IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL, LLC, a Nevada limited liability company, Appellant, v. US BANK, N.A., a national banking association as Trustee for the Certificate Holders of Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2006-AR4, , Respondent.	CASE NO.: 63614 District Court Case No.: A678814

Appeal from the Eighth Judicial District Court
of the State of Nevada
In and For the County of Clark

APPENDIX VOLUME III

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Bate Nos.	Document Title
US Bank0471-0584	SB 174
US Bank0585-0648	SB 280
US Bank0649-0662	Paradise Harbor v. Deutsche
US Bank0663-0676	Allf Order & Herndon Order
US Bank0677-0694	7912 Limbwood Order

Executed this 21st day of February, 2014.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing **APPENDIX VOLUME III** was made on the 21st day of February, 2014, by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

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MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
February 24, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:04 a.m. on Thursday, February 24, 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
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

Randolph Watkins, Executive Director and Vice President, Del Webb Community Management Company
Michael E. Buckley
John Leach
Mark Coolman, Western Risk Insurance
Pamela Scott
Garrett Gordon, Southern Highlands Community Association, Olympia Group
Angela Rock, President, Olympia Management Services
Donald Schaefer, Sun City Aliante
Jonathan Friedrich

Rana Goodman
Chris Ferrari, Concerned Homeowner Association Members Political Action Committee
Joseph Eaton, Concerned Homeowner Association Members Political Action Committee
Ellen Spiegel, Ex-Assemblywoman
Kay Dwyer
Jan Porter, Sage Creek Homeowners' Association
Gary Solomon, Professor, College of Southern Nevada
Tim Stebbins
Norman McCullough
Kevin Wallace, Community Association Managers Executive Organization, Inc.
Paul P. Terry, Jr., Community Associations Institute
Bill Uffelman, President and CEO, Nevada Bankers Association
Gail J. Anderson, Administrator, Real Estate Division, Department of Business and Industry
Rutt Premsrirut, Concerned Homeowner Association Members Political Action Committee

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 174.

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

RANDOLPH WATKINS (Executive Director and Vice President, Del Webb Community Management Company):
I have presented you a handout entitled HOA 101 (Exhibit C) which explains how homeowners' associations (HOAs) originated. I will highlight benefits to forming an HOA. Municipalities benefit from forming HOAs because they maintain private roads, common areas, and parks and recreation areas that local cities and governments do not maintain.

Another benefit is rules are and should be enforced for all. The HOAs are for amenities such as pools, tennis courts, recreation centers and places where families can have sense of community. They invite clean, efficiently run, architecturally and aesthetically controlled neighborhoods. Resale value for homes in an HOA are higher because property is maintained.

Nevada has 2,956 HOAs, including approximately 477,000 units, and HOA homeowners equate to 17 percent or 18 percent of the state's population. If there are two people in every home, approximately 950,000 live in HOAs. There are three types of HOAs: planned unit development, condominium and hotels, and stock co-ops.

The responsibilities of living in an HOA are to abide by the governing documents; pay assessments on time; attend board meetings; and volunteer to serve as elected board members and committee members.

In order for an HOA to govern itself, it needs governing documents such as articles of incorporation; covenants, conditions and restrictions (CC&Rs); and election procedures. Chapter 116 of the *Nevada Revised Statutes* (NRS) governs HOAs. The CC&Rs, rules and regulations, and design guidelines are tools used by management companies to assist the board of directors.

Professional management companies manage approximately 2,500 of the HOAs in Nevada. The remaining 400 are self-managed or managed by boards of directors or licensed community managers.

There are also supporting professionals, i.e., lawyers, certified public accountants, and landscaping and architectural review companies. It is actually big business.

In December 2009, a Zogby survey showed 71 percent of the residents in HOAs were satisfied with their associations, 12 percent were dissatisfied and the remainder had issues which did not fit into those two categories. In addition, 70 percent are in favor of the rules; 82 percent are positive about the value received from the community association assessments; 87 percent oppose additional government regulation; and 37 percent favor mandatory licensing for community association managers.

ALLISON COPENING (Clark County Senatorial District No. 6):
I am here today to introduce S.B. 174. I will read from my testimony (Exhibit D).

I have provided a list of the S.B. 174 Working Group members (Exhibit E) and request it be entered into the record.

MICHAEL E. BUCKLEY:
The Common-Interest Ownership Uniform Act was the first consumer protection law enacted in the State.

I am a member of the State Bar of Nevada, Real Property Law Section. We have looked at S.B. 174 in another context because the Uniform Act has been amended. I am also a member of the Commission for Common-Interest Communities and Condominium Hotels (CICCH). A group of people met before Session to compile solutions. We had input from different groups and people. An explanation of the proposed changes, section by section of the bill, is in (Exhibit F).

Section 1, page 4, of S.B. 174 would allow an appeal to the CICCH from a ruling of the Real Estate Division (RED). The main issue with HOAs is to have an easy, inexpensive way to resolve disputes. The CICCH is comprised of seven members—three homeowner representatives, an accountant, an attorney, a developer and a manager. All of the meetings are public, and public comment is allowed. A homeowner can go to the CICCH with a complaint. There has been discussion that issues appealed to the CICCH need to be fine-tuned. Sections 2 through 7 are procedural issues. The substance is in section 1.

Section 2, page 4, proposes not permitting cumulative voting. Smaller associations are concerned cumulative voting would permit a small group to take over an association. Cumulative voting may benefit larger associations; you need to draw a line rather than eliminate all cumulative voting.

Section 3, page 6, became law in 2009. *Nevada Revised Statute* 116.310312 addresses the fact homes were abandoned, foreclosed upon and falling into disrepair. This section allows the association to maintain an abandoned or foreclosed property. The costs expended by the association are a superpriority lien against the property. The Uniform Common Interest Ownership Act was adopted wherein, if a first mortgage holder forecloses on a common-interest community (CIC) unit, the association can be paid six months of the dues owed, which is called superpriority. This was expanded to nine months, except for condominiums.

On page 6, section 3 addresses the removal or abatement of a public nuisance on the exterior of the unit which "adversely affects the use and enjoyment of any nearby unit."

On page 8, section 4 changes the mailing of ballots on an election to save the association money. A CIC can consist of three to thousands of units. This language clarifies if the people nominated are equal to or not more than the board spaces which are open, those people are elected. The proposed amendment in section 3, subsection 5, paragraph (a) states if this situation applied, the association could not have an election. We would change the words "must not" to "shall not be required to."

On page 9, section 5, paragraph (b), the change states that the nominees will become duly elected members at the next regular board meeting.

On page 11, section 3, subsection 10 is cumulative voting. That may need to be clarified by limiting it to certain-size associations.

On page 12, section 5 needs to be in conjunction with section 7; although chapter 116 is uniform law, it has been amended many times. Section 7 states how to call a special meeting of the homeowners. Section 5 removes provisions from section 7 and puts them into section 5. This gives the owners the ability to call for a removal election, not the board or the president. Section 5, subsection 1, paragraph (a) clarifies the number of votes. In the statute, if an HOA had 100 members, you only needed a majority of 35 and 18 people could remove a member of the board. The new language restores the provision that at least 35 percent of the membership must vote for removal.

On page 14, section 5, subsection 4 is moved to section 18 on the bottom of page 33 and the top of page 34. Section 6 amends NRS 116.31073. The concern was from municipalities where if a wall or security wall was boarding a street and an association, the city was not responsible. The CICCH had meetings to understand what a security wall is. There can be a wall between a street and the association, referred to as a perimeter wall; a wall between two homes; a wall around a common area inside the project; or a wall along the street inside a project. The person whose property contains the wall assumes responsibility, unless the government has accepted the responsibility, the wall has been damaged by a third party or the CC&Rs provide otherwise. Clark County suggests that where subsection 1 references "governmental entity has accepted responsibility," the agreement be in writing (Exhibit G).

On page 16, section 7, subsection 3, paragraph (a) is a change which appears throughout S.B. 174. The law states an owner should be provided copies of the

minutes in electronic format at no charge. Some owners want a compact disc (CD) or a copy of the audiotape of a meeting. The intent was if there is a cost to the association, there should be a cost to the owner. But the intent of electronic format was intended as e-mail and PDF attachments.

On page 17, section 7, subsection 6 is the same change, to clarify e-mail rather than a CD or other format.

On page 18, section 8 defines an executive session and also states that an executive session does not require notification to unit owners.

On page 19, section 4, subsection 5 allows the association to make deliveries by e-mail. Paragraph (a) changes electronic format to e-mail. Page 20 is the same change.

On page 21, section 9 describes what can be discussed in executive session and subsection 3, paragraph (b) adds the board be permitted to discuss the professional competence or misconduct of a vendor. The board cannot act on a failure or change the contract in executive session; that needs to be discussed in an open meeting. There is a suggestion to delete the reference to "or physical or mental health" from paragraph (b). Paragraphs (d) and (e) may be repetitive.

On page 23, section 10, subsection 1, paragraph (c) requires the association to provide crime insurance. Section 11, section 1 requires the association maintain its funds with an institution insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund or the Securities Investor Protection Corporation.

On page 24, subsection 2 permits associations to have cash on hand.

On page 25, section 12, subsection 3 states assessments have to bear interest. The change is intended to say they "may" bear interest, not "have" to bear interest.

On page 26, section 12, subsection 6 may need to be rewritten. If a person in the community causes damage to the common elements, the person should be responsible. This would include not only the unit owner but the unit owner's tenants or guests. Subparagraph (b) states the person who created the harm is also responsible for legal fees and costs.

On page 27, section 13, subsection 1, paragraph (b), subparagraph (2), the word "necessary" is deleted. In subparagraph (3), "special" is replaced with "reserve." This clarifies it refers only to those reserves. Some associations refer to special assessments as an assessment for a violation. An association has the ability to fund its reserves or make an assessment against an owner without approval from the owner, but only for reserves.

On page 28, section 13, subsection 4, paragraph (a) clarifies the need to send owners the investment policy as well as the collection policy. Section 14 addresses how an association pays money and requires two signatures, but there are exceptions. If there is more than $10,000 to be paid to the State, you have to pay by wire transfer. This would permit the transfer. This also permits transfers to the United States Government for taxes and payment to certain vendors.

On page 29, section 14, subsection 3, paragraph (e), subparagraphs (1) through (3) are requirements designed to safeguard the electronic transfers. Section 15, subsection 1 defines anything the association charges a lien on the property. If the first mortgage forecloses, all association's liens are wiped out except the superpriority, which protects the association.

On page 30, section 15 would allow the collection costs to be part of the superpriority lien. In December 2010, the CICCH approved a proposed regulation that clarified what are reasonable collection costs, which is stalled because of the moratorium on new regulations. The CICCH determined what are reasonable fees and costs. In the comment to a change in 2008, the Uniform Law Commissioners stated the 2008 change was approved by the Foreclosure Prevention and Mortgage Assistance (Fannie Mae) program. I have been told that adding collection costs to the superpriority violates Fannie Mae, but when I looked at the Fannie Mae guidelines, that was not the case. Nevada has the concept of reasonable collection costs, which is another safeguard. Subsection 6 clarifies actions "against a unit's owner."

On page 31, section 16, subsection 1 makes the executive board, a member of the board or manager liable for retaliatory action against a unit owner. The intent of subsection 2 was to provide protection for board members against threats and retaliation by a unit's owners.

On page 32, section 17 is a technical correction to clarify reserve assessments, not special assessments.

On page 33, section 18 defines punitive damages.

On page 34, section 18, subsection 4, paragraph (d) should be deleted, as this would apply to the community manager and that was not the intent. It is intended to cover the volunteers who work for the HOA.

On page 35, section 19, subsection 1, paragraph (b), the reference to bond is removed.

On page 36, section 20 clarifies provisions regarding regulations on management contracts.

On page 37, section 20, subsection 1, paragraph (g) requires provisions for indemnity. Paragraph (k), subparagraph (1) defines it is not the manager's funds, but the association's funds. Subparagraphs (1) through (4) define insurance. Paragraph (l) is a technical correction to delete "include provisions for dispute resolution." It also conflicts with the provisions in subsection 2, paragraph (a) defining mandatory arbitration.

On page 38, section 20, subsection 2, paragraph (b) permits management to obtain contracts to provide indemnification for the manager. The reference to Title 7 of the NRS is to the corporate statutes, which say indemnification is not appropriate where the wrongdoer is negligent. Subsection 6 defines managers who only have electronic records. When there is a change in manager, the new manager can obtain and have access to those records without receiving a password from the previous manager.

On page 39, section 21 refers to NRS 116A, community managers (CMs).

On page 40, section 21, subsection 12 clarifies the board invests funds, although the CM can do things on behalf of board members who make those decisions.

On page 41, section 22 amends NRS 76.020 and defines "business." The business law tax was enacted to exempt nonprofits under NRS 82, under which

most associations are incorporated. This would also add NRS 81 because some associations are incorporated under that chapter.

On page 42, section 23 amends NRS 76.100 to further define business.

JOHN LEACH:
I am in favor of S.B. 174. I agree with Mr. Watkins, Senator Copening and Mr. Buckley. The comments Mr. Buckley made regarding Exhibit F breaks down into two categories, i.e., enhanced due process in section 1 giving the association owner the opportunity to come before the Commission, and the sections that provide cost-savings to HOAs and thereby the homeowners. Clarification in the statutes is also key.

CHAIR WIENER:
Mr. Buckley, when the Commission met with the Real Estate Division, were members going to address the safety issue for the unit owners and management?

MR. BUCKLEY:
We discussed if a crime is committed, it need not be added to NRS 116. But there needs to be protection of retaliation against board members.

MARK COOLMAN (Western Risk Insurance):
I am in favor of S.B. 174. Five major insurance markets provide coverage for HOAs, and all of them provide the endorsements free of charge. The way sections 10 and 20 are rewritten, the cost of insurance would be favorable. Homeowners' associations would have the largest amount of availability, and the cost would be less than both of them maintaining half the insurance coverage. First of all, you would disclose who does what, and second, you would go out to market and obtain the best available price and coverage.

Section 16 defines the need for protection of board members. In the last several years, I had four claims where a board member or president had cars, houses or other personal property destroyed, generally after board meetings or controversial activities within the association.

PAMELA SCOTT:
Section 15 talks about superpriority and reasonable collection costs. Banks are taking from 18 months to 24 months to complete the foreclosure process on

property, causing the superpriority liens and the need for collection costs. Homeowners have stopped paying their assessments prior to the bank's foreclosure action. If the homeowner stops paying the association, the association puts a lien on the property before the bank starts the foreclosure process. If the bank is not moving forward, it forces the association to move forward with the lien, which adds another step and fees. The association does not receive the funds and are writing off years of common assessment to bad debt. It is money which condominium and smaller associations need; they do not have the numbers to spread the debt around. It is important the associations receive their collection costs.

The key is the regulation, which has not been adopted because of the moratorium. Senator Copening has a bill that spells out reasonable collection costs. It is important to include reasonable collection costs for superpriority for HOAs.

GARRETT GORDON (Southern Highlands Community Association, Olympia Group):
Southern Highlands Community Association is a large association with over 7,000 rooftops, approximately 25,000 residents. Many of these issues are unique to large associations.

ANGELA ROCK (President, Olympia Management Services):
I am the president of Olympia Services, which manages Southern Highlands Community Association. We have submitted a list of clarifications (Exhibit H) on sections 1, 2, 4, 14 and 16. We have additional comments and questions on section 10 as it relates to insurance. Unique situations apply to smaller communities compared to large associations. Both have important issues and needs.

CHAIR WIENER:
Could you give us an idea of the budget and management challenges you have with a large association?

MS. ROCK:
When you have 25,000 homeowners and they disagree, a great number of groups are involved. This is a complex financial issue, with large amounts of money involved, and there needs to be protection, which S.B. 174 accomplishes. Homeowners volunteer their time to run a multimillion dollar corporation, which I point out in Exhibit H.

Last week, auditing issues were addressed in smaller associations. Cumulative voting can be an issue in a smaller association while in a larger community, it allows smaller subassociations to have a voice. We have some subassociations in our community with approximately 30 to 40 homes, compared to other subassociations that have 720 homes. It is a necessary tool for larger communities to allow smaller masses to have a voice. These are some issues which can be vetted through the process.

DONALD SCHAEFER (Sun City Aliante):
I am a homeowner in Sun City Aliante, an age-qualified community consisting of 2,028 homes. I am here today representing Sun City Aliante exclusively.

Homeowners own the association, which the board manages. Being transparent with disclosures—where money is invested, how it is invested, how collections are made and when someone is turned over to collections—makes board management clear to the homeowners.

On page 9, section 4, subsection 5, paragraphs (b) and (c) have not been addressed. In Sun City Summerlin, the process begins with nominations in January, as its fiscal year runs from July 1 through June 30. The homeowners have 30 days to nominate someone and the nominee to turn in a resume, etc. In another 30 days, the ballots are printed and sent to the homeowners. At the annual meeting in May, a candidate forum and open voting are held. At end of the board meeting, the winners are announced, the meeting is recessed and the board is reorganized. The board then has a meeting to elect the president, secretary, et cetera.

If S.B. 174 passes with no changes, the above section states: "the nominated candidates shall be deemed to be duly elected to the executive board." If this was the case, at the end of January if there were three people running for three positions, they would be elected to the board on the second Wednesday of February. You have shortened the term of the existing board and lengthened the term of the incoming board. It is not a major issue for those associations that have a two-year term, but for those associations that have a three-year term, the board would be in violation of the three-year maximum limit. That term would be exceeded by two to three months.

The Sun City Summerlin board suggests the language in paragraph (b) be changed to say elected board members would take their seats at the conclusion

of the current board term. This is consistent with how State officials are elected. They are elected in November and seated in January.

JONATHAN FRIEDRICH:
I will read from my testimony (Exhibit I).

When you buy a home in an HOA, you sign a contract. When the State changes the terms or supersedes the contract, there is no approval by one party—the homeowner. It is a contract.

Mr. Watkins stated 71 percent of the homeowners are satisfied; what about the other 29 percent? Based upon Mr. Watkins' numbers, he stated 950,000 people live in HOAs. If you multiply that times the 29 percent who are not happy, that makes 275,000 people in this State who are not happy with their HOA.

Mr. Buckley referenced the item on electronic format. I received a complaint from a homeowner whose CM wanted $25 for a CD. We need regulations.

On page 4, section 1, subsections 1 through 7 can be used as a tool by the HOA attorneys to charge high attorney fees, which the association will pay. Then, the association attempts to recoup those fees using NRS 116.3115, subsection 6, which forces the homeowner to pay the attorney fees. It can also be used by the homeowner who wants to appeal a RED decision to the CICCH. Either way, the Commission will become inundated with appeals. If these appeals are considered civil actions, NRS 116.31088 requires notice to all homeowners. This will prove costly to everybody.

The new law extends the removal of board members to 120 days, four months. If you have bad board members, you want them off the board as soon as possible.

I am in favor of criminal insurance, but the HOA should pick up the cost. That is a cost of doing business by the CM.

RANA GOODMAN:
I have previously submitted my comments (Exhibit J); I will not read them. However, I have additional comments regarding Mr. Watkins' statements about HOAs and how they are established. He is describing a utopia. When most of us buy a home in an HOA community, we buy it with the same idea; we want to

live in a nice community. In that respect, I agree with him. The problem is the people who govern the HOA. You are at the mercy of your board of directors. If you have a resident-friendly board, you have what you want. The problem is many HOAs are run by bully boards; it is a fact of life, and the complaints prove that.

In Southern Highlands Community Association and Sun City Anthem, there are 7,144 homes with 11,000-plus residents who are retired with no children. The biggest majority of those residents suffer from a bad case of apathy. They do not care—they want to play golf, live a fabulous retired life, and more power to them. I would argue that 71 percent are happy; a big portion are not happy, not with the association. The look of the association is beautiful, but the residents are not happy with those who govern the HOA.

I ask you to choose how you coin your words in S.B. 174. For example, on page 18, section 8, subsection 2, paragraph (b), you use the term, "if the association offers." It is too soft; I would suggest it be changed to "the board shall offer." When you say, "if the association offers to send notice by electronic mail" and you have a bad board, it can say, no, we are not going to do that. There is nothing a resident can do because the law gives the board an out.

On page 21, section 9, subsection 3, in paragraph (b), you use the term "misconduct." How do you define misconduct? Several years ago, a resident in my community physically assaulted someone by knocking that person down; that is misconduct. There are other cases where someone asks for documents and the board did not want to give them. Because the attorney deemed it misconduct, he fined the person, used the paragraph which deals with community expenses and charged the homeowner $8,000 in legal fees. That word needs to be changed and further defined; it is too loose. Misconduct is when my child mouths off to me. What we need from you, our Legislators, is a way the homeowners can hold their boards accountable. It is not the HOA per se, it is people governing the HOA. Our first line of governance is our board, but our line of reason is you. If we have ambiguous terms in the law, where do we go?

If residents are retaliated against by the board, they go to the Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels and wait for at least three months. Then they take it to RED, and it goes

into mandatory arbitration. If this law passes as is, a resident is deemed to retaliate against board members by having an argument with them or whatever the board deems is retaliation against them. The board can do anything it wants. I quote my board president in testimony last week to you: "This board can do whatever we want."

CHRIS FERRARI (Concerned Homeowner Association Members Political Action Committee):
Concerned Homeowner Association Members Political Action Committee (CHAMP) is a broad-based coalition of homeowners, consumer credit counselors, labor union members, minority chambers of commerce, National Association for the Advancement of Colored People, legal aid organizations, real estate agents, builders and numerous others. For clarification, we are not anti-HOA. Our primary concern is to ensure when fees are assessed based on nonpayment of assessments, the money goes to fix the communities and keep them maintained for their residents.

I am not in opposition to S.B. 174 but have concerns in opposition to sections 12 and 15. Based on Mr. Buckley's comments in section 12, subsection 6 alleviates our concerns in section 12, so I will focus on section 15.

After a home is foreclosed upon, the Fannie Mae program will pay up to six months of back due HOA assessments for common expenses. That amount may include collection fees, but no more than that. This is a discrepancy that we have with the comments made by Mr. Buckley and is evidenced on page 1 of our handout (Exhibit K), in the bottom two right-hand boxes. We have also had conversations with Fannie Mae and Federal Home Loan Mortgage Corporation's (Freddie Mac) counsel to confirm this.

The HOAs have the ability to foreclose for past due assessments through Nevada's nonjudicial foreclosure process. Prior to foreclosure, an HOA resident who missed payments is turned over to an HOA's collection or management company in less than two months. This is referred to as "imaginary fees." We all know someone who has been impacted by these egregious fees.

Page 2 of Exhibit K shows a sample payoff demand from an HOA collector, who supports S.B. 174, for services purportedly rendered to collect past due assessments. While it contains many of the imaginary fees—it is not unique—it is the norm. In this particular example, page 3 shows the two past due

assessments are each in the amount of $39.12 for a total amount owed of $78.24. How much would the demand letter be based upon? $3,322.24. To be fair, in this example we will deduct the demand and transfer fees from the total, as these are relevant charges. The new total is just under $3,000. The past due amount is $78, and we are talking about almost $3,000; that is the core of our argument. That means 2.7 percent of the money demanded will find its way to the HOA, and 97.3 percent will go to the collector. Who is winning in this situation? The money is not going back to the HOA to fix the issues.

Page 4 of Exhibit K shows a demand issued via e-mail at 9:08 a.m. for payment by 1 p.m. that same day. I doubt whether any one of us who received such a demand this morning would be able to pay it by 1 p.m. Because the four-hour demand was not met, the fee went up $2,000, a $2,000 fee increase in four hours. The money is not going back to the HOA to fix the problem.

In Exhibit K, page 10, in contrast—Fannie Mae and Freddie Mac's nonjudicial foreclosure pays $600 for the same process and completes the foreclosure, unlike the previous examples.

One of the members of Senator Copening's Working Group testified in previous Legislative Sessions that from the thousands of files opened by an HOA collection company, only two homes were foreclosed upon. This seems fairly consistent in the process, but the question is: why are those notices sent?

In closing, S.B. 174, sections 12 and 15 make it harder for families in Nevada to buy or sell a home and easier for their HOA collection companies to do business as usual.

SENATOR BREEDEN:
Mr. Friedrich, you mentioned homeowners contact you. Are you an advocate, but not with an organization?

MR. FRIEDRICH:
Through personal disputes with my HOA and having been run through the mill, I have become an advocate for unhappy homeowners. I will be glad to share my binder with anyone who would like to see it. These are complaints e-mailed to me by unhappy homeowners that range from, "I have a jungle gym in my backyard, and they want me to take it down" to "the color of my driveway paint does not match the exact shade I submitted." There is no organization,

just a group of people trying to fight for homeowners' rights and level the playing field.

SENATOR GUSTAVSON:
Mr. Ferrari, on the exorbitant fees people are being charged; if Fannie Mae or Freddie Mac will not pay these fees, who will?

MR. FERRARI:
That is a great question, one of which all of you are concerned. What typically happens is a superpriority lien, which is in section 15, incorporating more fees under superpriority. As many real estate agents or others can tell you, that lien is stuck on the house regardless of who owns it. When the next buyers purchase the home, they will not find out how much the fees are until the end of the process through a demand letter to the collection agency. We found in numerous examples, including the consumer credit counselors, when people buy homes, their federal loans are approved, but they cannot finance the lien amount. That is stopping real estate transactions throughout the State, making it a larger issue. Until we rid the excess inventory in the market, people cannot start building again and those homes will not transact.

SENATOR BREEDEN:
If this is a bank-owned home, why are buyers not responsible for paying those fees?

MR. FERRARI:
I will defer that question to Mr. Buckley, a real estate agent or attorney from CHAMP to answer the question.

SENATOR COPENING:
There is a collections bill which will mirror the CICCH's regulations not on hold. We wanted to codify it into law to ensure these egregious fees to a homeowner do not happen again. The fees would be capped at under $2,000 and only one letter will be sent. There would be limits on how much could be charged to write a letter, maybe $50 for the time it took to generate it.

Someone has to pay those collection costs when there is a foreclosure. Right now, in my bill and in the collections bill, superpriority will be given to collection costs because it is a cost of the association. In many cases, HOAs have paid those costs when contracted with a collections agency. In some situations, they

paid every month, and two years down the road, the home forecloses. There may be the maximum $2,000 collection fee. If the assessments were $100 for nine months, the association receives $900 and could also be owed those fees. It is my understanding CHAMP believes those costs should pass on to all homeowners of the association. In that case, one person's bad debt, or several in an association, would be passed on to all homeowners. If it is not passed on and the bank owns the unit, it would pay—or the investors would pay. Investors could recoup when they flip the home, or the debt would be paid by the new homeowner. If we remove superpriority, who should pay those collection costs?

MR. FERRARI:
This is an issue impacting folks; it is a unique issue because we agree with the cap. We will work with you and try to pass a bill we believe is reasonable and benefits all parties. When working with folks, i.e., legal aid centers all the way to bankers, there is a middle ground. It is not in the best interests of HOA residents to pay exorbitant fees without getting additional money. We look forward to working with you on the collections bill.

JOSEPH EATON (Concerned Homeowner Association Members Political Action Committee):
Superpriority fees are not paid by the purchaser who acquires the property from the bank if the bank is the successful bidder at a nonjudicial foreclosure sale. Those fees are paid by investors. Given the amendments proposed, those fees would be included in superpriority. The payment would be shifted from the community members to the general public as a whole. That is who will pick up those costs in the context of a foreclosure. Those fees have to be paid by the bank when the bank takes title to the property—or an investor when the investor takes title. This is not a case where a delinquent homeowner steps up and pays the fees. This is not a question of shifting the cost to someone who should have borne the cost. It is whether the people who could exercise restraint over the collectors and who enter into those contracts are going to be forced to bear the costs. When they do not, the costs shift to the public as a whole. Members of the community are in a much better position to exercise restraint over the collectors they retain.

SENATOR COPENING:
Collection costs are a part of the superpriority; you want that removed. We know it is happening because when investors or homeowners buy homes, they

are responsible for the superpriority. Those collection costs are paid to the collection companies.

MR. EATON:
There is litigation pending. This is not a settled question at this point.

SENATOR KIHUEN:
Mr. Friedrich, how long did it take you to accumulate the complaints in your binder? Are these from this January or the past few years?

MR. FRIEDRICH:
These have been forwarded to me by different people in less than a year. I will get the binder to each of you. It is broken down into three sections: the arbitration trap mandated under NRS 38 and 116, fines levied by associations against homeowners, and collection fees. In one case, a 78-year-old lady almost lost her home on two issues: Over $6,000 in fines for dead grass on her front lawn and delinquent association fees where she thought she was current and was not. I attribute this to her age and not being on top of the situation.

ELLEN SPIEGEL (Ex-Assemblywoman):
I will read from my written testimony (Exhibit L).

KAY DWYER:
I am a homeowner, resident and former board member of a large CIC. I am in support of S.B. 174.

There are many issues in sections of this bill, but I will limit my comments to section 16, subsection 3. This section addresses the issue of harassment and interference with the performance of duties of board members, managers and staff. You have received testimony where multiple complaints, 60 to 80, were filed in a large association at a cost of more than $38,000 to the association. None of these complaints resulted in fines or serious charges of wrongdoing. Most of the complaints resulted in either no action or were deemed unwarranted. Some complaints are still open and unresolved. These multiple and numerous complaints were filed by the same people over and over again. These complaints were made by fewer than a dozen people out of a population of 14,000 in a community of over 7,000 homes. There are probably 13,900 people who are happy with their association. Board members, managers, staff

and professional associates have been targeted by this very small, vocal group. This is not a unique situation as the recent negative publicity has shown.

Please support S.B. 174 and retain the authority of boards, managers and staff to perform their duties without harassment. This association is responsible for administering the business of the corporation, representing thousands of residents, and is accountable for millions of dollars in budget decisions, reserve issues, and maintenance and upkeep of many millions of resident dollars in assets. The association is responsible for over 250,000 square feet of recreational facilities that accommodate the lifestyle of the 14,000 residents. The HOA and other responsible, diligent volunteers, board members, managers and staff must be allowed to conduct the business of their communities. There are remedies in place for those associations and managers who violate their positions and duties.

JAN PORTER (Sage Creek Homeowners' Association):
I support S.B. 174. I am a homeowner and member of the board of the 230 homes in Sage Creek Homeowners' Association. I served as the homeowner representative on the Commission for Common-Interest Communities and Condominium Hotels. I serve as general manager for Peccole Ranch Association.

Our small association met last night and discussed a number of the different items in this bill. We need to ask how many of these complaints have gone before the CICCH. How many complaints has the Office of the Ombudsman received? What kind of validity do the complaints have, and have they followed the process? One of the most important things is education. Education helps the homeowners as well as the board members serve their communities better.

GARY SOLOMON (Professor, College of Southern Nevada):
I am a psychology professor at the College of Southern Nevada, am tenured, an expert witness, a published author and psychotherapist.

My concern is that HOAs are doing damage to their residents, a syndrome which I have identified as HOA Syndrome, somewhat similar to post-traumatic stress disorder. People living in HOAs are experiencing a wide range of psychiatric conditions. There are people who are becoming ill; people who are dying. I personally, at my own expense, placed a billboard on Boulder Highway warning people not to move into HOAs. It is so far out of hand that an HOA is

now mimicking a concentration camp, an actual neighborhood ghetto. People on the HOA boards have taken the roles as Capos, defined as individuals who hurt other individuals at no charge.

The master community is an absolute abomination. To refer to one as a "master" is an archaic term which was used against women and blacks. Now we are using it against homeowners.

At the top of the food chain come the collection companies. I refer to them collectively as a cartel. The HOA boards, the management companies and the collection companies operate as cartel consortiums. Unlike drug cartels, the HOAs supply nothing, no drugs, nothing, except harm and pain. As a health care professional, I am now putting the entire State on notice, you need to stop this now. Not only should this bill not be passed for health reasons, but what has been passed needs to be undone.

I have put individual board members and management companies on notice. I will continue to do so at my own expense until this stops. If we do not stop this now, you are going to see people killed and houses burned down because the owners feel powerless over their own situations.

TIM STEBBINS:
I will read from my written testimony (Exhibit M).

I urge the wording in section 8, subsection 5 be changed so it is not mandatory that the only way one can receive information about agendas, etc., is by e-mail. It should be optional. Maybe in another generation everybody will be up to speed on computers, but we are not there yet.

I support the comments made by Ms. Goodman earlier.

NORMAN MCCULLOUGH:
I agree with Mr. Stebbins' testimony. There are parts of S.B. 174 I am for, but there are parts I dislike, and dislike is a kind word. You need a third option such as, "disagree with parts." I have submitted a three-page statement with four exhibits (Exhibit N).

I will read from my written testimony (Exhibit O).

KEVIN WALLACE (Community Association Managers Executive Organization, Inc.):
I represent the Community Association Managers Executive Officers (CAMEO), which collectively manages 250,000 doors in the State. I was also the president of RMI Management and received hundreds of e-mails regarding the issues we are talking about today; most of them are in favor of S.B. 174. CAMEO supports this bill with the changes noted by the sponsors.

We want to clarify a few issues. Section 15 is a policy issue. There will be collection costs accrued to collect a homeowner's debt, but the issue is who should pay the costs. Is it going to be the homeowner who pays the costs, or under CHAMP's suggestion, the guilty party or delinquent party? We support the bill regarding collections and reasonable fees.

We are a Fannie Mae representative in this State. Fannie Mae and banks pay liens. Fannie Mae has offered to pay more than legally required. The agency's concerns are that associations in this State are financially strapped. If the troubled associations need help, it has offered to lend a hand.

PAUL P. TERRY, JR. (Community Associations Institute):
I am a member of the board of the Community Associations Institute (CAI) and a member of the CAI Legislative Action Committee. In the interest of full disclosure, I am also a practicing attorney in the HOA area and my law firm, Angius & Terry, operates a licensed collection agency.

I am here on behalf of CAI, which is in full support of S.B. 174. Unlike the bills in past years based largely on anecdotal information, this is the first bill where all stakeholders have been brought together in a thoughtful and collaborative approach. We understand there needs to be language change, but overall, the bill is the way the legislative process should work.

BILL UFFELMAN (President and CEO, Nevada Bankers Association):
The Association supports S.B. 174. The concerns we have are sections 12 and 15, the collection cost issues. There is a companion bill coming forward, and the more closely we can link the bills together, the better. Perhaps we need to ensure the collections bill reflects the discussions we had over the interim. Everything is tied together, so everyone knows the rules, the rights of the HOAs and the obligations of the purchaser at foreclosure sales. Be it known, I am also the neighborhood representative for Chardonnay Hills in Summerlin.

SENATOR MCGINNESS:
Are these collection fees unique to Nevada, or are they across the United States?

MR. UFFELMAN:
Collection fees are common. I was president of my HOA when I lived in Virginia. We had a little ...

SENATOR MCGINNESS:
I am referring to the collection fees in the case of the unpaid assessments for $39.12 for two months, but the total came to $3,000.

MR. UFFELMAN:
I cannot speak to the amounts, but the concept, yes.

MR. TERRY:
I operate a collection agency in both Nevada and California. The amounts are consistent between the two states. The issue is not the amount of collection costs because whatever the costs are, they are fixed. They are fixed regardless of whether the assessment owed is $10 or $1,000. The steps you go through to comply with the statutory process are always the same.

SENATOR MCGINNESS:
There was an exhibit presented today where the notice was sent out at 9 a.m. to be paid by 1 p.m.

MR. TERRY:
That situation is not common. Circumstances arise where homeowners ignore the collection process until the foreclosure sale is scheduled to take place. They call our office at 9 a.m. and say we do not want the foreclosure sale to go forward. We may send them a communication which says you have a very short period of time to produce the money. It is not because they received the notice for the first time at 9 a.m. before the foreclosure sale; it is because they ignored the entire collection process until 9 a.m. before the foreclosure sale.

CHAIR WIENER:
We have a stand-alone bill on collections where we go into more depth on this issue.

SENATOR MCGINNESS:
I hope we do not lose this because it is in a separate bill.

CHAIR WIENER:
We will make sure everything is covered. That is why we are waiting on this bill until the end.

SENATOR MCGINNESS:
I hope we do not leave it to "reasonable" because it does not seem "reasonable" is getting it accomplished.

GAIL J. ANDERSON (Administrator, Real Estate Division, Department of Business and Industry):
I will address section 1, where it states "any person who is aggrieved," then it lists a number of items, i.e., letter of instruction, advisory opinion, declaratory order or any other written decision which the person has received. The Real Estate Division issues many written documents, closing letters, responses to constituents and attorneys, and delinquency notices regarding delinquent registrations. If this section means to propose any written document issued by the Division under this program is subject to appeal by a recipient or possibly someone affected by it, it is going to create an arduous process for anything to be done and finalized. That letter could be presented as an appeal to the Commission, and then it comes to what?

Under the law, an investigative file is confidential. This poses some legal and procedural issues to be considered for a closing of an unsubstantiated case of complaint for nonjurisdiction. A complainant receives a closing letter on a complaint filed and investigated by the Division and then presents this closing letter in appeal to the Commission. The party who comes before the Commission says, here is my letter and I am aggrieved by it, but there is not much the Division can do. We have conducted an investigation under NRS 233B, which is notification of an opening letter, an opportunity to respond, and a request to provide us with an answer that might take care of the issue. The contents of that investigation are confidential. Outside the process of NRS 233B, I do not see how the Division could defend an appeal made to the Commission on the basis of our investigation.

Under NRS 233B, a notice of complaint and hearing has to be offered. The production of documents used in the State's prosecution and presentation of

evidence to support an alleged violation of law are all part of that process. I strongly oppose this procedure being offered to a licensee under the jurisdiction of RED. This provision is in NRS 116, not NRS 116A.

It is a conflict for the Commission to act as an investigative body and a judicial body on the same matter. I do not see how it would work in an appeal process.

Since a complaint and notice of hearing is a document issued by RED and the Office of the Attorney General, does the formal notice become an appealable written document someone could bring to the Commission and say, I do not like this notice of hearing and I would like to tell you why?

One suggestion is to address the needs for mediation or resolution and issues to be considered. If there are questions of substantive law a party wants considered by the Commission before a complaint has been filed, it would be argued before the Commission for determination of facts specific to an association's issues. Those are many of the complaints filed. Homeowners say this is going on and we do not think it is right, or they are doing it this way —they being the board.

The Division, and therefore the Commission, does not have jurisdiction over governing document disputes. I look forward to working on section 16, but I have jurisdictional concerns.

RUTT PREMSRIRUT (Concerned Homeowner Association Members Political Action Committee):
I am a director of CHAMPS. I would like to answer Senator Copening's question of who is paying the majority of these liens. It is the U.S. taxpayers. You may see Bank of America on the title, but the bank is the servicer. The bills are being paid by Freddie Mac, Fannie Mae and the U.S. Department of Housing and Urban Development (HUD). I have liens provided by Freddie Mac's in-house counsel of $3,000 (Exhibit P), $4,000 (Exhibit Q) and $7,000 (Exhibit R).

