IN THE SUPREME COURT OF THE STATE OF NEVADA

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, Appellant, v. IKON HOLDINGS, LLC, a Nevada limited liability company, Respondent.	Supreme Court Case No. 63178 District Court Case No. A-11-647850-B

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. NRS 116.3116(2) provides a statutory "super-priority" lien in favor of homeowners' associations in the event of a foreclosure by the holder of a first security interest on a common interest unit. This "super-priority" lien includes unpaid assessments, as well as fees and costs of collection. Is the statutory "super-priority" lien numerically limited to so-called "nine times monthly assessments" and no more?

2. The Covenants, Conditions & Restrictions (the "CC&Rs") for Horizons provide a separate contractual "super-priority" lien in favor of homeowners associations in the event of a foreclosure by the holder of a first security interest. This "super-priority lien" includes unpaid assessments, as well as fees and costs of collection. Is the contractual "super priority" lien numerically limited to so-called "six times monthly assessments" and no more?

3. Did the lower court err when it failed to consider undisputed evidence demonstrating the unreasonable and absurd results arising from Ikon's interpretation of NRS 116.3116(2) and the CC&Rs?

4. Did the lower court err when it failed to give great deference to an Advisory Opinion issued by the Commission for Common Interest Communities and Condominium Hotels (the "CCICCH") that expressly rejected Ikon's interpretation of NRS 116.3116(2)?

5. In *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012), this Court held that the CCICCH is "solely responsible for determining the type and amount of fees that may be collected by associations." Did the lower court err by failing to follow this binding precedent?

6. NRS 116.3116 creates a statutory priority lien separate and apart from the contractual priority lien that was created in the CC&Rs. Do these liens operate independently of one another? In other words, to the extent that there are differences between the two liens, does one lien control over or supersede the other?

STANDARDS FOR REVIEW

When a district court's decision to grant declaratory relief depends on a pure question of law, the review is *de novo*.[1] Questions of statutory construction are also a question of law that this Court must review *de novo*.[2]

STATEMENT OF THE CASE

This action involved a dispute between Appellant Horizons at Seven Hills Homeowners Association ("Horizons") and Respondent Ikon Holdings, LLC ("Ikon") over the meaning and interpretation of NRS 116.3116 and the Horizons CC&Rs. Ikon, a real estate investment company, commenced the lower court action, seeking declaratory relief and money damages on the following issues: (1) whether NRS 116.3116(2) limited Horizons' association super-priority lien to "nine times monthly assessments"; (2) whether the CC&Rs limited Horizons' association super-priority lien to "six times monthly assessments"; (3) whether the commencement of a civil lawsuit was a condition precedent to the assertion of any kind of super-priority lien; and (4) whether Ikon was entitled to money damages simply based upon Horizons' disagreement with Ikon over the amount of the lien.

On summary judgment, the lower court concluded as a matter of law that Horizons' lien was limited strictly to "six times monthly assessments" and no more. The lower court rejected Ikon's claim for

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[1] *Educ. Initiative PAC v. Comm. to Protect Nev. Jobs*, 129 Nev. ---, --- , 293 P.3d 874, 878 (2013).

[2] *Weddell v. H2O, Inc.*, 128 Nev. ---, ---, 271 P.3d 743, 748 (2012); *Borger v. District Ct.*, 120 Nev. 1021, 1026, 102 P.3d 600, 604 (2004).

money damages and its argument that the filing of a civil lawsuit was a prerequisite to asserting a super-priority lien.[3]

At trial, the parties stipulated (based upon the court's prior legal rulings) that the sum of six months' worth of assessments equaled $1,140.00. That amount was tendered by Ikon just prior to trial in exchange for a lien release by Horizons. Final judgment was thereafter entered consistent with the lower court's prior rulings. This appeal followed.

STATEMENT OF THE FACTS

A. Statutory "Super-Priority" Liens Under NRS 116.3116.

Most of the rules of law that form the foundation of this appeal are straightforward and agreed upon by the parties. Nevada law allows homeowners associations to impose assessments against their unit owners.[4] In the event of a default by a unit owner, the association may impose fees and charges to collect those unpaid assessments.[5] Such fees must be reasonable, and may be collected by the association directly, or by a third-party, such as a property manager or a collection agency.[6] To prevent excessive fees against unit owners, collection fees are capped by regulation.[7] Nevada law also provides a statutory lien to the association upon the amounts that are owed to the associations.[8]

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[3] Ikon did not appeal either of these determinations.
[4] NRS 116.3102.
[5] NRS 116.3102(k); NRS 116.310313(1).
[6] NRS 116.310313(1,2).
[7] NAC 116.470.
[8] NRS 116.3116(1); Appellant's Appendix ("AA") 0825-0826.

In the event of a foreclosure conducted by the association, the association recovers all of its unpaid lien, plus its collection fees and costs, before any other lien is satisfied.[9]

A slightly different result occurs, however, when a first security interest conducts a foreclosure that takes place before the association forecloses. In that instance, NRS 116.3116(2) governs. The rule provides that the association lien is senior to that of the first security interest holder "to the extent of assessments for common expenses . . . which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to foreclose the lien . . . ."[10]

This is where the litigants part company. Ikon maintains the foregoing phrase means the association can recover a numeric maximum of "nine times monthly assessments" and no more, regardless of what amounts the association might have incurred in its own attempts to collect prior to foreclosure by the first security interest holder.

However, such a simple numeric equation—which could have easily been written into the statute—simply is not present in NRS 116.3116(2). Rather, the rule is a "look-back" provision for the nine months leading up to foreclosure. In other words, NRS 116.3116(2) is designed to place the association in the same position it would have been financially ("to the extent of")[11] as if there had been no default

[9] NRS 116.31164(3)(c) (providing recovery of all reasonable expenses of sale, reasonable expenses of securing possession before sale, attorney's fees and other legal expenses incurred by the association).

[10] NRS 116.3116(2).

[11] NRS 116.3116(2).

by the unit owner ("which would have become due in the absence of acceleration")[12] for the nine months prior to foreclosure. While this amount includes recovery of all unpaid assessments arising during the nine months prior to foreclosure, it also necessarily includes the collection fees and costs that were incurred by the association during that same period. Otherwise, the association is not compensated "to the extent of" the amounts it would have received "in the absence of acceleration."

B. Contractual "Super-Priority" Liens Under The CC&Rs.

A similar dispute exists with regard to the "super-priority" lien created by the CC&Rs. Here, Ikon maintains that the lien created by the CC&Rs is limited to a numeric maximum of "six times monthly assessments" and no more, regardless of what amounts the association might have incurred in its own attempts to collect prior to foreclosure by the first security interest holder. However, the CC&Rs expressly provide that unpaid collection fees and costs survive foreclosure. Significantly, the lower court ignored this key language (and thus the fee/cost portion of the equation) when entering summary judgment in favor of Ikon.

On June 7, 2005, Horizons executed the CC&Rs, which were created with the following express intent:

> Declarant has deemed it desirable, for the efficient preservation of the value and amenities of the Properties pursuant to the provisions of this Declaration to organize the Association, to which shall be delegated and assigned the powers of owning, maintaining and administering the Common Elements (as defined herein), administering and enforcing the covenants and restrictions, and ***collecting and disbursing the Assessments and charges hereinafter created.***

[12] *Id.*

> Declarant will cause, or has caused, the Association to be formed for the purpose of exercising such functions. . . .
>
> **NOW, THEREFORE,** Declarant hereby declares that all of the Properties shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the provisions of this Declaration and to the following protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, ***all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Properties, in furtherance of a general plan for the protection, maintenance, subdivision, improvement and sale and lease of the Properties*** or any portion thereof.
>
> The covenants, conditions, restrictions, reservations, easements, and equitable servitudes set forth in this Declaration ***shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties***, or any part thereof, and their heirs, successors and assigns; shall inure to the benefit of and be binding upon, and may be enforced by, Declarant, the Association, each Owner and their respective heirs, executors and administrators, and successive owners and assigns.[13]

On its face, the CC&Rs were designed specifically to fund the Common Elements through assessments, and to give Horizons the mechanism and ability to fund and maintain those improvements with obligations that ran with the land.

Importantly, though commonly used, the term "monthly assessment" is actually a misnomer. Pursuant to the CC&Rs, there is no such thing as a "monthly assessment." Rather, assessments are made annually, with the board directing whether payments are to be billed on a quarterly or monthly basis. The CC&Rs provide:

> "Assessment, Annual" shall mean the annual or supplemental charge against each Owner and his Unit, representing a portion of the Common Expenses, which are to be paid in advance in equal periodic (monthly, or quarterly as determined from time to time by the Board) installments commencing on the Assessment Commencement Date, by

[13] AA0162-63 (emphasis in original and added).

> each Owner to the Association in the manner and at the times and proportions provided herein.[14]

This language defining "Assessment, Annual" precludes any notion that there is such a thing as "six times monthly assessments" in the CC&Rs or "nine times monthly assessments" under NRS 116.3116(2).

The CC&Rs also empower the Board to assess each unit, and personally obligate each Unit Owner to pay those assessments.[15] The CC&Rs state as follows:

> Each Owner of a Unit, by acceptance of a deed therefor, whether or not so expressed in such deed, is deemed to covenant and agree to pay to the Association: (a) Annual Assessments; (b) Specific Assessments; (c) Supplemental Assessments; (d) any Capital Assessments; and (e) any other charge levied by the Association on one or more Owner(s), such Assessments to be established and collected as provided in this Declaration. ***All Assessments, together with interest thereon, late charges, costs, and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit*** against which such assessment is made . . . .[16]

Recording of the CC&Rs creates notice and perfection of a contractual lien for assessments. *Id.* The CC&Rs were recorded on July 6, 2005. AA0160.

As a result, the CC&Rs create a ***contractual*** lien that is separate and distinct from the ***statutory*** lien created by NRS 116.3116.[17]

Section 7.9 of the CC&Rs establishes the priority of the assessment lien, and is similar in many respects to NRS 116.3116. Section 7.9 establishes the supremacy of the assessment lien, carves

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[14] AA0163.

[15] AA0175 at § 5.1 and AA0180 § 6.1.

[16] AA0180-0181 at § 6.1 (emphasis added).

[17] *Cf.* NRS 116.3116 to AA0180-0181 at § 6.1.

out an exception for a first deed of trust, and then re-affirms the supremacy of the lien for amounts "which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien . . . ."[18]

Significantly, Section 7.9 continues as follows:

> ***The sale or transfer of any Unit shall not affect an assessment lien.*** However, subject to the foregoing provision of this Section 7.9, the sale or transfer of any Unit pursuant to judicial or non-judicial foreclosure of a First Mortgage shall extinguish the lien of such assessment ***as to payments which became due prior to such sale or transfer.***

Id. (emphasis added). In other words, by the very terms of the CC&Rs, the assessment lien is not extinguished as to interest, costs, and fees, but only as to "payments which became due," which are junior in priority to the first deed of trust. The amounts that are due for interest, fees, and costs remain as a "charge on the unit and shall be a continuing lien upon the Unit . . . ."[19]

Significantly, it was undisputed before the lower court that the intent of the CC&Rs was such that interest, collection fees, and costs would not be extinguished by a foreclosure upon a first deed of trust.[20] In particular, Lauren Scheer, Vice-President of APS Management (the original property manager for Horizons), declared under oath that it was understood "[f]rom the beginning of the development" the CC&Rs did not allow for the extinguishment of an assessment lien as to interest, collection fees, and costs after a foreclosure by the holder

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[18] AA0184 at § 7.9.

[19] AA0180-0181 at § 6.1.

[20] AA1736-1738.

of a first security interest in a unit.[21] Ikon never offered any evidence of its own to contradict this declaration.

C. Common-Interest Communities and Collection of Assessments

Horizons is a common-interest community which operates in accordance with NRS Chapter 116.[22] As a common-interest community, it has the power to assess unit owners for the purpose of benefitting the community.[23]

Horizons, along with most other common-interest communities in Nevada, lack the resources, staff, and ability to pursue collections on their own.[24] As such, Horizons originally engaged a property manager, and later a third-party collection agency, to collect unpaid assessments on its behalf.[25]

Under both the CC&Rs and NRS Chapter 116, Horizons is allowed to charge for the costs of collecting any past due obligation, regardless of whether the past due obligation is collected by the association or a third-party debt collector.[26] It is undisputed that common-interest communities possess a lien upon the unit for any such collection fees and costs and that such fees and costs are lienable as assessments "unless the declaration otherwise provides . . . ."[27] In this case, the CC&Rs specifically provided that collection fees and

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[21] *Id.*

[22] AA1688.

