ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, and THE HONORABLE SUSAN H. JOHNSON, DISTRICT JUDGE, Respondents, and D.R. HORTON, INC., Real Party In Interest.	CASE NO. 58630 District Court Case No. 07-A542616 Dept. No. XXII

FILED
JUN 22 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

PETITION FOR WRIT OF MANDAMUS

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TABLE OF AUTHORITIES

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AFFIDAVIT OF JOHN J. STANDER, ESQ. IN SUPPORT OF HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, John J. Stander, being first duly sworn on oath, deposes and states under penalty of perjury that the following is true and correct, and of my own personal knowledge:

1. I am an attorney licensed to practice in the State of Nevada, and am a Partner of the law firm of Angius & Terry, LLP, attorneys for Petitioner High Noon at Arlington Ranch Homeowners Association, in support of its PETITION FOR WRIT OF MANDAMUS.

2. I certify that I have read this petition, and to the best of my knowledge, information and belief, it 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. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record to be supported by a reference to the appendix where the matter relied upon 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.

4. A true and correct copy of the Association's Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d), dated September 30, 2010, with exhibits thereto, is at Petitioner's Appendix, Vols. I-III, pp. 23-507.

5. A true and correct copy of D.R. Horton's Opposition to Association's Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS

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116.3102(1)(d), dated October 19, 2010, with exhibits thereto, is at Petitioner's Appendix, Vols. III-IV, pp. 615-768.

6. A true and correct copy of the Association's Reply to D.R. Horton's Opposition to Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d), dated November 3, 2010, with exhibits thereto, is at Petitioner's Appendix, Vol. III, pp. 573-614.

7. A true and correct copy of the Transcript of District Court Hearing of November 10, 2010 is at Petitioner's Appendix, Vol. III, pp. 540-572.

8. A true and correct copy of the District Court Order, dated February 10, 2011, is at Petitioner's Appendix, Vol. III, pp. 518-539.

Further, Affiant sayeth not.

John J. Stander

SUBSCRIBED AND SWORN to before me this 16th day of June 2011, by

Marcella L McCoy

NOTARY PUBLIC in and for said County and State

MARCELLA L. MCCOY
Notary Public State of Nevada
No. 06-108225-1
My appt. exp. June 4, 2014

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COMES NOW Petitioner, High Noon at Arlington Ranch Homeowners Association ("the Association"), by and through its attorneys of record, Angius & Terry, LLP, and hereby petitions the Court, pursuant to Nev. Const. Art. 6, §4, NRS 34.160, and NRAP 21, for issuance of a writ of mandamus, commanding Respondents, the Eighth Judicial District Court and the Honorable Susan H. Johnson ("the District Court"), to amend its Order dated February 10, 2011[1], to provide that *in addition* to standing to assert claims regarding the building envelope[2] of the residential buildings, the Association *also* has standing to bring claims for construction defects located in (a) individual condominium units for which the Association holds an assignment of claims from the homeowner, (b) the fire resistive and structural components of all buildings containing a unit for which the Association holds an assignment of claims from the homeowner, and (c) the fire resistive and structural components of all buildings pursuant to NRS 116.3102(1)(d).

The present controversy raises urgent matters of public interest. Moreover, granting this petition would further the interests of judicial economy and administration of justice.

I. SUMMARY OF THE ISSUES AND CONCLUSIONS

A. ISSUE ONE: Whether a written assignment by homeowners to the Association of all claims relating to the units and buildings conveys standing to the Association to pursue those claims against the developer?

B. ISSUE ONE CONCLUSION: Yes. The assignments are valid contractual agreements which convey all of the homeowners' claims to the Association. Thus, the Association has standing to pursue all claims against the developer that the homeowners could have pursued themselves.

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[1] District Court Order dated February 10, 2011, at Petitioner's Appendix, Vol. III, pp. 518-539.

[2] In its Order dated February 10, 2011, Respondent Court ruled that the Association has standing to pursue claims related to the building envelope of the buildings. The building envelope consists of the roofs, stucco walls, windows, doors, and decks. See District Court Order, dated February 10, 2011, at Petitioner's Appendix, Vol. III, pp. 518-539. Association does not challenge the Courts determination that it has standing to pursue these claims.

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C. **ISSUE TWO: If the Association holds the assignment to one or more units in a multi-unit residential building, does the Association have standing to pursue claims involving all building components which affect the interests of all of the building's owners jointly, for example, the building envelope, the firewalls between the units, and the structural components of the building?**

D. **ISSUE TWO CONCLUSION: Yes. The assignor-homeowners have standing to assert claims with regard to all defective building components that cause them damage. Since they have standing to assert claims with regard to those defects, then they can assign those claims to the Association.**

E. **ISSUE THREE: Did the District Court err in denying standing to the Association conferred by NRS 116.3102(1)(d) to pursue claims regarding those constructional defects contained in the interior of the buildings which affect all of the owners, for example, the firewalls, the structural components, the electrical components, and the plumbing?**

F. **ISSUE THREE CONCLUSION: Yes. The District Court did err in denying standing, conferred on the Association by NRS 116.3102(1)(d), to sue for defects in the interior of the buildings, because the Association demonstrated that such defects affect two or more unit owners, concern the common interest community, and complied with NRCP 23, as required in *D.R. Horton, Inc. v. Eighth Judicial District Court*, 215 P.3d 697, 699 (Nev. 2009) ("*First Light II*").**

