Inst #: 20150508-0001538
Fees: $115.00
N/C Fee: $0.00
05/08/2015 12:37:32 PM
Receipt #: 2415962
Requestor:
FIRST LEGAL INVESTIGATIONS
Recorded By: SOL Pgs: 99
DEBBIE CONWAY
CLARK COUNTY RECORDER

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APN: *137-27-817-026*

WHEN RECORDED, RETURN TO:

WILBUR M. ROADHOUSE, ESQ.
Fennemore Craig, P.C.
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101

SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS & RESTRICTIONS AND RESERVATION OF EASEMENTS

FOR

SAVONA

(a Nevada Residential Common-Interest Planned Community,
CITY OF LAS VEGAS, NEVADA

EXHIBITS:

DECLARATION
OF
COVENANTS, CONDITIONS AND RESTRICTIONS
AND RESERVATION OF EASEMENTS
FOR
SAVONA

THIS DECLARATION ("Declaration"), made as of the 29th day of April, 2015, by WOODSIDE HOMES OF NEVADA, LLC, a Nevada limited liability company ("Declarant")

W I T N E S S E T H :

WHEREAS:

A. Declarant owns certain real property located in the City of Las Vegas, Nevada, on which Declarant intends to subdivide, develop, construct, market and sell single family detached homes in a residential common-interest planned community, to be known as "SAVONA"; and

B. A portion of said property, as more particularly described in Exhibit "A" hereto, shall constitute the property initially covered by this Declaration ("Original Property"); and

C. Declarant intends that, upon Recordation of this Declaration, the Original Property shall be a Nevada Common-Interest Community, as defined in NRS § 116.021, and a Nevada Planned Community, as defined in NRS § 116.075 ("Community"); and

D. The name of the Community shall be SAVONA, and the name of the Nevada nonprofit corporation organized in connection therewith shall be the SAVONA HOMEOWNERS ASSOCIATION ("Association"); and

E. Declarant further reserves the right from time to time to add all or any portion(s) of certain other real property, from time to time described more particularly in Exhibit "B" hereto ("Annexable Area; and

F. The total maximum number of Units that may (but need not necessarily) be created by Declarant in the Community, is expected not to exceed one hundred thirty-five (135) aggregate Units ("Units That May Be Created"); and

G. The Original Property and, following annexation from time to time, in Declarant's sole discretion, any and all Annexed Property, shall comprise the "Properties"; and

H. Declarant intends to develop and convey the Properties pursuant to a general plan and subject to certain protective covenants, conditions, restrictions, rights, reservations, easements, equitable servitudes, liens and charges; and

I. In addition to this Declaration, the Properties also are subject to the Recorded Master Declaration for SUMMERLIN WEST ("Master Declaration") as said in Master Declaration from time to time may be supplemented, amended and/or restated; and

J. The Master Declaration provides that Supplemental Declarations may be recorded which may cover Neighborhoods within the Master Community (as such terms are defined in the Master Declaration), and that Sub-Associations may be established for the purpose of managing and administering said Neighborhoods; and

K. Taking into account certain unique aspects of the Properties, Declarant desires that the Properties be subject to the further covenants, conditions and restrictions and reservations of easements set forth herein, in addition to those set forth in the Master Declaration and that the Association be established (as a Sub-Association under the Master Declaration) for the purpose of assessing, managing and administering SAVONA; and

L. Declarant has deemed it desirable, for the efficient preservation of the value and amenities of the Properties pursuant to the provisions of this Declaration, to organize the Association, to which shall be delegated and assigned the powers of owning, maintaining and administering the Common Elements (as defined herein), administering and enforcing the covenants and restrictions, and collecting and disbursing the Assessments and charges hereinafter created. Declarant will cause, or has caused, the Association to be formed for the purpose of exercising such functions; and

M. This Declaration is intended to set forth a dynamic and flexible plan for governance of the Community, and for the overall development, administration, maintenance and preservation of a unique residential community, in which the Owners enjoy a quality life style as "good neighbors";

NOW, THEREFORE, Declarant hereby declares that all of the Original Property, and, from the date(s) of respective annexation, all Annexed Property (collectively, "Properties") shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the provisions of this Declaration and to the following covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Properties, in furtherance of a general plan for the protection, maintenance, subdivision, improvement and sale and lease of the Properties or any portion thereof. The covenants, conditions, restrictions, reservations, easements, and equitable servitudes set forth in this Declaration shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties, or any part thereof, and their heirs, successors and assigns; shall inure to the benefit of every portion of the Properties and any interest therein; and shall inure to the benefit of and be binding upon, and may be enforced by Declarant, the Association, each Owner, and their respective heirs, executors and administrators, and successive owners and assigns. All Units within this Community shall be used, improved and limited exclusively to single Family residential use.

ARTICLE 1
DEFINITIONS

Section 1.1 "Act" shall mean NRS Chapter 116, as defined below. Except as otherwise indicated, capitalized terms herein shall reasonably have the same meanings ascribed to such terms in the Act.

Section 1.2 "Allocated Interests" shall mean the following interests allocated to each Unit: a non-exclusive easement of enjoyment of all Common Elements in the Properties; allocation of Limited Common Elements, if any, pursuant to the Plats and as set forth herein; liability for Assessments pro-rata for Common Expenses in the Properties and allocation of Annual Assessments and any Capital Assessments pursuant to the allocation formula set forth in this Declaration (in addition to any Special Assessments as set forth herein); and membership and one vote in the Association, per Unit owned, which membership and vote shall be appurtenant to the Unit. These foregoing allocations may not discriminate in favor of Units owned by Declarant or affiliate thereof.

Section 1.3 "Annexable Area" shall mean all or any portion of that real property described in Exhibit "B" attached hereto and incorporated by this reference herein, all or any portion of which real property may from time to time be made subject to this Declaration pursuant to the provisions of Article 15 hereof. At no time shall any portion of the Annexable Area be deemed to be a part of the Community or a part of the Properties until such portion of the Annexable Area has been duly annexed of Record hereto pursuant to Article 15 hereof.

Section 1.4 "Annexed Property" shall mean any and all portion(s) of the Annexable Area from time to time added to the Properties covered by this Declaration, by Recordation of Annexation Amendment(s) pursuant to Article 15 hereof.

Section 1.5 "ARC" shall mean the Architectural Review Committee created pursuant to Article 8 hereof.

Section 1.6 "Articles" shall mean the Articles of Incorporation of the Association as filed or to be filed in the office of the Nevada Secretary of State, as such Articles may be amended from time to time.

Section 1.7 "Assessments" shall refer collectively to Annual Assessments, and any applicable Capital Assessments and/or Special Assessments.

Section 1.8 "Assessment, Annual" shall mean the annual or supplemental charge against each Owner and his or her Unit, representing a portion of the Common Expenses, which are to be paid in equal periodic (monthly or quarterly, as determined from time to time by the Board) installments commencing on the Assessment Commencement Date, by each Owner to the Association in the manner, and at the times, and proportions provided herein.

Section 1.9 "Assessment, Capital" shall mean a charge against each Owner and his or her Unit, representing a portion of the costs to the Association for installation, construction, or reconstruction of any Improvements on any portion of the Common Elements which the

Association may from time to time authorize, pursuant to the provisions of this Declaration. Such charge shall be levied among all Owners and their Units in the same proportion as Annual Assessments.

Section 1.10 "Assessment, Special" shall mean a charge against a particular Owner and his or her Unit, directly attributable to, or reimbursable by, that Owner, equal to the cost incurred by the Association for corrective action, performed pursuant to the provisions of this Declaration, or a reasonable fine or penalty assessed by the Association, plus interest and other charges on such Special Assessments as provided for herein, subject to applicable law.

Section 1.11 "Assessment Commencement Date" shall mean that date, pursuant to Section 6.7 hereof, duly established by the Board, on which Annual Assessments shall commence.

Section 1.12 "Association" shall mean SAVONA HOMEOWNERS ASSOCIATION (or substantially similar name), a Nevada non-profit corporation, and its successors and assigns.

Section 1.13 "Association Funds" shall mean the accounts created for receipts and disbursements of the Association, pursuant to Article 6 hereof.

Section 1.14 "Beneficiary" shall mean a Mortgagee under a Mortgage or a beneficiary under a Deed of Trust, as the case may be, and the assignees of such mortgagee or beneficiary.

Section 1.15 "Board" or "Board of Directors" shall mean the Board of Directors of the Association, elected or appointed in accordance with the Bylaws and this Declaration. The Board of Directors is an "Executive Board" as defined by NRS § 116.045.

Section 1.16 "Budget" shall mean a written, itemized estimate of the expenses to be incurred by the Association in performing its functions under this Declaration, prepared and approved pursuant to the provisions of this Declaration, including, but not limited to, Section 6.4 below.

Section 1.17 "Bylaws" shall mean the Bylaws of the Association which have or will be adopted by the Board, as such Bylaws may be amended from time to time.

Section 1.18 "City" shall mean the City of Las Vegas, Nevada.

Section 1.19 "Close of Escrow" shall mean the date on which a deed is Recorded conveying a Unit from Declarant to a Purchaser.

Section 1.20 "Common Elements" shall mean all real property or interests therein owned or leased in the Properties by the Association, but shall exclude fee title in and to Units. Without limiting the foregoing, Common Elements shall include all of that real property designated on the Plats as "Common Elements" or "C.E.", and Improvements respectively thereon, and shall include, but are not necessarily limited to: all private entry monumentation; private entry gate area for the Properties; Private Streets; and all easements designated on a Plat "to be privately maintained by the Homeowners' Association" (or words of substantially

similar meaning or import); and includes Common Element landscape (which may be desert landscape), drainage, and other easements; all as shown as such on the Plats. The Common Elements within the Properties shall constitute Common Elements, as provided in NRS §116.017. There also is a Shared Entry Area, with certain related provisions, as described further in this Declaration (including, but not limited to, Sections 1.69 – 1.72, 2.17, 6.3, 9.2, and 12.4, below). A portion (but not all) of the Shared Entry Area is comprised of certain Common Elements, but expressly subject to and governed by the Shared Improvements Instrument. The Common Elements do not include Master Association Property. Master Association Property is owned by, and within the jurisdiction and purview of, the Master Association.

Section 1.21 "Common Expenses" shall mean expenditures made by, or financial liabilities of, the Association, together with any allocations to reserves, including the actual and estimated costs of: maintenance, insurance, management, operation, repair and replacement of the Common Elements; painting over or removing graffiti on Exterior Walls, pursuant to Section 9.10 below; unpaid Special Assessments, and/or Capital Assessments; costs of irrigation and periodic maintenance of landscaping and/or ground cover on Common Elements; the costs of any commonly metered utilities, if any, and any other commonly metered charges for the Properties; costs of management and administration of the Association including, but not limited to, compensation paid by the Association to the Community Manager, accountants, attorneys, consultants, and employees; costs of all utilities, gardening, trash pickup and disposal, and other services benefitting the Common Elements; costs of fire, casualty and liability insurance, workers' compensation insurance, and any other insurance covering the Association, Common Elements, or Properties, or deemed prudent and necessary by the Board; costs of bonding the Board, Officers, Community Manager, or any other Person handling the funds of the Association; any statutorily required ombudsman fees; taxes paid by the Association; amounts paid by the Association for discharge of any lien or encumbrance levied against the Common Elements or Properties or deemed prudent and necessary by the Board; costs of any other item or items incurred by the Association for any reason whatsoever in connection with the Properties, for the benefit of the Owners; prudent reserves; costs allocated to the Association, under the Shared Improvements Instrument, of or related to performance by the Association of its obligations under the Shared Improvements Instrument; and any other expenses for which the Association is responsible pursuant to this Declaration or pursuant to requirement of governmental authority with jurisdiction, or of applicable law. Notwithstanding the foregoing, Common Expenses shall not include certain items (including, but not necessarily limited to: (a) political campaigns or contributions; (b) nuisances located outside of the boundaries of the Community) and the Association shall not spend any Association funds for or in connection with such items.

Section 1.22 "Community" shall mean the Properties from time to time comprising SAVONA, a Common-Interest Community, as defined in NRS § 116.021, and a Planned Community, as defined in NRS § 116.075.

Section 1.23 "Community Manager" shall mean the Person, if any, whether an employee or independent contractor, hired as such by the Association, acting through the Board, and delegated the authority to implement certain duties, powers or functions of the Association as provided in this Declaration.

Section 1.24 "County" shall mean Clark County, Nevada.

Section 1.25 "Declarant" shall mean WOODSIDE HOMES OF NEVADA, LLC, a Nevada limited liability company, and its successors and any Person(s) to which Declarant shall have assigned any rights hereunder by express written and Recorded assignment (but specifically excluding Purchasers, as defined in NRS §116.079).

Section 1.26 "Declarant Control Period" shall have the meaning set forth in Section 3.7, below.

Section 1.27 "Declarant Rights Period" shall mean the period of time (to the maximum time period and maximum extent not prohibited by applicable law) during which Declarant owns any property subject to this Declaration or in the Annexable Area (i.e., until the Close of Escrow to a Purchaser of the last residential unit in the Annexable Area); during which time, Declarant has reserved certain limited rights as expressly set forth in this Declaration.

Section 1.28 "Declaration" shall mean this instrument as it may be amended from time to time, subject to Declarant's reasonable prior written approval as required, and subject further to Master Declarant's approval and to the Master Declaration.

Section 1.29 "Deed of Trust" shall mean a Recorded mortgage or a deed of trust, as the case may be.

Section 1.30 "Director" shall mean a duly appointed or elected and current member of the Board of Directors.

Section 1.31 "Dwelling" shall mean a residential building located on a Unit designed and intended for use and occupancy as a residence by a single Family, subject to applicable law.

Section 1.32 "Eligible Holder" shall mean each Beneficiary, insurer and/or guarantor of a first Mortgage encumbering a Unit, which has filed with the Board a written request for notification as to relevant matters as specified in this Declaration.

Section 1.33 "Exterior Wall(s)" shall mean the exterior only face of Perimeter Walls (visible from streets or other areas outside of and generally abutting the exterior boundary of the Properties).

Section 1.34 "Family" shall mean (a) a group of natural persons related to each other by blood or legally related to each other by marriage or adoption, or (b) a group of natural persons not all so related, but who maintain a common household in a Dwelling, all as subject to and in compliance with all applicable federal and Nevada laws and local health codes and other applicable Ordinances.

Section 1.35 "FHA" shall mean the Federal Housing Administration.

Section 1.36 "FHLMC" shall mean the Federal Home Loan Mortgage Corporation (also known as The Mortgage Corporation) created by Title II of the Emergency Home Finance Act of 1970, and any successors to such corporations.

Section 1.37 "Fiscal Year" shall mean the twelve (12) month fiscal accounting and reporting period of the Association selected from time to time by the Board.

Section 1.38 "FNMA" or "GNMA" FNMA shall mean the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and any successors to such corporation. GNMA shall mean the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and any successors to such association.

Section 1.39 "Governing Documents" shall mean the Declaration, Articles, Bylaws, Plats, and any Rules and Regulations and any other relevant governance documents of the Association (and where applicable or required within the context, the Master Association Documents). Any irreconcilable inconsistency among the Governing Documents shall be governed pursuant to Sections 17.10 and 17.14, below.

Section 1.40 "Identifying Number", pursuant to NRS § 116.053, shall mean the number which identifies a Unit on the relevant Plat.

Section 1.41 "Improvement" shall mean any structure or appurtenance thereto of every type and kind, whether above or below the land surface, located in the Properties, including but not limited to Dwellings and other structures, walkways (if any), sprinkler pipes, garages, spas, swimming pools (if any are permitted), and other recreational facilities, Private Streets, roads, driveways, parking areas, hardscape, Perimeter Walls, Party Walls, curbs, gutters, walls, fences, screening walls, block walls, retaining walls, stairs, decks, landscaping, antennae, hardscape features, hedges, windbreaks, patio covers, railings, plantings, planted trees and shrubs, poles, permitted signs, exterior air conditioning and water softener fixtures or equipment.

Section 1.42 "Lot" shall mean the residential real property of any residential lot to be owned separately by an Owner, as shown on the relevant Plat, and duly subjected of Record to the Community and to this Declaration (subject to this Declaration and the other Governing Documents, and any area shown on the Plats as a Common Element or other easement).

Section 1.43 "Master Association", shall mean the SUMMERLIN WEST COMMUNITY ASSOCIATION, a Nevada non-profit corporation, and its successors or assigns. The rights and duties of the Master Association are as set forth in the Master Declaration.

Section 1.44 "Master Association Design Criteria" shall mean the Summerlin Design Standards applicable to this Community; Master Association Design Guidelines and Standards; applicable provisions of the Master Declaration pertaining to the Master DRC; and any and all other standards and/or other applicable documents of or related to the Master DRC.

Section 1.45 "Master Association Documents" (sometimes "Master Governing Documents") shall mean the Master Declaration, the Master Association Articles of Incorporation and Bylaws, the Master Association Rules, the Master Association Design Guidelines and Standards, and any and all other governing documents of the Master Association.

Section 1.46 "Master Association Property" shall mean the master common elements owned by the Master Association. Master Association Property shall be subject to and governed by the Master Association Documents.

Section 1.47 "Master Community" shall mean the SUMMERLIN WEST Master Community, subject to the Master Declaration and the other Master Association Documents.

Section 1.48 "Master Declarant" shall mean the declarant under the SUMMERLIN WEST Master Declaration.

Section 1.49 "Master Declaration" shall mean the Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for SUMMERLIN WEST, Recorded by Master Declarant as Instrument No. 01409 in Book No. 20010123, as supplemented by Supplemental Declaration of Annexation and of Covenants, Conditions, Restrictions, and Reservation of Easements for VILLAGE 23B, PARCEL T, Recorded by Master Declarant; as from time to time may be amended and/or restated of Record.

Section 1.50 "Master DRC" shall mean the Design Review Committee of the Master Association.

Section 1.51 "Member," "Membership." "Member" shall mean any Person holding a membership in the Association, as provided in this Declaration. "Membership" shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations, including liability for Assessments, contained in this Declaration, and/or in the other Governing Documents.

Section 1.52 "Mortgage," "Mortgagee," "Mortgagor." "Mortgage" shall mean any unreleased mortgage or deed of trust or other similar instrument of Record, given voluntarily by an Owner, encumbering his or her Unit to secure the performance of an obligation or the payment of a debt, which will be released and reconveyed upon the completion of such performance or payment of such debt. The term "Deed of Trust" or "Trust Deed" when used herein shall be synonymous with the term "Mortgage." "Mortgage" shall not include any judgment lien, mechanic's lien, tax lien, or other similarly involuntary lien on or encumbrance of a Unit. The term "Mortgagee" shall mean a Person to whom a Mortgage is made and shall include the beneficiary of a Deed of Trust. "Mortgagor" shall mean a Person who mortgages his or her Unit to another (i.e., the maker of a Mortgage), and shall include the trustor of a Deed of Trust. "Trustor" shall be synonymous with the term "Mortgagor;" and "Beneficiary" shall be synonymous with "Mortgagee." For purposes of this Declaration, "first Mortgage" or "first Deed of Trust" shall mean a Mortgage or Deed of Trust with first priority over other mortgages or deeds of trust on a Unit in the Properties and "first Mortgagee" or "first

Beneficiary" shall mean the holder of a first Mortgage or Beneficiary under a first Deed of Trust.

Section 1.53 "Notice and Hearing" shall mean written notice and a hearing before the Board, at which the Owner concerned shall have an opportunity to be heard in person, or by counsel at Owner's expense, in the manner further provided in the Bylaws.

Section 1.54 "NRS Chapter 116" shall mean each and all (as may be applicable) of: (a) Nevada's Uniform Common-Interest Ownership Act, Chapter 116 of Nevada Revised Statutes; (b) Common Interest Communities: Regulation of Community Managers and Other Personnel, Chapter 116A of Nevada Revised Statutes; and (c) Chapters 116 and 116A of the Nevada Administrative Code; as all or any portion of which respectively from time to time may be duly amended or supplemented by appropriate legal authority with jurisdiction.

Section 1.55 "Officer" shall mean a duly elected or appointed and current officer of the Association.

Section 1.56 "Ordinance(s)" shall mean all applicable ordinances, codes, regulations and rules of the City, and/or other applicable local governmental authority with jurisdiction.

Section 1.57 "Original Property" shall mean that real property described on Exhibit "A" attached hereto and incorporated by this reference herein, which shall be the initial real property made subject to this Declaration, immediately upon the Recordation of this Declaration.

Section 1.58 "Owner" shall mean the Person or Persons, including Declarant, holding fee simple interest of Record to any Unit. The term "Owner" shall include sellers under executory contracts of sale, but shall exclude Mortgagees. Pursuant to Article 3 hereof, a vendee under an installment land sale contract shall be deemed an "Owner" hereunder, provided the Board has received written notification thereof, executed by both vendor and vendee thereunder.

Section 1.59 "Party Wall(s)" shall have the meaning set forth in Section 9.5 below.

Section 1.60 "Perimeter Wall(s)" shall mean the walls and/or fences located generally around the exterior boundary of the Properties, as constructed or to be constructed by or with the approval of Master Declarant, as set forth in this Declaration, including, but not necessarily limited to, Sections 9.6 and 9.7, below.

Section 1.61 "Person" shall mean a natural individual, a corporation, or any other entity with the legal right to hold title to real property.

Section 1.62 "Plats" shall mean the final plat maps of (a) SAVONA @ SUMMERLIN – PHASE 1 ("Phase 1 Map"), on file in Book 149 of Plats, Page 0011; and (b) SAVONA @ SUMMERLIN - ENTRANCE, on file in Book 148 of Plats, Page 0098 ("Entry Map"); respectively in the Office of the County Recorder, Clark County, Nevada; and (c) SAVONA @ SUMMERLIN – PHASE 2 ("Phase 2 Map"), yet to be Recorded; and (d) SAVONA @ SUMMERLIN – PHASE 3 ("Phase 3 Map"), yet to be Recorded; together with any and all other

plat maps of the Community Recorded from time to time by Declarant, as said plat map(s) from time to time may be amended or supplemented of Record by Declarant.

Section 1.63 "Private Streets" shall mean all private streets, rights of way, street scapes, and vehicular ingress and egress easements in the Properties, shown as such on the Plats, and which Private Streets comprise a portion of the Common Elements. Although the streets within this privately gated Community are Private Streets, they are readily accessible by and to outsiders and to the public in general. Although the Private Streets are Common Elements (maintained and repaired by the Association) and the Association may promulgate and enforce parking and other use rules and restrictions over Private Streets, in accordance with the Governing Documents and with applicable law, there will be no private security on or over the Private Streets and/or the Community. There is no budget for any private security. Declarant and Association shall have no responsibility or liability whatsoever arising from or related to the absence of private security on or over the Private Streets and/or Community.

Section 1.64 "Properties" shall mean all of the Original Property described in Exhibit "A," attached hereto, together with such portions of the Annexable Area, described in Exhibit B hereto, as may hereafter be annexed of Record from time to time thereto pursuant to Article 15 of this Declaration.

Section 1.65 "Purchaser" shall have that meaning as provided in NRS § 116.079.

Section 1.66 "Record," "Recorded," "Filed" or "Recordation" shall mean, with respect to any document, the recordation of such document in the official records of the County Recorder of Clark County, Nevada.

Section 1.67 "Resident" shall mean any Owner, tenant, or other person, who is physically residing in a Unit.

Section 1.68 "Rules and Regulations" (or "Rules") shall mean the rules and regulations, if any, which may, but need not necessarily, be adopted by the Board pursuant to this Declaration and Bylaws, as such Rules and Regulations from time to time may be amended, subject to applicable law.

Section 1.69 "Shared Common Elements" shall have the meaning set forth in the Shared Improvements Instrument, and are a part of the Shared Entry Area. The Shared Common Elements are readily accessible by and to outsiders and to the public in general. There will be no private security on or over the Shared Common Elements and/or the Shared Entry Area. There is no budget for any private security. Declarant and Association shall have no responsibility or liability whatsoever arising from or related to the absence of private security on or over the Shared Common Elements and/or Shared Entry Area.

Section 1.70 "Shared Entry Area" shall mean the Shared Common Elements and the Shared Private Streets (collectively comprising the "Shared Improvements" as said term is defined in the Shared Improvements Instrument). A portion of the Shared Entry Area is comprised of certain Common Elements and Private Streets as set forth on the final map of SAVONA @ SUMMERLIN – ENTRANCE ("Entry Map"); and the other portion of the Shared

Entry Area is comprised of certain common elements and private streets of the adjoining Estrella community (developed or being developed by an unrelated third party) which is/are not a part of the Savona Community. Notwithstanding the foregoing, or any other provision herein, all of the Shared Entry Area is subject to and governed by the Shared Improvements Instrument.

Section 1.71 "Shared Improvements Instrument" shall mean that certain Declaration of Easement and Covenant to Share Costs Pertaining to Certain Shared Improvements for the Planned Communities of Savona and Estrella, which instrument has been Recorded or will be Recorded, and which accords certain benefits to, and imposes certain obligations on, the Association (including, but not limited to, obligations to maintain and repair certain Shared Entry Improvements, and related obligations and benefits) The Shared Improvements Instrument is incorporated herein by this reference. The costs allocable to the Association pursuant to the Shared Improvements Instrument shall be Common Expenses.

Section 1.72 "Shared Private Streets" shall mean all private streets, rights of way, street scapes, and vehicular ingress and egress easements in the Shared Entry Area, pursuant to the Shared Improvements Instrument, shown as such on the Plats, and which Shared Private Streets comprise a portion of the Shared Improvements. It is not intended that the Shared Private Streets will be privately gated at Antelope Ridge Drive. The Shared Private Streets are readily accessible by and to outsiders and to the public in general. There will be no private security on or over the Shared Private Streets and/or the Shared Entry Area. There is no budget for any private security. Declarant and Association shall have no responsibility or liability whatsoever arising from or related to the absence of private security on or over the Shared Private Streets and/or Shared Entry Area.

Section 1.73 "Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plats, subject to any and all easements shown on the Plats and/or any and all easements and/or restrictions set forth in this Declaration or other applicable Recorded instrument), and shall include such Lot and the Dwelling and all other Improvements thereon. With regard to certain Units, such Improvements shall include the portion of Perimeter Walls located on or within the Unit's boundaries, pursuant to Section 9.6 below. Subject to the foregoing, and subject further to Section 9.5 hereof, the boundaries of each Unit shall be the property lines of the Lot, as shown on the Plats.

Section 1.74 "Units That May Be Created" shall mean the total "not to exceed" maximum number of aggregate Units within the Original Property and the Annexable Area (which Declarant has reserved the right, in its sole discretion, to create) (i.e., 135 Units), subject to Section 14.1(h) below.

Section 1.75 "VA" shall mean the United States Department of Veterans Affairs.

Any capitalized term not separately defined in this Declaration shall reasonably have the meaning ascribed thereto in applicable provision of NRS Chapter 116.

the time of a loss under the policy there is other insurance in the name of the Owner covering the same risk covered by the policy, the Association's policy provides primary insurance.

ARTICLE 13
MORTGAGEE PROTECTION

Section 13.1 Mortgagee Protection Provisions. In order to induce FHA, VA, FHLMC, GNMA and FNMA and any other governmental agency or other Mortgagees to participate in the financing of the sale of Units within the Properties, the following provisions are added hereto (and to the extent these added provisions conflict with any other provisions of the Declaration, these added provisions shall control):

(a) Each Eligible Holder, upon its specific written request, is entitled to written notification from the Association of any default by the Mortgagor of such Unit in the performance of such Mortgagor's obligations under this Declaration, the Articles of Incorporation or the Bylaws, which default is not cured within thirty (30) days after the Association learns of such default. For purposes of this Declaration, "first Mortgage" shall mean a Mortgage with first priority over other Mortgages or Deeds of Trust on a Unit, and "first Mortgagee" shall mean the Beneficiary of a first Mortgage.

(b) Each Owner, including every first Mortgagee of a Mortgage encumbering any Unit which obtains title to such Unit pursuant to the remedies provided in such Mortgage, or by foreclosure of such Mortgage, or by deed or assignment in lieu of foreclosure, shall be exempt from any "right of first refusal" created or purported to be created by the Governing Documents.

(c) In all instances subject to and in accordance with applicable law (including, but not necessarily limited to, NRS §116.3116, as may be applicable): each Beneficiary of a first Mortgage encumbering any Unit which obtains title to such Unit or by foreclosure of such Mortgage, shall take title to such Unit free and clear of any claims of unpaid Assessments or charges against such Unit which accrued prior to the acquisition of title to such Unit by the Mortgagee.

(d) Unless at least sixty-seven percent (67%) of Eligible Holders (based upon one (1) vote for each first Mortgage owned) or sixty-seven percent (67%) of the Owners (other than Declarant) have given their prior written approval, neither the Association nor the Owners shall:

(1) subject to Nevada non-profit corporation law to the contrary, by act or omission seek to abandon, partition, alienate, subdivide, release, hypothecate, encumber, sell or transfer the Common Elements and the Improvements thereon which are owned by the Association; provided that the granting of easements for public utilities or for other public purposes consistent with the intended use of such property by the Association as provided in this Declaration shall not be deemed a transfer within the meaning of this clause.

(2) change the method of determining the obligations, Assessments, dues or other charges which may be levied against an Owner, or the method of allocating distributions of hazard insurance proceeds or condemnation awards;

(3) by act or omission change, totally waive or abandon any scheme of regulations, or enforcement thereof, pertaining to the architectural design of the exterior appearance of the Dwellings and other Improvements on the Units, the maintenance of Exterior Walls or common fences and driveways, or the upkeep of lawns and plantings in the Properties;

(4) fail to maintain Fire and Extended Coverage on any insurable Improvements on Common Elements on a current replacement cost basis in an amount as near as possible to one hundred percent (100%) of the insurance value (based on current replacement cost);

(5) except as provided by any applicable provision of NRS Chapter 116, use hazard insurance proceeds for losses to any Common Elements for other than the repair, replacement or reconstruction of such property; or

(6) amend those provisions of this Declaration or the Articles of Incorporation or Bylaws which expressly provide for rights or remedies of first Mortgagees.

(e) Eligible Holders, upon express written request in each instance therefor, shall have the right to (1) examine the books and records of the Association during normal business hours, (2) require from the Association the submission of an annual audited financial statement (without expense to the Beneficiary, insurer or guarantor requesting such statement) and other financial data, (3) receive written notice of all meetings of the Members, and (4) designate in writing a representative to attend all such meetings.

(f) Eligible Holders, who have filed a written request for such notice with the Board shall be given thirty (30) days' written notice prior to: (1) any abandonment or termination of the Association; and/or (2) the effective date of any termination of any agreement for professional management of the Properties following a decision of the Owners to assume self- management of the Properties. Such first Mortgagees shall be given immediate notice: (i) following any damage to the Common Elements whenever the cost of reconstruction exceeds Ten Thousand Dollars ($10,000.00); and (ii) when the Board learns of any threatened condemnation proceeding or proposed acquisition of any portion of the Properties.

(g) First Mortgagees may, jointly or singly, pay taxes or other charges which are in default and which may or have become a charge against any Common Elements and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for Common Elements, and first Mortgagees making such payments shall be owed immediate reimbursement therefor from the Association.

(h) The Reserve Fund described in Article 6 above must be funded by regular scheduled monthly, quarterly, semiannual or annual payments rather than by large extraordinary Assessments.

(i) The Board shall cause to be obtained and maintained errors and omissions insurance, blanket fidelity insurance coverage, or crime insurance coverage (which includes coverage for dishonest acts by Directors, Officers, Association employees (if any), agents, and volunteers, and which extends coverage to the Community Manager and its employees), in an amount at least equal to the lesser of: (a) three (3) months of aggregate Assessments on all Units plus Reserve Funds; or (b) $5,000,000; and such other insurance as the Board deems prudent, insuring the Board, the Directors, and Officers, and Community Manager against any liability for any act or omission in carrying out their respective obligations hereunder, or resulting from their membership on the Board or on any committee thereof, if reasonably feasible, in the amount of not less than $1,000,000; all as subject to applicable law from time to time.

(j) When professional management has been previously required by a Beneficiary, insurer or guarantor of a first Mortgage, any decision to establish self-management by the Association shall require the approval of at least sixty-seven percent (67%) of the voting power of the Association and of the Board respectively, and at least fifty-one percent (51 %) of the Eligible Holders.

(k) So long as VA is insuring or guaranteeing loans or has agreed to insure or guarantee loans on any portion of the Properties, then, pursuant to applicable VA requirement, for so long as Declarant shall control the Association Board, Declarant shall obtain prior written approval of the VA for any material proposed: action which may affect the basic organization, subject to Nevada nonprofit corporation law, of the Association (i.e., merger, consolidation, or dissolution of the Association); dedication, conveyance, or mortgage of the Common Elements; or amendment of the provisions of this Declaration, the Articles of Incorporation, Bylaws, or other document which may have been previously approved by the VA; provided that no such approval shall be required in the event that the VA no longer regularly requires or issues such approvals at such time.

In addition to the foregoing, the Board of Directors may enter into such contracts or agreements on behalf of the Association as are required in order to reasonably satisfy the applicable express requirements of Mortgagees, so as to allow for the purchase, insurance or guaranty, as the case may be, by such entities of first Mortgages encumbering Units. Each Owner hereby agrees that it will benefit the Association and the Membership, as a class of potential Mortgage borrowers and potential sellers of their Units, if such agencies approve the Properties as a qualifying subdivision under their respective policies, rules and regulations, as adopted from time to time. Mortgagees are hereby authorized to furnish information to the Board concerning the status of any Mortgage encumbering a Unit.

Section 13.2 FHA/VA Approval. So long as Declarant has effective control of the Board, the following actions will require the prior confirmation of the FHA and/or VA, as applicable: (a) annexation or deannexation of additional property in the Project (other than the Annexable Area); (b) dedication, conveyance or Mortgage of Association Property; (c) except

as provided in Section 17.5 below, amendment of this Declaration; and (d) mergers, consolidations or dissolutions of the Association; provided, however, that such prior confirmation shall not be a condition precedent if FHA or VA has ceased to regularly require or issue such written confirmations.

ARTICLE 14
DECLARANT'S RESERVED RIGHTS

Section 14.1 Declarant's Reserved Rights. Any other provision herein notwithstanding, pursuant to NRS § 116.2105.1(h), Declarant reserves, in its sole discretion, subject to applicable law, the following developmental rights and other special Declarant's rights, on the terms and conditions and subject to the expiration deadlines, if any, set forth below:

(a) Right to Complete Improvements and Construction Easement. Declarant reserves, for a period terminating at the end of the Declarant Rights Period, the right, in Declarant's sole discretion, to complete the construction of the Improvements in the Properties and an easement over the Properties for such purpose.

(b) Exercise of Developmental Rights. Pursuant to NRS Chapter 116, Declarant reserves the right to annex all or portions of the Annexable Area to the Community, pursuant to the provisions of Article 15 hereof, during the Declarant Rights Period. No assurances are made by Declarant with regard to the boundaries of those portions of the Properties which may be annexed or the order in which such portions may be annexed. Declarant also reserves the right to withdraw real property from the Community.

(c) Offices, Model Homes and Promotional Signs. Declarant reserves the right to install and maintain models, sales offices, management offices, construction trailers, and/or related private parking areas on any Lot or Unit owned or leased by Declarant in the Properties, and to install and maintain signs, flags, and/or banners anywhere on the Common Elements, respectively during the Declarant Rights Period. Declarant further expressly reserves the right during such period to use said signs, flags, and/or banners, offices, models, construction trailers, and/or private parking areas (which are not Common Elements, and are not Association areas), in connection with marketing and/or sales of Declarant. Without limiting the foregoing, during the Declarant Rights Period, Declarant reserves the right and an easement to place and maintain signs, flags and banners throughout the Properties for Declarant's marketing and advertising purposes, and to periodically enter upon the Properties to maintain said signs, flags, and banners and to keep them in good repair.

(d) Appointment and Removal of Directors. Declarant reserves the right to appoint and remove a majority of the Board as set forth in Section 3.7 hereof, during the Declarant Control Period.

(e) Amendments. Declarant reserves the right to amend this Declaration from time to time, as set forth in detail in Section 17.5 below, and any other provision of this Declaration, during the time periods set forth therein.

Entry Area, pursuant and subject to the Shared Improvements Instrument) unless specifically provided for in a Recorded instrument executed by the Master Declarant and/or the Master Association. Notwithstanding any other provision set forth in this Declaration: (1) the Declaration shall supplement, but shall not supersede, the Master Declaration; (2) the Master Declaration shall control in the event of any conflict with the provisions of this Declaration, although such documents shall be construed to be consistent with one another to the extent reasonably possible (and the inclusion in this Declaration of additional restrictions or provisions which are more restrictive than the restrictions or provisions contained in the Master Declaration shall not be deemed to constitute a conflict with the provisions of the Master Declaration); and (3) nothing in this Declaration shall be construed as relieving any Owner or Unit within the Community from the provisions of the Master Declaration or any other of the Master Association Documents, or as limiting or preventing any and all applicable rights of enforcement granted or available to Master Declarant and/or Master Association and/or Summerlin Council by virtue thereof or in connection therewith.

(b) No provision contained in this Declaration shall rescind, modify or amend any previous agreement(s) between Declarant and Master Declarant, whether such agreements are Recorded or not Recorded, with respect or related to the creation and development of Units and Common Elements in the Community.

Section 19.2 Protection of Master Declarant and Master Association. Notwithstanding the foregoing, or any other provision in this Declaration, no provision for the benefit of or affecting the Master Declarant and/or Master Association and/or Summerlin Council can be amended, altered, suspended, or superseded without the express prior written consent of Master Declarant and/or Master Association and/or Summerlin Council (as applicable, in their respective sole discretion), which consent must be acknowledged in a Recorded document; and any purported amendment in the absence of such prior written consent shall be null and void.

IN WITNESS WHEREOF, Declarant has executed this Declaration for SAVONA as of the day and year first written above.

DECLARANT: **WOODSIDE HOMES OF NEVADA, LLC**
a Nevada limited liability company

By: _____
Patrick Helfrich, Vice President

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

This Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for SAVONA was acknowledged before me on this 29 day of April, 2015, by Patrick Helfrich, as Vice President of Woodside Homes of Nevada, LLC, a Nevada limited liability company.

Commission # 07-5166-1
Exp. March 6, 2018

GWEN SCOTT
Notary Public, State of Nevada
Commission # 07-5166-1
My Comm. Expires March 6, 2018

_____
NOTARY PUBLIC
(Seal)

(91)

Inst #: 20150518-0001894
Fees: $107.00
N/C Fee: $0.00
05/18/2015 01:43:26 PM
Receipt #: 2426365
Requestor:
MCDONALD CARANO WILSON LLP
Recorded By: LEX Pgs: 91
DEBBIE CONWAY
CLARK COUNTY RECORDER

APNs: 137-27-818-001 through 137-27-818-059
137-34-522-001 through 137-34-522-018

RECORDING REQUESTED BY, AND
WHEN RECORDED, MAIL TO:
Robert E. McPeak, Esq.
McDonald Carano Wilson LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102

DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ALTURA

329574

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DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ALTURA

THIS DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ALTURA ("**Declaration**") is made by Toll South LV LLC, a Nevada limited liability company ("**Declarant**").

PREAMBLE:

A. Declarant is the owner of certain real property located in the County of Clark, State of Nevada, more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference, hereinafter referred to as the "**Properties**."

B. Declarant has improved or intends to improve the Properties (including the Annexable Property) by creating a common-interest community as defined by NRS § 116.021 to contain a maximum of one hundred twenty one (121) residential lots and various common lots thereon which will be called "Altura," which shall be a planned community (the "**Community**"). Declarant may annex additional unspecified real property as part of the Properties in order to create a greater number of lots and additional common lots, and specifically reserves the right to do so in the future. Declarant has deemed it desirable to establish certain protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges upon the Properties, all for the purpose of providing for the ongoing maintenance of the Common Elements, enhancing and protecting the value, desirability and attractiveness of the Properties and enhancing the quality of life therein.

C. Declarant has deemed it desirable to create a corporation to which shall be delegated and assigned the powers of owning, maintaining and administering the Properties for the private use of its Members, Residents and authorized guests; administering and enforcing the covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges; collecting and disbursing the assessments and charges hereinafter created; and performing such other acts as shall generally benefit the Properties, such corporation to be known as the **Altura Unit-Owners Association**, a Nevada non-profit corporation (the "**Association**"), the Members of which shall be the respective Owners of Lots located in the Properties, which has or will be incorporated under the laws of the State of Nevada for the purpose of exercising the powers and functions stated above.

