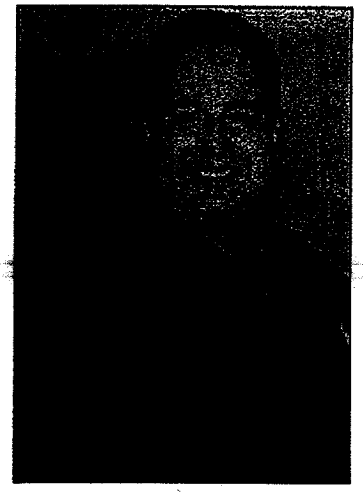
George Knapp, Chief Investigative Reporter

I-Team: Search Warrants Served in Corruption Probe

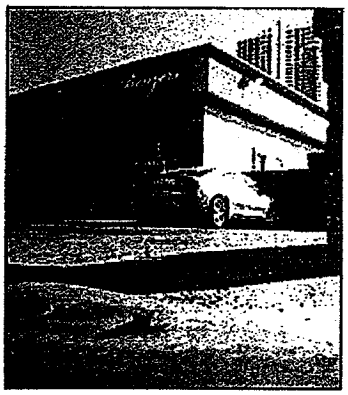
Updated: Sep 25, 2008 06:08 PM PDT



The Vistana Condo development is 720 units built by Rhodes Homes.



Businessman Leon Benzer has a lot going for him.



Benzer operates Benzer's nightclub near the

FBI agents, backed up by Metro Detectives, served search warrants all over the valley looking for evidence of political corruption. The *I-Team* has learned the investigation is focused on alleged corruption among local homeowner associations and contractors.

Homeowner associations are political bodies, so that's why the FBI is calling this a political corruption investigation. The association boards are elected positions, whose activities are prescribed by law.

Share Your Thoughts on the Investigation

A task force of FBI Agents and Metro Detectives believes a web of contractors, lawyers, management companies and others have siphoned away millions of dollars from homeowners and developers.

Businessman Leon Benzer has a lot going for him. Since 1992 he's owned Silver Lining Construction, which specializes in remediation work and claims involvement in 300 local building projects.

Benzer has been billed as a visionary and philanthropist who started his own line of tequila, Benzilla, and operates Benzer's nightclub near the Palms. But the crowd that came knocking Wednesday morning wasn't customers. They were FBI Agents and Metro Detectives.

They used an explosive device to blow open an iron gate then went in to serve the first of many search warrants. Additional warrants were served all over town at private homes and businesses.

The FBI will only confirm that this is a political corruption investigation, but the *I-Team* has learned a lot more.

The law enforcement task force that served the search warrants suspects huge sums of money have been squeezed out of homeowner associations through illegal relationships.

Example, the Vistana Condo development – 720 units built by Rhodes Homes. Owners initiated a massive construction defect lawsuit. They paid more than a million dollars to Benzers company to fix some of the defects.

Public records show that Benzer's manager Mark Kulla is also the attorney who set up Benzer's many businesses, and became the attorney of record for the Vistana homeowners. Kulla reportedly earned more than $2 million in fees for his work on the lawsuit against Rhodes.

What has not been made public are the other relationships involved. The president of the Vistana homeowners is Steve Wark, a well known Republican political strategist and frequent TV talk show guest.

According to state documents, Wark has been a business partner with Leon Benzer. The vice president of the Vistana association is reportedly a full time employee of Benzer's.

Homeowners alleged in the past that the board purposely steered their

Palms. lawsuit to Kulla and the remediation work to Benzer, both of whom made a bundle.

The FBI wants to know if the Vistana set up was mirrored in other homeowner associations and resulted in large lawsuit settlements. Said one source, the lawsuit against Rhodes drove up the cost of every house in Rhodes Ranch, but most of the settlement money went to people other than the homeowners.

Homeowners at Vistana took a massive pile of information to the State Real Estate Division back in 2005, but nothing ever came of it. The state won't say if it launched an investigation.

Among the complaints made back then was that elections of the board members at Vistana were rigged and that intimidation was used by security guards hired by management.

Leon Benzer did not return calls for comment. Steve Wark says he disclosed his friendship with Benzer before he was elected to the board and that Benzer and Kulla already were in place before he arrived.

Email your comments to Chief Investigative Reporter George Knapp

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lasvegas NEWS

Jonathan Humbert, Investigative Reporter

I-Team: Defect Lawsuits Impede Sales of Property

Updated: Sep 25, 2008 08:00 PM PDT

Condos, neighborhoods and your home could all be in jeopardy because of a complicated, greedy scheme.

Senator Schneider will propose new, harsher legislation to hold HOA's accountable.

The ongoing corruption probe shows that if you're buying or selling a home or condo, you could be in serious trouble. Condos, neighborhoods and your home could all be in jeopardy because of a complicated, greedy scheme.

It comes down to a simple questionnaire. If your condo or house is going through complicated defect litigation, one form becomes your death warrant. No one will lend you money and no one will touch your sale. You're stuck because someone decided to sue. They get in, funnel sweetheart deals to construction and attorney buddies, and take off. It's slash and burn economics.

The experts are weighing in and they say the condo corruption case is going to hit your street hard.

"It's a lot of money that funnels through and it's a lot of people's lives that can be effected," said Sophie Lapointe with Five Star Mortgage.

Lapointe says recent problems with lenders Freddie Mac and Fannie Mae have tightened up the lending market. So if one of these questionable defect lawsuits goes forward, you're in trouble.

Question nine is what sinks the deal. Is the HOA part of any litigation? If yes, nine times out of 10, "You're dead in the water."

"Banks have backed away from financing when there's litigation going on in homeowner's associations," said State Senator Mike Schneider.

Schneider has been a critic of HOA's for years. He says the lawsuits essentially poison the condo or housing development, beginning with lower property values. Then, no one wants to get near it and no one will give you money to buy it. So sellers and buyers become victims with a house to sell and nowhere to go.

"They're easily preyed upon by professionals who want to get in and get their money," he said.

So in February, Senator Schneider will propose new, harsher legislation to hold HOA's accountable, "With that much money floating around and no oversight, it's kind of like what we're going through with wall street right now."

Until then, Lapointe says ask lots of questions, "How many people even pay attention to what's happening with their homeowner's association?"

Lapointe hopes people continue to apply for lending. That's one of the few ways out of this -- to try to sell off the condo and homes, even if those lawsuits have no merit at all.

Email your comments to Investigative Reporter Jonathan Humbert

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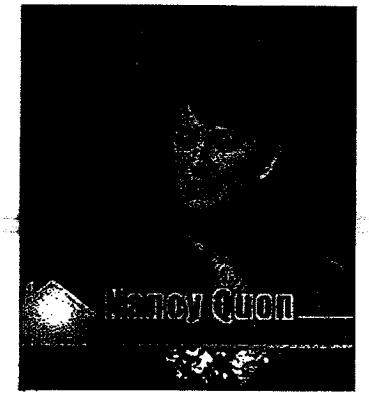
lasvegas NOW

Jonathan Humbert, Investigative Reporter

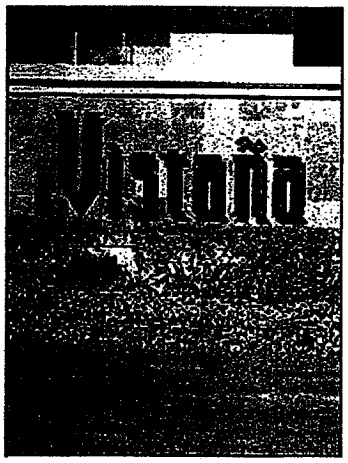
I-Team: More Search Warrants Served in HOA Probe

Updated: Sep 28, 2008 02:37 PM PDT

Leon Benzer is the man behind Silver Lining Construction and also the man at the heart of the FBI probe.



Quon has a long successful history in construction defect lawsuits. She filed four linked to the FBI/Metro probe.



She might be a familiar face to the afternoon TV crowd. Nancy Quon hosts a homeowner TV show on the City of Las Vegas channel but in recent days the bright lights were on her office on Sahara.

The FBI confirms they were there searching for clues in the corruption investigation. Former HOA board members have come forward saying Quon and businessman Leon Benzer tried to take over their development.

Quon's weekly show talks about the challenges and benefits of property management. Quon has a long successful history in construction defect lawsuits. She filed four linked to the FBI/Metro probe.

Share Your Thoughts on the Investigation

Cheryl Stockwell sat on the HOA board for Vistana Condos. The condo had some plumbing and structural problems, but she didn't like what she heard from Quon.

Stockwell says Quon touted her experience and winning record in court, "'You need to go with me. You have so many defects here,'" and we did have defects, no doubt about it. But, they were so overblown at times."

Stockwell says she started worrying when new members were elected to the board and they wanted to change course. So Stockwell enlisted the help of other residents to start finding out what was going on.

"Wanda, Enid, Bill, myself, Rita and Bruce joined us later. Started investigating and digging and finding all these ties to Benzer," she said.

Benzer is Leon Benzer, the man behind Silver Lining Construction and also the man at the heart of the FBI probe.

Sources say Benzer and others would buy small stakes in homes and condos. Then they would get themselves elected to the board any way possible. Once they had power, they would trump up exaggerated defect claims and bring in Nancy Quon.

Stockwell says she would try to win cases and the cherry picked board members would funnel millions of dollars in work back to Benzer and Silver Lining Construction.

"Everything went to Leon Benzer. Everything. Property managers, lawyers," she said.

The FBI raid on Quon's office may provide needed proof for investigators trying to find how much money was involved and how the board members brought her into the fold.

Stockwell wonders how far the probe will go, "They have their whole group who helps them. It's just a big – it's a big massive circle of fraud and deceit."

No one was at Quon's office today, except for a receptionist. Quon did

Vistana Condos had some plumbing and structural problems.

return phone calls or email. No one was at her house in Rhodes Ranch, either.

The FBI won't confirm if she is a suspect, but the search and the attention are bringing a lot of people forward.

Email your comments to Investigative Reporter Jonathan Humbert

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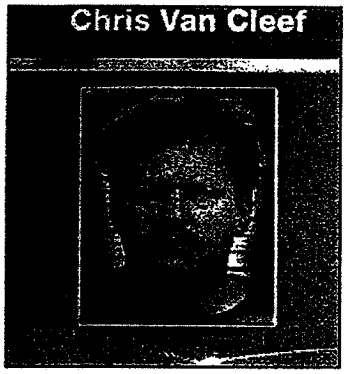
lasvegas NEWS

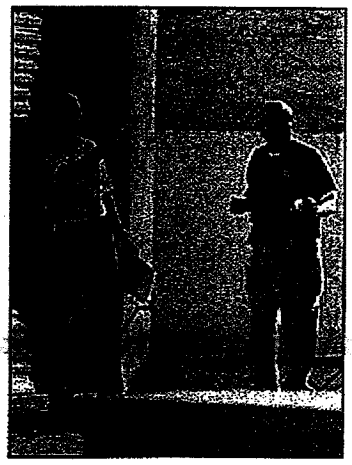
George Knapp, Chief Investigative Reporter

I-Team: Subject of HOA Investigation Commits Suicide

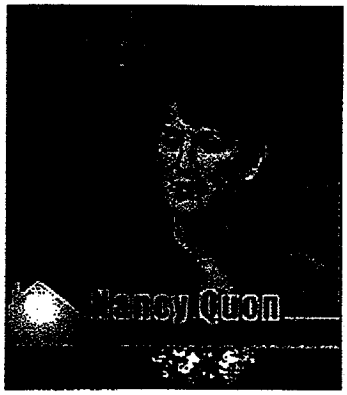
Updated: Sep 30, 2008 07:57 PM PDT



Retired Metro Police Lieutenant Chris Van Cleef died of what appears to be a self-inflicted gunshot wound Tuesday morning.



Agents served search warrants at several locations, seeking evidence to link local attorneys and contractors to HOA's all over the valley.



Attorney Nancy Quon is signed up to teach classes to future homeowner association managers.

A former police officer named as a potential target in an ongoing HOA corruption probe died Tuesday in an apparent suicide.

Retired Metro Police Lieutenant Chris Van Cleef died of what appears to be a self-inflicted gunshot wound Tuesday morning. The circumstances surrounding his death are under investigation but it certainly looks like a suicide according to law enforcement sources.

Van Cleef spent years with Metro and retired as a Lieutenant in 2005 after getting nabbed in Utah for a DUI. His name and that of two other former Metro Officers, surfaced last week in the massive FBI-Metro investigation into alleged corruption within local homeowner association boards.

Agents served search warrants at several locations, seeking evidence to link local attorneys and contractors to HOA's all over the valley.

One warrant was served at Platinum Communities, which is owned by the ex-wife of a current Metro Officer.

Lawmen think the outside interests conspired to take over the homeowner boards so that expensive repairs and lucrative construction defect lawsuits could be channeled to particular co-conspirators.

Van Cleef was elected to the board of the Pebble Creek Homeowner Association. Pebble Creek is one of the developments which is at the heart of the investigation.

No charges have been filed, but pressure is growing and sources close to the probe say the potential targets appear to be turning on each other.

There's also an interesting twist elsewhere in the unfolding story -- as federal agents and local police pursue leads against Las Vegas law firms and contractors, some of those very same potential targets are teaching courses for the state.

Attorney Nancy Quon, who specializes in construction defects lawsuits and whose name has been linked to several of the HOA's now under suspicion, is signed up to teach classes to future homeowner association managers in a program authorized and promoted by the State of Nevada Real Estate Division.

The schedule shows Quan and her partners teaching courses in community management principles and in construction defects lawsuits. Also listed on the schedule is at least one contractor named in the search warrants served last week.

Whether those classes will continue as scheduled now that Quon and others have been served with warrants will be a decision for real estate officials to make.

Email your comments to Chief Investigative Reporter George Knapp

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,	Case No. 52798 Clark County District Court No. A542616
D.R. HORTON, INC., Real Party in Interest	

FILED

FEB 02 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

REAL PARTY IN INTEREST, D.R.HORTON'S, EXHIBITS FOR 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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LAS VEGAS, NEVADA 89128-6652
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RECEIVED
FEB 02 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
DEPUTY CLERK

09-02893

ORIGINAL

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COMP
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Nevada Bar No. 6099
JASON W. BRUCE, ESQ.
Nevada Bar No. 6916
JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 3861
QUON BRUCE CHRISTENSEN LAW FIRM
2330 Paseo Del Prado, Suite C101
Las Vegas, NV 89102
(702) 942-1600
Attorneys for Plaintiff

FILED
JUN 7 4 50 PM '07
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated,

Plaintiff,

v.

D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive,

Defendants.

CASE NO.: A542616
DEPT. NO.: XXII

COMPLAINT

RECEIVED
JUN 07 2007
CLERK OF THE COURT

COMES NOW Plaintiff, HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, by and through its counsel, Quon Bruce Christensen, and upon information and belief, hereby complains, alleges, and states as follows:

I. PARTIES

1. Plaintiff, High Noon at Arlington Ranch Homeowners Association ("Plaintiff"), is a non-profit corporation organized and existing under and by virtue of the laws of the State of Nevada, and has its principal place of business within the County of Clark, State of Nevada.

2. The Association's members are collectively the owners, in fee simple, of the Common Areas of the Subject Property commonly known as High Noon at Arlington Ranch. The Common Areas of the Subject Property include the entire property, except the separate interests therein, as well as all facilities, improvements, and landscaping located within the Common Areas.

3. The Association has the responsibility to maintain the Common Areas of the Subject Property. Additionally its members have the duty, responsibility and obligation to paint, maintain, repair and replace all structures and appurtenances, including but not limited to, buildings, outbuildings, roads, driveways, parking areas, fences, screening walls, retaining walls, landscaping, exterior air-conditioning components, including, but not limited to, paint, repair, replacement, and care of roofs, exterior building surfaces, building framing, and other exterior improvements within the Subject Property.

4. Plaintiff's members are the individual owners of units within the Subject Property. Plaintiff brings this suit in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowners Association unit owners. The constructional deficiencies and damages resulting therefrom are matters affecting the High Noon at Arlington Ranch Common Interest Community. If it is subsequently determined that this action, and/or any claims within the scope of this action, should more properly have been brought in the name of each individual unit owner or as a class action, Plaintiff will seek leave to amend this Complaint to include unit owners and/or Class Representatives.

5. At all times relevant hereto, Defendant, D.R. HORTON, INC., was and remains a business entity doing business in the County of Clark, State of Nevada.

6. At all times relevant hereto, Defendant D.R. HORTON, INC., a Delaware Corporation ("Defendant"), was engaged in the business of planning, developing, designing, mass producing,

building, constructing, and selling residential real property in the County of Clark, State of Nevada, and was the owner, developer, general contractor, and seller of the Subject Property.

7. As the owner, developer, general contractor, and seller of the Subject Property, Defendant was directly responsible for the planning, design, mass production, construction, and/or supervision of construction of the Subject Property and, therefore, is responsible in some manner for the defects and deficiencies in the planning, development, design, and/or construction of the Subject Property, as alleged herein, and Plaintiff's damages related to such defects and deficiencies.

8. The true names and capacities of Defendants sued herein as DOE INDIVIDUALS 1-100, ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive, and each of them, are presently unknown to the Plaintiff and therefore are sued under fictitious names.

9. The DOE INDIVIDUALS 1- 100, and ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive, and each of them, are responsible for the planning, development, design, mass production, construction, supervision of construction, and/or sale of the Subject Property and, therefore, they are responsible in some manner for the defects and deficiencies in the planning, development, design, and/or construction, inspection and/or approval of the Subject Property as alleged herein, and Plaintiff's damages related to such defects and deficiencies.

II. GENERAL ALLEGATIONS

10. The Subject Property is located in the County of Clark, State of Nevada. A site map of the Subject Property is attached hereto as Exhibit 1. The Community is composed of 342 residences contained in 114 buildings. Sales of residences began in 2004 and continued through 2006.

11. At all times relevant herein, Defendants, including DOE and ROE INDIVIDUALS 1-100 or ROE BUSINESS ENTITIES 1-100, were the officers, agents, employees and/or representatives of each other in doing the things alleged herein and in so doing were acting in the scope of their respective authority and agency.

12. Defendants, and each of them, (excluding, however, ROE GOVERNMENTAL ENTITIES 1-100 unless hereinafter specifically included), undertook certain works of

improvement upon the undeveloped Subject Property, including all works of development, design, construction and sale of the Subject Property, products, and individual units therein to the general public, including the Plaintiff, its members and/or their predecessors in interest.

13. Defendants were merchants and sellers with respect to the Subject Property, non-integrated products, and all individual units therein, which are the subject of this action as described above.

14. By reason of the sale, transfer, grant and conveyance to Plaintiff and its members, Defendants impliedly warranted that the Subject Property and all individual units therein, were of merchantable quality.

15. Defendants failed to properly and adequately investigate, design, inspect, plan, engineer, supervise, construct, produce, manufacture, develop, prepare, market, distribute, supply and/or sell the Subject Property, non-integrated products and all individual units therein, in that said Subject Property, non-integrated products and individual units therein have experienced, and continue to experience, defects and deficiencies, and damages resulting therefrom, as more specifically described below.

16. The defects and deficiencies include, but are not necessarily limited to, structural defects, fire-safety defects, waterproofing defects, civil engineering/landscaping, roofing, stucco and drainage defects, architectural defects, mechanical defects, plumbing and HVAC defects, sulfate contamination, acoustical defects, defects relating to the operation of windows and sliding glass doors, and electrical defects.

17. The Subject Property may be defective or deficient in other ways and to other extent not presently known to Plaintiff, and not specified above. Plaintiff reserves the right to amend this Complaint upon discovery of any additional defects or deficiencies not referenced herein, and/or to present evidence of the same at the time of trial of this action.

18. Due to the failures of Defendants and the defects, deficiencies, and resulting damage, the Subject Property has been adversely impacted so as to diminish the function of the Subject Property and individual units thereon, thereby affecting and interfering with the health, safety and welfare of the Plaintiff and its members, and their use, habitation and peaceful and

quiet enjoyment of the Subject Property.

19. Plaintiff alleges generally that the defects and deficiencies as described above are, among other things, violations or breaches of local building and construction practices, industry standards, governmental codes and restrictions, manufacturer requirements, product specifications, the applicable Building Department Requirements, Chapter 523 of the Nevada Administrative Code, and the Uniform Building Code, National Electrical Code, Uniform Plumbing Code, and Uniform Mechanical Code, as adopted by Clark County and the City of Las Vegas at the time the Subject Property was planned, designed, constructed and sold.

20. The deficiencies in the construction, design, planning and/or construction of the Subject Property described in this Complaint were known or should have been known by the Defendants, including the ROE GOVERNMENTAL ENTITIES at all times relevant hereto.