[23] AA0162; *see* NRS 116.3102.

[24] AA1736-38; AA1742-45.

[25] *Id.*

[26] AA0180-0181 at § 6.1; NRS 116.310313.

[27] NRS 116.3116(1).

costs are lienable.[28]

Significantly, there were a number of ***undisputed facts*** before the lower court concerning common-interest communities such as Horizons and their ability to collect past due assessments, including the following:

- Almost without exception, unit owners who are in default with their lenders simultaneously default on their obligations to their common-interest communities. This results in unpaid assessments and neglected and/or blighted properties.
- Horizons and other common-interest communities must take active steps to have any chance of recovering amounts that are past due, including preparing and recording various notices and mailings that are required by NRS Chapter 116. Specific examples of the various tasks that must be performed by associations (and the amounts that may be charged) are recognized and specifically authorized by NAC 116.470.
- For years, common-interest communities like Horizons have retained third-parties such as property managers and collection agencies to pursue unpaid amounts due from unit owners. This is because common-interest communities rarely have the resources, staff, or ability to pursue collections on their own.
- Without collection agencies or property managers to pursue past due charges, common-interest communities would have

[28] AA0184 at § 7.9.

little or no ability to enforce their rights to collect said charges from homeowners who do not pay voluntarily, thereby increasing the costs to those homeowners who are not delinquent.

- In addition to collection fees, Horizons and other common-interest communities like it also are forced to incur out-of-pocket costs, such as payments to title companies and publication costs, in advance of a foreclosure sale. The out-of-pocket costs for publication and posting alone in advance of a foreclosure in Las Vegas are approximately $500.00.
- Depending on the amount owed by the unit owner, the publication costs alone often exceed the "nine times" super-priority lien calculation proposed by Ikon in this case.
- Using the calculation proposed by Ikon, many common-interest communities would never bother to pursue collection, as the out-of pocket costs alone would exceed the amount recoverable. For Horizons, collection would become cost prohibitive in most cases.
- If common-interest communities are unable to collect unpaid assessments, these communities would become blighted and neglected. In addition, the financial burden of paying for community expenses would fall upon the innocent unit owners who are actually following the rules and paying their obligations.
- At the time that the CC&Rs were drafted, recovery of interest, late fees, and costs of collection as part of the super-priority lien was and had been common practice in the

industry for years. The CC&Rs reflected that reality in the industry at the time and were applied in that manner.[29]

Again, none of these facts were disputed by Ikon. They were simply ignored by the lower court.

In 2007, Horizons engaged Nevada Association Services, Inc. ("NAS") to pursue collections of unpaid assessments and penalties, and then renewed that engagement in 2009.[30] In making that engagement, Horizons specifically represented that the CC&Rs allowed for—and NAS could charge for—collection fees and costs. The Authorization states:

> The Association permits NAS to charge collection fees and costs as provided under applicable State and Federal law, ***and the Association's governing documents.***[31]

This is, of course, consistent with the application of the CC&Rs from day one, which was to allow for the recovery of collection fees and costs in the event of a foreclosure.[32]

D. The Horizons Lien.

The subject property in this case is 950 Seven Hills Drive, #1411, Henderson, Nevada 89052, otherwise identified as Clark County Assessor Parcel Number 177-35-610-137 (the "Unit").[33] The parties agree that the Unit was subject to a lender's first deed of trust, which was foreclosed on June 28, 2010.[34] The purchaser at the sale,

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[29] AA1736-1738; NAC 116.470.

[30] AA1740.

[31] *Id.* (emphasis added).

[32] *Cf.* AA1736-38.

[33] *See* AA0217-31.

[34] *See, e.g.,* AA0005.

Scott Ludwig, thereafter transferred the Property by Quitclaim Deed to Ikon.[35]

At the time of the foreclosure sale, Horizons was owed the sum of $1,747.50 in unpaid assessments and late fees.[36] In addition, Horizons had incurred significant collection fees and out-of-pocket costs, as it was pursuing its own default.[37] Those collection fees and costs totaled $1,502.00.[38] In particular, Horizons incurred $800.00 alone in trustee's fees and a trustee's sale guarantee that it was forced to pay as it moved forward with its own foreclosure that was cut short by the lender's foreclosure.[39]

Ikon commenced the lower court action on September 6, 2011. AA0002. Ikon did not dispute that its unit was subject to the Horizons NRS Chapter 116 lien, agreed that part of the Horizons lien survived the lender's foreclosure pursuant to NRS 116.3116, and further agreed that Horizons' lien included collection fees and costs.[40] Rather, it maintained that Horizons was entitled to no more than six (6) times monthly assessments or, at most, nine (9) times monthly assessments pursuant to NRS 116.3116 and the CC&Rs.[41] Ikon maintained that this amount is strictly capped at the monthly multiplier, regardless of how much Horizons had incurred in collection fees and costs.

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[35] AA0261-64.

[36] AA0269.

[37] AA0269-70; AA1742-45.

[38] AA0269-70. There was no suggestion in the lower court that any specific fees or charges were unreasonable or that they exceeded the limits contained in NAC 116.470.

[39] AA0270.

[40] *See* AA0004-05; AA0788 at lns. 24-25; AA0825-26.

[41] *See* AA0001-015.

SUMMARY OF ARGUMENT

From a purely legal standpoint, this case is about the interpretation of a statute—NRS 116.3116(2)—and the underlying CC&Rs for the property at issue in this case. The overriding question is whether Horizons' recovery on its "super-priority" lien is capped at a multiple of "monthly assessments" or whether the association is also allowed to recover its reasonable collection fees and costs (as limited by NAC 116.470).

From a practical matter, this case is about who bears the loss when a unit owner defaults on payment of assessments. Associations will be crippled in their ability to recover unpaid assessments, and will be chilled from even attempting to do so, if they cannot recover reasonable collection fees and costs. Indeed, in this case, because Horizons was limited to "six times monthly assessments," it actually lost money trying to collect unpaid assessments on the underlying property.

When such restrictions are placed on associations and they cannot pursue recovery of unpaid debts, the fallout is significant. Properties and communities become blighted. The burden of payment for assessments falls upon the innocent members of common interest communities and condominium associations, in the form of increased assessments.

The purpose of NRS 116.3116(2) was to provide a **meaningful** recovery to associations on unpaid assessments in the event of a foreclosure by the holder of a first security interest. With such a cap, there is no meaningful recovery. It is a string with no bow or arrows, as has been described by the Connecticut Supreme Court.

There were numerous undisputed facts before the lower court directing that Ikon's interpretation of the statute would lead to unreasonable and absurd results. Yet, the lower court ignored all of these undisputed facts and, worse yet, offered no reason why those unreasonable and absurd results did not factor into the lower court's decision.[42]

Perhaps worst of all was the lower court's failure to balance the public interests involved. The only benefit of a "nine times monthly assessment" cap is to maximize the profit for the real estate investor who quickly "flips" the property to another buyer after the association's lien is released. Indeed, that is exactly what happened in this case. Under Ikon's interpretation of NRS 116.3116(2), innocent homeowners are forced to subsidize the profit of real estate "flippers" like Ikon **Holdings**, LLC. Hardly a reasonable result.

Respondent Ikon will likely say that NRS 116.3116(2) is plain and unambiguous as it peddles its overly simplistic "nine times monthly assessments" formula. Yet, that simple formula—which could have easily been written into the statute if that is truly what was intended by the Legislature—is simply not present in the text of the statute itself.

Rather, NRS 116.3116(2) is a "look-back" provision designed to place the association **in the same place it would have been but for the default during the nine month period prior to a lender foreclosure**. While Ikon rightly considers the assessments that would have accrued in the absence of a default, it tellingly ignores the costs

[42] *See* AA0969-73; AA1544-46; AA2086-93; AA2098-2100.

that the association incurred during that same period in its own attempts to collect prior to foreclosure. Failure to consider the costs incurred during that nine month "look-back" period cheats the association from being in the same place it would have been "in the absence of acceleration," which is what NRS 116.3116(2) specifically provides.

With only a speck of published authority from courts around the country interpreting similar statutes (Connecticut is the only state supreme court to decide this issue), Ikon successfully urged the lower court to adopt a "predictable" formula, regardless of what the statute actually provided. While predictability is an admirable goal, it cannot prevail over the actual language of the statute. Nor can the desire for "predictability" be allowed to drive unreasonable and absurd results. The tail does not wag the dog.

The lower court failed to give deference to an Advisory Opinion issued by the CCICCH, which is the controlling agency interpretation of the statute. In doing so, the lower court failed to follow this Court's binding authority directing district courts to give "great" deference to controlling agency opinions, and further failed to follow *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012), in which this Court held that the CCICCH is "solely responsible for determining the type and amount of fees that may be collected by associations."

The lower court additionally ignored NAC 116.470, which was promulgated by the CCICCH and already places caps on collection fees. The lower court, basing its ruling on a desire for a predictable formula, did not consider that this regulation already provides the

predictability the lower court apparently thought was lacking. Setting that aside, the CCICCH never would have bothered to promulgate NAC 116.470 if it believed that NRS 116.3116(2) already contained a miniscule "nine times monthly assessments" cap.

With regard to the CC&Rs, the lower court incorrectly concluded that the six-month look-back period limited the Horizons lien even further than the "nine times monthly assessment" figure. In doing so, the lower court gave short shrift to NRS 116.1206. More importantly, it rejected any notion that the CC&Rs create a contractual lien that is separate and independent of the statutory lien created by NRS 116.3116(1). And, the CC&Rs contain a provision specifically setting forth what part of its lien is extinguished in the event of a foreclosure by the first security interest. In such a case, the lien is extinguished **only** as to payments which became due prior to foreclosure (i.e., unpaid assessments), not accrued collection fees and costs. This publicly recorded document, of which Ikon had notice when it purchased the property, directs that the portion of the lien on which collection fees and costs arose survived foreclosure.

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ARGUMENT

A. Maxims of Statutory Construction Do Not Permit a "Nine Times Monthly Assessments" Interpretation of NRS 116.3116(2).

1. The Lower Court Ignored the Language of NRS 116.3116 In A Well-Intentioned—But Nevertheless Flawed—Attempt to Create a "Predictable" Rule

IKON's interpretation of NRS 116.3116(2)—that an association's lien is limited to "nine times monthly assessments"—is teasingly simple. However, the words "nine times monthly assessments" are notably missing from NRS 116.3116(2). Suffice to say, if the Legislature's intent had truly been to craft such a simple formula, it could have done so easily: "The lien is prior to all security interests . . . in an amount not to exceed 9 months worth of assessments." Indeed, the absence of such simple words indicates that the Legislature intended something else when it enacted NRS 116.3116(2).[43]

NRS 116.3116 is many things—simple is not one of them. The sheer number of conflicting decisions concerning NRS 116.3116(2) belies any suggestion that NRS 116.3116(2) contains a simple, bright-line rule.[44] Notably, throughout the proceedings, both parties struggled with the complexities of Section 116.3116.[45] Even the State

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[43] *See Butler v. State,* 120 Nev. 879, 902, 102 P.3d 71, 87 (2004) (noting the well-established rule of construction that the inclusion of one thing indicates that the omission of another was intentional).

[44] *See* Motion to Consolidate (May 24, 2013), at Exhibit 1 (containing the many various differing decisions concerning NRS 116.3116(2)).

[45] *See, e.g.,* AA0804 at lns. 12-13 (conceding that NRS 116.3116 is "a very long statute"); AA0799 at lns. 13-15 (explaining that it "[t]ook me a little while to understand what that phrase, 'Which would have

of Nevada Department of Business and Industry has two competing advisory opinions within its ranks—one by the CCICCH and one by the Nevada Real Estate Division (the "NRED")—that are totally at odds with one another.[46] The sheer length of NRS 116.3116(2), standing alone, should give anyone great pause when considering whether it provides such a simple formula.

