

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 D.R. HORTON INC., a Delaware  
3 Corporation

4                                   Petitioner,

5 vs.

6 EIGHTH JUDICIAL DISTRICT COURT of)  
7 the State of Nevada, in and for the )  
8 COUNTY OF CLARK; and the )  
9 HONORABLE SUSAN H. JOHNSON, )  
10 District Judge, )

11                                   Respondent.

12 HIGH NOON AT ARLINGTON RANCH )  
13 HOMEOWNERS ASSOCIATION, a )  
14 Nevada non-profit corporation, )

15                                   Real Party in Interest. )

) Supreme Court Case No.: 58533

) District Court Case No.: A542616

) Department No.: XXII

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16                                   **PETITIONER D.R. HORTON INC.'S REPLY IN SUPPORT OF ITS PETITION FOR**  
17                                   **WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION**

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**AFFIDAVIT OF IAN P. GILLAN, ESQ.**

STATE OF NEVADA            )  
  ) ss:  
COUNTY OF CLARK         )

I, IAN P. GILLAN, ESQ., being first duly sworn on oath, deposes and states under penalty of perjury that the following assertions are true and correct, and my own personal knowledge:

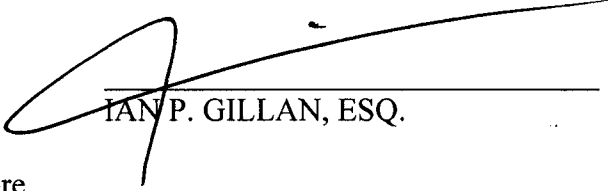
1. I am an attorney duly licensed to practice law in the State of Nevada, and I am a Partner of the law firm KOELLER NEBEKER CARLSON & HALUCK, LLP, attorneys for Petitioner, D.R. HORTON, INC. in support of its REPLY IN SUPPORT OF ITS PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION.

2. This Petition is being pursued because the Eighth Judicial District Court of Clark County, Nevada abused its discretion by ruling that the Association does not have to satisfy the analysis and prerequisites of *D.R. Horton, Inc. v. Eighth Judicial District Court*, 125 Nev.Ad.Op. 35, 215 P.3d 697 (2009) and *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005) and NRCP 23 before it can litigate constructional defect claims in a representative capacity on behalf of its members for defects affecting the Units.

3. I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matter in the record to be supported by a referenced to the portion 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.

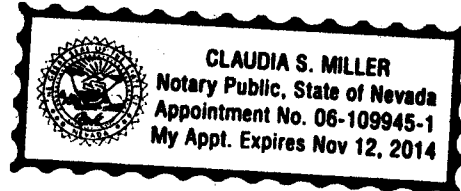
1           4.     I have discussed the REPLY IN SUPPORT OF PETITION FOR WRIT OF  
2 MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION with the Petitioner  
3 and have obtained authorization to file the same.

4           FURTHER YOUR AFFIANT SAYETH NAUGHT.

5  
6             
            \_\_\_\_\_  
            IAN P. GILLAN, ESQ.

7 SUBSCRIBED and SWORN to before  
8 me this 5<sup>th</sup> day of October, 2011.

9             
10          NOTARY PUBLIC



1 **PETITIONER D.R. HORTON INC.'S REPLY IN SUPPORT OF ITS PETITION FOR**  
2 **WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION**

3 COMES NOW PETITIONER, D.R. HORTON, INC., a Delaware Corporation  
4 [hereinafter referred to as, "Petitioner"], by and through Robert C. Carlson Esq., Megan K.  
5 Dorsey, Esq., and Ian P. Gillan, Esq., of the law firm of KOELLER, NEBEKER, CARLSON  
6 & HALUCK, LLP, its attorneys, and hereby submits this Reply in support of its Petition to the  
7 Supreme Court of Nevada requesting issuance of a Writ of Mandamus or, in the alternative,  
8 Writ of Prohibition, to overturn the Eighth Judicial District Court's [hereinafter referred to as  
9 "Respondent Court"] February 10, 2011, Findings of Fact, Conclusions of Law and Order  
10 [hereinafter referred to as the "Order"].

11 This Reply is made and based upon the following Memorandum of Points and  
12 Authorities, the pleadings and papers on file herein, and such oral arguments or documentary  
13 evidence as may be presented to this Honorable Court.