21. All of the claims contained in this Complaint have been brought within the applicable Statutes of Repose and/or Limitations.

22. Plaintiff alleges generally that the conduct of Defendants, including the ROE GOVERNMENTAL ENTITIES, was and remains the actual, legal and proximate cause of general and special damages to Plaintiff.

III. FIRST CLAIM FOR RELIEF
(Breach of Implied Warranties of Workmanlike Quality and Habitability)

23. Plaintiff hereby incorporates and realleges Paragraphs 1 through 22 of the Complaint as though fully set forth herein.

24. Defendants expressly and impliedly warranted that the Subject Property, components and associated improvements, were of workmanlike quality, were safely and properly constructed and were fit for the normal residential purpose intended.

25. Further implied warranties arose by virtue of the offering for sale by Defendants of the Subject Property to Plaintiff and its members, without disclosing that there were defects associated with said property, thereby leading all prospective purchasers, including Plaintiff and its members, to believe that there were no such defects.

26. Defendants gave similar implied warranties to any and all regulatory bodies who had

to issue permits and/or provide approvals of any nature as to the Subject Property, which were at all relevant times defective and known by Defendants to be so defective.

27. Defendants breached their implied warranties in that the Subject Property was not, and is not, of workmanlike quality, nor fit for the purpose intended, in that the Subject Property was not, and is not, safely, properly and adequately constructed.

28. Defendants have been notified and have full knowledge of the alleged breaches of warranties and Defendants have failed and refused to take adequate steps to rectify and/or repair said breaches.

29. As a proximate legal result of the breaches of said implied warranties by Defendants and the defective conditions affecting the Subject Property, Plaintiff and its members have been, and will continue to be, caused damage, as more fully describe herein.

30. As a further proximate and legal result of the breaches of the implied warranties by Defendants and the defective conditions affecting said Subject Property, Plaintiff and its members have been, and will continue to be, caused further damage in that the defects and deficiencies have resulted in conditions which breach the implied warranty of habitability.

31. Plaintiff incorporates by reference, as if set forth herein, the particular statement of damages described in the prayer for relief.

32. Plaintiff is entitled to recover damages pursuant to NRS 116.4114.

33. Plaintiff has been required to retain the services of Quon Bruce Christensen to prosecute this matter and is entitled to an award of attorney's fees based thereon.

34. Plaintiff is entitled to recover its attorney's fees, costs and expenses pursuant to NRS 116.4114.

35. The monies recoverable for attorney's fees, costs and expenses under NRS 40.600 *et seq.* and NRS 116 *et seq.*, include, but are not limited to, all efforts by Quon Bruce Christensen on behalf of Plaintiff prior to the filing of this Complaint.

IV. SECOND CLAIM FOR RELIEF
(Breach of Contract)

36. Plaintiff realleges and incorporates by reference Paragraphs 1 through 35 of the Complaint as though fully set forth herein.

37. On various dates, each of the Plaintiff's members and Defendants entered into a written contract pursuant to which Plaintiff's members would purchase a unit in the Subject Property and Defendants would sell a code-compliant and habitable unit to purchasers.

38. Plaintiff and its members have at all times performed the terms of the contract in the manner specified by the contract, except those terms which could not be fulfilled without fault attributable to Plaintiff or its members.

39. Defendants have failed and refused, and continue to refuse to tender its performance as required by the contract in that said units were not and are not in a habitable and code-compliant condition.

40. Said contracts contain a provision that if the subject of the contract should go to litigation, the prevailing party is entitled to attorneys' fees and costs.

V. THIRD CLAIM FOR RELIEF
(Breach of Express Warranties)

41. Plaintiff incorporates and realleges paragraphs 1-41 hereof by reference as though fully set forth herein.

42. When marketing and selling the residences and improvements and appurtenances thereto to the general public and to Plaintiff and its members, Defendants, with the exception of ROE GOVERNMENTAL ENTITIES 1-100, by and through their agents or employees, expressly warranted by verbal, written and demonstrative means, that the design and construction of said residences and improvements and appurtenances thereto, were designed and constructed free from defect or deficiency in materials or workmanship in compliance with applicable building and construction codes, ordinances and industry standards, and are fit for human habitation.

43. By designing and constructing the residences, improvements and appurtenances incident thereto in a defective and deficient manner violating building and construction codes, ordinances and industry standards then in force as described herein above, Defendants breached

said express warranties made to Plaintiff and its members. As a proximate cause of Defendants' conduct, Plaintiff and its members have and continue to suffer damages which include, without limitation, the cost to repair the defects and deficiencies in the design and construction of the residences and improvements and appurtenances thereto, which are now and will continue to pose a threat to the health, safety and welfare of Plaintiff, its members, their guests and the general public until such repairs are effected. Said damages are in excess of $40,000.00 (Forty Thousand Dollars) and continuing.

44. Plaintiff is entitled to damages pursuant to NRS 116.4113.

45. As a result of Defendants' breaches of express warranties, Plaintiff has been compelled to retain the services of the Quon Bruce Christensen Law Firm in order to comply with statutory requirements prior to litigation and to institute and prosecute these proceedings, and to retain expert consultants and witnesses as reasonably necessary to prove their case, thus entitling Plaintiff to an award of attorneys fees and costs in amounts to be established at the time of trial.

VI. FOURTH CLAIM FOR RELIEF
(Breach of Fiduciary Duty)

46. Plaintiff incorporates and realleges paragraphs 1-45 hereof by reference as though fully set forth herein.

47. Plaintiff is informed and believes and thereupon alleges that Defendants, with the exception of ROE GOVERNMENTAL ENTITIES, inclusive, were the promoters, developers and creators of the Association. In said capacities, Defendants served as directors and officers of the Association, exercising direct and indirect control over the administration, management and maintenance of the Association and its property, including but not limited to the Common Areas of the Subject Property. As such, Defendants were obligated to maintain and repair said Common Areas and the improvements and appurtenances incident thereto as the fiduciaries of all Association members.

48. Plaintiff is informed and believes and thereupon alleges that, as regards the sale of the units and accompanying interests in the Common Areas of the Subject Property, Defendants

owed a fiduciary duty to disclose material facts pertinent to the condition and desirability of said property which were neither known to nor reasonably discoverable by Plaintiff or its members at the time of purchase, including the costs of maintaining and repairing same. Said fiduciary duties were continuing in nature, including the duty to disclose to Plaintiff's members the nature and existence of any defects of deficiencies in the design or construction of the Subject Property, the Common Areas thereof and the improvements and appurtenances incident thereto.

49. Defendants breached their fiduciary duties by failing and refusing to disclose the existence and nature of such defects to Plaintiff's members, by failing and refusing to repair said defects, and by failing and refusing to take necessary action to have those responsible for the defects and deficiencies in design and construction repair, or pay to repair, said defects and deficiencies. Because Defendants and each of them were in some manner directly responsible for the development, design and construction of the Subject Property, the Common Areas thereof and improvements and appurtenances incident thereto, Defendants knew or should have known of said defects and deficiencies therein at or before the commencement of sales to the public, and their failure to disclose, repair or pay to repair said defects and deficiencies constitutes an act of self-dealing in reckless disregard for the health, safety and well-being of Plaintiff and its members.

50. Plaintiff is informed and believes and thereupon alleges that Defendants have further breached their fiduciary duties by (1) entering into agreements, contracts and financial arrangements contrary to the best interests of the Association, (2) entering into unauthorized transactions resulting in losses to the Association, (3) maintaining conflicts of interest with the Association and failing to disclose said conflicts, (4) negligently and recklessly handling of Association revenues, income and accounts to the detriment of the Association, (5) promoting a marketing scheme that directly benefitted Defendants to the detriment of the Association, and (6) failing to collect adequate assessment income and prepare adequate operating budgets to meet the reasonable repair and maintenance needs and related Association needs.

51. As a proximate cause of Defendants' conduct, Plaintiff and its members have suffered and continue to suffer damages, including without limitation, the cost to repair the defects

and deficiencies in the design and construction of the Subject Property, the Common Areas thereof and the improvements and appurtenances incident thereto, which are now and will continue to pose a threat to the health, safety and welfare of Plaintiff, its members, and their guests and the general public until such repairs are effected. Plaintiff is informed and believes and thereupon alleges that said damages are in excess of $40,000.00 (Forty Thousand Dollars) and continuing.

52. Defendants' breaches of the fiduciary duties owed to Plaintiff and its members were was at all times malicious and undertaken with the intent to defraud and oppress Plaintiff and its members for Defendants' own enrichment, thus warranting the imposition of punitive damages sufficient to punish and embarrass Defendants, and to deter such conduct by them in the future.

53. As a result of Defendants' conduct, Plaintiff has been compelled to retain the services of the law firm of Quon Bruce Christensen in order to comply with statutory requirements prior to litigation and to institute and prosecute these proceedings, and to retain expert consultants and witnesses as reasonably necessary to prove their case, thus entitling Plaintiff to an award of attorneys' fees and costs in amounts to be established at the time of trial.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For general and special damages all in an amount in excess of $10,000.00;
2. For such other relief that the Court deems just and proper, including, but not limited to equitable relief.

Dated this 7th day of June, 2007.

QUON BRUCE CHRISTENSEN

By: _____

NANCY QUON, ESQ.
Nevada Bar No. 6099
JASON W. BRUCE, ESQ.
Nevada Bar No. 6916
JAMES R. CHRISTENSEN, ESQ.
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Attorneys for Plaintiff

NOTES

This map is for assessment use only and does NOT represent a survey.

No liability is assumed for the accuracy of the data delineated herein. Information on roads and other non-assessed parcels may be obtained from the Road Document Listing in the Assessor's Office.

This map is compiled from official records, including surveys and deeds, but only contains the information required for assessment. See the recorded documents for more detailed legal information.

USE THIS SCALE(1"=100') WHEN MAP REDUCED FROM 11X17 ORIGINAL

0 50 100 200 400 600 800

MAP LEGEND

AVERAGE 6% VALUE 22

PARCEL BOUNDARY
SUBD BOUNDARY
ROAD EASEMENT
PM/LD BOUNDARY
NON-PARCEL LOT LINE
MATCH LINE / LEADER LINE
ROAD ID NUMBER

001 1.00 PARCEL NUMBER ACREAGE
202 PARCEL SUB/SEC NUMBER
PLAT RECORDING NUMBER
5 BLOCK NUMBER
5 LOT NUMBER
CLS GOV. LOT NUMBER

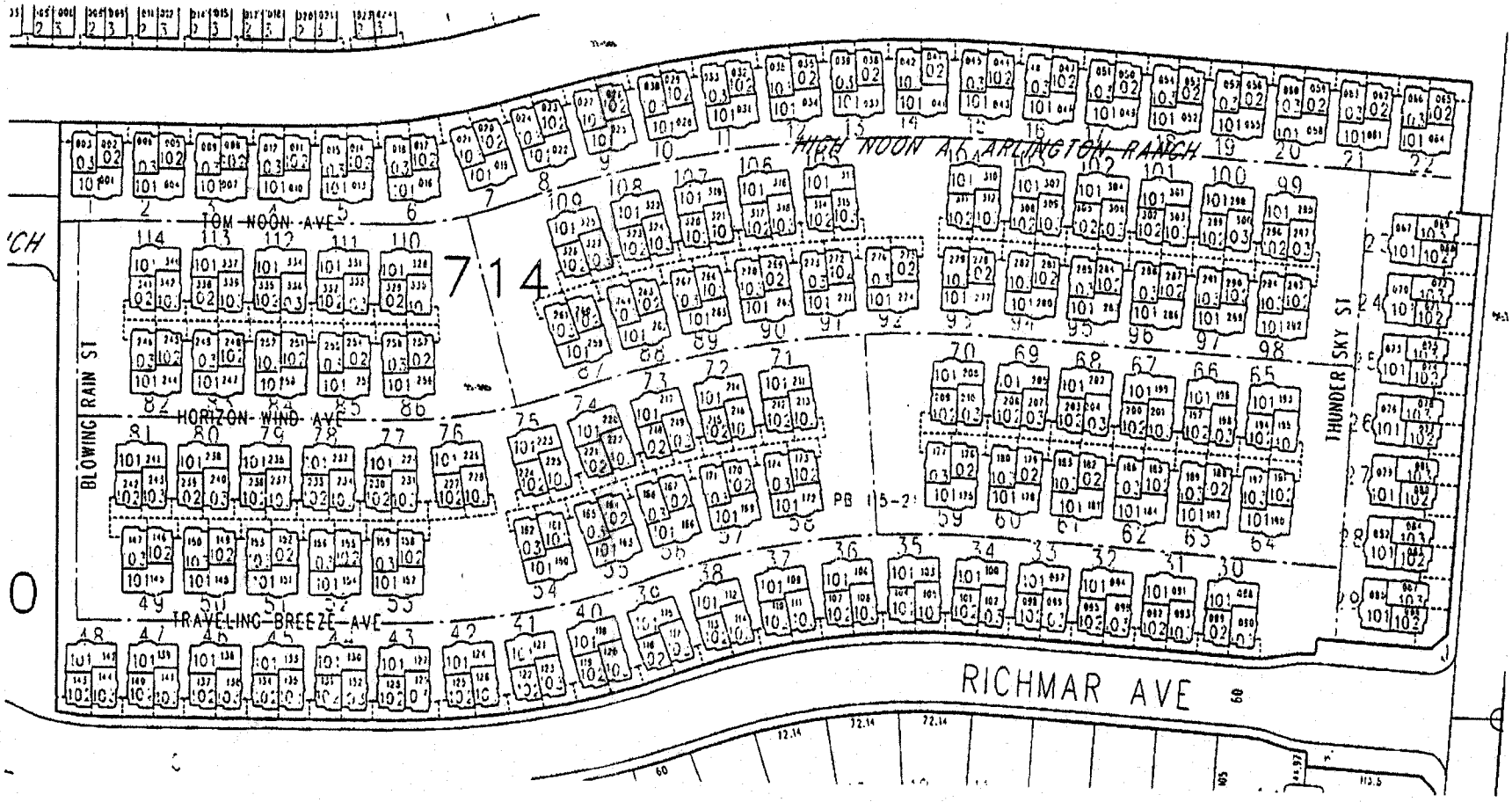
ASSESSOR'S PARCELS - CLARK CO., NV.

M. W. Schofield, Assessor

T22S R60E | 20 | N 2 SE 4 | 176-20-7

DETAIL B PG 1 OF 1

Scale:1"=100' Rev:05/20/04



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Attorneys for Defendant D.R. HORTON, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, HOA, v. D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendant.	CASE NO.: A542616 DEPT NO.: XXII **D.R. HORTON, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **DATE:** **TIME:**

COMES NOW, Defendant D.R. HORTON, INC. ("D.R. Horton"), by and through its attorneys Wood, Smith, Henning, & Berman LLP, and hereby moves for Partial Summary Judgment against the High Noon at Arlington Ranch Homeowners Association (the "HOA") on the ground that the HOA lacks standing to bring construction defect claims outside the "common interest community" as defined under the Uniform Common Interest Ownership Act, ***NRS*** Chapter 116.

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This Motion is based upon the pleadings and papers on file with the Court, the Memorandum of Points and Authorities, and any argument the Court may entertain at the time of the hearing of this matter.

DATED: April 11, 2008

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendant will bring the foregoing MOTION FOR PARTIAL SUMMARY JUDGMENT on for hearing on the 27 day of May, at the hour of 8:30 a.m., or as soon thereafter as counsel can be heard.

DATED: April ___, 2008

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. CASE SUMMARY

The subject of this litigation is a 342 unit condominium planned community known as High Noon at Arlington Ranch, located on Arlington Ranch Blvd and Blue Diamond Rd in Las Vegas. The instant matter involves a claim brought pursuant to ***NRS*** 40.645, by the HOA. D.R. Horton is the developer of community.

Without even serving a NRS 40.465 Notice, the HOA filed a construction defect complaint against D.R. Horton on June 7, 2007, asserting causes of action for Breach of Implied and Express Warranties (first and third causes of action), Breach of Contract (second cause of action) and Breach of Fiduciary Duty (fourth cause of action). The HOA then filed an ex parte motion to stay service of the Complaint, stating that the HOA "will immediately serve Defendants with Notice of Construction Defects pursuant to ***NRS*** 40.645." As Plaintiff's have not properly complied with ***NRS*** 40.6462, Defendants have filed concurrently with this motion, an Ex Parte Application for an Order Shortening time for an Order to Compel

compliance with the same. Unfortunately, even if granted, this will only provide Defendants partial relief, as significant issues exist over what claims the Association has standing to assert, and therefore what claims should be inspected. Accordingly, resolving both issues is critical for the Developer and the Subcontractors, so that they can make meaningful responses under ***NRS*** 40.6472 to the Association.

The HOA'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." Complaint at page 2, lines 18-19. Further, the HOA alleges that D.R. Horton breached the express warranties made by D.R. Horton to the purchaser(s) of each individual unit pursuant to ***NRS*** 116.4113. Complaint at page 8, line 8.

According to Nevada Revised Statutes, Chapter 116 of the Common Interest Ownership Act, 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 HOA has brought defect claims which are not limited to the common interest community. Instead, the HOA alleges defects which are exclusively related to individual units for which **only** the unit owner would having standing to pursue at trial or release in a settlement. For example, the HOA is actually suing D.R. Horton to recover damages for unit owners' shower enclosures, thermostat wiring, dishwasher outlets, toilets and tubs among other things.

On January 21, 2008 (six months after filing suit), the HOA served a ***NRS*** Chapter 40 Notice on D.R. Horton asserting a construction defect claims. After receiving the Chapter 40 Notice, D.R. Horton requested access to inspect each individual unit where these claims purported exist, to determine the nature and extent of them and formulate a response under ***NRS*** 40.6472 as required by April 21, 2008. Unfortunately, counsel for the HOA has attempted to delay and make this inspection process as expensive and time consuming as possible. As set

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forth in D.R. Horton's Motion to Compel filed herewith, after seven weeks since D.R. Horton's request for compliance with ***NRS*** 40.6462, only about 153 out of 342 of the homes have been made available for inspection[1].

The overreaching by the HOA in its Notice by making claims for items for which it has no standing is improper because repairs cannot occur without the consent of the real parties in interest (i.e., the unit owners who obviously do not consent as they will not make their homes available for viewing), and more importantly, repair offers under ***NRS*** 40.6272 and mediations and settlements under ***NRS*** 40.680 can not be effective where the HOA does not own the rights to the unit specific claims. Adding to this train wreck is the fact that it appears that Plaintiff's counsel has never even bothered to obtain Association members' permission to pursue these private defect claims[2].

This Motion is to narrow this case to those defects that the HOA has a right to bring, and to strike those defects which the HOA has no authority to assert under ***NRS*** Chapter 116. D.R. Horton respectfully requests that this Court rule on this Motion as soon as possible, so that it can determine which units to continue to try to inspect, and also confirm whether the HOA has the legal right to force ***NRS*** Chapter 40 procedures on the homeowners.

Further, this relief is critical before the commencement of repairs as D.R. Horton can not enter property that the HOA does not own or control. As this relief is also a logical pre-condition to any trial on the merits, resolving the issue now, even if this case does not resolve, will save the Court and the parties time should this case proceed to trial.

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[1] These inspections have been scheduled to make it as inconvenient and as expensive as possible to the Developer and Subcontractors, with significant gaps of hours in between access to units.

[2] The CC & R's require, in section 5.3, a 2/3's Vote of the HOA of the Board to commence a lawsuit such as the present one. Assuming that they did do so in this case, the Board then has to seek approval from the membership at large, and 75% affirmative vote of the same is required to proceed. Since the HOA sued before even providing D.R. Horton with a NRS 40.645 Notice, this provision could not have been complied with and D.R. Horton is informed and believes that it still has not been complied with as of today's date. Obviously, the Association and/or its counsel feel free to disregard the CC & R's when it suits them.

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For all these reasons, D.R. Horton requests that the Court limit the scope of defects that can be sought in this action by eliminating those defects outside the standing of the HOA.

II. STATEMENT OF FACTS

1. High Noon at Arlington Ranch consists of 342 condominiums in a 114-building development in Las Vegas, Nevada. Each condominium is a separate, freehold estate within the common-interest community called High Noon at Arlington Ranch. A copy of the High Noon at Arlington Ranch Homeowners CC&R's Supplemental Declaration attached hereto as Exhibit "A" and incorporated herein by this reference.

2. The HOA is a Nevada nonprofit corporation that manages the High Noon at Arlington Ranch condominium community.

3. The HOA filed suit against D.R. Horton on June 7, 2007, alleging breach of warranty, breach of contract and breach of fiduciary duty for alleged construction defects. A copy of the Complaint is attached hereto as Exhibit "B" and incorporated herein by this reference.