When the lower court adopted Ikon's "nine times monthly assessments" reading of NRS 116.3116(2), it gave no meaningful explanation of the reasoning behind its decision.[47] There is no discussion in the lower court's order (or its subsequent denials to clarify or reconsider) as to whether NRS 116.3116 is ambiguous or

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become due in the absence of acceleration' meant."). Ikon's analysis of NRS 116.3116(2) was so complex that counsel presented at oral argument a lengthy and detailed Power Point presentation—15 minutes long—merely to walk through the statute alone. AA0787 at lns. 12-20.

[46] AA0644-57. Subsequent to the issuance of partial summary judgment by the lower court, and before the entry of final judgment, the NRED issued its own advisory opinion contrary to the CCICCH advisory opinion. However, Ikon never maintained that the NRED opinion should be followed, and it is not part of the lower court record. Setting that aside, it has already been ruled by NRED Arbitrator Steven Wenzel that the conflicting NRED opinion is subservient to the CCICCH Advisory Opinion, as the NRED "generally must act under the supervision and control of the CCICCH." *Bank of America, NA v. Olympia Management Services, LLC*, Nevada Real Estate Division Arbitration Case No. 13-14, Arbitration Decision and Award, at 8:26-27 (September 6, 2013) (Wenzel, Arb.). Arbitrator Wenzel further concluded that the NRED opinion "must be viewed as a fugitive document, issued without authority or any legal effect whatsoever." *Id.* at 10:3-4. This authority, plus this Court's recent decision directing that the CCICCH is "***solely*** responsible for determining the type and amount of fees that may be collected by associations," directs that the CCICCH Advisory Opinion control. *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012). A copy of that Arbitration opinion is included in an Addendum attached hereto in accordance with NRAP 28(f).

[47] AA0969-73.

unambiguous, how its application is consistent with the purpose of the statute, or whether unreasonable or absurd results are created from its interpretation of the rule. *See id.* Only later, when explaining its reasoning to the parties, the lower court noted its desire to create "predictability" by fashioning a simple bright-line rule for all to follow.[48] While the desire to fashion "predictability" is an admirable goal, a lower court is not allowed to rewrite a statute to serve such a purpose.[49]

The only conclusion that can be gleaned from the foregoing is that age old maxims of statutory interpretation took a back seat to the lower court's well-intentioned desire to create a bright-line rule.

2. Ikon's Interpretation of NRS 116.3116 Guts the "Make-Whole" Nature of the Rule and Creates "A Bow With No String or Arrows."

As mentioned previously many times, the statute at issue is NRS 116.3116(2), which provides in pertinent part as follows:

> A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first

[48] AA1536 at lns.3-6.

[49] *See e.g., Holiday Retirement Corp. v. State, Div. of Indus. Relations,* 128 Nev. —, —, 274 P.3d 759, 761 (2012) ("It is the prerogative of the Legislature, not this court, to change or rewrite a statute.").

> security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> The lien is also prior to all security interests described in paragraph (b) . . . ***to the extent of*** the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 ***which would have become due in the absence of acceleration*** during the 9 months immediately preceding institution of an action to enforce the lien . . . .[50]

Before the lower court, Ikon consistently focused on the words "to the extent of" to urge a reading limiting the entire amount of the surviving lien to what it described as "nine times monthly assessments." In offering this interpretation, however, Ikon literally changed the words "to the extent of" to "not to exceed," and then largely glossed over the words "which would have become due in the absence of acceleration . . . ."[51] When read together—and the provisions must be read together under Nevada law[52]—one can only conclude that NRS 116.3116(2) is an expectancy clause for the association. It is a look-back provision, designed to place the

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[50] NRS 116.3116(2) (emphasis added).

[51] *See* NRS 116.3116(2). There is no dispute that the reference to "acceleration" in this statute is a reference to the unit owner's default in its obligations to pay periodic assessments.

[52] *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. Adv. Op. 70, — P.3d —, 2013 WL 5497736, at * 5 (Oct. 3, 2013) ("Whenever possible, we will interpret a rule or statute in harmony with other rules or statutes.") (internal citations and quotations omitted).

association **in the same place as if there had been no default** for the nine months preceding foreclosure. In an attempt to rewrite its obligation, Ikon focuses only on the assessments that become due during this nine month period. This position is deliberately short sighted, as it ignores the costs that the association incurs during this same period while it is pursuing its own collection of its own liens.

When interpreting the plain language of a statute, Nevada courts must consider a statute's provisions as a whole, reading them "in a way that would not render words or phrases superfluous or make provisions nugatory."[53] Meaningless or unreasonable results should be avoided by courts when interpreting statutes.[54] As such, "where a statute is susceptible to more than one interpretation it should be construed in line with what reason and public policy would indicate the legislature intended."[55] Moreover, "when the legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded."[56]

The only state supreme court case deciding this issue is *Hudson House Condominium Ass'n, Inc. v. Brooks*.[57] In *Hudson House*, the Connecticut Supreme Court considered whether collection fees and costs survived foreclosure as part of the super-priority lien **in addition**

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[53] *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 339, 117 P.3d 171, 173 (2005) (quotation omitted).

[54] *Matter of Petition of Phillip A.C.*, 122 Nev. 1284, 1293 (2006).

[55] *County of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 753, 961 P.2d 754, 757 (1998) (quotation omitted).

[56] *Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001).

[57] 611 A.2d 862 (Conn. 1992).

to "nine months" worth of assessments.[58] The Connecticut Supreme Court held that such fees and costs survived foreclosure as part of the super-priority lien, even though assessments had already been capped at the so-called "nine times monthly assessment" amount. The court stated:

> In construing a statute, we assume that "the legislature intended to accomplish a reasonable and rational result." Section 47-258(a) creates a statutory lien for delinquent common expense assessments. Section 47-258(i) authorizes the foreclosure of the lien thus created. Section 47-258(b) provides for a limited priority over other secured interests for a portion of the assessment accruing during the six month period preceding the institution of the action. Section 47-258(g) specifically authorizes the inclusion of the costs of collection as part of the lien.
>
> Since the amount of monthly assessments are, in most instances, small, and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be only the priority debt that in fact is collectible, ***it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without a string or arrows.*** We conclude that § 47-258 authorizes the inclusion of attorney's fees and costs in the sums entitled to a priority.[59]

Importantly, the Connecticut Supreme Court rejected the overly simplistic "nine times monthly assessments" catchphrase that is being argued here.[60]

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[58] *Id.* at 613.

[59] 611 A.2d at 616-17 (emphasis added).

[60] Although the Connecticut Supreme Court noted that its legislature later amended the statute to specifically include "the Association's costs and attorney's fees in enforcing its lien," the court specifically noted that this merely "clarified that attorney's fees and costs are included in the priority debt." *Hudson House*, 611 A.2d at 617 n.4.

Rather, the Connecticut Supreme Court viewed the purpose of the rule as a whole—to provide ***meaningful*** compensation to associations when a lender foreclosure occurs.[61] As the court noted, the legislature must have permitted all collection costs associated with enforcement of the super-priority lien to be recoverable, even after a foreclosure.[62] To read the statute otherwise would make no practical sense at all, as it would fashion a proverbial "bow" with no "string" or "arrows." Similar to the rules of statutory interpretation in Connecticut, under Nevada law, courts must "consider the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result."[63]

The foregoing interpretation is consistent with the text of NRS 116.3116. Before the lower court, Ikon consistently focused on the words "to the extent of" to urge a reading limiting the entire amount of the lien to what it described as "nine times monthly assessments." However, Ikon glossed over the phrase after that—"which would have become due in the absence of acceleration" (i.e., default). These phrases, read together, direct that the purpose of NRS 116.3116(2) is to place the association in the same position as if there had been no default in the nine months prior to foreclosure.

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[61] 611 A.2d at 616-17.

[62] *Id.*

[63] *J.E. Dunn Northwest, Inc. v. Corus Const. Venture, LLC,* 127 Nev. —, —, 249 P.3d 501, 506 (2011) ("This court seeks to avoid interpretation[s] that yield unreasonable or absurd results.") (internal citations and quotations omitted); *see also Flamingo Paradise Gaming, LLC v. Chanos,* 125 Nev. 502, 509, 217 P.3d 546, 551 (2009) ("The court must interpret a statute in a reasonable manner, that is, the words of the statute should be construed in light of the policy and sprit of the law, and the interpretation made should avoid absurd results.") (internal citation and quotation omitted).

Such an interpretation also makes practical sense. The intent and purpose of the CC&Rs was to give Horizons not only a legal ***right*** to recover some of the unpaid principal amounts as a result of a default, but the ***means*** to actually recover.[64] It was designed precisely to avoid crafting the "bow without a string or arrows" that is referred to in *Hudson House*. *Hudson House* goes precisely to the spirit, purpose, and intent of super-priority liens as a whole and the unreasonable and absurd results created by the interpretation proffered by Ikon.

3. Ikon's Interpretation of NRS 116.3116 Creates Unreasonable or Absurd Results or Contradicts the Spirit of the Act.

At oral argument, Ikon conceded that NRS 116.3116(2) was a "nine month look-back" provision.[65] Because Section 116.3116(2) is admittedly a look-back provision, it makes no sense to artificially limit the recovery of collection fees and costs because the association's expectancy will be undermined and thwarted. To do so would be to "look-back" with a blind eye. The "look back" is meaningless if it costs as much or more money for the association to collect a debt than it will recover on the debt itself.

The obvious public policy underlying the super-priority lien is to provide meaningful partial compensation to associations in the event of a lender foreclosure. Unit owners who are in default with their lenders simultaneously default on their association obligations,

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[64] *See* AA1736-38 and AA1743-45.

[65] AA0803 at lns. 23-25.

almost without exception.[66] This results in unpaid assessments and neglected properties.[67] By giving priority to the association ahead of a lender's deed of trust, associations are able to pay bills, abandoned properties do not become blighted, and neighboring "good" homeowners who pay their bills are not subject to increased assessments.[68]

At the lower court level, it was undisputed that many associations in Nevada (including Horizons) lack the resources, staff, and ability to pursue collections on their own.[69] While associations possess liens pursuant to NRS Chapter 116 on assessments, they must take active steps to collect if they are to have any chance of recovering amounts that are past due.[70] Without property managers or collection agencies to pursue these past due assessments, associations would have little or no ability to enforce their rights to collect said charges from homeowners who do not pay voluntarily, thereby significantly increasing the costs to those homeowners who are not delinquent.[71]

As a result, collecting interest, late fees, and costs of collection as part of Nevada's super-priority lien is and has been common practice in the industry for years.[72] An integral part of the collection process is the recording of a notice of lien with the Clark County

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[66] AA1743-45.
[67] *Id.*
[68] *Id.*
[69] AA1743-45.
[70] *Id.*
[71] *Id.*
[72] AA1743-45.

Assessor.[73] The types of charges associations retain their collection agencies to collect often include many different categories of assessments for common expenses. These assessments for common expenses can include special assessments for repairs to common areas, charges for late payment of assessments, and fees or charges for the use, rental or operation of the common elements.[74]

To pursue collection, associations and their collection agencies are also forced to incur out-of-pocket costs, such as trustee costs and publication costs in advance of a foreclosure sale.[75] The out-of-pocket costs for publication and posting in advance of a foreclosure in Las Vegas are approximately $500.00.[76] Depending on the monthly amount due from the unit owner, the publication costs alone often exceed the "nine times monthly assessment" calculation proposed by Ikon in this case.[77] Under this scenario, an association would never bother to pursue collection, as the out-of pocket costs alone would exceed the amount recoverable.[78]

Finally, it was undisputed before the lower court that limiting recovery by the association to such a narrow numerical cap (i.e., "six times" or "nine times" monthly assessments) would hamstring Horizons' ability to collect unpaid assessments because no collection agency would take on the debt for collection, and the debt would go

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[73] *Id.*

[74] *Id.; see also* NAC 116.470.

[75] AA1743-45; AA0085-86.

[76] AA1744.

[77] *Id.*

[78] *Id.*

unpaid.[79] The attendant result is that unpaid defaults, and liens that are otherwise recoverable, would go uncollected, forcing ever higher costs upon the "good" residents who actually pay their assessments and do not default.[80] This is an absurd result that would totally undermine the collection process for an association like Horizons, and was never intended when the CC&Rs were drafted.[81]

Given the foregoing, if associations cannot recover reasonable collection fees and costs, they will be effectively unable to pursue and collect from property owners who are in violation of the CC&Rs when there is a lender foreclosure, rendering NRS 116.3116 meaningless.[82] This is precisely the "bow without a string or arrows" problem identified in *Hudson House*. The result suggested by Ikon is therefore "unreasonable" and "absurd" and not supportable under this Court's maxims of statutory construction.