14 DATED this 5<sup>th</sup> day of October, 2011.

15 KOELLER NEBEKER CARLSON  
16 & HALUCK, LLP

17 By: Robert C. Carlson NV11143 For:  
18 ROBERT C. CARLSON, ESQ.  
19 Nevada Bar No. 8015  
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26 Attorneys for Petitioner,  
27 D.R. HORTON, INC.  
28

//

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In responding to D.R. Horton's Petition for a Writ of Mandamus, or in the alternative, a  
4 Writ of Prohibition, Real Party In Interest, High Noon at Arlington Ranch Homeowners'  
5 Association [hereinafter referred to as the "Association"], fails to adequately address the  
6 arguments Petitioner sets forth, but rather implicitly requests this Honorable Court overturn its  
7 holding in the hallmark case, *D.R. Horton, Inc. v. Dist. Ct.*, 125 Nev. \_\_\_, 215 P.3d 697 (2009)  
8 [hereinafter referred to as *First Light II*]. The Association attempts to argue that the holding in  
9 *First Light II* has caused homeowners associations, defendant developers, and third party  
10 defendant subcontractors to argue "varying interpretations" of the decision. In reality,  
11 however, the Plaintiff's Bar has taken a rather straight-forward, common sense holding and has  
12 twisted, distorted, and otherwise manipulated facts and definitions in an attempt to circumvent  
13 the mandates presented therein. Now, the Association comes before this Court and claims the  
14 holding in *First Light II* creates an alleged unconstitutional conflict between the standing  
15 statute – NRS 116.3102(1)(d) – and NRCP 23's Numerosity requirement and, therefore, this  
16 Court's properly reasoned decision should not be followed. Try as it might, the Association's  
17 claims are simply not appropriate for a representative suit under the clear-cut mandates of *First*  
18 *Light II*.

19 The Association further submits that this Court's requirement of an analysis under  
20 NRCP 23 within the holding of *First Light II* unconstitutionally transgresses the Nevada  
21 Legislature's intent in enacting NRS 116.3102(1)(d). However, this Court's holding in *First*  
22 *Light II* is in no way contrary to the intent of the Nevada Legislature in enacting NRS  
23 116.3102(1)(d). It is of note that the Nevada Legislature was given the opportunity to indicate  
24 its intent in enacting that statute was not to have a requirement such as an NRCP 23 analysis  
25 placed upon it through Assembly Bill 85 [hereinafter referred to as "A.B. 85"]. Upon being  
26 posed with a bill which would have specifically eliminated the requirement of an analysis  
27 under NRCP 23 when a Homeowner's Association sought to bring a representative action with  
28



1 standing being conferred by NRS 116.3102(1)(d), A.B. 85 did not make it to a vote on the  
2 Nevada Assembly floor and instead died in committee. Thus, all of the Association's  
3 arguments regarding the intent of the Nevada Legislature in enacting NRS 116.3102(1)(d) and  
4 the alleged placing of the requirement of passing an NRCP 23 analysis upon a homeowners'  
5 association prior to having the right to sue in a representative capacity are without merit as,  
6 *inter alia*, the Legislature was specifically given the opportunity to adopt the Association's  
7 position in this regard and failed to do so.

8 When weeding out the actual issues in this case, and when peering through the smoke  
9 screen of issues the Association has conjured up in order to divert this Court from the matter at  
10 hand, the only result is that Respondent Court arbitrarily and capriciously abused its discretion  
11 in finding that the requisite NRCP 23 analysis, as required by *First Light II*, was not necessary  
12 as to the "building envelopes," and an extraordinary writ must be issued to rectify Respondent  
13 Court's abuse of discretion.

14 **II. RESPONDENT COURT MUST CONDUCT AN NRCP 23 ANALYSIS,**  
15 **PURSUANT TO *FIRST LIGHT II***

16 None of the Association's arguments eradicate Respondent Court's obligation to  
17 perform a proper NRCP 23 analysis in order to determine whether the Association can assert  
18 the alleged constructional defect claims in a representative capacity on behalf of its individual  
19 homeowners in regards to the "building envelopes." The Association's Counsel goes well  
20 beyond the bounds of the arguments in Petitioner's Writ in a clear attempt to create the illusion  
21 that this Court somehow neglected to apply the proper procedural standards and safeguards.  
22 The Association also persists in comingling the concepts of "standing" and the right to sue in a  
23 representative capacity following a proper NRCP 23 analysis.

24 Such arguments are without merit as the argument that standing is conferred upon a  
25 homeowners' association pursuant to NRS 116.3102(1)(d) is not at issue in Petitioner's Writ  
26 Petition. Petitioner has simply asserted that Respondent Court has failed to follow the binding  
27 precedent of this Court and conduct a thorough NRCP 23/*Shuette*-type analysis prior to finding

1 that the Association had the right to sue for alleged constructional defects in a representative  
2 capacity. *See, Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 124 P.3d 530 (2005)  
3 [hereinafter referred to as “*Shuette*”].

