EXHIBIT 6

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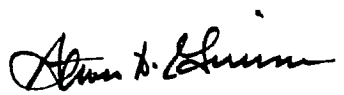

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Attorneys for Defendant Bank of America, N.A.

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Plaintiff, v. BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE, Defendants.	Case No.: A-12-654840-C Dept.: XXIII **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Denying Plaintiff's Motion for Reconsideration was entered in the above-referenced matter on January 23, 2014.

A copy of said Order is attached hereto and incorporated herein by reference.

DATED this 27th day of January, 2014.

AKERMAN LLP

/s/ Natalie L. Winslow

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of January, 2014 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, postage prepaid and addressed to:

Roger P. Croteau, Esq.
Timothy E. Rhoda, Esq.
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An employee of AKERMAN LLP

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Las Vegas Development Group, LLC's (**LVDG**) motion for reconsideration, filed October 18, 2013, came on for hearing before the Court on December 17, 2013. Jacob D. Bundick and Natalie L. Winslow, Esq. appeared on behalf of Bank of America, N.A. (**BANA**). Counsel for LVDG was not present. The Court, having examined the motion and corresponding documents, and ruling solely based on the motion, opposition, and reply, as well as the other papers filed in this matter, finds as follows:

1. LVDG presented no new fact in its motion for reconsideration. Specifically, LVDG attached the following documents to its motion: (1) a report by the Joint Editorial Board for Uniform Real Property Acts, dated June 1, 2013; (2) Nevada Real Estate Division advisory opinion 13-01, dated December 12, 2012; (3) a "presentation" to the Nevada Senate Judiciary Committee, dated May 6, 2013; and (4) a Nevada Legislative Counsel Bureau Opinion, dated December 7, 2012.

2. The documents attached to LVDG's motion do not raise any new issues of law or fact because all four exhibits were previously available to LVDG prior to the Court's hearing on the motion to dismiss the second amended complaint on September 17, 2013.

3. The Court finds no manifest error in law or fact that would warrant it reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

4. The Court finds LVDG has not presented any newly discovered evidence that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

5. The Court finds no manifest injustice that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

6. The Court finds LVDG has not presented any change in controlling law that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

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ORDER

Based on the foregoing, the Court orders as follows:

LVDG's MOTION FOR RECONSIDERATION is **DENIED**.

IT IS SO ORDERED.

Dated this 21st day of January, 2013.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:

AKERMAN LLP

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Attorneys for Defendant
Bank of America, N.A.

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EXHIBIT 5

EXHIBIT 5

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CLERK OF THE COURT

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Attorneys for Defendant Bank of America, N.A.

DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Plaintiff, v. BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE, Defendants.	Case No.: A-12-654840-C Dept.: XXIII **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an ORDER GRANTING BANK OF AMERICA, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT was entered in the above-captioned matter on October 10, 2013. A copy of said Order is attached hereto.

DATED this 10th day of October, 2013.

AKERMAN SENTERFITT LLP

/s/ Natalie L. Winslow
JACOB D. BUNDICK, ESQ.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of October, 2013 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER**, postage prepaid and addressed to:

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Rachel E. Donn, Esq.
Peter E. Dunkley, Esq.
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

ORDER GRANTING BANK OF AMERICA, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendant Bank of America, N.A.'s (**BANA**) motion to dismiss plaintiff Las Vegas Development Group, LLC's (**LVDG**) second amended complaint, filed August 15, 2013, came on for hearing before the Court on September 17, 2013. Marilyn Fine, Esq. appeared on behalf of LVDG, and Natalie L. Winslow, Esq. appeared on behalf of BANA. The Court, having examined the pleadings and heard the arguments of counsel at the hearing on the motion, finds as follows:

FINDINGS OF FACT

A. On June 22, 2006, Genevieve Uniza-Enriquez (the **borrower**) purchased certain real property located at 6279 Downpour Court, Las Vegas, Nevada 89110.

B. The borrower secured her purchase of the property with a deed of trust for $360,000.00 against the property.

C. On June 25, 2010, the successor trustee under the deed of trust and/or agent of the beneficiary, ReconTrust Company, N.A. (**ReconTrust**) recorded a first notice of default against the property.

D. On June 30, 2010, an assignment of the deed of trust was recorded in favor of BAC Home Loans Servicing, LP.

E. ReconTrust rescinded the first notice of default on March 30, 2011.

F. On April 5, 2011, ReconTrust recorded a second notice of default.

G. On December 29, 2011, the Nevada Foreclosure Mediation Program recorded its certificate, indicating that "[t]he Beneficiary may proceed with the foreclosure process."

H. ReconTrust recorded a notice of trustee's sale on December 29, 2011, and additional notices of trustee's sale on April 12, 2012 and July 25, 2012.

I. On April 1, 2010, Absolute Collection Services, LLC (**ACS**), as agent for Palo Verde Ranch Homeowners' Association (**Palo Verde**), recorded a Notice of Delinquent Assessment Lien against the property in the amount of $754.56.

J. The notice specifically stated that "[a]dditional monies shall accrue under this claim at the rate of the claimant's periodic assessments, *plus permissible late charges, costs of collection and interest and other charges*, if any, that shall accrue subsequent to the date of this notice." (Emphasis added).

K. The lien did not provide the amount attributable to assessments only – the only amount subject to Nevada's super priority lien statute.

L. On July 14, 2010, ACS recorded a notice of default against the property, stating that the amount owed as of July 13, 2010, totaled $1,749.65.

M. On November 18, 2010, ACS recorded a notice of foreclosure sale, stating that $2,873.86 was required to pay off the lien to avoid the HOA foreclosure sale.

N. On April 12, 2011, LVDG purchased the property at the HOA foreclosure sale.

///

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O. A trustee's deed upon sale was recorded on April 13, 2011, in favor of LVDG, stating that LVDG purchased the property for the total amount of $4,001.00.

P. On January 17, 2012, LVDG initiated this action, alleging, *inter alia*, that BANA's deed of trust was extinguished by virtue of the HOA foreclosure sale.

CONCLUSIONS OF LAW

1. Nevada Revised Statute 116.3116(1) grants a homeowners' association (**HOA**) a lien against a residential property for unpaid association dues, fines, and certain other assessments (**HOA Lien**).

2. A HOA Lien is junior in priority to "[a] first security interest recorded before the date on which the assessment sought to be enforced became delinquent. . . ." NRS 116.3116(2)(b).

3. However, a HOA Lien "is also prior to all security interests described in [NRS 116.3116(2)(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 assessment 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. . . ." NRS 116.3116(2).

4. The plain language of NRS 116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust.

5. Nevada's statutes governing homeowner associations, including NRS 116.3116, are based on the Uniform Common Interest Ownership Act (**UCIOA**). The UCIOA enacted the limited priority conferred to an HOA to "strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." UCIOA § 3-116 cmt. 1.

6. UCIOA § 3-116, as adopted by the Nevada Legislature, balances two interests: the collection of unpaid HOA Assessments and the protection of the security interest of lenders. Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust (**Holder**) forecloses on the property. When foreclosure of the first deed of trust is

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complete, the HOA would then be entitled to the priority amount owed on delinquent assessments pursuant to NRS 116.3116(2) before the Holder receives any of the proceeds.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Court orders as follows:

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **GRANTED WITH PREJUDICE** with respect to Bank of America, N.A. because NRS 116.3116(2) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **DENIED** with respect to the remaining defendant GENEVIEVE UNIZA-ENRIQUEZ. However, this Court determines that there are no claims remaining in this Case against Bank of America, N.A. and no just reason for delay in entry of a final appeal order in favor of Bank of America, N.A. pursuant to NRCP 54(b).

IT IS SO ORDERED.

Dated this 8 day of October, 2013.

DISTRICT COURT JUDGE
JUDGE STEFANY A. MILEY

Submitted by:

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Bank of America, N.A.

Approved as to Form and Content by:

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EXHIBIT 4

EXHIBIT 4

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

Las Vegas Development Group, LLC's (**LVDG**) motion for reconsideration, filed October 18, 2013, came on for hearing before the Court on December 17, 2013. Jacob D. Bundick and Natalie L. Winslow, Esq. appeared on behalf of Bank of America, N.A. (**BANA**). Counsel for LVDG was not present. The Court, having examined the motion and corresponding documents, and ruling solely based on the motion, opposition, and reply, as well as the other papers filed in this matter, finds as follows:

1. LVDG presented no new fact in its motion for reconsideration. Specifically, LVDG attached the following documents to its motion: (1) a report by the Joint Editorial Board for Uniform Real Property Acts, dated June 1, 2013; (2) Nevada Real Estate Division advisory opinion 13-01, dated December 12, 2012; (3) a "presentation" to the Nevada Senate Judiciary Committee, dated May 6, 2013; and (4) a Nevada Legislative Counsel Bureau Opinion, dated December 7, 2012.

2. The documents attached to LVDG's motion do not raise any new issues of law or fact because all four exhibits were previously available to LVDG prior to the Court's hearing on the motion to dismiss the second amended complaint on September 17, 2013.

3. The Court finds no manifest error in law or fact that would warrant it reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

4. The Court finds LVDG has not presented any newly discovered evidence that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

5. The Court finds no manifest injustice that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

6. The Court finds LVDG has not presented any change in controlling law that would warrant it to reconsider or alter/correct the order granting BANA's motion to dismiss the second amended complaint.

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ORDER

Based on the foregoing, the Court orders as follows:

LVDG's MOTION FOR RECONSIDERATION is **DENIED.**

IT IS SO ORDERED.

Dated this 21st day of January, 2013.

DISTRICT COURT JUDGE

JUDGE STEFANY A. MILEY

Submitted by:

AKERMAN LLP

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Attorneys for Defendant
Bank of America, N.A.

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EXHIBIT 3

EXHIBIT 3

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20; AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No.: A-12-654840-C
Dept.: XXIII

ORDER GRANTING BANK OF AMERICA, N.A.'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendant Bank of America, N.A.'s (**BANA**) motion to dismiss plaintiff Las Vegas Development Group, LLC's (**LVDG**) second amended complaint, filed August 15, 2013, came on for hearing before the Court on September 17, 2013. Marilyn Fine, Esq. appeared on behalf of LVDG, and Natalie L. Winslow, Esq. appeared on behalf of BANA. The Court, having examined the pleadings and heard the arguments of counsel at the hearing on the motion, finds as follows:

FINDINGS OF FACT

A. On June 22, 2006, Genevieve Uniza-Enriquez (the **borrower**) purchased certain real property located at 6279 Downpour Court, Las Vegas, Nevada 89110.

B. The borrower secured her purchase of the property with a deed of trust for $360,000.00 against the property.

C. On June 25, 2010, the successor trustee under the deed of trust and/or agent of the beneficiary, ReconTrust Company, N.A. (**ReconTrust**) recorded a first notice of default against the property.

D. On June 30, 2010, an assignment of the deed of trust was recorded in favor of BAC Home Loans Servicing, LP.

E. ReconTrust rescinded the first notice of default on March 30, 2011.

F. On April 5, 2011, ReconTrust recorded a second notice of default.

G. On December 29, 2011, the Nevada Foreclosure Mediation Program recorded its certificate, indicating that "[t]he Beneficiary may proceed with the foreclosure process."

H. ReconTrust recorded a notice of trustee's sale on December 29, 2011, and additional notices of trustee's sale on April 12, 2012 and July 25, 2012.

I. On April 1, 2010, Absolute Collection Services, LLC (**ACS**), as agent for Palo Verde Ranch Homeowners' Association (**Palo Verde**), recorded a Notice of Delinquent Assessment Lien against the property in the amount of $754.56.

J. The notice specifically stated that "[a]dditional monies shall accrue under this claim at the rate of the claimant's periodic assessments, *plus permissible late charges, costs of collection and interest and other charges*, if any, that shall accrue subsequent to the date of this notice." (Emphasis added).

K. The lien did not provide the amount attributable to assessments only – the only amount subject to Nevada's super priority lien statute.

L. On July 14, 2010, ACS recorded a notice of default against the property, stating that the amount owed as of July 13, 2010, totaled $1,749.65.

M. On November 18, 2010, ACS recorded a notice of foreclosure sale, stating that $2,873.86 was required to pay off the lien to avoid the HOA foreclosure sale.

N. On April 12, 2011, LVDG purchased the property at the HOA foreclosure sale.

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O. A trustee's deed upon sale was recorded on April 13, 2011, in favor of LVDG, stating that LVDG purchased the property for the total amount of $4,001.00.

P. On January 17, 2012, LVDG initiated this action, alleging, *inter alia*, that BANA's deed of trust was extinguished by virtue of the HOA foreclosure sale.

CONCLUSIONS OF LAW

1. Nevada Revised Statute 116.3116(1) grants a homeowners' association (**HOA**) a lien against a residential property for unpaid association dues, fines, and certain other assessments (**HOA Lien**).

2. A HOA Lien is junior in priority to "[a] first security interest recorded before the date on which the assessment sought to be enforced became delinquent. . . ." NRS 116.3116(2)(b).

3. However, a HOA Lien "is also prior to all security interests described in [NRS 116.3116(2)(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 assessment 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. . . ." NRS 116.3116(2).

4. The plain language of NRS 116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust.

5. Nevada's statutes governing homeowner associations, including NRS 116.3116, are based on the Uniform Common Interest Ownership Act (**UCIOA**). The UCIOA enacted the limited priority conferred to an HOA to "strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." UCIOA § 3-116 cmt. 1.

6. UCIOA § 3-116, as adopted by the Nevada Legislature, balances two interests: the collection of unpaid HOA Assessments and the protection of the security interest of lenders. Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust (**Holder**) forecloses on the property. When foreclosure of the first deed of trust is

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complete, the HOA would then be entitled to the priority amount owed on delinquent assessments pursuant to NRS 116.3116(2) before the Holder receives any of the proceeds.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Court orders as follows:

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **GRANTED WITH PREJUDICE** with respect to Bank of America, N.A. because NRS 116.3116(2) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.

Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **DENIED** with respect to the remaining defendant GENEVIEVE UNIZA-ENRIQUEZ. However, this Court determines that there are no claims remaining in this Case against Bank of America, N.A. and no just reason for delay in entry of a final appeal order in favor of Bank of America, N.A. pursuant to NRCP 54(b).

IT IS SO ORDERED.

Dated this 6 day of October, 2013.

DISTRICT COURT JUDGE
JUDGE STEFANY A. MILEY

Submitted by:

AKERMAN SENTERFITT LLP

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EXHIBIT 2

EXHIBIT 2

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Attorneys for Las Vegas Development Group, LLC

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

-o0o-

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company,

Plaintiff,

v.

BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20,AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE,

Defendants.

Case No. A-12-654840-C
Dept. No. XXIII

MOTION FOR RECONSIDERATION

Arbitration Exemption:
Title to Real Property,
Declaratory Relief

COME NOW, LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company ("LVDG"), by and through its attorneys of record, MEIER & FINE, LLC, and hereby files this Motion for Reconsideration of the Court's Order Granting Bank of America's Motion to Dismiss pursuant to NRCP 59(e) and E.D.C.R.

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This Motion is made and based upon EDCR 2.24, the pleadings and papers on file herein, the attached points and authorities, and any argument of counsel as the Court may consider.

DATED this 17th day of October, 2013.

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NOTICE OF MOTION

YOU AND EACH OF YOU, will please take notice that the **MOTION FOR RECONSIDERATION** will come on regularly for hearing on the 18 day of NOV, 2013, at the hour of 9 3 0 A or as soon thereafter as counsel may be heard, in Department XXIII in the above-referenced court.

DATED this 17th day of October, 2013.

MEIER & FINE, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. Summary

This matter is a declaratory relief / quiet title action, requesting determination of the parties' rights and interests in property located at 6279 Downpour, Las Vegas, Nevada (the "Property") and in particular, the rights and interests of Plaintiff LVDG (the bona fide purchaser of the Property at an HOA Lien Foreclosure Sale) vis-à-vis Defendant Bank of America (lienholder); and the rights and interests of Plaintiff LVDG vis-à-vis Defendant Genevieve Uniza-Enriquez (the former owner). The Property is situated in the common interest community known as Palo Verde Ranch and subject to CC&Rs in 2004, and rules and regulations for the Palo Verde Ranch Homeowners Association (the "HOA").

Plaintiff LVDG acquired the Property at a public auction held for foreclosure of a delinquent assessment lien (the "HOA Lien") on April 12, 2011 (the "HOA Lien Foreclosure Sale"). Immediately prior to the HOA Lien Foreclosure Sale, the Property was owned by Genevieve Uniza-Enriquez; and encumbered by a first deed of trust in favor of Plaintiff Bank of America as assignee of Utah Financial, Inc. (the "First Deed of Trust") recorded in 2006.