Ikon's interpretation of NRS 116.3116 also provides for an inherently inequitable result from a given association's perspective. Consider, for example, one association (Association A) where assessments are billed at a rate of only $20 per month, and another association where assessments are billed at a rate of $200 per month (Association B). Both associations pursue collection on their own by noticing their own respective foreclosure sales, but the lender foreclosure occurs first (thus creating a "super-priority" lien situation). In this scenario, using Ikon's reasoning, Association A

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[79] AA1736-38 and AA1743-45.

[80] *Id.*

[81] *Id.*

[82] AA1743-45.

loses money, while Association B makes money:

Association A		**Association B**	
"9 Times Monthly Assessments"	$180.00	"9 Times Monthly Assessments"	$1,800.00
Minus publication costs	-$500.00	**Minus** publication costs	-$500.00
Net Recovery	-$320.00	Net Recovery	$1,300.00

Simply put, under Ikon's interpretation of NRS 116.3116, Association A will never bother to attempt to collect because it is cost prohibitive to do so. The process is a guaranteed money loser, and Association A is punished merely for having a lower assessment than Association B. This makes no sense.

The foregoing scenario does not even take into account collection fees that would be incurred by Associations A and B if they were to hire a third-party (i.e., a collection agency or property manager) to recover their unpaid assessments.

Association A		**Association B**	
"9 Times Monthly Assessments"	$180.00	"9 Times Monthly Assessments"	$1,800.00
Minus publication costs	-$500.00	**Minus** publication costs	-$500.00
Minus collection fees	-$1,950.00	**Minus** collection fees	-$1,950.00
Net Recovery	-$2,270.00	Net Recovery	-$650.00

Applying the $1,950.00 cap on fees that are specifically allowed under NAC 116.470, Association A would lose $2,270.00 in the process; even Association B would lose $650.00.

In this particular case, Horizons was owed the sum of $1,747.50 in unpaid assessments as of the date of foreclosure. AA0085.

Applying the statutory cap on the assessment portion of the lien, Horizons' recovery on assessments for the nine months prior to foreclosure was limited to $1,710.00. Applying the contractual assessment cap at six months, Horizons was limited to $1,140.00 in assessments. Yet, Horizons incurred $1,502.00 in collection fees and costs prior to foreclosure. AA0085-86. This amount included paying a title company $800.00 for Trustee's Fees and a Trustee's Sale Guarantee. AA0086. **Yet, the lower court's decision resulted in Horizon losing the sum of $362.00 as a result of the lender foreclosure.** It created precisely the unreasonable and absurd result warned of in *Hudson House* and prohibited by this Court.[83]

The numbers do not lie. The "super-priority" lien protections of NRS 116.3116(2) are rendered completely meaningless if associations lose money trying to collect. This creates the kind of unreasonable, silly, and absurd results that Nevada law does not allow.[84]

Faced with the potential limitations proposed by Ikon, an association is faced with two alternatives. One, increase assessments against other properties that are not in default. Two, pursue judicial foreclosures ahead of a foreclosure by the first security interest holder in accordance with NRS 116.3116(7). The former option punishes "good" unit owners who pay their assessments, and scares off potential purchasers of land who want to avoid increased costs that they would have to pay if they purchased land in the association. The

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[83] *J.E. Dunn Northwest, Inc.* 127 Nev. at —, 249 P.3d at 506; *Flamingo Paradise Gaming, LLC,* 125 Nev. at 509, 217 P.3d at 551.

[84] *Id.*

latter option would necessarily require (1) the hiring of an attorney; (2) the filing of a civil action; and (3) a "race to the courthouse" between the association and the trust deed holder for the borrower which is in default. The obvious result would be a flood of civil lawsuits and a flood of judicial foreclosures. Is sound public policy really furthered by **more** foreclosures and **more** lawsuits?

And, of course, requiring associations to foreclose first, simply so they can recover their collection fees and costs, defeats the very purpose of having the "super-priority" lien in the first place. NRS 116.3116(2) was to provide associations a partial but meaningful recovery when a lender forecloses ahead of them. Pushing associations to spend more money (i.e., hiring a lawyer, court filing fees, etc.) to collect on relatively small amounts will burden the court system and swallows whole the basic seniority provision of NRS 116.3116(2). Nevada law strictly forbids such a nonsensical statutory interpretation.[85]

Associations' concerns are particularly important and significantly impact the role of common interest communities during these difficult economic times. With more foreclosures in Nevada than in any other state, it was associations like Horizons—and not real estate "flippers" like Ikon—that stepped up to maintain homes that have fallen into disrepair.[86] Dead or overgrown landscaping was a

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[85] *See Upchurch*, 114 Nev. at 753, 961 P.2d at 757 ("where a statute is susceptible to more than one interpretation it should be construed in line with what reason and public policy would indicate the legislature intended.").

[86] *See* AA1742-45.

common problem, as was unattended pools rife with algae.[87] Poorly kept residences create neighborhood blight that depressed surrounding property values – values that were already devastated by the worst housing market downturn in Nevada history.[88] If Associations are unable to recover the fees and costs of collection, in addition to a significant portion of the delinquent assessments themselves, they have no ability to collect the delinquent assessments, and their task of maintaining these communities becomes much more daunting.[89]

C. The Lower Court Did Not Give "Great Deference" to the CCICCH Advisory Opinion.

Nevada law is very clear—district courts must give "great deference" to agency interpretations of Nevada statutes over which they have jurisdiction.[90] Indeed, particularly for pure questions of statutory interpretation, courts must defer to the controlling agency interpretation.[91]

More specifically, this Court has held that the CCICCH "is ***solely*** responsible for determining the type and amount of fees that

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[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Imperial Palace v. State, Dep't Taxation*, 108 Nev. 1060, 1067, 843 P.2d 813, 818 (1992); *Dep't of Taxation v. DaimlerChrysler*, 121 Nev. 541, 549, 119 P.3d 135, 139 (2005); *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 101, 127 P.3d 1057, 1070 (2006) (citing *Chevron U.S.A. v. Not. Res. Def. Council*, 467 U.S. 837 (1984).

[91] *See, e.g., Human Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010) ("'If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.'") (*quoting Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

may be collected by associations."[92] Yet, the lower court gave absolutely no consideration—much less deference to—an Advisory Opinion rendered by the CCICCH on this very point. On that basis alone, the lower court committed reversible error.

On December 8, 2010, the CCICCH issued an advisory opinion (the "CCICCH Advisory Opinion") that addressed the ***same*** issue that was decided by the lower court.[93] The CCICCH expressly rejected the overly simplistic "nine time monthly assessments" methodology urged by Ikon and concluded that ***all*** reasonable costs of collecting survive foreclosure by a first deed of trust as part of the super-priority lien, even if the so-called "nine times monthly assessment" numeric amount has been reached.[94]

According to the CCICCH, the super-priority lien consists of two separate and distinct components—the assessment portion that is made up of assessments (the "Assessment Super-Priority Element") and the remaining portion made up of interest permitted by NRS 116.3115, late fees and charges authorized by the declaration, and the "costs of collecting" authorized by NRS 116.310313 (the "Costs Super-Priority Element").[95] The CCICCH Advisory Opinion contemplates only a **temporal** limitation on the **assessment portion** of the association's lien. In other words, while the Assessment Super-Priority Element of the super-priority lien is capped by NRS 116.3116, the Costs Super-

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[92] *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012) (emphasis added).

[93] AA1802-15.

[94] AA1813.

[95] AA1810.

Priority Element is not. This is consistent with the CC&Rs, which expressly provide that only the assessment portion of the lien is to be extinguished by a lender foreclosure.[96]

Giving absolutely no deference to the CCICCH Advisory Opinion, the lower court capped **both** components together, the Assessment Super-Priority Element and the Costs Super-Priority Element, using the temporal limitation that is only meant to cap the Assessment Super-Priority.

While Ikon may disagree with the scope of the CCICCH Advisory Opinion, there is no question that Ikon's position in this case (that there is a numerical cap on all recovery at "nine times monthly assessments") was expressly rejected by the CCICCH. The Commission stated:

> The argument has been advanced that limiting the super priority to a finite amount . . . is necessary in order to preserve this compromise and the willingness of lenders to continue to lend in common interest communities. ***The State of Connecticut, in 1991, NCCUSL, in 2008, as well as "Fannie Mae and local lenders" have all concluded otherwise.***
>
> Accordingly, both a plain reading of the applicable provisions of NRS § 116.3116 and the policy determinations of commentators, the state of Connecticut, and lenders themselves support the conclusion that associations should be able ***to include specified costs of collecting as part of the association's super priority lien***.

AA1813 (emphasis added). The CCICCH's reference to the "State of Connecticut" is a specific nod to *Hudson House*, which also rejected the overly simplistic "nine times monthly assessments" mantra. Further, the CCICCH expressly stated that, while the Assessment Super-Priority Element is capped, the Costs Super-Priority Element is

[96] *Cf.* AA0042 at § 7.9.

not capped. The Advisory Opinion states:

> [A]lthough the ***assessment portion*** of the super-priority lien is limited to a finite number of months, because the assessment lien itself includes 'fees, charges, late charges, attorney fees, fines, and interest,' these charges may be included as part of the super-priority lien amount.

AA1810 (emphasis added). Therefore, according to the CCICCH, there is no numerical "cap" on the total amount of the super-priority lien, merely a limitation on the **assessment portion**—the so-called "nine months of assessments" that underlie that total super-priority lien amount. *See id.*

In the lower court's order granting partial summary judgment, the lower court made absolutely no mention of the CCICCH Advisory Opinion, and offered no explanation whatsoever as to why it rejected the CCICCH's methodology. Further, by doing so, the lower court ignored this Court's opinion in *Nevada Ass'n Servs.*, in which this Court specifically held that the CCICCH was "***solely*** responsible for determining the type and amount of fees that may be collected by associations."[97] And, by giving no deference at all to the CCICCH Advisory Opinion (much less than the "great deference" that this Court requires), the lower court failed to comply with this Court's directive that lower courts give great deference to agency interpretations of statutes over which they have jurisdiction.[98] These failures, standing alone, warrant reversal of the lower court's judgment.

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[97] *State v. Nevada Ass'n Services, Inc.*, 128 Nev. Adv. Op. 34, 294 P.3d 1223 (2012),

[98] *Imperial Palace*, 108 Nev. at 1067, 843 P.2d at 818.

While there are numerous other legal reasons independently justifying the rejection of Ikon's position, the CCICCH Advisory Opinion deserves "great deference" from this Court as the controlling agency interpretation of law from the governing body with specialized expertise and knowledge that deals with these issues on a regular basis. Failure to give the required "great deference" to that Advisory Opinion places in jeopardy the proper interpretation and application of NRS 116.3116 and, standing alone, warrants reversal in this case.

D. The Impact of NAC 116.470 and Other Statutes.

It goes without saying that statutes and regulations must be read in harmony with one another.[99] NRS Chapter 116 contains numerous provisions supporting the proposition that associations should be meaningfully compensated when unit owners default on their obligations, including the following:

- Associations may impose charges for late payment of assessments.[100]
- Associations may charge a unit owner "reasonable fees to cover the costs of collecting past due obligation."[101]
- The foregoing fees may be recovered regardless of whether such fees are collected by "the association itself or by any person acting on behalf of the association,

[99] *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *see also In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. Adv. Op. 70, — P.3d —, 2013 WL 5497736, at * 5 (Oct. 3, 2013) ("Whenever possible, we will interpret a rule or statute in harmony with other rules or statutes.") (internal citations and quotations omitted).

[100] NRS 116.3102.

[101] NRS 116.310313(1).

including . . . a community manager or a collection agency."[102]

- The term "costs of collecting" includes collection fees, recording fees, fees relating to the preparation of a lien, etc.[103]
- Associations possess a statutory lien (in addition to their contractual lien in the CC&Rs) as security for all unpaid collection fees and costs.[104]

Here too, these various rules must be read in conjunction with NRS 116.3116(2), as they provide overwhelming evidence consistent with the notion that associations are entitled to a **meaningful** recovery when unit owners default on their obligations.