4 The Association asserts that “[s]ince the *First Light II* decision, homeowners  
5 associations, developers, and contractors have set forth varying interpretations of the decision,”  
6 and that such difference in the interpretations of “the *First Light II* decision did not set ‘clear  
7 and certain’ guidelines.” (*See, Answering Brief*, at 8-9). This proposition makes little sense  
8 when the clear and unambiguous terms of the *First Light II* decision are reviewed.

9 In *First Light II*, this Court extended its holding in *Shuette* regarding representative-  
10 type constructional defect claims and specifically declared:

11 Therefore, where a homeowners' association brings suit on behalf of its members,  
12 a developer may, under *Shuette*, challenge whether the associations' claims are  
13 subject to class certification. In doing so, the district court must conduct and  
14 document a thorough NRCP 23 analysis. This analysis will require the court to  
15 consider whether the claims and various theories of liability satisfy the  
16 requirements of numerosity, commonality, typicality, adequacy, and, as in *Shuette*,  
17 whether “common questions of law or fact predominate over individual questions,”  
18 or whether the action satisfies one of the other two options set forth in NRCP  
19 23(b). *See, id.* at 846, 850, 124 P.3d at 537, 539. Indeed, we emphasize that a  
20 shared experience alone does not satisfy the threshold requirements under NRCP  
21 23. *See, id.* at 858, 124 P.3d at 545. Instead, the court must determine, among other  
22 issues, which units have experienced constructional defects, the types of alleged  
23 defects, the various theories of liability, and the damages necessary to compensate  
24 individual unit owners.

25 *See, First Light II* at 704.

26 Petitioner submits that nothing about this holding is unclear. Indeed, by its own  
27 admission, the Association recognizes that constructional defect matters can rarely, if ever,  
28 pass muster under a NRCP 23 analysis. That such an analysis is difficult to withstand is  
entirely in line with this Court’s reasoning in *Shuette*, where the Court specifically stated that,  
“as a practical matter, single-family residence constructional defect cases will rarely be  
appropriate for class action treatment.” 124 P.3d at 543. The Association’s attempt to paint  
*First Light II*’s holding as unclear or uncertain is simply a mask for the fact that it is a holding

1 under which homeowners' associations can only represent the members in procedurally and  
2 substantively proper situations.

3 Respondent Court was required to perform and document an NRCP 23 analysis as  
4 properly and unambiguously required by this Court in *First Light II*. Respondent Court thus  
5 arbitrarily and capriciously abused its discretion in concluding that no NRCP 23 analysis was  
6 necessary in regards to the "building envelopes." There is no justification for Respondent  
7 Court's finding in this regard within its February 10, 2011 Order, and this Order should  
8 therefore be reversed. The holding of *First Light II* is not unclear and this Court should decline  
9 to consider such an extreme remedy as reversing its own properly reasoned jurisprudence when  
10 such safeguards as those in NRCP 23 are employed in most, if not all, situations wherein a  
11 representative-type suit is forwarded.

12 The true complexities of the claims asserted in this case must be analyzed. Counsel for  
13 the Association fabricated the term "building envelope" in an attempt to create a distinction  
14 amongst varying types of claims that can be brought in regards to each individual unit.  
15 However, nothing in regards to the "building envelope" should have caused Respondent Court  
16 to fail to perform a proper analysis under NRCP 23 and subsequently hold that an NRCP 23  
17 analysis was not necessary as to these "building envelopes." This is the true issue involved in  
18 this case. *First Light II's* holding is not unclear or unreasoned and does not fly in the face of  
19 constitutional policies. The fact that the Plaintiff's Bar and Counsel for the Association have  
20 now concocted a new, superficial term – "building envelope" – should not allow them to  
21 circumvent the dictates of this Court's ruling in *First Light II*, as the policies behind the  
22 Court's holding certainly have not changed.

23 Plaintiff's counsel also continues to apparently comingle the concepts of standing and  
24 the right to sue in a representative capacity following the passing of a proper analysis under  
25 NRCP 23. Again, the issue here is not "standing." What this Court has properly done in  
26 construction defect litigation is not to have "stripped" the Association of its standing or to have  
27 precluded the Association from pursuing its right to standing – which is conferred pursuant to

1 NRS 116.3102(1)(d) – but has simply exercised its right to utilize the procedural safeguards of  
2 an NRCP 23 analysis prior to such a homeowners’ association properly being found to be able  
3 to bring this type of representative-type action.