D. Declarant hereby declares that all of the Properties are to be held, conveyed, hypothecated, encumbered, leased, rented, used, occupied and improved subject to the limitations, restrictions, reservations, rights, easements, conditions and covenants contained in this Declaration, all of which are declared and agreed to be in furtherance of a plan for the protection, subdivision, maintenance, improvement and sale of the Properties for the purpose of enhancing the value, desirability and attractiveness of

the Properties. All provisions of this Declaration, including, without limitation, the easements, uses, obligations, covenants, conditions and restrictions hereof, are hereby imposed as equitable servitudes upon the Properties. All of the limitations, restrictions, reservations, rights, easements, conditions and covenants herein shall run with and burden the Properties and shall be binding on and for the benefit of all of the Properties and all Persons having or acquiring any right, title or interest therein, or in any part thereof, their heirs, successive owners and assigns, shall inure to the benefit of every portion of the Properties and any interest therein; and shall inure to the benefit and be binding upon Declarant and its successor owners and assigns, and each Owner and his respective successors in interest; and may be enforceable by any Owner or by the Association. By acceptance of a deed or by acquiring any interest in any of the property subject to this Declaration, each Person, for himself or itself, his heirs, personal representatives, successors, transferees and assigns, binds himself, his heirs, personal representatives, successors, transferees and assigns, to all of the provisions, restrictions, covenants, conditions, rules and regulations now or hereafter imposed by this Declaration and any amendments thereof.

E. The Howard Hughes Company, LLC, a Delaware limited liability company ("**Master Declarant**") has executed and Recorded a Master Declaration (as defined below) for Summerlin West Community Association pertaining to certain property located within the City of Las Vegas, Nevada, as described therein and referred to herein as Summerlin West, in order to establish a balanced community accommodating a mix of residential and other land uses, including open space, and to develop and convey portions of, or all of the properties subject to the Master Declaration and jurisdiction of the Master Association (as defined below) pursuant to a general plan for the maintenance, care, use and management of the property within Summerlin West. This Declaration for the Association (as defined below) is a "supplemental declaration" as such term is used in the Master Declaration. The Properties are a part of Summerlin West and are subject to the Master Declaration and the jurisdiction of the Master Association.

ARTICLE I
DEFINITIONS

Unless otherwise expressly provided, the following words and phrases when used herein shall have the following specified meanings:

"**Annexable Property**" shall mean the real property described in **Exhibit B** attached hereto and incorporated by this reference herein, all or any portion of which real property may from time to time be made subject to this Declaration pursuant to the provisions of Article XV hereof. At no time shall any portion of the Annexable Property be deemed to be a part of the Properties until such portion of the Annexable Property has been duly annexed hereto pursuant to Article XV hereof.

"**ARC**" shall mean the Architectural Review Committee.

"**Architectural Review Committee**" shall mean the Architectural Review Committee created pursuant to Article V hereof.

"**Articles**" shall mean the Articles of Incorporation of the Association as filed or to be filed in the Office of the Secretary of State of the State of Nevada, as such Articles may from time to time be amended or supplemented.

"**Assessment, Annual Common**" shall mean a charge against a particular Owner and his Lot, representing a portion of the Common Expenses which are to be levied among all Owners and their Lots in the Project in the manner and proportions provided herein. Annual Assessments shall commence upon the sale of the first Lot to a member of the public, or earlier at the sole discretion of the Board of Directors.

"**Assessment, Capital Improvement**" shall mean a charge against each Owner and his Lot, representing a portion of the costs to the Association for installation, construction or reconstruction of any Improvements on any portion of the Common Elements, which the Association may from time to time authorize pursuant to the provisions of this Declaration. Such charge shall be levied equally among all Owners and their Lots.

"**Assessment, Special**" shall mean an assessment which may be levied from time to time by the Association to cover unbudgeted expenses or expenses in excess of those budgeted, which shall be levied against each Lot in the Project, as more particularly stated in Article VI herein.

"**Assessment, Specific**" shall mean a charge against a particular Owner and his Lot, directly attributable to or reimbursable by the Owner, equal to the cost incurred by the Association for corrective action taken pursuant to the provisions of this Declaration or in bringing the Owner and his Lot into compliance with the provisions of this Declaration, or a charge levied by the Board of Directors as a reasonable fine or penalty for non-compliance with the Declaration, plus interest and other charges on such Specific Assessment as provided for in this Declaration.

"**Assessment Year**" shall mean the calendar year or such other twelve (12) consecutive calendar month period selected by the Board of Directors for the levying, determining and assessing of Annual Assessments under this Declaration.

"**Association**" shall mean the Altura Unit-Owners Association, a Nevada nonprofit corporation, its successors and assigns. The Association is an "association" as defined in NRS § 116.011.

"**Association Maintenance Funds**" shall mean the account created for receipts and disbursements of the Association, pursuant to Article VI hereof.

"**Association Personal Property**" shall mean all personal property, other than that which may be included as part of the Common Elements, which is owned or leased by the Association.

"**Beneficiary**" shall mean a Mortgagee under a Mortgage or a Beneficiary under a Deed of Trust and the assignees of such Mortgagee or Beneficiary.

"**Board of Directors**" or "**Board**" shall mean the Board of Directors of the Association, elected in accordance with the Articles and the Bylaws and this Declaration. The Board is an "executive board" as defined in NRS § 116.045.

"**Budget**" shall mean a written, itemized estimate of the income and Common Expenses of the Association in performing its functions under this Declaration.

"**Bylaws**" shall mean the Bylaws of the Association which have been or will be adopted by the Board of Directors as such Bylaws may from time to time be amended or supplemented.

"**Close of Escrow**" shall mean the date on which a deed is recorded conveying a Lot in the Properties from Declarant to any person or entity.

"**Common Elements**" shall mean such portion of the real property which now or hereafter may be conveyed by Declarant to the Association in fee or by easement, pursuant to Section 3.1 below, together with all Improvements located thereon, including, without limitation, all shrubs, trees and other landscaping, sidewalks, driveways, streets, pavement, pipes, wires, conduits, public utility lines, buildings, recreational facilities, water features, security gates, and appurtenances thereto owned or to be owned by the Association. Common Elements shall include those areas designated as such upon the Final Map.

"**Common Expenses**" shall mean the actual and estimated costs of:

(a) maintenance, management, operation, repair and replacement of the Common Elements;

(b) purchase, maintenance, operation, repair and replacement of any Association Personal Property for the benefit of the Owners;

(c) unpaid Special Assessments and Capital Improvement Assessments;

(d) management and administration of the Association, including, without limitation, compensation paid by the Association to managers, accountants, attorneys and other consultants and employees;

(e) all utilities, gardening, trash pickup and disposal, and other services benefiting the Common Elements;

(f) fire, casualty and liability insurance, worker's compensation insurance, errors and omissions and director, officer and agent liability insurance and other insurance covering Common Elements, Association Personal Property, and the directors, officers and agents of the Association;

(g) bonding the members of the Board of Directors, any manager or other person handling the funds of the Association;

(h) taxes paid by the Association;

(i) amounts paid by the Association for discharge of any lien or encumbrance levied against the Common Elements, or portions thereof;

(j) prudent reserves, in accordance with reserve studies prepared for the Association and the cost of such reserve studies; and

(k) any other item or items designated by the Association for any reason whatsoever in connection with the Common Elements, for the benefit of the Owners and the Properties, including, without limitation, amenities located outside of the Project which Owners have the right to use such as a gate and entryway and a recreation facility.

"**Community Systems**" shall mean and refer to any and all cable television, telecommunication, alarm/monitoring, internet, telephone or other lines, conduits, wires, amplifiers, towers, antennae, satellite dishes, equipment, materials and installations and fixtures (including those based on, containing and serving future technological advances not now known), if installed by Declarant or pursuant to any grant of easement or authority by Declarant within the Property. Declarant shall be under no obligation to install any such Community Systems.

"**Community-Wide Standards**" shall mean the standards of conduct, maintenance or other activity generally prevailing throughout the Project. Such standards may be more specifically determined by the Board of Directors and the ARC.

"**Declarant**" shall mean Toll South LV LLC, a Nevada limited liability company, its successors and any other person to which it shall have assigned any rights hereunder by an express written and recorded assignment as provided therein. For purposes of the foregoing, no individual, corporation, trust, partnership or other entity who or which has purchased or acquired property within the Project from Declarant, or whose title to such property is derived from a person who has purchased such property from Declarant, shall, solely as the result of such purchase or acquisition, be deemed to be a successor or assignee of Declarant. Any assignment hereunder may include all or only specific rights of Declarant hereunder and may be subject to such conditions and limitations as Declarant may impose in its sole and absolute discretion, subject to the Developmental Declaration.

"**Declaration**" shall mean this Declaration of Covenants, Conditions, Restrictions and Reservations of Easements for Altura, as amended or supplemented from time to time.

"**Deed**" shall mean a deed or other instrument conveying the fee simple title in a Lot.

"**Deed of Trust**" shall mean a mortgage or a deed of trust as the case may be.

"**Developmental Declaration**" shall mean that certain Declaration of Development Covenants and Restrictions by Toll South LV LLC, dated as of March 18, 2014, and Recorded in the Official Records on March 20, 2014, as Instrument 20140320-0002088. Notwithstanding any other provision in this Declaration, all Developmental Rights and Special Declarant Rights, and other rights and powers of Declarant, shall be subject to the Developmental Declaration.

"**Final Map**" shall mean that Map recorded on April 9, 2015 in the Official Records of Clark County, Nevada in Book 149, Page 19, which describes therein the Lots, Common Elements and any easements encumbering the Properties. A true and correct copy of the

Final Map is attached hereto as **Exhibit C**. The Final Map shall also mean and include any other Map recorded in the Official Records of Clark County, Nevada which describes therein any other and additional Lots, Common Elements and any easements encumbering any other real property which may subsequently be subject to this Declaration.

"**First Deed of Trust**" or "**First Mortgage**" shall mean a Mortgage or Deed of Trust with first priority over other Mortgages or Deeds of Trust on a Lot.

"**First Mortgagee**" shall mean a Person to whom a First Mortgage is made and shall include the beneficiary under a First Deed of Trust.

"**Fiscal Year**" shall mean the fiscal accounting and reporting period of the Association selected by the Board from time to time, which may or may not coincide with the Assessment Year.

"**Governing Documents**" shall mean this Declaration, the Articles of Incorporation, the Bylaws, and Rules and Regulations promulgated by the Board of Directors and the ARC.

"**Government Mortgage Agency**" shall mean the Federal Home Loan Mortgage Corporation, the Government National Mortgage Association or the Federal National Mortgage Association or any similar entity, public or private, authorized, approved or sponsored by any governmental agency to insure, guaranty, make or purchase mortgage loans.

"**Improvements**" shall mean all structures and appurtenances thereto, now or hereafter situated within the Properties of every type and kind, including, without limitation, buildings, outbuildings, walkways, sprinkler pipes, garages, recreational facilities, carports, roads, driveways, parking areas, fences, security gates, screening walls, retaining walls, stairs, decks, landscaping, hedges, windbreaks, plantings, planted trees and shrubs, poles, signs, exterior air conditioning and water softener fixtures or equipment.

"**Lot**" shall mean and refer to the numbered legal lots or parcels of land shown upon any Recorded subdivision or parcel map of the Properties with the exception of the Common Elements, together with all appurtenances, and Improvements, including any Residence now or hereafter built or placed thereon. A description of the particular Lots to which this Declaration applies is shown on the Final Map. A Lot is a "Unit" for purposes of NRS Chapter 116, and the words "Lot" and "Unit" may be used interchangeably within the Governing Documents.

"**Manager**" shall mean the Person, if any, whether an employee or independent contractor, employed by the Association, Declarant or an affiliated entity of Declarant, as described in Section 3.2(f) below, to whom is delegated the authority to implement the duties, powers or functions of the Association as the same may be limited by this Declaration, the Bylaws, and any agreement between the Association and such Person.

"**Master Association**" shall mean the Summerlin West Community Association, a Nevada non-profit corporation, and its successors and assigns.

"**Master Association Documents**" shall mean the Governing Documents of the Master Association, as defined in Section 2.17 of the Master Declaration.

"**Master Declaration**" shall mean the Master Declaration of Covenants, Conditions, Restrictions and Reservation of Easements for Summerlin West, Recorded by Master Declarant on January 23, 2001 in Book 20010123 as Instrument Number 01409, as may be further amended and/or supplemented from time to time, together with that certain Amended and Restated Supplemental Declaration of Covenants, Conditions, Restrictions and Reservation of Easement of Village 23B, Parcel Q, Recorded by Master Declarant on July 3, 2014 as Instrument Number 20140703-0002083.

"**Member**" shall mean every Person holding a Membership in the Association, pursuant to Article II hereof.

"**Membership**" shall mean a membership in the Association pursuant to Article II hereof.

"**Mortgage**" shall mean any unreleased Mortgage or Deed of Trust or other similar instrument of Record, given voluntarily by the Owner of a Lot, encumbering the Lot to secure the performance of an obligation or the payment of a debt and which is required to be released upon performance of the obligation or payment of the debt. The term "Deed of Trust" or "Trust Deed" when used shall be synonymous with the term "Mortgage." "Mortgage" shall also mean any executory land sales contract, whether or not Recorded, in which a Government Mortgage Agency is identified as the seller, whether such contract is owned by or has been assigned by such Government Mortgage Agency. "Mortgage" shall not include any judgment lien, mechanic's lien, tax lien or other similarly involuntary lien or encumbrance on a Lot.

"**Mortgagee**" shall mean a Person or entity to whom a Mortgage is made and shall include the beneficiary of a Deed of Trust. The term "beneficiary" shall be synonymous with the term "Mortgagee."

"**Mortgagor**" shall mean a Person who mortgages his or its property to another (i.e., the maker of a Mortgage), and shall include the trustor of a Deed of Trust. The term "trustor" shall be synonymous with the term "Mortgagor."

"**Notice and Hearing**" shall mean written notice and a hearing before the Board of Directors or the Architectural Review Committee, as applicable, at which the Owner concerned shall have an opportunity to be heard in person, or, at the Owner's expense, by counsel, in the manner further provided in the Bylaws.

"**Notice of Delinquent Assessment**" shall mean a Delinquent Assessment as described in Article VI hereof

"**NRS**" shall mean the Nevada Revised Statutes.

"**Occupant**" shall mean any Person, other than an Owner, in rightful possession of a Lot.

"**Owner**" shall mean the Person (or Persons) who is (are) the Record holder of legal title to the fee simple interest in any Lot (Unit), including executory contract sellers. An Owner shall not include Persons having an interest in a Lot merely as security for the performance of an obligation, or a lessee or tenant of a Lot, and shall not include a purchaser under a purchase contract and receipt, escrow instructions or similar executory

contracts which are intended to control the rights and obligations of the parties to executory contracts pending the closing of a sale or purchase transaction. In the case of a Lot, the fee simple title to which is vested in a trustee under a deed of trust, the Trustor shall be deemed the Owner unless and until such Trustor's interest has been foreclosed. An Owner shall include any Person who holds Record title to a Lot in joint ownership with any other Person or holds an undivided fee interest in any Lot.

"Period of Declarant's Control" shall mean the time period commencing on the date this Declaration is Recorded and ending on the earlier of:

(i) sixty (60) days after the conveyance of seventy-five percent (75%) of the Lots that may be created to Owners other than Declarant; or

(ii) five (5) years after Declarant has ceased to offer Lots for sale in the ordinary course of business;

(iii) five (5) years after Declarant has last exercised any right to add Lots to the Community; or

(iv) when Declarant has notified the Association in writing that the Period of Declarant's Control has ended.

"**Person**" shall mean a natural individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency or any other entity with the legal right to hold title to real property.

"**Private Streets**" shall mean those areas of the Project which are shown as Private Streets on any subdivision or parcel map Recorded by Declarant for an area of the Properties unless and until such streets are conveyed by the Association to a public agency or entity in accordance with the provisions of this Declaration.

"**Project**" shall mean that real property described in Exhibit A together with all Improvements thereon, together with such portion of the Annexable Property which is annexed pursuant to Article XV of this Declaration, together with all improvements thereon, The Project is a "common-interest community" as defined in NRS Chapter 116.

"**Record**," "**Recorded**," and "**Recordation**" shall mean, with respect to any document, the recordation or filing of such document in the office of the County Recorder of Clark County, Nevada.

"**Residence**" shall mean a dwelling on a Lot intended for use and occupancy by a Single Family.

"**Resident**" shall mean each individual occupying or residing on any Lot.

"**Rules and Regulations**" shall mean the rules and regulations of the Association adopted by the Board of Directors pursuant to Article III hereof, as they may be amended and supplemented from time to time.

"**Single Family**" shall mean (i) a group of natural Persons related to each other by blood or legally related to each other by marriage or adoption, or (ii) a group of natural Persons not all so related, not to exceed five (5) in number (unless some greater or lesser number

of persons is permitted by law to be defined as a "single family"), but who maintain a common household in a Residence on a Lot. Neither Declarant nor the Association shall have an obligation to identify or verify the relationships of those maintaining a common household in a Residence on a Lot.

"**Total Voting Power of the Association**" shall mean the total number of votes pertaining to all Lots (Units) in the Project available to be voted by Members in good standing as of a date certain to be established by the Board.

"**Turnover Date**" shall mean the last of the following events to occur: (1) the termination of the Period of Declarant's Control, (2) the conveyance of all of the Common Elements to the Association, or (3) the assumption by the Association of maintenance of the Common Elements.

"**Unit**" shall have the same meaning as the term "Lot," described above, and the words "Lot" and "Unit" may be used interchangeably within the Governing Documents.

ARTICLE II
CREATION AND MEMBERSHIP IN ALTURA OWNERS ASSOCIATION

2.1 ORGANIZATION OF ASSOCIATION

The Association is or shall be incorporated under the name of Altura Unit-Owners Association, as a non-profit corporation under the laws of the State of Nevada.

2.2 MEMBERSHIP

The Members of the Association shall be each Owner (including Declarant) of one (1) or more Lots in the Properties. The Person or Persons who constitute the Owner of a Lot shall automatically be the holder of the Membership in the Association, which Membership shall be appurtenant to the Lot. Such Membership shall automatically pass with fee simple title to the Lot. Ownership of a Lot shall be the sole qualification for an Owner's Membership in the Association. Declarant shall hold a separate Membership for each Lot owned by Declarant.

Any attempt to make a prohibited Membership transfer shall be void and will not be reflected on the books of the Association. Any Member who has sold his Lot to a contract purchaser under a Recorded installment sale contract shall be entitled to delegate to such contract seller his Membership rights in the Association; provided, however, that such contract purchaser shall not be entitled to vote or entitled to the use and enjoyment of the recreational or other facilities of the Association during the term of such delegation. Such delegation shall be in writing and shall be delivered to the Board of Directors. The contract seller, however, shall remain liable for all Assessments attributable to his Lot until fee title to the Lot sold is transferred. If the Owner of any Lot fails or refuses to transfer the Membership registered in his name to the purchaser of such Lot upon transfer of fee title thereto, the Board of Directors shall, nonetheless, have the right to Record the transfer upon the books of the Association. The Association may levy a reasonable transfer fee against a new Owner and his Lot (which fee shall be added to

(a) subrogation of claims against the Owners, Residents, Occupants and tenants of the Owners;

(b) any defense based upon co-insurance;

(c) any right of set-off, counterclaim, apportionment, proration or contribution by reason of other insurance not carried by the Association;

(d) any invalidity, other adverse effect or defense as a result of any breach of warranty or condition caused by the Association, any Owner, Resident, Occupant or any tenant of any Owner, or arising from any act, neglect, or omission of any named insured or the respective agents, contractors and employees of any insured;

(e) any right of the insurer to repair, rebuild, or replace, and, if the Improvement is not repaired, rebuilt, or replaced following loss, any right to pay under the insurance an amount less than the replacement value of the Improvements insured; notice of the assignment of any Owner of his interest in the insurance by virtue of a conveyance of any Lot; and

(f) any right to require any assignment of any Mortgage to the insurer.

9.9 OTHER INSURANCE TO BE MAINTAINED BY OWNERS

All other insurance coverage affecting any individual Lot, the Improvements and any personal property thereon, shall be the responsibility of the Owner thereof

9.10 DECLARANT MASTER INSURANCE PROGRAM

Notwithstanding anything to the contrary contained herein, for so long as Declarant controls the Board, Declarant reserves the right to include insurance obligations of the Association within a master insurance program controlled by Declarant.

ARTICLE X
RIGHTS OF MORTGAGEES

10.1 EFFECT OF AMENDMENT ON RIGHTS OF MORTGAGEES

Notwithstanding any other provision of this Declaration, no amendment or violation of this Declaration shall operate to defeat or render invalid the rights of the Beneficiary under any Deed of Trust upon one (1) or more Lots made in good faith and for value, provided that after the foreclosure of any such Deed of Trust, such Lot(s) shall remain subject to this Declaration, as amended. For purposes of this Declaration, "**First Mortgage**" shall mean a Mortgage with first priority over the other Mortgages or Deeds of Trust on a Lot, and "**First Mortgagee**" shall mean the Beneficiary of a First Mortgage. For purposes of any provision of this Declaration or the other Restrictions which require the vote or approval of a specified percentage of First Mortgagees, such vote or approval

shall be determined based upon one (1) vote for each Lot encumbered by each such First Mortgage.

10.2 REQUEST FOR NOTIFICATION

Each Beneficiary, insurer and guarantor of a First Mortgage encumbering one (1) or more Lots, upon filing a written request for notification with the Board of Directors, is entitled to written notification from the Association of (i) any condemnation or casualty loss which affects either a material portion of the Project or the Lot(s) securing the respective First Mortgage; and (ii) any delinquency of sixty (60) days or more in the performance of any obligation under the Restrictions, including, without limitation, the payment of assessments or charges owed by the Owner(s) of the Lot(s) securing the respective First Mortgage, which notice each Owner hereby consents to and authorizes; and (iii) a lapse, cancellation, or material modification of any policy of insurance or fidelity bond maintained by the Association which requires consent by a specified percentage of First Mortgages.

10.3 EFFECT OF FORECLOSURE

Each Owner, including each First Mortgagee of a Mortgage encumbering any Lot who obtains title to such Lot pursuant to the remedies provided in such Mortgage, or by foreclosure of the Mortgage, or by deed or assignment in lieu of foreclosure, shall be exempt from any "right of first refusal" created or purported to be created by the Declaration.

Each First Mortgagee of a Mortgage encumbering any Lot which obtains title to such Lot, pursuant to the remedies provided in such Mortgage or by foreclosure of such Mortgage, shall take title to such Lot free and clear of any claims for unpaid assessments or charges against such Lot, except as provided in NRS § 116.3116(2), if such First Mortgage was recorded before the date on which the assessment sought to be enforced became delinquent.

10.4 ACTION REQUIRING CONSENT OF MORTGAGEES

Unless at least fifty-seven percent (57%) of the First Mortgagees or sixty-seven percent (67%) of the Owners (other than Declarant) have given their prior written approval, neither the Association nor the Owners shall:

(a) change the method of determining the obligations, assessments, dues or other charges which may be levied against any Owner; or

(b) by act or omission, seek to abandon, partition, subdivide, encumber, sell or transfer the Common Elements (The granting of easements for public utilities or for other purposes consistent with the intended use of the Common Elements shall not be deemed a transfer within the meaning of this clause); or

(c) An exact description of the Annexed Property; and

(d) Assignment of an identifying number to each new Lot created; and

(e) A reallocation of the allocated interests among all Lots; and

(f) A description of any Common Elements created by the annexation of the Annexed Property.

15.3 DISCLAIMER

Portions of the Annexable Property may be annexed at any time by Declarant, and no assurances are made with respect to the boundaries or sequence of annexation of such portions. Annexation of a portion of the Annexable Property shall not necessitate annexation of any other portion of the remainder of the Annexable Property.

15.4 OTHER ADDITIONS

Subject to the limitations of NRS § 116.2112, and in addition to the provisions for annexation set forth above, additional real property may be annexed to the Properties by Declarant and brought within the general plan and scheme of this Declaration.

THIS DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ALTURA IS DATED FOR IDENTIFICATION PURPOSES AS OF May 6, 2015.

DECLARANT:

TOLL SOUTH LV LLC,
a Nevada limited liability company

By: _____
David Straub
Division President

STATE OF NEVADA)
)
COUNTY OF CLARK)

This instrument was acknowledged before me on this 6th day of May, 2015, by David Straub, as Division President of Toll South LV LLC, a Nevada limited liability company.

My Commission Expires:

NOTARY PUBLIC

MARIA RODRIGUEZ
Notary Public, State of Nevada
Appointment No. 14-14354-1
My Appt. Expires Aug 13, 2018

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
March 6, 2009

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

COMMITTEE MEMBERS PRESENT:

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

COMMITTEE MEMBERS ABSENT:

Assemblyman Richard McArthur (excused)

GUEST LEGISLATORS PRESENT:

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

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

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

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

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

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

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

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

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

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

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

[Read from prepared text, Exhibit D.]

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

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

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

Pam Borda:
We are exempt from it, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Robert Robey:
No, sir, I did not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will turn the Chair over to Vice Chair Segerblom.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jon Sasser:
That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Vice Chair Segerblom:
Have you offered an amendment?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jennifer Chandler:
It is key.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[A three-minute recess was called.]

I will open the hearing on Assembly Bill 204.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Assemblywoman Spiegel:
Mr. Chairman, one thing I can tell you is that my community, Green Valley Ranch, last year had our own private security company who would patrol our several miles of walking trails and paths. We have since externalized our costs and now the city of Henderson is patrolling those at night instead of our private service.

Chairman Anderson:
So, for your common-interest community, you have moved the burden over to the taxpayers and the city as a whole.

Assemblywoman Spiegel:
Yes, but our homeowners are also taxpayers of the city.

Chairman Anderson:
Of course, they choose to live in such a gated complex.

Assemblywoman Spiegel:
It is not gated. Parts of the community are, and some parts are not. Overall, the master association is not a gated area.

Chairman Anderson:
You allow the public to walk on those same paths?

Assemblywoman Spiegel:
Yes. They are open to all city residents, and non-city residents.

Chairman Anderson:
Okay. Are there any questions for Ms. Spiegel on the bill?

Assemblyman Segerblom:
Is it your experience that the lender will pay the association fees when the property is in default, or will they let it go to lien and then the association fees are paid when the property is sold?

Assemblywoman Spiegel:
My experience has been that, in many instances the fees are just not being paid. The lenders are not paying the fees. There may be some exceptions, but as a general rule they are not.

Alan Crandall, Senior Vice President, Community Association Bank, Bothell, Washington:

We have approximately 25,000 communities here in the State of Nevada. I am honored to speak today. I am a resident of Washington state. The area I want to specialize in my discussion is with loans for capital repair. We are the nation's leading provider of financing of community associations to make capital repairs such as roofs, decks, siding, retaining walls, and large items that the communities, for health and safety issues, have to maintain. Today, in Nevada, we are seeing associations with 25 to 35 percent delinquency rate. We are unable to make loans for these communities because we tie these loans to the cash flow of the association. If there is no cash flow coming in to support their operations, we cannot give them a loan. We do loans anywhere from $50,000, and we just approved one today for $17 million, so there are some communities out there with some severe problems that need assistance.

Now you may ask, why do we care about the loan? The loan is important in that it empowers the board to offer an option to the homeowners. Some of you may live in a community, and some of you may have children or parents who live in one. Because of a financial requirement for maintaining the property—the roof, the decks that may be collapsing, or a retaining wall that may be failing—they have to special assess because they do not have the money in their reserves. It was unforeseen, or they have not had the time to accumulate the money for whatever reason. These loans allow the association to provide the option to the homeowner to pay over time because, in effect, the board borrows the money from the bank, which is typically set up as a line of credit; they borrow the portion that they need for those members who do not have the ability to pay lump sum. So, whether that is $5,000, $10,000, $40,000, or $50,000, or my personal record which is $90,000 per unit, due in 60 days, it is a major financial hardship on homeowners. The typical association, based upon my experience of 18 years in this industry, is comprised of one-third of first time home buyers who may have had to borrow money from mom and dad to make the down payment, and who have small children for whom they are paying off their credit cards for next Christmas. Another one-third is comprised of retirees on a fixed income. Neither of those two groups, which typically make up two-thirds of an average community, are in a position to pay a large chunk of money in a very short period of time. The board cannot sign contracts in order to do the work unless they are 100 percent sure they can pay for the work when it is done. That is where the loan assists.

I urge your support of this bill. It will give us the ability to have some cash flow and guarantees that there will be some extended cash flows in these difficult times, and make it easier for those banks, like ours, who provide this special

type of financing that helps people keep their homes, to continue to do so. Thank you.

Bill DiBenedetto, Private Citizen, Las Vegas, Nevada:
I moved to Nevada in 1975 when I was 11 years old. The first time I was here was in 1982 as a delegate to Boys State. If you told me at that time that I would be testifying, I would have said, No way, you have got to know what you are talking about. Well, I was up here at an event honoring the veterans, and I saw this bill. I serve as the secretary-treasurer of my HOA, Tuscany, in Henderson, Nevada. The reason I became a board member was I revolted against the developer's interests in raising our dues. You see, we were founded in 2004, and we are at 700 homes out of 2,000, which means we are under direct control of our declarant, Rhodes Homes. We are at their mercy if they want to give us a special assessment or raise our dues. The reason I am here today is I also serve as secretary-treasurer. I am testifying as a homeowner, not as a member of the board. As of last year, our accounts receivable were over $200,000, which represented 13 percent of our annual revenue. Out of our 600 homeowners, 94 percent went to collections. Out of those, there were eight banks. When a bank takes over a home, they turn off the water; the landscaping dies; our values go down. We need these two years of back dues. Anything less, I believe, would be a bailout for the banks that took a risk, just like the homeowners. When it comes right down to it, out of the 700 homes that we have, we have to fund a $6.2 million reserve. Why? Because the developer continued to build a recreation center, greenways, and other amenities. So, our budget is $1.6 million. We have $200,000 in receivables. We receive 90-day notices from our utility companies. We can barely keep the lights and the water on. Our reserve fund, by law, is supposed to be funded, but we cannot because we have to pay the utility bills. I moved into that community because it was unique: We have rallied the 700 homes. We are not looking for a handout, but we are looking for what is right. When the bank took over the homes, they assumed the contracts that were made: to pay the dues, the $145 a month. I have banks that are 15 months past due, 10 months past due, 12 months past due. Thank you for listening to me.

Assemblyman Segerblom:
In regards to the banks owning these properties, at least under current law, what they owe for six months would be a super lien which you would collect when the property is sold. Have you been able to collect on those super liens?

Bill DiBenedetto:
Yes, we have.

Assemblyman Segerblom:
Is it your experience that the banks never pay without this super lien?

Bill DiBenedetto:
The banks never pay until the home is sold.

Assemblyman Segerblom:
Now, they are just paying for only six months?

Bill DiBenedetto:
They are paying for six months, and we are losing money that should be going into our reserve fund.

Chairman Anderson:
Does the bank not maintain an insurance policy on the property as the holder of the initial deed of trust?

Bill DiBenedetto:
I do not know. I would assume they would have to have some kind of liability insurance with the property.

Assemblyman Cobb:
When the banks foreclose, do they not take the position of the owner in terms of the covenants?

Bill DiBenedetto:
They do.

Assemblyman Cobb:
Do they have to start paying dues?

Bill DiBenedetto:
They have to start paying dues, and they have to abide by the covenants, which includes keeping their landscaping living.

Assemblyman Cobb:
How are they turning off the water and destroying the property?

Bill DiBenedetto:
They just shut off the water at the property.

Assemblyman Cobb:
And you do not do anything to try to force them to abide by the covenants?

Bill DiBenedetto:
There is nothing that we can do, unless we want to absorb legal costs by taking them to court. We cannot afford that. We have called them; we have begged them; there is just no response.

Assemblyman Cobb:
You cannot recover those legal costs if you do take them to court?

Bill DiBenedetto:
I have not pursued that any further with my board or the attorneys. Thank you.

Chairman Anderson:
Thank you, sir.

Michael Trudell, Manager, Caughlin Ranch Homeowners Association, Reno, Nevada:
I have emailed a prepared statement to members of the Committee (Exhibit V). I do not want to belabor the point. There is a statutory obligation of HOAs to maintain their common areas and to maintain the reserve accounts for their HOAs. I also believe that there is a direct impact on homeowners when there is only a six month ability for the HOA to collect because we have to be much more aggressive in our collection process. If that time frame was to be increased, we would be more willing to work with homeowners. Recently, our board at Caughlin Ranch changed our collection policy to be much more aggressive and to start the lien process much more quickly than we had in the past, which eventually leads to a foreclosure process. I think that has a direct impact upon our homeowners.

Chairman Anderson:
Mr. Trudell, you have been associated with this as long as I can recall, and you have been appearing in front of the Judiciary Committee. In dealings with the banks, have there been these kinds of problems in the past with your properties and others that you have been with?

Michael Trudell:
Yes, sir. Mr. Chairman, in the past, banks were much more receptive in working with us to pay the assessments and to get a realtor involved in the property to represent the property for sale.

Chairman Anderson:
Since the HOA traditionally looks out to make sure that everyone is doing the right thing, when there is a vacant property there, you probably become a little bit more mindful of it than you would in a normal community. Do you think that

this is the phenomenon right now because of the current economic situation? By extending this time period, are we going to be establishing an unusual burden, or changing the responsibility of the burden in some unusual way? In other words, should it have originally been this longer period of time? Why should there be any limit to it at all?

Michael Trudell:
From the association's standpoint, no limit would be better for the HOA, because each property is given its pro rata share of the annual budget. When we are unable to collect those assessments, then the burden falls on the other members of the HOA. As far as the current condition, banks in many instances are not taking possession of the property, so the property sits in limbo. There is a foreclosure, and then there is no property owner, at least in the situations that I have dealt with in Caughlin Ranch. We have had much fewer incidences of foreclosure than most HOAs.

Chairman Anderson:
Thank you very much. Let us turn to the folks in the south.

Lisa Kim, representing the Nevada Association of Realtors, Las Vegas, Nevada:
The Nevada Association of Realtors (NVAR) stands in support of A.B. 204. Property owners within common-interest community associations are suffering increases in association dues to cover unpaid assessments that are uncollectable because they are outside of the 6-month superpriority lien period. Many times, these property owners are hanging on by a thread in making their mortgage payment and association dues payment. I talk to people everyday that are nearing default on their obligations. By increasing the more-easily collectable assessments amount, the community associations are going to be able to keep costs down for the remaining residents. Thank you.

Chairman Anderson:
Thank you.

John Radocha, Private Citizen, Las Vegas, Nevada:
I cannot find anywhere in this bill, or in NRS Chapter 116, where a person, who has an assessment against him or her, has the right to go to the management company and obtain documents to prove retaliation and selective enforcement that was used to initiate an assessment. If they come by and accuse me of having four-inch weeds, and my next door neighbor has weeds even taller, and they are dead, that is selective enforcement. I think something should be put into this bill where I, as an individual, have the right to go to the management company and demand documentation. That way, when a case comes up, a person can be prepared. This should be in the bill someplace.

Chairman Anderson:
We will take a look and see if that is in another section of the NRS. It may well be covered in some other spot, sir.

John Radocha:
On section 1, number 5, I was wondering, could not that be changed to "a lien for unpaid assessments or assessments is extinguished unless proceedings to enforce the lien or assessments instituted within 3 years after the full amount of the assessments becomes due"?

Chairman Anderson:
The use of the words "and" and "or" are usually reserved to the staff in the legal division. They make sure the little words do not have any unintended consequences. But, we will take your comments under suggestion.

Michael Buckley, Commissioner, Las Vegas, Commission for Common-Interest Communities Commission, Real Estate Division, Department of Business and Industry; Real Property Division, State Bar of Nevada:
We are neutral on the policy, but we wanted to point out that one of the requirements for Fannie Mae on condominiums is that the superpriority not be more than six months. Just for your education, the six month priority came from the Uniform Common-Interest Ownership Act back in 1982. It was a novel idea at the time. It was met with some resistance by lenders who make loans to homeowners to buy units. It was generally accepted. We are pointing out that we would want to make sure that this bill would not affect the ability of homeowners to be able to buy units because lenders did not think that our statutory scheme complied with Fannie Mae requirements.

My second point is that there was an amendment to the Uniform Common-Interest Ownership Act in 2008. It does add to the priority of the association's cost of collection and attorney's fees. We did think that this would be a good idea. There is some question now whether the association can recover its costs and attorney's fees as part of the six-month priority. We think this amendment would allow that and it would allow additional monies to come to the association.

Chairman Anderson:
Are there any questions for Mr. Buckley who works in this area on a regular basis?

Assemblyman Segerblom:
I was not clear on what you were saying. Are you saying that this law would be helpful for providing attorney's fees to collect the period after six months?

Michael Buckley:
What I am saying is that, with the existing law, there is a difference of opinion whether the six-months priority can include the association's costs. The proposal that we sent to the sponsor and that was adopted by the 2008 uniform commissioners would clarify that the association can recover, as part of the priority, their costs in attorney's fees. Right now, there is a question whether they can or not.

Assemblyman Segerblom:
So, you are saying we should put that amendment in this bill?

Michael Buckley:
Yes, sir. This was part of a written letter provided by Karen Dennison on behalf of our section.

Chairman Anderson:
We will make sure it is entered into the record (Exhibit W).

Assemblywoman Spiegel:
I have received the Holland & Hart materials on March 4, 2009 at 2:05 p.m. They were hand delivered to my office. I am happy to work with Mr. Buckley and Ms. Dennison on amendments, especially writing out the condominium association so that they are not impacted by the Fannie Mae/Freddie Mac provisions.

David Stone, President, Nevada Association Services, Las Vegas, Nevada:
All of my collection work is for community associations throughout the state, so I am extremely familiar with this issue. Last week, I had the pleasure of meeting with Assemblywoman Spiegel in Carson City to discuss her bill and her concerns about the prolonged unpaid assessments (Exhibit X).

Chairman Anderson:
Sir, we have been called to the floor by the Speaker, and I do not want them to send the guards up to get us. I have your writing, which will be submitted for the record. Is there anything you need to quickly get into the record?

David Stone:
The handout is a requirement for a collection policy, which I think would affect and help minimize the problem that Assemblywoman Spiegel is having. I submitted a friendly amendment to cut down on that. I see that associations with collection policies have lower delinquent assessment rates over the prolonged period, and I think that would be an effective way to solve this problem. Thank you.

Chairman Anderson:
Neither Robert's Rules of Order, nor Mason's Manual, which is the document we use, recognizes any kind of amendment as friendly. They are always an impediment. Thank you, sir, for your writing. If there are any other written documents that have not yet been given to the secretary, please do so now.

Wayne M. Pressel, Private Citizen, Minden, Nevada:
Myself and two witnesses would like to speak against A.B. 204. I realize that this may not be the opportunity to do so, I just want to make sure that we are on the record that we do have some opposition, and we would like to articulate that opposition at some later time to the Judiciary Committee.

Chairman Anderson:
There will probably not be another hearing on the bill, given the restraints of the 120-day session. The next time we will see this bill is if it gets to a work session, at which time there is no public testimony. I would suggest that you put your comments in writing, and we will leave the record open so that you can have them submitted as such. With that, we are adjourned.

[Meeting adjourned at 11:20 a.m.]

RESPECTFULLY SUBMITTED:

_____
Robert Gonzalez
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 6, 2009 **Time of Meeting: 8:12 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 182	C	Jennifer Chisel, Committee Policy Analyst	Federal Register, list of explosive materials
A.B. 207	D	Assemblyman John C. Carpenter	Prepared testimony introducing A.B. 207.
A.B. 207	E	Assemblyman Carpenter	Suggested amendment to A.B. 207.
A.B. 207	F	Robert Robey	Suggested amendment to A.B. 207.
A.B. 189	G	Assemblyman Joseph Hogan	Prepared testimony introducing A.B. 189.
A.B. 189	H	Assemblyman Joseph Hogan	Chart comparing the various eviction processes of various states.
A.B. 189	I	Assemblyman Joseph Hogan	Flow chart of the California eviction process.
A.B. 189	J	Jon L. Sasser	Prepared testimony supporting A.B. 189.
A.B. 189	K	Rhea Gerkten	Prepared testimony supporting A.B. 189.
A.B. 189	L	James T. Endres	Suggested amendment to A.B. 189.
A.B. 189	M	Charles "Tony" Chinnici	Prepared testimony against A.B. 189.
A.B. 189	N	Jennifer Chandler	Prepared testimony against A.B. 189.
A.B. 189	O	Jeffery G. Chandler	Prepared testimony against A.B. 189.
A.B. 189	P	Kellie Fox	Prepared testimony opposing the change in section 2 of A.B. 189.
A.B. 189	Q	Bret Holmes	Prepared testimony against A.B. 189.
A.B. 189	R	Charles Kitchen	Prepared testimony against A.B. 189.

A.B. 189	S	Bill Uffelman	Suggested amendments for A.B. 189.
A.B. 189	T	Rosalie M. Escobedo	Prepared testimony against A.B. 189.
A.B. 204	U	Assemblywoman Ellen Spiegel	Presentation of A.B. 204.
A.B. 204	V	Michael Trudell	Prepared testimony in support of A.B. 204.
A.B. 204	W	Karen D. Dennison	Prepared testimony with suggested amendments for A.B. 204.
A.B. 204	X	David Stone	Suggested amendments for A.B. 204.