II. STATEMENT OF RELIEF SOUGHT

The Association seeks a writ of mandamus directing the District Court to vacate in part its order of February 10, 2011, at Petitioner's Appendix, Vol. III, pp. 518-539, and to order that, *in addition* to standing pursuant to NRS 116.3102(1)(d) to pursue claims for defects in the building envelopes of the residential buildings at High Noon at Arlington, the Association *also* has:

(1) Standing, by virtue of assignments, to pursue all constructional defect claims relating to or arising out of the units owned by the assignor-homeowners;

(2) Standing, by virtue of assignments, to pursue claims relating to or arising from structural and fire-resistive systems in residential buildings which contain one or more units owned by assignor-homeowners; and

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(3) Standing, pursuant to NRS 116.3102(1)(d), to maintain constructional defect claims relating to or arising from the structural and fire-resistive systems in all 114 residential buildings in the development.

III. REASONS WHY THE WRIT SHOULD ISSUE

A. The Importance Of The Issues, The Need For Immediate Relief, And The Association's Lack Of Any Other Adequate Remedy Warrant This Court's Exercise Of Original Jurisdiction

1. Mandamus review is appropriate to consider the District Court's order.

The Court has the authority to issue writs of mandamus to control arbitrary or capricious abuses of discretion by district courts. *See Marshall v. District Court*, 108 Nev. 459, 466 (1992). Here, it is submitted that the District Court abused its discretion in failing to order that the Association has standing, by virtue of written assignments executed by homeowners, to pursue constructional defect claims relating to the units owned by the assignor-homeowners. The District Court further abused its discretion in failing to order that the Association has standing, pursuant to NRS 116.3102(1)(d), to pursue claims relating to defects in the fire-resistive and structural components in the buildings, because these defective conditions, by their very nature, affect two or more association members and affect the common interest community.

2. Other cases raising similar issues are being reviewed by the Nevada Supreme Court.

Other cases that raise similar factual scenarios and district court rulings are currently being reviewed by the Nevada Supreme Court. Such related cases include:

1. *Environment For Living, Inc. and Time for Living Inc. v. Eighth Judicial District Court (Serenity Homeowners Association, Real Parties in Interest)*, Case No. 57515 (District Court Case No. A577933);

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2. *Beazer Homes Holding Corp. v. Eighth Judicial District Court (View of Black Mountain Homeowners Association, Inc., Real Parties in Interest)*, Case No. 57187 (District Court Case No. A59266);

3. *Chartered Development Corp. and Pecos-Alexander, LLC v. Eighth Judicial District Court (Cottonwood on Alexander Homeowners Association, Real Parties in Interest)*, Case No. 57614 (District Court Case No.. A573607);

4. *Pinnacle-Aurora II Limited Partnership and Pinnacle Homes, Inc. v. Eighth Judicial District Court (Aurora Glen Homeowners Association, Real Parties in Interest)*, Case No. 58029 (District Court Case No. A605463).

These cases all share the problem of district courts struggling with the application of the Court's decision in *First Light II*, and in harmonizing the provisions of NRS 116.3102(1)(d) with an NRCP Rule 23 analysis.

The present case, however, raises important issues that the above cases do not. For one, this case addresses whether assignments from the homeowners to the Association confer standing on the Association to pursue constructional defects in the units. Also, in this case, unlike the others, the Association seeks standing, pursuant to NRS 116.3102(1)(d), to bring claims not only in regard to the building envelopes, but also in regard to the structural and fire- resistive components of the buildings.

IV. STATEMENT OF FACTS AND SUMMARY OF ARGUMENT

The High Noon at Arlington townhome[3] community consists of 342 attached residential units and common areas located in Clark County, Nevada. There are 114 residential buildings, with three units per building. The development construction type is

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[3] The CC&Rs refer to the units as "townhomes," but with the stacked configuration of the multiple residences within the buildings, one would expect the units to be condominiums rather than townhomes. They are not classic "condominiums," however, because D.R. Horton drafted the CC&Rs in such a way as to strip the Association of virtually all the maintenance and ownership responsibilities over the common areas of the buildings which a condominium association would normally have. Where a condominium association would ordinarily have maintenance responsibilities over, for example, the building envelope, D.R. Horton in this case has assigned that responsibility to the unit owners.

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wood-framed walls, with concrete tile roofing, and a one-coat stucco system. The development was constructed and sold by D.R. Horton in or about 2005.

A. ASSIGNMENTS

To date, by virtue of executed assignment of claims, the Association is the assignee of the claims of 194 unit owners (out of a total of 342 units). A spreadsheet of assigned units is at Petitioner's Appendix, Vol. II, pp. 448-454. The executed assignments are at Petitioner's Appendix, Vol. II, pp. 253-446.

B. INSPECTIONS

The Association, through its retained experts, has conducted extensive testing and investigation of the buildings. The building envelopes and fire resistive systems were inspected by RH Adcock & Associates. The CV of the architectural expert is at Petitioner's Appendix, Vol. I, p.p. 63-65. The architectural report is at Petitioner's Appendix, Vol. I, pp. 67-231.

The structural elements were inspected by Marcon Forensics, Inc. The report and matrix of locations of the structural engineer is at Petitioner's Appendix, Vol. I, pp 233-250, and Vol. II, pp. 251-252.