This policy is also consistent with NAC 116.470, which was adopted by the CCICCH in 2011 in direct response to legitimate criticism that collection fees and costs sometimes dwarfed the underlying principal assessment amount owed on a Unit. When it adopted NAS 116.470, the CCICCH set a maximum cap of $1,950.00 on all collection fees. The regulation provides:

> **NAC 116.470 Fees and costs for collection of past due obligations of unit's owner.**
>
> 1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of

[102] NRS 116.310313(2).
[103] NRS 116.310313(3)(a).
[104] NRS 116.3116(1); AA0825-26.

delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 which exceed a total of $1,950, plus the costs and fees described in subsections 3 and 4.

2. An association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 which exceed the following amounts:

(a)	Demand or intent to lien letter	$150
(b)	Notice of delinquent assessment lien	325
(c)	Intent to notice of default letter	90
(d)	Notice of default	400
(e)	Intent to notice of sale letter	90
(f)	Notice of sale	275
(g)	Intent to conduct foreclosure sale	25
(h)	Conduct foreclosure sale	125
(i)	Prepare and record transfer deed	125
(j)	Payment plan agreement - One-time set-up fee	30
(k)	Payment plan breach letter	25
(l)	Release of notice of delinquent assessment lien	30
(m)	Notice of rescission fee	30
(n)	Bankruptcy package preparation and monitoring	100
(o)	Mailing fee per piece for demand or intent to lien letter, notice of delinquent assessment lien, notice of default and notice of ale	2
(p)	Insufficient funds fee	20
(q)	Escrow payoff demand fee	150
(r)	Substitution of agent document fee	25
(s)	Postponement fee	75
(t)	Foreclosure fee	150

As a practical matter, the "predictable" rule sought by the lower court was already right under its nose—collection fees can never exceed $1,950 per unit owner under NAC 116.470. Writing a numerical cap into NRS 116.3116(2) where none existed was not only improper statutory interpretation, it was unnecessary as a practical matter. The "predictable" numerical cap that the lower court desired already existed—it merely existed in another place.

The existence of an entirely separate regulatory cap on the amount of collection fees that can be charged by associations is telling. Why would the CCICCH have bothered to impose such a cap if there was already a strict "nine times monthly assessment" numerical cap under NRS 116.3116(2), which governed the vast majority of foreclosure cases? The answer is plain—the CCICCH did not consider association collection fees and costs to be capped at "nine times monthly assessments."[105]

Indeed, if Ikon's theory in this case is correct, the maximum amount set forth in NAC 116.470 would be meaningless to a small portion of unit owners. Only those who have "monthly assessments" that exceed $216.66 (9 times $216.66 equals $1,949.94) would benefit from the $1,950.00 numerical cap in NAC 116.470. Yet there is nothing in the record to suggest this was the CCICCH's intent, and NAC 116.470 becomes meaningless to most unit owners and associations in this light. Here too, this Court must interpret statutes and regulations "in harmony with other rules and statutes."[106]

E. There Are Two Liens—One Contractual and One Statutory.

Another key to resolving this case is whether the Unit was subject to one or two liens, and how those liens interact with one another, if at all. By filing entirely separate motions for summary judgment, one concerning the statutory interpretation of NRS 116.3116, and one concerning the contractual interpretation of the

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[105] AA0644-67.

[106] *Albios*, 122 Nev. at 418, 132 P.3d at 1028.

CC&Rs, Ikon recognized that there were two separate liens requiring the application of two separate legal analyses. Of course, a different legal analysis applies when interpreting the CC&Rs, as opposed to the statute, particularly where the words governing the survival of the lien after foreclosure differ, as they do here.

This question is important. To prevail in this appeal, Ikon must demonstrate to the court that **both** the statutory lien and the contractual lien are to be interpreted at a strict "six times" or "nine times" monthly assessments. Then, Ikon must demonstrate that language in the CC&Rs specifically directing that collection fees and costs survive a lender foreclosure is somehow trumped by the statute, even though Ikon maintains that the CC&Rs modifies the statute to the extent there is a conflict.

Though the lower court disagreed, there are two liens, one created by statute, and the other created by contract. NRS 116.3116(1) states as follows:

> The association has a lien on a unit for . . . any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due.

Meanwhile, the CC&Rs separately provide as follows:

> All Assessments, together with interest thereon, late charges, costs and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit against which such assessment is made....[107]

These liens have completely separate sources of creation, and therefore must operate independently of one another. For example, if

[107] AA0038-39 at § 6.1.

the CC&Rs were somehow declared void, there would still be a statutory lien under NRS 116.3116. If NRS 116.3116 were repealed by the Legislature at a later time or somehow declared unconstitutional, there would still be an existing contractual lien under the CC&Rs. It is no different than having multiple liens on property being created by both contract (i.e., a lender's deed of trust) and statute (i.e., a mechanic's lien).

Yet, the lower court rejected this distinction without explanation, treating the statute and the CC&Rs as one lien.[108]

To determine the scope of each surviving lien, one must interpret the contractual lien using principles of contract interpretation and the statutory lien using maxims of statutory interpretation. This is particularly important, given that the language of NRS 116.3116(2) and the CC&Rs differ slightly when it comes to the survival of the lien after a foreclosure by the holder of a first security interest. For example, the CC&Rs provide as follows:

> The sale or transfer of any Unit shall not affect an assessment lien. However, subject to the foregoing provision of this Section 7.9, the sale or transfer of any Unit pursuant to judicial or non-judicial foreclosure of a First Mortgage ***shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer.***

Meanwhile, NRS 116.3116 provides as follows:

> The ***lien is also prior*** to all security interests described in paragraph (b) . . . ***to the extent of*** the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 ***which would have become due in the absence of acceleration*** during the 9 months immediately preceding institution of an action to enforce the lien. . . .[109]

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[108] AA2092.

[109] *Cf.* AA0042 and NRS 116.3116.

Despite this language, the lower court never explained the basis for failing to apply the CC&Rs' surviving lien provision, which expressly states that the assessment lien is extinguished only as to "payments which became due," i.e., assessments, and not collection fees or costs.

F. The Language and Intent of the CC&Rs Directs that Amounts Due for Interest, Collection Fees, and Costs Survive Foreclosure.

Under Nevada law, this Court must interpret the CC&Rs pursuant to the rules governing the interpretation of contracts.[110] When the facts are not in dispute, the interpretation of CC&Rs is a question of law.[111] In interpreting a contract, "[a] court should not interpret a contract so as to make meaningless its provisions."[112]

Moreover, the Court must consider the intent and purpose of the CC&Rs when interpreting their meaning.[113] In fact, the Nevada Supreme Court has made clear that "the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself."[114] As such, in interpreting CC&Rs, the intent of the drafter and the object of

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[110] *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004); *see also Tompkins v. Buttrum Constr. Co. of Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983) ("The rules governing the construction of covenants imposing restrictions on the use of real property are the same as those applicable to any contract . . . .").

[111] *Diaz*, 120 Nev. at 73, 84 P.3d at 666.

[112] *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (quotation omitted).

[113] *See, e.g., Battram v. Emerald Bay Community Ass'n*, 204 Cal. Rptr. 107, 110 n.6 (Ct. App. 1984) ("This interpretation most satisfies the original intent of the CC&R drafters.").

[114] *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 488, 117 P.3d 219, 224 (2005) (quotation omitted).

the deed or restriction should govern, giving the CC&Rs a just and fair interpretation.[115]

In this particular case, the terms of the CC&Rs evidence an intent that interest, collection fees and costs should be recovered by Horizons upon a foreclosure, and that only the assessment portion of the lien would be limited. Section 7.9 of the CC&Rs is very specific. The sale or transfer of any unit "shall not affect an assessment lien." By the express terms of the CC&Rs, the lien is extinguished ***only*** as to "payments which became due prior to such sale or transfer."

> ***The sale or transfer of any Unit shall not affect an assessment lien.*** However, subject to the foregoing provision of this Section 7.9, the sale or transfer of any Unit pursuant to judicial or non-judicial foreclosure of a First Mortgage ***shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer.***[116]

The CC&Rs do not expressly define the term "payments" or "payments which became due." However, common sense and plain language dictate that "payments which became due" can only mean assessments which are billed and collected on a periodic basis.[117] Common sense dictates that the only "payments which become due"

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[115] *Zabrucky v. McAdams*, 28 Cal. Rptr. 3d 592, 595, 600 (Ct. App. 2005) (concluding "it would be in keeping with the intent of the drafters of the CC&Rs to read into Paragraph 11 a provision that the view may not be unreasonably obstructed").

[116] AA0042 at § 7.9 (emphasis added).

[117] *See generally, Las Vegas Ranch Club v. Bank of Nevada,* 97 Nev. 384, 386, 632 P.2d 1146, 1147 (1981) (holding that "the ordinary meaning of the word 'default,' when used with respect to an obligation created by contract, is failure of performance. When used with reference to an indebtedness, it simply means non-payment" and, based on these definitions, held that the appellant was in default on the payment due on a certain date) (internal quotations and citations omitted).

to a unit owner are the regularly billed assessments.

Setting that aside, there is substantial support elsewhere in the CC&Rs directing that "payments which became due" means assessments and assessments only. For example, the CC&Rs repeatedly refer to "unpaid" assessments throughout.[118] In addition Section 1.6 of the CC&Rs defines "Assessments, Annual" as the charges "which are to be ***paid*** in advance in equal periodic . . . installments...."[119]

The key phrase—"payments which become due" must also be read in context with the way associations bill and collect from their members, which is annually, quarterly, or monthly (in this case, monthly). The words "became due" plainly suggest a missed periodic scheduled payment by the unit owner.[120] Non-principal amounts due, such as interest, collection fees and costs, do not fall into this category. Thus, based upon the CC&Rs, collection fees and costs survive foreclosure and remain as a "charge on the unit and shall be a continuing lien upon the Unit. . . ."[121]

Indeed, the only evidence before the lower court on this point was from Ms. Lauren Scheer of APS Management, the original property manager of Horizons. She declared that it was understood by all "from the beginning of the development" that the CC&Rs provided

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[118] *See, e.g.,* AA0041 at § 7.1 and AA0042 at § 7.7.

[119] AA0021 at § 1.6.

[120] *See generally, Woori American Bank v. Sahara Westwood Hotel, LLC,* 2011 WL 2295072, *4 (D. Nev., June 8, 2011) (holding that the defendant defaulted under the terms of the Loan by failing to make the monthly installment payment which *became due* on November 5, 2008, and all subsequent installments).

[121] AA0038-39 at § 6.1.

for the extinguishment of the association lien only as to the assessment portion, and not as to interest, collection fees or costs.[122] This evidence was undisputed—yet it was ignored by the lower court, along with the specific language of Section 7.9 of CC&Rs which provided for the extinguishment of the lien only as to "payments which became due" prior to foreclosure.

G. Legislative Amendments to NRS 116.3116 In 2009 Preclude Limitation of an Association Lien to "Six Times Monthly Assessments."

In its first Motion for Summary Judgment, Ikon claimed that Horizons could recover no more than "nine times monthly assessments" based upon NRS 116.3116. Later, Ikon took a different position, contending that Horizons could recover no more than "six times monthly assessments" based upon the CC&Rs. One wonders why Ikon did this—if its position as to the CC&Rs was so strong, why did it wait to raise this issue before the lower court? Regardless, the filing of two separate motions for summary judgment, one as to the statute and one as to the CC&Rs, demonstrates Ikon's recognition that there are two separate and independent Horizon liens, one contractual and one statutory.

The lower court gave short shrift to the reality that NRS 116.3116(1) creates a very specific statutory lien, separate and apart from the CC&Rs, and that these liens exist independently from one another. Instead, the lower court treated Horizons as if it had only one lien, and ruled (without any real explanation or reasoning) that the

[122] AA1736-38.

"six month" period in the CC&Rs prevailed over the nine month period in the statute.[123]

As set forth previously, Horizons maintains that the liens are separate and operate independently of one another. As a result, there is no conflict between the two liens that needs to be reconciled. Rather, the lower court's task was to merely determine the scope of each lien, and conclude what portion of each lien survived the lender foreclosure. However, to the extent that NRS 116.3116 and the CC&Rs conflict and must be reconciled, a 2009 amendment to NRS 116.3116 mandates that the priority lien period be nine months, not six.