In section 15, amending the superpriority lien is nothing but a scheme to raid the U.S. Treasury. This is a 20-year-old statute being amended that takes advantage of the foreclosure situation. This amendment distorts the original intent of six or nine months. When you add collection fees on top, it becomes $5,000 or $10,000, which is five to ten years of assessments. If you are a lender, i.e., Fannie Mae or Freddie Mac, and you want to continue lending in

Nevada, you have to mitigate these risks, which means pass the costs off to the consumer. That means higher down payments, higher mortgage insurance premiums and higher interest rates.

I would like to ask the Senators, homeowners and HOA boards—when the Inspector Generals of HUD, Fannie Mae and Freddie Mac come to recover their millions of dollars in damages, similar to what Bank of America is doing now in federal court, who is going to be liable and holding the bag? I have confirmed this legal position with Regina Shaw, in-house counsel to Freddie Mac; Lisa O'Donald, Associate General Counsel of Fannie Mae; and Donna Ely, legal in-house counsel to the Federal Housing Finance Agency.

Clark County Republic Services, Clark County Water Reclamation District and special improvement districts all have superpriority liens. You do not see any of these entities hiring a third-party collector charging $3,000, $4,000 or $5,000 in collection fees, often four to ten times the original principal of the debt to collect their back due assessments. This amendment's intent is to unjustly enrich a small handful of collectors.

MR. EATON:
I will clarify what happens in the context of a nonjudicial foreclosure. Previous comments indicated that through this process, the superpriority lien is putting the burden of these delinquent assessments on the homeowners who failed to pay those assessments. That is not the case. When we speak about the superpriority statute, the portion at issue is what happens after there is a foreclosure under a first deed of trust. Under those circumstances, a delinquent homeowner does not show up and offer to pay the past due assessment and thus avoid the bank; U.S. taxpayers or an investor does not have to pay those expenses.

When the bank owns the property and has to clear those liens, it passes along those costs. We, the taxpayers, have to bail the banks out and pick up those costs. It is not the people in the community who did not pay those costs, it is the taxpayers who do not live in the community and who have no ability to exercise any oversight other than through their elected representatives such as yourselves. The collectors have contracts with associations to provide these services. When the members of the association can rest assured the taxpayers are going to pick up those burdens and the association will not have to bear

them, the board members have little incentive to exercise oversight over the collectors.

The vast majority of lien amounts I have seen as an investor are due to collection costs. A small amount of those monies the collectors seek are passed on to the association to help them out. Those monies line their own pockets.

A prior comment was made regarding the collection process that takes place on behalf of the HOA. One comment is because the banks are taking so long to foreclose, the HOAs have to go forward with their foreclosure process. In fact, they do not go forward with the process; they threaten to go forward but do not complete the process. There is a good reason why. If the HOAs were to go forward with that process, they would own the property. When they own the property, they would not have the lien against it and their lien would be lost. If their lien is lost, they are subject to the bank's foreclosure and they are not going to get paid at all. Lacking a present intention to go forward violates federal law—the Fair Debt Collection Practices Act, which is intended to protect consumers and shield them from threats. To say these people are going to get their legal fees and collection costs and be included in the superpriority is to stretch this to include improper costs the collectors seek to impose for their own benefit, not that of the community. This is an ill-advised policy.

With respect to common assessments, we are not confused to the extent the common assessments are composed of expenditures by the association. Our objection is the inclusion of collection fees and costs within common assessments that can be imposed exclusively against a particular unit and made

to survive the nonjudicial foreclosure under a bank.

CHAIR WIENER:
The meeting is adjourned at 10:54 a.m.

RESPECTFULLY SUBMITTED:

_____
Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

_____
Senator Valerie Wiener, Chair

DATE:_____

EXHIBITS

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 174	C	Randolph Watkins	Welcome to HOA 101
S.B. 174	D	Senator Allison Copening	Written Testimony
S.B. 174	E	Senator Allison Copening	S.B. 174 Working Group
S.B. 174	F	Michael E. Buckley	SB 174 -Explanation /Section Summary
S.B. 174	G	Senator Allison Copening	Clark County Proposed Amendment
S.B. 174	H	Angela Rock	Written Testimony
S.B. 174	I	Jonathan Friedrich	Written Testimony
S.B. 174	J	Rana Goodman	Written Testimony
S.B. 174	K	Chris Ferrari	Priority of Common Expense Assessments
S.B. 174	L	Ellen Spiegel	Written Testimony
S.B. 174	M	Tim Stebbins	Written Testimony
S.B. 174	N	Norman McCullough	Written Testimony
S.B. 174	O	Norman McCullough	Statement regarding S.B. 174
S.B. 174	P	Rutt Premsrirut	Lien by Freddie Mac $3,140
S.B. 174	Q	Rutt Premsrirut	Lien by Freddie Mac $3,962

S.B. 174	R	Rutt Premsrirut	Lien by Freddie Mac $6,788

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY
SUBCOMMITTEE

Seventy-Sixth Session
May 17, 2011

The Committee on Judiciary Subcommittee was called to order by Chairman James Ohrenschall at 4:58 p.m. on Tuesday, May 17, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 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/76th2011/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 James Ohrenschall, Chairman
Assemblyman Richard Carrillo
Assemblyman Richard McArthur

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Tick Segerblom, Clark County District No. 9
Senator Allison Copening, Clark County Senatorial District No. 6

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Nancy Davis, Committee Secretary
Michael Smith, Committee Assistant

Minutes ID: 1248

CM1248

OTHERS PRESENT:

Gary Lein, representing the Commission for Common-Interest Communities and Condominium Hotels
Garrett Gordon, representing Southern Highlands Homeowners Association
Jonathan Friedrich, Private Citizen, Las Vegas, Nevada
Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels
Michael Randolph, representing Homeowner Association Services Inc., Las Vegas, Nevada
Alisa Nave, representing the Nevada Justice Association
Eleissa Lavelle, Private Citizen, Las Vegas, Nevada
Gail Anderson, Administrator, Real Estate Division, Department of Business and Industry
Michael Joe, representing Legal Aid Center of Southern Nevada

Chairman Ohrenschall:
[Roll taken.] Tonight we will attempt to finish our work session on the two remaining bills. When we adjourned our last meeting, we were working on Senate Bill 204 (1st Reprint). We will begin where we left off.

Senate Bill 204 (1st Reprint): Enacts certain amendments to the Uniform Common-Interest Ownership Act. (BDR 10-298)

Dave Ziegler, Committee Policy Analyst:
When we adjourned our last work session, we were on S.B. 204 (R1), section 45. Perhaps we should forge through to the end and then, if necessary, review a few sections that were discussed earlier.

Section 45 requires a homeowners' association (HOA) to maintain property, liability, and crime insurance subject to reasonable deductibles.

[Continued to read from work session document (Exhibit C).]

Chairman Ohrenschall:
Were there any other amendments?

Dave Ziegler:
No.

Chairman Ohrenschall:
I believe the Committee members received an email from Senator Copening about the crime insurance issue.

Assemblyman Carrillo:
I received a copy also.

Senator Allison Copening, Clark County Senatorial District No. 6:
I did not post the email to Nevada Electronic Legislative Information System (NELIS). It was information that backs up the need for HOAs to carry crime insurance as it is the association's money that needs to be protected. I do not think it stops an independent community association manager (CAM) from carrying whatever insurance he or she would like to carry, but because it is the responsibility of the association to protect its funds, it is a recommendation in the Uniform Common-Interest Ownership Act that crime insurance be carried. I believe there was a supplemental email from Mark Coolman to discuss the fees, which are considered to be very nominal for the type of coverage.

Chairman Ohrenschall:
Do you have any comments on the amendment proposed by Mr. Friedrich?

Senator Copening:
I would need to defer to Michael Buckley on that. I do not have the amendment here. I think it stated the manager should carry the insurance and not the association.

Gary Lein, representing the Commission for Common-Interest Communities and Condominium Hotels:
I feel that insurance is a coverage that should remain at the association level. It is those funds that need to be protected and we need to make sure the insurance is there. We also need to ensure the crime insurance has the appropriate endorsements extending to the employees of the association, its agents, directors, volunteers, and community manager. For coverage up to $5 million of crime insurance with the appropriate endorsements, the cost would be approximately $3,200 per year for an association. That is $6.40 per $10,000. For a very small association with $250,000 of protection, the annual cost would be $582 per year, or $23.28 per $10,000. We feel that is a reasonable price to pay to know that the funds of the association are protected. As it relates to the cap, we had proposed this language so that it would be in sequence with the mortgage guidelines from Fannie Mae and Freddie Mac, in that there is currently no cap in those federal mortgage guidelines.

As a Commission, we had heard a case in Las Vegas this year where a board member got onto the association's executive board and within a few months started embezzling. In that particular case, that person embezzled about $64,000 over several months. This association is out those funds and had no coverage. Had the association had this coverage in place, it would have received that money back from the insurance company.

Another provision in this section is dealing with a no conviction requirement. We know that the Las Vegas Metropolitan Police Department is stretched in resources and in some cases the district attorney's office is as well, so it is important not to have a conviction requirement on the crime policy. I would support no cap, or at minimum a cap at $5 million.

Chairman Ohrenschall:
Mr. Ziegler, the cap Mr. Friedrich proposed was how much?

Dave Ziegler:
$500,000.

Chairman Ohrenschall:
Mr. Lein, you would propose a cap no lower than $5 million, correct?

Gary Lein:
That is correct. You must realize there are some associations that have reserve funds up to $10 million. I do not believe $500,000 is adequate. The cost of $3,200 for $5 million in coverage, when you are dealing with an association with $5 million to $10 million in reserves, is a minimal fee. They have a multimillion dollar budget and to protect those funds, I believe, is absolutely worthwhile.

Chairman Ohrenschall:
Any questions?

Assemblyman McArthur:
Is this where we decided to go with the $500,000 or the three months? There are some very small HOAs, if we kept it at $500,000 or three months' revenue, whichever is less, which would cover the larger HOAs that have a large amount of money coming in and the smaller HOAs would only have to go to $500,000.

Chairman Ohrenschall:
The text of the original bill states, "Such insurance may not contain a conviction requirement, and the minimum amount of the policy must be not less than an

amount equal to 3 months of aggregate assessments on all units plus reserve funds." There is no mention of $5 million.

Assemblyman McArthur:
I am not sure what three months of aggregate assessments is for some of the larger HOAs, but I believe it is a pretty substantial amount.

Garrett Gordon, representing Southern Highlands Homeowners Association:
In the case of Southern Highlands, there is $4 million to $5 million in reserves. Per month assessments for three months is another $2 million to $3 million. That is why our concern is when you start adding up reserve funds and three months of aggregated assessments, the premiums on those amounts would be quite substantial. If it got too high, we would have to increase the assessments of the homeowners. On behalf of Southern Highlands, we would ask that a reasonable amount would be three months of assessments or $500,000, whichever is less. There would be a cap of $500,000 and three months assessments for smaller associations.

Chairman Ohrenschall:
Would that be less than the $5 million that Mr. Lein proposed?

Garrett Gordon:
Yes, it is significantly less. I think Mr. Lein is proposing $5 million; Southern Highlands is proposing $500,000 or three months of assessments, whichever is less.

Assemblyman McArthur:
Approximately what are those three months worth?

Garrett Gordon:
Around $2 million worth of assessments for three months.

Assemblyman McArthur:
So that is still under the $5 million mark?

Garrett Gordon:
Correct. However, with the language I am recommending, "whichever is lower," then it would go to the $500,000 cap.

Assemblyman McArthur:
I am talking about the larger HOAs.

Chairman Ohrenschall:
Would you be comfortable with the three months aggregate assessments or $500,000?

Gary Lein:
I think that is too little for the larger HOAs. I think for an association that has $10 million in reserves and monthly expenses of approximately $700,000 per month, overall, $5 million at a cost of $3,200 per year, with all the proper endorsements is a very small price to pay to have that type of insurance and that type of protection. I think $500,000 for larger HOAs is just too small, especially with the incremental value to obtain the greater coverage. I show that for a policy for $1 million, the annual premium would be $1,160.

Assemblyman McArthur:
Basically we are talking about roughly $1,100 per $1 million?

Gary Lein:
Yes, at $25,000 worth of coverage, the annual premium would be $145. For $250,000 worth of coverage, the cost would be $582; $1 million costs $1,160; and the price for $5 million is $3,200. Again, I think the important thing is to be in line with the guidelines of Fannie Mae and Freddie Mac.

Assemblyman McArthur:
You said for $5 million the annual premium is $3,200?

Gary Lein:
Correct.

Assemblyman McArthur:
Initially I think you said it was around $1,100 for $1 million. So the premium drops as the coverage goes up?

Gary Lein:
Correct. The price per $10,000 of coverage on a $1 million policy is $11.60. The price per $10,000 of coverage on a $5 million policy is $6.40. So, for the smaller HOA that is trying to cover $250,000, it is $23.28 per $10,000.

Chairman Ohrenschall:
Do we want to decide on this section now, or wait until we go through the rest of the sections?

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
The way the law is written, this is a two-step process. I have never objected to the three months of the aggregate assessment. I have been told that Sun City Summerlin, which has 7,781 homes, receives monthly dues of approximately $30,000. My concern was that all the reserves be covered under the crime insurance policy. I believe Sun City Summerlin has about $13 million in its reserve fund. Before someone could embezzle that huge amount of money, I would think that flares would be going up, but they could take $10,000 to $50,000. That is why I came up with the $500,000. Most of the HOAs in the state are small and have nowhere near what Sun City Summerlin or Sun City Anthem have. Also, why should the HOA be forced to pay for the crime insurance that the CAM should pay? It is a cost of doing business on behalf of the CAM, just as they pay their own workers' compensation, rent, and office supplies. The HOA should not have to pay for a business expense.

Gary Lein:
I do not want to rebut Mr. Friedrich, but the problem is that not all HOAs are professionally managed. There are a number of self-managed HOAs. The CAM would have to have coverage, but that coverage is not going to cover the executive board, the volunteers, or the directors. The CAM cannot have an endorsement to cover the executive board for fraud or embezzlement. We feel that the coverage has to be at the level of the HOA protecting and insuring the executive board, the employees, the directors, the agents, the management company, and the CAM.

Assemblyman McArthur:
I might offer a compromise here. If we keep the wording as it currently is, three months of aggregate assessments plus reserve funds up to a maximum of $5 million. That way all the smaller HOAs can use the three months aggregate assessments and the larger HOAs will not have to go higher than $5 million.

Gary Lein:
I would not have an objection to that compromise.

Assemblyman McArthur:
As far as covering everyone else, I think most of these policies actually cover everyone including the managers. I do not think that is a problem.

Chairman Ohrenschall:
I have gotten a nod from both Mr. Gordon and Mr. Friedrich on this compromise.

Dave Ziegler:
Section 48 amends provisions relating to common expenses benefitting fewer than all of the units or caused by a unit owner, a tenant, or an invitee.

Chairman Ohrenschall:
There is an exception for when someone has a delivery; if the delivery driver hits a common area, the person receiving the delivery is not liable.

Assemblyman McArthur:
I have no problem with section 48.

Assemblyman Carrillo:
I am good with this one also.

Assemblyman McArthur:
I did not know what the intent of this was. But, it is a benefit, so I agree with it.

Chairman Ohrenschall:
I believe the intent was to exempt the unit owner from liability for willful misconduct or gross negligence of the invitee, the driver.

Dave Ziegler:
Section 49 provides that reasonable attorney's fees and costs and sums due to an HOA under the declaration, *Nevada Revised Statutes* (NRS) Chapter 116, or as a result of an administrative, arbitration, mediation, or judicial decision are enforceable in the same manner as unpaid assessments.

[Continued to read from work session document (Exhibit C).]

Chairman Ohrenschall:
Ms. Schuman's amendment seems reasonable to me.

Jonathan Friedrich:
I have a copy of the amendment, it is five pages long.

Chairman Ohrenschall:
Thank you. We have it up here.

Dave Ziegler:
This amendment is in your packet.

Chairman Ohrenschall:
Page 4, line 20 of the amendment states: "Following the trustee's sale or foreclosure sale of a security interest described in paragraph (b) of subsection 2 of NRS 116.3116, upon payment to the association of the amounts described in subsection 3, any unpaid amounts of the lien accruing before such sale remain the personal obligation of the owner of the unit as of the time the amount became due, but no longer constitute a lien upon the unit." That is quite a change from current law.

Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels:
I was involved in writing that amendment. The idea we were addressing is at the bottom of page 3. We think this would have a positive effect, and that is the way the law is currently written. The HOA's super priority lien dates from when the HOA starts the foreclosure. There is a statutory reason for an HOA to start the foreclosure. This amendment will measure the super priority lien, not just from the HOA starting the foreclosure, but also from the first mortgagee's foreclosure sale. In that respect there is not an incentive for the HOA to start the foreclosure if it knows it will get its super priority lien when the first lender forecloses. We took that language from the Colorado Uniform Common Interest Ownership Act. The language that you read on page 4 of the amendment was intended to address the idea that when there is a foreclosure sale and the super priority lien is paid off, there is no more lien. It remains of record because liens remain of record, but the HOA no longer has a lien for any unpaid amounts. Once the foreclosure of the first mortgage has occurred, someone cannot try to enforce the HOA lien for the old owner, who is gone. The amount that a homeowner owes when he buys a unit is not only a lien, it is a personal obligation, so the fact that there has been a foreclosure does not wipe out the fact that the money is owed. We have never heard of an HOA suing anyone, but it is like a utility bill; there may be a lien, but there is also a personal obligation. The intent of the law is if there is a foreclosure of the first mortgage, the HOA receives a super priority payment. Once that super priority payment is made, the lien is gone, and the unit is free from any lien from the prior owner.

Chairman Ohrenschall:
Currently, are HOAs going after the prior owners?

Michael Buckley:
We have heard of instances where an HOA files a lien for $5,000 and the super priority lien is $1,000. When the foreclosure of the first mortgage occurs, $1,000 is all that gets paid. There is a $5,000 lien of record. We have heard of situations where a collection agency or an HOA might try and assert a lien

against the new owner for $4,000. This amendment is to ensure that the lien is removed from the property. A lien by definition is an interest against property.

Chairman Ohrenschall:
Do you think this will make HOAs more or less whole in terms of their ability to recover these amounts owed to them?

Michael Buckley:
When a mortgage is foreclosed, it wipes out all junior liens. That is the law. If you are in the title industry, you know that when you foreclose a senior lien it wipes out all the junior liens. Since it does not say that in NRS Chapter 116, you do have a lien of record that says the HOA is owed money, but once the foreclosure occurs, the lien is gone once the super priority lien has been paid. This amendment is not intended to change the law. It is intended to ensure that it is clear that once the super priority lien is paid, the lien the HOA has for the past due assessments against the unit is gone.

Chairman Ohrenschall:
Any questions? [There were none.]

Michael Randolph, representing Homeowner Association Services Inc., Las Vegas, Nevada:
Mr. Buckley was referring to the recording of the priority of liens which is over in NRS Chapter 107. Since NRS 116.311 originally came from NRS Chapter 107, that is where it is. The idea behind removing the leftover amounts due from the property is to give clear title to the succeeding purchaser, whether it be an investor at the auction or a bank who resells it. I have heard of events where the super priority lien portion and collection fees were paid, yet the person attempting to collect was still attempting to collect amounts far greater than leftover amounts due from the prior homeowner, which were not in the super priority lien. They were trying to collect it from the new homeowner, which is a total aberration. When the lien is stripped off the property once the super priority lien portion has been paid, it protects the future homeowners.

Chairman Ohrenschall:
The part of the amendment on page 4, lines 18 through 25, is that in another Senate bill also?

Michael Buckley:
Yes, that is the language that we put in Senate Bill 174. Just to clarify, this is a State Bar Real Property section bill and the language in section 2 of the proposed amendment on page 3 is about Fannie Mae regulations. I would mention that currently the Fannie Mae regulations are referred to for the length

of the super priority lien. When Nevada went from six to nine months, that language was put in because in condominiums, Fannie Mae regulations are limited to six months. This proposal would add not only the time portion of the super priority lien, but the amounts of fees and collection costs would be limited by Fannie Mae guidelines. The other thing I would like to point out is that I have had this debate about what exactly Fannie Mae says about these fees. Some would argue that Fannie Mae prohibits the payment of collection costs and only permits the payment of assessments. I have found language that states that the collection costs can be paid in addition to the assessments. I think that if we adopt this language which now refers back to Fannie Mae regulations for collection costs, we will be injecting much more uncertainty into what must be paid at foreclosure, which I do not think is a good idea. It seems that the idea of a law is to make things more certain than less certain. That is why it was limited in the past to just the time and not the costs.

Chairman Ohrenschall:
So you are seeing that there would be a conflict between the six months that Fannie Mae allows for condominiums and the nine-month super priority lien?

Michael Buckley:
No. The way the law is currently written, there is no conflict because Fannie Mae limits condominiums to six months and our statute says nine months unless Fannie Mae says six months. I think the proposed amendment language would make things uncertain because I am not convinced that Fannie Mae regulations address this. For example, when Fannie Mae approves a project, there are regulations that address whether the project is approved for Fannie Mae financing. The other part of the process that Fannie Mae deals with is when there has actually been a loan that was sold to Fannie Mae because it was an approved project, and now Fannie Mae holds the mortgage. There is a different set of regulations that deal with what Fannie Mae will pay if it is foreclosing. There is also the lender who made the loan and sold the loan to Fannie Mae. There are different regulations that apply there also. I think this language, which would refer to Fannie Mae guidelines on how much collection costs you pay, is creating uncertainty.

Chairman Ohrenschall:
So you have concerns with the first part of the amendment, but you are all right with the section that comes from S.B. 174?

Michael Buckley:
That is correct.

Assemblyman Carrillo:
Assessments are the HOA's lifeblood. If we pass this bill and eliminate all the assessments from the previous owner, are we removing the lifeblood of an HOA? How will this affect the HOAs? If the HOA is dependent on the assessments, it will have to make up the difference by increasing the assessments for the rest of the homeowners.

Michael Buckley:
We are not changing the super priority lien. It will be six to nine months, which is what the law states now. Once an HOA gets paid the super priority lien, it no longer has a lien against the unit. That is existing law. When an investor buys a unit and resells it, it is great for the association who gets new owners because they start paying the dues on the unit that was foreclosed. If there is a problem with title, if the new owner has some question about having to pay the old owner's assessments, that affects the ability of those units to sell. We are not changing the law or the super priority lien. What we are trying to do is to clear up the title once the association has been paid its super priority lien. The association can only get the super priority lien if there is a foreclosure by the first mortgage. If there is no foreclosure by the first mortgage, the HOA could foreclose. Super priority lien deals only with the foreclosure by the first mortgage. When that has been paid, the old lien is gone, and the unit can go on the marketplace with a clean slate.

Assemblyman Carrillo:
You also stated that this will protect investors. Obviously, homeowners are now purchasing homes at the same prices that were paid 15 years ago. If the whole purpose of this bill is to protect investors, then this is missing the point.

Michael Buckley:
I think you make a very good point. Currently homes are very affordable. People can now afford to buy a home, and may want to buy a foreclosed unit from the bank. The association or an unscrupulous collection company could say, "There is a $4,000 lien on your property." The first-time homebuyer does not know whether he has to pay that or not. This is not a question of protecting the investor; it is a question of protecting the new owner.

Chairman Ohrenschall:
Any other questions? [There were none.]

Garrett Gordon:
I would echo Mr. Buckley's testimony. We have no objection to the language from S.B. 174. We do strongly object to the amendment on page 1. This deals with collection costs. There has been a huge debate over the last couple

months about timing of collections, costs of collections, and as this body knows, we have been in discussions about coming up with a reasonable compromise. This language was introduced by the investors in order to make this a collection bill. I would object to putting this language into a State Bar Real Property Section bill. We are trying to go through the uniform changes and not make this a controversial collection bill. Secondly, Senator Copening handed out an amendment to this section which adds three words, "Chapter 116 regulations" (Exhibit D). I just wanted to ensure that is on the record.

Chairman Ohrenschall:
Senator Copening's amendment has been posted on NELIS.

Assemblyman McArthur:
I guess there is a difference between the statutes and regulations in NRS Chapter 116.

Chairman Ohrenschall:
This amendment states, ". . . any other sums due to the association under the declaration, this chapter, Chapter 116 regulations, or as a result of an administrative, arbitration, mediation or judicial decision are enforceable in the same manner as unpaid assessments . . . ." Are we broadening the scope of fines that could be due?

Garrett Gordon:
I believe the intent was not to broaden the scope, but as we all know, NRS is the umbrella. Underneath it are regulations approved by the Commission on Common-Interest Communities and Condominium Hotels (CICCH). The Commission has delegated authority to cap, limit, and create costs and fines. I believe this would tighten this section up for the purpose of regulations that the NRS delegates to the Commission.

Chairman Ohrenschall:
So you do see any broadening of things that people may be liable for in terms of fines?

Garrett Gordon:
This is from Senator Copening, and I do not know whether it broadens it or not. There are regulations that deal with fines, costs, and charges. I think Senator Copening's intent was to encourage those regulations to be called out here in this Chapter and with the declaration. One could interpret this as broadening and one could interpret this as narrowing.

Chairman Ohrenschall:
Any other questions? [There were none.] Mr. Friedrich, would you like to address that amendment?

Jonathan Friedrich:
Only 15 percent of the homes that are sold in foreclosure are sold to investors. Those investors are risking their capital. They are paying cash. They are making the associations viable in that they are restoring the homes, paying the fees to the association, paying taxes, and giving employment to the contractors who are restoring these homes. They are allowing brokers to make a commission on the resale of the property. I see it as a win-win situation.

Regarding the amendment, I was concerned with the wording on section 49, page 47, lines 27 to 33. It would hold a unit owner responsible for all the attorney's fees and costs. "Other fees and charges" is very vague. It puts a unit owner at a disadvantage by making him susceptible to huge attorney fees. You gentlemen have seen some of the documentation that I supplied earlier where the attorney's fees and costs are hurled at homeowners. If you are chasing after the homeowner for anything beyond the nine-month super priority lien, the homeowner would be forced to file bankruptcy. In that case the association gets nothing; the attorney would be the winner. The other issue is on page 49, lines 19 to 28, which talks about a receiver. I have heard some horror stories about how much receivers charge for their services. I would suggest some sort of a percentage of the costs that are involved for the receivers. In essence, there should be a cap on the fees for the receivers' services.

Chairman Ohrenschall:
Your comment about the bankruptcy and the association not getting anything, can you go over that again?

Jonathan Friedrich:
It is section 49, page 47, lines 27 to 33. If someone is walking away from his property and is being foreclosed on, I read this that the individual would then be subject to all of the additional costs. Line 33 states ". . . in the same manner as unpaid assessments . . . ." Mr. Buckley advised me that the amendment by Ms. Schulman would remove that burden on a foreclosed homeowner.

Michael Buckley:
Just to remind you where this all started, which was a Uniform Act proposal. The comment from the Uniform Law Commission on subsection 1 states: "Subsection 1 is amended to add the cost of the association's reasonable attorney's fees and court costs to the total value of the association's existing

super lien. 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." That was referring to Connecticut. I think it goes back to Mr. Carrillo's point that associations need the ability to recover the costs incurred to collect unpaid assessments. If the association cannot recover these costs from the defaulting owner, it will be forced to pass those expenses on to the paying owners. To put it into perspective, our proposal was just to add the language which was adopted by the Uniform Law Commission.

Chairman Ohrenschall:
We definitely have some concerns with this section and the amendments. We will come back to them later. Mr. Ziegler, can we backtrack to Mr. Segerblom's amendment?

Assemblyman Tick Segerblom, Clark County Assembly District No. 9:
When I was here last week, I was seeking to remove a phrase that said "except for . . . ." Mr. Anthony convinced me that I did not need to remove it. In retrospect, I think it would be wise if we could remove that phrase.

Chairman Ohrenschall:
I think we have a mock-up of your proposed amendment.

Dave Ziegler:
That is correct. There is a mock-up prepared by the Legal Division, dated May 9, 2011. It is part of your packet. Section 34 shows what Mr. Segerblom is referring to on lines 32 and 33. What Mr. Segerblom is proposing is also the same that others are proposing. This is one case where all those who seek an amendment in this section are saying the same thing.

Chairman Ohrenschall:
Mr. Segerblom's proposal amends sections 21, 30, and 34 of the bill.

Assemblyman Segerblom:
The Committee agreed to support sections 21 and 30 amendments. Section 34 is the only one left.

Chairman Ohrenschall:
Any feelings from the Committee?

Assemblyman Segerblom:
My amendment to section 34 deals with not allowing the board to amend the declaration, and that it must be done at the vote of the members.

Michael Buckley:
I would just like to note for the record that we have no objection to this amendment.

Assemblyman McArthur:
I am okay with this amendment.

Assemblyman Carrillo:
I am okay with the amendment as written.

Chairman Ohrenschall:
So as a recommendation for the full Committee, we are all in agreement with the proposed amendment by Mr. Segerblom.

Dave Ziegler:
It is my understanding that you will take section 49 under advisement and move on to section 50?

Chairman Ohrenschall:
Correct. I think we need a little more time to reach a comfort level.

Dave Ziegler:
Section 50 provides that a judgment for money against an HOA is a lien on real property of the association. To expand further, this is a lien on property of the association, in addition to the common elements. The idea is that the HOA may have real property that is not part of the common elements.

Chairman Ohrenschall:
As I recall this could be a lien on real property not within the association. Mr. Buckley, is this language from the Uniform Law Commissioners?

Michael Buckley:
Yes, that language is from the Uniform Act. Earlier in the bill there is language that makes it clear that an association could own other real property, such as a parking lot or a golf course. Obviously if the association owes money, the lien is on that property as well.

Chairman Ohrenschall:
So this exempts all common elements within the association, but other real property both within the state or outside the state could be subject to that judgment lien.

Michael Buckley:
That is correct.

Chairman Ohrenschall:
I am all right with this section. I do not recall any testimony against this. Currently, without this change, the judgment lienholder may still be able to go against real property if it is outside the association, correct?

Michael Buckley:
I think that is correct, and this is more of a clarification.

Chairman Ohrenschall:
I agree this is more of a clarification. If someone has a judgment against you, he or she could put a lien on your real property, regardless of where it is.

Assemblyman McArthur:
I do not know whether this is just clarification, but I can go with it and move on.

Chairman Ohrenschall:
I assume this is language from the Uniform Act to just clarify things. Mr. Carrillo are you okay with this? Let the record show that Mr. Carrillo nodded his head that he is okay with section 50.

Dave Ziegler:
Sections 51 and 60 contain provisions that are virtually identical to sections 2 and 3 of Senate Bill 30 (1st Reprint), which this subcommittee approved at the last work session and which the full Assembly Committee on Judiciary approved in the work session yesterday. That point may be moot. We could either amend this out of the bill, or leave it in and ensure it conforms with S.B. 30 (R1). I would make the same comment on the proposed amendment from Yvonne Schuman because I think we covered that in the amendment for S.B. 30 (R1). The only thing that would remain on the table is a proposed amendment from Mr. Friedrich to add a $25 per day penalty if the HOA does not produce books and records within 14 days.

Chairman Ohrenschall:
So we could delete sections 51 and 60 or keep them in because they are identical to sections 2 and 3 of S.B. 30 (R1). The amendment that Yvonne Schuman has proposed seems identical to something we proposed earlier.

Dave Ziegler:
It is identical to the action we took on S.B. 30 (R1).

Chairman Ohrenschall:
Mr. Friedrich's amendment is new, having a penalty to the HOA for not producing books and records after 14 days.

Jonathan Friedrich:
There have been many instances where boards and their management companies refused to turn over the books and records even though it is already in statute. The statute calls for 14 days. This gives that part of the statute some teeth to ensure these books and records, when requested, are turned over to the individual.

Chairman Ohrenschall:
I would like to remind Mr. Friedrich and Mr. Buckley that we are in a work session, and while we appreciate everyone's knowledge and input, please leave it to us to call on you when we need information.

We have other provisions like this currently, correct? If an HOA is not complying, there are different kinds of fines or penalties that can be imposed. This is not something out of the ordinary for the amendment to go forward.

Michael Buckley:
I do not believe there is a specific penalty. I think the process is that if the request is not honored, the requester would go to the Ombudsman who would then request the information. If the HOA failed to comply, the Commission has the authority to impose a penalty or a fine on an HOA, or anyone who violates NRS Chapter 116. It is in the process, but there is no dollar amount. It would have to go through the Real Estate Division in the Department of Business and Industry.

Chairman Ohrenschall:
So, an aggrieved homeowner who did not receive the records that he requested could go through the process with the Ombudsman and potentially get a fine against the HOA right now.

Michael Buckley:
I think that is correct. The Commission focuses more on getting the documents rather than on fining, since if there is a fine, all the owners have to pay.

Jonathan Friedrich:
The process that Mr. Buckley just mentioned can take upwards of one to two years. In the meantime, the homeowner has been deprived of those records. It is a very costly process for the Office of the Ombudsman for Owners in

Common-Interest Communities and Condominium Hotels and for the Commission.

Chairman Ohrenschall:
So you envision this amendment to be swiftly enforced?

Jonathan Friedrich:
That is correct. This gives the existing statute some teeth that are currently missing.

Chairman Ohrenschall:
I see the intent, but I am thinking it may not actually work. The fines may not be imposed for some time, and a determination may need to be made whether there is some type of willful desire to withhold those records.

Garrett Gordon:
I concur with your comments, Mr. Chairman. It would be very difficult to enforce. As Mr. Buckley indicated, if you start assessing arbitrary fines, who pays that? All the other homeowners would have to pay that cost. I would submit to you that there is already a process, as indicated, for a remedy for an aggrieved homeowner.

Chairman Ohrenschall:
Any questions regarding the proposed amendment?

Assemblyman Carrillo:
I am okay with the amendment.

Chairman Ohrenschall:
Mr. McArthur?

Assemblyman McArthur:
I have the same concern; once you start charging these fees, the other homeowners are paying for it.

Chairman Ohrenschall:
Perhaps there is a way to draft this so it can be at the discretion . . .

Assemblyman McArthur:
I think $25 per day is a little steep, also.

Chairman Ohrenschall:
Perhaps it can be at the discretion of the Ombudsman?

Assemblyman McArthur:
I think we already have that process. We need to either put teeth in it with some money or leave it like it is without the amendment.

Chairman Ohrenschall:
Mr. Carrillo, are you okay with the $25 per day for not releasing the documents in 14 days? Is this a problem you see often that HOAs are not releasing the requested documents?

Assemblyman Carrillo:
Personally, in the dealings I have had with HOAs, they seem to be pretty compliant. I am not saying other experiences are not valid, but it may be on a case-by-case basis. Anytime you hit someone in the pocketbook, regardless whether it is an HOA or anyone else, they will respond to it.

Assemblyman McArthur:
I think $25 is a big hit.

Chairman Ohrenschall:
Although the HOA would have had 14 days to comply, but then if it went another 10 days, that would be $250. For a small association, that is a big hit. I recall in another bill we gave homeowners three weeks to remedy a situation.

Assemblyman McArthur:
Would this penalty be enough to sting an association? As a compromise, we could keep the penalty at $25 per day, but give the HOA four weeks to produce the records.

Assemblyman Carrillo:
I am okay with the three weeks.

Chairman Ohrenschall:
That would be consistent with our other bill where we gave the homeowner three weeks to comply.

Chairman Ohrenschall:
I would propose for us to report to the full Committee that we will accept sections 51 and 60. They are duplicative of sections 2 and 3 of S.B. 30 (R1). We will accept Yvonne Schuman's amendment and we will accept Mr. Friedrich's amendment. However, we will amend it to 21 days instead of 14 days.

Dave Ziegler:
Section 52 exempts the disposition of a unit restricted to nonresidential purposes from the requirement to provide a public offering statement or certificate of resale. It also deletes a provision applicable to small HOAs that is covered in NRS 116.1203.

[Chairman Ohrenschall left the room. Assemblyman Carrillo assumed the Chair.]

Acting Chairman Carrillo:
Mr. McArthur, do you have any concerns with section 52?

Dave Ziegler:
I think that there can be nonresidential common-interest communities and nonresidential components within residential common-interest communities.

Acting Chairman Carrillo:
This appears to be adding to the disposition of a unit restricted to nonresidential purposes; it struck out planned communities.

Assemblyman McArthur:
I am okay with this section.

Acting Chairman Carrillo:
Mr. Ziegler, we are okay with section 52.

Dave Ziegler:
Section 53 amends the information required to be included in the public offering statement provided to an initial purchaser of a unit, including any restraints or alienation on the common-interest community (CIC) and the HOA's budget information.

Assemblyman McArthur:
Does this exempt the nonresidential use? I am okay with this section.

Acting Chairman Carrillo:
Okay. Mr. Ziegler.

Dave Ziegler:
Section 55 requires an HOA to charge a unit owner not more than 10 cents per page after the first 10 pages for the cost of copying documents furnished in a resale package. It also provides that the purchaser, rather than the seller, is not liable for a delinquent assessment if the HOA fails to furnish documents required in a resale package within the 10 days allowed by this section. There is a

proposed amendment from Yvonne Schuman to provide that if the documents exist in electronic format, they must be provided, upon request, by email and at no charge.

Acting Chairman Carrillo:
Mr. McArthur?

Assemblyman McArthur:
I may have missed something. Were there three points to this section?

Dave Ziegler:
There is the cost per page, the substitution of purchaser for seller, and a proposed amendment from Yvonne Schuman regarding if the documents exist in an electronic format, they must be provided by email upon request at no charge.

Assemblyman McArthur:
I am okay with this.

Acting Chairman Carrillo:
I am okay with the proposed amendment. At that point the homeowner can provide an email address and it can be sent free.

Assemblyman McArthur:
I agree.

[Chairman Ohrenschall reassumed the Chair.]

Assemblyman Carrillo:
We are discussing the proposed amendment from Yvonne Schuman on section 55.

Chairman Ohrenschall:
I am okay with that also.

Dave Ziegler:
Section 56 addresses warranties made to a purchaser of a unit and provides that such warranties are made by a declarant, rather than any seller. There is a proposed amendment from the Nevada Justice Association to retain the language of the existing statute.

Assemblyman McArthur:
Does that mean we are putting seller back in instead of taking it out, and we have to do that by amendment?

Chairman Ohrenschall:
I believe so. I believe Ms. Dennison had no problem with that.

Dave Ziegler:
I do not recall. The proposal from the Nevada Justice Association is to retain the existing statute.

Alisa Nave, representing the Nevada Justice Association:
Regarding section 56, we are asking for a return to the original language, replacing "declarant" with "seller." The declarant is a master plan developer, and typically is responsible for the larger development of the parks, roads, amenities, a country club, and those things that go with a larger community. The builders will then build out the individual units, and sell them to the buyer. The warranties with regard to the specific unit should be placed on the seller and not the declarant. We think that makes more sense within the context of this section.