4 The Association’s reliance on a perceived distinction between alleged defects to the  
5 “interior” and “exterior” of units is also misplaced under this Court’s holding in *First Light II*.  
6 This Court made no distinction between alleged defects to the “interior” or “exterior” of units  
7 in a community. Relying on a comment to the Restatement Third of Property – relied upon by  
8 the Association in its Answering Brief (*See*, Answering Brief at 7) – this Court stated that,  
9 “because a homeowners’ association functions like a plaintiff in a class action, we conclude  
10 that when an association asserts claims in a representative capacity, the action must fulfill the  
11 requirements of NRCP 23, which governs class action lawsuits in Nevada.” *First Light II*, 215  
12 P.3d 697, 703 (2009).

13 Ultimately, this Court’s decision in *First Light II* was correct and corresponds with the  
14 most fundamental and basic tenets of how jurisdictional and civil procedure based issues have  
15 always been dealt with.<sup>1</sup> Respondent Court thus arbitrarily and capriciously abused its  
16 discretion in granting the Association’s Motion for Declaratory Relief without conducting an  
17 analysis under NRCP 23 pursuant to this court’s jurisprudence. Petitioner thus respectfully  
18 requests that this Court exercise its discretion and grant Petitioner’s Writ Petition to remedy  
19 Respondent Court’s arbitrary and capricious abuse of discretion.

20 **III. THIS COURT’S REQUIREMENT OF AN ANALYSIS UNDER NRCP 23**  
21 **PURSUANT TO *FIRST LIGHT II* DOES NOT TRANSGRESS THE**  
22 **INTENT OF THE NEVADA LEGISLATURE IN ENACTING NRS**  
**116.3210(1)(d)**

23 In its Answering Brief, the Association forwards the novel argument that *First Light II*  
24 does not require an NRCP 23 analysis where such analysis “would transgress the Nevada  
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26 <sup>1</sup> As stated accurately and pointedly: “Rule 23 merely provides a procedural doorstep which holds the door open  
27 for qualified class members, *once it has been opened by the person or persons initially seeking entry.*” *Chevalier*  
*v. Baird Sav. Ass’n*, 66 F.R.D. 105 (E.D.Pa., 1975) (emphasis added).

Legislatures Intent.” (See, Answering Brief at 6-8). The Association also continues to forward the faulty argument that the perceived conflict between NRCP 23’s numerosity requirement and NRS 116.3102(1)(d) is contrary to the intent of the Nevada Legislature in enacting NRS 116.3102(1)(d). To begin, it is an incorrect premise. It simply means that two or more homeowners are required to effectuate statutory standing. It has no bearing on the independent numerosity requirement of NRCP 23. Additionally, following the 2011 session of the Nevada Legislature it has become further solidified that the intent of the Nevada Legislature was not to preclude this Court from placing procedural safeguards upon the statutory grant of standing in NRS 116.3102(1)(d) and specifically that it was not its intent to prohibit an NRCP 23 analysis prior to a homeowners’ association being given the right to sue in a representative capacity pursuant to *First Light II*.

The Legislature was recently given the opportunity to rectify any deficiencies it saw in NRS 116.3102, and elected not to do so. Specifically, the Legislature chose not to act on a proposed amendment to NRS 116.3102(1)(d), which would have mandated that homeowners’ associations would not have to withstand scrutiny under NRCP 23 to bring representative actions On January 7, 2011, A.B. 85 was introduced in the Nevada Assembly.<sup>2</sup>

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<sup>2</sup> In anticipation of the Association’s argument that AB 85 was not presented before Respondent Court, Petitioner asserts that AB 85 is not factual evidence, but is instead a point of law directly at issue and relevant to the matters before this Court. AB 85 pointedly contradicts the Association’s arguments as to the alleged Legislative intent of NRS 116.3102 *et seq.* Further, footnote 5 on page 16 of Petitioner’s Writ Petition made specific reference to A.B. 85 and its rejection of the Association’s position in this regard. The Association failed to make any objection to the inclusion of A.B. 85 in the Writ Petition and thus may have waived any objection to the same. Petitioner reserves any and all rights and objections in this regard.

1 AB 85 proposed an amendment to NRS 116.3102(1)(d) regarding the placement of the  
2 procedural safeguard of NRCP 23 upon the statutory grant of standing as follows:

3 116.3102 1. Except as otherwise provided in this section, and subject to the  
4 provisions of the declaration, the association may do any or all of the following:

5 (a) Adopt and amend bylaws, rules and regulations.

6 (b) Adopt and amend budgets for revenues, expenditures and reserves and collect  
assessments for common expenses from the units' owners.