LVDG filed a complaint on January 17, 2012, seeking to quiet title to the Property. On August 1, 2013, LVDG filed an amended complaint, which added the former property owner, Genevieve Uniza-Enriquez. With respect to the former owner, LVDG seeks judicial determination of the effect of the HOA Lien foreclosure on the former owner's rights and interests in the Property.

With respect to Bank of America, LVDG seeks judicial determination of the effect of the HOA Lien foreclosure on the First Deed of Trust. LVDG believes that pursuant to NRS §116.3116(1) through NRS §116.3117 (the "HOA Lien Statutes") and well-established real estate law, a portion of an HOA Lien had super priority over the First Deed of Trust, Bank of America failed to pay the super priority amount of the HOA Lien to protect its security interest

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and as a result, foreclosure of the HOA Lien extinguishes the First Deed Of Trust by operation of law.

On August 15, 2013, Bank of America filed a Motion to Dismiss. On October 10, 2013, this Court entered an Order Granting Bank of America's Motion to Dismiss with prejudice (the "Order"), finding the following:

CONCLUSIONS OF LAW

1. Nevada Revised Statute 116.3116(1) grants a homeowners' association (HOA) a lien against a residential property for unpaid association dues, fines, and certain other assessments (HOA Lien).

2. A HOA Lien is junior in priority to "[a] first security interest recorded before the date on which the assessment sought to be enforced became delinquent. . . ." NRS 116.3116(2)(b).

3. However, a HOA Lien "is also prior to all security interests described in [NRS 116.3116(2)(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 assessment 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. . . ." NRS 116.3116(2).

4. The plain language of NRS 116.3116 demonstrates that the super priority lien attaches once a lender forecloses under a first deed of trust.

5. Nevada's statutes governing homeowner associations, including NRS 116.3116, are based on the Uniform Common Interest Ownership Act (UCIOA). The UCIOA enacted the limited priority conferred to an HOA to "strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interest of lenders." UCIOA § 3-116 cmt. 1.

6. UCIOA § 3-116, as adopted by the Nevada Legislature, balances two interests: the collection of unpaid HOA Assessments and the protection of the security interest of lenders. **Therefore, the limited priority afforded by NRS 116.3116(2) is triggered when the holder of a first deed of trust (Holder) forecloses on the property. When foreclosure of the first deed of trust is complete, the HOA would then be entitled to the priority amount owed on delinquent assessments pursuant to NRS 116.3116(2) before the Holder receives any of the proceeds.**

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ORDER

* * * *

> Bank of America, N.A.'s motion to dismiss Las Vegas Development Group, LLC's second amended complaint is **GRANTED WITH PREJUDICE** with respect to Bank of America, N.A. because **NRS 116.3116(2) creates a limited super priority lien for 9 months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest.**

See Order (emphasis added).

II.

ARGUMENT

A. STANDARD FOR RECONSIDERATION.

EDCR 2.24 provides that a party may seek "reconsideration of a ruling of the court..." EDCR 2.24(b). NRCP 59(e) permits a party to file a Motion to Alter or Amend a Judgment no later than 10 days after service of a written notice of entry of a judgment. The Court has great discretion as to whether to grant reconsideration. See Harvey's Wagon Wheel, Inc. v. MacSween, 96 Nev. 215, 217 (1980) (reconsideration granted "in light of persuasive authority cited by the [parties]"). In Nevada, where "new issues of fact or law are raised supporting a ruling contrary to the ruling already reached" a motion should be reheard. Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976). A motion may be reheard if the Court "may have arrived at an erroneous conclusion." Geller v. McCown, 64 Nev. 102, 108 (1947), or if the decision is clearly erroneous. Masonry & Tile Contrs. v. Jolley, Urga & Wirth Ass'n, 113 Nev. 737, 741 (Nev. 1997). After reconsidering the matter, the court may "amend, correct, resettle, modify or vacate as the case may be, an order previously made and entered on the motion in the progress of the cause or proceeding." Trial v. Faretto, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975).

B. THE BASIS FOR THE COURT'S DECISION IS CLEARLY ERRONOUS.

Reconsideration of the Court's Order granting Bank of America's Motion to Dismiss is proper because the Court misread and misinterpreted the HOA Lien Statutes in finding in essence that the super priority provision of NRS §116.3116(2) does not create a true lien, but

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merely a payment priority, which is only triggered upon foreclosure of the first deed of trust and accordingly, foreclosure of the super priority HOA Lien does not extinguish a first deed of trust. As supported by the recent Report of the Joint Editorial Board for Uniform Real Property Acts dated June 1, 2013, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act*, www.uniform.org/_shared/docs/jeburpa/2013jun1 (the "JEBURP Report") attached hereto as **Exhibit 1,** this Court's interpretation of NRS §116.3116(2) is clearly erroneous. The JEBURP Report was prepared by the editorial board of the UCIOA in pertinent part to clarify the meaning and intended application of the HOA super priority lien provisions and to provide guidance to parties and the courts for resolving the high volume of litigation on the HOA Lien priority issue. See JEBURP Report, p. 6. As explained in the JEBURP Report, the Uniform Laws (defined as the UCIOA and its predecessor acts, the Uniform Condominium Act ("UCA"), the Model Real Estate Cooperative Act, and the Uniform Planned Community Act) "facilitate an association's ability to collect common expense assessments by providing that, subject to limited exceptions, the association's lien is prior to all encumbrances that arise after the recording of the declaration." JEBURP Report, p. 1. The JEBURP Report further states:

> The rationale for this approach lies in the realization that (1) the association is an involuntary creditor that is obligated to advance services to owners in return for a promise of future payments; and (2) the owners' default in these payments could impair the association's financial stability and its practical ability to provide the obligated services. The priority of the association's lien is critical because if there is insufficient equity in a unit/parcel to provide a full recovery of unpaid assessments, the association must (as explained above) either reassess the remaining unit owners or reduce maintenance and services. The potential impact of these acts on the community and the association's status as an involuntary creditor argue in favor of providing the association lien with priority vis-à-vis competing liens.
>
> Nevertheless, many practical and regulatory barriers militate against complete priority for an association's assessment lien. Because the interests of the general public outweigh the interests of the community alone, real estate tax liens and other governmental charges should have priority over an association's assessment lien. Likewise, complete priority for association liens could discourage common interest community development. Traditional first mortgage lenders might be reluctant to lend from a subordinate lien position if there was no "cap"

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> on the potential burden of an association's assessment lien. In addition, some federally- or state-regulated lenders face regulatory restrictions on the amount of mortgage lending they can undertake involving security other than first lien security.
>
> For these and other reasons, the general rule in the Uniform Laws (granting the association's lien priority as of the recording of the declaration) does not apply to first mortgages. Instead, the priority of the association's lien with respect to first mortgages is a function of the time the assessment becomes due. If the assessment becomes due after a first mortgage is of record, the assessment lien is generally subordinate to the lien of the first mortgage. However, this subordination is not absolute; under UCIOA §3-116(c), the association's lien is given a limited or "split" priority over the first mortgage lien to the extent of six months' worth of assessments based on the association's periodic budget.
>
> In this way, the Uniform Laws mark a substantial deviation from prior law, striking what the drafters described as "an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." UCIOA §3-116, comment 1.

JEBURP Report, p. 6-7 in **Exhibit 1**.

As explained in the JEBURP Report, the HOA Lien created by the UCIOA [NUCIOA] is a true lien with bifurcated priority not merely a payment priority. The HOA Lien is junior to a first deed of trust, which was recorded prior to the date upon which the assessment becomes due. However, the first deed of trust's priority over the HOA Lien is not absolute because a portion of the HOA Lien has super priority over a first deed of trust up to a capped amount. See JEBURP, example 2, p. 8-10; JEBURB p. 9 ("association's six month limited priority lien constituted a true lien priority and not merely a distributional preference in favor of the association," referring to Summerhill Village Homeowners Assoc. v. Roghley, 270P.3d 639 (Wash. Ct. App. 2012) and application of Washington common interest ownership statutes). See also the last paragraph on page 9 of the JEBURP states in pertinent part:

> **Section -116(c) establishes that the association's lien is "prior to" even the lien of a first mortgage to the extent of both "common expense assessments ...which would have become due in the absence of acceleration during the six months immediately preceding institution of**

> **an action to enforce the lien" and "reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien." A foreclosure sale of the association's lien (whether judicial or nonjudicial) is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary result.[9]**

JEBURP Report, p. 9 in **Exhibit 1** (emphasis added).

Footnote 9 to the JEBURP Report notes that recent Nevada federal court decisions have found that the HOA Lien is a not a true lien, but merely a payment priority. However, the JEBURP Report explains that these decisions misread and misinterpret the UCIOA. Footnote 9 to the JEBURP Report states:

> Two recent Nevada federal decisions interpreting Nevada's limited priority lien statute, Nev. Rev. Stat. § 116.3116(2)(c), rejected the reasoning of *Summerhill Village* and concluded that an association's nonjudicial foreclosure of its assessment lien did not extinguish the lien of the senior mortgage lender. See Weeping Hollow Avenue Trust v. Spencer, 2013 WL 2296313 (D. Nev. May 24, 2013); Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2013 WL 531092 (D. Nev. Feb 11, 2013). For example, in *Weeping Hollow*, the court held that the limited priority lien provision did not create a true lien priority, but instead merely provided that the association's lien would continue to encumber the property following a foreclosure sale by the first mortgagee, to the extent of the assessments unpaid during the preceding nine months. Weeping Hollow, 2013 WL 2296313, at *5 ("Read in its entirety, NRS 116.3116(2)(c) states that an HOA's unpaid charges and assessments incurred during the nine months prior to the foreclosure of a first position mortgage continue to encumber the property after the foreclosure of the first position deed of trust.... However, the super priority lien does not extinguish the first position deed of trust."). **These decisions misread and misinterpret the Uniform Laws limited priority provision, which provides the association with priority to the extent of assessments accruing in the period immediately prior to the association's enforcement of its lien. As discussed in the text, this constitutes a true lien priority, and thus the association's proper enforcement of its lien would thus extinguish the otherwise senior mortgage lien.**

JEBURP Report, page 9, fn9 in **Exhibit 1** (emphasis added).

Nevada Supreme Court has yet to rule on this issue, and as supported by the JEBURB Report, some of the Nevada state and federal courts have been confused, and have misread NRS UCIOA §3-116 and §116.3116. Part of the confusion arises from the fact that some states like

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Nevada adopted the UCIOA virtually verbatim, while other states have adopted variations of the UCIOA or UCA. See JEBURP Report, pages 2-3 (more than 20 states have adopted the UCA, UCIOA, or nonuniform legislation comparable in substance to UCIOA §3-116). See also Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U. Chi. L.J. 53, 75, n 87-88 ("Boyak Article").[1] The *payment priority* theory arises from other states that have expressly altered provisions of the UCIOA to provide for a payment priority approach not a true lien approach. For example, Minnesota has adopted the UCIOA. For example, Minnesota altered the UCIOA statute to create a mere payment priority scheme. As explained in the table set forth below, Minnesota's HOA Lien Statutes are distinguishable from Nevada's HOA Lien Statutes because Nevada's HOA Lien Statute do not contain the *payment priority* language adopted by the Minnesota legislature and accordingly, Nevada is not a *payment priority* state.

Comparison of Nevada and Minnesota HOA Lien Statutes

Description	NRS §116.3116	Minn. Stat. Ann. §515B.3-116
Lien Creation	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.	(a) The association has a lien on a unit for any assessment levied against that unit from the time the assessment becomes due. 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. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charges pursuant to section 515B.3-102(a)(10), (11) and (12) are liens, and are enforceable as assessments, under this section. Recording of the declaration constitutes record notice and perfection of any assessment lien under this section, and no further recording

[1] The Boyak Article provides a broad overview of common interest community statutes in various states, and recognizes that the laws differ from state to state.

		of any notice of or claim for the lien is required.
Perfection	4. 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	Same as Nevada. See last sentence above.
Priority	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.	(b) Subject to subsection (c), a lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) any first mortgage encumbering the fee simple interest in the unit, or, in a cooperative, any first security interest encumbering only the unit owner's interest in the unit, (iii) liens for real estate taxes and other governmental assessments or charges against the unit, and (iv) a master association lien under section 515B.2-121(h). This subsection shall not affect the priority of mechanic's liens
Super Priority	2. **** **-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**	**(c) If a first mortgage on a unit is foreclosed, the first mortgage was recorded after June 1, 1994, and no owner or person who acquires the owner's interest in the unit redeems pursuant to chapter 580, 581, or 582, the holder of the sheriff's certificate of sale from the foreclosure of the first mortgage or any person who acquires title to the unit by redemption as a junior creditor shall take title to the unit subject to a lien in favor of the association for unpaid assessments for common expenses levied pursuant to section 515B.3-115(a), (e)(1) to (3), (f), and (i) which became**

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	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. . . .	**due, without acceleration, during the six months immediately preceding the end of the owner's period of redemption. The common expenses shall be based upon the association's then current annual budget, notwithstanding the use of an alternate common expense plan under section 515B.3-115(a)(2).**

The Minnesota Lien Statutes afford the HOA Lien super priority only after the first mortgage forecloses. See 515B.3-116(c) (if a first mortgage on a unit is foreclosed, the person who acquires title at the mortgage foreclosure sale or by redemption takes title subject to a lien in favor of the HOA for unpaid assessments which became due, without acceleration, during the six months immediately preceding the end of the owner's period of redemption). However, Nevada's HOA Lien Statutes do not contain this limitation. See NRS 116.3116(2). Unlike the super priority provision in Minnesota's HOA Lien Statutes, the super priority provision in Nevada's HOA Lien statute is not triggered if or when the first deed of trust forecloses. Nevada's HOA Lien is a true lien not a mere *payment priority*. Compare the *payment priority* scheme in Minn. Stat. Ann. §515B.3-116(c) to the super priority provision in the second paragraph of NRS §116.3116(2). Unlike the Minnesota legislature, the Nevada legislature adopted the UCIOA virtually verbatim. Unlike the Minnesota HOA Lien Statute, Nevada's HOA Lien Statute creates a true lien not a *payment priority*, and a portion of Nevada's true lien has super priority over a first deed of trust upon recordation of the CC&Rs (not if or when a foreclosure under the first deed of trust occurs).

This legal conclusion is supported by the Nevada State Real Estate Division as supported by the advisory opinion dated December 12, 2012 (the "Real Estate Division Advisory"). A courtesy copy of the Real Estate Division Advisory is attached hereto as **Exhibit 2**. The Real Estate Division Advisory is important and persuasive because the Nevada Supreme Court will likely give deference to the Real Estate Division Advisory when it rules on this issue. The

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Nevada Supreme Court will likely defer to the agency's interpretation of the HOA Lien statutes because the agency's interpretation is based on the plain meaning of the statute. See State Bus. & Indus. v. Nev. Ass'n Servs., 128 Nev. Adv. Op. 34, 2012 WL 3127275* 4 (Nev. Aug. 2, 2012) ("We therefore determine that the plain language of the statutes requires that the CCICCH and the Real Estate Division and no other commission or division, interpret NRS Chapter 116"); Dutchess Business Services v. Nev. State Bd. of Pharmacy, 124 Nev. 701, 709 (2009) (court defers to agency's interpretation of statutes if interpretation is within the language of the statute). The Real Estate Division Advisory explains that the HOA has a statutory lien and a portion of the lien has priority over a first deed of trust. See pages 8-9 of the Real Estate Division Opinion in **Exhibit 2**. See also page 6 of the presentation made by the Administrator of the Real Estate Division to the Nevada Senate Judiciary Committee on May 6, 2013 in **Exhibit 3**, which explains that foreclosure of the super priority lien extinguishes the first deed of trust.