Chairman Ohrenschall:
Is my recollection correct that Ms. Dennison had no problem with this?

Alisa Nave:
That is correct.

Chairman Ohrenschall:
This is something I am supportive of. Mr. McArthur?

Assemblyman McArthur:
Yes, I am okay with it.

Chairman Ohrenschall:
I think we can proceed.

Dave Ziegler:
Section 58 authorizes an HOA board to create an independent committee of the board to evaluate, enforce, and compromise warranty claims, and provides rules for such a committee. There is a proposed amendment by Mr. Friedrich to delete the word "compromise" at page 60, line 21.

Chairman Ohrenschall:
Mr. Carrillo, while you stepped out of the room, we reviewed section 56 and the proposed amendment. Are you okay with that?

Assemblyman Carrillo:
I am okay with section 56.

Chairman Ohrenschall:
We are now reviewing section 58 and the proposed amendment.

Assemblyman McArthur:
Perhaps as a compromise, we could use the word "address" in place of "compromise."

Chairman Ohrenschall:
I think you and Nick Anthony are legal geniuses. I am surprised that was not caught earlier. I support that. Mr. Carillo?

Assemblyman Carrillo:
I am fine with that.

Chairman Ohrenschall:
Mr. Friedrich, are you okay with changing "compromise" to "address"?

Jonathan Friedrich:
I am ecstatic.

Chairman Ohrenschall:
We are all in agreement and propose to accept the amendment, but instead of deleting "compromise," we will replace it with the word "address."

Dave Ziegler:
I would like to point out that what I am about to say is current law. Section 59 provides that members of an HOA board are not personally liable to victims of crimes occurring on the property, and provides that punitive damages may not be awarded against an HOA or its board or officers under certain circumstances. Those two things are in current law. The new provision is that the CICCH is not prohibited from taking disciplinary action against a member of an HOA board.

Assemblyman McArthur:
I am okay with this section.

Chairman Ohrenschall:
This section is duplicative of everything except for subsection 8 on page 61. Subsection 8 states, "The provisions of this section do not prohibit the

Commission from taking any disciplinary action against a member of an executive board pursuant to NRS 116.745 to 116.795, inclusive."

Assemblyman McArthur:
I do not have a problem with that.

Assemblyman Carrillo:
I am fine with subsection 8 of section 59.

Chairman Ohrenschall:
All three of us are fine with subsection 8 of section 59, and the rest of it is duplicative.

Dave Ziegler:
Section 59.5 deletes the requirement that a community manager must post a bond.

Chairman Ohrenschall:
I am trying to remember what the testimony was in support of removing the requirement for a manager posting a bond.

Michael Buckley:
This is the flip side of requiring the HOA to have crime insurance. This was passed in 2009 with the thought that this was the best way to protect the HOA. When the Commission held hearings on this issue, the Commission heard testimony from the insurance experts that crime insurance was the best way to provide security. It also found that to require a manager—and a manager is the individual, not the company—to post the bond would be mostly cost prohibitive to that individual. An example was given of a young person starting out who did not have a super credit rating. The cost for the bond would be very expensive. The bond would also be very low and would not protect the HOA. The Commission feels that the best way to protect the HOA is through crime insurance, not the bonds for the managers.

Chairman Ohrenschall:
Currently, do the managers have to be bonded?

Michael Buckley:
The statute required the Commission to come up with regulations on what these bonds would look like. Frankly, we were unable to find anyone who could tell us what these bonds were. They are required to have a bond, but there is really no such thing that is available.

Assemblyman McArthur:
Basically I think we are covered by the other part of this bill with the crime insurance.

Assemblyman Carrillo:
I am fine with this.

Chairman Ohrenschall:
We are all in agreement with deleting the requirement of bonding the managers.

Dave Ziegler:
That concludes the printed portion of the bill. There are a few things still on the table. There are three amendments that have been proposed that would be added to the bill. We also have said at the outset that we need to go back and review a couple of sections. The first additional amendment was proposed by Jonathan Friedrich. It would add a new section. It is copied in the work session document. It begins with, "The fee for a mediator or arbitrator selected or appointed pursuant to this section must not exceed $1,000, unless a greater fee is authorized for good cause shown."

Chairman Ohrenschall:
Is this new language being proposed? This is duplicative language that was also in Assembly Bill 448.

Assemblyman McArthur:
It appears as though this would put a cap of $1,000 and each party will split the fees.

Chairman Ohrenschall:
As I recall, this was to be in line with the Nevada Supreme Court Rule 24, which caps arbitrator fees at $1,000 with exceptions for good cause.

Jonathan Friedrich:
The reason for this amendment is that even though A.B. 448 passed through the Assembly 42 to 0, someone added a fiscal note to the bill. It has been sent to die over in the Senate Committee on Finance. If that happens, then this provision, which was approved in A.B. 448, would not be included.

Chairman Ohrenschall:
We are all hopeful that your prognosis is premature; while the patient is on life support, it will pull through and walk out of that hospital, and receive a clean bill of health. I have a "probably okay" from Mr. McArthur. Mr. Carrillo?

Michael Buckley:
For clarification, this is a bill dealing with the Uniform Common-Interest Ownership Act. The next bill on your agenda deals with arbitration and alternative dispute resolution, and that is probably the best place for this amendment.

Chairman Ohrenschall:
I think that is a valid point and perhaps we should consider adding this to Senate Bill 254 (1st Reprint).

Dave Ziegler:
The next proposed additional amendment was from Trudy Lytle. It would amend NRS 116.12065, which is entitled, "Notice of changes to governing documents," to make it applicable to small planned communities also.

Chairman Ohrenschall:
I believe this was covered by Mr. Segerblom's amendment. We have already approved this. It is in Mr. Segerblom's mock-up.

Dave Ziegler:
The next proposed new amendment was submitted by Garrett Gordon. It would amend NRS 116.310305, relating to construction penalties. A copy of this amendment is in your packet.

Garrett Gordon:
This amendment is to clarify NRS 116.310305, which gives the power to the executive board to impose penalties for failure of a unit's owner to adhere to certain schedules relating to design, construction, occupancy, or use of an improvement. The intent behind this section was to mitigate inconvenience to other unit owners, for instance, noise, dust, and construction traffic, giving the board the ability to impose penalties. This amendment will clarify the 2003 legislation regarding where the maximum amount of the penalty should be set forth. In brief, the new language is, "The right to assess and collect a construction penalty is set forth in: (1) The declaration; (2) another document . . . ." Again, where "the maximum allowable penalty" set forth should be made available in a notice and "as part of the resale package that is required under NRS 116.4109 (a)." In summary, this amendment clarifies exactly where the maximum amount of the penalty needs to be, given the declarations that existed prior to 2003. We are adding a provision that this notice of a schedule and notice of what construction penalties may be imposed are, in fact, part of the resale package so all buyers, which includes custom and speculation home builders, are aware of what remedy is available to the HOA.

Again, the intent of this section is to mitigate inconvenience to neighbors regarding noise, dust, construction traffic, et cetera.

Chairman Ohrenschall:
Are there any questions?

Assemblyman McArthur:
For clarification, when you talk about construction penalty, I think about some sort of building, but what we really are talking about is the scheduling. Is this wording clear enough?

Garrett Gordon:
Yes, this does deal with the schedule. You will see the amendment discusses completion and commencement to mitigate any impact on the neighbors. The term construction penalty is used in this section, so I think it is clear that it does deal with a schedule.

Assemblyman McArthur:
In that case, I am fine with this amendment.

Chairman Ohrenschall:
Mr. Gordon can you elaborate on what the confusion was after the passage of the statute in 2003? Has there been litigation with these penalties?

Garrett Gordon:
In 2003, this legislative body added this language regarding that the maximum amount of the penalty must be set forth in the declaration, in a recorded document, or in a contract between the unit owner and the HOA. There has been confusion and questions in the industry regarding declarations existing prior to 2003. It is clear that in order to collect and assess a construction penalty, it must be set forth in the declaration. Regarding the maximum amount of the penalty, from my understanding, in many HOAs, this information is in the rules and regulations, or another document approved by the board, which can be amended very easily by the board. This amendment would say the right to assess and collect a construction penalty must be codified in the declaration. To ensure all buyers are on notice of what this penalty could be, it must be in the resale package.

Chairman Ohrenschall:
So the confusion is within the industry. Has there been litigation?

Garrett Gordon:
To my knowledge there has been no litigation. This has been dealt with through arbitration or mediation. I have heard there is some question regarding declarations prior to 2003. My understanding is the intent was not to affect those declarations, but make this provision prospective in 2003. I hope this clarifies that the declaration must give the right to assess a construction penalty, but that the maximum allowed penalty could be set forth in another document approved by the board.

Chairman Ohrenschall:
Any questions or concerns? [There were none.] I do not remember any testimony in opposition. Was there any, Mr. Ziegler?

Dave Ziegler:
This is a new amendment.

Chairman Ohrenschall:
Right.

Garrett Gordon:
I have spoken with Ms. Dennison and Senator Copening. Neither of them were opposed to this amendment.

Jonathan Friedrich:
In A.B. 448 there was an exclusion for delays and penalties beyond the control of the owner. For example, if bank financing had fallen through and was retracted, or if the contractor went broke, that would be beyond the control of the owner.

Chairman Ohrenschall:
I do recall that. This is not contrary to A.B. 448, if it passes.

Jonathan Friedrich:
If A.B. 448 does not pass, then I would like to see the language from A.B. 448 included in this amendment.

Chairman Ohrenschall:
Mr. Friedrich, there does not seem to be much appetite for that, but thank you for your comments. We will accept this amendment.

Dave Ziegler:
There are a couple of things that we agreed we would revisit. One has to do with section 7. At the last work session, I read from my abstract that the

definitions in NRS Chapter 116 do not apply to the bylaws and declarations of HOAs. After the work session, Ms. Dennison and I discussed that. It was her concern that the intent was exactly the opposite; that the wish was that the definitions in NRS Chapter 116 actually do control. If there are contrary definitions in bylaws and declarations, the definition in NRS Chapter 116 would be the dominant definition. There is a conceptual amendment to satisfy those concerns. Section 7 would be amended to read, "As used in this chapter and in the declarations and bylaws of an association, the words and terms defined in NRS 116.005 to 116.095, inclusive, have the meanings ascribed to them in those sections."

Assemblyman McArthur:
It appears that we are taking one part out and putting another part back in, is that correct?

Dave Ziegler:
One way to describe this is that it takes section 7 and flips it. The way that section 7 is now, it says that NRS Chapter 116 does not control the bylaws and declarations. The intent was that it would control.

Michael Buckley:
The intent of the bill was just as Mr. Ziegler states. The statutory definitions would always trump what the parties provided in the documents.

Chairman Ohrenschall:
I am inclined to support this amendment. It provides uniformity throughout the state. One way to get that uniformity is if the definitions in NRS Chapter 116 are the definitions, and we will not have different definitions with different HOAs.

Assemblyman Carrillo:
This appears to be putting it back to what it was intended to be. I am okay with it.

Chairman Ohrenschall:
We are all in agreement to support this amendment.

Dave Ziegler:
Section 33 has to do with the idea that an HOA board has discretion whether to take enforcement action for a violation of the bylaws, declarations, or rules and provides that a board does not have a duty to take enforcement action in certain circumstances. Yvonne Schuman had suggested an amendment that persons in similar situations must be treated similarly. In other words, there should be a

fairness doctrine attached to this. I do not think we reached closure on that during the last work session.

Michael Buckley:
For clarification, NRS 116.31036, section 3, already requires that the association uniformly enforce the rules and regulations.

Assemblyman McArthur:
Did Mr. Friedrich have an amendment in there? I recall he wanted everything to be fair.

Chairman Ohrenschall:
Mr. Friedrich, did you have an amendment to this section?

Jonathan Friedrich:
I do not see anything.

Michael Buckley:
My previous reference should be NRS 116.31065, subsection 5, which states: the rules ". . . must be uniformly enforced under the same or similar circumstances against all units' owners. Any rule that is not so uniformly enforced may not be enforced against any unit's owner."

Assemblyman McArthur:
There are a couple of other places in statute that address this also.

Chairman Ohrenschall:
Are you all right with this, Mr. Carrillo? All right, we can proceed.

Dave Ziegler:
I do not have anything else on S.B. 204 (R1).

Chairman Ohrenschall:
Is there anyone else who would like to express themselves on this bill?

Jonathan Friedrich:
I believe there are still a couple of sections that have not been resolved.

Chairman Ohrenschall:
Do you know what sections those are?

Jonathan Friedrich:
Section 49. I believe section 45 has been done.

Dave Ziegler:
We have that in our notes. It is the same wording as in the bill, up to a maximum of $5 million.

Garrett Gordon:
I appreciate the compromise, and we are fine with this section. I got a clarification in my amendment regarding the construction penalties. For the record, when I added the language regarding the maximum allowable penalty and schedule as part of the resale package, it should also include the language "or part of the public offering statement." Obviously, we want full notice and disclosure to new buyers and to subsequent buyers. This would provide another layer of transparency.

Chairman Ohrenschall:
So your proposal is to change your amendment to read, "The association has made available a notice of the maximum allowable penalty and schedule as part of the resale package or part of the public offering statement." Is that correct?

Garrett Gordon:
I would suggest that sentence read, "The association has made available a notice of the maximum allowable penalty and schedule as part of the public offering statement or resale package that is required under NRS 116.4109 (a)." I think that is broader and provides more notice to prospective buyers.

Dave Ziegler:
To recap section 49, it provides reasonable attorney's fees and costs and sums due to an HOA under the declaration, or as a result of an administrative, arbitration, mediation, or judicial decision, are enforceable in the same manner as unpaid assessments. This section also authorizes a court to appoint a receiver to collect all rents or other income from a unit owner in an action to collect assessments or foreclose a lien. There are two amendments proposed. One is by Yvonne Schuman, which is attached to the work session document (Exhibit C). Another is proposed by Jonathan Friedrich to delete the language regarding items that are enforceable in the same manner as unpaid assessments. He also suggests that all fees should be capped and that a cap should be placed on the amount a receiver may charge for his or her services.

Chairman Ohrenschall:
There was an amendment having to do with the fines adopted by NRS Chapter 116. That was to which section?

Garrett Gordon:
It was section 49.

Chairman Ohrenschall:
Section 49, subsection 1, on page 47 of the bill, is this duplicative language from another bill?

Michael Buckley:
Yes, I believe it is in S.B. 174, dealing with collections. It came on a parallel track because this is the uniform language.

Chairman Ohrenschall:
One concern I have with that section is that we are working on several of these collection issues, and attempting to come to an agreement prior to the end of session, using one or perhaps both of those bills as a vehicle. I believe the proper venue for this is through those negotiations and attempts to compromise. I do not believe we should process section 49, subsection . . .

Michael Buckley:
Just to point out, I think that you are right. This is all about collections and liens. If you are going to deal with that elsewhere, we do not have any objection to putting that in another bill. We would hope that the language on receivers, which came from the Uniform Act, would go in there as well.

Chairman Ohrenschall:
I agree, I think section 49, subsection 11, should stay in there. There was an example of the Paradise Spa in Las Vegas, correct?

Michael Buckley:
That is correct.

Chairman Ohrenschall:
Mr. Friedrich proposed an amendment regarding charges by receivers. I was thinking perhaps we could pass subsection 11, but mandate that the CICCH promulgate regulations establishing a cap for receivers and what they may charge.

Michael Buckley:
For clarification, the bill proposes to allow receivers to be appointed by the court. I do not think that the CICCH could tell a judge what the receiver would be paid. There may be some confusion about this kind of receiver. The example of Paradise Spa is that there were tenants who were paying their rent to the unit owner. The unit owner was not paying his dues and the association was owed money. There was income to pay the receiver's fee, which is more like a property manager, and would be according to market rates. That needs to be distinguished from appointing a receiver for an association that is being

poorly run, which would be very expensive. I think the Commission does have some authority there because the Real Estate Division is the "person" who would seek the receiver, rather than here where it is the association that is trying to collect and get some money to pay the assessments that the owner is not paying. I do not think the Commission could tell a court what do to.

Chairman Ohrenschall:
So the examples that Mr. Friedrich pointed out about receivers charging egregious fees, you do not think that would happen because the judges would try to ensure the fees are reasonable.

Michael Buckley:
A receiver is an officer of the court. The receiver has to report back to the judge. The judge has to approve the receiver's fees and his accounting. It does not have anything to do with common-interest communities per se. This is just allowing the association to have a remedy that most mortgage lenders have.

Chairman Ohrenschall:
I would propose on section 49 that we do not accept any of the amendments and that we do not process section 49, subsections 1 through 10, and process subsection 11.

Assemblyman Carrillo:
I am not sure I feel comfortable with deleting all of those subsections. Earlier, we were looking at a simple amendment.

Chairman Ohrenschall:
I see your point. However, as Mr. Buckley testified, this section is also in S.B. 174. I do not think it would be wise to have this move forward here, when the issue is part of an overall attempt at a compromise.

Assemblyman McArthur:
We are taking out a lot of language if we delete all of those subsections, correct?

Chairman Ohrenschall:
No. I am not proposing we delete any current language in the NRS. I am just proposing that section 49 would now only have subsection 11. The rest of it would just go away. We would not be deleting any existing language from the NRS, but we would be adding subsection 11.

Assemblyman Carrillo:
If you are going on the assumption that another bill will pass or not, or that both will pass or not, I think we should keep this bill whole.

Chairman Ohrenschall:
Remember the amendment Mr. Friedrich proposed dealing with the construction penalties, and he was concerned that even though it was duplicative of A.B. 448, he wanted it in here because he was afraid A.B. 448 would not get out of the Senate Finance Committee. He wanted a second bite at the apple by having it in this bill. We turned that down for substantially the same reason that I do not think this should be approved. This is not only two bites at the same apple, but more importantly, this is part of the negotiations on the collections issue between both houses.

Assemblyman Carrillo:
This is a bill in itself. This is not taking a second bite at the apple because it is already in the bill. For clarification, how is your example the same as having two bills with the same language? How are we looking at amending it when it is already there? We are not talking about putting section 49 in this bill, because we are not adding to it, that is part of the bill as it is proposed.

Michael Buckley:
I am aware that when S.B. 174 was drafted, we did give them the uniform language. I believe the language in S.B. 174 incorporates the changes that we made. I am not sure about the receiver section, but I know that the language on the attorney's fees and the technical changes are the same as in S.B. 174.

Assemblyman McArthur:
Is there room for compromise in this?

Chairman Ohrenschall:
I think there is room for compromise, and that compromise is going to come out of the negotiations between both houses on S.B. 174 and A.B. 448. Hopefully, we can come out with something that will protect homeowners and protect the HOAs. I do not believe this is a proper place for this issue.

Assemblyman McArthur:
I am not concerned with a compromise having to do with a couple of completely different bills. I am not sure that is helping us with this bill. I am wondering whether maybe we should do what we want to do here and not worry so much about what is being done with two other bills. My question was, can we compromise on this bill? I think we are in agreement on subsection 11.

Chairman Ohrenschall:
We are going to take a brief recess.

[The Committee recessed at 8 p.m. and reconvened at 8:43 p.m.]

Before the break, we were discussing S.B. 204 (R1). We are going to delay any further action on this bill until we reconvene. We will now begin the review of Senate Bill 254 (1st Reprint).

Senate Bill 254 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-264)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 254 (R1) is sponsored by Senator Copening and was heard in this Subcommittee on May 6, 2011. It revises the procedures for alternative dispute resolution of civil actions concerning governing documents or the covenants, conditions, or restrictions (CCRs) applicable to residential property. It also revises administrative proceedings concerning a violation of existing law governing common-interest communities and condominium hotels.

[Read from work session document (Exhibit E).]

I would like to point out that Senator Copening's amendment dated May 13, 2011, does include the suggestions of Mr. Stebbins.

Chairman Ohrenschall:
Is the amendment proposed by Mr. Friedrich the arbitration cap that was proposed for Senate Bill 204 (R1)?

Dave Ziegler:
No, the proposed amendment by Mr. Friedrich would replace the bill with new provisions, which are attached to the work session document.

[Read amendment.]

Chairman Ohrenschall:
Regarding the prior amendment that Mr. Friedrich had proposed for S.B. 204 (R1), we will consider that in this bill with the cap on arbitration fees. Are there any concerns with adopting the cap on arbitrator's fees?

Eleissa Lavelle, Private Citizen, Las Vegas, Nevada:
I have been involved as an arbitrator and as an advocate on behalf of both associations and individuals. The concern is to ensure that the arbitrators

hearing these cases are as qualified as possible. We have seen the complexity of *Nevada Revised Statutes* (NRS) Chapter 116 and the way these rules operate. In order for this process to work, you must ensure that you have qualified people who are hearing these matters. While I agree there should be some limitation on these costs, because I do agree with many of the people who have spoken, that there are in many cases an excessive amount of bills that are being promulgated by these arbitrators. I think the method to handle this is partly by what has been proposed by Senator Copening's conceptual amendment. I am also aware that Gail Anderson is in the process of addressing these issues. In addition to limiting the dollar amount, perhaps incorporating something along the lines of budgets and establishing the kinds of things that arbitrators do would limit the total cost of these arbitrations.

Chairman Ohrenschall:
Why would the $1,000 cap work under the Supreme Court rule but not work here?

Eleissa Lavelle:
The $1,000 cap has been implemented in the mandatory arbitration process in the district court. Those kinds of cases under NRS Chapter 38 are very limited in their scope. They deal with matters where under $50,000 is at stake. But the statutes exclude a number of kinds of disputes, notably, matters relating to title to real estate, matters dealing with equitable claims, matters dealing with appeals from courts of limited jurisdiction, and actions for declaratory relief. Basically those types of cases limit the scope and complexity of what arbitrators are hearing. That is not the case with these kinds of arbitrations. Here you have very complex issues, and in many cases, arbitrators are given packets of documents of all the board minutes, all the correspondence, perhaps plans and specifications, and architectural guidelines. It takes a great amount of time for arbitrators to do a decent job of understanding the issues and giving adequate opportunity for these people to be heard. At $1,000, you are going to be requiring people to volunteer their time, and I do not know whether you will find quality arbitrators to do this for $1,000.

Chairman Ohrenschall:
When you talked about the district court cases under arbitration being limited to less than $50,000, does that mean you anticipate that most of these disputes would be more than that?

Eleissa Lavelle:
In many cases with homeowners' associations (HOAs), the dollar amount is not significant with respect to each individual case. More particularly, this is an enforcement issue. It could have a dollar figure, but more often it may deal

with interpretations of declarations or interpretations of other governing documents, where a dollar amount really is not the significant part of it. There may be fines imposed, but the most significant part is not only how that declaration or other governing document is enforced with respect to a single homeowner, but the impact it may have on an entire community. Consistency of enforcement is really what is critical with all of these. We want to ensure that these enforcements are being fairly and evenly applied. Whereas, one person may not consider a fine to be a huge amount of money, the impact across the board to the way that community operates and the value of the homes that this enforcement proceeding might have can be very significant.

Chairman Ohrenschall:
Any questions? [There were none.]

Assemblyman McArthur:
Are we going to review the bill, starting with page 1?

Chairman Ohrenschall:
Regarding the arbitrator's fees, if you do not think the $1,000 cap would work, do you think some other cap would work, and is that something that should be put in statute?

Eleissa Lavelle:
There are provisions in the bill that would provide a fast-track type of arbitration where the Real Estate Division Administrator in the Department of Business and Industry would develop regulations that would limit the scope of what these arbitrations would require. It is provided that is what the Administrator would be doing. I think that it may best be handled by the Administrator with clear direction within the statute. That is the goal. The reason for that is if this statute is to last for as long as we all would like it to last, we want it to be responsive to changing events in the community and changing needs and requirements of the people that are utilizing the statute. The Administrator may be in a better position to find out what is going on and develop in a very quick manner the kinds of regulations that would implement a limitation on these fees.

Chairman Ohrenschall:
What is the reason the bill only provides for capping the fast-track arbitration fees as opposed to all arbitration fees?

Eleissa Lavelle:
I believe the proposal is that all fees would be reviewed and limited. The fast-track is a special form of arbitration that could be utilized where the issues are not complex and would require very limited or no discovery and very short

arbitrations. Some of these arbitrations can go days at a time. Others, where the issues are fairly limited, can be limited by regulation to one or two hours. That alone will limit the cost for everybody. All of those are included within the concept this bill encompasses.

Chairman Ohrenschall:
Where within the bill are the arbitrator fees?

Eleissa Lavelle:
They are on page 21, line 19, which deals with rules for speedy arbitration. I may also have been thinking of the proposal that Senator Copening has made to attempt to lift all fees across the board. Not just for fast-track, but for other types of arbitration.

Chairman Ohrenschall:
That is in her amendment, correct?

Eleissa Lavelle:
Correct.

Chairman Ohrenschall:
If Senator Copening's amendment is approved, how long would it take to adopt those regulations?

Gail Anderson, Administrator, Real Estate Division, Department of Business and Industry:
I actually have a regulation file started. I had a workshop proposing a number of things concerning the arbitrators and mediators under NRS Chapter 38, which is under the Real Estate Division Administrator's jurisdiction. This is very doable. I have spoken with Senator Copening regarding this. I will have to request that I be allowed to proceed with the regulation, but this is an important public policy that I am fairly certain we can get approval for. There would be some changes; I had some good input from the workshop. I do need to review and incorporate the referenced speedy arbitration fast-track process.

Chairman Ohrenschall:
Your caps would apply to all arbitrators under Senator Copening's amendment, correct?

Gail Anderson:
That is correct. My proposed regulation is concerning all arbitrations.

Chairman Ohrenschall:
Any questions? [There were none.] Ms. Lavelle, would you mind walking us through this bill?

Eleissa Lavelle:
Section 1 deals with the mediation portion of this bill and provides that no later than five days after receipt of the written response—the complaint process is initiated through the Division; when a written response is prepared and received, within 5 days after that—the Division is required to provide a copy of the response to the claimant so that everyone knows what the claims are, what the defenses are, and to provide a list of the mediators that is maintained by the Division. The mediators are to be selected, approved, and trained by the Administrator so that it is clear that they have adequate training in mediation process and an adequate understanding of NRS Chapter 116 and general HOA law. That is the purpose of having the panel of mediators maintained by the Administrator.

The mediator is required to provide an informational statement as set forth in subsection 3, within a very short time period. The mediation is supposed to take place within 60 days after the selection and appointment of the mediator. The purpose is to assure that this process does not unduly delay ultimate decision making if the case cannot be settled.

Subsection 5 states that if the parties reach an agreement, that agreement is to be reduced to writing. This is absolutely standard mediation practice and is something that Mr. Friedrich had proposed as well. The idea is that once the parties have agreed to a settlement, it becomes a binding contract between the parties. It will not be sent out to everyone; the agreement is going to be confidential, and it will not be published unless it will be enforced in some way.

There is a provision for the payment of fees of mediation. The plan is that there would be funds available to some extent through the account referenced in subsection 6. The Account for Common-Interest Communities and Condominium Hotels (CICCH) created in NRS 116.630 had funds set aside for the mediation process. The idea was that this money would be available for payment of these mediators. It is true that the statute does not state that it will be free mediation. It is calculated that given the anticipated number of mediations, if the cost per hour was limited, there would be adequate funds from which these mediators would be paid, not requiring any additional funding by the individuals.

Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels:
We did have, at the Commission, $150,000 for several years that was available to subsidize arbitration that was never used. Finally the amount was taken out of the budget. The fund for CICCH has a surplus in the budget that is not being used. There are funds available through that which could be allocated to provide for the free mediation.

Eleissa Lavelle:
The bill provides that the Commission will have the ability to regulate the fees and charges that would be assessed in section 1, subsection 5. It states, "The Commission shall adopt regulations governing the maximum amount that may be charged for fees and costs of mediation and the manner in which such fees and costs of mediation are paid." We are cognizant of the fact that this should not be a more expensive process, but in fact a tool to perhaps limit the ultimate costs that are going to be incurred in resolving these disputes.

Section 1, subsection 7, provides that if either party fails to participate in the mediation, or if the parties are unable, with the assistance of the mediator, to resolve the issues, then the mediator would, within five days, certify to the Ombudsman that the mediation was unsuccessful and recommend that the claim be referred either to arbitration pursuant to NRS 38.330, if the claim relates to any governing documents, or to the Division for proceedings pursuant to NRS 116.745 through 116.795 if the claim relates to an alleged violation of a provision of NRS Chapter 116.

In order for the mediations to be successful, the communications that take place are required to be confidential. The next provision of that section says the mediator may not provide any other information relating to the mediation to the Division. The Division, the Commission, and a hearing panel may not request from the mediator any other information relating to the mediation. This is a very important part of this statute because it ensures that the people will be able to freely and frankly discuss their positions without fear of having their words come back to them if the case does not settle. That is also included within subsection 8, essentially the same language.

Subsection 9 is a definitional subsection, dealing with where the mediators are going to be taken from and where the mediations will be conducted.

Assemblyman McArthur:
You mentioned a time limit of five days after receipt, is that enough time?

Eleissa Lavelle:
That is a very legitimate concern. We certainly do not want to create any problems in getting this information out. The intent was to ensure the process moved along quickly. I would defer to Gail Anderson as to whether or not that is a sufficient response time.

Assemblyman McArthur:
I am not trying to fix it or change it; I am just wondering whether it is doable.

Gail Anderson:
The five days is the time the Division has once we have received the written response. That is certainly doable; it would be helpful to make it five business days.

Assemblyman McArthur:
The bill states that the Ombudsman must be available within the geographic area. Is that possible in some of the rural areas? We might want to change that to "should be available" instead of "must be available."

Eleissa Lavelle:
That is a very legitimate concern and I think any modification that would make that easier to accommodate is fine. I think within the large metropolitan areas it should be very simple to find someone within the geographical area.

Assemblyman McArthur:
Also, it states in section 1, subsection 2, "Upon appointing a mediator, the Ombudsman shall provide the name of the mediator to the parties." There is not a time frame for that. Do we need one?

Eleissa Lavelle:
I think the time frame for providing the mediators is within five days of the date of the response. We can take a look at that.

Assemblyman McArthur:
I think we need to tighten up who pays and how much they pay. It does not state what funds will be used.

Chairman Ohrenschall:
Any other questions? [There were none.]

Eleissa Lavelle:
Section 4, page 5, is the confidentiality provisions that have already been addressed. Section 5, subsection 5, deals with bad faith filings and states, "If

the Commission finds that an appeal from a final order of a hearing panel is filed in bad faith or without reasonable cause for the purpose of delay or harassment, the Commission may impose any of the sanctions set forth . . . ."

Michael Buckley:
This is a Commission process rather than an arbitration process. This is where there is a hearing panel, which is a subset of the Commissioners that would hear a complaint that the Real Estate Division brought against someone. It is not the typical homeowner dispute.

Chairman Ohrenschall:
Would this be after the mediation has run its course, or independent of any mediation?

Michael Buckley:
This is completely independent. This is after mediation, after it has been directed to the Division, after the Division has filed a complaint, after a hearing panel has held a hearing, then someone can file an appeal to the Commission.

Chairman Ohrenschall:
Is there a sense that many appeals are filed in bad faith, or for the purpose of delay?

Michael Buckley:
Currently we do not have hearing panels. This section will add a little more weight to what the hearing panel can do.

Chairman Ohrenschall:
Any questions on section 5? [There were none.]

Eleissa Lavelle:
I will skip over some of the sections; they are essentially cleanup sections and language modifications. Section 9, subsection 2, allows for the Division to disclose a claim and response filed with the Division and other documents to the mediator and to the arbitrator. This is a procedural process so that the parties will have an idea of what the claims are about and what the defenses are as they are preparing to either conduct a mediation or an arbitration.

Chairman Ohrenschall:
These are claims filed with the Division prior to the mediation process going forward, correct?

Eleissa Lavelle:
Correct.

Assemblyman McArthur:
It states the Division "may" disclose. Is there a reason for "may"?

Michael Buckley:
The reason this is necessary is because all the records of the Division, at the initial start of the claim, are confidential. It was not intended to say they should not disclose. They do need to disclose to the parties what the problem is; so there may need to be some language clarification.

Eleissa Lavelle:
The intent of section 10 is to consolidate all of the claims that a party has to the extent that they are aware of them within one proceeding. When any given claim is made, everything that the individual or HOA knows about that claim needs to be included so that we are not hitting homeowners with multiple claims on multiple occasions and the homeowners do not have to continue to defend themselves claim after claim. Similarly, if a homeowner has a claim against the association, those are consolidated to the best of their knowledge; so the association is not defending claim after claim. This effort is an attempt to limit the cost that homeowners and associations are paying to go through the arbitration process. It does provide that if these claims are not addressed, if known, that they may be limited and there may not be any ability to proceed with the claims. This is very similar to a statute of limitation that you will find in normal adjudicative law in a district court.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 10, subsection 3, provides and details what needs to be included within the claims. This is essentially a due process provision. Due process requires that the person be told what the claim is about and have an adequate opportunity to be heard. This provision sets forth what will be required in the claim: a statement of whether all administrative procedures have been satisfied and a statement of the nature of the claim and the facts supporting it. Section 10, subsection 3, paragraph (e), states that all claims of which the claimant is aware or reasonably should be aware, including any claims that relate to a violation of the governing documents, need to be included within the complaint that is being filed.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 10, subsection 4, says, "Upon the filing of a claim that satisfies the requirements of this section, the Division shall serve a copy of the claim on the respondent by certified mail, return receipt requested, to his or her last known address." Again, this is a due process provision, so that the respondent knows exactly what the claim is and has all of the information available to him to be able to adequately respond.

Subsection 5 requires that a written response be made by the respondent and sets forth the content of what that response is going to be.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 10, subsection 6, provides that the claims may be consolidated. Subsection 7 states that by filing a claim or response, the claim or response is not being filed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of proceedings and that the claims have evidentiary support. The purpose of this is so that people are not filing false or fraudulent claims. There is a substantial amount of support for this in other provisions of the law. Rule 11, under the Nevada Rules of Civil Procedure, requires that if an attorney files a claim on behalf of a party, or if a party signs a pleading, the attorney has to do so with knowledge that there is evidentiary support and that the claim is not filed for improper purposes. There are sanctions applicable if that rule is violated. There are similar provisions within mechanics' lien law and general litigation.

Chairman Ohrenschall:
So will most of the homeowners who are filing these claims be doing it on their own without representation?

Eleissa Lavelle:
An attorney is not required to file these claims. Sometimes attorneys are there, and sometimes they are not. The homeowners who are filing individual claims would be reminded that they must file these claims with a legitimate and good faith purpose for doing so.

Chairman Ohrenschall:
Is there a penalty if they are found not to have met that standard?

Eleissa Lavelle:
There is. In section 18, subsection 9, it says that if a person files a frivolous claim with the Division pursuant to this section or NRS 38.320, the Commission may issue an order directing the person who filed the frivolous claim to pay the costs incurred by the Division as a result of that filing. This cost may be assessed not only against homeowners but also against HOAs. It has equal applicability. Nobody is entitled to file a false, fraudulent, or frivolous claim. There is a penalty involved, but it is a discretionary provision.

Chairman Ohrenschall:
If someone is found to have filed a false or fraudulent claim, can he or she appeal to a court if he or she feels the Commission is wrong?

Eleissa Lavelle:
Under normal administrative law, if a party is aggrieved by an administrative proceeding, there are limited rights of review by a district court. Those rights of review are based on whether the Commission has acted in an arbitrary or capricious manner.

Chairman Ohrenschall:
That provision, allowing an appeal to a district court and ultimately the Supreme Court, comes through the State Administrative Procedures Act as applicable to the Nevada Real Estate Division?

Eleissa Lavelle:
That is correct.

The balance of section 11 deals with false and fraudulent claims and the manner in which these are going to be handled. Subsection 1, page 12, commencing at line 2, states:

> "If, after investigating the alleged violation, the Division determines that the allegations in the claim are not frivolous, false, or fraudulent and that good cause exists to proceed with a hearing on the alleged violation, the Administrator shall:
>
> (a) File a formal complaint with the Commission, with the Division as complainant, and schedule a hearing . . . ."

I believe this is essentially the intervention process that currently exists. We have the analysis period to determine whether or not it is a false or fraudulent filing.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 11, subsection 4, states, "No admission, representation or statement made in the course of the Ombudsman's efforts to assist the parties . . . is admissible as evidence . . . ." There are provisions in NRS Chapter 116 that give the Ombudsman an additional attempt to resolve these disputes. This simply clarifies the confidentiality of those conversations.

Chairman Ohrenschall:
Does this protection currently exist when someone speaks with the Ombudsman, or is this reclarifying?

Eleissa Lavelle:
I have never heard of a situation where an Ombudsman has ever revealed anything inappropriately. I am aware that there is some feeling among people who participate in this process that they want to have this very clear so that when they speak to the Ombudsman, because he is part of the process, that whatever is said is confidential. It is really a clarification.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
The balance of page 13 is clarification. Section 15 basically mirrors earlier parts of this bill. This section provides that not later than five days after receipt of the response, the claimant gets a copy and the parties get a list of the mediators. The changes we have discussed in terms of business days for the five-day time frame would be appropriate here as well.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Continuing on, page 15 is also a mirror image of what we have discussed with respect to the method by which mediators and arbitrators are selected.

Assemblyman McArthur:
Also, section 15, subsection 6, paragraphs (a) and (b), discuss the payment of fees. This area also needs to be tightened up.

Chairman Ohrenschall:
What line is that on?

Assemblyman McArthur:
Page 15, line 18; "The Division may provide for the payment of the fees . . . ."

Chairman Ohrenschall:
I thought the "may" had to do with the fact that there was enough funding right now and no one will be charged for awhile.

Assemblyman McArthur:
I do not think so; a little lower it says "The Commission approves the payment; and . . . ," so there are a lot of questions about who pays and for how long.

Chairman Ohrenschall:
Maybe we can ask Legal to look at that tomorrow. Do you think there is some conflict in the language?

Assemblyman McArthur:
No, I just think it needs to be tightened up regarding whether or not the Division is going to pay, whether there are funds available, or will we need to get funds somewhere else if those funds get used up?

Chairman Ohrenschall:
Ms. Lavelle, do you think there is a problem in that language?

Eleissa Lavelle:
It is the same issue that was raised earlier; the question is, how do you limit the costs of these arbitrations? How do you set fees? Perhaps put parameters around the kinds of things that arbitrators might be doing that exceed the reasonable costs. I agree there are issues with respect to how much arbitrators are charging and what these costs should be. I think the very same issues and concerns that were expressed in the earlier part of this bill apply equally here.

Chairman Ohrenschall:
Thank you. Please proceed.