4. As established in Exhibit "B" the HOA is seeking to recover damages in this action pursuant to ***NRS*** Chapter 116.

5. Pursuant to ***NRS*** Chapter 116, a homeowners association may only bring suit in its own name on matters affecting the "common interest community." ***NRS*** 116.3102(1)(d).

6. Six months after commencing suit, on January 21, 2008, the HOA sent a NRS 40.645 Notice to D.R. Horton alleging defects in both the common areas and each of the 342 individual units at the Subject Property (hereinafter the "Chapter 40 Notice"). Throughout the Chapter 40 Notice, counsel for the HOA asserts representation of all of the homeowners of the 342 individual homes. A copy of the Notice is attached hereto as Exhibit "C" and incorporated herein by this reference.

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7. As set forth in Exhibit "D" attached hereto, on February 20, 2008, counsel for D.R. Horton requested, pursuant to ***NRS*** 40.6462, access to each individual unit to determine the nature and extent of the constructional defects alleged and the nature and extent of repairs that may be necessary.

8. For nearly two (2) weeks, the HOA continued to deny D.R. Horton's request to inspect all units where defects are alleged. Instead, the HOA made multiple excuses stating that the inspections were impractical and too costly.

9. On March 4, 2008, the HOA finally agreed to afford D.R. Horton their statutory right to inspect, and stated that it would "supply **as many residents** (sic.) **as possible** for visual inspection beginning March 12, 2008." (Emphasis added) (attached as Exhibit "E").

10. D.R. Horton finally received a schedule from the HOA after 4:00 PM on March 11, 2008. Out of a total of 12 units per day requested by D.R. Horton only the first day, March 12, 2008, had more than six (6) units scheduled. Only five (5) units were scheduled for the entire second week (Exhibit "F" attached hereto).

11. Throughout the first two weeks of inspections, the HOA did not provide D.R. Horton with an updated schedule. All interested parties were expected to show up each day at 8:00 AM and a "final" schedule was given to each of the attendees. D.R. Horton was advised that this lack of prior notice was due to scheduling difficulties **caused mainly by homeowners continuing to refuse access** to the HOA. D.R. Horton has made a request for a list of these homeowners in a letter attached hereto as Exhibit "G," and for reasons known only to the HOA's counsel, this request has been ignored.

12. On March 21, 2008, D.R. Horton received a revised schedule from the HOA for upcoming inspections, which also showed the numerous cancellations and gaps in the schedule that had occurred to date (Exhibit "H" hereto).

13. By Monday, March 24, 2008, gaps in the scheduled inspections became quite prevalent, burdening D.R Horton and its subcontractors with paying

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for its consultants to wait for long periods of time in between units. Consultants were expected to show up each day at 8:00 AM, whether or not an inspection was scheduled at that time, and gaps of more than four (4) hours in between units became the norm.

14. On March 26, 2008, D.R. Horton's consultants, and not the HOA, advised D.R. Horton that the HOA revised the inspection schedule yet again. The HOA unilaterally scheduled only four (4) or less inspections for each day for March 26, 2008 through March 28, 2008. D.R. Horton immediately objected to the HOA's unannounced derivation from the revised schedule (Exhibit "G").

15. As set forth in D.R. Horton's Motion to Compel Compliance with NRS 40.6462, filed concurrently herewith, from March 31, 2008, through April 10, 2008, D. R. Horton received numerous revised schedules, with a minimal number of units made available for inspection. Only 31 units were inspected in this interval, with gaps of up to seven (7) hours in between inspections, for an average of 3 homes per day. It is evident that homeowners have little knowledge of the claims being made on their behalf, let alone a willingness to let strangers come into their home and inspect.

16. To date, only 153 of the total of 314 units at the project have been inspected. The HOA's practices of going door to door at the last second, and making last minute phone calls to schedule inspections has led to less than half of the units being provided. The tapering off of access to these units only verifies D.R. Horton's concern that the chance of the HOA gaining access to all units is becoming less likely each week.

17. For more than have of the alleged affected units, the HOA has failed to provide D.R. Horton its statutory right to inspect, frustrating D.R. Horton and its subcontractors abilities to effectuate repairs, if warranted.

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18. Instead, Plaintiff's counsel continues to only obtain access to approximately two to three units per day, while attempting to discourage D.R. Horton from exercising its rights under ***NRS*** 40.6462.

III. DEFECTS ALLEGED WITHIN THE PRIVATE UNITS

In this action, the HOA seeks to recover for the following alleged defects which are contained within the private units and are the subject of this Motion:

Structural:

11.01 Wallboard system failure; cracking

11.02 Wallboard ceiling and wall stains

14.01 Floor sheathing is improperly fastened.

15.01 Shower enclosure system failure; stained framing.

Electrical:

E.1 At the termination points of aluminum wires in the panels, lack of wire preparation and insufficient torque tightness of conductors.

E.2 The load center is recessed and over cut into the wall space beyond the code allowance.

E.3 The general quality of workmanship in the Electrical system does not meet the code.

E.3.1 Debris in panel.

E.3.2 Vague directory.

E.3.3 Open knockouts.

E.3.4 Lower/upper hallway switches reversed (9460 Thunder Sky 103).

E.3.5 Zero Torque on neutral (8810 Horizon Wind 103).

E.3.6 Exhaust fan not flush.

E.3.7 Wall switch cover bent (8785 Traveling breeze 101).

E.3.8 Fittings are not fire-sealed at main panel.

E.3.9 The outlet boxes in the fire-rated wall spaces are not installed in a Code-approved assembly to assure fire-resistant integrity of the wall space.

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E.3.10 The Ground Fault Circuit Interrupter outlet failed to trip within the established thresholds.

E.4 The groundling electrode system is not effectively bonded together.

E.5 The cables were inadequately supported or not supported at all.

E.6 NM cables are well within 6 ft. radius of attic access.

E.7 At the fire rated wall spaces or floor assemblies and the attic access areas, the cables are running through fire rated walls or framing members, in openings much greater than the conductor diameter.

E.8 The non-metallic cables in bored holes thru studs and framing plates, and are within the restricted area specified by Code without the use of required steel protection plates.

E.9 The boxes for wiring, devices and splices are required to be flush to the finished surface.

E.10 The outlet for the dishwasher and disposal cords has been placed in an area where it is now blocked by the finish installation of the cabinets and plumbing.

E.11 The required outlet along floor line is not present at wall spaces.

E.13 The recessed lighting fixtures contain paint overspray.

E.14 The class 2 thermostat wires are a type PJ2, a non rated wire for exposed use.

E.15 A/C disconnect is not sealed against the entry of washer where the disconnect is attached to the structure.

Plumbing:

P.1 3-wall fiberglass shower or combination bath/shower modules have "in-wall" valves, spouts and shower arms, are not properly aligned or adequately secured to the wall structure, the spout nipple and valve penetrations are not properly sealed.

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P.2a The master tubs and Plan 102 shower pans lack support bedding materials; fixtures creak and pop when stepped upon.

P.2b The wainscot panel surrounds are not properly sealed.

P.3 Toilets (a) are not securely mounted to the wood framed floors and/or (b) closet bend grade slab penetrations are not sealed and/or the closet ring is not secured to the floor.

P.4 Water heaters are inadequately sized, lack sufficient capacity and recovery rates to satisfy the hot water demands of the residence.

P.5 Water heater drip collection pans discharge into a 2" pipe nipple which is not integrated into the floor materials, the 2" line improperly reduces down to 1" and pans' tailpiece is not solidly connected to the discharge pipe; and are undersized.

P.6 Water heater temperature and pressure relief valve discharge lines contain corrugated connectors which fail to meet the valve's surface temperature minimums and creates a reduction in the discharge pipe's size.

P.7 Water heater seismic restraint devices are either lacking 'vee' blocks or the devices are not installed.

P.8 Water heater shutoff valves and/or heater connections are prematurely corroding/failing.

P.9 Water heater flues ("B" vent stack) lack appropriate materials and fittings.

P.10 Washing machine utility box have hose bib water connections, piped with plastic tubing, lack sufficient rotating resistive stability to permit proper operation; and/or the support arms are backwards and the box is set-back from the drywall's face; and/or are improperly located in the party walls.

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P.11 Washing machine drain pans are equipped with 1" undersized outlets, do not provide complete drainage, laundry area wall/floor joints are not sealed and are not curbed/dammed to control/direct surface water flow and piping does not discharge to the sanitary sewer.

P.12 Free-standing gas ranges are either lacking or have improperly installed "anti-tip" bracket.

P.13 Dishwasher drain hoses from the air gap to the disposer are either kinked or trapped, thus lacking positive slope.

P.14 Pedestal lavs located in the 103 Guest Bathroom have interior cleanouts that are inaccessible due to the lav's pedestal.

P.15 Individual unit water service laterals lack individual shut off valves.

P.17 Pressure reducing valves installed on the interior surface of the garage walls are vulnerable and exposed to mechanical injury.

Mechanical:

M.1 The refrigerant lines are not properly weatherproofed at the building line. Condensers are not secured to the pad.

M.2 FAUs sleeping on suspended angle iron hangers lack "securement" and anti-sway stabilizers.

Please see the defect reports prepared by consultants to the HOA and enclosed with the Chapter 40 Notice. A copy of the reports is attached hereto as Exhibit "I" and incorporated herein by this reference.

IV. LEGAL ARGUMENT

In Nevada, a homeowners' association has the right to bring suit in its own name only "on matters affecting the common-interest community." ***NRS*** 116.3012(1)(d). In this case, however, the HOA has brought defect claims which are not limited to the common-interest community. Instead, the HOA has placed at issue alleged defects which are exclusively related to individual units for which only the legal owner has standing to pursue at trial or release in a settlement.

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Because the HOA is not entitled to pursue claims for defects exclusively related to individual units, and which do not affect the common-interest community, partial summary judgment in favor of D.R. Horton on these particular defects is proper as a matter of law.

A. STANDARD OF REVIEW.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. Adv. Op. No. 73, 121 P.3d 1026, 1030-31 (Oct. 20, 2005).

While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that non-moving party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Id.*, 121 P.3d at 1030-31. The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

In this case, there can be no dispute that the above-listed defects are exclusively related to individual units and do not affect the common-interest community. There are no genuine issues of material fact regarding these defects. Therefore, as a matter of law, D.R. Horton is entitled to partial summary judgment on the defects listed above.

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B. **PARTIAL SUMMARY JUDGMENT IS PROPER BECAUSE THE ASSOCIATION LACKS STANDING TO PURSUE CLAIMS FOR DEFECTS EXCLUSIVELY RELATED TO INDIVIDUAL UNITS, OUTSIDE THE COMMON INTEREST COMMUNITY, TO WHICH IT IS NOT THE REAL PARTY IN INTEREST.**

The Supreme Court, the Legislature, and the HOA's own governing documents make it abundantly clear that if the HOA wishes to pursue a claim on behalf of unit owners, the claim must affect the common-interest community. The HOA does not have the right nor the standing to serve an ***NRS*** 40.645 Notice or to bring suit on behalf of unit owners where the alleged defects are exclusively related to individual units. Moreover, allowing the HOA to proceed on these claims could later preclude unit owners from individual recovery or allow double recovery. Finally, the HOA's suit in its own name is improper under Nevada law and the Nevada Rules of Civil Procedure because it skirts well-established class action requirements. Because each of the defects listed in this Motion is unquestionably related exclusively to the individual units, there is no genuine issue of material fact precluding summary judgment.

1. The Nevada Supreme Court Has Not Conferred Standing On The HOA To Pursue Claims For Defects Exclusively Related To Individual Units That Do Not Affect the Common-Interest Community.

In *Deal v. 999 Lakeshore HOA*, 94 Nev. 301 (1978), the Nevada Supreme Court addressed whether a condominium homeowners' HOA may sue for construction defects and held as follows:

> "NRCP 17(a) provides: 'Every action shall be prosecuted in the name of the real party in interest.' In the absence of any express statutory grant to bring suit on behalf of the owners, or a direct ownership interest by the association in a condominium within the development, a condominium management HOA does not have standing to sue as a real party in interest. (citations). Only the owners of condominiums have standing to sue for construction or design defects to the common areas, since they must eventually bear the costs of assessments made by the HOA."

Deal, at 94 Nev. at page 304; See also *Colfer v. Harmon*, 108 Nev. 363, 367 ("[O]nly condominium owners have standing to sue for construction or design

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defects.").

Since the decision in *Deal*, the Nevada Legislature in 1992 passed the Uniform Common Interest Ownership Act, ***NRS*** Chapter 116. The only express power to bring suit on behalf of unit owners was set forth in ***NRS*** 116.3102(1)(d), entitled "Powers of the HOA", which provides that an HOA 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."

Although ***NRS*** Chapter 116 does provide broader express powers for associations than what was allowed in *Deal*, the statute falls short of allowing an association to bring a claim on behalf of individual unit owners for defects which are exclusively related to individual units and do not affect the common-interest community.

To date, no Nevada decision has addressed what construction defects come within the "common interest community" pursuant to ***NRS*** 116.3102(1)(d), nor does the legislative history illuminate the matter. States which have addressed the issue have ruled that a condominium HOA may only pursue damages claims within the common interest community for those defects for damages that "results from injury to property in which all of the unit owners have a common interest." See *Villa Sierra Condominium HOA v. Field Corporation*, 787 P.2d 661, 667 (1990) ("[W]hile an HOA may generally obtain declaratory or injunctive relief without joining its members, any litigation designed to obtain damages on their behalf would normally require the members' presence"); see also *Equitable Life Assurance v. Tinsley Mill*, 249 Ga. 769, 772 (1982)(Court granted summary judgment against homeowners' HOA for lack of standing ruling "[a] party may have capacity to sue without being the real party in interest. Here the rights sought to be enforced are the right to recover for damages to property and the right to have that property protected against continuance of a nuisance.

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Those rights belong to the owners of the property damaged- the condominium owners here.")

In this case, the HOA has not joined any unit owners to the lawsuit, and is suing solely on its behalf for damages on behalf of the unit owners. While this is appropriate for common area defects pursuant to ***NRS*** 116.3102(1)(d), under the holding of *Deal*, the HOA is prohibited from bringing damage claims belonging to an individual unit owner because there is no express legislative grant allowing such a claim by the HOA.

2. Neither ***NRS*** Chapter 116 Nor ***NRS*** 40.600 et seq. Confer Standing on the HOA to Pursue Claims For Defects Exclusively Related To Individual Units That Do Not Affect the Common-Interest Community.

In enacting ***NRS*** Chapter 116 and ***NRS*** 40.600 et seq., the Nevada Legislature explicitly did not confer standing on homeowners' associations to bring claims that do not affect the common-interest community. "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 that unit." ***NRS*** 116.021. "Unit" means the boundary of the unit by the walls and floor per ***NRS*** 116.2102.

NRS Chapter 116 permits an association to bring litigation "on behalf of itself or two or more units' owners on matters affecting the common-interest community." ***NRS*** 116.3102(1)(d). ***NRS*** 40.615 defines a construction defect as "a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance...." A "residence" is further defined at ***NRS*** 40.630 as "any dwelling in which title to individual units is transferred to the owners." ***NRS*** 40.630 An "appurtenance" is a "structure, installation, facility, amenity or other improvement that is appurtenant to or benefits one or more residences, but is not a part of the dwelling unit." ***NRS*** 40.605.

While it is permissible under ***NRS*** 40.610 for a "Claimant" under the pre-

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litigation provisions of ***NRS*** Chapter 40 to be "[a] representative of a homeowners association that is responsible for a residence or appurtenance and is acting within the scope of his duties pursuant to Chapter 116 or 117 of ***NRS***," the statute explicitly states that the homeowners association must be "**responsible** for [the] residence or appurtenance." ***NRS*** 40.610(2) (emphasis added). Moreover, the homeowners association must be "acting **within the scope of his duties pursuant to Chapter 116 or 117**." *Id.* (emphasis added).

Thus, while ***NRS*** 40.610 permits a homeowners association to bring a construction defect claim, ***NRS*** 40.600, ***et seq.*** does not confer any greater standing than what is provided in ***NRS*** Chapters 116 and 117 and in the association's governing documents. By failing to extend the powers of associations in any of these statutes, the Legislature made it abundantly clear that if an association such as the HOA wished to assert an ***NRS*** 40.600, ***et seq.*** construction defect claim on behalf of individual unit owners, the HOA must be responsible for the residence or the claim must affect the common-interest community. ***NRS*** 116.3102(1)(d). The defects that are the subject of this Motion do not meet either of these standards.

3. <u>The Governing Documents of the HOA Do Not Confer Standing On The HOA To Pursue Claims For Defects Exclusively Related To Individual Units That Do Not Affect the Common-Interest Community.</u>

The HOA is not responsible for individual units in the High Noon at Arlington Ranch development. According to the governing documents of the HOA, the HOA owns the common elements and is responsible for their maintenance, but it does not have the duty, nor does it have the right, to maintain non-common area elements exclusively related to individual units which do not affect the common-interest community.

The High Noon at Arlington Ranch Declaration of Covenants, Conditions & Restrictions (the "CC&Rs") clearly distinguishes between common elements and units, and limits the HOA's responsibility to common elements. The CC&Rs

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Section 1.20 defines "Common Elements:"

> Section 1.20 "Common Elements" shall mean all portions of the Properties conveyed to and owned by the HOA, and all Improvements thereon. Subject to the foregoing, Common Elements may include, without limitation: private main entryway gates for Properties; private entryway monumentation and entry landscaping areas for the Properties; Private Streets; sidewalks; perimeter walls, fences; common landscape and greenbelt areas; hardscape and parking areas (other than Garages); all water and sewer systems, lines and connections, from the boundaries of the Properties, to the boundaries of Units (but not including such internal lines and connections located inside Units); pipes, ducts, flues, chutes, conduits, wires, and other utility systems and installations (other than those located within a Unit, which outlets shall be a part of the Unit), and heating, ventilation and air conditioning, as installed by Declarant or the HOA for common use (but not including HVAC which serves a single Unit exclusively). Common Elements shall constitute "Common Elements" with respect to this Community, as set forth in ***NRS*** § 116.017.

See, HOA CC&Rs §1.20 attached hereto as Exhibit "A".

Section 2.12 of the CC&Rs states, "The HOA shall own the Common Elements." Then, under the Heading "Functions of HOA," and the subheading, "Section 5.1 Powers and Duties," subsection (b) describes the HOA's responsibilities to maintain the common elements:

> Section 5.1 Powers and Duties:
>
> (b) Maintenance and Repair of Common Elements. The power and duty to cause the Common Elements to be maintained in a neat and attractive condition and kept in good repair (which shall include the power to enter into one or more maintenance and/or repair contract(s), including contract(s) for materials and/or services, with any Person(s) for the maintenance and/or repair of the Common Elements), pursuant to this Declaration and in accordance with standards adopted by the ARC, and to pay for utilities, gardening, landscaping, and other necessary services for the Common Elements. Notwithstanding the foregoing, the HOA shall have no responsibility to provide any of the services referred to in this subsection 5.1(b) with respect to any Improvement which is accepted for maintenance by any state, local or municipal governmental agency or public entity. Such responsibility shall be that of the applicable agency or public entity. Exhibit "A" at § 5.1(b).

The Section goes on to enumerate other powers and duties of the HOA, such as paying taxes on common elements, hiring a manager and keeping

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records. See, Exhibit "A" at § 5.1(e), (h) & (n). The CC&Rs do provide a section on "Maintenance of Other Areas," but the section is limited to slopes, parkways, entry structures and community signs. See, Exhibit "A" at § 5.1(o).

Nowhere do the CC&Rs confer either the responsibility or the right to maintain the individual units. Units are described in the CC&Rs as follows:

> Section 1.77 "Unit" or "Residential Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plat), and shall include all Improvements thereon. As set forth in the Plat, 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. Each Residential Unit shall be a separate freehold estate (not owned in common with the other Owners of Units in the Module or Properties), as separately shown, numbered and designated in the Plat. Units shall include appurtenant Garage Components, and certain (presently, Units 2 and 3 in each Module), but not all Units shall include Yard Components. Declarant discloses that Declarant has no present intention for any Unit 1 in a Module to have any Yard Component. The boundaries of each Unit are set forth in the Plat, and include the above-described area and all applicable Improvements within such area, which 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.
>
> Exhibit "A" at § 1.77.

Unit Owners are responsible for the maintenance of the Units pursuant to Section 9.3 of the CC&Rs. Exhibit "A" at § 9.3. The HOA's maintenance responsibility, meanwhile, is limited to the common elements. Exhibit "A" at § 5.1. The only time an HOA may correct an item for which the Unit Owner is responsible is when a Unit Owner allows the item to fall into disrepair, creating, "a dangerous, unsafe, unsightly or unattractive condition." Exhibit "A" at § 9.6. In such a case, the HOA has the right, but not the responsibility, to make the repair at the owner's cost. Exhibit "A" at § 9.6. Nothing in the CC&Rs gives the HOA the right or the

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responsibility to maintain the individual units, other than in these extreme cases of lack of maintenance by a unit own.

