IT IS FURTHER ORDERED ADJUDGED AND DECREED that NAS shall recover $55,689.19 plus statutory interest from Plaintiff JP Morgan Chase Bank, N.A., a National Association the judgment amount as follows:

1. $6,653.91 for delinquent assessments and partial collection costs; and

2. $49,035.28 for reasonable attorney's fees and costs comprised of $1,635.28 in costs and $47,400.00 in attorney's fees as part of NAS' collection costs.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the judgment will accrue interest in the manner permitted by Nevada law until the judgment has been satisfied.

IT IS SO ORDERED.

Dated this 11th day of May, 2011.

DISTRICT COURT JUDGE

MARTIN & ALLISON LTD.
3191 E. Warm Springs Road
Las Vegas, Nevada 89120-3147

Submitted by:

MARTIN & ALLISON LTD.

By
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Approved/Disapproved as to form and content:

SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON

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EXHIBIT 8

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
April 15, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 7:10 a.m. on Friday, April 15, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Ruben J. Kihuen
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bradley A. Wilkinson, Counsel
Kathleen Swain, Committee Secretary

OTHERS PRESENT:

Orrin J. H. Johnson, Washoe County Public Defender's Office
Keith Lee, Lawyers Title Insurance Corporation; First American Title Company
Michael Buckley, Commission for Common-Interest Communities and Condominium Hotels
Pamela Scott, Howard Hughes Corporation
Renny Ashleman, City of Henderson

CHAIR WIENER:
We will begin this work session with Senate Bill (S.B.) 103. The State Gaming Control Board brought S.B. 218 as the regulatory agency bill. Senate Bill 103 was brought, and everything from S.B. 103 was moved into S.B. 218, which was passed out of this Committee. One portion of legislation was moved from S.B. 218 into S.B. 103 that dealt with the Live Entertainment Tax. That is what we have before us today.

SENATE BILL 103: Authorizes a licensed interactive gaming service provider to perform certain actions on behalf of an establishment licensed to operate interactive gaming. (BDR 41-828)

SENATE BILL 218: Revises provisions governing the regulation of gaming. (BDR 41-991)

LINDA J. EISSMANN (Policy Analyst):
The amendment you received this morning (Exhibit C) is identical to the amendment in the work session document (Exhibit D), pages 2 through 8.

CHAIR WIENER:
Senate Bill 103 clarifies the Live Entertainment Tax.

SENATOR BREEDEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 103 AND REREFER TO THE SENATE COMMITTEE ON FINANCE.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR ROBERSON VOTED NO.)

*****

CHAIR WIENER:
We will address S.B. 150, which deals with public storage facilities. I am concerned about protected property and how to ensure that property is kept safe. This includes medical, insurance and financial records. People store their records in boxes, and we want to ensure those records are secure and treated with respect. This will be a model bill for the Country in terms of steps taken to hold people accountable for this important information. Bradley Wilkinson will go over the amendment.

SENATE BILL 150: Revises certain provisions governing liens of owners of facilities for storage. (BDR 9-907)

BRADLEY A. WILKINSON (Counsel):
The amendment changes the definition of "electronic mailing" in conjunction with the definition of "verified mail" (Exhibit E), page 3. To be an electronic mailing, there must be an electronic confirmation of receipt of the message. The reference to electronic mail is removed from the definition of "verified mail," which would include actual mailing for which evidence is provided, such as certified, return receipt requested or registered mail.

The next change relates to some of the definitions of "rental agreement" and "occupant," page 4, Exhibit E. This conveys that the law will continue to apply. These rental agreements will apply to one space at a time rather than multiple spaces.

Section 14 contains changes to protected property, page 4, Exhibit E. As part of the rental agreement when occupants store protected property, section 14 requires they clearly and prominently label that property as protected property. The general type of protected property must be identified, such as medical records or legal records, etc. If the occupant is subject to regulation by a licensing board—a doctor, for example—he or she is required to provide the licensing board with written notice that protected property is being stored at the facility. The occupant must provide contact information for the facility and for a secondary contact.

Section 16, Exhibit E, page 5, includes provisions relating to protected property and a specific priority for disposition when the owner of a storage facility finds protected property. It provides the owner can first contact the occupant and return the protected property to the occupant. If that does not work, the owner would try to return the property to the secondary contact listed in the rental agreement. If that fails, the owner would contact the appropriate state or federal authorities, which might include a licensing board, and ascertain whether it will accept the protected property. If so, the owner would deliver the property to the authority. If those attempts fail, the owner would destroy the protected property in a manner that ensures it is completely destroyed and cannot be accessed by the public.

Section 19, Exhibit E, page 7, relates to protected property and states that if protected property is found and subject to a sale, the person who purchased the property in good faith has a duty to return it to the occupant. If that fails, the purchaser would return the property to the owner of the facility who would dispose of it in the priority just discussed.

CHAIR WIENER:
By notifying a licensing board that protected property is stored at a facility, it is on notice that a license holder is possibly violating a requirement of licensure because he or she is not securing the documents of his or her clients or customers by being in arrears or abandoning the storage unit where protected documents are stored. We wanted to hold the occupant accountable because he or she is not being responsible for the records. We have done everything we can to protect records for people who do not know they are in jeopardy.

SENATOR GUSTAVSON:
I am concerned with section 14 of the bill where a person must disclose to the owner what he or she is storing or clearly mark the boxes as protected property. An occupant must clearly mark the boxes as containing medical, legal or financial records; pharmaceuticals; alcoholic beverages or firearms. I would not want to label my boxes with their contents. People break into storage units quite often, and this will make it easier for them to locate what they might steal. We should not be going in this direction. I cannot support the bill.

SENATOR BREEDEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 150.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

*****

CHAIR WIENER:
We will address S.B. 283, which relates to postconviction petitions for habeas corpus where the petitioner has been sentenced to death.

SENATE BILL 283: Revises provisions governing the appointment of counsel for a postconviction petition for habeas corpus in which the petitioner has been sentenced to death. (BDR 3-1059).

MS. EISSMANN:
I have a work session document (Exhibit F). Two amendments were offered and are included in Exhibit F. I have received nothing else.

SENATOR GUSTAVSON MOVED TO AMEND AND DO PASS AS AMENDED S.B. 283, INCLUDING AMENDMENT 6215.

SENATOR ROBERSON SECONDED THE MOTION.

CHAIR WIENER:
This will retain law stating there must be an appointment. However, it will include the education requirements.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR WIENER:
We will address S.B. 347. We have a conceptual amendment I worked on with the sponsor of the bill. This relates to allowing the Aging and Disability Services Division of the Department of Health and Human Services to use a subpoena to access financial records to determine whether it has probable cause to go after other information it needs. The sponsor agrees with this amendment.

SENATE BILL 347: Authorizes the issuance of a subpoena to compel the production of certain financial records as part of an investigation of the exploitation of an older person. (BDR 15-1075)

MS. EISSMANN:
I have a work session document (Exhibit G).

SENATOR ROBERSON:
This bill is unconstitutional.

MR. WILKINSON:
This amendment might eliminate concerns about constitutionality because there would be no administrative subpoenas. This person would be law enforcement and would have to seek a warrant with probable cause like any other law enforcement officer.

ORRIN J. H. JOHNSON (Washoe County Public Defender's Office):
When we talked with the people in the Aging and Disability Services Division who are trying to get this information, their problem was not that they did not want to get a warrant. The problem was they could not get a warrant because no one in the office had the power to apply for it. There was an administrative hurdle to get to the judge. I wanted a magistrate to look at it before a search or seizure was conducted. This bill allows that to happen, and everyone is happy with that. We have no problem with the amendment.

CHAIR WIENER:
Does this amendment address everything you suggested?

MR. JOHNSON:
Yes.

SENATOR ROBERSON:
This amendment does require a warrant?

MR. JOHNSON:
Yes.

SENATOR BREEDEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 347.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR WIENER:
We will address S.B. 356. I moved this bill forward to add the word "monetary." We have a work session document (Exhibit H).

SENATE BILL 356: Establishes the crime of stolen valor. (BDR 15-999)

SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED S.B. 356.

SENATOR GUSTAVSON SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR WIENER:
We will address S.B. 174. We received a mock-up of what we have discussed and paperwork we received (Exhibit I), and we have a work session document (Exhibit J).

SENATE BILL 174: Revises provisions relating to common-interest communities. (BDR 10-105)

SENATOR COPENING:
I want to bring your attention to page 25 of Exhibit I. I worked with people for many hours going over this bill to ensure there were no misunderstandings about what the bill does. One of the comments was to make sure we included an amount in the collections portion. The cap of $1,950 appears on page 25 of Exhibit I, line 16, which is the wrong place. This was added to mirror what the Commission on Common-Interest Communities and Condominium Hotels adopted to cap the collection fees. It should be on page 26 of Exhibit I at line 4 in the subsection relating to collection costs, which says this is the maximum that can be collected. Other than that, we reviewed all these things.

CHAIR WIENER:
I sent a letter to Michael Buckley and met with the Chair of the Legislative Commission regarding my concerns about this issue. In my letter, I requested to start at the difference between the measures we considered, which would be $1,500. My intention was to make it lower. I have received a response from Mr. Buckley that will be presented for consideration.

SENATOR KIHUEN:
For the record, under this bill the fees cannot exceed $1,950. We will not have bills of $40,000 and $50,000 for late charges, etc. I want to confirm costs will not exceed $1,950. I would prefer a lower amount, but inserting a cap solves the problem for now because there is no cap.

SENATOR COPENING:
These are the costs a collection company can charge. A homeowners' association (HOA) can retain an attorney to foreclose on a home, for example, and it is part of the superpriority lien. We are not changing law. However, a board of directors of an association can charge whatever they want for attorney fees. Therefore, we included "reasonable" attorney fees. "Reasonable" is defined in statute. The court goes by a median price for attorney's fees, depending on the kind of work the attorney is doing. We wanted to make sure we included the word "reasonable."

SENATOR KIHUEN:
Aside from reasonable attorney fees, will $1,950 be the absolute cap on any other fees?

SENATOR COPENING:
I believe so, but I am not an expert in this area.

KEITH LEE (Lawyers Title Insurance Corporation; First American Title Company):
When a decision is made to issue a notice of default and go forward with a sale, *Nevada Revised Statute* (NRS) 116 requires notice be given to everyone in the chain of title and everyone who has requested special notice of any proceeding against that particular title. We issue a trustee sale guarantee (TSG) that ranges in fees from $290 to $400, depending upon several factors. My understanding was we would be carved out of this cap. In reviewing this, I am not sure we are carved out.

In direct answer to Senator Kihuen's question, the intent was the fee would be capped at $1,950, but the TSG and other items necessary to ensure clear title would be in addition to that. That is what the regulation says. The title fees are capped by the rate schedule filed with the Division of Insurance, Department of Business and Industry.

That would be additional cost if we go forward with the intent during our negotiations and the pending regulation.

SENATOR KIHUEN:
Aside from the $1,950, there would be these additional charges you are discussing, the $290 to $400?

MR. LEE:
Yes. That was the understanding. I do not know if that is still the intent because I do not see that carveout in this mock-up.

MR. WILKINSON:
I was trying to ascertain exactly what the intent was. We are talking specifically about the items included in the superpriority lien, not necessarily the cap on fees set forth in NRS 116.310313. Presumably, those could be different. I have not studied this language carefully enough to determine that. We can do whatever the Committee desires. We can draft this in a manner that would include those costs or not include them.

SENATOR KIHUEN:
I would prefer we cap it at $1,950 with all the fees included. This has been my concern. People are struggling, and these management and collection companies have been abusing people. I want to make sure there is an absolute cap aside from the reasonable attorney fees.

SENATOR COPENING:
Our intent was to mirror the Commission's regulations. The Commission's regulations say collection fees are capped at $1,950. Those are the fees a collection company can charge. The foreclosure process includes other fees, such as title company fees, the collection company is not privy to. Those are costs of doing business the HOA must pay if it is going through the title process. The money does not go into the pockets of the collection companies. I realize now by including what we did in this bill, we are creating an unintended consequence because NRS 116.310313 is the regulation. We thought by making it well known that we did not want collection companies getting more than $1,950, we may be doing the wrong thing regarding other charges that may come with a foreclosure.

If we can pass this, we will fix it on the Senate Floor with whatever you need, Senator Kihuen, to make sure we know collection costs are capped. Anything a collection company can get is capped at $1,950.

MR. LEE:
If it is any solace to you, the way the regulation is written and everyone involved in the collection process agreed, the title company charges—$290 to $350—are absolute charges. No surcharge can be placed on that. Neither the collection agency nor the HOA can bump that amount so as to realize something. The HOA or debt collection agency could do a title search and come up with the names, but title searching is not easy. Title companies have been doing this for years and have a system that works. Most important, they give a guarantee, the TSG, that the information they have is correct. They insure that up to a certain amount, usually in the range of $50,000. There is recourse if a mistake is made so there is no cloud on title. There is no risk that sometime down the road there might be a break in the chain of title causing difficulty with the way the title goes forward.

MR. WILKINSON:
This provision in Exhibit I, page 25, line 10 refers to the "cost of collecting a past due obligation which are imposed pursuant to NRS 116.310313." *Nevada Revised Statute* 116.310313 states:

> "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation ... .

This type of fee would be included in that definition and would therefore be included within the $1,950 cap.

SENATOR ROBERSON:
It is unclear to me where this language should be. If we are being asked to vote on this now, it would help to see where the language should be.

I received an e-mail the day before yesterday regarding a friend who lives in Anthem. We have a serious problem with collection agencies. This person bought an existing home in Anthem nine years ago. The original owner lived in the home and had landscaping installed. When my friend moved in, he received a notice from the HOA requiring a landscaping plan. He said he did not have one because he bought an existing home with landscaping. He was assessed a fine of $400. That is the only documentation he received from the HOA or management company for nine years. He went to pay off the loan on his home and received a letter from Associated Community Management wherein that $400 is now $27,827. This is a problem.

The proposed language does nothing to prevent this problem because it appears the $1,950 cap does not include reasonable attorney fees. The word "reasonable" does not give me a lot of comfort. I do not see where management or collection companies would be prevented from continuing to charge large amounts of money for attorney's fees, whether they are attorneys or they hire an attorney. I do not see how this closes that hole allowing management and collection companies to charge outrageous fees.

I asked the other day if S.B. 195 was going to be heard for a vote. I was told no, we are not going to institute caps because the regulators are going to handle that. I am confused because we have a cap of sorts in S.B. 174. In this case, we are not waiting for the regulators to make this decision. I do not understand that.

SENATE BILL 195: Revises provisions relating to the costs of collecting past due financial obligations in common-interest communities. (BDR 10-832)

SENATOR COPENING:
You are right. We did say we were not going to do that. I am open to removing it. I was working with some of my colleagues who wanted that. We wanted to make sure it could not be raised, but our intent was to lower it. That was important to Senator Kihuen. We can take it out, but I do not want to do that without Senator Kihuen. That was where his comfort level was.

SENATOR ROBERSON:
The point is, we are not being consistent. When it comes to Senator Elizabeth Halseth's bill, we want to wait for the regulators to decide. When it comes to your bill, it is okay to put in the cap. I have a problem with this.

SENATOR KIHUEN:
Page 26, lines 3 and 4 of the mock-up, Exhibit I, say, "... any reasonable attorney's fees and other fees to cover the cost of collecting a past due obligation ... ." If we were to put in this cap of $1,950, would it cover those fees?

MR. WILKINSON:
As Senator Copening pointed out, that language would fit better on line 5, page 26 of Exhibit I. If the cap was there, it would include attorney's fees and other fees to cover the cost of collecting. We would have to be careful of the wording and make it clear on the record. It refers specifically to NRS 116.310313. I would read those things together to mean everything authorized under NRS 116.310313 would be capped at $1,950.

SENATOR KIHUEN:
That is my concern. We agreed on the reasonable attorney's fees. Many attorneys have abused the word "reasonable." I am not comfortable with the other fees. If the $1,950 cap would cover these other fees, it would make me feel better. It would not please me 100 percent, but I just want to make sure the cap will cover those fees.

MR. WILKINSON:
It is important to make it clear on the record regarding the amount of the superpriority with respect to attorney's fees and all costs if the intent is to cap it at $1,950. We can draft that in a manner to make it clear.

CHAIR WIENER:
Are the other fees concerning you because the bill says reasonable attorney's fees and other fees? It is the other fees you want addressed in the $1,950?

SENATOR KIHUEN:
Yes.

CHAIR WIENER:
Reasonable attorney's fees would be separate?

SENATOR KIHUEN:
Other fees are not defined.

MICHAEL BUCKLEY (Commission for Common-Interest Communities and Condominium Hotels):
Mr. Wilkinson is clear that if the $1,950 is moved to page 26 of Exhibit I, it would be everything. It would include title costs, attorney's fees and everything within the $1,950. It would be an absolute cap. That is not the same as the Commission. As Mr. Lee pointed out, the Commission distinguished between out-of-pocket amounts—the recorder's fees, title fees, etc. We included those as separate costs because of the concern that anything not recovered comes back to the other owners who are paying their dues and would be picking up the slack for those who are delinquent.

SENATOR COPENING:
We have established we are okay with keeping the reasonable attorney's fees separate. We are concerned about the other fees that are undefined. Since we know the other fees could be passed along to all the homeowners, what are they?

PAMELA SCOTT (Howard Hughes Corporation):
The other fees were probably included to address the $200 that can go to a management company for preparing a file to turn over to collection. That would come under the $1,950. I understand Mr. Lee's concerns, and the associations should have the same concerns because it does cost to record and send registered mail. That is a hard cost. It does not go to the collection company. The association will have to eat that cost if it is included in the $1,950.

SENATOR ROBERSON:
Mr. Buckley is under the impression the $1,950 would include reasonable attorney's fees, or it would include attorney's fees generally. Senator Copening is saying it would not; that would be outside of the $1,950. We are not all comfortable with that. We need to get a handle on who is correct in the interpretation of this amendment.

CHAIR WIENER:
That is what we are deciding. They will take their lead from whatever we decide to include in this amount. Based on the conversation we just had regarding Senator Kihuen's concern about other add-on fees, reasonable attorney's fees would be outside that. As we discussed in Committee, the word "reasonable" is not addressed. That is where some of the egregious charges come from. There are legal standards for "reasonable." Courts have evaluated what "reasonable"

should be. We added "reasonable," which we have not had before. Is your concern the hard cap of collection and other fees and "reasonable" attorney's fees being outside the cap?

SENATOR KIHUEN:
Yes. Ideally, I would want to cap 100 percent of everything, but I understand a definition for "reasonable" attorney's fees is in statute. I am not happy with the $1,950. I would prefer a lower amount. Some fees in the regulation—$150 for a lien letter and $400 for a notice of default—could be lower. There is no cap now. I would rather have something than nothing in this bill.

SENATOR ROBERSON:
I hear the argument that if these fees are charged and a collection company is not able to collect on them, all the other homeowners who are paying their dues would have to absorb those costs. That misses the point. We should be looking at the HOA management companies and boards. The boards have a fiduciary duty to the residents of their communities. They need to do a better job in negotiating agreements with collection companies so the law-abiding homeowners are not stuck with the bill. We are looking at the wrong issue when we say bills like this will protect the homeowners who pay their dues. That makes no sense.

A judge will decide whether attorney's fees are reasonable. If a homeowner gets stuck with a $27,000 lien, does he or she have to hire an attorney and go to court to argue with the collection company over whether its attorney's fees are reasonable? For practical purposes, how often will a homeowner be able to do that? Will the homeowner have to take it because he or she does not have the money to argue their position in court? I can assure you, the collection company attorneys have the money. They can tie this up in court forever. It is more and more put on the backs of homeowners. The word "reasonable" attorney's fees does not give me a lot of comfort because the homeowners will ultimately have to fight that in court.

The superpriority question seems to be the big issue. It is being proposed we codify that the fees, potentially the attorney's fees, have a superpriority lien. It is my understanding this issue is being debated in the courts. I am concerned because the collection companies want this bill. I would like Chris Ferrari's comments about this new language we have just seen.

CHAIR WIENER:
We have had debate on this issue. This is probably the only new language putting in a cap, and there are often caps in statute. I do not want to rehear a bill. We need to move forward. We have had two days of hearings on this and a day of hearing on each other bill.

SENATOR ROBERSON:
Senator Copening, how do you see this working if a homeowner gets a bill for $27,000 or $2,700, and it includes attorney's fees? How is that homeowner supposed to dispute whether those attorney's fees are reasonable? Must they hire an attorney and spend more in legal fees to argue with other attorneys about whether those attorney's fees are reasonable?

SENATOR COPENING:
We wanted to make sure the word "reasonable" was included regarding attorney's fees so HOAs, boards and management companies could not go crazy with attorney's fees. Including "reasonable" attorney's fees is a protection for homeowners.

The Commission adopted caps that must be approved by the Legislative Commission. Those caps will preclude costs of collection from being more than $1,950. Our Chair sent a letter to the Commission saying this Committee is not satisfied with that and would like a lower cap. I expect the Chair of the Commission will take that into consideration and probably hold additional hearings. *Nevada Revised Statute* 116 allows aggrieved homeowners to go before the Commission, and it includes many steps—mediation and arbitration—at no or very low cost. We are trying to include these caps so egregious fees do not occur.

Originally in this bill, we struck the first section. The first section included an extra step of due process by allowing a homeowner to appeal to the Commission if he or she received an unfavorable ruling from the Ombudsman's Office. We received approximately 15 e-mails from people who did not like section 1. We tried to do what the homeowners wanted, and we struck section 1. Administrator Gail J. Anderson from the Real Estate Division created a bill allowing that extra due process because it is good for homeowners. Attorney's fees are part of the superpriority. People do not like it, and it is being disputed in court.

SENATOR ROBERSON:
Where are attorney's fees already part of the superpriority in this statute?

SENATOR COPENING:
It is not in my bill. It is already in the law.

SENATOR ROBERSON:
Where, other than new language, does it say attorney's fees?

MR. BUCKLEY:
There is a decision in the Eighth Judicial District Court that attorney's fees and collection costs are part of the superpriority. There are a number of lawsuits dealing with this issue. There are decisions on both sides. It will not be settled until the Nevada Supreme Court makes a decision or this legislation addresses it. We are only talking about the superpriority. In cases of a delinquency, the association will most likely be paid when the lender forecloses. Senator Roberson's issue of the fine is not addressed in this bill; it is a separate issue. It cannot be foreclosed. It is a lien but cannot be foreclosed.

To put this into context, S.B. 254, which would create mediation at a reduced cost and speedy arbitration, would create a forum where people could use the Real Estate Division or speedy arbitration to resolve an issue on attorney's fees. But remember, fines cannot be imposed unless a hearing is held with due process. If there was not a hearing, a fine would not be right. This bill only deals with the superpriority amount, and it would include everything capped at $1,950.

SENATOR ROBERSON:
This is about superpriority. Attorney's fees are not included in superpriority in statute. As Mr. Buckley pointed out, this issue is being litigated in the courts. What we are doing today is fundamentally changing statutory law to allow attorney's fees in the superpriority lien. For those of you on this Committee who are concerned about homeowners being stuck with attorney's fees in the superpriority, this does not help. This statutorily blows a hole wide open to allow attorney's fees whether reasonable or not. We can debate that. But for the first time, we are allowing attorney's fees to be included in the superpriority lien by statute. That is my problem with this bill.

SENATOR COPENING:
It is law that they are awarded. I will point to the e-mail sent about Paradise Spa in Senator Roberson and Senator Breeden's district. The HOA was raided. An investor bought the majority of the units. He foreclosed on them. He stopped paying his assessments before foreclosing approximately two years ago. Paradise Spa, which is mostly senior citizens, is nearly broke. On April 18, the gas, which is on one meter owned by this investor, will be shut off. The residents got an extension. It was supposed to be shut off on April 8 in 261 units where mostly senior citizens live.

I have stayed on top of this to ensure these senior citizens are not out on the street. The unpaid assessments are nearly $1 million. This facility has gone downhill. In a few days, the gas will be turned off. I do not know when these people will be evicted. They have accumulated significant fees. They are chasing past due amounts of nearly $1 million, and their collection costs are way beyond $1,950. They had to enlist the help of an attorney to get this investor out of their unit. He has been arrested. These people do not have the money to come up with $1 million and pay the gas bill of $41,000. The gas will be turned off unless people help them. If you take this away, they are done. These are your constituents, Senator Roberson.

SENATOR ROBERSON:
That is a complete red herring. There is allegedly criminal activity going on. We do not need this statute to deal with that. I do not see how this statute helps that situation. They are my constituents, but that is a false argument.

RENNY ASHLEMAN (City of Henderson):
The mock-up includes language never discussed that is contrary to my agreement with the working committee. The working committee agreed to the language, "unless a person has accepted the responsibility." On page 11 of Exhibit I, section 6, subsection 1 says, "... unless a governmental entity has accepted responsibility ... ." This is a concern to the City of Henderson. It should say "person" rather than "governmental entity." These walls are not on our property. They are not our responsibility. We were only interested in the issue because they were a safety concern on our right-of-way.

CHAIR WIENER:
That was agreed to.

MR. ASHLEMAN:
It was agreed to. The language in lines 24 through 27 on page 11 of Exhibit I was not agreed upon by anyone and does not appropriately describe the relationship between the people. There are thousands of these walls. You can imagine us having to accept or deny responsibility for interior walls. We did not build them. They are not on our property. We did not ask anyone to do anything about them. Please remove that language.

CHAIR WIENER:
You want the word "person" at line 14 on page 11 of Exhibit I?

MR. ASHLEMAN:
Yes. I do not want the new language on page 11 of Exhibit I, lines 24 through 27.

MR. WILKINSON:
This is an important distinction, and it is a drafting issue. It needs to be clear. The term "person" as used in NRS does not include a governmental entity unless we specifically state that it does. If the desire is to exclude "governmental entity," the effect of using the term "person" would be to entirely exclude "governmental entities" unless we said "person," and then we further said as used in the statute that a "person" includes a "governmental entity."

CHAIR WIENER:
My understanding was that sometimes a municipality does need to get involved. Sometimes, it is the complex itself. I do not remember entirely excluding a municipality. It would be if it is appropriate to bring in the municipality; if it is appropriate, it is the complex. It was not just one or the other.

MR. ASHLEMAN:
I have no objection to using the word "person or other entity." Would that pick up the municipalities?

SENATOR COPENING:
You are right. This is wrong. We took all the amendments we went through the other day and asked our legal staff to include them in a mock-up. They misunderstood, and we got it this morning. I can see there are things missing in the portion saying, "not the responsibility of the unit owner." It is not in here.

There are mistakes. I apologize. Did you review the amendments we went through?

MR. ASHLEMAN:
Yes.

SENATOR COPENING:
Were they good?

MR. ASHLEMAN:
I had agreed to the one Mr. Buckley presented.

SENATOR COPENING:
That is what was supposed to be in Exhibit I. We will fix this section. If Exhibit I does not match up to the amendments we reviewed two days ago, we need to match them so we do not include something incorrect.

CHAIR WIENER:
In the work session, we went through item by item what the parties agreed to.

SENATOR MCGINNESS:
You recognize the problem, but everyone who has a part in this has not been able to come to the table. We got this amendment this morning just like Mr. Ashleman. I am concerned we will try to fix it on the Senate Floor or fix it in the other House. That makes me nervous.

CHAIR WIENER:
I am ready for a motion on the bill with the amendments as we discussed in our work session document, Exhibit J. We walked through each one two days ago with the addition of the cap. We need clarity on the $1,950 cap on page 26 of Exhibit I, "any reasonable attorney's fees" and capping all other fees at $1,950. Is that the intention?

SENATOR BREEDEN:
There is nothing in statute; it is just status quo. We have heard from many constituents who have been affected by these escalated fees. We need a starting place to help our constituents. This is a good start.

SENATOR BREEDEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 174.

SENATOR COPENING SECONDED THE MOTION.

SENATOR KIHUEN:
For the record, I will support this bill now because it puts a cap on the fees. I am not 100 percent comfortable with the cap, but it is better than the status quo. I reserve my right to change my vote on the floor. I want to consult further with my constituents who will be directly impacted by this bill before I vote on the Senate Floor.

SENATOR ROBERSON:
This is not a good start. It is a step backward because under the statute, there is no provision allowing attorney's fees to be included within the superpriority lien. Today, we are taking a step in the wrong direction by allowing attorney's fees, for the first time in statute, to be part of the superpriority lien.

THE MOTION CARRIED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

*****

CHAIR WIENER:
We will address S.B. 185. We have a work session document (Exhibit K). I am requesting a one-week waiver.

SENATE BILL 185: Makes various changes relating to real property. (BDR 10-23)

SENATOR COPENING MOVED TO REQUEST A ONE-WEEK WAIVER FROM SENATE LEADERSHIP ON S.B. 185.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR WIENER:
We will address S.B. 204. We have a work session document (Exhibit L). This bill enacts amendments to the Uniform Common-Interest Ownership Act. We have had other uniform acts before the Committee. We have not updated our uniform acts since 1991. Most of this bill consists of technical changes and updates to the Uniform Act.

SENATE BILL 204: Enacts certain amendments to the Uniform Common-Interest Ownership Act. (BDR 10-298)

MR. WILKINSON:
Most of the changes are technical in nature, and they are not substantive. They are changes in internal references and include drafting issues and minor changes the Uniform Law Commission made to the Uniform Act to update it.

CHAIR WIENER:
Has the 1991 law been worked on since then? We have not joined the other states?

MR. WILKINSON:
Some efforts were made last Session, in particular, to include some of the changes from the Uniform Act. This is the first time those things have been carefully looked at. The Uniform Law Commissioners approved the final version in 2008. This is the most comprehensive review of that.

MR. BUCKLEY:
Mr. Wilkinson is correct.

SENATOR BREEDEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 204.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

*****

CHAIR WIENER:
We will address S.B. 254. We have a work session document (Exhibit M). This bill relates to alternative dispute resolution. You have a handwritten markup of the amendments, Exhibit M, pages 4 through 30. We have a mock-up of the amendments to S.B. 254 (Exhibit N).

SENATE BILL 254: Revises provisions relating to common-interest communities. (BDR 10-264)

SENATOR COPENING:
We went through the proposed amendments, and we put them into a mock-up version, Exhibit N. Mr. Buckley and some not on the working group worked on these amendments.

MR. BUCKLEY:
We went through all the amendments included in Exhibit N.

SENATOR BREEDEN MOVED TO AMEND AND DO PASS AS AMENDED S.B. 254 WITH AMENDMENT 6327.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

*****

CHAIR WIENER:
Is there any public comment? There being nothing further to come before the Committee, we are adjourned at 8:33 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
S.B. 103	C	Linda Eissmann	Proposed Amendment 6332 to SB 103
S.B. 103	D	Linda Eissmann	Work Session Document
S.B. 150	E	Bradley A. Wilkinson	Work Session Document
S.B. 283	F	Linda Eissmann	Work Session Document
S.B. 347	G	Linda Eissmann	Work Session Document
S.B. 356	H	Valerie Wiener	Work Session Document
S.B. 174	I	Senator Valerie Wiener	Proposed Amendment 6328
S.B. 174	J	Senator Valerie Wiener	Work Session Document
S.B. 185	K	Senator Valerie Wiener	Work Session Document
S.B. 204	L	Senator Valerie Wiener	Work Session Document
S.B. 254	M	Senator Valerie Wiener	Work Session Document
S.B. 254	N	Senator Valerie Wiener	Proposed Amendment 6327

EXHIBIT 9

ASSEMBLY BILL NO. 448–ASSEMBLYMAN MUNFORD

MARCH 21, 2011

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to real property. (BDR 10-513)

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

~

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

AN ACT relating to real property; providing for the issuance of cease and desist orders by the Administrator of the Real Estate Division of the Department of Business and Industry under certain circumstances; revising provisions governing access to a unit in a common-interest community; prohibiting an association of a common-interest community from charging certain fees; prohibiting an association from enacting certain restrictions on antennae and certain other devices for receiving broadcast signals; revising provisions governing the powers of an association; revising provisions governing the filling of vacancies on an executive board; revising provisions governing the powers and duties of the executive board; revising provisions governing construction penalties; revising provisions governing sanctions for violations of the governing documents; revising provisions governing the collection of certain past due financial obligations; revising provisions governing eligibility to be a member of the executive board or an officer of the association; requiring members of the executive board to complete certain courses of education; revising provisions governing meetings of the units' owners and of the executive board; revising provisions governing surplus funds of an association; revising provisions governing the budget of an association; revising provisions governing certain expenditures by an association; revising provisions governing assessments to fund the reserves of an association; revising provisions governing studies of the reserves of an association; revising provisions governing liens of an association; revising provisions governing the books, records and papers of an association; revising provisions governing parking in a common-interest community; revising provisions governing claims based on alleged violations of certain laws and the interpretation, application and enforcement of the governing documents; revising various other provisions relating to common-interest communities; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Section 1 of this bill provides for the issuance of orders to cease and desist by the Administrator of the Real Estate Division of the Department of Business and Industry under certain circumstances.

Existing law prohibits an association of a common-interest community from unreasonably restricting, prohibiting or otherwise impeding the right of a unit's owner to have access to his or her unit. (NRS 116.2111) **Section 2** of this bill prohibits the association from restricting, prohibiting or otherwise impeding the access to the unit of the parents and children of the unit's owner. **Section 2** also prohibits the association from: (1) charging a fee to a unit's owner for obtaining permission to change the exterior appearance of a unit or the landscaping; and (2) restricting in a manner which violates certain federal regulations the installation, maintenance or use of an antenna or other device for receiving certain broadcast signals.

Existing law requires an association to provide certain notice at least 48 hours before directing the removal of a vehicle which is improperly parked on property owned or leased by the association unless the vehicle is blocking a fire hydrant, fire lane or handicapped parking space or poses a threat to the health, safety and welfare of residents. (NRS 116.3102) **Section 3** of this bill requires the association to provide the 48-hour notice before removing a vehicle which is blocking a handicapped parking space.

Section 4 of this bill provides for an emergency election to fill certain vacancies on the executive board if the executive board is unable to obtain a quorum because of such vacancies and requires the Division to apply for the appointment of a receiver for the association if the units' owners are unable to fill such vacancies. **Section 4** also: (1) requires the association to make available to members of the executive board, at no charge, certain books, records and papers; and (2) requires the executive board to notify the units' owners if the executive board has been found to have violated the provisions of existing law governing common-interest communities or the governing documents.

Existing law authorizes an association to impose a construction penalty against a unit's owner who fails to adhere to a schedule. (NRS 116.310305) **Section 5** of this bill prohibits the imposition of a construction penalty if the failure to adhere to the schedule is caused by circumstances beyond the control of the unit's owner.

Existing law authorizes an association to prohibit a unit's owner or a tenant or an invitee of a unit's owner or a tenant from using the common elements as a sanction for a violation of the governing documents. (NRS 116.31031) **Section 6** of this bill provides that the association may prohibit only the use of a common element to which the violation relates, unless the violation is failure to pay an assessment. **Section 6** also revises provisions relating to fines for violations of the governing documents by: (1) providing a lifetime cap of $2,500 on the amount of fines which may be imposed on a unit's owner and his or her spouse; (2) prohibiting an association from imposing a fine if another association has imposed a fine for the same conduct; (3) authorizing the postponement of a hearing on a violation for medical reasons; and (4) requiring a hearing before the imposition of a fine for a continuing violation.

Existing law authorizes, but does not require, an association to enter the grounds of a unit to maintain the exterior of the unit under certain circumstances. (NRS 116.310312) **Section 7** of this bill provides that this authorization expires if the unit's owner or the agent of the unit's owner performs the maintenance necessary for the unit to meet the community standards.

Section 8 of this bill limits the type of collection fees which an association may charge to a unit's owner and establishes a cap on the amount of such fees which is based on the amount of the outstanding balance.

Section 9 of this bill requires a member of the executive board to successfully complete 2 hours of education concerning the duties of members of an executive board each year. **Section 9** also provides that: (1) unless the governing documents provide otherwise, officers of the association are required to be units' owners; and (2) a person who resides with, or is related within the first degree of consanguinity to, an officer of the association or member of the executive board may not become an officer of the association or a member of the executive board.

Section 11 of this bill revises various provisions relating to meetings of the units' owners by: (1) authorizing a unit's owner to request that an item be included on the agenda for the meeting; (2) authorizing a guest of a unit's owner to attend the meeting; and (3) authorizing a unit's owner to record the meeting on videotape as well as audiotape.

Section 12 of this bill revises various provisions relating to meetings of the executive board by: (1) requiring the meetings which are held at a time other than standard business hours to start no earlier than 6 p.m.; (2) requiring the agenda to be available not later than 5 days before the meeting; (3) requiring a copy of certain financial information required to be reviewed at an executive board meeting to be made available at no charge to each person present at the meeting and to be provided in electronic format at no charge to a unit's owner who requests the information; and (4) providing that a page limit on materials, remarks or other information to be included in the minutes of the meeting must not be less than two double-sided pages.

Section 13 of this bill revises provisions governing the right of a unit's owner to speak at a meeting of the units' owners or the executive board by: (1) requiring a limitation of not less than 3 minutes on the time a unit's owner may speak; (2) requiring the association to comply with the Americans with Disabilities Act in providing access to the meeting; (3) requiring the executive board to provide a period of comments by the units' owners before voting on a matter; and (4) authorizing a person to be represented by a person of his or her choosing at a hearing concerning an alleged violation of the governing documents.

Section 14 of this bill requires bids for the provision of durable goods to the association to be opened during a meeting of the executive board.

Existing law requires an executive board which receives a complaint from a unit's owner alleging that the executive board has violated existing law or the governing documents to place the subject of the complaint on the agenda for its next meeting if the unit's owner requests that action. (NRS 116.31087) **Section 15** of this bill requires the executive board to discuss the complaint fully and completely and attempt to resolve the complaint at the meeting.

Existing law creates certain crimes related to voting by units' owners. (NRS 116.31107) **Section 16** of this bill requires these provisions to be printed on each ballot provided to the units' owners.

Section 17 of this bill defines "surplus funds" for the purpose of determining whether the association is required to pay the surplus funds to units' owners.

Existing law requires a review or audit of the financial statement of an association at certain times. (NRS 116.31144) **Section 18** of this bill requires the association to provide a copy of the review or audit to a unit's owner in either paper or electronic format at no charge to the unit's owner if the unit's owner requests such a copy.

Under existing law, the proposed budget of an association takes effect unless the units' owners reject the proposed budget. (NRS 116.3115, 116.31151) **Sections 19 and 20** of this bill provide that the proposed budget does not take effect unless the units' owners ratify the proposed budget. If the proposed budget is not ratified, the most recently ratified budget continues in effect.