Eleissa Lavelle:
Regarding section 16, line 21, the term "assessment" had been included within NRS 38.300 regarding the types of things that need to be defined. Instead of the word "assessment," the word "charges" is used. Essentially, this provides a definitional section for use in the statute. It does not impose any additional charges or fees; it is purely definitional.

Chairman Ohrenschall:
I know that Mr. Friedrich had some concerns with that definition. I have talked it over with our legal counsel, and we do not feel that his concerns are correct. I am okay with this section now.

Eleissa Lavelle:
Subsection 3 is also part of the definitional section. It simply adds and clarifies what kinds of things are going to be included and excluded within the arbitration provisions, and also defines more carefully what "irreparable harm" means. These are more clarifications rather than changing anything substantive.

Subsection 4 defines "Commission" so that we know what we are talking about in the course of this statute.

Subsection 6 is a clarification that links the definition of "governing documents" to the meaning that is already defined in the statute.

Chairman Ohrenschall:
On page 16, lines 38 through 41, is the definition of "irreparable harm." Is that from somewhere else in the revised statutes, or did it come from the Uniform Law Commissioners?

Eleissa Lavelle:
Under normal injunctive relief within the NRS and the Rules of Civil Procedure, whenever you have a potential for an immediate risk of irreparable harm, you have a right for injunctive relief. In drafting this statute, the intent was to preserve that right so that if someone has an immediate issue or concern that there is a huge risk, that has to be addressed immediately, and that if you do not go through the arbitration process or the mediation process, you can go straight to court and get a judge to issue an injunction. The question is what does "irreparable harm" mean? This provision is an attempt to define that more carefully by meaning a harm or injury for which the remedy of damages or monetary compensation is inadequate and does not exist solely because a claim involves real estate. It is really a clarification of this. Under normal real estate law, or injunctive relief law, a change to the way in which real estate is held is normally sufficient grounds for getting into court. This is clarification that I believe comports with other provisions of Nevada law.

Chairman Ohrenschall:
If this passes, will it be harder for someone to get injunctive relief for something involving real estate?

Eleissa Lavelle:
I think this will give the court some guidance as to what kinds of cases they can hear and should be hearing for injunctive relief as opposed to what kinds of cases go through the arbitration process. The idea is not to limit either an HOA or a homeowner's right to get immediate access to injunctive relief. It is simply to define that right as carefully as possible.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 17 is cleanup language. Section 18, page 17, provides that a claim may not be filed if a claimant has previously filed a claim with the Division and at the time the claimant filed the previous claim the claimant was aware or reasonably should have been aware of the facts and circumstances underlying the current claim. This is similar to the earlier provisions that I discussed that talk about a requirement that a claimant cannot keep filing the same claim over and over again, or if he or she has facts that he or she knows justify bringing a claim at a certain point in time, he or she has to consolidate those claims at the same time. This creates a more streamlined and less costly approach to dispute resolution.

Assemblyman McArthur:
For clarification, on page 17, line 36, it says "The claimant previously filed a claim . . . ." Should there be something about the same claim again?

Eleissa Lavelle:
If a claimant files a claim, and at the time he filed the claim, he knew of facts that gave rise to a second claim, that second claim will be barred.

Assemblyman McArthur:
I understand that. I am just not sure about the wording. I do not believe the intent is clear.

Eleissa Lavelle:
Both portions of that statute have to be satisfied. So paragraph (a) and paragraph (b) are both necessary. It is both that the claimant filed previously, and at the time the claimant filed, the claimant was aware or should have been aware of facts and circumstances underlying the current claim.

Chairman Ohrenschall:
So there is no requirement that this latter claim arose out of the same nucleus. It could be something unrelated; there just has to be knowledge of it?

Eleissa Lavelle:
That is the way it is currently drafted. It could be the HOA or the claimant.

Chairman Ohrenschall:
It is not like the civil procedure rule, requiring the same transaction or occurrence. In this situation, knowledge would be enough to bar a second claim?

Eleissa Lavelle:
Actually, there is a provision within the doctrine of *res judicata* that if you file a complaint against someone, and at the time you file that complaint you had actual knowledge of other claims that could be filed, even unrelated, you may be barred.

Chairman Ohrenschall:
Any questions? [There were none.] Thank you, please proceed.

Eleissa Lavelle:
Section 18, subsection 2, paragraph (a) is a due process provision, which says that the claimant must provide the respondent by certified mail, with written notice of the claim which specifies in reasonable detail the nature of the claim. These are provisions that ensure that everybody against whom a claim has been filed has full understanding of what the claim is about. Paragraph (b) provides that "If the claim concerns real estate within a common-interest community subject to the provisions of Chapter 116 of NRS . . . all administrative procedures specified in the governing documents . . ." must be exhausted. It requires that each of these parties, before filing a claim, has exhausted whatever hearing processes exist, and they have to certify that has occurred before they can file a claim with the Division. The rest of this section is procedural. It talks about what the claim forms will include and again, a reasonable detail of the violations. The rest of the section deals with the requirements to be included in the claim so that when these claims come before the Division, it will be clear that the parties have thought through all of their claims and supporting information and the fact that they have tried to resolve this through their administrative processes. If they do not do this, there is no penalty, but it is a requirement in the way the forms are set up.

Chairman Ohrenschall:
Any questions? [There were none.] Please proceed.

Eleissa Lavelle:
Page 19 deals with the consolidation of claims and the way the answers are prepared. Section 18, subsection 8, certifies that the claim is being filed with a

reasonable belief formed after reasonable inquiry that the claim is adequately supported and is not being filed for improper purposes. Subsection 9 provides that if a person files a claim which he or she knows to be false or fraudulent, the Commission or a hearing panel may impose penalties.

Chairman Ohrenschall:
Normally, if someone were to appeal from a hearing panel, he or she goes to the Commission?

Michael Buckley:
That is correct. From a hearing panel you would appeal to the Commission.

Chairman Ohrenschall:
Here either one would have the power to impose a penalty. If it is the Commission that imposes the penalty, the only avenue of appeal would be to district court through the State Administrative Procedure Act?

Michael Buckley:
This is referring to a claim and the fact that if a claim filed with the Real Estate Division turns out to be false or fraudulent, then the Commission and hearing panel can impose a penalty. I believe this is existing law.

Chairman Ohrenschall:
Is that something that has never happened in terms of the Commission or hearing panel imposing a penalty for a false or fraudulent claim in bad faith or without reasonable cause?

Gail Anderson:
There is a provision in law although it is not this exact language, where if the Division believes there is evidence to substantiate a knowing, willful filing of false and fraudulent claims that the state would bring a complaint to the Commission against the person who filed it. The Commission has the ability to impose a penalty. The Division has not done that as yet. We continue to try to work this program on getting things resolved, but we have the ability to do that and we may be doing that. Part of the clarifications in the proposed legislation will help define more clearly what things are appropriate and inappropriate that we could bring forth. We have not brought a claim against someone who has filed something at this point to the Commission. We have closed claims as unsubstantiated, but have not brought forth the case as being willful and fraudulent.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 19 sets forth the procedure with clarification based on what has happened with the mediation. If the mediation is unsuccessful, the mediator refers the matter to arbitration. This provides that the Division will maintain a list of qualified arbitrators, and that not later than ten days from the receipt of the referral to arbitration, an arbitrator will be identified. The parties will be notified who the arbitrator will be. This is a slight clarification of statute that already exists in order to accommodate the mediation process.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 19, subsection 3, provides that arbitrations conducted are nonbinding unless the parties agree in writing to binding arbitration. This is so that if the arbitrator gets it wrong, the parties have a right to go to court and see whether they can get it right. We do not want this to be binding arbitration unless the parties want it that way.

Subsection 5 states unless all the parties to the arbitration otherwise agree, the arbitration will be conducted in accordance with rules of the American Arbitration Association or other comparable rules for speedy arbitration approved by the Commission or the Division. The intent is that speedy, fast-track arbitration rules will be established for cases. The default will be a speedy arbitration unless the parties want to take it out of the speedy arbitration if the issues are more complex.

Chairman Ohrenschall:
So if the issues are more complex, that will take it out of the speedy arbitration?

Eleissa Lavelle:
Correct, the parties can agree to that.

Chairman Ohrenschall:
Any questions? [There were none.] Please proceed.

Eleissa Lavelle:
Section 19, subsection 6, states that once the arbitration decision award has been issued, the Division receives a copy of that award. It will also provide that the arbitration awards will be indexed and maintained by the Division. The intent is that there needs to be some consistency in these rulings. One way of doing that is for these arbitration decisions to be maintained by the Division.

Chairman Ohrenschall:
This does not specify how long they will be maintained.

Eleissa Lavelle:
That would be determined by regulation.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
I jumped ahead to that because the Division is going to be getting copies of these arbitration decisions and it will maintain them. The arbitrator provides a copy of the arbitration award. Except as otherwise provided and subject to regulations adopted by the Commission, the parties are responsible for payment of all fees and costs of arbitration in the manner provided by the arbitrator. This is the way the statute was originally drafted. I understand that we are in the process, through the earlier testimony and proposed amendment by Senator Copening, of tightening this up so that you have clear and more concise and limited fees for these arbitrations.

Chairman Ohrenschall:
Any questions? [There were none.]

Eleissa Lavelle:
Section 20, subsection 2, provides that upon request of a party to a mediation or arbitration, the Division will provide a statement to the party indicating the amount of the fees the selected mediator or arbitrator would charge. This will be revised through either amendment or regulation as discussed earlier.

Chairman Ohrenschall:
Thank you very much for taking the time to walk us through this bill and answer our questions.

Assemblyman McArthur:
If someone has a complaint, does it automatically go to mediation?

Eleissa Lavelle:
The point is to get people talking to each other quickly. As the statutes currently exist, they either go immediately to arbitration or to the Division for investigation or hearing. There are dispute resolution processes that are adversarial. This statute proposes that before any of those disputes go to an adversarial proceeding, the parties are required to sit down and attempt to mediate and resolve the dispute.

Michael Buckley:
Also, the mediation and arbitration ties in to making a formal complaint. If you call the Ombudsman and ask for some help, he does not have to refer you to arbitration. He can give you help without going through the process of mediation.

Assemblyman McArthur:
If you do file, it is required to go to mediation first.

Chairman Ohrenschall:
We will now recess and reconvene tomorrow upon adjournment of the Assembly Committee of the Judiciary hearing, at approximately 10 a.m.

[Meeting recessed at 10:08 p.m. on May 17, 2011, and reconvened at 10:30 a.m. on May 18, 2011.]

Chairman Ohrenschall:
We had a late night last night, but I think we made a lot of progress on these bills. We will come back to Senate Bill 204 (1st Reprint).

Senate Bill 204 (1st Reprint): Enacts certain amendments to the Uniform Common-Interest Ownership Act. (BDR 10-298)

We were held up on section 49. We agreed we did not want to consider any of the amendments that were proposed. We agreed that we supported subsection 11. The impasse was on subsections 1 through 10, that I believe are part of the overall negotiations on the collection and super priority lien issue. We have Senator Copening here to discuss section 49.

Senator Allison Copening, Clark County Senatorial District No. 6:
Regarding section 49, the Chair and I are in discussions about how to strengthen the regulations that are currently in place for collection costs. We are going to remove the new language in section 49, lines 22 through 33, leaving existing language that is currently in law and continue to work on the collection proposal.

Chairman Ohrenschall:
Thank you very much. I would like to clarify with Legal, if we were to not amend that part of *Nevada Revised Statutes* (NRS) 116.3116, we also would not have the subsequent small amendments to subsection 2 through 10. Basically that would leave us with subsection 11, correct?

Nick Anthony, Committee Counsel:
Yes, that is correct.

Assemblyman McArthur:
For clarification, lines 22 through 33, and the new language in subsections 1 through 10, correct?

Chairman Ohrenschall:
Correct, we will not change the existing statute at all. We will keep subsection 11 which deals with receivers.

Assemblyman Carrillo:
I agree with the way section 49 is.

Chairman Ohrenschall:
So we will recommend to the Assembly Committee on the Judiciary that section 49, subsection 11, be kept. All the recommendations we made last night will be included. Mr. Ziegler, is there any point in recapping this bill?

Dave Ziegler:
I think you rehashed it to death last night.

Chairman Ohrenschall:
Then I would be willing to hear a motion that we recommend to the full Committee S.B. 204 (R1) with all the amendments we liked and without all the amendments that we did not like, with section 49, subsection 11, surviving, but subsections 1 through 10 not being recommended.

ASSEMBLYMAN MCARTHUR RECOMMENDED AMEND AND DO PASS SENATE BILL 204 (1st REPRINT).

ASSEMBLYMAN CARRILLO SECONDED THE RECOMMENDATION.

THE RECOMMENDATION PASSED UNANIMOUSLY.

Chairman Ohrenschall:
We will now review Senate Bill 254 (1st Reprint).

Senate Bill 254 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-264)

I have a few questions on this bill. Last night we discussed Supreme Court Rule 24 that established a $1,000 cap for arbitrators. I believe Ms. Lavelle answered

that these arbitrations are much more complicated and are often at a value higher than the $50,000 set in the Supreme Court Rule. Even with the proposed cap, how high do you think arbitrator's fees might go, assuming that is promulgated through regulation. My fear is that arbitrator's fees might be too high.

Eleissa Lavelle, Private Citizen, Las Vegas, Nevada:
The issue has to do with the complexity of some of these issues. I understand that there is a lot of frustration. There is frustration on everybody's part, those of us who have these cases before arbitrators and some of us that are arbitrating, and I understand your concern. The difference has to do with what these cases are about. While sometimes the cases can be very simple, they deal with whether there has been a violation, either it happens or it does not happen, or either it is established or it is not established. Those are easy, and I agree that those fees should be minimal. I absolutely share the concern with this. Every case that comes before a court or an arbitrator does not necessarily have a dollar amount that is the most significant part of it. Sometimes the most significant part may be dealing with an interpretation of one of the governing documents, or how the documents work together. As an example, I had a matter as an arbitrator recently where the community documents were very complicated. They set up various neighborhoods and there were some gaps in those documents with respect to the way certain communities were going to be separately assessed, or certain individuals were going to be separately assessed. In order to reach a decision on that case, it was necessary to take testimony from a number of people and to do a very detailed interrelationship between the declaration and statutory intentions. That being said, the dollar amount is not significant, but the ramifications were huge. It was not necessary to do a site visit, and it was not necessary to take days and days of testimony.

The way that you might consider limiting these is not only a cap on the dollar amount of hourly fees that are charged, but some parameters around the kinds of activities that arbitrators should engage in. That way you can control what might be considered padding of bills, or inappropriate, unnecessary work that is sometimes done. I am not saying that arbitrators are doing that, but sometimes I think there might be a feeling that they are.

Another way would be to have an oversight mechanism, by regulation, so that the Commission for Common-Interest Communities and Condominium Hotels, the Real Estate Division of the Department of Business and Industry, or the Real Estate Administrator would have the ability to review an arbitrator's bill if someone thought it was too high and determine whether it exceeded what were reasonable parameters. There are models for this within the state bar. There is

a fee dispute committee. If an aggrieved client feels an attorney's fees are too high, he or she can go before the committee and claim the fees are inappropriate. There are different ways of controlling these costs. An absolute cap is not going to solve the problem. I know some of these arbitrators charge as little as $115 per hour, but their fees are enormous because of what they are doing.

Chairman Ohrenschall:
So with the Supreme Court Rule, which has a cap of $1,000, is there a loophole where the court may award additional damages, or is it the fact that these disputes are under $50,000? I am still having trouble with the fact that under Supreme Court Rule 24, the $1,000 cap works for all of those arbitrations, yet you feel it is not adequate here.

Eleissa Lavelle:
When you are dealing with the arbitration provisions that are conducted through the court systems, a big component of these issues has to do with discovery and perhaps pretrial motions. There is a court-appointed discovery commissioner where parties can go to have those issues briefed and heard. Those are outside the $1,000 cap. They are heard by someone else and the costs incurred by that are not included within the arbitration. The issues are there, the problems are dealt with, but they are not dealt with within the scope of the arbitration. Those costs can be huge. If you look at what those Supreme Court rules and the mandatory arbitration provisions deal with, they limit the scope of what is considered within those cases. It is not just a dollar amount of a claim that is limited; it is also the character and nature of the disputes that are heard. Complicated disputes dealing with title to real property, declaratory relief actions, et cetera, are excluded from those mandatory arbitrations. The reason for that is it is understood that those matters may be more complicated and cannot be simply divided up based upon a dollar amount. Because there is more involved, you cannot stick them with a $1,000 cap.

Chairman Ohrenschall:
Thank you. Do you feel comfortable that if this passes with Senator Copening's amendment, that these caps that will be in regulation will be adequate to ensure that there are not any outrageous or egregious arbitrator fees?

Eleissa Lavelle:
I think there needs to be a combination of things. I think that the limitation in Senator Copening's amendment is a significant part of this. In addition to that, the testimony that you heard last night from Gail Anderson and the regulations that she would propose for adoption are another significant part. You cannot deal with this issue with one bullet. There needs to be a number of different

approaches taken. Together, a limitation on the dollar amount of fees and other types of structures that are imposed, and other oversights that are imposed, are going to be the control. One other idea, the market, to some extent, controls who gets selected. If someone is outrageous in the fees and is constantly overbilling, and there is a pool of good arbitrators, that arbitrator is not going to be doing much work. That is something that is within the structural control of the Administrator.

Chairman Ohrenschall:
Thank you. Any questions?

Assemblyman McArthur:
I just want to clarify that we are looking at the amendment where there is a maximum of $225 per hour, and not the $1,000 hard cap?

Chairman Ohrenschall:
If we process conceptual amendment one by Senator Copening, there would be a conflict with what we passed in Assembly Bill 448, which was a $1,000 cap on arbitration fees.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
Regarding the $225 per hour, is this per side, which would then be $450? I have seen a lot of arbitrators' resumes and they normally put between $100 and $200 per hour, which is for each side. It is very unclear whether this $225 is in total or split each side? As far as oversight is concerned; I am looking at *Nevada Revised Statutes* (NRS) 38.360, which says "The Division shall administer the provisions of NRS 38.300 to 38.360 . . . ." There is no administration. I have written documentation from Mr. Gordon Milden who says that the Real Estate Division only facilitates the process. So as far as oversight is concerned, currently the Division is supposed to be administering this program and it is not. Regarding the statement that if one arbitrator is charging much more than another, how would a homeowner who has never gone through this process know that? There are still a lot of holes in this bill. I am concerned where it says that the Division "may" pay "if" there are funds available and "if" the Commission approves it. If not, then the homeowner is stuck with these outrageous fees.

Chairman Ohrenschall:
What section are you referring to? I found it, section 15, subsection 6, lines 18 through 23, states:

> The Division may provide for the payment of the fees for a mediator selected or appointed pursuant to this section from the Account for Common-Interest Communities and Condominium Hotels created by NRS 116.630, to the extent that:
>
> (a) The Commission approves the payment; and
> (b) There is money available in the Account for this purpose.

Jonathan Friedrich:
It is also mentioned earlier in the bill.

Chairman Ohrenschall:
Your question about whether both sides would have to pay, is a question I had not thought of.

Assemblyman McArthur:
I think the intent was $225 per hour total.

Eleissa Lavelle:
That is correct. The hourly rate is the maximum rate, normally to be split between the parties. There have been instances where an arbitrator will award fees to one side or another, but the $225 is the total hourly rate that the arbitrator would charge.

Chairman Ohrenschall:
Is that approximately the fair rate that arbitrators are being paid now?

Eleissa Lavelle:
I think the hourly rates range between $150 to $400 per hour. It depends on what the arbitrator is doing. The parties are entitled to not select an arbitrator if they choose to. The rates have been published, and within the resumes that are submitted to the parties, the hourly rates of the arbitrators are provided so they know ahead of time.

Chairman Ohrenschall:
If this bill passes, would both sides have to agree on the mediator, or would the Division pick the mediator.

Eleissa Lavelle:
I would like to make a distinction between mediators and arbitrators with respect to both of these professionals. The parties would be provided a list from which they could jointly select a mediator or an arbitrator. That list is maintained by the Division. If they could not reach a decision, then the Division

would make the appointment. That is consistent with the way that the district courts handle and administer the arbitration program and it is also consistent with the way other organizations, such as the American Arbitration Association, conduct their selection process.

Chairman Ohrenschall:
Thank you. In looking at the conceptual amendment presented by Senator Copening, it says to mandate the Administrator of the Nevada Division of Real Estate to adopt regulations by August 1, 2011, capping the fees that may be charged for arbitration under NRS 38.300 through 38.360, and put in statute that these charges may not exceed $225 per hour. Was this meant to be a cap on mediator's fees or solely to cap arbitrator's fees?

Eleissa Lavelle:
I cannot speak for Senator Copening, but I believe the idea is that there would be a cap on both arbitrator's fees and mediator's fees.

Chairman Ohrenschall:
Senator Copening, can you address that?

Senator Copening:
Only because I do not know the difference between mediation and arbitration, I had a recommendation and I think that one of the amendments that came through from one of the testifiers mentioned just arbitration, and that is why I had proposed that. I certainly would not object to having both in there. Generally, if a mediator charges less than an arbitrator, then perhaps we should make the cap for the mediator less than the cap for the arbitrator.

Chairman Ohrenschall:
So you would be amenable if we were to also propose a reasonable cap on mediator's fees?

Senator Copening:
I certainly would. I would want the people who work in that industry to speak to what the appropriate cap would be.

Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels:
I think the idea would be that the Real Estate Division would contract with mediators for a flat fee of $500 per mediation. Certainly the idea of a cap on mediation is the intent, and we would not object to putting a cap on it. The Real Estate Division would get resumes and put mediators under contract, and they would agree to mediate these particular problems for a set fee. It would

be much less, and not necessarily on an hourly fee, but it would be a cap per mediation.

Eleissa Lavelle:
I agree with that. I think that is certainly something that can be accomplished for a flat fee. Normally, these mediations are going to go, perhaps, a half a day or a day at the very most. There could be some reasonable way of accommodating a flat number, so that everyone knows what he or she is getting into.

Chairman Ohrenschall:
Would you be averse to our amending Senator Copening's conceptual amendment number one to mandate that the Administrator at the Nevada Division of Real Estate establish a flat fee cap for every mediation?

Eleissa Lavelle:
I do not think that is unreasonable.

Chairman Ohrenschall:
Gail Anderson, would you be okay with that? She is nodding her head yes. Ms. Lavelle, do you do think it would be appropriate to place the cap in statute the way we might with the $225 cap proposed for arbitrators?

Eleissa Lavelle:
I think it is appropriate to do $225 cap for an hourly rate for arbitrators, along with additional regulations governing the structure and the way these arbitrations are going to be conducted, and an oversight by the Division as to fees. You cannot really limit the total number for the arbitration fees because each arbitration is going to be different. The costs will be different based upon the complexity of the issue. With respect to mediations, I believe that a flat fee cap is entirely appropriate.

Assemblyman McArthur:
Are we going to come up with a number for the flat mediation fee?

Chairman Ohrenschall:
That would be up to this subcommittee.

Assemblyman McArthur:
If we set a cap for arbitration, we should set it for mediation also.

Chairman Ohrenschall:
Setting a cap that may not exceed $500 for mediation. Does that seem reasonable?

Eleissa Lavelle:
I think that is a fair number. I also think that is consistent with what the Supreme Court has authorized for its mediation program; so I think there is precedent for that. I also believe that if you do cap it at $500, you will be more likely to be able to accommodate the money that has been set aside for this purpose so that it will not have to come out of the parties' pockets.

Chairman Ohrenschall:
As I read through the bill, there are different provisions for someone who does not show up and participate having to pay all the fees. If both sides participate, then do both sides divide the fee for the mediation, after the available funds have been exhausted?

Eleissa Lavelle:
That is the way it is normally handled, unless through the mediation settlement, occasionally, as a way of settling the case, one side will offer to pay the other side's fees. That can be flexible, but under normal situations, the costs would be split.

Chairman Ohrenschall:
That is in conceptual amendment number three to change section 1, subsection 5, of the bill to state that the parties shall evenly split the costs of mediation should there be a charge. That seems like a good clarification to me.

Assemblyman McArthur:
It looks like we covered number three, so I would be in favor of conceptual amendments one, two, and three.

Chairman Ohrenschall:
You are in favor of conceptual amendments one, two, and three proposed by Senator Copening, including in conceptual amendment one, a direction to the Administrator to promulgate regulations establishing a flat fee for mediation at no more than $500 total? Mr. Carrillo, are you all right with the additional cap on mediation fees?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
I still have some reservations about the $225 versus the $1,000 to cap, although it seems that Ms. Lavelle has expressed the need for this. There was an issue brought up about class action suits and not requiring them to go to mediation. How would this bill affect a potential class action?

Eleissa Lavelle:
Typically, these cases are not heard as a class action, but they can affect a group of people. You may have factions in an association. That is certainly something that happens and is the thorniest of problems to deal with. They are not typically characterized as class actions, and are not certified. I do not see any reason why those types of disputes would not go to mediation. In fact, it seems that those types of disputes are exactly why mediation should be effectuated.

Chairman Ohrenschall:
If they were not happy with the mediation, they could then file a class action, or would they have to go to arbitration under this bill?

Eleissa Lavelle:
If the mediation did not settle, and if they could not reach an accord and resolve their disputes, the mediator would make the recommendation that the case goes to the Division for investigation and go before the Commission. For example, one group of homeowners believes that the board has acted inappropriately and has violated NRS Chapter 116. There may be 50 people in a community who are aggrieved about this. If they cannot reach an agreement, it may go to the Division for investigation and go through that process. That is already in place. If it needs to go to arbitration, the mediator would send it to arbitration instead. The mediator would have the understanding of what the dispute is and be able to direct it in one direction or the other.

Chairman Ohrenschall:
Under S.B. 254 (R1), the mediator determines whether it should go to arbitration or to the Division. There is no opt out for either party, correct?

Eleissa Lavelle:
The mediator makes the recommendation to go either one way or the other. Ultimately, if the parties still do not get satisfaction, if the arbitrator gets it wrong, or they feel the Commission's decision is inappropriate, they can then go to court as an ultimate way of getting another bite at the apple. Presumably, if the mediator sent something to arbitration and the arbitrator felt that it should not be with him, he is not prevented from kicking it back. Similarly, if the Division gets the case, it can also refer it to arbitration.

Chairman Ohrenschall:
If one of the parties in mediation did not want to go to arbitration, would there be anything else he or she could do?

Eleissa Lavelle:
The mediator would recommend where the dispute would be heard because the mediator would have a greater insight as to what these disputes are. Typically, the way the statute exists now, the party files a complaint and the Division makes the decision as to whether it will go to arbitration or to the intervention process. It is somewhat the same. The party can file, but if the Division does not believe it is being conducted where the party wants it to be conducted, the Division can move it to the other process.

Chairman Ohrenschall:
So one of the parties would not have to go the arbitration route if he or she had misgivings about arbitration. We have heard Mr. Friedrich talk about the experiences he has had where the fees are very exorbitant. For clarification, under S.B. 254 (R1), if one of the parties had a fear of arbitration, he or she could choose to go an alternative route. Is that correct?

Eleissa Lavelle:
No, that is not quite accurate. The ultimate objective is to have the dispute decided. The question is who is going to decide it? What this statute does is establish jurisdiction over the dispute, much in the same way as the Nevada statutes establish jurisdiction of justice courts, district courts, and the Supreme Court. This statute establishes jurisdiction between the arbitration process and the intervention process based upon the nature of the dispute. It has to do with how the case is going to be decided, based upon what is being requested to be decided. It is almost a jurisdictional type of allocation.

Gail Anderson, Administrator, Real Estate Division, Department of Business and Industry:
I would like to clarify the jurisdiction. The Real Estate Division investigative compliance arm only has jurisdiction, and the Commission over violations of the law. If someone's dispute does not concern a violation of the law, it is not an option. The Real Estate Division compliance section can look at it and make sure, but if it is a governing documents dispute, the Real Estate Division and the Commission will not be able to deal with it, as there is no jurisdiction there. The only option then is arbitration, if a ruling is required. The other dimension here is if someone wants to sue civilly, he or she has to go through arbitration or mediation under NRS Chapter 38. If the ultimate goal is some kind of civil litigation, he or she will have to go to arbitration or mediation. While there is some discretion, it really is a jurisdictional question of who can deal with what

the substance of the problem is. Sometimes there is a combination with some potential violations of the law that the Real Estate Division can deal with, but cannot touch the governing document side of it. Jurisdiction is the bottom line and the Division would be involved in determining and closing a case.

Chairman Ohrenschall:
Currently, no one is forced into arbitration; it is a choice, correct?

Gail Anderson:
That is correct; no one is forced into it, but the party is told that if there is not a violation of law, the Real Estate Division does not have jurisdiction. The other option is to go through arbitration or mediation.

Chairman Ohrenschall:
Eventually, even after arbitration, someone could get to court if he or she wanted to, but he or she would first have to go through the Division, then mediation and arbitration, or am I misunderstanding.

Gail Anderson:
If someone's ultimate goal is to go to court, he or she will do the filing of affidavit, go through mediation, and if not resolve in mediation, then must file for arbitration, administered by the Real Estate Division to get to court.

Chairman Ohrenschall:
Thank you. Any questions? [There were none.]

Eleissa Lavelle:
I was reminded of another issue regarding setting the cap on mediation fees. While a $500 cap is appropriate in most cases, I want to ensure that parties could opt out of the cap if for some reason the matter were more complex and required more time. For example, if there is a complex mediation, the parties may choose to go forward and continue to mediate beyond what is normally expected.

Chairman Ohrenschall:
Would you want that same opt out opportunity on the arbitration cap?

Eleissa Lavelle:
I think if the parties wanted to select an arbitrator that charged at a higher rate, and that arbitrator was acceptable to the Division, if both parties agree to the rate, they should be allowed to select that arbitrator. I would suggest the parties be given the right to make their own decision if it is a greater amount.

Chairman Ohrenschall:
This would be at their own expense, if they chose to waive the cap, correct?

Eleissa Lavelle:
Correct. Either both parties agree, or if one party agrees to pick up the difference, that party should be given the opportunity to do so.

Chairman Ohrenschall:
Thank you. Any questions?

Assemblyman McArthur:
Do we really need to add that into statute? They can do that on their own and pay it out of their own pocket.

Chairman Ohrenschall:
I think we might if we are directing the Administrator of the Real Estate Division to establish a cap for mediators and arbitrators.

Assemblyman McArthur:
That is a cap that is put on the mediators and arbitrators. After that, it is the decision of the parties.

Chairman Ohrenschall:
We may need to check with Legal about that. One concern that was expressed to me last night in an email was that if someone gets behind in paying these mediation or arbitration fees, it could end up as a lien on his property that could be foreclosed upon. Is that a valid concern?

Eleissa Lavelle:
Normally, the declarations will include a provision for an award of attorney's fees to the prevailing party. Attorney's fees and court costs can be awarded by the arbitrator against one side in an arbitration. That becomes part of the arbitration award. It is not a fine; it is a separate issue and I do not know that there is anything in this statute that makes those attorney's fees lienable, except to the extent that there is a judgment ultimately entered on that award. So attorney's fees and arbitrator's fees alone are not a lienable assessment for which a nonjudicial foreclosure can take place. The point of the arbitration awards is that, for example, someone has not landscaped his or her property. The arbitrator may say the association has the right, if not fixed within 30 days, to make repairs to the landscaping at $1,000. That is reduced to a judgment through the district court or the justice court depending on jurisdiction. Now there is a judgment against the individual that is recorded against the property. If the person does not pay the money and any attorney's fees and costs, yes,

through the normal judgment process, he or she could ultimately execute for that. That is no different than any other judgment in court. This arbitration process does not change that. If the parties went directly to court to get that enforced, the right would be the same.

Michael Buckley:
I agree with Ms. Lavelle. Whether or not the association could foreclose for these fees goes to the section we were discussing before, which is NRS 116.3116. That states that the association can have a lien for fines, construction penalties, and assessments. I think that this is not a fine, it is not a construction penalty, and it is not an annual assessment. I suspect that you could make an argument that the association might be able to make a special assessment against someone based on the language in the covenants, conditions, and restrictions (CCRs), but I do not think it is clear one way or the other. This bill does not address that. It goes back to the collection issue in NRS 116.3116. My own preference is that the way these should be enforced would be through the normal judgment process unless, for example, the arbitration award determines that what the person did violated the CCRs, and therefore fits under the normal basis to make a special assessment. There is a provision that says that if an owner ran into the guard gate, it must be fixed. The owner says I did not do it. If you caused the damage to the association, you should be liable as a special assessment. There is a fine line, but this bill does not address that issue.

Chairman Ohrenschall:
Would either of you be averse to some language in the bill that would clarify that arbitrator's fees and mediator's fees could never be considered assessments for foreclosure purposes?

Eleissa Lavelle:
I do not have a problem with saying they are not lienable in the sense that they would be subject to a nonjudicial foreclosure. To the extent that they would be included in a judgment issued by a court, they would be subject to a judicial foreclosure, which carries with it a right of redemption. The assessments in NRS Chapter 116 are nonjudicial. They happen without any right of redemption. I think there needs to be a mechanism for the association to collect these fees. This is money that everybody in the community will have to pay because one person has done something that has been found to be inappropriate.

Chairman Ohrenschall:
So we need some clarifying language saying that the arbitrator's fees and mediator's fees are not lienable to the extent that it is a nonjudicial foreclosure.

I agree, they should be collectable; I just do not want them to be considered part of the arrears for foreclosure.

Eleissa Lavelle:
I agree with that.

Assemblyman McArthur:
I am not comfortable with that. It is muddying the waters and I am not sure it belongs in this particular bill. We have problems whether it is judicial or nonjudicial.

Chairman Ohrenschall:
I think we are trying to clarify this, not muddy the waters. We are trying to say that these fees for mediators and arbitrators would never be one of those categories under NRS Chapter 116 where the HOA is allowed to pursue foreclosure, which are arrears assessments, and the two exceptions for fines or penalties having to do with construction penalties, and with the health hazard penalty. This would clarify that these fees are definitely not something for which an HOA can foreclose on your home.

Assemblyman McArthur:
Are you saying that the addition of these fees may put them in foreclosure because they cannot pay for them?

Chairman Ohrenschall:
I want to clarify that the addition of these fees would not be part of that nonjudicial foreclosure provided for under NRS Chapter 116. The mediator and arbitrator could still go to court and get a judgment, and potentially put a lien on the property.

Eleissa Lavelle:
Anytime you have a judgment against an individual, regardless of whether it is a breach of contract, hit someone in the face, or whatever, if you get a judgment in court, you can record that judgment and it becomes a lien on all properties. That is standard Nevada law and it has to do with every single kind of judgment you can get. This would fall into that category. If an association or a homeowner were to get a judgment against the adverse party and record it, it becomes a lien against that party's property. Because it is a lien, that judgment can be executed on. There are homestead exemptions that apply to this kind of judgment. So the likelihood of foreclosing a judgment lien based upon a violation of someone's CCRs diminishes because it is a judgment lien. This is a significant protection to homeowners but may still provide a way for an association to be paid. For example, if the home sells, it will be paid through

escrow. It is a middle ground and is a way of providing a mechanism by which the prevailing party can get paid upon the sale of a property, but it does not allow for an immediate nonjudicial foreclosure.

Michael Buckley:
I think these are not really clear issues, and as Ms. Lavelle has pointed out, this is very complex. For example, NRS 116.310312, which deals with an abandoned or vacated unit and the association has the ability to clean up a unit, there could be charges. I do not know whether that would be subject to an arbitration if someone objected, but there was an express finding of that by the Legislature last session that these costs should be enforceable as a lien. In fact, it is given a super priority lien. I think we need to be very careful in how to frame the language. We forget sometimes how complex NRS Chapter 116 is, and if you tweak something one place, it may end up making something else not work.

Assemblyman McArthur:
That is my concern. I am not sure this is necessary because we could cause other problems.

Chairman Ohrenschall:
Mr. Buckley, do you think that adding the language we discussed earlier would cause problems elsewhere in NRS Chapter 116?

Michael Buckley:
I think it can be done if it is carefully worded. The basic idea that you are suggesting is that the attorney's fees and costs, and the arbitrator's fees and costs would not be part of the lien under NRS 116.3116 as long as it was clear that it was unless expressly provided for elsewhere. Also, let us go into this again, because the arbitration deals with the amount of the assessment. If someone is not paying his or her assessment, I do not know whether the association would arbitrate an assessment but certainly if the arbitration involves the collection of an assessment, the association is entitled to collect its fees. As mentioned, the assessments are the lifeblood of the association, and it is clear that the association has the right to collect. There is really no defense to not paying your assessments. If the association incurs costs in collecting assessments, they should be included. In concept, it is the subject matter of the arbitration that makes it complicated. If the subject matter deals with something that gives the association the ability to lien, then it may not work.

Assemblyman McArthur:
My main concern is that it would have to be drafted very carefully. If you are comfortable that this can be drafted, I do not have a real problem.

Chairman Ohrenschall:
I am all right with it. Mr. Carrillo, are you okay with the clarification that fees from mediation and arbitration could never be part of a nonjudicial foreclosure provided for in NRS Chapter 116?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
Thank you. Next we will review Senator Copening's amendment number four, which is to include in section 5 the requirement that penalties be imposed for the responder of the claim filing in bad faith, false, fraudulent, or frivolous response to a claim. I believe that is from Mr. Stebbins' amendment. He was concerned that section 5 of the bill would not work both ways.

Michael Buckley:
On page 11, line 9, you see that the original intent was that if you file a claim or a response, a person is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, and it applies to not just the person who files the claim, but the respondent also.

Chairman Ohrenschall:
Thank you. Any questions? [There were none.]

Michael Buckley:
On page 19 is the same issue. Line 28 refers to a claim or response; on line 40 it just refers to the claim. It should also refer to the claim or response.

Assemblyman McArthur:
So for amendment number four we will be adding the word "respondent" or "response."

Chairman Ohrenschall:
Yes, this is just a cleanup. Mr. Carrillo, are you okay with conceptual amendment number four?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
Conceptual amendment number five was proposed by Mr. Segerblom, which we processed yesterday, as a mock-up.

Dave Ziegler:
I checked that mock-up against this bill, and I did not see any overlap between that mock-up and this bill.

Chairman Ohrenschall:
So this is a new amendment?

Dave Ziegler:
No. Amendment number five in Senator Copening's document that states she is in favor of the friendly amendment, number 6818, that applies to Senate Bill 204 (R1). I checked it and I do not see how it overlaps with this bill.

Chairman Ohrenschall:
Okay, and we already accepted that amendment, so we do not need it here.

Conceptual amendment number 6 presented by Senator Copening states, "Add language in Sec. 1 that states that if a party fails to participate in the mediation, that party shall be responsible for any and all costs of that mediation." I believe this will hold parties accountable for resolving their differences.

Michael Buckley:
I would propose that I think this is a good amendment and we need to incorporate the idea of good faith. I think that is in the foreclosure statutes. You would not want someone going through the motions; they need to participate in good faith.