7 (c) Hire and discharge managing agents and other employees, agents and  
independent contractors.

8 (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 [.] , ***regardless of whether the claims involved in the  
9 litigation or administrative proceeding relate to individual units and regardless  
10 of whether the declaration provides specific authorization for such action. An  
association is not required to satisfy the requirements of Rule 23 of the Nevada  
Rules of Civil Procedure to commence or maintain a civil action for damages on  
11 behalf of two or more units' owners on matters affecting individual units.***

12 (See, A.B. 85 and Nevada Legislature Bill History, attached hereto as Exhibit "1") (emphasis  
13 in original).

14 Pursuant to Joint Standing Rule No. 14.3.1, no further action was allowed on AB 85 as  
15 it failed to meet the April 15, 2011 deadline and the bill died in Committee.<sup>3</sup> As such, the  
16 Nevada Legislature rejected the revision to NRS 116.3102(1)(d) that may have affected *First*  
17 *Light II* related issues.

18 This Court has held that, "[w]here...the legislature has had ample time to amend an  
19 administrative agency's reasonable interpretation of a statute, but fails to do so, such  
20 acquiescence indicates the interpretation is consistent with legislative intent." *Del Papa v.*  
21 *Board of Regents of the Univ. and Community College System of Nevada*, 114 Nev. 388, 396,  
22 956 P.2d 770, 776 (1998), (citing, *Hughes Properties v. State of Nevada*, 100 Nev. 295, 298,  
23 680 P.2d 970, 972 (1984)); *Roberts v. State of Nevada*, 104 Nev. 33, 39, 752 P.2d 221, 225  
24 (1988). The *Del Papa* Court also noted the Legislature had a specific opportunity to amend the  
25

26 <sup>3</sup> Joint Standing Rule 14.3.1 states, in pertinent part, that "[t]he final standing committee to which a bill or joint  
27 resolution is referred in its House of origin may only take action on the bill or joint resolution on or before the 68th  
calendar day of the legislative session."

1 interpretation of the statute when it was presented with a Bill addressing the issue. 114 Nev. at  
2 396, 956 P.2d at 776.

3 Here, the Nevada Legislature was presented with a Bill that could have affected the  
4 holding of *First Light II*, and could have eradicated the requirement that a district court  
5 perform an NRCP 23 analysis prior to permitting a homeowners' association to proceed in a  
6 representative capacity on behalf of their individual homeowner members. The proposed  
7 revision specifically addressed the NRCP 23 analysis requirement and sought to remove the  
8 procedural safeguard from the analysis of construction defect actions within common-interest  
9 communities. The Nevada Legislature implicitly rejected the Bill and the proposed  
10 amendment. Accordingly, the Nevada Legislature impliedly affirmed this Court's  
11 implementation of a procedural safeguard through the use of the NRCP 23 analysis when  
12 analyzing NRS 116.3102(1)(d).

13 The Association further argues that the District Courts of this State have recognized  
14 that there is an inherent conflict between NRS 116.3102(1)(d) statutory grant of standing and  
15 NRCP 23's numerosity requirement. (*See*, Answering Brief at 8-10). The Association's  
16 position that requiring a homeowners' association to pass an NRCP 23 analysis amounts to an  
17 association being "stripped" of or "precluded" from the statutory grant of standing and an  
18 unconstitutional discriminatory classification being created is wholly without merit. (*See*,  
19 Answering Brief at 10-12). In fact, the adoption of the Association's position in this regard  
20 would be the actual way that disparate classes of homeowners would be created.

21 This can be clearly seen when looking at a simple hypothetical; had the homeowners at  
22 the High Noon at Arlington Ranch development not been a part of a common-interest  
23 community and had they attempted to bring these same claims in a representative capacity,  
24 those homeowners would have had to pass a NRCP 23 analysis prior to being allowed to bring  
25 these claims. Thus, those homeowners would not be able to bring a representative claim  
26 without passing the NRCP 23 analysis. Likewise, a homeowners' association is required to  
27 pass this same analysis to bring representative claims, demonstrating that eliminating this

1 requirement for homeowners' association would give such associations more rights than the  
2 individual homeowners. The only difference is the individual homeowners seeking to  
3 represent a class in a non-homeowners' association type case have the requisite "standing" as  
4 owners of property. Under the common-interest community scenario, the homeowners'  
5 association only has "standing" by way of NRS 116.3102(1)(d). Thus, allowing a  
6 homeowners' association the right to sue in a representative capacity without first satisfying an  
7 analysis under NRCP 23 would place individual homeowners in a disparate position, and this  
8 could not have been what was intended by the Nevada Legislature in enacting NRS  
9 116.3102(1)(d) and extending standing to homeowners' associations.