Section 19 also revises provisions governing special assessments by: (1) removing provisions which specifically authorize the executive board to impose

necessary and reasonable assessments to carry out a plan to adequately fund the reserves of the association without seeking or obtaining the approval of the units' owners; (2) providing that an assessment to fund the reserves of the association may not exceed $35 per unit per month; and (3) requiring the approval of the units' owners for capital expenditures exceeding a certain amount and for any visible changes to the interior or exterior of a common element.

Section 20 requires the collections policy of the association to establish a certain period after which a delinquent fee, fine, assessment or cost may be referred for collection.

Existing law requires an association to conduct a study of the reserves required to repair, replace and restore the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain. (NRS 116.31152) **Section 21** of this bill prohibits the executive board from taking any action based on the study of the reserves, including, without limitation, establishing a funding plan to provide adequate funding for the required reserves, unless and until the executive board approves the study of the reserves at a meeting of the executive board. **Section 21** also: (1) requires the reserve study to be made available to a unit's owner in electronic format at no charge; and (2) provides for notice of the meeting to a unit's owner.

Section 22 of this bill revises provisions governing the amount of the association's lien which is prior to a first security interest on a unit.

Section 23 of this bill prohibits the foreclosure of an association's lien and the filing of a civil action to obtain a judgment for the amount due if: (1) the foreclosure sale does not occur within 120 days after mailing the notice of default and election to sell; or (2) an agreement extending that period is not reached.

Section 24 of this bill revises provisions governing the access of a unit's owner to the books, records and papers of an association and requires the publication of the views or opinions of a unit's owner in the association's official newsletter under certain circumstances.

Existing law provides for a civil action if the executive board, a member of the executive board, a community manager or an officer, employee or agent of the association take, direct or encourage certain retaliatory action against a unit's owner. (NRS 116.31183) **Section 25** of this bill specifies certain actions which constitute retaliatory action.

Section 26 of this bill prohibits an association from charging a fee to a unit's owner to obtain approval for the installation of drought tolerant landscaping.

Section 27 of this bill replaces the authorization of an executive board to approve the renting or leasing of a unit under certain circumstances with a provision requiring the executive board to grant such approval under certain circumstances.

Section 28 of this bill: (1) prohibits the executive board and the governing documents from interfering with the parking of an automobile, privately owned standard pickup truck, motorcycle or certain other vehicles; and (2) requires the association of a common-interest community which is not gated or enclosed to display signs on or near any property on which parking is prohibited or restricted.

Sections 29 and 33 of this bill revise provisions governing mediation and arbitration of claims relating to the interpretation, application or enforcement of certain governing documents by authorizing a civil action concerning certain claims to be commenced without submitting the claims to mediation or arbitration. **Section 29** also authorizes a civil action concerning a violation of existing law governing common-interest communities to be brought by a tenant or an invitee of a unit's owner or a tenant.

Sections 31 and 32 of this bill require the sharing of information by the parties to an affidavit filed with the Division alleging a violation of existing law governing common-interest communities.

Section 34 of this bill revises provisions governing the mediation and arbitration of certain claims relating to the governing documents by: (1) prohibiting the findings of a mediator or arbitrator from being admitted in a civil action; (2) limiting the fees of a mediator or an arbitrator to $750; (3) requiring each party to a mediation or arbitration to pay an equal percentage of the fees of a mediator or arbitrator; (4) providing that a party to a mediation or arbitration is not liable for the costs and attorney's fees incurred by another party during the mediation or arbitration; and (5) providing for the removal of a mediator or arbitrator under certain circumstances.

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

Section 1. Chapter 116 of NRS is hereby amended by adding thereto a new section to read as follows:

1. If the Administrator has reasonable cause to believe that any person or executive board has engaged in any activity in violation of any provision of this chapter, any regulation adopted pursuant thereto or any order, decision, demand or requirement of the Commission or Division or a hearing panel, or is about to commit such a violation, and that the violation or potential violation has caused or is likely to cause irreversible harm, the Administrator may issue an order directing the person or executive board to desist and refrain from continuing to commit the violation or from doing any act in furtherance of the violation.

2. Within 30 days after the receipt of such an order, the person may file a verified petition with the Administrator for a hearing before the Commission.

3. The Commission shall hold a hearing at the next regularly scheduled meeting of the Commission. If the Commission fails to hold such a hearing, or does not render a written decision within 30 days after the hearing, the cease and desist order is rescinded.

4. The decision of the Commission at a hearing held pursuant to subsection 3 is a final decision for the purposes of judicial review.

Sec. 2. NRS 116.2111 is hereby amended to read as follows:

116.2111 1. Except as otherwise provided in this section and subject to the provisions of the declaration and other provisions of law, a unit's owner:

(a) May make any improvements or alterations to his or her unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common-interest community;

(b) May not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the

common-interest community, without permission of the association; and

(c) After acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the common-interest community. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries.

2. An association may not:

(a) ~~[Unreasonably restrict,]~~ ***Restrict,*** prohibit or otherwise impede the lawful rights of a unit's owner ***, and the children or parents of a unit's owner,*** to have reasonable access to his or her unit ~~[.]~~ ***, unless directed otherwise by the unit's owner.***

(b) Charge any fee for a person to enter the common-interest community to provide services to a unit, a unit's owner or a tenant of a unit's owner or for any visitor to the common-interest community or invitee of a unit's owner or a tenant of a unit's owner to enter the common-interest community.

(c) Unreasonably restrict, prohibit or withhold approval for a unit's owner to add to a unit:

(1) Improvements such as ramps, railings or elevators that are necessary to improve access to the unit for any occupant of the unit who has a disability;

(2) Additional locks to improve the security of the unit;

(3) Shutters to improve the security of the unit or to reduce the costs of energy for the unit; or

(4) A system that uses wind energy to reduce the costs of energy for the unit if the boundaries of the unit encompass 2 acres or more within the common-interest community.

(d) With regard to approving or disapproving any improvement or alteration made to a unit, act in violation of any state or federal law.

(e) Charge any fee to a unit's owner for obtaining permission to change the exterior appearance of a unit or the landscaping associated with a unit.

(f) Restrict in a manner which violates the provisions of 47 C.F.R. § 1.4000 the installation, maintenance or use of any antenna or other device described in that section.

3. Any improvement or alteration made pursuant to subsection 2 that is visible from any other portion of the common-interest community must be installed, constructed or added in accordance with the procedures set forth in the governing documents of the association and must be selected or designed to the maximum extent

EXHIBIT 1

OPPS
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MORTENSEN & SANDERS
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Homeowners Association

DISTRICT COURT

CLARK COUNTY, NEVADA

-*-

WINGBROOK CAPITAL, LLC, Plaintiff, v. PEPPERTREE HOMEOWNERS ASSOCIATION; and DOES 1-10 and ROE ENTITIES 1-10, inclusive, Defendant.	Case No.: A-11-636948-B Dept No.: XI

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION TO DISMISS

Defendant Peppertree Homeowners' Association, by and through its attorneys of record, the law firm of ALVERSON TAYLOR MORTENSEN & SANDERS, hereby submits this Opposition to Plaintiff's Motion for Summary Judgment and Counter-Motion to Dismiss Plaintiff's Fourth Cause of Action pursuant to NRCP 12(b)(5) ("Opposition").

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KRB/19060

This Motion is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument the Court may require.

DATED this 6 day of May, 2011.

ALVERSON, TAYLOR,
MORTENSEN & SANDERS

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case concerns Wingbrook Capital LLC's (hereinafter "Wingbrook") obligation to satisfy a lien on real property that is located within the Peppertree Homeowners Association (hereinafter "Association"). In its Motion for Summary Judgment on its Fourth Cause of Action, Wingbrook seeks declaratory relief regarding what has been commonly referred to as a Homeowner's Association's "Super Priority Lien" as it applies to delinquent assessments. Because the lien in this matter primarily concerns an abatement lien, comprised of expenses other than charges for delinquent assessments, the Association requests this Court refuse to grant a declaration to Plaintiff, because it will not resolve the uncertainty in this case.

Pursuant to N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. This particular lien is afforded superiority over virtually every other lien or encumbrance against the property, including the first deed of trust. The lien applies to assessments that accrued in the nine (9) months preceding an action to

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enforce the lien (ie. foreclosure) plus certain repair costs under NRS 116.310312. Pursuant to Nevada law, late fees, interest and collection costs are also included in the Super Priority Lien. Lenders and investors are required to satisfy the Super Priority Lien in order to secure marketable title to re-sell the home.

In its Motion, Wingbrook purposefully side-steps the facts of this case in order to obtain a declaration from this Court under NRS 116.3116, a Nevada statute that is currently being litigated in virtually every available forum in the Nevada judicial and administrative system. What Wingbrook fails to mention is that the lien in this case does not hinge on the collection of delinquent assessments beyond the 9 month Super Priority period. This case primarily involves the Association's right to collect all assessments associated with an abatement lien, comprised of repair costs it incurred to abate a public health hazard and public nuisance. Indeed, throughout its Motion, Wingbrook continually concedes that there is no cap for charges the Association incurred for repair costs. As such, while Wingbrook provides this Court with a detailed explanation of the plain language and legislative history of NRS 116.3116 as it relates to delinquent assessments, Wingbrook buries the seminal issue in this case: the Association's right to collect the entirety of the abatement lien under NRS 116.310312.

Therefore, the Association requests that this Court deny Wingbrook's Motion for Summary Judgment and dismiss Wingbrook's action for Declaratory Relief.

II. FACTS

On December 4, 2009, Wingbrook purchased real property located at 651 Peppertree Circle in Henderson, Nevada (hereinafter the "Property") through a foreclosure sale. The Property is located within the Peppertree Homeowners' Association. At the time of the sale, the Property was subject to a lien placed upon it by the Association. The lien primarily originated from a Special Assessment which was charged against the unit to recover necessary repair and

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clean-up expenses incurred to abate a health hazard resulting from the previous owner's lifestyle as a "hoarder." In order to clear title to the Property, Wingbrook was required to pay the full amount of the lien.

Importantly, the lien amount was originally comprised of 9 months of delinquent assessments carried over from the previous owner, plus the late fees association therewith. In addition, the Association incurred repair costs pursuant to NRS 116.310312, which were also included in the lien amount. The remaining charges were collection costs and interest associated with the substantive abatement lien charges. Thus, a majority of the charges associated with the lien did not involve delinquent assessments charged against the Property. And, the Association did not charge more than 9 months in assessments. Rather, the majority of the charges stemmed from an abatement lien, which was comprised of expenses for two primary purposes: (1) hazard clean-up and repair; and, (2) repair of a broken toilet, which flooded the Property and a neighboring unit. The facts associated with each condition are addressed as follows:

First, in January 2009, the Association was contacted by the sister of the former owner, who informed the Association that the former owner, Kathleen Masa, had passed away. See Exhibit A, Affidavit of Eric Theros, attached hereto. Ms. Masa's sister also informed the Association that Ms. Masa was a "hoarder" and that the Association would need to remediate the condition of the unit in order to protect the surrounding units and residents. Id. Ms. Masa's sister scheduled a meeting at the unit with the Association's Community Manager, some members of the Board of Directors of the Association, and a contractor. Id. At the meeting, the Association discovered the unit in a disastrous and nauseating condition. Id. Before entering the unit, those in attendance immediately noticed the dangerous and hazardous condition of the exterior deck. Id. The Community Manager described walking across the deck as "walking the plank," because only one board on the entire deck was supported; the remaining boards of the

deck shifted, lifted, and moved with any pressure placed upon them. Id. Moreover, when approaching the unit, the smells and fumes from inside the unit leaked through the windows and doors, confirming Ms. Masa's sister's initial description of the unit as a "disaster." Id.

When Ms. Masa invited the group into the unit, those in attendance immediately saw that the Property filled with trash and debris. Id. Some people were not able to enter the unit, because the smell and fumes were so nauseating, they made them feel physically ill. Id. However, Eric Theros, the Community Manger walked through the unit and instantly noticed that the trash and debris had begun to juice, the discharge and seepage of which started to leak through the floors, threatening to contaminate other units. Id. The filth was such that without immediate remedy, severe mold, microbial growth and/or bacteria imminently threatened nearby units and residents. Id. Indeed, the putrid discharge that had been seeping through the exterior of the unit and into other units threatened the health and safety of the Residents of nearby units. Id. The Association was compelled to make repairs to protect the health and safety of nearby residents. Id. Importantly, at the time of her death, the Ms. Masa's sister informed the Association that neither the family nor the Estate would take any action to remediate the unit's condition, and that they would have no further communication with the Association. Id. Nevertheless, the Association first contacted Ms. Masa's Estate, requesting that the Estate make the necessary repairs. Id. However, the Estate failed to answer or otherwise refused to remedy the problems presented above and wiped their hands clean of any responsibility for the condition of the Property, *including* the responsibility to fulfill the mortgage contract or otherwise prevent the Property from being sold in a foreclosure sale. Id. Indeed, Ms. Masa's sister handed over the keys and garage door opener to the unit and informed the Association's Community Manager that neither she nor the Estate would be communicating with the Association further, and that

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they intended to "walk away" from the Property. Id. The Association was therefore compelled to effectuate the safe clean-up and repair of the Property.

Second, after the Property was repaired to address the initial health hazards, the Association was informed by a down-stairs unit, that a toilet in Ms. Masa's unit had leaked and subsequently flooded the Property and the exterior unit below. Id. The Association was then required to make additional repairs to the toilet and to the surrounding flooring to ensure the health and safety of the nearby units and residents. Without repair, the toilet would have continued to flood, providing an environment ripe for microorganisms, such as viruses, bacteria, and mold, leading to long term diseases and health risks. Notably, the Association also contacted Ms. Masa's Estate to fix the toilet. Again, the Estate failed to respond or otherwise refused to make the repairs necessary to ensure the safety of others. Id. Therefore, pursuant to governing documents and NRS 116, the Association assumed the financial burden of repairing the unit in order to remove or abate the health hazards and public nuisance that threatened the safety of nearby residents.

Wingbrook, who purchase the Property in a foreclosure sale, has improperly refused to satisfy the lien in its entirety and has filed the instant Motion for Summary Judgment.

III. ARGUMENT

A. DECLARATORY RELIEF

Declaratory Relief in this case is improper because no justiciable controversy exists between the parties and declaratory relief would not terminate the controversy giving rise to Plaintiff's complaint. As such, the Association requests that this Court deny Wingbrook's Motion for Summary Judgment and dismiss Wingbrook's action for Declaratory Relief.

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In Kress v. Corey, 65 Nev. 1, 26 (1948), the Nevada Supreme Court articulated the prerequisite facts or conditions that must exist for a court to grant declaratory relief. The four facts or conditions are as follows:

> (1) [T]here must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Id. In interpreting Kress and the phrase "justiciable controversy" as it applies to declaratory relief, the Court has held that a judicial declaration is not available if the damage alleged is "merely apprehended or feared." Doe v. Bryan, 102 Nev. 523, 525-526 (1986). Instead, there must be a dispute that allows and calls for an, "'immediate and definitive determination of the parties' rights.'" Id. (quoting Wills v. O'Grady, 409 N.E.2d 17, 19 (Ill.App.Ct. 1980)). Similarly, NRS 30.080 grants this court broad discretion to, "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Plaintiff seeks Declaratory Relief from this court with respect to two issues: (1) the monetary limit of a homeowners' association's "Super Priority" lien for delinquent assessments under NRS 116.3116; and, (2) the act necessary to determine when the calculation of the Super Priority Lien should begin. A declaration of these two issues is inappropriate in this case and will not terminate the uncertainty or controversy giving rise to Plaintiff's Complaint.

First, this case does not hinge on a lien for delinquent assessments. Instead, a majority of the lien charges in this case concerns repair expenses incurred after the Association was forced to abate a public health hazard. Moreover, the Association did not include delinquent assessments for a longer period than 9 months. Thus, although Plaintiffs discuss, in great detail, the legislative history underlying the super priority lien as it applies to delinquent assessments,

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Plaintiffs concede that there is no statutory limit to the amount an Association may recover for repair costs. In its Motion, Wingbrook provides:

> With the exception of the repair expenses pursuant to NRS § 116.310312, the Super Priority Lien is limited to a finite number, i.e. an amount which cannot exceed a figure equaling 9 times the monthly assessments which immediately preceding institution of an action to enforce the lien.

See Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief, pg. 33.

Therefore, granting a declaration regarding the maximum amount an association may collect with regards to *delinquent assessments* will not efficiently assist this Court in resolving this case, because this case primarily concerns a lien charged to recover repair costs under NRS § 116.310312. The mere fear or apprehension that the Association or another Association could attempt to collect more than 9 months of delinquent assessments in the future does not render declaratory relief available in this action. See Doe v. Bryan, 102 Nev. 523, 525-526 (Nev. 1986).

Second, affording Plaintiffs a declaration concerning the act necessary to begin calculating the Super Priority Lien is inappropriate because there has already been a triggering action—a foreclosure of the home. Because the triggering event is necessary only to determine when to begin counting the 9 months of delinquent assessments, declaration of the triggering event is not relevant to Wingbrook's claim. Moreover, because Wingbrook is liable for the entire Lien as it applies to the repair costs, regardless of when the Lien was charged to the unit, determining what event is required under NRS 116.3116 to trigger the commencement of the 9 month period is not helpful and will not resolve the uncertainty in this case.

It is important to emphasize that many Lenders and Investors are litigating or seeking declaratory relief on these two issues in virtually every forum in the Nevada Judicial and Administrative system. It is anticipated and expected that the issues will ultimately be resolved by the Nevada Supreme Court. However, the majority of those cases *only* involve delinquent assessment liens. And, while a declaration in those cases may resolve uncertainty to Lenders and

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Investors regarding their obligations under the respective liens, a declaration in this case will not. This case primarily involves an abatement lien, which is subject to a completely different standard and statutory construction. Thus, affording Plaintiffs a declaration in this case would only serve to the benefit of parties in other cases, not to the parties here.

As such, the Association requests that this Honorable Court refuse Plaintiff's application for declaratory judgment and dismiss Plaintiff's Fourth Cause of Action for Declaratory Relief for failure to state a claim upon which relief can be granted.

B. SUPER PRIORITY LIEN UNDER NRS 116.3116

Generally, under N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. A delinquent assessment lien is afforded superiority over nearly every lien or encumbrance against the property as to the full amount of the lien, to the extent of assessments accrued in the 9 months preceding an action to enforce the lien. This delinquent assessment lien is referred to as the Super Priority Lien. Pursuant to Nevada law, late fees, interest and the costs associated with collection are included in the Super Priority Lien. And, lenders and investors are required to satisfy the Super Priority Lien to secure marketable title and sell the home.

Nevada Revised Statutes also allow a homeowners' association to enter the property of a unit owner to make certain repairs. NRS 116.310312. These repairs may be charged against the unit and the association holds a lien for any unpaid charges. Id. The amounts levied by an association are also known as an "abatement lien" and are also entitled to "Super Priority" under NRS 116.3116(2)(c). However, unlike a lien for delinquent assessments, there is no cap to charges made for repairs under NRS 116.310312. In its Motion for Summary Judgment, Wingbrook concedes this issue, providing:

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> The only time the Super Priority Lien amount can change is when the assessments change in the association's budget or when the association incurs repair expenses for a unit pursuant to NRS § 116.310312.1

See Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief pg. 22-23; see also id. at 33 (providing "With the exception of the repair expenses pursuant to NRS § 116.310312, the Super Priority Lien is limited to a finite number . . ."). Indeed, this explanation provided by Wingbrook is exactly what happened here: the Association incurred expenses for a unit pursuant to NRS 116.310312, which includes an entirely different standard for calculating the costs included in the lien.

To be clear, N.R.S. § 116.3116(1) provides, in relevant part, as follows:

> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. . . .
>
> 2. 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 . . . 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 any charges incurred by the association on a unit pursuant to**

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1 See also Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief, pg. 3 (providing, "Plaintiff was only liable for the limited Super Priority Lien amount of a maximum of 9 times the monthly assessment (plus exterior costs)"); id. at pg. 8 (providing, "In calculating the Super Priority Lien, it also allowed to be added any charges incurred by the association on a unit pursuant to NRS 116.310312 (repair expenses of a unit)(see Nevada Assembly Bill 361)") (emphasis added); id. at pg. 9 (providing, "With the exception of repair costs (NRS 116.310312) the Super Priority Lien is a cap, a limit a finite figure)") (emphasis added); id. at pg. 13 (providing, "The plain and unambiguous language of NRS 116.3116 states that only 'to the extent' of an amount equaling 9 months of assessments based on the association's period budget (plus repair costs) is the association's statutory lien superior to the first mortgage holder")) (emphasis added); id. at pg. 17 (providing, "[Collection fees and costs] may also be included within the Super Priority Lien amount, as long as the total Super Priority Lien amount does not exceed an amount which equals 9 times the association's monthly assessment amount (plus unit repair expenses under NRS 116.310312)"); id. pg. 33 (providing, "With the exception of the repair expenses pursuant to NRS § 116.310312, the Super Priority Lien is limited to a finite number") (emphasis added).

> NRS 116.3103122 and 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).

Thus, because the Association is entitled to the entire amount of the Lien as it applies to repair costs, a declaration of the maximum amount an Association can collect for *delinquent assessments* will not resolve uncertainty of the primary issues in this case, which does not involve a lien solely for delinquent assessments.

a. THE REPAIR EXPENSES WERE PROPER UNDER THE ASSOCIATION'S DECLARATION AND NRS 116.310312

The Association was entitled to make repairs to the Property under NRS 116.310312 which provides, in pertinent part:

> 2. . . . [T]he association, including its employees, agents and community manager, may, but is not required to, enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions if the unit's owner refuses or fails to take any action or comply with any requirement imposed on the unit's owner within the time specified by the association as a result of the hearing:
>
> (a) Maintain the exterior of the unit in accordance with the standards set forth in the governing documents, including, without limitation, any provisions governing maintenance, standing water or snow removal.
>
> (b) Remove or abate a public nuisance on the exterior of the unit which:
>
> (1) Is visible from any common area of the community or public streets;
>
> (2) Threatens the health or safety of the residents of the common-interest community;
>
> (3) Results in blighting or deterioration of the unit or surrounding area; and
>
> (4) Adversely affects the use and enjoyment of nearby units.
>
> . . .
>
> 4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

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2 See also NRS 116.310312(6), which provides, "Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. . . ."

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> 6. Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. . . .

The Association in this case made significant repairs to abate a public health hazard that threatened the health or safety of residents, resulted in the deterioration of the unit, and adversely affected the use and enjoyment of nearby units. When the Association discovered the rancid condition of the Property after the previous owner died, the Association was compelled to engage in haz-mat style clean up and repairs. Indeed, the Association was required to expend significant funds to abate the conditions left by the previous owner, and her lifestyle as a "hoarder." See Photographs of Property, attached as Exhibit B. As the photographs of the Property demonstrate, the Property was filled with trash and debris that threatened the health and safety of nearby units and Residents of the community. See id.; see also Correspondence from Community Management Group, attached as Exhibit C; see also Exhibit 1. Notably, the trash and debris had begun to contaminate other units by seeping through the exterior of the unit's floor. Exhibit C. The filth was such that, without immediate remedy, severe mold, microbial growth and/or bacteria threatened nearby units and residents. Id. Moreover, the Association was required to repair the severely deteriorated exterior deck to effectuate the safe clean-up process for the Association's staff and maintenance personnel. See Concern Statement, attached as Exhibit D; Correspondence to Kathleen Masa, attached as Exhibit E; Correspondence to Executor of Kathleen Masa, attached as Exhibit F. Lastly, after the Property was repaired to address the initial health hazards, the Property's toilet leaked into the exterior unit below and subsequently flooded the Property and the unit below. See Exhibit F. The Association was thus required to make additional repairs to the toilet and surrounding areas.

Each of the repairs and costs incurred concerned the exterior of the Property and were necessarily performed to remove or abate a public nuisance and public health hazard that

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affected the exterior of the Property, nearby units, and affected the use and enjoyment of the community. Indeed, the condition which resulted from the previous owner's "hoarder lifestyle" posed, in part, an increase risk of fire; structural damage; disease, injury and infestation; and non-working utilities, such as running water and sewer. Indeed, the problems associated with the broken toilet already evidenced the hazards the unit posed to neighboring units. Thus, it would have been negligent and absurd for Association to ignore the Property's condition and not effectuate the necessary repairs. In fact, if it had ignored the condition of the Property, Peppertree would have certainly been subject to liability from multiple parties, including nearby residents, homeowners, and city and county health officials. As such, the special assessment was necessary and proper under subsection two of NRS 116.310312 and Peppertree was entitled to place a lien on the Property for the costs of the repairs under subsection four.

b. COLLECTION COSTS, FEES, AND INTEREST WERE ALL PROPERLY INCLUDED IN THE SUPER PRIORITY LIEN

Although Wingbrook provides a broad legislative history in other jurisdictions regarding whether collection costs and attorneys fees may be added in addition to the 9 months of delinquent assessments, this case does not solely concern the collection of delinquent assessments; this case concerns the collection of an abatement lien, which the Association charged to address a public health hazard. Therefore, it is not proper to provide a declaratory judgment regarding the meaning of NRS 116.3116, when the relevant statute at issue is NRS 116.310312. Nevertheless, both statutes are clear on their face: the Association has Super Priority over any costs associated with repair costs incurred to abate a public health hazard, including collection costs and interest.

When a statute is clear on its face, a court must not go beyond the statute's plain language to determine the Legislature's intent. Hardy Cos. v. SNMARK, LLC, 126 Nev. ___, ___, 245 P.3d 1149, 1153 (2010). Only when a statute is ambiguous should a Court turn to the Legislative

history to determine the meaning of the statute and the Legislative intent. J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC, 2011 Nev. LEXIS 6, 10-11 (2011). Moreover, when a statute contains words that have a plain and certain meaning, no part of the statute should be rendered superfluous or meaningless in a manner that would produce an absurd result. Allstate Insurance Co. v. Fackett, 125 Nev.___, ____, 206 P.3d 572, 576 (2009).

The Association agrees with Wingbrook that NRS 116.3116 plainly and unambiguously provides the Association's Lien is prior to the first security interest and all other security interests "to the extent of **any** charges incurred by the association on a unit pursuant to NRS 116.310312." (emphasis added). The charges an Association may collect under NRS 116.310312 are included in subsection (4) of the statute, which provides:

> The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and **collection costs and interest**, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges.

(emphasis added).

Therefore, based on the plain language of both NRS 116.3116 and NRS 116.310312(4), the Association has Super Priority over any charges the Association incurs to abate a public health hazard. And, any charges includes "without limitation," collection costs and interest. Because the Lien in this case concerns collection costs associated with an abatement lien, declaratory relief regarding the collection costs under NRS 116.3116 will not resolve the uncertainty over the primary issue in this case.

c. THE "TRIGGERING EVENT" FOR THE SUPER PRIORITY LIEN WAS THE FORECLOSURE SALE

The Association requests that this Court refuse and dismiss Wingbrook's cause of action for declaratory relief based on the "triggering event" required for the enforcement of the Super Priority Lien for two reasons: (1) the "triggering event" is not relevant and will not resolve the

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uncertainty in this case, because Wingbrook is liable for the entirety of an abatement lien, regardless of when the costs were incurred, and (2) the "triggering event" in this case was the foreclosure sale, which gave the Association and Wingbrook a date upon which to count back the 9 month period of time.

In this case, a declaration of the "triggering event" would be meaningless, because Wingbrook has already conceded that the abatement lien is not subject to the 9 month rule. Wingbrook owes the entirety of the abatement lien regardless of when the charges were incurred. Moreover, the "triggering event" in this case was the foreclosure of the Property. Thus, granting a declaration in this case would only benefit other litigants instead of the parties in this case.

In addition, the "triggering event" in this case was the foreclosure sale. On December 4, 2009, Wingbrook became the owner of record of the Property. Therefore, the Association and the Lender had a reference with which to begin counting the 9 months super priority lien. Importantly, in other cases pending before Nevada court, some Lenders are seeking to force the Associations to accept pay-offs before Lenders become record owners of the properties (ie. foreclose on the properties). See e.g. BAC Home Loans Servicing, LP v. Stonefield II Homeowners Association et. al, United States District Court, District of Nevada Case No. 2:11-cv-00167-JCM-RJJ. Therefore, many of these litigants are seeking the courts to declare that the Association must take action to enforce the Super Priority lien, which would allow these lenders to avoid paying the true value of the Super Priority Liens. This issue is *not* relevant in this case, and a declaration on this issue would only serve to the benefit of other litigants, it would not serve to the benefit of these parties.

Again, under N.R.S. § 116.3116, the Association has a lien on a unit for any assessment levied against the unit by the Association. The Lien is prior to all security interests, including the first deed of trust, "to the extent" of charges included in an abatement lien (ie. no limit) and

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"to the extent" of the monthly assessments that "would have become due . . . during the 9 months immediately preceding intuition of an action to enforce the lien." N.R.S. § 116.3116(2)(c).

Importantly, the statute does not mandate that the Association (or any party) bring an action to enforce the lien; it simply provides that there must be some "action" or event that occurs in order to determine what assessments accumulated during the 9 month period of time. The policy of the statute is thus to require some event that would trigger the Association's accounting of when the 9 months would begin and end. The foreclosure of the property in this case was the "action" that triggered the accounting. Notably, the Nevada Supreme Court has previously recognized that foreclosure on real property constitutes an "action." Levinson v. Eighth Judicial Dist. Court, 109 Nev. 747, 750-751 (Nev. 1993).

Thus for the reasons set forth above, a declaration of the triggering event in this case would not serve to resolve the uncertainty in this case.

CONCLUSION

Based on the foregoing, the Association requests that this Court deny Wingbrook's Motion for Summary Judgment and dismiss Wingbrook's action for Declaratory Relief.

DATED this 6 day of May, 2011.

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Attorney for Peppertree
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 6th day of May, 2011, service of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION TO DISMISS** was made this date by depositing a true copy of the same for mailing, first class mail at Las Vegas, Nevada, addressed as follows:

James R. Adams, Esq.
Assly Sayyar, Esq.
ADAMS LAW GROUP, LTD.
8330 W. Sahara Ave., Suite 290
Las Vegas, NV 89117

Puoy K. Premsrirut, Esq.
PUOY K. PREMSRIRUT, INC.
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An Employee of ALVERSON, TAYLOR, MORTENSEN & SANDERS

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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

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WINGBROOK CAPITAL, LLC, Plaintiff, v. PEPPERTREE HOMEOWNERS ASSOCIATION; and DOES 1-10 and ROE ENTITIES 1-10, inclusive, Defendant.	Case No.: A-11-636948-B Dept No.: XI

AFFIDAVIT OF ERIC THEROS IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION TO DISMISS

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, ERIC THEROS, do hereby swear under penalty of perjury that the following assertions are true to the best of my knowledge and belief:

1. That I am currently the Community Manager at Peppertree Homeowners' Association. I have been the Community Manager at the Association since May 2009. Before that, I served as Assistant Community Manger from 2008 until May 2009. KB/19060

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2. That I have personal knowledge of the facts and circumstances set forth herein. And for those facts and circumstances for which I do not have personal knowledge, I believe them to be true.

3. The Property located at 651 Peppertree Circle, is situated within the Peppertree Homeowners' Association. Until March, 2010, the unit was owned by Kathleen Masa.

4. In January, 2009, I received a telephone call from Kathleen Masa's sister, informing me that Ms. Masa had passed away in the unit. Ms. Masa's sister also informed me that Ms. Masa was a "hoarder" and that the unit was in "shambles."

5. Ms. Masa's sister also informed me that the Masa Estate and/or the Masa family would not take over the Property due to its horrifying condition and that the family intended to "walk away" from the Property. Ms. Masa's sister also described the condition of the unit as a "hazard" and informed me that either the Association or the Lender would need to remediate the condition to protect people around or near the unit.

6. Ms. Masa's sister arranged for us to meet at the Property with a contractor and a few Directors from the Association's Board. When I approached the unit at the meeting, there was a rancid smell that emanated from the doors and windows of the Property.

7. In addition to the smell, the deck to the unit was visibly dangerous. I would describe walking across the deck akin to "walking the plank," because loose boards shifted or lifted with any pressure. There was only one safe route across the deck, where a single board had enough support to hold a person's weight.

8. At the meeting at the unit, Ms. Masa's sister invited each of us to enter the Property. The Property was filled throughout with garbage and debris. Some in attendance were unable to enter the unit because the smell and fumes made them physically ill.

9. I walked through the unit and could see that seepage from the garbage had started to melt the carpets and flooring in the unit. I could also see juices from the trash had begun to leak through the floor of the unit.

10. At the end of the meeting, Ms. Masa's sister handed me a key to the unit and the garage door opener and told me that the unit's condition would be the Association and/or the Lender's responsibility. She told me that she would not communicate with the Association from that point forward. It was evident that the Association would be necessarily responsible for remediating the condition of the unit.

11. Nevertheless, the Association contacted Ms. Masa's Estate once before the deck was repaired and the unit underwent "haz mat" clean-up and repairs.

12. After the deck and unit were repaired to remediate the hazardous and dangerous conditions that resulted from Ms. Masa's lifestyle as a "hoarder," I was contacted by the owner of the unit below. The unit owner complained that water was leaking into his unit from Ms. Masa's unit. The Association discovered that Ms. Masa's toilet had leaked and flooded the area surrounding the toilet and the unit below.

13. The Association was compelled to fix the toilet and the surrounding areas of the toilet in order to repair the flood damage and prevent mold to the unit.

14. The repair costs associated with the deck, the toilet, and the haz mat clean-up were charged as a special assessment to the unit.

///

///

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
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LAS VEGAS, NEVADA 89117-1401
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15. It is my opinion and belief that because Ms. Masa's Estate refused to remediate the unit, the Association was obligated and required to make the necessary repairs as described above. If the Association had not made the repairs, the conditions of the unit posed great danger to the health and welfare of neighboring units and the Association's community.

Further, your Affiant sayeth naught.

5/6/11

ERIC THEROS

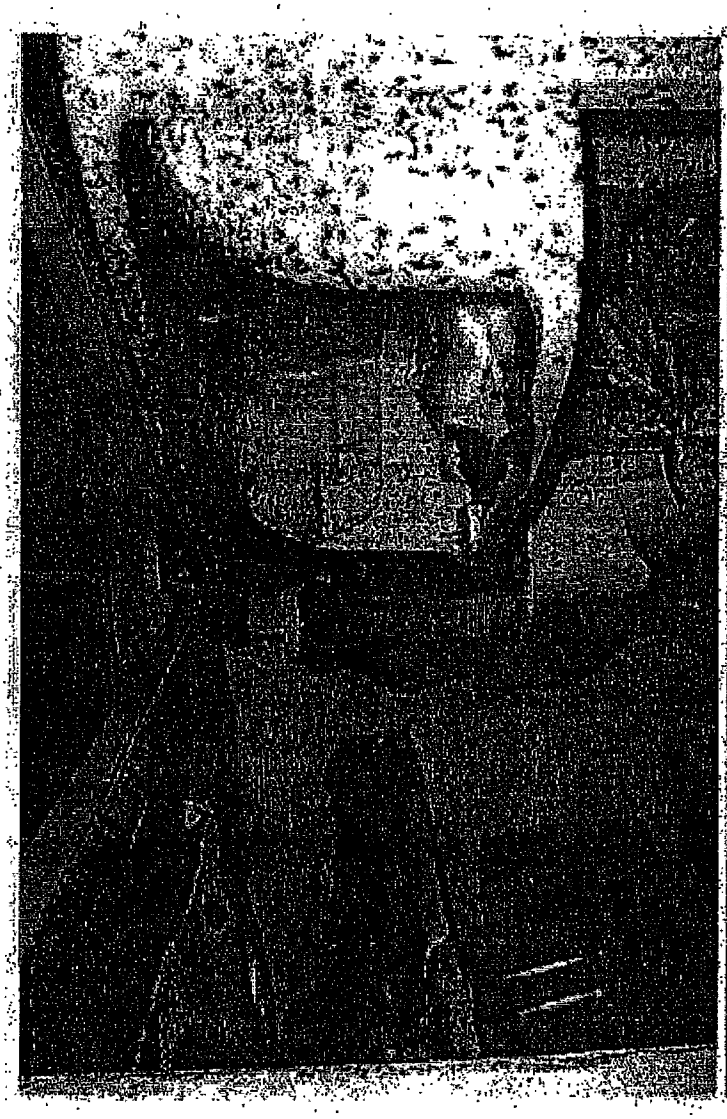
SUBSCRIBED and SWORN to before me this 6th day of May, ~~2010~~ 2011

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
ANTONIA J. DI DIO
Appt. No. 03-79585-1
My Appt. Expires Dec. 20, 2014

Notary Public, in and for said County and State

ALVERSON, TAYLOR, MORTENSEN & SANDERS
LAWYERS
7401 WEST CHARLESTON BOULEVARD
LAS VEGAS, NEVADA 89117-1401
(702) 384-7000

EXHIBIT B



Peppertree Homeowners Association
c/o Platinum Community Services, LLC
3360 W. Sahara Avenue, Suite #200
Las Vegas, NV 89102
Telephone #702.942.2500 ~ Facsimile #702.942.2510

November 10, 2008

Kathleen Masa
651 Peppertree Circle
Henderson NV 89014

Re: Courtesy Letter
651 Peppertree Circle Acct.# 651PT

Dear Kathleen Masa:

Living in a planned community involves the consideration of all Residents to abide by the CC&R's. One reason for having CC&Rs is to protect the rights of homeowners in the community, both yours and those of your neighbors. Another reason is to assure that everyone maintains their property in a manner that is consistent with other properties in the association.

Please be aware that the following condition has been noted on your property and is not consistent with the standards outlined in the governing documents.

INFRACTION: Owners Obligation to Repair

DESCRIPTION: Patio deck repairs need to be completed. This is a Health/Safety/Welfare issue and must be remedied.

CC&R article XI section 1: Each owner shall, at their own cost or expense, maintain and repair their unit as may be required.

CORRECTION TIME: This must be taken care of within 14 days receipt of this notice, or the HOA will be forced to make the necessary repairs and submit the charges to the homeowner. Thank you.

Please consider this a courtesy reminder. We appreciate your cooperation in resolving this matter.

YOU MUST REPLY IN WRITING TO THE ABOVE INFRACTION BY USING THE ATTACHED CORRECTION RESPONSE FORM. NO PHONE CALLS OR VERBAL REPLIES ARE ACCEPTED.

Sincerely,

Board of Directors
Peppertree Homeowners Association

cc: Board of Directors
Homeowner's File

C

EXHIBIT C

Peppertree Homeowners Association
C/O Community Management Group
3360 West Sahara Avenue Suite 200, Las Vegas, Nevada 89102
Telephone (702) 942-2500 Facsimile (702)942-2510

Bruce:

The following is a scanned set of documents in reference to 651 Peppertree Circle, former unit of Kathleen Masa.