The defects enumerated in this Motion do not present the "disrepair" envisioned in the CC&Rs. Nor are these defects common elements for which the HOA is responsible. Furthermore, the HOA's governing documents do not expand the Associations' standing to bring construction defect claims beyond that which is conferred in ***NRS*** Chapters 40 and 116. Because the defects enumerated in this Motion are exclusively related to the individual units, and are solely within the Unit Owners' responsibility to maintain, these particular defects do not, and in fact, cannot affect the common-interest community. Therefore, the HOA is precluded, by statute and by its own governing documents, from serving an ***NRS*** Chapter 40 Notice of Defect, asserting a claim or recovering damages for these defects.

C. ONLY UNIT OWNERS HAVE THE RIGHT TO BRING CLAIMS FOR DEFECTS EXCLUSIVELY RELATED TO INDIVIDUAL UNITS WHICH DO NOT AFFECT THE COMMON-INTEREST COMMUNITY.

Alleged defects within the interior of the units involve property claims belonging to the individual unit owners, and cannot be deemed "common interest community" under the Uniform Common Interest Ownership Act, ***NRS*** Chapter 116. There has to be a dividing line between defects in which all unit owners have a collective property interest (such as common areas) and those defects for which only a particular unit owner could logically recover damages. Without this defining line, the limitation of "common interest community" becomes meaningless, and the HOA is permitted to enter a blurred area of property ownership that makes mediation and trial impossible to resolve or adjudicate.

Further, none of these statutes or the CC&Rs allow the homeowners association to preempt what is lawfully the right of the unit owners to bring a claim for defects exclusively related to their individual residences.

Allowing such a distortion of the statute would permit the HOA to sue and

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collect damages for defects exclusively related to individual units which rightfully belong to the individual unit owner, for which the Association could not legally enter the unit and coerce repairs. Further, the HOA's recovery of these damages could lead to two undesirable results. One result is that the individual unit owner would be precluded from individual recovery in a later suit because the HOA had already recovered for defects exclusively related to individual's home. The other possible result is a double recovery if the individual unit owner later brought suit for the same defects, because the homeowner would have a persuasive argument that it is he, not the HOA, who is the proper party to recover damages for defects exclusively related to homeowner's individual's unit.

D. THE ASSOCIATION CANNOT BE PERMITTED TO CIRCUMVENT NRCP 23 BY BRINGING A CLASS ACTION LAWSUIT AS AN HOA LAWSUIT.

There are 342 individual units at High Noon at Arlington Ranch and the HOA's lawsuit alleges defects exclusively related to most, if not all, of those individual units. However, not one single homeowner is a party to the lawsuit. By maintaining an action for individual unit defects on behalf of the unit owners, the HOA is basically maintaining a class action without undergoing the analysis and scrutiny of NRCP 23.

The Association is stretching and straining ***NRS*** 116.3102(d) so far beyond its limits that it renders the Nevada Supreme Court's decision in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (Nev. 2005) irrelevant. In *Shuette*, the Nevada Supreme Court went through a painstaking and detailed analysis to demonstrate what is necessary for class certification in a construction defect action. *Id.* at 846-853, 124 P.3d at 537-542. In spite of this, the HOA has brought what is basically a class action lawsuit on behalf of all homeowners in the development, with the HOA as the class representative. Allowing the HOA's counsel to move forward would enable the HOA to skirt NRCP 23 and the Court's decision in *Shuette*. Under this interpretation of ***NRS*** Chapter 40, any construction

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defect litigation involving community associations could become basically a class action by acquiring only the support of the homeowners association's board of directors and without a homeowner vote.

V. CONCLUSION

For all the foregoing reasons, D.R. Horton respectfully requests that its Motion for partial summary judgment be granted and that aforementioned listed defects be stricken from the claims that may be made at trial by the HOA.

DATED: April 11, 2008

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DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Plaintiff, v. D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendants.	CASE NO.: A542616 DEPT. NO.: XXII **PLAINTIFF'S OPPOSITION TO DR HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW Plaintiff, HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, by and through its counsel, Quon Bruce Christensen, and hereby submits its opposition to DR Horton's Motion for Partial Summary Judgment. This motion is made and based upon the attached memorandum of points and authorities, the pleadings on file herein, and

CAV

any oral argument the Court may allow.

Respectfully submitted this 1st day of May, 2008.

QUON BRUCE CHRISTENSEN

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MEMORANDUM OF POINTS AND AUTHORITIES

I. DR HORTON'S MOTION SHOULD NOT BE ENTERTAINED.

This Court should not entertain DR Horton's Motion for Partial Summary Judgment. On August 10, 2007 this Court entered an order stating "Plaintiff's Complaint is hereby stayed until the completion of the NRS 40.600 et seq. pre-litigation process." (**Ex. 1**, at 2:5-6). Summary adjudication is procedurally improper until the stay on the complaint is lifted. DR Horton's Motion should simply be taken off calendar.

In an abundance of caution, however, Plaintiff addresses the substance of DR Horton's Motion below.

II. INTRODUCTION

The High Noon at Arlington Ranch Community consists of 342 condominium units 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").[1]

Plaintiff, the High Noon at Arlington Ranch Homeowners Association ("Association") on

[1]Enacted as NRS 116.001 *et seq.* ("This chapter may be cited as the Uniform Common-Interest Ownership Act"). "This chapter being a general act intended as a unified coverage of its subject matter, no part of it may be construed to be impliedly repealed by subsequent legislation if that construction can reasonably be avoided." NRS 116.1109(1).

behalf of itself and its members, filed its Complaint on June 7, 2007 as the result of severe and pervasive community-wide construction defects. (See Ass'n Complaint on file herein). The construction defect claims were brought under several theories of liability, which are similarly actionable by all homeowners in the community.

DR Horton maintains the Association has no standing to bring the construction defect claims in its own name on behalf of the Association's members. This position is contrary to the UCIOA's plain language and well-developed case law.

The UCIOA provides standing to the Association where the claims involve matters affecting the High Noon at Arlington Ranch common interest community. Failures in the electrical, plumbing and mechanical systems create life-safety issues that impact more than a single homeowner. Indeed, the construction defects have the propensity to cause electrocution, fire, water intrusion, unsightly cracking and mold, which affect more than one unit. The defects make the community unsafe and less desirable to live in. Moreover, all of the defects must be disclosed to potential purchasers. *See, e.g.*, NRS 40.688.

Defendants' Motion should be denied thereby upholding the Association's statutory standing to bring all claims at issue.

III. ARGUMENT RE: STANDING

A. SUMMARY JUDGMENT & DECLARATORY RELIEF STANDARD

A party seeking to obtain a declaratory relief may move for summary judgment upon all or any part thereof. NRCP 56(a). It is well established in Nevada that summary judgment is appropriate where no genuine issue of material fact remains for trial and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005).

With regard to declaratory relief, which is essentially what DR Horton seeks here, courts of record are empowered "to declare rights, status and other legal relations whether or not further relief is or could be claimed." NRS 30.030; *see Nevada Management Co. v. Jack*, 75 Nev. 232,

338 P.2d 71 (1959). Any person whose rights, status or other legal relations are affected by a statute may have determined any question of construction or validity arising under the statute "and obtain a declaration of rights, status or other legal relations thereunder." NRS 30.040; *see County of Clark, ex rel. University Medical Center v. Upchurch*, 114 Nev. 749, 961 P.2d 754 (1998)(finding declaratory relief appropriate regarding statutory cap on damages even though plaintiff had yet to establish underlying liability).

No material facts are at issue regarding the declaratory judgment sought. Statutory interpretation presents the only issue. It is therefore proper for this Court to enter judgment in favor of the Association's standing to bring all claims at issue.

B. THE ASSOCIATION HAS STANDING TO BRING THIS CONSTRUCTION DEFECT MATTER IN ITS REPRESENTATIVE CAPACITY

1. The UCIOA Expressly Provides Standing to a Homeowners Association to Bring Suit for Matters Affecting the Common Interest Community.

Actions must be prosecuted in the name of the real party in interest. NRCP 17(a). To this end, "a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought." *Id*; *see Ray v. Hawkins*, 76 Nev. 164, 350 P.2d 998 (1960); *and see* 59 AM.JUR. 2d PARTIES § 24 ("[w]here a person is expressly authorized by statute to bring a particular action, his right of action arises directly out of the statute, and he needs no title under the substantive law to authorize such suit").

The Nevada Legislature has expressly granted a homeowners association standing to bring an action on behalf of its homeowners. Specifically, NRS 116.3102(1)(d) 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 units' owners on matters affecting the common-interest community**." (emphasis added). A "unit owner" means a

"person who owns a unit." NRS 116.110393. A "unit" is *a physical portion of the common-interest community* designated for separate ownership or occupancy . . . ." NRS 116.11039 (emphasis added). The term "common interest community" necessarily includes separately owned "units". The Legislature has therefore conveyed standing to homeowners associations to bring actions for damages to individually owned units.

2. The Uniform Common Interest Ownership Act (NRS 116) and NRS 40.600 *et seq.* Harmoniously Recognize a Homeowners Association's Standing To Bring Construction Defect Claims That Are Located Within "Units"

NRS 116 conveniently harmonizes with NRS 40.600 *et seq.* (hereinafter "Chapter 40") to provide homeowners association standing for construction defect claims. A "unit" within an attached housing community is unquestionably a "residence" as set forth in Chapter 40. *See* NRS 40.630 ("'Residence' means any dwelling in which title to the individual units is transferred to the owners")(emphasis added). Under Chapter 40, a "claimant" is an owner of a residence. NRS 40.610(1). In this vein, NRS 116 allows an association to bring litigation on behalf of two or more owners of residences for matters affecting the common interest community. NRS 116.3102(1)(d). As demonstrated below, construction defects clearly affect the High Noon at Arlington Ranch common interest community.

A homeowners association NRS 116 standing also harmonizes neatly through a second legislative vehicle. That is, standing for a homeowners association is also recognized under NRS 40.610(2).[2] The statute provides that a claimant may also be "[a] representative of a homeowner's association that is responsible for a residence or appurtenance and is acting within the scope of his duties pursuant to chapter 116 or 117 of NRS." Under this statutory

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[2]DR Horton cites to *Deal v. 999 Lakeshore HOA*, 94 Nev. 301 (1978). *Deal* held that absent a statute to the contrary, a condominium's HOA does not have standing to bring construction defect claims. This 1978 case is no longer good law as NRS 116 and NRS 40.600 were subsequently enacted which expressly provide associations with standing.

construction, an association is afforded standing if the claims are within the scope of its duties pursuant to the UCIOA.[3] Thus, by referencing the Uniform Common-Interest Ownership Act, the Nevada Legislature recognized that construction defects must necessarily affect the common interest community.

The CC&Rs charge the Association with the duty and responsibility of preserving Arlington Ranch's beauty, desirability and property values. (*See, e.g.*, **Ex. 2**, CC&Rs at p. 2 para. M). As demonstrated below, the elements and values the Association is charged with protecting are destroyed by construction defects. NRS 116 standing must be afforded to the Association for all claims.

3. The Construction Defects Are Affecting the High Noon at Arlington Ranch Common Interest Community

By virtue of their ownership, all homeowners within Arlington Ranch are members of the Homeowners Association. (**Ex. 2**, CC&Rs at §2.1). The Arlington Ranch Homeowners Association is governed by NRS 116. (*See, e.g.*, **Ex.2**, p. 1, Recitals para. C referencing applicability of NRS 116). The CC&Rs declare that all property within Arlington Ranch is subject to the protective covenants, conditions and restrictions that run with the land. (*Id.* at p. 2). The express purpose of the CC&Rs is to enhance and protect the value, attractiveness, and desirability of the Property. (*Id.*). The CC&Rs recognize that the Association generally has the power "to do any and all things that a corporation organized under the laws of the State of Nevada may lawfully do 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,"

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[3]A homeowners association has a fiduciary duty to its association members. NRS 116.3103.

(**Ex.2**, at §3.2).

Construction defects, wherever they may occur within the common interest community, negatively affect the property values, safety, attractiveness and desirability of Arlington Ranch. The experts in this matter have identified severe and pervasive defects that plague Arlington Ranch, including those cited in DR Horton's Motion. 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. The defects are matters affecting the common interest community. (*See* **Ex. 3**, Arlington Ranch's Expert Architectural Report, **Ex. 4**, Plumbing and Mechanical Report, and **Ex. 5** Electrical Report).

In that regard, the Association may take action as authorized by the CC&Rs and NRS 116.3102 to protect the value, attractiveness and desirability of Arlington Ranch. These matters affecting Arlington Ranch go well beyond the boundaries of the common areas. This conclusion is underscored by the Associations' authority to enter the individual units and cure such conditions when necessary. (**Ex. 2**, at §9.3).

The defects at issue were not caused by the unit owners, but DR Horton and its subcontractors that constructed the homes. Pursuant to the CC&Rs, the Association has the option of forcing the unit owners to correct the deficiencies at their own cost or prosecuting the culpable parties. Because of its fiduciary duty to act on behalf of its members' interests, the Association's Board chose to initiate this lawsuit in its own name on behalf of its homeowners. In so doing, it enjoys standing to bring all of the construction defect claims.

4. Other Common Interest Community Jurisdictions Recognize Homeowner Associations' Standing to Bring Claims for Construction Defects Located Within Units

DR Horton's motion boldly asserts that other jurisdictions facing similar standing issues

"have ruled that a condominium HOA may only pursue damages claims within the common interest community for those defects for damage that 'results from injury to property in which all of the unit owners have a common interest.'" (DR Hort. Mot. at 15:16 - 16:2). To support its proposition, DR Horton cites two cases: *Villa Sierra Condominium HOA v. Field Corp.*, 787 P.2d 661 (Colo.App. 1990) and *Equitable Life Assurance v. Tinsley Mill*, 249 Ga. 769 (1982). These authorities fail for three reasons.

First, overwhelming national authority supports Association's standing as does the official commentary to the Uniform Act. Second, Georgia is not a UCIOA state and the *Tinsley Mill* case was published prior to the Uniform Act's creation. Georgia does not have a similar statute to derive an Association's standing from and is therefore disqualified from persuasive authority. Third, *Villa Sierra* is a Colorado case published before Colorado adopted the UCIOA standing provisions. As demonstrated below, *Villa Sierra* has been expressly overruled and should not have been cited by DR Horton.

NRS 116 "must be applied and construed 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). Other states adopting the UCIOA have analyzed the statute to determine the breadth of an association's standing. These jurisditions allow homeowner associations to sue for construction defects located within the individual units. Their interpretation stems from their analysis of statutory provisions similar, if not identical, to NRS 116. For example, in *Yacht Club II Homeowners Association, Inc., v. A.C. Excavating*, the Colorado Court analyzed its common interest community statute substantially similar to the Nevada statute. 94 P.3d 1177 (Colo.App. 2003).[4] Indeed, the Colorado statute was also patterned after the Uniform Act, which provides

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[4]Certiorari granted for other issues only in *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 2004 WL 1658306 (finding the economic loss rule did not prevent the homeowners association from suing in tort); judgment affirmed by *A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc.*, 114 P.3d 862 (Colo. 2005).

that an association may:

> Institute, 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.

Compare CRS § 38-33.3-101 and NRS 116.3102(1)(d). The Colorado Court faced similar factual circumstances to the instant matter in that the defendant builder asserted that the homeowners association lacked standing to bring claims for defects alleged to exist within the individual condominium units. *Yacht Club II*, at 1179. In interpreting the Uniform Act, the Court held:

> By its terms, the plain language of [the UCIOA] permits an association to bring an action not only on its own behalf but also on behalf of "two or more unit owners." The only limitation... is the matter be one "affecting the common interest community."
>
> Under [the UCIOA] individual units are a part of the "common interest community." [citation omitted]. Recognizing the underlying purpose of [the Act], giving the phrase "common interest community" the meaning ascribed to it by [the UCIOA], and realizing that an exception should not be read into a statute that its plain language does not suggest, warrant, or mandate [citations omitted], we conclude that [the UCIOA] *confers standing upon associations to pursue damage claims on behalf of two or more unit owners with respect to matters affecting their individual units.*

Id. at 1180 [emphasis added].

The Colorado Court also cited to the intent of 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.* at (citing UCIOA § 3-102 cmt. 3 at 96)(emphasis added).[5] Finally, the Court found that its holding was in accordance with the national trend. *Id.*

Yacht Club II was later upheld in a townhome context. The Colorado Court held in

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[5]DR Horton argues that there is no legislative history supplying guidance as to when a matter qualifies as "affecting the common interest community." DR Horton did not search far as the UCIOA drafters' official commentary expressly undermines DR Horton's entire motion.

pertinent part:

> Here, defendants point to sections of the [CC&Rs] apportioning maintenance duties between the Association and the owners of individual units . . . . Provisions [set forth in CC&Rs] stating that the Association and individual owners have separate maintenance duties under the [CC&Rs] have no bearing on the Association's standing under the [UCIOA].

Heritage Village Owners Ass'n v. Golden Heritage Investors, LTD, 83 P.3d 513 (Colo.App. 2004). The Colorado Court concluded that the Uniform Act and *Yacht Club II* make clear that an "[a]ssociation has standing to assert claims of individual owners" and discarded the same arguments put forth by DR Horton. (*Id.* at 1).[6]

Other states have found homeowner association standing to bring suit for defects found in two or more individually owned units. For example, in *Brickyard Homeowners' Ass'n Management Committee v. Gibbons Realty Co.*, the Court analyzed statutory provisions akin to the Nevada Statute. 668 P.2d 535 (Utah 1983). The plaintiff was a homeowners association suing for construction defects occurring in the common areas and the individually owned units. *Id.* The Utah Court held that the association had statutory authority to bring suit on behalf of two or more of its unit owners as the allegations affected more than one unit. *Id.* at 541.

Other jurisdictions are in accord with the Association's statutory interpretation regarding homeowner association standing. *See, e.g., Association of Unit Owners of Bridgeview Condominiums v. Dunning*, 187 Or.App. 595, 69 P.3d 788 (2003)(finding association's standing to bring claims for construction defects in individual units and the addition of individual unit owners "would change nothing as to those claims"); *Winthrop House Ass'n, Inc. v. Brookside Elm Limited Partners*, 451 F.Supp.2d 336 (D.Conn. 2005)(finding association had standing to

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[6]DR Horton argues that recognizing an association's standing to bring a lawsuit for defects within the individual units will expose it to subsequent lawsuits by unit owners for the same defects. (20:28 - 21-10). This argument ignores the plain language of NRS 116.3102, which states that the claim is brought "on behalf of two or more unit owners". Thus, unless a unit owners exercises her express right under the same statute to intervene in the lawsuit, she is leaving her interests in the hands of the association.

sue its developer for breach of warranties provided to its unit owners); *Sandy Creek Condominium Ass'n v. Stolt and Egner, Inc.*, 267 Ill.App.3d 291, 642 N.E.2d 171 (1994)(recognizing that an association enjoyed 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); *Charley Toppino & Sons, Inc., v. Seawatch Marathon Condominium Ass'n*, 658 So.2d 922 (Fla. 1995)(holding "the right to bring an implied warranty claim belongs to the unit owners, and this right may be exercised by the unit owners in the aggregate through their condominium association in matters of common interest" which include damages to units and personal property); *Candlewood Landing Condo. Ass'n v. Town of New Milford*, 44 Conn.App. 107, 111, 686 A.2d 1007 (1997)(holding that a condominium association has standing to bring a tax appeal on behalf of unit owners even through the statute governing tax appeals does not expressly so provide because the common interest ownership act authorizes an association to act in a representative capacity without exception or limitation); *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890 (D.C.App. 1977)(recognizing statutory standing of association to sue on behalf of two or more unit owners for matters that affect individual units). Other jurisdictions have unequivocally discarded the standing assertions championed by DR Horton. This Court has no logical reason to deviate Nevada's course. DR Horton's Motion should be denied.

C. THERE IS NO NEED FOR NRCP 23 CLASS ACTION ANALYSIS

DR Horton argues that if NRS 116 standing is afforded to the Association for construction defect claims within the units, Association will circumvent the requirements of NRCP 23's class action requirements. Such circumvention is specifically proscribed in the Nevada Rules of Civil Procedure. Indeed, "a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought . . . ." NRCP 17(a).

This Rule is satisfied by the plain language of NRS 116.3102(1)(d). There is simply no reason for NRCP 23 analysis in this matter.

IV. CONCLUSION

The plain language of NRS 116.3102(1)(d) provides standing for Association to bring claims for construction defects located within the individually owned units. NRS 40.610 and the operative CC&Rs reinforce this conclusion. Such an interpretation is in accord with other jurisdictions that have adopted a common interest community act patterned after the UCIOA. Defendants' Motion should be denied.