1. Fire Resistive Construction

Defects were found in both the unit-to-unit fire walls and the garage-to-unit firewalls. Adcock destructively tested 13 firewalls. Defects in the firewalls were identified at 100% of the locations inspected. *See* Adcock Report, Petitioner's Appendix, Vol. I, pp. 176-1

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2. Structural

Structural engineer Felix Martin of Marcon Forensics inspected the structural systems of the building and discovered serious structural deficiencies at each of the locations inspected. For example, they identified insufficient nailing at the shear walls, insufficient width of shear walls, nailing at foundation holdown straps missing, floor-to-floor holdown straps, and sill nailing missing rim joists at exterior walls. *See* Marcon Forensics Report and Matrix, at Petitioner's Appendix, Vol. I, pp. 233-Vol. II, p. 252. Each of the locations inspected showed structural insufficiencies and defects. These defects, by their very definition, affect the entirety of the buildings in which they exist and, therefore, affect two or more homeowners.

V. STANDARD OF REVIEW

When the parties raise only legal issues on appeal from a district court order, the Court reviews the matter de novo. *St. James Village, Inc. v. Cunningham*, ____ Nev. ____, 210 P.3d 190, 193 (2009). A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station (NRS 34.160) or to control an arbitrary or capricious exercise of discretion. *Round Hill Gen. Improvement District v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

A writ of mandamus is an extraordinary remedy and will not be issued if the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. *See* NRS 34.170, NRS 34.330.

VI. ARGUMENT

A. A Written Assignment By Homeowners To The Association Of All Construction Defect Claims Relating To Their Units And Buildings Conveys Standing To The Association To Pursue Those Claims Against The Developer

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High Noon at Arlington Ranch is a tri-plex townhome development consisting of 342 units in 114 buildings. The Association has obtained written assignments from 194 unit owners out of a total of 342 units. These assignments expressly include all of the construction defect claims relating to those unit-owners' units and buildings. *See* Petitioner's Appendix, Vol. II, pp. 253-446. The assigned units are located in 107 of the 114 buildings. *See* Petitioner's Appendix, Vol. II, p. 456 (map of the buildings containing the assigned units.) The assignments state the following:

> HOMEOWNER hereby assigns to THE ASSOCIATION all of the claims and causes of action that HOMEOWNER possesses against D.R. Horton, Inc., and any and all of the designers, contractors, subcontractors and material suppliers that participated in any way in the design, construction or supply of materials for construction of the townhome project and/or HOMEOWNER'S unit, for defective construction. Such assigned claims and causes of action expressly include, but are not limited to, all claims and causes of action that arise out of (1) The contract for sale of the subject property from D.R. Horton, Inc., (2) Any express or implied warranties; (3) Any and all common law claims, including but not limited to claims in negligence, fraud and equitable claims; (4) Any and all claims relating to or arising out of NRS Chapter 40, et seq.; and (5) Any and all claims relating to or arising out of Chapter 116, et seq.

See Petitioner's Appendix, Vol. II, pp. 253-446. By virtue of these assignments, and without reliance on NRS Chapter 116 standing, the Association has standing to pursue all constructional defect claims relating to the assigned units. Moreover, since the assignor-homeowners have an undivided interest in the buildings appurtenant to their units, the Association derives, from the assignments, standing to pursue claims for defects in the building envelope and the structural and fire-resistive systems of those buildings. Thus, by this petition, the Association seeks a writ of mandamus from the Nevada Supreme Court ordering the following:

(1) The Association has standing to assert all constructional defect claims in *units* for which the Association has procured an assignment of rights from the unit-owners; and

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(2) The Association has standing to assert constructional defect claims in the *building* envelope (roof, exterior walls, and wall openings), structural systems, and fire-resistive systems in all buildings which contain a unit for which the Association has procured an assignment

1. Under Nevada law, the assignments are valid contractual agreements that convey all of the homeowners' claims to the Association; thus, the Association has standing to pursue all claims against the developer relating to those assigned units.

The Association has procured the assignment of all claims that 194 unit owners have against D.R. Horton and its subcontractors. The Association, therefore, by virtue of those assignments, is the real party in interest under NRCP 17(a) to assert those claims. As the Court noted in *Deal v. 999 Lakeshore Association*, 94 Nev. 301, 305, 579 P.2d 775 (1978), the owners of condominium units are real parties in interest to pursue actions for constructional defect claims, in that they bear the costs of replacement or repair of those defects. *Id.* at 94 Nev. 304, 579 P.2d 778. The homeowners' standing has been assigned to the Association. Therefore, the Association now has standing as a result of these assignments, completely apart from, and without reference to either NRS 116.3102(1)(d) or the *First Light II* decision.

a. Like any other valid contractual agreements, assignments are enforceable under Nevada law. Even when a claim has not been assigned until after the action has been instituted, the assignee is the real party in interest under NRCP 17(a) and can maintain the action.