Ms. Masa was informed her deck was in disrepair and it was never repaired. She then passed away in her unit a few months later. Her unit was full of trash and debris as she was a "hoarder". The unit had to be cleaned out professionally in order to prevent the contamination in the unit from spreading into other units. The trash on the floor was actually already seeping in through the floor as it was.

Ms. Masa's sister was notified of the issue, and she informed management and the Board at a face to face visit at the property that the family had no intention of taking over the property and the HOA would have to do whatever was necessary to deal with it.

At that point to prevent severe microbial growth and/or bacteria to other units, the HOA had no choice but to enter onto the property and remedy the situation. The deck was in such disrepair and a hazard that it had to be replaced before the emptying of the unit could be performed.

Once the deck was completed, the clean out of the unit began. In this attachment you will see the photos from the inside of the unit.

After all repairs were made, the costs of the repairs were assessed to the homeowners account as a special assessment.

A few months later, unrelated to the first issue, the toilet in the unit leaked and flooded the unit and the downstairs. Once again, this was THIS unit's responsibility, but there was nobody that would step in. Management attempted to contact the bank to see if the insurance company on file for the estate could step in. We were refused any information, and when we suggested that the bank contact the insurance as this would ultimately soon be their property, they stated that was not procedure and they could not help in any way. The Association had no choice but to enter into the property again to make the repairs to prevent microbial growth, and to make the repairs to the lower unit. Once again, when the work was completed, the account was assessed the costs as a special assessment.

This is not "fines". This is hard costs. That is why the special assessment was levied against the homeowner. The following pages are the correspondence and invoices from the events, as well as the minutes where the motions were carried to assess the account.

If there is anything else needed, please do not hesitate to contact me.

Eric Theros,
Provisional Community Manager
Agent for Peppertree Homeowners Association

D

EXHIBIT D

ERIC

Concern/Action/Narrate/Do ~~(Can Do)~~

Resident Name:

Address: 651 PEPPER TREE CIR

Resident Telephone#

Today's Date: 11-06-06

Please Print Concern/Problem:

PATIO DECK NEEDS REPAIR, OR REPLACEMENT OF DECK FLOORING THIS DECK IS IN UNSAFE CONDITION AND IS A HAZARD

PLYWOOD OVER 1X4 DECK BOARDS WAS REMOVED FROM DECK — FLOORING LEAVING BOARDS AND GAPS UNDER DECK OPEN TO THE ELEMENTS

OWNER MUST TAKE CARE OF OR HOA WILL HAVE REPAIRED AND CHGS OWNER

Resident Signature:

Action To Be Taken:

ERIC TO CHECK WITH TONYA ON PLAN OF ATTACH.

HOA Board Representative Signature: BOB AGELSON

EXHIBIT E

Peppertree Homeowners Association
c/o Platinum Community Services, LLC
3360 W. Sahara Avenue, Suite #200
Las Vegas, NV 89102
Telephone #702.942.2500 ~ Facsimile #702.942.2510

November 10, 2008

Kathleen Masa
651 Peppertree Circle
Henderson NV 89014

Re: Courtesy Letter
651 Peppertree Circle Acct.# 651PT

Dear Kathleen Masa:

Living in a planned community involves the consideration of all Residents to abide by the CC&R's. One reason for having CC&Rs is to protect the rights of homeowners in the community, both yours and those of your neighbors. Another reason is to assure that everyone maintains their property in a manner that is consistent with other properties in the association.

Please be aware that the following condition has been noted on your property and is not consistent with the standards outlined in the governing documents.

INFRACTION: Owners Obligation to Repair

DESCRIPTION: Patio deck repairs need to be completed. This is a Health/Safety/Welfare issue and must be remedied.

CC&R article XI section 1: Each owner shall, at their own cost or expense, maintain and repair their unit as may be required.

CORRECTION TIME: This must be taken care of within 14 days receipt of this notice, or the HOA will be forced to make the necessary repairs and submit the charges to the homeowner. Thank you.

Please consider this a courtesy reminder. We appreciate your cooperation in resolving this matter.

YOU MUST REPLY IN WRITING TO THE ABOVE INFRACTION BY USING THE ATTACHED CORRECTION RESPONSE FORM. NO PHONE CALLS OR VERBAL REPLIES ARE ACCEPTED.

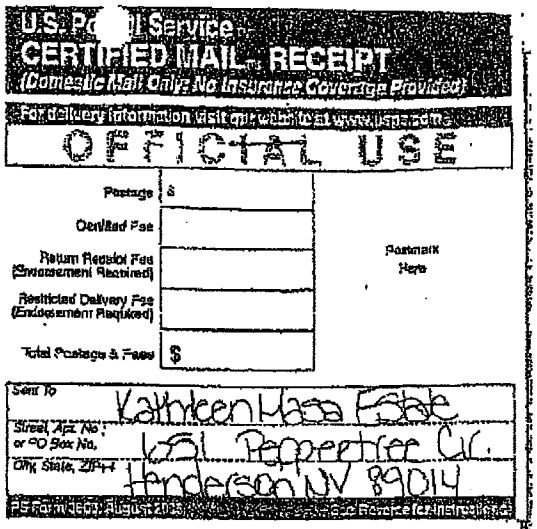
Sincerely,

Board of Directors
Peppertree Homeowners Association

cc: Board of Directors
Homeowner's File

EXHIBIT F

Peppertree Homeowr
C/O Community Mana
3360 West Sahara Avenue Suite 20
Telephone (702) 942-2500 Fa



August 27, 2009

Executor of Kathleen Masa Estate
651 Peppertree Circle
Henderson, NV 89014

Re: Mold Remediation and Flood Damage

Dear Executor of Kathleen Masa Estate,

It has been reported to the Board of directors that the unit currently owned in Kathleen Masa's name has had a flood, damaging not only her unit, but the unit below at 655 Peppertree. The damage has gone through the floor of your unit and into the ceiling of the lower unit. Due to the fact that we cannot get into contact with anybody in the Masa family, and Kathleen Masa is deceased, the Association had to enter into the property to turn off the water and assess the situation. The damage is estimated at $3200 to $5500. These are only estimates, as the contractors will not know the severity of damage until the floor and ceiling are pulled out.

I have attempted to contact the mortgage lender (Washington Mutual), and obtain the insurance carrier's information to the unit. I was refused the information due to not being on the account. Therefore, the association has no further choice but to enter onto the property to make the necessary repairs as this is a severe health, safety, and welfare issue and could adversely affect the health of the neighboring residents.

Please note that any charges incurred with the repairs will be assessed to the unit owner's account with Peppertree, and a lien will be filed.

This is an attempt to contact somebody regarding this issue, as it is homeowner responsibility. Please contact the management company immediately upon receipt of this letter to discuss further. Failure to do so will result in the association making the repairs and assessing all charges to the unit owner's account.

Sincerely,

Eric Theros, Provisional Community Manager
Agent for Peppertree HOA
Board of Directors

cc: Homeowner's File
General Counsel

Peppertree Homeowners Association
C/O Community Management Group
3360 West Sahara Avenue Suite 200, Las Vegas, Nevada 89102
Telephone (702) 942-2500 Facsimile (702) 942-2510

August 27, 2009

Executor of Kathleen Masa Estate
651 Peppertree Circle
Henderson, NV 89014

Re: Water Shut Off

Dear Executor of Kathleen Masa Estate,

The Association is having the water going into the home shut off due to a leak that needs to be repaired. The water will remain shut off to prevent further damages to the unit.

Should you have any questions or concerns regarding this letter, or need assistance in re-activating the water service, please do not hesitate to contact the management company.

Sincerely,

Eric Theros, Provisional Community Manager
Agent for Peppertree HOA
Board of Directors

cc: Homeowner's File
General Counsel

EXHIBIT 2

MOT
ALVERSON, TAYLOR,
MORTENSEN & SANDERS
KURT R. BONDS, ESQ.
Nevada Bar #6228
MARLA DAVEE, ESQ.
Nevada Bar #11098
7401 W. Charleston Boulevard
Las Vegas, NV 89117
efile@alversontaylor.com
(702) 384-7000
Attorney for Peppertree
Homeowners Association

DISTRICT COURT

CLARK COUNTY, NEVADA

-*-

WINGBROOK CAPITAL, LLC, Plaintiff, v. PEPPERTREE HOMEOWNERS ASSOCIATION; and DOES 1-10 and ROE ENTITIES 1-10, inclusive, Defendant.	Case No.: A-11-636948-B Dept No.: XI

PEPPERTREE HOMEOWNERS ASSOCIATION'S MOTION FOR RECONSIDERATION REGARDING THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF WINGBROOK CAPITAL, LLC

COMES NOW, Defendant, PEPPERTREE HOMEOWNERS ASSOCIATION, (hereinafter "Peppertree" or "Association"), by and through its attorneys of record, the law firm of ALVERSON, TAYLOR, MORTENSEN & SANDERS, and hereby moves this Court for reconsideration of its grant of Plaintiff's Motion for Partial Summary Judgment.

///

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KB/19060

This Motion is made and based upon the papers and pleadings herein and any oral argument that may heard on this matter.

DATED this 30 day of June, 2011.

ALVERSON, TAYLOR
MORTENSEN & SANDERS

KURT R. BONDS, ESQ.
Nevada Bar #6228
MARLA DAVEE, ESQ.
Nevada Bar #11098
7401 W. Charleston Boulevard
Las Vegas, NV 89117
Attorney for Peppertree
Homeowners Association

NOTICE OF MOTION

PLEASE TAKE NOTICE that on the ____ day of _____, 2011, at the hour of ____ o'clock a.m./p.m., or as soon thereafter as counsel may be heard, Defendant Peppertree Homeowners Association will bring the foregoing Motion for Reconsideration for hearing in the Clark County District Court, Department No. XI.

DATED this 30 day of June, 2011.

ALVERSON, TAYLOR
MORTENSEN & SANDERS

KURT R. BONDS, ESQ.
Nevada Bar #6228
MARLA DAVEE, ESQ.
Nevada Bar #11098
7401 W. Charleston Boulevard
Las Vegas, NV 89117
Attorney for Peppertree
Homeowners Association

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POINTS AND AUTHORITIES
INTRODUCTION

This case concerns Wingbrook Capital LLC's (hereinafter "Wingbrook") obligation to satisfy a lien on real property that is located within the Peppertree Homeowners Association (hereinafter "Association"). On June 3, 2011, this court entered Partial Summary Judgment in favor of Wingbrook on its Fourth Cause of Action: Declaratory Relief regarding what has been commonly referred to as a Homeowner's Association's "Super Priority Lien."

Pursuant to N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. This particular lien is afforded superiority over virtually every other lien or encumbrance against the property, including the first deed of trust. The lien applies to assessments that accrued in the nine (9) months preceding an action to enforce the lien. In its Motion for Summary Judgment, Wingbrook sought a Declaration from this Court stating that late fees, interest and collection costs are not included in the Super Priority Lien. This court granted Plaintiff's motion, in part, and ordered that interest and late fees were improperly charged. This court did not address collection costs.

However, the Association requests this court to reconsider its declaration because the lien in this matter primarily concerns an abatement lien, comprised of expenses other than charges for delinquent assessments. In other words, because of the unique facts of this case, the declaration did not resolve the uncertainty and has created more ambiguity regarding whether the late fees and interest were charged in connection with the delinquent assessments or the abatement lien. More specifically, under N.R.S. 116.310312 an Association is entitled to charge a lien against a unit for expenses incurred to abate a public nuisance or health hazard. And, Plaintiff does not dispute that the Association is entitled to include late fees, interest and collection costs as part of its lien. Thus, in this case, the late fees and interest the Court awarded to Wingbrook by virtue of its Declaratory Relief create a genuine issues of material fact regarding what portion were related

to the lien for delinquent assessments and what portions were related to the abatement lien.

To resolve this uncertainty, Peppertree requests this Court to reconsider its grant of Partial Summary Judgment in favor of Plaintiff and first make a determination as to whether the abatement lien was proper.

FACTS

On December 4, 2009, Wingbrook purchased real property located at 651 Peppertree Circle in Henderson, Nevada (hereinafter the "Property") through a foreclosure sale. The Property is located within the Peppertree Homeowners' Association. At the time of the sale, the Property was subject to a lien placed upon it by the Association. The lien primarily originated from a Special Assessment which was charged against the unit to recover necessary repair and clean-up expenses incurred to abate a health hazard resulting from the previous owner's lifestyle as a "hoarder." In order to clear title to the Property, Wingbrook paid the full amount of the lien.

Importantly, the lien amount was originally comprised of only 9 months of delinquent assessments carried over from the previous owner in accordance with NRS 116.3116. In addition, the Association incurred repair costs pursuant to NRS 116.310312, which were also included in the lien amount. The remaining charges were collection costs and interest associated with the substantive abatement lien charges. Thus, a majority of the charges associated with the lien did not involve delinquent assessments charged against the Property. Rather, the majority of the charges stemmed from an abatement lien, which was comprised of expenses for hazard remediation and the repair of a broken toilet, which flooded the Property and a neighboring unit. More specifically, as this court will recall, the abatement lien in this case arose of expenses the Association incurred to effectuate a haz mat clean-up of the unit, after the previous owner of the unit died and left remnants of her lifestyle as a hoarder.

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On April 14, 2011, Plaintiff filed its Complaint, seeking, in part, Declaratory Relief with respect to two issues: (1) the monetary limit of a homeowners' association's "Super Priority" lien for delinquent assessments under NRS 116.3116; and, (2) the act necessary to determine when the calculation of the Super Priority Lien should begin. On April 18, 2011, Plaintiff filed its Motion for Summary Judgment on its causes of action for Declaratory Relief. On May 24, 2011, this court heard the arguments of counsel and granted Plaintiff's Motion for Summary Judgment with respect to the monetary limit of an association's Super Priority lien, and denied Plaintiff's request for Declaratory Relief with respect to the second issue.

ARGUMENT

In its Order, this Court declared that the Super Priority Lien afforded by NRS 116.3116 is limited to a monetary amount, an "Assessment Cap Figure" that equals:

> 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the institution of an action to enforce the lien . . . plus external repair costs pursuant to NRS116.310312.

Additionally, the Order provides that while costs, fees, fines, penalties, assessments, charges, late charges, or interest or any other costs may be included with the Assessment Cap, the total amount must not exceed 9 times the amount of monthly assessments for common expenses.

The Association respectfully requests this court to reconsider its Order granting Declaratory Relief to Plaintiff because (1) Declaratory relief was improper and has created more uncertainty in the case; (2) the Order requires the Association to remit funds to the Plaintiff that were correctly charged to Plaintiff under NRS 116.310312 before this Court has determined whether the charges under NRS 116.310312 were proper; (3) the Asssesment Cap Figure articulated in this Court's Order amounts to an improper reading of NRS 116.3116 and will necessarily create unworkable and unjust results for homeowners' associations.

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I. THE GRANT OF WINGRBOOK'S MOTION FOR PARTIAL SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE DECLARATORY RELIEF IS NOT PROPER UNDER THE FACTS OF THIS CASE.

Declaratory Relief in this case was improper because no justiciable controversy exists between the parties, and declaratory relief did not terminate the controversy giving rise to Plaintiff's complaint. In fact, it creates more controversy.

NRS 30.080 grants this court broad discretion to, "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."

Moreover, in Kress v. Corey, 65 Nev. 1, 26 (1948), the Nevada Supreme Court articulated the prerequisite facts or conditions that must exist for a court to grant declaratory relief. The four facts or conditions are as follows:

> (1) [T]here must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Id. The phrase "justiciable controversy" does not simply mean a "dispute." In interpreting Kress and the plirase "justiciable controversy" as it applies to declaratory relief, the Court has held that a judicial declaration is not available if the damage alleged is "merely apprehended or feared." Doe v. Bryan, 102 Nev. 523, 525-526 (1986). Instead, there must be a dispute that allows and calls for an, "'immediate and definitive determination of the parties' rights.'" Id. (quoting Wills v. O'Grady, 409 N.E.2d 17, 19 (Ill.App.Ct. 1980)).

Plaintiff was granted Declaratory Relief with respect to the monetary limit of a homeowners' association's "Super Priority" lien for delinquent assessments under NRS 116.3116. The declaration of this issue did not terminate the uncertainty or controversy giving

rise to Plaintiff's Complaint, and, has arguably made the accounting of proper and improper charges in the case more difficult.

To explain, Declaratory Relief was improper because the declaration did not and could not have immediately determined the parties' rights. Determining that accrued interest and late fees were improperly charged to Plaintiff was premature because the Court has not yet considered (1) whether those charges were associated with delinquent assessments under NRS 116.3116 or the abatement lien under NRS 116.310312, and/or; (2) whether the charges under NRS 116.310312 were proper.

Thus, the Association requests this Honorable Court reconsider its issuance of Declaratory Relief in favor of the Plaintiff.

II. THE JUDGMENT GRANTING WINGBROOK'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE RECONSIDERED BECAUSE THE ASSOCIATION SHOULD NOT BE REQUIRED TO REFUND OR OTHERWISE RETURN LATE FEES AND INTEREST TO WINGBROOK ON CHARGES RELATED TO THE ABATEMENT LIEN

This Court should reconsider the grant of summary judgment in favor of Wingbrook because the late fees and interest awarded to Wingbrook were prematurely awarded without a determination of whether they were properly brought pursuant to NRS 116.310312.

NRS 116.310312 provides, in pertinent part:

> [T]he association, including its employees, agents and community manager, may, but is not required to, enter the grounds of the unit . . . to take any of the following actions if the unit's owner refuses or fails to take any action . . . :
>
> . . .
>
> (b) Remove or abate a public nuisance on the exterior of the unit which:
>
> (1) Is visible from any common area of the community or public streets;
>
> (2) Threatens the health or safety of the residents of the common-interest community;
>
> (3) Results in blighting or deterioration of the unit or surrounding area; and
>
> (4) Adversely affects the use and enjoyment of nearby units.
>
> . . .

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4. The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

5. A lien described in subsection 4 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.

6. Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens . . .

(emphasis added).

It is clear from the statutory language that late fees and interest associated with an abatement lien are clearly entitled to priority and includable within the Super Priority lien codified under NRS 116.3116. Plaintiff does not dispute these additional fees and costs are not subject to a statutory cap.

Thus, this court improperly awarded Wingbrook late fees and interest, although these charges stemmed primarily from the abatement charges and not the charges associated with the delinquent assessments. Without first determining whether the abatement lien was proper and what charges were associated with the lien, the Association is obligated to remit funds to the Plaintiff that this Court ruled it would consider at a later date.

Similarly, this Court did not address collection costs. Thus, although the Order seems to provide an Assessment Cap Figure that bars interest and late fees under NRS 116.3116, this Court did not expressly rule that the collection costs were barred. The declaratory judgment therefore did not fully provide a declaration of what the statute means.

Moreover, even if this Court *intended* to rule on collection costs, a declaratory judgment in this case would have been premature and improper. Without first determining whether the abatement lien was proper, then determining how the collection costs were calculated, there is a genuine issue of material fact regarding whether the Association properly charged Plaintiff for

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the collection costs. More importantly, there is a genuine issue of material fact as to whether declaratory relief was proper considering that the case necessarily involves the analysis of two statutes, NRS 116.3116 and NRS 116.310312, and necessarily requires a determination of whether the collection costs were associated with the abatement lien or the delinquent assessment lien. Discovery of these issues is required in this case.

Therefore, because this Court expressly reserved the determination of the propriety of the abatement lien for a later date, this court should also reconsider its grant of summary judgment in favor of the Plaintiff to allow a determination on the abatement lien first, in order to properly declare what charges the lien in this case should have included.

III. THE JUDGMENT GRANTING WINGBROOK'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE RECONSIDERED BECAUSE THE ASSSESMENT CAP FIGURE ARTICULATED IN THIS COURT'S ORDER AMOUNTS TO AN IMPROPER READING OF NRS 116.3116 AND WILL NECESSARILY CREATE UNJUST RESULTS FOR HOMEOWNERS' ASSOCIATIONS.

In its Order granting Plaintiff Declaratory Judgment, this Court articulated:

> "after the foreclosure of a First Security Interest holder of a unit located within a homeowners' association, pursuant to NRS 116.3116 the monetary limit of a homeowners' association's Super Priority Lien is limited to a maximum amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budge which would have become due immediately preceding the institution of an action to enforce the lien (the "Assessment Cap Figure") plus external repair costs pursuant to NRS 116.310312.

The Association respectfully requests this Court to reconsider its grant of declaratory relief regarding NRS 116.3116 because this "Assessment Cap Figure," as articulated, amounts to an incorrect reading of NRS 116.3116 and will necessarily create unjust results. Moreover, the judgment directly contradicts regulations and an advisory opinion issued by the Commission for Common-Interest Communities—the very agency charged with the interpretation of NRS 116—and contradicts at least three district court decisions in Clark County.

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a. Introduction and Statutory Language

Generally, under N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. A delinquent assessment lien is afforded superiority over nearly every lien or encumbrance against the property as to the full amount of the lien, to the extent of assessments accrued in the 9 months preceding an action to enforce the lien. This delinquent assessment lien is referred to as the Super Priority Lien. Lenders and investors are required to satisfy the Super Priority Lien to secure marketable title and sell the home. And, pursuant to Nevada law, late fees, interest and the costs associated with collection should be included in the Super Priority Lien.

In addition, Nevada Revised Statutes also allow a homeowners' association to enter the property of a unit owner to make certain repairs, which may be charged against the unit. NRS 116.310312. The Association holds a lien for any of these unpaid charges. Id. The amounts levied by an association are also known as an "abatement lien" and are also entitled to "Super Priority" under NRS 116.3116(2)(c). Unlike a lien for delinquent assessments, however, there is no cap to charges made for repairs under NRS 116.310312.

To be clear, N.R.S. § 116.3116(1) provides, in relevant part, as follows:

> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. . . .
>
> 2. 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 . . . 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 any charges incurred by the association on a unit pursuant to NRS

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> 116.3103121 and 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).

When determining the meaning and intent of NRS 116.3116 it is essential to review the statute in reference and in concert with NRS 116.310312. Nevertheless, NRS 116.3116 is plain and unambiguous and review of the Legislative History is not necessary for this court to determine that: (1) penalties, fees, charges, late charges, fines and interest are enforceable as assessments as against a unit (NRS 116.3116(1)); (2) the association has a lien on a unit for any assessment levied against that unit (NRS 116.3116(1)); and (3) the Association's Lien is prior to the first security interest and all other security interests (NRS 116.3116 (2)(c)).

When a statute is clear on its face, a court must not go beyond the statute's plain language to determine the Legislature's intent. Hardy Cos. v. SNMARK, LLC, 126 Nev. ___, ___, 245 P.3d 1149, 1153 (2010). Only when a statute is ambiguous should a Court turn to the Legislative history to determine the meaning of the statute and the Legislative intent. J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC, 2011 Nev. LEXIS 6, 10-11 (2011). Moreover, when a statute contains words that have a plain and certain meaning, no part of the statute should be rendered superfluous or meaningless in a manner that would produce an absurd result. Allstate Insurance Co. v. Fackett, 125 Nev.___, ____, 206 P.3d 572, 576 (2009).

In this case, the Legislature has expressly given the Association the right to recover penalties, fees, charges, late charges, fines and interest in connection with 9 months of delinquent assessments. To promulgate the Association's right to recover these fees and costs, but then to exclude those as part of the Super Priority lien produces an unworkable and unjust result. The

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1 See also NRS 116.310312(6), which provides, "Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. . ."

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Court's declaratory judgment therefore renders the language of NRS 116.3116(1) superfluous and the Association's right to collect these fees and costs, illusory. See S. Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (holding that a court must read a statute in its entirety, so that the reading "would not render words or phrases superfluous or make a provision nugatory.")(emphasis added).

b. The Declaratory Judgment contradicts the Advisory Opinion set forth By the Commission for Common Interest Communities and relevant case law.

In addition, pursuant to NRS 116.623, the Nevada Real Estate Division has the authority to issue advisory opinions to interpret NRS 116. On December 8, 2010, the Commission for Common-Interest Communities and Condominium Hotels ("Commission"), which is part of the Nevada Real Estate Division, issued an advisory opinion regarding whether fees and costs could be recovered by an association as part of the Super Priority Lien. The Commission rejected the "Assessment Cap" articulated in this Court's Order—that the Super Priority Lien is limited to nine times monthly assessments—and instead concluded:

> An association may collect as part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the 'costs of collecting' authorized by NRS 116.310313.

Comm'n for Common Interest Communities and Condominium Hotels, Ad. Op. No. 2010-01, pp. 14 (attached hereto as Exhibit A).

Importantly, in its Advisory Opinion, the Commission reviewed the Legislative History and case law from other jurisdictions in order to interpret NRS 116.3116. One case the Commission considered was Hudson House Condominium Assocation, Inc. v. Brooks, 223 Conn. 610, 611 A.2d 862 (1992). In Hudson House, the Connecticut Supreme Court reviewed statutory language that is almost identical to NRS 116.3116.[2] On Appeal, the Court in that case

2 Although Connecticut has since amended their statute to explicitly include attorneys' fees, the Hudson House

was asked, in part, whether the trial court improperly excluded attorneys' fees and other costs from a homeowners' association's super priority lien. The Connecticut Supreme Court determined that attorneys' fees and other costs must be included in the Super Priority Lien to produce the only reasonable and logical result. Id. at 616. The Court's rationale is concisely provided as follows:

> 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 and the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without string or arrows.

Id. at 616-17 (citations omitted).

Thus, when the Nevada Commission on Common Interest Communities considered the Hudson House case, it considered the Court's analysis and rationale as just and equitable and the only reasonable result in light of the fact that the Nevada and Connecticut statutes were virtually identical. As such, this Court should reconsider its grant of declaratory judgment in favor of Plaintiff.

c. **The Eighth Judicial District has adopted the reasoning of Hudson House and the Commission's Advisory Opinion.**

The issue concerning what amounts are included within the Super Priority Lien has already been addressed in the Eighth Judicial District Court. And, while these other determinations are not necessarily binding, they do offer support for the reconsideration of this court's declaratory judgment. See Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, Case No. 06A523959-C; Elkhorn Community Ass'n v. Valenzuela, Case No. A-10-607051-C; JP Morgan Chase Bank, Case No. A562678. In each of these cases, the Courts have found that

decision was decided under the previous version of Connecticut's statute, which mirrored NRS 116.3116.

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costs of collection, interest, and late fees are included in the Super Priority Lien Amount. Indeed, this is the only Court that has found otherwise.

As such, this Court's Declaratory Judgment entered in favor of Plaintiffs contradicts the agency that is authorized to interpret NRS 116 and contradicts the only reasonable, just and equitable result under the statute—that the Association is entitled to collect various fees and costs as outlined in NRS 116.3116(1) as part of the Super Priority Lien. Moreover, the declaratory judgment in this case produces and inconsistent result as compared to other courts facing the same issue.

CONCLUSION

For the foregoing reasons, Defendant Peppertree Homeowners Association respectfully requests that this Court reconsider its decision granting Plaintiff's Motion for Partial Summary Judgment.

DATED this 30 day of June, 2011.

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EXHIBIT A

ADOPTED DECEMBER 8, 2010

COMMISSION FOR COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS ADVISORY OPINION NO. 2010-01

Subject: Inclusion of Fees and Costs as an Element of the Super Priority Lien

QUESTION

Under NRS 116.3116, the super priority of an assessment lien includes "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 6 or 9 month super priority period. May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?

ANSWER

An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

ANALYSIS

Statutory Super Priority. NRS Chapter 116 provides for a "super priority" lien for certain association assessments. NRS 116.3116 provides, in pertinent part, as follows:

> **NRS 116.3116 Liens against units for assessments.**
>
> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . becomes due. . . .
>
> 2. 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 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 any charges incurred by the association on a unit pursuant to NRS 116.310312[1] and 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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. . .

NRS 116.3116 further provides that "Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section."

UCIOA. The "super priority" provisions of NRS Chapter 116, like the rest of the chapter, are based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA) adopted by the National Conference of Commissioners

[1] NRS 116.310312, enacted in 2009, provides for the recovery by the association of certain costs incurred by an association with respect to a foreclosed or abandoned unit, including costs incurred to "Maintain the exterior of the unit in accordance with the standards set forth in the governing documents" or "Remove or abate a public nuisance on the exterior of the unit...."

of Uniform State Laws (NCCUSL). A comparison of the statutory language in UCIOA[2] and NRS reveals few material changes:

UCIOA 3-116. (1994)	NRS 116.3116 Liens against units for assessments.(2009)
(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	1. 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. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
(b) A lien under this section is prior to all other liens and encumbrances on a unit except	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(i) 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,	(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;
(ii) 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 security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and	(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 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

[2] The 1982 version of UCIOA was superseded by a 1994 version, which is used here, and a 2008 version, discussed below.

(iii) 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 clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.	(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 any charges incurred by the association on a unit pursuant to NRS 116.310312 and 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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

Reported Cases. There are no reported Nevada cases addressing the issue of whether the super priority lien may include amounts other than just the 6 or 9 months of assessments. Because NRS Chapter 116 is based on a Uniform

Act, however, decisions in other states that have adopted UCIOA can be helpful. Colorado and Connecticut are both UCIOA states; reported cases in both these states have addressed the question presented in this opinion.

In *Hudson House Condominium Association, Inc. v. Brooks*, 611 A.2d 862 (Conn., 1992), the Connecticut Supreme Court rejected an argument by the holder of the first mortgage that "because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien that is subordinate to [the first mortgagee's] interest." In reaching its conclusion, however, the court relied on a non-uniform statute dealing with the judicial enforcement of the association lien.[3] In a footnote the court also noted that the super priority language of the Connecticut version of UCIOA 3-116 had since been amended to expressly include attorney's fees and costs in the priority debt.

The two Colorado cases that have considered this issue reached their conclusion, that the priority debt *includes* attorneys' fees and costs, based on statutory language similar to Nevada's. The language of the court in *First Atl. Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005) is very helpful:

> Within the meaning of Section 2(b), a "lien under this section" may include any of the expenses listed in subsection (1), including "fees, charges, late charges, attorney fees, fines, and interest." Thus, ***although the maximum amount of a super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments.***[Emphasis added.]

[3] C.G.S.A. Section 47-258(g)

In support of its holding, the Sunstone court quoted the following language from James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 Wake Forest L. Rev. 353, 367:

> A careful reading of the . . . language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. The reference in Section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.

The decision of the court in Sunstone was followed in *BA Mortgage, LLC v. Quail Creek Condominium Association, Inc.*, 192 P.2d 447 (Colo. App, 2008).

A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical:

CRS 38-33.3-316 Lien for assessments. (2008)	NRS 116.3116 Liens against units for assessments. (2009)
(1) The association . . . has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, **fees, charges, late charges, attorney fees, fines, and interest** charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. . . .	. 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. Unless the declaration otherwise provides, any . . . **fees, charges, late charges, fines and interest** charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. . . .

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except: * * * (b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of: (I) **An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding** institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien. [Emphasis added.]	2. A lien under this section is prior to all other liens and encumbrances on a unit except: * * * The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [Emphasis added.]

2008 UCIOA. In 2008 NCCUSL proposed the following amendment to 3-116 of UCIOA[4]:

SECTION 3-116. LIEN FOR ~~ASSESSMENTS;~~ SUMS DUE ASSOCIATION; ENFORCEMENT.

(a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit . . .. Unless the declaration otherwise provides, **reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest** charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except:

~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to~~,~~;

~~(ii)~~(2) except as otherwise provided in subsection (c), 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 security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent~~,~~; and

~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

(c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of **both** the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien **and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien**.. . . [Emphasis added.]

[4] The changes noted are to 1994 UCIOA.

New Comment No. 8 to 3-116 states as follows:

> 8. Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:
>
> **First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien'** – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b).[5] The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state. [Emphasis added.]

Discussion. The Colorado Court of Appeals and the author of the Wake Forest Law Review article quoted by the court in the *Sunstone* case both concluded that although 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. This language is the same as NRS 116.3116, which states that "fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments." As the *Sunstone* court noted "although the maximum amount of the super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments."

[5] The statutory change noted by the Connecticut Supreme Court in the Hudson House case referred to above.

The referenced statute, NRS 116.3102, provides that an association has the power to:

> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
>
> (k) Impose charges for late payment of assessments pursuant to NRS 116.3115.
>
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
>
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
>
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

It is immediately apparent that the charges authorized by NRS 116.3102(1)(j) through (n) cover a wide variety of circumstances. The fact that "fees, charges, late charges, fines and interest" that may be included as part of the assessment lien under NRS 116.3116 include amounts unrelated to monthly assessments does not mean, however, that such amounts should not be included in the super lien if they do relate to the applicable super priority monthly assessments. It appears that only those association charges authorized under NRS 116.3102(1) Subsections (k) and a portion of (n) apply to the collection of unpaid assessments, i.e., Subsection (k)'s charges for late payment of

assessments and Subsection (n)'s charges for preparing any statements of unpaid assessments. Subsection (j)'s charges for use of common elements or providing association services, Subsection (l)'s construction penalties and Subsection (n)'s amendments to the declaration and providing resale information clearly do not relate to the collection of monthly assessments.

The inclusion of the word "fines" authorized by NRS 116.3102(1)(m) as part of the assessment lien presents an additional problem in Nevada. The "fines" referred to in NRS 116.3116/NRS 116.3102(1)(m) are fines authorized by NRS 116.31031. While fines may be imposed for "violations of the governing documents," which, of course, could include non-payment of assessments required by the governing documents, the hearing procedure mandated by NRS 116.31031 prior to the imposition of "fines" refers to an inquiry involving conduct or behavior that violates the governing documents, not the failure to pay assessments. Because "fines" involve conduct or behavior, enforcement of fines are given special treatment under NRS 116.31162:

> 4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:
>
> (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
>
> (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Thus, to use the words of the *Sunstone* court, the "plain language" of NRS 116.3116, when read in conjunction with NRS 116.3102(1) (j) through (n), supports the conclusion that the only additional amounts that can be included as part of the super priority lien in Nevada are "charges for late payment of

assessments pursuant to NRS 116.3115" and "reasonable charges for the preparation and recordation of . . . any statements of unpaid assessments." NRS 116.3102(1)(k),(n). Note that the reference in Subsection (k) to NRS 116.3115 appears to be solely for the purpose of identifying what is meant by the word "assessment," though NRS 116.3115(3) provides for the payment of interest on "Any assessment for common expenses or installment thereof that is 60 days or more past due...."

Conclusion. The super priority language contained in UCIOA 3-116 reflected a change in the traditional common law principle that granted first priority to a mortgage lien recorded prior to the date a common expense assessment became delinquent. The six month priority rule contained in UCIOA 3-116 established a compromise between the interests of the common interest community and the lending community. The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, 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"[6] 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. We reach a similar conclusion in finding that Nevada law

[6] See New Comment No. 8 to UCIOA 3-116(2008) quoted above.

authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

In 2009, Nevada enacted NRS 116.310313, which provides as follows:

> **NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.**
>
> 1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
>
> 2. The provisions of this 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, an officer or employee of the association, a community manager or a collection agency.
>
> 3. As used in this section:
>
> (a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.
>
> (b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

Since Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation and, further, limits those amounts, we conclude that a reasonable interpretation of the kinds of "charges" an association

may collect as a part of the super priority lien include the "costs of collecting" authorized by NRS 116.310313. Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

EXHIBIT 3

Case No. NRED 10-49

BEFORE THE NEVADA REAL ESTATE COMMISSION

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Claimant,

v.

THE FOOTHILLS at WINGFIELD HOMEOWNER'S ASSOCIATION; ALESSI TRUSTEE CORPORATION, a Nevada corporation; ALESSI & KOENIG, LLC, a Nevada limited liability company;

Respondents.

ARBITRATOR'S DECISION and AWARD

The Arbitrator in this matter, the Honorable Steven McMorris, hereby renders the following decision in the non binding arbitration conducted pursuant to the rules of the Nevada Real Estate Commission.

RECITALS

A. On June 7, 2010, the above named parties, by and through their respective counsel, participated in an arbitration hearing before the undersigned arbitrator. Claimant Wells Fargo Bank, National Association ("Wells Fargo") was represented by Alex Flanges of the firm of Holland & Hart LLP; Respondent The Foothills at Wingfield HOA ("Foothills HOA" or "HOA") was represented by Ryan Hamrick of the firm of Jones Vargas; and Respondents Alessi Trustee Corporation and Alessi & Koenig, LLC (collectively "Alessi") were represented by Ryan Kerbow and Tom Bayard.

B. The parties presented evidence and argument on the legal points, and the matter was concluded on June 7, 2010.

C. The parties stipulated to many of the facts in the case, including the following:

1. Wells Fargo is a national banking association, duly licensed and registered to conduct business in the State of Nevada.

2. The Foothills HOA is a community association organized and operating pursuant to the provisions of Chapter 116 of the Nevada Revised Statutes.

3. ATC is a Nevada corporation, in good standing with the Secretary of State of Nevada.

4. Alessi & Koenig is a Nevada limited-liability company, operating as a law firm, with its principal place of business in Las Vegas, Nevada.

5. This case involves the property development commonly known as The Foothills at Wingfield ("The Foothills") in the City of Sparks, Nevada.

6. The developer of The Foothills, "Reynen & Bardis (The Foothills), LLC, a Nevada limited-liability company" ("Reynen & Bardis"), signed a promissory note with Wells Fargo, as lender, which was secured by a Construction Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing ("Deed of Trust") signed by Reynen & Bardis as "Trustor." The Deed of Trust was recorded in the official records of Washoe County on June 5, 2007. The Deed of Trust affected the 248 lots that are at issue in this arbitration (the "Lots").

7. At the time the Deed of Trust was recorded, Reynen & Bardis was not delinquent in the payment of the common assessments on the Lots developed by Reynen & Bardis.

8. Within days of recording the Deed of Trust, Reynen & Bardis transferred ownership of the property in The Foothills encumbered by the Deed of Trust to "Foothills Village Owner, LLC, a Delaware limited-liability company," who also executed an "Assumption and Modification Agreement and Addendum to Deed of Trust" (the "Assumption"), which was recorded on June 29, 2007. Under the Assumption, Foothills Village Owner, LLC, assumed all of the obligations of Reynen & Bardis for payment of assessments due on the Lots at The Foothills.

9. The Foothills property is subject to and governed by a recorded document entitled, "Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for the Foothills at Wingfield" (the "CC&Rs"), which document allows for

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the creation of The Foothills HOA and its Bylaws, and establishes the right of The Foothills HOA to create and enforce rules affecting the development.