The CC&Rs were executed and recorded in 2005.[124] As mentioned previously, Section 7.9 of the Association's CC&R's provides:

> A lien for assessments, including interest, costs and attorneys' fees as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for: (a) liens and encumbrances Recorded before the Declaration was Recorded; (b) a first Mortgage Recorded before the delinquency of the assessment sought to be enforced (except to the extent of Annual Assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien), and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. The sale or transfer of any Unit shall not affect an assessment lien.[125]

At the time the CC&Rs were executed and recorded, NRS 116.3116 mirrored the CC&Rs, to the extent that it provided for a SPL amount "which would have become due in the absence of acceleration during

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[123] AA2091-93.

[124] AA0018.

[125] AA0042.

the 6 months immediately preceding institution of an action to enforce the lien . . . ."[126] However, in 2009, the Nevada Legislature amended NRS 116.3116 to increase the length of the SPL period from 6 months to 9 months. The amended statute now provides, in pertinent part, as follows:

> The lien is also prior. . .to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . .[127]

As a result, to the extent the amended statute does not create a separate lien from the CC&Rs, there is an express conflict between the CC&Rs and Nevada law, which specifically directs priority of the lien for a nine month period, not six. NRS 116.1206 provides:

> 1. Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter:
>
> (a) **Shall be deemed to conform with those provisions by operation of law**, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.
>
> (b) Is **superseded** by the provisions of this chapter, regardless of whether the provision contained in the declaration, bylaw or other governing document became effective before the enactment of the provision of this chapter that is being violated.[128]

If this Court rejects the notion that there is a separate contractual lien in the CC&Rs, this Court must then follow NRS 116.1206, which

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[126] *Cf.* AA0042 and AA1750.

[127] NRS 116.3116(2).

[128] NRS 116.1206 (emphasis added).

requires that the CC&Rs conform to the so-called "nine times monthly assessment" period that, indeed, was argued so strenuously by Ikon as a "simple formula" at the outset of this case.

CONCLUSION

Accordingly, and based on the foregoing, Horizons urges this Court to reverse the lower court's judgment based on its erroneous interpretation and application of NRS 116.3116(2) and the CC&Rs, and direct the lower court to issue an amended judgment declaring that the association's super-priority lien included (1) assessments that had accrued in the nine months prior to the lender foreclosure; and (2) collection fees and costs incurred by Horizons.

October 28, 2013.

HOLLAND & HART LLP

By: _____

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VERIFIED CERTIFICATE OF COMPLIANCE

STATE OF NEVADA
COUNTY OF CLARK

I, Patrick J. Reilly, being duly sworn, do hereby depose and say:

1. I am a partner with the law firm of Holland & Hart LLP, counsel of record for Appellant named in the foregoing Opening Brief.

2. I am licensed in the State of Nevada and competent to testify to the matters set forth in this Affidavit.

3. Pursuant to NRAP 28.2, I hereby certify that I have read Appellant's Opening Brief, and to the best of my knowledge, information, and belief verify that the facts stated therein are true, and to those matters that are on information and belief, such matters I believe to be true.

4. I further certify that Appellant's Opening Brief is not frivolous or interposed for any improper purpose and complies with the applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page of the appendix where the matter relied on is to be found.

5. Appellants' Opening Brief complies with the type-volume limitations of NRAP 32(a)(7)(A)(ii), in that it contains no more than 14,000 words. Further, the Opening Brief complies with the formatting requirements of NRS 32(a)(4-6).

6. 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.

7. I make this verification on behalf of Appellant.

EXECUTED this 28th day of October, 2013.

Patrick J. Reilly

SUBSCRIBED AND SWORN to before
me this 28th day of October, 2013.

Notary Public

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
SUSANN THOMPSON
Appt. No. 04-92131-1
My Appt. Expires Aug. 19, 2016

ADDENDUM

Pursuant to NRAP 28(f), a copy of *Bank of America, NA v. Olympia Management Services, LLC*, Nevada Real Estate Division Arbitration Case No. 13-14 (September 6, 2013) (Wenzel, Arb.), is attached hereto as an Addendum to this Opening Brief.

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION

Bank of America, NA

Claimants,

vs.

Case No. NRED #13-14

ARBITRATION DECISION AND AWARD

Olympia Management Services, LLC, Alessi & Koenig, Southern Highlands Community Association, and Royal Highlands Street and Landscape Maintenance Corporation,

Respondents.
_____/

BACKGROUND

This is a non-binding arbitration proceeding filed pursuant to Nevada Revised Statute ("NRS") 38.300 *et seq*, involving a dispute over the amounts that may be recovered by a homeowner's association and its agents and representatives as a part of the residential foreclosure process. *See generally* Nevada Revised Statute ("NRS") Chapter 116.3116 (often referred to as Nevada"s "Super Priority Lien" statute)(an "SPL"). This issue is complex and, as will be discussed below, has to date generated a wide range of "non-precedential" and "non-binding" judicial, regulatory agency and private analysis and opinion.

NRS Chapter 38 jurisdiction is present and appropriate with respect to each party and the subject matter of this proceeding. The parties have agreed to submit the case for decision on the basis of their respective briefs and documents.

In this case, in the context of a completed residential foreclosure, Claimant Bank of America originally sought reimbursement of a portion of certain NRS 116.3116 alleged "super priority" sums paid under protest to or for the benefit of each of the four (4) original respondents. During the pendency of this case, Bank of American completed a settlement with respondent Royal Highlands Street and Landscape Maintenance Corporation ("Royal Highlands") and Alessi & Koenig resolving any and all claims of Bank of America against these two (2) parties relating to sums paid by Bank of America related to the claims of Royal Highlands. On the basis of that written Settlement Agreement[1], the terms of which are incorporated here by reference, all claims resolved by that agreement shall be and hereby are dismissed in their entirety.

All claims against or related to Southern Highlands Community Association ("Southern Highlands"), including but not limited to any and all sums paid by Bank of America to or for the benefit of Respondents Southern Highlands, Alessi & Koenig ("A&K"), Olympia Management Services, LLC ("OMS") (collectively the "Respondents"), the remaining three (3) Respondents remain unresolved and to be determined in this proceeding.

BANK OF AMERICA'S CLAIMS

The gravamen of Bank of America's complaint is that to complete its 2011 non-judicial foreclosure of a residential property located at 3936 Royal Scots Avenue, Las Vegas, Nevada 89141, it was forced, under protest, to pay the original respondents over $22,000.00 when

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[1] The Settlement Agreement does not carry any date, but a signed copy was delivered to the undersigned in July, 2013. A copy of that Settlement Agreement is attached as Exhibit "A".

the two associations and their agents were legally entitled to recover only $2,772.00. Bank of America alleges that to gain clear title to the foreclosed property, it was forced to pay to the remaining Respondents the total sum of **$7,126.31.** (This payment is alleged to include claimed "Delinquent HOA Dues" in the amount of $1,821.31 and collection costs claimed by Alessi & Koenig in the amount of $5,305.00.)[2] Bank of America submits that, by law, the Respondents' claims are limited to nine (9) months regular monthly assessments (9 X $55.00= $495)(the "super priority lien"), plus an additional $495 for the nine (9) months Bank of America owned the real property and $90.00 in late fees for the latter period - the total sum of **$1,080.00.** Thus, Bank of America seeks the recovery of the sum of **$6,046.31** from Respondents. It should be noted that Bank of America does not dispute (that outside a super priority lien) an association's general right to lien for and collect penalties, fees, charges, late charges, fines and interest under Nevada law. *See* Bank of America brief, page 6 and page 6, fn 3, citing NRS 116.3116(1).

Finally, Bank of America seeks the recovery of its expenses, and attorney fees and costs incurred in this proceeding. In this respect, Bank of America also alleges that the Respondents' absolute refusal to negotiate a settlement lower than their initial escrow demand amounts to bad faith and overreaching, further justifying an award of expenses, fees and costs.

RESPONDENTS' DEFENSE AND CLAIMS

Respondents deny overcharging Bank of America in any way. To

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[2] *See* Joint Exhibit "7", HUD Closing Statement, page BANA00073.

the contrary, they argue that a careful analysis of their claims, the sums demanded and the amounts paid by Bank of America in escrow reveals that each and every claim and payment was proper under Nevada law.

Southern Highlands argues that it properly received the sum of $1,551.31 from Bank of America. That sum is alleged to be the total of $709.15 (consisting of unpaid assessments, interest, late charges and collection costs) for the nine (9) months preceding Bank of America's November 18, 2011 foreclosure on the real property in question and $842.16 (consisting of unpaid assessments, interest, late charges, and collection costs) incurred during the time Bank of America was the owner of the real property. With respect to the latter sum, Southern Highlands points out that such charges are not based on a SPL claim theory, but are simply charges and expenses with regard to which the Association is allowed to record a lien and collect by its governing documents and Nevada law.

For its part, OMS alleges that *all* of its claimed charges (the alleged sum of $1,775.00) were incurred *after* Bank of America foreclosed on the property. Similarly to Southern Highlands, OMS argues that "super priority" issues are irrelevant as to its claim and that it was simply entitled to recover the amounts claimed from Bank of America as the actual "*owner*" of the property.

Finally, both Southern Highlands and OMS argue that expenses each incurred as a result of the collection actions of their agent, Alessi & Koenig, are recoverable either as a part of the super priority lien or a claim based upon collection activities undertaken during Bank of America's actual ownership of the property.

Finally Alessi & Koenig alleges that of the total sum of

$5,305.00 which it was paid in relation to its collection efforts related to the Southern Highlands account, $3,140.00 represented billed attorney's time and $2,165.00 were "hard costs" incurred by Alessi & Koenig as the result of its collection activities on behalf of Southern Highlands. Moreover, Alessi & Koenig alleges that the costs and expenses billed were the result of two (2) non-judicial foreclosure actions, one prior to Bank of America's foreclosure of its note and deed of trust and one initiated after Bank of America became the owner of the property. As with the above-discussed Southern Highland and OMS claims, Alessi & Koenig takes the position that expenses and costs incurred when Bank of America was the actual owner of the property were not part of any SPL and were recoverable as a straightforward lien and collection effort under the applicable governing documents and Nevada law.

THE ISSUES

The salient differences between the reimbursement claims of Bank of America and the sums alleged by Respondents to have been properly due can be generally explained by virtue of one primary issue: Does a Nevada SPL properly include *only* nine (9) months regular monthly association assessments[3] or can it also include late fees, interest and the costs of collection. Secondarily, a portion of the disputed sums appear to be related to the period of time Bank of America actually owned the property (November 23, 2011 (Exhibit "25", Joint Exhibit page A7K0071) to October 2, 2012 (Joint Exhibit "26", page A&K0075) but apparently failed to pay the ongoing

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[3] NRS 116.310312 also permits certain costs incurred by an association to conduct maintenance of a property or to remove or abate a public nuisance to be recovered as part of a super priority lien. Such costs are not at issue in this case and that potential issue will therefore not be further addressed.

homeowner association assessments in a timely fashion. As noted earlier, the latter charges are really not challenged by Bank of America. They constituted a conventional homeowner's association lien upon foreclosure or sale under Nevada law, were not a part of any super priority lien, and are thus not properly a part of Bank of America's alleged claims for reimbursement under a restrictive theory of super priority liens under Nevada law.

DISCUSSION

As noted earlier, there have been a number of non-binding Nevada decisions and opinions authored on the "super priority" lien. issue. Of particular interest to this decision, Bank of America offers a relatively new "Advisory Opinion" ("Adv. Op. 13-01") issued by the State of Nevada, Department of Business and Industry, Real Estate Division (the "Division") on December 12, 2012.[4] On multiple occasions, Bank of America cites Adv. Op. 13-01 in its brief and, without doubt, Adv. Op. 13-01 is offered by Bank of America as persuasive if not binding authority on the "super priority" lien issue. Bank of America Brief, pages 6-10.