Chairman Ohrenschall:
So we will change that to read "fails to participate in good faith in the mediation . . . ." That is quite a departure from what Mr. Stebbins had proposed.

Michael Buckley:
I do not think so. When people say "participate," we think they will participate in the process, and as lawyers we think how will this work in practice. The practice might be that you could read that literally by saying I will go, but I am not going to get involved. I think the idea of participate, good faith is inherent with what Mr. Stebbins suggested.

Chairman Ohrenschall:
Mr. McArthur and Mr. Carrillo, are you both okay with this amendment, including the addition of the words "good faith" as proposed by Mr. Buckley?

Assemblyman McArthur:
Yes.

Assemblyman Carrillo:
I am good.

Chairman Ohrenschall:
Conceptual amendment number seven reads, "Add language in Sec. 10 that if the person whom a copy of the claim was served refuses or fails to file a written response with the division not later than 30 days after the date of service, the allegations of the claim are deemed substantiated." My only concern is what if there is a bona fide reason that the person could not participate? Should we put in an exception? I would hate for all the allegations to be considered true against him or her if there was a bona fide excuse.

Assemblyman Carrillo:
I think you need to ensure that things are in order if you are going to be away for a period of time. Putting your head in the sand does not resolve anything. If you are going to be away, you need to make sure your business is taken care of before you leave. Obviously, we cannot know whether we will be in the hospital for six months, but a power of attorney would assist getting around this issue. In fact, if you are in the service, you have to give a power of attorney; so that cannot be used as an excuse. You need to ensure your house is in order.

Chairman Ohrenschall:
In an ideal universe that is how it would be. But there could be unforeseen problems.

Assemblyman McArthur:
I agree with Mr. Carrillo. Unless there is a medical emergency that extended the time period, I think in most of the other cases you should be able to take care of your own situation.

Michael Buckley:
I think this could be solved with the word "may" be deemed substantiated. We see this in the Commission, in a complaint where someone did not respond, and you see it in the judicial system. You do take the default, but it is not an automatic that you win. The person would need to prove that the respondent was actually served. I think you would leave that up to the arbitrator. I think that is a customary legal process.

Eleissa Lavelle:
I think something perhaps as a hybrid so that there may be some requirement that the case be proved perhaps by affidavit so there does not have to be a full-blown hearing if the party does not show up, but it could be an abbreviated hearing to keep the costs low.

Chairman Ohrenschall:
That would be in addition to this amendment?

Eleissa Lavelle:
Actually I think the word "may" does it, but I think you may want to say that it is not an absolute that the party still needs to establish by affidavit or some abbreviated mechanism that the arbitrator designates to establish the service has been proper and that the claim is appropriate.

Chairman Ohrenschall:
That gives me a lot more comfort. Mr. McArthur and Mr. Carrillo, would you be all right with amendment number seven if we changed it from "the allegations of the claim are deemed substantiated" to "the allegations of the claim may be deemed substantiated" and include proof of service and perhaps affidavits that prove the allegations?

Assemblyman McArthur:
I would be okay if we can come up with a good conceptual amendment along those lines.

Assemblyman Carrillo:
I am okay.

Chairman Ohrenschall:
Thank you.

Michael Joe, representing Legal Aid Center of Southern Nevada:
I want to comment about what the foreclosure mediation program is doing in terms of people who have a reason for not attending a mediation. The Supreme Court explained to me that they have ruled a lot about the phrase "good cause." Under the mediation program they allow a homeowner or a lender to say they cannot attend for good cause. This has to be a request in writing. The foreclosure mediation program has it addressed specifically by rule. We do see it come up quite often.

Chairman Ohrenschall:
Do you know what the foreclosure mediation program charges to conduct a mediation?

Michael Joe:
They charge a flat fee of $400. In terms of what that works out to per hour, it varies. The program allows for four hours. Some mediations take less and some will go longer. For the $400, the mediator guarantees four hours of mediation plus the mediator does the scheduling work and documentation work up-front. The mediator easily puts in the four hours of work. They have 215 mediators and most of them are happy to do this work. I am okay with a cap on fees, as well.

Chairman Ohrenschall:
Thank you. Regarding the proposed clarifying language that we want to add to ensure that mediator's fees do not become something foreclosable under NRS Chapter 116, do you have an opinion on that?

Michael Joe:
I specialize in doing foreclosures and I deal with people with homeowners' associations (HOAs). We believe that the foreclosure under that statute should only be limited to those situations where it is a violation of paying the association dues and assessments. We do believe that an association plans its budget on those and therefore should be able to collect on it. The most serious remedy we give them of foreclosure should be limited to that and should not be applied to other things. If there is a foreclosure for some other reason, that is okay. It could be a judicial foreclosure, which I have never seen. You cannot foreclose nonjudicially in Nevada; you have to foreclose judicially; so as a practical matter, they just do not bother foreclosing.

Chairman Ohrenschall:
I received an email, and I am not sure this would be an amendment the Subcommittee would consider. What if during the mediation, the fines froze until the mediator made his decision? Is that something that you think would be reasonable?

Michael Joe:
I am sorry, I do not understand.

Chairman Ohrenschall:
After the parties enter the mediation, what if the fines, fees, and any potential foreclosure were frozen until the mediator made the decision?

Michael Joe:
I think there are some real issues of due process for the homeowner. Can you foreclose on someone while he is still appealing something? I think there should be a stay on foreclosure and also maybe on some of the fees. There are different situations where it might be okay, but in general, if you have the mediator's intent to be quick, I think you can resolve an issue, and during that period, through the pendency of that hearing, maybe it should be stayed. In the mediation program, we essentially stay the foreclosure until the mediation is completed.

Chairman Ohrenschall:
So it is possible that this mediation program for problems with HOAs could take a lot of lessons from how the foreclosure mediation program is working under the auspices of the Nevada Supreme Court. It seems that it is working well in terms of how it administers the program.

Michael Joe:
The foreclosure mediation program has had a lot of effort put into it, and therefore, it is a pretty decent program. It gives homeowners one way to appeal and it is appealed pretty quickly and efficiently. If everybody does their jobs, the foreclosure mediation program runs within that 90- to 111-day period that it takes to foreclose. In addition, I know the neighborhood justice center does mediations on a routine basis. I know there are a lot of trained mediators in Clark County and across the state. There is a pool of mediators who are available to do this, and you could craft a program that works pretty well. Currently, there is a $50 fee for the notice of default that goes to fund the program and the administration of it. I am not sure whether that would be available for this program.

Michael Buckley:
There is a difference between assessments and other fees. I am not sure there is anything the association can do if it is in mediation as far as collecting the penalties or fines. It is different as far as assessments go. If someone is not paying his or her assessments, I do not think the assessments should stop or that the association should be stopped from enforcing its liens for the assessments. Those assessments are the lifeblood of the association. They are based on a budget and there are not too many arguments you can make about not paying your assessment. There are lots of arguments as far as fines or interpretation of the documents or construction penalties, et cetera. I would distinguish between those.

Chairman Ohrenschall:
You would be all right with freezing any move toward collections, fines, or potential foreclosure if it dealt with construction penalties as long as it did not deal with arrears assessments. Is that correct?

Michael Buckley:
I think I would be okay with that.

Eleissa Lavelle:
When you see these arbitrations or intervention matters, if someone has violated the governing documents, for example, he or she has not landscaped his or her property, or he or she left his garbage cans out, or there may be some other dispute that has absolutely nothing to do with construction penalties or with the payment of the assessments. I personally think it is inappropriate to penalize the association for enforcing a rule or regulation that has nothing to do with those assessments and then not allowing them to collect the assessments. If there is a homeowner who is absolutely violating rules and regulations on something that has nothing to do with payment of assessments or construction penalties, there is no reason that you stop the payment of assessments because he or she has not taken his or her garbage cans in or left playground equipment out. One has nothing to do with the other.

Chairman Ohrenschall:
Perhaps I am not expressing myself clearly. I was thinking that only fines, collection costs, or interest should be suspended during the pendency of any mediation or arbitration, because that could be part of the arbitrator's award. I was not referring to the assessments.

Eleissa Lavelle:
I wanted to ensure that was the case because I was hearing different things and I wanted to clear it up. If a homeowner is being assessed $10 per month for a violation and the arbitration process goes for 4 months, does that mean that during the time there will be no retroactive assessment of those fines? Do they stop completely, or simply stop the collection process during that time?

Chairman Ohrenschall:
The way I was envisioning this is that any action by a collection agency would be stopped until resolution. I also believe that any interest accrual would stop.

Michael Buckley:
Under NRS there was no interest on fines by statute, but that was changed in 2009. I believe that the fine is not foreclosable, except for the two exceptions you mentioned. I am not aware of collection agencies enforcing fines.

Eleissa Lavelle:
The distinction needs to be if we are talking about the accrual of the fine as opposed to the collection of the fine.

Chairman Ohrenschall:
What would be the adverse impact to having both frozen until the mediator or arbitrator makes his decision?

Eleissa Lavelle:
I have no problem with freezing them both, provided that the arbitrator is entitled to do a retroactive award of those accrued fines if it is determined that the homeowner has violated the governing documents.

Chairman Ohrenschall:
Do you feel that would need to be spelled out in statute?

Eleissa Lavelle:
I think it is happening that way now. I would not want to see the provision be authored in such a way that the association's ability to retroactively collect those accrued fines be diminished if in fact it is determined that the homeowner has violated.

Chairman Ohrenschall:
In those two exceptions on fines where someone could lose his or her home for construction penalties or for a health hazard issue, assuming that got resolved, it might prevent a foreclosure if the mediator or arbitrator is able to reach a successful agreement.

Eleissa Lavelle:
That would be absolutely appropriate.

Assemblyman McArthur:
I am not comfortable with this at all. This new language for this new amendment, we are going to have to add too much technical wording for a conceptual amendment.

Chairman Ohrenschall:
I think our Legal division is pretty topnotch.

Assemblyman McArthur:
I understand that, but we have a lot of topnotch stuff we are adding to this bill already.

Chairman Ohrenschall:
We do want it to be right.

Assemblyman McArthur:
Well, if you want to bring it back to another work session later this week so we can see those conceptual amendments.

Chairman Ohrenschall:
We could always propose the amendment to the full Committee. I could make my recommendation and you can certainly express your opinions against it. Mr. Carrillo, what are your feelings?

Assemblyman Carrillo:
I concur with that, Chairman.

Chairman Ohrenschall:
Mr. Joe, is there anything else here in S.B. 254 (R1) that causes you any concern for your clients?

Michael Joe:
I see arbitration clauses all the time, and for those of us who went to law school, it seemed like they were good things. I have no problem with arbitration as long as it is reined in and accomplishes what it is supposed to. I think arbitration was intended to be an alternative to the judicial process; it is supposed to be cheaper, and to the extent that it does not turn out to be easier, or cheaper, or faster, what is the point? If you are saying that you want to have an arbitration and mediation process that has reasonable costs, I am okay with that. Sometimes arbitration can run amuck, then they ought to be in district court and they should not be barred from doing that. If the reason an arbitrator wants to charge $10,000 to $20,000 is because it is so complicated, then maybe it should be in district court. Having a cap on it will drive those cases that should be in the district court and this will give them an opportunity to get there. I am in favor of a cap for both the arbitration and mediation.

Chairman Ohrenschall:
I suppose as a compromise, we could go ahead with the $500 flat fee for mediation and with the $225-per-hour fee that Senator Copening recommended, maybe have a maximum of $2,500, and give the party the option to go to district court if the fees will be higher than that.

Michael Buckley:
The Real Estate Division has a group of experienced arbitrators who know NRS Chapter 116. As we all know, NRS Chapter 116 is complex, it is

complicated, and, of course, CCRs are usually 80 pages long. Even in A.B. 448, while there is a $1,000 cap, it says "unless for good cause." I am not sure you can legislatively solve this by giving a cap. You will always need to have an out. If we add "for good cause," that will be the next issue to discuss; what is "good cause"? Ms. Lavelle mentioned earlier to allow the Administrator or the Commission to have the ability to review the fees of an arbitration. She mentioned that the State Bar has the fee dispute committee, where they can see whether the fees are reasonable.

Chairman Ohrenschall:
Thank you. You are correct. Assembly Bill 448 does have that safety hatch of a good cause showing allowing higher fees. We could put that good cause in this bill also, or we could go with Senator Copening's proposal of $225 an hour with no absolute cap. These are complex issues that could require a lot of time. I do think Mr. Joe brought up a good point that when it gets over $1,000, should the people go to court?

Eleissa Lavelle:
I would like to go back to the beginning and why arbitration is important. It works. Are there problems? Yes, sometimes there are problems. I think that Senator Copening's suggestion addresses those issues with the additional suggestions we have been talking about today. My concern is that, because these issues are complex, there will be cases not being heard by arbitrators who are qualified to do the work and are spending the time to do the work. This program has been enormously successful. While I recognize that there are many people who are in very serious financial straights, understand that there are communities with all kinds of people, with all kinds of property values, with all kinds of issues. By saying that there will be an absolute dollar cap on these arbitrations, effectively what you are saying is that these arbitrations are not going to be doing what they were initially designed to do. I gave a seminar on NRS Chapter 116 with Mr. Buckley in Reno. It was interesting to hear from the people up there how successful this program has been and how very few of these cases actually get to district court because people are satisfied that they are getting an adequate opportunity to be heard and getting fair and reasonable arbitration awards. They may not always win, but if they feel like they have been heard and understood and there is a good reason for the decision, they are not going to go anywhere else.

Michael Joe:
The question of whether it is working or not is depending on which side you are looking at it from. If you are saying that the purpose is to keep it out of district court, I am not sure that it is working for homeowners and association members. Maybe it is working for the Real Estate Division, maybe it is working

for the district court, maybe it is working for attorneys and collection companies, but I do not think it is working for homeowners. I think that it is not fair to say that it is working if you do not look at all parties involved. The question is who is it that you are representing and who is it that you are trying to protect in this. I think there are plenty of protections for the collection companies and the management companies and the associations, but there are very few protections for the homeowners. This arbitration and mediation process and court litigation is a process to help the homeowner protect himself. I wonder whether it is not slanted to protect the other parties: the management companies, the associations, and the attorneys.

Chairman Ohrenschall:
Thank you, Mr. Joe. We did adopt that $1,000, and it is not an absolute cap. It does have exceptions for good cause. When higher fees are needed, they could be granted. We thought it was good policy six weeks ago in A.B. 448, and I am not really sure we should backtrack from it. It was a unanimous vote when we adopted that $1,000 cap to match the Supreme Court Rule 24, but it also had the exception for circumstances that required it. I would propose that we accept all the amendments with the changes proposed by Senator Copening, with the changes we recommended, which for conceptual amendment number one included instructing the Administrator of the Division of Real Estate to adopt a flat fee cap for mediation fees of $500. However, I think we should stick with the cap we adopted in A.B. 448, which is not an absolute cap. I am sure when there is a complex case involving a lot of money, an exception will be granted for the Administrator to charge an hourly rate going over the cap of $1,000. We all agreed on amendments two and three. Regarding amendments four, five, and six, we were all fine. Actually we decided not to adopt number five because it is in S.B. 204 (R1). Conceptual amendment number seven, we will change the word "are" to "may be" and "proof of service of affidavits proving the claim" should be there to substantiate the other party was served if the other party does not show up. Mr. Joe has a good potential amendment to the conceptual amendment coming from the mediation program that our Supreme Court administers that good cause be required if the person cannot show up for the mediation. Perhaps we could model that on the rule the Supreme Court has adopted for the foreclosure mediation program. We also have Mr. Stebbins' amendment which has been incorporated into Senator Copening's amendments.

Assemblyman McArthur:
If we are going to take a vote, I am not going to go with the recommendation at this point until I see the conceptual amendments.

Chairman Ohrenschall:
Do you mean a mock-up?

Assemblyman McArthur:
Yes, I want to see those mock-ups of conceptual amendments.

Assemblyman Carrillo:
I agree with Mr. McArthur's statement.

Chairman Ohrenschall:
We have gone over Senator Copening's amendments and we agree on most of the language. There is a little debate on conceptual amendment one on whether we should adopt the arbitrator fee cap we had adopted in A.B. 448. Mr. McArthur brought up some cleanup in the original bill he is interested in. I think we should process all the recommendations that we all agree on that will be in the mock-up we present to the full Committee, which basically are conceptual amendments two through seven, without amendment five and with the additions proposed in conceptual amendment number seven. The part we disagree on is in conceptual amendment number one. We can propose to the full Committee on Friday. Does either of you have any appetite for Mr. Friedrich's amendment?

Assemblyman Carrillo:
I do not.

Chairman Ohrenschall:
Mr. McArthur is shaking his head no.

Michael Buckley:
For clarification, I did not hear that the Subcommittee had an issue with the mediation set fee, only the arbitration fees, correct?

Chairman Ohrenschall:
That is correct. We would go ahead with recommending that the Administrator of the Real Estate Division propose a regulation that has a maximum total cost of $500 flat fee for mediation. We are in dispute about whether to keep the arbitrator cap we had adopted in A.B. 448, which is $1,000 with exceptions, or to go ahead with Senator Copening's suggestion. Is there anything else that I am missing? Are we all in favor of that recommendation?

There is another point we do not agree on, which is those fines for construction penalties and the health hazard. These are the fines that are not for assessments that can lead to foreclosure in a common-interest community.

Should they be put on hold during the pendency of the mediation or the arbitration? I feel they should, if they are the issue of the arbitration or mediation. Mr. McArthur has some concerns with that. Maybe we can have an option A and an option B in the mock-up on that issue when we present to the full Committee.

Assemblyman McArthur:
There are some other cleanup things we want to get in there also.

Chairman Ohrenschall:
One is dealing with the geographical area of the Ombudsman.

Assemblyman McArthur:
We have noted it.

Chairman Ohrenschall:
Are we all on board with the recommendation for the full Committee that we agree on most of these recommendations, and there are two points where we are presenting an option A and option B? We are all unanimous on this recommendation and hopefully we will have a mock-up by Friday to present to the full Committee. Could I get a motion?

ASSEMBLYMAN MCARTHUR RECOMMENDED AMEND AND DO PASS SENATE BILL 254 (1st REPRINT).

ASSEMBLYMAN CARRILLO SECONDED THE RECOMMENDATION.

THE RECOMMENDATION PASSED UNANIMOUSLY.

We will forward this recommendation to the full Committee. There will be a few decisions that will need to be made on Friday during the work session. I appreciate everyone being here. Meeting is adjourned [at 12:20 p.m.].

RESPECTFULLY SUBMITTED:

_____
Nancy Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman James Ohrenschall, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 17, 2011 **Time of Meeting:** 4:58 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 204 (R1)	C	Dave Ziegler	Work Session Document
S.B. 204 (R1)	D	Senator Copening	Proposed Amendment
S.B. 254 (R1)	E	Dave Ziegler	Work Session Document

SB280

Introduced in the Senate on Mar 15, 2013.

By: (Bolded name indicates primary sponsorship)
Kihuen

Revises provisions relating to common-interest communities. (BDR 10-863)

Fiscal Notes

Effect on Local Government: No.
Effect on State: No.

Most Recent History Action: Approved by the Governor. Chapter 552.
(See full list below)

Upcoming Hearings

Past Hearings

Senate Judiciary	Apr 01, 2013 AM	09:00	Agenda	Minutes	No Action
Senate Judiciary	Apr 10, 2013 AM	08:00	Agenda	Minutes	No Action
Senate Judiciary	Apr 11, 2013 AM	08:00	Agenda	Minutes	Amend, and do pass as amended
Assembly Judiciary	May 09, 2013 Agenda	See	Agenda	Minutes	No action
Assembly Judiciary	May 16, 2013 AM	07:30	Agenda	Minutes	
Assembly Judiciary	May 16, 2013 AM	08:00	Agenda	Minutes	Not heard
Assembly Judiciary	May 17, 2013 Agenda	See	Agenda	Minutes	Amend, and do pass as amended

Final Passage Votes

Senate Final Passage	(1st Reprint)	Apr 23, 2013	Yea 11,	Nay 10,	Excused 0,	Not Voting 0,	Absent 0
Assembly Final Passage	(2nd Reprint)	May 24, 2013	Yea 35,	Nay 6,	Excused 1,	Not Voting 0,	Absent 0

Conference Committee

Jun 02, 2013 07:30 PM Conference Report

Bill Text As Introduced 1st Reprint 2nd Reprint 3rd Reprint As Enrolled

Adopted Amendments Amend. No. 339 Amend. No. 777 Amend. No. CA15

Bill History

Mar 15, 2013
- Read first time. Referred to Committee on Judiciary. To printer.

Mar 18, 2013
- From printer. To committee.

Apr 19, 2013
- From committee: Amend, and do pass as amended.
- Placed on Second Reading File.
- Read second time. Amended. (Amend. No. 339.) To printer.

Apr 22, 2013
- From printer. To engrossment. Engrossed. First reprint .
- Taken from General File. Placed on General File for next legislative day.

Apr 23, 2013
- Read third time. Passed, as amended. Title approved. (Yeas: 11, Nays: 10.) To Assembly.

Apr 25, 2013
- In Assembly.
- Read first time. Referred to Committee on Judiciary. To committee.

May 24, 2013
- From committee: Amend, and do pass as amended.
- Declared an emergency measure under the Constitution.
- Read third time. Amended. (Amend. No. 777.) To printer.
- From printer. To reengrossment. Reengrossed. Second reprint .
- Read third time. Passed, as amended. Title approved, as amended. (Yeas: 35, Nays: 6, Excused: 1.) To Senate.

May 27, 2013
- In Senate.

May 28, 2013
- Assembly Amendment No. 777 not concurred in. To Assembly.

May 29, 2013
- In Assembly.

May 31, 2013
- Assembly Amendment No. 777 not receded from. Conference requested. Conference Committee appointed by Assembly. To Senate.

Jun 01, 2013
- In Senate.
- Conference Committee appointed by Senate. To committee.

Jun 03, 2013
- From committee: Concur in Assembly Amendment No. 777 and further amend.
- Conference report adopted by Senate.
- Conference report adopted by Assembly.
- To printer.
- From printer. To re-engrossment. Re-engrossed. Third reprint .

Jun 06, 2013
- To enrollment.

Jun 07, 2013
- Enrolled and delivered to Governor.

Jun 13, 2013
- Approved by the Governor. Chapter 552.
- Effective October 1, 2013.

SENATE BILL NO. 280–SENATOR KIHUEN

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to common-interest communities. (BDR 10-863)

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

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

AN ACT relating to common-interest communities; revising provisions governing the collection of past due financial obligations owed to an association; revising provisions governing payments received by an association from a unit's owner; revising provisions governing the foreclosure of an association's lien by sale; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale of the unit and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168) This bill revises provisions governing: (1) the collection of past due financial obligations owed to a homeowners' association; and (2) foreclosures by a homeowners' association.

Section 1 of this bill establishes procedures which a homeowners' association must follow before initiating the process of foreclosing on a unit or commencing any other debt collection activity. Under section 1, before initiating the foreclosure process or commencing any other debt collection activity: (1) a homeowners' association must mail three letters and make two telephone calls to a unit's owner who owes a past due obligation to the association to inform the unit's owner of certain information concerning the past due obligation; and (2) the executive board of the homeowners' association must approve the initiation of the foreclosure process or the commencement of any other debt collection activity at a regular meeting of the executive board. Section 7 of this bill authorizes the executive board to meet in executive session to discuss whether to approve the initiation of the foreclosure process or the commencement of any other debt collection activity, but requires the votes of each member of the executive board and the assessor's parcel number of the unit to be recorded in the minutes of the meeting. Sections 1 and 7 further authorize a unit's owner to request a hearing before the executive board to contest a past due obligation and require the executive board to hold such a hearing

in executive session upon the written request of the unit's owner. Under section 1, a homeowners' association is required to offer a repayment plan to a unit's owner who owes a past due obligation to the association and a unit's owner may accept such a repayment plan at any time before the foreclosure sale of the unit or the commencement of a civil action to collect the past due obligation. Sections 1 and 4 of this bill prohibit the association from charging the unit's owner for any costs incurred in complying with the requirements of section 1.

Section 8 of this bill requires the collection policy of a homeowner's association to provide an administrative process by which a unit's owner may contest a past due obligation.

Sections 9-11 of this bill revise provisions governing foreclosures by homeowner's associations. Section 9 prohibits the association from foreclosing a unit unless the foreclosure is for a failure to pay when due assessments for common expenses and only if the amount of such delinquent assessments, excluding acceleration and any interest, charges for late payment, fines or costs of collecting the assessment, is $1,000 or more. Section 11 also provides that a foreclosure of a unit by a homeowner's association is subject to a right of redemption for the unit's owner and that the redemption period is 180 days. Under section 10, the notice of a foreclosure sale provided by a homeowner's association or a person conducting the foreclosure sale must provide notice of the right of redemption.

Section 5 of this bill prohibits an association from refusing to accept a unit owner's payment of any assessment, fine, fee or other charge that is due because there is an outstanding payment due. Section 5 further requires an association to apply any payment received from a unit's owner to any past due assessments, including late charges, costs of collecting and interest, owed by the unit's owner before the payment is applied to any other financial obligation owed by the unit's owner.

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. An association may not mail to a unit's owner or his or her successor in interest a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 or take any other action to collect a past due obligation from a unit's owner or his or her successor in interest unless:

(a) The association has satisfied the requirements of subsections 2 and 3; and

(b) Not later than 30 days after the association has satisfied the requirements of subsections 2 and 3, at a regular meeting of the executive board, the executive board determines that the association has satisfied the requirements of subsection 4 and approved the foreclosure of the association's lien pursuant to NRS 116.31162 to 116.31168, inclusive, or the taking of any other action to collect the past due obligation.

2. If a unit's owner owes a past due obligation to the association, the association must:

(a) Mail by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, at least three letters, not less than 10 days apart, informing the unit's owner or his or her successor of:

(1) The amount of the past due obligation and an itemized statement of payments made and the charges owed by the unit's owner;

(2) The right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing;

(3) A schedule of any late fees, interest, collection costs, fines or other charges that may be imposed if the past due obligation is not paid; and

(4) The repayment plan offered by the association pursuant to subsection 4.

(b) Make at least two telephone calls, not less than 10 days apart, to the unit's owner or his or her successor in interest at the last known telephone number of the unit's owner or his or her successor in interest. During any contact with a unit's owner or his or her successor in interest pursuant to this paragraph, the association must inform the unit's owner or his or her successor in interest of:

(1) The amount of the past due obligation;

(2) The right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing; and

(3) The repayment plan offered by the association pursuant to subsection 4.

3. Not later than 30 days after receiving the last of the letters required by paragraph (a) of subsection 2, a unit's owner or his or her successor in interest may submit to the association a written request for a hearing before the executive board to contest the past due obligation. If the association receives a written request for a hearing within the period prescribed by this subsection, the executive board must hold a hearing in accordance with subsection 5 of NRS 116.31085 before the association may mail to a unit's owner or his or her successor in interest a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 or take any other action to collect a past due obligation from the unit's owner or his or her successor in interest. The executive board shall schedule the date, time and location for the hearing to contest the past due obligation so that the unit's owner or his or her successor in interest is provided with

a reasonable opportunity to prepare for and be present at the hearing.

4. An association must offer a unit's owner who owes a past due obligation to the association a repayment plan providing for the payment of the amount of the past due obligation in equal monthly installments over a period of:

(a) Six months, if the amount of the past due obligation is $1,000 or less.

(b) Twelve months, if the amount of the past due obligation is more than $1,000 but less than $2,000.

(c) Twenty-four months, if the amount of the past due obligation is $2,000 or more.

↳ The association shall not charge any fee for a repayment plan or any interest or late fees on a past due obligation for which a unit's owner or his or her successor in interest has entered into a repayment plan. A unit's owner or his or her successor in interest may accept a payment plan at any time before the date of the sale of the unit pursuant to NRS 116.31164 or the commencement of a civil action against the unit's owner or his or her successor in interest to obtain a judgment for the amount of the past due obligation. A unit's owner or his or her successor in interest may accept the repayment plan offered by the association pursuant to this subsection by tendering the first monthly payment. If a unit's owner or his or her successor in interest defaults on any repayment plan, the association may resume its efforts to collect the past due obligation from the time at which the unit's owner or his or her successor in interest accepted the repayment plan.

5. Any costs incurred by an association in satisfying the requirements of this section must not be charged to the unit's owner or his or her successor in interest.

6. As used in this section, "obligation" has the meaning ascribed to it in NRS 116.310313.

Sec. 2. NRS 116.1203 is hereby amended to read as follows:

116.1203 1. Except as otherwise provided in subsections 2 and 3, if a planned community contains no more than 12 units and is not subject to any developmental rights, it is subject only to NRS 116.1106 and 116.1107 unless the declaration provides that this entire chapter is applicable.

2. The provisions of NRS 116.12065 and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that the definitions are necessary to construe any of those provisions, apply to a residential planned community containing more than 6 units.

3. Except for NRS 116.3104, 116.31043, 116.31046 and 116.31138, the provisions of NRS 116.3101 to 116.350, inclusive, *and section 1 of this act* and the definitions set forth in

NRS 116.005 to 116.095, inclusive, to the extent that such definitions are necessary in construing any of those provisions, apply to a residential planned community containing more than 6 units.

Sec. 3. NRS 116.12075 is hereby amended to read as follows:

116.12075 1. The provisions of this chapter do not apply to a nonresidential condominium except to the extent that the declaration for the nonresidential condominium provides that:

(a) This entire chapter applies to the condominium;

(b) Only the provisions of NRS 116.001 to 116.2122, inclusive, and 116.3116 to 116.31168, inclusive, *and section 1 of this act* apply to the condominium; or

(c) Only the provisions of NRS 116.3116 to 116.31168, inclusive, *and section 1 of this act* apply to the condominium.

2. If this entire chapter applies to a nonresidential condominium, the declaration may also require, subject to NRS 116.1112, that:

(a) Notwithstanding NRS 116.3105, any management, maintenance operations or employment contract, lease of recreational or parking areas or facilities and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(b) Notwithstanding NRS 116.1104 and subsection 3 of NRS 116.311, purchasers of units must execute proxies, powers of attorney or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

Sec. 4. NRS 116.310313 is hereby amended to read as follows:

116.310313 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 [.] *or any costs incurred by an association in complying with the requirements of section 1 of this act.*

(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.

Sec. 5. NRS 116.310315 is hereby amended to read as follows:

116.310315 *1. An association:*

(a) Shall not refuse to accept from a unit's owner payment of any assessment, fine, fee or other charge that is due because there is an outstanding payment due.

(b) Shall apply a payment received from a unit's owner to any past due assessment for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, including any late fees, costs of collection and interest on the past due assessment, before any portion of the payment is applied to any other assessment or any fine, penalty, fee, charge or interest which has been levied or imposed against the unit's owner pursuant to this chapter or the governing documents.

2. If an association has imposed a fine against a unit's owner or a tenant or an invitee of a unit's owner or a tenant pursuant to NRS 116.31031 for violations of the governing documents of the association, the association shall establish a compliance account to account for the fine, which must be separate from any account established for assessments.

Sec. 6. NRS 116.31068 is hereby amended to read as follows:

116.31068 1. Except as otherwise provided in subsection 3, an association shall deliver any notice required to be given by the association under this chapter to any mailing or electronic mail address a unit's owner designates. Except as otherwise provided in subsection 3, if a unit's owner has not designated a mailing or electronic mail address to which a notice must be delivered, the association may deliver notices by:

(a) Hand delivery to each unit's owner;

(b) Hand delivery, United States mail, postage paid, or commercially reasonable delivery service to the mailing address of each unit;

(c) Electronic means, if the unit's owner has given the association an electronic mail address; or

(d) Any other method reasonably calculated to provide notice to the unit's owner.

2. The ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting.

3. The provisions of this section do not apply:

(a) To a notice required to be given pursuant to NRS 116.3116 to 116.31168, inclusive ~~.~~, *and section 1 of this act;* or

(b) If any other provision of this chapter specifies the manner in which a notice must be given by an association.

Sec. 7. NRS 116.31085 is hereby amended to read as follows:

116.31085 1. Except as otherwise provided in this section, a unit's owner may attend any meeting of the units' owners or of the executive board and speak at any such meeting. The executive board may establish reasonable limitations on the time a unit's owner may speak at such a meeting.

2. An executive board may not meet in executive session to open or consider bids for an association project as defined in NRS 116.31086, or to enter into, renew, modify, terminate or take any other action regarding a contract.

3. An executive board may meet in executive session only to:

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

(b) Discuss the character, alleged misconduct, professional competence, or physical or mental health of a community manager or an employee of the association.

(c) Except as otherwise provided in subsection 4, discuss a violation of the governing documents, including, without limitation, the failure to pay an assessment.

(d) Discuss the alleged failure of a unit's owner to adhere to a schedule required pursuant to NRS 116.310305 if the alleged failure may subject the unit's owner to a construction penalty.

(e) Discuss whether to initiate the process of foreclosing the association's lien by sale pursuant to NRS 116.31162 to 116.31168, inclusive, or whether to take any action other than the actions set forth in section 1 of this act to collect a past due obligation.

4. An executive board shall meet in executive session to hold a hearing on an alleged violation of the governing documents unless the person who may be sanctioned for the alleged violation requests in writing that an open hearing be conducted by the executive board. If the person who may be sanctioned for the alleged violation requests in writing that an open hearing be conducted, the person:

(a) Is entitled to attend all portions of the hearing related to the alleged violation, including, without limitation, the presentation of evidence and the testimony of witnesses;

(b) Is entitled to due process, as set forth in the standards adopted by regulation by the Commission, which must include, without limitation, the right to counsel, the right to present witnesses and the right to present information relating to any conflict of interest of any member of the hearing panel; and

(c) Is not entitled to attend the deliberations of the executive board.

5. An executive board shall meet in executive session to hold a hearing on a request to contest a past due obligation submitted by a unit's owner or his or her successor in interest pursuant to subsection 3 of section 1 of this act. The person who submitted the request:

(a) Is entitled to attend all portions of the hearing, including, without limitation, the presentation of evidence and the testimony of witnesses;

(b) Is entitled to due process, as set forth in the standards adopted by regulation by the Commission, which must include, without limitation, the right to counsel, the right to present witnesses and the right to present information relating to any conflict of interest of any member of the hearing panel; and

(c) Is not entitled to attend the deliberations of the executive board.

6. The provisions of ~~[subsection]~~ *subsections 4 and 5* establish the minimum protections that the executive board must provide before it may make a decision. The provisions of ~~[subsection]~~ *subsections 4 and 5* do not preempt any provisions of the governing documents that provide greater protections.

~~[5.]~~ *7.* Except as otherwise provided in this subsection, any matter discussed by the executive board when it meets in executive session must be generally noted in the minutes of the meeting of the executive board. The executive board shall maintain minutes of ~~[any]~~ *:*

(a) Any decision made pursuant to subsection 4 concerning an alleged violation and, upon request, provide a copy of the decision to the person who was subject to being sanctioned at the hearing or to the person's designated representative.

~~[7.]~~ *(b) Any decision made pursuant to subsection 5 concerning a contest of a past due obligation and, upon request, provide a copy of the decision to the person who was alleged to owe the past due obligation or to the person's designated representative.*

(c) Any decision made pursuant to subsection 1 of section 1 of this act concerning whether to initiate the process of foreclosing the association's lien by sale pursuant to NRS 116.31162 to 116.31168, inclusive, or whether to take any action other than the actions set forth in section 1 of this act to collect a past due obligation. The minutes must state only the vote of each member of the executive board and the assessor's parcel number of the unit.

8. Except as otherwise provided in ~~[subsection]~~ *subsections* 4 ~~[,]~~ *and 5*, a unit's owner is not entitled to attend or speak at a meeting of the executive board held in executive session.

9. As used in this section, "obligation" has the meaning ascribed to it in NRS 116.310313.

Sec. 8. NRS 116.31151 is hereby amended to read as follows:

116.31151 1. Except as otherwise provided in subsection 2 and unless the declaration of a common-interest community imposes more stringent standards, the executive board shall, not less than 30 days or more than 60 days before the beginning of the fiscal year of the association, prepare and distribute to each unit's owner a copy of:

(a) The budget for the daily operation of the association. The budget must include, without limitation, the estimated annual revenue and expenditures of the association and any contributions to be made to the reserve account of the association.

(b) The budget to provide adequate funding for the reserves required by paragraph (b) of subsection 2 of NRS 116.3115. The budget must include, without limitation:

(1) The current estimated replacement cost, estimated remaining life and estimated useful life of each major component of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore;

(2) As of the end of the fiscal year for which the budget is prepared, the current estimate of the amount of cash reserves that are necessary, and the current amount of accumulated cash reserves that are set aside, to repair, replace or restore the major components of the common elements and any other portion of the common-interest community that the association is obligated to maintain, repair, replace or restore;

(3) A statement as to whether the executive board has determined or anticipates that the levy of one or more special assessments will be necessary to repair, replace or restore any major component of the common elements or any other portion of the common-interest community that the association is obligated to

maintain, repair, replace or restore or to provide adequate funding for the reserves designated for that purpose; and

(4) A general statement describing the procedures used for the estimation and accumulation of cash reserves pursuant to subparagraph (2), including, without limitation, the qualifications of the person responsible for the preparation of the study of the reserves required by NRS 116.31152.

2. In lieu of distributing copies of the budgets of the association required by subsection 1, the executive board may distribute to each unit's owner a summary of those budgets, accompanied by a written notice that:

(a) The budgets are available for review at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties but not to exceed 60 miles from the physical location of the common-interest community; and

(b) Copies of the budgets will be provided upon request.

3. Within 60 days after adoption of any proposed budget for the common-interest community, the executive board shall provide a summary of the proposed budget to each unit's owner and shall set a date for a meeting of the units' owners to consider ratification of the proposed budget not less than 14 days or more than 30 days after the mailing of the summaries. Unless at that meeting a majority of all units' owners, or any larger vote specified in the declaration, reject the proposed budget, the proposed budget is ratified, whether or not a quorum is present. If the proposed budget is rejected, the periodic budget last ratified by the units' owners must be continued until such time as the units' owners ratify a subsequent budget proposed by the executive board.

4. The executive board shall, at the same time and in the same manner that the executive board makes the budget available to a unit's owner pursuant to this section, make available to each unit's owner the policy established for the association concerning the collection of any fees, fines, assessments or costs imposed against a unit's owner pursuant to this chapter. The policy must include, without limitation:

(a) The responsibility of the unit's owner to pay any such fees, fines, assessments or costs in a timely manner; ~~[and]~~

(b) The association's rights concerning the collection of such fees, fines, assessments or costs if the unit's owner fails to pay the fees, fines, assessments or costs in a timely manner ~~[.]~~ *; and*

(c) An administrative process by which a unit's owner may contest an allegation that the unit's owner is delinquent in the payment of any fees, fines, assessments or costs imposed against a

unit's owner pursuant to this chapter. The administrative process must include, without limitation, a reasonable opportunity for a hearing before the executive board.