10. Pursuant to Section 6.4 of the CC&Rs, a sum sufficient to pay common expenses and to establish reserves for The Foothills was charged against the homeowners of all lots located within The Foothills. The Foothills HOA established the amount of the common expense assessments on a yearly basis, consistent with The Foothills HOA's annual budget, and billed those amounts quarterly.

11. In 2008, The Foothills HOA's budgeted assessment for common expenses based on the periodic budget adopted by the Foothills HOA pursuant to NRS 116.3115 was $147.00 per lot assessed on a quarterly basis. This equates to the sum of $49 per month for each lot.

12. As the owner of several hundred lots located within The Foothills, Foothills Village Owner, LLC was obligated to pay the assessments made against all those lots to The Foothills HOA. However, in early 2008, Foothills Village Owner, LLC became delinquent in the payment of the assessments to The Foothills HOA.

13. Alessi had previously executed a Delinquent Assessment Collection Agreement (the "Collection Agreement") with The Foothills HOA on or about May 8, 2006.

14. As a result of the failure of payment of assessments by Foothills Owner, LLC, Alessi proceeded to mail, via certified mail, notices of delinquent assessments ("NDAs") to the owner of the Lots, Reynen & Bardis, during late July and early August, 2008, and caused copies of those NDAs to be recorded in the Official Records of Washoe County.

15. A portion of the assessed amount was attributable to "Collection and/or Attorney fees" and "collection costs, late fees, service charges and interest."

16. After mailing the NDAs to the owner of the Lots, Alessi continued to process and record Notices of Default ("NODs") for the Lots.

17. Reynen & Bardis (and Foothills Owner LLC) subsequently defaulted on the loan obligations to Wells Fargo, and Wells Fargo proceeded to foreclose on the Deed of Trust.

18. As a result of a foreclosure sale on December 17, 2008, Wells Fargo became the owner of the 248 lots located within The Foothills (previously identified as the "Lots").

19. Wells Fargo proceeded to calculate the total amount it determined was due to The Foothills HOA pursuant to NRS 116.3116(2) and Section 6.15 of the CC&Rs for the "super-priority" that the Foothills HOA had against the Lots. Wells Fargo calculated that super priority amount by taking two quarters worth of assessments for any given Lot (i.e. $147 multiplied by 2, or 6 months of common assessments) for a total of $294, and multiplied that amount by the number of Lots subject to the Liens, 248. Thus, Wells Fargo calculated the amount of the super-priority lien of the Foothills HOA to be a total of $72,912.00 for all 248 lots combined.

20. Wells Fargo tendered that sum ($72,912) to the Foothills HOA on or about February 25, 2009, accompanied by a letter from James Follis, Vice President of the Real Estate Managed Assets Group at Wells Fargo.

21. Following the foreclosure by Wells Fargo, Alessi prepared and delivered via certified mail an additional Notice of Delinquent Assessment ("NDA") to Wells Fargo because Wells Fargo was the new owner of the Lots once the foreclosure was completed.

22. On or about June 18, 2009, David Alessi delivered to Alilda Ferraro at Wells Fargo a spreadsheet showing the "demand" of ATC, which demand listed assessments, interest, fees and expenses in a total sum exceeding $621,000.

23. About a month later, on or about July 21, 2009, Mr. Alessi sent a revised demand for payment to Alilda Ferraro at Wells Fargo. Pursuant to the revised demand, Mr. Alessi represented that his company was waiving certain fees and costs, but still claimed that the Lien on the Lots asserted on behalf of the Foothills HOA was

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$382,039.00; and that this sum would need to be paid in order to clear the HOA's liens from title on the Lots.

24. Through the date of the arbitration hearing the HOA liens are still recorded against the Lots and have not been released by the HOA or any of respondents.

NOW, THEREFORE, the undersigned arbitrator makes the following findings, conclusions, and AWARD:

A. Wells Fargo was a first security interest holder, as that status is identified in NRS 116.3116, as to the Lots. At the time that Wells Fargo obtained its secured position, there was no delinquency in the payment of common assessments by the prior owner of the property, Reynen & Bardis.

B. NRS 116.3116(2) establishes the extent or amount of the super-priority lien that the Foothills HOA and/or Alessi may assert against the Lots following the foreclosure by Wells Fargo.

C. Because the delinquent assessment was made in 2008 and the foreclosure by Wells Fargo was conducted in 2008 well prior to the modification of NRS 116.3116(2) in 2009, the 2007 version of that statute governs this matter. The 2007 version of the statute allowed a homeowners association to assert a super-priority lien to the extent of "the 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 6 months immediately preceding institution of an action to enforce the lien."

D. The extent or amount of the super-priority lien that may be asserted against the Lots in this matter and which – by operation of statute – is granted a priority ahead of the Deed of Trust held by Wells Fargo is therefore equal to the sum total of six months of the common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115.

E. Thus, the total of the super-priority lien that could be asserted by the Foothills HOA and/or Alessi against the Lots was $72,912, which is the same amount that was tendered by Wells Fargo in February 2008.

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F. The tender by Wells Fargo was in the appropriate amount and should have resulted in a release of the HOA's lien on the Lots.

G. The Foothills HOA and/or Alessi are hereby ordered to accept the amount tendered by Wells Fargo, the sum of $72,912, as and for full payment of all sums necessary to satisfy the super-priority lien asserted by the HOA and/or Alessi against the Lots, and to record a release of lien executed by both the HOA and Alessi on the Lots within 7 business days of the date of this Decision.

H. If the check previously tendered by Wells Fargo is for any reason "stale" and cannot be negotiated, Wells Fargo is hereby ordered to tender a new check to the Foothills HOA for the sum of $72,912, and the Foothills HOA and Alessi are thereafter ordered to record a release of lien executed by both the HOA and Alessi on the Lots within 7 business days of the delivery by Wells Fargo of that check to the Foothills HOA.

Dated this 8th day of June, 2010.

Steven D. McMorris, Arbitrator

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Copies of this ARBITRATOR'S DECISION and AWARD served by mail this 23rd day of June, 2010, to: Alex J. Flangas, Esq., 5441 Kietzke Lane, Second Floor, Reno, NV 89511; Ryan M. Kerbow, Esq., 9500 W. Flamingo, Ste. 100, Las Vegas, NV 89147; Ryan W. Herrick, Esq., 100 W. Liberty St., 12th Floor, Reno, NV 89504.

EXHIBIT 4

ADOPTED DECEMBER 8, 2010

COMMISSION FOR COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS
ADVISORY OPINION NO. 2010-01

Subject: Inclusion of Fees and Costs as an Element of the Super Priority Lien

QUESTION

Under NRS 116.3116, the super priority of an assessment lien includes "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 6 or 9 month super priority period. May the association also recover, as part of the super priority lien, the costs and fees incurred by the association in collecting such assessments?

ANSWER

An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

ANALYSIS

Statutory Super Priority. NRS Chapter 116 provides for a "super priority" lien for certain association assessments. NRS 116.3116 provides, in pertinent part, as follows:

> **NRS 116.3116 Liens against units for assessments.**
>
> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . from the time the . . . assessment . . . becomes due. . . .
>
> 2. 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 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 any charges incurred by the association on a unit pursuant to NRS 116.310312[1] and 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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. . .

NRS 116.3116 further provides that "Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section."

UCIOA. The "super priority" provisions of NRS Chapter 116, like the rest of the chapter, are based on the 1982 version of the Uniform Common Interest Ownership Act (UCIOA) adopted by the National Conference of Commissioners

[1] NRS 116.310312, enacted in 2009, provides for the recovery by the association of certain costs incurred by an association with respect to a foreclosed or abandoned unit, including costs incurred to "Maintain the exterior of the unit in accordance with the standards set forth in the governing documents" or "Remove or abate a public nuisance on the exterior of the unit...."

of Uniform State Laws (NCCUSL). A comparison of the statutory language in UCIOA[2] and NRS reveals few material changes:

UCIOA 3-116, (1994)	NRS 116.3116 Liens against units for assessments.(2009)
(a) The association has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, fees, charges, late charges, fines, and interest charged pursuant to Section 3-102(a)(10), (11), and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.	1. 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. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.
(b) A lien under this section is prior to all other liens and encumbrances on a unit except	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
(i) 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,	(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;
(ii) 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 security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and	(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 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

[2] The 1982 version of UCIOA was superseded by a 1994 version, which is used here, and a 2008 version, discussed below.

(iii) 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 clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.	(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 any charges incurred by the association on a unit pursuant to NRS 116.310312 and 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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien.

Reported Cases. There are no reported Nevada cases addressing the issue of whether the super priority lien may include amounts other than just the 6 or 9 months of assessments. Because NRS Chapter 116 is based on a Uniform

Act, however, decisions in other states that have adopted UCIOA can be helpful. Colorado and Connecticut are both UCIOA states; reported cases in both these states have addressed the question presented in this opinion.

In *Hudson House Condominium Association, Inc. v. Brooks*, 611 A.2d 862 (Conn., 1992), the Connecticut Supreme Court rejected an argument by the holder of the first mortgage that "because [the statute] does not specifically include 'costs and attorney's fees' as part of the language creating [the association's] priority lien, those expenses are properly includable only as part of the nonpriority lien that is subordinate to [the first mortgagee's] interest." In reaching its conclusion, however, the court relied on a non-uniform statute dealing with the judicial enforcement of the association lien.[3] In a footnote the court also noted that the super priority language of the Connecticut version of UCIOA 3-116 had since been amended to expressly include attorney's fees and costs in the priority debt.

The two Colorado cases that have considered this issue reached their conclusion, that the priority debt *includes* attorneys' fees and costs, based on statutory language similar to Nevada's. The language of the court in *First All. Mortgage, LLC v. Sunstone N. Homeowners Ass'n*, 121 P.3d 254 (Colo. App 2005) is very helpful:

> Within the meaning of Section 2(b), a "lien under this section" may include any of the expenses listed in subsection (1), including "fees, charges, late charges, attorney fees, fines, and interest." Thus, ***although the maximum amount of a super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments.***[Emphasis added.]

[3] C.G.S.A. Section 47-258(g)

In support of its holding, the Sunstone court quoted the following language from James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Ownership Act*, 27 Wake Forest L. Rev. 353, 367:

> A careful reading of the . . . language reveals that the association's Prioritized Lien, like its Less-Prioritized Lien, may consist not merely of defaulted assessments, but also of fines and, where the statute so specifies, enforcement and attorney fees. The reference in Section 3-116(b) to priority "to the extent of" assessments which would have been due "during the six months immediately preceding an action to enforce the lien" merely limits the maximum amount of all fees or charges for common facilities use or for association services, late charges and fines, and interest which can come with the Prioritized Lien.

The decision of the court in Sunstone was followed in *BA Mortgage, LLC v. Quail Creek Condominium Association, Inc.*, 192 P.2d 447 (Colo. App, 2008).

A comparison of the language of the Colorado statute and the language of the Nevada statute reveals that the two are virtually identical:

CRS 38-33.3-316 Lien for assessments. (2008)	NRS 116.3116 Liens against units for assessments. (2009)
(1) The association . . . has a statutory lien on a unit for any assessment levied against that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, **fees, charges, late charges, attorney fees, fines, and interest** charged pursuant to section 38-33.3-302 (1) (j), (1) (k), and (1) (l), section 38-33.3-313 (6), and section 38-33.3-315 (2) are enforceable as assessments under this article. The amount of the lien shall include all those items set forth in this section from the time such items become due. . . .	. 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. Unless the declaration otherwise provides, any . . . **fees, charges, late charges, fines and interest** charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. . . .

(2) (a) A lien under this section is prior to all other liens and encumbrances on a unit except:	2. A lien under this section is prior to all other liens and encumbrances on a unit except:
* * *	* * *
(b) Subject to paragraph (d) of this subsection (2), a lien under this section is also prior to the security interests described in subparagraph (II) of paragraph (a) of this subsection (2) to the extent of:	The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and **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, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [Emphasis added.]
(I) **An amount equal to the common expense assessments based on a periodic budget adopted by the association under section 38-33.3-315 (1) which would have become due, in the absence of any acceleration, during the six months immediately preceding** institution by either the association or any party holding a lien senior to any part of the association lien created under this section of an action or a nonjudicial foreclosure either to enforce or to extinguish the lien. [Emphasis added.]	

2008 UCIOA. In 2008 NCCUSL proposed the following amendment to 3-116 of UCIOA[4]:

> SECTION 3-116. LIEN FOR ~~ASSESSMENTS;~~ SUMS DUE ASSOCIATION; ENFORCEMENT.
>
> (a) The association has a statutory lien on a unit for any assessment ~~levied against~~ attributable to that unit . . .. Unless the declaration otherwise provides, **reasonable attorney's fees and costs, other fees, charges, late charges, fines, and interest** charged pursuant to Section 3-102(a)(10), (11), and (12), and any other sums due to the association under the declaration, this [act], or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments under this section. If an assessment is payable in installments, the lien is for the full amount of the assessment from the time the first installment thereof becomes due.
>
> (b) A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> ~~(i)~~(1) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances ~~which~~ that the association creates, assumes, or takes subject to~~,~~;
>
> ~~(ii)~~(2) except as otherwise provided in subsection (c), 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 security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent~~,~~; and
>
> ~~(iii)~~(3) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> (c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of **both** the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien **and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien**. . . [Emphasis added.]

[4] The changes noted are to 1994 UCIOA.

New Comment No. 8 to 3-116 states as follows:

> 8. Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:
>
> **First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien'** – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b).[5] The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state. [Emphasis added.]

Discussion. The Colorado Court of Appeals and the author of the Wake Forest Law Review article quoted by the court in the *Sunstone* case both concluded that although 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. This language is the same as NRS 116.3116, which states that "fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments." As the *Sunstone* court noted "although the maximum amount of the super priority lien is defined solely by reference to monthly assessments, the lien itself may comprise debts other than delinquent monthly assessments."

[5] The statutory change noted by the Connecticut Supreme Court in the Hudson House case referred to above.

The referenced statute, NRS 116.3102, provides that an association has the power to:

> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
>
> (k) Impose charges for late payment of assessments pursuant to NRS 116.3115.
>
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
>
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
>
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

It is immediately apparent that the charges authorized by NRS 116.3102(1)(j) through (n) cover a wide variety of circumstances. The fact that "fees, charges, late charges, fines and interest" that may be included as part of the assessment lien under NRS 116.3116 include amounts unrelated to monthly assessments does not mean, however, that such amounts should not be included in the super lien if they do relate to the applicable super priority monthly assessments. It appears that only those association charges authorized under NRS 116.3102(1) Subsections (k) and a portion of (n) apply to the collection of unpaid assessments, i.e., Subsection (k)'s charges for late payment of

assessments and Subsection (n)'s charges for preparing any statements of unpaid assessments. Subsection (j)'s charges for use of common elements or providing association services, Subsection (l)'s construction penalties and Subsection (n)'s amendments to the declaration and providing resale information clearly do not relate to the collection of monthly assessments.

The inclusion of the word "fines" authorized by NRS 116.3102(1)(m) as part of the assessment lien presents an additional problem in Nevada. The "fines" referred to in NRS 116.3116/NRS 116.3102(1)(m) are fines authorized by NRS 116.31031. While fines may be imposed for "violations of the governing documents," which, of course, could include non-payment of assessments required by the governing documents, the hearing procedure mandated by NRS 116.31031 prior to the imposition of "fines" refers to an inquiry involving conduct or behavior that violates the governing documents, not the failure to pay assessments. Because "fines" involve conduct or behavior, enforcement of fines are given special treatment under NRS 116.31162:

> 4. The association may not foreclose a lien by sale based on a fine or penalty for a violation of the governing documents of the association unless:
>
> (a) The violation poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community; or
>
> (b) The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Thus, to use the words of the *Sunstone* court, the "plain language" of NRS 116.3116, when read in conjunction with NRS 116.3102(1) (j) through (n), supports the conclusion that the only additional amounts that can be included as part of the super priority lien in Nevada are "charges for late payment of

assessments pursuant to NRS 116.3115" and "reasonable charges for the preparation and recordation of . . . any statements of unpaid assessments." NRS 116.3102(1)(k),(n). Note that the reference in Subsection (k) to NRS 116.3115 appears to be solely for the purpose of identifying what is meant by the word "assessment," though NRS 116.3115(3) provides for the payment of interest on "Any assessment for common expenses or installment thereof that is 60 days or more past due...,"

Conclusion. The super priority language contained in UCIOA 3-116 reflected a change in the traditional common law principle that granted first priority to a mortgage lien recorded prior to the date a common expense assessment became delinquent. The six month priority rule contained in UCIOA 3-116 established a compromise between the interests of the common interest community and the lending community. The argument has been advanced that limiting the super priority to a finite amount, i.e., UCIOA's six months of budgeted common expense assessments, 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"[6] 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. We reach a similar conclusion in finding that Nevada law

[6] See New Comment No. 8 to UCIOA 3-116(2008) quoted above.

authorizes the collection of "charges for late payment of assessments" as a portion of the super lien amount.

In 2009, Nevada enacted NRS 116.310313, which provides as follows:

> **NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.**
>
> 1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
>
> 2. The provisions of this 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, an officer or employee of the association, a community manager or a collection agency.
>
> 3. As used in this section:
>
> (a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.
>
> (b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

Since Nevada law specifically authorizes an association to recover the "costs of collecting" a past due obligation and, further, limits those amounts, we conclude that a reasonable interpretation of the kinds of "charges" an association

may collect as a part of the super priority lien include the "costs of collecting" authorized by NRS 116.310313. Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

EXHIBIT 5

ORD
JOHN B. LEACH, ESQ.
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Attorneys for Spring Mountain Ranch Master Association

FILED
Dec 22 9 33 AM '06
CLERK

DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST

Plaintiff,

v.

SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP.;

Defendants.

Case No.: 06-A-523959-C
Dept. No.: V

ORDER

Hearing Date: November 28, 2006
Time: 9:00 A.M.

ORDER

The above-referenced matter having come before this Court, the Plaintiff being represented by Marty G. Baker, Esq. of The Cooper Castle Law Firm, and Defendant Spring Mountain Ranch Master Association (the "Association") being represented by John B. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, each party having briefed the issues, good cause appearing therefore and thereby no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Nevada Revised Statutes 116.3116(2), a portion of the Association's assessment lien has priority over the first deed of trust. This portion of the Association's assessment lien comprises the super-priority portion of the lien. The Association's assessment lien, with the exception of the super-priority portion of the lien, is extinguished by a foreclosure of the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association's super-priority claim shall include the following subitems:

(a) Six (6) months of the assessments for common expenses;

(b) Six (6) months of late fees imposed for non-payment of the assessments for common expenses;

(c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association's governing documents;

(d) The Association's costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and

(e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant Association's assessment lien has priority over the second deed of trust and any claims originating from the second deed of trust. *See* NRS 116.3116(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's super-priority claim, in the case at hand, to be paid by the Plaintiff to the Defendant Association is $1,969.08.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining balance of the Association's claim is $3,563.07, and that said claim has priority over all other claimants in this action.

...

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court shall issue a check payable to the Spring Mountain Ranch Master Association, in the amount of $9,565.07, which payment shall be issued from the funds previously deposited with the Court on October 4, 2006, by Miles, Bauer, Bergstrom & Winters, LLP, on behalf of the Intervenor, Reconstrust Company, N.A.

Dated this 20 day of December, 2006.

DISTRICT COURT JUDGE

Submitted by:

SANTORO, DRIGGS, WALCH, KEARNEY, JOHNSON & THOMPSON

JOHN H. LEACH, ESQ.
Nevada Bar No. 1225
TRACY A. GALLEGOS, ESQ.
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400 South Fourth Street, Third Floor
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Attorneys for Defendant Spring Mountain Ranch Master Association

Approved as to Form and Content:

THE COOPER CASTLE LAW FIRM

Ayala H. McPartland, Esq.
Marty O. Baker, Esq.
820 S. Valley View Blvd.
Las Vegas, NV 89107

Attorneys for Kerbal Family Trust

EXHIBIT 6

A-10-607051-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Title to Property	COURT MINUTES	February 16, 2011

A-10-607051-C Elkhorn Community Association, Plaintiff(s)
vs.
Mortgage Electronic Registration Systems Inc (Mers), Defendant(s)

February 16, 2011 3:00 AM Motion for Declaratory Relief

HEARD BY: Vega, Valorie J. COURTROOM: RJC Courtroom 16B

COURT CLERK: Nora Pena

PARTIES PRESENT: None

JOURNAL ENTRIES

- In this motion the Plaintiff is asking this Court to provide the parties and their counsel with guidance by providing answers to two legal questions.

Question #1. Does the Association have the right to bring a judicial foreclosure action before a court of proper jurisdiction in Nevada to satisfy the special priority portion of a lien for assessments authorized by NRS 116.3116 "SPL"?

Answer to Question #1: The Court finds that yes, it does pursuant to NRS Chapters 40 and 116 plus the relevant CC&R's (see also Article 6 Section 6.17 of said CC&R's) so long as the assessments were for common expenses based on the periodic budget adopted by the association (see also NRS 116.3116 (2)(c)).

Question #2. If the Association has the right to bring a judicial foreclosure action to satisfy its SPL, are the non-attorney fees and costs of collection accrued by the Association to bring the judicial foreclosure action considered a component part of the Association's super priority portion of the lien for assessments ("SPL")?

Answer to Question #2: The Court finds that yes, they would be covered by the very broad language selected by the legislature "of any charges incurred" pursuant to NRS 116.3116 (2) (c). This court further clarifies that this would also apply so as to include attorney fees; however, said attorney fees must be "reasonable attorney's fees" pursuant to Article 6, Section 6.1 of the CC&R's.

Due to the foregoing citations and findings, COURT ORDERED, Plaintiff's motion for Declaratory Relief GRANTED. Mr. Terry to prepare the order.

EXHIBIT 7

Electronically Filed
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CLERK OF THE COURT

OGM/JUDG
MARTIN & ALLISON LTD.
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Attorneys for Nevada Association Services, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

JP MORGAN CHASE BANK, N.A. a National Association,

Plaintiff,

vs.

COUNTRYWIDE HOME LOANS, INC., a New York corporation; COUNTRYWIDE WAREHOUSE LENDING, INC., a California corporation; CITIMORTGAGE, INC., a New York corporation; NV MORTGAGE, INC., a Nevada corporation d/b/a SOMA FINANCIAL; SOMA FINANCIAL, INC., a Nevada corporation; NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation; JOHNATHAN D. AMOS, an individual; MELISSA SMILEY a/k/a MELISSA AMOS, an individual, DOES 1 through 10, ROE CORPORATIONS 1 through 10, inclusive,

Defendants.

ALL RELATED CLAIMS.

CASE NO.: 08-A562678

DEPT.: XVI

ORDER AND JUDGMENT

Date: April 7, 2011
Time: 9:00 a.m.

Defendant Nevada Association Service, Inc.'s Motion for Determination of Priority Amount Including Attorney's Fees and Costs ("Motion") came on for rehearing on April 7, 2011. Debra L. Pieruschka, Esq. of Martin & Allison Ltd. appeared on behalf of Nevada Association Services, Inc. ("NAS"), Jason D. Smith, Esq. of Santoro, Driggs, Walch, Kearney, Holley & Thompson appeared on behalf of JP Morgan Chase Bank ("Chase"), and no other party or counsel having appeared at the

05-10-11

rehearing of this matter. The Court having reviewed the moving papers, opposition papers and reply papers submitted by counsel and hearing oral argument, good cause appearing, the Court issued a decision on April 8, 2011, and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. On August 27, 2010, this Court issued an order denying Chase's Motion for Summary Judgment and granting NAS's Countermotion for Summary Judgment in part, determining that NAS has a "super priority" position for no more than nine (9) months of assessments senior to Chase's equitable lien finding that:

a. The Property at issue in this matter is part of a common-interest ownership community. As such, NRS 116 governs the priority of NAS's lien over Chase's equitable lien.

b. NRS 116.3116(1) establishes NAS's statutory right to a lien for any assessments from the time they become due.

c. Pursuant to NRS 116.3116, recording of the Declaration by the Association constitutes record notice and perfection of the lien – no further recordation of any claim of lien is required.

d. NRS 116.3116(2) establishes the priority of NAS's liens against the Property. Specifically, NRS 116.3116(2) provides that NAS's lien is prior to all other liens and encumbrances except:

(1) a lien or encumbrance recorded prior to the recording of the Declaration of the association;

(2) a first security interest recorded before the date on which the assessment sought to be enforced became delinquent; and

(3) liens for real estate taxes and other governmental assessments.

e. NRS 116.3116(2) further provides NAS with a limited priority even over a first security interest recorded against the property for nine (9) months of assessments that would have become due immediately preceding institution of an action to enforce the lien.

f. Chase's equitable lien attached to the property on August 9, 2007 when its Deed of Trust was recorded against the property.

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2. The Court further directed NAS to submit further briefing to the Court to determine the extent and amount of NAS' "super priority" lien that it has against the subject property, including the issue of attorney's fees and costs.

3. After briefing by both parties, on September 16, 2010 this Court held oral arguments regarding the amount of NAS' "super priority" lien amount and granted NAS' Motion in part and denied it in part.

4. The Court found that pursuant to NRS 116.3116(2) an association has a "super priority" position over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.

5. The Court further found that pursuant to NRS 116.310313 an association can recover as part of its collection costs reasonable attorney's fees and costs associated with enforcement of its assessment lien. The Court noted, however, that an analysis must be performed by the Court to determine the reasonableness of the attorney's fees using the factors articulated in Brunzell v. Gold Gate National Bank, 85 Nev. 345, 349 (1969).

6. The Court further found that pursuant to NRS 116.3116(2) an association can recover as part of its "super priority" lien amount collection costs associated with enforcement of its assessment lien.

7. As such, the Court granted NAS' Motion, in part, and awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $5,909.91 out of the $23,480.16 requested in delinquent assessments. The Court further awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $6,000.00 out of the $49,035.28 for reasonable attorney's fees and costs as part of its collection costs.

8. The Court, however, denied NAS the following requested portions of its "super priority" lien amount because it failed to provide adequate documentation to support the claim:

(a) $135.00 out of the total amount of $525.00 in late fees relating to the nine (9) months of delinquent assessments as permitted by NRS 116.3116;

(b) $1,352.00 for collection costs related to the nine (9) months of delinquent assessments as permitted by NRS 116.310313 and NRS 116.3116; and

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(c) $43,035.28 in legal fees as part of its collection costs related to the collection of the "super priority" amount as permitted by NRS 116.310313 and NRS 116.3116.

9. On October 28, 2010, NAS filed a Motion for Partial Reconsideration of the Court's October 4, 2010 Order denying NAS its full collection costs including attorney's fees and costs pursuant to NRS 116.3116.

10. After supplemental briefing by the parties, on February 17, 2011, the Court granted NAS' Motion for Partial Reconsideration.

11. On April 7, 2011, after further supplemental briefing by the parties, the Court entertained oral arguments by Counsel.

12. The Court concluded that NAS can recover as part of its "super priority" its costs associated with enforcement of the Association's assessment lien including late fees and collection costs pursuant to NRS 116.3116(1) and (2).

13. The Court found that NAS properly supported its claim for $135.00 in late fees relating to the nine (9) months of delinquent assessments, pursuant to NRS 116.3116(1).

14. The Court further found that NAS properly supported its claim for $1,352.00 in collection costs relating to the nine (9) months of delinquent assessments but disallowed $743.00 of the requested $1,352.00 because $743.00 related to costs incurred by NAS after the lawsuit was filed to enforce any past due obligation and are, thus, precluded by statute.

153. The Court further found that NAS properly supported its claim for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien, pursuant to NRS 116.3116(7).

16. NAS's documented attorney's fees in the amount of $47,400.00 meet the Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349 (1969) factors. That based on the qualities of the advocate, the character of the work to be done, the work actually performed by the lawyer, and the result obtained, the amount of attorney's fees and costs to be included as part of NAS' collection costs relating to its "super priority" lien amount are reasonable and necessary.

///

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ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that NAS' Motion for Determination of NAS' Priority Amount Including Attorney's Fees and Cost is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that NAS's "super priority" lien amount totals $55,689.19 comprised as follows:

(1) An award of $5,909.91 for nine (9) months of delinquent assessments, pursuant to NRS 116.3116;

(2) An award of $135.00 in late fees relating to the nine (9) of delinquent assessments, pursuant to NRS 116.3116;

(3) An award of $609.00 in collection costs, pursuant to NRS 116.310313 and NRS 116.3116;

(4) An award of for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien as collection costs, pursuant to NRS 116.3116(7), NRS 116.310313, and NRS 116.3116.

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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 No. 63178 District Court Case No. A-11-647850-B

APPELLANT'S APPENDIX

VOLUME 3 OF 11

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Ex.	Pleading	Date	Vol.	Pages
2	Answer to Complaint	11/3/2011	I	0099-0105
16	Appendix of Exhibits to Defendant's Motion for Clarification or, in the alternative, for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	2/6/2012	V	1002-1172
7	Business Court Order	12/8/2011	IV	0781-0785
1	Complaint	9/6/2011	I	0001-0098
49	Correspondence dated 3/28/13 re: Proposed Final Judgment	4/10/2013	X	2114-2140
10	Court Minutes: Decision re: Plaintiff's Motion for Partial Summary Judgment & Defendant's Countermotion	12/16/2011	IV	0833-0834
9	Court Minutes: All Pending Motions	12/12/2011	IV	0831-0832
27	Court Minutes: All Pending Motions	3/12/2012	VII	1538-1539
34	Court Minutes: All Pending Motions	5/7/2012	VIII	1755
38	Court Minutes: All Pending Motions	6/11/2012	IX	1888
63	Court Minutes: All Pending Motions	6/3/2013	XI	2464
48	Court Minutes: Bench Trial	3/12/2013	X	2112-2113
46	Court Minutes: Calendar Call	2/19/2013	IX	2101
30	Court Minutes: Decision	3/28/2012	VII	1550
40	Court Minutes: Decision	6/22/2012	IX	1893
11	Court Minutes: Mandatory Rule 16 Conference	1/9/2012	IV	0835-0836
25	Court Minutes: Minute Order	3/7/2012	VII	1511-1512
64	Court Minutes: Minute Order – Decisions re: 6/3/13 Motion for Attorney Fees and Costs	6/28/2013	XI	2465
43	Court Minutes: Motion for Reconsideration	7/12/2012	IX	2081-2082
60	Court Minutes: Motion to Retax	5/28/2013	XI	2427
29	Decision	3/28/2012	VII	1547-

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				1549
39	Decision	6/22/2012	IX	1889-1892
65	Decision	6/28/2013	XI	2466-2470
56	Defendant's Case Appeal Statement	5/8/2013	X	2328-2331
70	Defendant's Case Appeal Statement	9/5/2013	XI	2505-2508
15	Defendant's Motion for Clarification or, in the alternative, for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	2/6/2012	V	0975-1001
37	Defendant's Motion for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	6/8/2012	VIII-IX	1774-1887
52	Defendant's Motion to Retax Costs	4/25/2013	X	2173-2186
69	Defendant's Notice of Appeal and Notice of Related Case	9/5/2013	XI	2485-2504
55	Defendant's Notice of Appeal and Notice of Related Cases	5/8/2013	X	2253-2327
57	Defendant's Notice of Filing Cost Bond on Appeal	5/10/2013	X	2332-2337
59	Defendant's Opposition to Motion for Attorney's Fees and Costs	5/24/2013	XI	2377-2426
5	Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment and Counter-Motion for Summary Judgment	11/30/2011	III-IV	0544-0756
18	Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Counter-Motion for Summary Judgment	2/14/2012	VI-VII	1181-1433
33	Defendant's Opposition to Plaintiff's Third Motion for Summary Judgment / Countermotion for Summary Judgment	4/25/2012	VIII	1668-1754
23	Defendant's Reply In Support of Motion for Clarification or, in the alternative, Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	3/6/2012	VII	1486-1507

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42	Defendant's Reply in Support of Motion for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	7/9/2012	IX	1952-2080
36	Defendant's Reply Memorandum in Support of Countermotion for Summary Judgment	6/4/2012	VIII	1766-1773
22	Defendant's Reply to Plaintiff's Opposition to Defendant's Counter-Motion for Summary Judgment	3/6/2012	VII	1477-1485
50	Final Judgment	4/11/2013	X	2141-2168
53	Final Judgment	5/1/2013	X	2187-2212
17	Joint Case Conference Report	2/10/2012	VI	1173-1180
47	Joint Pre-Trial Memorandum	3/11/2013	IX	2102-2111
68	Judgment	8/18/2013	XI	2481-2484
54	Motion for Attorney Fees and Costs	5/2/2013	X	2213-2252
66	Order Denying Motion to Retax Costs	7/3/2013	XI	2471-2475
32	Order Denying Plaintiff's Motion for Summary Judgment/Order Granting Defendant's Countermotion for Summary Judgment	4/16/2012	VIII	1661-1667
71	Order for Return of Monies on Deposit	9/9/2013	XI	2509-2510
28	Order re: Defendant's Motion for Clarification	3/16/2012	VII	1540-1546
45	Order re: Defendant's Motion for Reconsideration of Order Granting Summary Judgment on Claim of Declaratory Relief	7/24/2012	IX	2095-2100
67	Order re: Plaintiff's Motion for Attorney Fees and Costs and Defendant's Motion to Retax Costs	7/23/2013	XI	2476-2480
14	Order re: Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief	1/19/2012	V	0967-0974

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	and Defendant's Counter Motion for Summary Judgment on Claim of Declaratory Relief			
44	Order re: Plaintiff's Motion for Summary Judgment on Declaratory Relief and Defendant's Counter-Motion for Summary Judgment	7/20/2012	IX	2083-2094
13	Order re: Rule 16 Conference	1/18/2012	V	0964-0966
24	Order Setting Civil Non-Jury Trial and Calendar Call	3/6/2012	VII	1508-1510
51	Plaintiff's Memorandum of Costs and Disbursements	4/16/2013	X	2169-2172
4	Plaintiff's Motion for Partial Summary Judgment on Issue of Declaratory Relief	11/7/2011	I-III	0108-0543
12	Plaintiff's Motion for Summary Judgment	1/16/2012	IV-V	0837-0963
31	Plaintiff's Motion for Summary Judgment on Issue of Declaratory Relief	3/30/2012	VII-VIII	1551-1660
19	Plaintiff's Opposition to Motion for Clarification or in the alternative for Reconsideration of Order Granting Summary Judgment	2/27/2012	VII	1434-1472
41	Plaintiff's Opposition to Motion for Reconsider [sic] of Order Granting Summary Judgment on Claim of Declaratory Relief	6/27/2012	IX	1894-1951
58	Plaintiff's Opposition to Motion to Retax Costs	5/23/2013	X-XI	2338-2376
62	Plaintiff's Reply to Opposition to Motion for Attorney Fees and Costs	5/29/2013	XI	2444-2463
35	Plaintiff's Reply to Opposition to Motion for Partial Summary Judgment on Issue of Declaratory Relief & Opposition to Counter Motion for Summary Judgment	5/18/2012	VIII	1756-1765
3	Plaintiff's Request to Transfer to Business Court	11/4/2011	I	0106-0107
61	Plaintiff's Supplement to Memorandum of Costs and Disbursements	5/29/2013	XI	2428-2443
26	Recorder's Transcript of Proceedings: Plaintiff's Motion for Summary	3/12/2012	VII	1513-1537

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	Judgment/Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Countermotion for Summary Judgment			
6	Reply to Opposition to Motion for Partial Summary Judgment on Issue of Declaratory Relief & Opposition to Counter Motion for Summary Judgment	12/7/2011	III-IV	0757-0780
21	Scheduling Memo	2/28/2012	VII	1476
20	Scheduling Order	2/28/2012	VII	1473-1475
8	Transcript of Proceedings: Motions	12/12/2011	IV	0786-0830

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Ex. 22

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
March 6, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:12 a.m. on Friday, March 6, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

Assemblyman Richard McArthur (excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Joseph M. Hogan, Clark County Assembly District No. 10
Assemblywoman Ellen Spiegel, Clark County Assembly District No. 21

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Nick Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Robert Gonzalez, Committee Secretary
Nichole Bailey, Committee Assistant

OTHERS PRESENT:

Pam Borda, President and General Manager, Spring Creek Association, Spring Creek, Nevada
Stephanie Licht, Private Citizen, Spring Creek, Nevada
Warren Russell, Commissioner, Board of Commissioners, Elko County, Nevada
Michael Buckley, Commissioner, Las Vegas, Commission for Common-Interest Communities Commission, Real Estate Division, Department of Business and Industry; Real Property Division, State Bar of Nevada
Robert Robey, Private Citizen, Las Vegas, Nevada
Barbara Holland, Private Citizen, Las Vegas, Nevada
Jon L. Sasser, representing Washoe Legal Services, Reno, Nevada
Rhea Gerkten, Directing Attorney, Nevada Legal Services, Las Vegas, Nevada
James T. Endres, representing McDonald, Carano & Wilson; and the Southern Nevada Chapter of the National Association of Industrial and Office Properties, Reno, Nevada
Paula Berkley, representing the Nevada Network Against Domestic Violence, Reno, Nevada
Jan Gilbert, representing the Progressive Leadership Alliance of Nevada, Carson City, Nevada
David L. Howard, representing the National Association of Industrial and Office Properties, Northern Nevada Chapter, Reno, Nevada
Ernie Nielsen, representing Washoe County Senior Law Project, Reno, Nevada
Shawn Griffin, Director, Community Chest, Virginia City, Nevada
Charles "Tony" Chinnici, representing Corazon Real Estate, Reno, Nevada

Jennifer Chandler, Co-Chair, Northern Nevada Apartment Association, Reno, Nevada
Rhonda L. Cain, Private Citizen, Reno, Nevada
Kellie Fox, Crime Prevention Officer, Community Affairs, Reno Police Department, Reno, Nevada
Bret Holmes, President, Southern Nevada Multi-Housing Association, Las Vegas, Nevada
Zelda Ellis, Director of Operations, City of Las Vegas Housing Authority, Las Vegas, Nevada
Jenny Reese, representing the Nevada Association of Realtors, Reno, Nevada
Roberta A. Ross, Private Citizen, Reno, Nevada
Bill Uffelman, President and Chief Executive Officer, Nevada Bankers Association, Las Vegas, Nevada
Alan Crandall, Senior Vice President, Community Association Bank, Bothell, Washington
Bill DiBenedetto, Private Citizen, Las Vegas, Nevada
Michael Trudell, Manager, Caughlin Ranch Homeowners Association, Reno, Nevada
Lisa Kim, representing the Nevada Association of Realtors, Las Vegas, Nevada
John Radocha, Private Citizen, Las Vegas, Nevada
David Stone, President, Nevada Association Services, Las Vegas, Nevada
Wayne M. Pressel, Private Citizen, Minden, Nevada

Chairman Anderson:
[Roll called. Chairman reminded everyone present of the Committee rules.]