Unfortunately, Adv. Op. 13-01 recently issued by the Division, and an earlier Adv. Op. 2010-01, issued by the Commission for Common Interest Communities and Condominium Hotels (the "CCICCH") are in direct conflict. The former concludes that SPLs in Nevada are quite restricted, essentially in the manner advocated by Bank of America in this case, while the latter opinion concludes that unpaid assessments, interest, late charges and collection costs may all be included in such SPLs. The more expansive view of "super priority"

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[4] Advisory Opinion 13-01, issued December 12, 2012. The Opinion does not identify the author or authors.

liens is essentially the position taken by the Respondents in this case. As a result of the foregoing conflict, the impact of the recent Division advisory opinion must be considered and decided as this case is decided.

Prior to issuance of Adv. Op. 31-01, in the context of several non-binding arbitration decisions, the undersigned has previously carefully considered and ruled on the SPL issue in Nevada. In each case, putting aside ministerial adjustments to claims based on case specific facts and variations, the undersigned has concluded that Nevada law does allow for the inclusion of unpaid assessments, interest, late charges and collection costs as a part of a SPL. In material part, those decisions were based upon the earlier Advisory Opinion (Adv. Op. 2010-01) issued by the CCICCH.

The Relationship of the CCICCH and the DIVISION

The CCICCH was created by statute in 2003. NRS 116.600. Its seven (7) members are appointed by the Governor, serve for three (3) year terms and are required to have some connection to or experience with common-interest communities. *Id.*

The Division is an agency of the State of Nevada Department of Business and Industry.

By statute, the CCICCH and the Division share responsibility for the administration of NRS Chapter 116. NRS 116.615. NRS 116.615 provides that NRS Chapter 116 is to be administered by the Division, subject to the administrative supervision of the Director of the Department of Business and Industry. NRS 116.615(1). NRS 116.615 also provides that "[t]*he CCICCH and the Division may do all things necessary and convenient to carry out the provisions of this chapter, including, without limitation, prescribing forms and*

adopting such procedures as are necessary to carry out the provisions of this chapter."; that "[t]*he CCICCH, or the Administrator* [of the Division] *with the approval of the CCICCH, may adopt such regulations as are necessary to carry out the provisions of this chapter.*"; and that "[t]*he CCICCH may by regulation delegate any authority conferred upon it by the provisions of this chapter to the Administer [of the Division] to be exercised pursuant to regulations adopted by the CCICCH.*" NRS 116.615(2)-(4).

Material to this case, NRS Chapter 116 also provides for the issuance of declaratory orders and advisory opinions by the Division in response to a petition filed with the Division's administrator. NRS 116.623. NRS 116.623 provides that the Division, by regulation, provide for the ". . . *filing and prompt resolution of petitions for declaratory orders and advisory opinions as to the applicability or interpretation of. . .*": ". . . [116,] *NRS 116A or NRS 116B*", ". . . *any regulation adopted by the* [CCICCH], *the Administrator or the Division . . .*",and ". . . *any decision of the* [CCICCH], *Administrator or Division . . .*" . Any petition filed pursuant to NRS 116.623 must be submitted for the consideration by the Division after it has been filed with the Administrator. NRS 116.623(4). The Division's response to any petition must be issued within sixty (60) days of submission. NRS 116.623(5)(a).

With the foregoing administrative law backdrop, the hierarchy and relative authority of the CCICCH and the Division can be understood more clearly. The statutory scheme makes clear that the Division generally must act under the supervision and control of the CCICCH. NRS 116.623. Absent a specific delegation of authority to it by the CCICCH, the Division's authority to consider and issue

advisory opinions is limited by NRS 116.623 to those matters and circumstances identified in that statutory section and submitted to it via petition. In the present case, Division Adv. Op. 13-01 appears to have been issued spontaneously, without petition or specific authority from the CCICCH, and in fact, in direct conflict with a prior advisory opinion issued by the CCICCH itself.

Even more specific to the issue of the scope of "super priority" liens, NRS 116.310313(1) provides as follows: "*An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The* ***CCICCH*** *shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.*" (Emphasis added). NRS 116.310313(2) further provides that "... [t]*he provisions of th*[e] *section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, ... a community manager or a collection agency.*" As the Supreme Court of the State of Nevada has very recently pointed out "[t]*he language of the two sections is clear that the CCICCH is* ***solely*** *responsible for determining the type and amount of fees that may be collected by associations.*" (Emphasis added). State of Nevada Dep't of Bus. & Indus., Fin. Inst. Div. V. Nevada Ass'n Servs., Inc., 128 Nev. Adv. Op. No. 34 (Nev. 2012). The CCICCH has done so, both by adoption of amendments to NAC 116.470 and by issuance of CCICCH Advisory Opinion No. 2010-01.

In the absence of clear evidence that the CCICCH has abandoned its view of the proper scope of Nevada "super priority" liens, or

that it delegated to the Division the authority to reconsider the issue and potentially overrule the Commission's own decisions[5], the Division's Adv. Op. 13-01 must be viewed as a fugitive document, issued without authority or any legal effect whatsoever. Strangely, in Adv. Op. 13-01, the Division itself seems to admit it's lack of authority to issue the opinion by adding to the end of the text the following disclaimer:

> *Statements in this advisory opinion represent the views of the Division and its general interpretation of the provisions addressed. It is issued to assist those involved in common interest communities with questions that arise frequently. It is not a rule, regulation, or final legal determination. The facts in a specific case could cause a different outcome.*

Whatever the motivations of the Division in issuing Adv. Op. 13-01, the only conclusion that can be reached is that even the Division doubts the efficacy of its thoughts. Adv. Op. 13-01 will be disregarded in its entirety in this case. This result is required because the Commission, as required by statute, has already issued its determination of the nature of and amounts allowed to be included in a Nevada SPL and its determinations literally preempt the field (with respect to the Division). *See* NRS 116.310313, NAC 116.470, and CCICCH Adv. Op. 2010-01.

The "Super Priority" Lien Claims

In Nevada, since 2006, in a very troubled national and state economy, real estate property values have fallen dramatically, in many cases losing 50% or more of their peak value. This unfortunate

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[5] It should be noted that, given the statutory directive in NRS 116.310313 that the CCICCH itself adopt the regulations establishing the type and amount of fees to be collected by association, it appears the CCICCH could not delegate to the Division the authority to make such decision, even if it desired to do so.

occurrence has been coupled with many Nevadans losing their jobs or being reduced to fewer hours or lower wages. As a result, the occurrence of foreclosures (and foreclosure related sales) has very greatly increased. Along with that increase in such sales has come a renewed interest in the issue of super priority liens. Lenders and buyers of residential properties, often times investors, are particularly interested in limiting the amounts they must pay to associations to obtain clear title to their property(ies). Associations, on the other hand, are facing serious budget shortfalls due to association members failure to pay dues and assessments as their homes are lost to foreclosure. The confluence of these often opposing interests has resulted in significant numbers of legal disputes, including the present arbitration proceeding.

The parties in this do not agree whether an NRS 116.3116(2) SPL may include both overdue regular periodic assessments *and* other collection costs incurred by the association in recovering those assessments. It is this dispute, analyzed at length in many of the numerous opinions, cases and articles provided by the parties, that has vexed property owners, associations, administrative agencies, courts, and legal experts for years and has more recently arisen as a "*hot button*" issue in Nevada.

The dispute arises out of the provisions of NRS 116.3116(2)(c) which in relevant part state that the SPL is limited:

> ". . . ***to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115*** *which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, ...* (Emphasis added).

The parties' respective interpretations of the meaning of the highlighted phrase are diametrically opposed. The Supreme Court of the State of Nevada has never considered the issue. Claimant argues that the correct interpretation of the phrase is that of a fixed monetary limit or cap on the total that may be asserted by an association as an SPL (consisting of the total of the budgeted but unpaid regular periodic assessments during the nine (9) months immediately preceding the foreclosure). The Respondents, on the other hand, take the position that the language used in NRS 116.3116 clearly indicates that, in addition to the nine (9) months of overdue assessments, the costs of collecting those arrearages are also recoverable.

The undersigned has carefully read and considered all of the materials presented by the parties. After that careful review, it is inescapable that the phrase in question can be fairly interpreted in different ways and that, as a result, it is ambiguous.[6] *"Where a statute is capable of being understood in two or more senses by reasonably informed persons, the statute is ambiguous."* McKay v. Bd. of Supervisors of Carson City, Nevada, 102 Nev. 644, 649, 730 P.2d 438 (1986), *citing* Robert E. v. Justice Court, 99 Nev. 443,

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[6] It should be noted that today both Connecticut's (originally the same as Nevada's statute, but amended during the pendency of the 1992 Hudson House case) and Colorado's (already different when First Atlantic Mort., LLC v. Sunstone North HO, 121 P.3d 254 (2005) was decided) super priority lien amount definitions are significantly different than Nevada's statute. Each, in relevant part defines the super priority common assessments as ". . . *to the extent of . . .* ***an amount equal to*** *the common expense assessments based on the periodic budget adopted by the association . . .".* (Emphasis added). *See Conn. Ge. Statute 47-258 and C.R.S. 38-333.3-316.* This language is somewhat more precise than the comparable Nevada language " . . . *to the extent of the common assessments . . .*" . The Connecticut statute also includes in the SPL a specific right to a priority recovery of " *the association's costs and attorney's fees in enforcing its lien.*" *Id.*

445, 664 P.2d 957 (1983).

As noted earlier, it is the goal of statutory interpretation to effectuate the legislature's intent. Savage, *supra*. When an ambiguous statute is construed, it should be given meaning consistent with what the legislature intended, based on reason and public policy. McGrath, *supra*. It is the duty of a court, by examining the background and spirit in which the law was adopted, to interpret a statutory scheme "harmoniously" with the purpose of the statute. Southern Nevada Homebuilders Ass'n and Public Employees' Benefits Program, *supra*.

Nevada adopted the Uniform Common Interest Ownership Act (UCIOA) in 1991 (A.B. 221- 66th Session) (Effective January 1, 1992) as NRS Chapter 116. The "*super priority*" lien created by NRS 116.3116 is a legislative effort to balance the financial interests of the several parties involved in a financed residential common interest community property facing foreclosure.

One involved party is the association itself. As discussed earlier, in a foreclosure setting, the provisions of NRS 116.3116 allow an association to step ahead of a first security interest holder (or successor in interest) and require of the new owner payment of at least a portion of assessments originally the responsibility of the prior owner. The rationale behind this rule lies in the nature of common interest communities. Such organizations bear responsibility to furnish association members with all of the benefits of collective ownership and governance. Modern associations often are responsible, not only for the day to day operations of the community, but the short and long term care and upkeep of millions of dollars of commonly owned and/or

maintained assets and improvements. To provide these services, associations establish and collect regular and special assessments from each member. The success (and popularity) of any association is directly dependant on its ability to maximize the benefits it provides, while at the same time minimizing the cost of its services. Any time a member fails to pay an assessment, that burden is effectively transferred to the association and the remaining members. Dues increases or special assessments may become necessary. Those additional burdens can lead to yet more failures to pay. If sufficient owners fail to pay assessments, the association can literally lose its ability to function. In short, the viability of any common interest community is dependant on universal or near universal participation of its members, financial and otherwise.

Lenders, on the other hand, are, quite appropriately, interested in maximizing their return (or minimizing losses) when a foreclosure happens. While no doubt having some interest in preserving the involved association (and protecting property values), a lender's interest in the association is understandably weighted toward its own financial position. When, as occurs in many foreclosure cases these days in Nevada, the lender never takes title to the property, but oversees a sale to a new owner, its interest in the association's problems may be minimal.

Buyers and investors, when buying such properties, may have quite limited interest in the long term viability of the community. Even in the case of the buyer who intends to keep the property, paying past assessments is at the very least viewed an additional unwelcome amount to be paid to gain entry into the community. In

the case of the investor, who perhaps intends to resell or "*flip*" the property in as short a time as possible, not only is this an additional purchase cost, but it adds absolutely no direct value to his or her investment.

The foregoing factors weigh heavily in interpreting NRS 116.3116. As the cases cited in this Decision direct, in construing the statute, its provisions should be given meaning that is consistent with the remainder of NRS Chapter 116, legislative intent, reason, and public policy.

It is highly unlikely that, in 1991, as it adopted the UCIOA, the Nevada legislature contemplated even the possibility of the economic and real estate disaster that has recently befallen Nevada. What cannot be denied is that it was recognized that common interest communities were a significant participant in many Nevadan's lives and that adoption of the UCIOA was intended to be of benefit to them.