Under the Nevada Rules of Civil Procedure, Rule 17(a), an action must be commenced by the real party in interest. *El Ranco, Inc. v. First Nat. Bank of Nev.*, 406 F.2d 1205, 1209 (9th Cir. 1968).[4] "Like any other valid agreements, assignments are enforceable under Nevada

[4] NRCP 17(a) states that "Every action shall be prosecuted 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

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law." *In re Silver State Helicopters, LLC*, 403 B.R. 849, 864 (Bkrtcy.D.Nev. 2009). To constitute an effective assignment of contractual rights, the assignor must simply manifest a present intention to transfer its contract rights to the assignee. *Easton Bus. Opp. v. Town Executive Suites*, _____ Nev. _____, 230 P.3d 827, 832 (2010). There is no general requirement as to when an assignment of contractual rights must be made, and even when the claim is not assigned until after the action has been instituted, the assignee is the real party in interest under NRCP 17(a) and can maintain the action. *Id.* at 831, citing 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*: Civil 2d § 1545, at 350-51. A cause of action for injury to property rights and breach of contract can be assigned under Nevada law. *El Ranco, Inc. v. First Nat. Bank of Nev.*, 406 F.2d 1205, 1209 (9th Cir. 1968) (stating that causes of action based upon injury to property rights and breach of contract can generally be assigned).

In *Easton Bus. Opp. v. Town Executive Suites*, _____ Nev. _____, 230 P.3d 827 (2010), the Nevada Supreme Court addressed assignments of a chose in action. A "chose in action" is defined as a "personal right not reduced into possession, but recoverable by a suit at law." *Pelton v. Meeks*, 993 F.Supp. 804, 806 (D.Nev. 1998), citing Black's Law Dictionary Rev. 4th ed. (1968). In *Easton Bus. Opp.*, the Court confirmed the validity of assignments:

> Based on the agreement as written and the facts the district court found to be undisputed, we conclude that the commission was assignable and

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that person's own name without joining 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. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

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> that Century 21 validly assigned it to Easton. From this it follows that, as Century 21's assignee, Easton has real party in interest status under NRCP 17(a)."

The Court further stated that:

> Plainly, the right to recover the gift/fraudulent transfer is just such a chose in action. Thus, as we read the Nevada statute, the present right of action may be sold in the same manner as other personal property. We note that the Nevada Supreme Court has published no cases construing this language.

Id. at 806. The Court also held that the assignment of commission rights from a brokerage agreement did not materially change the terms of the agreement as to the seller; the agreement did not contain a valid anti-assignment clause; and, thus, the assignment of commission rights was valid, and the assignee was a real party in interest for the purposes of maintaining an action. *Id.* at 830-831. The Court stated that:

> [A] standard no-oral-modification clause cannot be pressed into service as an anti-assignment clause because, ***without more, [an] assignment does not modify the terms of the underlying contract. It is a separate agreement between the assignor and assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party charged.*** (Emphasis added.)

Id. at 831, citing *Citibank, N.A. v. Tele/Resources, Inc.*, 724 F.2d 266, 269 (2nd Cir.1983).

An "assignment" of a right is a "manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." *In re Silver State Helicopters, LLC*, 403 B.R. at 864-865. An assignee typically "steps into the shoes" of an assignor. *Id.* Under the ordinary rules of contract law, a contractual right is assignable unless the assignment materially changes the terms of the contract or unless the contract expressly precludes assignment. *Easton Bus. Opp. v. Town Executive Suites*, *supra*, citing Restatement (Second) of Contracts § 317(2)(a)-(c) (1981).

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b. Nevada courts have consistently recognized that assignments of causes of action are valid under Nevada law.

Nevada courts have consistently recognized that assignments of causes of action are valid under Nevada law. *See Castleman v. Redford*, 61 Nev. 259, 124 P.2d 293, 294 (1942) (an assignee of a chose in action is entitled to sue, and an assignment which is absolute in terms, and vests in the assignee the apparent legal title to a chose in action, is considered as being unaffected by a collateral contemporaneous agreement respecting the proceeds, and the assignee may sue in his own name as the real party in interest). *See also*, *Wood v. Chicago Title Agency*, 109 Nev. 70, 72-73, 847 P.2d 738, 740-741 (1993) (the assignee of funds in an escrow account brought an action for damages against the escrow agent for failing to honor the assignment, and the Court held that the escrow agent was not excused from his contractual obligation to pay the assignee); *Bell v. American Family Mut. Ins. Co.*, 2011 WL 855813, 1 (Nev. 2011) (stating that without an assignment, [the plaintiff] lacked standing to proceed directly against [the defendant] for extracontractual liability or bad faith); *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*, 110 Nev. 270, 275, 871 P.2d 327, 331 (1994) (stating that in order for there to be a legal assignment of rights, the obligee must manifest an intention to transfer the right to another person); *First Interstate Bank of California v. H.C.T., Inc.,* 108 Nev. 242, 247, 828 P.2d 405, 408 (1992) ("It is true that [the assignor] was not the real party in interest after it assigned its interest in the certificate of deposit to [the assignee, Independence Bank]"); *Wells v. Bank of Nevada*, 90 Nev. 192, 197, 522 P.2d 1014, 1017 (Nev. 1974) (stating that controversies arising under an agreement properly are to be determined and settled by parties to the agreement ***or their assigns, that is, by those who have legal rights or duties thereunder***; and that, absent evidence of [an assignment of contract rights], neither [party] has rights, duties or obligations under the