This legal conclusion is further supported by the legal opinion of the State of Nevada Legislative Counsel Bureau dated December 7, 2012, which is attached hereto as **Exhibit 4** (the "LCB Opinion"). As explained in the LCB Opinion, the purchaser of a unit at a HOA Lien Foreclosure Sale, acquires all title held by the previous owner without equity or right of redemption. See pages 1-2, LCB Opinion, **Exhibit 4.** However, the purchaser does not acquire the property subject to a first deed of trust. The ownership interest acquired by the purchaser of a unit, survives a subsequent foreclosure of a security interest. See pages 3-4, LCB Opinion, **Exhibit 4.** Following the HOA Lien foreclosure sale, the HOA's foreclosing trustee is required to disburse the sales proceeds in accordance with NRS §116.31164(3)(c) to (1) the reasonable expenses of the sale; (2) reasonable expenses of securing possession before the sale; holding, maintaining and preparing the unit for sale, including taxes and insurance; to the extent provided in the CC&Rs, attorneys' fees and costs; (3) satisfaction of the HOA Lien; (4) satisfaction in the order of priority of any subordinate claim of record [in accordance with the ranking of priority in NRS §116.3116(2); e.g., first to the super priority portion of the HOA Lien, then to the first deed of trust, then to the sub-priority portion of the HOA Lien, then to junior liens in order of their priority based on "first in time" priority rules]; and (5) remittance of any excess to the owner. If

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proceeds received from the HOA Lien foreclosure sale are less than the amount owed on a security interest, the lender may pursue a judgment against the borrower/former owner. However, the lender cannot seek a judgment against the purchaser for any deficiency resulting from the distribution of proceeds when the HOA lien foreclosure deed contains the recitals described in NRS §116.31166. See pages 3-4, LCB Opinion, **Exhibit 4.** "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 116.31164." LCB Opinion, page 4.

III.

CONCLUSION

The new information before this Court should result in a correction of the Order entered on October 10, 2013. The JEBURB Report, Nevada Real Estate Division Advisory Opinion and legislative presentation, and Nevada Legislative Counsel Bureau Opinion provide useful guidance on the issue at hand. Contrary to the legal conclusions set forth in the Order, NRS §116.3116(2) does not create a *payment priority* triggered only on foreclosure of the first deed of trust. This Court is confusing Nevada's statutes with statutes from other states like Minnesota, which have made express alterations to UCIOA §3-116. Unlike Minnesota's super priority lien statute, Nevada's super priority lien statute creates a true lien not merely a payment priority triggered upon the first deed of trust's foreclosure.

DATED this 17th day of October, 2013.

Meier & Fine, LLC

By _____

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Exhibit List

Exhibit 1:	Report of Joint Editorial Board for Uniform Real Property Acts dated 6/1/2013
Exhibit 2:	Nevada State Real Estate Division Advisory Opinion dated 12/12/2012
Exhibit 3:	Nevada Real Estate Division Presentation to the Nevada Senate Judiciary Committee on May 6, 2013
Exhibit 4:	State of Nevada Legislative Counsel Bureau opinion dated 12/7/2012

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 17, 2013, I served a copy of the above and foregoing **Las Vegas Development Group, LLC'S MOTION FOR RECONSIDERATION** by depositing said copy in the U.S. Mails, postage fully prepaid, addressed as follows:

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Attorneys for Defendant

/s/ Cynthia Kelley
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EXHIBIT 1

REPORT OF THE JOINT EDITORIAL BOARD FOR UNIFORM REAL PROPERTY ACTS

THE SIX-MONTH "LIMITED PRIORITY LIEN" FOR ASSOCIATION FEES UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT

JUNE 1, 2013

The Joint Editorial Board for Uniform Real Property Acts (the "Board") provides guidance to the Uniform Law Commission (ULC) and others regarding potential subjects for uniform laws relating to real estate, as well as advice regarding potential amendments to existing uniform laws relating to real estate. The Board is comprised of representatives of the ULC, the American Bar Association Real Property, Trust and Estate Law Section, and the American College of Real Estate Lawyers, as well as liaisons from the American College of Mortgage Attorneys, the American Land Title Association, and the Community Associations Institute.

JOINT EDITORIAL BOARD FOR UNIFORM REAL PROPERTY ACTS

THE SIX-MONTH "LIMITED PRIORITY LIEN" FOR ASSOCIATION FEES UNDER THE UNIFORM COMMON INTEREST OWNERSHIP ACT

Introduction

Role of Association Assessments. In the modern common interest community (the most common forms of which are the condominium, the planned community, and the cooperative), each unit/parcel is subject to an assessment for its proportionate share of the common expenses needed to operate the owners' association (the "association") and to maintain, repair, replace, and insure the community's common elements and amenities. Assessments constitute the primary source of revenue for the community, and the ability to collect assessments is crucial to the association's ability to provide the maintenance and services expected by community residents. If some owners do not pay their proportionate share of common expenses, the association will be forced to shift the burden of delinquent assessments to the remaining unit owners through increased assessments or reduced services and maintenance, potentially threatening property values within the community.

Statutory Lien. To facilitate the association's ability to collect assessments, assessments unpaid by an owner constitute a lien on the owner's unit/parcel. In theory, the lien provides the association with the leverage needed to assure timely collection of assessments. If an owner fails to pay assessments, the association can institute an action to foreclose on the owner's interest in the unit/parcel and can use the proceeds of the foreclosure sale to satisfy the balance of the unpaid assessments (along with interest, costs, and to the extent authorized by the declaration and applicable law, attorney's fees incurred by the association in enforcing its lien).

Uniform Law Treatment. The Uniform Common Interest Ownership Act (UCIOA) — along with its predecessor acts, the Uniform Condominium Act, the Model Real Estate Cooperative Act, and the Uniform Planned Community Act (collectively, the "Uniform Laws") — facilitate an association's ability to collect common expense assessments by providing that, subject to limited exceptions, the association's lien is prior to all encumbrances that arise after the recording of the declaration. The rationale for this approach lies in the realization that (1) the association is an involuntary creditor that is obligated to advance services to owners in return for a promise of future payments; and (2) the owners' default in these payments could impair the association's financial stability and its practical ability to provide the obligated services. The priority of the association's lien is critical because if there is insufficient equity in a unit/parcel to provide a full recovery of unpaid assessments, the association must (as explained above) either reassess the remaining unit owners or reduce maintenance and services. The potential impact of these acts on the community and the association's status as an

involuntary creditor argue in favor of providing the association lien with priority vis-à-vis competing liens.

Nevertheless, many practical and regulatory barriers militate against complete priority for an association's assessment lien. Because the interests of the general public outweigh the interests of the community alone, real estate tax liens and other governmental charges should have priority over an association's assessment lien. Likewise, complete priority for association liens could discourage common interest community development. Traditional first mortgage lenders might be reluctant to lend from a subordinate lien position if there was no "cap" on the potential burden of the an association's assessment lien. In addition, some federally- or state-regulated lenders face regulatory restrictions on the amount of mortgage lending they can undertake involving security other than first lien security.

For these and other reasons, the general rule in the Uniform Laws (granting the association's lien priority as of the recording of the declaration) does not apply to first mortgages. Instead, the priority of the association's lien with respect to first mortgages is a function of the time the assessment becomes due. If the assessment becomes due after a first mortgage is of record, the assessment lien is generally subordinate to the lien of the first mortgage. However, this subordination is not absolute; under UCIOA § 3-116(c), the association's lien is given a limited or "split" priority over the first mortgage lien to the extent of six months' worth of assessments based on the association's periodic budget:[1]

> A lien under this section is also prior to [a first mortgage lien] to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.

In this way, the Uniform Laws mark a substantial deviation from prior law, striking what the drafters described as "an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." UCIOA § 3-116, comment 1. Since its introduction in 1976, the six-month priority for association liens has been adopted in more than twenty

[1] Comparable priority provisions appear in the Uniform Condominium Act [UCA § 3-116], the Model Real Estate Cooperative Act [MRECA § 3-115], and the Uniform Planned Community Act [UPCA § 3-116].

jurisdictions, either through adoption of the UCA, UCIOA, or in nonuniform legislation comparable in substance to UCIOA § 3-116.[2]

The drafters of § 3-116(c) believed that the six-month association lien priority struck a workable and functional balance between the need to protect the financial integrity of

[2] The relevant Uniform Laws include Ala. Code § 35-8A-316(b) (six-month limited priority for assessment lien for condominium association); Alaska Stat. Ann. § 34.08.470(b) (six-month limited priority for assessment lien for common interest community association); Colo. Rev. Stat. Ann. § 38-33.3-316(b) (six-month limited priority for assessment lien for common interest community association); Conn. Gen. Stat. Ann. § 47-258(b) (six-month limited priority for assessment lien for common interest community association, plus association's costs and attorney fees in enforcing its lien); Del. Code Ann. tit. 25, § 81-316(b) (six-month limited priority for assessment lien for common interest community association); Minn. Stat. Ann. § 515B.3-116(c) (six-month limited priority for assessment lien for common interest community association); Vernon's Ann. Mo. Stat. § 448.3-116(2) (limited priority for six months of condominium association assessments and fines which are due at time of subsequent refinancing); Nev. Rev. Stat. Ann. § 116.3116(2) (nine-month limited priority for assessment lien for common interest community association; although duration may be reduced to six months if required by federal regulation); Purdon's Pa. Cons. Stat. Ann. tit. 68, § 5315(b) (six-month limited priority for assessment lien for planned community association); *id.* § 3315(b) (six-month limited priority for assessment lien for condominium association); *id.* § 4315(b) (six-month limited priority for assessment lien for cooperative association); R.I. Gen. Laws Ann. § 34-36.1-3.16(b) (six-month limited priority for assessment lien for condominium association); Vt. Stat. Ann. tit. 27A, § 3-116(b) (six-month limited priority for assessment lien for common interest community association); Rev. Code Wash. Ann. § 64.34.364(3) (six-month limited priority for assessment lien for condominium association); W. Va. Code § 36B-3-116(b) (six-month limited priority for assessment lien for common interest community association).

Jurisdictions that have not enacted one of the Uniform Laws, but that have adopted a limited priority lien provision, include the District of Columbia, D.C. Code § 42-1903.13(a)(2) (six-month limited priority for assessment lien for condominium association); Florida, Fla. St. Ann. §§ 718.116(1)(b), 720.3085(2)(c) (priority for assessment lien for association limited to twelve months of assessments or one percent of the original mortgage debt); Illinois, 765 Ill. Comp. Stat. § 605/9(g)(4) (six-month limited priority for assessment lien for condominium association); Maryland, Md. Code Real Prop. § 11B-117(c) (four-month limited priority for assessment lien of homeowners association); Massachusetts, Mass. Gen. Laws Ann. ch. 183A, § 6(c) (six-month limited priority for assessment lien for condominium association); New Hampshire, N.H. Rev. Stat. § 356-B:46(I) (six-month limited priority for assessment lien for condominium association); New Jersey, N.J. Stat. Ann. § 46:8B-21 (six-month limited priority for assessment lien for condominium association); and Tennessee, Tenn. Code Ann. § 66-27-415(b) (six-month limited priority for assessment lien for condominium association).

Although Kentucky, Maine, Nebraska, New Mexico, North Carolina, Texas, and Virginia each adopted versions of the UCA, those states did not enact the six-month limited-priority for condominium association liens. Ky. Rev. Stat. Ann. § 381.9193; Me. Rev. Stat. Ann. tit. 33, § 1603-116(b); Neb. Rev. Stat. § 76-874; N.M. Stat. Ann. § 47-7C-16; N.C. Gen. Stat. § 47C-3-116; Tex. Prop. Code § 82.113(b); Va. Code Ann. § 55-79.84.

the association and the legitimate expectations of first mortgage lenders. Fundamental to that belief was the assumption that, if an association took action to enforce its lien and the unit/parcel owner failed to cure its assessment default, the first mortgage lender would promptly institute foreclosure proceedings and pay the prior six months of unpaid assessments to the association to satisfy the limited priority lien — thus permitting the mortgage lender to preserve its first lien position and deliver clear title in its foreclosure sale. The drafters further understood — based on circumstances then existing — that the first mortgage lender's foreclosure proceeding would likely be completed within six months (particularly in jurisdictions with nonjudicial foreclosure) or a reasonable period of time thereafter, minimizing the period during which unpaid assessments would accrue for which the association would not have first lien priority. Finally, the drafters anticipated that the unit/parcel would, in the typical situation, have a value sufficient to enable the first mortgagee to recover the both the unpaid mortgage balance and the cost of six months of assessments. Once a buyer was in place — whether the foreclosing first mortgagee or a third party — that buyer would have to begin making monthly assessment payments, thus preserving the association's ability to carry out its maintenance and services obligations.

Today's Marketplace. The real estate market facing common interest communities today is quite different from the one contemplated by the drafters of the Uniform Laws:

- Many units/parcels in common interest communities are "underwater," with values below the outstanding first mortgage balance.

- More significantly — particularly in states with judicial foreclosure — there are long delays in the completion of foreclosures. During this time, neither the unit/parcel owner nor the mortgagee typically pays the common expense assessments — the unit/parcel owner is unable or unwilling to do so, and the mortgagee is not legally obligated to do so prior to acquiring title.

If it takes 24 months for a mortgagee to complete a foreclosure, but the association has a first priority lien for only the immediately preceding six months of unpaid assessments, the consequences for the association can be devastating. The association may receive payment of six months worth of assessments, but because of depressed unit/parcel values, the sale will not generate surplus proceeds from which the association could satisfy the subordinate portion of its lien — and the association likely could not collect a judgment against the unit/parcel owner for that unpaid balance.

Because an association's sources of revenues are usually limited to common assessments, the remaining residents of the community bear the consequences of default by a unit/parcel owner of its assessment obligations, unless the state's statute requires the mortgagee to bear some portion of that cost. As suggested above, § 3-116(c)'s "split" priority for association liens was premised on the assumption that the six-

month limited priority lien would protect the mortgagee's expected first lien position while enabling an association to recover a substantial portion of the common expense costs that would accrue during a period in which the first mortgagee was foreclosing on the unit/parcel. However, if foreclosure takes substantially longer than six months and foreclosure proceeds are inadequate to pay off the first mortgage, the association can collect only a fraction of unpaid assessments from the mortgagee, effectively forcing the remaining owners to bear increased assessments or decreased maintenance/services.

This problem has become extreme in the current economic environment, in which long foreclosure delays have become commonplace. In some cases, delay is attributable to the size of defaulted mortgage portfolios having overwhelmed the capacity of lenders and their servicers. Faulty record-keeping and transaction practices by both lenders and servicers have prompted statutory and judicial responses that have lengthened the foreclosure timeline in judicial foreclosure states.[3] Further, anecdotal evidence suggests that some mortgage lenders are delaying the institution of foreclosure proceedings on units/parcels affected by common interest assessments. If the lender acquires such a unit/parcel at a foreclosure sale via credit bid, the lender (as a successor owner of the unit/parcel) becomes legally obligated to pay assessments arising during the lender's period of ownership. The lender may fear that it may be unable to resell the unit/parcel quickly and for an appropriate return in a depressed housing market — recognizing that it will incur liability for assessments during any period in which it holds the unit/parcel for resale. Thus, for two reasons, the lender has a substantial economic incentive to delay the foreclosure. First, the lender may benefit from a higher recovery in the event that the local housing market experiences any recovery during the period of delay. Second, the delay enables the lender to avoid incurring any legal obligation to pay common expense assessments on the unit/parcel as those assessments accrue during the delay prior to foreclosure.

While the existing legal infrastructure gives the mortgage lender a substantial economic incentive to delay foreclosure, the consequences of this delay are devastating to the community and the remaining residents. To account for the unpaid assessments, the association must either increase the assessment burden on the remaining

[3] The Federal Housing Finance Authority, conservator for Fannie Mae and Freddie Mac, has published foreclosure timelines for all 50 states, reflecting the "periods within which Enterprise servicers are expected to complete the foreclosure process for mortgages that did not qualify for loan modification or other loss mitigation alternatives." Notice, State-Level Guarantee Fee Pricing, Federal Housing Finance Agency (September 25, 2012), 77 Fed. Reg. 58991, 58992. FHFA prepared these timelines from an analysis of the actual experience of Fannie Mae and Freddie Mac with foreclosure processing in each state, as adjusted for each state's statutory requirements and changes in law or practice in response to the foreclosure crisis. *Id.* The national average of the FHFA timelines is 396 days, ranging from 270 days (a common timetable in nonjudicial foreclosure states such as Georgia, Michigan, Minnesota and Missouri) to 750 days in New Jersey and 820 days in New York. *Id.* at 58992, 58993.

unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities). If the other community residents have to pay the burden of increased assessments to preserve community services/amenities, the delaying lender receives a benefit — the value of its collateral is preserved, to some extent, while the lender waits to foreclose. Yet this preservation of the mortgage lender's collateral value comes through the community's imposition of assessments that the lender does not have to pay or reimburse. This benefit arguably constitutes unjust enrichment of the mortgage lender, particularly to the extent that the lender enjoys this benefit by virtue of a conscious decision to delay instituting or prosecuting a foreclosure. See generally Andrea Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U.Chi.L.Rev. 53 (2011).