We have a rather large number of people who have indicated a desire to speak. We have three bills which must be heard today, so we will try to allocate a fair amount of time to hear from those both in favor and against so that everybody has an opportunity to be heard.

Ms. Chisel, do we have a handout from legislation we saw yesterday?

Jennifer M. Chisel, Committee Policy Analyst:
Yesterday we heard Assembly Bill 182, which was brought to the Committee by Majority Leader Oceguera. During that conversation, Lieutenant Tom Roberts indicated that he would provide to the Committee a list of the explosive materials that is in the Federal Register. That has been provided to the Committee, and that is what is before you (Exhibit C).

Chairman Anderson:
Mr. Gustavson, I think this was part of the concerns you raised. You wanted to see the specific prohibited materials. With that, Mr. Carpenter, I think we are going to start with your bill. Let me open the hearing on Assembly Bill 207.

Assembly Bill 207: Makes various changes concerning common-interest communities. (BDR 10-694)

Assemblyman John C. Carpenter, Assembly District No. 33:
Thank you, Mr. Chairman and members of the Committee.

[Read from prepared text, Exhibit D.]

Chairman Anderson:
The amendment (Exhibit E) is part of the copy of Mr. Carpenter's prepared testimony. Are there any questions on the amendment? No? Is there anyone else to speak on A.B. 207?

Pam Borda, President and General Manager, Spring Creek Association, Spring Creek, Nevada:
Thank you, Mr. Chairman and members of the Committee. I am the President and General Manager of the Spring Creek Association (SCA). We have existed for about 38 years, long before the Ombudsman Office was even thought about. When it was created in 1997 and then broadened in 1999, we were exempted from that office and from its fees. In 2005, there was a change to legislation, which compelled us to pay fees, but still exempted us from the services of the Ombudsman Office. We are here today to ask you to change it back and exempt us from paying those fees because we do not utilize their services. We have been taking care of our own problems in Spring Creek for 38 years, and we are pretty good at it. We do not believe we need the services of the Ombudsman Office, and therefore should not be paying fees to them. I have provided you with a handout with a lot of information about the history of Spring Creek. The biggest issue I would like to portray today is that, while this may not seem like a lot of money, our deed restrictions limit the amount that our assessments can be raised, unlike a lot of other homeowners' associations (HOA). Any raise in cost to us generally means we need to cut something out of our budget. If you can imagine, we have 158 miles of road that we are responsible for maintaining, which costs hundreds of thousands of dollars a year. We are not even doing the job that we need to do. This year, for example, we had to cut $500,000 out of our budget because of a 110 percent increase in our water rates and other utilities. The impact of the Ombudsman fees means that, if we have to pay those fees, we will be cutting out some other service to our homeowners.

Chairman Anderson:
Ms. Borda, you do not use the Ombudsman, at least you have not to date? You are precluded from using the Ombudsman?

Pam Borda:
We are exempt from it, yes.

Chairman Anderson:
That is because you have chosen not to avail yourself of the use of that office?

Pam Borda:
Yes, we have been exempt from it since the office was created.

Assemblywoman Dondero Loop:
I have actually been to Spring Creek many times visiting your schools. You mentioned 5,420 lots. Is this how many homes are actually up there, or simply lots?

Pam Borda:
That is referring to the number of lots. We are at 74 percent capacity.

Stephanie Licht, Private Citizen, Spring Creek, Nevada:
I have been a resident of Spring Creek HOA since September 1987. My first husband was Chairman of the Board for quite a few years in the early 1990s. I have been through eight different general managers, so I have some history of the particular problems that are related to the Association. All of those have been solved by things that are in place in our board—the way they conduct themselves, and the way the Committee of Architecture conducts themselves. Basically, we have taken care of our own problems for 38 years. If you look on the Ombudsman's page on the website, most of the things they deal with are arbitration and disputes between a homeowner and an overzealous board. We do not feel that we should fall under the Ombudsman, primarily because we are quite different from other HOAs. Mr. Chairman, I have brought with me a low-tech visual. If you will allow me to show a map, I would appreciate it.

This map is on loan from the Nevada Department of Transportation. In the upper left hand corner is just part of the mobile home section. The line transecting most of the center of that is Lamoille Highway. You can see that the lots are quite spread out. In fact, we abut a rancher's place on the right. All of our lots are over an acre, and are spread out all over. I think that part of Chapter 116 of *Nevada Revised Statutes* (NRS) at one time requested gated communities. The only way we could do that is by blocking off the state route with a toll gate, I guess. We are spread over most of 25 to 30 square miles.

We cover 19,000 acres that are interspersed with a lot of different kinds of things, some common and some private or federal. You can see some of the common elements in that, but there is quite a bit of Bureau of Land Management (BLM) property that surrounds us. There are some private areas in between. Some of what you see on the map are other small developments. We are just not like the other HOA properties, which are so close to one another.

Pam Borda:
We have four different housing tracts of land in the Spring Creek Association. It covers 30 square miles, and we have 158 miles of road.

Stephanie Licht:
I would be happy to answer any questions.

Assemblyman Horne:
What is to stop other associations from coming to the Legislature and asking to be exempted because they are not like others? Is this not a slippery slope? You say it is different because you are rural and, I think you said, "we take care of ourselves," and you are spread out over 30 square miles. Next time it could be another association with other dynamics who will want to be excluded.

Pam Borda:
That is a good question. The answer would be that our Conditions, Covenants and Restrictions (CC&Rs) are not restrictive like the typical HOA. We do not care what color someone paints his house, or what kind of fence he puts in. It is truly a rural environment where we do not make a lot of rules about how people live. They move out there to be left alone and to live as they choose. You will find that the typical HOA is extremely restrictive and makes more rules for homeowners and how they live. That is one of the primary differences between a rural agricultural HOA and an urban HOA.

Warren Russell, Commissioner, Board of Commissioners, Elko County, Nevada:
Thank you, Mr. Chairman. Two-thirds of my district, which is the Fifth District, is part of the Spring Creek HOA. I try to attend at least half the meetings by the SCA Board, both as a commissioner and as official liaison from the Elko County Commission. We continue to have a very close working relationship with this group. I support this bill, and everything that has been said before.

Chairman Anderson:
Commissioner Russell, are there services that the county provides in that area in which the HOA is treated differently than other organizations? Is that the only HOA you have in the county?

Warren Russell:
No, sir, that is not the only HOA in the county. We subsidize the road program throughout the HOA. The HOA is subject to codes and resolutions that we have established. Many of the issues that might arise for the residents who live in isolated areas would probably have no other recourse for resolution except through the HOA. There might be limited options for recourse pertaining to the laws of the county.

Chairman Anderson:
Do you have a similar relationship with other HOAs in the county in that you maintain their roads?

Warren Russell:
We do not maintain the roads of other HOAs. We do not maintain the roads in the Spring Creek HOA, either. We provide a subsidy.

Chairman Anderson:
Do you have any influence in deciding infrastructural questions such as the upkeep and development of roads, inasmuch as your budget is affected?

Warren Russell:
As a county, our budget would not be affected by this bill. The SCA would be affected. Our primary relationship would revolve around the use of the right-of-ways. All the roads have already been established in SCA, so we are not looking to develop new roads. That would be an exception rather than the rule.

Chairman Anderson:
You are misinterpreting the question. Obviously, this is going to be an economic advantage to SCA. Given the peculiar nature of this relationship between the county and SCA, is there any time when the SCA can place upon the county an economic demand without the input of the county? If the SCA wanted to build additional roads, would they not have to come to the county to gain approval since it is an additional cost to the county?

Warren Russell:
I think that it would be a voluntary decision if there were additional fiscal costs to the county associated with building new roads in Spring Creek. For example,

there are additional units that have decided to connect to utilities and roads that are outside of Spring Creek. That issue is handled by the SCA in a satisfactory manner in coordination with Elko County. I would say there is no impact to the county, but rather it falls upon the residents of Spring Creek, and the tax base in a general way.

Chairman Anderson:
I see no other questions. Thank you very much.

Michael Buckley, Commissioner, Las Vegas, Commission for Common-Interest Communities Commission, Real Estate Division, Department of Business and Industry; Real Property Division, State Bar of Nevada:
The Commission has no objection to the bill that would take these associations out of paying the ombudsman's fee.

Chairman Anderson:
Has the Commission taken a position regarding the loss of revenue that would stem from passage of A.B. 207?

Michael Buckley:
At the Commission meeting on March 2, 2009, we were advised that the compliance department of the Division had not ever had problems with Spring Creek. In that sense, there was never a use of the ombudsman facilities. We did not discuss the loss of revenue.

Chairman Anderson:
That is the heart of the bill. They have always been exempt from your oversight. Now, what they are saying is, "we should not be paying for it."

Michael Buckley:
Mr. Chairman, I think that is right. They have not been paying it in the past. They paid it only one year, I think. The loss would not affect the Ombudsman office.

Chairman Anderson:
Thank you, Mr. Buckley. Are there any questions? Thank you, sir. Is there anyone else compelled to speak in support of A.B. 207?

Robert Robey, Private Citizen, Las Vegas, Nevada:
I am supporting A.B. 207. I found the most interest in the idea of the open meeting law being applied. I wish that applied to all HOAs. I feel that HOAs are taxing authorities. We put assessments on people that they have to pay.

Chairman Anderson:
We are distributing the amendment that was faxed here just before we started today (Exhibit F). Did you have an opportunity to discuss this with Mr. Carpenter, Mr. Robey?

Robert Robey:
No, sir, I did not.

Assemblyman Carpenter:
I am aware that there are some people who want all associations to be under the open meeting law, but I think that would need discussion with all the people involved. All I know is that it works well at Spring Creek. Whether it would work with all the other associations, I am not in a position to say at this time.

Chairman Anderson:
It sounds as if the maker of the bill does not perceive this as a friendly amendment, Mr. Robey. The question of open meeting may require a longer discussion. The Chair will be placing several bills dealing with common-interest communities in a subcommittee. There are several bills that deal with that, and all of those will be worked out. If you would like, I will add your amendment to their responsibilities to include in the general law, rather than the specific law in this particular piece of legislation. If you would like to pursue it, I would be happy to put it in the work session and put it in front of the Committee. Your choice, sir.

Robert Robey:
I appreciate the time that you took to respond to me. Whatever you think is the wisest and best. I think that the open meetings are very important.

Chairman Anderson:
I do not disagree with you. It would be one of the recommendations that we would want to make to this piece of legislation to deal with all the common-interest communities. I do not disagree with the concept of having an open meeting law. Thank you.

We will not hold it for the work session on this particular piece of legislation unless a member of the Committee wants me to put it into the work session document. Two people have indicated to me a desire to serve on the common-interest community subcommittee. It is my intention to put in the recommendation for open meetings.

Anybody else feel compelled to speak on A.B. 207? Anyone in opposition?

Barbara Holland, Private Citizen, Las Vegas, Nevada:
Looking at number one, which exempts HOAs from paying the $3, you ask if there would be an impact on the Ombudsman Office. I can tell you right now, it would probably not have an impact. The Ombudsman Office has never had an audit. The $3 per unit per year is substantially more than what they actually need, so if we are going to exempt people from paying the $3, maybe we should look at reducing the $3 for everybody to a different number. I think it is about time the Legislature does something as far as auditing the Ombudsman Office. Number two, the last legislative session, the Legislature approved electronic mail. We can use the computer age electronic mail, which is still available for rural areas, to facilitate open meetings and to reduce scheduling costs. The law allows HOAs to create one newsletter, which they can create at the very beginning of the year, and list every single meeting time, thereby avoiding additional costs associated with the mailing of notices of their meetings.

Let us talk about the reserves. Assembly Bill No. 396 of the 74th Session, for which the Governor's veto was upheld, also had a section that talked about the reserve study. It talked about the counties with fewer than a certain number of people should be exempt from paying fees. I think the slippery slope is a very dangerous situation with many inequities. We have many small HOAs, and right now in southern Nevada, where we have a lot of foreclosures, they would love to be exempt from paying $3 to the Real Estate Division. As to reserve studies, I will let you know that these reserve studies cost an average of about $1,200 a year.

Chairman Anderson:
Ms. Holland, I do not believe the issue of reserve studies is in this bill.

Barbara Holland:
I am reading where they would be exempt from conducting a reserve study, as per item number 3.

Chairman Anderson:
So, you are speaking against this particular group.

Barbara Holland:
That is exactly correct, sir. I am against the exemption of HOAs from paying $3 for the ombudsman fee because: One, I think you can argue that there are many other types of properties that should be exempt. There is a need for an audit, because I think that $3 is too much. Two, the electronic mail that I mentioned would facilitate the open meeting laws. Three, HOAs should notify homeowners once a year about meetings. Because they do not have many of

the improvements that we have here in the urban areas, whether they are high-rises, condominiums, townhomes, and so forth, the average reserve study costs $1,200. That reserve study is done once every five years. There is absolutely no reason why they cannot budget for this. One of the Assembly members said something to the effect that, if we allow this exemption, there are many other associations that can come back with their own idiosyncrasies. I agree with this sentiment. Though Spring Creek may have 5,000 lots, there are some large associations in southern Nevada, in the thousands already, that could certainly look for having a reduction in their costs. We have a lot of planned urban developments (PUD) that are single-family homes. There are many associations that are not over-regulated, especially the PUDs. I certainly have many associations that have never been before the Ombudsman Office. We have a very clean record; we try to resolve all of our problems, too. The whole concept of NRS Chapter 116 was to be able to protect the members of the public. I am very glad they do not have any troubles today. People from the county areas other than Clark County have written letters to me about their issues for the column I write in southern Nevada on HOAs.

Chairman Anderson:
Thank you, Ms. Holland. Is there anyone else who wishes to speak in opposition? Is there anyone who is neutral? Let me close the hearing on A.B. 207. We will now turn to Assembly Bill 189.

Assembly Bill 189: Revises provisions governing the eviction of tenants from property. (BDR 3-655)

I will turn the Chair over to Vice Chair Segerblom.

Vice Chair Segerblom:
Is the sponsor for A.B. 189 ready? I will open the hearing on A.B. 189.

Assemblyman Joseph M. Hogan, Clark County Assembly District No. 10:
Good morning, Vice Chair Segerblom. Good to see you this morning.
[Read from prepared testimony (Exhibit G); submitted (Exhibit H) and (Exhibit I).]

Vice Chair Segerblom:
Thank you, Mr. Hogan. Mr. Sasser?

Jon L. Sasser, representing Washoe Legal Services, Reno, Nevada:
I appear today in support of A.B. 189. By way of background, I have been involved in the Nevada Legislature since 1983. I have testified on each landlord-tenant bill that has come before this body since that time. This is the third time I have been involved in an attempt to expand the time frames in this

process. The first time was in 1983, when Congresswoman Shelley Berkley (then Assemblywoman, 1983-1984) sponsored a bill that we got through the Assembly, but died in the final days of the session in the Senate. It would have wiped out our summary eviction process entirely, and created a normal summons and complaint process. Then, in 1995, I was involved with a bill to expand the time frame again. I am back today, and my hope is that the applicable cliché is "the third time is a charm," rather than "three strikes and you're out." I represent two legal services organizations that represent tenants in this eviction process. Rarely do we have the luxury of representing tenants in court. Most of the time, we provide advice and brief service, and help with some pro se forms.

The number of evictions in Nevada is staggering. I have given you some statistics in my written testimony (Exhibit J). For example, in a Las Vegas Justice Court, they have 23,000 evictions filed each year. As you know, there are many good tenants, and some bad tenants. There are also many good landlords and a few bad ones. There are some transient tenants that have little contact with our state, and there are some huge apartment complexes owned by out-of-state landlords who also care little about Nevada. There is much mud that can be thrown in both directions. You will probably hear some of that mud today, unfortunately. However, I ask you to stay above the fray and look at the process dispassionately and try to decide if the process is fair or if it needs change.

Nevada's eviction procedures, as Assemblyman Hogan mentioned, are among the fastest in the country. You have been given a wonderful chart prepared by the Legislative Counsel Bureau (LCB) research staff showing the process in the western states around us. You will see that there are three stages in the process. The first is, prior to any court action, there is a notice that must be given from a landlord to a tenant telling him to do something: pay rent, get out, to cure a lease violation, or to be out after a certain period of time if there is an alleged nuisance. Our time frames are in-line with other states there. Some are actually a little bit shorter. California was mentioned with 3 days for nonpayment of rent, whereas we have 5 days.

The next stage is the court process. That is where Nevada is truly unique. As mentioned in a nonpayment of rent case, you get a five-day notice to pay or quit, or, if you are going to contest the matter, file an affidavit with the court. If you file an affidavit, a hearing is scheduled the next day. If you do not file an affidavit, then on noon of the fifth day, the landlord can go down and get an order removing the tenant within 24 hours. If you lose that hearing the day after you file your affidavit, you again can be evicted within 24 hours. That, too, is unique in Nevada. If you look at the chart provided to you, in all of the

other states, there are somewhere between 2 to 7 days that the sheriff has to put you out at the end of the process, instead of within 24 hours as it is in Nevada. Also, in every other state, there is a regular lawsuit filed, a summons and complaint, where the defendant can either file an answer within a certain period of time, or the summons and complaint contains a court date, which is usually 7 days or more until there is an actual hearing. So the speed in our process is in step two and in step three. Because the summary eviction process is well-rooted in Nevada, we have not proposed changing that. Instead, we ask you to add some time on the front end. We think that would be very helpful in a number of cases. It might even avoid eviction. If a tenant has 10 days instead of 5 days to try and raise the rent, and they pay it, then the landlord is better off and the court system is better off. An eviction has been avoided, and the rent has been paid. Nowadays, with people who had a job two months ago and are now trying to live on unemployment compensation, for example, juggling those bills, that extra time can often make a crucial difference. Also, we have a few programs around the state that offer some rental assistance to tenants in this situation. Unfortunately, those are few and far between. Their processes take some time to go through, and frequently the programs do not have enough money. For example, calls to the Catholic Community Services in Reno indicate they get 300 applications a month, and they have only enough money to help about 10 to 12 families each month. The rest are out of luck.

Let me walk you through the bill. First, in section 1, we are expanding the nonpayment of rent notice from 5 to 10 days. In section 2, we are expanding from 3 to 5 days the notice for waste or nuisance. Section 3 talks about a breach of lease. Today, you get a 5-day notice. You have 3 days to cure that breach, and then you have to be out 2 days later. We would change that from 7 to 10, and I have provided in my testimony some comparison to other states in our region and around the country. Section 4 goes into the eviction process itself in the statute. It repeats the change from 5 to 10 days for nonpayment of rent, expands from the eviction within 24 hours to 5 days. Then there is another section, for which I have received a number of calls. It might inadvertently create a problem, if the Committee chooses to process this bill. It might need to be looked at and some issues resolved. There is an unusual problem sometimes in the courts where a 5-day notice is given. A tenant goes down the next day and files his answer. Then, he gets a hearing 1 day later. If he loses, he is out within 24 hours. He is out before the rent is actually due under the 5-day notice to pay or quit. The way this bill is drafted, it would propose to give the tenant up to the end of the 5-day period to actually pay the rent. I have received some concern from the constables' offices in southern Nevada, that this may create a problem with them if they have a notice in hand. How do they know the rent was paid? There are complications contacting the constable and stopping them in their tracks. Court clerks have expressed some

concern. How do they know this receipt for the rent that the tenant brings is a legitimate receipt? I think that does create some logistical complications. I have some ideas about how that might be solved, and would like an opportunity, if you go forward, to meet with the parties, and we can resolve that one.

On the next two sections of the bill, the bill drafter went a little further and gave the tenants a little more than we had originally contemplated. I am glad to have that, of course, but I would say upfront that it gave us more than what we contemplated. It amends *Nevada Revised Statutes* (NRS) 40.254, which deals with evictions that are from other than nonpayment of rent. Now the time frame is, at the end of their notice period, say a 30-day notice for a no-fault eviction. The landlord then gives a 5-day notice to tell the tenant to be out or to file an affidavit with the court. The bill extends that to 10 days. That is wonderful, but it is not what we had asked for originally. I am not pressing that at this time. You have already had your 30 days, you have already had your 5 days, and it is stretching it a little bit to ask for 10 days instead.

Also there is an amendment in the bill to NRS 40.255 that deals with evictions, post-foreclosure sale. That is the subject of another bill in the Commerce Committee, Assembly Bill 140 that expands the time frame for single-family dwellings to 60 days. This bill, as drafted, would change it from 3 to 5 days. Again, that would affect those who are in a sale situation or in a foreclosure sale situation. That would be nice, but it is not something that we specifically asked for. We have also been approached by Jim Endres, who has called our attention to the fact that the way the bill is drafted, it may affect commercial property as well as residential property. It was certainly not our intention to change the law as to commercial property. I believe he has offered an amendment that I believe the sponsor of the bill has seen. I do not want to speak for him, but I have no problem with it. Finally, we believe the time has come to level the playing field. This is a value difference between my friends, the realtors, and me. Normally, we can work things out over the years, but I think things are out of balance and in favor of the landlords in Nevada. The playing field needs to be leveled, as compared to these other states. They do not feel this is the case. I ask you again to rise above the fray and look at the fairness of the process to decide, and I ask you to pass A.B. 189 as may be amended in work session. Thank you, Mr. Vice Chair.

Vice Chair Segerblom:
Thank you, Mr. Sasser. Could you briefly walk through the typical time frame of eviction? Say I have rent due the first of the month, and I do not pay it. These dates get a little confusing. Please go through the different stages.

Jon Sasser:
I would be happy to, Mr. Vice Chair. If my rent is due on the first of the month, and I do not pay on the first, and it is now the second of the month, the landlord has the legal right to give me a 5-day notice to pay or quit my rent by noon of the fifth day after the receipt of that notice.

Vice Chair Segerblom:
Let me stop you there. The law seems to say 3-day notice. Is that a different 3 days?

Jon Sasser:
For nonpayment of rent, the notice is 5 days. There are other notices that we are affecting as well: notice for breach of lease, and notice for nuisance and waste. But for nonpayment of rent, we propose to change the current 5-day limit to 10 days. Again, going back to the current law, at noon on the fifth day, if the tenant has not filed an affidavit, paid the rent, or left, then the landlord can go to the court and apply for an order of removal. He can get it that day, and the tenant can be evicted within 24 hours. If the tenant files the affidavit by noon of the fifth day, the court schedules a hearing as soon as possible—at least in Reno, that is typically the very next day—and if the tenant loses, he can be evicted within 24 hours. I would note, these are judicial days and not calendar days. When you start adding in the weekends, it does lengthen it out a bit. That is the way it works for nonpayment of rent. For something that is not a rent case, it is a little different. You get a 30-day notice for no cause (we are not trying to change that), then at the end of that 30 days, if the tenant is still there, the landlord gives that 5-day notice that says be out within 5 days or file an affidavit with the court, or we can go to court and seek relief.

Vice Chair Segerblom:
So, right now, I do not pay the rent on the first of the month. The second, they give me a notice to quit. I have 5 days to go to court and file an affidavit. You are requesting that it be changed to 10 days?

Jon Sasser:
That is correct.

Vice Chair Segerblom:
Right now, if I file an affidavit and go to court, and I lose, I get evicted the next day. Are you extending that time?

Jon Sasser:
We are asking for that to be extend to 5 days.

Vice Chair Segerblom:
Okay. Any questions? Mr. Hambrick.

Assemblyman Hambrick:
Thank you, Mr. Vice Chair. Mr. Sasser, the bill, as it is presented right now, appears to throw out the baby with the bathwater. I think things have to be worked over. There are so many consequences that I do not think we really realize what is coming down the pipeline. Who is this bill really meant to protect? When we start talking about large conglomerates, we have one mind-set. But when we are talking about individuals, I think we have a different mind-set. We need to address those issues. I am cognizant of the possible unintended consequences. I hope we can address those issues.

Vice Chair Segerblom:
Are there any questions? I see none. Assemblyman Hogan, do you have anyone else you wish to speak on your behalf?

Assemblyman Hogan:
Yes, Mr. Vice Chair. In Las Vegas, we have Rhea Gerkten of Nevada Legal Services who is familiar with the process in that locale and could add a little something and also answer questions that might be on the minds of some of your members who are from Las Vegas.

Rhea Gerkten, Directing Attorney, Nevada Legal Services, Las Vegas, Nevada:
I am testifying in support of A.B. 189 (Exhibit K). We at Nevada Legal Services at the Las Vegas office represent clients who receive a federal subsidy or a county subsidy for their rent. We have a tenants' rights center that assists individuals who are in private landlord situations that do not receive a subsidy. We are primarily going to court only on tenants in subsidized apartments because the need is so great for eviction defense work. Because of that, we see a lot of disabled, elderly, and single mothers with small children as our clients. It is extremely difficult at times for our clients, especially in these difficult economic times, to come up with the money, for various reasons, within the 5-day time frame. Some of our disabled clients might, for one reason or another, not have received their social security benefits on the third of the month, as they had hoped, and are therefore unable to pay by the fifth day of the month. Some of our clients are individuals who are applying for unemployment benefits. The unemployment rate, as per my written testimony, is 9.1 percent; however, it may be higher than that now in Nevada. It takes at least three months to get a hearing if someone is initially denied unemployment benefits. The actual claims process can take some time, so even someone who applies for unemployment benefits is not necessarily going to be approved right away. Dealing with unemployment benefits and trying to find a job makes it

difficult to juggle bills. Some of our clients have to choose whether they are going to buy food for their children or pay rent, late fees, and utilities. Again, some of our clients are single mothers with small children who rely on child support payments. If, for some reason, they do not get their child support checks that month, they are going to have a difficult time coming up with the money to pay. This is not designed to get rid of late fees; these tenants are still required to pay late fees. Late fees are designed to protect the landlords against some financial loss. Certainly, this is not going to do away with any late fee provisions in a lease agreement.

I think Mr. Sasser mentioned social services and tenants applying for rental assistance. That also is not a quick process. Even if money is available, it can take time for tenants to receive financial assistance. The landlords first have to agree to accept the money from the social services agency, so it is not like the tenant can just walk in, say "I need help," get the money, and go pay the rent. There is a back and forth with landlords and with the tenants before they are even eligible to receive the financial assistance, and it does take quite a bit of time in some instances. We would also support the lengthening of time from 24 hours to 5 days after a family receives the order for summary eviction. It is very difficult for a disabled or elderly tenant to pick up and move within 24 hours after a judge tells him that he is going to be evicted. Giving someone a little additional time might mean he gets to remove his property out of the landlord's house or apartment prior to the constable coming to lock him out, which should save the landlords a lot of headaches in the long run. If former tenants remove all their property, landlords would not be required to store and keep the property for 30 days, as per Nevada law. With these changes, the Nevada eviction law would still be one of the fastest in the country. In most other states, it takes quite a bit longer to see an eviction through. We just ask that tenants be given a little bit of extra time in these difficult economic times in which to pay their rent or cure lease violations.

Vice Chair Segerblom:
Because of the tough economic environment, have you seen an increase in evictions in the past year or six months?

Rhea Gerkten:
What we have seen is a huge increase in the number of denials of unemployment benefits. Eviction cases have been increasing, especially with the foreclosure crisis. We are seeing a lot more tenants come in that are being evicted after foreclosure. So, yes, in the general sense, evictions have been increasing, but I cannot give you any numbers.

Assemblyman Ohrenschall:
I was looking at the flow chart, and looking at our neighboring states that have the more generous time periods. Do you think if we did process this bill and extend the time periods that either your office, or the other parts of the social services network, might be able to help evicted tenants avoid falling into homelessness? Do you think that is realistic?

Rhea Gerkten:
In a lot of cases, it would be realistic. Some of the things that we have actually seen are tenants who received the 5-day notice, cannot get the money together in 5 days, file the affidavit, and get a hearing set. In Las Vegas it used to be that you would get a hearing set within 3 days, now most of the courts have changed the process a little bit, so the quickest hearing might be 5 days. But for tenants, a lot of the time what they needed was either that extra time to come up with the money, to borrow the money, or to get a social services agency to approve their applications. There are a lot of times where we have seen tenants who come up with the money prior to their court hearings, which is within the 10-day time frame that is in the bill.

Assemblyman Hogan:
Assemblyman Hambrick raised a good question about who would benefit. I kept hearing that question as I was listening to the last witness. I think our witness has indicated that the most severe need may be those who are disabled or elderly. We would certainly concur that those are the people for whom we are trying to level the playing field. We think they would benefit.

Vice Chair Segerblom:
This would also be the single mothers with small children. Anyone else wish to come forward to testify?

James T. Endres, representing McDonald, Carano & Wilson; and the Southern Nevada Chapter of the National Association of Industrial and Office Properties, Reno, Nevada:
This bill came to our attention in the past week, and after studying it, we realize that it does apply to commercial real estate. As Mr. Hogan and Mr. Sasser pointed out this morning, it was not the intent of A.B. 189 to apply to commercial real estate. Real estate transactions in the commercial sector are very complex, and the leasing negotiations are very detailed. Some of the underpinnings that go through those lease agreements are grounded in part in the current statute.

Vice Chair Segerblom:
Have you offered an amendment?

James T. Endres:
Yes, we have (Exhibit L).

Vice Chair Segerblom:
Have you shown it to Mr. Hogan?

James T. Endres:
Yes, we reviewed it this morning with him and Mr. Sasser. We believe that the amendment we offer this morning may be a solution to distinguish between residential and commercial properties. We suggest that, in *Nevada Revised Statutes* (NRS) Chapter 118, the solution has already been found by referring to residential properties or residential dwellings as "dwellings" to distinguish them from commercial. Whether or not that is the most appropriate solution in this instance, we are not totally clear. But we think, without any question, there is a solution to distinguish between commercial and residential and allow the bill to move forward in its normal progress.

Paula Berkley, representing the Nevada Network Against Domestic Violence, Reno, Nevada:
I think we are a group of people to which Assemblyman Hambrick has been referring. As you know, domestic violence is about control. Quite often, a key sector of control is controlling the money. With so many women that are victims of domestic violence, their partners either take the money or they do not pay the child support and women find themselves unable to pay their rent. This is certainly not due to any problem on her part, but rather her money has been taken. She finds herself potentially evicted. Especially with kids; that is a tremendous pressure and a concern for her sense of security if she gets kicked out of her house. An additional five days, if she can get that money together, certainly protects her children as well as herself. We would urge support of this bill. Thank you.

Vice Chair Segerblom:
Are there resources that woman could go to in order to get the money to help pay the rent?

Paula Berkley:
There are limited resources. For example, the network has the Jan Evans Foundation. We collect money for just such emergencies, but, unfortunately, it is not anywhere near what it needs to be.

Jan Gilbert, representing the Progressive Leadership Alliance of Nevada, Carson City, Nevada:
One of our main goals is to create more humane solutions to problems in Nevada. We support this bill. Years ago, I sat in the welfare office to interview women who were applying for food stamps and health care. A hundred percent of the people I interviewed said the unreliability of their child support was the reason they were there. It was an amazing experience to hear about the amount of money they were owed in unpaid child support. Most of these people want to stay in their homes and keep their children protected, and without child support, they struggle. I would urge you to think about Nevada's laws and try to make them more consistent with our surrounding states.

Assemblyman Cobb:
For purposes of disclosure, Ms. Gilbert is one of my constituents. Whatever response she gives, she is correct. We are talking about the humaneness of all the things we are dealing with here. It is a very laudable goal to help people and give them enough time to move, or to give them whatever they need to aid the individual. I think my colleague from the south referenced the other side of the coin. A lot of people that I know own homes and rent them out. They are not huge corporations, they are just individuals. In Nevada, we are seeing people who cannot afford these homes anymore with 9 percent unemployment. A lot of times they are renting out their homes and living in much smaller ones so that they can pay the mortgage on their homes. I worry about the unintended consequences here for that individual who cannot afford to pay a mortgage and another rent. Are we tying the hands of the individuals who are also hurting right now in this economy, and who would not be able to cover a renter for an extra 10 days?

Jan Gilbert:
That is a very good question. I know we are very sensitive, because you are right. A lot of people I know have rentals. I think the example that Mr. Sasser gave of all the neighboring states contrasts the severity of our laws. It seems unrealistic to me. According to Ms. Gerkten's comments, she actually had tenants get the money before the end of the 5-day period. I know my husband gets his social security check deposited into our account, and it is quite frequently late. I do not know if that is just the way our situation works, but you have to know that these people are living very close. They want to pay the rent; they just need a little extra time. This is not an extreme bill. As Assemblyman Hogan said, we would still have the most severe laws in the country. I am sympathetic to both sides, but I really feel that we want these people to pay the rent. Let us give them that extra time to do so.

Assemblyman Cobb:
I think there is a lot of common ground. Many people are agreeing on all sides of this issue. The people I know who rent out their homes do not, on day 5 or whenever they are allowed to, walk into the court and start paying fees to have people evicted. They want to give them that extra time, and oftentimes just do give them extra time. There might be a slight late fee or something to encourage prompt payment. Nevertheless, I hope we have a good examination of where we are in this economy with the people who are going to be hurt on both sides, while also realizing that common sense oftentimes prevails and allows these people that extra time anyway. Thank you.

David L. Howard, representing the National Association of Industrial and Office Properties, Northern Nevada Chapter, Reno, Nevada:
We are here to go on record that we are in support of the amendment that would make the distinction between commercial property and residential property. Thank you.

Ernie Nielsen, representing Washoe County Senior Law Project, Reno, Nevada:
We support this bill. We assist and represent hundreds of seniors in eviction cases each year. A great percentage of our clients are disabled and are extremely frail. Many of these evictions are very avoidable. As Ms. Gerkten points out, some of the reasons for having the nonpayment is very unique to that month; otherwise, the rent is very affordable to that person and sustainable. There are remedies. There are emergency funds, such as the 15 percent from the Low-Income Housing Trust Fund that is available for emergency housing. However, you must have sustainability with respect to your ability to pay your rent thereafter. There are also representative payee programs for seniors who are beginning to lose their ability to ably manage their funds. However, we need time to be able to engage these systems to be able to save the tenancy. We think that there is a win-win approach here. Both the tenant and the landlord win when we can get involved and have time to work these things out. The cost associated with getting people out of homelessness is far greater than the cost of keeping them from becoming homeless.

Assemblyman Hambrick:
Mr. Nielsen, I appreciate when you say you need the time to be effective. You are representing many seniors and disabled people. This might be a rhetorical question, but how many of your clients find out on the first or second of the month that they cannot pay that month's rent. Can they not backtrack to the middle of the previous month and foresee something coming down the pipeline and say, "Uh oh, I have got a problem. I better let somebody know about this situation?" Can they not do this, instead of waiting until the last minute, which puts the landlord into a difficult situation? As my colleague from the north

states, we do have individuals owning these homes who also have to meet their obligations. Where is the middle?

Chairman Anderson:
Mr. Nielsen, what other material would you like add to the discussion?

Ernie Nielsen:
Our clients are generally less able as they grow older. We find that many of our clients need our assistance to work themselves out of the issue. Certainly, even I would prefer to stave off a problem when we see that it is going to occur. But many of our clients do not have that capability, and they may not feel that they have any options. They try to do the best they can.

Shawn Griffin, Director, Community Chest, Virginia City, Nevada:
I am in favor of A.B. 189. I have been working in a nonprofit organization called Community Chest in Virginia City for the past 20 years. I see these individuals after they are evicted. We do not have this discussion; this discussion is over. The discussion we have is, "where am I going to stay tonight," "how am I going to eat," "how am I going to feed my kids," and "how am I going to get my job?" It is absent housing and it is just not the right thing to do. We do not have the luxury of putting more people out on the street. All of you know this. Every single social system we have is overrun right now; every single one. There is not another place to turn to. I will tell you where they go. They go back to the endlessness of living without shelter. Every person working on this problem would tell you that it is going to take much more time, energy, and taxpayer resources to find them shelter than it takes to evict them. If this were health care, they would say "do not send them to the emergency room to get fixed." They would say, "treat them before the problem occurs." We can do better. We need to do better. Let us give them a few more days and enable them to find the resources they need to stay in their shelter. That is all I have.

Chairman Anderson:
Mr. Griffin, thank you for your testimony and your service to the folks up in Virginia City through Community Chest. Let us now hear from those who are opposed to A.B. 189.

Charles "Tony" Chinnici, representing Corazon Real Estate, Reno, Nevada:
I am opposed to A.B. 189 (Exhibit M). Overall, the effect of this legislation would be minimal to negative for good tenants, fantastic for bad tenants, and bad for landlords. Going back to the analogy of throwing out the baby with the bathwater, this bill would create a huge benefit for people who are abusing the eviction process. When seniors particularly have a problem making their rent, I

always hear from them long before there is an issue. For instance, in the previous month, I would get a phone call from them. Because I represent landlords who recognize that it costs a great deal more to make a property ready for the next tenant, they are supportive of my efforts to negotiate the best possible outcome for both the tenant and the landlord. That means working out some sort of payment arrangement. Any of the community groups who spoke today, if they are working with a tenant who is having financial difficulty, they contact me and I work with them. In the owner's best interest, if there is an opportunity to receive funds from someone who is helping the tenant, that is just as good for the landlord. Some practical aspects of extending the periods involved in eviction would be that it shifts the risk of renting to a marginal tenant to the landlord. The landlord is going to have to compensate for that. Some ways in which that would happen are in a rental agreement where you would typically see a grace period 5 days like our rental agreement has in it. A tenant has 5 days already written into the agreement where no notice is filed, in which they could come in and pay the rent. That way they are covered for things like weekends when they get paid. They can also call me and say, "I am going to be in on the seventh of the month to pay my rent." The first thing that is going to happen is we are going to have to get rid of the grace period of our evictions. Then, we are going to have to file eviction notice for nonpayment on the second day of the month.

Over ten years of managing properties, I have rented to thousands and thousands of tenants. A lot of those tenants were people who, on paper and on their applications, had some things on their credit report that would make me concerned. But, looking at their application as a whole, they were worth taking a risk on to rent them a property. Now, if we were to pass this bill, the majority of those people I would have been willing to take a risk with in the past are people I would no longer be able to afford to take that risk with. Again, we are hurting a lot of good tenants who would be worth renting to but who maybe had some hardships in the past and they do not look so great when they apply to rent your property.

Finally, another way in which we would have to adjust for the risk involved in the extended eviction process is that we would have to increase the security deposit that we charge tenants up front. Or, we would ask for prepaid rent to cover this period. In practical terms, it is about once in a blue moon that it is an actual 5-day process for nonpayment, or for breach of lease, or an actual 3-day period for a nuisance eviction, due to the court restrictions based on whether a tenant received a notice in person or had it mailed to them, due to holidays, and due to weekends. What effectively winds up happening is that it is about a three-week to one-month process already to evict a tenant. So, it does not really make sense to create this extension when, in Nevada, regardless

of what is happening in regional states, this bill would result in more than one month to remove tenants from property. That is why this law is bad for landlords.