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agreement); *Wood v. Chicago Title Agency of Las Vegas, Inc.*, 109 Nev. 70, 72, 847 P.2d 738, 740 (1993), citing *Martinez v. Martinez*, 98 N.M. 535, 650 P.2d 819, 822 (1982) (under established principles of assignment, once a valid assignment has been made, the assignor cannot cancel or modify the completed assignment by unilateral action without the consent of the assignee); *Wood v. Chicago Title Agency of Las Vegas, Inc.*, 109 Nev. 70, 73, 847 P.2d 738, 740 (1993), citing *Business Fin. Servs., Inc. v. AGN Dev. Corp.*, 143 Ariz. 603, 694 P.2d 1217, 1222 (Ct.App.1984) (stating that an obligor who disregards a valid assignment and makes payment elsewhere remains liable to the assignee); *Kelly v. CSE Safeguard Ins. Co.*, 2010 WL 3843777, 2 (D. Nev. 2010) ("it is clear that whatever rights may be pursued in this action now reside with [the plaintiff]. Between [assignor's] February 24, 2009 assignment and October 14, 2009 assignment, he transferred all of causes of action that he could pursue to [the plaintiff]); *Kelly v. CSE Safeguard Ins. Co.,* 2010 WL 3613872, 3 (D. Nev. 2010) (stating that a third-party receives standing by virtue of an assignment); *Pasina v. California Cas. Indem. Exchange*, 2008 WL 5083831, 4 (D. Nev.2008) (applying Nevada law and holding that, without proper assignment of rights, Nevada does not recognize a right of action by a third-party claimant against an insurance company for bad faith); *Righthaven LLC v. Dr. Shezad Malik Law Firm P.C.*, 2010 WL 3522372, 2 (D.Nev. 2010) (stating that the assignment in question clearly assigns both the exclusive copyright ownership, together with accrued causes of action, *i.e.*, infringements past, present, and future; thus the plaintiff has standing to sue, even for an infringement which preceded the assignment, because that right was specifically assigned with the exclusive assignment of the copyright itself); *Pasina ex rel. Taputu v. California Cas. Indem. Exchange*, 2010 WL 3860646, 13-18 (D. Nev. 2010) (stating that the defendant has failed to show that [the assignor's] assignment of his cause of action to the special administrator is void).

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The above-discussed authority is in accord with the current, nationwide trend in this area of the law. This trend is summed up succinctly in *ACLI Intern. Commodity Services, Inc. v. Banque Populaire Suisse*, 609 F. Supp. 434, 441-442 (S.D.N.Y. 1984):

> The difficulties in determining the effect of assignments stems largely from the dramatic changes that have occurred in the common law over what rights are assignable. . . . [The] law has moved away from the limitations on free assignability to the point that New York law now permits the assignment of most types of claims, including claims of fraud, and the guiding statutory principle is that the assignee of a claim should be deemed to have received the right to enforce any claim assigned. ...The] parties to an assignment are now free to agree by contract to virtually any form of assignment, subject to such general limitations as the principle that an assignee can receive no greater rights than the assignor possessed. ... [This] sweeping change in the law of assignments presents the greatest difficulties in situations where the parties have failed expressly to deal with a particular claim. When the law disfavored the assignment of claims, courts naturally were reluctant to find that claims beyond those expressly conveyed had been transferred to the assignee. As free assignability is now the guiding principle, courts—including those of New York—have turned to modern contact principles to find more readily that claims other than those mentioned in an assignment were conveyed to the assignee.

c. Under Nevada law, there are no prescribed formalities that must be observed to make an effective assignment.

"[I]n the absence of statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment." *Easton Bus. Opp. v. Town Executive Suites*, _____ Nev. _____, 230 P.3d 827, 832 (2010), citing 9 *Corbin on Contracts*, § 47.7, at 147 (rev. ed. 2007). The assignor must simply manifest a present intention to transfer its contract right to the assignee. *Id.*, at _____ Nev. _____, 230 P.3d 832. Absent some additional contract-based or statute-based requirement, no particular formality in expressing that intention need be followed: It is essential to an assignment of a right that the obligee manifests an intention to transfer the right to another person without further action or manifestation of intention by the obligee. The manifestation may be made to

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the other or to a third person on his behalf and, except as provided by statute or by contract, may be made either orally or by a writing. *Id.* at _____ Nev. _____, 230 P.3d 832, citing Restatement (Second) of Contracts § 324 (1981). While failure to give notice of an assignment may affect the rights of the assignee in the event the obligor delivers performance to the obligee/assignor before being notified of the assignment, it normally does not invalidate an otherwise valid assignment. *Id.* at 833.

In the case at bar, of course, the unit-owners' assignments were in writing and were quite clear and unambiguous in assigning all of their constructional defect claims, for both the units and the buildings, to the Association.

B. The District Court Erred In Denying The Association Standing Pursuant To NRS 116.3102(1)(D) To Assert Claims In The Structural System And The Fire- Resistive System, In That Those Defects, By Definition, Affect Two Or More Unit- Owners And Concern The Common-Interest Community

The District Court erred in denying the Association standing pursuant to NRS 116.3102(1)(d) to assert claims relating to defects in the structural and fire-resistive systems of the buildings. This Court has recognized that an association has statutorily conferred standing, by virtue of NRS 116.3102(1)(d), to pursue claims for constructional defects on behalf of two or more unit-owners which affect the common-interest community. *First Light II,* 215 P.3d at 702. The buildings at High Noon at Arlington Ranch are all tri-plexes. Defects in either the structural components or the fire- resistive components of the buildings, by their very nature, affect two or more unit-owners and affect the common-interest community.

These defects, like defects in the building envelope, by their very nature affect every inhabitant of the building. A failure of the structural system will certainly affect every unit in the building. Similarly, a failure of the fire-resistive system would allow fire to spread more rapidly between the units and endanger the lives of more than one unit-owner. Repairs or

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maintenance of these systems would require coordination and contribution by all the unit owners in the building—a proposition that is, in reality, next to impossible.