THE PURPOSE OF THIS REPORT

The Board has two primary purposes in issuing this Report. The first purpose is to address the appropriate interpretation of the existing six-month limited priority lien provision in the Uniform Acts. In states that have adopted § 3-116(c) or a provision substantially comparable to it, the pressures described in the Introduction have produced an increasing volume of litigation between associations and first mortgage lenders regarding the proper scope of the association's lien priority. This litigation may include not only questions regarding the effect of foreclosure proceedings by the association and/or the first mortgage lender, but also questions regarding whether an association can assert its six-month assessment lien priority only on a one-time basis or on a recurring basis (i.e., each time it brings an action to enforce its lien for unpaid assessments). As a result, the Board has prepared this Report to clarify, for the benefit of parties and courts faced with these disputes, the intended application of § 3-116(c) in a variety of scenarios in which priority disputes might arise.

The second purpose is to acknowledge — as addressed in the Introduction — that the existing law governing the relative priority of association liens and first mortgage liens is unsatisfactory. In a slight majority of states, association liens are subordinate to first mortgage liens and mortgage lenders have no obligation to pay or reimburse assessments that accrued prior to the lender's acquisition of title in a foreclosure sale. As a result, first mortgage lenders effectively can shift the costs of preserving the value of their collateral onto the remaining unit/parcel owners. Even in states that have adopted § 3-116(c) or a comparable limited priority rule for association liens, the six-month period of limited priority has proven insufficient to protect the community's financial interests. The Board thus encourages the ULC to consider preparing a uniform law that would strike a more appropriate balance between the interests of first mortgage lenders and common interest community associations and their residents.[4]

[4] In a state that has adopted § 3-116(c) of the Uniform Laws or a similar provision, the new uniform law would effectively function as an amendment to the existing state statute. In states

APPLICATION OF § 3-116(c) AND THE SIX-MONTH LIMITED PRIORITY LIEN

This portion of the Report addresses the intended application of § 3-116(c) through examining a series of examples, the facts of which are reflective of those in judicial opinions addressing the relative priority of association liens and mortgage liens under § 3-116(c). Each example presumes the following facts: Pinecrest is a common interest community created by virtue of a recorded declaration pursuant to UCIOA. Under the declaration, parcels or units within Pinecrest are subject to a mandatory annual common expense assessment of $3,000, payable to Pinecrest Property Owners Association (PPOA) in monthly installments of $250. The assessments pay for operating expenses of PPOA, including the maintenance and insurance of common facilities and recreational areas within Pinecrest.

Unpaid assessments constitute a lien in favor of PPOA upon the affected parcel or unit. Homeowner is the owner of a parcel or unit within Pinecrest, which parcel or unit is subject to a properly recorded mortgage or deed of trust in favor of Bank, securing the repayment of the unpaid balance of Homeowner's mortgage debt to Bank in the amount of $200,000. In each example, Homeowner is in default to Bank on its debt secured by a mortgage or deed of trust, and is also in default to PPOA in payment of assessments.

Example One: Homeowner has failed to pay both its common expense assessments and its mortgage for a period of 12 months, Bank institutes a foreclosure proceeding, joining PPOA as a party. Bank ultimately proceeds with a proper foreclosure sale, at which Buyer purchases the unit/parcel for $150,000.

Section § 3-116(c) establishes that the association's assessment lien is "prior to" even the lien of a first mortgage to the extent of "common expense assessments ... which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien." This means that prior to the sale, PPOA had a first priority lien in the unit/parcel to secure the payment of the preceding six months of common expense assessments ($1,500); Bank effectively had a second priority lien to secure the outstanding mortgage balance ($200,000); and PPOA had a third priority lien to secure the payment of the additional six months of unpaid assessments ($1,500).

When Bank forecloses its mortgage in this context, the foreclosure sale extinguishes its mortgage and PPOA's subordinate lien, with these liens being transferred to the sale proceeds. Bank's foreclosure sale does not extinguish PPOA's first priority "limited priority lien" for the immediately preceding six months of assessments, as that lien is senior under § 3-116(c) and is thus unaffected by Bank's foreclosure sale. Buyer will thus take title to the unit/parcel subject to PPOA's six-month limited priority lien; Buyer

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that do not currently have a limited priority provision for association liens, the new uniform law could be enacted as a freestanding statute.

must pay $1,500 to PPOA to extinguish this lien and clear her title.[5] The $150,000 sale proceeds will be applied first to costs of sale, then to the unpaid balance of Bank's mortgage. As the sale proceeds are insufficient to satisfy Bank's claim, PPOA is left with an unsecured claim for unpaid assessments beyond its six-month priority.

In Example One, it is conceivable that PPOA and Bank may agree, in advance, that the foreclosure sale will deliver clear title to the foreclosure sale purchaser. If PPOA and Bank so agree, the sale would also extinguish PPOA's six-month limited priority lien. If that sale produced a price of $151,500,[6] the proceeds would be applied first to costs of sale; the next $1,500 would be distributed to PPOA on account of its limited priority lien, and the balance would be distributed to Bank to be applied to the unpaid mortgage balance. Again, as the sale proceeds would be insufficient to satisfy Bank's claim, PPOA would be left with an unsecured claim for unpaid assessments beyond its six-month priority.

As described above, Example One involves a third party buying the property at Bank's foreclosure sale. It is perhaps more likely that Bank would end up as the foreclosure sale buyer by means of a credit bid, but this would not make a difference in terms of the appropriate application of § 3-116(c). If Bank buys the property for a credit bid in an amount less than or equal to the unpaid mortgage balance, Bank will receive clear title only if it pays PPOA $1,500 to satisfy its assessment limited priority lien; to the extent Bank does not pay that amount, Bank will take title subject to PPOA's lien, which PPOA could enforce by bringing a foreclosure proceeding of its own.

Example Two: Homeowner has failed to pay its common expense assessment for 12 consecutive months (a total unpaid balance of $3,000). PPOA brings an action to foreclose its lien, joining Homeowner and Bank as parties. Bank does not institute a foreclosure action. PPOA obtains a judgment allowing it to foreclose; neither Homeowner nor Bank takes steps to redeem their respective interests. At the sale, Buyer purchases Homeowner's interest for a cash bid of $207,000. PPOA incurs costs and attorney's fees of $5,000 in conjunction with the sale.

This example is based in part on the facts of *Summerhill Village Homeowners Association v. Roughley*, 270 P.3d 639 (Wash. Ct. App. 2012). In *Summerhill Village*, the association commenced an action against the unit owner and her mortgagee (GMAC) to obtain a judgment for unpaid assessments and to foreclose its lien. The association obtained a default judgment and sold the unit to a third-party buyer for

[5] If Buyer redeems her title by paying off the lien before PPOA brings an action to enforce it, Buyer can redeem by paying only the six months of unpaid assessments. By contrast, if Buyer does not pay off the lien until after PPOA brings an action to enforce it, Buyer must also pay the costs and reasonable attorney's fees incurred by PPOA in its lien enforcement action.

[6] In this context, the sale should produce a higher price (by an increment of $1,500) as the foreclosure sale purchaser will receive clear title rather than title subject to PPOA's senior lien for $1,500 worth of assessments.

$10,302 ($100 over the balance of the judgment). GMAC later sought to set aside the default judgment and establish the priority of its mortgage lien (or, in the alternative, to redeem the property). The Washington Court of Appeals held that under the six-month limited priority lien as incorporated in Washington's version of the Uniform Condominium Act, Rev. Code Wash. Ann. § 64.34.364(3), the association's foreclosure sale had extinguished the lien of the mortgagee. Under this view, the association's six-month limited priority lien constituted a true lien priority and not merely a distributional preference in favor of the association.

To the extent that *Summerhill Village* held that the association's foreclosure sale extinguished GMAC's mortgage lien,[7] the decision is consistent with the proper understanding of the six-month limited priority lien reflected in § 3-116. Section 3-116(c) establishes that the association's lien is "prior to" even the lien of a first mortgage to the extent of both "common expense assessments ... which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien" and "reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien." A foreclosure sale of the association's lien (whether judicial or nonjudicial)[8] is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary result.[9]

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[7] The *Summerhill Village* court also concluded that under Washington's post-sale redemption statute, GMAC was not entitled to redeem the property. As the question of GMAC's right to redeem did not involve the interpretation of § 3-116(c), this Report expresses no opinion as to that aspect of the *Summerhill Village* decision.

[8] The Uniform Laws provide that in a condominium or planned community, the association must foreclose its lien in the manner in which a mortgage is foreclosed. Thus, an association may foreclose its lien by nonjudicial proceedings if the state permits nonjudicial foreclosure. See UCIOA § 3-116(k), UCA § 3-116(a).

[9] Two recent Nevada federal decisions interpreting Nevada's limited priority lien statute, Nev. Rev. Stat. § 116.3116(2)(c), rejected the reasoning of *Summerhill Village* and concluded that an association's nonjudicial foreclosure of its assessment lien did not extinguish the lien of the senior mortgage lender. See Weeping Hollow Avenue Trust v. Spencer, 2013 WL 2296313 (D. Nev. May 24, 2013); Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2013 WL 531092 (D. Nev. Feb. 11, 2013). For example, in *Weeping Hollow*, the court held that the limited priority lien provision did not create a true lien priority, but instead merely provided that the association's lien would continue to encumber the property following a foreclosure sale by the first mortgagee, to the extent of the assessments unpaid during the preceding nine months. Weeping Hollow, 2013 WL 2296313, at *5 ("Read in its entirety, NRS 116.3116(2)(c) states that an HOA's unpaid charges and assessments incurred during the nine months prior to the foreclosure of a first position mortgage continue to encumber the property after the foreclosure of the first position deed of trust.... However, the super priority lien does not extinguish the first position deed of trust."). These decisions misread and misinterpret the Uniform Laws limited

As a result, in Example Two, under a proper application of § 3-116(c), PPOA would have a first priority lien on Homeowner's unit/parcel to the extent of $6,500, reflecting six months of unpaid assessments ($1,500) and the reasonable costs and attorney's fees incurred by PPOA in its foreclosure ($5,000). Bank would have a second priority lien on the unit/parcel to the extent of the $200,000 unpaid balance of Homeowner's mortgage debt. PPOA would have a third priority lien to the extent of the unpaid assessments beyond the six-month threshold (a total of $1,500).

PPOA's foreclosure sale in Example Two would extinguish both of its liens (the six month "limited priority lien" as well as the third-priority lien) as well as the Bank's mortgage lien, thereby delivering a clear title to Buyer. The extinguished liens would transfer to the $207,000 sale proceeds in the same order of priority. PPOA would receive the first $6,500 of the sale proceeds on account of its limited priority lien. Bank would receive the next $200,000 in sale proceeds on account of its mortgage lien. PPOA would receive the final $500 of sale proceeds on account of its third-priority lien, and the remaining $1,000 of PPOA's claim would be unsecured.

Example Three. Because of a dispute over PPOA's enactment of parking rules and imposition of parking fines, Homeowner withheld payment of the monthly installment of assessments. After six months, PPOA brings an action to enforce its lien for the six preceding months of unpaid assessments and to collect fines (joining Bank as a party). Homeowner continues to withhold assessments. Six months later, while the first action is still pending, PPOA brings a second action to enforce another lien for the most recent six months of unpaid assessments and fines. Again, PPOA joins Bank as a party and seeks to establish its lien priority over Bank for the additional six months of unpaid assessments. Bank objects that PPOA is entitled to only one six-month limited priority lien and cannot extend its lien priority through successive actions.

Example Three is based upon the facts in *Drummer Boy Homes Association, Inc. v. Britton*, 2011 Mass. App. Div. 186 (2011). In *Drummer Boy*, the association commenced three successive actions, seeking to establish lien priority for a total of 18 months of unpaid assessments. The association argued that the six-month limited priority lien provision in the Massachusetts statute [Mass. Gen. Laws Ann. Ch. 183A, § 6(c)] did not explicitly forbid — and thus presumptively permitted — successive actions to extend the association's six-month lien priority. The court rejected this view, instead concluding that the association's lien priority was limited to only six months of unpaid assessments:

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priority lien provision, which provides the association with priority to the extent of assessments accruing in the period immediately prior to the association's enforcement of its lien. As discussed in the text, this constitutes a true lien priority, and thus the association's proper enforcement of its lien would thus extinguish the otherwise senior mortgage lien.

> Under the Association's theory, however, a condominium association could file successive suits and thereby enlarge the priority portion of its lien such that its entire lien, no matter how large and no matter how much time was encompassed, would be prior to the first mortgage. If the Legislature had intended to make the condominium lien prior to the first mortgage, it could have done so explicitly.... Recognizing that a condominium association's lien could be extinguished entirely by a foreclosing first mortgagee, the legislature gave condominium associations a limited six-month period of priority. This was meant to be an "equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders." [quoting Uniform Condominium Act (1980) § 3-116, Comment 2.]

On its face, the language of § 3-116(c) does not explicitly address whether an association may file successive actions every six months to extend its limited priority lien priority. Section 3-116(c) provides, in pertinent part:

> A lien under this section is also prior to [a first mortgage recorded prior to the due date of the unpaid assessments] to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien.

Nevertheless, the result reached by the court in *Drummer Boy* is consistent with the appropriate understanding of § 3-116(c). *See also* Hudson House Condo. Ass'n v. Brooks, 223 Conn. 610, 61 A.2d 862 (1992) (rejecting the view that Connecticut six-month limited priority lien statute permitted an association to institute a foreclosure proceeding every six months and thereby obtain perpetual superpriority over mortgagee). Section 3-116(c) provides an association with a first priority lien for the common expense assessments accruing during the six months preceding the filing of "an action" to foreclose (either an action by the association to foreclose its lien, or by the first mortgagee to foreclose the mortgage). The second and third lien foreclosure actions commenced by the association in *Drummer Boy* were not necessary to enforce the association's lien; only one such action is needed for the purpose of selling the unit/parcel and delivering clear title.[10] Thus, the association's commencement of the successive actions could only have been to extend the association's lien priority beyond the six months reflected in § 3-116(c). In such a situation, a court should properly consolidate those successive actions into a single action — in which the association would receive first lien priority only for the immediately preceding six months of unpaid assessments.

[10] Recognizing this, the court in *Drummer Boy* properly consolidated the three actions into a single action. *Drummer Boy*, 2011 Mass.App.Div. 186, at *1.

Thus, in Example Three, Bank can redeem its first mortgage lien from the burden of PPOA's limited priority lien by payment of $1,500 (reflecting the immediately preceding six months of unpaid assessments) plus the costs (including reasonable attorney's fees) incurred by PPOA in bringing the action to enforce its lien).[11] Once Bank has paid this amount to PPOA, PPOA's foreclosure sale to enforce the balance of unpaid assessments would transfer title to the unit/parcel subject to the remaining balance of Bank's first mortgage. PPOA's lien for the unpaid assessment balance would transfer to the proceeds of the sale (if there are any proceeds).[12]

Once the Association Brings an Action to Enforce Its Lien, Is Its Lien Priority Limited to the Prior Six Months of Unpaid Assessments, or Does Its Priority Extend to Include Any Assessments that Accrue During the Pendency of the Lien Enforcement Action? Example Three addressed whether an association could extend its lien priority by filing successive lien enforcement actions every six months. In a recent set of Vermont decisions, however, several associations argued that once an association files an action to enforce its lien, its lien priority should extend not only to the unpaid assessments that had accrued during the preceding six months, but also to all assessments that accrued and remained unpaid during the pendency of the lien enforcement action. Two recent Vermont Superior Court decisions have accepted this argument. *Bank of America, N.A. v. Morganbesser*, No. 675-10-10 (Jan. 18, 2013); *Chase Home Finance, LLC v. Maclean*, http://www.vermontjudiciary.org/20112015%20Todecisionsv/2012-6-25-13.pdf (Jan. 31, 2012). In the *Morganbesser* case, the court concluded that section 3-116(c) is "silent" as to the issue of continuing priority, and reasoned that continuing priority is justified because the association could "extend its superpriority merely by filing a new action for unpaid assessments which have come due every six months" and requiring the association "to repeatedly file new actions simply to extend its priority position serves no purpose." In addition, the court in *Morganbesser* justified its interpretation of section 3-116(c) by observing that "[e]xtending the superpriority from 6 months prior to institution through to the end of the action also provides the mortgage lender with an incentive, albeit a small one, to proceed as expeditiously as permitted in their foreclosure actions."