More recently, in 2009, the provisions of NRS 116.3116 and even the super priority lien were raised before the legislature. Via Assembly Bill 204, Clark County Assemblywoman Ellen Spiegel offered legislative amendments that would have extended the super priority lien period from six (6) months to two (2) years. Minutes of the Assm. Comm. On Judiciary, March 6, 2009, 75th Sess. at 34. The stated objectives of the amendment were to preserve property values, help common interest communities mitigate the adverse effects of the foreclosure crisis, help homeowners avoid special assessments resulting from revenue shortfalls, and prevent cost-shifting from common interest communities to local governments. *Id.* Ultimately, the bill was modified to extend the super priority lien period from

six (6) months to nine (9) months. NRS 116.3116(2)(b). There is little else in the record to clarify the basis for that more minimal amendment of the super priority lien period.

As A.B. 204 was being considered, the issue of the scope of the super priority lien was raised. In testimony given on March 6, 2009, Common Interest Community Commissioner Michael Buckley mentioned the super priority lien, pointing out to the Committee members that the UCIOA had been amended in 2008 to specifically add to the scope of the super priority lien an association's "*cost*[s] *of collection and attorney's fees*". March 6, 2009 Minutes, *supra* at 44-45. He also stated that there exists in Nevada a question as to whether such expenses can be added to an association's super priority lien and he recommended that A.B. 204 be amended to clarify that issue. *Id.* He also referred the Committee to a letter that had been authored by Ms Karen D. Dennison, Esq., the Vice Chair of the Real Property Section of the State Bar of Nevada which raised similar issues. *Id.* Unfortunately, it does not appear that the subject was further addressed nor resolved by the 2009 Legislature. Since 2009, as evidenced by this case, the controversy over the scope of the NRS NRS116.3116(2) super priority lien has continued unabated.

When interpreting a statute, the legislative history and legislators' statements can be persuasive. *See* Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n, 126 Nev. Adv. Op. 7, 225 P.2d 1265 (2010).

From the legislative history of AB204, it can be concluded that the basic intent behind the legislation was to provide additional financial protections to homeowner associations as they faced

unprecedented delinquencies, foreclosures, and resultant loss of anticipated income in their communities.

In addition, during the 2009 legislative session, Assembly Bill 350 was introduced and, in part, later became law. Of interest to this discussion is Section 1.5 of that bill, now found in NRS Chapter 116 as NRS 116.310313. That new statutory provision specifically provided that an association may charge a unit owner ". . . *reasonable fees to cover the costs of collecting any past due obligation.*" NRS 116.310313. It also directed the Commission for Common-Interest Communities (the "CCICCH") to adopt regulations establishing ". . . *the amount of the fees that an association may charge . . .*" *Id.* The statute defines the terms "*obligation*" and "*costs of collecting*" very broadly. *Id.* The new statute was clearly intended to broaden the scope of expenses recoverable by associations as it sought to recover any past due obligation of a unit owner, including ". . . *assessments, fines, construction penalties, fees, charges, and interest . . .*" levied pursuant to any provision of an association's governing documents or NRS Chapter 116. *See generally* NRS 116.310313.

Effective May 5, 2011, the CCICCH adopted, as a part of the Nevada Administrative Code (NAC), a regulation setting an overall fee limit of $1,950.00[7], and individual limits on a wide variety of individual fees and charges, that might be recovered from a unit owner in connection with the collection of a past due obligation.

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[7] Pursuant to Sections 3 and 4 of the Regulation (R199-09, effective May 5, 2011), certain association or third party agent "hard costs", including but not limited to, "reasonable" management fees not exceeding $200 and "reasonable" attorney's fees and costs are allowed to be recovered in addition to the basic $1,950.00 limit.

See NRS 116.310313 and NAC 116.470.

In considering the 2009 passage and impact of AB204, AB350 and the later CCICCH adoption by regulation[8] of NAC 116.470, there is no doubt that, in the current troubled economic times, the Nevada legislature has continued its efforts to balance the interests of homeowners, associations, lenders and investors. No mean task on any level. In this case, however, as noted above, little help can be found in the legislative history of AB204, or for that matter, legislative consideration of similar homeowner association issues. In such a case, one must turn to reason and public policy to determine the true intent of the legislature. *Id.*

Taking into account Nevada's 1991 adoption of the UCIOA granting associations broad assessment and enforcement powers and the Nevada Legislature's more recent efforts to ensure associations are able to collect both delinquent assessments and the costs of collection from unit owners, reason would dictate that it has been and is the public policy of the State of Nevada, in foreclosure and similar circumstances, while continuing, to the extent appropriate, to protect other stakeholders' interests, to ensure that common interest communities continue to be able to recover sufficient delinquent assessments and costs of collection to perform their statutory and other governing document duties.

In considering its state's version of the UCIOA (in 1992, in relevant part, identical to Nevada's statute), the Supreme Court of Connecticut stated that in construing the statute it would assume that the legislature intended a "*reasonable and rational result*".

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[8] CCICCH regulation R199-09, effective May 5, 2011.

Hudson House Condominium Association v. Michael B. Brooks *et al*, 611 A.2d 862, 866 (1992)(citations omitted). In setting out its rational for its holding the Connecticut court said the following:

> *Since the amount of monthly assessments are, in most instances, small and since the statute limits the priority status to only a six month period, and since in most instances, it is going to be the only priority debt that in fact is collectible, it seems highly unlikely that the legislature would have authorized such foreclosure proceedings without including the costs of collection in the sum entitled to priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without string or arrows.*

Using this rational, the Connecticut court allowed the association to include as a part of its super priority lien its costs of collection including: interest, appraisal fees, a title examination fee, and attorney's fees and costs. *Id.* at 863-866, fn 3. The Connecticut Court viewed that state's "*super priority*" lien statute as providing for a broad range of recoverable costs of collection which it determined were specifically *not* limited in an amount equal to six months of monthly association assessments.

In Hudson House, as a part of the association's super priority lien, the trial court awarded not only six (6) months of monthly dues, but also interest on those assessments. Hudson House, at 864. The trial court, however, while also awarding the association costs including attorney's fees, an appraisal fee, and a title examination fee, refused to include those sums in the super priority lien. *Id.* On appeal, the association sought to have included, as a part of its super priority lien, the foregoing costs, plus ". . . *other costs of collection.*" *Id.* at 866. The Supreme Court of Connecticut agreed with the association. The Connecticut court held (1) that the association's collection costs that had accrued in the six months

preceding the commencement of the foreclosure action were entitled to super priority treatment *and* (2) that the association's attorney's fees and costs incurred leading up to and during the judicial foreclosure action were also entitled to the same priority treatment. *Id.*

Some critics also argue that, because the Hudson House case involved a judicial foreclosure action (Connecticut did not provide for an alternative non-judicial foreclosure process), the holding of the Supreme Court of Connecticut cannot be looked to for guidance in interpreting Nevada's super priority lien provisions. This too inappropriately attempts to limit the reasoning underlying the court's interpretation of Connecticut's super priority lien statute. The reasoning underlying the court's opinion remains unchanged whether viewed in the context of a judicial foreclosure action or assertion of the super priority lien in the context of the present case, a non-judicial foreclosure proceeding. The Hudson House decision remains good law today and helpful in considering the meaning of Nevada's statute.

The recent advisory opinion issued by the CCICCH addressed whether or not, under NRS 116.3116, an association may collect as a part of its super priority lien, its costs and fees incurred in collecting association assessments. CCICCH Adv. Op. 2010-01, *supra*. Referencing several sources of authority, including NRS 116.310313, the CCICCH answered that question in the affirmative. *Id.* at 12-14. The CCICCH concluded that, in addition to the nine (9) months of unpaid regular periodic assessments, an association in Nevada is entitled to include in its NRS 116.3116 super priority lien the following amounts: (1) interest permitted by NRS 116.3115, (2) late

fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (3) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (4)the association's "*costs of collecting*" authorized by NRS 116.310313.

Pursuant to the terms of regulations specifically authorized by NRS 116.310313(1) and adopted effective May 5, 2011, recoverable ". . . *costs of collecting any past obligation of a unit's owner . . .*" specifically include "[*r*]*easonable attorney's fees and actual costs . . .*" NAC 116.470(1) and(4)(b). Courts generally give "*great deference*" to an agency's interpretation of a statute that the agency is responsible for enforcing. State of Nevada, Division of Insurance v. State Farm Mutual Auto. Ins. Co., 116 Nev. 290, 293, 995 P.2d 482 (2000)(Citations omitted).

The undersigned believes that today, the statutes, regulations, agency opinions and cases discussed (and not deliberately disregarded) in this Decision generally express the proper approach to be taken in this case.[9] Moreover, the conclusions set forth below are in keeping with rules already accepted by various federal and local lenders.

DECISION AND AWARD

Pursuant to the provisions of NRS Chapter 38, jurisdiction exists over the parties and the subject matter of this arbitration proceeding.

On the overarching issue of the permissible scope of a super

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[9] The scope of this Decision is limited to the claims and issues raised in this proceeding. Additional possible "super priority " lien issues, including but not limited to, those related to construction penalties (NRS 116.310305) or fines (NRS 116.31031) have not been addressed. *See* NRS 116.3116(1).

priority lien in Nevada, Respondents are prevailing parties in this case. On the primary legal issue to be determined - that being the appropriate scope of an NRS 116.3116(2) "super priority" lien, Respondents' position has been vindicated.

With regard to Bank of America's claim for reimbursement of assessments, late charges and costs of collection relating to the period of time Bank of America was the actual owner of the property (November 23, 2011 to October 2, 2012, Respondents also prevail. Bank of America claims focus on "super priority" lien issues and amounts. It does not dispute the Respondents' right to recover unpaid assessments, late charges and costs of collection related to the period of time it was the owner of the real property in question.

Turning to the actual "super priority" lien amounts in dispute, the undersigned's review of the briefs and exhibits revealed no amounts recovered by or on behalf of Respondents that were not permitted by Nevada law. Moreover, Bank of America's Brief failed to identify any sum (assuming the application of the "super priority" lien rules as indicated by this Decision) that was either not permitted to be recovered or in excess of the amount that could be claimed in such a lien. As a result, Respondents prevail on this issue as well.

As a result of the foregoing each, every and all of the claims of Bank of America shall be and hereby are dismissed with prejudice.

FEES, COSTS & EXPENSES

Under the circumstances an award of arbitration expenses, attorney's fees and costs to Respondents is warranted. Respondents shall file their motion (or motions), if any, within ten (10) days

of the date of this Decision, plus three days for mailing. All such filings shall comply with the normal Nevada rules for the recovery of such expenses, fees and costs. This includes, but is not limited to delineation of the *Brunzell* factors. Any opposition to such motion(s) shall be filed within a similar time frame. Replies in support of motions will not be allowed in the absence of further order.

POST-ARBITRATION DEADLINES

Any motion(s) for expenses, fees and costs shall be filed within ten (10) days of the date of this Decision, plus three (3) days for mailing. All other post-arbitration deadlines, including the deadline for requesting a trial *de novo*, shall be held in abeyance pending the resolution of the foregoing motion(s).

CERTIFICATION AUTHORIZATION

Authorization for issuance of a Certificate of Completion shall also be held in abeyance pending the resolution of all post-arbitration motions.

DATED this 6th day of September, 2013.

BY: _____
STEVE E. WENZEL, Arbitrator
301 Flint Street
Reno, Nevada 89501

CERTIFICATE OF MAILING

I, STEVE. WENZEL, Esq., on this date, by First Class Mail, delivered a true copy of the within document entitled **ARBITRATION DECISION AND AWARD** addressed to:

Bank of America, NA
c/o Jason Peck, Esq.
The Cooper Castle Law Firm, LLP

Olympia Management Services, LLC
Southern Highlands Community Association
c/o Alexis Brown, Esq.
Fennmore Craig Jones Vargas

Royal Highlands Street and Landscape Maintenance Corporation
c/o Royi Moas, Esq.
Wolf, Ripkin, Shapiro, Schulman & Rabkin, LLP

Ryan Kerbow, Esq.
Alessi & Kerbow

Anne Moore, Program Officer
Office of the Ombudsman
State of Nevada
Department of Business and Industry
Real Estate Division

DATED: September 6th, 2013

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I electronically filed the forgoing **APPELLANT'S OPENING BRIEF AND APPELLANT'S APPENDIX** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on October 28, 2013.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

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