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY
SUBCOMMITTEE

Seventy-Fifth Session
March 25, 2009

The Committee on Judiciary Subcommittee was called to order by Chair Tick Segerblom at 1:39 p.m. on Wednesday, March 25, 2009, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 5100 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

SUBCOMMITTEE MEMBERS PRESENT:

Assemblyman Tick Segerblom, Chair
Assemblyman John Hambrick
Assemblyman Ruben J. Kihuen

SUBCOMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Harvey J. Munford, Clark County Assembly District No. 6
Assemblyman James A. Settelmeyer, Assembly District No. 39
Assemblyman Richard McArthur, Clark County Assembly District No. 4
Assemblywoman Ellen B. Spiegel, Clark County Assembly District No. 21
Assemblyman John C. Carpenter, Assembly District No. 33
Assemblyman Mark A. Manendo, Clark County Assembly District No. 18

STAFF MEMBERS PRESENT:

Alison Combs, Committee Policy Analyst
Nick Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Emilie Reafs, Committee Secretary
Steve Sisneros, Committee Assistant

OTHERS PRESENT:

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada
Monica Wise, Private Citizen, Las Vegas, Nevada
Robert Robey, Private Citizen, Las Vegas, Nevada
Paula McDonough, President, Park Tower Homeowners Association, Reno, Nevada
Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada
Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada
Garrett Gordon, Reno, Nevada, representing Olympia Group, Las Vegas, Nevada
Angela Rock, President, Olympia Management Services, Las Vegas, Nevada
Michael Schulman, Las Vegas, Nevada, representing various homeowners associations throughout Nevada
Randolph Watkins, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Michael Forman, Vice President, Green Valley Ranch Community Association, Henderson, Nevada
Michael Dixon, Private Citizen, Henderson, Nevada
Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada
John Radocha, Private Citizen, Las Vegas, Nevada
Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Frances Copeland, Private Citizen, Las Vegas, Nevada
Robert Allgeier, President, Westwood Park Homeowners Association, Minden, Nevada
Wendell Vining, Vice President, Westwood Park Homeowners Association, Minden, Nevada

Gary Lein, Accountant Representative, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada
Michael Trudell, General Manager, Caughlin Ranch Homeowners Association, Reno, Nevada
Erin McMullen, representing Bank of America, Las Vegas, Nevada

[Call to order, roll called.]

Chair Segerblom:
The first bill we are going to hear is Assembly Bill 350.

Assembly Bill 350: Makes various changes relating to common-interest communities. (BDR 10-620)

Assemblyman Harvey J. Munford, Clark County Assembly District No. 6:
I call this bill the Homeowners' Bill of Rights.

In many communities today, especially in southern Nevada, it is nearly impossible to purchase a relatively new home that is not in a homeowners' association (HOA). This Committee has heard plenty of testimony about homeowner boards. Many homeowner boards are run in a roughshod way. They sometimes keep the homeowners in the dark about important decisions. They also threaten homeowners' rights to live safely and at peace in their homes.

Section 1 of the bill would change the votes needed to change the declaration of an HOA from a simple majority to 85 percent of homeowners.

I will cover sections 2 and 9 together. These sections will require board members to perform their duties on an informed basis, in good faith, and in the honest belief that their actions are in the best interest of the HOA.

Section 4 would prohibit the HOA from charging interest on a past due fine.

Section 5 would limit consecutive terms for board members to two terms. The person would have to wait six years before serving on the board again. These term restrictions would only apply to HOAs with more than 50 units.

Sections 6, 7, and 8 require associations to give homeowners copies of the minutes at no charge. Under existing laws, homeowners in some HOAs have

the right to request and receive copies of the minutes without having to make prior arrangements, but an HOA may charge the homeowner for the cost of an extra copy. These sections of the bill would require the HOA to provide the copy free of charge in electronic or paper form.

Under existing law, agendas of meetings must include a period for homeowners to comment. Section 6, subsection 4, paragraph (c) expands homeowners' rights to speak at meetings. Homeowners will be able to speak for a minimum of five minutes on each agenda item. The HOA board has discretion over which materials, remarks, or information are included in the minutes. Under section 8, a homeowner's written comments will be required to be included in the minutes if he submitted his comments 24 hours before the meeting.

Section 9 deals mostly with interest rates. The existing law allows HOAs to charge interest of not more than 18 percent on past due assessments. This section would decrease the maximum rate of simple interest to 5 percent. It would only permit interest on assessments that are 60 or more days past due. It would only allow 3 percent interest on special assessments that are more than 90-days past due. Also the HOA would need the approval of two-thirds the homeowners before it can levy special assessments; for example, to repair, replace, or restore major components of common areas. Special assessments are also a way to fund reserves in an adequate way or anything dealing with capital improvements.

Section 9, subsection 11, on page 19 of the bill, would establish schedules for paying special assessments in installments if needed. It would require the HOA to notify homeowners of certain past-due special assessment payments.

Under section 10 homeowners cannot be charged for reviewing or obtaining copies of books, records, or contracts or other documents.

Sections 11 and 21 prohibit foreclosure for overdue assessments. These sections would prevent an HOA from foreclosing on any home; instead, the HOA can place a lien.

Sections 13 and 15 require that purchasers be given more information about life in an HOA. Under these sections, a person purchasing a home would be informed of the covenants, conditions and restrictions (CC&Rs).

The jurisdiction of the Commission for Common-Interest Communities and Condominium Hotels (Commission) would be expanded to include alleged violations of the HOA's governing documents. The Commission would be required to impose fines for violations according to specific limits. An owner or

tenant, under certain circumstances, could be fined up to $100, for certain violations, but no more than $400 in any two-year period. For the HOA, the community manager, any board manager, the declarant or its agent, and other employees or agents of the HOA could be fined up to $2,000 for certain violations.

In certain matters brought before the Commission, attorneys' fees could be granted to the prevailing party, whether or not the HOA's governing documents so provided. A homeowner who brought a matter before the Commission would not be required to pay attorneys' fees to the other party unless the affidavit was filed in bad faith.

This completes my testimony. I would ask that you support this important homeowners' protection bill.

Assemblyman Hambrick:
I understand the intent of the bill, because occasionally some HOA groups may look at themselves with too much self-importance, and we have to level the playing field on these issues.

I have a problem with the minimum/maximum times for speaking. I have not been to a lot of HOA meetings, but I have been to a few. If we were to allow everyone to speak more than five minutes, you would be there all night. I think we could make it a maximum of five minutes. If someone cannot be articulate in five minutes, I am not sure he could be articulate in fifteen.

Regarding the term of office, while I like the idea of term limits, there are times when you ask for help and no one raises his hand. If there are no candidates available, could we come back and allow someone to run again after they have been off the board for a few years?

I have some questions about the cost of documents and also about the use of the word "any" in the prohibition of foreclosure in section 11, subsection 10. I was taught that you never use absolutes, like never, always, any.

These questions might be answered by the witnesses.

Assemblyman Kihuen:
Have homeowners’ associations or common-interest communities charged for copies and if so, how much?

Assemblyman Munford:
There are so many homeowners' associations in Nevada, and it would vary with the various HOAs. Some do charge a fee, and some do not.

Assemblyman Kihuen:
Is there anything in the bill that states that there has to be some type of listing of the fees that the HOA will charge for late fees, lien fees, et cetera? Are you requiring any of that prior to signing the purchase agreement?

Assemblyman Munford:
If it is not covered in the bill, it should be. There should be some transparency as to what the fees are and where they go.

Assemblyman Kihuen:
While my district does not have very many homeowners' associations, I have heard of various situations from people, from southern Nevada in particular, where they are charged for every little thing and the interest rates on some of the fees are 20 or 30 percent.

Assemblyman Munford:
Yes, they are over the top.

Assemblyman Kihuen:
So does the bill mandate that the HOAs provide a copy to the homeowners so they know what they will be charged?

Assemblyman Munford:
Again, if it is not in the bill, it should be. I do not recall whether that is in the bill, but it will be noted, and we can add it in.

Chair Segerblom:
We could ask our staff if it is in the bill or in existing law.

Nick Anthony, Committee Counsel:
We will take a look.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada;
I live in a small homeowners' association known as Rancho Bel Air. [Read from prepared statement (Exhibit C).]

Chair Segerblom:
We do not have your amendments yet, so I will have others speak while we wait.

Monica Wise, Private Citizen, Las Vegas, Nevada:
I own rental property in Rancho Santa Fe. I am one abused homeowner. If any of you want a reason why this bill should pass, please call me. I would be more than happy to give you my horror story, from embezzlement, to misappropriation of funds, to abuse of any number of chapters of the *Nevada Revised Statues* (NRS). I filed a complaint with the Federal Bureau of Investigation (FBI), because going to the board is just impossible. The books have not been balanced since the last audit.

Chair Segerblom:
You support the bill, correct?

Monica Wise:
Absolutely. Some of the language is a bit stringent, but the bill, in all, is supportive of homeowners, and that is what we need: transparency and support.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I wish to acknowledge what the previous speaker said. This bill needs a lot of work, but I am in general support. It is called the homeowners' bill of rights. We need open meetings, and we need to have control of our own lives.

Chair Segerblom:
I will go back to the north, is there anyone else in support? In opposition?

Paula McDonough, President, Park Tower Homeowners Association, Reno, Nevada:
Park Tower is probably the original high-rise building in downtown Reno. It was built about 50 years ago. It was built as an apartment building, and about nine years ago it went condominium. [Read from a prepared statement (Exhibit D).]

Chair Segerblom:
So to summarize, you have two objections: the two-thirds vote and the ability to foreclose?

Paula McDonough:
Right.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
I am a practicing lawyer in Reno, but I am not here as a lawyer but as a homeowner. For 20 years I have been elected to the homeowners' association board called the Caughlin Ranch Homeowners Association. We have been in

existence for 25 years and have 2,250 members. It has become my hobby, and I continue to volunteer.

I have taken some time to put together some materials (Exhibit E).

I would like to make several general comments. The entire system of homeowners' associations depends on volunteers. If neighbors do not step up to donate their time to be on a board, the entire system will fail. Whatever bills you pass and whatever changes you make in the law, if the members will not step up and volunteer their time, the entire system will crumble. You cannot pass a law that mandates that I serve on the board. You cannot mandate that once every five years we must serve on boards.

We have a good board in Caughlin Ranch. Be very cautious about how you tinker with these laws, because right now the bills that are in front of the Legislature are going to subject me to punitive damage claims and subject me to huge fines. I do not make a nickel as a board member. I spend hours and hours reading materials; I get six-inch binders for each meeting. I have six and eight hour meetings. I am not an elected public official, I am a volunteer. Be careful that you do not kill the golden geese, who are the volunteers.

This bill proposes term limits for homeowners' boards. My association has a budget of $2 million. Because of our 2,000 members, we are a big business. We have a volunteer board of good members. It would be detrimental if you were to make everyone get off the board after four years because it takes years to get the experience needed to run the business. If you were to run everyone off after four years, this big business would be run by beginners.

Chair Segerblom:
We have a $5 billion budget, and we are term-limited.

Bill Magrath:
I would hope that you would agree with me that maybe it is not a good idea to have term limits. My point is, among our 2,250 members, we had seven people volunteer in the last election. If the bill were to get rid of the five experienced members, this large business would be run by two people who have been on the board for one year and the rest of the qualified people are ineligible. It is terrible to discourage volunteers, especially people who are elected by the members.

There are nearly 3,000 homeowners' associations in Nevada, and probably 2,900 work fine and are doing a great job for their members. There are clearly some rogue boards and improper board members, but I want to caution again

against passing bills that will make it so destructive that a potential board member will not sign up.

Also, if Assembly Bill 350 passes, I would probably decide it is not worth it. If you lose the volunteers, you lose the entire system, and then two years from now there is no bill you could pass that would put it all back together.

Chair Segerblom:
Is there anything about the bill you do like?

Bill Magrath:
I like the comment that Assemblyman Munford made about boards working in good faith because I think they should and do.

So let me give you some examples. There is a proposal in this bill that says if you do not pay your assessments, the maximum that can be charged is 5 percent interest. It sounds like a good idea to cap the interest rate. But if I have a couple of members who are paying their bills at the end of the month and they have the choice between paying their homeowners' association dues at 5 percent interest or their credit card at 22 percent interest, they will pay their credit card.

Now, the association does not get the payment of the assessment; it cannot fund its reserves, mow the lawns, fix the parking lot, or do whatever needs to be done. Five percent is an artificial cap on the interest rate, and the net result is that you are turning the HOA into a bank. Suddenly all of the members are going to pay other, higher-interest bills first.

There is a provision in the bill, where, if there is a special assessment, the interest rate is capped at 3 percent. You are turning us into a lending institution, when we are not in the business of lending money. We are in the business of performing services. We will collapse if members are suddenly able to borrow money from us at 5 or 3 percent and pay their other bills instead.

There are bad people out there on HOA boards; Senator Schneider and I talked yesterday about bribery, and Senate Bill 182 will take care of it.

There is a cost to having a copy machine. It frustrates me when people say that HOAs should not charge for copies and the law currently states they can at a maximum, of 25 cents per page. If there is no charge, then any new member could walk in and say he wants copies of every set of minutes the association has had since inception. If the copies are free, there is no reasonable restriction on requests, and it encourages harassment of associations.

There is also a provision in this bill that says that any member can demand copies of any document, including legal opinions. That means a person suing the association can request confidential legal opinions to find out what the association's lawyer is doing to defend against the lawsuit.

The bill also states that there shall be no right to foreclose on liens. Right now the statute says a lien is good for three years. Every homeowners' association divides its budget by the number of units, and that is the assessment. When someone does not pay the assessment, the association has to pay the expense without having received that portion of the money.

The statistics are there, the representatives from the Commission will tell you that last year there were 19 total foreclosures. Those 19 homes were the total sold out of 3,000 homeowners' associations in the entire state. It is not something where people are being thrown out of their homes; foreclosures are done after plenty of notice and due process. One of the Senate bills now provides for a right of redemption, which gives owners one more chance to get their house back. Here is the advantage for the ability to foreclose: people realize they are going to have to pay their bills, and it avoids the need for associations to have to sue members who are past due in assessments. If the Committee were to pass the no foreclosure part of the bill, it is true that there will be a lien, but a lien is just a secured right to be paid sometime in the future. If the homeowner sells in the future, the HOA would probably be paid as part of the process to clear the title to the property. If the homeowner does not pay and does not sell the property, the only way the HOA can be paid is to foreclose on the lien. The issue is that the current statute now says that liens are valid for three years. If I cannot foreclose and they have not paid, it is like that member has lived in the association and benefited from services that the association provides without paying for them. This would crush homeowners' associations. They would not be able to fund mandatory reserves.

If, as a board member, I realize that people are not paying their dues, but I can no longer encourage or force them to pay through the foreclosure process, the association would need to hire a lawyer. In my association there are currently about 60 delinquencies, so if the law changed it would be 60 more lawsuits.

Regarding Assemblyman Kihuen's issue, the associations would be more than happy to post our costs so that people are forewarned. I agree with opening up the whole process.

Chair Segerblom:
Why would someone sue you if we take away the right to foreclosure?

Bill Magrath:
I would have to sue that member to collect. Right now, because we have the power to foreclose, everyone in a homeowners' association in Nevada paid their assessments, except 18 people. Foreclosure is a heavy hammer, but without it there will be many more lawsuits, and then everyone will be unhappy because, not only would they have to pay the costs of the foreclosure process, the statute states they would have to pay the attorneys' fees.

There is also a provision in the bill that says if any member submits a written document to the homeowners' association more than 24 hours in advance, that document must be attached to the minutes and someone at the board meeting has to read the entire document into the record before the board can take action or vote. I am not sure which one of you wants to read my handout from start to finish, as a legislator or a volunteer. It is just too much.

My next comment is about the five minute rule. Right now my association allows anyone who wants to speak, to speak. I added up that there are about 30 people in this room, so if 30 people were to speak for five minutes it would take two and a half hours per agenda item. My agendas often have 25-30 items on each one. I think there should be an opportunity to speak; mandating five minutes is difficult.

The final sections of the bill add fines. I would be subject to fines up to $5,000 and unlimited fines, as a board member, if someone were to find that I did not follow every detailed rule, regulation, or governing document. As a lawyer, I think I do a good job of understanding and following the rules, but some of the other volunteers might not want to face those fines.

The bill also says the most the Commission can fine any member is $100 per violation, four times in a two-year period. With those caps, someone might say that they would rather pay the $400 than have to landscape and maintain their property. We do not want to fine anyone. All we want is for our members to comply with the rules, which they agreed to and knew of when they moved in.

If this bill passes, it will be the beginning of the crumbling of the entire system.

Chair Segerblom:
I did not realize that this was the beginning of the domino theory.

Assemblyman Kihuen:
Are you completely against term limits, or would you be okay with increasing the number of terms allowed by the bill?

Bill Magrath:
I am not a supporter of term limits because every election is a term limit. If the homeowners want to support somebody, they should be able to elect me. Even if the terms were increased, there are not a lot of volunteers. If you artificially cut off good, qualified, experienced people who have a history and working knowledge, you would be harming the people who want to elect that person.

Assemblyman Kihuen:
You said that the HOA could charge up to 25 cents per copy. That goes towards the expense of the copy machine?

Bill Magrath:
The copy machine, the paper, and the time of the employee who has to make the copies.

Assemblyman Kihuen:
The bill also says that you can provide an electronic copy. Why would you charge for an electronic copy?

Bill Magrath:
Many homeowners' associations like mine put all of the minutes up on their website, so you can print them out at your own expense. There is an expense and time involved in making an electronic copy as well.

My biggest fear of the copy rule is that, if you give anybody a right to demand copies of anything and everything, it would become the method by which he can harass the association. It seems more reasonable to place the burden on the person who wants the copy rather than making everyone else pay for it.

Assemblyman Kihuen:
Do the dues not cover the copy machine?

Bill Magrath:
Our budget includes business office expenses; we have an in-house member who is a community manager, as an employee. We count into our budget that we will be reimbursed for copying. If you make it free, that is a cost that will be absorbed by the 2,250 members, but it becomes an entitlement to anything, and it could be abused.

Assemblyman Kihuen:
I would not say anything; it would have to relate to the homeowners' association.

Bill Magrath:
Yes, but the association has existed for 24 years, we have rooms full of documents, and if someone were to ask us for copies of all of it, we would have to provide them under the bill, because it is not just the minutes. If the cost is borne by the person requesting the documents, they may be a little more conservative in what they are asking for.

Assemblyman Hambrick:
Is it your interpretation, if this bill is passed, if I were a member of your association, I could walk into your office with the federal tax code and ask you to copy it, and you would be required to read it at your next meeting?

Bill Magrath:
No. If you were to send me the tax code to be read at the next HOA meeting, then yes, I would be so required. Any written materials a member submits must be read into the record and attached in its entirety to the minutes.

Chair Segerblom:
Has anyone tried to harass you in the 20 years you have been on the board?

Bill Magrath:
I would say out of the 2,250 members, there is always someone who is not pleased no matter what you do.

Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada:
I agree with what Mr. Magrath said.

My client sent a letter (Exhibit F) about how, if the foreclosure process were taken away, the courts would be clogged up and how few of those foreclosures proceed into actual foreclosures.

Garrett Gordon, representing Olympia Group, Reno, Nevada:
We also have major concerns with the bill; we sat down with the sponsor of the bill and expressed those concerns. We agree with what Mr. Magrath said.

Angela Rock, President, Olympia Management Services, Las Vegas, Nevada:
I like the concept, but I do not think the language achieves the concept. I want to address a few points that I do not think Mr. Magrath addressed.

In section 1, increasing the necessary vote to amend the CC&Rs to 85 percent would make it virtually impossible to amend a set of documents unless you had a very small association. The largest association we represent has

6,700 homes. At their last election, we had three people put their name in for an open seat. Getting participation is almost impossible. There are certain provisions in documents that do need to be updated and amended; therefore there needs to be a mechanism for the majority of people to control the community in which they live.

The next issue is the ability of the board of directors to levy an assessment to fund the reserve. I think it is necessary that people participate in establishing their budget, but there are statutory requirements that an association must fund a reserve in order to take care of the amenities in the future. If the association would have to get the vote of the membership to fund road repairs 20 to 25 years from now, it stands to reason that you would not be able to get people to vote for it. It is a necessary expense, and is vital to the community. Boards need the ability to levy an assessment to have a fully-funded reserve to take care of the common elements, which are often a safety issue if they are not maintained.

There is a requirement in section 12 that a developer make a multimedia presentation of the documents. In another section, the association must have a multimedia presentation available to potential purchasers. I will allow Mr. Schulman to address the part pertaining to associations, but on behalf of the developer, if you require a multimedia presentation, aside from the cost, which may be minimal, the true effect is that you will have someone reading the CC&Rs and the governing documents so as to not be later claimed as liable for not fully disclosing something.

At the end of the bill is section 21 which repeals certain existing law. This includes current law that allows associations or homeowners, whoever the prevailing party is in a non-binding arbitration, to seek confirmation of the award. With Senator Schneider and other working groups there has been a great deal of discussion about what prompted this language and the attempt to repeal the section. My understanding is that some individuals who participated in the non-binding arbitration process felt that they were not fully informed that the process could become binding. We have worked through some language and some potential steps that the Commission and the Division of Real Estate (Division) are willing to take to make sure those individuals are informed including the timelines for matters to become binding, as opposed to taking away the right of both parties to turn an arbitration award into a binding award, which does decrease some of the load on the courts and is necessary.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I sent a letter to you (Exhibit G). I think Mr. Magrath and Ms. Rock have covered most of my points. I represent 700-800 homeowners' associations.

I think it is important to understand the differences between board meetings and homeowners' meetings. Some of the language in the bill allowing owners to speak applies to owners meetings and board meetings. Generally there is an annual owners' meeting, and generally there is no quorum, so whatever you write regarding it will be irrelevant. Regarding the board meetings, issues have been hit on in the prior testimony that needs to be highlighted.

First, if the association is required to attach anything to the minutes—you have touched on the copying costs, but more importantly, because this has happened to us—people can send in things that are defamatory. If we were required to republish them, we are also committing acts of libel. Right now, most associations have a rule that a member can submit something that is one to two pages, signed, not defamatory, and on one of the issues relevant to homeowners, and it will be included in the minutes.

Regarding section 15, which would require an association to make a presentation available to purchasers, we do not have contractual privity with purchasers. In the law now, NRS Chapter 116 provides that we have a duty to disclose things to our members who are then going to sell to someone. If section 15 became law, we would read the entire document so as not to be involved in killing a sale or being liable if a sale walks away.

From my experience, the 85 percent requirement to amend a document is an impossibility. Legislators have already recognized the inability of associations to reach a quorum in elections, and in Senator Schneider's bill there is a reduction to a 35 percent quorum to recall people.

I could not agree more with what Mr. Magrath said about the foreclosure issue. There will be a number of lawsuits.

While I think this bill was brought with good intent, I am completely against it. I believe there are some very bad boards. In Las Vegas the FBI is investigating one group. The investigation has to do with outsiders bringing in bad boards, but I do not think you can legislate bad behavior out of existence. No matter what you write, it will not stop the really bad actors.

Assemblyman Kihuen:
Is there any part of the bill you could support?

Michael Schulman:
No, I think that I am with Mr. Magrath. I believe in the concept of good faith and community, but one of the things missing is that people look at HOAs as governments, and the law does not treat them that way. They are private corporations, and until such time as a case is decided that says that big associations are governments, I do not agree with any part of this bill. I think at some point there will be an association so big, that it should and will be treated as a government. But if an association is going to be treated like a government, the board members should have immunity, just like Assembly members do, to a certain extent. Throughout every jurisdiction in the country and including the leading case in New Jersey, called *Twin Rivers—Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*, 929 A.2d 1060 (N.J. 2007)—no associations have been held to be governments or state actors. I am for good faith and community, but I cannot support any part of this bill.

Randolph Watkins, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
Chairman Michael Buckley asked me to make a presentation. In effect, the Commission only supports one section of the bill and opposes all others.

Section 17 proposes to expand the jurisdiction of the Commission by making any violation of the governing documents subject to our jurisdiction. The Commission supports alternative dispute resolution and mediation among the homeowners and associations in regard to governing documents disputes. Under present procedures, the focus of the Commission's jurisdiction is violations of law which are important enough to demand the services of the Attorney General to bring a case before the Commission. The Commission believes these resources should not be devoted to resolve disputes regarding governing documents. Accordingly, we strongly oppose section 17.

Speaking as an individual, I am a licensed community manager in the State of Nevada, live in a large HOA, and work for a developer who develops HOAs, and I am strongly opposed to every aspect of this bill.

Michael Forman, Vice President, Green Valley Ranch Community Association, Henderson, Nevada:
I have submitted a proposed amendment (Exhibit H). I agree with everything that has been said, but I wanted to cover some other items.

One is in section 3 about providing copies: if copies are provided electronically, the association would have to be absolved from any guarantee that the documents are in fact correct and true copies, because if they are not printed,

there is no way to verify right now that what the homeowner received is what was provided.

Section 10, subsection 1, calls for the provision of financial documents over and above the budget, including the end-of-year financial statement and the audit. The audit is usually not completed until three to six months later, so there is no way to provide that with the budget.

Section 10, subsection 3, calls for discussion of the budget after it is sent out for ratification. Again, this makes no sense. Discussion should have occurred before the budget was approved and sent out for ratification.

Section 12, subsection 1, calls for distributing things like draft documents. Draft documents may include confidential information, which is only included so the association board can evaluate if the document should proceed. Draft documents should not be in the public domain and offered to homeowners.

Those are the main points I have; I did not find anything in this bill which got me excited about wanting to pass it.

Michael Dixon, Private Citizen, Henderson, Nevada:
I am speaking as an individual. I am on the board of Sun City Anthem and am a former president. I will not run for reelection.

I would like to echo what Mr. Magrath said. He made some excellent comments. I would like to expand on a couple of things.

First of all, HOA boards are made up of homeowners; they have the same interests as any other homeowner. This is not really a homeowners' bill of rights. This is a homeowner-who-chooses-not-to-volunteer-for-the-board bill of rights. The common elements of HOAs are all owned by the units. The last legislature passed a law saying that the value of all of the common interest of an HOA would be taxed by the units. If the Committee were to pass this bill, you would allow some members of an HOA to get away with not maintaining their property.

In section 3, if one has an honest belief that the association is better off by having the board members in charge of everything, then they would be protected under this law. It is a law that I would describe as a full employment act for court appointed receivers, because once an association no longer has a quorum it goes into receivership. This is not something that will support good governance.

Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada:
We have 255 units, and we have a budget of about $36,000. I object to all of the provisions in A.B. 350. Board members are volunteers, and we find it difficult to get members to run because they are afraid of all of these laws. I object to the mandate of five minutes to speak on each agenda item because we would have to bring sleeping bags to board meetings.

In addition to the resale package, another expense this bill would place on the association is to provide the purchaser with a presentation of our documents. Can the purchaser not read? The purchaser can take his concerns to a lawyer. This idea sounds like someone's son graduated from film school and needs a job in multimedia technology. I can see an association like The Lakes in Las Vegas having this type of presentation because it is a selling point for developers and a great marketing tool for high-end merchandise. But what about the rest of us? Since when did associations become selling agents for contractors? This idea should be up to the individual associations who can afford it.

All I see in this bill is more restrictions and more costs. If all of these laws pass, it will cause a mass termination of associations. Please kill this bill. Since we are a small association, most unit owners know me and know I am here. In the 11 years I have been here, I try to keep all my members informed about what is going on at the legislature, and they are well apprised of what is happening.

John Radocha, Private Citizen, Las Vegas, Nevada:
I would like to review the letters I submitted (Exhibit I). I wish the Committee would define "capital improvement." I am having a big problem with my homeowners' association. I went to a meeting and they said that capital improvements are used for common elements in a gated community. The dictionary says that when you use dues it is for permanent additions. They want to use maintenance fees for speed bumps.

In section 9, line 42, I would like to see a definition of "capital improvement." I would like to specify that speed bumps are capital improvements in gated communities. If things are not defined, then associations do whatever they want.

This bill does not include anything about retaliation and selective enforcement. If you fight the board, go to meetings and ask questions, the next thing you know they are citing you for everything.

In section 11, subsection 5, I would like it to say "a lien for unpaid assessments or any other assessments is extinguished unless proceedings to enforce the lien

are instituted within 3 years after the full amount of the assessments becomes due."

Chair Segerblom:
I think that is a good point about retaliation.

Jonathan Friedrich:
I have several proposed amendments to Assembly Bill 350. Nowhere in existing statute does it state how an owner or tenant can cure an alleged violation. [Read from page 3 of prepared statement, (Exhibit C).]

The last item is with regard to weight limitations on dogs. I have heard all kinds of horror stories about people who are told that they have to get rid of their pet because the dog is over a certain weight. When you buy a puppy, you do not know what the puppy will weigh when he is mature.

Chair Segerblom:
Otherwise you support the bill?

Jonathan Friedrich:
Yes, I do.

Chair Segerblom:
Is there anyone else in support of the bill? [There were none.] Is there anyone else in opposition? [There were none.] Neutral on the bill?

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
Chairman Michael Buckley had several responses regarding this bill in his letter (Exhibit J). In addition to the points that the previous speakers made, we are also in opposition and support the points they made.

We are concerned about the burden that would be inappropriately placed on the Commission, for example, to look at every foreclosure or other particular duties that would be placed on the Commission. We obviously could not do that. We meet several times a year, but some of the requirements would necessitate that we meet very frequently and that would not be appropriate. It would be a burden with our state budget as it is, and it would be a burden having to frequently convene because we must convene as a group in order to make decisions.

Chair Segerblom:
What do you think about the section that states that the HOA cannot foreclose to recover deficiencies?

Marilyn Brainard:
We think it places an unfair burden on associations; they would be a creditor down the line and would be the last to be paid. Assessments do, in fact, fund all of the expenses of the association so if they were not able to foreclose it would be a terrible burden. It would be a business for receiverships because some associations' finances are that bad today. And out of 543 notices of sale that were posted, only 18 were consummated in this fiscal year. It is a very low percentage.

Frances Copeland, Private Citizen, Las Vegas, Nevada:
I would like to speak against certain portions of the bill.

Certain portions of this bill favor HOAs, such as the portion regarding emergency repairs. It seems that every time there is an emergency repair, the onus is put on the owner to take care of it, even if it is between the walls and in common areas. I see nothing in this bill about holding HOAs accountable when they fail to perform emergency repairs promptly. There is culpability on the part of the HOA to perform emergency repairs.

There is also a portion of the bill about arbitrators. The arbitrator is good for arbitrating differences between neighbors, wild parties, illegal cars, et cetera, but when it comes to a construction defect in common areas and financial loss to the owner of the condo, I do not think the arbitrator is in a position to mediate that. These cases belong in the civil courts and not with the arbitrator. I think that every legal situation, whether involving the owner or the HOA, should have compulsory documentation by recording it on tape, otherwise without a record, there is no way to refer back to it.

There are other areas in the bill where the onus is put on the homeowner instead of the HOA for caring for things like mold remediation and construction defects. Homeowners' associations have received millions of dollars from lawsuits, but the money has not been passed on to the homeowners, who have suffered great financial losses.

I notice that there are a number of people here associated with the management, but I think more emphasis should be put on the responsibility of the HOA to homeowners. I would also like to see language dealing with the situation where the owner does not live on the property, but his dependents do.

The bill covers lessees and residents, but it does not differentiate between an owner and a dependent living on the property.

Assemblyman Munford:
Through some of the testimony, I felt like how Custer must have felt at the Little Bighorn. This bill should take into account that this is a time of an economic downturn. Some people are running into difficulties, and having a hard time paying their assessments and dues. I think that boards should be giving them special consideration and understanding. Having sat in on some of these meetings, with some boards, you do get the feeling that this is not a place for the little guy. Sometimes I am grateful that I do not live in a gated community.

In summation, the State of Nevada must assure that all association board members honor the state and federal constitutions, which guarantee equal protection and due process to their citizens. The State of Nevada has a duty to ensure that each common-interest community adheres to the law and protects the rights of its members.

Chair Segerblom:
I will bring A.B. 350 back to the Committee. I will open the hearing on Assembly Bill 311.

Assembly Bill 311: Revises provisions governing the financial statements of common-interest communities. (BDR 10-389)

Assemblyman James A. Settelmeyer, Assembly District No. 39:
The background as to why I brought this bill forward is there are 2,952 associations in Nevada representing about 470,000 units. The other reality is that four homeowners' associations (HOAs) disappear for every one added, so they are decreasing in numbers.

The size ranges from four units with budgets of about $1,300 to 8,000 units in Summerlin with a budget of nearly $54 million. There is a proposed project in Coyote Springs with over 160,000 units.

The current law requires associations with annual budgets of $75,000 or less to have a full-blown audit every four years. This bill seeks to lower the standard to a review, rather than an audit. For HOAs whose annual budgets range from $75,000 to $150,000 there would be an annual review, rather than an audit every four years. The reason for this is cost. For the smaller HOAs with budgets of $1,300 a year, a full audit costs $5,000 to $8,000 and is too costly. The protection will remain within the *Nevada Revised Statutes* (NRS),

which currently states that if 15 percent of the people in an HOA come together, they can order an audit at any time.

What is the difference between a review and an audit? An audit includes an examination on a test basis, using evidence supporting the amounts in disclosures in the financial statement. An audit also includes assessing accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. Everything has to be backed up.

A review, on the other hand, consists principally of inquiries of management and analytical procedures applied to financial data. It is substantially less in scope than an audit, but it is in accordance with generally accepted auditing standards. The objective of a review is the expression of an opinion regarding a financial statement taken as a whole and that the reviewers are not aware of any material modifications that should be made to the accompanying financial statement in order for it to be in conformity with generally accepted accounting principles. It would still be done by a Certified Public Accountant (CPA).

Assemblyman Kihuen:
What is the cost of an audit?

Assemblyman Settelmeyer:
A full-blown audit by a CPA can range from $5,000 to $8,000, depending on the scope. The smaller HOAs with $1,300 budgets are at the lower end of that spectrum. For the larger HOAs that are not touched by this bill, for example Summerlin and its $54 million budget, I have no idea what their audit would cost. I would have to assume that it would be in the tens of thousands of dollars. I have been told by a CPA friend of mine that for a review you can basically remove a zero, so it would be $500 to $800.

Chair Segerblom:
So this bill only applies to homeowners' associations with budgets of $150,000 or less?

Assemblyman Settelmeyer:
Correct.

Chair Segerblom:
So the large ones would not be impacted at all by this?

Assemblyman Settelmeyer:
The breakdown for your information: there are 1,260 HOAs with an annual budget ranging from $0 to $75,000, 563 HOAs with annual budgets from $75,000 to $150,000, and then about 1,200 HOAs are in the $150,000 and above bracket.

Robert Allgeier, President, Westwood Park Homeowners Association, Minden, Nevada:
We represent 84 homeowners in the north end of Minden. The 84 homes are approximately 20 years old. Associated with the homes we have 13.2 acres of common area, which we are required to maintain and service, including the utilities.

Because of the size of the common area we are required to maintain, our annual budget this year is $116,000, so we fall within the $75,000 to $150,000 range. I can tell you, because we get competitive bids on all services that we utilize, the best bid for a review by a CPA would be $2,000 and a full audit would be 200 to 300 percent more.

An annual review is very specifically designed to pinpoint difficulties and things that are out of alignment within the accounting system. The management service we employ prepares monthly financial statements. We require two signatures on every check, and only the officers can sign the checks.

Following is a breakdown of our budget. About 45 percent of our $116,000 is spent for the maintenance and care of the common area. A little over 20 percent is spent for utilities, and the water for the grass, shrubs, and trees. Then 11 to 12 percent is for homeowner sewer services. The management fee is a little over 10 percent, and the office expenses, including the $2,000 for the review, runs about 6 percent. Then, by state law, we have to set aside reserves, and that is another 5 to 6 percent a year.

The things we pay are relatively simple. We have a five-member board and meet every month, so I can assure you that if a review disclosed anything out of financial order, it would not need to be the homeowners who would ask for a full audit. The board would ask for the audit.

We are fighting budget issues the same way you are, and many of the people who live in our homeowners' association have lived there for 20 years and are retired. So every dollar we have to impose upon them is an added burden on them. We have very serious restrictions about dues and assessments, and we try to hone our budget as you all do. We just cannot see the benefit of an audit

unless something is revealed by the review, and then it may not be a full audit, but only a section for example, of the operations or reserves financing.

Chair Segerblom:
Do you have insurance for theft or misappropriation by the board?

Robert Allgeier:
We have insurance to cover the board members and the association. I do not know the answer to your question.

Wendell Vining, Vice President, Westwood Park Homeowners Association, Minden, Nevada:
I fully agree with everything Mr. Allgeier said, and I fully support this bill.

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
The Commission did discuss this bill, and we fully support it. We think it is very fair. We would like to submit the letter from Chairman Buckley (Exhibit K). The expense for the smaller associations to pay for a full-blown audit is an unreasonable burden. I understand that the Nevada State Board of Accountancy also supports this bill.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I am speaking as a private owner. I have been contacted by several members of our sub-associations in Sun City Anthem, Las Vegas and they support this bill.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
My only concern is that it calls for a four-year period between audits, and if you have some unscrupulous board members, a lot of money can be embezzled in a four-year period. A possible alternative could be an annual or biennial review.

Chair Segerblom:
The bill as I read it requires a review every four years for the $75,000 and under and annually for the $75,000 to $150,000.

Jonathan Friedrich:
I was talking about the budgets that are less than $75,000.

Chair Segerblom:
So you would like to see that every year versus every four years.

Jonathan Friedrich:
For a review.

Chair Segerblom:
Is there anyone else in favor? [There were none.] Is there anyone opposed? [There were none.] Is there anyone who is neutral?

Gary Lein, Accountant Representative, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
I am a shareholder with Hilbert and Lein CPAs in Las Vegas. We do audit and review work for a number of associations in southern Nevada.

As a CPA, I do not like the loss of business, but I also understand that for some small associations the audit requirement is a real burden; specifically, for the communities in outlying areas. Few firms do audits because as auditors we are subject to peer review every three years, so many firms elect out of the audit process. I see the benefit of the review, which would free up firms and lower the costs of reviews for many associations. I feel strongly about the audit process, but again, if it is a review, so be it.

One of the concerns I have is in section 1, subsection 1, paragraph (a) where it talks about a review once every four years. That seems to be an arbitrary number. *Nevada Revised Statutes* 116.31152 require reserve studies for homeowners' associations once every five years. What would make sense to me would be to delete "once every 4 fiscal years" and replace it with "for the year preceding the preparation of the reserve study that is required by NRS 116.31152." That way there is a real purpose behind the review of the financial statements. Then the person preparing the reserve study has a solid basis and a confirmation of the true operating and reserve fund balances of the association. I would like to see it tied to the preparation of the reserve study.

Chair Segerblom:
Would that cost any additional money for the homeowners' association?

Gary Lein:
It would not because the reserve study is required every five years. If the reviewed financial statement was done the year prior to the preparation of the reserve study, it would be asking for the reviewed statement every five years versus every four.

Chair Segerblom:
It could still be done with a review? And what other point did you want to make?

Gary Lein:
Yes, absolutely. The other point is on section 1, subsection 1, paragraph (b). The audit requirement was always troublesome. We would do a review for three years and on the fourth year do an audit. The problem was having to go back into the prior year and audit the beginning balances, and it created a lot of additional work and expense to the association. I like paragraph (b) which has us consistently preparing reviewed financial statements. Where I have a problem trying to figure out is where the numbers $75,000 versus $150,000 came from. I do not know how that was developed. I do like the idea of consistently budgeting for a certain service, because there are significant differences between a review and an audit.

Assemblyman Settelmeyer:
I appreciate his disclosure on pecuniary interest, and I think his suggestion might have some merit. I chose four years because it is in existing law. I think this bill will provide some economic relief to people.

Chair Segerblom:
If you would think about the five-year versus four-year, and if it sounds good to you, it sounds good to me.

Assemblyman Settelmeyer:
I would be agreeable to that. It makes sense. If you want to have it go from four years to the year prior to the reserve study, as he indicated, I think it is a very favorable amendment, and I think it would benefit everyone.

Chair Segerblom:
I will call this bill back to the Committee, and I will open Assembly Bill 361.

Assembly Bill 361: Makes changes relating to the destruction or deterioration of foreclosed or vacant units in common-interest communities. (BDR 10-940)

Assemblyman Richard McArthur, Clark County Assembly District No. 4:
The intent of this bill is to do two things: one, to get the lending institutions and the homeowners' associations together early on in the foreclosure and vacancy process, so that the lending institutions can provide some contact information to the homeowners' associations, with their address, phone number, and the department that handles residential mortgages; and two, to make sure the homeowners' associations can maintain the exterior of the foreclosed properties and go on to the property without any liability for trespass.

I will review the bill. Section 1, subsection 1, states that a lending institution must provide the association with contact information. Paragraphs (a), (b), and (c) are the trigger points to make sure the lending institutions have to provide that information to the homeowners' associations (HOAs).

Subsection 2, about halfway through states "the association may enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions...."

Subsection 3 basically says that if a unit is vacant "the association may enter the grounds of the unit to maintain the exterior of the unit." That is the real basis for this bill. That is what people have been worried about because of the foreclosure process. The HOAs did not have any contact information with the lending institutions and there was no guarantee that there would not be liability problems when the HOA tried to keep up the exterior of these homes on their own.