The corporate landlords that were mentioned earlier make business decisions, so typically they are going to work with tenants in the first place. But, what they are going to start doing as a matter of procedure is that they are going to be filing eviction notices on everybody. So, you are going to see the number of notices processed start to go way up. For practical reasons, I ask that you vote against A.B. 189. This bill would only serve the interests of bad tenants, people who do not do what they promise to do, and those who exploit the system that is in place.

Jennifer Chandler, Co-Chair, Northern Nevada Apartment Association, Reno, Nevada:
I am speaking in opposition to A.B. 189. [Read from prepared text (Exhibit N).]

A lot of properties we are seeing with Section 8, Section 42, and the Department of Housing and Urban Development (HUD) housing, are those where people are paying portions of people's rent and trying to assist in that. A lot of those programs are tax credit properties where, if they do not maintain a certain occupancy rate, they are in jeopardy of losing their tax credit. We are not getting eviction-happy. The only ones who are not being worked with are the ones who seem to be predominately doing the same repetitive thing over and over again. [Continued to read from prepared text (Exhibit N).]

All in all, we have the laws we have because we are Nevada. We are not California, Massachusetts, Oregon, Vermont, Washington, or Arizona; we are Nevada. We are proud of our state and our abilities. That is what makes Nevada worth investing in. To model ourselves after other states makes us no more enticing for investors than any other state to invest in. How the law is now is an economic benefit to investors. If you take that away, investors will just go somewhere else. Thank you.

Chairman Anderson:
We have two handouts from you that will be entered into the record (Exhibit N) (Exhibit O). We appreciate you putting forth the information. Are there any questions for Ms. Chandler? Mr. Manendo.

Assemblyman Manendo:
Thank you, Mr. Chairman. What is the average rent in northern Nevada?

Jennifer Chandler:
The average rent as far as the cost?

Assemblyman Manendo:
Rent for your units or apartments. You are with the Northern Nevada Apartment Association. Am I wrong? What are the rents?

Jennifer Chandler:
Right. I am on the legislative committee. They range anywhere from about $675 to $1,200, depending on the area you are in.

Assemblyman Manendo:
You had mentioned something about a tax credit. Can you explain that to me? What is the tax credit based on occupancy that you get?

Jennifer Chandler:
There are programs that investors can partake in, with regards to their purchasing of a property. If they were to make their property—and each program is different, that is why you have Section 8 and Section 42, they all have different levels of qualifications—partake in those programs for the complex, it renders them a tax credit. To be able to partake in the tax credit, they have to maintain a certain percentage of occupancy. They have to be above 82 percent, 88 percent, or 89 percent, depending upon how many units there are in the complex or on the property. If they go below that, they do not get the tax credit because they are not conforming to the guidelines of the program, which is to maintain a certain amount of occupancy. If they go below that, they do not get the tax credit, there is no benefit for them to have that complex as a Section 8 or Section 42 complex.

Assemblyman Manendo:
So, keeping a high occupancy and keeping people in their homes is a benefit to you.

Jennifer Chandler:
It is key.

Assemblyman Manendo:
I just wanted to get that into the record. Thank you, Mr. Chairman.

Assemblyman Hambrick:
Ms. Chandler, from your expertise in the area, would the effect of this bill, one way or the other, directly impact the number of investors that would step up to the plate to offer their properties for Section 8?

Jennifer Chandler:
I think, right now, where our law states having the time frame that we have, we are in the middle of the road. To increase the time frame is going to be consequential. To lower the time frame would not make a difference. We have neighboring states: Wyoming, Arizona, and other states that have a 3-day, pay or quit notices. We have 5-day pay or quit notices. California and other states have even higher time frames. As we sit right now, we are in the middle of the road. I like to think of us as being pretty neutral. We are not pro-tenant, and we are not pro-landlord. The landlords are not beyond working with people, especially in these hard economic times. It is just as hard on the investors. They are having a hard time making their payments and mortgages when people cannot afford to pay their rent. It is hard for everybody. So I think, for the investor side, if we were to go with A.B. 189, they would be less likely to invest in our areas of Nevada where we are steadily growing exponentially. It is going to be detrimental. It is not going to be worth it to them to have somebody in their units for a month without paying rent when they cannot turn around and receive the same time extension to pay their debts and bills.

Rhonda L. Cain, Private Citizen, Reno, Nevada:
I am speaking in opposition to A.B. 189. I am a property owner and investor in Nevada. I am also on the Northern Nevada Apartment Association board. I have been an investor in Nevada for about 20 years. I came here from California; I was an investor in California as a property owner. It is beyond me why we would want to mirror California at this point. Last I looked, they are not doing so well. The laws were so prohibitive for property owners there that I got out. I can speak firsthand to investors wanting to come to Nevada because I have several investors right now from California who are looking to invest and have done so in the last six months. When this bill came on the radar screen, the investors backed off to wait to see what happened. They do not want to invest here if they could have the same laws and invest in California.

I am a property owner and I have been for 15 years. I work with tenants. I do not file a 5-day notice on day 2. We do not do that; we do not want vacancies. With this new legislation, I will change the way I do business. I will probably eliminate my 5-day grace period, and I will start filing those notices on day 2. So, it is just prohibitive. We have mortgages to pay and vendors to pay; we have taxes, sewer bills, water bills, and with all of that, we still have to pay them. The reality is right now, even with the 5-day notice, it takes about

30 days to get someone out. When we extend that to 10 days, it is going to extend that far beyond another 5 days. So the reality is we do not want vacancies, and we work with tenants at this point. As was testified to before, it is the bad tenants that this law will protect, because we try to protect the good tenants at this point. We want good tenants. My investors from California want to come to Nevada, and they want me to manage and oversee these properties. They do not want me evicting good tenants. They want me to work with them. But, when they see the laws going down the slippery slope as California is going, where they are not investing, they are not going to bring their investment dollars here and provide rental housing in Nevada.

Assemblyman Manendo:
Your investors have invested in northern Nevada before?

Rhonda L. Cain:
They have invested extensively in the last six months. We have made several purchases.

Assemblyman Manendo:
Are they interested in converting the apartments into condominiums? That happened a lot in southern Nevada, where we had a lot of apartment units reconfigured and made into condominiums.

Rhonda L. Cain:
That was happening at the beginning of 2007. We invested in many properties with the intent of conversion. Now, what is happening is what is called a reversion. They are going back from the condominiums to rentals. The mindset of most investors right now is to find a safe place to park their money. They are not comfortable with the stock market, and they are not comfortable with 1 percent interest in the banks. So, if they do have a little bit of funds, they want to invest it in a place where it can sit for two to three years.

Assemblyman Manendo:
Thank you, I appreciate that. I am sure that they will invest, build some apartments, or invest in some apartments, flip those over and make some more money later on when the economy changes. Maybe that is why you see many places where people are struggling to find a place to live, because a lot of these units have gone over into single family dwellings. I am sorry your investors were not making as much as they thought they were going to at the time. Thank you, Mr. Chairman.

Assemblyman Cobb:
You made an interesting point about automatically filing for evictions if the law is changed. My question has to do with the costs involved on the rental property side. I know, in Carson City, it is $69 to file for eviction, and then another $69 to lock out a tenant. I am assuming that, if we are changing the law and you are going to automatically file for eviction on day 2, that action would raise your costs: Rental rates would go up for people throughout Nevada; therefore, it is going to be more costly to have a place to live. Finally, there is going to be less opportunity for people who do not make a lot of money to find apartment spaces to live in. Is this correct?

Rhonda L. Cain:
Correct. The costs will go up considerably when we have to change the way we do business. I thought about how I will run my business should this legislation pass, because it is an enormous impact. It sounds like 5 days, but it is much more than that. I will probably raise my security deposit on those tenants that are a little iffy on their application because I am taking a risk. It is more money out-of-pocket for them. It does not help anyone in the long run.

Kellie Fox, Crime Prevention Officer, Community Affairs, Reno Police Department, Reno, Nevada:
Good morning, Mr. Chairman and members of the Committee. [Read prepared testimony (Exhibit P).]

Assemblyman Gustavson:
You brought up the point of illegal activities. I know we are having a lot of problems with homes being foreclosed on and people removing appliances and fixtures in the home. Are they having the same problem with rental properties too? If time would be extended, would they have more time to remove these items from the homes?

Kellie Fox:
I am familiar with a specific house in my cul-de-sac that was foreclosed on. The people living there moved out and took everything, including the kitchen sink. All my neighbors came to me because of what I do, and we referred that to code enforcement. We, as a police department, did supervise it as far as making sure there were no kid parties, it did not get broken into, or other criminal activity until it was repaired. We had a neighborhood watch.

As far as rentals and apartments, I have not seen that happen. I do not think that would come to the police department per se; however, I do not know.

Chairman Anderson:
Let us turn our attention to the people in the south. Is there anyone who wishes to speak in opposition to A.B. 189?

Barbara Holland, Private Citizen, Las Vegas, Nevada:
I would like to comment on some of the other comments that have been made. If anyone thinks that a landlord, owner, or manager wants to put people out on the streets, that is absolutely incorrect. Our job is to have apartments rented; occupied with paying renters. There are very few residents who are evicted because they are waiting for social security checks. I do not even know anybody in southern Nevada that would do that. Most of the management companies in southern Nevada all have grace periods of anywhere from three to five days. If a person has not paid his rent on the first, he would not even see a 5-day notice until either the fourth or sixth of the month. Also, I want to talk about the timeline. Here in southern Nevada, the 5-day period is not a 5-day period. You cannot serve a 24-hour notice until after eight days. We already have an extended time period that has been done here locally. For all of southern Nevada, if you serve a 5-day notice, you will actually wait eight days. It does not count the day that it was served, weekends, or holidays. In addition, we cannot bring any more than five evictions per property per day because the courts cannot process the notices. Right now, if this law were to pass, it would complicate the situation even more. A statistic was made by another person showing there were about 23,000 evictions a year. Do you know what that means in southern Nevada? That means less than one person evicted per year per apartment property.

One of the things that has not been stated is that we go out of our way to talk to the residents about what is happening. Most of us will knock on doors and say, "Please, talk to us. Give us an idea. Are you going to pay rent or not pay rent? Should we put you in a promissory note? Are you changing jobs and waiting for another two-week period before you get paid?" These are things that are not being mentioned by the people that spoke in favor of the bill. We will even talk to people who have lost their roommates and offer them cheaper accommodations.

As far as damage to property, there is a tremendous relationship between the people that do not talk to us and those who we are forced to evict, that abuse the system and damage the property. I can show you multiple units in southern Nevada over the years that have that relationship. Also, I want to distinguish on foreclosures. If a foreclosure was happening in a single family home, and there was a tenant who was elderly or handicapped, there is already a state law that states you can go to the courts and ask for an additional 30 or 60 days.

Those who have started the legal aid services can certainly help tenants who are elderly and handicapped, and who are affected by bank foreclosures.

As far as giving people an extra five days for nonpayment of rent, I doubt whether they are going to be able to come up with any money. There are very few government programs left right now for people to have additional money. The other thing that people have misstated is that a lot of times tenants will say, "my rent money is sitting at the craps table at one of the local casinos." That makes us different from other states in the United States. I am from Connecticut and Massachusetts, where the eviction process was difficult. Obviously, we do not have a 24-hour town that offers a lot of vices. I tell my friends, if you move to this state, do not come here if you have a vice, because it will kill you.

Our industry creates jobs. We spent over $16 million dollars in southern Nevada in goods and services last year on all the properties that we managed. When we have vacancies caused by evictions because people are not paying their rent, two things happen. Number one, we stop doing maintenance, or the maintenance gets slower, because we have to pay our mortgages. Also, not everybody that owns an apartment complex is a corporation. We have many retired people that own over a hundred units as well as many that own 50 units or less. These units are their retirements. Obviously, between everything else that is happening in our country right now, they are not seeing very much money.

It was mentioned before about the single-family homes. Many homeowners, in trying to prevent losing their single-family homes, have moved into apartment communities and then have asked property managers to help lease those homes. They are willing to subsidize, so if I can find a tenant to pay $1,200 a month towards the mortgage and the homeowner that does not want to lose his home can contribute $300, which enables the homeowner to keep that home. This bill has a horrible effect for the individual homeowner with a single-family home.

Chairman Anderson:
Thank you. I see no questions for you, Ms. Holland.

Bret Holmes, President, Southern Nevada Multi-Housing Association, Las Vegas, Nevada:
I want to reiterate a few of the points and point out that the Southern Nevada Multi-Housing Association represents hundreds of property managers and owners in the Las Vegas area that are all opposed to A.B. 189.

The good landlords do work with the tenants. The way that this was presented in the beginning was like we were following the letter of the law. Generally, landlords do not do that, especially the good ones. People will not get their notice to pay rent or quit until the fourth, fifth or sixth day. Then it turns into a lengthy process. When you talk about the current process being approximately three to four weeks, extending that out to six to eight weeks and having a landlord or owner go through that period of time with no income on that unit really hurts a number of people. The decrease in income would have to be made up by an increase in rent, security deposits, and tightening up the credit. The other side that this affects is the employment side and the problem of employing a full staff to keep up the property and maintain tenant relations. There are an extensive number of reasons why this bill should be tabled and put down, some of which you have heard today.

Chairman Anderson:
Mr. Holmes, you also sent up by fax your position statement. I will make sure it is entered into the record (Exhibit Q).

Zelda Ellis, Director of Operations, City of Las Vegas Housing Authority, Las Vegas, Nevada:
We would like to go on record opposing section 2 of A.B. 189 in regard to the nuisance extension to serve a notice. The housing authority rarely serves 3-day notices, but in the event that we do, it is because there is a serious situation on the property. Because we are the owners of low-income public housing property, numerous times we have illegal activity occurring on our property. We are working with our local police department. When we have a situation where there is gun violence, illegal drugs being sold, search warrants being served, the housing authority absolutely needs the ability to get those residents out of our property as soon as possible in order to maintain the quality of life for the law-abiding citizens that are living in our units. When you extend the time frame from three to five days, including the time these residents have to go through due process within the Housing Authority with the grievance procedure, it extends that time for them to continue to damage the property that they are living in. By the time we eventually evict them, many lives have been affected by the continued illegal activity. To increase the time frame from three to five days would be a disservice to the population that we serve, especially those who are law-abiding citizens.

Jenny Reese, representing the Nevada Association of Realtors, Reno, Nevada:
The realtors are in opposition to A.B. 189.

Chairman Anderson:
Mr. Kitchen, do you have written documentation that you want to submit to the Committee? We will have that submitted for the record (Exhibit R). Is there anyone else who feels compelled to speak, whose position has not been fairly represented, in opposition to A.B. 189?

Roberta A. Ross, Private Citizen, Reno, Nevada:
I am here against A.B. 189. I own a 162-unit weekly/monthly apartment building in downtown Reno. I am the President of the Motel Association. We have an unintended consequence here with the majority of the people who are in extreme poverty, living in motels. In 2001, I came in front of this Committee to try to pass legislation that people who lived in weekly motels did not have to pay room tax. At that time, I think it was around an 11 percent tax. Now it is up to 13.5 percent tax. That started in 2001. Since that time, I was very politely told here that this was a local issue, not a state issue. I went back locally. I became President of the Motel Association, and then I was on the board of the Reno-Sparks Convention and Visitors Authority (RSCVA) and worked diligently to get this passed. Those people who live in weekly motels do not have to pay the room tax if they can pay 10 days all at one time. The other thing that is in place and stays there is that if a person pays weekly, they will be charged room tax until the 28th day. So, in Washoe County, that will be 12.5 and 13.5 percent. If this bill passes, I would say that it will probably happen that those people who live in weekly motels are going to be hit hard. The landlords of those motels will no longer let them go in ten days because you can usually weed out your bad tenants in 28 days. They will be charged 13.5 percent room tax. If they leave in under 28 days, we as the landlords have to pay the 13.5 percent tax. So, now the people in weekly motels will probably be charged that 13.5 percent for the landlords to protect themselves.

The other issue is that, in the 28-day stay, those people who sign a contract stating that they will live there for 28 days do not have to pay the room tax. If they get knocked out prior to that, they will have to pay the room tax. My point is that the people who are barely scraping by and living at weekly rentals will be affected by this because landlords will not take them in for 30 days, keep them at the weekly rental rates, and absorb the 13.5 percent tax. They will probably begin raising their deposits up from the $35 or $50 deposits to $100 or more. I would ask that you do not pass A.B. 189.

Bill Uffelman, President and Chief Executive Officer, Nevada Bankers Association, Las Vegas, Nevada:
Normally, the bankers would not care about a bill like this; however, due to foreclosures and the progress of Assembly Bill 140, which is over in the Commerce and Labor Committee, we may well become landlords for a period of

60 days following a foreclosure sale. Mr. Sasser made reference to section 6 of A.B. 189, which is the notice to quit after a foreclosure sale. He said that he did not really care about that section, as it was a result of the enthusiasm on the part of the Legislative Counsel Bureau. I would suggest that section 6 needs to fall off of the bill.

Chairman Anderson:
So, the bankers would like us to remove section 6 as being unnecessary. Have you prepared an amendment?

Bill Uffelman:
I could prepare one very quickly, Mr. Anderson (Exhibit S).

Chairman Anderson:
Did you raise these concerns with the primary sponsor of the bill?

Bill Uffelman:
I have spoken with Mr. Sasser, who was acting as a representative of the sponsor of A.B. 189.

Chairman Anderson:
Thank you, sir. Does anybody have any amendments that need to be placed into the record? Ms. Rosalie M. Escobedo has submitted testimony, and that will be entered into the record (Exhibit T). We will close the hearing on A.B. 189.

[A three-minute recess was called.]

I will open the hearing on Assembly Bill 204.

Assembly Bill 204: Revises provisions relating to the priority of certain liens against units in common-interest communities. (BDR 10-920)

Assemblywoman Ellen Spiegel, Clark County Assembly District 21:
Thank you for having me and for hearing this bill. As a disclosure, I serve on the Board of the Green Valley Ranch Community Association. This bill will not affect me or my association any more than it would any other association in this state. My participation on the board gave me firsthand insight into this issue. That is what led me to introduce this legislation. I am here today to present A.B. 204, which can help stabilize Nevada's real estate market, preserve communities, and help protect our largest assets: our homes. Whether you live in a common-interest community or not, whether you like common-interest communities or hate them, whether you live in an urban area or a rural area, the

outcome of this bill will have a direct impact on you and your constituents. Just as a summary, A.B. 204 extends the existing superpriority from six months to two years. There are no fiscal notes on this. In a nutshell, this bill makes it possible for common-interest communities to collect dues that are in arrears for up to two years at the time of foreclosure. This is necessary now because foreclosures are now taking up to two years. At the time the original law was written, they were taking about six months. So, as the time frames moved on, the need has moved up.

Since everyone who buys into a common-interest community clearly understands that there are dues, community budgets have historically been based upon the assumption that nearly all of the regular assessments will be collected. Communities are now facing severe hardships, and many are unable to meet their contractual obligations because of all of the dues that are in arrears. Some other communities are reducing services, and then simultaneously increasing their financial liabilities. They and their homeowners need our help.

I recognize that there are some concerns with this bill, and you will hear about those later this morning directly from those with concerns. I have been having discussions with several of the concerned parties, and I believe that we will be able to work something out to address many of their concerns. In the meantime, I would like to make sure that you have a clear understanding of this bill and what we are trying to achieve.

The objectives are, first and foremost, to help homeowners, banks, and investors maintain their property values; help common-interest communities mitigate the adverse effects of the mortgage/foreclosure crisis; help homeowners avoid special assessments resulting from revenue shortfalls due to fellow community members who did not pay required fees; and, prevent cost-shifting from common-interest communities to local governments.

This bill is vital because our constituents are hurting. Our current economic conditions are bleak, and we must take action to address our state's critical needs. I do not need to tell you that things are not good, but I will. If you look, I have provided you with a map that shows the State of Nevada and, by county, how foreclosures are going (Exhibit U). Clark, Washoe, and Nye Counties are extremely hard hit, with an average of 1 in every 63 housing units in foreclosure. People whose homes are being foreclosed on are not paying their association dues, and all of the rest of the neighbors are facing the effects of that. Clark County is being hit the hardest, and we will look at what is going on in Clark County in a little bit more depth just as an example.

In Clark County, between the second half of 2007 and the second half of 2008, property values declined in all zip codes, except for one really tiny one, which increased by 3 percent. Overall, everywhere else in Clark County, property values declined significantly. The smallest decline was 13 percent, and that was in my zip code. The largest decline was 64 percent. Could you imagine losing 64 percent of the equity of your home in one year? Property values have plummeted, and this sinkhole that we are getting into is being affected because there is increased inventory of housing stock on the market that is due to foreclosures, abandoned homes, and the economic recession. People cannot afford their homes; they are leaving; they are not maintaining them. It is flooding the market, and that is depressing prices. You sometimes have consumers who want to buy homes, but they cannot get mortgages. That keeps homes on the market. There is increased neighborhood blight and there is a decreased ability for communities to provide obligated services. For example, if you have a gated community that has a swimming pool in it (or a nongated community, for that matter), and your association cannot afford to maintain the pool, and someone is coming in and looking at a property in that community, they will say, "Let me get this straight: you want me to buy into this community because it has a pool, except the pool is closed because you cannot afford to maintain the pool; sorry, I am not buying here." That just keeps things on the market and keeps the prices going down, because they are not providing the services; therefore, how do you sell something when you are not delivering?

Unfortunately, we are hearing in the news that help is not on the way for most Nevadans. We have the highest percentage of underwater mortgage holders in the nation. Twenty-eight percent of all Nevadans owe more than 125 percent of their home's value. Nearly 60 percent of the homeowners in the Las Vegas Valley have negative equity in their homes. This is really scary. Unfortunately, President Barack Obama's Homeowner Affordability and Stability Plan restricts financing aid to borrowers whose first mortgage does not exceed 105 percent of the current market values of their homes. There are also provisions that they be covered by Fannie Mae or Freddie Mac. Twenty-eight percent owe more than 125 percent, and cannot get help from the federal government. And for 60 percent of homeowners, the help is just not there. So, we need to be doing something.

What does this mean to the rest of the people who are struggling to hold onto their homes in common-interest communities? Their quality of life is being decreased because there are fewer services provided by the associations. There is increased vandalism and other crime. As I mentioned earlier, there is a potential for increased regular and special assessments to make up for revenue

shortfalls, and then there is the association liability exposure. Let me explain that.

If you have a community that has a pool, and you were selling it as a community with a pool, and all of a sudden you cannot provide the pool, the people who are living there and paying their dues have a legal expectation that they are living in a pool community, and they can sue their community association because the association is not providing the services that the homeowners bought into. That could then cause the communities to further destabilize as they have financial exposure with the possibility of lawsuits because they are not providing services since the dues are not paid.

That all leads to increased instability for communities and further declines in property values. I went to see for myself. What does this really mean? What are we talking about? Through a friend in my association who generously helped send out some surveys, we received responses to this survey from 75 common-interest community managers. Fifty-five of them were in Clark County, 20 of them were in Washoe County. Their answers represented over 77,000 doors in Nevada. That is over 77,000 households, and they all told me the same thing. First of all, not one person was opposed to the bill. They gave me some comments that were very enlightening. They are all having problems collecting money; they all do not want to raise their dues; they do not want to have special assessments; they are cutting back; they are scared.

I want to share some comments with you and enter them into the record. Here is the first one: "Dollars not collected directly impact future assessment rates to compensate for the loss of projected income. Also, there is less operating cash to fund reserves or maintain the common area." That represented 2,001 homes in Las Vegas. Another one: "Our cash reserves are severely underfunded and we have serious landscaping needs." This is 129 homes in Reno that are affected. This one just really scared me: "Increase in bad debt expense over $100,000 per year has frustrated the majority of the owners who are now having to pay for those who are not paying, including the lenders who have foreclosed." That is from the Red Rock Country Club HOA, over 1,100 homes in Las Vegas. This last one: "The impact is that the HOA is cutting all services that are not mandated: water, trash, and other utilities. The impact is that drug dealers are moving into the complex, and homicides are on the rise, and the place looks horrible. Special assessments will not work. Those that are paying will stop paying if they are increased. The current owners are so angry that they are footing the bill for the deadbeat investors that they no longer have any pride or care for their units. I support this bill 100 percent. The assessments are an obligation and should not be reduced." That is from someone who manages several properties in Las Vegas.

I mentioned an additional impact, and that I really believe that this bill will affect everybody in the state, even those who do not live in common-interest communities. Let me explain that. There could be cost shifting to local government. I gave you a couple of examples in the handout: graffiti removal, code enforcement, inspections, use of public pools and parks, and security patrols. Let me use graffiti as an example.

My HOA contracts with a firm to come out and take care of our graffiti problem. We do this, and we pay for this. Clark County also has a graffiti service for homeowners in Clark County. There are about 4,000 homes in our community, and our homeowners are told, "If you see graffiti, here is the number you call. It is the management company. They send out American Graffiti, who is the provider we use, and they have the graffiti cleaned up." If an association like mine all of a sudden says, Well, you know, we do not have the money to pay our bills and do other things. We could cut out the graffiti company and we could just say to our homeowners, 'You know what, the number has changed.' So instead of calling the management company, you now call Clark County. There is a cost shift. There is a limited number of resources available in Clark County, and that will have to be spread even thinner.

It goes on into other things too. You have the pools that are closed. The people are now going to send their kids to the public pools, again, taking up more of the county resources and spreading it out thinner and thinner. There are community associations that are now, because of their cash flow problems, having to pay their vendors late. Many of their vendors are small local businesses. They are being severely impacted because the reduced cash flow is having a ripple effect on their ability to employ people.

Chairman Anderson:
Let us go back to the graffiti removal question. I understand the use of pools and parks. Are you under the impression that the HOA and common-interest community would allow the city to go and do that?

Assemblywoman Spiegel:
It is my opinion, and from what I have heard from property managers, especially that big long quote that I read, that people are cutting back on everything and anything that they deem as nonessential.

Chairman Anderson:
That is not the question. The question deals specifically with graffiti removal and security. Patrols by the police officers are usually not acceptable in gated communities and other common-interest communities. This would be a rather

dramatic change, and it would probably change the city's view of their relationship with, or their tolerance of, some common-interest communities.

Assemblywoman Spiegel:
Mr. Chairman, one thing I can tell you is that my community, Green Valley Ranch, last year had our own private security company who would patrol our several miles of walking trails and paths. We have since externalized our costs and now the city of Henderson is patrolling those at night instead of our private service.

Chairman Anderson:
So, for your common-interest community, you have moved the burden over to the taxpayers and the city as a whole.

Assemblywoman Spiegel:
Yes, but our homeowners are also taxpayers of the city.

Chairman Anderson:
Of course, they choose to live in such a gated complex.

Assemblywoman Spiegel:
It is not gated. Parts of the community are, and some parts are not. Overall, the master association is not a gated area.

Chairman Anderson:
You allow the public to walk on those same paths?

Assemblywoman Spiegel:
Yes. They are open to all city residents, and non-city residents.

Chairman Anderson:
Okay. Are there any questions for Ms. Spiegel on the bill?

Assemblyman Segerblom:
Is it your experience that the lender will pay the association fees when the property is in default, or will they let it go to lien and then the association fees are paid when the property is sold?

Assemblywoman Spiegel:
My experience has been that, in many instances the fees are just not being paid. The lenders are not paying the fees. There may be some exceptions, but as a general rule they are not.

Alan Crandall, Senior Vice President, Community Association Bank, Bothell, Washington:

We have approximately 25,000 communities here in the State of Nevada. I am honored to speak today. I am a resident of Washington state. The area I want to specialize in my discussion is with loans for capital repair. We are the nation's leading provider of financing of community associations to make capital repairs such as roofs, decks, siding, retaining walls, and large items that the communities, for health and safety issues, have to maintain. Today, in Nevada, we are seeing associations with 25 to 35 percent delinquency rate. We are unable to make loans for these communities because we tie these loans to the cash flow of the association. If there is no cash flow coming in to support their operations, we cannot give them a loan. We do loans anywhere from $50,000, and we just approved one today for $17 million, so there are some communities out there with some severe problems that need assistance.

Now you may ask, why do we care about the loan? The loan is important in that it empowers the board to offer an option to the homeowners. Some of you may live in a community, and some of you may have children or parents who live in one. Because of a financial requirement for maintaining the property—the roof, the decks that may be collapsing, or a retaining wall that may be failing—they have to special assess because they do not have the money in their reserves. It was unforeseen, or they have not had the time to accumulate the money for whatever reason. These loans allow the association to provide the option to the homeowner to pay over time because, in effect, the board borrows the money from the bank, which is typically set up as a line of credit; they borrow the portion that they need for those members who do not have the ability to pay lump sum. So, whether that is $5,000, $10,000, $40,000, or $50,000, or my personal record which is $90,000 per unit, due in 60 days, it is a major financial hardship on homeowners. The typical association, based upon my experience of 18 years in this industry, is comprised of one-third of first time home buyers who may have had to borrow money from mom and dad to make the down payment, and who have small children for whom they are paying off their credit cards for next Christmas. Another one-third is comprised of retirees on a fixed income. Neither of those two groups, which typically make up two-thirds of an average community, are in a position to pay a large chunk of money in a very short period of time. The board cannot sign contracts in order to do the work unless they are 100 percent sure they can pay for the work when it is done. That is where the loan assists.

I urge your support of this bill. It will give us the ability to have some cash flow and guarantees that there will be some extended cash flows in these difficult times, and make it easier for those banks, like ours, who provide this special

type of financing that helps people keep their homes, to continue to do so. Thank you.

Bill DiBenedetto, Private Citizen, Las Vegas, Nevada:
I moved to Nevada in 1975 when I was 11 years old. The first time I was here was in 1982 as a delegate to Boys State. If you told me at that time that I would be testifying, I would have said, No way, you have got to know what you are talking about. Well, I was up here at an event honoring the veterans, and I saw this bill. I serve as the secretary-treasurer of my HOA, Tuscany, in Henderson, Nevada. The reason I became a board member was I revolted against the developer's interests in raising our dues. You see, we were founded in 2004, and we are at 700 homes out of 2,000, which means we are under direct control of our declarant, Rhodes Homes. We are at their mercy if they want to give us a special assessment or raise our dues. The reason I am here today is I also serve as secretary-treasurer. I am testifying as a homeowner, not as a member of the board. As of last year, our accounts receivable were over $200,000, which represented 13 percent of our annual revenue. Out of our 600 homeowners, 94 percent went to collections. Out of those, there were eight banks. When a bank takes over a home, they turn off the water; the landscaping dies; our values go down. We need these two years of back dues. Anything less, I believe, would be a bailout for the banks that took a risk, just like the homeowners. When it comes right down to it, out of the 700 homes that we have, we have to fund a $6.2 million reserve. Why? Because the developer continued to build a recreation center, greenways, and other amenities. So, our budget is $1.6 million. We have $200,000 in receivables. We receive 90-day notices from our utility companies. We can barely keep the lights and the water on. Our reserve fund, by law, is supposed to be funded, but we cannot because we have to pay the utility bills. I moved into that community because it was unique: We have rallied the 700 homes. We are not looking for a handout, but we are looking for what is right. When the bank took over the homes, they assumed the contracts that were made: to pay the dues, the $145 a month. I have banks that are 15 months past due, 10 months past due, 12 months past due. Thank you for listening to me.

Assemblyman Segerblom:
In regards to the banks owning these properties, at least under current law, what they owe for six months would be a super lien which you would collect when the property is sold. Have you been able to collect on those super liens?

Bill DiBenedetto:
Yes, we have.

Assemblyman Segerblom:
Is it your experience that the banks never pay without this super lien?

Bill DiBenedetto:
The banks never pay until the home is sold.

Assemblyman Segerblom:
Now, they are just paying for only six months?

Bill DiBenedetto:
They are paying for six months, and we are losing money that should be going into our reserve fund.

Chairman Anderson:
Does the bank not maintain an insurance policy on the property as the holder of the initial deed of trust?

Bill DiBenedetto:
I do not know. I would assume they would have to have some kind of liability insurance with the property.

Assemblyman Cobb:
When the banks foreclose, do they not take the position of the owner in terms of the covenants?

Bill DiBenedetto:
They do.

Assemblyman Cobb:
Do they have to start paying dues?

Bill DiBenedetto:
They have to start paying dues, and they have to abide by the covenants, which includes keeping their landscaping living.

Assemblyman Cobb:
How are they turning off the water and destroying the property?

Bill DiBenedetto:
They just shut off the water at the property.

Assemblyman Cobb:
And you do not do anything to try to force them to abide by the covenants?

Bill DiBenedetto:
There is nothing that we can do, unless we want to absorb legal costs by taking them to court. We cannot afford that. We have called them; we have begged them; there is just no response.

Assemblyman Cobb:
You cannot recover those legal costs if you do take them to court?

Bill DiBenedetto:
I have not pursued that any further with my board or the attorneys. Thank you.

Chairman Anderson:
Thank you, sir.

Michael Trudell, Manager, Caughlin Ranch Homeowners Association, Reno, Nevada:
I have emailed a prepared statement to members of the Committee (Exhibit V). I do not want to belabor the point. There is a statutory obligation of HOAs to maintain their common areas and to maintain the reserve accounts for their HOAs. I also believe that there is a direct impact on homeowners when there is only a six month ability for the HOA to collect because we have to be much more aggressive in our collection process. If that time frame was to be increased, we would be more willing to work with homeowners. Recently, our board at Caughlin Ranch changed our collection policy to be much more aggressive and to start the lien process much more quickly than we had in the past, which eventually leads to a foreclosure process. I think that has a direct impact upon our homeowners.

Chairman Anderson:
Mr. Trudell, you have been associated with this as long as I can recall, and you have been appearing in front of the Judiciary Committee. In dealings with the banks, have there been these kinds of problems in the past with your properties and others that you have been with?

Michael Trudell:
Yes, sir. Mr. Chairman, in the past, banks were much more receptive in working with us to pay the assessments and to get a realtor involved in the property to represent the property for sale.

Chairman Anderson:
Since the HOA traditionally looks out to make sure that everyone is doing the right thing, when there is a vacant property there, you probably become a little bit more mindful of it than you would in a normal community. Do you think that

this is the phenomenon right now because of the current economic situation? By extending this time period, are we going to be establishing an unusual burden, or changing the responsibility of the burden in some unusual way? In other words, should it have originally been this longer period of time? Why should there be any limit to it at all?

Michael Trudell:
From the association's standpoint, no limit would be better for the HOA, because each property is given its pro rata share of the annual budget. When we are unable to collect those assessments, then the burden falls on the other members of the HOA. As far as the current condition, banks in many instances are not taking possession of the property, so the property sits in limbo. There is a foreclosure, and then there is no property owner, at least in the situations that I have dealt with in Caughlin Ranch. We have had much fewer incidences of foreclosure than most HOAs.

Chairman Anderson:
Thank you very much. Let us turn to the folks in the south.

Lisa Kim, representing the Nevada Association of Realtors, Las Vegas, Nevada:
The Nevada Association of Realtors (NVAR) stands in support of A.B. 204. Property owners within common-interest community associations are suffering increases in association dues to cover unpaid assessments that are uncollectable because they are outside of the 6-month superpriority lien period. Many times, these property owners are hanging on by a thread in making their mortgage payment and association dues payment. I talk to people everyday that are nearing default on their obligations. By increasing the more-easily collectable assessments amount, the community associations are going to be able to keep costs down for the remaining residents. Thank you.

Chairman Anderson:
Thank you.

John Radocha, Private Citizen, Las Vegas, Nevada:
I cannot find anywhere in this bill, or in NRS Chapter 116, where a person, who has an assessment against him or her, has the right to go to the management company and obtain documents to prove retaliation and selective enforcement that was used to initiate an assessment. If they come by and accuse me of having four-inch weeds, and my next door neighbor has weeds even taller, and they are dead, that is selective enforcement. I think something should be put into this bill where I, as an individual, have the right to go to the management company and demand documentation. That way, when a case comes up, a person can be prepared. This should be in the bill someplace.

Chairman Anderson:
We will take a look and see if that is in another section of the NRS. It may well be covered in some other spot, sir.

John Radocha:
On section 1, number 5, I was wondering, could not that be changed to "a lien for unpaid assessments or assessments is extinguished unless proceedings to enforce the lien or assessments instituted within 3 years after the full amount of the assessments becomes due"?

Chairman Anderson:
The use of the words "and" and "or" are usually reserved to the staff in the legal division. They make sure the little words do not have any unintended consequences. But, we will take your comments under suggestion.

Michael Buckley, Commissioner, Las Vegas, Commission for Common-Interest Communities Commission, Real Estate Division, Department of Business and Industry; Real Property Division, State Bar of Nevada:
We are neutral on the policy, but we wanted to point out that one of the requirements for Fannie Mae on condominiums is that the superpriority not be more than six months. Just for your education, the six month priority came from the Uniform Common-Interest Ownership Act back in 1982. It was a novel idea at the time. It was met with some resistance by lenders who make loans to homeowners to buy units. It was generally accepted. We are pointing out that we would want to make sure that this bill would not affect the ability of homeowners to be able to buy units because lenders did not think that our statutory scheme complied with Fannie Mae requirements.

My second point is that there was an amendment to the Uniform Common-Interest Ownership Act in 2008. It does add to the priority of the association's cost of collection and attorney's fees. We did think that this would be a good idea. There is some question now whether the association can recover its costs and attorney's fees as part of the six-month priority. We think this amendment would allow that and it would allow additional monies to come to the association.

Chairman Anderson:
Are there any questions for Mr. Buckley who works in this area on a regular basis?

Assemblyman Segerblom:
I was not clear on what you were saying. Are you saying that this law would be helpful for providing attorney's fees to collect the period after six months?

Michael Buckley:
What I am saying is that, with the existing law, there is a difference of opinion whether the six-months priority can include the association's costs. The proposal that we sent to the sponsor and that was adopted by the 2008 uniform commissioners would clarify that the association can recover, as part of the priority, their costs in attorney's fees. Right now, there is a question whether they can or not.

Assemblyman Segerblom:
So, you are saying we should put that amendment in this bill?

Michael Buckley:
Yes, sir. This was part of a written letter provided by Karen Dennison on behalf of our section.

Chairman Anderson:
We will make sure it is entered into the record (Exhibit W).

Assemblywoman Spiegel:
I have received the Holland & Hart materials on March 4, 2009 at 2:05 p.m. They were hand delivered to my office. I am happy to work with Mr. Buckley and Ms. Dennison on amendments, especially writing out the condominium association so that they are not impacted by the Fannie Mae/Freddie Mac provisions.