10 As such, adopting the Association's position that some perceived conflict exists  
11 between NRS 116.3102(1)(d) and strict compliance with NRCP 23 finds no support from  
12 intent of the Nevada Legislative – as evidenced by its rejection of the proposed amendment  
13 contained within A.B. 85 – or from an alleged unconstitutional creation of a discriminatory  
14 class.

15 Here, the Association's argument regarding Petitioner's framing of the CC&Rs at the  
16 High Noon at Arlington Ranch development to insulate itself from potential liability for  
17 constructional defects is also wholly without merit, *inter alia*, for two main reasons. (See,  
18 Answering Brief at 10-12). First, the CC&Rs of the High Noon at Arlington Ranch  
19 development were enacted prior to this Court's decision in *First Light II*. As such, the  
20 Association could not have prognosticated that the *First Light II* decision would have an  
21 impact on a potential constructional defect lawsuit such that the CC&Rs of the High Noon at  
22 Arlington Ranch development would be drafted in such a way as to allegedly "strip" the  
23 Association of maintenance requirements. Second, the Association's arguments in this regard  
24 further evidence that the "building envelopes" are part of the individual units under the CC&Rs  
25 of the High Noon at Arlington Ranch development, as there would be no need to argue  
26 otherwise unless this was the nature of that document. In fact, the heading employed by the  
27 Association in its Answering Brief regarding the definition of "Unit" within the CC&Rs of the



1 High Noon at Arlington Ranch development is an admission that NRCP 23 must apply here  
2 under *First Light II* as the “building envelopes” are within units and the homeowners, not the  
3 Association, have the ownership interest and maintenance responsibilities for the “building  
4 envelopes.” (See, Answering Brief at 10) (“3. The Fact That The CC&RS Of The High Noon  
5 Community Define ‘Unit’ To Include The Building Envelope And Place The Maintenance  
6 Responsibilities Upon The Unit Owners Does Not Defeat The Association’s Standing”).

7 In this same light, and again contrary to the Association’s position that an NRCP 23  
8 analysis is not required here, the CC&Rs of the High Noon at Arlington Ranch development  
9 bestow upon the individual unit owners a broad ownership interest in their homes and allows  
10 for homeowners’ association’s dues to be relatively modest. The consequence of this fact  
11 would be to expand the ownership of the portions of units owned by individual homeowners at  
12 the development and, by implication, reduce the common areas at the development for which  
13 the satisfaction of an NRCP 23 analysis would not be required prior to the Association being  
14 allowed to bring a representative action on behalf of its individual unit owner members for  
15 alleged constructional defects to those individually owned areas.

16 The apparent basis of the Association’s argument is that standing is somehow being  
17 “limited” by the language within the CC&Rs at the High Noon at Arlington Ranch  
18 development which allegedly “stripped” the Association of an ownership interest and/or  
19 maintenance responsibilities within the development. (See, Answering Brief at 11). Again,  
20 standing is not being limited here. The issue here is not whether standing is being “limited” by  
21 any action of Petitioner or this Court’s holding in *First Light II*. Rather, it is whether  
22 Respondent Court abused its discretion in not performing an NRCP 23 analysis.

23 The well-settled area of representative-type action jurisprudence when dealing with an  
24 actual property right would have to be improperly overturned under the Association’s approach  
25 to such actions. Eliminating the requirement of an NRCP 23 analysis for homeowners’  
26 association who have standing pursuant to NRS 116.3102(1)(d) would also be condoning the  
27 notion that a homeowners’ associations’ “property rights” are greater than those of actual

1 homeowners. This is certainly not what the Legislature intended in enacting NRS  
2 116.3102(1)(d). It also cannot be demonstrated that the intent of the Nevada Legislature was  
3 to preclude this Court from utilizing the procedural safeguard of NRCP 23 in determining  
4 whether a homeowners' association can properly bring a representative-type suit. The Nevada  
5 Legislature was specifically given the opportunity to express this view point with A.B. 85 and  
6 chose not to adopt the proposed language within that Assembly Bill. Accordingly, the  
7 Association's arguments regarding the Nevada Legislature's intent in enacting NRS  
8 116.3102(1)(d) and the affect of the CC&Rs at the High Noon at Arlington Ranch  
9 development upon the Association's standing are without merit and should be given no  
10 credence by this Court. Petitioner thus respectfully requests that this Court exercise its  
11 discretion and grant Petitioner's Writ Petition to remedy Respondent Court's arbitrary and  
12 capricious abuse of discretion.