Respectfully submitted this 1st day of May, 2008.

QUON BRUCE CHRISTENSEN

By: _____

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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Plaintiff, v. D.R. Horton, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendant.	CASE NO.: A542616 DEPT NO.: XXII **REPLY TO PLAINTIFF'S OPPOSITION TO D.R. HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: May 27, 2008 Time: 8:30 a.m.

COMES NOW, Defendant D.R. HORTON, INC. ("D.R. Horton"), by and through its attorneys, Wood, Smith, Henning, & Berman LLP, and hereby replies to the High Noon at Arlington Ranch Homeowners Association's (the "HOA") Opposition to Defendant's Motion for Partial Summary Judgment (the "Opposition").

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Nothing in the HOA's Opposition demonstrates that the HOA has the statutory right to pursue the disputed claims[1] located within the individual units (the "Disputed Claims"). Despite the HOA's attempt to mislead this court and confuse the issue, the question before the Court is the meaning and application of the phrase "common interest community" under ***NRS***116.3102(1)(d)(providing 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 units' owners on matters affecting the common-interest community.) If the HOA is bringing claims **outside** the "common-interest community," it has no standing power to bring such claims and they *must* be stricken from this case. *See Deal v. 999 Lakeshore Association*, 94 Nev. 301, 304 (1978) ("***In the absence of any express statutory grant to bring suit on behalf of the owners***, or a direct ownership interest by the Association in a condominium within the development, ***a condominium management Association does not have standing to sue as a real party in interest***.").

In this open area of the law, the HOA seeks to have the Court interpret "common-interest community" in a manner so broadly that it eviscerates the limitations of ***NRS*** 116.3102(1)(d). According to the HOA, *any claimed defect falls within the definition* regardless of its location, nature, description, or connection or lack thereof with the *common* community. Had this been what the Nevada Legislature intended, there would have been no need to legislate a limitation on

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[1] See D.R. Horton's Motion for Partial Summary Judgment 9:4-12:21

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association standing. The Legislature could have stopped the language of ***NRS*** 116.3102(1)(d) at the word "owners," or expressly stated that an association had standing to bring ***any*** claims belonging to the unit owners. But the Legislature did not do so. Instead, they made it abundantly clear that if an association wishes to assert a claim on behalf of a unit owner, it must be a claim **"affecting the common interest community."**

The logical reason for the limitation under ***NRS*** 116.3102(1)(d) is to prevent the absurdity of the HOA asserting individual claims of unit owners having little or no connection with other unit owners. Imagine the HOA using its monthly assessments collected from all of the units' owners to pursue a defect claim or make repairs to a claim under NRS116.3102(1)(d) caused by a floor *installed by a single unit owner*, or an individual claim for inadequate sized water heater, or a claim for bent light switch cover, or even an improperly installed cabinet (Please see Exhibit "J" attached hereto). If a homeowner asked the Association to make a repair to their individual unit for any of these claims, the Association would summarily deny the same. *Yet this is exactly what the HOA is proffering in its Opposition that it has standing to pursue, to the potential detriment of its members.* The HOA wants to recover money in this litigation for these types of claimed defects, yet it has absolutely no legal standing to pursue and no legal obligation to repair. It cloaks these claims with wholly inapplicable citations to *federal* law on standing, the UCIOA, and a parade of out-of-state cases, all to create a distraction from **Nevada law**. This not only creates a conflict of interest between the Associations' attorneys and its members since a homeowner's rights are being "Taken" by the Association, but also puts the defendants at a risk for double liability if a court subsequently rules inconsistently with the present HOA's claims.

What governs this question is the plain language of ***NRS*** 116.3102(1)(d) and 116.021 (definition of "common interest community"), and the only Nevada

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Supreme Court decision on the topic, *Deal v. 999 Lakeshore Association*, 94 Nev. 301 (1978). The inexorable conclusion from these sources is that the HOA is overreaching by asserting defect claims beyond its authorized standing, to the detriment of this court, the homeowners, and the defendants and placing all at the risk of subsequent inconsistent rulings.

II.

LEGAL ARGUMENT

A. The HOA's Arguments Concerning NRCP 17 are Meritless.

The HOA begins its Opposition by making the specious argument that it is unnecessary to join the unit owners as parties, claiming that under NRCP 17(a) the HOA is the real party in interest. NRCP 17(a) only allows "a party ***authorized by statute***" to "sue in his own name without joining with him the party whose benefit the action is brought." Because the HOA is ***not*** authorized by statute to pursue defect claims not affecting the "common interest community," NRCP 17(a) precludes the HOA from asserting these claims.

B. *Deal v. 999 Lakeshore Association* Is the Controlling Authority.

Next, the HOA contends that the decision in *Deal* is no longer good law the result of the Nevada Legislature's adoption of the Common-Interest Ownership Act ("CIOA"). That is untrue. In *Deal*, the Court held:

> "***In the absence of any express statutory grant to bring suit on behalf of the owners***, or a direct ownership interest by the Association in a condominium within the development, ***a condominium management Association does not have standing to sue as a real party in interest***. (citations omitted)."

Id. at 304. The subsequent adoption of the CIOA only begs the question of *what* express statutory grant was provided by the CIOA to the HOA, leading to the

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ultimate question of the scope of ***NRS*** 116.3102(1)(d) and 116.021. The *Deal* decision is still intact, i.e., *the Association cannot go beyond the standing that the Legislature expressly granted it in Chapter 116.* Accordingly, standing for defects in the individual units belong *solely* to the unit owners. The HOA only has standing to pursue defects in the common areas outside the units.

C. **The Units are *Not* Part of the Common-Interest Community.**

The HOA reaches the conclusion of standing by focusing on the phrase "matters affecting common-interest community." ***NRS*** 116.3102(1)(d). Using this language, the HOA argues that *all* defects ***regardless of location or nature*** should be within its scope because they "affect" the common-interest community. This extension of power was not contemplated by the Nevada Legislature.

The definition of "common-interest community" pursuant to NRS 116.021 is as follows:

> **"Common-interest community" defined.** "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***. "Ownership of a unit" does not include holding a leasehold interest of less than 20 years in a unit, including options to renew.

The HOA reads the above-cited statutory provision to mean that the common-interest community is comprised of two elements – both the common elements and the units. Rewriting the provision, the HOA ignores the key phrase **"other than that unit."** The inclusion of this phrase by the Nevada Legislature means what it says and can not be ignored – the units are not part of the common-interest community and may not be the subject of a claim asserted by the Association.

The HOA attempts to convert the negative phrase of "other than that unit" into the affirmative position that the definition actually ***includes*** the unit. This is illustrative of the HOA's counsel's revisionist tactics. Faced with a definitional phrase **that excludes the units from the "common-interest community,"** they

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alter the wording of the statute in their argument and offer it to the Court as fact. No amount of mechanics can change the plain language of NRS 116.021. The inclusion of the phrase "**other than that unit**" by the Nevada Legislature means what it says – the units are not part of the common-interest community.

D. The Disputed Claims Are Not Matters Affecting the Common-Interest Community.

Perhaps sensing that its interpretations do not pass muster, the HOA also asserts that the defects within individually-owned units pose a threat to the safety and health of the occupants. As such, the HOA posits that due to the alleged threat to the safety of the unit owners, all defects therefore affect the entire common-interest community. *See*, Opposition p. 4, ll. 27; p. 5, ll. 1-6. The actual facts belie the HOA's position.

NRS 40.670 requires that a claimant give notice to contractor of any defect that creates an "imminent threat to the health or safety" of the occupants. As noted in the Motion, the HOA served its Chapter 40 Notice on D.R. Horton on or about January 28, 2008. *See*, Exhibit "C" attached to the Motion. Nowhere does the HOA's Chapter 40 Notice set forth or otherwise advise D.R. Horton that any alleged defect creates an imminent threat to the health or safety of any unit owner.

While the HOA cites to the expert reports it attached to the Chapter 40 Notice, this is insufficient at law to provide D.R. Horton with notice of a defect creating a threat to the health and safety of an owner. It is disingenuous for counsel for the HOA to now assert in response to a Motion for Partial Summary Judgment that these defects present a threat to the health and safety of the owners since it never triggered their provisions in its original notice. The HOA's new position should be seen for what it is – a last ditch attempt to survive partial

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summary judgment[2].

E. The CC&Rs Do Not Confer A Duty Upon the HOA To Pursue Defect Claims Within the Individual Units.

The HOA cites to ***NRS*** 40.610(2), which provides that an association has standing to assert defect claims when acting in furtherance of the scope of its duties pursuant to Chapter 116. However, the duty to pursue an action for defects under ***NRS*** 116.3102 applies only to matters affecting the common-interest community. As explained hereinabove, the HOA's position that the defects within the individual units affect the common-interest community is without merit.

The HOA then claims that under Chapter 116, the CC&Rs confer a duty upon the HOA to preserve the beauty, desirability and property value of the units. Therefore, the HOA believes that a duty as contemplated by ***NRS*** 40.610(2) is triggered thereby conferring standing upon the HOA to assert claims for defects within the individual units. A closer look at the provisions of the CC&Rs relied upon by the HOA confirms that there is no such duty.

The first section the HOA cites to in contending that the CC&Rs impose a "duty" upon the HOA with regard to defects within the individual units is at page 2, paragraph M. The HOA argues that this provision "charges the Association with

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[2] It should be noted that D.R. Horton is not seeking to cut off anyone's rights in this motion, but instead protect them. The HOA is attempting to take these rights away from its members and recover money damages for them. This will only work to the determent of the homeowners, since the HOA would then not have any obligation to repair these same conditions and could deny the homeowners relief. Faced with the same, the homeowners would then have not choice but to submit a new claim to D.R. Horton, which then may be cut off by *res judicata*.

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the **duty** and responsibility of preserving Arlington Ranch's beauty, desirability and property values." *See* Opposition, p. 6, ll. 5-8. 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 HOA. Indeed, nothing therein is even remotely close to what the HOA claims the paragraph provides. Paragraph M is utterly void of establishing any duty of the HOA with regard to defects within the individual units.

The HOA also relies on another section of the CC&Rs as conferring a duty as to the individual units. Citing to Section 9.3, the HOA maintains 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. Again, the HOA misquotes the CC&Rs and ignores the relevant language therein.

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 Owner.

See, CC&Rs, p. 49, Section 9.3.

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It is obvious why the HOA failed to quote the direct language of the CC&Rs – there is nothing in any of the cited provisions which delineates a duty with regard to the individual units as alleged by the HOA. Section 9.3 not only fails to confer upon the HOA a duty, **it specifically provides that no such duty exists**.

In the absence of any duty delineated by the CC&Rs upon the HOA as to defects within the individual units, the HOA has failed to rebut D.R. Horton's showing the HOA lacks standing to pursue the claims. There is no duty at law with regard to the defects within the individual units as they do not affect the common-interest community. The lack of any duty imposed by law or the CC&Rs confirms that the HOA lacks standing.

F. **The HOA's Case Citations Do Not Support Its Position**.

The HOA cites to a line of Colorado cases which purport to support the plaintiffs' notion that it can assert whatever claim it desires on behalf of a unit owner. The opposition 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 HOA 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

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as to this issue.[3]

The HOA'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 HOA'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); *Owens v. Tiber Island Condominium* Ass'n, 373 A. 2d 890 (D.C. 1977)(did not even involve the uniform common interest ownership act, and had no restriction for "common interest community."); *Toppino & Sons, Inc. v. Seawatch at Marathon Condominium Ass'n*, 658 So. 2d 922 (Fla. 1994) (did not involve the uniform common interest ownership act); *Candlewood Landing Condominium Ass'n v. Town of New Milford*, 686 A.2d 1007 (Conn. App. 1997) ("common elements" means all portions of the community other than the units.)

G. Points and Authorities Not Addressed in the Opposition

As set forth in D.R. Horton's moving papers and not contested in the

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[3] Significantly, the HOA misrepresents to the Court that the decision in *Villa Sierra Condominium Ass'n v. Field Corp.*, was "expressly overruled" by Colorado's adoption of the uniform act. To the contrary, the *Yacht Club* decision made clear that "the General Assembly enacted the CCIOA in 1991, *following the division's decision in Villa Sierra.*" 94 P.2d 1179.

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Opposition, the HOA has failed to comply with both ***NRS*** 40.6462(1) and Section 5.3 of the CC &R's. Moreover, the HOA has failed to counter D.R. Horton's citation to specific claims that only affect the units.

Taken together, these first two set of uncontested issues demonstrate the policy reasons why the Nevada legislature elected to include the phrase "other than that unit" in its definition of the terms "common-interest community."

The statutory scheme of ***NRS*** 40.600 et seq., coupled with the Nevada Supreme Court's rulings in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (Nev. 2005) and *D.R. Horton v. Dist. Ct.*, 168 P.3d 731 (Nev. 2007), demonstrate a clear Legislative and Judicial mandate toward allowing the Contractor to gather up the evidence it needs to decide whether or not to make repairs and what repairs to make:

> "The provisions of NRS Chapter 40, concerning constructional defect actions, reveal that the Legislature intended to provide contractors with an opportunity to repair construction defects in order to avoid litigation." ***Shuette v. Beazer Homes Holdings Corp.***, 121 Nev. 837, 853-854, 124 P.3d 530, 542 (2005).

> "To ensure that ensure that contractors are given an opportunity to repair, the Legislature requires a claim to give the contractor notice in "reasonable detail" and, based on that notice, to allow the contractor time and the opportunity to inspect and make repairs when a defect is verified." ***D.R. Horton v. Dist. Ct.,*** 168 P.3d 731, 737 (Nev. 2007).

The foregoing Legislative and Judicial mandate is completely frustrated if the Association is permitted to make claims for which it does not have standing to pursue. Not only has this Plaintiff HOA kept its members in the dark by not

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ratifying its premature election to file suit, but it has also failed to make these same units available for an inspection.[4] The reasons for both is the simple fact that the HOA is over-reaching and making claims that its own members either do not agree with or are completely unaware of at this time. This adds to the damage that the HOA is doing to its own members, whose rights are being potentially being cut off if the Association is found to have standing for the claims at issue in this motion.

Finally, as admitted by the Opposition on page 4 line 8-9, there are no material facts in dispute. Statutory interpretation as to the HOA's standing is the only issue before this court. As the HOA has failed to distinguish in its opposition any of the 47 items that D.R. Horton has stated that it lacks standing to pursue (pages 9-12, lines 5-21 of the moving papers), this Court should find conclusively that these allegations only affect the "units."

As discussed above, the HOA only has standing for claims on behalf of "two or more units' owners on matters affecting the common-interest community" (***NRS*** 116.3102(1)(d). Since the HOA now concedes that the issues raised in this motion only affect the "units," and as ***NRS*** 116.021 **excludes** "units" from the definition of "common-interest community" (a "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 that unit"), the instant motion should be granted.

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[4] While the HOA has filed an opposition to D.R. Horton's separate motion on this issue, that opposition was both untimely and ignored the plain language of the statute. Instead, the HOA cited other cases wherein its same counsel has misrepresented a number of facts in an attempt to wrongfully accuse D.R. Horton of misconduct .

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III.

CONCLUSION

For all the foregoing reasons, D.R. Horton respectfully requests that its Motion for partial summary judgment be granted and that aforementioned listed defects be stricken from the HOA's ***NRS*** 40.645 notice and for claims that may be made at trial.

DATED: May 19, 2008

WOOD, SMITH, HENNING & BERMAN LLP

By: /s/ Joel D. Odou

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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 May 19, 2008, I served the following document(s) described as **REPLY TO PLAINTIFF'S OPPOSITION TO D.R. HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT** 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. (Code Civ. Proc. §1013, subd. (a) and 1013a(3).)

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 May 19, 2008, at Las Vegas, Nevada.

Angela A. Monegain

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MASTER SERVICE LIST
ARLINGTON RANCH HIGH NOON v. D.R. HORTON, INC.
Case No. A542616

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EXHIBIT J

QUON|BRUCE CHRISTENSEN
LAW FIRM

Nancy Quon, Esq.
Jason Bruce, Esq.*
James Christensen, Esq. **

*Also Licensed in Colorado and Arizona
**Also Licensed in Illinois

May 8, 2008

Via Facsimile Only – 702/253-6225
Joel Odou, Esq.
Stephen Rosen, Esq.
WOOD SMITH HENNING & BERMAN, LLP
7670 W. Lake Mead Blvd. #250
Las Vegas, NV 89128

Re: High Noon at Arlington Ranch

Dear Counsel:

Please be advised our office has scheduled an inspection for the fallen cabinets in the kitchen at 8780 Horizon Wind #103 to begin at 10:00am on Monday, May 12, 2008.

You are invited to attend and observe. Each attendee must provide and wear shoe covers for all interior inspections. Socks and bare feet will not be permitted. All experts are required to provide any and all equipment needed to perform their duties and to leave our Clients' homes as they are found. Borrowing anything from our clients is strictly prohibited.

Sincerely,

QUON BRUCE CHRISTENSEN

Jason W. Bruce, Esq.

JWB/jg

Cc:
Adcock

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JDO/TET/SNR
AAW
AKM
5708-088

Details of filing titled:
Reply to Plaintiff's Opps to Defendant'...
for Case Number A542616

Lead File Size:	507488 bytes
Date Filed:	2008-05-19 17:16:38.0
Case Title:	A542616
Case Name:	A542616 - High Noon At Arlington Ranch Homeowners vs. D R Horton Inc
Filing Title:	Reply to Plaintiff's Opps to Defendant's Motion for Partial Summary Judgment
Filing Type:	EFS
Filer's Name:	Joel D. Odou
Filer's Email:	
Account Name:	Joel D. Odou Monthly Account
Filing Code:	RPLY
Amount:	$ 10.00
Comments:	
Courtesy Copies:	
Firm Name:	Wood Smith Henning & Berman
Your File Number:	5708-088
Status:	Accepted - (A)
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Review Comments:	
Reviewer:	Norreta Caldwell
File Stamped Copy:	A542616-308635_RPLY_Reply_to_Plaintiff_s_Opps_to_Defendant_s_Motion_for_Partial_Summary_Judgment.pdf
Lead Document:	Reply to Opps to DR Horton Motion for Partial SJ.pdf 507488 bytes
Data Reference ID:	

Details of filing titled:
Reply to Plaintiff's Opps to Defendant'...
for Case Number A542616

Lead File Size:	507488 bytes
Date Filed:	2008-05-19 17:16:38.0
Case Title:	A542616
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Filing Title:	Reply to Plaintiff's Opps to Defendant's Motion for Partial Summary Judgment
Filing Type:	EFS
Filer's Name:	Joel D. Odou
Filer's Email:	
Account Name:	Joel D. Odou Monthly Account
Filing Code:	RPLY
Amount:	$ 10.00
Comments:	
Courtesy Copies:	
Firm Name:	Wood Smith Henning & Berman
Your File Number:	5708-088
Status:	Pending - (P)
Date Accepted:	
Review Comments:	
Reviewer:	
File Stamped Copy:	
Lead Document:	Reply to Opps to DR Horton Motion for Partial SJ.pdf 507488 bytes
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Attorneys for Defendant, D.R. HORTON, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non- profit corporation, for itself and for all others similarly situated,, Plaintiff, v. D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendant.	CASE NO. A542616 DEPT. XXII **NOTICE OF ENTRY OF ORDER GRANTING D.R. HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Notice is hereby provided of the entry of the attached Order Granting D.R. Horton's Motion for Partial Summary Judgment having been entered on July 2, 2008 in Department XXII before District Court Judge Susan Johnson.

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/ / /

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DATED: July 9, 2008

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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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 July 9, 2008, I served the following document(s) described as **NOTICE OF ENTRY OF ORDER GRANTING D.R. HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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. (Code Civ. Proc. §1013, subd. (a) and 1013a(3).)

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 July 9, 2008, at Las Vegas, Nevada.

Angela A. Monegain

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MASTER SERVICE LIST
ARLINGTON RANCH HIGH NOON v. D.R. HORTON, INC.
Case No. A542616

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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Plaintiff, v. D.R. Horton, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendant.	CASE NO.: A542616 DEPT NO.: XXII **ORDER GRANTING D.R. HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

D.R. Horton Inc.'s Motion for Partial Summary Judgment came on for hearing on May, 27, 2008, before the Honorable Judge Susan Johnson in Department XXII.

Jason Bruce, Esq., of the Quon Bruce Christensen Law Firm, appeared on behalf of Plaintiff, the High Noon at Arlington Ranch Homeowners' Association, Joel D. Odou, Esq. and Stephen N. Rosen, Esq., of the law firm of Wood, Smith, Henning & Berman LLP appeared on behalf of Defendant D.R. Horton, Inc.