As explained in Example Three, however, section 3-116(c) does not (and was not intended to) authorize an association to file successive lien enforcement actions every six months as a means to extend the association's limited lien priority. Only one action

[11] In this situation, the court might reasonably conclude that the attorney fees incurred by PPOA in bringing a repetitive action were not reasonable and thus not secured by PPOA's superlien.

[12] If the value of the unit/parcel is less than the remaining balance due to Bank, of course, PPOA will have no substantial incentive to proceed with the foreclosure sale. No third party will agree to purchase the unit/parcel without an agreement by Bank to reduce the mortgage loan balance. PPOA could acquire the unit by credit bid, but this would obligate PPOA to pay ongoing assessments — accentuating the burden on the rest of the residents of the community, who will have to bear assessment increases or service decreases until PPOA could re-sell the unit/parcel.

is necessary to permit the association to enforce its lien, sell the unit/parcel, and deliver clear title; accordingly, successive actions would only serve to extend the association's lien priority beyond the six-month period expressed in section 3-116(c). Two other Vermont Superior Court decisions have disagreed with *Morganbesser* and *Maclean*, correctly concluding that section 3-116(c) places a six-month limit on the association's lien priority. See Vermont Hous. Fin. Auth. v. Coffey, S0367-11 CnC (Aug. 11, 2011) (Toor, J.); EverHome Mtge. Co. v. Murphy, No. 115-3-10 Bncv (Dec. 6, 2011) (Hayes, J.).

Example Four. Homeowner fails to pay common expense assessments and its mortgage debt for a period of six months. Both Bank and PPOA institute foreclosure proceedings. In response to PPOA's foreclosure proceeding, Bank redeems its lien position by tendering payment of $3,500 to PPOA ($1,500 for six months of unpaid common expense assessments plus $2,000 in costs and attorney fees incurred to that date by PPOA in enforcing its lien). For the next six months, while Bank's foreclosure action is pending, Homeowner again fails to pay common expense assessments. PPOA brings another action to enforce its lien, once again joining Bank as a party.

Example Four is based upon the facts in *Lake Ridge Condominium Association, Inc. v. Vega*, No. NNHCV116021568S (Conn. Super. Ct. June 25, 2012). Example Four presents a question about the appropriate interpretation of UCIOA § 3-116(c). Is the six-month limited priority lien a "one-time" lien; i.e., once an association brings an action to enforce its limited priority lien and the mortgagee responds by redeeming that lien by paying six months of common expense assessments, does the association no longer have the right to assert the limited priority lien for any future unpaid assessments? Or is the six-month limited priority lien a potentially recurring lien; i.e., in Example Four, can PPOA assert the limited priority lien a second time, and thereby successfully obtain lien priority over Bank's mortgage lien to the extent of the most recent six months of unpaid assessments?

In *Lake Ridge*, the association commenced a second action to enforce its lien two years after the mortgagee had ostensibly redeemed the association's priority by paying off the then-immediately preceding six months of assessments. The association argued that under the text of the statute and sound policy, there was no bar on repetitive association foreclosures and that in each such proceeding the association should be permitted to assert a limited priority lien for assessments unpaid during the immediately preceding six months. The mortgagee disagreed, asserting that under UCIOA as adopted in Connecticut, Conn. Gen. Stat. § 47-258, the six-month limited priority lien created but a "one-time" lien priority over the mortgagee.

The Connecticut Superior Court agreed with the lender, stating that the association had "previously satisfied its 'superpriority' lien" and holding that the statute "allows the assertion of that lien only once during the pendency of either an action to enforce either

the association's lien or a security interest (first priority mortgage)." See also Linden Condo. Ass'n, Inc. v. McKenna, 247 Conn. 575, 726 A.2d 502 (1999) (statute prevents association from asserting limited priority lien more than once during the course of a foreclosure action by the mortgagee).

The result reached by the court in *Lake Ridge* is consistent with the appropriate understanding of § 3-116(c) as drafted. Section 3-116(c) provides an association with first lien priority only to the extent of the six months of unpaid common expense assessments that accrued immediately preceding a lien foreclosure action by either the association or the first mortgagee. In Example Four, Bank had a foreclosure action pending at the time it made the $3,500 payment to redeem its mortgage from PPOA's limited priority lien, and that action remained pending at the time of PPOA's second lien enforcement proceeding. By its terms, § 3-116(c) does not permit PPOA to assert a first lien priority for more than six months of unpaid common expense assessments in the context of the same foreclosure proceeding by Bank.

As discussed in the Introduction, in fashioning the six-month limited priority lien, the drafters of UCIOA § 3-116(c) did not contemplate the now-common scenario in which the first mortgagee's foreclosure action might remain pending for two years or more. In such a situation, the mortgagee's delay in foreclosure may unreasonably force the community residents to bear either increased assessments or decreased maintenance/services.

Example Five. Homeowner fails to pay common expense assessments for a period of six months. PPOA notifies Bank that Homeowner has not paid those assessments. Before PPOA commences an action to enforce its lien, Bank pays PPOA an amount equal to the preceding six months of common expense assessments. For the ensuing six months, Homeowner again fails to pay its common expense assessments. PPOA then commences an action to enforce its lien and joins Bank as a party. Bank responds by instituting a proceeding to foreclose its mortgage lien.

In Example Five, Bank's payment of the unpaid common charges to PPOA does not prevent PPOA from now asserting its six-month limited priority lien. Under § 3-116(c), PPOA can assert a limited priority lien to the extent of "common expense assessments ... which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien." Under the proper understanding of § 3-116(c), PPOA can thus assert a limited priority lien either in (a) an action by PPOA to enforce its association lien, or (b) an action by Bank to foreclose its mortgage lien. In Example Five, at the time of Bank's payment of the unpaid common expense assessments, PPOA had not commenced an action to enforce its lien, nor had Bank instituted a foreclosure proceeding. Bank's payment of the unpaid common charges was a voluntary business decision which Bank was not compelled to make to

protect its lien priority.[13] As a result, the payment does not prevent PPOA from asserting its limited priority lien in PPOA's subsequent lien enforcement action. To redeem its lien priority in PPOA's action, Bank will have to pay PPOA the immediately preceding six months of unpaid common expense assessments, as well as costs and reasonably attorney's fees incurred by PPOA in its lien enforcement action.

CONCLUSION: A PROPOSAL FOR A NEW UNIFORM LAW

As discussed above, existing law governing the relative priority of association liens and first mortgage liens is unsatisfactory. In many states, association liens are entirely subordinate to first mortgage liens, and mortgage lenders have no obligation to pay or reimburse assessments that accrued prior to the time that the lender acquired title in a foreclosure sale. This permits first mortgage lenders to delay in foreclosing mortgages on common interest units/parcels, while effectively and unjustly shifting the cost of preserving the value of their collateral onto the remaining unit/parcel owners. Even in states that have adopted § 3-116(c) or a comparable limited priority rule for association liens, the six-month period of limited priority has proven insufficient to protect the community's financial interests.

The Board thus encourages the ULC to consider preparing a uniform law that would strike a more appropriate balance between the interests of first mortgage lenders and common interest community associations and their residents. A new uniform law might take a number of potential approaches:

- It might simply extend the association's existing limited priority lien from six months to a longer fixed duration, such as one year or more. A uniform law taking this approach might reflect a more appropriate response to the longer foreclosure timetables that have resulted in the wake of the mortgage crisis.[14]
- It might establish alternatives for the duration of association's limited priority lien, such that the duration of the association's lien priority might vary from state to state. A uniform law taking this approach might acknowledge that differences in local circumstances (i.e., the duration of a state's foreclosure

[13] Bank likely can add this payment to the balance of the Homeowner's mortgage debt as an amount advanced to protect Bank's security, at least to the extent permitted by the terms of Bank's mortgage or deed of trust (which typically provides that the lien shall secure such advances).

[14] It is worth noting that Florida's limited priority lien provides the association with priority to the extent of the lesser of twelve (12) months' worth of unpaid association assessments or one percent (1%) of the outstanding mortgage loan amount. Fla. Stat. Ann. § 718.116. Professor Andrea Boyack has observed that given the delays customarily experienced in Florida foreclosures, even this expanded lien priority has not been sufficient to permit Florida associations to recover all unpaid assessments. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U.Chi.L.Rev. 53, 116 (2011).

timetable, or the extent of decreases in unit values) might warrant local differences in the duration of an association's lien priority.

- It might preserve the state's existing priority rule as a general matter, but require that if the first mortgage lender delays foreclosure beyond a defined period of time, the lender must pay assessments as they accrue during that period of delay (or some portion of those assessments). This would permit a first mortgage lender to make a determination to delay in foreclosing if the lender concludes that delay is justified, but would prevent the lender from being unjustly enriched by forcing the remaining unit/parcel owners to bear the increased cost of preserving the lender's collateral.
- It might preserve the state's existing priority rule as a general matter, but require that if the first mortgage lender delays foreclosure beyond a defined period of time, the association's lien would have priority (or extended priority) for the assessments accruing during that period of delay.
- It could analogize common interest ownership assessments to real property taxes, and give the association full priority over the first mortgage lender for unpaid assessments to the same extent as real property taxes currently enjoy a superpriority over first mortgage liens.[15]

The Board does not advocate for any one of these approaches; a drafting committee should make a determination following deliberations involving the participation of all relevant stakeholder groups (including first mortgage lenders, community associations, and government-sponsored enterprises like Fannie Mae and Freddie Mac).

[15] To a significant extent, an analogy between community assessments and property taxes is compelling, as the association often provides public services such as paving, snow removal, open space maintenance, and land use control/enforcement. First mortgage lenders would no doubt voice strong objections to giving association liens full priority, which raises a concern as to whether such a change would affect the availability of home mortgage credit for common interest units/parcels. Nevertheless, as Professor Boyack has noted, priority for real property taxes has not dissuaded lenders from making first mortgage loans; lenders have addressed this risk by requiring real property escrow accounts, and could demand similar escrow accounts for association assessments. Andrea J. Boyack, *Community Collateral Damage: A Question of Priorities*, 43 Loy.U.Chi.L.Rev. 53, 116, 122 (2011).

EXHIBIT 2

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
ADVISORY OPINION

Subject:	Advisory No. 13-01	21 pages
The Super Priority Lien	Issued By: Real Estate Division	
	Amends/ Supersedes	N/A
Reference(s): NRS 116.3102; ; NRS 116.310312; NRS 116.310313; NRS 116.3115; NRS 116.3116; NRS 116.31162; Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No. 2010-01		Issue Date: December 12, 2012

QUESTION #1:

Pursuant to NRS 116.3116, may the portion of the association's lien which is superior to a unit's first security interest (referred to as the "super priority lien") contain "costs of collecting" defined by NRS 116.310313?

QUESTION #2:

Pursuant to NRS 116.3116, may the sum total of the super priority lien ever exceed 9 times the monthly assessment amount for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115, plus charges incurred by the association on a unit pursuant to NRS 116.310312?

QUESTION #3:

Pursuant to NRS 116.3116, must the association institute a "civil action" as defined by Nevada Rules of Civil Procedure 2 and 3 in order for the super priority lien to exist?

SHORT ANSWER TO #1:

No. The association's lien does not include "costs of collecting" defined by NRS 116.310313, so the super priority portion of the lien may not include such costs. NRS 116.310313 does not say such charges are a lien on the unit, and NRS 116.3116 does not make such charges part of the association's lien.

SHORT ANSWER TO #2:

No. The language in NRS 116.3116(2) defines the super priority lien. The super priority lien consists of unpaid assessments based on the association's budget and NRS 116.310312 charges, nothing more. The super priority lien is limited to: (1) 9 months of assessments; and (2) charges allowed by NRS 116.310312. The super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines, or interest. References in NRS 116.3116(2) to assessments and charges pursuant to NRS 116.310312 define the super priority lien, and are not merely to determine a dollar amount for the super priority lien.

SHORT ANSWER TO #3:

No. The association must *take action* to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the process for foreclosure in NRS 116.31162 or exercise any other remedy it has to enforce the lien.

ANALYSIS OF THE ISSUES:

This advisory opinion – provided in accordance with NRS 116.623 – details the Real Estate Division's opinion as to the interpretation of NRS 116.3116(1) and (2). The Division hopes to help association boards understand the meaning of the statute so they are better equipped to represent the interests of their members. Associations are encouraged to look at the entirety of a situation surrounding a particular deficiency and evaluate the association's best option for collection. The first step in that analysis is to understand what constitutes the association's lien, what is not part of the lien, and the status of the lien compared to other liens recorded against the unit.

Subsection (1) of NRS 116.3116 describes what constitutes the association's lien; and subsection (2) states the lien's priority compared to other liens recorded against a unit. NRS 116.3116 comes from the Uniform Common Interest Ownership Act (1982) (the "Uniform Act"), which Nevada adopted in 1991. So, in addition to looking at the language of the relevant Nevada statute, this analysis includes references to the Uniform Act's equivalent provision (§ 3-116) and its comments.

I. NRS 116.3116(1) DEFINES WHAT THE ASSOCIATION'S LIEN CONSISTS OF.

NRS 116.3116(1) provides generally for the lien associations have against units within common-interest communities. NRS 116.3116(1) states as follows:

> 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.

(emphasis added).

Based on this provision, the association's lien includes assessments, construction penalties, and fines imposed against a unit when they become due. In addition – unless the declaration otherwise provides – penalties, fees, charges, late charges, fines, and interest charged pursuant to NRS 116.3102(1)(j) through (n) are also part of the association's lien in that such items are enforceable as if they were assessments. Assessments can be foreclosed pursuant to NRS 116.31162, but liens for fines and penalties may not be foreclosed unless they satisfy the requirements of NRS 116.31162(4). Therefore, it is important to accurately categorize what comprises each portion of the association's lien to evaluate enforcement options.

A. "COSTS OF COLLECTING" (DEFINED BY NRS 116.310313) ARE NOT PART OF THE ASSOCIATION'S LIEN

NRS 116.3116(1) does not specifically make costs of collecting part of the association's lien, so the determination must be whether such costs can be included under the incorporated provisions of NRS 116.3102. NRS 116.3102(1)(j) through (n) identifies five very specific categories of penalties, fees, charges, late charges, fines, and interest associations may impose. This language encompasses all penalties, fees,

charges, late charges, fines, and interest that are part of the lien described in NRS 116.3116(1).

NRS 116.3102(1)(j) through (n) states:

> 1. Except as otherwise provided in this section, and subject to the provisions of the declaration, the association may do any or all of the following: ...
> (j) Impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.
> **(k) Impose charges for late payment of assessments pursuant to NRS 116.3115.**
> (l) Impose construction penalties when authorized pursuant to NRS 116.310305.
> (m) Impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.
> (n) Impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(emphasis added).

Whatever charges the association is permitted to impose by virtue of these provisions are part of the association's lien. Subsection (k) – emphasized above – has been used – the Division believes improperly – to support the conclusion that associations may include costs of collecting past due obligations as part of the association's lien. The Commission for Common Interest Communities and Condominium Hotels issued Advisory Opinion No. 2010-01 in December of 2010. The Commission's advisory concludes as follows:

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

Analysis of what constitutes the *super priority lien* portion of the association's lien is discussed in Section III, but the Division agrees that the association's lien does include items noted as (a), (b) and (c) of the Commission's advisory opinion above. To support item (d), the Commission relies on NRS 116.3102(1)(k) which gives associations the power to: "Impose charges for late payment of assessments pursuant to NRS 116.3115." This language would include interest authorized by statute and late fees if authorized by the association's declaration.

"Costs of collecting" defined by NRS 116.310313 is too broad to fall within the parameters of charges for late payment of assessments.[1] By definition, "costs of collecting" relate to the collection of past due "obligations." "Obligations" are defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner."[2] In other words, costs of collecting includes more than "charges for late payment of assessments."[3] Therefore, the plain language of NRS 116.3116(1) does not incorporate costs of collecting into the association's lien. Further review of the relevant statutes and legislative action supports this conclusion.

B. PRIOR LEGISLATIVE ACTION SUPPORTS THE POSITION THAT COSTS OF COLLECTING ARE NOT PART OF THE ASSOCIATION'S LIEN DESCRIBED BY NRS 116.3116(1).

The language of NRS 116.3116(1) allows for "charges for late payment of assessments" to be part of the association's lien.[4] "Charges for late payments" is not the same as "costs of collecting." "Costs of collecting" was first defined in NRS 116 by the adoption of NRS 116.310313 in 2009. NRS 116.310313(1) provides for the association's

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[1] Charges for late payment of assessments comes from NRS 116.3102(1)(k) and is incorporated into NRS 116.3116(1).
[2] NRS 116.310313.
[3] "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. NRS 116.310313(3)(a).
[4] NRS 116.3102(1)(k) (incorporated into NRS 116.3116(1)).

right to charge a unit owner "reasonable fees to cover the costs of collecting any past due obligation." NRS 116.310313 is not referenced in NRS 116.3116 or NRS 116.3102, nor does NRS 116.310313 specifically provide for the association's right to lien the unit for such costs.