Chair Segerblom:
It sounds from the first section that some of these lending institutions are trying to hide so they cannot be assessed or called on the carpet for not maintaining the property.

Assemblyman McArthur:
They basically do not have any real reason to hurry up and start the foreclosure process. The homeowners' associations have not been able to find out who the lending institutions are.

Garrett Gordon, representing Olympia Group, Reno, Nevada:
To my right is Angela Rock with Olympia Group. To be brief, we support the bill. I have been working with the sponsor on some clarifying language, so we will continue to work with him to come up with a resolution.

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
I worked with the sponsor early on and suggested to him that this kind of bill is a solution to some of the problems we have in the communities where properties are falling into disrepair. My members assure me that once they have the legal authority to do maintenance, they do it, but until there is a foreclosure, they do not own the property and have no right of entry. If the association can do the things the Assemblyman has suggested to at least minimally keep properties in compliance, then we are all better off. So we support this bill.

Michael Schulman, representing various homeowners' associations, Las Vegas, Nevada:
This is one of the best bills we have seen this year. Our clients have a number of issues with houses that are not taken care of, and they are an incredible liability to our associations.

Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada:
I support this bill and give Assemblyman McArthur an "attaboy."

Chair Segerblom:
Is there anyone else in favor the bill? [There were none.] Is there anyone in opposition? [There were none.] Is there anyone neutral? [There were none.]

Assemblyman McArthur:
I will have a couple of wording changes, but it will not change the intent of this bill. I have already talked to Legal and the people who were testifying today, we have one section to clear up, and I will get it to you as soon as I can. The purpose of this bill is to get the homeowners' associations and the lending institutions together so they can work together on it. I think everyone will be happy with it.

Assemblyman Hambrick:
It seems like a common sense bill. It keeps the value of the property up, and it will have a good ripple affect.

Chair Segerblom:
We will bring A.B. 361 back to the Committee. That ends the three bills that had not been heard before. Now we are going to go back to some of the bills that have been heard by the full Judiciary Committee to discuss them further. I will open the hearing on Assembly Bill 108.

Assembly Bill 108: Revises provisions governing community managers of common-interest communities. (BDR 10-178)

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
I have some comments on A.B. 108. I submitted some comments (Exhibit L). I propose one amendment. There are three kinds of homeowners' associations: self-managed, managed with internal employees who are community managers, and others which have outside community managers. This bill is a good bill because it increases the standards for community managers. We will all benefit from that.

Unfortunately, section 7, subsection 1, paragraph (k), subparagraph (1) states that a community manager must have his own insurance policy. Many of the associations which have employees already have insurance on their employees. This bill requires that homeowners' associations (HOAs) get a separate insurance policy on their managers, which means we would have to pay for two policies from two separate insurance companies.

I am hoping you will allow an amendment which would say that the community manager would have to get his own insurance "unless that community manager is a full-time employee of the association and is covered for errors and omissions and professional liability by the association's existing insurance coverage." There is no reason to have an employee covered by two separate policies.

Michael Dixon, Private Citizen, Henderson, Nevada:
Section 1, subsection 1, paragraph (a), subparagraph (3) states the budget for the daily operation of the association must include "for each month in which expenses are estimated to be incurred, an itemized list of the expenses expected to be incurred during that month." At Sun City Anthem, Las Vegas, we run a budget of about $8 million a year. We write 250 to 300 checks a month, and were we to have to itemize all of those checks every month, it would cost an inordinate amount of money to no benefit.

We review our books every month and all of our departments' operating expenses on a quarterly basis. We do all of these things to make sure we are well managed. This would be a terrible burden.

Chair Segerblom:
Do you subcategorize things like utilities, et cetera? Is there a way that you could itemize without being specific for each check?

Michael Dixon:
We group things. We have different operating departments like administrative, maintenance, fitness, and activities, and each of them has subcategories and a budget for various things they do.

Chair Segerblom:
Is it possible that this could be focused on categories, versus specifics?

Michael Dixon:
Of course, it is what we do now.

We are a large association, and there are a lot of large associations. The impacts of *Nevada Revised Statutes* (NRS) Chapter 116 on large associations differ markedly from those with 100 or 200 homeowners. I would like to strongly urge the Legislature to establish an ad hoc commission to look at the effects of NRS Chapter 116 on large associations over the next two years to try to streamline the enforcement and application of these laws without negatively impacting the interests of the members of an association.

Gary Lein, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
Mr. Buckley submitted a letter (Exhibit M), which has more detail on what I am going to cover. Section 8, subsection 9 of Assembly Bill 108 states "cause to be prepared annually a financial audit performed by an independent certified public accountant of the records of the community manager pertaining to the common-interest community, which must be made available to the Division and the executive board." Going back to Assembly Bill 311, we just talked about circumstances where some of the associations will qualify for the reviewed financial statement. This section of A.B. 108 is now requiring a financial audit. I want to make sure we are clear that we are talking about an audit of the association and not of the manager or the management company. It is clear that the two—the association and the manager—cannot comingle funds. If there is a reference to an audit, it would be an audit of the association's books and records.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I am in support of this bill, but I have a couple of specific comments that are included in the letter I wrote to you (Exhibit G).

In section 4, "client" is defined as the executive board. An executive board is not a legal entity, so that definition needs to be changed. I would suggest "association."

In sections 7 and 8, the drafters of the bill have incorporated a number of provisions that are in the regulations which the Commission adopts. I would rather the language be in the regulations, but if it is not going to be, I have some more comments.

I think Mr. Magrath's comments are correct, but we need to go further. He made a comment about protecting individual employees of associations. I would suggest that the law has to recognize the management contract relationship is generally between an association and a management company rather than an individual. So Mr. Magrath's comments should also apply to

management companies: if the management company has insurance, the employee of the management company should not also have to have insurance. It does not make sense.

Section 8, subsection 13, is something the Commission has been dealing with for a number of years: what associations may do with their funds. I will provide the language that the Commission has recently adopted, which makes a little more sense than the language in the bill. Subsection 15 puts responsibilities on the community managers that they cannot fulfill. This subsection states that the community manager must "ensure that the executive board is aware of all legal requirements pursuant to the applicable laws and regulations." They are not lawyers, they cannot be doing that. They already have a duty to tell the board when something is outside of their expertise and to advise the board to get advice in areas of particular expertise. So I suggest that subsection be deleted.

Similarly, subsection 17 deals with the investment funds and states that the manager shall "develop written investment policies and procedures that are approved by the executive board." That, again, is beyond the scope of what any of these managers are capable of or have the background to do. I have suggested language that parallels other language that says, "advise the executive board to engage qualified individuals to draft written investment policies." We have to remember that these managers are not supposed to take actions outside of their expertise.

Chair Segerblom:
I thought we were just codifying the regulations in this bill.

Michael Schulman:
You are codifying, but you also added some. The one regarding investment policies is new, and the one relating to deposit has already been revised by the Commission.

Nick Anthony, Committee Counsel:
The Commission has adopted those regulations, but they have not formally gone through the Legislative Commission yet. Is that correct?

Michael Schulman:
I do not think the one regarding investment has ever appeared. It is a temporary regulation that will expire in November, according to Mr. Lein.

Chair Segerblom:
Unless we make it into law.

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
We discussed this at length in our last Commission meeting in Las Vegas and it is being considered as a temporary regulation, which I understand expires November 1 of this year.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I am in favor of A.B. 108, and I would like to endorse everything Mr. Schulman said.

I have one issue with section 1, subsection 1, paragraph (a), subparagraph (4). Really small associations, such as 18 units, have three-member boards. If more than one member leaves town on vacation, there may not be two people around to sign checks.

I also have a comment about separate insurance for community managers and the board. If someone should be in litigation, I feel the community manager should have his own attorney, as well as the board.

Chair Segerblom:
Just so you know, if an insurance company sells a policy like that, they have to provide separate lawyers for each party, even if it is one policy.

Robert Robey:
If that is the law, then great.

Michael Trudell, General Manager, Caughlin Ranch Homeowners Association, Reno, Nevada:
I wanted to follow up on the comments made by Mr. Magrath and Mr. Lein. Section 8, subsection 9, states, "cause to be prepared annually a financial audit performed by an independent certified public accountant of the records of the community manager." I am an employee of the Caughlin Ranch Homeowners Association, so the same language that Mr. Magrath had indicated before should also be used in this section.

Chair Segerblom:
So you are saying that a community manager is an employee and does not need to be audited?

Michael Trudell:
In my case, I am an employee of the homeowners' association and not an employee of a management company.

Chair Segerblom:
I understand that. You are saying that you do not need to be audited because you are just an employee and the language, as it reads now, would require you to be audited?

Michael Trudell:
True, and the homeowners' association is already being audited.

Chair Segerblom:
We will close the hearing on A.B. 108 and open the hearing on Assembly Bill 204.

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

Assemblywoman Ellen B. Spiegel, Clark County Assembly District No. 21:
I wanted to give you a brief update on the surveys I was doing, speaking with community groups to find out about the impact this bill would have on them. I have received responses that cover over 78,000 doors statewide, and I have not received a response from anyone who said this bill would not be beneficial to them.

I am also here to present an amendment on behalf of Assembly Speaker Buckley (Exhibit N). This amendment is designed to offer consumers and homeowners some additional protection by limiting the cost of collection associated with the fines. The amendment adds a new section to Chapter 116 of *Nevada Revised Statutes* (NRS), designed to limit the collection fees for fines, penalties, or any past due obligation. It starts at $50, if the outstanding balance is less than $200, and then there is a sliding scale based on the amount of the obligation, which maxes-out at $500.

Chair Segerblom:
Mr. Anthony, does this mirror Assemblyman Munford's bill?

Nick Anthony, Committee Counsel:
No, his impacts an existing section, this adds a new section to NRS Chapter 116.

Chair Segerblom:
His placed limitations on fines or penalties...

Nick Anthony, Committee Counsel:
His bill limited the fees and the amount of interest that could be collected. This bill limits the extra costs that may be incurred in collecting a past-due obligation.

Assemblywoman Spiegel:
For example, if a common-interest community association charges a fine, it is not paid, and there is a collection effort to go after the fine, in addition to seeking to collect the penalty for the violation, there would be interest and a collection fee. This amendment would limit the collection fee. My understanding is that Assemblyman Munford's bill limited what the penalty itself could be and the interest rate.

This bill also encompasses regular assessments, what are called HOA dues. They are the general assessments that are due periodically to maintain the operating accounts and balances of the associations and to fund their reserve accounts.

Chair Segerblom:
After the last hearing on this bill, there were questions about whether your extension of the look-back for homeowners' association (HOA) liens to two years would violate Federal Housing Administration (FHA) or Fannie Mae or Freddie Mac regulations. Did you look into that?

Assemblywoman Spiegel:
I believe the bill said to the extent it was not an issue with federal law. If that is not the case, I will put in another amendment if necessary.

Chair Segerblom:
Mr. Uffelman is here, so he will probably give us some language on that.

Assemblywoman Spiegel:
This is something that will help preserve communities.

Chair Segerblom:
I think the intent is fantastic.

Assemblyman Kihuen:
I want to commend you for bringing this bill. Some of these issues came up on the first bill, so I am glad to see this bill.

Chair Segerblom:
Is there anyone here in support?

Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada:
David Stone, the president of Nevada Association Services, and I have worked with Assemblywoman Spiegel, and we came up with a friendly amendment that we proposed in the original hearing (Exhibit O). It puts in place a policy for collections for homeowners' associations. We believe that if homeowners' associations actually have policies in place, then perhaps these collections would not take beyond six months.

Chair Segerblom:
So you are adding a subsection (c)? Would that impact the amendment submitted by Speaker Buckley? It seems like it is a different issue.

Assemblywoman Spiegel:
Ms. Laxalt's amendment requires common-interest communities to develop a collections policy and to provide that disclosure to the homeowners. By doing that, it makes it more fair and transparent for everyone and offers additional consumer protection because the homeowners know what their obligations are and they understand the ramifications of their actions. Conversely, it also helps the associations by clearly delineating in the policy the time frames of what would happen and when, which could accelerate the collection process and not have as large of a fiscal impact on the homeowners or the associations.

Neena Laxalt:
We just had a quick look at Speaker Buckley's amendment, and I am sure that my client would have some concerns. We would be happy to speak with the Speaker about our concerns.

Chair Segerblom:
We will not be taking any action today on this bill.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I support this bill because I think it is a good bill. Also the Assemblywoman sits on one of my boards in Henderson, and this will be very beneficial. I have two comments. The amendment that has been offered by Speaker Buckley may conflict or may need to be resolved with NRS 116.31031, which already limits the collection cost in regard to fines.

Chair Segerblom:
The amendment deletes that section and replaces it.

Michael Schulman:
Okay.

I think Michael Buckley, the Chairman of the Commission, wrote to you to state that the FHA does not have rules against this particular type of statute. They have concerns about it because it will affect them, but I do not think their loans are precluded because of it.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
One of the things that is good about extending the time frame from six months to two years would be that it would allow an association to slow the collections process down. If a homeowner gets behind in his assessments and the association knows it has a two-year comfort level, it will allow the association to not race out and hire a lawyer and start the collection process.

Assemblywoman Spiegel:
I just needed to disclose that I am on the board of the Green Valley Ranch Community Association in Henderson, Nevada. This bill will not affect my association any more or less than any other.

Chair Segerblom:
Is there anyone who would like to speak against the bill?

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
When the bill was first heard in Committee, I submitted a document from the Summerlin North Homeowner Association (Exhibit P), which was amended to change the forbearance time from six months to three months. I think that an aggressive collections policy by an association is the answer to the problem the Assemblywoman is trying to solve.

The policy provides that the association can pursue on a contract theory as well as the normal course of foreclosure. The policy also provides that the association can work out with the homeowner their failure to pay in a timely fashion. It is the collections policy that makes these things work.

I am supportive of the amendment offered by Ms. Laxalt. I would point out that while Assemblywoman Buckley's amendment strikes existing law and moves it to a new section, it increases the lowest level of cost to $50 and the second level to $75, whereas existing law provides for $20 and $50 in those two categories. I am not sure where the reduction is, unless it is an overall reduction in cost.

The letter submitted (Exhibit Q) provided the policy of Fannie Mae, which will not buy a mortgage on a condominium with more than six months of past due assessments. We took a small survey. Other lenders, while they do not have established policies, said the bill if passed will have a negative impact on lending in Nevada. Again, on behalf of the bankers, the answer to the problem the Assemblywoman is trying to address is an aggressive collection policy by the homeowners' association.

Chair Segerblom:
Will Assemblywoman Spiegel's two-year provision prevent some federal mortgages or not?

Bill Uffelman:
It would certainly run afoul of Fannie Mae with regard to condominiums or attached dwellings. They have specifically said they will not buy those kinds of mortgages for the secondary market.

Chair Segerblom:
Do you have any proposed language which would carve out Fannie Mae?

Bill Uffelman:
My proposed amendment would be to eliminate that section of the bill and change the two years back to six months. I had understood that the Assemblywoman was going to exclude condominiums and attached dwellings from these provisions, which would be the kind of amendment you would want to include.

Chair Segerblom:
What percentage of mortgages are Fannie Mae? Pretty high? Would it also include Veterans Administration (VA) loans?

Bill Uffelman:
Yes, it is pretty high. I did not ask a VA lender. So you understand, the latter pages of the letter (Exhibit P) are the guidelines that that lender is publishing for the benefit of mortgage brokers and anyone who is making loans.

Chair Segerblom:
What percentage of homeowners' associations are condominiums?

Bill Uffelman:
In Nevada, I do not know.

Assemblyman Hambrick:
Not only do condominiums have their own HOAs, I also live in Summerlin North and there are condominiums within an HOA. They can be members of other groups.

Bill Uffelman:
A condominium by its very nature would have to have a homeowners' association because of the common areas within it. So yes, there are a lot of condominium associations that are sub-associations of Summerlin, for example. There are a lot of properties in Summerlin that would be affected by this provision.

Assemblywoman Spiegel:
Condominiums represent about 20 percent of associations. I am willing to go through any language or any proposed amendment from Mr. Uffelman.

Chair Segerblom:
It sounds like it would be worth it. Would you be willing to do that Mr. Uffelman?

Bill Uffelman:
I would be happy to give her language on that, but we would still be opposed to the bill.

Erin McMullen, representing Bank of America, Las Vegas, Nevada:
We just want to go on record in opposition to this bill because we believe that it penalizes banks for trying to work with individuals and not foreclosing sooner.

Assemblywoman Spiegel:
I think this would be an important bill in terms of what it means for our values and our state's real estate values and what it means to our homeowners and our communities. I would like to see our communities being kept strong. I am willing to work with everyone because I think this bill is important.

Chair Segerblom:
I will close the hearing on A.B. 204. We will take a short recess.

I will open the hearing on Assembly Bill 207.

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

Assemblyman John C. Carpenter, Assembly District No. 33:
This bill would basically take agricultural...

Chair Segerblom:
As I recall this, there are something like 7,000 lots in Spring Creek and a $1 a lot assessment?

Assemblyman Carpenter:
There are about 5,500 lots at a $3 assessment.

Chair Segerblom:
So we are talking about $15,000 a year? I move that we recommend your bill.

There is an amendment which states something like 20 units or fewer in a county that is 45,000 or less.

Assemblyman Carpenter:
There was an amendment (Exhibit R) which applies to some really small associations.

Chair Segerblom:
These are the agricultural ones where they have the pond for watering livestock and horses?

Assemblyman Carpenter:
The amendment would exempt those really small associations, which may only have a road and a few culverts, from having to hire a reserve specialist. They could hire another professional like an engineer or building inspector, because reserve specialists cost a lot of money.

Chair Segerblom:
Is there anyone here to speak in favor? [One person indicated they were in favor.] Is there anyone opposed to the bill? [There were none.] Are we agreed that we are going to recommend this bill as amended?

> ASSEMBLYMAN KIHUEN MOVED TO RECOMMEND ASSEMBLY BILL 207 AS AMENDED TO THE FULL COMMITTEE.
>
> ASSEMBLYMAN HAMBRICK SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

Gary Lein, Accountant Representative, Commission for Common-Interest Communities and Condominium Hotels, Las Vegas, Nevada:
We would like a point of clarification here in Las Vegas about A.B. 207. There will be an amendment to exempt associations of 20 units or less from *Nevada Revised Statutes* (NRS) Chapter 116?

Nick Anthony, Committee Counsel:
The motion was to refer A.B. 207 back to the full committee as an Amend and Do Pass with an amendment to NRS 116.31152 which would exempt associations that contain 20 units or less.

Chair Segerblom:
My understanding is that those are small agricultural cooperatives.

I will open the hearing on Assembly Bill 251.

Assembly Bill 251: Revises provisions relating to common-interest communities. (BDR 10-555)

Assemblyman Mark A. Manendo, Clark County Assembly District No. 18:
We originally heard Assembly Bill 251 on March 18, 2009. At that time one of my constituents was going to testify, and I would like to submit her testimony into the record (Exhibit S). It applies to the second portion of the bill.

We do not have any opposition on this bill. What I hear from many homeowners' associations (HOAs), including the one I live in, is that if there are elections of officers for the board that are unopposed, the HOAs would not have to send out ballots to save on printing, postage, and labor. Regarding the requirements in statute about notice for vacancies on the board and/or that current board members are up for reelection, so people can run if they choose: none of these requirements are deleted.

This only applies if one is running for a position and is the only candidate; then the HOA does not have to go through the expense of sending out ballots.

There is a letter in support from Michael Buckley, Chairman of the Commission for Common-Interest Communities and Condominium Hotels (Exhibit T) and there is a proposed amendment from the Olympia Group (Exhibit U) which helps clarify.

Chair Segerblom:
It clarifies this election issue?

Assemblyman Manendo:
Basically section 1, subsection 8, says, "incumbent member," but say that no incumbent is running.

Chair Segerblom:
So it is just if the seat is unopposed?

Assemblyman Manendo:
The amendment says, "Notwithstanding any provision in this section, no election is required if a candidate is running unopposed." I am okay with the amendment because that was the original intent.

Legal will need to review it and work it into the bill, but at least you know the intent.

The second issue came from my constituent, Marion Ainsworth, who on the day of the original hearing was in the wrong HOA hearing in Las Vegas. The Senate was hearing similar bills that same day. She is an onsite manager where she lives. She was hospitalized and out of work for a while, during which time her license expired. She has no problem with renewing her license and taking the test again, but current statute says that she needs two years of supervision, which is kind of unfair for someone who already has been licensed, passed courses, and done what is necessary for her training.

As an attorney, Assemblyman Segerblom, if your license lapsed, I do not think you would have to have two years of supervision to be reinstated. The fee and the continuing education requirements would remain.

Garrett Gordon, representing Olympia Group, Reno, Nevada:
Assemblyman Manendo did a good job of explaining our amendment. It is just to clarify that any candidate who is running unopposed would not need an election.

Chair Segerblom:
Do you have any issue with the second part of the bill?

Garrett Gordon:
No.

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
I will speak only for myself since the Commission has not discussed removing the word "incumbent." I am totally in favor of the bill and I have tried to do

what this bill is doing ever since I was appointed to the Commission in 2006. It will save associations a lot of money in these very tight times.

We will defer to the Real Estate Division licensing personnel about the second part of the bill. If you have not received anything, I would assume—realizing that it is dangerous to assume—they are not opposed.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I support both sections of this bill, wholeheartedly. I have not had a chance to see the amendment from the Olympia Group. I have suggested in my letter (Exhibit G) that the language needs to be tied to the number of open positions. If the number of candidates does not exceed the number of positions, the board, by acclamation, may state that it is the board as of the date the election would have occurred. But it can only take that action once the nomination process is closed.

On the second issue, I teach classes for managers in Las Vegas, and I think there is a shortage of good managers, so anything you can do to make it easier for someone to return, who is already qualified, would be terrific.

Chair Segerblom:
I was not clear on the first issue how you differ from what Assemblyman Manendo wants to do?

Michael Schulman:
I caught the same issue that Olympia Group did on the use of the word "incumbent," but I do not think it should be written in the singular or about incumbents. The language should be written to state "if at the end of the nomination process, the number of candidates equals or is less than the number of seats open, it should be done by acclamation." There has to be an actual process, and it needs to be spelled out.

Nick Anthony, Committee Counsel:
I had the same concerns when I was looking at it. We just need to spell out some kind of process, if candidates are unopposed, how they would take the seats.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
I support both parts of the bill. There is no language that addresses a write-in candidate.

Maybe it should be allowed.

Chair Segerblom:
It would defeat the purpose because the HOA would have to mail out a blank ballot asking if anyone wanted to write-in a candidate.

Michael Schulman:
There is already a requirement in the law that candidates fill out a nomination disclosure, to say if they are in good standing and whether they have any conflicts of interest. It would be impossible for write-in candidates to disclose that to anyone, which is why at the end of the nomination process it is generally assumed that no one else can be nominated, write-in or otherwise.

Jonathan Freidrich:
I withdraw my comment.

Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada:
We put on the nomination ballot that there are no write-in candidates. Thank you for saving the associations money.

John Radocha, Private Citizen, Las Vegas, Nevada:
My concern is if you are in a dispute with the board after a fine has been applied, and they allow you to fill out the candidate paperwork but then decide they are going to take your vote away from you. I would like it more defined about disputed fines, selective enforcement, and retaliation.

Chair Segerblom:
We are going to discuss retaliation in regard to Assembly Bill 350.

John Radocha:
What about signs? If you are going to run for the board, or there is an item on the agenda, can you put a sign in your front yard or in the common area? That is what the boards do, they want you to dot every I and cross every T.

Assemblyman Manendo:
Under *Nevada Revised Statutes* (NRS) Chapter 116, signs are permitted in HOAs for political purposes, but I do not know if it is limited to just candidates for public office or ballot questions.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
Current law allows any member of an association to post a sign, not to exceed 24 inches by 36 inches, for any candidate or any position or any issue. So, in theory, you could post one for an initiative petition, running for a homeowners'

association, or anything else. It can only be posted on a piece of property you exclusively control, so it cannot be posted in a common area.

John Radocha:
The board has the advantage because they can use the United States Postal Service to put out their message, so how does the homeowner get their message out if they are so restricted?

Chair Segerblom:
You walk door to door. We will look into that. Is there anyone else to speak on A.B. 251? [There were none.]

> CHAIR SEGERBLOM MOVED TO RECOMMEND ASSEMBLY BILL 251 TO THE FULL COMMITTEE WITH THE CHANGES MADE BY NICK ANTHONY, COMMITTEE COUNSEL.
>
> ASSEMBLYMAN HAMBRICK SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

We will have a short second meeting next week to bring a couple of these issues back that we have asked people to work on. Then it will go to full Committee the following week.

We are adjourned [at 4:47 p.m.]

RESPECTFULLY SUBMITTED:

_____
Emilie Reafs
Committee Secretary

APPROVED BY:

_____
Assemblyman Tick Segerblom, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 25, 2009 Time of Meeting: 1:39 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 350	C	Jonathan Friedrich	Prepared Statement and proposed amendments.
A.B. 350	D	Paula McDonough	Prepared Statement.
A.B. 350	E	Bill Magrath	Handout.
A.B. 350	F	Neena Laxalt	Letter from David Stone.
A.B. 108, 204, 207, 251, 311, 350, and 361	G	Michael T. Schulman	Letter addressing concerns in several bills.
A.B. 350	H	Michael Forman	Proposed Amendment.
A.B. 350	I	John Radocha	Letters in support of S.B. 281/ A.B. 350.
A.B. 350	J	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels .
A.B. 311	K	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels.

A.B. 108	L	Bill Magrath	Handout.
A.B. 108	M	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels.
A.B. 204	N	Assemblywoman Spiegel	Mock-up of Amendment 3542.
A.B. 204	O	Neena Laxalt	Proposed Amendment.
A.B. 204	P	Bill Uffelman	Handout.
A.B. 204	Q	Alison Combs	Letter submitted during original hearing, from Holland & Hart re: Fannie Mae regulations.
A.B. 207	R	Assemblyman John Carpenter	Proposed Amendment.
A.B. 251	S	Assemblyman Mark Manendo	Letter from Marion Ainsworth.
A.B. 251	T	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels.
A.B. 251	U	Garrett Gordon	Proposed Amendment.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
April 29, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:38 a.m. on Wednesday, April 29, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Mark E. Amodei

COMMITTEE MEMBERS ABSENT:

Senator Maurice E. Washington (Excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Marcus Conklin, Assembly District No. 37
Assemblywoman Ellen B. Spiegel, Assembly District No. 21

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

Howard L. Skolnik, Director, Department of Corrections

Debra Gallo, Director, Government and State Regulatory Affairs, Southwest Gas Corporation
Judy Stokey, Director, Governmental Affairs, NV Energy
Garrett Gordon, Olympia Group
Angela Rock, Olympia Group
Robert Gastonguay, Executive Director, Nevada State Cable Telecommunications Association
Gary E. Milliken, Community Associations Institute
Sandra Duncan, Airpark Estates Homeowners' Association
Josh Griffin, American Nevada Company
Michael Trudell, Caughlin Ranch Homeowners' Association
Mike Randolph, Homeowner Association Services
Bill Uffelman, Nevada Bankers Association
George Ross, Bank of America

CHAIR CARE:
I will open the work session and address Assembly Bill (A.B.) 473 page 7, (Exhibit C, original is on file in the Research Library).

ASSEMBLY BILL 473: Revises provisions relating to medical and dental services for prisoners. (BDR 16-1128)

LINDA J. EISSMANN (Committee Policy Analyst):
Assembly Bill 473 requires the Department of Corrections to establish certain regulations regarding training and medical emergency response. While there was no specific opposition to the bill, Director Howard L. Skolnik indicated that legislation may not be necessary. They are already implementing some of the regulations provided for in the bill. The Committee had asked for documentation from Mr. Skolnik, including cost estimates, that are included in the work session binder, Exhibit C, pages 8 through 11. There was an amendment proposed by Lee Rowland of the American Civil Liberties Union of Nevada suggesting the adoption of standards should comply with the National Commission on Correctional Health Care. This amendment is not included in the work session document.

CHAIR CARE:
We have the memo dated April 22 from Rebecca Gasca that includes their amendment (Exhibit D).

HOWARD L. SKOLNIK (Director, Department of Corrections):
The fiscal information we provided relates to us if we have to go for accreditation with the standards, Exhibit C, pages 8 through 11. The standards require certain ratios of medical care. We are not consistent with those ratios throughout the State. We would have to add staff, which would be the primary cost to comply with the standards provided.

CHAIR CARE:
In Exhibit C, page 8, it says $1.2 million. Is that correct?

MR. SKOLNIK:
That is correct. It represents the additional positions we need to comply with the ratio outlined in the standards.

CHAIR CARE:
The total expenditure would be a little over $1.7 million, Exhibit C, page 11. I had asked Mr. Skolnik to provide the information. The e-mail we received indicates it is an estimate and is more likely to go up than down.

MR. SKOLNIK:
We did provide you with a number of our regulations already in effect that are consistent with the standards, Exhibit C, pages 12 through 33. We have already done most of what this bill would require.

SENATOR PARKS:
I can understand the requirement for additional staff, but there was some discussion in our initial hearing regarding a cost element to comply with these particular health and safety requirements.

MR. SKOLNIK:
That is correct. The numbers we have given you are the numbers required for us to become accredited, not to implement the standards as part of our regulations. If we were to meet the staffing ratios required for accreditation, we need the additional staff.

SENATOR PARKS:
Rather than being fully certified, could you ascribe to their standards without going through the formal process? Is there a way for some middle ground where we can substantially support this without incurring the entire cost?

MR. SKOLNIK:
We write our regulations to comply with those standards. The issue is not the writing of our regulations; the issue is coming into compliance with the standards. If we were to do that, we would have the additional costs for staff.

SENATOR COPENING:
In looking through the material you provided and going back to the original bill, page 2 in lines 34 through 40, where it says, "... shall establish standards ... (a) The personal hygiene of offenders ... " I did not see any standards for personal hygiene. Did I miss something or has that been established?

MR. SKOLNIK:
I do not know the answer to that question. The definition of personal hygiene would be a problem. We provide inmates with hygiene products if they cannot afford them. We are required by the courts, for example, to provide a shower, under all circumstances, at least once every 72 hours. We are required by the courts, regardless of the position of the inmate, to offer exercise at least five hours per week outside of the cell. Many of these are already required in case law. Regarding a regulation for a personal hygiene standard, it would be difficult, given our staffing patterns, to make sure every inmate gets up in the morning and brushes his teeth and washes his hands.

SENATOR COPENING:
There probably is not a standard requiring a prisoner to receive teeth cleaning. That is not provided?

MR. SKOLNIK:
Yes. We have a standard physical examination. The inmates have access to dental care, either on their own or as part of their initial intake. All inmates are examined both medically and dentally. A plan of treatment is prescribed at that point if they need anything special.

SENATOR COPENING:
Page 2, lines 21 through 23 of the bill discuss establishing regulations, with Board approval, governing staff training in medical emergency response and reporting. I did not see anything addressing training. Do you have a training program?

MR. SKOLNIK:
Our staff is trained in cardiopulmonary resuscitation, which is institutionally based and is required. Staff is required to go through refresher training periodically. We do training for medical emergency. I do not want a correctional officer or case worker to respond to the medical needs of an inmate because we are never going to train them to the standard of medical care.

CHAIR CARE:
I will close the work session on A.B. 473 and open the hearing on A.B. 129.

ASSEMBLY BILL 129 (1st Reprint): Revises provisions governing common-interest communities. (BDR 10-34)

ASSEMBLYMAN MARCUS CONKLIN (Assembly District No. 37):
In the interim, representatives from Southwest Gas asked if I would consider sponsoring such a bill. I cosponsored this bill with Assemblyman Bernie Anderson, Assembly District No. 31, because it was necessary to have a bill addressing the ability of first responders in a variety of public services to take their vehicles home and not be excluded from certain common-interest communities. These first responders are ambulance drivers, police officers, firemen and public utilities—gas and electricity.

Because of the contracts they have with the State of Nevada as monopoly vendors, they have the responsibility to respond to emergencies. In doing so, people are sent home with first-responder vehicles. If these people are denied the ability to live in certain communities, a violation of rights occurs. This bill is designed to clarify that in certain circumstances, those people cannot be denied living quarters in common-interest communities.

CHAIR CARE:
Mr. Wilkinson, in section 6 of Senate Bill (S.B.) 351, there was a passage about an association having to amend, without action of the membership, its governing documents to be consistent with state law. If that were to become law, would that provision take care of section 1 of this bill, even though this relates to tariffs as opposed to state law?

SENATE BILL 351 (1st Reprint): Makes various changes relating to common-interest communities. (BDR 10-1145)

BRADLEY A. WILKINSON (Chief Deputy Legislative Counsel):
That is a slightly different issue, law as opposed to tariffs. I do not see that these would have any effect on each other.

CHAIR CARE:
This Committee has been concerned about whether some homeowners' associations (HOA) with fewer than 100 units, for example, would have to go back and do paperwork. Section 1 of A.B. 129 requires amendment of the governing documents.

ASSEMBLYMAN CONKLIN:
That is a provision Legal put in. We are primarily concerned with everything after section 2 of the bill. If section 1 of the bill includes provisions that help smaller HOAs comply with the law at minimal expense regarding documentation and bylaws, I am amenable to that.

CHAIR CARE:
Mr. Wilkinson, we could say that the tariffs, rules and standards govern where they conflict with the governing documents. The only problem is how to put the members of the association on notice.

SENATOR WIENER:
I am curious about the reprint. What was the change in the amendment?

ASSEMBLYMAN CONKLIN:
The changes were just owner or tenant. For example, on page 3, line 9 where it says, "A unit's owner ... ," it was originally drafted to say "owner." We realized it does not have to be the owner; it could be a tenant. It is an expansion to include whoever is living in that unit.

MS. EISSMANN:
The amendment made three changes. It removes inoperable vehicles from the list of parking restrictions; clarifies that the authorized parking location for service vehicles is in designated visitor parking, the owner's driveway or in front of the owner's unit; and clarifies that the provisions of the bill apply to tenants.

CHAIR CARE:
In section 2, subsection 3 of the bill and going forward, was it S.B. 183 where we had some discussion that related more to a plumbing truck, but not this situation?

SENATE BILL 183 (1st Reprint): Revises various provisions governing common-interest communities. (BDR 10-70)

MR. WILKINSON:
Section 4 of S.B. 183 is identical to section 1 of this bill. Section 32 of S.B. 183 was identical before the first reprint of A.B. 129 was created.

DEBRA GALLO (Director, Government and State Regulatory Affairs, Southwest Gas Corporation):
We had a similar bill last Session. Our employees are still having the same problem. This bill addresses the problem our employees experience with parking their company-assigned vehicles in communities where they live. There are two types of vehicles. First, our service technicians take home minivans. They are dispatched from their home if someone smells gas. They could be dispatched 24 hours a day, 7 days a week. Second, we have emergency first-responder trucks that are on call one week a month. They go to dig-ins, not gas leaks.

Our employees have been issued citations, monetary fines and liens. Most recently, one of our employees was threatened with towing our emergency-response vehicle.

We are asking that where parking is allowed—in the driveway, in front of the unit, visitor parking, on-street parking—our employees be allowed to park. We are not asking that special parking sections be designated for our employees. We are not asking for special permission to park in certain places. We are just asking that, where parking is available, our employees be allowed to park their service vehicles.

An amendment will be brought by another group, which we are not in favor of. The amendment provides Southwest Gas with the ability to provide a letter. The employee could provide a letter to the HOA governing board saying they are required to have this vehicle for their employment. We have no problem with

doing that. We already do that. It just has not worked. We provide the letter, and they still get ticketed.

SENATOR COPENING:
You talked about two scenarios where vehicles are sent home with employees who respond to emergencies, are on call or respond to something that may occur in the night, but might not necessarily be an emergency.

MS. GALLO:
We still classify it as an emergency. If you smell gas in your house and you call our dispatch, we dispatch a service technician. We do not dispatch one of the larger trucks. Depending on what the service technician finds, they could call out additional resources. They are both emergency-response vehicles. There is a different designation regarding who is sent on what type of calls.

SENATOR COPENING:
An employee would not take a vehicle home for his convenience? He would only take a vehicle home if he was assigned to be on call that particular night?

MS. GALLO:
Yes, that is correct. You would only take a vehicle home if you are on call, which is approximately one week per month.

JUDY STOKEY (Director, Governmental Affairs, NV Energy):
Ms. Gallo's comments are identical to the situations we have. In southern Nevada we only have electric, not gas. In northern Nevada, we have gas and electric.

We requested the language in section 1 of the bill regarding the standards because we have had problems getting HOA governing boards to go along with the standards regarding where we put some of our facilities. It is the same language that was in S.B. 183.

CHAIR CARE:
Give us an idea of what a 20,000-pound vehicle is.

MS. GALLO:
I have pictures to pass around for you to see. Our largest vehicle is 19,000 pounds. We have 7 of these in southern Nevada and 11 in northern Nevada.

CHAIR CARE:
How many of the employees who drive these vehicles live in HOAs?

MS. GALLO:
I am not sure. About 12 HOA violation letters have come to me. It depends when a person is on call. It is not a vehicle assigned to a specific employee.

CHAIR CARE:
Is it practical to park one of those vehicles in a driveway?

MS. GALLO:
No. People have tried to park them in their driveway, but the vehicles extend a little bit. They have been ticketed for extending over the sidewalk. We have also had issues when they have parked in their driveway, and they have received a ticket or warning letter because they have the commercial compartments on the side of the truck. We have tried many things—the letters, talking or having our attorneys talking.

SENATOR WIENER:
The bill also provides for law enforcement and other emergency services. There could be quite a few who are on call and need somewhere to live and be ready to respond.

CHAIR CARE:
Assemblyman Conklin, have you had a chance to look at the proposed amendment from the Olympia Group (Exhibit E)?

ASSEMBLYMAN CONKLIN:
I have had a chance to look at the amendment. Given the history of HOA bills, it is probably best that we consider the bill in its current form because every time we add something to this bill or try to tighten it, we create a greater opportunity for abuse on one side or the other. From my position, the bill is pretty tight. It allows some flexibility. If we have to come back in a later session and tighten it

up, I am afraid the amendment creates the situation where we will be back in two years with more violations.

CHAIR CARE:
Southwest Gas has 18 of these vehicles. How many does NV Energy have?

MS. STOKEY:
We have 60 statewide. We represent the entire State, and there are 14 in southern Nevada.

GARRETT GORDON (Olympia Group):
We have been working with Assemblyman Conklin and the utility companies. We may still have a little work to do. We support everything said by the utility companies. There is no intent to prejudice, prevent or interfere with their duty, response times and emergency first-response trucks. This could turn into a slippery slope. We are asking for some clarifying language.

ANGELA ROCK (Olympia Group):
Regarding the associations we represent and control, we allow first-response vehicles to park in areas designated for parking of unit owners. We have not had problems with Southwest Gas, NV Energy or any utility services. Assemblyman Conklin said this is a specific issue, and we agree with that. We want to narrowly tailor this to keep it a specific issue. He said he agreed and wanted to make it easier for HOAs to comply with this law. He supported documentation.

Our amendment, Exhibit E, is asking that, regardless of the language, we create a situation where both parties can comply with this and do not have to come back here in two years. In practicality, you will have inspectors for communities driving neighborhoods. They are not going to know whether a vehicle is 20,000 pounds or if it is a first-response vehicle. Because they do not know, they will have to ask a homeowner for a letter. We do not want to create a situation where the homeowner believes they do not need to supply the letter. The association does not know if it complies with the provisions of the statute. So, we asked for language permitting an association to ask for a letter. Implicit in that, the case should be closed once a letter is provided by the individual's employer. If we do not create a method to take this to the next step allowing these people to park, associations would be left with nothing but to allow everyone to park if they cannot ask for documentation.

The second issue is when Ms. Gallo testified that she is not asking for special treatment, only that these vehicles be allowed to park where unit owners park. The way the bill is currently written, it says they may be allowed to park in front of the unit. There are myriad situations when even a unit owner is not allowed to park in front of their unit, for example, in a cul-de-sac, when the street is too narrow to allow parking on both sides. We ask that the language be changed to say that the vehicles be allowed to park where a unit owner or resident is allowed to park.

Those are the two biggest issues for us—to make it easier for HOAs to comply and not opening the door to allow these vehicles to park where unit owners are not allowed to park.

Most of the cases in Southern Highlands where we have commercial-vehicle violations are neighbor complaints. We had 189 homeowner calls last year related to people upset because they felt commercial vehicles could not be in neighborhoods. We allow law enforcement. It is a deterrent to allow police officers to park in the neighborhood. I support that. There are many homeowners who purchased a home and read their documents. They did not want to live next door to big utility vehicles. We have to narrowly tailor this to emergency first response. That is why we have asked to strike the word "cable." We have yet to have a conversation with someone where we were convinced that cable is an emergency service.

Our two main issues are simply to allow the associations a methodology to comply and do not require them to allow parking where parking is not otherwise permitted.