The Court, having considered the pleadings, supporting papers and

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arguments from counsel, hereby makes the following findings of material and undisputed facts and legal determinations pursuant to NRCP 56(c):

I.

FINDINGS OF MATERIAL AND UNDISPUTED FACTS

1. The High Noon at Arlington Ranch consists of 342 townhomes in a 114-building development in Las Vegas, Nevada. Each town-home is a triplex separate, freehold estate within the greater common-interest community called High Noon at Arlington Ranch (the "Subject Property").

2. The High Noon at Arlington Ranch Homeowners Association (the "HOA") is a Nevada nonprofit corporation, which manages the High Noon at Arlington Ranch condominium community.

3. As with any corporation, the HOA must follow the rules of its governing documents. In this case those governing documents are the High Noon at Arlington Ranch Covenants, Conditions and Restrictions (the "CC&Rs"), attached as Exhibit "A" to the Moving Papers, and referenced by both parties.

4. On June 7, 2007, the HOA filed suit against D.R. Horton, Inc., on behalf of itself alleging causes of action entitled breach of warranty, breach of contract and breach of fiduciary duty for alleged construction defects.

5. The HOA is seeking to recover damages in this action pursuant to ***NRS*** Chapter 116.

6. Both parties to this motion agree that there are no material facts in dispute (Opposition page 4, lines 8-10, Reply page 12, lines 8-9).

7. Pursuant to ***NRS*** Chapter 116, a homeowners association may only bring suit in its own name on matters affecting the "common interest community." ***NRS*** 116.3102(1)(d).

8. Six months after commencing suit, on January 21, 2008, the HOA sent a ***NRS*** 40.645 Notice to D.R. Horton alleging defects in both the common areas and each of the 342 individual units at the Subject Property (hereinafter the

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"Chapter 40 Notice").

9. The boundaries of each individually owned unit, within the Subject Property, is defined by Section 1.77 of the CC&Rs, which provides the following:

> "Unit" or "Residential Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plat), and shall include all Improvements thereon. As set forth in the Plat, 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. Each Residential Unit shall be a separate freehold estate (not owned in common with the other Owners of Units in the Module or Properties), as separately shown, numbered and designated in the Plat. Units shall include appurtenant Garage Components, and certain (presently, Units 2 and 3 in each Module), but not all Units shall include Yard Components. Declarant discloses that Declarant has no present intention for any Unit 1 in a Module to have any Yard Component. The boundaries of each Unit are set forth in the Plat, and include the above-described area and all applicable Improvements within such area, which 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.

10. Pursuant to the CC&Rs Section 9.3, the individual unit owners are solely responsible for the maintenance and repair of items within their individual units.

11. Section 9.3 of the CC&Rs provides in pertinent part as follows:

> **Section 9.3 Maintenance and Repair Obligations of Owners:** It shall be the duty of each Owner, at his or her sole cost and expense, subject to the provisions of this Declaration requiring ARC approval, to maintain, repair, replace and restore all Improvements located on his or her Unit, the Unit itself, and any Exclusive Use Area pertaining to his or her Unit, in a neat, sanitary and attractive condition, except

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for any areas expressly required to be maintained by the Association under this Declaration... Without limiting the foregoing, **each Owner shall be responsible for the following**:

(a) **maintenance, repair, and/or replacement of all exterior walls, and all roof area of the Triplex Building** (including the exteriors of exterior walls of Yard Components) in which the Owner's Unit is located, respectively appurtenant to said Unit, ...in conformity with the original construction thereof; without limiting the foregoing, exterior painting of Triplex Buildings shall be the responsibility of the Owners of the Units in each Triplex Building, and if two (2) of the three (3) such Owners agree that such exterior painting is required, they shall have the right, following reasonable notice to the third such Owners, to proceed with such painting and to require such third Owner to equally or equitably share the cost of such painting.

(b) periodic painting, maintenance, repair, and/or replacement of the front doors to the Owner's Units, and Garage sectional roll-up doors;

(c) annual inspection and repair or replacement of heat sensors, as originally installed in certain (but not necessarily all) of the Owner's Unit;

(d) **cleaning, maintenance, repair, and/or replacement of any and all plumbing fixtures, electrical fixtures, and/or appliances** (whether "built-in" or free-standing, including, **by way of example and not of limitation: water heaters (and associated pans), furnaces, plumbing fixtures, lighting fixtures**, refrigerators, dishwashers, garbage disposals, microwave ovens, washers, dryers, and ranges), **within the Owner's Unit**;

(e) cleaning, maintenance, painting and repair of the interior of the front door of the Owner's Unit; cleaning and maintenance of the exterior of said front door, subject to the requirement that the exterior appearance of such door shall not deviate from its external appearance as originally installed by Declarant;

(f) **cleaning, maintenance, repair, and/or replacement of all windows and window glass within or exclusively associated with, the Owner's Unit, including the metal frames, tracks, and exterior screens thereof**, subject to the requirement that the exterior appearance of such items shall not deviate from its external appearance as originally installed by Declarant;

(g) cleaning, and immediate, like-kind replacement of burned-out light bulbs, and broken light fixtures, with respect to the "coach lights" at or near the front door of the Owner's Unit; in the event that the Owner does not immediately accomplish his or her duties under

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this subsection (g), the Association shall have the rights set forth in Section 9.1 (h), above.

(h) cleaning, maintenance, repair, and replacement of the HVAC, located on an easement within the Common Elements, serving such Owner's Unit exclusively (but not the concrete pad underneath such HVAC), subject to the requirement that the appearance of such items shall not deviate from their appearance as originally installed by Declarant:

(i) maintenance, repair, and replacement of Garage remote openers, subject to the requirement that any replacement therefor be purchased by the Owner from the Association; and

(j) without limiting any of the foregoing: cleaning, maintenance, repair, and replacement of the door opener and opening mechanism located in the Owner's Garage (provided that any replacement door opener shall be a "quiet drive" unit, at least as quiet as the unit originally installed by Declarant), so as to reasonably minimize noise related to or caused by an unserviced or improperly functioning Garage door opener and/or opening mechanism.

(Emphasis added).

12. In this action, the HOA has made claims for the following defects, among other claims, in its Chapter 40 Notice:

Structural:

11.01 Wallboard system failure; cracking

11.02 Wallboard ceiling and wall stains

14.01 Floor sheathing is improperly fastened.

15.01 Shower enclosure system failure; stained framing.

Electrical:

E.1 At the termination points of aluminum wires in the panels, lack of wire preparation and insufficient torque tightness of conductors.

E.2 The load center is recessed and over cut into the wall space beyond the code allowance.

E.3 The general quality of workmanship in the Electrical system does not meet the code.

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E.3.1 Debris in panel.

E.3.2 Vague directory.

E.3.3 Open knockouts.

E.3.4 Lower/upper hallway switches reversed (9460 Thunder Sky 103).

E.3.5 Zero Torque on neutral (8810 Horizon Wind 103).

E.3.6 Exhaust fan not flush.

E.3.7 Wall switch cover bent (8785 Traveling breeze 101).

E.3.8 Fittings are not fire-sealed at main panel.

E.3.9 The outlet boxes in the fire-rated wall spaces are not installed in a Code-approved assembly to assure fire-resistant integrity of the wall space.

E.3.10 The Ground Fault Circuit Interrupter outlet failed to trip within the established thresholds.

E.4 The groundling electrode system is not effectively bonded together.

E.5 The cables were inadequately supported or not supported at all.

E.6 NM cables are well within 6 ft. radius of attic access.

E.7 At the fire rated wall spaces or floor assemblies and the attic access areas, the cables are running through fire rated walls or framing members, in openings much greater than the conductor diameter.

E.8 The non-metallic cables in bored holes thru studs and framing plates, and are within the restricted area specified by Code without the use of required steel protection plates.

E.9 The boxes for wiring, devices and splices are required to be flush to the finished surface.

E.10 The outlet for the dishwasher and disposal cords has been

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placed in an area where it is now blocked by the finish installation of the cabinets and plumbing.

E.11 The required outlet along floor line is not present at wall spaces.

E.13 The recessed lighting fixtures contain paint overspray.

E.14 The class 2 thermostat wires are a type PJ2, a non rated wire for exposed use.

E.15 A/C disconnect is not sealed against the entry of washer where the disconnect is attached to the structure.

Plumbing:

P.1 3-wall fiberglass shower or combination bath/shower modules have "in-wall" valves, spouts and shower arms, are not properly aligned or adequately secured to the wall structure, the spout nipple and valve penetrations are not properly sealed.

P.2a The master tubs and Plan 102 shower pans lack support bedding materials; fixtures creak and pop when stepped upon.

P.2b The wainscot panel surrounds are not properly sealed.

P.3 Toilets (a) are not securely mounted to the wood framed floors and/or (b) closet bend grade slab penetrations are not sealed and/or the closet ring is not secured to the floor.

P.4 Water heaters are inadequately sized, lack sufficient capacity and recovery rates to satisfy the hot water demands of the residence.

P.5 Water heater drip collection pans discharge into a 2" pipe nipple which is not integrated into the floor materials, the 2" line improperly reduces down to 1" and pans' tailpiece is not solidly connected to the discharge pipe; and are undersized.

P.6 Water heater temperature and pressure relief valve discharge lines contain corrugated connectors which fail to meet the valve's surface

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temperature minimums and creates a reduction in the discharge pipe's size.

P.7 Water heater seismic restraint devices are either lacking 'vee' blocks or the devices are not installed.

P.8 Water heater shutoff valves and/or heater connections are prematurely corroding/failing.

P.9 Water heater flues ("B" vent stack) lack appropriate materials and fittings.

P.10 Washing machine utility box have hose bib water connections, piped with plastic tubing, lack sufficient rotating resistive stability to permit proper operation; and/or the support arms are backwards and the box is set-back from the drywall's face; and/or are improperly located in the party walls.

P.11 Washing machine drain pans are equipped with 1" undersized outlets, do not provide complete drainage, laundry area wall/floor joints are not sealed and are not curbed/dammed to control/direct surface water flow and piping does not discharge to the sanitary sewer.

P.12 Free-standing gas ranges are either lacking or have improperly installed "anti-tip" bracket.

P.13 Dishwasher drain hoses from the air gap to the disposer are either kinked or trapped, thus lacking positive slope.

P.14 Pedestal lavs located in the 103 Guest Bathroom have interior cleanouts that are inaccessible due to the lav's pedestal.

P.15 Individual unit water service laterals lack individual shut off valves.

P.17 Pressure reducing valves installed on the interior surface of the garage walls are vulnerable and exposed to mechanical injury.

Mechanical:

M.1 The refrigerant lines are not properly weatherproofed at the

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building line. Condensers are not secured to the pad.

M.2 FAUs sleeping on suspended angle iron hangers lack "securement" and anti-sway stabilizers.

13. It was not contested that each of the above defects is contained within the private units owned by the individual, non-party homeowners.

II.

CONCLUSIONS OF LAW

1. Actions must be prosecuted in the name of the real party in interest. ***NRCP*** 17(a).

2. The only express power by an HOA to bring suit on behalf of unit owners is set forth in ***NRS*** 116.3102(1)(d), entitled "Powers of the HOA", which provides that an HOA 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."

3. The definition of "common-interest community" pursuant to ***NRS*** 116.021 is as follows: "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. "Ownership of a unit" does not include holding a leasehold interest of less than 20 years in a unit, including options to renew."

4. The definition of "common-interest community" as set forth in ***NRS*** 116.021 is different than the definition in the Colorado Statute, ***CRS*** 38-33.3-103(8), as cited by the HOA in its Opposition to the present motion. Specifically, ***CRS*** 38-33.3-103(8) does not include the phrase "other than that unit." Because ***NRS*** 116.021 is different than CSR 38-33 3-103(8), the Colorado cases cited in the opposition purporting to define the Nevada statute are distinguishable.

5. As the Nevada Supreme Court held in *Albios v. Horizon Communities.*, Inc., 132 P.3d 1022 (2006), the Court will interpret a rule or statute

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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. *Id.* at 1028. As such, this Court finds that the legislature intended to have the words "other than the unit" considered in any interpretation of ***NRS*** 116.021 and that the Nevada's legislature intended to limit the definition to exclude claims within the Unit.

6. As ***NRS*** 116.2102 defines unit boundaries, which includes the phrase "[e]xcept as otherwise provided by the declaration," the definition of the Unit Boundaries as found in Section 1.77 of the High Noon at Arlington Ranch Homeowner's Association CC&Rs control.

7. Section 1.77 of the CC&Rs provides in pertinent part that each Unit at Arlington Ranch includes 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.

8. As 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.

9. As the HOA is not empowered by either statute or the CC&Rs to pursue the Defects at Issue, the HOA cannot pursue construction defect claims for any item contained within the individual units, for which ownership rights belong solely to an individual homeowner.

10. This court finds that the HOA only has standing to sue for defects that are within the common interest community that are defined within the CC&R's.

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III.

ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

That Partial Summary Judgment is entered in favor of Defendant D.R. Horton, Inc, and against the HOA, such that the HOA is precluded from pursuing claims related to the individual units and/or owned by the individual unit owners.

DATED this 2nd day of June, 2008.

DISTRICT COURT JUDGE

Prepared and submitted by:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MONARCH ESTATES HOMEOWNERS ASSOCIATION, a non-profit corporation, Petitioner, vs. JUDGE TIMOTHY C. WILLIAMS, EIGHTH JUDICIAL DISTRICT COURT OF CLARK COUNTY, NEVADA, Respondents.	Case No.: 51942
JOHNSON COMMUNITIES OF NEVADA, INC., a Nevada corporation; RICHMOND AMERICAN HOMES OF NEVADA, INC., a foreign corporation; Real Parties In Interest.	

D.R. HORTON, INC.'S AMICUS CURIAE BRIEF IN SUPPORT OF POSITION OF REAL PARTIES IN INTEREST

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

At the heart of Monarch HOA's ("Monarch") Writ Petition is the notion that if Monarch is granted standing under NRS 116.3102(1)(d), then Monarch can somehow rise to the level of becoming a claimant under NRS 40.610 for purposes of alleging constructional defects against Johnson Communities of Nevada, Inc. ("Johnson"). However, Monarch's Writ Petition fails to establish any legal grounds for standing under NRS 116.3102(1)(d) since it has no ownership or interest in the concrete masonry unit ("CMU"). Interestingly, Monarch admits that it has no ownership interest in the CMU, but Monarch, nevertheless, seeks relief from this Court to go beyond the authority of the CC&R's and NRS 116 to assert claims that do not belong to Monarch. As this Court will see, because Monarch has no ownership interest in the CMU, Monarch also has no standing to assert claims arising out of the CMU. Therefore, Monarch cannot be a claimant under the plain language of NRS 40.610 since Monarch is not responsible for the CMU.

Aside from the arguments advanced by the other amici parties and Johnson, three additional reasons support this Court's decision to deny Monarch's Writ Petition: (1) Monarch's interpretation of the term "common-interest community" is misleading since Monarch is limited both by the CC&Rs and NRS 116 to assert claims only for areas over which Monarch has ownership and control; (2) collateral estoppel and res judicata do not prohibit simultaneous, overlapping claims made by Monarch and the unit owners since these doctrines do not apply until a final judgment has been entered; and (3) Monarch's reliance on the dissimilar statutes from foreign jurisdictions is misplaced since the foreign statutes contain different language than NRS 116, and this Court is not bound to accept the statutory construction of other states from which NRS 116 was not adopted. Therefore, Amicus Curiae D.R. Horton, Inc. ("D.R. Horton") requests that this Court deny Monarch's Writ Petition.

II. D.R. HORTON'S INTEREST IN THIS MATTER

D.R. Horton is one of the largest residential home builders in the United States and is a publicly-traded corporation. Additionally, D.R. Horton has built and continues to build

residential communities throughout Nevada. Donald R. Horton began his own construction business in 1978 in the Dallas/Fort Worth metroplex. In 1987, D.R. Horton began expanding its operations by seeking out the nation's most active homebuilding markets. Since 1987, D.R. Horton has geographically diversified into 82 markets and 27 states across the United States. D.R. Horton is traded on the New York Stock Exchange (DHI), and its outstanding financial performance has earned the company a place as one of the industry leaders in revenue and earnings growth. By offering a piece of the "American Dream," D.R. Horton has grown to over $4.1 billion in stockholders' equity, which emphasizes the financial commitment and stability D.R. Horton provides its homebuyers. Therefore, this Court's legal analysis of statutes and case law concerning NRS Chapter 40 and construction law issues is of utmost importance to D.R. Horton.

With these interests in mind, D.R. Horton requests that this Court afford developers, such as D.R. Horton, the opportunity to work directly with unit owners that may suffer from constructional defects, instead of homeowners associations ("HOAs"), such as Monarch, that do not represent the interests of the individual unit owners.

III. LEGAL ARGUMENT

A. MONARCH'S INTERPRETATION OF THE TERM "COMMON-INTEREST COMMUNITY" IS MISLEADING AND DOES NOT OPERATE TO ALLOW MONARCH TO ASSERT CLAIMS THAT ACTUALLY BELONG TO UNIT OWNERS.

Although Monarch attempts to "bootstrap" its supposed authority to represent unit owners without any written assignment or proof of notice to the unit owners, Monarch has no such authority. NRS 116.3102(1)(d) is the only stated basis of Monarch's supposed authority. However, a closer look at the use of the term "common-interest community" within NRS 116 demonstrates that Monarch does not have any standing to assert claims that belong to unit owners since ownership of the CMU gives rise to ownership of any claim arising out of the CMU. In this case, Monarch does not have an ownership interest in the CMU or any ownership

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of a claim arising out of the CMU. In fact, this Court recently held that to be a constructional defect claimant one must own the residence.[1]

1. Monarch is Limited by the CC&Rs and Has No Authority to Assert Claims on Behalf of Unit Owners.

According to NRS 116.3102(1), the powers of HOAs granted in NRS 116 are "***subject to the provisions of the declaration***." That is, the limitations identified in the CC&Rs limit Monarch's authority, and any authority granted by NRS 116 cannot go beyond the limited authority given to Monarch in the CC&Rs. It is undisputed that Monarch has duties and ownership interests in the common areas of the Monarch community.[2] Section 5.1(b) of the CC&Rs limits Monarch's power and duty to repair and maintain to the ***common areas*** and the improvements upon the common areas. Notably, the exhaustive definition of "common area" in the CC&Rs does not include the CMU:

> Section 1.17 "Common Area" shall mean those: (a) landscape easements, (b) public sewer and drainage easements, and (c) private street and public utility easements; respectively located on certain portions of Lots, all shown on the Plat, (d) additional landscape easements on portions of those Lots abutting Public Roads, located between the Exterior Side of Perimeter Walls and the public right of way, as set forth in further detail in this Declaration ("Landscape Buffer Area"); and (e) all Improvements constructed by Declarant on said easements, including, but not necessarily limited to, entry monument, entry gate to the Properties, streetlights (if any), "crash" gate, private streets, curbs, gutters, and landscaping. The Common Area shall constitute Common Elements as to the Properties, as provided in NRS § 116.110318.

Additionally, Monarch's common expenses are ***limited to removing or painting over graffiti*** on the ***exterior side*** of the CMU:[3]

> Section 1.18 "Common Expenses" shall mean expenditures made by, or financial liabilities of, the Association, together with any allocation to reserves, including the actual and estimated costs of: irrigation, maintenance, repair and replacement of the Common Area; maintenance, repair and replacement of Wall Lights; removing or painting over graffiti on the Exterior Side of Perimeter Walls…

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[1] ANSE, Inc. v. Dist. Ct., 124 Nev. Adv. Op. No. 74, at 18 (Sept. 25, 2008).

[2] See NRS 116.3107.

[3] See **Exhibit 2.3**, Section 1.18. The numbered exhibits identified in this Amicus Brief refer to the exhibits attached to Monarch's Writ Petition. The lettered exhibits are attached hereto.

So, it is clear that Monarch's duty and power to repair and maintain in the Monarch community are limited to only those areas over which Monarch has ownership and control, which does not include the CMU. Therefore, the Court should deny Monarch's Writ Petition.

Further, the CC&Rs also require Monarch to obtain "advance consent" of 75% of the voting power of the Association, which would be comprised of the individual unit owners.[4] But, Monarch seeks to ignore the express language of the CC&Rs and assert itself as a claimant, despite no proof that Monarch has obtained any "advance consent" of the unit owners. This was the very concern of the District Court—the fact that Monarch was asserting itself as a claimant while having no assignment from the unit owners, and additionally not having any proof that it had actually satisfied the 75% advance consent of the unit owners.[5] Even if Monarch had consent from the unit owners, Monarch's authority to institute litigation would still be limited to the areas which it owns or controls. In other words, the advance consent of 75% of the unit owners could not subject ***all*** unit owners into litigation involving ***all*** the units. Each individual unit owner retains ownership as well as the duty to maintain his own property, which includes an abutting portion of the CMU. Therefore, the Court should find that Monarch cannot make claims arising out of the CMU because Monarch has no consent or assignment from the unit owners.