In contrast, NRS 116.310312, also adopted in 2009, allows an association to enter the grounds of a unit to maintain the property or abate a nuisance existing on the exterior of the unit. NRS 116.310312 specifically provides for the association's expenses to be a lien on the unit and provides that the lien is prior to the first security interest.[5] NRS 116.3102(1)(j) was amended to allow these expenses to be part of the lien described in NRS 116.3116(1). And NRS 116.3116(2) was amended to allow these expenses to be included in the association's super priority lien.

The Commission's advisory opinion from December 2010 also relies on changes to the Uniform Act from 2008 to support the notion that collection costs should be part of the association's super priority lien. Nevada has not adopted those changes to the Uniform Act. Since the Commission's advisory opinion, the Nevada Legislature had an opportunity to clarify the law in this regard.

In 2011, the Nevada Legislature considered Senate Bill 174, which proposed changes to NRS 116.3116. S.B. 174 originally included changes to NRS 116.3116(1) such that the association's lien would specifically include "costs of collecting" as defined in NRS 116.310313. S.B. 174 proposed changes to NRS 116.3116 (1) and (2) to bring the statute in line with the changes to the same provision in the Uniform Act amended in 2008.

The Uniform Act's amendments were removed from S.B. 174 by the first reprint. As amended, S.B. 174 proposed changes to NRS 116.3116(2) expanding the super priority lien amount to include costs of collecting not to exceed $1,950, in addition to 9 months

[5] See NRS 116.310312(4) and (6).

of assessments. S.B. 174 was discussed in great detail and ultimately died in committee.[6]

Also in 2011, Senate Bill 204 – as originally introduced – included changes to NRS 116.3116(1) to expand the association's lien to include attorney's fees and costs and "any other sums due to the association."[7] The bill's language was taken from the Uniform Act amendments in 2008. All changes to NRS 116.3116(1) were removed from the bill prior to approval.

The Nevada Legislature's actions in the 2009 and 2011 sessions are indicative of its intent not to make costs of collecting part of the lien. The Nevada Legislature could have made the costs of collecting part of the association's lien, like it did for costs under NRS 116.310312. It did not do so. In order for the association to have a right to lien a unit under NRS 116.3116(1), the charge or expense must fall within a category listed in the plain language of the statute. Costs of collecting do not fall within that language. Based on the foregoing, the Division concludes that the association's lien does not include "costs of collecting" as defined by NRS 116.310313.

A possible concern regarding this outcome could be that an association may not be able to recover their collection costs relating to a foreclosure of an assessment lien. While that may seem like an unreasonable outcome, a look at the bigger picture must be considered to put it in perspective. NRS 116.31162 through NRS 116.31168, inclusive, outlines the association's ability to enforce its lien through foreclosure. Associations have a lien for assessments that is enforced through foreclosure. The association's expenses are reimbursed to the association from the proceeds of the sale. NRS 116.31164(3)(c) allows the proceeds of the foreclosure sale to be distributed in the following order:

(1) The reasonable expenses of sale;

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[6] See http://leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=423.
[7] Senate Bill No. 204 – Senator Copening, Sec. 49, ln. 1-16, February 28, 2011.

(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.

Subsections (1) and (2) allow the association to receive its expenses to enforce its lien through foreclosure *before* the association's lien is satisfied. Obviously, if there are no proceeds from a sale or a sale never takes place, the association has no way to collect its expenses other than through a civil action against the unit owner. Associations must consider this consequence when making decisions regarding collection policies understanding that every delinquent assessment may not be treated the same.

II. NRS 116.3116(2) ESTABLISHES THE PRIORITY OF THE ASSOCIATION'S LIEN.

Having established that the association has a lien on the unit as described in subsection (1) of NRS 116.3116, we now turn to subsection (2) to determine the lien's priority in relation to other liens recorded against the unit. The lien described by NRS 116.3116(1) is what is referred to in subsection (2). Understanding 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.

NRS 116.3116(2) provides that the association's lien is prior to all other liens recorded against the unit *except:* liens recorded against the unit before the declaration; first security interests (first deeds of trust); and real estate taxes or other governmental assessments. There is one exception to the exceptions, so to speak, when it comes to priority of the association's lien. This exception makes a portion of an association's lien prior to the first security interest. The portion of the association's lien given priority status to a first security interest is what is referred to as the "super priority lien" to

distinguish it from the other portion of the association's lien that is subordinate to a first security interest.

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. NRS 116.3116 is found in the Uniform Act at § 3-116. Nevada adopted the original language from § 3-116 of the Uniform Act in 1991. From its inception, the concept of a super priority lien was a novel approach. The Uniform Act comments to § 3-116 state:

> [A]s to prior first security interests the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders. 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. If the lender wishes, an escrow for assessments can be required.

This comment on § 3-116 illustrates the intent to allow for 6 months of assessments to be prior to a first security interest. The reason this was done was to accommodate the association's need to enforce collection of unpaid assessments. The controversy surrounding the super priority lien is in defining its limit. This is an important consideration for an association looking to enforce its lien. There is little benefit to an association if it incurs expenses pursuing unpaid assessments that will be eliminated by an imminent foreclosure of the first security interest. As stated in the comment, it is also likely that the holder of the first security interest will pay the super priority lien amount to avoid foreclosure by the association.

III. THE AMOUNT OF THE SUPER PRIORITY LIEN IS LIMITED BY THE PLAIN LANGUAGE OF NRS 116.3116(2).

NRS 116.3116(2) states:

> 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.

(emphasis added)

Having found previously that costs of collecting are not part of the lien means they are not part of the super priority lien. The question then becomes what can be included as part of the super priority lien. Prior to 2009, the super priority lien was limited to 6 months of assessments. In 2009, the Nevada legislature changed the 6 months of

assessments to 9 months and added expenses for abatement under NRS 116.310312 to the super priority lien amount. But to the extent federal law applicable to the first security interest limits the super priority lien, the super priority lien is limited to 6 months of assessments.

The emphasized language in the portion of the statute above identifies the portion of the association's lien that is prior to the first security interest, i.e. what comprises the super priority lien. This language states that there are two components to the super priority lien. The first is "to the extent of any charges" incurred by the association pursuant to NRS 116.310312. NRS 116.310312(4) makes clear that the charges assessed against the unit pursuant to this section are a lien on the unit and subsection (6) makes it clear that such lien is prior to first security interests. These costs are also specifically part of the lien described in NRS 116.3116(1) incorporated through NRS 116.3102(1)(j). This portion of the super priority lien is specific to charges incurred pursuant to NRS 116.310312. Payment of those charges relieves their super priority lien status. There does not seem to be any confusion as to what this part of the super priority lien is. Analysis of the super priority lien will focus on the second portion.

A. THE SUPER PRIORITY LIEN ATTRIBUTABLE TO ASSESSMENTS IS LIMITED TO 9 MONTHS OF ASSESSMENTS AND CONSISTS ONLY OF ASSESSMENTS.

The second portion of the super priority lien is "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."

The statute uses the language "to the extent of the assessments" to illustrate that there is a limit on the amount of the super priority lien, just like the language concerning expenses pursuant to NRS 116.310312, but this portion concerns assessments. The limit on the super priority lien is based on the assessments for

common expenses reflected in a budget adopted pursuant to NRS 116.3115 which would have become due in 9 months. The assessment portion of the super priority lien is no different than the portion derived from NRS 116.310312. Each portion of the super priority lien is limited to the specific charge stated and nothing else.

Therefore, while the association's *lien* may include any penalties, fees, charges, late charges, fines and interest charged pursuant to NRS 116.3102 (1) (j) to (n), inclusive, the total amount of the *super priority lien* attributed to assessments is no more than 9 months of the monthly assessment reflected in the association's budget. Association budgets do not reflect late charges or interest attributed to an anticipated delinquent owner, so there is no basis to conclude that such charges could be included in the super priority lien or in addition to the assessments. Such extraneous charges are not included in the association's super priority lien.

NRS 116.3116 originally provided for 6 months of assessments as the super priority lien. Comments to the Uniform Act quoted previously support the conclusion that the original intent was for 6 months of the assessments alone to comprise the super priority lien amount and not the penalties, charges, or interest. It is possible that an argument could be made that the language is so clear in this regard one should not look to legislative intent. But considering the controversy surrounding the meaning of this statute, the better argument is that legislative intent should be used to determine the meaning.

The Commission's advisory opinion of December 2010 concluded that assessments *and* additional costs are part of the super priority lien. The Commission's advisory opinion relies in part on a Wake Forest Law Review[8] article from 1992 discussing the Uniform Act. This article actually concludes that the Uniform Act language limits the

[8] See James Winokur, *Meaner Lienor Community Associations: The "Super Priority" Lien and Related Reforms Under the Uniform Common Interest Ownership Act*, 27 WAKE FOREST L. REV. 353, 366-69 (1992).

amount of the super priority lien to 6 months of assessments, but that the super priority lien does not necessarily consist of only delinquent assessments.[9] It can include fines, interest, and late charges.[10] The concept here is that all parts of the lien are prior to a first security interest and that reference to assessments for the super priority lien is only to define a specific dollar amount.

The Division disagrees with this interpretation because of the unreasonable consequences it leaves open. For example, a unit owner may pay the delinquent assessment amount leaving late charges and interest as part of the super priority lien. If the super priority lien can encompass more than just delinquent assessments in this situation, it would give the association the right to foreclose its lien consisting only of late charges and interest prior to the first security interest. It is also unreasonable to expect that fines (which cannot be foreclosed generally) survive a foreclosure of the first security interest. Either the lender or the new buyer would be forced to pay the prior owner's fines. The Division does not find that these consequences are reasonable or intended by the drafters of the Uniform Act or by the Nevada Legislature. Even the 2008 revisions to the Uniform Act do not allow for anything other than assessments and costs incurred to foreclose the lien to be included in the super priority lien. Fines, interest, and late charges are not *costs* the association incurs.

In 2009, the Nevada Legislature revised NRS 116.3116 to expand the association's super priority lien. Assembly Bill 204 sought to extend the super priority lien of 6 months of assessments to 2 years of assessments.[11] The Commission's chairman, Michael Buckley, testified on March 6, 2009 before the Assembly Committee on Judiciary on A.B. 204 that the law was unclear as to whether the 6 month priority can

[9] See id. at 367 (referring to the super priority lien as the "six months assessment ceiling" being computed from the periodic budget).
[10] See id.
[11] See http://leg.state.nv.us/Session/75th2009/Reports/history.cfm?ID=416.

include the association's costs and attorneys' fees.[12] Mr. Buckley explained that the Uniform Act amendments in 2008 allowed for the collection of attorneys' fees and costs incurred by the association in foreclosing the assessment lien as part of the super priority lien. Mr. Buckley requested that the 2008 change to the Uniform Act be included in A.B. 204. Mr. Buckley's requested change to A.B. 204 to expand the super priority lien never made it into A.B. 204. Ultimately, A.B. 204 was adopted to change 6 months to 9 months, but commenting on the intent of the bill, Assemblywoman Ellen Spiegel stated:

> Assessments covered under A.B. 204 are the regular monthly or quarterly dues for their home. *I carefully put this bill together to make sure it did not include any assessments for penalties, fines or late fees.* The bill covers the basic monies the association uses to build its regular budgets.

(emphasis added).[13]

It is significant that the legislative intent in changing 6 months to 9 months was with the understanding that no portion of that amount would be for penalties, fines, or late fees and that it only covers the basic monies associations use to build their regular budgets. It does make sense that a lien superior to a first security interest would not include penalties, fines, and interest. To say that the super priority lien includes more than just 9 months of assessments allows several undesirable and unreasonable consequences.

B. NEVADA HAS NOT ADOPTED AMENDMENTS TO THE UNIFORM ACT TO ALTER THE ORIGINAL INTENT OF THE SUPER PRIORITY LIEN.

The changes to the Uniform Act support the contention that only what is referenced as the super priority lien in NRS 116.3116(2) is what comprises the super priority lien. In 2008, § 3-116 of the Uniform Act was revised as follows:

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[12] See Minutes of the Meeting of the Assembly Committee on Judiciary, Seventy-fifth Session, March 6, 2009 at 44-45.

[13] See Minutes of the Senate Committee on Judiciary, Seventy-fifth Session, May 8, 2009 at 27.

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

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

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

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

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

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

(c) A ~~The~~ lien under this section is also prior to all security interests described in subsection (b)(2) ~~clause (ii) above~~ to the extent of both the common expense assessments based on the periodic budget adopted by the association pursuant to Section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien and reasonable attorney's fees and costs incurred by the association in foreclosing the association's lien. ~~This subsection~~ Subsection (b) and this subsection ~~does~~ do not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. [~~The~~ A lien under this section is not subject to ~~the provisions of~~ [insert appropriate reference to state homestead, dower and curtesy, or other exemptions].]

Explaining the reason for the changes to these sections, the Uniform Act includes the following comments:

> Associations must be legitimately concerned, as fiduciaries of the unit owners, that the association be able to collect periodic common charges from recalcitrant unit owners in a timely way. To address those concerns, the section contains these 2008 amendments:
>
> First, subsection (a) is amended to add the cost of the association's reasonable attorneys fees and court costs to the total value of the association's existing 'super lien' – currently, 6 months of regular common assessments. This amendment is identical to the amendment adopted by Connecticut in 1991; see C.G.S. Section 47-258(b). 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.

The Uniform Act's amendment in 2008 is very telling about § 3-116's original intent. The comments state reasonable attorneys' fees and court costs are *added* to the super priority lien stating that it is currently 6 months of regular common assessments. The Uniform Act adds attorneys' fees and costs to subsection (a) which defines the association's lien. Those attorneys' fees and costs attributable to foreclosure efforts are also added to subsection (c) which defines the super priority lien amount.

If the association's lien ever included attorneys' fees and court costs as "charges for late payment of assessments" or if such sum was part of the super priority lien, there would be no reason to add this language to subsection (a) and (c). Or at a minimum, the comments would assert the amendment was simply to make the language more clear. It is also clear by the language that only what is specified as part of the super priority lien can comprise the super priority lien. The additional language defining the super priority lien provides for costs that are *incurred* by the association foreclosing the lien. This is further evidence that the super priority lien does not and never did consist of interest, fines, penalties or late charges. These charges are not incurred by the association and they should not be part of any super priority lien.

The Nevada Legislature had the opportunity to change NRS 116.3116 in 2009 and 2011 to conform to the Uniform Act. It chose not to. While the revisions under the

Uniform Act may make sense to some and they may be adopted in other jurisdictions, the fact of the matter is, Nevada has not adopted those changes. The changes to the Uniform Act cannot be insinuated into the language of NRS 116.3116. Based on the plain language of NRS 116.3116, legislative intent, and the comments to the Uniform Act, the Division concludes that the super priority lien is limited to expenses stemming from NRS 116.310312 and assessments as reflected in the association's budget for the immediately preceding 9 months from institution of an action to enforce the association's lien.

IV. "ACTION" AS USED IN NRS 116.3116 DOES NOT REQUIRE A CIVIL ACTION ON THE PART OF THE ASSOCIATION.

NRS 116.3116(2) provides that the super priority lien pertaining to assessments consists of those assessments "which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116 requires that the association take action to enforce its lien in order to determine the immediately preceding 9 months of assessments. The question presented is whether this action must be a civil action.

During the Senate Committee on Judiciary hearing on May 8, 2009, the Chair of the Committee, Terry Care, stated with reference to AB 204:

> One thing that bothers me about section 2 is the duty of the association to enforce the liens, but I understand the argument with the economy and the high rate of delinquencies not only to mortgage payments but monthly assessments. Bill Uffelman, speaking for the Nevada Bankers Association, broke it down to a 210-day scheme that went into the current law of six months. Even though you asked for two years, I looked at nine months, thinking the association has a duty to move on these delinquencies.

NRS 116 does not require an association to take any particular action to enforce its lien, but that it institutes "an action." NRS 116.31162 provides the first steps to foreclose the association's lien. This process is started by the mailing of a notice of delinquent

assessment as provided in NRS 116.31162(1)(a). At that point, the immediately preceding 9 months of assessments based on the association's budget determine the amount of the super priority lien. The Division concludes that this action by the association to begin the foreclosure of its lien is "action to enforce the lien" as provided in NRS 116.3116(2). The association is not required to institute a civil action in court to trigger the 9 month look back provided in NRS 116.3116(2). Associations should make the delinquent assessment known to the first security holder in an effort to receive the super priority lien amount from them as timely as possible.