#### 13 V. CONCLUSION

14 Respondent Court arbitrarily and capriciously abused its discretion in failing to fully  
15 and properly perform an NRCP 23 analysis pursuant to this Court's September 3, 2009 Order,  
16 and pursuant to *First Light II* in Respondent Court's February 10, 2011, Findings of Fact,  
17 Conclusions of Law and Order. The Association has provided no support for the apparent  
18 proposition that this Court should consider overturning its holding in *First Light II*. Nor has  
19 the Association demonstrated that the "building envelopes" are not subject to an NRCP 23  
20 analysis.

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1 As such, Petitioner respectfully requests that this Court exercise its discretion and grant  
2 its Petition for a Writ of Mandamus, or, in the alternative, Writ of Prohibition, and direct  
3 Respondent Court to properly analyze the Association's ability to bring forth claims under the  
4 NRCP 23 analysis.

5 DATED this 5<sup>th</sup> day of October, 2011.

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# EXHIBIT "1"



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ASSEMBLY BILL NO. 85—ASSEMBLYMAN SEGERBLOM

PREFILED JANUARY 7, 2011

Referred to Committee on Judiciary

**SUMMARY**—Revises provisions governing common-interest communities. (BDR 10-512)

**FISCAL NOTE:** Effect on Local Government: No.  
Effect on the State: No.

EXPLANATION — Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to common-interest communities; revising provisions concerning litigation instituted by an association in a common-interest community on behalf of two or more units' owners; and providing other matters properly relating thereto.

**Legislative Counsel's Digest:**

1 Existing law provides that, subject to the provisions of the declaration, an  
2 association in a common-interest community may institute litigation on behalf of  
3 two or more units' owners on matters affecting the common-interest community.  
4 (NRS 116.3102) In *D.R. Horton, Inc. v. Eighth Judicial District Court*, 125 Nev.  
5 Adv. Op. 35, 215 P.3d 697 (2009), the Nevada Supreme Court held that: (1) an  
6 association in a common-interest community has standing to pursue constructional  
7 defect claims on behalf of units' owners with respect to constructional defects in  
8 individual units; and (2) an association that pursues a constructional defect claim on  
9 behalf of units' owners with respect to constructional defects in individual units  
10 must satisfy the requirements for class actions set forth in Rule 23 of the Nevada  
11 Rules of Civil Procedure.

12 This bill provides that if an association pursues a claim for damages on behalf  
13 of units' owners with respect to individual units, the association is not required to  
14 satisfy the requirements for class actions set forth in Rule 23 of the Nevada Rules  
15 of Civil Procedure. In addition, this bill authorizes an association to institute,  
16 defend or intervene in litigation or administrative proceedings regardless of  
17 whether the declaration specifically authorizes such action.



THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN  
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1     **Section 1.** NRS 116.3102 is hereby amended to read as  
2 follows:

3     116.3102 1. Except as otherwise provided in this section, and  
4 subject to the provisions of the declaration, the association may do  
5 any or all of the following:

6     (a) Adopt and amend bylaws, rules and regulations.

7     (b) Adopt and amend budgets for revenues, expenditures and  
8 reserves and collect assessments for common expenses from the  
9 units' owners.

10    (c) Hire and discharge managing agents and other employees,  
11 agents and independent contractors.

12    (d) Institute, defend or intervene in litigation or administrative  
13 proceedings in its own name on behalf of itself or two or more units'  
14 owners on matters affecting the common-interest community {-},  
15 *regardless of whether the claims involved in the litigation or*  
16 *administrative proceeding relate to individual units and regardless*  
17 *of whether the declaration provides specific authorization for such*  
18 *action. An association is not required to satisfy the requirements*  
19 *of Rule 23 of the Nevada Rules of Civil Procedure to commence or*  
20 *maintain a civil action for damages on behalf of two or more*  
21 *units' owners on matters affecting individual units.*

22    (e) Make contracts and incur liabilities. Any contract between  
23 the association and a private entity for the furnishing of goods or  
24 services must not include a provision granting the private entity the  
25 right of first refusal with respect to extension or renewal of the  
26 contract.

27    (f) Regulate the use, maintenance, repair, replacement and  
28 modification of common elements.

29    (g) Cause additional improvements to be made as a part of the  
30 common elements.

31    (h) Acquire, hold, encumber and convey in its own name any  
32 right, title or interest to real estate or personal property, but:

33       (1) Common elements in a condominium or planned  
34 community may be conveyed or subjected to a security interest only  
35 pursuant to NRS 116.3112; and

36       (2) Part of a cooperative may be conveyed, or all or part of a  
37 cooperative may be subjected to a security interest, only pursuant to  
38 NRS 116.3112.