The CC&Rs also clearly define that each unit owner is responsible "at his sole cost and expense" to "maintain, repair, replace and restore all Improvements located on his unit."[6] It is also undisputed that the CMU is deemed to be located ***within the boundaries of the individual lots of the unit owners***, and that each unit owner owns, repairs, and maintains the portion of the CMU that abuts his lot.[7] However, Monarch seeks to interfere with the relationship of a unit owner to his own property and the unit owner's duty to maintain and repair his own property—a

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[4] See **Exhibit 2.3**, Section 5.1(p).

[5] See **Exhibit 7**.

[6] See **Exhibit 2.3**, Section 9.1

[7] See **Exhibit 2.3**, Section 9.6.

proposition specifically prohibited by the CC&Rs. In the end, Monarch's supposed claim to "unlimited" statutory standing under NRS 116.3102(1)(d) simply does not exist since subsection 1 of this statute provides that Monarch's statutory authority is ***subject to*** the provisions of the CC&Rs. And, the CC&Rs make it abundantly clear that the unit owners own the CMU, and that the unit owners have the exclusive duty to maintain and repair their individual portions of the CMU. Therefore, any claim for constructional defects arising out of the CMU belongs to the unit owners, not Monarch. Hence, this Court should deny Monarch's Writ Petition that improperly seeks authority to make claims that the CC&Rs specifically prohibit.

2. The Term "Common-Interest Community" Refers Only to Areas Over Which Monarch Has Ownership and Control.

Although Monarch refers to NRS 116.3102(1)(d) as the supposed authority to perpetuate its claim against Johnson, Monarch fails to properly define the term "common-interest community." As defined in NRS 116.021, a common-interest community refers to "real estate ***other than a unit***." So, even the statutory definition of "common-interest community" separates the units that are owned by individual owners.

The CC&Rs define the Monarch community as a planned community.[8] A planned community is defined in NRS 116.075 as a common-interest community that is ***not*** a condominium or a cooperative. In contrast, a cooperative is defined as a common-interest community in which the real estate is owned by an association.[9] Essentially, Monarch seeks to have this Court declare that it has ownership rights over the individual units in order to make claims arising out of the CMU, despite the fact that the Monarch community is a planned community, not a cooperative.

Further, NRS 116.3107 specifically provides that an HOA, such as Monarch, is "***responsible for maintenance, repair and replacement of the common elements***" while each

[8] See **Exhibit 2.3**, Section 1.19.

[9] See NRS 116.031. A condominium is another type of common-interest community in which the areas traditionally designated as common areas are actually owned by the unit owners.

individual unit owner is "***responsible for the maintenance, repair and replacement of his unit***." Therefore, when the term "common-interest community" is taken into context of the usage within NRS 116, it is clear that "common-interest community" does not contemplate inclusion of the separate ownership of units held exclusively by the unit owners. In a planned community, such as the Monarch community, ownership of the units lies with the individual unit owners. It follows, therefore, that the individual unit owners, not Monarch, have the right to assert claims arising out of the CMU.

In the end, Monarch's desire to usurp the right from the unit owners to make a constructional defect claim arising out of the CMU falls completely flat in light of the definition of "claimant" under NRS 40.610 which requires that an HOA be "responsible for a residence." In fact, Monarch admits that it has no ownership or responsibility for the private and individually-owned CMU. Nevertheless, Monarch improperly seeks standing and authority from this Court that is not provided to Monarch either under statute or the CC&Rs. Therefore, this Court should deny Monarch's Writ Petition due to Monarch's overbroad and overreaching definition of "common-interest community."

B. THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA DO NOT PROHIBIT SIMULTANEOUS, OVERLAPPING CLAIMS MADE BY MONARCH AND THE UNIT OWNERS.

In Monarch's Petition, it suggests that overlapping claims from unit owners and an HOA are inconsequential because collateral estoppel and res judicata can somehow resolve any potential overlapping claims. However, Monarch's shortsightedness fails to consider that collateral estoppel and res judicata do not apply to ***simultaneous*** claims. In other words, without a final judgment, the doctrines of collateral estoppel and res judicata do not apply to bar a similar claim made at the same time by either unit owners and an HOA. Instead, contractors, such as D.R. Horton, are often subjected to a multiplicity of lawsuits from unit owners and an HOA for identical claims. Even when there is a final judgment, the doctrines of collateral and res judicata do not always apply to bar claims.

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1. The Doctrines of Collateral Estoppel and Res Judicata Are Not Valid Defenses to Simultaneous, Overlapping Claims Made by an HOA and Unit Owners.

The doctrine of res judicata is properly limited to the situation where there is a bar to or a merger of the ***former cause of action***. It is a rule which precludes the parties from relitigating what is substantially the same cause of action.[10] Res judicata has also been defined as claim preclusion, which only applies when a second suit is brought against the same party on the same claim.[11] The doctrine of issue preclusion or collateral estoppel similarly requires that an issue of fact or law be actually litigated and determined by a ***valid and final judgment.***[12] For res judicata to apply, three pertinent elements must be present: (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.[13]

In some instances, D.R. Horton is subjected to claims from an HOA for alleged constructional defects arising out of the common areas of a particular community. In such lawsuits, the HOA also usually alleges constructional defects within the individual units. Similarly, individual homeowners will also often allege constructional defects within their own units, and sometimes even go so far as to allege constructional defects within the common areas. To illustrate this point, D.R. Horton refers this Court to three lawsuits filed against D.R. Horton in the High Noon community in Las Vegas, Nevada. D.R. Horton was originally sued in November 2004 by 45 unit owners in the High Noon community. The unit owners alleged various constructional defects within their units and the related appurtenances. The case was docketed in the District Court as Case No. A495059.[14] D.R. Horton was later sued by a sole unit

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[10] Clark v. Clark, 80 Nev. 52, 389 P.2d 69 (1964).

[11] Executive Management, Ltd. v. Ticor Title Insurance Co., 114 Nev. 823, 963 P.2d 465 (1998).

[12] Id.

[13] Id.

[14] A copy of the Complaint filed in Case No. A495059 is attached hereto as **Exhibit A**.

owner in the High Noon Community whose claims were also limited to the unit and related appurtenances. This case was docketed in the District Court as Case No. A528123.[15] Earlier this year, the High Noon HOA has also asserted claims for constructional defects both within the individual units and within the common areas. Because of the notice-pleading allowance of NRCP 8, the individual units are not identified in High Noon HOA's Counterclaim, even though many of the units are already involved in litigation. This case was docketed as Case No. A566724.[16]

Due to the simultaneous, overlapping claims from an HOA and unit owners, it is certain that a bright-line rule needs to be established by this Court. A bright-line rule makes the most sense in which a claimant (whether an HOA ***or*** a unit owner) may only assert alleged constructional defects when the claimant has ownership over the particular real estate where the claim is located. This appears to be the statutory construction of the provisions of NRS 116 as well as NRS 40.610 defining the term "claimant." Nevertheless, without a bright-line rule and clarification, developers, such as D.R. Horton, have been subjected to multiple suits from various parties for the identical alleged constructional defects. The multiplicity of lawsuits causes developers, such as D.R. Horton, the unnecessary time and expense to defend lawsuits that have no basis to be filed. Therefore, this Court should reject Monarch's suggestion that collateral estoppel and res judicata somehow operate to bar simultaneous, overlapping claims against a developer for constructional defects arising under NRS 40.600 et seq.

2. Even With a Final Judgment, the Doctrines of Collateral Estoppel and Res Judicata Do Not Always Prohibit Similar Claims.

Res judicata may not apply to defendants unless their hostile and conflicting claims were actually brought in issue, litigated, and determined.[17] This Court has also recognized that waiver of the preclusive effect of a first judgment is a possible avenue to file a second suit based upon

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[15] A copy of the Complaint filed in Case No. A528123 is attached hereto as **Exhibit B**.

[16] A copy of the Answer and Counterclaim filed in Case No. A566724 is attached hereto as **Exhibit C**.

[17] University of Nevada v. Tarkanian, 110 Nev. 581, 600, 879 P.2d 1180, 1192 (1994).

the conduct of the parties.[18] Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based upon a different cause of action involving a party to the prior litigation. So, there are situations in which a final judgment still may not bar overlapping claims, which is perhaps even more persuasive evidence that this Court should clarify that a claimant under NRS 40.610 must have an ownership interest or an assignment from the owner to assert constructional defect claims arising out of the particular property in question.

While it is clear that collateral estoppel and res judicata do not apply to bar claims and issues until there has been a final judgment, the law has created various exceptions to the doctrines of collateral estoppel and res judicata such that it is possible for a final judgment to be entered, and these doctrines may not actually operate to bar future claims that are similar or identical. Accordingly, not only do collateral estoppel and res judicata fail to afford the necessary relief to contractors, such as D.R. Horton, but even the entry of a final judgment may not actually operate in favor of developers to bar identical claims. So, developers may be subjected to additional lawsuits based upon any of the exceptions in the collateral estoppel and res judicata doctrines. For example, res judicata may not apply to a subsequent claim by a unit owner if he can establish that he had no privity with the HOA, if the conduct of the parties constituted waiver, or if certain claims in the subsequent lawsuit were not litigated in the first lawsuit.

C. MONARCH'S RELIANCE ON THE DISSIMILAR STATUTES FROM FOREIGN JURISDICTIONS IS MISPLACED.

Monarch cites to cases from other states as support for its assertion that Nevada should adopt these other states' interpretation of HOA standing. However, Monarch's reliance on case law from these foreign jurisdictions is misplaced. The states where Monarch's case law originated have adopted varying versions of the Uniform Common Interest Ownership Act ("UCIOA"). Thus, the other cases from these states, which all turn on the interpretation of each

[18] Executive Management, Ltd. v. Ticor Title Insurance Co., 114 Nev. 823, 963 P.2d 465 (1998).

state's common interest ownership act, are of limited value in determining the meaning of NRS Chapter 116.

In Nevada, when a statute is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state.[19] In the case of NRS 116, Nevada adopted the UCIOA, but made certain significant alterations to the Model Act's language. Other states did the same. In Nevada's version, the definition of "common-interest community" is different from that in the UCIOA. In the 1982 version of the UCIOA, which was the version considered by the Nevada Legislature, the definition of "common-interest community" was as follows:

> "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 taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration***. "Ownership of a unit" does not include holding a leasehold interest of less than [20] years in a unit, including renewal options.[20]

In Nevada, the definition of common interest community was adopted as:

> "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.*** "Ownership of a unit" does not include holding a leasehold interest of less than 20 years in a unit, including options to renew.[21]

No reason is given in the legislative history for the change. However, the change is significant because it redefines the boundaries of the common-interest community.

Also significant is what the Nevada Legislature did not change when adopting the UCIOA. The provision of the UCIOA regarding the power of an HOA to institute, defend or intervene in litigation on behalf of homeowners was not altered or amended by Nevada lawmakers:

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[19] Craigo v. Circus-Circus Enterprises, Inc., 106 Nev. 1, 3, 786 P.2d 22, 23 (1990) (citations omitted), *disapproved of on other grounds by*, Countrywide Home Loans v. Thitchener, 124 Nev. Adv. Op. 64 (Sept. 11, 2008).

[20] UCIOA §1-103(7) (emphasis added).

[21] NRS 116.021 (emphasis added).

> (a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association [, even if unincorporated,] may:
>
> . . .
>
> (4) institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or 2 or more unit owners on matters affecting the common interest community.[22]

The persuasive value of the case law from states that have adopted the UCIOA depends on the similarity of their statutory language to Nevada's. In particular, the persuasiveness of the case law depends on each state's interpretation of the provision giving powers to an HOA to intervene or institute litigation and the provision defining a "common-interest community."

1. Colorado.

Colorado's common-interest community statutes permit associations to "Institute, 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."[23] However, Colorado has adopted a different definition of "common-interest community" than Nevada. Notably, Colorado's "common-interest community" definition does not include Nevada's key phrase: "other than that unit."

The definition of "common-interest community" under Colorado law is as follows:

> "Common interest community" means real estate described in a declaration with respect to which a person, by virtue of 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.*** Ownership of a unit does not include holding a leasehold interest in a unit of less than forty years, including renewal options. The period of the leasehold interest, including renewal options, is measured from the date the initial term commences.[24]

Monarch's citation to a line of cases interpreting Colorado's statutes is irrelevant here. The Colorado Legislature adopted a completely different definition of "common-interest community" than Nevada. Colorado's definition of "common-interest community" is cited in

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[22] UCIOA § 3-102(a)(4). NRS 116.3102(1)(d) contains identical language.

[23] Colo. Rev. Stat. § 38-33.3-302(1)(d) (1991).

[24] Colo. Rev. Stat. § 38-33.3-103(8) (1991) (emphasis added).

Yacht Club II Homeowners Ass'n v. A.C. Excavating,[25] and Heritage Village Owners v. Golden Heritage Investors,[26] decisions upon which Monarch heavily relies.

2. Connecticut.

Connecticut's statute regarding the powers of an HOA to bring litigation is identical to the UCIOA and to Nevada's statute.[27] However, Connecticut has adopted a different definition of "common-interest community" than Nevada. Connecticut's statute states:

> "Common-interest community" means real property described in a declaration with respect to which a person, by virtue of his ownership of a unit, ***is obligated to pay for (A) real property taxes on, (B) insurance premiums on, (C) maintenance of, or (D) improvement of, any other real property other than that unit described in the declaration.*** "Ownership of a unit" includes holding a leasehold interest of forty years or more in a unit, including renewal options. "Ownership of a unit" does not include the interest which a resident holds in a mutual housing association, as defined in subsection (b) of section 8-214f, by virtue of either a state contract for financial assistance or an individual occupancy agreement. An association of property owners funded solely by voluntary payments from those owners is not a common interest community.[28]

The cases cited by Monarch, namely Winthrop House Association, Inc. v. Brookside Elm., Ltd.,[29] and Candlewood Landing Condominium Ass'n v. Town of New Milford[30] relied on the courts' interpretation of the Connecticut statutes. Because Nevada's statute has a different definition of "common-interest community" than Connecticut, the Connecticut cases are of limited utility to this Court's construction of NRS 116.

3. Oregon.

The Oregon case law cited by Monarch relied on the 1997 version of the Oregon common-interest community statutes, which gave broader powers to HOAs than the 1999

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[25] 94 P.3d 1177 (Colo. App. 2003).

[26] 89 P.3d 513, 514 (Colo. App. 2004).

[27] See Conn. Gen. Stat. § 47-244(1)(d).

[28] Conn. Gen. Stat. § 47-202(7) (emphasis added).

[29] 451 F.Supp.2d 336, 340–41 (D. Conn. 2005).

[30] 686 A.2d 1007 (Conn. App. 1997).

amendments. Under the prior 1997 version, an HOA could bring suit on behalf of two or more unit owners on any matter "affecting the condominium."[31] In 1999, the Oregon statute was amended to be more restrictive:

> (4) Subject to the provisions of the condominium's declaration and bylaws, and whether or not the association is unincorporated, the association may:
>
> . . .
>
> (e) Subject to subsection (11) of this section, initiate or intervene in litigation or administrative proceedings in its own name, and without joining the individual unit owners, in the following:
>
> (A) Matters relating to the collection of assessments and the enforcement of declarations and bylaws;
>
> (B) Matters arising out of contracts to which the association is a party;
>
> (C) Actions seeking equitable or other nonmonetary relief regarding matters that affect the common interests of the unit owners, including but not limited to the abatement of nuisance;
>
> (D) Matters relating to or affecting common elements, including but not limited to actions for damage, destruction, impairment or loss of use of any common element;
>
> (E) Matters relating to or affecting the units or interests of unit owners including but not limited to damage, destruction, impairment or loss of use of a unit or portion thereof, if:
>
> (i) Resulting from a nuisance or a defect in or damage to a common element; or
>
> (ii) Required to facilitate repair to any common element; and
>
> (F) Any other matter to which the association has standing under law or pursuant to the declaration, bylaws or any articles of incorporation.[32]

These statutes deal with condominiums only. The case law cited in Johnson's Answer, Quail Hollow West Owners Ass'n v. Brownstone Quail Hollow, LLC, interprets a provision identical to the Oregon common-interest community statutes.[33] In interpreting Or. Rev. Stat. §

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[31] Or. Rev. Stat. § 100.405(4)(d) (1997); see also Ass'n of Unit Owners of Bridgeview Condo. v. Dunning, 187 Or. App. 595 (2003).

[32] Or. Rev. Stat. § 100.405(4)(e)(1999).

[33] 136 P.3d 1139 (Or. App. 2006).

94.630(1)(e), the Court of Appeals of Oregon held in that the statute did not authorize an HOA to sue on behalf of the individual unit owners.[34]

4. Utah.

Utah's common-interest community statutes give broad powers to an HOA to sue on behalf of two or more unit owners, without limiting the HOA's standing to "matters affecting the common-interest community." Specifically, the Utah statute states:

> Without limiting the rights of any unit owner, actions may be brought by the manager or management committee, in either case in the discretion of the management committee, on behalf of two or more of the unit owners, as their respective interest may appear, with respect to any cause of action relating to the common areas and facilities or more than one unit. Service of process on two or more unit owners in any action relating to the common areas and facilities or more than one unit may be made on the person designated in the declaration to receive service of process.[35]

Because Utah's statute is so much broader than Nevada's statute, Monarch's reliance on the Utah Supreme Court's interpretation of the statute in Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons[36] is misplaced.

5. Maryland.

The Maryland statute and case law cited by Monarch deals with the state's condominium act, not the UCIOA.[37] As such, Maryland's interpretation of its own condominium statutes is not helpful to this Court in interpreting Nevada's common-interest community act, which is based on the UCIOA.

6. Illinois.

The Illinois common-interest act is strikingly dissimilar to Nevada's. The Illinois act allows an HOA to sue on behalf of unit owners "as their interests appear" without any

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[34] Quail Hollow, 136 P.3d at 1147.

[35] Utah Code Ann. § 57-8-33 (1953).

[36] 668 P.2d 535 (Utah 1983).

[37] Md. Code Ann., Real Property, § 11-109 (d)(4); see also Milton Co. v. Council of Unit Owners of Bentley Place Condominium, 354 Md. 264, 729 A.2d 981 (1999).

limitation.[38] This statute grants much broader powers to an HOA to sue on behalf of unit owners than Nevada's statute. Thus, case law interpreting this statute that grants unlimited standing and power is unpersuasive.

7. District of Columbia.

Monarch's cited case law from the District of Columbia did not even involve the UCIOA, which the District of Columbia has not adopted.[39] Owens dealt with D.C.'s condominium statutes and horizontal property act, which are not comparable to Nevada's common-interest community act.

As is evident from this overview of foreign statutes, the case law cited by Monarch is of limited utility to this Court's construction of Nevada's common-interest community act. A better guide is found in the language of NRS 116.021, NRS 116.3102, and the CC&Rs.

IV. CONCLUSION

This Court should clarify that the ownership of real property gives rise to ownership of a claim for alleged constructional defects. The relief that Monarch's Writ Petition seeks violates not only the provisions of its own CC&Rs, but also the statutory limits identified in NRS 116 and NRS 40.610. In short, Monarch seeks to prosecute claims for which it has no ownership or duty to maintain. This admitted fact is fatal to the entire basis for Monarch's Writ Petition. In the end, Monarch's position runs completely afoul of the express provisions of the CC&Rs as well as the controlling provisions of NRS 116.

If this Court were to accept Monarch's absurd position, contractors, such as D.R. Horton, would be subjected to a multiplicity of lawsuits from both unit owners and an HOA for the same alleged constructional defects since collateral estoppel and res judicata do not prevent simultaneous, overlapping claims. The absence of a bright-line rule prohibitively requires contractors to defend themselves and incur thousands of dollars in unnecessary attorney fees and

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[38] 765 Ill. Comp. Stat. 605/9.1; see also Sandy Creek Condo. Ass'n v. Stolt & Egner, Inc., 642 N.E.2d 171 (App. Ct. Ill. 2d Dist. 1994).

[39] Owens v. Tiber Island Condo. Ass'n, 373 A.2d 890 (D.C. 1977).

costs based upon an HOA's supposed right to allege claims for which it has no standing and no ownership interest.

Further, Monarch's reliance upon dissimilar foreign statutes and foreign case law is unpersuasive since this foreign law is based upon distinct provisions not present in Nevada's statutes. Therefore, this Court should deny Monarch's Writ Petition.

Dated this ____ day of October, 2008.