SENATOR AMODEI:
I appreciate the concerns from the HOA's perspective, but the issues are first response and public safety. With all due respect to the community concept, which is significant in the State, the first priority is the body of statute, and the second priority is probably public safety regarding utility service.

My priority is to get the business taken care of first, which are utilities. If that causes some gray area or some unintended consequences for the associations, we will deal with that. Ease of operation for the association in the context of public safety and utility supply is not on par or above that in my scheme of thinking. If we create letter requirements in statute and how to define the

vehicles, that skews things on the side of the association operations. I understand the concerns you have indicated, but maybe the association has to bend to provisions in the statute as opposed to whether it creates a problem. I have a problem placing association operations above what this bill aims to do.

MS. ROCK:
I apologize if that was the perception that came across. I agree with you. Public safety is the priority. These vehicles ought to be allowed to park in the communities. Maybe the wording should be changed so the utilities would say a letter provided by them shall prove it is a necessary vehicle. I am not opposed to that. I was attempting to say there will be vehicles in these neighborhoods. Associations will not know they are emergency response vehicles, so they will either have to allow everything or ask for some proof. Once the proof is provided, the issue is over. It does require a little more work on the language because I agree with you. The right to have public utility service must come first, but we must have a method by which to manage it once it is there. The letter should suffice as the letter of the law.

CHAIR CARE:
When we had S.B. 182 and S.B. 183 and some other bills, there was a working group that Senator Michael Schneider, who was the sponsor of both those bills, had convened. We just heard that in S.B. 183, there was similar language to what is contained in section 2 of this bill. Were you part of that group?

SENATE BILL 182 (1st Reprint): Makes various changes relating to common-interest communities. (BDR 10-795)

MS. ROCK:
Yes, I was in the group. This issue arose. We spoke about the fact that many of these issues were in this bill. At that time, we asked that language be taken out of those bills and just left in this bill so it could be dealt with independently. We did not discuss modifying language.

CHAIR CARE:
Mr. Wilkinson, please put S.B. 183 in its original form where it touched on this issue in the work session binder. Include how S.B. 183 and the amended version were when they left this House—if that was deleted—so the Committee can look at that at work session.

ROBERT GASTONGUAY (Executive Director, Nevada State Cable Telecommunications Association):
I support this bill in its current form for two reasons. First, Senator Wiener brought a bill this Session whereby broadcasters and video service providers would be trained and certified as first responders in an emergency situation. For example, should disaster occur, people must be able to communicate or listen to communications by over-the-air broadcast signal or video-service-provider signal. We need to stay up and running.

Secondly, there is a Voice over Internet Protocol (VoIP) communication systems, or telephones. If the cable is out and a person is using VoIP, he cannot communicate with the outside world should an emergency situation arise where 911 must be called.

CHAIR CARE:
I understand there are those situations if someone needs to come into the association and park the vehicle. If cable becomes a first responder, it would still be necessary for the unit owner or tenant to have the vehicle in the association?

MR. GASTONGUAY:
Yes. In most cases, those vehicles that go home with the employees are on call for outages and cases like that.

SENATOR WIENER:
The bill Mr. Gastonguay is talking about would create first-responder status for certain employees who are trained to keep those communications online so people have access to information. That could have impact if this measure goes through because certain members of those professions would be characterized as first responders.

CHAIR CARE:
Are your trucks up to 20,000 pounds?

MR. GASTONGUAY:
I do not know the exact weight of our trucks. Our bucket trucks are smaller than those vehicles.

GARY E. MILLIKEN (Community Associations Institute):
I agree with everything Ms. Gallo and Ms. Stokey said. The bottom of page 2 of the bill, the very last sentence says, "... owns the vehicle for the purpose of responding to requests for public utility services ... ." Do we need to add the words "first responder" or "emergency" in that situation?

CHAIR CARE:
I will close the hearing on A.B. 129 and open the hearing on A.B. 204.

ASSEMBLY BILL 204 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-920)

ASSEMBLYWOMAN ELLEN B. SPIEGEL (Assembly District No. 21):
As a disclosure, I serve on the Board of the Green Valley Ranch Community Association. My participation on the Board gave me insight into this issue. I learned about some of these issues as I was going door-to-door speaking with constituents, and I did more research.

I am here to present A.B. 204, which can help stabilize Nevada's real estate market, preserve our communities and help protect our largest assets—our homes. Whether you live in a common-interest community or not, whether you like common-interest communities or hate them, and whether you live in an urban or rural area, the outcome of this bill will have an impact on you and your constituents.

In a nutshell, this bill does two things. First, it requires common-interest communities to implement and publicize their collection policies. This will increase the likelihood that associations will be able to collect their assessments or dues prior to foreclosures. Second, it makes it possible for common-interest communities to collect dues in arrears for up to two years at the time of foreclosure. This is necessary because foreclosures are now taking up to two years.

Everyone who buys into a common-interest community understands there are dues. Community budgets have historically been based on the assumption that nearly all of the regular assessments or dues will be collected. Communities are now facing severe hardships, and many are unable to meet their contractual obligations because they are not receiving the revenues owed to them. Others

are reducing their services and maybe simultaneously increasing their financial liabilities. They and their homeowners need our help.

I recognize there are some who are opposed to this bill, and you will hear from them later this morning. The objectives of the bill are to help homeowners, banks and investors maintain their property values; help common-interest communities mitigate the adverse effect of the mortgage foreclosure crisis; help homeowners avoid special assessments resulting from revenue shortfalls because fellow community members did not pay their required fees; and prevent cost shifting from common-interest communities to local governments. This bill is vital because our constituents are hurting. Our economic condition is bleak, and we must take action to address our State's critical needs.

Statewide, our individual property values continue to decline. Our urban areas are being hit the hardest. Everywhere in Nevada, we are having foreclosure problems. Clark County is the hardest hit. Between the second half of 2007 and the second half of 2008, property values declined in all zip codes in the Las Vegas Valley, except for one. The smallest decline was 13 percent, and the largest decline was 64 percent.

Our property values are being depressed because of a few factors. The increased inventory of housing due to foreclosures, abandoned homes and economic recession bring the pricing down. Consumer inability to acquire mortgages, increased neighborhood blight and the decreased ability of communities to provide obligated services also bring prices down. No one wants to buy into a blighted community unless it is at a bargain-basement price.

We all hoped the stimulus package would help, but help is not on the way for most Nevadans. We have the highest percentage of underwater mortgages in the nation. Twenty-eight percent of Nevadans owe more than 125 percent of their mortgage value, so they are not qualified for federal help. Nearly 60 percent of the homeowners in the Las Vegas Valley have negative equity in their homes.

What does this mean for homeowners in common-interest communities? There is decreased quality of life because there are fewer services provided by the associations. There is also increased vandalism and other crime. There is the potential for increased regular and special assessments to make up for revenue shortfalls. As a corollary to that, associations have liability exposure because, if

they say they are providing certain services, people may have bought in because of those services. If those services are not being provided, the association has liability for that. There is increased instability for communities and further declines in property values. Nevada Revised Statute 116.3107 requires associations to maintain, repair and replace the common elements. If the money is not there, it has to come from somewhere. Associations stop providing services or impose special assessments.

I conducted a survey and received responses from community association managers statewide. My responses covered 77,020 doors. Seventy-five common-interest communities responded—55 responded in Clark County and 20 in Washoe County. No one was opposed to the bill. I provided you with a summary of my testimony (Exhibit F, original is on file in the Research Library). The comments I received from the survey were enlightening, Exhibit F, pages 10 through 12.

Cost shifting is going on for some services. The costs are being shifted to local governments. For example, in my community, we have a company that does graffiti removal. Clark County also provides graffiti-removal services. If we needed to cut our budget for lack of funds, we could theoretically advise the homeowners to call Clark County, and they will come and take care of it. This cost would shift to the local government.

Code enforcement would be similar. If we have to cut back on inspections, local governments would have to take on those roles. The use of public pools and parks will increase because, if the communities are not able to maintain their pools, people will then go to the public pools and parks.

I was questioned about security patrols. My community experienced an increase in vandalism and problems along our walking paths. We could not afford to beef up our private security patrols. So, we turned to the City of Henderson. My community is open and ungated. The City of Henderson has increased patrols in my community. There is cost shifting going on because we cannot afford to hire the private companies we have traditionally relied on.

Another potential impact is when communities are having cash-flow issues and make late payments to local vendors—gardeners or small businesses that provide support services. This further contributes to the downfall of the area.

There are a few proposed amendments out there. You have received two of them by e-mail or regular mail. I put an amendment together that encapsulates one of the amendments and has some additional language (Exhibit G). My amendment does two things. The bill has excluded certain types of units because of Fannie Mae and Freddie Mac requirements. At the time, we thought the easiest way to do that would be to limit it to single-family homes. That excluded lots that have been purchased but not developed and other things that should be covered. We have made the language generic so those would be included where permissible.

There are some condominiums and attached townhomes on properties that were excluded in the version of the bill you have, and they do not fall under Fannie Mae and Freddie Mac requirements and provisions. Those should be included as well.

The other component of this amendment is that, if Fannie Mae and Freddie Mac requirements were to change so properties could be covered under them or the super priority could be extended under them, no additional legislation would be needed.

The Bankers Association has an amendment (Exhibit H). I do not support that amendment because it takes away from the intent of helping communities recover funds and make themselves whole so they can provide the services they need to provide.

I urge your support. Assembly Bill 204 supports Nevada communities and is vital for our recovery. It stabilizes communities; it will mitigate further declines in property values and local businesses; and it will help homeowners, families, banks and other investors.

CHAIR CARE:
We have two proposed amendments, one from Sandra Duncan (Exhibit I) and one from the Bankers Association, Exhibit H. Your mock-up, Exhibit G, would relate to all real property within the association, correct? Initially, it was the detached family dwelling.

ASSEMBLYWOMAN SPIEGEL:
Initially, it was all property. Then, we limited it to single-family dwellings in consideration of Fannie Mae and Freddie Mac because condominiums,

townhomes and other attached dwellings could not be included or they would not underwrite the mortgages. We thought that was acceptable because they underwrite approximately 80 percent of all mortgages. We did not want to create more problems for homeowners. However, we excluded lots such as Mrs. Duncan was concerned about.

CHAIR CARE:
The way your amendment, Exhibit G, is drafted, it says, "... unless the federal regulations ... ," Exhibit G, page 2, line 15. It goes on to say, "... If the federal regulations ... ." There are already federal regulations. Is this in anticipation of federal regulations being adopted?

ASSEMBLYWOMAN SPIEGEL:
I understand there are regulations or requirements that say for loans Fannie Mae and Freddie Mac underwrite, there is no more than a six-month super priority associated with that. The second part of the language says, if they were to change their regulations to whatever period they would designate, that would apply here as well.

CHAIR CARE:
Apparently, discussions like that are taking place in Washington, D.C.?

ASSEMBLYWOMAN SPIEGEL:
They are either taking place or are imminent.

CHAIR CARE:
If they were adopted, I do not know if we need the language.

SENATOR PARKS:
Detaching condominiums and townhouses is a problem for me and a number of my constituents. Something has to be in this bill addressing their issues. The existing language appears to include single-family, condominiums and townhouses, whereas the revised language appears to me to only include single-family detached dwellings.

ASSEMBLYWOMAN SPIEGEL:
The original version of the bill did include townhomes and condominiums. The amended version to address the Fannie Mae and Freddie Mac issue was limited to single-family homes. My amendment, Exhibit G, would extend it to

condominiums, townhomes and other types of property wherever possible because Fannie Mae and Freddie Mac's federal regulations take precedence over Nevada law.

CHAIR CARE:
Section 1 of the bill, page 3, line 24 through 27, says the executive board will make the policy established available to each unit's owner. Does that mean it is available upon request, or is there a requirement contemplated here that policy would be given to the unit owners as a matter of course?

ASSEMBLYWOMAN SPIEGEL:
Under NRS 116, the boards are required to mail the budget to each homeowner within their association for approval and ratification of the budget. This provision would require the collections policy to be included in that packet.

SANDRA DUNCAN (Airpark Estates Homeowners' Association):
I had submitted a proposed amendment, Exhibit I. However, the language in Assemblywoman Spiegel's amendment, Exhibit G, is better than what I had suggested. I am in favor of her bill. We have at least one homeowner who is seriously delinquent. The process of foreclosure is taking considerably longer than the six months. This extension of the super-priority lien would help avoid other homeowners having to make up for the amount of money we are losing. Even though we are small, our association has a collections policy. We mail that out annually to our homeowners. If you pass Assemblywoman Spiegel's amendment, Exhibit G, I will withdraw my amendment.

JOSH GRIFFIN (American Nevada Company):
We support this bill and Assemblywoman Spiegel's amendment. American Nevada Company has built and developed the two largest condominium projects in that section of Green Valley in Assembly District No. 21.

MS. ROCK:
Olympia Group supports this bill. It is valuable. The lack of the ability to collect assessments puts a burden on government agencies. Southern Highlands, which is our largest master-planned community, is located in the southwest area of Las Vegas. The Las Vegas Metropolitan Police Department (Metro), Southwest Area Command services that area. On any shift, they generally have between 11 and 16 vehicles on the road. They cover 250,000 rooftops. That is approximately one Metro vehicle to 20,000 homes. We have 7,000 homes in

Southern Highlands and 4 security vehicles. That is 1 security vehicle for every 1,700 homes. On a daily basis, when calls come into Metro, they call our security force to be a first response for backup if there are vehicular accidents. Master-planned communities provide vital services that take the burden off law enforcement agencies. But it is a nonessential service and is something considered to be cut when there is a lack of funds.

MICHAEL TRUDELL (Caughlin Ranch Homeowners' Association):
We support this bill. I had some concerns about the amendment approved on the other side because, as a manager, we have to interpret these provisions, and we disagree with title companies or Realtors regarding our interpretation. This amendment, Exhibit G, clarifies the intent of the bill and the provisions that would exclude those houses from the two-year super-priority lien to the six-month in a way that satisfies our concerns.

MIKE RANDOLPH (Homeowner Association Services):
I am in favor of this bill. I am glad to see the requirement to send the collection policy annually. It should also be sent with all welcome packages and resale packages.

Condominium and townhouse associations have a high foreclosure rate. The costs not paid during the super-priority lien raises fees to other members who are struggling to stay in their homes. If we can include the condominiums, townhouses and mobile home communities, it would be great for Nevada and all homeowners.

BILL UFFELMAN (Nevada Bankers Association):
I am a representative to the Summerlin North Community Association. We modified our policy to specifically emphasize the ability of the association to do collections outside the lien process. They could bring an action.

The irony is that homeowners' associations, in many cases, are the first one to know a homeowner is in trouble. They have not missed their mortgage payment but miss their HOA payment. If the association stays on top of that and exercises its right under the law, there is self help there.

You processed a bill from Senator Parks talking about the foreclosure owner filing within 30 days; they are the new owner. The association will know who the new owner is. On May 5, you will hear a bill from

Assemblyman Richard McArthur, Assembly District No. 4, which talks about a homeowners' association entering properties in the association to do minimal maintenance so it is not an eyesore.

That lien, because it is an assessment, will survive and be part of the foreclosure and would be paid. The new owner of that property has an obligation to maintain the property at the HOA standards.

In foreclosures, a bank or the lender does not have any title or right to that property until the foreclosure sale. You have a 21-day notice that there is going to be a sale. You have to give a 90-day notice of default and the intent to exercise rights to sell. Typically, you do not get the 90-day notice until you have missed payments for 3 months. The reality is, in approximately 210 days, the lender may become the owner at the foreclosure sale, or a third party may purchase the property. That is where the six-month look back on homeowner assessments comes in.

Until you start missing payments, the lender has no idea what your situation is. The bill is retroactive. As the bill is written, prospectively, we can pick and choose among the dwellings this will apply to in a homeowners' association because it would apply if someone's loan is a Fannie Mae or Freddie Mac conforming loan. If Fannie Mae or Freddie Mac own the loan, their rules would apply. If it is another mortgage-backed security, you would have another set of rules if it forecloses another time.

The bill is disruptive of the lending process. Lenders, when a bundle of mortgages is offered, have to evaluate what they are buying. This is in part what got us where we are because the people who were supposed to do that evaluation were not paying attention to their job.

My amendment, Exhibit H, is to strike section 2. That will keep the law at the six-month look back on homeowners' association dues. It takes advantage of the provision, saying HOAs must get serious about managing their association. With Senator Parks' bill and Assemblyman McArthur's bill, you are attacking the core of the problem. In many ways, there is a reward for homeowners' associations where the association management has not exercised their right. The purchaser at the foreclosure is going to pay—the financial institution that is foreclosing or a third-party purchaser at the foreclosure sale.

The Nevada Bankers Association is opposed to section 2 of this bill and ask that you strike it from the bill.

CHAIR CARE:
Were you stating there are people who are making their mortgage payments but skipping the general assessments? The property manager or HOA is aware of that. I do not know the degree of tolerance for that.

MR. UFFELMAN:
My association tightened down its collection policy. Before that, you were allowed about six-months slippage before they attacked you. Now they attack more aggressively and quicker. They give you 30 days to cure, and if you do not cure, you no longer get the option of monthly payments; you have to pay a year ahead. They made it clear they have a right to sue in civil court under the contract. You have a contract with your homeowners' association and have a contractual obligation to pay the fees. You could get a judgment against you. That could all be triggered before you miss your first mortgage payment.

CHAIR CARE:
You gave us the 200-day scheme, which gave rise to the 6 months currently on the books. The testimony was that foreclosures are now taking up to two years.

MR. UFFELMAN:
I do not know whether they are taking two years. One of the ironies is that around Thanksgiving, Fannie Mae and Freddie Mac dictated a moratorium that they were not allowing any more foreclosures for about 90 days. So, we had a big spike in foreclosure filings in March. That was because Fannie Mae and Freddie Mac's foreclosure moratorium expired.

Those who service the mortgages—receive the payments and distribute them to paper holders, mortgage-backed securities or the bank—the system got bound up. We have worked through those things. There are lenders who have not pursued foreclosures. Once I have become the owner, I have an obligation under Nevada law, and as further emphasized by Assemblyman McArthur's bill and Senator Parks' bill, to maintain that property to the association's standards. That is going forward after the foreclosure. I have no control over what happens up to the time of the sale.

There is the situation where an investor purchases a home and intends to flip that home to make money. Perhaps he sat on it for a year and did no maintenance. Assemblyman McArthur's bill speaks to that situation. Senator Parks' bill speaks to the situation that, once it is sold, the association will know who the owner of the property is. Then the association would pursue the new owner to do what he is required by law to do. As lenders, we have no control of it until we own it.

GEORGE ROSS (Bank of America):
Bank of America opposes A.B. 204, at least section 2. The time of six months should not be extended to two years. Bank of America works with those with whom it has mortgages to try to keep them in their properties. Those people are beginning to exhibit signs that they may fall behind. If they do fall behind, miss payments or make late payments, Bank of America makes every effort to contact that person and find out what is happening. Bank of America tries to find out what it can do to adjust the mortgage, forgive payments for six months or redo their mortgage. Similarly, Bank of America is now in a nationwide program to redo hundreds of thousands of mortgages. Six thousand or more people work directly on this.

Sometimes, these efforts do not work, and the home is ultimately foreclosed. This can take time, up to two years. What we are seeing here is that because we worked with these people for a period of time to try to keep them in their home, we will be penalized for 18 more months of homeowner dues. If we work with these people and are then penalized with homeowner dues, that is not a good economic calculation.

You will get several bills from the Assembly having to do with helping renters in foreclosed situations and bills helping those who are getting mortgages. Assembly Bill 149 will set up a mediation process for those who are afraid to go to their lender. Those are progressive bills. But this bill sends the wrong message to a bank who may be trying to help people stay in their homes.

ASSEMBLY BILL 149 (1st Reprint): Revises provisions governing foreclosures on property. (BDR 9-824)

CHAIR CARE:
I will close the hearing on A.B. 204. We will go back to work session and address A.B. 59, Exhibit C, page 2.

ASSEMBLY BILL 59 (1st Reprint): Creates a rebuttable presumption against an award of custody or unsupervised visitation for any person who has abducted a child in the past. (BDR 11-265)

CHAIR CARE:
There are no amendments. There was opposition from Mr. Johnson. We had discussion over what constitutes an abduction—returning the child home beyond the deadline from attending a movie, for example. The bill was brought by the Attorney General's Office. Hearing no discussion, I will entertain a motion.

SENATOR COPENING MOVED TO DO PASS A.B. 59.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR McGINNESS VOTED NO.)

* * * * *

CHAIR CARE:
We will address A.B. 233, Exhibit C, page 3.

ASSEMBLY BILL 233 (1st Reprint): Makes various changes concerning scrap metal. (BDR 54-53)

SENATOR AMODEI:
I had some concern about section 7.5 of the bill on page 5, line 36. I spoke with Mr. Wilkinson, and if you eliminate it entirely, you can go to other provisions in the *Nevada Revised Statutes* and find misdemeanor treatment for section 7.5. In discussing it with Mr. Wilkinson, it is probably cleaner to amend section 7.5 to simply say a violation of the provision is a misdemeanor. It is my understanding that allows the prosecutors some discretion based on whether it is first offense, second offense, to go for a fine or a fine and jail time, or whatever the options are within the sentencing maximums of a misdemeanor. If there is appetite to process the bill, section 7.5 should be amended to read that a violation of this section is a misdemeanor.

CHAIR CARE:
My recollection is the bill sponsor was not married to the language in section 7.5.

SENATOR WIENER:
I did contact a primary source I use in my identity theft work. He responded that because of the information required with no assurance of protection of that information, it is ripe for identity theft. I do not have language of protection, except I could work with the industry to ensure people's identity is protected in these transactions.

SENATOR PARKS:
Am I correct in understanding the standard misdemeanor is a fine of $1,000 and six months?

CHAIR CARE:
It is six months or less. We will address A.B. 237, Exhibit C, page 5.

ASSEMBLY BILL 237 (1st Reprint): Revises the provisions governing the certification of certain juveniles as adults for criminal proceedings. (BDR 5-825)

CHAIR CARE:
It was suggested the age for discretionary certification be raised from 14 to 16. Mr. Pomi suggested eliminating presumptive certification in its entirety. There was some language offered by Mr. Bateman.

MS. EISSMANN:
This bill was on work session once already. In the previous work session discussion, the Committee agreed not to pursue that.

SENATOR PARKS:
Does raising the age from 14 to 16 leave the 14- and 15-year-olds in no man's land?

MR. WILKINSON:
For those you would still have the offenses that are excluded from the juvenile court jurisdiction, murder or attempted murder. That would raise the age for

discretionary certification to 16, so those 14- and 15-year-olds could not be certified as adults.

SENATOR MCGINNESS:
I spoke with both sides on this, I like the bill the way it came over. There was some testimony that the bill was good from the Assembly.

SENATOR McGINNESS MOVED TO DO PASS A.B. 237.

SENATOR COPENING SECONDED THE MOTION.

SENATOR WIENER:
If the juvenile justice system is not working for those 14- and 15-year-olds because their behavior was so egregious, when they are 16, is there a mechanism to reconsider and place them in the adult system?

MR. WILKINSON:
No.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CARE:
We will address A.B. 462, Exhibit C, page 6. There was no opposition to the bill and no amendments.

ASSEMBLY BILL 462: Revises the provisions governing sureties. (BDR 14-838)

SENATOR WIENER MOVED TO DO PASS A.B. 462.

SENATOR McGINNESS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARE:
There being nothing further to come before the Senate Committee on Judiciary, we are adjourned at 10:22 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE:

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
February 24, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:04 a.m. on Thursday, February 24, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

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

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bradley A. Wilkinson, Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On page 33, section 18 defines punitive damages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I support the comments made by Ms. Goodman earlier.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to survive the nonjudicial foreclosure under a bank.

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

RESPECTFULLY SUBMITTED:

Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS

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

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

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY
SUBCOMMITTEE

Seventy-Sixth Session
May 17, 2011

The Committee on Judiciary Subcommittee was called to order by Chairman James Ohrenschall at 4:58 p.m. on Tuesday, May 17, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman James Ohrenschall, Chairman
Assemblyman Richard Carrillo
Assemblyman Richard McArthur

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

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

STAFF MEMBERS PRESENT:

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

OTHERS PRESENT:

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

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

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

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

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

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

Chairman Ohrenschall:
Were there any other amendments?

Dave Ziegler:
No.

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

Assemblyman Carrillo:
I received a copy also.

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

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

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

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

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

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

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

Dave Ziegler:
$500,000.

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

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

Chairman Ohrenschall:
Any questions?

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

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

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

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

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

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

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

Assemblyman McArthur:
Approximately what are those three months worth?

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

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

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

Assemblyman McArthur:
I am talking about the larger HOAs.

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

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

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

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

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

Gary Lein:
Correct.

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

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

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

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

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

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

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

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

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

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

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

Assemblyman McArthur:
I have no problem with section 48.

Assemblyman Carrillo:
I am good with this one also.

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

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

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

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

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

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

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

Dave Ziegler:
This amendment is in your packet.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Michael Buckley:
That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

super lien. The increased amount of the association's lien has been approved by Fannie Mae and local lenders and has become a significant tool in the successful collection efforts enjoyed by associations in that state." That was referring to Connecticut. I think it goes back to Mr. Carrillo's point that associations need the ability to recover the costs incurred to collect unpaid assessments. If the association cannot recover these costs from the defaulting owner, it will be forced to pass those expenses on to the paying owners. To put it into perspective, our proposal was just to add the language which was adopted by the Uniform Law Commission.

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

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

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

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

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

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

Chairman Ohrenschall:
Any feelings from the Committee?

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

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

Assemblyman McArthur:
I am okay with this amendment.

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

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

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

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

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

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

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

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

Michael Buckley:
That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chairman Ohrenschall:
Any questions regarding the proposed amendment?

Assemblyman Carrillo:
I am okay with the amendment.

Chairman Ohrenschall:
Mr. McArthur?

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

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

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

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

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

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

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

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

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

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

Assemblyman Carrillo:
I am okay with the three weeks.

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

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

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

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

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

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

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

Assemblyman McArthur:
I am okay with this section.

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

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

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

Acting Chairman Carrillo:
Okay. Mr. Ziegler.

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

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

Acting Chairman Carrillo:
Mr. McArthur?

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

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

Assemblyman McArthur:
I am okay with this.

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

Assemblyman McArthur:
I agree.

[Chairman Ohrenschall reassumed the Chair.]

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

Chairman Ohrenschall:
I am okay with that also.

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

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

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

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

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

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

Alisa Nave:
That is correct.

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

Assemblyman McArthur:
Yes, I am okay with it.

Chairman Ohrenschall:
I think we can proceed.

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

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

Assemblyman Carrillo:
I am okay with section 56.

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

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

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

Assemblyman Carrillo:
I am fine with that.

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

Jonathan Friedrich:
I am ecstatic.

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

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

Assemblyman McArthur:
I am okay with this section.

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

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

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

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

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

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

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

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

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

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

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

Assemblyman Carrillo:
I am fine with this.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chairman Ohrenschall:
Are there any questions?

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

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

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

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

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

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

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

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

Dave Ziegler:
This is a new amendment.

Chairman Ohrenschall:
Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Jonathan Friedrich:
I do not see anything.

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

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

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

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

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

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

Chairman Ohrenschall:
Do you know what sections those are?

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

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

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

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

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

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

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

Garrett Gordon:
It was section 49.

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

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

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

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

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

Michael Buckley:
That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Assemblyman McArthur:
Is there room for compromise in this?

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

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

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

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

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

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

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

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

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

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

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

[Read amendment.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chairman Ohrenschall:
That is in her amendment, correct?

Eleissa Lavelle:
Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Eleissa Lavelle:
Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Eleissa Lavelle:
That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

Chairman Ohrenschall:
What line is that on?

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

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

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

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

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

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

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

Chairman Ohrenschall:
Thank you. Please proceed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Eleissa Lavelle:
That would be determined by regulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> ASSEMBLYMAN MCARTHUR RECOMMENDED AMEND AND DO PASS SENATE BILL 204 (1st REPRINT).
>
> ASSEMBLYMAN CARRILLO SECONDED THE RECOMMENDATION.
>
> THE RECOMMENDATION PASSED UNANIMOUSLY.

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

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

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

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

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

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

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

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

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

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

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

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

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

Chairman Ohrenschall:
Thank you. Any questions?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chairman Ohrenschall:
Senator Copening, can you address that?

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

Chairman Ohrenschall:
So you would be amenable if we were to also propose a reasonable cap on mediator's fees?

Senator Copening:
I certainly would. I would want the people who work in that industry to speak to what the appropriate cap would be.

Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels:
I think the idea would be that the Real Estate Division would contract with mediators for a flat fee of $500 per mediation. Certainly the idea of a cap on mediation is the intent, and we would not object to putting a cap on it. The Real Estate Division would get resumes and put mediators under contract, and they would agree to mediate these particular problems for a set fee. It would

be much less, and not necessarily on an hourly fee, but it would be a cap per mediation.

Eleissa Lavelle:
I agree with that. I think that is certainly something that can be accomplished for a flat fee. Normally, these mediations are going to go, perhaps, a half a day or a day at the very most. There could be some reasonable way of accommodating a flat number, so that everyone knows what he or she is getting into.

Chairman Ohrenschall:
Would you be averse to our amending Senator Copening's conceptual amendment number one to mandate that the Administrator at the Nevada Division of Real Estate establish a flat fee cap for every mediation?

Eleissa Lavelle:
I do not think that is unreasonable.

Chairman Ohrenschall:
Gail Anderson, would you be okay with that? She is nodding her head yes. Ms. Lavelle, do you do think it would be appropriate to place the cap in statute the way we might with the $225 cap proposed for arbitrators?

Eleissa Lavelle:
I think it is appropriate to do $225 cap for an hourly rate for arbitrators, along with additional regulations governing the structure and the way these arbitrations are going to be conducted, and an oversight by the Division as to fees. You cannot really limit the total number for the arbitration fees because each arbitration is going to be different. The costs will be different based upon the complexity of the issue. With respect to mediations, I believe that a flat fee cap is entirely appropriate.

Assemblyman McArthur:
Are we going to come up with a number for the flat mediation fee?

Chairman Ohrenschall:
That would be up to this subcommittee.

Assemblyman McArthur:
If we set a cap for arbitration, we should set it for mediation also.

Chairman Ohrenschall:
Setting a cap that may not exceed $500 for mediation. Does that seem reasonable?

Eleissa Lavelle:
I think that is a fair number. I also think that is consistent with what the Supreme Court has authorized for its mediation program; so I think there is precedent for that. I also believe that if you do cap it at $500, you will be more likely to be able to accommodate the money that has been set aside for this purpose so that it will not have to come out of the parties' pockets.

Chairman Ohrenschall:
As I read through the bill, there are different provisions for someone who does not show up and participate having to pay all the fees. If both sides participate, then do both sides divide the fee for the mediation, after the available funds have been exhausted?

Eleissa Lavelle:
That is the way it is normally handled, unless through the mediation settlement, occasionally, as a way of settling the case, one side will offer to pay the other side's fees. That can be flexible, but under normal situations, the costs would be split.

Chairman Ohrenschall:
That is in conceptual amendment number three to change section 1, subsection 5, of the bill to state that the parties shall evenly split the costs of mediation should there be a charge. That seems like a good clarification to me.

Assemblyman McArthur:
It looks like we covered number three, so I would be in favor of conceptual amendments one, two, and three.

Chairman Ohrenschall:
You are in favor of conceptual amendments one, two, and three proposed by Senator Copening, including in conceptual amendment one, a direction to the Administrator to promulgate regulations establishing a flat fee for mediation at no more than $500 total? Mr. Carrillo, are you all right with the additional cap on mediation fees?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
I still have some reservations about the $225 versus the $1,000 to cap, although it seems that Ms. Lavelle has expressed the need for this. There was an issue brought up about class action suits and not requiring them to go to mediation. How would this bill affect a potential class action?

Eleissa Lavelle:
Typically, these cases are not heard as a class action, but they can affect a group of people. You may have factions in an association. That is certainly something that happens and is the thorniest of problems to deal with. They are not typically characterized as class actions, and are not certified. I do not see any reason why those types of disputes would not go to mediation. In fact, it seems that those types of disputes are exactly why mediation should be effectuated.

Chairman Ohrenschall:
If they were not happy with the mediation, they could then file a class action, or would they have to go to arbitration under this bill?

Eleissa Lavelle:
If the mediation did not settle, and if they could not reach an accord and resolve their disputes, the mediator would make the recommendation that the case goes to the Division for investigation and go before the Commission. For example, one group of homeowners believes that the board has acted inappropriately and has violated NRS Chapter 116. There may be 50 people in a community who are aggrieved about this. If they cannot reach an agreement, it may go to the Division for investigation and go through that process. That is already in place. If it needs to go to arbitration, the mediator would send it to arbitration instead. The mediator would have the understanding of what the dispute is and be able to direct it in one direction or the other.

Chairman Ohrenschall:
Under S.B. 254 (R1), the mediator determines whether it should go to arbitration or to the Division. There is no opt out for either party, correct?

Eleissa Lavelle:
The mediator makes the recommendation to go either one way or the other. Ultimately, if the parties still do not get satisfaction, if the arbitrator gets it wrong, or they feel the Commission's decision is inappropriate, they can then go to court as an ultimate way of getting another bite at the apple. Presumably, if the mediator sent something to arbitration and the arbitrator felt that it should not be with him, he is not prevented from kicking it back. Similarly, if the Division gets the case, it can also refer it to arbitration.

Chairman Ohrenschall:
If one of the parties in mediation did not want to go to arbitration, would there be anything else he or she could do?

Eleissa Lavelle:
The mediator would recommend where the dispute would be heard because the mediator would have a greater insight as to what these disputes are. Typically, the way the statute exists now, the party files a complaint and the Division makes the decision as to whether it will go to arbitration or to the intervention process. It is somewhat the same. The party can file, but if the Division does not believe it is being conducted where the party wants it to be conducted, the Division can move it to the other process.

Chairman Ohrenschall:
So one of the parties would not have to go the arbitration route if he or she had misgivings about arbitration. We have heard Mr. Friedrich talk about the experiences he has had where the fees are very exorbitant. For clarification, under S.B. 254 (R1), if one of the parties had a fear of arbitration, he or she could choose to go an alternative route. Is that correct?

Eleissa Lavelle:
No, that is not quite accurate. The ultimate objective is to have the dispute decided. The question is who is going to decide it? What this statute does is establish jurisdiction over the dispute, much in the same way as the Nevada statutes establish jurisdiction of justice courts, district courts, and the Supreme Court. This statute establishes jurisdiction between the arbitration process and the intervention process based upon the nature of the dispute. It has to do with how the case is going to be decided, based upon what is being requested to be decided. It is almost a jurisdictional type of allocation.

Gail Anderson, Administrator, Real Estate Division, Department of Business and Industry:
I would like to clarify the jurisdiction. The Real Estate Division investigative compliance arm only has jurisdiction, and the Commission over violations of the law. If someone's dispute does not concern a violation of the law, it is not an option. The Real Estate Division compliance section can look at it and make sure, but if it is a governing documents dispute, the Real Estate Division and the Commission will not be able to deal with it, as there is no jurisdiction there. The only option then is arbitration, if a ruling is required. The other dimension here is if someone wants to sue civilly, he or she has to go through arbitration or mediation under NRS Chapter 38. If the ultimate goal is some kind of civil litigation, he or she will have to go to arbitration or mediation. While there is some discretion, it really is a jurisdictional question of who can deal with what

the substance of the problem is. Sometimes there is a combination with some potential violations of the law that the Real Estate Division can deal with, but cannot touch the governing document side of it. Jurisdiction is the bottom line and the Division would be involved in determining and closing a case.

Chairman Ohrenschall:
Currently, no one is forced into arbitration; it is a choice, correct?

Gail Anderson:
That is correct; no one is forced into it, but the party is told that if there is not a violation of law, the Real Estate Division does not have jurisdiction. The other option is to go through arbitration or mediation.

Chairman Ohrenschall:
Eventually, even after arbitration, someone could get to court if he or she wanted to, but he or she would first have to go through the Division, then mediation and arbitration, or am I misunderstanding.

Gail Anderson:
If someone's ultimate goal is to go to court, he or she will do the filing of affidavit, go through mediation, and if not resolve in mediation, then must file for arbitration, administered by the Real Estate Division to get to court.

Chairman Ohrenschall:
Thank you. Any questions? [There were none.]

Eleissa Lavelle:
I was reminded of another issue regarding setting the cap on mediation fees. While a $500 cap is appropriate in most cases, I want to ensure that parties could opt out of the cap if for some reason the matter were more complex and required more time. For example, if there is a complex mediation, the parties may choose to go forward and continue to mediate beyond what is normally expected.

Chairman Ohrenschall:
Would you want that same opt out opportunity on the arbitration cap?

Eleissa Lavelle:
I think if the parties wanted to select an arbitrator that charged at a higher rate, and that arbitrator was acceptable to the Division, if both parties agree to the rate, they should be allowed to select that arbitrator. I would suggest the parties be given the right to make their own decision if it is a greater amount.

Chairman Ohrenschall:
This would be at their own expense, if they chose to waive the cap, correct?

Eleissa Lavelle:
Correct. Either both parties agree, or if one party agrees to pick up the difference, that party should be given the opportunity to do so.

Chairman Ohrenschall:
Thank you. Any questions?

Assemblyman McArthur:
Do we really need to add that into statute? They can do that on their own and pay it out of their own pocket.

Chairman Ohrenschall:
I think we might if we are directing the Administrator of the Real Estate Division to establish a cap for mediators and arbitrators.

Assemblyman McArthur:
That is a cap that is put on the mediators and arbitrators. After that, it is the decision of the parties.

Chairman Ohrenschall:
We may need to check with Legal about that. One concern that was expressed to me last night in an email was that if someone gets behind in paying these mediation or arbitration fees, it could end up as a lien on his property that could be foreclosed upon. Is that a valid concern?

Eleissa Lavelle:
Normally, the declarations will include a provision for an award of attorney's fees to the prevailing party. Attorney's fees and court costs can be awarded by the arbitrator against one side in an arbitration. That becomes part of the arbitration award. It is not a fine; it is a separate issue and I do not know that there is anything in this statute that makes those attorney's fees lienable, except to the extent that there is a judgment ultimately entered on that award. So attorney's fees and arbitrator's fees alone are not a lienable assessment for which a nonjudicial foreclosure can take place. The point of the arbitration awards is that, for example, someone has not landscaped his or her property. The arbitrator may say the association has the right, if not fixed within 30 days, to make repairs to the landscaping at $1,000. That is reduced to a judgment through the district court or the justice court depending on jurisdiction. Now there is a judgment against the individual that is recorded against the property. If the person does not pay the money and any attorney's fees and costs, yes,

through the normal judgment process, he or she could ultimately execute for that. That is no different than any other judgment in court. This arbitration process does not change that. If the parties went directly to court to get that enforced, the right would be the same.

Michael Buckley:
I agree with Ms. Lavelle. Whether or not the association could foreclose for these fees goes to the section we were discussing before, which is NRS 116.3116. That states that the association can have a lien for fines, construction penalties, and assessments. I think that this is not a fine, it is not a construction penalty, and it is not an annual assessment. I suspect that you could make an argument that the association might be able to make a special assessment against someone based on the language in the covenants, conditions, and restrictions (CCRs), but I do not think it is clear one way or the other. This bill does not address that. It goes back to the collection issue in NRS 116.3116. My own preference is that the way these should be enforced would be through the normal judgment process unless, for example, the arbitration award determines that what the person did violated the CCRs, and therefore fits under the normal basis to make a special assessment. There is a provision that says that if an owner ran into the guard gate, it must be fixed. The owner says I did not do it. If you caused the damage to the association, you should be liable as a special assessment. There is a fine line, but this bill does not address that issue.

Chairman Ohrenschall:
Would either of you be averse to some language in the bill that would clarify that arbitrator's fees and mediator's fees could never be considered assessments for foreclosure purposes?

Eleissa Lavelle:
I do not have a problem with saying they are not lienable in the sense that they would be subject to a nonjudicial foreclosure. To the extent that they would be included in a judgment issued by a court, they would be subject to a judicial foreclosure, which carries with it a right of redemption. The assessments in NRS Chapter 116 are nonjudicial. They happen without any right of redemption. I think there needs to be a mechanism for the association to collect these fees. This is money that everybody in the community will have to pay because one person has done something that has been found to be inappropriate.

Chairman Ohrenschall:
So we need some clarifying language saying that the arbitrator's fees and mediator's fees are not lienable to the extent that it is a nonjudicial foreclosure.

I agree, they should be collectable; I just do not want them to be considered part of the arrears for foreclosure.

Eleissa Lavelle:
I agree with that.

Assemblyman McArthur:
I am not comfortable with that. It is muddying the waters and I am not sure it belongs in this particular bill. We have problems whether it is judicial or nonjudicial.

Chairman Ohrenschall:
I think we are trying to clarify this, not muddy the waters. We are trying to say that these fees for mediators and arbitrators would never be one of those categories under NRS Chapter 116 where the HOA is allowed to pursue foreclosure, which are arrears assessments, and the two exceptions for fines or penalties having to do with construction penalties, and with the health hazard penalty. This would clarify that these fees are definitely not something for which an HOA can foreclose on your home.