39    (i) Grant easements, leases, licenses and concessions through or  
40 over the common elements.

41    (j) Impose and receive any payments, fees or charges for the use,  
42 rental or operation of the common elements, other than limited



1 common elements described in subsections 2 and 4 of NRS  
2 116.2102, and for services provided to the units' owners, including,  
3 without limitation, any services provided pursuant to  
4 NRS 116.310312.

5 (k) Impose charges for late payment of assessments pursuant to  
6 NRS 116.3115.

7 (l) Impose construction penalties when authorized pursuant to  
8 NRS 116.310305.

9 (m) Impose reasonable fines for violations of the governing  
10 documents of the association only if the association complies with  
11 the requirements set forth in NRS 116.31031.

12 (n) Impose reasonable charges for the preparation and  
13 recordation of any amendments to the declaration or any statements  
14 of unpaid assessments, and impose reasonable fees, not to exceed  
15 the amounts authorized by NRS 116.4109, for preparing and  
16 furnishing the documents and certificate required by that section.

17 (o) Provide for the indemnification of its officers and executive  
18 board and maintain directors' and officers' liability insurance.

19 (p) Assign its right to future income, including the right to  
20 receive assessments for common expenses, but only to the extent the  
21 declaration expressly so provides.

22 (q) Exercise any other powers conferred by the declaration or  
23 bylaws.

24 (r) Exercise all other powers that may be exercised in this State  
25 by legal entities of the same type as the association.

26 (s) Direct the removal of vehicles improperly parked on property  
27 owned or leased by the association, as authorized pursuant to NRS  
28 487.038, or improperly parked on any road, street, alley or other  
29 thoroughfare within the common-interest community in violation of  
30 the governing documents. In addition to complying with the  
31 requirements of NRS 487.038 and any requirements in the  
32 governing documents, if a vehicle is improperly parked as described  
33 in this paragraph, the association must post written notice in a  
34 conspicuous place on the vehicle or provide oral or written notice to  
35 the owner or operator of the vehicle at least 48 hours before the  
36 association may direct the removal of the vehicle, unless the vehicle:

37 (1) Is blocking a fire hydrant, fire lane or parking space  
38 designated for the handicapped; or

39 (2) Poses an imminent threat of causing a substantial adverse  
40 effect on the health, safety or welfare of the units' owners or  
41 residents of the common-interest community.

42 (t) Exercise any other powers necessary and proper for the  
43 governance and operation of the association.

44 2. The declaration may not impose limitations on the power of  
45 the association to deal with the declarant which are more restrictive



1 than the limitations imposed on the power of the association to deal  
2 with other persons.

3 3. Notwithstanding any provision of this chapter or the  
4 governing documents to the contrary, an association may not impose  
5 any assessment pursuant to this chapter or the governing documents  
6 on the owner of any property in the common-interest community  
7 that is exempt from taxation pursuant to NRS 361.125. For the  
8 purposes of this subsection, "assessment" does not include any  
9 charge for any utility services, including, without limitation,  
10 telecommunications, broadband communications, cable television,  
11 electricity, natural gas, sewer services, garbage collection, water or  
12 for any other service which is delivered to and used or consumed  
13 directly by the property in the common-interest community that is  
14 exempt from taxation pursuant to NRS 361.125.

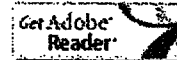
15 Sec. 2. The amendatory provisions of this act apply to any  
16 litigation or administrative proceeding that is pending or  
17 commenced on or after the effective date of this act.

18 Sec. 3. This act becomes effective upon passage and approval.





# AB85



Introduced in the Assembly on Jan 07, 2011.

By: (Bolded name indicates primary sponsorship)

**Segerblom**

Revises provisions governing common-interest communities. (BDR 10-512)

## Fiscal Notes

Effect on Local Government: No.

Effect on State: No.

**Most Recent History** (Pursuant to Joint Standing Rule No. 14.3.1, no further action allowed.)

**Action:**

(See full list below)

## Upcoming Hearings

## Past Hearings

## Final Passage Votes

## Bill Text As Introduced

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## Bill History

Jan 07, 2011

- Prefiled. Referred to Committee on Judiciary. To printer.

Jan 11, 2011

- From printer.

Feb 07, 2011

- Read first time. To committee.

Apr 16, 2011

- (Pursuant to Joint Standing Rule No. 14.3.1, no further action allowed.)