By its very nature, a defect in the structural integrity of the building affects more than two unit-owners and concerns the common-interest community. The same is true of a defect in the fire-resistive system. Because repairs cannot realistically be made without the coordination of the Association, the community is necessarily involved. For that reason, the Association has standing, pursuant to NRS 116.3102(1)(d), to assert claims to regarding these defects.

The *First Light II* decision further instructed that the statutory grant of standing must be "reconciled with the principles and analysis of class-action lawsuits and the concerns related to constructional defect class-actions, which this court addressed in *Shuette*." *First Light II*, 215 P.3d at 703. Thus, the *First Light II* Court held, in addition to the statutory grant of standing, that an association must also demonstrate satisfaction of a NRCP Rule 23 analysis. Here, every prong of NRCP Rule 23 is satisfied with regard to the Association's assertion of claims relating to defects in the structural and fire resistive-building components.

To the extent that a Rule 23 analysis can be made with application to an association representative action, the Association indeed satisfies the class certification requirements of NRCP 23. As provided in NRCP 23(a), a class-action (here, a representative action) is appropriate when:

> (1) the class is so numerous that joinder of all members is impractical;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

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In addition to these four requirements, a litigant must also satisfy at least one of the categories of NRCP 23(b) which generally evaluates "whether maintaining a class action is logistically possible and superior to other actions." *Meyer v. District Court*, 110 Nev. 1357, 1363, 885 P.2d 622, 626 (1994). Specifically, NRCP 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

For purposes of this petition, the Association will focus on the third requirement of NRCP 23(b) by showing that common questions predominate over individual questions and, therefore, a representative action is the superior method of adjudication.

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1. The class is so numerous that joinder is impracticable.

The putative "class" of unit-owners at High Noon at Arlington Ranch is sufficiently numerous to make joinder of all class members impracticable. Although there is no universal, minimum number required to fulfill the numerosity requirement, "a putative class of forty or more generally will be found 'numerous.'" *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 537 (2005). Moreover, impracticability factors, such as judicial economy, geographic dispersion of class members, financial resources of class members, and ability of class members to bring individual suits, should be taken into consideration when analyzing the numerosity requirement. *Id.* Moreover, in the context of this analysis, "Impractical does not mean impossible." *Robidoux v. Celani*, 987 F.2d 931, 935 (2nd Cir. 1993).

There are 342 units in High Noon at Arlington Ranch. Certainly, litigating over 300 of the same claims individually would not be judicially economical, especially when dealing with similar breach of warranty and negligence claims.

While an individual homeowner may ultimately recover his or her reasonable expert and investigation costs under NRS 40.655, it is still financially burdensome to the homeowner, given that he or she would have to advance these costs before a verdict. This may, in fact, make homeowners hesitant to bring their actions forward. Thus, even though the unit-owners may be close in geographical location, the high costs associated with bringing an individual or "joinder" construction defect action make it impractical and burdensome.

Moreover, it is impractical, if not impossible, to contact all of the unit-owners to give them a meaningful opportunity to bring an action. In fact, the Association has attempted to contact all homeowners to discuss assigning their claims to the Association. But, despite exhaustive efforts, the Association has been unable to reach a large percentage of the homeowners to discuss the issue. Of the homeowners that the Association did reach, virtually

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all of them agreed to assign their rights.[5] Therefore, and for that reason, any sort of "joinder" action would deprive a large percentage of unit-owners from recovery—not by any choice of theirs, but simply because some unit-owners could not reasonably be reached. Clearly a representational action is the superior alternative in this case.

Moreover, the legislature has determined that a common-interest community association can proceed on behalf of just two of its members when the issue affects the common-interest community. NRS 116.3102(1)(d). If the minimum number of homeowners required under an NRCP Rule 23 analysis is greater than two, it runs afoul of this legislative mandate. Accordingly, the numerosity requirement should be viewed in that light.

2. This action involves common questions of both law and fact.

The "commonality" prong of Rule 23 can be satisfied by a ***single*** common question of law or fact. *Shuette*, *supra*, 121 Nev. at 848, 124 P.3d at 538. *Meyer v. District Court*, 110 Nev. 1357, 1363, 885 P.2d 622, 626 (1994). "Commonality does not require that all questions of law and fact must be identical, but that an issue of law or fact exists that inheres in the complaints of all the class members." Here questions of law and fact are common throughout the development.

In this case, every resident of High Noon at Arlington Ranch is affected by the same constructional defects, both in their own units and in the other units in their buildings. Common issues include whether D.R. Horton negligently constructed and breached any express and implied warranties in constructing the units and buildings. Clearly, the Association has satisfied the commonality element.

---

[5] It is unclear exactly why so many homeowners were unreachable. It is likely a combination of absentee-owner of an investment or rental unit, units in foreclosure, or bank owned. It is precisely for this reason—the impracticability of even reaching all of the unit-owners in such a large development to give them a meaningful choice in pursuing their claims—that Association standing is so important.

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3. The claims and defenses of the Association are typical of the class.

As indicated above, the analysis of Association representation does not fit easily into the "typicality" analysis. In this case, however, the Association is the assignee of over half of the unit-owners in the development. Therefore, its claims are ***literally*** the same as those of the homeowners. Also, with regard to the units and buildings for which the Association does not have an assignment, the claims of its assignors (which the Association is here exercising) are similar to and very typical of the claims of the other unit-owners.