ADVISORY CONCLUSION:

An association's lien consists of assessments, construction penalties, and fines. Unless the association's declaration provides otherwise, the association's lien also includes all penalties, fees, charges, late charges, fines and interest pursuant to NRS 116.3102(1)(j) through (n). While charges for late payment of assessments are part of the association's lien, "costs of collecting" as defined by NRS 116.310313, are not. "Costs of collecting" defined by NRS 116.310313 includes costs of collecting any *obligation*, not just assessments. Costs of collecting are not merely a charge for a late payment of assessments. Since costs of collecting are not part of the association's lien in NRS 116.3116(1), they cannot be part of the super priority lien detailed in subsection (2).

The super priority lien consists of two components. By virtue of the detail provided by the statute, the super priority lien applies to the charges incurred under NRS 116.310312 and up to 9 months of assessments as reflected in the association's regular budget. The Nevada Legislature has not adopted changes to NRS 116.3116 that were made to the Uniform Act in 2008 despite multiple opportunities to do so. In fact, the Legislative intent seems rather clear with Assemblywoman Spiegel's comments to A.B. 204 that changed 6 months of assessments to 9 months. Assemblywoman Spiegel stated that she "carefully put this bill together to make sure it did not include any

assessments for penalties, fines or late fees." This is consistent with the comments to the Uniform Act stating the priority is for assessments based on the periodic budget. In other words, when the super priority lien language refers to 9 months of assessments, assessments are the only component. Just as when the language refers to charges pursuant to NRS 116.310312, those charges are the only component. Not in either case can you substitute other portions of the entire lien and make it superior to a first security interest.

Associations need to evaluate their collection policies in a manner that makes sense for the recovery of unpaid assessments. Associations need to consider the foreclosure of the first security interest and the chances that they may not be paid back for the costs of collection. Associations may recover costs of collecting unpaid assessments if there are proceeds from the association's foreclosure.[14] But costs of collecting are not a lien under NRS 116.310313 or NRS 116.3116(1); they are the personal liability of the unit owner.

Perhaps an effective approach for an association is to start with foreclosure of the assessment lien after a nine month assessment delinquency or sooner if the association receives a foreclosure notice from the first security interest holder. The association will always want to enforce its lien for assessments to trigger the super priority lien. This can be accomplished by starting the foreclosure process. The association can use the super priority lien to force the first security interest holder to pay that amount. The association should incur only the expense it believes is necessary to receive payment of assessments. If the first security interest holder does not foreclose, the association will maintain its assessment lien consisting of assessments, late charges, and interest. If a loan modification or short sale is worked out with the owner's lender, the association is better off limiting its expenses and more likely to recover the assessments. Adding unnecessary costs of collection – especially after a short period of delinquency – can

[14] NRS 116.31164.

make it all the more impossible for the owner to come current or for a short sale to close. This situation does not benefit the association or its members.

EXHIBIT 3

Presentation to Senate Committee on Judiciary
Real Estate Division Advisory 13-01
By Gail J. Anderson, Administrator
May 6, 2013

SUMMARY OF NRED ADVISORY OPINION 13-01

Advisory Conclusions:

- An association's lien does not include "costs of collecting" as defined by NRS 116.310313, so the super priority portion of the association's lien does not include "costs of collecting;"
- The super priority portion of the association's lien (the "super priority lien") consists of: (1) 9 months of assessments; and (2) abatement costs under NRS 116.310312;
- The assessment portion of the super priority lien consists of only "assessments", i.e. not late charges, fines or interest;
- The association must take action to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the foreclosure process set out in NRS 116.31162 to enforce its super priority lien.

The Division's advisory looks at the language of NRS 116.3116 to reach its conclusions.

NRS 116.3116 Liens against units for assessments.

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. 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. 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. 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. 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. A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

8. 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. 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. 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.

(Added to NRS by 1991, 567; A 1999, 390; 2003, 2243, 2272; 2009, 1010, 1207; 2011, 2448)

NRS 116.3102 Powers of unit-owners' association; limitations.

1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

(a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.

(b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.

(c) May hire and discharge managing agents and other employees, agents and independent contractors.

(d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.

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

(f) May regulate the use, maintenance, repair, replacement and modification of common elements.

(g) May cause additional improvements to be made as a part of the common elements.

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

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

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

(i) May grant easements, leases, licenses and concessions through or over the common elements.

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

(k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

(l) May impose construction penalties when authorized pursuant to NRS 116.310305.

(m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.

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

(o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.

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

(q) May exercise any other powers conferred by the declaration or bylaws.

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

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

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

(2) 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.

(l) May exercise any other powers necessary and proper for the governance and operation of the association.

- Section 1 of NRS 116.3116 defines the lien an association has. Under NRS 116.3116(1) - associations have a lien on units consisting of: (1) Construction penalties; (2) Assessments; and (3) Penalties, fees, charges, late charges, fines and interest permitted by NRS 116.3102 (1)(j) to (n)
- Section 2 of NRS 116.3116 sets out the lien's priority. Subsection 2(b) says the lien is subordinate to the first security, but after subsection 2(c), the language [highlighted in green] allows for part of the association's lien to be prior to the first security.
- The Division interprets this language to allow for two parts of the lien described in Subsection 1 to be prior to the first secured: (1) Costs pursuant to NRS 116.310312 (which are typically called abatement charges); and (2) 9 months of assessments as reflected in the association's budget.
- The 9 months of assessments is a "look back period" from the association's "action to enforce the lien."
- This statute having come from the Uniform Common Interest Ownership Act was written for a judicial foreclosure process, hence the term "action." But since Nevada does not require a judicial foreclosure process, the Division interprets this language to mean any action pursuant to the non-judicial foreclosure process, i.e. the mailing of the notice of delinquent assessment under NRS 116.31162.
- An association could do a judicial foreclosure process, but they are not required to.

Issues with NRS 116.3116:

1. Can anything other than regular assessments (monthly assessments based on the periodic budget) be part of the super priority lien?
   - Is there a cap to the super priority lien?
   - How does the regulation in NAC 645.470 on costs of collecting fit in?
2. Can an association's foreclosure of its super priority lien extinguish the first security interest?
   - Is the language in NRS 116.3116 sufficient?
   - Is the language describing the foreclosure process under NRS 116.31162 to 116.31168, inclusive sufficient to extinguish a first security?

1. Can anything other than regular assessments be part of the super priority lien?

This issue comes down to whether or not the language in NRS 116.3116(2)(c) [highlighted in green] includes collection costs for an association, and if so, is there a cap on the total super priority lien. The Division, as previously explained, reads this language to apply only to assessments provided in the association's budget that is limited to 9 months of regular monthly assessments.

Collection costs are not assessments provided in an association budget. The language of NRS 116.3116(2)(c) does not provide any mechanism for including collection costs within the priority lien.

Even more important to note, costs of collection are not referenced in the language of NRS 116.3116(1) that defines the association's lien. ***If costs of collection are not part of the lien, they cannot be part of the super priority portion of the lien.***

The concept of "costs of collecting" was first introduced to NRS 116 in 2009 with the adoption of NRS 116.310313. As is clear from the language of NRS 116.310313 an association may charge a unit's owner, but it does not say the charge can be liened on a unit.

NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.

1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.
3. As used in this section:

(a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.

(b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

(Added to NRS by 2009, 2795)

(emphasis added)

NRS 116.310313 applies to the association's collection of any past due "obligation" as defined in the statute. It includes the collection of all amounts due to the association from an owner, i.e. fines and penalties, not merely assessments. The Commission for Common-Interest Communities and Condominium Hotels adopted NAC 116.470 with the authority provided in NRS 116.310313. It became effective May 5, 2011 on "the amount of the fees that an association may charge pursuant to this section."

NAC 116.470 Fees and costs for collection of past due obligations of unit's owner. (NRS 116.310313, 116.615)

1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment *pursuant to paragraph (a) of subsection 1 of NRS 116.31162* which exceed a total of $1,950, plus the costs and fees described in subsections 3 and 4.

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

(a) Demand or intent to lien letter.....	$150	
(b) Notice of delinquent assessment lien.....	325	
(c) Intent to notice of default letter.....	90	
(d) Notice of default....	400	
(e) Intent to notice of sale letter.....		90
(f) Notice of sale.....		275
(g) Intent to conduct foreclosure sale.....	25	
(h) Conduct foreclosure sale.....	125	
(i) Prepare and record transfer deed.....	125	

(j) Payment plan agreement - One-time set-up fee..30
(k) Payment plan breach letter..... 25
(l) Release of notice of delinquent assessment lien..30
(m) Notice of rescission fee..... 30
(n) Bankruptcy package preparation and monitoring..... 100
(o) Mailing fee per piece for demand or intent to lien letter,
notice of delinquent assessment lien, notice of default and notice of sale..... 2
(p) Insufficient funds fee..... 20
(q) Escrow payoff demand fee..... 150
(r) Substitution of agent document fee..... 25
(s) Postponement fee..... 75
(t) Foreclosure fee..... 150

3. If, in connection with an activity described in subsection 2, any costs are charged to an association or a person acting on behalf of an 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, the association or person acting on behalf of an association may recover from the unit's owner the actual costs incurred without any increase or markup.
4. If an association or a person acting on behalf of an association is attempting to collect a past due obligation from a unit's owner, the association or person acting on behalf of an association may recover from the unit's owner:
(a) Reasonable management company fees which may not exceed a total of $200; and
(b) Reasonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2.
5. If an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner is engaging in the activities set forth in NRS 116.31162 to 116.31168, inclusive, with respect to more than 25 units owned by the same unit's owner, the association or person acting on behalf of an association may not charge the unit's owner fees to cover the costs of collecting a past due obligation which exceed a total of $1,950 multiplied by the number of units for which such activities are occurring, as reduced by an amount set forth in a resolution adopted by the executive board, plus the costs and fees described in subsections 3 and 4.
6. For a one-time period of 15 business days immediately following a request for a payoff amount from the unit's owner or his or her agent, no fee to cover the cost of collecting a past due obligation may be charged to the unit's owner, except for the fee described in paragraph (q) of subsection 2 and any other fee to cover any cost of collecting a past due obligation which is imposed because of an action required by statute to be taken within that 15-day period.
7. As used in this section, "affiliate of the community manager of the association or of an agent of the association" means any person who controls, is controlled by or is under common control with a community manager or such agent. For the purposes of this subsection:
(a) A person "controls" a community manager or agent if the person:
(1) Is a general partner, officer, director or employer of the community manager or agent;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the community manager or agent;
(3) Controls in any manner the election of a majority of the directors of the community manager or agent; or
(4) Has contributed more than 20 percent of the capital of the community manager or its agent.
(b) A person "is controlled by" a community manager or agent if the community manager or agent:
(1) Is a general partner, officer, director or employer of the person;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the person;
(3) Controls in any manner the election of a majority of the directors of the person; or
(4) Has contributed more than 20 percent of the capital of the person.
(c) Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised.
(Added to NAC by Comm'n for Common-Interest Communities & Condo. Hotels by R199-09, eff. 5-5-2011)
(emphasis added)

The regulation in NAC 116.470 cannot expand the statute; the regulation only establishes fees that can be charged pursuant to NRS 116.301313. There is confusion over whether the association's lien can include costs of collecting as a result of this regulation. The Division's position is that this regulation is limited to the authority granted by the statue; the statute does not allow an association to lien for costs of collecting.

The Commission's authority in NRS 116.310313 was to adopt a regulation establishing the fees that could be charged pursuant to NRS 116.310313. To make the costs of collecting part of an association's lien, NRS 116.310313 would have to say those costs can be part of the lien and that would have to be incorporated into NRS 116.3116.

When NRS 116.310313 was adopted in 2009, the Nevada Legislature also adopted NRS 116.310312. These costs in NRS 116.310312 – typically referred to as abatement charges – are specifically made part of the association's lien in NRS 116.310313 and they are incorporated into NRS 116.3116(1) by addition to NRS 116.3102(1)(j). If costs of collecting past due assessments are intended to be part of the super priority, lien specific language needs to be added to NRS 116.3116. It is not sufficient to refer simply to "costs of collecting" in NRS 116.3116, because as defined in NRS 116.310313, those costs apply to the collection of more than just assessments. For example, they apply to fines and penalties. Generally, a lien for fines cannot be foreclosed by an association – and would certainly not be part of the super priority lien.

2. Can an association's foreclosure of its super priority lien extinguish the first security interest?

The super priority lien comes into play in two situations – when the association forecloses ahead of a first security and when a first security forecloses ahead of the association. If the first secured forecloses its lien ahead of the association, the amount of the super priority lien would remain a lien on the unit. When the association forecloses before the first security, the issue is whether the first security is extinguished. The Division believes the purpose of the super priority lien is to give associations leverage over a first security. For that reason, the Division takes the position that the association's foreclosure of its super priority lien would extinguish the first secured if the first secured does not pay the priority lien amount before the sale.

While the Division believes an association's foreclosure should be able to extinguish a first secured, the Division also recognizes problems with the current law making that conclusion uncertain. For example, NRS 116.3116 comes from the Uniform Common Interest Ownership Act which was written to apply to a judicial foreclosure process. Nevada does not require that associations follow a judicial foreclosure process, which leads to confusion regarding the meaning of certain words within NRS 116.3116. Additionally, the foreclosure statutes (NRS 116.31162 to 116.31168, inclusive) do not mandate notice to the first secured unless the lender previously requested such notice. While the Division believes notice to the first secured is commonplace for association foreclosures, the absence of a required notice in the law is a problem. Ultimately, the state of the current law will be for the courts to decide.

It is preferred that the law be absolutely clear as to the effect of the association's foreclosure. If the law is clear that an association's foreclosure would extinguish a first secured, associations would be more likely to receive payment from a lender making a foreclosure by the association

unnecessary. And in the unlikely event that a lender would ignore an association's foreclosure action, the sale by an association would be more likely to generate a sales price far greater than the amount of the super priority lien. In that event, the lender would receive the excess up to the amount of its deed of trust.

In a case out of Washington (Summerhill Village Homeowners Association v Roughley et al, 166 Wash.App. 625, 270 P.3d 639) (289 P.3d 645), an association's foreclosure did in fact extinguish a first security. Under Washington law, however, an association must follow a judicial foreclosure process in order to extinguish the first secured. Under Washington State law, an association could foreclose non-judicially, but it would not extinguish the first secured. A judicial foreclosure process would ensure adequate notice to the lender and allow them to participate in the process. It would also reflect in the record whether or not the lender maintained its secured status by paying the super priority lien amount. In order to generate a fair market value, the buyer needs to know whether the lender has paid the super priority lien. This would ensure an appropriate sales price at the sale.

EXHIBIT 4

STATE OF NEVADA
LEGISLATIVE COUNSEL BUREAU
LEGISLATIVE BUILDING
401 S. CARSON STREET
CARSON CITY, NEVADA 89701-4747

December 7, 2012

Senator Scott Hammond
8408 Gracious Pine Avenue
Las Vegas, NV 89143-4608

Dear Senator Hammond:

You have asked this office certain questions relating to the foreclosure of liens under chapter 116 of NRS, the chapter which governs common-interest communities in this State. We will answer each of your questions separately below.

DISCUSSION

1. What ownership interest is obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, considering the language set forth in NRS 116.31164?

The provisions of NRS 116.31162 to 116.31168, inclusive, govern the foreclosure of a lien held by the association of a common-interest community. NRS 116.31164 sets forth the procedure for conducting the sale of real property by an association pursuant to the foreclosure of a lien on that property. With respect to the distribution and use of the proceeds of such a sale and the delivery of the property after the sale, subsection 3 of NRS 116.31164 provides:

> 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.

(Emphasis added). Additionally, subsection 3 of NRS 116.31166 provides that "[t]he 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."

In considering a provision of NRS, we are guided by several rules of statutory construction employed by the Nevada Supreme Court. As a general rule of statutory construction, a court presumes that the plain meaning of statutory language reflects a full and complete statement of the Legislature's intent. Villanueva v. State, 117 Nev. 664, 669 (2001). Therefore, when the plain meaning of statutory language is clear and unambiguous on its face, a court generally will apply the plain meaning of the statutory language and will not search for any meaning beyond the language of the statute itself. Erwin v. State, 111 Nev. 1535, 1538-39 (1995); McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986) (words in a statute "should be given their plain meaning unless this violates the spirit of the act").