Sec. 9. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection 4, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

↳ whichever date occurs later.

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 unit's 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 116.31030.]~~ *foreclose a lien by sale only for a failure to pay when due an assessment for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 and only if the amount of such delinquent assessment, excluding acceleration and any interest, charges for late payment, fines or costs of collecting the assessment, is $1,000 or more.*

Sec. 10. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by first-class mail to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the

mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; ~~[and]~~

(b) *A statement that the unit is being sold subject to the right of redemption created by subsection 3 of NRS 116.31166; and*

(c) The following warning in 14-point bold type:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 11. NRS 116.31166 is hereby amended to read as follows:

116.31166 1. The recitals in a deed made pursuant to NRS 116.31164 of:

(a) Default, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell;

(b) The elapsing of the 90 days; and

(c) The giving of notice of sale,

↳ are conclusive proof of the matters recited.

2. Such a deed containing those recitals is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons. The receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money.

3. The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 ~~[vests in the purchaser the title of the unit's owner without equity or]~~ *is subject to a* right of redemption ~~[.]~~ *for the unit's owner. The redemption period within which a unit's owner may redeem the unit from a foreclosure sale pursuant to this subsection ends 180 days after the sale. If a unit's owner does not redeem the unit from a foreclosure sale within the redemption period specified in this subsection, the title of the unit's owner vests in the purchaser.*

(Reprinted with amendments adopted on May 24, 2013)
SECOND REPRINT S.B. 280

SENATE BILL NO. 280–SENATOR KIHUEN

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to common-interest communities. (BDR 10-863)

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

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

AN ACT relating to common-interest communities; revising provisions governing an association's lien on a unit; revising provisions governing the payment of financial obligations to an association; revising provisions governing the foreclosure of an association's lien by sale; requiring an association to provide a statement concerning certain amounts due to the association under certain circumstances; authorizing an association to charge a fee for such a statement; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. Generally, the association's lien is not prior to a first security interest on the unit recorded before the date on which the amount sought to be enforced became delinquent. However, the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. The portion of the association's lien that is prior to the first security interest on the unit is commonly referred to as the "super-priority lien." (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168)

This bill revises provisions governing the association's lien on a unit and the foreclosure of the association's lien. Section 10 of this bill provides that the association does not have a priority lien over the first security interest when the association forecloses its lien and, thus, the foreclosure of the association's lien does not extinguish the first security interest on the unit. However, under section 7 of this bill, if the holder of the first security interest forecloses on a unit, the association has a lien on the unit which is prior to the first security interest. This priority lien consists of the amounts included in the "super-priority lien" under

existing law and the costs of collecting the assessments included in the "super-priority lien," unless the federal regulations adopted by the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association or the Department of Veterans Affairs require a shorter period of priority or prohibit the inclusion of collection costs in the "super-priority lien." Section 7 also limits the amount of the costs of collecting included in the lien upon the foreclosure of the first security interest.

Under section 8 of this bill, the association may not foreclose its lien by sale based on unpaid collection costs. Section 9 of this bill requires that certain notice of the foreclosure of the association's lien be provided by certified or registered mail, return receipt requested, rather than by first-class mail.

Section 3 of this bill: (1) sets forth the order in which an association must apply a payment made by a unit's owner who is delinquent in the payment of assessments, unless a contract between the association and the unit's owner provides otherwise; and (2) prohibits the association or its agent from refusing to accept a partial payment from a unit's owner or any holder of a first security interest encumbering the interest of the unit's owner because the amount tendered is less than the amount owed.

Section 11 of this bill authorizes a unit's owner or the authorized agent of a unit's owner to request from the association a statement concerning certain amounts owed to the association. Under section 11, the association may charge certain fees for such a statement. Section 11 also revises provisions governing the resale package provided to a prospective purchaser of a unit and authorizes the association to charge a fee for providing in electronic format certain documents related to the resale package.

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 the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *As used in this section and NRS 116.3116 to 116.31168, inclusive, and section 3 of this act, unless the context otherwise requires, "first security interest" means a first security interest described in paragraph (b) of subsection 2 of NRS 116.3116.*

Sec. 3. *1. Unless the parties agree otherwise, the association shall apply any sums paid by a unit's owner who is delinquent in paying assessments in the following order:*

(a) Unpaid assessments;

(b) Charges for late payment of assessments;

(c) Costs of collecting past due assessments charged to the unit's owner pursuant to NRS 116.310313; and

(d) All other unpaid fees, charges, fines, penalties, costs of collecting charged to a unit's owner pursuant to NRS 116.310313, interest and late charges.

2. The association or its agent shall not refuse to accept a partial payment from a unit's owner or any holder of a first

security interest encumbering the interest of the unit's owner because the amount tendered is less than the amount owed.

Sec. 4. NRS 116.1203 is hereby amended to read as follows:

116.1203 1. Except as otherwise provided in subsections 2 and 3, if a planned community contains no more than 12 units and is not subject to any developmental rights, it is subject only to NRS 116.1106 and 116.1107 unless the declaration provides that this entire chapter is applicable.

2. The provisions of NRS 116.12065 and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that the definitions are necessary to construe any of those provisions, apply to a residential planned community containing more than 6 units.

3. Except for NRS 116.3104, 116.31043, 116.31046 and 116.31138, the provisions of NRS 116.3101 to 116.350, inclusive, *and sections 2 and 3 of this act* and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that such definitions are necessary in construing any of those provisions, apply to a residential planned community containing more than 6 units.

Sec. 5. NRS 116.12075 is hereby amended to read as follows:

116.12075 1. The provisions of this chapter do not apply to a nonresidential condominium except to the extent that the declaration for the nonresidential condominium provides that:

(a) This entire chapter applies to the condominium;

(b) Only the provisions of NRS 116.001 to 116.2122, inclusive, and 116.3116 to 116.31168, inclusive, *and sections 2 and 3 of this act* apply to the condominium; or

(c) Only the provisions of NRS 116.3116 to 116.31168, inclusive, *and sections 2 and 3 of this act* apply to the condominium.

2. If this entire chapter applies to a nonresidential condominium, the declaration may also require, subject to NRS 116.1112, that:

(a) Notwithstanding NRS 116.3105, any management, maintenance operations or employment contract, lease of recreational or parking areas or facilities and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(b) Notwithstanding NRS 116.1104 and subsection 3 of NRS 116.311, purchasers of units must execute proxies, powers of attorney or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

Sec. 6. NRS 116.31068 is hereby amended to read as follows:

116.31068 1. Except as otherwise provided in subsection 3, an association shall deliver any notice required to be given by the

association under this chapter to any mailing or electronic mail address a unit's owner designates. Except as otherwise provided in subsection 3, if a unit's owner has not designated a mailing or electronic mail address to which a notice must be delivered, the association may deliver notices by:

(a) Hand delivery to each unit's owner;

(b) Hand delivery, United States mail, postage paid, or commercially reasonable delivery service to the mailing address of each unit;

(c) Electronic means, if the unit's owner has given the association an electronic mail address; or

(d) Any other method reasonably calculated to provide notice to the unit's owner.

2. The ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting.

3. The provisions of this section do not apply:

(a) To a notice required to be given pursuant to NRS 116.3116 to 116.31168, inclusive ~~,~~ *, and sections 2 and 3 of this act;* or

(b) If any other provision of this chapter specifies the manner in which a notice must be given by an association.

Sec. 7. NRS 116.3116 is hereby amended to read as follows:

116.3116 1. The association has a 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 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, 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.

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.

~~[—]~~

3. The *association has a* lien *which* is ~~[also]~~ prior to ~~[all security interests described in paragraph (b)]~~ *the first security interest* to the extent of ~~[any:]~~ *:*

(a) Any charges incurred by the association on a unit pursuant to NRS 116.310312 *;* and ~~[to the extent of]~~

(b) Except as otherwise provided in this paragraph, 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,]~~ *a trustee's sale or foreclosure sale of the unit to enforce the first security interest and the costs of collecting those assessments which are charged to a unit's owner pursuant to NRS 116.310313.* If federal regulations adopted by the Federal Home Loan Mortgage Corporation, ~~[or]~~ the Federal National Mortgage Association *or the Department of Veterans Affairs* require a shorter period of priority for the lien ~~[,]~~ *or prohibit the inclusion of costs of collecting in the lien,* the ~~[period during which]~~ *amount of* the lien *which* is prior to ~~[all security interests described in paragraph (b)]~~ *the first security interest pursuant to this paragraph* 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]~~ *a trustee's sale or foreclosure sale of the unit to enforce the first security interest. The amount of the costs of collecting included in the lien pursuant to this paragraph must not exceed the amounts set forth in the regulations adopted by the Commission pursuant to NRS 116.310313, except that the amount included in the lien to recover the actual costs charged to the association or a person acting on behalf of the association to collect a past due obligation by a person who is not an officer, director, agent or affiliate of the community manager of the association or of an agent of the association, including, without limitation, the cost of a trustee's sale guarantee and other title costs, recording costs, posting and publishing costs, sale costs, mailing costs, express delivery costs and skip trace fees, must not exceed $500.*

4. The provisions of subsections 2 and 3 do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

~~[3.]~~ *5. The holder of the first security interest or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of the first security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.*

6. 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.]~~ *7.* 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.]~~ *8.* 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.]~~ *9.* This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

~~[7.]~~ *10.* A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~[8.]~~ *11.* The association, upon written request, 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.

~~[9.]~~ *12.* 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.

~~[9.]~~ *13.* In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

Sec. 8. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection 4, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

↳ whichever date occurs later.

4. The association may not foreclose a lien by sale based on ~~[a]~~ *:*

(a) The costs of collecting charged to a unit's owner pursuant to NRS 116.310313.

(b) A fine or penalty for a violation of the governing documents of the association unless:

~~[(a)]~~ *(1)* 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)]~~ *(2)* The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Sec. 9. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by ~~first-class mail~~ *certified or registered mail, return receipt requested,* to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 10. NRS 116.31164 is hereby amended to read as follows:

116.31164 1. The sale must be conducted in the county in which the common-interest community or part of it is situated, and may be conducted by the association, its agent or attorney, or a title insurance company or escrow agent licensed to do business in this State, except that the sale may be made at the office of the association if the notice of the sale so provided, whether the unit is located within the same county as the office of the association or not. The association or other person conducting the sale may from time to time postpone the sale by such advertisement and notice as it considers reasonable or, without further advertisement or notice, by proclamation made to the persons assembled at the time and place previously set and advertised for the sale.

2. On the day of sale originally advertised or to which the sale is postponed, at the time and place specified in the notice or postponement, the person conducting the sale may sell the unit at public auction to the highest cash bidder. Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.

3. After the sale, the person conducting the sale shall:

(a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit;

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign; and

(c) Apply the proceeds of the sale for the following purposes in the following order:

(1) The reasonable expenses of sale;

(2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;

(3) Satisfaction of the association's lien;

(4) Satisfaction in the order of priority of any subordinate claim of record; and

(5) Remittance of any excess to the unit's owner.

4. The foreclosure by sale of the association's lien does not extinguish the rights of the holder of the first security interest.

Sec. 11. NRS 116.4109 is hereby amended to read as follows:

116.4109 1. Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under subsection 2 of NRS 116.4101, a unit's owner or his or her authorized agent shall, at the expense of the unit's owner, furnish to a purchaser a resale package containing all of the following:

(a) A copy of the declaration, other than any plats, the bylaws, the rules or regulations of the association and the information statement required by NRS 116.41095.

(b) A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner. ~~[The statement remains effective for the period specified in the statement, which must not be less than 15 working days from the date of delivery by the association to the unit's owner or his or her agent. If the association becomes aware of an error in the statement during the period in which the statement is effective but before the consummation of the resale, the association must deliver a replacement statement to the unit's owner or his or her agent and obtain an acknowledgment in writing by the unit's owner or his or her agent before that consummation. Unless the unit's owner or his or her agent receives a replacement statement, the unit's owner or his or her agent may rely upon the accuracy of the information set forth in a statement provided by the association for the resale.]~~

(c) A copy of the current operating budget of the association and current year-to-date financial statement for the association, which must include a summary of the reserves of the association required by NRS 116.31152 and which must include, without limitation, a summary of the information described in paragraphs (a) to (e), inclusive, of subsection 3 of NRS 116.31152.

(d) A statement of any unsatisfied judgments or pending legal actions against the association and the status of any pending legal actions relating to the common-interest community of which the unit's owner has actual knowledge.

(e) A statement of any transfer fees, transaction fees or any other fees associated with the resale of a unit.

(f) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges

or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

2. The purchaser may, by written notice, cancel the contract of purchase until midnight of the fifth calendar day following the date of receipt of the resale package described in subsection 1, and the contract for purchase must contain a provision to that effect. If the purchaser elects to cancel a contract pursuant to this subsection, the purchaser must hand deliver the notice of cancellation to the unit's owner or his or her authorized agent or mail the notice of cancellation by prepaid United States mail to the unit's owner or his or her authorized agent. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly. If the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to:

(a) Cancel the contract pursuant to this subsection; or

(b) Damages, rescission or other relief based solely on the ground that the unit's owner or his or her authorized agent failed to furnish the resale package, or any portion thereof, as required by this section.

3. Within 10 days after receipt of a written request by a unit's owner or his or her authorized agent, the association shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package:

(a) Copies of the documents required pursuant to paragraphs (a) and (c) of subsection 1; and

(b) A certificate containing the information necessary to enable the unit's owner to comply with paragraphs (b), (d), (e) and (f) of subsection 1.

4. If the association furnishes the documents and certificate pursuant to subsection 3:

(a) The unit's owner or his or her authorized agent shall include the documents and certificate in the resale package provided to the purchaser, and neither the unit's owner nor his or her authorized agent is liable to the purchaser for any erroneous information provided by the association and included in the documents and certificate.

(b) The association may charge the unit's owner a reasonable fee to cover the cost of preparing the certificate furnished pursuant to subsection 3. Such a fee must be based on the actual cost the association incurs to fulfill the requirements of this section in preparing the certificate. The Commission shall adopt regulations establishing the maximum amount of the fee that an association may charge for preparing the certificate.

(c) The other documents furnished pursuant to subsection 3 must be provided in electronic format ~~[at no charge]~~ to the unit's owner. ~~[or, if]~~ *The association may charge the unit's owner a fee, not to exceed $20, to provide such documents in electronic format. If* the association is unable to provide such documents in electronic format, the association may charge the unit's owner a reasonable fee, not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter, to cover the cost of copying.

(d) Except for the fees allowed pursuant to paragraphs (b) and (c), the association may not charge the unit's owner any other fees for preparing or furnishing the documents and certificate pursuant to subsection 3.

5. Neither a purchaser nor the purchaser's interest in a unit is liable for any unpaid assessment or fee greater than the amount set forth in the documents and certificate prepared by the association. If the association fails to furnish the documents and certificate within the 10 days allowed by this section, the purchaser is not liable for the delinquent assessment.

6. Upon the request of a unit's owner or his or her authorized agent, or upon the request of a purchaser to whom the unit's owner has provided a resale package pursuant to this section or his or her authorized agent, the association shall make the entire study of the reserves of the association which is required by NRS 116.31152 reasonably available for the unit's owner, purchaser or authorized agent to inspect, examine, photocopy and audit. The study must be made available at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties.

7. A unit's owner or the authorized agent of the unit's owner may request a statement of demand from the association. Not later than 10 days after receipt of a written request from a unit's owner or the authorized agent of the unit's owner for a statement of demand, the association shall furnish a statement of demand to the unit's owner or the authorized agent. The association may charge a fee of not more than $150 to prepare and furnish a statement of demand pursuant to this subsection and an additional fee of not more than $100 to furnish a statement of demand within 3 days after receipt of a written request for a statement of demand. The statement of demand:

(a) Must set forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner; and

(b) Remains effective for the period specified in the statement of demand, which must not be less than 15 business days after the date of delivery by the association to the unit's owner or authorized agent of the unit's owner.

8. If the association becomes aware of an error in a statement of demand furnished pursuant to subsection 7 during the period in which the statement of demand is effective but before the consummation of a resale for which a resale package was furnished pursuant to subsection 1, the association must deliver a replacement statement of demand to the unit's owner or the authorized agent of the unit's owner who requested the statement of demand. Unless the unit's owner or the authorized agent of the unit's owner who requested the statement of demand receives a replacement statement of demand, the unit's owner or authorized agent may rely upon the accuracy of the information set forth in the statement of demand provided by the association for the resale. Payment of the amount set forth in the statement of demand constitutes full payment of the amount due from the selling unit's owner.

(10)

(Reprinted with amendments adopted on June 3, 2013)
THIRD REPRINT S.B. 280

SENATE BILL NO. 280–SENATOR KIHUEN

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to common-interest communities. (BDR 10-863)

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

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

AN ACT relating to common-interest communities; authorizing the establishment of an impound account for the payment of assessments under certain circumstances; revising provisions governing the collection of past due financial obligations owed to an association; revising provisions governing the foreclosure of an association's lien by sale; requiring an association to provide a statement concerning certain amounts due to the association under certain circumstances; authorizing an association to charge a fee for such a statement; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168)

Section 7 of this bill authorizes the establishment of an impound account for advance contributions for the payment of assessments. Under section 8 of this bill, not earlier than 60 days after a unit's owner becomes delinquent on a payment owed to the association and before the association mails a notice of delinquent assessment or takes any other action to collect a past due obligation, the association must mail a notice to the unit's owner setting forth the fees that may be charged if the unit's owner fails to pay the past due obligation, a proposed repayment plan and certain information concerning the procedure for requesting a hearing before the executive board.

Section 11 of this bill authorizes a unit's owner, the authorized agent of a unit's owner or the holder of a security interest on the unit to request from the association a statement concerning certain amounts owed to the association. Under section 11, the association may charge certain fees for such a statement. Section 11 also

revises provisions governing the resale package provided to a prospective purchaser of a unit and authorizes the association to charge a fee for providing in electronic format certain documents related to the resale package.

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

Section 1. (Deleted by amendment.)

Sec. 2. (Deleted by amendment.)

Sec. 3. (Deleted by amendment.)

Sec. 4. (Deleted by amendment.)

Sec. 5. (Deleted by amendment.)

Sec. 6. (Deleted by amendment.)

Sec. 7. NRS 116.3116 is hereby amended to read as follows:

116.3116 1. The association has a 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 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, 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.

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 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.

3. *The holder of the security interest described in paragraph (b) of subsection 2 or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of that security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.*

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 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, 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.

~~[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.

~~[10.]~~ *11.* In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

Sec. 8. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection ~~[1,]~~ *5,* in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the

county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

↪ whichever date occurs later.

4. *An association may not mail to a unit's owner or his or her successor in interest a letter of its intent to mail a notice of delinquent assessment pursuant to paragraph (a) of subsection 1, mail the notice of delinquent assessment or take any other action to collect a past due obligation from a unit's owner or his or her successor in interest unless, not earlier than 60 days after the obligation becomes past due, the association mails to the address on file for the unit's owner:*

(a) A schedule of the fees that may be charged if the unit's owner fails to pay the past due obligation;

(b) A proposed repayment plan; and

(c) A notice of the right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing.

5. 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.

Sec. 9. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by ~~[first-class mail,]~~ *certified or registered mail, return receipt requested,* to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 10. (Deleted by amendment.)

Sec. 11. NRS 116.4109 is hereby amended to read as follows:

116.4109 1. Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under subsection 2 of NRS 116.4101, a unit's owner or his or her authorized agent shall, at the expense of the unit's owner, furnish to a purchaser a resale package containing all of the following:

(a) A copy of the declaration, other than any plats, the bylaws, the rules or regulations of the association and the information statement required by NRS 116.41095.

(b) A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling

unit's owner. ~~[The statement remains effective for the period specified in the statement, which must not be less than 15 working days from the date of delivery by the association to the unit's owner or his or her agent. If the association becomes aware of an error in the statement during the period in which the statement is effective but before the consummation of the resale, the association must deliver a replacement statement to the unit's owner or his or her agent and obtain an acknowledgment in writing by the unit's owner or his or her agent before that consummation. Unless the unit's owner or his or her agent receives a replacement statement, the unit's owner or his or her agent may rely upon the accuracy of the information set forth in a statement provided by the association for the resale.]~~

(c) A copy of the current operating budget of the association and current year-to-date financial statement for the association, which must include a summary of the reserves of the association required by NRS 116.31152 and which must include, without limitation, a summary of the information described in paragraphs (a) to (e), inclusive, of subsection 3 of NRS 116.31152.

(d) A statement of any unsatisfied judgments or pending legal actions against the association and the status of any pending legal actions relating to the common-interest community of which the unit's owner has actual knowledge.

(e) A statement of any transfer fees, transaction fees or any other fees associated with the resale of a unit.

(f) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

2. The purchaser may, by written notice, cancel the contract of purchase until midnight of the fifth calendar day following the date of receipt of the resale package described in subsection 1, and the contract for purchase must contain a provision to that effect. If the purchaser elects to cancel a contract pursuant to this subsection, the purchaser must hand deliver the notice of cancellation to the unit's owner or his or her authorized agent or mail the notice of cancellation by prepaid United States mail to the unit's owner or his or her authorized agent. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly. If the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to:

(a) Cancel the contract pursuant to this subsection; or

(b) Damages, rescission or other relief based solely on the ground that the unit's owner or his or her authorized agent failed to furnish the resale package, or any portion thereof, as required by this section.

3. Within 10 days after receipt of a written request by a unit's owner or his or her authorized agent, the association shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package:

(a) Copies of the documents required pursuant to paragraphs (a) and (c) of subsection 1; and

(b) A certificate containing the information necessary to enable the unit's owner to comply with paragraphs (b), (d), (e) and (f) of subsection 1.

4. If the association furnishes the documents and certificate pursuant to subsection 3:

(a) The unit's owner or his or her authorized agent shall include the documents and certificate in the resale package provided to the purchaser, and neither the unit's owner nor his or her authorized agent is liable to the purchaser for any erroneous information provided by the association and included in the documents and certificate.

(b) The association may charge the unit's owner a reasonable fee to cover the cost of preparing the certificate furnished pursuant to subsection 3. Such a fee must be based on the actual cost the association incurs to fulfill the requirements of this section in preparing the certificate. The Commission shall adopt regulations establishing the maximum amount of the fee that an association may charge for preparing the certificate.

(c) The other documents furnished pursuant to subsection 3 must be provided in electronic format ~~[at no charge]~~ to the unit's owner. ~~[If, if]~~ *The association may charge the unit's owner a fee, not to exceed $20, to provide such documents in electronic format. If* the association is unable to provide such documents in electronic format, the association may charge the unit's owner a reasonable fee, not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter, to cover the cost of copying.

(d) Except for the fees allowed pursuant to paragraphs (b) and (c), the association may not charge the unit's owner any other fees for preparing or furnishing the documents and certificate pursuant to subsection 3.

5. Neither a purchaser nor the purchaser's interest in a unit is liable for any unpaid assessment or fee greater than the amount set forth in the documents and certificate prepared by the association. If the association fails to furnish the documents and certificate within

the 10 days allowed by this section, the purchaser is not liable for the delinquent assessment.

6. Upon the request of a unit's owner or his or her authorized agent, or upon the request of a purchaser to whom the unit's owner has provided a resale package pursuant to this section or his or her authorized agent, the association shall make the entire study of the reserves of the association which is required by NRS 116.31152 reasonably available for the unit's owner, purchaser or authorized agent to inspect, examine, photocopy and audit. The study must be made available at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties.

7. A unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit may request a statement of demand from the association. Not later than 10 days after receipt of a written request from the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit for a statement of demand, the association shall furnish a statement of demand to the person who requested the statement. The association may charge a fee of not more than $150 to prepare and furnish a statement of demand pursuant to this subsection and an additional fee of not more than $100 to furnish a statement of demand within 3 days after receipt of a written request for a statement of demand. The statement of demand:

(a) Must set forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner; and

(b) Remains effective for the period specified in the statement of demand, which must not be less than 15 business days after the date of delivery by the association to the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit, whichever is applicable.

8. If the association becomes aware of an error in a statement of demand furnished pursuant to subsection 7 during the period in which the statement of demand is effective but before the consummation of a resale for which a resale package was furnished pursuant to subsection 1, the association must deliver a replacement statement of demand to the person who requested the statement of demand. Unless the person who requested the statement of demand receives a replacement statement of demand, the person may rely upon the accuracy of the information set forth

in the statement of demand provided by the association for the resale. Payment of the amount set forth in the statement of demand constitutes full payment of the amount due from the selling unit's owner.

Amendment No. 777

Assembly Amendment to Senate Bill No. 280 First Reprint	(BDR 10-863)
Proposed by: Assembly Committee on Judiciary	
Amends: Summary: No Title: Yes Preamble: No Joint Sponsorship: No Digest: Yes	

ASSEMBLY ACTION	Initial and Date	SENATE ACTION	Initial and Date
Adopted ☐ Lost ☐		Adopted ☐ Lost ☐	
Concurred In ☐ Not ☐		Concurred In ☐ Not ☐	
Receded ☐ Not ☐		Receded ☐ Not ☐	

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) ***green bold italic underlining*** is new language proposed in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill that is proposed to be retained in this amendment; and (6) green bold underlining is newly added transitory language.

BFG/BAW Date: 5/24/2013

S.B. No. 280—Revises provisions relating to common-interest communities.
(BDR 10-863)

SENATE BILL NO. 280–SENATOR KIHUEN

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to common-interest communities. (BDR 10-863)

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

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

AN ACT relating to common-interest communities; revising provisions governing ~~the collection of past due financial obligations owed to an association~~ an association's lien on a unit; revising provisions governing ~~payments received by~~ the payment of financial obligations to an association ; ~~from a unit's owner~~ revising provisions governing the foreclosure of an association's lien by sale; requiring an association to provide a statement concerning certain amounts due to the association under certain circumstances; authorizing an association to charge a fee for such a statement; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. ~~(NRS 116.3116)~~ Existing law authorizes the association to foreclose its lien by sale of the unit and prescribes the procedure for such a foreclosure. ~~(NRS 116.31162-116.31168)~~ This bill revises provisions governing (1) the collection of past due financial obligations owed to a homeowners' association; and (2) foreclosure by a homeowners' association.

~~Section 1 of this bill establishes procedures which a homeowners' association must follow before initiating the process of foreclosing a unit's lien or commencing any other debt collection activity. Under section 1, before initiating the foreclosure process or commencing any other debt collection activity, (1) a homeowners' association must mail to the unit's owner a statement and two letters that provide certain information concerning the past due obligation and (2) the executive board of the homeowners' association must conduct a hearing to verify the past due obligation. Sections 1 and 7 of this bill require (1) the executive board to meet in executive session to conduct a hearing to verify a past due obligation, (2) the unit's owner to be allowed to attend and present evidence at the hearing, and (3) that the total number of votes for and against a determination of the executive board in the hearing to verify the past due obligation and the assessor's parcel number of the unit be recorded in the minutes of the meeting. Under section 1, a homeowners' association is required to offer a repayment plan to a unit's owner who owes a past due obligation to the association and a unit's owner may accept such a repayment plan at any time before the foreclosure sale of the unit or the commencement of a civil action to collect the past due obligation. Finally, section 1 authorizes an association to charge the unit's owner (1) a fee of not more than $20 for a repayment plan;~~

~~and (2) a fee of not more than $50 for any costs incurred by the association in complying with the requirements of section 5.~~

~~Section 8 of this bill requires the collection policy of a homeowner's association to provide an administrative process by which a unit's owner may contest a past due obligation.~~

~~Section 9 of this bill revises provisions governing foreclosure by homeowner's associations. Section 9 prohibits the association from foreclosing a unit for a failure to pay when due assessments for common expenses unless the amount of such delinquent assessments, excluding acceleration and any interest, charges for late payment, fines or costs of collecting the assessment, is $1,000 or more or exceeds 12 months of assessments, whichever is less. Section 14 also provides that for a unit containing owner occupied housing, a foreclosure of the unit by a homeowner's association is subject to a right of redemption for the unit's owner. Under section 14, the redemption amount must include assessment and property taxes paid after the foreclosure sale and the redemption period is 120 days. Under section 15, the notice of foreclosure sale provided by a homeowner's association or a person conducting the foreclosure sale must provide notice of the right of redemption.~~

~~Section 5 of this bill prohibits an association from refusing to accept any payment from a unit's owner. Section 5 further requires an association to apply any payment received from a unit's owner to any past due assessments, including late charges, costs of collecting and interest owed by the unit's owner before the payment is applied to any other financial obligation owed by the unit's owner unless the unit's owner directs a different application of the payment.~~ Generally, the association's lien is not prior to a first security interest on the unit recorded before the date on which the amount sought to be enforced became delinquent. However, the association's lien is prior to the first security interest on the unit to the extent of certain maintenance and abatement charges and a certain amount of assessments for common expenses. The portion of the association's lien that is prior to the first security interest on the unit is commonly referred to as the "super-priority lien." (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168)

This bill revises provisions governing the association's lien on a unit and the foreclosure of the association's lien. Section 10 of this bill provides that the association does not have a priority lien over the first security interest when the association forecloses its lien and, thus, the foreclosure of the association's lien does not extinguish the first security interest on the unit. However, under section 7 of this bill, if the holder of the first security interest forecloses on a unit, the association has a lien on the unit which is prior to the first security interest. This priority lien consists of the amounts included in the "super-priority lien" under existing law and the costs of collecting the assessments included in the "super-priority lien," unless the federal regulations adopted by the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association or the Department of Veterans Affairs require a shorter period of priority or prohibit the inclusion of collection costs in the "super-priority lien." Section 7 also limits the amount of the costs of collecting included in the lien upon the foreclosure of the first security interest.

Under section 8 of this bill, the association may not foreclose its lien by sale based on unpaid collection costs. Section 9 of this bill requires that certain notice of the foreclosure of the association's lien be provided by certified or registered mail, return receipt requested, rather than by first-class mail.

Section 3 of this bill: (1) sets forth the order in which an association must apply a payment made by a unit's owner who is delinquent in the payment of assessments, unless a contract between the association and the unit's owner provides otherwise; and (2) prohibits the association or its agent from refusing to accept a partial payment from a unit's owner or any holder of a first security interest encumbering the interest of the unit's owner because the amount tendered is less than the amount owed.

Section 11 of this bill authorizes a unit's owner or the authorized agent of a unit's owner to request from the association a statement concerning certain amounts owed to the association. Under section 11, the association may charge certain fees for such a statement. Section 11 also revises provisions governing the resale package provided to a prospective purchaser of a unit and authorizes the association to charge a fee for providing in electronic format certain documents related to the resale package.

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

Delete existing sections 1 through 11 of this bill and replace with the following new sections 1 through 11:

Section 1. Chapter 116 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. As used in this section and NRS 116.3116 to 116.31168, inclusive, and section 3 of this act, unless the context otherwise requires, "first security interest" means a first security interest described in paragraph (b) of subsection 2 of NRS 116.3116.

Sec. 3. 1. Unless the parties agree otherwise, the association shall apply any sums paid by a unit's owner who is delinquent in paying assessments in the following order:

(a) Unpaid assessments;

(b) Charges for late payment of assessments;

(c) Costs of collecting past due assessments charged to the unit's owner pursuant to NRS 116.310313; and

(d) All other unpaid fees, charges, fines, penalties, costs of collecting charged to a unit's owner pursuant to NRS 116.310313, interest and late charges.

2. The association or its agent shall not refuse to accept a partial payment from a unit's owner or any holder of a first security interest encumbering the interest of the unit's owner because the amount tendered is less than the amount owed.

Sec. 4. NRS 116.1203 is hereby amended to read as follows:

116.1203 1. Except as otherwise provided in subsections 2 and 3, if a planned community contains no more than 12 units and is not subject to any developmental rights, it is subject only to NRS 116.1106 and 116.1107 unless the declaration provides that this entire chapter is applicable.

2. The provisions of NRS 116.12065 and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that the definitions are necessary to construe any of those provisions, apply to a residential planned community containing more than 6 units.

3. Except for NRS 116.3104, 116.31043, 116.31046 and 116.31138, the provisions of NRS 116.3101 to 116.350, inclusive, *and sections 2 and 3 of this act* and the definitions set forth in NRS 116.005 to 116.095, inclusive, to the extent that such definitions are necessary in construing any of those provisions, apply to a residential planned community containing more than 6 units.

Sec. 5. NRS 116.12075 is hereby amended to read as follows:

116.12075 1. The provisions of this chapter do not apply to a nonresidential condominium except to the extent that the declaration for the nonresidential condominium provides that:

(a) This entire chapter applies to the condominium;

(b) Only the provisions of NRS 116.001 to 116.2122, inclusive, and 116.3116 to 116.31168, inclusive, *and sections 2 and 3 of this act* apply to the condominium; or

(c) Only the provisions of NRS 116.3116 to 116.31168, inclusive, *and sections 2 and 3 of this act* apply to the condominium.

2. If this entire chapter applies to a nonresidential condominium, the declaration may also require, subject to NRS 116.1112, that:

(a) Notwithstanding NRS 116.3105, any management, maintenance operations or employment contract, lease of recreational or parking areas or facilities and any other contract or lease between the association and a declarant or an affiliate of a declarant continues in force after the declarant turns over control of the association; and

(b) Notwithstanding NRS 116.1104 and subsection 3 of NRS 116.311, purchasers of units must execute proxies, powers of attorney or similar devices in favor of the declarant regarding particular matters enumerated in those instruments.

Sec. 6. NRS 116.31068 is hereby amended to read as follows:

116.31068 1. Except as otherwise provided in subsection 3, an association shall deliver any notice required to be given by the association under this chapter to any mailing or electronic mail address a unit's owner designates. Except as otherwise provided in subsection 3, if a unit's owner has not designated a mailing or electronic mail address to which a notice must be delivered, the association may deliver notices by:

(a) Hand delivery to each unit's owner;

(b) Hand delivery, United States mail, postage paid, or commercially reasonable delivery service to the mailing address of each unit;

(c) Electronic means, if the unit's owner has given the association an electronic mail address; or

(d) Any other method reasonably calculated to provide notice to the unit's owner.

2. The ineffectiveness of a good faith effort to deliver notice by an authorized means does not invalidate action taken at or without a meeting.

3. The provisions of this section do not apply:

(a) To a notice required to be given pursuant to NRS 116.3116 to 116.31168, inclusive [.] *, and sections 2 and 3 of this act;* or

(b) If any other provision of this chapter specifies the manner in which a notice must be given by an association.

Sec. 7. NRS 116.3116 is hereby amended to read as follows:

116.3116 1. The association has a 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 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, 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.

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.

[.

3. The *association has a* lien *which* is [also] prior to [all security interests described in paragraph (b)] *the first security interest* to the extent of [any] :

(a) Any charges incurred by the association on a unit pursuant to NRS 116.310312 *;* and ~~to the extent of~~

(b) Except as otherwise provided in this paragraph, 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,~~ *a trustee's sale or foreclosure sale of the unit to enforce the first security interest and the costs of collecting those assessments which are charged to a unit's owner pursuant to NRS 116.310313.* If federal regulations adopted by the Federal Home Loan Mortgage Corporation *,* ~~or~~ the Federal National Mortgage Association *or the Department of Veterans Affairs* require a shorter period of priority for the lien ~~,~~ *or prohibit the inclusion of costs of collecting in the lien,* the ~~period during which~~ *amount of* the lien *which* is prior to ~~all security interests described in paragraph (b)~~ *the first security interest pursuant to this paragraph* 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~~ *a trustee's sale or foreclosure sale of the unit to enforce the first security interest. The amount of the costs of collecting included in the lien pursuant to this paragraph must not exceed the amounts set forth in the regulations adopted by the Commission pursuant to NRS 116.310313, except that the amount included in the lien to recover the actual costs charged to the association or a person acting on behalf of the association to collect a past due obligation by a person who is not an officer, director, agent or affiliate of the community manager of the association or of an agent of the association, including, without limitation, the cost of a trustee's sale guarantee and other title costs, recording costs, posting and publishing costs, sale costs, mailing costs, express delivery costs and skip trace fees, must not exceed $500.*

4. The provisions of subsections 2 and 3 do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

~~(c)~~ *5. The holder of the first security interest or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of the first security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.*

6. 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.

~~(d)~~ *7.* 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.

~~(e)~~ *8.* 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)~~ *9.* This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

~~(7)~~ *10.* A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

~~(8)~~ *11.* The association, upon written request, 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.

~~(9)~~ *12.* 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.

~~(10)~~ *13.* In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

Sec. 8. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection 4, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

whichever date occurs later.

4. The association may not foreclose a lien by sale based on [a]:

(a) The costs of collecting charged to a unit's owner pursuant to NRS 116.310313.

(b) A fine or penalty for a violation of the governing documents of the association unless:

[(a)] *(1)* 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)] *(2)* The penalty is imposed for failure to adhere to a schedule required pursuant to NRS 116.310305.

Sec. 9. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by [first-class mail] *certified or registered mail, return receipt requested,* to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

> WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 10. NRS 116.31164 is hereby amended to read as follows:

116.31164 1. The sale must be conducted in the county in which the common-interest community or part of it is situated, and may be conducted by the association, its agent or attorney, or a title insurance company or escrow agent licensed to do business in this State, except that the sale may be made at the office of the association if the notice of the sale so provided, whether the unit is located within the same county as the office of the association or not. The association or other person conducting the sale may from time to time postpone the sale by such advertisement and notice as it considers reasonable or, without further advertisement or notice, by proclamation made to the persons assembled at the time and place previously set and advertised for the sale.

2. On the day of sale originally advertised or to which the sale is postponed, at the time and place specified in the notice or postponement, the person conducting the sale may sell the unit at public auction to the highest cash bidder. Unless otherwise provided in the declaration or by agreement, the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien.

3. After the sale, the person conducting the sale shall:

(a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, a deed without warranty which conveys to the grantee all title of the unit's owner to the unit;

(b) Deliver a copy of the deed to the Ombudsman within 30 days after the deed is delivered to the purchaser, or his or her successor or assign; and

(c) Apply the proceeds of the sale for the following purposes in the following order:

(1) The reasonable expenses of sale;

(2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;

(3) Satisfaction of the association's lien;

(4) Satisfaction in the order of priority of any subordinate claim of record; and

(5) Remittance of any excess to the unit's owner.

4. The foreclosure by sale of the association's lien does not extinguish the rights of the holder of the first security interest.

Sec. 11. NRS 116.4109 is hereby amended to read as follows:

116.4109 1. Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under subsection 2 of NRS 116.4101, a unit's owner or his or her authorized agent shall, at the expense of the unit's owner, furnish to a purchaser a resale package containing all of the following:

(a) A copy of the declaration, other than any plats, the bylaws, the rules or regulations of the association and the information statement required by NRS 116.41095.