The Association's claims and the applicable defenses are typical of the class. Typicality is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Shuette*, 121 Nev. at 848-49, 124 P.3d at 538 (citing *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). This does not require all class-member claims to be identical. *Id.* at 121 Nev. 849, 124 P.3d at 538. Thus, "certification will not be prevented by mere factual variations among class members' underlying individual claims." *Id.*

In *Deal v. 999 Lakeshore Association, supra,* the Court recognized that, where the roofs leaked in every one of the buildings, and where all of the unit owners were assessed for repairs to the roof area, each of the homeowners thereby suffered damage, and their claims were typical of the other homeowners. *See Deal v. 999 Lakeshore Association, supra*, 94 Nev. 301, 306, 579 P.2d 775 (1978).

Here, the unit-owners who have assigned their claims to the Association have suffered injury from the same course of events as those who have not. Their claims rest on the very same legal arguments of breach of express and implied warranties, as well as negligence, to prove D.R. Horton's liability. Each High Noon at Arlington Ranch homeowner in the putative "class" would advance these same common constructional defect arguments were they to individually pursue relief for these defects. Therefore, the Association's claims and applicable defenses are typical of the entire High Noon at Arlington Ranch membership.

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4. The Association will fairly and adequately protect the interests of its membership.

The Association will fairly and adequately protect the interests of the membership and each member thereof. To satisfy this prong, the class representative (here the Association) and members must generally "possess the same interest and suffer the same injury" as the other class members in order to avoid any potential conflicts of interest. *Shuette*, *supra*, 121 Nev. 837, 849, 124 P.3d 530, 539 (2005).

In this case, the Association and its assignors have suffered the same injury in that their homes were built in the same defective manner as the rest of the unit-owners. Furthermore, the Association, its assignors, and the other homeowners all possess the same interest in proving the defects and otherwise seeking compensation to remedy the condition of the building components. Accordingly, the Association will fairly and adequately protect the interests of the unit owners of High Noon at Arlington Ranch.

Additionally, the quality of the Association counsel must be taken into consideration. *In re Dalkon Shield IUD Products Liability Litig.*, 693 F.2d 847 (9th Cir. 1982). The law firm of Angius & Terry LLP is more than qualified in representing the class. The firm has pursued numerous class-action lawsuits dealing with construction defects. A-V rated attorney, Paul P. Terry, Jr., has several years of litigation experience in litigating complex matters relating to construction defects. As such, the membership will be adequately represented by Angius & Terry LLP.

5. Common questions of law and fact predominate over individual questions, and a class-action is the superior method of adjudication.

In addition to satisfying the numerosity, commonality, typicality, and adequacy of representation elements of NRCP 23(a), the Association must also fulfill at least one of the requirements outlined under NRCP 23(b)(3)—namely, that common questions predominate over individual questions, and that class-action is a superior method of adjudication of the claims. Here, those prongs are met.

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a. Common questions predominate over individual questions.

The predominance prong "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625, 117 S.Ct. 2231, 138 L.Ed.2d 689, (1997). The rule "does not require uniformity of claims across the entire class" and "presupposes that individual issues will exist." *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 26 (D. Mass. 2003). "There is no rigid test of predominance; rather, it simply requires a finding that a sufficient constellation of issues binds class members together." *Id.* (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000)). "A single, central issue as to the defendants' conduct vis-a-vis class members can satisfy the predominance requirement even when other elements of the claim require individualized proof." *Id.*

In the present case, adequate notice under Chapter 40 was given to the entire prospective "class" as to the condition of the entire project. The claims and defenses are common to every building. Moreover, the Association's claims are similar to those made in condominium cases where the Association maintains the envelope and class representation is therefore not required.

Indeed, if during discovery it is determined that cost of repair or replacement damages greatly vary, the "class" can easily be broken down into "subclasses" according to plan type, phases, or other variables contributing to the variance in damages. Of course, the same subclass breakdown could be used in the event that any variance in causation issues arises during discovery. Therefore, individual questions can be minimized through the use of subclasses, thereby making the common questions predominant.

This foregoing approach was endorsed by the Court in *First Light II.* As the Court stated:

> [I]f necessary, NRCP 23(c)(4) allows the district court to certify a class action with respect to certain issues or subclasses. To that end, the district court may classify and distinguish claims that are suitable for class action certification from those requiring individualized proof.

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First Light II, 215 P.3d at 704.

b. A representative action is the superior method of adjudication.

The Association also satisfies the superiority element of NRCP 23(b)(3). The purpose of a class-action is to prevent the same issues from "being litigated over and over[,] thus avoid[ing] duplicative proceedings and inconsistent results." *Shuette, supra,* 121 Nev. at 852, 124 P.3d at 539, citing *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D.Ga. 2001)). "It also helps class members obtain relief when they might be unable or unwilling to individually litigate an action for financial reasons or for fear of repercussion." *Id.* In general, "class action is only superior when management difficulties and any negative impacts on all parties' interests 'are outweighed by the benefits of class wide resolution of common issues.'" *Id.*, quoting *Peltier Enterprises, Inc. v. Hilton,* 51 S.W.3d 616, 624 (Tex.App. 2000). Here, the common issue of defective buildings in High Noon at Arlington Ranch, the sheer volume of potential class members, and the high costs in expert and legal fees, easily tip the scale in favor of class-wide resolution.