Applying this rule of statutory construction stated above, the plain language of subsection 3 of NRS 116.31164 provides that when property is sold pursuant to an association's foreclosure of a lien, the purchaser obtains a deed without warranty which conveys to the purchaser, as the grantee of the warranty made, executed and delivered by the person conducting the sale, all title held by the previous owner.[1] In addition, subsection 3 of NRS 116.31166 provides that the interest vested in the purchaser is that of the previous owner's title without equity or right of redemption. Thus, these two provisions of NRS clearly and unambiguously establish that when real property is sold pursuant to the foreclosure of a lien on the property held by an association, the purchaser acquires the entirety of the title held by the previous owner of the property, and such title is not subject to any claim of equity or right of redemption by the previous owner.

2. Does the ownership interest obtained by the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, survive a subsequent foreclosure on a security interest, other than an association lien, on the same property?

The order of distribution of proceeds of a sale of real property made pursuant to an association's foreclosure of a lien on the property is set forth in subsection 3 of NRS 116.31164. The order of priority for satisfying a security interest other than an association lien on such property is also set forth in subsection 3 of NRS 116.31164. Subsection 3 of NRS 116.31164 provides that proceeds from the sale of a property must be applied to "[s]atisfaction in the order

[1] A deed without warranty, unlike a warranty deed which contains a covenant of title, may carry with it the risk of a defect in the title. 13 Am. Jur. 2d Deeds § 3 (2012) (citing Corbin on Contracts § 587).

of priority of any subordinate claim of record" but only after those proceeds are first applied to: (1) the reasonable expenses of the sale; (2) the reasonable expenses of securing, maintaining and preparing the property for sale; and (3) the satisfaction of the association's lien.

Significantly, subsection 1 and 2 of NRS 116.31166 also provide that:

> 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.

(Emphasis added)

Based on the plain language of subsection 2 of NRS 116.31166, the receipt for the purchase money contained in a deed without warranty delivered to a purchaser pursuant to NRS 116.31164 that includes the recitals described in subsection 1 of NRS 116.31166 serves to discharge the purchaser from any obligation to ensure the proper application of the purchase money paid by the purchaser.

In the event there are insufficient proceeds to satisfy a security interest, the holder of that security interest may be able to seek recourse by pursuing a deficiency judgment against the person who was the owner of the property at the time of sale under chapter 40 of NRS.[2] However, assuming the purchaser of the property obtains a deed containing the proper recitals described in subsection 1 of NRS 116.31166 and the receipt for purchase money described in subsection 2 of NRS 116.31166, there are no other applicable statutory provisions that would otherwise authorize the holder of a security interest to whom the previous owner of the property was obligated to seek a judgment against the purchaser of the property for any deficiency resulting from the distribution of proceeds. Accordingly, the ownership interest of a purchaser who obtains title through a deed properly containing the information described above 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.

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[2] NRS 40.451 to 40.463, inclusive, establish procedures for the award of a deficiency judgment, and NRS 40.4631 to 40.4639, inclusive, set forth provisions relating to actions by holders of junior real mortgages after a foreclosure sale. It should be noted, however, that pursuant to Assembly Bill No. 471 of the 2009 Legislative Session (Ch. 310, Statutes of Nevada 2009, at p. 1328-31), a deficiency judgment on an obligation secured by a mortgage, deed of trust or other encumbrance on or after October 1, 2009, may not be awarded against a homeowner if certain criteria are met.

3. ***Can any part of an ownership interest vested in the purchaser of real property that is foreclosed pursuant to NRS 116.31162 to 116.31168, inclusive, be extinguished by a subsequent foreclosure on a security interest, other than an association lien, on the same property?***

As explained above, any recourse sought by the holder of a security interest to whom the previous owner of the property was obligated is properly made against that previous owner and not the purchaser of the property. Therefore, 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 116.31164.

SUMMARY

Based on the reasoning set forth above, it is the opinion of this office that: (1) the purchaser of real property sold pursuant to the foreclosure of an association lien under the provisions of NRS 116.31162 to 116.31168, inclusive, obtains all title belonging to the previous owner; and (2) if certain recitals and the receipt for purchase money are properly contained in the deed conveying such title to the purchaser, the purchaser is discharged from any obligation relating to the application of proceeds from the sale of the property to satisfy the claims described in NRS 116.31164, including any claim that may be made by the holder of an interest secured by the same property but to whom the previous owner, and not the purchaser, was obligated.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By ______________________
J. Daniel Yu
Principal Deputy Legislative Counsel

Bradley A. Wilkinson
Chief Deputy Legislative Counsel

DY:dtm
Encl.
Ref No. [illegible]
File No. OP_Hammond[illegible]

EXHIBIT 1

EXHIBIT 1

ACOM
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MEIER & FINE, LLC
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Las Vegas, Nevada 89102
Telephone: (702) 673-1000
Facsimile: (702) 673-1001

Attorneys for Las Vegas Development Group, LLC

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

-oOo-

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Plaintiff, *v.* BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 THROUGH 20,AND ROE CORPORATIONS 1 THROUGH 20, INCLUSIVE, Defendants.	Case No. A-12-654840-C Dept. No. XXIII **SECOND AMENDED COMPLAINT** Arbitration Exemption: Title to Real Property, Declaratory Relief

COME NOW, LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, by and through its attorneys of record, MEIER & FINE, LLC, and hereby files this Complaint against BANK OF AMERICA, GENEVIEVE UNIZA-ENRIQUEZ, DOES 1 through 20, and ROE CORPORATIONS 1through 20 as follows:

MEIER & FINE, LLC
2300 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Tel: (702) 673-1000
Fax: (702) 673-1001

MEIER & FINE, LLC
2300 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Tel: (702) 673-1000
Fax: (702) 673-1001

I.

FIRST CAUSE OF ACTION

QUIET TITLE/ DECLARATORY RELIEF
NRS 30.010, NRS 40.010 and NRS 116.3116, et seq.

1. Defendants BANK OF AMERICA; and DOES 1 through 10, inclusive are and at all times herein mentioned were residents of the City of Las Vegas, County of Clark, State of Nevada and/or doing business therein.

2. Defendant GENEVIEVE UNIZA-ENRIQUEZ is an individual, who at times relevant herein was a resident of Clark County, Nevada and/or owner or real property situated in Clark County, Nevada. Plaintiff is informed and believes that Defendant GENEVIEVE UNIZA-ENRIQUEZ is the former owner of the Property.

3. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is ignorant of the true names and capacities of defendants sued herein as DOES 1 through 10, inclusive, and therefore sues these defendants by such fictitious names. Said Defendants are any and all other persons, unknown, claiming any estate, right, title, interest or lien in the Property (as defined herein). Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC will amend this complaint to allege their true names and capacities when ascertained.

4. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is informed and believes and thereon alleges that at all times herein mentioned, each of the defendants sued herein was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

5. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is presently the owner and/or entitled possession of the property located at 6279 Downpour, Las Vegas, Nevada 89110 (the "Property").

MEIER & FINE, LLC
2360 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Tel: (702) 673-1600
Fax: (702) 673-1601

6. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is informed and believes and thereupon alleges that the Defendants and each of them, claim an interest in the property adverse to plaintiff herein. However, the claim of said Defendants are without any right whatsoever and said Defendants do not have legal or equitable right, claim, or interest in said property.

7. Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC therefore seeks a declaration that the title to the subject property is vested in plaintiff alone and that the defendants herein, and each of them, be declared to have no estate, right title or interest in the subject property and that said defendants, and each of them, be forever enjoined from asserting any estate, right, title or interest in they subject property adverse to plaintiff herein.

8. The true names and capacities, whether individual, corporate, associate, or otherwise of Defendants Does 1 through 20, inclusive, and Roe Corporations 1 through 20, inclusive, are unknown to Plaintiff, who therefore sues those Defendants by such fictitious names. Plaintiff is informed and believes, and upon such, alleges that each of the Defendants designated as Does or Roe Corporations assert an interest in the Property adverse to Plaintiff, LVDG. Plaintiff asks leave of this Court to amend this Complaint to insert the true names and capacities of said Does 1 through 20, inclusive, and Roe Corporations 1 through 20, inclusive, when the same have been ascertained by Plaintiff, together with the appropriate charging allegations, and to join these Defendants in this action.

II.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC prays for judgment against defendants and each of them as follows:

1. For a declaration and determination that Plaintiff LAS VEGAS DEVELOPMENT GROUP, LLC is the rightful holder of title to the property and that Defendants, and each of them, be declared to have no estate, right title or interest in said property;

2. For a judgment forever enjoining said defendants, and each of them, from claiming any estate, right, title or interest in the subject property.

3. For an order enjoining said defendants, and each of them, from proceeding with a foreclosure sale of the subject property;

4. For an order declaring any such completed foreclosure sale of the subject property void;

5. For costs of suit and attorneys fees herein incurred; and

6. For such other and further relief as the Court may deem just and proper.

DATED this 1 day of August, 2013.

Meier & Fine, LLC

By _____
MARILYN FINE, ESQ., #005949
RACHEL E. DONN, ESQ., #010568
PETER E. DUNKLEY, ESQ., #011110
2300 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Attorneys for Plaintiff Las Vegas Development Group, LLC

MEIER & FINE, LLC
2300 West Sahara Avenue, Suite 1150
Las Vegas, Nevada 89102
Tel: (702) 673-1000
Fax: (702) 673-1001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6 day of August, 2013, I did serve a copy of the above and foregoing SECOND AMENDED COMPLAINT by depositing said copy in the U.S. Mails, postage fully prepaid, addressed as follows:

Ariel E. Stern, Esq. Jacob D. Bunkick, Esq. AKERMAN SENTERFITT LLP 1160 Town Center Drive, Suite 330 Las Vegas, NV 89144 *Attorneys for Defendant*	

Employee of MEIER & FINE, LLC

ROGER P. CROTEAU, ESQ.
Nevada Bar No. 4958
TIMOTHY E. RHODA, ESQ.
Nevada Bar No. 7878
ROGER P. CROTEAU & ASSOCIATES, LTD.
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
(702) 254-7775
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croteaulaw@croteaulaw.com
Attorney for Appellant
LAS VEGAS DEVELOPMENT GROUP, LLC

ROGER P. CROTEAU & ASSOCIATES, LTD.
• 9120 W. Post Road, Suite 100 • Las Vegas, Nevada 89148 •
Telephone: (702) 254-7775 • Facsimile (702) 228-7719

IN THE SUPREME COURT OF THE STATE OF NEVADA

***

LAS VEGAS DEVELOPMENT GROUP, LLC, a Nevada limited liability company, Appellant,	Supreme Court No. 65083
vs.	District Court Case No. A-12-654840-C
BANK OF AMERICA, Respondent.	

DOCKETING STATEMENT

1. Judicial District: Eighth Department: XXIII

County: Clark Judge: Stefany A. Miley

District Court Docket No. A-12-654840-C

2. Attorney filing this docket statement:

Roger P. Croteau, Esq.
Roger P. Croteau & Associates, Ltd.
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
(702) 254-7775 (telephone)
Attorney for Appellant

Client(s): Las Vegas Development Group, LLC

6279 Downpour Court

ROGER P. CROTEAU & ASSOCIATES, LTD.
• 9120 W. Post Road, Suite 100 • Las Vegas, Nevada 89148 •
Telephone: (702) 254-7775 • Facsimile (702) 228-7719

3. Attorney representing Respondents:

Jacob D. Bundick, Esq.
Natalie L. Winslow, Esq.
AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144
Attorneys for Respondent

Client(s): Bank of America, N.A.

4. Nature of disposition below:

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☐ Summary judgment
- ☐ Default judgment
- ☒ Grant/denial of NRCP 60(b) relief
- ☐ Grant/denial of injunction
- ☐ Grant/denial of declaratory relief
- ☐ Review of agency determination
- ☐ Other disposition (specify): _____
- ☒ Dismissal
  - ☐ Lack of jurisdiction
  - ☒ Failure to state claim
  - ☐ Failure to prosecute
  - ☐ Other (specify) _____
- ☐ Divorce decree:
  - ☐ Original ☐ Modification

5. Does this appeal raise issues concerning any of the following:

- ☐ Child custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal: None

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition: None other than the underlying case, Las Vegas Devlopment Group, LLC v. Bank of America, N.A., et al., A-12-654840-C, Eighth Judicial District Court of Clark County, Nevada.

ROGER P. CROTEAU & ASSOCIATES, LTD.
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8. **Nature of action.** Briefly describe the nature of the action and the result below: The action is a quiet title and injunctive relief action related to real property purchased by the Plaintiff at an HOA lien auction. Plaintiff alleges that the HOA lien auction served to extinguish any and all mortgages previously secured by the property. On August 15, 2013, Defendant, Bank of America, N.A. filed a Motion to Dismiss Second Amended Complaint, which was subsequently granted by the district court on or about October 10, 2013. Plaintiff filed a Motion for Reconsideration on October 18, 2013, which was subsequently denied by the district court on or about January 23, 2014. These are the Orders from which Plaintiff appeals.

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary): The primary issues on appeal relate to the force, effect and interpretation of N.R.S. Chapter 116 and specifically, to the effect of an HOA Lien Foreclosure Sale upon a first deed of trust. At issue is whether the district court's dismissal of the action was erroneous as a matter of law.

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceeding presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket number and identify the same or similar issues raised: Numerous cases are currently pending before this Court which raise the same or similar issues raised in this appeal.

11. **Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A ☐ Yes ☐ No If not, explain:_____

12. **Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first-impression

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☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain The interpretation of N.R.S. Chapter 116 is a substantial issue of first impression that has not previously been addressed by the Supreme Court of the State of Nevada.

13. **Trial.** If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? No If so, which Justice? N/A

TIMELINESS OF NOTICE OF APPEAL

15. **Date of entry of written judgment or order appealed from** October 10, 2013 and January 23, 2014

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review: N/A

16. **Date written notice of entry of judgment or order served** October 10, 2013, and January 27, 2014.

Was service by:

☐ Delivery

☒ Mail/electronic/fax

17. **If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59),**

(a) Specify the type of motion, the date and method of service of the motion, and date of filing

☐ NRCP 50(b) Date of filing _____

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☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing October 18, 2013

Note: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion January 23, 2014

(c) Date written notice of entry of order resolving tolling motion was served January 27, 2014

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. Date notice of appeal was filed February 21, 2014

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other NRAP 4(a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1) ☐ NRS 38.205

☐ NRAP 3A(b)(2) ☐ NRS 233B.150

☐ NRAP 3A(b)(3) ☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The Court's orders granting the Motion to Dismiss and the subsequent denial of Plaintiff's Motion for Reconsideration constituted a final judgment appealable pursuant

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to NRAP 3A(b)(1)

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff - LAS VEGAS DEVELOPMENT GROUP, LLC

Defendant - BANK OF AMERICA, N.A.

Defendant - GENEVIEVE UNIZA-ENRIQUEZ

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, e.g., formally dismissed, not served, or other: Defendant, Genevieve Uniza-Enriquez, had not appeared in the action at the time of dismissal

22. **Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third party claims, and the date of formal disposition of each claim.** Plaintiff's Complaint is comprised of a claim for Quiet Title/Declaratory Relief. Plaintiff's claim was disposed as to Bank of America at the time the matter was dismissed and the Motion for Reconsideration was denied.

23. **Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☐ Yes

☒ No

24. **If you answered "No" to question 23, complete the following:**

(a) Specify the claims remaining pending below:

The district court did not adjudicate the Plaintiff's claims as they relate to Defendant, Genevieve Uniza-Enriquez

(b) Specify the parties remaining below:

Plaintiff - LAS VEGAS DEVELOPMENT GROUP, LLC

Defendant - GENEVIEVE UNIZA-ENRIQUEZ

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☒ Yes

☐ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):

Order is independently appealable under NRAP 3A(b)

26. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

See attached:

Exhibit 1 - Second Amended Complaint

Exhibit 2 - Motion for Reconsideration

Exhibit 3 - Order Granting Bank of America, N.A.'s Motion to Dismiss Second Amended Complaint

Exhibit 4 - Order Denying Plaintiff's Motion for Reconsideration

Exhibit 5 - Notice of Entry of Order Granting Bank of America, N.A.'s Motion to Dismiss Second Amended Complaint

Exhibit 6 - Notice of Entry of Order Denying Plaintiff's Motion for Reconsideration

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VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Name of appellant: Las Vegas Development Group, LLC

Name of counsel of record: Roger P. Croteau, Esq.

State and county where signed: Clark County, Nevada

DATED this 13th day of April, 2014.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Roger P. Croteau
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