Assemblyman McArthur:
Are you saying that the addition of these fees may put them in foreclosure because they cannot pay for them?

Chairman Ohrenschall:
I want to clarify that the addition of these fees would not be part of that nonjudicial foreclosure provided for under NRS Chapter 116. The mediator and arbitrator could still go to court and get a judgment, and potentially put a lien on the property.

Eleissa Lavelle:
Anytime you have a judgment against an individual, regardless of whether it is a breach of contract, hit someone in the face, or whatever, if you get a judgment in court, you can record that judgment and it becomes a lien on all properties. That is standard Nevada law and it has to do with every single kind of judgment you can get. This would fall into that category. If an association or a homeowner were to get a judgment against the adverse party and record it, it becomes a lien against that party's property. Because it is a lien, that judgment can be executed on. There are homestead exemptions that apply to this kind of judgment. So the likelihood of foreclosing a judgment lien based upon a violation of someone's CCRs diminishes because it is a judgment lien. This is a significant protection to homeowners but may still provide a way for an association to be paid. For example, if the home sells, it will be paid through

escrow. It is a middle ground and is a way of providing a mechanism by which the prevailing party can get paid upon the sale of a property, but it does not allow for an immediate nonjudicial foreclosure.

Michael Buckley:
I think these are not really clear issues, and as Ms. Lavelle has pointed out, this is very complex. For example, NRS 116.310312, which deals with an abandoned or vacated unit and the association has the ability to clean up a unit, there could be charges. I do not know whether that would be subject to an arbitration if someone objected, but there was an express finding of that by the Legislature last session that these costs should be enforceable as a lien. In fact, it is given a super priority lien. I think we need to be very careful in how to frame the language. We forget sometimes how complex NRS Chapter 116 is, and if you tweak something one place, it may end up making something else not work.

Assemblyman McArthur:
That is my concern. I am not sure this is necessary because we could cause other problems.

Chairman Ohrenschall:
Mr. Buckley, do you think that adding the language we discussed earlier would cause problems elsewhere in NRS Chapter 116?

Michael Buckley:
I think it can be done if it is carefully worded. The basic idea that you are suggesting is that the attorney's fees and costs, and the arbitrator's fees and costs would not be part of the lien under NRS 116.3116 as long as it was clear that it was unless expressly provided for elsewhere. Also, let us go into this again, because the arbitration deals with the amount of the assessment. If someone is not paying his or her assessment, I do not know whether the association would arbitrate an assessment but certainly if the arbitration involves the collection of an assessment, the association is entitled to collect its fees. As mentioned, the assessments are the lifeblood of the association, and it is clear that the association has the right to collect. There is really no defense to not paying your assessments. If the association incurs costs in collecting assessments, they should be included. In concept, it is the subject matter of the arbitration that makes it complicated. If the subject matter deals with something that gives the association the ability to lien, then it may not work.

Assemblyman McArthur:
My main concern is that it would have to be drafted very carefully. If you are comfortable that this can be drafted, I do not have a real problem.

Chairman Ohrenschall:
I am all right with it. Mr. Carrillo, are you okay with the clarification that fees from mediation and arbitration could never be part of a nonjudicial foreclosure provided for in NRS Chapter 116?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
Thank you. Next we will review Senator Copening's amendment number four, which is to include in section 5 the requirement that penalties be imposed for the responder of the claim filing in bad faith, false, fraudulent, or frivolous response to a claim. I believe that is from Mr. Stebbins' amendment. He was concerned that section 5 of the bill would not work both ways.

Michael Buckley:
On page 11, line 9, you see that the original intent was that if you file a claim or a response, a person is certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, and it applies to not just the person who files the claim, but the respondent also.

Chairman Ohrenschall:
Thank you. Any questions? [There were none.]

Michael Buckley:
On page 19 is the same issue. Line 28 refers to a claim or response; on line 40 it just refers to the claim. It should also refer to the claim or response.

Assemblyman McArthur:
So for amendment number four we will be adding the word "respondent" or "response."

Chairman Ohrenschall:
Yes, this is just a cleanup. Mr. Carrillo, are you okay with conceptual amendment number four?

Assemblyman Carrillo:
Yes, I am good with that.

Chairman Ohrenschall:
Conceptual amendment number five was proposed by Mr. Segerblom, which we processed yesterday, as a mock-up.

Dave Ziegler:
I checked that mock-up against this bill, and I did not see any overlap between that mock-up and this bill.

Chairman Ohrenschall:
So this is a new amendment?

Dave Ziegler:
No. Amendment number five in Senator Copening's document that states she is in favor of the friendly amendment, number 6818, that applies to Senate Bill 204 (R1). I checked it and I do not see how it overlaps with this bill.

Chairman Ohrenschall:
Okay, and we already accepted that amendment, so we do not need it here.

Conceptual amendment number 6 presented by Senator Copening states, "Add language in Sec. 1 that states that if a party fails to participate in the mediation, that party shall be responsible for any and all costs of that mediation." I believe this will hold parties accountable for resolving their differences.

Michael Buckley:
I would propose that I think this is a good amendment and we need to incorporate the idea of good faith. I think that is in the foreclosure statutes. You would not want someone going through the motions; they need to participate in good faith.

Chairman Ohrenschall:
So we will change that to read "fails to participate in good faith in the mediation . . . ." That is quite a departure from what Mr. Stebbins had proposed.

Michael Buckley:
I do not think so. When people say "participate," we think they will participate in the process, and as lawyers we think how will this work in practice. The practice might be that you could read that literally by saying I will go, but I am not going to get involved. I think the idea of participate, good faith is inherent with what Mr. Stebbins suggested.

Chairman Ohrenschall:
Mr. McArthur and Mr. Carrillo, are you both okay with this amendment, including the addition of the words "good faith" as proposed by Mr. Buckley?

Assemblyman McArthur:
Yes.

Assemblyman Carrillo:
I am good.

Chairman Ohrenschall:
Conceptual amendment number seven reads, "Add language in Sec. 10 that if the person whom a copy of the claim was served refuses or fails to file a written response with the division not later than 30 days after the date of service, the allegations of the claim are deemed substantiated." My only concern is what if there is a bona fide reason that the person could not participate? Should we put in an exception? I would hate for all the allegations to be considered true against him or her if there was a bona fide excuse.

Assemblyman Carrillo:
I think you need to ensure that things are in order if you are going to be away for a period of time. Putting your head in the sand does not resolve anything. If you are going to be away, you need to make sure your business is taken care of before you leave. Obviously, we cannot know whether we will be in the hospital for six months, but a power of attorney would assist getting around this issue. In fact, if you are in the service, you have to give a power of attorney; so that cannot be used as an excuse. You need to ensure your house is in order.

Chairman Ohrenschall:
In an ideal universe that is how it would be. But there could be unforeseen problems.

Assemblyman McArthur:
I agree with Mr. Carrillo. Unless there is a medical emergency that extended the time period, I think in most of the other cases you should be able to take care of your own situation.

Michael Buckley:
I think this could be solved with the word "may" be deemed substantiated. We see this in the Commission, in a complaint where someone did not respond, and you see it in the judicial system. You do take the default, but it is not an automatic that you win. The person would need to prove that the respondent was actually served. I think you would leave that up to the arbitrator. I think that is a customary legal process.

Eleissa Lavelle:
I think something perhaps as a hybrid so that there may be some requirement that the case be proved perhaps by affidavit so there does not have to be a full-blown hearing if the party does not show up, but it could be an abbreviated hearing to keep the costs low.

Chairman Ohrenschall:
That would be in addition to this amendment?

Eleissa Lavelle:
Actually I think the word "may" does it, but I think you may want to say that it is not an absolute that the party still needs to establish by affidavit or some abbreviated mechanism that the arbitrator designates to establish the service has been proper and that the claim is appropriate.

Chairman Ohrenschall:
That gives me a lot more comfort. Mr. McArthur and Mr. Carrillo, would you be all right with amendment number seven if we changed it from "the allegations of the claim are deemed substantiated" to "the allegations of the claim may be deemed substantiated" and include proof of service and perhaps affidavits that prove the allegations?

Assemblyman McArthur:
I would be okay if we can come up with a good conceptual amendment along those lines.

Assemblyman Carrillo:
I am okay.

Chairman Ohrenschall:
Thank you.

Michael Joe, representing Legal Aid Center of Southern Nevada:
I want to comment about what the foreclosure mediation program is doing in terms of people who have a reason for not attending a mediation. The Supreme Court explained to me that they have ruled a lot about the phrase "good cause." Under the mediation program they allow a homeowner or a lender to say they cannot attend for good cause. This has to be a request in writing. The foreclosure mediation program has it addressed specifically by rule. We do see it come up quite often.

Chairman Ohrenschall:
Do you know what the foreclosure mediation program charges to conduct a mediation?

Michael Joe:
They charge a flat fee of $400. In terms of what that works out to per hour, it varies. The program allows for four hours. Some mediations take less and some will go longer. For the $400, the mediator guarantees four hours of mediation plus the mediator does the scheduling work and documentation work up-front. The mediator easily puts in the four hours of work. They have 215 mediators and most of them are happy to do this work. I am okay with a cap on fees, as well.

Chairman Ohrenschall:
Thank you. Regarding the proposed clarifying language that we want to add to ensure that mediator's fees do not become something foreclosable under NRS Chapter 116, do you have an opinion on that?

Michael Joe:
I specialize in doing foreclosures and I deal with people with homeowners' associations (HOAs). We believe that the foreclosure under that statute should only be limited to those situations where it is a violation of paying the association dues and assessments. We do believe that an association plans its budget on those and therefore should be able to collect on it. The most serious remedy we give them of foreclosure should be limited to that and should not be applied to other things. If there is a foreclosure for some other reason, that is okay. It could be a judicial foreclosure, which I have never seen. You cannot foreclose nonjudicially in Nevada; you have to foreclose judicially; so as a practical matter, they just do not bother foreclosing.

Chairman Ohrenschall:
I received an email, and I am not sure this would be an amendment the Subcommittee would consider. What if during the mediation, the fines froze until the mediator made his decision? Is that something that you think would be reasonable?

Michael Joe:
I am sorry, I do not understand.

Chairman Ohrenschall:
After the parties enter the mediation, what if the fines, fees, and any potential foreclosure were frozen until the mediator made the decision?

Michael Joe:
I think there are some real issues of due process for the homeowner. Can you foreclose on someone while he is still appealing something? I think there should be a stay on foreclosure and also maybe on some of the fees. There are different situations where it might be okay, but in general, if you have the mediator's intent to be quick, I think you can resolve an issue, and during that period, through the pendency of that hearing, maybe it should be stayed. In the mediation program, we essentially stay the foreclosure until the mediation is completed.

Chairman Ohrenschall:
So it is possible that this mediation program for problems with HOAs could take a lot of lessons from how the foreclosure mediation program is working under the auspices of the Nevada Supreme Court. It seems that it is working well in terms of how it administers the program.

Michael Joe:
The foreclosure mediation program has had a lot of effort put into it, and therefore, it is a pretty decent program. It gives homeowners one way to appeal and it is appealed pretty quickly and efficiently. If everybody does their jobs, the foreclosure mediation program runs within that 90- to 111-day period that it takes to foreclose. In addition, I know the neighborhood justice center does mediations on a routine basis. I know there are a lot of trained mediators in Clark County and across the state. There is a pool of mediators who are available to do this, and you could craft a program that works pretty well. Currently, there is a $50 fee for the notice of default that goes to fund the program and the administration of it. I am not sure whether that would be available for this program.

Michael Buckley:
There is a difference between assessments and other fees. I am not sure there is anything the association can do if it is in mediation as far as collecting the penalties or fines. It is different as far as assessments go. If someone is not paying his or her assessments, I do not think the assessments should stop or that the association should be stopped from enforcing its liens for the assessments. Those assessments are the lifeblood of the association. They are based on a budget and there are not too many arguments you can make about not paying your assessment. There are lots of arguments as far as fines or interpretation of the documents or construction penalties, et cetera. I would distinguish between those.

Chairman Ohrenschall:
You would be all right with freezing any move toward collections, fines, or potential foreclosure if it dealt with construction penalties as long as it did not deal with arrears assessments. Is that correct?

Michael Buckley:
I think I would be okay with that.

Eleissa Lavelle:
When you see these arbitrations or intervention matters, if someone has violated the governing documents, for example, he or she has not landscaped his or her property, or he or she left his garbage cans out, or there may be some other dispute that has absolutely nothing to do with construction penalties or with the payment of the assessments. I personally think it is inappropriate to penalize the association for enforcing a rule or regulation that has nothing to do with those assessments and then not allowing them to collect the assessments. If there is a homeowner who is absolutely violating rules and regulations on something that has nothing to do with payment of assessments or construction penalties, there is no reason that you stop the payment of assessments because he or she has not taken his or her garbage cans in or left playground equipment out. One has nothing to do with the other.

Chairman Ohrenschall:
Perhaps I am not expressing myself clearly. I was thinking that only fines, collection costs, or interest should be suspended during the pendency of any mediation or arbitration, because that could be part of the arbitrator's award. I was not referring to the assessments.

Eleissa Lavelle:
I wanted to ensure that was the case because I was hearing different things and I wanted to clear it up. If a homeowner is being assessed $10 per month for a violation and the arbitration process goes for 4 months, does that mean that during the time there will be no retroactive assessment of those fines? Do they stop completely, or simply stop the collection process during that time?

Chairman Ohrenschall:
The way I was envisioning this is that any action by a collection agency would be stopped until resolution. I also believe that any interest accrual would stop.

Michael Buckley:
Under NRS there was no interest on fines by statute, but that was changed in 2009. I believe that the fine is not foreclosable, except for the two exceptions you mentioned. I am not aware of collection agencies enforcing fines.

Eleissa Lavelle:
The distinction needs to be if we are talking about the accrual of the fine as opposed to the collection of the fine.

Chairman Ohrenschall:
What would be the adverse impact to having both frozen until the mediator or arbitrator makes his decision?

Eleissa Lavelle:
I have no problem with freezing them both, provided that the arbitrator is entitled to do a retroactive award of those accrued fines if it is determined that the homeowner has violated the governing documents.

Chairman Ohrenschall:
Do you feel that would need to be spelled out in statute?

Eleissa Lavelle:
I think it is happening that way now. I would not want to see the provision be authored in such a way that the association's ability to retroactively collect those accrued fines be diminished if in fact it is determined that the homeowner has violated.

Chairman Ohrenschall:
In those two exceptions on fines where someone could lose his or her home for construction penalties or for a health hazard issue, assuming that got resolved, it might prevent a foreclosure if the mediator or arbitrator is able to reach a successful agreement.

Eleissa Lavelle:
That would be absolutely appropriate.

Assemblyman McArthur:
I am not comfortable with this at all. This new language for this new amendment, we are going to have to add too much technical wording for a conceptual amendment.

Chairman Ohrenschall:
I think our Legal division is pretty topnotch.

Assemblyman McArthur:
I understand that, but we have a lot of topnotch stuff we are adding to this bill already.

Chairman Ohrenschall:
We do want it to be right.

Assemblyman McArthur:
Well, if you want to bring it back to another work session later this week so we can see those conceptual amendments.

Chairman Ohrenschall:
We could always propose the amendment to the full Committee. I could make my recommendation and you can certainly express your opinions against it. Mr. Carrillo, what are your feelings?

Assemblyman Carrillo:
I concur with that, Chairman.

Chairman Ohrenschall:
Mr. Joe, is there anything else here in S.B. 254 (R1) that causes you any concern for your clients?

Michael Joe:
I see arbitration clauses all the time, and for those of us who went to law school, it seemed like they were good things. I have no problem with arbitration as long as it is reined in and accomplishes what it is supposed to. I think arbitration was intended to be an alternative to the judicial process; it is supposed to be cheaper, and to the extent that it does not turn out to be easier, or cheaper, or faster, what is the point? If you are saying that you want to have an arbitration and mediation process that has reasonable costs, I am okay with that. Sometimes arbitration can run amuck, then they ought to be in district court and they should not be barred from doing that. If the reason an arbitrator wants to charge $10,000 to $20,000 is because it is so complicated, then maybe it should be in district court. Having a cap on it will drive those cases that should be in the district court and this will give them an opportunity to get there. I am in favor of a cap for both the arbitration and mediation.

Chairman Ohrenschall:
I suppose as a compromise, we could go ahead with the $500 flat fee for mediation and with the $225-per-hour fee that Senator Copening recommended, maybe have a maximum of $2,500, and give the party the option to go to district court if the fees will be higher than that.

Michael Buckley:
The Real Estate Division has a group of experienced arbitrators who know NRS Chapter 116. As we all know, NRS Chapter 116 is complex, it is

complicated, and, of course, CCRs are usually 80 pages long. Even in A.B. 448, while there is a $1,000 cap, it says "unless for good cause." I am not sure you can legislatively solve this by giving a cap. You will always need to have an out. If we add "for good cause," that will be the next issue to discuss; what is "good cause"? Ms. Lavelle mentioned earlier to allow the Administrator or the Commission to have the ability to review the fees of an arbitration. She mentioned that the State Bar has the fee dispute committee, where they can see whether the fees are reasonable.

Chairman Ohrenschall:
Thank you. You are correct. Assembly Bill 448 does have that safety hatch of a good cause showing allowing higher fees. We could put that good cause in this bill also, or we could go with Senator Copening's proposal of $225 an hour with no absolute cap. These are complex issues that could require a lot of time. I do think Mr. Joe brought up a good point that when it gets over $1,000, should the people go to court?

Eleissa Lavelle:
I would like to go back to the beginning and why arbitration is important. It works. Are there problems? Yes, sometimes there are problems. I think that Senator Copening's suggestion addresses those issues with the additional suggestions we have been talking about today. My concern is that, because these issues are complex, there will be cases not being heard by arbitrators who are qualified to do the work and are spending the time to do the work. This program has been enormously successful. While I recognize that there are many people who are in very serious financial straights, understand that there are communities with all kinds of people, with all kinds of property values, with all kinds of issues. By saying that there will be an absolute dollar cap on these arbitrations, effectively what you are saying is that these arbitrations are not going to be doing what they were initially designed to do. I gave a seminar on NRS Chapter 116 with Mr. Buckley in Reno. It was interesting to hear from the people up there how successful this program has been and how very few of these cases actually get to district court because people are satisfied that they are getting an adequate opportunity to be heard and getting fair and reasonable arbitration awards. They may not always win, but if they feel like they have been heard and understood and there is a good reason for the decision, they are not going to go anywhere else.

Michael Joe:
The question of whether it is working or not is depending on which side you are looking at it from. If you are saying that the purpose is to keep it out of district court, I am not sure that it is working for homeowners and association members. Maybe it is working for the Real Estate Division, maybe it is working

for the district court, maybe it is working for attorneys and collection companies, but I do not think it is working for homeowners. I think that it is not fair to say that it is working if you do not look at all parties involved. The question is who is it that you are representing and who is it that you are trying to protect in this. I think there are plenty of protections for the collection companies and the management companies and the associations, but there are very few protections for the homeowners. This arbitration and mediation process and court litigation is a process to help the homeowner protect himself. I wonder whether it is not slanted to protect the other parties: the management companies, the associations, and the attorneys.

Chairman Ohrenschall:
Thank you, Mr. Joe. We did adopt that $1,000, and it is not an absolute cap. It does have exceptions for good cause. When higher fees are needed, they could be granted. We thought it was good policy six weeks ago in A.B. 448, and I am not really sure we should backtrack from it. It was a unanimous vote when we adopted that $1,000 cap to match the Supreme Court Rule 24, but it also had the exception for circumstances that required it. I would propose that we accept all the amendments with the changes proposed by Senator Copening, with the changes we recommended, which for conceptual amendment number one included instructing the Administrator of the Division of Real Estate to adopt a flat fee cap for mediation fees of $500. However, I think we should stick with the cap we adopted in A.B. 448, which is not an absolute cap. I am sure when there is a complex case involving a lot of money, an exception will be granted for the Administrator to charge an hourly rate going over the cap of $1,000. We all agreed on amendments two and three. Regarding amendments four, five, and six, we were all fine. Actually we decided not to adopt number five because it is in S.B. 204 (R1). Conceptual amendment number seven, we will change the word "are" to "may be" and "proof of service of affidavits proving the claim" should be there to substantiate the other party was served if the other party does not show up. Mr. Joe has a good potential amendment to the conceptual amendment coming from the mediation program that our Supreme Court administers that good cause be required if the person cannot show up for the mediation. Perhaps we could model that on the rule the Supreme Court has adopted for the foreclosure mediation program. We also have Mr. Stebbins' amendment which has been incorporated into Senator Copening's amendments.

Assemblyman McArthur:
If we are going to take a vote, I am not going to go with the recommendation at this point until I see the conceptual amendments.

Chairman Ohrenschall:
Do you mean a mock-up?

Assemblyman McArthur:
Yes, I want to see those mock-ups of conceptual amendments.

Assemblyman Carrillo:
I agree with Mr. McArthur's statement.

Chairman Ohrenschall:
We have gone over Senator Copening's amendments and we agree on most of the language. There is a little debate on conceptual amendment one on whether we should adopt the arbitrator fee cap we had adopted in A.B. 448. Mr. McArthur brought up some cleanup in the original bill he is interested in. I think we should process all the recommendations that we all agree on that will be in the mock-up we present to the full Committee, which basically are conceptual amendments two through seven, without amendment five and with the additions proposed in conceptual amendment number seven. The part we disagree on is in conceptual amendment number one. We can propose to the full Committee on Friday. Does either of you have any appetite for Mr. Friedrich's amendment?

Assemblyman Carrillo:
I do not.

Chairman Ohrenschall:
Mr. McArthur is shaking his head no.

Michael Buckley:
For clarification, I did not hear that the Subcommittee had an issue with the mediation set fee, only the arbitration fees, correct?

Chairman Ohrenschall:
That is correct. We would go ahead with recommending that the Administrator of the Real Estate Division propose a regulation that has a maximum total cost of $500 flat fee for mediation. We are in dispute about whether to keep the arbitrator cap we had adopted in A.B. 448, which is $1,000 with exceptions, or to go ahead with Senator Copening's suggestion. Is there anything else that I am missing? Are we all in favor of that recommendation?

There is another point we do not agree on, which is those fines for construction penalties and the health hazard. These are the fines that are not for assessments that can lead to foreclosure in a common-interest community.

Should they be put on hold during the pendency of the mediation or the arbitration? I feel they should, if they are the issue of the arbitration or mediation. Mr. McArthur has some concerns with that. Maybe we can have an option A and an option B in the mock-up on that issue when we present to the full Committee.

Assemblyman McArthur:
There are some other cleanup things we want to get in there also.

Chairman Ohrenschall:
One is dealing with the geographical area of the Ombudsman.

Assemblyman McArthur:
We have noted it.

Chairman Ohrenschall:
Are we all on board with the recommendation for the full Committee that we agree on most of these recommendations, and there are two points where we are presenting an option A and option B? We are all unanimous on this recommendation and hopefully we will have a mock-up by Friday to present to the full Committee. Could I get a motion?

ASSEMBLYMAN MCARTHUR RECOMMENDED AMEND AND DO PASS SENATE BILL 254 (1st REPRINT).

ASSEMBLYMAN CARRILLO SECONDED THE RECOMMENDATION.

THE RECOMMENDATION PASSED UNANIMOUSLY.

We will forward this recommendation to the full Committee. There will be a few decisions that will need to be made on Friday during the work session. I appreciate everyone being here. Meeting is adjourned [at 12:20 p.m.].

RESPECTFULLY SUBMITTED:

_____
Nancy Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman James Ohrenschall, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 17, 2011 **Time of Meeting: 4:58 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 204 (R1)	C	Dave Ziegler	Work Session Document
S.B. 204 (R1)	D	Senator Copening	Proposed Amendment
S.B. 254 (R1)	E	Dave Ziegler	Work Session Document

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Seventh Session
May 17, 2013

The Committee on Judiciary was called to order by Chairman Jason Frierson at 8:48 a.m. on Friday, May 17, 2013, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Jason Frierson, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Richard Carrillo
Assemblywoman Lesley E. Cohen
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Wesley Duncan
Assemblywoman Michele Fiore
Assemblyman Ira Hansen
Assemblyman Andrew Martin
Assemblywoman Ellen B. Spiegel
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Senator Tick Segerblom, Clark County Senatorial District No. 3
Senator Barbara K. Cegavske, Clark County Senatorial District No. 8
Senator Mark Hutchison, Clark County Senatorial District No. 6
Senator Mark A. Manendo, Clark County Senatorial District No. 21

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Dianne Harvey, Committee Secretary
Colter Thomas, Committee Assistant
Macy Young, Committee Assistant

OTHERS PRESENT:

Vanessa Spinazola, representing the American Civil Liberties Union of Nevada
Michael Patterson, representing the Lutheran Advocacy Ministry in Nevada; and the Episcopal Diocese of Nevada
Carey Stewart, Director, Department of Juvenile Services, Washoe County
Jennifer Batchelder, representing the Nevada Women's Lobby
Regan Comis, representing M&R Strategic Services
Rebecca Gasca, representing the Campaign for Youth Justice
Allan Smith, representing the Religious Alliance in Nevada
E.K. McDaniel, Deputy Director of Operations, Nevada Department of Corrections
Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriff's Office; Nevada Sheriffs' and Chiefs' Association
Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Robert Roshak, representing Nevada Sheriffs' and Chiefs' Association
Jason Guinasso, Private Citizen, Reno, Nevada
Francisco Nahoe, Private Citizen, Reno, Nevada
Gwen Linde, Private Citizen, Sparks, Nevada
Rocìo Grady, Private Citizen, Carson City, Nevada
Mark Foxwell, representing Knights of Columbus, Nevada State Council
Lynn Chapman, representing Nevada Families for Freedom
John Wagner, representing the Independent American Party of Nevada
Juanita Cox, representing Citizens in Action
Nicholas Frey, Private Citizen, Reno, Nevada

Barbara Jones, Private Citizen, Fallon, Nevada
Tim O'Callaghan, representing the Nevada Catholic Conference
Allen Lichtenstein, representing the American Civil Liberties Union of Nevada
Nechole Garcia, representing the City of Henderson
John T. Jones, Jr., representing Clark County Intergovernmental Relations
Elisa P. Cafferata, President & CEO, Nevada Advocates for Planned Parenthood Affiliates
Stacey Shinn, representing the Progressive Leadership Alliance of Nevada; and the National Association of Social Workers, Nevada Chapter
Edward Wynder, Private Citizen, Las Vegas, Nevada
Frank Cervantes, Division Director, Department of Juvenile Services, Washoe County
Alan Byers, Acting Administrator, Compliance Enforcement Division, Department of Motor Vehicles
Garrett Gordon, representing Olympia Companies

Chairman Frierson:
[Roll was called, and protocol was explained.] The Committee has a heavy agenda today, so we are going to hear the bills in order. I will open the hearing on Senate Bill 107 (1st Reprint).

Senate Bill 107 (1st Reprint): Restricts the use of solitary confinement and corrective room restriction on children in confinement. (BDR 5-519)

Senator Tick Segerblom, Clark County Senatorial District No. 3:
Senate Bill 107 (1st Reprint) is an issue which is coming to fruition around the country dealing with what we call solitary confinement, but it has many other names. It started out as a bill that was going to limit the solitary confinement in both juvenile and adult facilities in the state of Nevada. As it evolved, because of the controversy and newness of the issue, we agreed to a study of solitary confinement in the adult prison system, and then the juvenile court facilities agreed to limitations on their facilities. That is where the bill is amended to at this point. This issue is not going away, so I think it is important for all of us to start focusing on it and try to learn more about it over the years.

There is a lot of evidence that solitary confinement is psychologically devastating, particularly to youth, but also to adults (Exhibit C). If we are going to put people in that situation and we expect them to come out of jail, we have to realize that there are serious consequences. It is also much more expensive, obviously, to have three people, one per cell, as opposed to multiple-person cells. There are a lot of issues involved. It turned out to be a much bigger issue

than we could deal with in one bill, so what we have here is basically a compromise with juvenile being loaded, which they say is already currently in force, and then a study in the future. Ms. Spinazola is here to make a presentation.

Vanessa Spinazola, representing the American Civil Liberties Union of Nevada:
The American Civil Liberties Union of Nevada (ACLU) is here in strong support of S.B. 107 (R1). I submitted a letter for the record (Exhibit D), which I will briefly summarize and add a few points to it.

Why look at the issue of solitary confinement? Research shows that solitary confinement has a profound impact on the health and well-being of the incarcerated, and in particular the mentally ill. There is actually a syndrome called segregated housing unit syndrome, and some of the reactions include increased anxiety and nervousness, revenge fantasies, fears of prosecution, and lack of impulse control. These are folks who will get back out in our communities after they are released from prison. Essentially, the clinical impacts of isolation are as detrimental as physical torture can be. This is exacerbated for juveniles because of the difference in cognitive development for children. There is a moral concern. We should be concerned about the state using solitary confinement on individuals who have been deprived of their liberty, but there is also the public safety concern that I briefly mentioned, as most prisoners will return to society, particularly the youth. Studies also show that these folks are more likely to reoffend than people who have not spent time in solitary confinement because of the difficulties they have reintegrating into society.

To mention the second part of the bill, I would like to call your attention to the amendment submitted by Senator Segerblom (Exhibit E). It is basically what we are working from. He is approving all the amendments. The second half starts with section 7, on page 3 of the amendment, and has to do with a study of solitary confinement. We use the term "solitary confinement," and no one in the state of Nevada or anywhere else in the country uses it. In the adult system, we hear terms such as "protective segregation," "administrative segregation," "disciplinary detention," and "disciplinary segregation." In the juvenile system, we hear terms such as "corrective room restriction," "behavioral room confinement," and "administrative seclusion." Those are some of the terms we are working with. What all of these terms can mean in terms of solitary confinement is basically depriving incarcerated people of contact with other individuals for 22 to 24 hours per day; restricting privileges and access to reading materials, radio, and TV; constraints on visitation; and creating an inability to participate in group activities. Ironically, solitary can

sometimes mean double-cell solitary, which is spending all of that time in a cell with someone else, but being restricted from all those privileges.

Because there are so many different types of segregation and so many different inconsistent administrative regulations—and I point to a number of those in my letter on the record—we believe a study of the impacts of these different types of segregation is warranted. In the study, some of the things we focus on are suicide rates, how mentally disabled people are treated, due process issues on getting out of solitary confinement once a person has been placed in it, recidivism rates, and the cost. You will notice in the study that we like to compare folks who spend time in solitary versus those who spend time in the general population and see what those results are.

I want to note that on the record, coming out of the Senate, the Nevada Department of Corrections (NDOC) was for the study; however, I had a drafting error when I drafted the study, and I did not include "protective segregation," so you will see in the amendment that "protective segregation" is added. There was no substantive reason for it; it was simply that I was looking through 300 pages of administrative regulations and I did not see "protective segregation," and it is my fault. However, I do believe that NDOC will oppose this addition. I do not see any reason why we should study the types of segregation in Nevada without looking at all types, which would include protective. Hopefully you will accept that amendment.

Finally, the first half of the bill deals with standardizing solitary and juvenile facilities. As mentioned, the effects of solitary confinement on the juvenile mind are even more debilitating than for adults. Kids in the juvenile justice system are also more likely to suffer from mental illness. There was a study done in New York that showed that 48 to 50 percent of the kids spending time in juvenile justice facilities had diagnosed mental disabilities, so the rates go up even higher.

We worked extensively with the juvenile justice administrators on the amendments for S.B. 107 (R1), and I will not go through them line by line, but I want to point out some of the highlights.

Chairman Frierson:
Keep in mind that we are starting from scratch, so if you are intending on going through the bill as a regular presentation, it would be helpful for us to go through the provisions of the bill. You can cross-reference to proposed amendments while you do it.

Vanessa Spinazola:
Excellent. For reference, section 1 and section 2 are substantially the same. The only differences are that section 1 has to do with local and regional facilities for juveniles, and section 2 has to do with state facilities. In section 1, in the amendment (Exhibit E), we are taking out the term "solitary confinement" for the reasons I have already mentioned. No one actually uses the term. In this section, we are talking about the situations in which corrective room restriction will be used. We talk that it is for modifying the negative behavior of the child, holding the child accountable for a violation of a rule, and ensuring the safety of the child.

Section 1, subsection 2, talks about an action that results in corrective room restriction. If it is more than two hours, it must be documented by a supervisor. In section 1, subsection 3, of the amendment, we state that the safety and well-being checks must be conducted. This has to do with the child being in corrective room restriction and having someone from the facility checking and making sure they are not suffering or potentially committing suicide.

Subsection 4 addresses the fact that the child shall only be in there for the minimum time required to address the original negative behavior they were put in for.

Chairman Frierson:
In subsection 2, I think the two-hour provision is a substantive one that is going to be the subject of conversation. That section is providing that if a child is being detained for those limited reasons, the child can only be detained for up to two hours.

Vanessa Spinazola:
They could be detained for longer; however, anything longer than two hours must be documented.

Subsection 3 has to do with conducting safety and well-being checks at intervals not to exceed 10 minutes. We worked with juvenile justice administrators on this, and it does not diminish their ability. Some folks do room checks three minutes apart, others eight minutes apart, and ten minutes was something we all agreed would work with everyone's regulations.

Subsection 4 states that the child should be in corrective room restriction only for the minimum time required, and they should be returned to the general population as soon as feasibly possible. Subsection 5 deals with the child who is subjected to room restriction for more than 24 hours. This has to do with the access that I was talking about earlier. Some of the detrimental effects from

solitary come when there is not access to privileges. This is a lot of what the juvenile justice administrators do already. Some of this has to do with the Prison Rape Elimination Act of 2003.

Subsection 5, paragraph (a), notes they should get not less than one hour of out-of-room, large muscle exercise. Paragraph (b) provides access to the same meals and to medical and mental health treatment. We amended in educational services after talking with the juvenile justice administrators a bit more. Paragraph (c) is a review, which is a due-process issue of the child being in there for 24 hours. The room restriction could be continued, but it must be documented in writing at that time.

Subsection 6 of section 1 is something that we obviously talked to the juvenile justice administrators about as well, and it has to do with limiting the detention for an incident to 72 consecutive hours. Subsection 7 has to do with reporting, and this is very important to us, so we can see what is happening to kids in the juvenile justice facility. We will have to report on all the items that I have outlined above.

On page 2 of the amendment (Exhibit E), subsection 8 addresses what I said earlier about there being different terms. The juvenile justice administrators asked all the facilities what terms they use, so this is how we have defined it. "Corrective room restriction" means the confinement of a child to his or her room as a disciplinary or protective action, and we included some of the terms that are currently in the regulations.

Section 2 is actually an almost verbatim repetition of section 1, except that it is for state facilities, so all the same provisions are provided in there, and the same amendments have been provided as well.

I want to note the fiscal costs. In Mississippi, they revolutionized their use of solitary confinement. The state reduced their segregation population in one institution from 1,000 to 150 individuals, and they eventually closed the entire unit. They saved about $8 million annually by doing this, and they also reduced the prison violence about 70 percent by getting rid of their segregation units. The federal government is studying the Federal Bureau of Prisons and their use of solitary therein. Also, comprehensive immigration reform is now looking at studying the use of segregation in immigration detention facilities. This is a national effort at this time.

We encourage passage of S.B. 107 (R1) with the amendments that we really worked on with the juvenile justice administrators. Also, in relation to the

study, we would like the protective segregation to be included. I will take any questions.

Chairman Frierson:
Section 7, although it is not bolded, is new language. I want to make sure that we do not overlook the fact that section 7 refers this matter of the study to the Advisory Commission on the Administration of Justice (ACAJ).

Vanessa Spinazola:
Correct. On the Senate side, this is where we initially had solitary as applied to state prison facilities and also county jails and detention facilities, and that proved to be controversial. We agreed to change all of that to a study, so that is all new language from the original drafting of the bill, but it is what was passed out of the Senate to the Assembly side, with the exception of the one amendment to include protective segregation in the study. I can go through the study if you would like.

Chairman Frierson:
If you could briefly, because it is new language.

Vanessa Spinazola:
This will refer the study to the ACAJ, and they will look at all the different terms that are used for solitary. Among the initial things they will look at—as in section 7, subsection 1—are the procedures that are used to put people in solitary initially. Subsection 2 has to do with security threat group identification, such as gang activity. That is in there because in other states, as I have read, people may have tattoos on their body and may not be in a gang anymore, but they are being put in solitary simply because of their identification tattoo. There can also be some racial undertones involving "gang activity."

Subsection 3 has to do with notification of release and release procedures. Again, this is the due process issue about folks being put in solitary. Subsection 4 has to do with access to the things that provide folks some sort of mental stability while they are in isolation: mental health services, audio and visual media, contact with staff, health care services, substance abuse services, reentry programs, programs for veterans, educational programming, and other services available to the general population. We want to be able to look at what is provided to folks in the general population versus what is provided to those in solitary.

Chairman Frierson:
Would it be fair to say that the study is proposing to look at everything that has anything to do with putting a minor in this type of confinement?

Vanessa Spinazola:
I would hope so, yes. As background, there are several other states that are studying solitary, including New Mexico, Texas, and California. This is basically a conglomeration of what other legislatures have studied.

Assemblyman Wheeler:
You mentioned in your testimony that apparently there have been some studies that prove mental disabilities after solitary. I am wondering if there were any studies done to the same people regarding mental disabilities before they went in, or was this study just after they came out?

Vanessa Spinazola:
I believe there are some comparison studies. The study that I passed around, which is the ACLU report, "Growing Up Locked Down," has to do with juveniles, and the New York study that I mentioned talks about folks who had diagnoses going in and also when they were out. Some of the differences that we see are that their mental illnesses are actually exacerbated and, arguably, part of the reason they are put in solitary is because of the way they act out in the prison population due to their mental disability. I am not sure if that answers your question but, yes, there have been some studies. Some folks are diagnosed, and a lot of folks with mental illnesses are not diagnosed before they go in, so it is hard to say.

Assemblyman Wheeler:
You said you have a comparison rate of people who have been diagnosed mentally disabled before they go in versus coming out. You presented solitary as exacerbating, defining, or actually causing these mental disabilities, and in your statement right now, that is kind of a backup, and I am trying to figure out where we are on this. Is it or is it not causing this?

Vanessa Spinazola:
That is a good question, and there are studies that will show—I can certainly get you a list of those, and I think some are cited in my letter—that it does cause it for individuals who do not have a diagnosed mental disability going in, and also that it exacerbates for folks who had a diagnosed mental disability when they went in to solitary. That is why we are interested in the study here in Nevada, and we hope we will get some Nevada-specific statistics on it.

Assemblyman Thompson:
I have a question about the Advisory Commission on the Administration of Justice. I would like to know more about their makeup and, if we do this study, how Nevada-specific is the study going to be? I think that the most counterproductive thing in the world is to do a study that does not relate

specifically to the area of concern. I would like them to focus on the data in Nevada and the issues in Nevada. It has to be very specific to our community, because a study can be done and it is not one size fits all. If it is going to be something that we are going to use as an effective tool to continue to build on our system, it has to truly drill down and work specifically with our community.

Chairman Frierson:
I will ask Mr. Ziegler to address it. The Advisory Commission on the Administration of Justice has been around for some time, and obviously throughout the session there have been several things referred to it, and if you are volunteering to be on the Commission, we are going to have a lot of work. I will have Mr. Ziegler talk about the Commission itself, because that goes far above and beyond this particular issue.

Dave Ziegler, Committee Policy Analyst:
The ACAJ is statutory, so the membership and duties are spelled out in the *Nevada Revised Statutes* (NRS). There are two members of the Legislature on the Commission and many other folks, including representatives from the Supreme Court, the district courts, the justice courts, the ACLU, and the Department of Corrections. It has quite a large membership and it also has a number of statutory subcommittees. It meets during the interim on an irregular basis. I would imagine in a typical interim it probably meets about six or seven times, and it has been chaired most recently by Assemblyman Horne.

Chairman Frierson:
It is in NRS Chapter 176, which goes over the makeup, duties, and subcommittees of the Advisory Commission in great detail.

Are there any other questions of Ms. Spinazola? [There were none.] I will invite those wishing to testify in support of S.B. 107 (R1) to now come forward.

Michael Patterson, representing the Lutheran Advocacy Ministry in Nevada; and the Episcopal Diocese of Nevada:
When Senator Segerblom first spoke, he talked about the fact that the bill was amended in the Senate hearings to remove the adult facilities from the bill. With his permission, we have submitted an amendment to you that reinstates sections 3 and 4 of the original bill (Exhibit F). Removing the youth from the bill's protections, as amended, we think is wrong. We think they still need to be in there for the adult systems.

One of the reasons we are so concerned relates to the federal Prison Rape Elimination Act of 2003. This year the Governor has to submit to the federal

government that we are making provisions to make sure that children who are in our state prisons are protected and that they are not subject to rape. We are concerned that one of the possible remedies to this would be to have an increased use of solitary or whatever the term is. In the amendment that we offered, we took out solitary and put in isolation, but there is still a debate going on regarding what term to use for the youth. That might have to be adjusted. I was in on that meeting, and there were so many different terms it was hard to pin down what the definition of solitary was.