David Stone, President, Nevada Association Services, Las Vegas, Nevada:
All of my collection work is for community associations throughout the state, so I am extremely familiar with this issue. Last week, I had the pleasure of meeting with Assemblywoman Spiegel in Carson City to discuss her bill and her concerns about the prolonged unpaid assessments (Exhibit X).

Chairman Anderson:
Sir, we have been called to the floor by the Speaker, and I do not want them to send the guards up to get us. I have your writing, which will be submitted for the record. Is there anything you need to quickly get into the record?

David Stone:
The handout is a requirement for a collection policy, which I think would affect and help minimize the problem that Assemblywoman Spiegel is having. I submitted a friendly amendment to cut down on that. I see that associations with collection policies have lower delinquent assessment rates over the prolonged period, and I think that would be an effective way to solve this problem. Thank you.

Chairman Anderson:
Neither Robert's Rules of Order, nor Mason's Manual, which is the document we use, recognizes any kind of amendment as friendly. They are always an impediment. Thank you, sir, for your writing. If there are any other written documents that have not yet been given to the secretary, please do so now.

Wayne M. Pressel, Private Citizen, Minden, Nevada:
Myself and two witnesses would like to speak against A.B. 204. I realize that this may not be the opportunity to do so, I just want to make sure that we are on the record that we do have some opposition, and we would like to articulate that opposition at some later time to the Judiciary Committee.

Chairman Anderson:
There will probably not be another hearing on the bill, given the restraints of the 120-day session. The next time we will see this bill is if it gets to a work session, at which time there is no public testimony. I would suggest that you put your comments in writing, and we will leave the record open so that you can have them submitted as such. With that, we are adjourned.

[Meeting adjourned at 11:20 a.m.]

RESPECTFULLY SUBMITTED:

_____
Robert Gonzalez
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 6, 2009 **Time of Meeting: 8:12 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 182	C	Jennifer Chisel, Committee Policy Analyst	Federal Register, list of explosive materials
A.B. 207	D	Assemblyman John C. Carpenter	Prepared testimony introducing A.B. 207.
A.B. 207	E	Assemblyman Carpenter	Suggested amendment to A.B. 207.
A.B. 207	F	Robert Robey	Suggested amendment to A.B. 207.
A.B. 189	G	Assemblyman Joseph Hogan	Prepared testimony introducing A.B. 189.
A.B. 189	H	Assemblyman Joseph Hogan	Chart comparing the various eviction processes of various states.
A.B. 189	I	Assemblyman Joseph Hogan	Flow chart of the California eviction process.
A.B. 189	J	Jon L. Sasser	Prepared testimony supporting A.B. 189.
A.B. 189	K	Rhea Gerkten	Prepared testimony supporting A.B. 189.
A.B. 189	L	James T. Endres	Suggested amendment to A.B. 189.
A.B. 189	M	Charles "Tony" Chinnici	Prepared testimony against A.B. 189.
A.B. 189	N	Jennifer Chandler	Prepared testimony against A.B. 189.
A.B. 189	O	Jeffery G. Chandler	Prepared testimony against A.B. 189.
A.B. 189	P	Kellie Fox	Prepared testimony opposing the change in section 2 of A.B. 189.
A.B. 189	Q	Bret Holmes	Prepared testimony against A.B. 189.
A.B. 189	R	Charles Kitchen	Prepared testimony against A.B. 189.

A.B. 189	S	Bill Uffelman	Suggested amendments for A.B. 189.
A.B. 189	T	Rosalie M. Escobedo	Prepared testimony against A.B. 189.
A.B. 204	U	Assemblywoman Ellen Spiegel	Presentation of A.B. 204.
A.B. 204	V	Michael Trudell	Prepared testimony in support of A.B. 204.
A.B. 204	W	Karen D. Dennison	Prepared testimony with suggested amendments for A.B. 204.
A.B. 204	X	David Stone	Suggested amendments for A.B. 204.

Ex. 23

HOLLAND&HART

Karen D. Dennison
Phone (775) 327-3000
kdennison@hollandhart.com

March 4, 2009

Hand Delivered

Assembly Judiciary Committee
401 South Carson Street
Carson City, Nevada 89701

Re: AB 204
Hearing Date: 3/6/09
Hearing Time: 8:00 a.m.

Dear Committee Members:

This letter is written on behalf of the executive committee of the Real Property Section of the State Bar of Nevada to inform you of the Fannie Mae Legal Requirements for condominiums and other attached housing which are contrary to the proposed amendment to NRS 116.3116(2)(c) contained in AB 204.

Enclosed are excerpts regarding project eligibility from the existing Fannie Mae Selling Guide. In addition, I have enclosed the 2009 Fannie Mae Selling Guide Preview Version which is the latest version available online. The Selling Guide outlines the legal requirements for projects in which Fannie Mae will purchase home loans from originating lenders. The existing requirements provide as follows regarding unpaid dues:

> **Unpaid dues**- Any first mortgagee who obtains title to a condominium unit pursuant to the remedies in the mortgage or through foreclosure will not be liable for more than six months of the unit's unpaid regularly budgeted dues or charges accrued before acquisition of the title to the unit by the mortgagee. If the condominium association's lien priority includes costs of collecting unpaid dues, the lender will be liable for any fees or costs related to the collection of the unpaid dues.

The current 2009 Fannie Mae Selling Guide Preview Version similarly provides that a first mortgagee cannot be liable for more than six months of the unit's unpaid and regularly budgeted dues.

When NRS Chapter 116 was originally adopted (effective January 1, 1992) it was patterned after the Uniform Common Interest Ownership Act (UCIOA). The subsection in question, NRS 116.3116(2)(c), as it is presently written is the original UCIOA language which provides for an HOA superpriority lien in a maximum amount of six months regularly budgeted assessments. UCIOA was revised in 2008 to expressly include in the superpriority lien attorney's fees and costs incurred by the association in foreclosing the assessment lien. Enclosed for your consideration is a version of NRS 116.3116 which is modified to include the 2008 UCIOA language.

As practitioners in the area of real estate law, we feel it is necessary to bring these matters to your attention in your deliberations on Assembly Bill 204.

Very truly yours,

Nevada State Bar Real Property Section

By: Karen D. Dennison (by csr)
Karen D. Dennison, Vice Chair

KDD:csr
Enclosures

cc: Assemblywoman Ellen B. Spiegel (w/Encl.)
Assemblywoman Kathy McClain (w/Encl.)
Speaker Barbara Buckley (w/Encl.)
Senator David R. Parks (w/Encl.)

NRS 116.3116; 116.31162 [UCIOA 3-116]

Proposed Change:

NRS 116.3116 Liens against units for assessments; *Sums due the association; Enforcement.* [UCIOA 3-116 (a) – (j), (l) – (n)]

1. The association has a *statutory* lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment ~~levied against~~ *attributable to* that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, *reasonable attorney's fees and costs,* any penalties, *other* fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102, *and any other sums due to the association under the declaration, this chapter, or as the result of an administrative, arbitration or judicial decision* are enforceable as *unpaid* assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. 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~~ *that* the association creates, assumes or takes subject to;

(b) ~~A~~ *Except as otherwise provided in subsection 3, 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 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.

~~E~~ *3. A* ~~The~~ lien *under this section* is also prior to all security interests described in paragraph (b) *of subsection 2* to the extent of *both* 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 6 months immediately preceding institution of an action to enforce the lien *and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.* ~~This~~ *Subsection 2 and this* subsection ~~does~~ *do* not affect the priority of mechanics' or materialmen's liens, or the priority of *mechanics' or materialmen's* liens *or the priority* for other assessments made by the association.

~~3.~~ *4.* Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

~~4.~~ *5.* Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

~~5.~~ *6.* A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due.

~~6.~~ *7.* This section does not prohibit actions *against unit owners* to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

~~7.~~ *8.* A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~8.~~ *9.* The association, upon ~~written~~ request *made in a record,* shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.

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~~9.~~ *10.* In a cooperative, upon nonpayment of an assessment on a unit, the unit's owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and:

(a) In a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, the association's lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

(b) In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien:

(1) May be foreclosed as a security interest under NRS 104.9101 to 104.9709, inclusive; or

(2) If the declaration so provides, may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

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Ann. 08-34: Project Eligibility Review Service and Changes to Condominium and Cooperative Project Policies (12/16/08)

Amends these Guides: Selling

Introduction

Announcement 07-18, *Lender Delegation of Project Review Processes and Related Changes for Condominiums, Cooperatives, and Planned Unit Developments (PUDs)*, communicated Fannie Mae's intention to fully delegate the project review process for condominiums, cooperatives, and PUDs to lenders. It also notified lenders that Fannie Mae would continue to monitor its project standards and make additional changes as warranted in the future. In that light, Fannie Mae is introducing a new Project Eligibility Review Service (PERS), which is being made available to lenders for the review of new and newly converted condominium projects. Furthermore, PERS will be required for new and newly converted condominium projects located in the state of Florida. Fannie Mae is also making several changes to its project standards policies for condominium and cooperative projects. All of the changes in this Announcement related to condominium projects pertain only to attached projects; Fannie Mae's requirements for detached condominium projects remain unchanged.

This Announcement amends the *Selling Guide*, Part XII, Project Standards. Except as otherwise stated, all provisions of Part XII of the *Selling Guide*, Announcement 07-18, and Announcement 08-01, *Miscellaneous Changes* continue to apply to mortgages secured by properties in condominium, cooperative, and PUD projects.

Effective Dates

All applicable effective dates are outlined at the end of this Announcement. The changes apply to all mortgage loans delivered to or guaranteed by Fannie Mae, including mortgages originated pursuant to any negotiated contract in the lender's Master Agreement.

Following is a brief summary of the changes outlined in this Announcement:

- **PERS - Project Eligibility Review Service:** introduction of a new project review service option. Lenders now have the option to submit new and newly converted condominium projects to Fannie Mae for review to determine eligibility. Lender Full Review and Condo Project Manager™ (CPM™) Expedited Review are still available for new and newly converted condominium projects except those located in Florida.
- **Requirements for attached condominium projects in Florida:** PERS approval will be required for all new and newly converted condominium projects located in Florida. Additionally, Fannie Mae is reducing the maximum loan-to-value (LTV) ratios for mortgage loans secured by units in established condominium projects in Florida that are eligible for Limited Review, the CPM Expedited Review, or the FHA-Approved Project Review process. Note that there are no LTV ratio eligibility changes for loans secured by units in projects utilizing the Lender Full Review process.
- **General policy changes regarding project eligibility requirements:** introduction of new or revised eligibility requirements for pre-sale, delinquent homeowner's association (HOA) dues, fidelity insurance, hazard insurance, non-residential space, and legal document review for established, new, and newly converted condominium projects. In addition, cooperative project

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eligibility requirements are being amended to align with changes to IRS Code Section 216.

- **Additional ineligible projects:** addition of three new ineligible project characteristics to Fannie Mae's list of ineligible projects, including projects with excessive sales/financing structures, projects with excessive non-residential space, and projects where a single entity owns an excessive percentage of units.
- **Clarification of "spot loan" availability under the Limited Review process:** clarification of when a "spot loan" secured by a unit in an established project is eligible for the Limited Review process.
- **Clarification of owner-occupancy ratio requirements:** clarification of how units that are currently owned by financial institutions as Real Estate Owned (REO) should be treated for determining the owner-occupancy ratio.
- **Condominium association project insurance:** clarification of Fannie Mae's requirements for "master" or "blanket" project hazard insurance policies.

PERS – Project Eligibility Review Service

Lender feedback has indicated that Fannie Mae's project acceptance review service, retired with Announcement 07-18, was important to lenders and business partners in their ability to provide financing for units located in condominium projects. In response to this feedback, Fannie Mae is introducing a new, more comprehensive Fannie Mae project review option. Lender delegated project review using CPM Expedited Review or Lender Full Review is still available except for new condominiums and newly converted condominium projects located in Florida (see section below). The Limited Review process remains available for established projects that meet the applicable LTV and occupancy requirements regardless of geographic location.

Lenders submitting condominium projects to PERS must ensure that the developer, builder, management company, and/or homeowner's association will provide project information to Fannie Mae as and when requested without charge. In the event the requested information is not provided, Fannie Mae reserves the right to withdraw the PERS approval.

Effective Date

Effective January 15, 2009, lenders will have the option to submit new or newly converted condominium projects to the Fannie Mae PERS.

Process Overview

1. Lender performs a basic review to determine if the project satisfies eligibility requirements prior to submission to PERS.
2. Lender completes a project submission package, which includes a Project Eligibility Review Service Document Checklist (Form 1030) and Application for Project Approval (Form 1026). These forms are posted on eFannieMae.com.
3. Lender submits the complete project package via email, including all relevant supporting documentation, to PERS_Projects@fanniemae.com
4. A member of the project standards team will review the project package to determine if the project

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is eligible for approval.

5. Upon completion of the review, Fannie Mae will issue one of the following decisions via email: Conditional Project Approval, Final Project Approval, Ineligible, or Suspension of the Application.

6. Fannie Mae will inform lenders of the specific review fee that will be assessed for each PERS submission. Lenders will be billed for PERS review fees in their "Monthly Technology Invoice."

7. PERS-approved projects will be posted on eFannieMae.com. Conditional Project Approval decisions will expire after six months and Final Project Approval decisions will expire one year after issuance.

8. PERS-reviewed projects determined to be ineligible for delivery to Fannie Mae will also be identified on eFannieMae.com.

Review Fees

Lenders will be charged a fee for any project submitted to Fannie Mae's PERS as follows:

- **Optional review**: The base review fee for a new project is $1,200 plus $30 for each unit in the project or legal phase up to a maximum of $15,000 per project.
- **Mandatory review**: The base review fee is waived and only the $30 per unit fee applies for a new or newly converted condominium project located in Florida up to a maximum of $15,000 per project.
- **Subsequent phase**: The greater of $600 or $30 for each new unit in additional legal phases of a previously approved project.
- **Extensions**: The greater of $500 or $30 for each unit for the legal phase or project. Conditional and final extensions will be granted as appropriate for a maximum of six months.

Note: The applicable project review fee will be assessed regardless of decision.

Examples

1) 100 unit single phase project – Optional PERS Submission

   Review fees: $1200 + $30 per unit (100 units x $30 = $3,000) total review fees = $4200

2) 100 unit single phase project – Mandatory PERS Submission

   Review fees: $30 per unit x 100 units = $3,000

Delivery Codes for PERS Approved Projects

When a lender delivers a mortgage for purchase or securitization that is secured by a unit in a condominium project approved via PERS it must identify the project review type code as Type T – Fannie Mae Review.

Reminder: *Use of Special Feature Code for Detached Condominiums*

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As a reminder, Fannie Mae currently requires the delivery of Special Feature Code 588 for mortgage loans in detached condominium projects. In light of the new requirements for attached projects outlined in this Announcement, the use of this code is imperative to ensure accurate monitoring of condominium projects.

Requirements for Attached Condominium Projects in Florida

There are currently excessive unsold inventories of condominium project units in Florida resulting from the increase in building new condominium projects and the conversion of apartments to condominium ownership that occurred during the last several years. The increase in the number of units available is one of the factors that caused home prices to reach historical lows, particularly in the condominium market. As part of an ongoing review of business activities, Fannie Mae assessed the performance of mortgage loans secured by condominiums located in Florida and found that the number of loans currently delinquent or in default is at an all time high. As a result, Fannie Mae is modifying some of the terms under mortgage loans secured by attached units in condominium projects located in Florida will be accepted.

PERS Requirements for Certain Projects in Florida

PERS will be required for new and newly converted condominium projects consisting of attached units located in Florida. Accordingly, the following lender delegated review types will no longer be accepted for loans secured by such projects in Florida: Lender Full Review, Limited Review, CPM Expedited Review, and FHA- approved projects.

All new or newly converted Florida condominium projects that have been submitted to CPM and received a "Certified by Lender" recommendation or "Owner-Occupied and Second Home" recommendation as of January 15, 2009, will be valid until expiration. Recertifications will not be permitted. Thereafter, lenders that desire to lend against such units in projects in Florida must submit the applicable projects to PERS on or after January 15, 2009. Lenders who have recently approved projects under the Lender Full Review process and have valid loan applications in their pipeline must contact their account team by January 15, 2009 to determine pipeline coverage. Projects with a Conditional Final Project Acceptance or Final Project Acceptance will continue to be valid until the expiration date.

Project Review LTV Ratio Requirements for Condominium Projects in Florida

The following table outlines the project review LTV ratio requirements for loans secured by units in condominium projects in Florida. These requirements are effective for mortgage loan applications dated on or after January 15, 2009.

Project Review LTV Requirements for Attached Projects in Florida					
Established Condominium Projects					
	PERS Approved	Lender Full Review	CPM Expedited Review	Limited Review	FHA Approved Projects
Principal Residence	97% - DU 95% - Non-DU	97% - DU 95% - Non-DU	75%	75%	75%
Second Home	90%	90%	70%	70%	70%
Investor	85%	85%	Not eligible	Not eligible	Not eligible

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New and Newly Converted Condominium Projects					
Principal Residence	97% - DU 95% - Non-DU	Not eligible	Not eligible	Not eligible	Not eligible
Second Home	90%	Not eligible	Not eligible	Not eligible	Not eligible
Investor	85%	Not eligible	Not eligible	Not eligible	Not eligible

Note: The existing higher LTV ratios will remain available for loans secured by units in established projects approved pursuant to PERS and Fannie Mae's Lender Full Review process.

General Policy Changes Regarding Project Eligibility Requirements

Pre-Sale Requirements for Attached Units in New and Newly Converted Condominium Projects

Announcement 07-18 states under the Lender Full Review process at least 51 percent of the total units in attached condominium projects or subject legal phase must have been conveyed or be under a bona fide contract for purchase to principal residence or second home purchasers.

Fannie Mae is increasing the pre-sale eligibility requirement for attached new or newly converted condominium projects reviewed under the Lender Full Review process. Accordingly, at least 70 percent of the total units in the project or subject legal phase must have been conveyed or be under a bona fide contract for purchase to principal residence or second home purchasers.

CPM Expedited Review will continue to have more flexible presale requirements for attached new or newly converted condominium projects.

Delinquent HOA Dues for Units in Attached Condominium Projects

Announcement 07-18 states that when using CPM Expedited Review and Lender Full Review for an established project consisting of attached units, no more than 15 percent of the *condominium/association fee payments* can be more than one month delinquent.

Fannie Mae is updating its delinquent HOA dues policy for the CPM Expedited Review and Lender Full Review processes to require that no more than 15 percent of the *total units* in a project can be 30 days or more past due on the payment of their condominium/association fee payments. This new policy applies to the review of both new and established attached condominium projects.

Fidelity Insurance for Units in Attached Condominium Projects

The *Selling Guide*, Part XII, Chapter 5, Section 504, Fidelity Insurance, states fidelity bond/fidelity insurance is required for new condominium projects with 20 or more units reviewed using the CPM Expedited Review, Lender Full Review, and FHA-approved project review processes. Fannie Mae is updating this policy to require fidelity bond/fidelity insurance for new and established condominium projects with more than 20 units. This new policy applies to all condominium project review types including the Limited Review process.

Hazard Insurance for Units in Attached Condominium Projects Including 2-4 Unit Projects

The *Selling Guide*, Part XII, Chapter 5, Insurance Requirements require that lenders verify that hazard insurance for all condominium projects with attached units, including two- to four- unit projects, covers

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fixtures, equipment, and other personal property inside individual units if they will be financed by the mortgage.

The updated policy now requires that the borrower obtain a "walls-in" coverage policy (commonly known as HO-6 policy) unless the lender can document that the master policy provides the same interior unit coverage. The master policy must include replacement of improvements and betterment coverage to cover any improvements that the borrower may have made to the unit.

The HO-6 insurance policy must provide coverage in an amount that is no less than 20 percent of the condominium unit's appraised value. In the event such coverage can not be obtained, the lender should call the Fannie Mae Project Standards Department at the phone number listed at the end of this Announcement. The standard requirement for a 5 percent deductible applies.

Co operative Project Commercial Space and IRS Code Section 216

The *Selling Guide*, Part XII, Section 501.02 limits the cooperative corporation's income from commercial space to 20 percent of its total income. The updated policy limits non-residential use in the cooperative project to no more than 20 percent of the project's total square footage and eliminates the income limitation.

Review of the Condominium Project's Legal Documents

Established Condominium Projects and all Two- to Four-Unit Projects

Announcement 08-01 provided clarification regarding legal document review for condominium projects. Currently, lenders must represent and warrant that the project's legal documents comply with the legal requirements for established condominium projects and established and new two- to four-unit condominium projects.

Fannie Mae is updating this policy to eliminate this representation and warranty requirement altogether for established condominium projects and established and new two-to-four unit condominium projects.

New Condominium Projects (excluding New Two-to Four-Unit Projects)

Announcement 08-01 clarified that a qualified attorney engaged by the lender must review the legal documents for all new condominium projects that are not two- to four-unit projects, and determine that the documents are in compliance with Fannie Mae's legal requirements.

Fannie Mae is updating this policy to make the attorney review requirement optional for all review processes with the exception of PERS. Going forward, it will be mandatory for lenders to represent and warrant that the condominium project's legal documents are in compliance with Fannie Mae's legal requirements.

Projects submitted to PERS

A qualified attorney engaged by the lender must review the legal documents for all condominium projects submitted to PERS and determine that the documents are in compliance with the legal requirements as described in Announcement 08-01, Attachment 1. This determination must be documented by the attorney in writing but need not rise to the level of a formal, written legal opinion. The attorney may be the same person who prepared the legal documents or an attorney employed by the

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lender, but he or she cannot be an employee, principal, or officer of the developer or sponsor of the project. The lender must complete Fannie Mae Form 1054 and attach the attorney review as part of the PERS submission process. Lender must retain all legal documents and make available to Fannie Mae upon request.

Additional Ineligible Projects

Fannie Mae is adding three new characteristics to the list of ineligible project types currently identified in the *Selling Guide*, Part XII, Section 102: Ineligible Projects. Fannie Mae considers condominium projects with the following characteristics to be ineligible for delivery to Fannie Mae:

- New projects where the seller is offering sale/financing structures in excess of Fannie Mae's eligibility policies for individual mortgage loans. These excessive structures include, but shall not be limited to, builder/developer contributions, sales concessions, HOA or principal and interest payment abatements, and/or contributions not disclosed on the HUD-1 Settlement Statement.
- Projects where more than 20 percent of the total space is used for non-residential purposes.
- Projects where a single entity (the same individual, investor group, partnership, or corporation) owns more than 10 percent of the total units in the project.

Clarification of "Spot Loans" Under the Limited Review Process

Fannie Mae received a number of lender questions about the following provision in Announcement 07-18 related to use of the Limited Review process:

> "Our Limited Review process â€¦ is intended to be used on a 'spot loan' basis and must not be used to deliver multiple mortgages within the same condominium project to Fannie Mae. Lenders must use one of the other project review methods described in this Announcement to deliver multiple mortgages from a given project."

Based upon the number of questions that were received, the following clarification is necessary:

- The Limited Review process is intended to be used on a "spot loan" basis, meaning that lenders may originate loans that arise through the ordinary course of business.
- A lender may originate more than one loan in a particular project under the Limited Review process provided that the project is an established project and meets the requirements for Limited Review set forth in Announcement 07-18.
- However, if the lender has targeted the project with specific marketing efforts or is named as a preferred lender by either the developer or the project's home owner's association, the project is ineligible for Limited Review and the lender must use one of the other project review processes.

Clarification of Owner-Occupancy Ratio Requirements

Fannie Mae requires that established condominium projects consisting of attached units have an owner-occupancy ratio of at least 51 percent at the time the loan is originated (purchase or refinance) if the mortgage loan being delivered is secured by an investment property. Established projects where borrowers will occupy the unit or use the unit as a second home are not subject to any owner-occupancy ratios.

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Due to current market conditions, many condominium projects are experiencing higher numbers of financial institution- owned REO units, which many lenders may be counting as non-owner-occupied under Fannie Mae's current requirements.

Fannie Mae is clarifying its condominium project owner-occupancy ratio policy to include REO units that are for sale (not rented) as owner-occupied units in the owner- occupancy ratio.

Projects where a borrower is an investor and the project does not meet the owner-occupied ratio of 51 percent will only be eligible if the lender submits the project to Fannie Mae for review under PERS and the project is approved or as a single-loan project eligibility waiver and Fannie Mae approves the waiver based on its review of the overall risk of the project.

Condominium Association Project Insurance Clarifications

Selling Guide, Part XII, Section 501: Hazard Insurance; and Servicing Guide, Part II, Section 205.01: Amount of Coverage

Fannie Mae is clarifying the requirements for master or blanket project insurance (hazard, windstorm, and flood) for condominiums. Lenders must review the entire condominium project insurance policy to ensure that the owners' association maintains a master or blanket type of insurance policy for only the project in which the individual condominium unit will be financed. The following are not permitted:

- a blanket policy that covers multiple unaffiliated condominium associations or projects, or
- a self insurance arrangement whereby the owners' association is self insured or has banded together with other unaffiliated associations to self insure all of the general and limited common elements of the various associations.

As a reminder, condominium association project insurance must cover 100 percent of the insurable replacement cost of the project improvements, including the individual units in condominium project. Coverage does not need to include land, foundations, excavations, or other items that are usually excluded from insurance coverage. Fannie Mae expects lenders to verify hazard insurance (including wind and flood insurance, if applicable) coverage at the project level as part of their review of a project. Lenders must verify that each condominium association is covered by an individual policy before it delivers a mortgage loan on an individual unit in a condominium project.

Effective Dates

The chart below outlines the effective dates for the changes described in this Announcement.

Topic	Effective Date
PERS is available for optional submissions (exception - certain Florida projects)	January 15, 2009
PERS is mandatory for new and newly converted attached condominium projects in Florida	January 15, 2009
CPM Projects in Florida with "Certified by Lender" or "Owner-Occupied and Second Home" recommendations obtained prior to January 15, 2009	CPM recommendations are valid until expiration
Florida Project Review LTV Ratio Requirements	Loan applications dated on or after January 15, 2009

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General policy changes regarding project eligibility requirements	Loan applications dated on or after March 1, 2009
Additional ineligible projects	Loan applications dated on or after March 1, 2009
Clarifications: • "Spot loans" under the Limited Review process • Owner-occupancy ratio requirements • Condominium association project insurance	Immediately

* * * * *

Lenders who have questions about Announcement 08-34 should contact their Customer Account Team or the Fannie Mae Project Standards Department at 202-752-2916. Lenders that have CPM related questions should call 800-752-6440.

Michael A. Quinn

Senior Vice President

Single-Family Risk Officer

Ann. 07-18: Attachment 1: Exhibit 1: Legal Requirements for CPM Expedited Review and Lender Full Review Processes for Condominiums – Lender Representations and Warranties (11/15/07)

Compliance with laws – The condominium project has been created and exists in full compliance with the state law requirements of the jurisdiction where the condominium project is located and all other applicable laws and regulations.

Limitations on ability to sell/Right of first refusal – Any right of first refusal in the condominium project documents will not adversely impact the rights of a mortgagee or its assignee to:

a. Foreclose or take title to a condominium unit pursuant to the remedies in the mortgage;

b. Accept a deed or assignment in lieu of foreclosure in the event of default by a mortgagor; or

c. Sell or lease a unit acquired by the mortgagee or its assignee.

Amendments to Documents –

a. The project documents must provide that amendments of a material adverse nature to mortgagees be agreed to by mortgagees that represent at least 51 percent of the votes of unit estates that are subject to mortgages.

b. The project documents must provide for any action to terminate the legal status of the project after substantial destruction or condemnation occurs or for other reasons to be agreed to by mortgagees that represent at least 51 percent of the votes of the unit estates that are subject to mortgages.

c. The project documents may provide for implied approval to be assumed when a mortgagee fails to submit a response to any written proposal for an amendment within 60 days after it receives proper notice of the proposal, provided the notice was delivered by certified or registered mail, with a "return receipt" requested.

Rights of Condo Mortgagees and Guarantors – The project documents must give the mortgagee and guarantor of the mortgage on any unit in a condominium project the right to timely written notice of:

a. Any condemnation or casualty loss that affects either a material portion of the project or the unit securing its mortgage;

b. Any 60-day delinquency in the payment of assessments or charges owed by the owner of any unit on which it holds the mortgage;

c. A lapse, cancellation, or material modification of any insurance policy maintained by the homeowners' association; and

d. Any proposed action that requires the consent of a specified percentage of mortgagees.

First mortgagee's rights confirmed – No provision of the condominium project documents gives a condominium unit owner or any other party priority over any rights of the first mortgagee of the condominium unit pursuant to its mortgage in the case of payment to the unit owner of insurance proceeds or condemnation awards for losses to or a taking of condominium units and/or common elements.

W-14

Unpaid dues - Any first mortgagee who obtains title to a condominium unit pursuant to the remedies in the mortgage or through foreclosure will not be liable for more than six months of the unit's unpaid regularly budgeted dues or charges accrued before acquisition of the title to the unit by the mortgagee. If the condominium association's lien priority includes costs of collecting unpaid dues, the lender will be liable for any fees or costs related to the collection of the unpaid dues.

Attorney's Opinion –Lenders must represent and warrant that a qualified attorney engaged by the lender issued a written legal opinion based upon a review of the project's legal documents which states that they are in compliance with the legal requirements discussed herein. The attorney may be the same person who prepared the legal documents but he or she cannot be an employee, principal, or officer of the developer or sponsor of the project. The attorney's written opinion must be available upon request for the purposes of a Fannie Mae Quality Assurance review. (Selling Guide *Part XII, Chapter 2, Exhibit 2*, Guidelines for Preparing an Attorney's Opinion, provides guidelines that may be used to develop the attorney's opinion)

W-5

Fannie Mae 2009 Selling Guide Preview Version (105660) / 2009 Selling Guide ? Preview Version / Part B, Origination Through Closing / Subpart B2, Eligibility and Underwriting / Chapter B2-8, Appraisal Guidelines and Project Standards / Section B2-8.2, Project Standards / Section B2-8.2.3, Fannie Mae Reviews / B2-8.2.3-02, Legal Requirements for Lender Full Review and CPM Expedited Processes (PREVIEW VERSION)

B2-8.2.3-02, Legal Requirements for Lender Full Review and CPM Expedited Processes (PREVIEW VERSION)

Introduction

This topic contains information on legal requirements for Fannie Mae reviews.

- Legal Requirements for Lender Full Review and CPM Expedited Processes
- Lender Representations and Warranties
- Limitations on Ability to Sell/Right of First Refusal
- Rights of Condo Mortgagees and Guarantors
- First Mortgagee's Rights Confirmed
- Unpaid Dues
- Amendments to Documents
- Attorney's Opinion: Established and New Two- to Four-Unit Condo Projects
- Attorney's Opinion: New Condo Projects (Excluding New Two- to Four-Unit Projects)

Legal Requirements for Lender Full Review and CPM Expedited Processes

For established projects and all two- to four-unit projects, the lender must represent and warrant that the project complies with the legal requirements set forth in Fannie Mae policies. For new condo projects that are not two- to four-unit projects, a qualified attorney engaged by the lender must review the legal documents and determine that the documents are in compliance with the legal requirements; the determination must be documented in writing but need not rise to the level of a formal, written legal opinion.

W-16

Lender Representations and Warranties

The condo project has been created and exists in full compliance with the state law requirements of the jurisdiction where the condo project is located and all other applicable laws and regulations.

Limitations on Ability to Sell/Right of First Refusal

Any right of first refusal in the condo project documents will not adversely impact the rights of a mortgagee or its assignee to:

- Foreclose or take title to a condo unit pursuant to the remedies in the mortgage;
- Accept a deed or assignment in lieu of foreclosure in the event of default by a mortgagor;
- Sell or lease a unit acquired by the mortgagee or its assignee.

Rights of Condo Mortgagees and Guarantors

The project documents must give the mortgagee and guarantor of the mortgage on any unit in a condo project the right to timely written notice of:

- Any condemnation or casualty loss that affects either a material portion of the project or the unit securing its mortgage;
- Any 60-day delinquency in the payment of assessments or charges owed by the owner of any unit on which it holds the mortgage;
- A lapse, cancellation, or material modification of any insurance policy maintained by the homeowners' association; and
- Any proposed action that requires the consent of a specified percentage of mortgagees.

First Mortgagee's Rights Confirmed

No provision of the condo project documents gives a condo unit owner or any other party priority over any rights of the first mortgagee of the condo unit pursuant to its mortgage in the case of payment to the unit owner of insurance proceeds or condemnation awards for losses to or a taking of condo units and/or common elements.

Unpaid Dues

Any first mortgagee who obtains title to a condo unit pursuant to the remedies in the mortgage or through foreclosure will not be liable for more than six months of the unit's unpaid regularly budgeted dues.

W-17

Amendments to Documents

The amendments to documents are as follow:

- The project documents must provide that amendments of a material adverse nature to mortgagees be agreed to by mortgagees that represent at least 51% of the votes of unit estates that are subject to mortgages.
- The project documents must provide for any action to terminate the legal status of the project after substantial destruction or condemnation occurs or for other reasons to be agreed to by mortgagees that represent at least 51% of the votes of the unit estates that are subject to mortgages.
- The project documents may provide for implied approval to be assumed when a mortgagee fails to submit a response to any written proposal for an amendment within 60 days after it receives proper notice of the proposal, provided the notice was delivered by certified or registered mail, with a "return receipt" requested. Notwithstanding the foregoing, project documents that were recorded prior to August 23, 2007, may provide for implied approval to be assumed when a mortgagee fails to submit a response to any written proposal for an amendment within 30 days after it receives proper notice of the proposal, provided the notice was delivered by certified or registered mail, with a "return receipt" requested.

Attorney's Opinion: Established and New Two- to Four-Unit Condo Projects

Lenders must represent and warrant that the project complies with the legal requirements discussed herein.

Attorney's Opinion: New Condo Projects (Excluding New Two- to Four-Unit Projects)

A qualified attorney engaged by the lender must review the legal documents for all new condo projects that are not two- to four-unit projects, and determine that the documents are in compliance with the legal requirements discussed herein. This determination must be documented by the attorney in writing but need not rise to the level of a formal, written legal opinion. The attorney may be the same person who prepared the legal documents or an attorney employed by the lender, but he or she cannot be an employee, principal, or officer of the developer or sponsor of the project. The writing reflecting compliance with the legal requirements must be available upon request for the purposes of a Fannie Mae Quality Control review.

W-18

Ex. 24

Federal Housing Finance Agency
1700 G Street, N.W., Washington, D.C. 20552-0003
Telephone: (202) 414-3800
Facsimile: (202) 414-3823
www.fhfa.gov

April 26, 2011

Lucas Foletta
General Counsel
Office of the Governor
State of Nevada
101 N. Carson Street
Carson City, NV 89701

RE: SB 174

Dear Mr. Foletta:

In furtherance of our discussion regarding SB 174 and as promised, I wanted to expand on my analysis of and concerns with the provisions of the bill. As you know, the Federal Housing Finance Agency (FHFA) acts as regulator and conservator for Fannie Mae and Freddie Mac and has obligations that focus on preserving and conserving assets of the firms, avoiding losses and maintaining their safe and sound operations. The agency also oversees operations of the twelve Federal Home Loan Banks.

As we discussed, the provisions of the bill which relate to the collection of unpaid homeowners association (HOA) assessments raise significant issues. I would note Fannie Mae and Freddie Mac have provided for reimbursement of six months of regular common expense unpaid assessments. They do not reimburse for collection costs or attorney's fees. The comments that follow, therefore, relate primarily with specifics of the legislation, but I would note that, in general, the bill would alter practices for which the Enterprises do not provide reimbursement.

Specific observations concerning substantive provisions of SB 174 and problems with implementation of such a law, that I would hope would be of benefit to your consideration, are provided here:

First, Section 15 of the bill provides that "reasonable" attorney's fees and collection costs for collecting unpaid HOA assessments are included in a HOA's "super-priority lien" for assessments for common expenses. Experience shows that, in general, attorney's fees and collection costs are much higher than the amount of delinquent assessments and this bill would transfer such costs to servicers and potentially the Enterprises. In any event, general practice has been that homeowners who have title to the property and want to resolve claims related to the property would be required to pay attorney's fees and collection costs.

If a bill such as SB 174 were enacted, Fannie Mae and Freddie Mac servicers would be responsible for the payment of such attorney's fees and collection costs to the extent they are not paid by homeowners. Servicers might attempt to seek reimbursement from Fannie Mae and Freddie Mac, however, Enterprise seller-servicer guides prohibit reimbursing servicers for such attorney's fees and collection costs. In addition, attorney's fees and collection expenses could increase foreclosure costs and increase the costs to purchasers of homes coming to the market.

Second, with regard to capping collection fees under Section 15, the set amount of $1950 is not a true limitation as an exception exists transferring authority to homeowners associations to make a declaration to provide that a lien may exceed the statutory cap without limitation. Therefore, because the provision allows the HOA's declaration to govern over the statutory cap, but then applies the limitation to "any other amounts due the association pursuant to the governing documents," the cap may be illusory. While Fannie Mae and Freddie Mac, as noted above, would not reimburse for such collection fees, the language as reported appears to provide no firm capping of such fees in any event.

Third, Section 15 is somewhat ambiguous about the lien for collection costs. In particular, it is unclear what time frame is involved for which such collection costs would be afforded lien priority. As we discussed, Fannie Mae and Freddie Mac do not reimburse for such costs.

Finally, I would note that this measure would represent a significant change to existing law and practice and could have unintended consequences in the current market environment. Please do not hesitate to contact me if you have any questions regarding these comments; I may be reached at 202 414-3788.

With all best wishes, I am

Sincerely,

Alfred M. Pollard
General Counsel

Ex. 25

THE
COOPER CASTLE
LAW FIRM, LLP
A MULTIJURISDICTIONAL LAW FIRM

October 25, 2011

James R. Adams, Esq.
Adams Law Group, Ltd.
8681 W. Sahara Ave., Suite 280
Las Vegas, NV 89117
Via Email: James@adamslawnevada.com

RE: Owner's Request for Super-Priority Demand and 116.4109 Information Form

Dear Mr. Adams:

Thank you for your recent inquiry regarding the form we utilize entitled "Owner's Request For Super-Priority Demand and 116.4109 Information." As you are aware, The Cooper Castle Law Firm, LLP (CCLF) is Nevada designated counsel for Federal Home Loan Mortgage Corporation (FreddieMac). CCLF is charged with the responsibility of obtaining payoff demands from homeowner's associations for properties that FreddieMac has acquired via foreclosure. I believe that your questions regarding this form related to a question as to whether or not FreddieMac concurs with Judge Glass's opinion in the *Korbel vs. Spring Mountain Ranch Master Association* case.