(b) A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner. ~~[The statement remains effective for the period specified in the statement which must not be less than 15 working days from the date of delivery by the association to the unit's owner or his or her agent. If the association becomes aware of an error in the statement during the period in which the statement is effective but before the consummation of the resale, the association must deliver a replacement statement to the unit's owner or his or her agent and obtain an acknowledgment in writing by the unit's owner or his or her agent before that consummation. Unless the unit's owner or his or her agent receives a replacement statement, the unit's owner or his or her agent may rely upon the accuracy of the information set forth in a statement provided by the association for the resale.]~~

(c) A copy of the current operating budget of the association and current year-to-date financial statement for the association, which must include a summary of the reserves of the association required by NRS 116.31152 and which must include, without limitation, a summary of the information described in paragraphs (a) to (e), inclusive, of subsection 3 of NRS 116.31152.

(d) A statement of any unsatisfied judgments or pending legal actions against the association and the status of any pending legal actions relating to the common-interest community of which the unit's owner has actual knowledge.

(e) A statement of any transfer fees, transaction fees or any other fees associated with the resale of a unit.

(f) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges or penalties, interest rates on delinquent

assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

2. The purchaser may, by written notice, cancel the contract of purchase until midnight of the fifth calendar day following the date of receipt of the resale package described in subsection 1, and the contract for purchase must contain a provision to that effect. If the purchaser elects to cancel a contract pursuant to this subsection, the purchaser must hand deliver the notice of cancellation to the unit's owner or his or her authorized agent or mail the notice of cancellation by prepaid United States mail to the unit's owner or his or her authorized agent. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly. If the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to:

(a) Cancel the contract pursuant to this subsection; or

(b) Damages, rescission or other relief based solely on the ground that the unit's owner or his or her authorized agent failed to furnish the resale package, or any portion thereof, as required by this section.

3. Within 10 days after receipt of a written request by a unit's owner or his or her authorized agent, the association shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package:

(a) Copies of the documents required pursuant to paragraphs (a) and (c) of subsection 1; and

(b) A certificate containing the information necessary to enable the unit's owner to comply with paragraphs (b), (d), (e) and (f) of subsection 1.

4. If the association furnishes the documents and certificate pursuant to subsection 3:

(a) The unit's owner or his or her authorized agent shall include the documents and certificate in the resale package provided to the purchaser, and neither the unit's owner nor his or her authorized agent is liable to the purchaser for any erroneous information provided by the association and included in the documents and certificate.

(b) The association may charge the unit's owner a reasonable fee to cover the cost of preparing the certificate furnished pursuant to subsection 3. Such a fee must be based on the actual cost the association incurs to fulfill the requirements of this section in preparing the certificate. The Commission shall adopt regulations establishing the maximum amount of the fee that an association may charge for preparing the certificate.

(c) The other documents furnished pursuant to subsection 3 must be provided in electronic format ~~free of charge~~ to the unit's owner. ~~, or, if~~ *The association may charge the unit's owner a fee, not to exceed $20, to provide such documents in electronic format. If* the association is unable to provide such documents in electronic format, the association may charge the unit's owner a reasonable fee, not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter, to cover the cost of copying.

(d) Except for the fees allowed pursuant to paragraphs (b) and (c), the association may not charge the unit's owner any other fees for preparing or furnishing the documents and certificate pursuant to subsection 3.

5. Neither a purchaser nor the purchaser's interest in a unit is liable for any unpaid assessment or fee greater than the amount set forth in the documents and certificate prepared by the association. If the association fails to furnish the documents and certificate within the 10 days allowed by this section, the purchaser is not liable for the delinquent assessment.

6. Upon the request of a unit's owner or his or her authorized agent, or upon the request of a purchaser to whom the unit's owner has provided a resale package

pursuant to this section or his or her authorized agent, the association shall make the entire study of the reserves of the association which is required by NRS 116.31152 reasonably available for the unit's owner, purchaser or authorized agent to inspect, examine, photocopy and audit. The study must be made available at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties.

7. A unit's owner or the authorized agent of the unit's owner may request a statement of demand from the association. Not later than 10 days after receipt of a written request from a unit's owner or the authorized agent of the unit's owner for a statement of demand, the association shall furnish a statement of demand to the unit's owner or the authorized agent. The association may charge a fee of not more than $150 to prepare and furnish a statement of demand pursuant to this subsection and an additional fee of not more than $100 to furnish a statement of demand within 3 days after receipt of a written request for a statement of demand. The statement of demand:

(a) Must set forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner; and

(b) Remains effective for the period specified in the statement of demand, which must not be less than 15 business days after the date of delivery by the association to the unit's owner or authorized agent of the unit's owner.

8. If the association becomes aware of an error in a statement of demand furnished pursuant to subsection 7 during the period in which the statement of demand is effective but before the consummation of a resale for which a resale package was furnished pursuant to subsection 1, the association must deliver a replacement statement of demand to the unit's owner or the authorized agent of the unit's owner who requested the statement of demand. Unless the unit's owner or the authorized agent of the unit's owner who requested the statement of demand receives a replacement statement of demand, the unit's owner or authorized agent may rely upon the accuracy of the information set forth in the statement of demand provided by the association for the resale. Payment of the amount set forth in the statement of demand constitutes full payment of the amount due from the selling unit's owner.

Senate Bill No. 280–Senator Kihuen

CHAPTER.....

AN ACT relating to common-interest communities; authorizing the establishment of an impound account for the payment of assessments under certain circumstances; revising provisions governing the collection of past due financial obligations owed to an association; revising provisions governing the foreclosure of an association's lien by sale; requiring an association to provide a statement concerning certain amounts due to the association under certain circumstances; authorizing an association to charge a fee for such a statement; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, a homeowners' association has a lien on a unit for certain amounts due to the association. (NRS 116.3116) Existing law authorizes the association to foreclose its lien by sale and prescribes the procedures for such a foreclosure. (NRS 116.31162-116.31168)

Section 7 of this bill authorizes the establishment of an impound account for advance contributions for the payment of assessments. Under section 8 of this bill, not earlier than 60 days after a unit's owner becomes delinquent on a payment owed to the association and before the association mails a notice of delinquent assessment or takes any other action to collect a past due obligation, the association must mail a notice to the unit's owner setting forth the fees that may be charged if the unit's owner fails to pay the past due obligation, a proposed repayment plan and certain information concerning the procedure for requesting a hearing before the executive board.

Section 11 of this bill authorizes a unit's owner, the authorized agent of a unit's owner or the holder of a security interest on the unit to request from the association a statement concerning certain amounts owed to the association. Under section 11, the association may charge certain fees for such a statement. Section 11 also revises provisions governing the resale package provided to a prospective purchaser of a unit and authorizes the association to charge a fee for providing in electronic format certain documents related to the resale package.

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

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

Sections 1-6. (Deleted by amendment.)

Sec. 7. NRS 116.3116 is hereby amended to read as follows:

116.3116 1. The association has a 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 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, 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.

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 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.

3. *The holder of the security interest described in paragraph (b) of subsection 2 or the holder's authorized agent may establish an escrow account, loan trust account or other impound account*

for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of that security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.

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 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, 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.

~~[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.

~~[10.]~~ *11.* In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

Sec. 8. NRS 116.31162 is hereby amended to read as follows:

116.31162 1. Except as otherwise provided in subsection ~~[4,]~~ *5*, in a condominium, in a planned community, in a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, or in a cooperative where the owner's interest in a unit is personal property under NRS 116.1105 and the declaration provides that a lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the association may foreclose its lien by sale after all of the following occur:

(a) The association has mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest, at his or her address, if known, and at the address of the unit, a notice of delinquent assessment which states the amount of the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116, a description of the unit against which the lien is imposed and the name of the record owner of the unit.

(b) Not less than 30 days after mailing the notice of delinquent assessment pursuant to paragraph (a), the association or other person conducting the sale has executed and caused to be recorded, with the county recorder of the county in which the common-interest community or any part of it is situated, a notice of default and election to sell the unit to satisfy the lien which must contain the same information as the notice of delinquent assessment and which must also comply with the following:

(1) Describe the deficiency in payment.

(2) State the name and address of the person authorized by the association to enforce the lien by sale.

(3) Contain, in 14-point bold type, the following warning:

WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE!

(c) The unit's owner or his or her successor in interest has failed to pay the amount of the lien, including costs, fees and expenses incident to its enforcement, for 90 days following the recording of the notice of default and election to sell.

2. The notice of default and election to sell must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association.

3. The period of 90 days begins on the first day following:

(a) The date on which the notice of default is recorded; or

(b) The date on which a copy of the notice of default is mailed by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and at the address of the unit,

↳ whichever date occurs later.

4. *An association may not mail to a unit's owner or his or her successor in interest a letter of its intent to mail a notice of delinquent assessment pursuant to paragraph (a) of subsection 1, mail the notice of delinquent assessment or take any other action to collect a past due obligation from a unit's owner or his or her successor in interest unless, not earlier than 60 days after the obligation becomes past due, the association mails to the address on file for the unit's owner:*

(a) A schedule of the fees that may be charged if the unit's owner fails to pay the past due obligation;

(b) A proposed repayment plan; and

(c) A notice of the right to contest the past due obligation at a hearing before the executive board and the procedures for requesting such a hearing.

5. 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.

Sec. 9. NRS 116.311635 is hereby amended to read as follows:

116.311635 1. The association or other person conducting the sale shall also, after the expiration of the 90 days and before selling the unit:

(a) Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution, except that in lieu of following the procedure for service on a judgment debtor pursuant to NRS 21.130, service must be made on the unit's owner as follows:

(1) A copy of the notice of sale must be mailed, on or before the date of first publication or posting, by certified or registered mail, return receipt requested, to the unit's owner or his or her successor in interest at his or her address, if known, and to the address of the unit; and

(2) A copy of the notice of sale must be served, on or before the date of first publication or posting, in the manner set forth in subsection 2; and

(b) Mail, on or before the date of first publication or posting, a copy of the notice by ~~[first-class mail]~~ *certified or registered mail, return receipt requested,* to:

(1) Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163;

(2) The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable; and

(3) The Ombudsman.

2. In addition to the requirements set forth in subsection 1, a copy of the notice of sale must be served:

(a) By a person who is 18 years of age or older and who is not a party to or interested in the sale by personally delivering a copy of the notice of sale to an occupant of the unit who is of suitable age; or

(b) By posting a copy of the notice of sale in a conspicuous place on the unit.

3. Any copy of the notice of sale required to be served pursuant to this section must include:

(a) The amount necessary to satisfy the lien as of the date of the proposed sale; and

(b) The following warning in 14-point bold type:

WARNING! A SALE OF YOUR PROPERTY IS IMMINENT! UNLESS YOU PAY THE AMOUNT SPECIFIED IN THIS NOTICE BEFORE THE SALE DATE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE. YOU MUST ACT BEFORE THE SALE DATE. IF YOU HAVE ANY QUESTIONS, PLEASE CALL (name and telephone number of the contact person for the association). IF YOU NEED ASSISTANCE, PLEASE CALL THE FORECLOSURE SECTION OF THE OMBUDSMAN'S OFFICE, NEVADA REAL ESTATE DIVISION, AT (toll-free telephone number designated by the Division) IMMEDIATELY.

4. Proof of service of any copy of the notice of sale required to be served pursuant to this section must consist of:

(a) A certificate of mailing which evidences that the notice was mailed through the United States Postal Service; or

(b) An affidavit of service signed by the person who served the notice stating:

(1) The time of service, manner of service and location of service; and

(2) The name of the person served or, if the notice was not served on a person, a description of the location where the notice was posted on the unit.

Sec. 10. (Deleted by amendment.)

Sec. 11. NRS 116.4109 is hereby amended to read as follows:

116.4109 1. Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under subsection 2 of NRS 116.4101, a unit's owner or his or her authorized agent shall, at the expense of the unit's owner, furnish to a purchaser a resale package containing all of the following:

(a) A copy of the declaration, other than any plats, the bylaws, the rules or regulations of the association and the information statement required by NRS 116.41095.

(b) A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner. ~~[The statement remains effective for the period specified in the statement, which must not be less than 15 working days from the date of delivery by the association to the unit's owner or his or her agent. If the association becomes aware of an error in~~

~~the statement during the period in which the statement is effective but before the consummation of the resale, the association must deliver a replacement statement to the unit's owner or his or her agent and obtain an acknowledgment in writing by the unit's owner or his or her agent before that consummation. Unless the unit's owner or his or her agent receives a replacement statement, the unit's owner or his or her agent may rely upon the accuracy of the information set forth in a statement provided by the association for the resale.~~]

(c) A copy of the current operating budget of the association and current year-to-date financial statement for the association, which must include a summary of the reserves of the association required by NRS 116.31152 and which must include, without limitation, a summary of the information described in paragraphs (a) to (e), inclusive, of subsection 3 of NRS 116.31152.

(d) A statement of any unsatisfied judgments or pending legal actions against the association and the status of any pending legal actions relating to the common-interest community of which the unit's owner has actual knowledge.

(e) A statement of any transfer fees, transaction fees or any other fees associated with the resale of a unit.

(f) In addition to any other document, a statement describing all current and expected fees or charges for each unit, including, without limitation, association fees, fines, assessments, late charges or penalties, interest rates on delinquent assessments, additional costs for collecting past due fines and charges for opening or closing any file for each unit.

2. The purchaser may, by written notice, cancel the contract of purchase until midnight of the fifth calendar day following the date of receipt of the resale package described in subsection 1, and the contract for purchase must contain a provision to that effect. If the purchaser elects to cancel a contract pursuant to this subsection, the purchaser must hand deliver the notice of cancellation to the unit's owner or his or her authorized agent or mail the notice of cancellation by prepaid United States mail to the unit's owner or his or her authorized agent. Cancellation is without penalty, and all payments made by the purchaser before cancellation must be refunded promptly. If the purchaser has accepted a conveyance of the unit, the purchaser is not entitled to:

(a) Cancel the contract pursuant to this subsection; or

(b) Damages, rescission or other relief based solely on the ground that the unit's owner or his or her authorized agent failed to

furnish the resale package, or any portion thereof, as required by this section.

3. Within 10 days after receipt of a written request by a unit's owner or his or her authorized agent, the association shall furnish all of the following to the unit's owner or his or her authorized agent for inclusion in the resale package:

(a) Copies of the documents required pursuant to paragraphs (a) and (c) of subsection 1; and

(b) A certificate containing the information necessary to enable the unit's owner to comply with paragraphs (b), (d), (e) and (f) of subsection 1.

4. If the association furnishes the documents and certificate pursuant to subsection 3:

(a) The unit's owner or his or her authorized agent shall include the documents and certificate in the resale package provided to the purchaser, and neither the unit's owner nor his or her authorized agent is liable to the purchaser for any erroneous information provided by the association and included in the documents and certificate.

(b) The association may charge the unit's owner a reasonable fee to cover the cost of preparing the certificate furnished pursuant to subsection 3. Such a fee must be based on the actual cost the association incurs to fulfill the requirements of this section in preparing the certificate. The Commission shall adopt regulations establishing the maximum amount of the fee that an association may charge for preparing the certificate.

(c) The other documents furnished pursuant to subsection 3 must be provided in electronic format ~~[at no charge]~~ to the unit's owner. ~~[or, if]~~ *The association may charge the unit's owner a fee, not to exceed $20, to provide such documents in electronic format. If* the association is unable to provide such documents in electronic format, the association may charge the unit's owner a reasonable fee, not to exceed 25 cents per page for the first 10 pages, and 10 cents per page thereafter, to cover the cost of copying.

(d) Except for the fees allowed pursuant to paragraphs (b) and (c), the association may not charge the unit's owner any other fees for preparing or furnishing the documents and certificate pursuant to subsection 3.

5. Neither a purchaser nor the purchaser's interest in a unit is liable for any unpaid assessment or fee greater than the amount set forth in the documents and certificate prepared by the association. If the association fails to furnish the documents and certificate within

the 10 days allowed by this section, the purchaser is not liable for the delinquent assessment.

6. Upon the request of a unit's owner or his or her authorized agent, or upon the request of a purchaser to whom the unit's owner has provided a resale package pursuant to this section or his or her authorized agent, the association shall make the entire study of the reserves of the association which is required by NRS 116.31152 reasonably available for the unit's owner, purchaser or authorized agent to inspect, examine, photocopy and audit. The study must be made available at the business office of the association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county, within one of those counties.

7. A unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit may request a statement of demand from the association. Not later than 10 days after receipt of a written request from the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit for a statement of demand, the association shall furnish a statement of demand to the person who requested the statement. The association may charge a fee of not more than $150 to prepare and furnish a statement of demand pursuant to this subsection and an additional fee of not more than $100 to furnish a statement of demand within 3 days after receipt of a written request for a statement of demand. The statement of demand:

(a) Must set forth the amount of the monthly assessment for common expenses and any unpaid obligation of any kind, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently due from the selling unit's owner; and

(b) Remains effective for the period specified in the statement of demand, which must not be less than 15 business days after the date of delivery by the association to the unit's owner, the authorized agent of the unit's owner or the holder of a security interest on the unit, whichever is applicable.

8. If the association becomes aware of an error in a statement of demand furnished pursuant to subsection 7 during the period in which the statement of demand is effective but before the consummation of a resale for which a resale package was furnished pursuant to subsection 1, the association must deliver a replacement statement of demand to the person who requested the statement of demand. Unless the person who requested the

statement of demand receives a replacement statement of demand, the person may rely upon the accuracy of the information set forth in the statement of demand provided by the association for the resale. Payment of the amount set forth in the statement of demand constitutes full payment of the amount due from the selling unit's owner.

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ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE HARBOR PLACE TRUST,

Plaintiff,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, et al.,

Defendants.

CASE NO.: A-13-687846
DEPARTMENT NO. XX

ORDER ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

(1) This matter comes before the Court on a Motion by Defendant Deutsche Bank National Trust Company to Dismiss the Complaint or, in the alternative, for Summary Judgment.

(2) This dispute relates to residential property located at 5005 Paradise Harbor Place, North Las Vegas, Nevada ("the Property"), formerly owned by Mimi Ralph. (Complaint, paragraphs 1-3, 6). According to the Complaint, the Property is located within a common-interest community governed by a homeowners' association known as the Tierra de las Palmas Owners Association ("HOA"). (Complaint, para. 3). The Plaintiff avers that it obtained title to the Property from Ms. Ralph by way of foreclosure deed recorded June 21, 2012 after the HOA initiated a foreclosure pursuant to the provisions of NRS Chapter 116 after Ms. Ralph failed to pay monthly

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assessments required by the HOA. (Complaint, paras. 2-4). The Defendant is the beneficiary of a Deed of Trust recorded against the Property on November 7, 2003. (Complaint, para. 4). The Complaint asserts that the foreclosure initiated by the HOA pursuant to NRS Chapter 116 extinguished any interest in the property held by the Defendant by operation of law, and seeks declaratory relief from this Court to that effect.

(3) By this Motion, the Defendant seeks a determination by this Court that the foreclosure initiated by the HOA pursuant to NRS Chapter 116 did not extinguish its prior interest in the Property.

(4) The parties appear to agree that the facts relevant to this action are not in dispute. Therefore, the Court is confronted with a pure question of law, and specifically a question of statutory interpretation.

(5) The question whether a foreclosure initiated by a homeowners' association pursuant to the provisions of NRS Chapter 116 extinguishes any and all prior encumbrances upon a property is one that has been litigated before numerous Departments of this Court as well as before different judges in the U.S. District Court for the District of Nevada. The Court is aware that the decisions of various judges regarding the answer to this question have been inconsistent.

(6) In *SFR Investments Pool 1 LLC v. U.S. Bank National Association*, Case No. A-13-678858, this Court solicited briefing *in amicus curaie* from the Real Property Section of the State Bar of Nevada, as well as from the Nevada Bankers' Association, regarding the question before the Court. (*See*, Amicus Curiae Brief of the Real Property Section of the State Bar of Nevada filed August 1, 2013; Amicus Curiae Brief of the Nevada Bankers' Association filed August 1, 2013). The Court was particularly interested in the views of the Real Property Section because its Chairperson was one of the drafters of the model legislation that ultimately became NRS Chapter 116 as well as one of the principal witnesses before the Legislature when the bill was considered and subsequently amended. The briefing submitted by the Real Property Section argues

that the unambiguous intent of the model legislation that was presented to the Nevada Legislature and became NRS Chapter 116 was that a foreclosure initiated by a homeowners' association based upon unpaid assessments extinguishes any and all prior encumbrances upon the property. The Court also notes the existence of a December 12, 2012 administrative opinion of the Nevada Department of Business and Industry which reaches the same conclusion.

(7) In this Court's "Order Denying Defendant's Motion to Dismiss" dated May 30, 2013, in *First 100 LLC v. Burns*, Case No. A677693, this Court concluded that, as a matter of law, the provisions of NRS Chapter 116 must be interpreted such that a foreclosure upon real property initiated by a homeowners' association based upon unpaid assessments extinguishes all other prior encumbrances on the property except to the extent that other lienholders also participate in the foreclosure proceedings. The Plaintiff urges this Court to adhere to the same reasoning in the case at bar.

(8) Because of the manner in which the question was originally presented to the Court by the parties, this Court's Order in *First 100 LLC v. Burns* did not address certain questions that may relate to the validity of a foreclosure conducted pursuant to NRS Chapter 116. For example, the Order did not address the question whether a junior lienholder's interest in the foreclosed property may be constitutionally extinguished if the junior lienholder did not receive actual notice of the initiation of foreclosure proceedings against the property. NRS 116.11635(1)(b)(2) requires notice to be given to certain parties, but notably does not, by its plain terms, require that notice be given to all junior or subordinate stakeholders whose interests in the property may be extinguished by a foreclosure. It is axiomatic that under the U.S. and Nevada Constitutions, an interest in real property may not be extinguished by operation of law or any governmental action unless and until the owner has been afforded "due process of law" which includes, at a minimum, notice and a reasonable opportunity to object to the extinguishment. *See generally, Brown v. Brown*, 96 Nev. 713, 715-716 (1980) (due process requires notice and the opportunity to be heard). Yet, as literally written, NRS

116.11635(1)(b)(2) permits a junior property interest to be extinguished by a foreclosure initiated by a homeowners' association even if neither the property owner nor the association bother to give any notice whatsoever to any other lienholder regarding the pendency of the foreclosure proceedings and the potential destruction of their property interests.

(9) Thus, as literally drafted, NRS Chapter 116 permits an outcome that, at least in some cases, may contravene the Due Process Clause of both the U.S. and Nevada Constitutions. This potential outcome was not noted nor argued by the parties in *First 100 LLC v. Burns*, and therefore was not addressed by this Court in its May 30 Order. It is also not addressed in the *amicus curiae* brief of the Real Property Section, nor by the December 12, 2012 administrative opinion of the Nevada Department of Business and Industry interpreting the meaning of NRS Chapter 116. Indeed, in this Court's "Order Denying Defendant's Motion to Dismiss Complaint" filed August 9, 2013, in *SFR Investments Pool 1 LLC v. U.S. Bank National Association*, the Court expressly noted that while the question of due process had been presented in the *amicus* brief of the Nevada Bankers' Association, it had not been raised by the parties and therefore was not properly before the Court. The Court therefore declined to address the argument. However, the question of due process or lack thereof is a very serious flaw inherent in the plain language of the statute that has been noted by other parties in other cases pending before other Departments of this Court, and one that has troubled this Court for some time, because if a statute, as literally interpreted and applied by this Court, potentially (and in some cases actually) results in an unconstitutional deprivation of a party's property interest without even minimal notice or an opportunity to be heard, then one of two conclusions must logically follow: either the statue is unconstitutional and therefore void, or the statute has not been understood correctly by the parties and/or the Court.

(10) The parties in this case have now squarely presented to this Court the question of due process which was not before the Court in either *SFR Investments Pool*

1 LLC v. U.S. Bank National Association or *First 100 LLC v. Burns*.

(11) As an initial observation, in this case the Defendant does not assert as a factual matter that it did not actually know of the foreclosure proceedings at issue when they were initiated. Therefore, some question exists whether the Defendant has legal "standing" to challenge or argue the constitutionality of the statute, because if the Defendant was given actual notice, then although the Defendant may have been generally harmed by the loss of its property interest, it has not been harmed in any way that resulted particularly from a lack of Due Process in the underlying foreclosure proceeding. *See, Thayer v. City of Worcester*, 2013 WL 5780445 at *3 (D.Mass. October 24, 2013) (discussing standards of "constitutional standing"). Perhaps for this reason, in its briefing the Defendant does not actually assert that NRS Chapter 116 is unconstitutional, but this is a question that must be confronted. Whether or not this particular Defendant was afforded notice in this particular case, if the interpretation of NRS Chapter 116 proffered by the Real Property Section and by the Nevada Department of Business and Industry is literally correct, then the statute is unconstitutional because it facially permits some property rights to be extinguished in at least some cases without any notice or any opportunity to be heard.

(12) For these reasons, the Court is compelled to conclude that the broad interpretation of NRS Chapter 116 proffered by the Real Property Section and by the Nevada Department of Business and Industry (and by this Court in its May 30 Order in *First 100 LLC v. Burns*) cannot be literally correct in all cases of any kind in which a homeowners' association forecloses upon a property, because such an interpretation could potentially result in an unconstitutional outcome in at least some cases in which subordinate interests were never given notice of, or an opportunity to object to, the foreclosure proceedings and the deprivation of their property interests as a consequence thereof.

(13) If that interpretation is not correct, the question before the Court then becomes whether there exists an interpretation that is consistent with the express

language of the statute, the intent of the Legislature in enacting the statute, and the Due Process clause of the U.S. and Nevada Constitution. If an interpretation exists that is consistent with all three, then that must be the correct interpretation. If there is no such interpretation, and if the only interpretation available to the Court is incompatible with the Constitution, then the statute (or at least the foreclosure and extinguishment portions of it) is unconstitutional and therefore void.

(14) The Defendant asserts that the proper interpretation of NRS Chapter 116 must be that foreclosures initiated by homeowners' associations only operate to extinguish other liens if the foreclosure was conducted judicially. If the foreclosure was non-judicial, then the Defendant asserts that the non-judicial foreclosure operates only as a scheme of "payment priority" affecting only the distribution of proceeds from the sale, and not the validity of any other liens or interests. The Defendant avers that this interpretation is necessitated by the reference within NRS 116.3116(2) to the phrase "action." (NRS 116.3116(2): "during the nine months immediately preceding institution of an action to enforce the lien"). The Defendant asserts that "action" must necessarily be interpreted as a judicial proceeding such as a lawsuit or other court proceeding, citing NRCP 3; *Seaborn v. District Court*, 29 P.2d 500, 505 (Nev. 1934) ("an action is a judicial proceeding"); Black's Law Dictionary (8th Ed. 2004) ("bring an action" means "to sue; institute legal proceedings"). However, this argument is dubious at best, because the Court notes that the Legislature has expressly defined the phrase "action" to encompass non-judicial foreclosures in at least one other instance in the NRS. *See*, NRS 40.430(1) ("one action rule" defined to encompass non-judicial foreclosures). Moreover, a more recent edition of Black's Law Dictionary (9th Ed. 2009) defines "action" to include non-judicial behavior: "the process of doing something; conduct or behavior."

(15) Fundamentally, the Defendant's argument explicitly reads NRS Chapter 116 to create something of a complex "binary" system under which two completely different outcomes are produced with respect to other liens (one in which all other liens

are extinguished and one in which they are not) depending upon whether the association chooses to proceed judicially or non-judicially. But there is nothing in the plain language of NRS Chapter 116 that can be read as creating anything remotely approaching such a complex, two-tiered system producing radically different potential outcomes. Quite to the contrary, the statute expressly permits an association to initiate "foreclosure" upon a property (NRS 116.31162 is titled "foreclosure of liens"). The text of the statute does not include any reference to two potentially different types of "foreclosures" producing two different outcomes. Furthermore, a "foreclosure" has long been held under Nevada law to be a process that extinguishes all other encumbrances upon the foreclosed property as a matter of law. *E.g., Brunzell v. Lawyers Title Ins. Co.*, 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). Moreover, NRS 116.31166(3) recites that a foreclosure sale initiated pursuant to NRS 116.3116 "vests in the purchaser the title of the unit's owner without equity or right of redemption" which the Nevada Supreme Court has defined as acquisition of title free and clear of any encumbrances. *E.g., Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867) (a sale "without equity or right of redemption" is one that vests the purchaser with "absolute legal title as complete, perfect and indefeasible as can exist...and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court"), quoted in *In re Grant*, 303 B.R. 205, 209 (Bankr.D.Nev. 2003). The Defendant's proposal simply ignores this express provision. The Court can find nothing in the text or legislative history of NRS Chapter 116 that suggests any intention to create the complex, dual-outcome scheme proposed by the Defendant under which an association's foreclosure might, or might not, extinguish junior interests depending upon how the association opts to conduct the foreclosure, and notably the Defendant cites to no such language in its brief. If anything, the express intention of the Legislature in creating the entirety of NRS Chapter 116 was to simplify the process by which associations could recoup unpaid monthly assessments,

and it strikes the Court that creating a complex two-tiered system of foreclosures which produces two entirely different outcomes *vis-a-vis* other liens is something akin to the exact opposite of "simplification."

(16) Contrary to the Defendant's argument, NRS 116.31162 through 116.31168 provide a detailed mechanism for foreclosure quite independent of the judicial foreclosure process embodied in NRS Chapter 40. If, as the Defendant argues, the Legislature merely intended that an association must employ existing procedures for conducting a judicial foreclosure outlined in NRS Chapter 40 in order to foreclose upon a property, then virtually everything contained in NRS 116.31162 through 116.31168 becomes utterly meaningless. The Court cannot interpret a statute in such a way that multiple lengthy and detailed sections expressly included within it become meaningless, while simultaneously importing into the statute a complex, dual-outcome substitute scheme that is totally unsupported by any language actually contained within the statute.

(17) Nonetheless, the Court must reconcile, in some way, the fact that the foreclosure mechanism explicitly outlined in NRS 116.31162 through 116.31168 permits associations to foreclose upon properties in a way that, at least in some instances, violates the requirements of due process. As interpreted by the Real Property Section of the State Bar (chaired by a drafter of the legislation) and the Nevada Department of Business and Industry, a foreclosure conducted pursuant to NRS Chapter 116 extinguishes all other existing encumbrances on the property, including any pre-existing first mortgage on the property whose holder did not participate in the foreclosure proceedings. This was the conclusion reached by this Court in its May 30 Order in *First 100 LLC v. Burns* based upon the plain language of the statute. But this interpretation violates the requirements of due process in at least some cases, because NRS 116.11635(1)(b)(2) expressly does not require notice of the foreclosure to be given to all lienholders before their property interests are completely erased by operation of law.

(18) In view of the foregoing, the Court concludes as follows. NRS 116.31162 clearly establishes that when a homeowners' association imposes a lien for unpaid assessments, a portion of the unpaid assessments (not exceeding nine months) are entitled to "super priority" status over existing liens and mortgages including any first mortgage or deed of trust. NRS 116.3116(2). If the association initiates foreclosure proceedings against the property based upon its "super priority" lien, any existing subordinate claims are paid off with any surplus proceeds of the foreclosure sale. NRS 116.31164(3)(c)(4). However, after the foreclosure sale is completed, any unpaid subordinate claims (including any prior first mortgage) are automatically extinguished by operation of law. NRS 116.31162 through 116.31168 sets forth a detailed mechanism for conducting such a foreclosure that was apparently designed to represent a simpler and cheaper method than existed under NRS Chapter 40 or NRS Chapter 107. However, the simplified foreclosure mechanism set forth in NRS 116.31162 through 116.31168 is unconstitutional because it facially permits subordinate interests to be erased without proper notice or any opportunity to object. Therefore, any foreclosure conducted in accordance with solely these provisions is null and void. However, the remaining "super priority" provisions of NRS 116.3116 et seq. are not unconstitutional merely because they artificially elevate the priority of liens based upon certain unpaid monthly assessments over the priority of other liens, for the same reasons that laws elevating the priority of liens based upon unpaid taxes over other liens are not unconstitutional. Therefore, a foreclosure initiated by a homeowners association based upon a "super priority" lien that was or is conducted in accordance with established, recognized, Constitutional foreclosure procedures (such as those set forth in NRS Chapter 40 or 107) other than (or in addition to) the procedures set forth in NRS 116.31162-31168 would be valid and would operate as a matter of law to extinguish all other liens on the property, including any pre-existing first mortgage on the property rendered artificially subordinate by operation of NRS 116.3116.

(19) In this case, the Plaintiff's Complaint does not allege whether the foreclosure at issue in this case was, or was not, properly conducted in accordance with established and Constitutional foreclosure procedures (such as NRS Chapters 40 or 107). The Plaintiff simply asserts that the foreclosure was conducted under the procedures set forth in NRS 116.31162 through 116.31168 which do not comply with the requirements of Due Process. Therefore, the Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, is GRANTED IN PART to the extent that the Court concludes that the Plaintiff has failed to plead or establish that the foreclosure at issue through which it acquired the Property met the standards set forth in this Order. However, in lieu of dismissal based upon a legal standard that is now being adopted for the first time by this Order, the Plaintiff is hereby permitted leave to amend its Complaint. The Defendant's Motion is DENIED in all other respects.

(20) Because of the considerable public interest in the proper interpretation of NRS Chapter 116 and the inconsistencies in how the statute has been interpreted to date by different Judges of this Judicial District, this Order is hereby STAYED and this matter is CERTIFIED FOR APPEAL pursuant to NRCP 54(b).

DATED: January 3, 2014

Jerome T. Tao

JEROME T. TAO
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing, by mailing, by placing copies in the attorney folder's in the Clerk's Office or faxing as follows:

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DISTRICT JUDGE
DEPARTMENT XX

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Plaintiff, vs. US BANK, N.A., a national banking association as Trustee for the Certificate Holders of the Banc of America Mortgage Securities 2008-A Trust, Mortgage Pass-Through Certificates, Series 2008-A, CAL-WESTERN RECONVEYANCE CORPORATION, a California corporation, SAN SEVINO WEST AT SOUTHERN HIGHLANDS HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, a Nevada non-profit corporation, GEORGE A. SHERWOOD, an individual, SHARON L. SHERWOOD, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants,	Case No.: A-12-673671-C Dept. No.: XXVII NOTICE OF ENTRY OF ORDER DENYING MOTION FOR INJUNCTION AND GRANTING COUNTER-MOTION TO DISMISS

TO: ALL PARTIES:

//

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER DENYING MOTION FOR PRELIMINARY INJUCTION AND GRANTING COUNTER-MOTION TO DISMISS was entered in the above-referenced matter on the 22TH day of March, 2013, a copy of which is attached hereto.

DATED this 22nd day of March, 2013.

MILES, BAUER, BERGSTROM & WINTERS, LLP

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CERTIFICATE OF MAILING

IT IS HEREBY CERTIFIED that on the 22 day of March, 2013, a true and correct copy of the foregoing was mailed by placing in the United States Mail, postage pre-paid, to the parties addressed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Plaintiff, vs. US BANK, N.A., a national banking association as Trustee for the Certificate Holders of the Banc of America Mortgage Securities 2008-A Trust, Mortgage Pass-Through Certificates, Series 2008-A; CAL-WESTERN RECONVEYANCE CORPORATION, a California corporation; SAN SEVINO WEST AT SOUTHERN HIGHLANDS HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation; SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, a Nevada non-profit corporation; GEORGE A. SHERWOOD, an individual; SHARON L. SHERWOOD, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: A-12-673671-C Dept. No.: XXVII **ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING COUNTER-MOTION TO DISMISS**

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING COUNTER-MOTION TO DISMISS

In this action, after review and consideration of Plaintiff SFR Investments Pool 1, LLC's ("Plaintiff") Motion for Preliminary Injunction, Defendant US Bank, N.A.'s ("US Bank") Opposition thereto and Countermotion to Dismiss, Plaintiff's Reply in Support of Motion for Preliminary Injunction and Opposition to Countermotion to Dismiss, US Bank's Reply in Support of Countermotion to Dismiss, all pleadings and papers on file herein, the oral arguments presented on March 6, 2013 by counsel for Plaintiff Diana S. Cline, Esq. of Howard Kim & Associates and counsel for US Bank Jory C. Garabedian, Esq. of Miles, Bauer, Bergstrom & Winters, LLP, and after taking the matter under advisement, the Court hereby finds as follows:

FINDINGS OF FACT

1. The instant action concerns title to real property commonly known as 11577 Capanna Rosso Place, Las Vegas, Nevada 89141 (APN 191-05-217-040) (hereinafter the "Subject Property").

2. US Bank, through a recorded Assignment, is the record beneficiary of a $885,000.00 first mortgage/deed of trust recorded against the Subject Property on October 23, 2007 in the Office of the Clark County Recorder as document/instrument 20071023-0000688 (hereinafter the "Deed of Trust") and executed by former record Subject Property owners George A. Sherwood and Sharon Sherwood.

3. Non-judicial foreclosure proceedings under the terms of the Deed of Trust were commenced on or around September 17, 2009 by the recording of a Notice of Default and by the recording of a Notice of Trustee's Sale on August 8, 2012. However, the foreclosure sale under the Deed of Trust has not yet gone forward.

4. On or around April 9, 2010, Southern Highlands Community Association through its agents and trustee (hereinafter collectively the "HOA"), recorded a Notice of Delinquent Assessment Lien claiming a lien in the amount of $1,225.19 for collection and/or attorney fees, assessments, interest, late fees, service charges and collection costs.

5. On or around November 16, 2010, the HOA recorded its Notice of Default and Election to Sell indicating that it intended to foreclosure on the Notice of Delinquent Assessment Lien. Said Notice of Default indicates that the total amount due and owing had increased to $2,550.06 and that such amounts would continue to increase until the homeowners' account became current.

6. The HOA then recorded a Notice of Trustee's Sale on September 29, 2011 noting that the total amount due and owing had again increased to $4,542.06.

7. On September 24, 2012, a Trustee's Deed Upon Sale was recorded stating that the HOA foreclosure sale was held on September 5, 2012 where Plaintiff paid $6,000.00 to purchase the Subject Property for the amount that was due and owing to the HOA.

8. Plaintiff commenced the instant quiet title action on or around December 14, 2012, seeking title free and clear of any interest of the defendants named herein, including US Bank's Deed of Trust. Specifically, Plaintiff alleges that the HOA foreclosure sale extinguished US Bank's Deed of Trust due to the foreclosure of the HOA's super priority lien.

9. On December 17, 2012, Plaintiff filed an Ex Parte Application for Temporary Restraining Order (TRO) and Motion for Preliminary Injunction to prevent US Bank from foreclosing on the Subject Property. The Court executed/issued the TRO on December 18, 2012 and set a hearing date.

10. On January 2, 2013, the Court granted a preliminary injunction for 30 days to allow the named defendants time to appear and respond.