The decisions in *Blumenthal v. Medina Supply Company*, 139 Ohio App.3d 283, 743 N.E.2d 923 (2000) and *Payne v. Goodyear Tire and Rubber Co.*, 216 F.R.D. 21 (D.Mass. 2003) offer some insight on the superiority of the class-action in the present case. In *Blumenthal*, a group of Ohio homeowners sued the concrete manufacturer of their concrete driveways because there was too much water in the design mix, thereby causing the concrete to become weak and to crack and crumble. *Blumenthal*, 139 Ohio App.3d 283, 743 N.E.2d 923. The trial court initially certified a class that included thousands of Ohio homeowners, but then decertified the class on the predominance and superiority prongs because of a high concentration of individual issues that could have contributed to the concrete's failure; specifically, curing procedures, concrete placement, the handling by various contractors, and actions by the homeowners post installation. *Id.* However, the Ohio appellate court deemed the decertification improper and ruled, in relevant part:

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> The difficulties and complexities affecting the claims of individual class members do not outweigh the efficiency and economy of a common adjudication in this case. It must be remembered that the class affects approximately one thousand property owners throughout northern Ohio who were supplied concrete by Medina. The individual financial claims of these property owners in the class are, given the size and cost of a typical residential driveway, relatively small in dollar terms, less than $10,000 each. The individual claim, when viewed against the typical legal and expert witness fees customarily employed to litigate such a claim, necessarily militates against the bringing of individual small damage claims in favor of resolving these claims in a more efficient and economical legal vehicle for all parties, namely, a class action, wherein the claims can be aggregated and the common theories advanced for recovery. . . . [to avoid] the geometric explosion of expenses and costs that these multiple cases would necessarily generate...

Id., at 139 Ohio App.3d 296-97, 743 N.E.2d 923 (2000).

Thus, the court emphasized the high class volume and the high litigation costs as major factors in evaluating the superiority prong and held that certification was proper. *Id.*

The *Payne v. Goodyear* court noted the same factors in holding that a class action was the superior method of adjudicating the issue of an alleged defective rubber hose, used in radiant floor heating systems, and affecting around 2,000 homes. *Payne*, 216 F.R.D. 21 (D. Mass. 2003). Specifically, the court ruled, in pertinent part:

> [A] class action would best serve the underlying purposes of Rule 23(b) by assuring aggrieved consumers their day in court. "The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation." While the claims of many class members are not insubstantial – perhaps tens or even hundreds of thousands of dollars – the litigation costs, including extensive scientific expert analysis, of pursuing individual claims against Goodyear would be likely, in many cases, to be prohibitive."

Id., at 29.

As in *Blumenthal* and *Payne*, perhaps even more so, the putative class in the present case is far too numerous to efficiently proceed in any other way than a class-action. Again, the putative class encompasses at least 340 homes. It would surely create an undue burden on

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the court system to hear over 340 individual claims regarding the same issues of whether the same building components are defective.

Also, as in *Blumenthal* and *Payne*, but perhaps even more so, the expected high litigation costs would likely deter individual homeowners from bringing forward their claims. Construction investigations, as well as expert testimony, can be extremely expensive and would likely be a prohibitive financial burden on a single homeowner. While NRS 40.655 allows a homeowner to ultimately recover such costs from the builder and subcontractors, the reality remains that the homeowner would need to advance all of these costs years before recovery. Allowing the present case to proceed as a class-action will minimize these burdens on the class, because investigations will be limited to a representative sample of homes, and the associated costs will be shared by all class members. Any attorney's fees and associated costs would also be shared by the class, as opposed to each individual class member's incurring his or her own attorney's fees and costs in an individual action based on the same main issues that apply to all.

Undoubtedly, the common issues of defects in the building envelopes and the other issues at over 340 homes, as well as the anticipated high litigation costs associated with claims relating thereto, makes a representative action the superior method of adjudication in the case at hand.

VII. CONCLUSION

For the forgoing reasons, Petitioner Association urges this Court for issuance of a writ of mandamus, commanding Respondents, the Eighth Judicial District Court and the Honorable Susan H. Johnson to rule that in addition to standing to assert claims regarding the building envelope of the residential buildings, the Association also has standing to bring claims for construction defects located in (a) individual condominium units for which the Association holds an assignment of claims from the homeowner, (b) the fire resistive and

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structural components of all buildings containing a unit for which the Association holds an assignment of claims from the homeowner, and (c) the fire resistive and structural components of all buildings pursuant to NRS 116.3102(1)(d).

Dated: June 16, 2011

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ORIGINAL

IN THE SUPREME COURT
OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, and THE HONORABLE SUSAN H. JOHNSON, DISTRICT JUDGE, Respondents, and D.R. HORTON, INC., Real Party In Interest.	CASE NO. District Court Case No. 07-A542616 Dept. No. XXII

PROOF OF SERVICE OF HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS

I HEREBY CERTIFY that on the 17th day of June, 2011, a copy of HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS with appendix was duly deposited in the United States mail, postage prepaid,

///

RECEIVED
JUN 22 2011
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CLERK OF SUPREME COURT
DEPUTY CLERK

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THE HONORABLE SUSAN JOHNSON
DEPARTMENT XXII
EIGHTH JUDICIAL DISTRICT COURT
OF CLARK COUNTY, NEVADA
Regional Justice Center
200 Lewis Avenue
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Respondent

DATED this 17th day of June, 2011.

BY: _____

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