I submitted to you a number of documents, and there are two that I want you to pay very close attention to. One is an article from the *Las Vegas Sun*. The title is "Age-old debate: Henderson boy's case brings to forefront issue of children being tried in adult courts" (Exhibit G). It includes a story about a 16-year-old boy in Clark County who, for various reasons, was put in solitary for his own protection, and his defense attorney commented, "I cannot tell you the difference it makes. You take a kid and lock him in a room for 23 of 24 hours of the day, and you drive him crazy." I think it would drive any of us crazy to be locked up that long. To do this to a young child in the adult system is unbelievably cruel. A number of children have resorted to suicide because the lockup has been so extensive and for such long periods of time. One young man was 17 years old and hanged himself because he had been in solitary for so long. We feel that the mistake was made taking the adult system out of the original bill. Mr. Segerblom has approved us putting this language back in.

Chairman Frierson:
Keep in mind that we do not know what that section was. It was taken out before it got here.

Michael Patterson:
You have it in the Nevada Electronic Legislative Information System (NELIS). Do you want me to read it to you?

Chairman Frierson:
If you could describe what it is you are proposing to put back in, it would help.

Michael Patterson:
As you have seen in S.B. 107 (R1), it says that section 3 and 4 are deleted by amendment. In our amendment (Exhibit F), we are proposing to re-add sections 3 and 4. Section 3 refers to the Department or a private facility or institution, and it would eliminate the use of solitary confinement on these youthful offenders. It also applies in section 4 to local jurisdictions such as county jails and other areas like that. Does that answer your question?

Chairman Frierson:
I think that what you are saying is that the bill as it made it out of the Senate referred only to juvenile facilities, and you are proposing to apply the same restrictions on the treatment of juveniles and confinement in the adult establishments as well as the juvenile facilities.

Michael Patterson:
Correct. We know that NDOC is going to oppose this. I have an email pretty much stating that.

Chairman Frierson:
Are there any questions for Mr. Patterson? [There were none.]

Carey Stewart, Director, Department of Juvenile Services, Washoe County:
I am also here on behalf of the Juvenile Justice Administrators of Nevada. As Ms. Spinazola mentioned, there has been a lot of dialogue and discussion in regard to sections 1 and 2 of the bill. We appreciate everyone's efforts. We greatly appreciate the bill's sponsor taking out the language of solitary confinement and adding language that we use within our facilities. The juvenile justice administrators are in support of sections 1 and 2 of this bill as they are written. We feel this is going to be really good legislation that will set a good standard for our juvenile facilities to follow in years to come, especially when we have kids in the highest level of care when they are in our facilities.

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Jennifer Batchelder, representing the Nevada Women's Lobby:
We support the bill and would support the amendments as well.

Chairman Frierson:
Are there any questions? [There were none.]

Regan Comis, representing M&R Strategic Services:
M&R manages a campaign with the MacArthur Foundation to reform juvenile justice in various states. We would like to express our strong support of this bill. We have been very involved in all the negotiations to bring this bill to the current form it is. We hope that you can support it.

Chairman Frierson:
Are there any questions? [There were none.] Thank you for the video link you provided us some time ago.

Regan Comis:
Yes, and I did send it to all the Committee members as well.

Chairman Frierson:
Thank you.

Rebecca Gasca, representing the Campaign for Youth Justice:
The Campaign for Youth Justice is a national organization dedicated to ending the practice of trying, sentencing, and incarcerating youth under the age of 18 in the adult criminal justice system. We strongly support S.B. 107 (R1). We were definitely involved in all of the conversations with respect to the current changes that you see before you based on what the Senate Committee on Judiciary decided to do. We are here in support of both the amendments that have been presented, which are both supported by Senator Segerblom. I wanted to express our deep interest in how the state is following up with the Prison Rape Elimination Act.

I wanted to state on the record that the Prison Rape Elimination Commission was very clear on the use of isolation, and it stated in part that the Commission strongly discourages the practice of segregating vulnerable residents, because isolation may aggravate symptoms of mental illness and limit access to education programming and mental health services. Youth may be segregated as a last resort for short periods when less restrictive measures are inadequate to keep them and other residents safe. We are very interested in the study and how it comes out, and we want to make sure that we are complying with these federal standards. We really appreciate your consideration of this bill. If I might add, I submitted written testimony that is more comprehensive (Exhibit H).

Chairman Frierson:
Are there any questions? [There were none.]

Allan Smith, representing the Religious Alliance in Nevada:
We are here in support of S.B. 107 (R1) in its form as well as with the friendly amendments, and we would like to echo the testimony that has been given in support of this measure.

Chairman Frierson:
Are there any other folks wishing to offer testimony in support? [There was no one.] Is there anyone in Las Vegas wishing to offer testimony in support? [There was no one.] Is there anyone in Carson City wishing to offer testimony in opposition?

E.K. McDaniel, Deputy Director of Operations, Nevada Department of Corrections:
I would like to give a little history of our involvement in this bill when we went through it originally. We had some concerns that were quite restrictive for the Nevada Department of Corrections to operate, and we did agree and still do agree with the amendments in regard to doing a study and providing information for the study. There have been several amendments added to it since we agreed to it, so there are a few things that we want to point out to the Committee that we have some concerns with.

First of all, section 7 basically talks about the Nevada Department of Corrections' responsibility to provide information. It is not very clear and it is not defined well enough for us to be able to provide the accurate kind of information that we think needs to be provided in regard to the study. I could go through them individually. For example, in subsection 2, it talks about disseminating information on security threat groups. Security threat group information is protected by some federal laws. There are some things that we can provide and some things that we cannot provide in regard to security threat group information, and in regard to confidentiality of identifying certain individuals as to gang affiliations. The amendment does not specify exactly what information we would need to provide. Some we could; we would not have a problem with it. Some we could not, so it needs to be much clearer in regard to what we could provide.

Chairman Frierson:
Are you talking about the study?

E.K. McDaniel:
Yes.

Chairman Frierson:
Are you on the Advisory Commission?

E.K. McDaniel:
No.

Chairman Frierson:
This measure directs the Advisory Commission to conduct this study. It does not tell the Department of Corrections what to do at all. It seems to me that this would be on the Advisory Commission to the extent they are able to obtain information to conduct this study, and how they get that information and the limitations on that seem to be something that the Advisory Commission could

adjust based on what the Department of Corrections is able to provide them. This does not require the Department to do anything.

E.K. McDaniel:
My apologies, Mr. Chairman. Generally, what happens is the Advisory Commission asks the Department of Corrections to provide them this information based on this law. Some of it we could provide, and some of it we could not provide without clarification.

The other thing was that Mr. Segerblom's amendment (Exhibit E) added protective segregation to the study. Protective segregation is clearly a separate and distinct issue from anything considered to be disciplinary segregation or administrative segregation. Our protective custody units are operated more like a general population unit. They are not isolated. They are only segregated from the main population. Their housing units are completely separate so, to us, it is like apples and oranges. If you are going to compare administrative or disciplinary segregation to protective segregation, you will find they are two completely separate entities. We had some issues with the wording "protective segregation" being added.

Chairman Frierson:
The way I read it, this whole section does not tell NDOC to do anything. This whole section tells the Advisory Commission to conduct a study based on the information that they can obtain, so if there is information that you cannot compile based on how NDOC operates, then I do not think that you are violating anything because this does not tell NDOC to do anything. With respect to the number of children who are in protective segregation, while you may not think it is relevant, I think the sponsor of the bill would like to know the numbers, even if you think that it is apples and oranges to compare protective segregation to disciplinary segregation. It seems to me that this section directs the Commission to simply ask for the numbers of juveniles who are in protective segregation.

E.K. McDaniel:
I want to clarify one thing. If that is the case, we would not have a problem with that; however, when we are asked by a commission or a group in government to provide certain information, generally we are commanded to provide that information. We have a computerized system that will give us a lot of this information that we could readily provide. However, it would be very costly to update our system, and it would also take additional staff to be able to compile this information and provide it to whoever asked for it.

Chairman Frierson:
I do not mean to imply that NDOC could ignore requests. It just sounds to me like you were saying you cannot provide the numbers of people in protective segregation. You just do not think they are the same for the policy consideration, and I think that is a different argument. Whether or not they are comparable is different from whether or not you can give them the number.

E.K. McDaniel:
I understand that, and we hope it is clearly understood that if we could provide it, we would, but if there is a cost associated with it or complicated issues in regard to providing the information, this Committee just needs to understand how difficult it would be for the Department.

Chairman Frierson:
I understand and appreciate that. Are there any questions from the Committee? [There were none.] When we make decisions that impact the prison population, we need to see what we are doing, so we did tour a prison, and we appreciate your hospitality in showing it to us. I think we are allowed to put this bill in context because we were actually able to see the facility. I think you are speaking to the challenges that are associated with the populations you deal with.

E.K. McDaniel:
We appreciated the opportunity to give you a tour. Thank you very much.

Chairman Frierson:
Is there anyone else wishing to provide testimony in opposition? [There was no one.] Is there anyone in Las Vegas wishing to provide testimony in opposition? [There was no one.] Is there anyone wishing to provide testimony in a neutral position?

Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriff's Office; and Nevada Sheriffs' and Chiefs' Association:
The Washoe County Sheriff's Office supports constitutional rights and personal liberties as well as ethical and humane treatment of all persons and the safety and security of our jail and all staff and inmates within. Because of that, I am here as neutral to S.B. 107 (R1) because the sponsor did work with us to remove local jails from this bill. We would passionately oppose adding sections back in due to the enormous fiscal and operational impact that would have on correctional facilities, both state and county.

As this study moves forward in the interim, and as you come back next session, if there is going to be an answer to that study, please consider that we operate

our facility with the best care for all staff and inmates within. To that end, 10 percent of the population gets 90 percent of the attention. These are people who we put into protective custody because they come in as beautiful persons with gender issues and we cannot figure out where it is safest to put them. So we put them in protective custody for their protection. We put the people who will take any object and try to kill themselves with it into protective custody or administrative segregation or whatever. We put the people who want to kill everyone, staff and inmates alike, into single cells. None of that is a dark hole in the ground, without natural light or access to the voice of any other human beings, and they get checked on every 10 or 15 minutes per our policy. We treat them the best that we can, and at any opportunity, these people will try to kill us or anyone they can reach out to and try to kill. Just keep those things in mind. You are going to get a study and know why we do the things we do. I just want you to think about that, and I want to plant that seed so that you know. You are all welcome to come and tour the Washoe County jail and see how well we run it. We thank the sponsor for bringing this bill forward, and excluding us this go-round, and hope that next session we do not get added back into something like this.

Chairman Frierson:
What is your position?

Eric Spratley:
It is neutral. I would oppose the proposed amendment to bring us back in.

Chairman Frierson:
Are there any questions for Mr. Spratley? [There were none.] Is there anyone else wishing to offer testimony in neutral?

Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
I would echo the comments made by Mr. Spratley. We are neutral on the bill, but we would oppose an amendment to include sheriffs' jails.

Chairman Frierson:
Are there any questions? [There were none.]

Robert Roshak, representing the Nevada Sheriffs' and Chiefs' Association:
Just throw in a "me too" to what my cohorts say.

Chairman Frierson:
Are there any questions? [There were none.] Is there anyone else wishing to offer testimony in a neutral position, here or in Las Vegas? [There was no one.] I will invite Ms. Spinazola back up to make any brief closing remarks.

Vanessa Spinazola:
We would hope that this would move forward with the current amendments proposed through Senator Segerblom. We worked very hard with the juvenile justice administrators. We did not hear any issues with the first two sections. Again, in the study, I understand from the conversation with Mr. McDaniel that we are okay with the study at this point and my drafting error of not putting in the protective segregation.

I want to clarify that he did mention something about fiscal cost, and I want to make sure that there are no fiscal notes on this bill. This is typically what ACAJ does, and there are typically no fiscal costs associated with those studies.

Chairman Frierson:
I know what Mr. McDaniel was saying, which is that if we require him to do something that he is currently not equipped to do, he is either going to not be able to do it, or he is going to have to associate a cost in order to make adjustments to be able to do it. The intention is not to put on NDOC something that they are not equipped to do.

Vanessa Spinazola:
Correct. Thank you very much.

[The following exhibits were submitted but not discussed: (Exhibit I), (Exhibit J), (Exhibit K) (Exhibit L), (Exhibit M), and (Exhibit N).]

Chairman Frierson:
With that, I will close the hearing on S.B. 107 (R1) and open the hearing on Senate Bill 192 (1st Reprint).

Senate Bill 192 (1st Reprint): Enacts the Nevada Preservation of Religious Freedom Act to prohibit governmental entities from substantially burdening the exercise of religion. (BDR 3-477)

Senator Barbara K. Cegavske, Clark County Senatorial District No. 8:
I am here today to present Senate Bill 192 (1st Reprint) for your consideration. The freedom of religion is protected by both the *Nevada Constitution* and the *United States Constitution*. Unfortunately, the constitutional provisions do not identify a legal standard for protecting religious freedom. That is why Congress

passed the Religious Freedom Restoration Act (RFRA) in 1993, which declared that if a government action substantially burdens a person's religious freedom, that action has to be done in the least restrictive way and must be in a furtherance of compelling government interest. We will be hearing a lot about that compelling interest. In 1997, the U.S. Supreme Court held that the federal Religious Freedom Restoration Act could not apply to the states, so S.B. 192 (R1), titled the Nevada Preservation of Religious Freedom Act (NPRFA), is meant to fill the holes left by the 1997 decision. Passing S.B. 192 (R1) will bring Nevada in line with the other states—up to 28 now—that have passed similar laws protecting religious freedom by enacting the compelling interest statute, which you will learn more about from my colleagues.

I would like to walk you through the bill. I will start with section 3 on page 3. This provision clarifies that the bill applies to all existing and future state and local laws and their implementation. However, while the bill allows state laws enacted on or after October 1, 2013, to explicitly exclude the application of S.B. 192 (R1), the bill also makes it clear that this provision shall not be construed to authorize a governmental entity to burden a person's religious belief.

The bill includes two important definitions on page 3. Exercise of religion is defined in section 5 of the bill as the ability to act or to refuse to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief. In section 6, governmental entity is defined as the State of Nevada, a political subdivision of the state, or an agency of either.

The key provision of S.B. 192 (R1) is found in section 8 of the bill. Specifically, section 8 prohibits a governmental entity from substantially burdening a person's exercise of religion unless the governmental entity demonstrates that burden furthers a compelling governmental interest and is the least restrictive means of furthering that governmental interest. Senator Hutchison will go further into the topic of compelling government interest. These standards would apply even if the burden is the result of the rule of general applicability. That is on page 3, lines 14 through 17. To protect governmental entities, the bill allows a court to prohibit a person from bringing future claims under the act if a court determines that the person filed earlier complaints that were without merit, fraudulent, or intended to harass the governmental entity. That is on page 3, starting on line 33. Finally, section 9 of the bill makes it clear that S.B. 192 (R1) applies to actions pending on October 1, 2013, the effective date of this bill, as well as to actions filed after that date.

Senator Mark Hutchison, Clark County Senatorial District No. 6:
It is an honor for me to present this bill, S.B. 192 (R1). Before providing some legal perspective in context to S.B. 192 (R1), I would like to remind us all today about the basis for the religious freedoms that we as a country, as a state, and as a people have cherished for generations. We have learned since our youth that our ancestors came to this country and populated its shores in large measure to escape persecution and death from exercising their religious beliefs, which were contrary to the beliefs or practices of their home country monarch, dictator, or tyrant. Ironically, our ancestors, once here, were themselves often intolerant of other faiths. In 1776, Thomas Jefferson drafted the *Declaration of Independence* from England. It would cost the lives of tens of thousands of Americans, but eventually we won independence from the greatest military power on the planet at the time, according to George Washington, by divine intervention again and again. Following the war, the American people would embark on a great experiment of self-government guided by the *U.S. Constitution*, which was ratified by the states in 1788. Three years later, the Bill of Rights was ratified, including the first ten amendments to the *Constitution*. Of course, the First Amendment was its first declaration.

The *Declaration of Independence*, which has been described as American scripture and our greatest export, became the foundational source for religious freedom in the United States by declaring, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights." Of course, the First Amendment itself is a fundamental source for our religious freedoms as well: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

Beyond these domestic sources of religious freedom, international law likewise embraces all people's rights to freedom of religion. The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the United Nations General Assembly, declares in Article 1, "Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in a community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Having described some of the sources for our religious freedom, let me now turn to S.B. 192 (R1) and provide you the legal context for this important bill. As Senator Cegavske pointed out, the Religious Freedom Restoration Act was passed in 1993 by Congress, and it is important for the community to understand why the legislation was even necessary then. In 1963, the United

States decided a case called *Sherbert v. Verner*, 374 U.S. 398 (1963). Adele Sherbert was a textile-mill operator and a member of the Seventh-day Adventist Church. Eventually, Ms. Sherbert's employer switched from a five-day work week to a six-day work week, requiring her to work on Saturdays. According to her faith, working on Saturdays was not permitted, so Ms. Sherbert refused to work on Saturdays and was fired. Unable to find other employment, she sought unemployment compensation in South Carolina and her claim was denied. She appealed the denial all the way up to the South Carolina Supreme Court, and then, having lost all of her appeals at the state level, she appealed the decision to the U.S. Supreme Court. In that case, the court, which was presided over by Chief Justice Earl Warren, and in an opinion authored by Justice William J. Brennan, Jr., established a test. He did not bestow any new rights, but established a test to determine if an individual's rights to the freedom of exercising religious beliefs had been violated by the government. The *Sherbert* test required a court to determine, first, whether a person had a claim involving a sincere religious belief and, second, whether the government's action was a substantial burden on the person's ability to act on that belief. If those two elements were established, then the government had the burden of proving that it was acting in furtherance of a compelling state interest, and that it had pursued that interest in the least restricted means towards religion.

The *Sherbert* test, established by the widely recognized progressive Warren Court and by the widely recognized, established, and respected Justice Brennan, was the law of the land in this country until 1990, when the U.S. Supreme Court decided a case called *Employment Division v. Smith*, 494 U.S. 872 (1990). In that case, the court, presided over by Chief Justice William Rehnquist, in an opinion authored by Antonin Scalia, decided that the state could deny unemployment benefits to Native Americans who had been fired from their state jobs for violating a state prohibition on the use of peyote, even though the use of the drug was part of a religious ritual. This case received wide publicity and wide attention. I might add that the American Civil Liberties Union (ACLU) represented the Native Americans in the case and promoted their rights to religious freedoms and their First Amendment rights. The Supreme Court reasoned that a law that forbade Orthodox Jews from wearing yarmulkes on government property would be unconstitutional, as it would be targeting a religion. On the other hand, a law forbidding all people from wearing hats on state property would be constitutional, even though the law would require Orthodox Jews to violate either their religion or the law in order to walk on government property. In other words, the court said if the law was neutral towards religion and generally applicable to all persons, the First Amendment would no longer apply, despite the very real burden the law placed on religious minorities. This is why there was a widespread outcry and concern expressed

by the *Employment Division* decision and why the U.S. Congress took action after the U.S. Supreme Court decided that case. The U.S. Congress almost unanimously passed the Religious Freedom Restoration Act of 1993, and it reinstated the freedoms protected under the *Sherbert* test by requiring the government to show a compelling state interest if the government burdened religious freedoms.

Consider that then-Representative Chuck Schumer introduced a bill in the House of Representatives that passed by voice vote out of the House and by a 97 to 3 vote out of the Senate. The bill was sponsored by Senator Ted Kennedy and cosponsored by, among others, Senator Barbara Boxer, Senator John Kerry, Senator Patrick Leahy, and our own Senator Harry Reid. But unfortunately for the states, the U.S. Supreme Court was not done with the *Sherbert* test. In 1997, the court declared that the Religious Freedom Restoration Act did not apply to the states, and only to the federal government, so the act governed federal law and federal actions but not states.

As Senator Cegavske so well stated, the Nevada Preservation of Religious Freedom Act is simply meant to adopt and mirror the Religious Freedom Restoration Act on the federal level, which was affirmed by overwhelming bipartisan support in the Senate and the House and was signed into law by President Bill Clinton. Senate Bill 192 (R1) largely mirrors that act.

In conclusion, S.B. 192 (R1) deserves the wide bipartisan support that it has received not only at the national level, and not only among the 28 states that have passed it, but also among the cosponsors and supporters of this bill. Religious freedom under the *Declaration of Independence* and the First Amendment is a hallmark, in my opinion, of this country's greatest and mightiest attributes. My own faith teaches, "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men and women the same privilege, let them worship how, where, or what they may."

Chairman Frierson:
Are there questions for either Senator Cegavske or Senator Hutchison? [There were none.]

Jason Guinasso, Private Citizen, Reno, Nevada:
I am a citizen and a local Nevada attorney who cares very deeply about religious liberty and protecting that most fundamental of all rights often called the first among equals. Anytime you are dealing with a fundamental liberty that is being burdened by the state or federal government, it is important that the highest standards of scrutiny be applied to that government action. I have divided my

testimony into several memorandums that I have already submitted. [They include (Exhibit O), (Exhibit P), and (Exhibit Q).] I answered what have become the most common questions from the Senate Judiciary Committee to the Senate and what I anticipate may come from the Assembly, based on conversations I have had with some of your colleagues on the Committee.

The first memo that I prepared is "Why Does Nevada Need a Religious Liberty Preservation Act?" (Exhibit O). The second memo I have prepared is "Will Religious Liberty Preservation Act Result in an Increase in Litigation?" (Exhibit P). The third memo deals with cases and examples illustrating why Nevada needs the Religious Freedom and Preservation Act [exhibit was not received]. The fourth memo deals with some concerns raised by Senator Ford, who was initially a sponsor of the bill and then later concluded that he was not going to support it (Exhibit Q). I am going to leave those comments to the Committee to review in detail, because I tried to be comprehensive and thorough in addressing those questions and concerns in the memorandums. Nevada needs the Religious Freedom Preservation Act to preserve the protections Nevadans have already historically enjoyed to free exercise of their convictions based on their faith.

For those who do not know, we have a constitutional amendment in the *Nevada Constitution*. It is Article 1, Section 4, and it is titled the Liberty of Conscience provision. This provision provides that, "The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of his religious belief, but the liberty of conscience hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State."

While we do already have a very strong constitutional provision protecting conscience and liberty, S.B. 192 (R1) is necessary to codify the standard that Nevada courts have historically used to determine whether a person's religious beliefs should be accommodated when a state government action or regulation restricts his or her religious practice. Senator Hutchison explained very well the standard that should be applied, and that is that any time religious liberty is burdened by state government, the state has to show that it had a compelling interest to burden that person's exercise of their faith and that they chose the least restrictive means to accomplish that end. Senate Bill 192 (R1) will guarantee that this test will be applied in all cases where free exercise of religion is substantially burdened. This test is a workable test, and it has been used since 1963 for just these kinds of cases. It is not novel, and it has

coexisted with other laws with regard to discrimination and women's reproductive health for all that time.

I want to emphasize that S.B. 192 (R1) simply mandates a standard that the highest level of judicial scrutiny will be applied to religious liberty cases. It is an articulation of standard that will protect all Nevadans, not just a select few. Senate Bill 192 (R1) is not about dictating results. It is about fair standards being applied to a fundamental liberty, not picking winners and losers in a culture war. You are going to hear testimony from organizations such as the ACLU and Planned Parenthood who are going to try to draw this Committee into a debate about the broader culture war, and who should win and who should lose in that war. This piece of legislation is not about picking winners and losers. This is about ensuring that our Nevada courts, when analyzing these cases where very important rights are pitted against each other, apply a standard that is fair and equitable to all parties that raise concerns about their religious liberty being infringed upon.

If my testimony is not enough for you to emphasize that point, I think you should be aware that Senator Ford asked the Legislative Counsel Bureau (LCB) to prepare a memorandum addressing the impact of S.B. 192 (R1) on such issues as women's reproductive health rights, and a couple of hypotheticals were specifically presented. One hypothetical was in rural counties, a doctor is not providing contraception, or doctors are not providing abortions in emergent circumstances. The LCB analyzed those issues and first affirmed that Nevada already has strong laws protecting those interests. That is, a pharmacist under the current regulations cannot refuse to provide contraception to women who seek to have their prescriptions filled. Nevada law already protects that. With regard to abortions in emergent circumstances, Nevada law already protects that interest as well, and LCB did an excellent job of outlining that. The thing that you should take away from LCB's memorandum is that what the bipartisan sponsors of this bill have said since they introduced it is, in fact, the truth. This is a bill advocating a standard to be applied in courts. It is not a bill to pick winners and losers. It is not a bill to dictate results.

The ACLU provided several anecdotes. If you notice in their anecdotes, they are all from other states. There is not one example of a Nevada case where a woman's right to access to health care has been burdened in any way. I want to point out that I have every state RFRA, and every case and every brief citing any state RFRA that has been enacted, and not one case has been used to attack a woman's access to health care or to unlawfully discriminate against any minority. I think that is an important thing to understand.

Additionally, the ACLU memorandum alleges that there will be a flood of new litigation, and that simply is not the case. This compelling interest standard has been in effect for 40 years, and in the states it has been in effect for about 15 years. There have been a total of four cases filed in Idaho, three cases filed in Oklahoma, two cases filed in South Carolina, one case in Alabama, one case in New Mexico, and zero in four other states that have this law. In bigger states like Texas, Illinois, and Florida, there have been 15, 14, and 16 cases filed respectively. This bill is not an invitation to open the floodgates of litigation. Further, it is not a bill that is meant to be a sword to attack our rights that have already been established by Nevada law. This bill is a shield to protect the sincerely held religious beliefs of all people of faith, regardless of what their faith is.

In the examples I gave you, I would like you to pay attention to one particular example, because I think many of you here may be supporters of Senate Joint Resolution 13 (1st Reprint).

Chairman Frierson:
That is not before us today.

Jason Guinasso:
If that is the case, then S.B. 192 (R1) would certainly be complementary.

Chairman Frierson:
I do not want to confuse the record. That is not before us today, and we are consistent about not talking about other bills, other than in passing.

Jason Guinasso:
With respect to marriage and marriage equality, I would say that, for example, John and Joe want to get married, but the state of Nevada limits marriage under Section 21 of Article 1 of the *Nevada Constitution,* where it says, "Only marriage between a male and female person shall be recognized and given effect in this state." For many people like John and Joe, especially men and women in the gay, lesbian, bisexual, and transgender community, marriage is a term reflective of their faith and of their conscience. However, the state of Nevada has established the definition of marriage consistent with the traditional Judeo-Christian definition of marriage. If S.B. 192 (R1) is passed, John and Joe could challenge Section 21 of Article 1 of the *Nevada Constitution* on the basis that this definition of marriage substantially burdens their sincerely held religious beliefs regarding same-sex couples and unlawfully establishes a definition of marriage that favors certain religious groups over another. Would I agree with that kind of litigation personally? Probably not. But John and Joe would be guaranteed, like other religious faiths, a right to have this matter considered by

the court, and they would be guaranteed that a high standard would be placed on the burden on their exercise of faith. That is to say that the state of Nevada would be forced to show that it has a compelling interest in defining marriage in that way.

I gave you that example because ultimately, when you discuss this in your work session and you vote on this bill, a lot of folks are going to try to allege that the bipartisan sponsors of this bill have some secret agenda to take away rights from the gay, lesbian, bisexual, and transgender community, or to attack women's access to reproductive health, or to discriminate against some other minority. This bill will not facilitate that kind of attack. The bipartisan sponsors of this bill would ask you whether or not you trust the motives and the specific language that they have presented to you, or do you believe there really is some hidden agenda? In the example that I just gave to you, I have showed you how this bill might be applied to a particular party with a certain set of religious beliefs that may not be consistent with my own, but if S.B. 192 (R1) is passed, we can all walk away with the assurance that the courts will apply a very high standard to circumstances where people's faiths are substantially burdened by government, and that regardless of the outcome, we can know that those people are given appropriate due process under law, and that the highest standard of scrutiny is applied when their fundamental rights are substantially impacted.

Assemblywoman Cohen:
On page 2 of the bill, from lines 11 through 14, where it says, "WHEREAS, the United States Supreme Court has upheld facially neutral laws which burden the exercise of religion with little justification by the governmental entity that enacted the law," I would like to know in what cases the United States Supreme Court upheld facially neutral laws that burden the exercise of religion with little justification, so the key is little justification. I do not understand that the rational basis test is equating to little justification. I would like to know where that comes from.

Senator Hutchison:
I believe this was taken from the federal RFRA laws as well as state RFRA laws. I think that the reference is to the case that you are talking about, which is *Employment Division v. Smith*, the insurance commissioner of the state, that was referenced earlier where the compelling state interest test was abandoned. The compelling state interest test required the government to come forward and justify what was their compelling state interest for burdening religion. When Justice Scalia authored the opinion in *Employment Division*, he said that test no longer applied, and that the only thing the government needed to do was demonstrate it was not targeting religion, and that it was generally applicable.

So if I were to guess what the authors of this had in mind, I would assume that they are saying in abandoning the compelling state interest test, and then just looking to see if it is generally applicable, that is not as high a standard or that does not require a lot of justification. That would be my analysis. I do not know exactly why the authors did it, but that would be my suggestion.

Assemblywoman Cohen:
Page 4, section 8, subsection 3, line 29 is the attorney's fees section. Are there any other statutes that have an automatic attorney's fee against the state government? That seems odd to me.

Senator Hutchison:
My understanding is that this pretty much mirrors federal and state law.

Jason Guinasso:
Most of the states where this has been enacted—for example, Texas, Illinois, and a few others—have this provision in it. The federal RFRA has it as well, so it is a standard provision in every RFRA, and I think the reason for that is to provide some teeth with regard to protecting the fundamental liberty interest at stake. That is, if the federal government or the state government is going to burden faith, they have to understand that there is a cost to them if they do so without fully analyzing the issue and applying the test themselves. This provision causes a state entity to pause and consider. Are we going to burden a faith group's religious convictions, and if so, will our burdening of that faith group's exercise of religion pass constitutional muster? That kind of provision is a mechanism to cause those who would enact specific rules or regulations or take certain actions to stop and count the costs.

Assemblywoman Cohen:
What has been going on in Nevada? Are there examples of people whose religious beliefs have been burdened that this bill, if it had been passed, would have helped?

Jason Guinasso:
There are certainly going to be people here today who are going to testify to that. As an attorney, I recently represented a couple before a court that was a guardian of some children they adopted from Costa Rica. The minor child had substantial disabilities that carried into adulthood, which required the couple to be the legal guardians of that child into adulthood. They had to make some major health care decisions regarding that child, and in the course of making those decisions, their rationale was questioned by the court. I put this in my exhibit to you (Exhibit R), and you can read the transcript excerpts. The court specifically told my clients, your faith has no place in my decision-making, and

has no place regarding the decisions you are making regarding your daughter's health care. This should be a decision based just on the black-letter law applied to governing those particular health care decisions. In this circumstance, the faith of this family was essential to arriving at a conclusion about what health care was going to be provided and what health care was not. That is one recent example from last October where a family was told by a court in Nevada that their faith had no relevance to the decisions they were making regarding their ward.

Assemblywoman Spiegel:
I have a situational question. Let us say that there is a couple, John and Jim, and they are domestic partners in Nevada. Jim goes to work and he wants domestic partnership health insurance for John. His employer says that his religion is against homosexual couples, and because of that he denies health insurance coverage despite there being laws that would allow for it. If this bill were to pass into law, which law would prevail?

[Assemblywoman Diaz assumed the Chair.]

Senator Hutchison:
I do not know, because the compelling state interest test does not determine outcomes. The compelling state interest test is just a test. This is a great example. You have two competing interests. You have the state saying you need to cover domestic partners in terms of their health insurance, and we have passed a law that requires it for domestic partners. Then an employer says, wait a minute. My belief is not in favor of providing that kind of coverage because of my belief in terms of that union or relationship or domestic partnership. So you have two important interests now competing against each other.

What will the court do? Someone is going to sue over that. Then the court says, I have two competing interests in front of me. If this law passes, I at least know what test I am going to apply. The test I am going to apply is compelling state interest. So I say to the state, you passed a law that said there has to be health insurance coverage for domestic partner relationships. What was your compelling state interest for doing that? The employer says that it is burdening his or her religious beliefs. The state is going to say, you know why we do that? Because we think as a matter of policy and a matter of course, and a matter of fairness and a matter of equality, the people who have domestic partnership relationships, just like married people, ought to have coverage under their insurance policies. We think that that furthers a compelling state interest by providing more coverage for those couples, more people in Nevada, and we think it is the fair and just and right thing to do and it

is a matter of policy. That is what we have done, and we have had years of experience of it that has benefitted the state. That is our compelling state interest.

The court can look at it and say, that sounds like a compelling state interest to me, or the court can say, no, it does not sound like a compelling state interest to me. In fact, we know that in *Bob Jones University v. United States*, 461 U.S. 574 (1983) the U.S. Supreme Court has said that the government will always have a compelling state interest to eradicate discrimination. Bob Jones University wanted to have an all-white student body, and denied access to all minorities. The Internal Revenue Service pulled its tax-exempt status. Bob Jones University sued and said, we have religious beliefs for not admitting people other than white people. The U.S. Supreme Court said, tough. The compelling state interest that the government has will always prevail over your religious views when it comes to antidiscrimination laws. So even though I cannot answer the question in terms of definitely how that is going to be resolved—because the test does not determine outcome—we at least have a test to apply, and you are going to find that the state government will often have a compelling state interest in that scenario.

[Chairman Frierson reassumed the Chair.]

Assemblywoman Spiegel:
There was an example in 2010 when a transgender person went to the Department of Motor Vehicles (DMV) and wanted to change her driver's license to reflect that she is a woman and to use her new name, and the DMV worker expressed his religious beliefs and denied her the ability to do that. It seems like a similar situation. Are you then saying that the prevailing state interest would be to say that the DMV could not discriminate against that Nevadan?

Senator Hutchison:
Yes. I think the same analysis would apply. In order for this test to apply, the state worker would say, for whatever religious beliefs I have, I do not think that I should be issuing this driver's license to someone who is transgender and wants to change it. We have to assume that is the reason. The state law is that, as a matter of state policy and state law, we issue driver's licenses, and we do not ask those kinds of questions. That is the state law. The state worker says, that violates my religious beliefs. I am suing, or someone is suing. Then the court gets it and says, okay, state, what is your compelling state interest? The state says our compelling state interest is that we do not want individual workers at the DMV to make all kinds of decisions based on their religion about whether they are going to issue, or not issue, a driver's license. We want to issue the driver's license. It promotes uniformity, certainty, and

driver safety in the state. All of those are compelling state interests. The court looks at the DMV worker and says, I am sorry; those sound like pretty compelling state interest reasons. Your religious beliefs are a back door in this case. I think that is the way it would turn out. Who knows, but at least that is how the compelling state interest would be applied.

Chairman Frierson:
Are there any questions from the Committee? [There were none.] My question relates to a point that was raised earlier, which was that there were no cases that were, in your opinion, applicable. I ask this question on a weekly basis with bills that come before the Judiciary Committee, and that is, what are we fixing? Are there cases that give rise to the need to do this? I have not seen that either.

Senator Hutchison:
I believe Jason Guinasso addressed that in terms of a case that he had where a judge had said that the religious beliefs of the family would play no role at all in the decisions of their mentally challenged daughter who had a need for some health issues that were surfacing and were an issue in court. Following us, we also have other people who can give real-life examples.

Chairman Frierson:
Are there any other questions from the Committee? [There were none.] I will invite others to provide testimony in support of S.B. 192 (R1) to now come forward.

Francisco Nahoe, Private Citizen, Reno, Nevada:
I am a citizen of Nevada and Rector of Saint Thomas Aquinas Cathedral in Reno. Before coming to Nevada, I spent several years in New England as a member of the faculty of Phillips Academy in Andover, as a teaching fellow at Dartmouth College, and as a graduate student at the Divinity School of Harvard University. In all three capacities, I found myself something of an anomaly. I was a Franciscan and a priest, very much on the traditional end of the spectrum of Catholic theology and Roman liturgy in three thoroughly secular and radically pluralistic institutions: Andover, Dartmouth, and Harvard. Even so, I benefited tremendously from the experiences there.

At Harvard, for example, my fellow graduate students and our professors included Hindu, Muslim, Sikh, Christian, and Jewish, pro-choice and pro-life, and gay, lesbian, bisexual, and transgender persons of every imaginable political persuasion. The experience gave an ethnic and regionally provincial Catholic like myself a valuable insight into the religious, cultural, and ideological diversity that makes America great. The feature that kept these tremendously diverse

groups of individuals productively united in common intellectual, social, and communal pursuits was, quite simply, the principle of respect for matters of conscience—the very issue that lies at the heart of the Nevada Preservation of Religious Freedom Act before this Committee of Assembly members today. [Mr. Nahoe continued to read from prepared text (Exhibit S).]

Indeed, S.B. 192 (R1) is an appropriately balanced, legally tested, and reasonable approach to preserve the best features of religious and secular pluralism and their salutary impact on our American democracy, especially when those religious and secular values clash with one another. Senate Bill 192 (R1) offers us a standard of strict scrutiny that has proved over the decades to be effective and to be fair.

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Gwen Linde, Private Citizen, Sparks, Nevada:
I am United States Air Force retired, and I support S.B. 192 (R1). I urge your support for it as well. When I was commissioned as a second lieutenant in 1979, I took an oath to uphold and defend the *Constitution of the United States*. I take that oath very seriously. I see my testimony today as a continuation of that solemn oath.

You are going to hear from people who will tell you that S.B. 192 (R1) discriminates against women, and I am here to tell you that that simply is not so. We heard from these people at the Senate Judiciary Committee in March, and we were mystified to discover that their lobbyists had been pressuring Senators and Assembly members to oppose something as commonsensical as S.B. 192 (R1). They have told us that this bill discriminates against women, indeed, that it wages war on women. I know a little bit about war and more than a little bit about war on women. [Ms. Linde continued to read from prepared text (Exhibit T).]

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Rocìo Grady, Private Citizen, Carson City, Nevada:
I support S.B. 192 (R1), and I ask you to do so as well. I am a citizen of the United States and have been a resident of Nevada since 1986. I am a single working mom and I am doing my best to raise my two children, a 13-year-old girl and an 11-year-old boy in a household with the same kind of values that my mother handed to me and my brothers and sisters. Those values include

concern about the community we live in and the respect for the beliefs of others, even if they are not the same as ours.

Religious liberty is very important to me and to my family. For us, religion is not just about praying the rosary quietly at home. It is about getting involved in the community as religious persons. It is helping people when people need help. It is showing our values by the way we live and by the way we vote. I know that the First Amendment guarantees my right to the free exercise of my religion. But what happens if I have to deal with governmental rules or regulations that do not seem to me to respect my free exercise of religion? [Ms. Grady continued to read from prepared text (Exhibit U).]

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Mark Foxwell, representing Knights of Columbus, Nevada State Council:
I am an unpaid lobbyist who works as a legislative liaison for approximately 5,000 members of the Knights of Columbus in 41 councils and 13 assemblies throughout the state of Nevada. The Knights of Columbus is an organization of Catholic men and families who provide charitable benefits to the community regardless of whether they have any religion or not. We support S.B. 192 (R1). What we like about the bill is that it does not enable or entitle individual citizens to impose their religious beliefs on others. That is not what it does. It provides a standard for government to deal with individuals' claims of violation of their constitutional rights for the free exercise of religion.

This legislation, as others have testified, is needed in Nevada because of the 1997 U.S. Supreme Court decision, and we feel it is necessary for individual states to pass this religious freedom act. That is the extent of my testimony before you.

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Michael Patterson, representing the Lutheran Advocacy Ministry in Nevada; and the Episcopal Diocese of Nevada:
We were late in coming to the support of this bill because of the issues that the ACLU raised. We feel that the amendments that were offered on the bill in the Senate bring it into compliance and that our concerns about women's health care issues and discrimination against minorities have been appeased. We are able to give our support to this bill.

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Lynn Chapman, representing Nevada Families for Freedom:
I was a homeschool consultant for many years, helping and advising people get started homeschooling. I had one particular family come to me, and I helped them get started homeschooling. A month or so later, the husband was laid off from work and they needed some help, so they went to the state to ask for food stamps to help them get by. They had three children. The woman at the welfare office was giving them a hard time and, because the children did not have vaccinations because they were homeschooled, she asked why, and the mother said, "Our religious beliefs." She was then quizzed for about a half hour what her religious background was, did she have a letter from her pastor, where in the Bible did it say that about vaccinations, and on and on and on. There are all sorts of things that happen that you may never hear about. I helped her and told her what she needed to do. There are things that might seem small, but when it is affecting your family, it is not such a small thing. Please support this bill.

Chairman Frierson:
Are there any questions for Ms. Chapman? [There were none.]

John Wagner, representing the Independent American Party of Nevada:
I would like to say, "Us too."

Chairman Frierson:
Thank you.

Allan Smith, representing the Religious Alliance in Nevada:
For those of you who are not familiar with us, we are a group that is made up of five denominations: Nevada Roman Catholic Conference, Evangelical Lutheran Church in America, Episcopal Church USA, United Methodist Church, and Presbyterian Church USA. I can say that we do not agree on a lot of things, in particular reproductive health issues and same-sex marriage, but when we do not agree, you will see me silent, and when we do, I am here. I do not think that you need to hear much more, as you probably understand why I am here and in support.