While our form does cite this case, this is not done as a matter of concurrence with Judge Glass' opinion, but rather an attempt to curtail the constant abuses visited on our client by homeowner associations and their agents. On a daily basis, CCLF receives demands for payment which routinely include pre-foreclosure assessments which date well beyond nine months, pre-foreclosure violation fines, post-foreclosure violation fines which have been levied without property notice and hearing, construction penalties, and special assessments that do not meet the criteria of NRS 116.310312. FreddieMac is frequently charged double transfer fees, inflated transfer fees, charged for obtaining a payoff demand of its own account, and even charged an additional fee if we dispute an erroneous payoff demand. There is a pervasive attitude of "demand everything" from the new owner, even if this is not the party that actually owes the money to the association..."the old owner is gone...the new owner has the money and has to pay us whatever we demand if they want to re-sell the property with clear title..." We have seen many cases where the CC&Rs provide that a new owner is not chargeable for ***any*** of the past due assessments owing. These CC&Rs were specifically drafted to induce the FHLMC, GNMA, VA, HUD and FNMA to participate in the financing of the sale of Separate Interests within the Properties. In direct violation of its own governing documents, we frequently see HOA's demanding pre-foreclosure assessments and violations, hoping that no one bothers to actually read the CC&Rs.

In summary, neither The Cooper Castle Law Firm, LLP nor Federal Home Loan Mortgage Corporation concur with Judge Glass' opinion, but we currently seem to have no other Nevada precedents that will at least partially protect our clients from constant overcharges by homeowners' associations and their agents.

Please do not hesitate to contact me if you have any additional questions regarding the foregoing.

Sincerely,
/s
Anita KH McFarland, Esq.

COS
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Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

IKON HOLDINGS, LLC, a Nevada limited liability company, Plaintiff, vs. HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive, Defendant.	CASE NO: A-11-47850-C DEPT NO. 13 HEARING DATE: 12/12/2011 HEARING TIME: 9:00 a.m.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Adams Law Group, Ltd., and that on this date, I served the following **MOTION FOR PARTIAL SUMMARY JUDGMENT ON ISSUE OF DECLARATORY RELIEF** upon all parties to this action by:

x	Placing an original or true copy thereof in a sealed enveloped place for collection and mailing in the United States Mail, at Las Vegas, Nevada, postage paid, following the ordinary business practices;

	Hand Delivery - Kurt Bonds only.
	Facsimile
	Overnight Delivery
	Certified Mail, Return Receipt Requested.

addressed as follows:

Kurt R. Bonds, Esq.
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117
Attorneys for Defendant

Dated this 8th day of November, 2011.

An Employee of Adams Law Group, Ltd.

ADAMS LAW ASSOCIATES, LTD.
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CLERK OF THE COURT

ALVERSON, TAYLOR, MORTENSEN & SANDERS
KURT R. BONDS, ESQ.
Nevada Bar #6228
ERIC W. HINCKLEY, ESQ.
Nevada Bar #12398
7401 W. Charleston Boulevard
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(702) 384-7000
Attorney for Defendant Horizons At
Seven Hills Homeowners' Association

DISTRICT COURT

CLARK COUNTY, NEVADA

-*-

IKON HOLDINGS, LLC, a Nevada limited liability company,

Plaintiff,

vs.

HORIZONS AT SEVEN HILLS HOMEOWNERS ASSOCIATION, and DOES 1 through 10 and ROE ENTITIES 1 through 10 inclusive,

Defendant.

Case No. A-11-647850-C
Dept. No. XXVIII

DEFENDANT, HORIZONS AT SEVEN HILLS HOMEOWNERS' ASSOCIATION'S, OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT

COMES NOW, Defendant, HORIZONS AT SEVEN HILLS HOMEOWNERS' ASSOCIATION, by and through its attorneys of record, Kurt R. Bonds, Esq., and Eric W. Hinckley, Esq., of ALVERSON, TAYLOR, MORTENSEN & SANDERS, and hereby files its Opposition to Plaintiff's Motion for Partial Summary Judgment and Counter-Motion for Summary Judgment.

KB/19223

This Opposition and Counter-Motion is made and based on the following Points and Authorities, the papers and pleadings on file herein and any oral argument the Court entertains at the time of hearing on the Motion.

DATED this 28th day of November, 2011.

ALVERSON, TAYLOR,
MORTENSEN & SANDERS

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POINTS AND AUTHORITIES

I.

INTRODUCTION

This case concerns Ikon Holdings, LLC's (hereinafter "Ikon" or "Plaintiff") obligation to satisfy a lien on real property that is located within the Horizons at Seven Hills Homeowners' Association (hereinafter "Association"). In its Complaint, Ikon seeks declaratory relief regarding what has been commonly referred to as a Homeowner's Association's "Super Priority Lien" as it applies to delinquent assessments. The Association requests this Court deny Plaintiff's Motion and grant the Association's Motion for Summary Judgment, because the relief requested by Plaintiff is improper under NRS 116.

Pursuant to N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. This particular lien is afforded superiority over virtually every other lien or encumbrance against the property, including the first deed of

trust. The lien applies to assessments that accrue in the nine (9) months preceding an action to enforce the lien (i.e. foreclosure) plus certain repair costs under NRS 116.310312. Pursuant to Nevada law, late fees, interest and collection costs are also included in the Super Priority Lien. *See* Section III.B.8. below. Lenders and investors are required to satisfy the Super Priority Lien in order to secure marketable title to re-sell the home.

Therefore, the Association requests that this Court deny Ikon's Motion for Partial Summary Judgment and grant the Association's Motion for Summary Judgment.

II.

STATEMENT OF FACTS

On or around June 28, 2010, Scott Ludwig purchased the real property located at 950 Seven Hills Drive, Suite 1411, Henderson, Nevada 89052 (hereinafter "Property") at a foreclosure sale held by the first mortgage lender. The Property is located within the Association. The Association had previously filed a Notice of Default against the Property on or around August 4, 2009 in the amount of $4,289.50. Mr. Ludwig then transferred title of the Property to Ikon on or around July 14, 2010. Therefore, Ikon was on notice of the Association's lien when it purchased the Property.

On or around September 30, 2010, the Association filed a lien against the Property, including past due assessment and collection costs. On or around the first week of October 2010, Ikon requested a payoff amount in order to gain clear title to the property. In response, the Association informed Ikon that the outstanding balance was $6,287.94. On or around November 18, 2010, the Association filed a Notice of Default against the Property.

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III.

LEGAL AUTHORITY

A. SUMMARY JUDGMENT

Plaintiff seeks Summary Judgment on its cause of action for Declaratory Relief from this court with respect to two issues: (1) the monetary limit of a homeowners' association's "Super Priority" lien for delinquent assessments under NRS 116.3116; and, (2) whether the Association is required to commence a civil action in order to enforce its lien. As Plaintiff notes, there is no factual dispute in this case. As such, the Association requests that this Arbitrator deny Plaintiff's Motion for Partial Summary Judgment and grant the Association's Counter-Motion for Summary Judgment. All of Plaintiff's causes of action are dependent on its cause of action for declaratory relief. Therefore, if this Arbitrator grants summary judgment in favor of the Association on the cause of action for declaratory relief, this Arbitrator must grant summary judgment against Plaintiff on all of its causes of action.

This Arbitrator should grant summary judgment in the Association's favor in this case as the controlling authority clearly indicates that the Super Priority lien includes late fees, interest and collection costs and that the Association need not file a lawsuit in order to enforce its lien.

SUPER PRIORITY LIEN

Generally, under N.R.S. 116.3116, a homeowners' association has a statutory lien against a unit owner's real property for delinquent assessments. A delinquent assessment lien is afforded superiority over nearly every lien or encumbrance against the property as to the full amount of the lien, to the extent of assessments accrued in the 9 months preceding an action to enforce the lien. This delinquent assessment lien is referred to as the Super Priority Lien. Lenders and investors are required to satisfy the Super Priority Lien to secure marketable title and sell the home. And, pursuant to Nevada law, late fees, interest and the costs associated with

collection are included in the Super Priority Lien.

To be clear, N.R.S. § 116.3116(1) provides, in relevant part, as follows:

> 1. The association has a lien on a unit for . . . any assessment levied against that unit . . . Unless the declaration otherwise provides, any **penalties, fees, charges, late charges, fines and interest** charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 **are enforceable as assessments** under this section. . . .
>
> 2. 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 . . . 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 any charges incurred by the association on a unit pursuant to NRS 116.3103121 and 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).

NRS 116.3116 is plain and unambiguous and review of the Legislative History is not necessary for this court to determine that: (1) penalties, fees, charges, late charges, fines and interest are enforceable as assessments as against a unit (NRS 116.3116(1)); (2) the association has a lien on a unit for any assessment levied against that unit (NRS 116.3116(1)); and (3) the Association's Lien is prior to the first security interest and all other security interests (NRS 116.3116 (2)(c)). Any assertion that fees and collection costs are in addition to the super priority lien is erroneous as these fees and collection costs are included in the super priority lien.

Fees and collection costs are "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115." First, collection costs and fees

1 See also NRS 116.310312(6), which provides, "Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. . . ."

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are assessments because NRS 116.3116(1) states "any penalties, fees, charges, late charges, fines, and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are **enforceable as assessments under this section.**" Moreover, fees and collection costs are assessments for common expenses, because said fees and costs are expenditures made by, or financial liabilities of, the association, together with any allocations to reserves." Finally, fees and collection costs are based on the periodic budget adopted pursuant to NRS 116.3115 because collection costs and fees are caused by the failure of a unit owner to pay assessments, and are chargeable as assessments under NRS 116.3115(6). Thus, when the statute is considered in its entirety, the plain language shows fees and collection costs are "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115", and therefore the full amount of reasonable fees and costs associated with enforcement of the super priority lien are included in the super priority lien.

When a statute is clear on its face, a court must not go beyond the statute's plain language to determine the Legislature's intent. Hardy Cos. v. SNMARK, LLC, 245 P.3d 1149, 1153 (Nev. 2010). Only when a statute is ambiguous should a Court turn to the Legislative history to determine the meaning of the statute and the Legislative intent. J.E. Dunn Northwest, Inc. v. Corus Constr. Venture, LLC, 2011 Nev. LEXIS 6, 10-11 (2011). Moreover, when a statute contains words that have a plain and certain meaning, no part of the statute should be rendered superfluous or meaningless in a manner that would produce an absurd result. Allstate Insurance Co. v. Fackett, 206 P.3d 572, 576 (Nev. 2009).

In this case, the Legislature has expressly given the Association the right to recover penalties, fees, charges, late charges, fines and interest in connection with 9 months of delinquent assessments. To promulgate the Association's right to recover these fees and costs, but then to exclude those as part of the Super Priority lien produces an unworkable and unjust result. If the

Court were to grant Plaintiff's Motion, the language of NRS 116.3116(1) would be rendered superfluous and the Association's right to collect these fees and costs, illusory. See S. Nev. Homebuilders Ass'n v. Clark County, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (holding that a court must read a statute in its entirety, so that the reading "would not render words or phrases superfluous or make a provision nugatory.")(emphasis added).

Following Plaintiff's argument that the Association's lien is limited to the total of nine months worth of monthly assessments, the Association would never seek to enforce its super priority lien. The cost of retaining an attorney plus filing fees and costs would certainly exceed many times over the total of nine months of past due assessments. Therefore, per Plaintiff's position, the Legislature provided homeowners' associations with a special super priority lien knowing that the association would never enforce it. Clearly, this is not what the Legislature intended when it promulgated NRS 116.

Subsection (2) of NRS 116.3116 includes no numeric cap on the super priority lien. The lien given super priority status is defined with regard to the particular time period only, not any numerical limitation or mathematical calculation of nine times the monthly assessments. If the Legislature intended to define the super priority lien, it could have done so by simply setting forth that mathematical calculation in the statute. In fact, Assembly Bill (AB) 448, which was introduced during the 2011 legislative session, proposed to do just that. As discussed below, AB 448 sought to include the express language calculating the super priority lien based on nine times the amount of monthly assessments. However, the Nevada Legislature, aware that the Clark County District Court had ruled that collection fees and costs are part of the super priority lien without a numerical cap, declined to adopt AB 448.

It is interesting to note that Plaintiff asks this Court to interpret the plain language of the statute but then proceeds to offer his own interpretation of the statute's language. Clearly, this is

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unnecessary given the statute's language in favor of the Association's position. In addition to the statutory interpretation favoring the Association's position, recent case law further supports this Court's denial of Plaintiff's Motion.

B. PURSUANT TO CURRENT LEGAL AUTHORITY, PLAINTIFF'S MOTION MUST BE DENIED

1. The Uniform Common Interest Ownership Act (UCIOA) and its Legislative History

NRS 116 differs significantly from the UCIOA with regard to the super priority lien. Plaintiff argues that the UCIOA comments indicate that the super priority lien was intended to be a fixed amount, but this is irrelevant for two reasons. First, Nevada did not adopt the UCIOA as written; rather Nevada's statutory scheme provides for a much broader super priority lien than the UCIOA. The differences between NRS 116 and the UCIOA are discussed more fully below. As a result of these differences, the comments to the UCIOA are not instructive. Second, contrary to the UCIOA, it is not possible for the super priority lien to be a fixed amount in Nevada because the super priority lien includes "charges incurred by the association on a unit pursuant to NRS 116.310312." The charges incurred by the association on a unit pursuant to NRS 116.310312 are not fixed, and cannot be determined in advance. Thus, the legislative history cited by Plaintiff in support of its argument that the super priority lien must be a fixed amount has no bearing on the proper interpretation of NRS 116.

2. Plain Language of NRS 116

As discussed above, the plain language of NRS 116 dictates that fees and collection costs are enforceable as assessments under NRS 116.3116(1). Also as outlined above, the plain language of NRS 116 dictates that fees and costs of collection are "assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115." Thus, the plain language of the statute dictates that fees and collection costs must be included

when calculating the amount of the super priority lien.

3. Wingbrook Capital, LLC v. Peppertree Homeowners' Association

Plaintiff cites an Order in the Wingbrook Capital, LLC v. Peppertree Homeowners' Association case for the proposition that the super priority lien does not include collection costs and fees. Although the Wingbrook Order is not binding on this Court, Plaintiff misrepresents the facts at issue and the import of the ruling issued by Judge Gonzalez in Wingbrook. In Wingbrook, the issues before the Court primarily concerned an abatement lien for work performed by the homeowners' association to abate a public health hazard and nuisance. *See* Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Counter-Motion to Dismiss, attached hereto as Exhibit 1. In fact, the moving papers presented by the homeowners' association raise no similar arguments raised by the Association in the instant matter. Rather, the homeowners' association in Wingbrook states, "unlike a lien for delinquent assessments, there is no cap to charges made for repairs under NRS 116.310312." Id. at p. 9:24-27.

Thus, because the primary issue in Wingbrook was the abatement lien, the homeowners' association focused solely on its right to recover construction costs as part of the super priority lien and raised no argument that fees and costs of collecting delinquent assessment are part of the super priority lien. As a result, with regards to fees and costs of collecting delinquent assessments, Judge Gonzalez's decision in Wingbrook was made without the benefit of a full presentation of the arguments on both sides of the issues presented herein. Although Judge Gonzalez ruled that costs of collection of the abatement liens are collectible, her decision was limited to the abatement lien and not delinquent assessments.

Moreover, Judge Gonzalez did not address fees and collection costs associated with delinquent assessments. Following issuance of the Wingbrook order, the homeowners' association filed a Motion for Reconsideration. *See* Peppertree Homeowners Association's

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Motion for Reconsideration Regarding the Grant of Summary Judgment in Favor of Wingbrook Capital, LLC, attached hereto as Exhibit 2. Based on the Motion for Reconsideration, it appears Judge Gonzalez did not address collection costs. The Motion for Reconsideration states, "This Court granted Plaintiff's motion, in part, and ordered that interest and late fees were improperly charged. This court did not address collection costs." Id. at 3:15-17. The Motion for Reconsideration goes on to state, "Similarly, this court did not address collection costs. Thus, although the Order seems to provide an Assessment Cap Figure that bars interest and late fees under NRS 116.3116, the Court did not rule that the collection costs were barred." Id. at 8:19-22. There is no way to know whether Judge Gonzalez would have granted the Motion for Reconsideration, because the parties settled the case before the motion was heard. Thus, not only did Wingbrook deal primarily with issues that have no bearing on the instant matter, it is uncertain what ruling, if any, Judge Gonzalez intended to issue with regard to fees and collection costs related to delinquent assessments (as opposed to fees and costs related to the abatement lien.)

4. Financial Institution Division

The Advisory Opinion issued by the Financial Institutions Division ("FID") is entitled to no weight whatsoever. First, the FID opinion was issued without jurisdiction, and has been enjoined by this Court. Moreover, contrary to Plaintiff's argument that "Judge Johnson did not dispute the substance of the Declaratory Order," the true facts are that Judge Johnson had no need to rule on the substance of the Advisory Opinion because jurisdiction was the threshold issue and Judge Johnson's ruling on that issue was dispositive.

Second, the reason the FID did not have jurisdiction to issue the Advisory Opinion is the very reason the FID's opinion is entitled to no weight: the FID is not the agency charged with interpretation of NRS 116. The FID, which is a division of the Nevada Department of Business

and Industry, is limited in both jurisdiction and expertise to the interpretation and enforcement of NRS 649, which governs collection agencies. Thus, it is the Commission on Common Interest Community's (hereinafter "Commission") interpretation of NRS 116 that is entitled to deference.

5. ADR 10-87

The decision and Interim Award issued by the Arbitrator are entitled to no deference in this action. It is undisputed that this Court must conduct a *de novo* review of the issues presented. Thus, not only is ADR 10-87 irrelevant, but it would be improper for this Court to rely on ADR 10-87 in deciding the issues presented herein.

Moreover, the decision issued in ADR 10-87 is not a decision of the Commission or the Real Estate Division. There is no process by which the Commission or Real Estate Division approves, reviews or even offers any input to an arbitrator with regard to decisions issued by that arbitrator. Thus, the decision of the Arbitrator cannot be attributed to the Commission.

6. ADR 10-49

The decision and award issued in ADR 10-49 has no bearing on this Court's decision for all the same reasons the Interim Award in ADR10-87 has no bearing. Additionally, contrary to Plaintiff's assertion, the Arbitrator in ADR 10-49 did not rule that NRS 116.3116 calls for a cap on the amount of the super priority lien. Rather, in that case, the parties stipulated to every fact set forth in the Decision and Award, including the amount of the "assessment for common expenses based on the periodic budget." *See* Arbitrator's Decision and Award, attached hereto as Exhibit 3. It is unclear from the Award whether either party even argued that any fees and/or collection costs were part of those common assessments.

7. Plaintiff's Position contradicts the Advisory Opinion set forth By the Commission for Common Interest Communities and relevant case law.

Pursuant to NRS 116.623, the Nevada Real Estate Division has the authority to issue advisory opinions to interpret NRS 116. On December 8, 2010, the Commission for Common-

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Interest Communities, which is part of the Nevada Real Estate Division, issued an advisory opinion regarding whether fees and costs could be recovered by an association as part of the Super Priority Lien. The Commission rejected the "Assessment Cap" argument that Plaintiff presents—that the Super Priority Lien is limited to nine times monthly assessments—and instead concluded:

> An association may collect as part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the 'costs of collecting' authorized by NRS 116.310313.

Comm'n for Common Interest Communities and Condominium Hotels, Ad. Op. No. 2010-01, pp. 14, attached hereto as Exhibit 4.

Thus, when the Commission wrote that the "costs of collecting" may be included as part of the super priority lien, the Commision did so with the express written contemplation that such "costs of collecting" would be part of the super priority lien even where there are "6 or 9 months of super priority assessment" that are unpaid.

Moreover, the Commission's Advisory Opinion explicitly rejects the position Plaintiff urges this Court to adopt:

> 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.

Commission Advisory Opinion, p. 12.

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As evidenced by the very language quoted by Plaintiff, the Commission Advisory Opinion contemplates only a temporal limitation on the amount of the homeowners' association's lien that is entitled to super priority:

> ...although 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.

See Plaintiff's Motion for Partial Summary Judgment, p. 39:19-21. Thus, the super priority lien is that portion of the homeowners' association's lien that accrues during the finite number of months (i.e. six or nine months) preceding an action to enforce the lien. The super priority lien itself is the only limitation on that portion of the homeowners' association's lien entitled to super priority, and the super priority lien is defined temporally (i.e. a finite number of months), not numerically.

Importantly, in its Advisory Opinion, the Commission reviewed the Legislative History and case law from other jurisdictions in order to interpret NRS 116.3116. One case the Commission considered was Hudson House Condominium Assocation, Inc. v. Brooks, 223 Conn. 610, 611 A.2d 862 (1992). In Hudson House, the Connecticut Supreme Court reviewed statutory language that is almost identical to NRS 116.3116.[2] On appeal, the Court in that case was asked, in part, whether the trial court improperly excluded attorneys' fees and other costs from a homeowners' association's super priority lien. The Connecticut Supreme Court determined that attorneys' fees and other costs must be included in the Super Priority Lien to produce the only reasonable and logical result. Id. at 616. The Court's rationale is concisely provided as follows:

> 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,

2 Although Connecticut has since amended their statute to explicitly include attorneys' fees, the Hudson House decision was decided under the previous version of Connecticut's statute, which mirrored NRS 116.3116.

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> 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 and the sum entitled to a priority. To conclude that the legislature intended otherwise would have that body fashioning a bow without string or arrows.

Id. at 616-17 (citations omitted).

Thus, when the Nevada Commission on Common Interest Communities considered the Hudson House case, it considered the Court's analysis and rationale as just and equitable and the only reasonable result in light of the fact that the Nevada and Connecticut statutes were virtually identical. Plaintiff cites to Colorado statutes similar to NRS 116 and Colorado case law interpreting the Colorado statutory scheme. This is irrelevant as no Nevada court or body with authority to interpret NRS 116 has adopted the Colorado court's reasoning. In fact, the Nevada Commission on Common Interest Communities adopted the reasoning from the Connecticut Supreme Court, which directly contradicts the Colorado Supreme Court's position.

8. The Eighth Judicial District has adopted the reasoning of Hudson House and the Commission's Advisory Opinion.

The issue concerning what amounts are included within the Super Priority Lien has already been addressed in the Eighth Judicial District Court.

a. Korbel Family Trust v. Spring Mountain Ranch Master Ass'n.

In Korbel, the Honorable Jackie Glass specifically ruled that the super priority lien includes, and the homeowners' association is entitled to recover, the following:

-Assessments for common expenses;

-Late fees imposed for non-payment of assessments for common expenses;

-Interest on principal amount of unpaid assessments for common expenses;

-The HOA's "costs of collection, which may include legal fees and costs, that accrue prior to the date of the foreclosure of the first deed of trust" and

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> -The transfer fee for conveyance and change of ownership of the property foreclosed upon pursuant to the first deed of trust.

See Exhibit 5 Order attached hereto. The issues presented in Korbel were identical to the issues presented in this case. Since the issuance of the Korbel decision, Judge Glass's opinion has been relied upon in the industry by the homeowners' associations, the law firms and/or collection agencies that represent them and Fannie Mae, Freddie Mac, and the Federal Home Loan Mortgage Corporation.

Defendants assert Fannie Mae, Freddie Mac and the Federal Home Loan Mortgage Corporation do not follow the Korbel decision, and provide correspondence from the Cooper Castle law firm to Plaintiff's counsel James Adams in support of this argument. Although the Cooper Castle law firm may not express satisfaction with the Korbel decision, it certainly follows the holding in Korbel.

On July 16, 2010, the Cooper Castle law firm sent an "Owner's Request for Super-Priority Demand and NRS 116.419 Information," to Sun City Anthem on behalf of the Federal Home Loan Mortgage Corporation. The Cooper Castle law firm stated,

> "It is the intent of the Federal Home Loan Mortgage Corporation to immediately pay all sums which are properly due and owing to the Association pursuant to NRS 116.3116(2)... Pursuant to the Clark County District Court's interpretation of the statute (Korbel v. Spring Mountain Ranch Master Association), **the amount may include 9 months of pre-foreclosure common area expenses, interest, late fees and reasonable costs of collection.**"

(emphasis added). The Korbel decision properly interpreted NRS 116.3116 and Fannie Mae and Freddie Mac's adherence to the decision only further solidifies the ruling.

b. Elkhorn Community Ass'n v. Valenzuela and JP Morgan Chase Bank

In Elkhorn, Judge Valerie Vega held collection fees and costs are included in the super priority lien in addition to other assessments that came due in the nine month period immediately

preceding the first action to enforce the lien. *See* Exhibit 6, Court Minutes attached hereto. Similarly, in JP Morgan Chase, the honorable Judge Timothy Williams stated as follows:

> 4. The Court found that pursuant to NRS 116.3116(2) an association has a "super priority" position over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.
> 5. The Court further found that pursuant to NRS 116.310313 an association can recover as part of its collection costs reasonable attorney's fees and costs associated with enforcement of its assessment lien.
> ...
> 6. The Court further found that pursuant to NRS 116.3116(2) an association can recover as part of its "super priority" lien amount collection costs associated with enforcement of its assessment lien.

See Exhibit 7, Order and Judgment attached hereto. In each of these cases, the Courts have found that costs of collection, interest, and late fees are included in the Super Priority Lien Amount.

The issues presented in Elkhorn and JP Morgan Chase are nearly identical to the issues raised here. As such, to find in Plaintiff's favor would contradict the agency that is authorized to interpret NRS 116 and contradicts the only reasonable, just and equitable result under the statute—that the Association is entitled to collect various fees and costs as outlined in NRS 116.3116(1) as part of the Super Priority Lien. Moreover, any judgment for Plaintiff in this case would produce an inconsistent result as compared to other courts, including Nevada's District Court, facing the same issue.

Plaintiff may argue that the Elkhorn and JP Morgan Chase are not controlling because those cases involved a judicial foreclosure. However, the Court Orders are clear. The Orders specifically address the fact that collection costs and fees are included in the super priority lien. Further, NRS 116.3116 makes no distinction between the super priority lien afforded to homeowners' associations that choose judicial as opposed to non-judicial foreclosure.

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Therefore, the Court has on numerous occasions ruled on the same issue presented in the instant case and consistently found that collection costs and fees are included in the super priority lien.

9. Legislative Proposals

Plaintiff notes that there have been several proposed amendments to NRS 116, which have not passed, and argues the fact that these amendments have not passed is evidence that the Legislature does not intend fees and collection costs to be included in the super priority lien. The proposed amendments, however, made multiple changes to the statute and there is no indication in the record that the failure to enact these changes was in any way related to the issues before this Court. In fact, when the Legislature was considering the most recently proposed amendment to this statute, AB 174, they were undoubtedly aware of the Korbel Family Trust decision and the fact that multiple District Court decisions have held that fees and collection costs are included in the super priority lien. For example, in the April 15, 2011 Senate Committee on Judiciary, Senator Buckley stated, "There is a decision in the Eighth Judicial District Court that attorney's fees and collection costs are part of the superpriority." *See* Minutes of the Senate Committee on Judiciary, attached hereto as Exhibit 8, p.16.

Moreover, the Minutes of the Meeting of the Assembly Committee on Judiciary attached as Exhibit 22 to Plaintiff's Motion for Partial Summary Judgment contain absolutely no comments indicating the failure to pass AB 204 had anything to do with the proposed changes to NRS 116.3116 included in that bill. The language from those Minutes quoted by Plaintiff shows the proposed amendment to NRS 116.3116 were intended to clarify-not change- the current state of the law with regard to fees and collection costs: "What I am saying is that, with the existing law, there is a difference of opinion whether the six-months priority can include the association's costs. The proposal that we sent to the sponsor and that was adopted by the 2008 uniform

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commissioners would **clarify** that the association can recover, as part of the priority, their costs in attorney's fees. *See* Plaintiff's Motion for Partial Summary Judgment, p. 42:8-11.

Similarly, with regard to AB 174, Plaintiff argues that Senator Allison Copening proposed this bill to change the current law to allow for inclusion of fees and collection costs in the super priority lien. This is simply not the case. In discussing AB 174, Senator Copening states, "These are the costs a collection company can charge. A homeowners' association (HOA) can retain an attorney to foreclose on a home, for example, and it is part of the super priority lien. **We are not changing law.**" *See* Minutes of the Senate Committee on Judiciary, attached hereto as Exhibit 8, p. 8. This shows that the proposed legislation was not intended to change the law as Plaintiff alleges.

In addition to the proposed amendments cited by Plaintiff, AB 448 proposed amending the statutory super priority lien language to read:

> The lien is also prior to all security interests described in paragraph (b) but only in an amount not to exceed charges incurred by the association on a unit pursuant to NRS 116.310312 **plus an amount not to exceed *nine times the monthly assessment* for common expenses based on the periodic budget** adopted by the association pursuant to NRS 116.3115 which is in effect at the time of the commencement of a *civil action* to enforce the association's lien...

See Exhibit 9, p. 43-44. This amendment appears to be designed to change NRS 116.3116 to more closely match Plaintiff's proposed interpretation of that statute. Tellingly, AB 448 was not passed.

10. Scholarly Publication

Plaintiff erroneously claims "the only scholarly article written on this issue has determined that the Super Priority Lien is capped." *See* Plaintiff's Motion for Partial Summary Judgment, p. 5:26-27. In the article cited by Plaintiff, Professor James Winnokur does not directly address the issues before this Court. *See* James Winnokur, Meanor Lienor Community

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Associations: The "Super Priority" Lien and Related Reforms Under The Uniform Common Interest Ownership Act, 27 Wake Forest L.Rev., 354 357-362 (1992). First, Winnokur was discussing the scope of the super priority lien under the UCIOA. The difference between the UCIOA and NRS 116 is very significant. The super priority lien in all three (3) versions of the UCIOA (1982, 1994, and 2008) is limited to the extent of "common expenses based on the periodic budget adopted by the Association pursuant to section 3-115(a)." Nevada, however, specifically removed the limitation to subsection (a) (which is Subsection 1 of NRS 116.3115 in Nevada's statutory scheme). Thus, common expenses for purposes of the super priority lien under the UCIOA are limited to 3-115(a), while common expenses for purposes of the super priority lien in Nevada includes all of NRS 116.3115, including 116.3115(6), which addresses common expenses caused by an owner's misconduct, such as failure to pay assessments. In other words, "common expenses" is much broader under the Nevada statute than it is under the UCIOA and includes amounts assessed against a specific unit. Such common expenses, including those costs and fees caused from a unit owner's misconduct, must be included in Nevada's super priority lien amount.

Second, the article as a whole supports the Association's position that as a matter of public policy, homeowners' associations must be able to recover the fees and collection costs associated with delinquent assessments. For example, Professor Winnokur states,

> Contributing to many associations financial weakness, the collection of delinquent assessments has been an extremely inefficient and often frustrating process. In hard economic times, assessment collection typically becomes both more important and less effective.
> ...
> Associations in weak financial condition cannot always justify incurring the costs involved to pursue collection efforts for unpaid assessments actively, especially when they are unsure of the ultimate results of the enforcement effort, When CIC assessments go uncollected, however, the defaulting homeowner's share of community costs to maintain common elements currently falls on those least responsible for the default-neighboring homeowners who regularly pay their assessments, remain in good standing, and constitute the community association.

> As their assessments rise, these owners face great pressure to default if they cannot afford the assessment increases, and lower valuations of their homes should they opt to sell in order to escape unanticipated assessment costs.
>
> ...
>
> This syndrome of disproportionately burdening owners in good standing- whose resulting assessment defaults further burden a shrinking group of owners still paying- is greatly exacerbated in hard economic times; foreclosures and abandonment of CIC units severely deplete the assessment base and property values within these communities. As the assessment base dries up, it is difficult for association leadership to maintain common elements. As a result, CIC's will face the quandary of either heavily assessing the decreasing number of remaining solvent residents, often in excessive amounts, or deferring needed maintenance facilities as basic as the roofing over individual units, only to be later forced to higher assessments as deferred maintenance takes its toll.

Id. at 357-362.

Additionally, Professor Winnokur authored a later article, in which he again acknowledges the important policy concerns underscoring the need for a homeowners' association to be able to enforce its super priority lien. In fact, Professor Winnokur states, "Indeed, an argument can be made that common interest community assessments- all assessments, and not just the most recent six months in default- should be appropriately prioritized as superior to even a first lien on each residence because the assessments are needed to fund facilities and services for the public in much the same sense as those financed by public government property taxes." James Winnokur, Critical Assessment: The Financial Role of Community Associations, 38 Santa Clara L.Rev. 1135, 1158-1159 (1998). Regardless of the opinion of the author of these articles as to whether the super priority lien under the UCIOA includes fees and collection costs, these articles clearly demonstrate the devastating and absurd results that would flow from imposing a numeric cap on the super priority lien as Plaintiff requests.

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C. NO CIVIL ACTION IS REQUIRED TO ENFORCE THE SUPER PRIORITY LIEN

As previously noted, under N.R.S. § 116.3116, the Association has a lien on a unit for any assessment levied against the unit by the Association. The Lien is prior to all security interests, including the first deed of trust, "to the extent" of charges included in an abatement lien (i.e. no limit) and "to the extent" of the monthly assessments that "would have become due . . . during the 9 months immediately preceding institution of **an** action to enforce the lien." N.R.S. § 116.3116(2)(c) (emphasis added). Importantly, the statute does not mandate that the Association (or any party) bring an action to enforce the lien; it simply provides that there must be some "action" or event that occurs in order to determine what assessments accumulated during the 9 month period of time. The policy of the statute is thus to require some event that would trigger the Association's accounting of when the 9 months would begin and end.

In this case, the foreclosure of the property was the "action" that triggered the accounting. Notably, the Nevada Supreme Court has previously recognized that foreclosure on real property constitutes an "action." Levinson v. Eighth Judicial Dist. Court, 109 Nev. 747, 750-751 (Nev. 1993). Plaintiff's argument that the lien holder must file a civil action to enforce its super priority lien does not make sense. The reason the lien is given super priority is to allow the Association to retain its lien even after a separate lien holder forecloses on the property. NRS 116 clearly contemplates a homeowners' association's lien remaining on the property after the bank institutes foreclosure proceedings and all other liens are extinguished. Otherwise, the Association's lien would be treated as any other lien which must be enforced or is subject to extinguishment by a senior lien.

The phrase civil action is used throughout NRS 116, but not in NRS 116.3116, which only refers to an 'action' to enforce the lien. "Action is one thing; cause or right of action is quite another. The action is the means of redress of the legal wrong described by the words

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cause of action. The cause of action precedes and affords the right to the remedy by such action as the laws furnish." Scheuing v. State, 177 Ala. 162, 59 So. 160, 161 (1912). "Perhaps at times, incautious use by judicial writers of terms indicative of failure to note the important distinction between the right and the remedy has invited some confusion which might otherwise have been avoided." Id. Thus, where the term "action" is used in a statute in such a manner as to render the term ambiguous, one must look to the means of redressing the particular legal wrong at issue to determine the appropriate definition of the term.

Plaintiff's reliance on the Nevada Rules of Civil Procedure is misplaced, as it is the substantive law governing the legal right at issue that determines what is required to bring an "action." *See* e.g. Sierra Club v. Colorado Refining Co., 852 F.Supp. 1476, 1484 (D. Colo. 1994). Here, the substantive law governing the means by which a homeowners' association makes a legal demand of its right to enforce a lien is outlined in NRS 116.31162, which allows a homeowners' association to foreclose its lien by sale after (1) the homeowners' association has mailed the unit's owner a notice of delinquent assessment, (2) executed and caused to be recorded a notice of default and election to sell, and (3) the unit's owner fails to pay the amount of the lien for 90 days following the recording of the notice of default and election to sell. No other "action" is required of the homeowners' association.

The case law cited by Plaintiff in support of the proposition that "action" means "civil action" does not apply to the instant case. First, in Trustees of MacIntosh Condominium Ass'n v. FDIC, 908 F.Supp. 58, the parties stipulated that an "action" required a "law suit." There, the Court clearly states, "It is uncontested by the parties that a lawsuit is required before a lien for unpaid condominium fees achieves a 'super priority' status." Id. at 63. The Court said this because the parties agreed a lawsuit must be filed!

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In each of the remaining cases cited by Plaintiff, the word "action" is being construed in a completely different context. Thus, those cases address only a possible use or meaning of the word "action." Here, the context dictates a different result, because NRS116 specifically allows homeowners' associations to enforce their liens by non-judicial sale without filing a lawsuit. As noted above, the homeowners' association can foreclose on a property and enforce their lien by simply filing a notice of default and election to sell. This Court cannot ignore NRS 116.31162. No other "action" is required of the homeowners' association.

In support of their argument that a civil action is required to create the super priority lien, Plaintiff cites to the proposed amendments to NRS 116 included in Senate Bill 174. Plaintiff argues that that Senate Bill 174 did not pass and therefore the Legislature intended to require a civil action. Plaintiff offers no citation to the legislative history to support this argument. Senate Bill 174 proposed several changes to NRS 116, and there is absolutely no reason to believe the Legislature's decision not to adopt Senate Bill 174 was in any way related to require homeowners' associations to institute a civil action to enforce the super priority lien.

Notably, AB 448 proposed amending the statutory super priority lien language to require a civil action:

> The lien is also prior to all security interests described in paragraph (b) but only in an amount not to exceed charges incurred by the association on a unit pursuant to NRS 116.310312 **plus an amount not to exceed nine times the monthly assessment for common expenses based on the periodic budget** adopted by the association pursuant to NRS 116.3115 which is in effect at the time of the commencement of a *civil action* to enforce the association's lien …

See Assembly Bill No. 448, attached hereto as Exhibit 9, p.43-44. Following the decisions of the Nevada courts, the Legislature could not interpret the current statute to require a civil action, and therefore, this amendment to NRS 116.3116 was not adopted.

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IV.

CONCLUSION

Based on the foregoing, the Association respectfully requests that the Arbitrator grant the Association's Counter-Motion for Summary Judgment and find the following: (1) that the homeowners' association super priority lien includes nine times the monthly assessment amount in addition to late fees, interest, collection costs and attorney's fees; (2) that the foreclosure is sufficient to satisfy the action to enforce the lien as required by NRS 116.3116; (3) that the Association's CC&R's permit the Association to recover past due monthly assessments from the new unit owner.

DATED this 28th day of November, 2011.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 28TH day of November, 2011, service of the foregoing DEFENDANT, HORIZONS AT SEVEN HILLS HOMEOWNERS' ASSOCIATION'S, OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT was made this date by depositing a true copy of the same for mailing, first class mail at Las Vegas, Nevada, addressed as follows:

James R. Adams, Esq.
Assly Sayyar, Esq.
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