11. On January 30, 2013, the Court held a Status Check on the preliminary injunction, at which the Court set a briefing schedule on the Motion for Preliminary Injunction and any Countermotions and relating briefing and further set the hearing on the matters for March 6, 2013.

CONCLUSIONS OF LAW

1. Pursuant to NRCP 65, EDCR 2.10, NRS 33.010 and Nevada case law, when deciding to grant or deny a preliminary injunction, the Court must consider: 1) the plaintiff's likelihood of success on the merits, 2) the reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy, and 3) the potential hardships to the relative parties, and others and the public interest.

2. The Court finds that Plaintiff does not enjoy a substantial likelihood of success on the merits. Pursuant to NRS 116.3116(2)(b), an HOA lien is prior to all other liens and encumbrances on the real property unit except, among others, "[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." Here, it is undisputed that US Bank has a first security interest through the Deed of Trust, which was recorded approximately two and a half years before the HOA's Notice of Delinquent Assessment Lien and therefore the Deed of Trust would generally have priority over the HOA lien.

3. However, NRS 116.3116(2)(c) creates, for an association, a super priority lien "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 budge 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*). Massachusetts and Washington require a civil action or judicial foreclosure before a super priority lien is triggered and foreclosed. *See Trustees of Macintosh Condominium Association v. FDIC*, 908 F. Supp. 58, 63 (D. Mass. 1995); *In Re Stern*, 44 B.R. 15, 19 (Bankr.D.Mass. 1984); *see also Summerhill Vill. Homeowners Ass'n v. Roughley*, 289 P.3d 645, 649 (Wash. Ct. App. 2012). Although the Court acknowledges that authority from other jurisdictions is not binding, the Court finds persuasive the jurisprudence in Massachusetts and Washington requiring judicial foreclosures to trigger and foreclose super priority liens.

4. The Court also acknowledges the recent December 2012 Advisory Opinion from the Nevada Real Estate Division ("Division") wherein the Division opined that a civil action was not necessary to trigger an association's super priority lien, and that it could be triggered by commencing a non-judicial foreclosure. However, the Court is not bound by an opinion that contains a disclaimer at the end of the opinion stating it does not have the force of law. The Court has the ability to review statutory interpretations de novo.

5. Both State and Federal constitutional due process guarantees are offended if the first security mortgagee's interest may be voided by non-judicial foreclosure for an assessment lien, relatively nominal in value, without notice to the otherwise senior interest mortgagee, and if an opportunity is not provided to the mortgagee to argue its position, or to pay the assessment amounts in order to avoid the risk of losing, in this case, an $885,000.00 first security interest in

the Subject Property. While the Court acknowledges that NRS 116.311635(1)(b)(2) does not absolutely require notice to the holder of a recorded security interest, failure to provide notice is a deprivation of due process. Accordingly, NRS 116.3116(2)(c) must be construed to require a civil action to trigger and foreclose an HOA's super priority lien.

6. Because it is undisputed that Plaintiff acquired its ownership interest in the Subject Property through a non-judicial foreclosure HOA sale, and not a judicial foreclosure sale, Plaintiff does not enjoy a substantial likelihood on the merits.

7. For purposes of determining whether to grant injunctive relief, the Court further finds that although real property is considered unique and the loss of which is often not compensable by a monetary award, Plaintiff can be compensated through pecuniary damages in this case.

8. The Court further finds that after balancing the hardships between the parties, US Bank stands to lose an interest valued around $885,000.00 whereas Plaintiff's purchase price was merely $6,000.00. The balance of hardships therefore tips in favor of US Bank to warrant the denial of a preliminary injunction.

9. Finally, because the Court hereby concludes as a matter of law that an association must conduct a judicial foreclosure to trigger and foreclose any super priority lien claimed, and because it is undisputed that Plaintiff acquired its ownership interest in the Subject Property through a non-judicial foreclose sale, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted as to US Bank.

ORDER

NOW WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby DENIES Plaintiff's Motion for Preliminary Injunction, DISSOLVES any

TRO and/or preliminary injunction previously in effect in this matter, and further GRANTS US Bank's Countermotion to Dismiss Plaintiff's Complaint with prejudice. However, the parties to this action are invited to seek a stay pending appeal if they so wish.

IT IS SO ORDERED.

DATED: March 20, 2013

Navarro ALF
DISTRICT COURT JUDGE

Respectfully submitted:

MILES, BAUER, BERGSTROM & WINTERS, LLP

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA

JASON FRENCH, an individual,

Plaintiff,

vs.

SWEETWATER HOMEOWNERS' ASSOCIATION, INC., a Nevada Corporation; NEVADA ASSOCIATION SERVICES, INC., A Nevada Corporation; SFR INVESTMENTS POOL 1, LLC, A Domestic Limited-Liability Company; BANK OF AMERICA, N.A.; DOE Individuals I Through X; And ROE Corporations I Through X, inclusive,

Defendants.

Case No.: A-12-667931-C

Dept.: III

SFR INVESTMENT POOL 1, LLC, A Domestic Limited-Liability Company,

Counter-Claimant/Cross-Claimant,

vs.

JASON FRENCH, An Individual,

Counter-Defendant,

And

SWEETWATER HOMEOWNERS' ASSOCIATION, INC., A Nevada Corporation; NEVADA ASSOCIATION SERVICES, INC., A Nevada Corporation; BANK OF AMERICA, N.A.; DOE Individuals I Through X; And ROE Corporations I Through X, inclusive,

Cross-Defendants.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE, that an Order Granting Defendant and Cross-Defendant Bank of America, N.A.'s Motion to Dismiss Complaint and Cross-Complaint was entered on April 26, 2013. A copy of the Order is attached hereto as Exhibit "A."

DATED this 1 day of May, 2013.

RCO LEGAL, P.S.

By: /s/ Joseph E. Bleeker
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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that, on the 2 day of May, 2013, a true and correct copy of the foregoing Notice of Entry of Order Granting Defendant and Cross-Defendant Bank of America, N.A.'s Motion to Dismiss Complaint and Cross-Complaint was served to the following via U.S. Mail postage prepaid and addressed to the following:

Richard Vilkin
Attorney's for Sweetwater Homeowner's Association, Inc.
and Nevada Association Services, Inc.
1286 Crimson Sage Avenue,
Henderson, NV 89012

Diana S. Cline
Attorney's for SFR Investment Pool 1, LLC
400 N. Stephanie Street, Suite 160
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Jason French
3900 Wharton Street
Las Vegas, NV 89130

An employee for Routh Crabtree Olsen, P.S.

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CLERK OF THE COURT

ORDR

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA

JASON FRENCH, an individual,

Plaintiff,

vs.

SWEETWATER HOMEOWNERS' ASSOCIATION, INC., a Nevada Corporation; NEVADA ASSOCIATION SERVICES, INC., A Nevada Corporation; SFR INVESTMENTS POOL 1, LLC, A Domestic Limited-Liability Company; BANK OF AMERICA, N.A.; DOE Individuals I Through X; And ROE Corporations I Through X, inclusive,

Defendants.

Case No.: A-12-667931-C

Dept.: III

SFR INVESTMENT POOL 1, LLC, A Domestic Limited-Liability Company,

Counter-Claimant/Cross-Claimant,

vs.

JASON FRENCH, An Individual,

Counter-Defendant,

And

SWEETWATER HOMEOWNERS' ASSOCIATION, INC., A Nevada Corporation; NEVADA ASSOCIATION SERVICES, INC., A Nevada Corporation; BANK OF AMERICA, N.A.; DOE Individuals I Through X; And ROE Corporations I Through X, inclusive,

Cross-Defendants.

04-16-2013 RCVD

ORDER GRANTING MOTION TO DISMISS
COMPLAINT AND CROSS-COMPLAINT

Defendant and Cross-Defendant, Bank of America, N.A.'s Motion to Dismiss Complaint and Cross-Complaint ("Motion") came on for hearing before the Court at 9:00 a.m. on March 13, 2013. Brett P. Ryan, Esq. appeared on behalf of Bank of America, N.A., Diana S. Cline, Esq. and Howard C. Kim, Esq. appeared on behalf of SFR Investments Pool I, LLC. No one appeared on behalf of plaintiff, Jason French, or on behalf of Defendants and Cross-Defendants Nevada Association Services, Inc. and Sweetwater Homeowners' Association, Inc.

The Court, having considered the moving papers, its own files, the arguments of counsel, and good cause appearing, makes the following findings:

1. Plaintiff's Complaint contains no allegations or claims against Bank of America, N.A. Accordingly, Bank of America, N.A.'s Motion is GRANTED as to Plaintiff's Complaint;

2. Under Nevada Revised Statutes 116.3116, for an HOA's lien to obtain super priority status an HOA must institute an "action to enforce the lien";

3. Under Nevada Revised Statutes 116.3116, an "action to enforce the lien" means a judicial foreclosure, not a non-judicial foreclosure;

4. Sweetwater Homeowners' Association, Inc. conducted or caused to be conducted a non-judicial foreclosure sale of the property located at 3900 Wharton Street, Las Vegas, NV 89130 ("Property");

5. Because Sweetwater Homeowners' Association, Inc. conducted or caused to be conducted a non-judicial foreclosure sale of the Property, its lien did not obtain super priority status;

6. SFR Investments Pool I, LLC purchased the Property at the non-judicial foreclosure;

7. When SFR Investments Pool I, LLC purchased the Property at a non-judicial foreclosure, it took title to the Property subject to Bank of America, N.A.'s interest in the Property, as described in the Deed of Trust, Instrument No. 20090616-0000566, which constitutes a first security interest on the Property recorded before the date on which the assessment sought to be enforced became delinquent pursuant to NRS 116.3116(2)(b);

8. SFR Investments Pool I, LLC's ownership interest in the Property remains subject to Bank of America, N.A.'s interest in the Property.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Bank of America, N.A.'s Motion to Dismiss is GRANTED. Plaintiff's Complaint and SFR Investments Pool I, LLC's Cross-Complaint are DISMISSED as to Defendant Bank of America, N.A.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that certification for appeal is granted in accordance with Rule 54(b) of the Nevada Rules of Civil Procedure.

DATED this 19 day of April, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:
RCO LEGAL, P.S.

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APPROVED AS TO FORM:
HOWARD KIM & ASSOCIATES

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Attorney for Defendant
SFR Investments Pool I, LLC

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

7912 LIMBWOOD COURT TRUST, Plaintiff, v. WELLS FARGO BANK, N.A.; MTC FINANCIAL INC.; and FEDERAL HOME LOAN MORTGAGE CORPORATION, Defendants.	2:13-CV-00506-PMP-GWF ORDER

This case is one of many similar disputes over whether a foreclosure sale conducted by a homeowners' association ("HOA") to collect unpaid HOA assessments extinguishes all junior liens, including a first deed of trust. Presently before the Court are the following motions:

1. Defendant MTC Financial Inc.'s Motion to Dismiss (Doc. #37), filed on May 23, 2013. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A. filed a Joinder (Doc. #39) on May 28, 2013. Plaintiff 7912 Limbwood Court Trust did not file a response to this Motion.

2. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Motion to Dismiss (Doc. #40), filed on May 29, 2013. Defendant MTC Financial

Inc. filed a Joinder (Doc. #41) on May 29, 2013. Plaintiff filed an Opposition (Doc. #43) on June 10, 2013. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A. filed a Reply (Doc. #46) on June 24, 2013. Defendant MTC Financial Inc. filed a Joinder (Doc. #47) on June 25, 2013.

3. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Motion to Expunge Lis Pendens (Doc. #48), filed on June 28, 2013. Plaintiff filed an Opposition (Doc. #49) on July 15, 2013. Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A. filed a Reply (Doc. #50) on July 22, 2013.

I. BACKGROUND

Because the matter is before the Court on motions to dismiss, the following recitation of background facts is taken largely from the Amended Complaint, which the Court takes as true. Williams v. Gerber Prods. Co., 552 F.3d 934, 937 (9th Cir. 2008). Additionally, the Court takes judicial notice of the fact that certain documents were recorded in the Office of the County Recorder for Clark County, Nevada. See United States v. Ritchie, 342 F.3d 903, 908-09 (9th Cir. 2003).

The property at issue, located at 7912 Limbwood Court in Las Vegas, Nevada, previously was owned by Sandra and Sonya Newton (the "Newtons"). (Am. Compl. (Doc. #33) at 1; Request for Judicial Notice (Doc. #38), Ex. 1.) The property was subject to a first deed of trust recorded in 2004 which identified Silver State Mortgage as the lender and Lawyers Title of Nevada as the trustee. (Request for Judicial Notice (Doc. #38), Ex. 1.) In 2011, Silver State Mortgage assigned the deed of trust to Defendant Wells Fargo Bank, N.A. ("Wells Fargo"). (Am. Compl. at 2-3; Request for Judicial Notice (Doc. #38), Ex. 2.) Defendant MTC Financial Inc. ("MTC") thereafter was substituted as the trustee under the deed of trust. (Request for Judicial Notice (Doc. #38), Ex. 3.)

The property is subject to the 1995 Covenants, Conditions, and Restrictions ("CC&Rs") recorded by the Elkhorn Community Association ("Elkhorn"). (Am. Compl. at

3; Request for Judicial Notice (Doc. #12), Ex. P.) In 2010, Elkhorn initiated an HOA foreclosure sale of the property pursuant to Nevada Revised Statutes § 116.3116, et seq. to recover unpaid HOA assessments. (Am. Compl. at 2; Request for Judicial Notice (Doc. #12), Exs. G-I.) According to the Amended Complaint, Elkhorn, through its agent Angius & Terry, LLC, conducted the foreclosure sale in compliance with all statutory notice requirements. (Am. Compl. at 2-3.) The sale was conducted on March 6, 2012, at which Plaintiff purchased the property. (Id. at 2; Request for Judicial Notice (Doc. #12), Exs. H-J.) The HOA foreclosure deed was recorded with the Clark County Recorder on March 16, 2012. (Am. Compl. at 2; Request for Judicial Notice (Doc. #12), Ex. J.)

On October 5, 2012, Wells Fargo and MTC recorded a notice of default and election to sell based on the Newtons' deed of trust. (Request for Judicial Notice (Doc. #38), Ex. 4.) The sale was set for March 8, 2013. (Request for Judicial Notice (Doc. #38), Ex. 5.)

Plaintiff brought suit in Nevada state court on March 5, 2013, against Wells Fargo, MTC, Republic Services, and the Newtons to quiet title in the property. (Pet. for Removal (Doc. #1), Ex. A.) Plaintiff moved for a temporary restraining order and preliminary injunction seeking to enjoin Wells Fargo's foreclosure sale. (Pet. for Removal, Ex. E.) The state court set a hearing for March 12, 2013. (Pet. for Removal, Ex. F.) However, Wells Fargo and MTC sold the property on March 8, 2013, to Defendant Federal Home Loan Mortgage Corporation ("Freddie Mac"). (Id.; Am. Compl. at 3; Request for Judicial Notice (Doc. #38), Exs. 6-7.) The state court set a hearing for April 2, 2013, for Defendants to show cause why the sale should not be set aside. (Pet. for Removal, Ex. F.) Prior to the April 2 hearing, MTC removed the action to this Court. (Pet. for Removal.)

This Court set a hearing on Plaintiff's Motion for Preliminary Injunction and the Nevada state court's order to show cause why the sale should not be set aside. (Order (Doc. #18).) At the hearing, the Court denied Plaintiff's motion for injunctive relief without

prejudice for Plaintiff to file an Amended Complaint. (Mins. of Proceedings (Doc. #30).) Plaintiff filed an Amended Complaint against Wells Fargo, MTC, and Freddie Mac, asserting claims for wrongful foreclosure and to quiet title in the property. (Am. Compl.)

Defendant MTC now moves to dismiss, arguing MTC claims no interest in the property, and therefore it is not a proper defendant in a quiet title action. Additionally, MTC contends Plaintiff's wrongful foreclosure claim against MTC should be dismissed because MTC owes no common law duty to Plaintiff, MTC was an agent acting for a disclosed principal, and a wrongful foreclosure claim lies only as between trustors and mortgagors.

Defendants Wells Fargo and Freddie Mac join in MTC's Motion and also separately move to dismiss. Wells Fargo and Freddie Mac argue Wells Fargo's lien is superior to Elkhorn's HOA lien, and therefore it was not extinguished by the HOA foreclosure sale. Wells Fargo and Freddie Mac contend that under the Nevada statutory scheme, foreclosure on the HOA's lien does not extinguish the first deed of trust. Rather, the HOA's lien is a payment priority lien only, and the first deed of trust continues to encumber the property after foreclosure of the HOA lien. Wells Fargo and Freddie Mac contend that Plaintiff thus purchased merely a possessory interest in the property subject to the first deed of trust. Wells Fargo and Freddie Mac contend it would violate their due process rights to allow a later-recorded HOA assessment lien to extinguish the deed of trust lien recorded several years earlier. Wells Fargo and Freddie Mac also contend that Elkhorn's CC&Rs preserve the first deed of trust's priority over HOA liens. Defendants therefore also move to expunge the Notice of Lis Pendens that Plaintiff recorded on the property.

Plaintiff responds that Nevada's statutory scheme provides the HOA with a lien for nine months' worth of HOA assessments which is superior to the first deed of trust, referred to as the "super priority lien." According to Plaintiff, if the HOA forecloses on the

super priority lien, all junior liens, including the first deed of trust, are extinguished. Plaintiff further contends an HOA cannot waive its super priority lien through the CC&Rs. Plaintiff also argues Defendants received the statutory notice required, and all lenders were on notice of the possibility of a super priority lien extinguishing a first deed of trust upon enactment of the super priority statutory scheme in 1991. Plaintiff contends Defendants could have preserved the security interest by complying with the statutory requirements to receive notice and by paying off the HOA super priority lien, but they sat on their rights and cannot be heard to complain now.

II. DISCUSSION

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). However, the Court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in the plaintiff's complaint. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption against dismissing an action for failure to state a claim. Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). A plaintiff must make sufficient factual allegations to establish a plausible entitlement to relief. Bell Atl. Corp. v Twombly, 550 U.S. 544, 556 (2007). Such allegations must amount to "more than labels and conclusions, [or] a formulaic recitation of the elements of a cause of action." Id. at 555.

A. MTC's Motion to Dismiss

Under Nevada law, "[a]n action may be brought by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim." Nev. Rev. Stat. § 40.010. Because the Amended Complaint does not allege MTC claims an interest in the property, and MTC disclaims any interest in the property, the Court will dismiss Plaintiff's quiet title claim as

against Defendant MTC.

As to the wrongful foreclosure claim against MTC, a trustee under a deed of trust owes no duties beyond those imposed by the deed of trust and applicable foreclosure statutes. Harlow v. MTC Fin. Inc., 865 F. Supp. 2d 1095, 1100 (D. Nev. 2012). Plaintiff has not alleged MTC breached the deed of trust or any requirement imposed by the foreclosure statutes. Rather, Plaintiff asserts a common law wrongful foreclosure claim. See Collins v. Union Fed. Sav. & Loan, 662 P.2d 610, 623 (Nev. 1983). The Court therefore will dismiss Plaintiff's wrongful foreclosure claim against MTC.

Defendants Wells Fargo and Freddie Mac filed a conclusory Joinder which did not explain how MTC's arguments applied to them. The Court therefore will deny Defendants Well Fargo and Freddie Mac's Joinder in MTC's Motion.

B. Wells Fargo and Freddie Mac's Motion to Dismiss

The parties dispute the effect of the HOA foreclosure sale on the first deed of trust. The parties also dispute whether Wells Fargo's due process rights would be violated by allowing foreclosure of the HOA lien to extinguish Wells Fargo's security interest based on the first deed of trust. Finally, the parties dispute whether the Elkhorn CC&Rs provide that the HOA lien is subordinate to the first deed of trust.

1. Priority

Wells Fargo and Freddie Mac contend the HOA super priority lien gives the HOA priority in payment only, and foreclosure on the HOA super priority lien does not extinguish Wells Fargo's security interest based on the first deed of trust. Plaintiff, on the other hand, contends foreclosure on the super priority lien extinguishes all junior liens, including the first deed of trust.

The Nevada Supreme Court has not addressed the statutory provisions at issue to determine whether a foreclosure sale on an HOA super priority lien extinguishes all junior liens, including a first deed of trust. "Where the state's highest court has not decided an

issue, the task of the federal courts is to predict how the state high court would resolve it." Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007) (quotation omitted). "In answering that question, this court looks for 'guidance' to decisions by intermediate appellate courts of the state and by courts in other jurisdictions." Id. (quotation omitted).

This Court looks to Nevada rules of statutory construction to determine the meaning of a Nevada statute. In re First T.D. & Inv., Inc., 253 F.3d 520, 527 (9th Cir. 2001). Under Nevada law, a court should construe a statute to give effect to the legislature's intent. Richardson Constr., Inc. v. Clark Cnty. Sch. Dist., 156 P.3d 21, 23 (Nev. 2007). If the statute's plain language is unambiguous, that language controls. Id. If the statute's language is ambiguous, the Court "must examine the statute in the context of the entire statutory scheme, reason, and public policy to effect a construction that reflects the Legislature's intent." Id.

Chapter 116 of the Nevada Revised Statutes, enacted in 1991, codifies the Uniform Common-Interest Ownership Act and sets forth the statutory framework for common interest communities such as HOAs. Nev. Rev. Stat. § 116.001; A.B. 221, Summary of Legislation, 66th Leg. (Nev. 1991). Section 116.3116(1) provides for a lien in an HOA's favor "for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due." Additionally, unless the HOA's declaration provides otherwise, "any penalties, fees, charges, late charges, fines and interest charged pursuant to [§ 116.3102(1)(j)-(n)] are enforceable as assessments under this section." Nev. Rev. Stat. § 116.3116(1); see also id. § 116.3102(1)(j)-(n) (providing for charges for such items as late payment penalties, rental fees for common elements, and fines).

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The key provision in dispute between the parties is § 116.3116(2), which sets forth the priority of the HOA lien with respect to other liens on the property. Pursuant to § 116.3116(2), the HOA lien is prior to all other liens on the property except:

> (a) Liens and encumbrances recorded before the recordation of the declaration[1] 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.

Although § 116.3116(2)(b) makes a first deed of trust superior to an HOA lien, the last paragraph of § 116.3116(2) gives what the parties refer to as "super priority" status to a portion of the HOA's lien which is superior to the first deed of trust:

> 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[2] 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. . . . This subsection does not affect the priority of mechanics' or materialmens' liens, or the priority of liens for other assessments made by the association.

Id. § 116.3116(2). Recording the HOA's declaration "constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required." Id. § 116.3116(4).

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[1] The declaration is "any instrument[], however denominated, that create[s] a common-interest community, including any amendments to th[at] instrument[]." Nev. Rev. Stat. § 116.037.

[2] Allowing for the HOA's executive board to enter a unit to conduct maintenance or remove or abate a nuisance, and permitting the imposition of fees and costs for any such activity.

The HOA may pursue a civil suit to recover unpaid assessments directly from the unit owner, or it may foreclose on a lien created under § 116.3116. Id. §§ 116.3116(6), (10), 116.31162. To conduct a foreclosure sale on its lien, the HOA must comply with certain notice requirements. First, the HOA must notify the owner of the delinquent assessments. Id. § 116.31162(1)(a). If the owner does not pay within 30 days, the HOA must record a notice of default and election to sell. Id. § 116.31162(1)(b). In addition to recording the notice of default, the HOA must mail it to "[a]ny holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest." Id. § 116.31163(2). If the unit owner has not paid the lien amount within 90 days of the notice of default being recorded, the HOA then must give notice of the sale to the owner and to the known holder of a security interest if the security interest holder "has notified the association, before the mailing of the notice of sale, of the existence of the security interest." Id. §116.311635(b)(2); see also id. § 116.61162(1)(c).

At the sale, the HOA must sell to the highest bidder, and the HOA may credit bid on the property "up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien." Id. § 116.31164(2). After the sale, the seller must execute and deliver to the buyer "a deed without warranty which conveys to the grantee all title of the unit's owner to the unit." Id. §§ 116.31164(3)(a), 116.31166(3). The seller must apply the proceeds of the sale in the following order:

> (1) The reasonable expenses of sale;
> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
> (3) Satisfaction of the association's lien;
> (4) Satisfaction in the order of priority of any subordinate claim of record; and
> (5) Remittance of any excess to the unit's owner.

Id. § 116.31164(3)(c). "The sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption." Id. § 116.31166(3). A deed which recites there was a default, the proper notices were given, the appropriate amount of time has lapsed between notice of default and sale, and notice of the sale was given, "is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons." Id. § 116.31166(2). Upon payment, the purchaser is "discharge[d] from obligation to see to the proper application of the purchase money." Id.

Section 116.3116(2) effectively separates the HOA's lien into two separate liens. The last paragraph of subsection 2, which generally consists of the last nine months of unpaid assessments and any unpaid nuisance abatement costs, constitutes the super priority portion of the HOA's lien. It provides that the super priority portion of the HOA's lien is prior to the first deed of trust. The rest of the HOA's lien, consisting of any charges not contained within the super priority lien, including any assessments unpaid for more than nine months, is junior to the first deed of trust under § 116.3116(2)(b). The parties agree the statute operates in this fashion, but disagree about the legal effect of the HOA's foreclosure on the super priority lien.

Nevada's statutory scheme is clear. Section 116.3116(2) unambiguously provides that the HOA super priority lien is prior to the first deed of trust. The statutory scheme also unambiguously provides for the HOA to resort to non-judicial foreclosure procedures to enforce its lien. The statute sets forth the order of priority by which the foreclosure sale proceeds must be distributed, and the association's lien must be satisfied before any other subordinate claim of record. The purchaser at an HOA foreclosure sale obtains the unit owner's title without equity or right of redemption, and a deed which contains the proper recitals "is conclusive against the unit's former owner, his or her heirs and assigns, and all other persons." Id. § 116.31166(2). Compare Nev. Rev. Stat.

§ 107.080 (providing that a mortgage foreclosure sale "vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption"); Bryant v. Carson River Lumbering Co., 3 Nev. 313, 317-18 (1867) (providing that such a sale vests absolute title in the purchaser). Consequently, a foreclosure sale on the HOA super priority lien extinguishes all junior interests, including the first deed of trust.

Even if these statutory provisions do not explicitly provide that foreclosure of the HOA super priority lien extinguishes the first deed of trust, § 116.1108 provides that general principles of law and equity "supplement the provisions of this chapter, except to the extent inconsistent with this chapter." Under settled foreclosure principles, foreclosure of a superior lien extinguishes junior security interests. Aladdin Heating Corp. v. Trustees of Central States, 563 P.2d 82, 86 (Nev. 1977); Erickson Constr. Co. v. Nev. Nat'l Bank, 513 P.2d 1236, 1238 (Nev. 1973). If junior lienholders want to avoid this result, they readily can preserve their security interests by buying out the senior lienholder's interest. See Carrillo v. Valley Bank of Nev., 734 P.2d 724, 725 (Nev. 1987); Keever v. Nicholas Beers Co., 611 P.2d 1079, 1083 (Nev. 1980).

Nothing in the statute suggests that anything other than normal foreclosure principles apply to an HOA foreclosure sale, nor is it inconsistent with Chapter 116 to apply the usual principle that foreclosure of a senior interest extinguishes junior interests. Rather, this result is consistent with the statutory purpose of the super priority lien to "ensure prompt and efficient enforcement of the association's lien for unpaid assessments." Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982); see also Nev. Rev. Stat. § 116.1109(2) ("This chapter must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among state enacting it."). Moreover, the Nevada Legislature presumably was aware of the normal operation of foreclosure law when it enacted Chapter 116 in 1991. If the Legislature intended a different rule to apply to an HOA foreclosure sale, it could have said so.

While Nevada state trial courts and decisions from the United States District Court for the District of Nevada are divided on the question,[3] other guidance from Nevada confirms the Court's conclusion about the statutory meaning. The Nevada Real Estate Division of the Department of Business and Industry and the Commission for Common Interest Communities and Condominium Hotels ("Real Estate Division") is the entity charged with interpreting Chapter 116. State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc., 294 P.3d 1223, 1227-28 (Nev. 2012); see also Nev. Rev. Stat. §§ 116.043, 116.615, 116.623. The Nevada Supreme Court therefore would defer to the Real Estate Division's interpretation so long as that interpretation is within the statute's language. Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy, 191 P.3d 1159, 1165 (Nev. 2008); Folio v. Briggs, 656 P.2d 842, 844 (Nev. 1983) (stating the Nevada Supreme Court "attach[es] substantial weight" to the interpretation of a state agency "clothed with the power to construe the statutes under which it operates"). The Real Estate Division has interpreted the statute to mean that foreclosure on the HOA super priority lien results in extinguishment of all junior liens, including the first deed of trust.

In a December 2012 advisory opinion, the Real Estate Division addressed three questions: (1) whether, pursuant to § 116.3116, the HOA's super priority lien included collection costs; (2) whether the super priority lien can exceed nine times the monthly assessment plus charges; and (3) whether the HOA must institute a civil action for the super priority lien to exist. (Pl.'s Opp'n to Defs.' Mot. to Dismiss (Doc. #43), Ex. 1.) The Real Estate Division answered the first question by concluding the super priority lien does not include collection costs because the statute specifically states what constitutes the super priority lien. (Id. at 1, 3-7.) As to the second question, the Real Estate Division concluded

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[3] (See, e.g, Pet. for Removal, Ex. H, Attach. M; Request for Judicial Notice (Doc. #12), Exs. L-O, Q; Defs.' Mot. to Dismiss (Doc. #40), Exs. C-F; Pl.'s Opp'n to Defs.' Mot. to Dismiss (Doc. #43), Ex. 9.)

the super priority lien consists only of unpaid assessments and certain charges specifically identified in § 116.310312. (Id. at 2, 10-17.) As to the third question, the Real Estate Division asserted the HOA must take action to enforce its super priority lien, but it need not institute a civil lawsuit. (Id. at 2, 17-18.) Rather, the HOA could institute a non-judicial foreclosure under § 116.31162 or pursue other remedies. (Id.)

In reaching these conclusions, the Real Estate Division examined the priority of the HOA lien under § 116.3116(2). (Id. at 8-9.) The Real Estate Division sought to give guidance to HOAs on this point because "[u]nderstanding the priority of the lien is an important consideration for any board of directors looking to enforce the lien through foreclosure or to preserve the lien in the event of foreclosure by a first security interest." (Id. at 8.)

According to the Real Estate Division, the "ramifications of the super priority lien are significant in light of the fact that superior liens, when foreclosed, remove all junior liens. An association can foreclose its super priority lien and the first security interest holder will either pay the super priority lien amount or lose its security." (Id. at 9.) The Real Estate Division suggested it was "likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association." (Id.); see also Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982) ("As a practical matter, secured lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit."). In its conclusion, the Real Estate Division stated that the "association can use the super priority lien to force the first security interest holder to pay that amount." (Pl.'s Opp'n to Defs.' Mot. to Dismiss, Ex. 1 at 19.) The HOA retains a junior lien for other charges and penalties, and thus if the first security interest holder pays off the super priority lien, the first deed of trust lienholder still may foreclose and the HOA's junior lien for items not included in the super priority lien may be extinguished by that foreclosure. (Id.) Thus, contrary to Defendants' argument that

§ 116.3116(2)(b) would be rendered meaningless by this construction of the statute, § 116.3116(2)(b) establishes that the first deed of trust takes priority over that portion of an HOA lien which does not comprise the super priority lien, including any unpaid assessments beyond the nine months of unpaid assessments comprising the super priority lien.

The State of Nevada Legislative Counsel Bureau reached the same conclusion in a December 2012 advisory letter. (Pl.' Opp'n to Defs.' Mot. to Dismiss, Ex. 4.) The Legislative Counsel Bureau concluded the statute unambiguously provides that "the ownership interest of a purchaser who obtains title through a deed properly containing the [statutory recitals in § 116.31164] is not subject to any claim made by the holder of a security interest who forecloses on an obligation after the purchase is made pursuant to NRS 116.31164." (Id. at 3.) The Legislative Counsel Bureau concluded that "no part of an ownership interest vested in the purchaser may be extinguished by a foreclosure on a security interest to which the previous owner was obligated that occurs after the purchaser obtains title to the property under NRS 116.31161." (Id. at 4.)

The Court rejects Defendants' argument that it would be inequitable to allow foreclosure of an HOA lien of relatively little value to extinguish a first deed of trust of considerable value. The Court must apply the plain and unambiguous statutory language. Moreover, statutory principles of priority, not the monetary value of the respective liens, control. Under the unambiguous statutory language, the HOA super priority lien is prior to the first deed of trust, and consequently foreclosure on the HOA super priority lien extinguishes all junior security interests, including the first deed of trust.

Moreover, the result in this case is neither novel nor unfair. Wells Fargo easily could have avoided this purportedly inequitable consequence by paying off the HOA super priority lien amount to obtain the priority position thereby avoiding extinguishment of its junior interest. Additionally, Wells Fargo could have required an escrow for HOA

assessments so that in the event of default, Wells Fargo could have satisfied the super priority lien amount without having to expend any of its own funds. See Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982).

Finally, the HOA foreclosure sale extinguished only Wells Fargo's security interest in the property, not the underlying debt. Olson v. lacometti, 533 P.2d 1360, 1363 (Nev. 1975) ("Foreclosure of the first trust deed extinguished only the security for the Olson-lacometti note, not the indebtedness represented by that note.") Wells Fargo still can pursue the Newtons for the unpaid balance. The Court therefore will deny Defendants' Motion to Dismiss on the basis that the HOA foreclosure sale did not extinguish Wells Fargo's security interest based on the first deed of trust.

2. Due Process

Wells Fargo and Freddie Mac argue that allowing a foreclosure sale based on a later-recorded notice of delinquent HOA assessments to extinguish the previously recorded first deed of trust violates their due process rights because Nevada is a race-notice state. Plaintiff responds that Defendants had adequate notice of the super priority lien based on the super priority statute's enactment in 1991, the 1995 Elkhorn CC&Rs, and the notice procedures in the statute.

"Nevada is a race notice state." Buhecker v. R.B. Petersen & Sons Constr. Co., 929 P.2d 937, 939 (Nev. 1996) (citing Nev. Rev. Stat. §§ 111.320, 111.325). Recorded security interests therefore "impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice." Nev. Rev. Stat. § 111.320.

Under usual race notice rules, Wells Fargo's lien would be superior to the HOA delinquency notice because the first deed of trust was recorded in 2004, and the HOA did not record a notice of default on the assessments until 2010. However, Chapter 116 provides that an HOA perfects its lien by recording the declaration, which provides notice

to any future first deed of trust holder of the potential that, under the statute, a super priority lien may take priority over the first deed of trust, even if the notice of default on the assessments is recorded after the first deed of trust. Id. § 116.3116(4). Chapter 116 was enacted in 1991, and thus Wells Fargo was on notice that by operation of the statute, the 1995 Elkhorn CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over a first deed of trust recorded in 2004. Consequently, the conclusion that foreclosure on an HOA super priority lien extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate Wells Fargo's due process rights. Freddie Mac purchased the property after the HOA recorded the notice of default and conducted the HOA foreclosure sale. Freddie Mac therefore took the property with notice of the HOA foreclosure sale.

To the extent Wells Fargo contends Elkhorn failed to provide the required notice as a factual matter, the Amended Complaint alleges Elkhorn provided all statutorily required notices. (Am. Compl. at 2.) The Court must accept that allegation as true at this stage of the proceedings. In their Reply, Defendants assert that the statute violates due process because the statutory notice provisions do not necessarily require notice to the first deed of trust holder. The Court will not consider this issue raised for the first time in a reply brief. Carstarphen v. Milsner, 594 F. Supp. 2d 1201, 1204 n.1 (D. Nev. 2009). The Court therefore will deny Defendants' Motion to Dismiss on the basis that Defendants' due process rights are violated by operation of the statute.

3. CC&Rs

Defendants argue the Elkhorn CC&Rs provide that first deeds of trust are superior to Elkhorn's HOA liens. Plaintiff responds that the statute prohibits waiver of Chapter 116's provisions.

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Sections 6.16 and 6.17 of the Elkhorn CC&Rs provide as follows:

> **Section 6.16. Mortgages Protection.**
> Notwithstanding all other provisions hereof, no lien created under this Article VI, nor the enforcement of any provision of this Master Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Lot or Condominium, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Lot or Condominium by a judicial foreclosure or exercise of power of sale, such Lot or Condominium shall remain subject to this Master Declaration and the payment of all installments of assessments accruing subsequent to the date such Beneficiary or Person obtains title. The lien of the assessments, including interest and costs, shall be subordinate to the lien of any previously recorded First Mortgage upon the Lot or Condominium except as may be otherwise required in accordance with NRS Section 116.3116, as amended. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the First Mortgage shall not relieve the prior Owner of his personal obligation for the payment of such unpaid assessments.
> **Section 6.17. Priority of Assessment Lien.**
> The lien of the assessments, including interest and costs (including attorneys' fees) as provided for herein, shall be subordinate to the lien of any previously Recorded First Mortgage upon any Lot or Condominium. The sale or transfer of any Single Family Residential Lot or Condominium shall not affect an assessment lien. However, the sale or transfer of any Single Family Residential Lot or Condominium pursuant to judicial or nonjudicial foreclosure of a previously Recorded First Mortgage shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer except as set forth in NRS Section 116.3116.

(Request for Judicial Notice (Doc. #12), Ex. P.) By the CC&Rs' plain language, in both sections 6.16 and 6.17 Elkhorn preserved its statutory super priority lien rights by reference to § 116.3116, which is the statutory section setting forth the relative priority of the HOA's super priority and junior liens in relation to a first deed of trust. Chapter 116 provides that its requirements "may not be varied by agreement, and rights conferred by it may not be waived," except as "expressly provided in this chapter." Nev. Rev. Stat. § 116.1104. Nothing in § 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien. Accordingly, the Court will deny Defendants' Motion to Dismiss on this basis.

C. Motion to Expunge Lis Pendens

Defendants' Motion to Expunge is based on the same arguments as presented in the Motion to Dismiss. Because the Court will deny Wells Fargo and Freddie Mac's Motion to Dismiss, the Court also will deny the Motion to Expunge.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant MTC Financial Inc.'s Motion to Dismiss (Doc. #37) is hereby GRANTED. Judgment is hereby entered in favor of Defendant MTC Financial Inc. and against Plaintiff 7912 Limbwood Court Trust.

IT IS FURTHER ORDERED that Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Joinder (Doc. #39) is hereby DENIED.

IT IS FURTHER ORDERED that Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Motion to Dismiss (Doc. #40) is hereby DENIED.

IT IS FURTHER ORDERED that Defendants Federal Home Loan Mortgage Corporation and Wells Fargo Bank, N.A.'s Motion to Expunge Lis Pendens (Doc. #48) is hereby DENIED.

DATED: October 28, 2013

PHILIP M. PRO
United States District Judge