MARQUIS & AURBACH

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this **D.R. HORTON, INC.'S AMICUS CURIAE BRIEF IN SUPPORT OF POSITION OF REAL PARTIES IN INTEREST** 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 requirements of the Nevada Rules of Appellate Procedure.

Dated this ____ day of October, 2008.

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I hereby certify that on the ___ day of October, 2008, I served a copy of the foregoing **D.R. HORTON, INC.'S AMICUS CURIAE BRIEF IN SUPPORT OF POSITION OF REAL PARTIES IN INTEREST** upon each of the parties by depositing a copy of the same in a sealed envelope in the United States Mail, Las Vegas, Nevada, First-Class Postage fully prepaid, and addressed to:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MONARCH ESTATES HOMEOWNERS ASSOCIATION, A NON-PROFIT CORPORATION;	Supreme Court No.: 51942
Petitioner,	District Court Case No. A545049
vs.	
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT COURT JUDGE	
Respondents,	
and	
JOHNSON COMMUNITIES OF NEVADA, INC., A NEVADA CORPORATION; RICHMOND AMERICAN HOMES OF NEVADA, INC., A FOREIGN CORPORATION,	
Real Parties in Interest	

FILED
AUG 20 2008
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY _____
DEPUTY CLERK

REAL PARTY IN INTEREST JOHNSON COMMUNITIES OF NEVADA, INC.'S ANSWER TO MONARCH ESTATES HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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COMES NOW Real-Party-In-Interest, JOHNSON COMMUNITIES OF NEVADA, INC. (hereinafter referred to as "JOHNSON"), by and through its attorneys of record, the law firm of LEE, HERNANDEZ, KELSEY, BROOKS, GAROFALO & BLAKE, and hereby submits its Answer to Petitioner's, the Monarch Estates Homeowners Association, Petition for Writ of Prohibition or Mandamus. JOHNSON respectfully submits this Answer in support of Respondent's, the Eight Judicial District of the State of Nevada and the Honorable Judge Timothy C. Williams', ruling that the Petitioner lacked standing to pursue their constructional defect claims pertaining to the concrete masonry unit ("CMU") fencing surrounding the Monarch Estates single-family home development. While N.R.S. Chapter 116 provides a limited instance where a homeowners' association may initiate claims involving the common areas on behalf of the community's homeowners it undoubtedly does not provide a method for an HOA's widespread pursuit of constructional defect claims for separate interests within a single-family home community. A homeowner has a fundamental right to decide what will be done to his home. Allowing the Petitioner to assert rights that belong to the homeowner, without any notice, would be to take away the homeowner's fundamental ownership rights. As such, the HOA's Petition for a Writ of Prohibition or Mandamus is without merit and must be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUE PRESENTED

The issues complained of in Petitioner's Brief are self-serving, speculative and miss the true meaning of Nevada Revised Statute ("NRS")116.3101. NRS 116.3101, *et seq.* applies to "common interest communities" and does not serve to control separate and individually held interests in any common interest community whether it be single-family homes, townhomes or condominiums. Therefore, NRS 116.3102(1)(d) does not provide the HOA with standing to steal individual homeowners' abilities to control whether construction defect litigation will affect their individual single family residence.

More specifically, the issues presented in JOHNSON's Answering Brief are as follows:

(1) NRS 116.3102 does not confer standing upon a homeowners' association to maintain

a constructional defect suit on behalf of an entire community consisting of single-family homes for those homeowners' individual property interests;

(2) The Petitioner's requested relief undermines this Court's ruling in Shuette v. Beazer Homes Holding Corp.,[1] and provides a means to "end run" the class certification requirements; and

(3) The Petitioner's argument that JOHNSON lacked the requiste standing to raise the CC&Rs in defense of the HOA's claims was improperly brought before this Court.

II. STATEMENT OF CASE

This case stems from the alleged defective construction of certain of the common areas located at Monarch Estates, a single-family residential community, generally located in Las Vegas, Nevada.[2] On or about August 23, 1996, JOHNSON purchased 85 finished lots from a company called Bermuda Springs Developers Joint Venture, which included all finished civil improvements with the exception of the CMU fencing surrounding the community. At the time of purchase, all civil improvements, but for the CMU fencing surrounding the community, had been fully constructed by a company called U.S. Home Corporation. From July 10, 1996 to November 10, 1999, JOHNSON served as the general contractor for the construction of the CMU fencing surrounding the community at Monarch Estates, and hired licensed subcontractors to complete all aspects of its construction.[3] JOHNSON itself performed no actual construction at Monarch Estates. Monarch Estates includes 84 single-family homes (the 85 finished lots ultimately became 84 when construction at Monarch Estates ceased) which are not at issue in this litigation; 47 of the single-family homes were ultimately constructed by JOHNSON.

JOHNSON was initially served with a *Notice To Contractor Pursuant To Nevada Revised Statutes, Section 40.645* dated May 25, 2006, by the Petitioner. (Petitioner App. Exh. 2) The

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[1] Shuette, et al. V. Beazer Homes Holdings Corp., 124 P.3D 530, 2005 Nev. LEXIS 100, 121 Nev. Adv. Op. 82 (December 15, 2005).

[2] Plaintiff's Complaint, filed July 23, 2007.

[3] Johnson Communities of Nevada, Inc. Accounting Records, attached hereto and incorporated herein for reference as Exhibit "A".

purported defects at Monarch Estates primarily concern the CMU fencing surrounding the community and certain civil improvements, inclusive of concrete flatwork and asphalt paving installation. Upon receipt of said notice, JOHNSON responded to Petitioner's allegations pursuant to the requirements of NRS Chapter 40. Petitioner was advised that JOHNSON was not responsible for any of the alleged defects pertaining to the fencing surrounding the community CMU perimeter wall under any theory of liability available to the Petitioner under Nevada law. JOHNSON based this contention on the fact that under the Monarch Estates Covenants, Conditions and Restrictions, (hereinafter "CC&R's) ownership and maintenance of the CMU perimeter walls was held by the individual homeowners and not the Petitioner. As such, any claim pertaining to the CMU walls would have to be initiated by the individual homeowners and not the Petitioner, as the Petitioner had no standing. Accordingly, JOHNSON recommended that Petitioner move forward with filing its complaint against JOHNSON.

On or about July 23, 2007, a *Complaint* was filed by the Petitioner against JOHNSON. (Petitioner App. Exh. 1) On or about September 17, 2007, JOHNSON filed a *Motion to Dismiss or in the Alternative, a Motion for Summary Judgment*. (Petitioner App. Exh. 2) In said Motion, JOHNSON asserted that the Petitioner lacked standing to pursue damages for claims arising out of the alleged defective construction of the CMU fencing surrounding the community based on the unambiguous language contained in the Monarch Estates CC&R's. The District Court hearing on JOHNSON's *Motion to Dismiss or in the Alternative, a Motion for Summary Judgment* was held on October 27, 2007. The District Court granted JOHNSON's Motion and on December 31, 2007, issued a Minute Order stating:

> "After review of the points and authorities on file herein, and the argument of counsel, the Court determined, based upon a review of the Monarch Estates CC&R's and NRS 116, that the homeowners association, absent a written assignment, does not have standing to pursue a construction defect claim for the CMU fencing. Consequently, Defendant's Motion to Dismiss or Partial Summary Judgment as to the exterior wall is hereby GRANTED. Counsel for Defendant to prepare the Findings of Fact and Conclusions of Law" (Petitioner App. Exh. 7).

In the course of preparing an Order for the District Court a dispute arose between the parties regarding whether the Petitioner's NRS Chapter 116 breach of warranty claims related to other aspects of construction had been dismissed in conjunction with their claims pertaining to the CMU

walls, and on which provisions of NRS Chapter 116 and the CC&R's the District Court relied in reaching its conclusion that the Petitioner lacked standing to pursue their claims for the CMU walls. To gain the requisite clarification from the District Court, JOHNSON and the Petitioner filed a *Joint Motion for Clarification.* (Petitioner App. Exh. 8) A hearing was held on March 26, 2008, and on June 17, 2008, the District Court issued a Minute Order stating:

> "After review and consideration of the points and authorities herein and argument of counsel the court hereby clarifies it's order of December 31, 2007, that the Motion for Summary Judgment was GRANTED only as to the Association's standing with respect to instituting litigation in its own name on behalf of its members for damages arising out of the construction of the perimeter CMU walls. Counsel for Defendant Johnson Communities of Nevada shall prepare the Order and Findings of Fact and Conclusions of Law"(Petitioner App. Exh. 9).

As a result of the District Curt ruling the Petitioner submitted the instant Petition for Writ of Mandamus and Prohibition to the Nevada Supreme Court on June 30, 2008, requesting a reversal of the District Court ruling.

III. REASONS WHY THE DISTRICT COURT RULING MUST BE UPHELD

A. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE PETITIONER DOES NOT HAVE STANDING TO INSTITUTE LITIGATION ON BEHALF OF THE ASSOCIATION ARISING OUT OF CONSTRUCTION OF THE PERIMETER CMU WALLS

1. Petitioner Lacks Standing to Litigate Separate Interests of Community Members Under NRS 116

"The doctrine of 'standing' requires the party bringing suit to allege an injury to a legally protected interest, so that the court may decide only specific controversies."[4] "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues."[5] The concepts of "standing" and "real party in interest" are closely related and often discussed in conjunction with one another. The relationship between these concepts is set forth in Nevada Rules of Civil Procedure ("NRCP"), Rule 17(a)[6] , which states as follows:

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[4] Briarcliffe West Townhomes Owners Ass'n v. Wiseman Construction Co., 454 N.E.2d 363, 365-367 (Ill. App. 1983)(internal citations omitted).

[5] Warth v. Seiden, 422 U.S. 490 498, 95 S.Ct. 2197, 2205

[6] NRCP 17(a). Every action shall be procecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining

> A 'real party in interest' under NRCP 17(a) is one who possesses the right to enforce the claim and has significant interest in the litigation [..]. The question of standing is similar; it also focuses on the party seeking adjudication rather than on issues sought to be adjudicated [..]. [7]

Prior to the enactment of NRS 116.3102(1)(d), the Nevada Supreme Court, citing NRCP 17(a) in Deal v. 999 Lakeshore Association, held that construction defect suits (whether involving common area claims or not) must be pursued in the name of the real party in interest and that in such a case, only a real property owner could be a real party in interest despite any homeowners' association's maintenance duties.[8] [Emphasis Added] The Court in Deal unequivocally stated that without an express statutory grant, only actual homeowners, **not the associations**, have standing to bring suits involving their own real property. This holding is oft-repeated in subsequent Nevada case law.[9]

Since the Deal decision, the Nevada Legislature specifically enacted NRS 116.3102(1)(d), to allow a homeowners' association to bring suit regarding common area claims even though specific injury does not result to the association. However, it is quite telling that the Legislature has not gone so far as to provide a statutory grant for homeowners associations to pursue non-common area claims. As set forth below, Petitioner is clearly not the real party in interest for any home specific defect claim being asserted in the underlying action. Moreover, NRS chapter 116 does not confer such status to Petitioner despite the legislature's enactment of NRS 116.3102 (1)(d).

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with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State. NRCP 17(a) also provides that an action may only be maintained by a real party in interest unless a statutory grant exists.

[7] Szilagyi v. Testa, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983)[*internal citations omitted in text*],*citing* Painter v. Anderson, 96 Nev. 941, 620 P.2d 1254 (1980) and Harmon v. City and County of San Francisco, 7 Cal.3d 150, 101 Cal.Rptr. 880, 496 P.2d 1248, 1254 (1972)

[8] Deal v. 999 Lakeshore Association, 94 Nev. 301, 304-305, 579 P.2d 775, 777-778 (1978), *relying on*, Wittington Condominium Apts., Inc. v. Braemer Corp, 313 So.2d 463 (Fla.App. 1975), Friendly Village Com. Ass'n v. Silva & Hill Const. Co., 107 Cal.Rptr. 123 (Cal.App. 1973). As Petitioner points out in its Brief, Deal has been supe rseded by statue (i.e. NRS Chapter 116). As such, it is used for historical purposes and to make clear that the Petitioner does not have the authority to pursue individual interest claims like the CMU fencing surrounding the community in this case.

[9] Colfer v. Harmon, 108 Nev. 363, 367, 832 P.2d 383, 386, (1992); Wardleigh v. Second Judicial District Court of the State of Nevada, 111 Nev. 345, 352, 891 P.2d 1180, 1185 (1995).

2. NRS 116.3102(1)(d) Only Allows A Homeowners' Association To Pursue Common Area Defect Issues.

Regardless of Petitioner's contentions NRS 116.3102(1)(d) does not allow homeowners associations to pursue "non-common area" claims. NRS 116.3102(1)(d) "Powers of unit-owners' association" specifically reads as follows:

> 1. 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]

It is critically important to note, two important limitations in the above-referenced statute. First, the Petitioner's ability to pursue litigation can be limited by the language of the "declaration" which consists of the documents used to create the "common-interest community."[10] Second, this legislative grant is limited to "matters affecting the common-interest community." A "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 that unit."[11] It specifically identifies the property that a property owner is responsible for *other than* that owners' residence.

The plain language of the relevant statutes within NRS Chapter 116 clearly provides a limited instance where a homeowners' association may pursue claims involving the common areas on behalf of the community's homeowners. It certainly does not provide a mechanism for a homeowners' association's wholesale pursuit of construction defect claims for all separate interests within an entire single-family home community, simply because Petitioner's counsel determines that those claims "affect the common interest community."

These limitations are carried over to NRS 40.600 *et seq*. Specifically, NRS 40.610 clearly identifies those who have standing to pursue a construction defect action, specifically requiring as follows:

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[10] NRS 116.037 "Declaration" defined. Additionally, in this case, the Monarch Estates CC&Rs are the operative governing documents for the Monarch Estates Development, a true and correct copy is attached to JOHNSON's Answer as Exhibit "B" and is incorporated herein by reference as if fully set forth herein.

[11] NRS 116.021 "Common-Interest Community" defined.

"Claimant" defined. "Claimant" means:

1. An owner of a residence or appurtenance;

2. A representative of a homeowner's association **that is responsible for a residence or appurtenance and is acting within the scope of his duties** pursuant to chapter 116 or 117 of NRS; or

3. Each owner of a residence or appurtenance to whom a notice applies pursuant to subsection 4 of NRS 40.645.[12] [Emphasis Added]

As set forth above, a homeowners' association's statutory charge, and that of the instant Petitioner, is limited to the care of the common areas of the Monarch Estates development. Therefore, the Petitioner may only maintain an action alleging residential construction deficiencies in the common areas under the Petitioner's care and as defined by the Monarch Estates CC&Rs. The Petitioner cites NRS 116.3101(2) for the proposition that a homeowners association is "responsible" for all residences and appurtenances that are included in the common interest community. (*See,* Petitioner Brief at 44:15-20). NRS 116.3101(2) states:

> "The membership of the association at all times consists exclusively of all units' owners or, following termination of the common-interest community, of all owners of former units entitled to distributions of proceeds under NRS 116.2118, 116.21183 and 116.21185, of their heirs, successors or assigns"

Nowhere in NRS 116.3101(2) does it state that the Petitioner is "responsible" for all residences and appurtenances within the common-interest community. All that is noted is what the common-interest community consists of, nothing more and nothing less. The Petitioner again is attempting to stretch the meaning of NRS Chapter 116 to fit their interests and somehow make NRS 116 analogous with the standing requirements of NRS 40.610.

3. The Nationwide "Authority" Provided by The Petitioner is Not Persuasive, nor is it Applicable, and is Readily Distinguishable From the Matter at Hand

The Petitioner's reliance upon NRS Chapter 116 to assert standing to prosecute claims for single-family residences and separate interest claims is entirely misplaced. Petitioner's brief fails to provide any on-point authority or any persuasive holdings where NRS Chapter 116 is applied to grant standing to bring claims related to individual interests in "single-family" communities. While

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[12] NRS. 40.610.

the Petitioner misapplies the case law upon which it relies to support it's tenuous position, said case law does help to allow JOHNSON to bring home its point and the reasons for which this Court must deny Petitioner's Writ of Mandamus and Prohibition. Specifically, this very basic concept is pronounced in Brickyard Homeowners' Ass'n Management Comm.,[13] whereby the Utah Supreme Court pointed out that:

> **A condominium owner is the holder of a hybrid real property interest consisting of "two distinct tenures, one in severalty and the other in common; both types, although well established separately, are inseparably joined in a condominium.**[14] [Emphasis Added]

This statement succinctly demonstrates that varying treatment of an ownership interest in condominiums versus single-family homes is not unfair or prejudicial to the Petitioner, but instead is grounded upon the nature of the property composition and uniqueness of ownership inherent in condominiums and townhomes. The Brickyard court utilizes the Utah ***Condominium*** Ownership Act to support its position, and echoes the statements of Siller, (another condominium case cited by Petitioner) where that court reasons as follows:

> Realistic and practical application of the statutory scheme requires that the language used in and pursuant to the statute be liberally construed to include the assertion and settlement of claims on behalf of unit owners against the developer with respect to common elements. To deprive the association of the rights to act on behalf of all unit owners in such matters would leave the responsibility for and authority over the common elements fragmented and thus make vindication of the common rights highly uncertain, difficult and burdensome. The statute [New Jersey Condominium Act, NJ Stat. Ann. 46.8B-18] is clearly designed to avoid just that result.[15]

Clearly, the Brickyard Court emphasizes the fact that the Utah Condominium Act allows condominium associations to pursue common area claims on behalf of all condominium unit owners in a common interest community, due to the uniqueness of a condominium or shared interest property. What makes a condominium "unique" is the composition of the actual building. Condominiums have shared roofs, walls, electrical and plumbing systems. As such, it makes sense to have an association to deal with any issues that may affect that shared construction. Likewise, the

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[13] Brickyard Homeowners' Ass'n Management Comm. v. Gibbons Realty Co, 668 P.2d 535 (Utah 1983).

[14] Id. at 537.

[15] Id. at 537, *citing* Siller v. Hartz Mountain Assoc., 446 A.2d 551, 554 (N.J. 1981).

other cases cited by Petitioner, namely Yacht Club II, Winthrop House Association, The Milton Co; Tiber Island Condominium Ass'n; and Association of Unit Owners of Bridgeview Condominiums[16] involve condominium litigation and cite the Colorado Common Interest Ownership Act, [17] Connecticut Common Interest Ownership Act,[18] Maryland Condominium Act,[19] the Horizontal Property Act (a subdivision of Washington D.C.'s condominium laws)[20] and the Oregon Condominium Act.[21]

Like NRS 116.3102(1)(d), Colorado's statutory provision CRS 38-33.3-302(1)(d), permits an association to pursue litigation "in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community."[22] As demonstrated below, just like NRS 116.3102(1)(d), that statute does not permit an association to pursue litigation involving an individual's separate fee simple property interest.

The case cited below bolster JOHNSON's position that while NRS 116.3102 (1)(d) may allow a homeowners' association to pursue litigation on matters affecting the "common interest" community it does not neccessarily allow claims to be brought for interests that are owned by the individual homeowner. For example, Yacht Club II, does not grant an association unlimited ability to pursue individual unit claims, but instead confirms that any association action based upon a grant

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[16] Yacht Club II Homeowners Association v. A.C. Excavating, 94.P.3d 1177 (Colo.App.2003)(common area defect claims); Winthrop House Asociation v. Brookside Elm, Ltd., 451 F. Supp. 2d 336 (USDC, Conn. 2005)(common area defects claims); Milton Co. v. Council of Unit Owners of Bentley Place Condo., 729 Ad.2d 981 (Md. 1999)(common area defect claims.); Owens v. Tiber Island Condominium Ass'n, 373 A.2d 890 (D.C. 1977)(homeowners contest association's action to enjoin subway construction.); Association of Unit Owners of Bridgeview Condominiums v. Charles G. Dunning, 69 P.3d 788 (Or. App. 2003)(common area defect claims.).

[17] Yacht Club II, 94 P.3d at 1180, citing 38-33.3-302(1(d) of the Colorado Common Interest Ownership Act.

[18] Winthrop House Asociation, 451 F. Supp. 2d at 340 citing Conn. Gen Stat 47-244(a)(4)

[19] The Milton Co., 354 Md. at 276, *citing* Md. Real Prop. Code Ann. 11-109(d)(19) of the Md. Condominium Act.

[20] Owens v. Tiber Island Condominium Ass'n, 373 A.2d at 894, *citing* D.C. Code 1973, 5-924(a) of the Horizontal Property Act, a subdivision of the Condominium Act.

[21] Ass'n of Unit Owners of Bridgeview Condominiums, 187 Ore. App. at 608, *citing* ORS 100.405(4)(d) of the Oregon Condominium Act.

[22] CRS 38-33.3-3-302(1)(d)