Juanita Cox, representing Citizens in Action:
We certainly support S.B. 192 (R1). I will not bore you with the details.

Nicholas Frey, Private Citizen, Reno, Nevada:
I am an attorney in Reno, Nevada, and have been practicing for about 35 years. I have seen instances where this kind of bill would have eased my clients' path. As an example, I had a client who wanted to offer a non-Christian prayer at a city council meeting and was told he could not do that. When we pressed the issue with one of the persons in the city government, he said, "Well, all we have to have is a rational purpose for our rule. That is all it takes, and it will be upheld." I pressed the issue further with the attorney who represented the governmental entities as we went forward, and we were able to compromise the matter. I think that this kind of legislation would have made the proposition very plain. Obviously, if prayers are being allowed at a city council meeting, a person of any faith should be allowed to offer that kind of prayer.

I have seen other instances over the years when there have been zoning decisions where it seemed to my colleagues and I that there may be some religious discrimination going on. I think that this kind of legislation would have helped clear the path. We ended up having to resort to litigation, but we had lengthy discussions that took place over a period of months at a great expense to our clients that could have been avoided if we had had this kind of legislation in place. I hope you will support this bill. I think it is an important thing for the citizens of the state of Nevada.

Assemblywoman Spiegel:
Before we begin our floor sessions every day, we have a prayer, and oftentimes the prayers are given in the name of Jesus Christ. I belong to a religion that does not believe in Jesus Christ, and I know that some of my colleagues often feel excluded and left out, like we are not part of the body and we are not part of the prayer. Sometimes folks have expressed that they feel in some way that there is an effort to have them change religions. Under this bill and with the example that you were given, how do you think things like that should be handled for religious minorities?

Nicholas Frey:
I am not sure I understand your question. I think that clearly, as in the case I spoke of, if I were taking the position that prayers to be offered at that function only by those who would so close their prayers, that was the rule. They were not allowing Hindu prayers, they were not allowing Jewish prayers, they were not allowing other prayers, but only Christian prayers. I think that this legislation would clearly pave the way for persons of other faiths. I am Christian, but certainly others would be allowed, I think, under this law, to offer the prayers they want in the manner they want. I think that this bill would protect those of other faiths who chose to close their prayers in a fashion differently than traditional Christian persons.

Assemblywoman Spiegel:
So then it would not matter that a number of people felt bad and excluded?

Nicholas Frey:
Again, I am not following. I think if you had people there who did not close their prayers in the name of Jesus Christ, and wanted to offer a prayer in the manner that they typically pray, such as my Hindu and Jewish friends, they certainly could do so. They would not be required to close their prayers in the fashion that many traditional Christians close their prayers. That is a protection to those persons of other faiths, and I think that that is a liberating idea. You do not have to pray in a set form. You can pray in the form that you want to pray, and not in the form that the majority perhaps requires.

Assemblywoman Spiegel:
So what you are saying is that the majority would rule and the considerations and feelings of others are secondary?

Nicholas Frey:
No. I think it is just the opposite. The feelings or sentiments of the majority would not rule. In a typical Nevada community, the majority of those living there, if they were Christian, and they prayed in the manner that you described by closing their prayers in the name of Jesus Christ, a person of another faith would certainly not be required to offer a prayer in that form, and would not be prohibited from offering prayers simply because he or she does not use that form of ending a prayer. That was our situation. This city council group was saying, "You cannot offer a prayer here because you do not close your prayers in the name of Jesus Christ." So the fellow approached me and said, "Can you help arrange to persuade this group to allow me to offer a prayer?" In his case, he was a Hindu. He does not close his prayers that way, and I had to make several calls and have conversations with a number of individuals until all of them agreed and the decision was made, "Okay, we will allow him to offer his prayer." What I am proposing is that this bill would enable persons of different faiths, non-Christian, to also offer prayers if prayers are allowed in a city council meeting, or some other public function. If those prayers can be offered by a Christian, they can be offered by a Hindu, Jew, or Muslim.

I think that the important thing about this legislation, in the narrow context I am discussing, is that it would allow fair treatment of all. Certainly you have heard a lot about the standards that would be used. I believe that if litigation were commenced, the court would have a very clear standard that would guide it in making the determination that this kind of burden upon the religious choice of an individual, wanting to offer his or her own prayer in a form that he was used

to offering, would be duly burdened in that context. It would allow prayers of all religious groups to be offered.

Chairman Frierson:
Are there any questions from the Committee? [There were none.] Is there anyone else in Carson City who wishes to offer testimony in support?

Barbara Jones, Private Citizen, Fallon, Nevada:
Sheila Ward submitted written testimony and she had to leave. May I read her testimony (Exhibit V)?

Chairman Frierson:
If she has testimony that she submitted, we will certainly make it a part of the record and circulate it, but I would ask that you not read it.

Barbara Jones:
Okay. She is with the Nevada Legislative Affairs Committee. She is in support of the bill. I am also strongly urging you to please support S.B. 192 (R1) along with the other 28 states for this important and, I think, historic bill. The American Center for Law and Justice mentioned on TV the other night about 27 cases that are now coming up on the encroachment of religious freedoms, and this would certainly prevent a lot of that by passing the bill.

I am also in contact with religious representatives in every county in Nevada, and a number of people in Clark County. I worked with 26 ministries my first year back in Nevada. I am not officially speaking for them, but I know them well enough to know that they would also support S.B. 192 (R1). Thank you for considering this and we thank Senator Cegavske for presenting this bill.

Chairman Frierson:
Are there any questions from the Committee? [There were none.] Is there anyone in Las Vegas wishing to offer testimony in support?

Tim O'Callaghan, representing the Nevada Catholic Conference:
I am echoing the great testimonies this morning. The Nevada Catholic Conference supports S.B. 192 (R1).

Chairman Frierson:
Are there any questions for Mr. O'Callaghan? [There were none.] Is there anyone else wishing to offer testimony in support? [There was no one.] Is there anyone wishing to offer testimony in opposition to S.B. 192 (R1) in Carson City?

Vanessa Spinazola, representing the American Civil Liberties Union of Nevada:
With the Chair's permission, I will briefly summarize the letter that I have, and I will have Allen Lichtenstein, our general counsel in Las Vegas, address any of the constitutional law concerns. I want to note that the ACLU supports religious liberty. We have a history of supporting these cases. I think the difference in RFRA is that we are concerned when expressing one's religious liberty crosses the line into depriving someone else of rights that they have. We are concerned that that may happen with this current RFRA.

Senator Hutchison mentioned the *Employment Division v. Smith* case. That was a huge case for us and is a really good example of one person who is being affected by a government burden. They want to wear the yarmulkes because it is their religious belief; however, the Air Force policy says that they cannot. By permitting that persons may wear their religious garb, they are not affecting any other person. They are not depriving any other person of their rights. Those are the types of free expression cases in which the ACLU typically gets involved.

Some of the areas where we are concerned that this would infringe upon rights is access to contraceptive freedom. I want to note that Nevada is very different from every other state that has passed a RFRA. We actually have a good law on the books. We have *Nevada Administrative Code* 639.753, which prohibits pharmacists from refusing to dispense contraception. Now, is it an open question if this RFRA passes whether this regulation will stand? Yes, it is an open question, and that is what is going to engender lots of litigation. I would argue that women have come this far, particularly in Nevada, to get a right like this, which we do not have in any other states, that we should not have to litigate our right to access contraception. We should not be going backwards in this state. It is possible that it will come out the other way.

This is also a reason why we do not yet have Nevada-specific examples about contraceptive refusals. Pharmacists in Nevada cannot refuse to dispense contraception; therefore, there are no examples. If this law passes, we may start seeing some of those examples, and we are concerned about that.

In terms of other litigation that is pending, in the last month the number of federal cases litigating the contraceptive provisions of ObamaCare have tripled. When I testified in the Senate, there were only 23 pending cases. Today, one month later, there are 59 cases. This issue will be bubbling up to the Supreme Court in the next year or two. Those cases are being litigated under the federal RFRA, which is substantially similar to S.B. 192 (R1).

The other concern that we have is, in fact, in regard to a woman's right to choose. I have provided examples in the letter (Exhibit W), but I will not go through all of them. We are concerned that health care professionals have an ethical obligation to perform their job, particularly in circumstances where a woman's life may be at stake, and we are concerned that if the RFRA passes, it may result in some examples of health care professionals feeling emboldened that they could refuse to support a woman's right to choose. That will result in litigation.

I want to note for the record that I do not know a lot about the case that Mr. Guinasso referenced in Reno, but I want to flesh it out a little further. This is in reference to the parents with the Costa Rican child. She was 35 years old, but she had the mental capacity of a 6-year-old. Allegedly, she had wandered from the group home where she was being held and engaged in sexual intercourse with individuals at a truck stop. She was also taking medication that, for someone who was pregnant, could endanger the birth of the child. In the affidavits that I looked at—we did have interest in this case at the time—she actually wanted an abortion, to the extent that a woman with a 6-year-old mental capacity can say that she does. So the conflict was, do these state guardians—who also had not filed their annual reports for their child for a number of months—have the right to go against her wishes? That is a fuller understanding of what happened in that case.

I also want to note that there were a couple of references to zoning issues, and the Religious Land Use and Institutionalized Persons Act would deal with any and all zoning issues. That is not at issue in the RFRA.

The final concern that we have is in reference to counseling services, and I have provided some examples of it (Exhibit W). We have seen in other states where students and counseling programs have refused to work with gay people. They have wanted to counsel gay folks that their life choices or their preferences are immoral, and they have used the RFRAs in those other states to say that they should be able to say that to their clients. We are concerned about that happening here. I want to note that ten national groups representing lesbian, gay, bisexual, and transgender (LGBT) issues are weighing in on S.B. 192 (R1). They are also adamantly opposed to this bill passing due to the possible backward steps in rights of LGBT individuals.

Ultimately, we believe that this is a proverbial solution in search of a litigation in women's reproductive rights problems. We are not aware of any particular issue that S.B. 192 (R1) would address. We have won religious liberty cases in Nevada, and we are concerned that this will open the door to significant litigation and steps backward in women's reproductive health.

Assemblywoman Fiore:
My question deals with when you are concerned with doctors refusing to give abortions. Would you prefer a doctor who has a religious belief not to give an abortion to someone, or give an abortion to someone reluctantly, or a doctor who is used to giving these types of surgeries? Would you prefer your patient to be safe with someone who does this practice, or someone who does not want to and is forced to?

Vanessa Spinazola:
I think the health care professionals should do what they are trained to do. We are mainly concerned with the emergency room context, and the examples I have provided are doctors, who presumably are trained across the board to perform any sort of emergency services, refusing in the context of an emergency abortion to provide those services. In one of the examples I provided, one doctor even refused to transfer the woman to another hospital, and she experienced severe blood loss because she had to leave the emergency room and drive to another emergency room in order to get the emergency abortion. I understand what you are saying, but I am concerned about health professionals doing what they are trained to do.

Assemblywoman Fiore:
I am concerned with legislating laws in place that force doctors to do things that they do not want to.

Chairman Frierson:
Are there any questions for Ms. Spinazola? [There were none.]

Allen Lichtenstein, representing the American Civil Liberties Union of Nevada:
I will try to keep this brief and deal with just a few areas that Ms. Spinazola did not. I guess I am going to disappoint some people who are supporters of this bill because I am not going to talk about culture wars, hyperbole, personal attacks, or anything like that. I would like to talk about something that we have not really dealt with much today, which is the text of the bill itself. For the ACLU, if this were simply a matter of having strict scrutiny for any case where an individual's or a group's religious worship was being challenged, I do not think we would have a particular problem with that. But this is not limited to religious worship.

If I could direct your attention to section 5, lines 37 through 40 on page 3, it says, "'Exercise of religion' means the ability to act or to refuse to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief." That is not the free exercise of religion. That is essentially anybody being able to use a

religious motivation to challenge any law. This will come up in two different contexts. It is an individual one where someone is worshipping or doing something that is not affecting someone else. Take the case of the pharmacy. Let us remember that the law came into effect prior to the pharmacist refusing to issue the proper medication. That did not just come out of nowhere. Let us say that particular one is challenged. Then we are dealing with competing rights. Constitutional laws often involve competing rights, and really, strict scrutiny is a constitutional term of art. It is one that Justice Kennedy has said strict scrutiny, a compelling interest and least restrictive means, at least in a free speech context, is almost always one that is impossible to meet.

Let us take the case of someone who needs particular medication and someone who will use this law, if it goes into effect, saying that they have this religious right. On the one hand there is the strictest deference because of someone's claim that they have a religious belief, where you do not have the same kind of deference and the same kind of need for that person to show that there is a compelling religious need with simply a religious motivation. You will end up with a lot of cases. Someone said earlier that there is not going to be much litigation, and then with every hypothetical that members of the Committee brought up, the court will have to decide this and the court will have to decide that. In fact, this bill as written allows someone to challenge virtually any law, with the exception of those that are defined as a civil rights law, and we know that civil rights issues and discrimination issues are not just covered within those particular laws. Part of the problem here is that we are not talking about someone practicing their religion or even people having to violate natural tenets of their religion. We are talking about language that says a religious motivation gets the greatest deference that the courts and the government could give, even though it may affect someone else whose rights do not get that same kind of deference.

There are a couple of other areas where the language is a little puzzling. On page 3, section 3, subsection 4 to paragraph (a), it says, "apply to any claim or defense regarding the employment, education or volunteer service of a person who performs or will be tasked with performing any religious duties for a religious organization, including, without limitation: (a) Spreading or teaching faith." So does that mean a schoolteacher can proselytize because that is part of their religious faith and they are tasked with that by their religious organization? Am I pulling this out of thin air? No. We have had numerous cases of teachers claiming free exercise rights to do just that, even in public schools.

I have litigated a number of free exercise cases, and won most of them. Generally, in those particular cases, you have a balancing of the rights of

religious conscience for certain acts, whether wearing a yarmulke or a religious T-shirt in school versus some other interests. The courts will have to balance the interest depending on the circumstance, and the law, as it generally goes, is if it is not disruptive, if it is not creating an undue problem for an employer, a school, or the like, then religious accommodation is required. So, although some make the suggestion that somehow people's religious rights and their right to exercise religious principles do not exist, they do exist in Nevada. We have litigated those in Nevada, but I think it is highly problematic to say that any religiously motivated action gets greater deference than any other kind of interest for anyone else.

As a final note, no one has talked about this, but on page 4, section 8, subsection 4, because someone filed a frivolous lawsuit, the ability to keep them out of the courtroom is not going to fly constitutionally. I will be happy to answer any questions.

Assemblywoman Cohen:
Do you think this will cause more lawsuits coming out of the prisons for prisoners claiming religious concerns?

Allen Lichtenstein:
It probably will. There are a number of them right now. I think it may create greater success on the part of prisoners in this kind of litigation because then they are going to have to pass something that exempts prisoners from these particular provisions. It is an interesting point I had not thought of. If this is applied across the board to prisoners, then in each particular circumstance, again, safety within the prison and the orderly run of the prison is undoubtedly a compelling interest. I think you will see more litigation from prisons, outside the prisons, in schools, and outside of the schools. Litigation is always going to take place, but here it is opening up a Pandora's box.

Assemblyman Wheeler:
I am wondering, since the other 28 states have passed this, have you seen increased litigation coming out of the prisons?

Allen Lichtenstein:
I have not looked at the litigation in the prisons in other states. What I am looking at here is simply what the text of this particular document says. When you are talking about things that are substantially the same, you know as legislators that the devil is in the details and all of the words are important. Here the wording is much broader than I think we can support. If it were the idea of scrutiny for religious practice and worship, that would make sense.

Scrutiny and that kind of deference for anything that anyone says is motivated by religion probably does not.

Assemblyman Wheeler:
So the answer is no, correct?

Allen Lichtenstein:
I have not looked.

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Nechole Garcia, representing the City of Henderson:
The City of Henderson is in support of religious freedom; however, our concern with this bill is the language. We are concerned that the language is overbroad and is going to incur frivolous litigation that would use the City's resources. We share the same concern that Mr. Lichtenstein raised about section 5 being overbroad. We would also note that while other states have similar laws in place, not all of those laws are as overbroad or as broad as this. For example, in Pennsylvania, they chose to define what a substantial burden is, thereby discouraging any litigation through the courts. Because it is not defined here, it is going to end up forcing us to litigate that issue.

Finally, a concern on the criminal side for the City of Henderson is that any time, based on this language, if we were to prosecute an individual, if their defense was based on any part of their religion whatsoever, that would then put the burden on the City to first prove that the law is not a substantial burden before having to prove that they violated the law beyond reasonable doubt.

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

John T. Jones, Jr., representing Clark County Intergovernmental Relations:
I am here this morning on behalf of Clark County Intergovernmental Relations, and we are opposed to this measure. I appreciate both Senator Cegavske and Senator Hutchison meeting us prior to the hearing on the Senate side and listening to our concerns; however, we are still opposed.

I want to point out something that has not been said about the Supreme Court jurisprudence in this case. Basically the Supreme Court has carved out two types of case law with respect to laws that affect a religion. The first are laws that the Supreme Court does not consider generally applicable or religiously neutral. If a law targets a specific religion or a specific practice of a religion,

then reading the case laws, I would argue that strict scrutiny would still apply, so a court would still have to find a compelling governmental interest and the least restrictive alternative. What the Supreme Court did in the *Employment Division v. Smith* was to say that when we look at a generally applicable law—in other words, a law that applies to everyone the same; there is no type of religious intent or desire to suppress a particular religious practice—then we are going to basically see just that. Is it generally applicable? If so, then it is a valid law.

One of the people who testified previously said that this law will basically force local governments to analyze how particular laws or ordinances affect a religious organization. As Mr. Lichtenstein pointed out, I think this law is much broader than that when you look at the exercise of religion. Section 5 of the bills reads, "whether or not the exercise is compulsory or central to a larger system of religious belief." That basically puts it on the person, not the religion.

In Clark County, we have over 2 million people, and each one of them could argue that they are a religion unto themselves. I would say that Justice Scalia, in his opinion in the *Employment Division* case, articulated this by saying that aspects of public policy "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To do so would create anarchy, allowing each believer "to become a law unto himself." In terms of practice, it is Clark County's position that this bill is overbroad, it will invite litigation, and because of that we are opposed.

Assemblyman Hansen:
Everyone is talking about this as if it is a brand new thing. My understanding is that this has been on the books in 28 other states in almost the same substantial form, yet we keep hearing people bring this up as though it is a new thing and there are some problems. Are you aware of any other counties or city governments around these 28 states that have seen substantial increases in litigation and problems? My understanding is that it has been minimal.

John Jones:
I have read law review articles, and what they indicate is there has been an increase in litigation. You used the word "substantial." I cannot say that, but I can say that from what I have read, there has been an increase in litigation surrounding this.

Pointing to what Ms. Garcia from the City of Henderson said earlier, one of the issues that causes litigation is always uncertainty and lack of definitions. I think the definition with respect to substantially burdened that Ms. Garcia brought up is a great example. What does substantially burdened mean? That is going to

have to be litigated in the state of Nevada to find out what that definition is. I appreciate that everyone who testified in support would indicate the courts are going to have to decide it. It is litigation that leaves the court to decide these questions. I think that is where the basis of Clark County's concerns lies.

Assemblyman Hansen:
So we have lawyers who are concerned about too much litigation?

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Elisa P. Cafferata, President & CEO, Nevada Advocates for Planned Parenthood Affiliates:
We certainly support religious freedom, and we believe that having the First Amendment of the *United States Constitution* as the first enumerated freedom is the best protection you can have. Then having it in the *Nevada Constitution* is very helpful and important. We think that the current situation in the state of Nevada, the balancing act that these cases go through currently, is the appropriate balance point for these rights.

I want to agree with Gwen Linde and thank her for her service. Women certainly are a lot more than their reproductive health care, and that is why you have seen me in here testifying on behalf of nonprofit disclosure, election transparency, social media issues, and other things. We are concerned that a lot of times women's reproductive health care seems to be the place where these issues get tested out. One thing that has not been mentioned is that, so often reproductive health care is a time-sensitive issue. Birth control pills today have such low doses of hormones that you need to be taking them within the same hour in each day to maintain the effectiveness. You do not really have time to go to court and litigate, whatever the outcome is, and it is not a case of us being concerned about the outcome of these cases. My concern is just the going to court part. You do not have time to go to court to decide if you are going to be able to get your prescription filled. Emergency contraception is even more time-sensitive; it only works if you have not ovulated, and once you have ovulated it is not going to be effective. That is a minute-by-minute, hour-by-hour time sensitivity concern.

I have a statement that we submitted (Exhibit X) which lists several cases, some in states where there are RFRA, and some in states where there are not. We are concerned that if we end up in court, either way, we have the time and expense. Let me talk about the flood of lawsuits. Is there or is there not a flood of lawsuits? One thing that has not been talked about is that over 25 states in the country—I do not have the exact number—have birth control

parity laws, or contraceptive parity laws. These have been on the books for decades. Nevada has a contraceptive parity law. Those say that if your insurance covers prescriptions, it has to cover the birth control prescription like any other prescription. There were not any lawsuits from any organizations, or very few—not enough to make the news—in the 28 states that have these birth control parity laws. At that point, the churches that have religious beliefs and did not want to fill these prescriptions did not have a legal problem with it.

The federal government passed the federal RFRA, and then there was the Affordable Care Act, and since those two acts, which require that insurance cover birth control, there have been 59 lawsuits under the federal RFRA. Now, there might not be state lawsuits that we can point to, although there are some, but 59 in six months seems to me a flood of lawsuits around the issue over women's reproductive health care. We think it is a legitimate concern, and that is why we urge you to leave the laws as they are and not support this bill.

Jennifer Batchelder, representing the Nevada Women's Lobby:
We also strongly support religious freedom; however, we are strongly opposed to this bill. As has been stated by a lot of people today, the *U.S. Constitution* and the *Nevada Constitution*, along with a lot of other documents and court cases, have secured religious freedoms in this country and this state. We do not feel additional language in statute is needed. This freedom and liberty does not need to be codified any further. Even with the amended version, we firmly believe that this legislation will not strengthen civil rights but weaken them. It can open the door, as it has in other states such as Florida, for groups and individuals to claim a religious belief and that a law violates that religious belief. An example of this in Florida was that the Aryan Nation decided to become a branch of the Christian Identity religion so they could claim certain acts would constitute a product of their religion. Cases are starting to happen regarding LGBT issues because of this law, not only in states with RFRA but in states without RFRA. Most recently in Washington State, a florist refused to provide flowers for a longtime customer's wedding because she did not believe in gay marriage, and the couple happened to be gay. The florist claimed that she did not have to provide flowers for their wedding because it violated her religious belief.

We believe that many other lawsuits will be brought forth if this is passed, and it will be costly for the cities, counties, and states. We believe this body should base policy decisions on what is best for the people of the state and not their religious beliefs. It can happen here. On the floor of our own Senate during the passage of S.J.R. 13 (R1), more than one senator opposed that resolution because they felt it violated their religious beliefs and convictions.

Stacey Shinn, representing the Progressive Leadership Alliance of Nevada; and the National Association of Social Workers, Nevada Chapter:
We are here in opposition to S.B. 192 (R1). Due to current protections, we find this legislation unnecessary and could possibly result in unintended consequences. We do not want to jeopardize any current rights or underrepresented populations, such as women's reproductive rights, LBGT rights, employment nondiscrimination acts, students and their schools' curriculums, and even animal welfare laws.

Chairman Frierson:
Is there anyone else in Carson City wishing to offer testimony in opposition? [There was no one.] Is there anyone in Las Vegas wishing to offer testimony in opposition?

Edward Wynder, Private Citizen, Las Vegas, Nevada:
I am here speaking in opposition on behalf of myself. Supporters of this law have talked about fairness and equality, but I feel that it is not fair and it is not equal because this law does not protect people like me. This law protects the deepest-abiding convictions of people because they believe in God, but because I do not, this law does not protect me. Certainly, with the hypotheticals we have had, we could come up with one where my neighbor and I do the exact same thing, and I am punished but he is protected because he believes in God. I support individual rights. I support religious freedom. I support individual freedom, but this law separates people into classes. It separates me into a class that the law does not protect and indicates that somehow my beliefs are not worthy of protection. I feel that it is fundamentally wrong and I ask you to vote no.

Chairman Frierson:
Is there anyone else wishing to offer testimony in opposition? [There was no one.] Is there anyone in Carson City wishing to offer testimony in a neutral position? [There was no one.] Is there anyone in Las Vegas wishing to testify in a neutral position? [There was no one.] I will invite Senator Cegavske and Senator Hutchison back up briefly for closing remarks.

Senator Cegavske:
We really appreciate the time that you have allotted us to speak. To those who have proposed opposition, I am going to let my colleague from the Senate respond. I want to thank Ms. Spinazola from the ACLU and Ms. Cafferata from Planned Parenthood. They were very good in giving us the information that they distributed to everyone, and I appreciate it.

Senator Hutchison:
I tried to think of what I could do to summarize what I knew would be opposition. If you do not want to have any litigation in this country, you just do not have to recognize rights. That is going to eliminate all litigation. In fact, most of the groups that came up and fought really hard, including the counties, ACLU, and Planned Parenthood, are more than willing to go to court when they think their rights are involved. When someone else's rights are surfacing, particularly religious freedom rights, now the argument seems to be, let us not go to court, and it is going to open the floodgates. The easy way in this country to cut down litigation—I can tell you as someone who has done it for 25 years—is just not recognize rights. Let us get past that argument and decide whether or not in this country since 1791 we have had this right. This is not some new right that we are bestowing upon ourselves or upon the people of Nevada. Since 1791, upon the adoption of the Bill of Rights, we have had the First Amendment rights, all of what we are talking about emanate from the First Amendment. All we are talking about is what test do you apply when you get into court. It does not open the floodgates. There are no new rights bestowed in this bill. The right that you and I have is in the First Amendment, and we have had it since the day we were born. The question in this bill is whether we are going to allow government to substantially burden that right without having to show first a compelling state interest to do so. If the state can show a compelling state interest to do so, that law stands. If it cannot, then we yield to religious freedom and liberties in this case.

The second thing I would say is that almost every one of the opponents say, we think, we believe, there is a possibility that, and then ignores 20 years of history at the federal level. I would suggest that if these draconian results are going to flow from RFRA, Harry Reid sure got it wrong. So did Barbara Boxer. So did John Kerry. So did Ted Kennedy. So did Chuck Schumer. Why bipartisan support for this legislation that has not resulted in all the draconian results that you heard about today? Mr. Chairman and Committee members, I appreciate your time and thank you for your consideration.

[The following exhibits were submitted but not discussed: (Exhibit Y), (Exhibit Z), and (Exhibit AA).]

Chairman Frierson:
Thank you, Senator. With that, I will close the hearing on S.B. 192 (R1) and take a brief recess [at 11:30 a.m.] for the Committee to get ready for the work session.

The Committee will come back to order [at 11:57 a.m.]. We have a significant work session today. I am going to get started, but we also may have to recess

at the call of the Chair and reconvene. This is deadline day. I will open up the work session and start with Assembly Bill 499.

Assembly Bill 499: Ratifies certain technical corrections made to NRS and Statutes of Nevada. (BDR S-522)

Dave Ziegler, Committee Policy Analyst:
Assembly Bill 499 is sponsored by this Committee and was heard yesterday. This is the biennial ratification bill, which ratifies technical corrections to the *Nevada Revised Statutes* (Exhibit BB). There are no amendments.

Chairman Frierson:
I suspect this is going to be the easiest bill in the work session. I will seek a motion to do pass.

ASSEMBLYMAN WHEELER MOVED TO DO PASS ASSEMBLY BILL 499.

ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Assemblyman Duncan will handle the floor statement. The next bill before us is Senate Bill 314.

Senate Bill 314: Provides that the right of parents to make choices regarding the upbringing, education and care of their children is a fundamental right. (BDR 11-880)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 314 is sponsored by Senator Denis and was heard in this Committee on May 10, 2013. This bill provides that the right of a parent to direct the upbringing, education, and care of the parent's child is a fundamental right. Under this measure, in implementing a statute, local ordinance, or regulation, the State or any agency, instrumentality, or political subdivision is prohibited from violating this right without demonstrating a compelling governmental interest that, as applied to the child involved, is of the highest order (Exhibit CC). On the day of the hearing, there was an amendment provided by the Division of Child and Family Services, which is attached. The Chairman of this Committee proposed a conceptual amendment on May 13, 2013. That amendment is also attached.

Chairman Frierson:
Are there any questions on the bill?

Assemblyman Thompson:
Have all the amendments been accepted?

Chairman Frierson:
It is the inclination of the Chair to entertain the motion to amend and do pass with the amendment that I provided to the Legal Division. I have cleared it through the sponsor of the bill. That amendment incorporates some language that was proposed by the Division of Child and Family Services previously.

Legal pointed out to me that there is some language in the original bill dealing with applicability that would provide some direction regarding how this applies, and without that it would probably raise some questions about existing rules. I believe that the sponsor of the bill actually proposed to put that in when I gave him the language, so that would be included in the Chair's conceptual amendment so it is clear on applicability.

Assemblywoman Diaz:
I would like to comment that, especially in this area when we are talking about children and parents, I think that in this arena when we are crafting laws, a lot of times people tend to be looking for negative things. I see this bill as a breath of fresh air, saying that parents do try to do what is best for their children and to assert that fact that parents really do try to do what is best for them. I am supportive of this bill with your amendment.

Chairman Frierson:
Are there any other thoughts on the bill? [There were none.] I will be entertaining a motion to amend and do pass.

> ASSEMBLYWOMAN FIORE MOVED TO AMEND AND DO PASS SENATE BILL 314.
>
> ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN CARRILLO, COHEN, AND HANSEN VOTED NO.)

Assemblywoman Diaz will handle the floor statement. The next bill is Senate Bill 389 (1st Reprint).

Senate Bill 389 (1st Reprint): Revises provisions relating to real property. (BDR 9-601)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 389 (1st Reprint) relates to real property. The bill is sponsored by Senator Segerblom and was heard in this Committee on May 14, 2013. Senate Bill 389 (R1) provides that the owner-occupant of a single-family dwelling subject to a mortgage or deed of trust may submit a written request to the servicer of the mortgage for a certified copy of the note, the mortgage, or deed of trust and each assignment. [Continued to read from the work session document (Exhibit DD).] On the day of the hearing, the sponsor submitted a proposed amendment, and it is attached.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Diaz:
Was this a homeowners' association bill or not?

Chairman Frierson:
This was not a bill with the Subcommittee. I will be entertaining a motion to amend and do pass.

> ASSEMBLYMAN OHRENSCHALL MOVED TO AMEND AND DO PASS SENATE BILL 389 (1ST REPRINT).
>
> ASSEMBLYMAN THOMPSON SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYWOMAN SPIEGEL VOTED NO.)

Assemblywoman Cohen will handle the floor statement. The next bill is Senate Bill 424 (1st Reprint).

Senate Bill 424 (1st Reprint): Revises provisions relating to foreclosures. (BDR 3-1113)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 424 (1st Reprint) relates to foreclosures, is sponsored by the Senate Committee on Judiciary, and was heard in this Committee on May 14, 2013. This bill provides that if a banking or other financial institution forecloses on real property, purchases that real property at the foreclosure sale, and intends to sell the real property for an amount less than the amount of indebtedness, the debtor must be afforded a right of first refusal, under the following

circumstances. [Continued to read from the work session document (Exhibit EE).] On the day of the hearing, the Nevada Credit Union League submitted a proposed amendment, a copy of which is attached. That amendment was accepted in part by the sponsor, but there was a portion that the sponsor did not agree with, and that is the portion that would require the debtor to have participated in the Foreclosure Mediation Program in order to be afforded the first right of refusal.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Spiegel:
I am really concerned that, if passed, this bill would lead to a lot of homeowners walking away from their property so that they could get it back at a reduced rate. I think it is really prone to abuse, and for that reason I will be voting no.

Assemblywoman Fiore:
I do not see that, because I think once you start not paying your mortgage, your credit score goes down and you will not qualify to be able to purchase that home.

Assemblyman Wheeler:
I agree with Assemblywoman Spiegel. I think this will incentivize bad behavior and has no place in Nevada law.

Assemblywoman Cohen:
I agree with Assemblywoman Spiegel and Assemblyman Wheeler. I am also not happy with the message this is sending to our constituents who work really hard to stay in their homes and keep their payments up, but I do want to see this go to the full body, so I am going to reserve my right to change my vote on the floor but still vote yes.

Assemblyman Thompson:
As the colleague on this Committee who has the most foreclosure notices in his district, I am definitely in support of this. Hopefully, we can work out the specifics of it, but I think it is a hope for homeowners who would like to stay in their homes.

Assemblyman Hansen:
I am a ditto with Assemblywoman Spiegel.

Assemblyman Martin:
I am in support of this bill. I understand the concerns about possibly codifying something that could encourage bad behavior, but the bad behavior has been done by the banks not being responsive to the homeowners in the first place, and maybe this will open the dialogue and finally get them to answer the phone in terms of debt reduction without destroying someone's credit. I am hoping this law does just that, and I am in full support.

Assemblyman Carrillo:
I will be voting this out of the Committee, and I will reserve my right to change my vote on the floor.

Chairman Frierson:
Are there any other thoughts on the bill? I will say that while some folks' basis for opposing the bill is that people will not be able to qualify for it, that could equally be a reason to support it as something that rarely is applicable and would rarely affect the market. Are there any other comments on the bill? [There were none.] I will be entertaining a motion to amend and do pass at the pleasure of the sponsor of the bill, meaning with the amendment that was offered minus the provisions that he did not approve.

> ASSEMBLYMAN OHRENSCHALL MOVED TO AMEND AND DO PASS SENATE BILL 424 (1ST REPRINT).
>
> ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN DUNCAN, HANSEN, SPIEGEL, AND WHEELER VOTED NO.)

The next bill is Senate Bill 131 (1st Reprint).

Senate Bill 131 (1st Reprint): Establishes provisions governing the disposition of a decedent's accounts on electronic mail, social networking, messaging and other web-based services. (BDR 12-563)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 131 (1st Reprint) is sponsored by Senator Cegavske and was heard in this Committee on May 13, 2013. This bill authorizes the personal representative of a decedent to take control of, conduct, continue, or terminate any account on any Internet website providing social networking, short message service, electronic mail service, or any similar electronic or digital assets of the decedent. The measure specifies that it does not authorize a personal representative to take control of, conduct, continue, or terminate any financial

account of the decedent including, without limitation, a bank account or investment account (Exhibit FF). The sponsor submitted a proposed amendment. Our office mocked that up and the mock-up is attached. Basically, the amendment limits the power of the personal representative to terminate the account.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Diaz:
Just for clarification, the amendment gives the family members the ability to close out any accounts that the deceased might have, correct?

Chairman Frierson:
It would not necessarily be a family member. It could be your personal representative, maybe the executor, but it is whoever the person that was designated as a personal representative. Yes, it would be for the purpose of closing the account. I believe that an amendment was submitted by the sponsor to reflect that. The staff looked at it, and it refers to that language throughout, so I would imagine that the intent of the amendment is to make it consistent throughout the bill. Is there any other discussion of the bill?

Assemblyman Carrillo:
Is there a certain time that has to take place? That way we know that the account has been closed and it does not take them a year to close the account. Is there any date or time frame upon the deceased passing? What kind of time frame are we looking at?

Chairman Frierson:
I will defer to Legal. I do not think that the bill contemplates a time requirement or limitation.

Brad Wilkinson, Committee Counsel:
That is correct.

Assemblyman Carrillo:
So they can still have access to the accounts and not be held accountable for how long it goes before they have to close them? The amendment says that is the only thing they are supposed to be doing.

Chairman Frierson:
My reading of the amendment reflects that the person can go in solely for the purpose of closing out the accounts, so they could not go in for the purpose of

accessing email for maintaining, continuing, or posting on behalf of the person. There is no time limit and, I would presume that in the instances where it is uncertain as to when the death occurred, it allows some flexibility, but in narrowing it to closing, I think the intention would have been to make sure that that was the only purpose.

Brad Wilkinson:
I think that is accurate. The bill does not require that the account be terminated, but it authorizes a personal representative to do so.

Assemblywoman Diaz:
As a final point based on what my colleague, Mr. Carrillo, just brought up, the person will not be granted access to the account, just the power to terminate it. Is that correct?

Brad Wilkinson:
The bill does not speak in terms of limiting it in that fashion. I imagine that you may need to have access to it to terminate it, but the only authorized action is actually termination, not continuing it. I think that that contemplates that the person would have access to do so.

Assemblywoman Diaz:
The information for logging into the accounts is given to the person, and if the person never terminates the account, they could potentially still keep it up. How do we really know that they are going to use the login information to terminate it, instead of continuing to use it or keep it up?

Brad Wilkinson:
That is a good question. As it is proposed, the amendment only authorizes termination and does not require it. Presumably, if it were not terminated, then it would continue. By removing the language about taking control of, conducting, or continuing, I think it is contemplated that it will be terminated if the personal representative wants to do so. That may well be in accordance with a will that specifically provides that it should be closed. There is no time frame as to when that has to occur, so you are correct in that it could, in fact, continue for some period until it was terminated.

Chairman Frierson:
I think that in order to access someone's account, it is a requirement that you have a password and information, and in order to get that, you have to contact the provider of the service. I think, in a practical sense, that is when the conversation would take place that I am the representative and this person is

deceased and either you close it out or let me in there so I can close it out. I am trying to describe what I think the conceptual effect is of the bill.

Assemblywoman Diaz:
My concern would still lie with what my colleagues have said. We are allowing the access to the accounts for that purpose, but how do we really know that that purpose is going to be followed through with? That is my underlying concern. There is nothing else in the bill that speaks to it.

Chairman Frierson:
Given those concerns, I will throw out there a conceptual amendment that provides that the personal representative may contact the provider for the purpose of closing the account or something that does not allow the dissemination of a password, but allows a personal representative to provide evidence that they are the personal representative and to direct the service to close out the account.

Senator Barbara K. Cegavske, Clark County Senatorial District No. 8:
For the record, the person has no access whatsoever. The only thing they can do is terminate it, and the social media has access, so you would have to contact them to terminate. That is the only access. You have no access to do anything, but if you do not know that they have that social media, you would not know to terminate it. There is no access at all. It is just to terminate. That is what the amendment does.

Assemblyman Carrillo:
They would not have access to the account, but they would have to show some type of document such as a death certificate to show that this individual had passed on, and the process would fall in place where they would go ahead and terminate the account at that point. The way I see it, this is to prevent people from going into the personal business of that individual and keeping that person in the frame of mind that they know them as—not saying that the individual has any skeletons in his closet, but in the hopes of preserving that individual's memory of that person the way it is. I want to make sure that is exactly what we are going to be doing.

Senator Cegavske:
You are absolutely right. All this does is give you the right to terminate. You have to have a death certificate. You have to have information to give them. You cannot just call up and say, I am so-and-so's whatever. There has to be documentation, and there is no time period because each account is so different. There is no access that any individual has to that account other than being able to terminate.

Chairman Frierson:
In concept, if the language reflected something more along the lines of a personal representative having the authority to direct the termination of an account of the decedent, would that accomplish your intent?

Senator Cegavske:
If that language is better, that is fine. We wanted the access to terminate, to be able to get to them and say, I would like it terminated. That language is fine.

Assemblywoman Diaz:
If we could get that clarification, I am good with just being able to terminate the accounts and having no further access.

Chairman Frierson:
Are there any other comments from the Committee? [There were none.] At this time, I will entertain a motion to amend and do pass with the conceptual amendment that a personal representative would have the authority to direct the termination of an account upon the death of the subject.

> ASSEMBLYWOMAN DIAZ MOVED TO AMEND AND DO PASS SENATE BILL 131 (1ST REPRINT).
>
> ASSEMBLYMAN MARTIN SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

Chairman Frierson:
Assemblyman Hansen will handle the floor statement. The next bill is Senate Bill 111 (1st Reprint).

Senate Bill 111 (1st Reprint): Requires production of certain evidence under certain circumstances. (BDR 3-771)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 111 (1st Reprint) has to do with evidence, is sponsored by Senator Jones and was first heard in this Committee on May 16, 2013. Senate Bill 111 (R1) requires a person who owns or controls the premises on which an injury or death allegedly occurred to produce and provide copies, if any, of any visual evidence of the incident to the claimant or an attorney representing the claimant. [Continued to read from the work session document (Exhibit GG).] There were no amendments.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Spiegel:
I have a number of concerns about this bill, particularly about how it would affect small business. I understand that in some regards it might cut down on the cost of litigation and, if the bill passes, I would hope that in the future it might be amended to make it a little less onerous. I will be voting no on this.

Assemblyman Thompson:
I will be voting to pass it out of Committee; however, I would like to reserve the right to change my vote on the floor.

Assemblywoman Fiore:
As a small business person, I will be voting no on this bill.

Assemblyman Duncan:
I have concerns with going through the discovery process in an extrajudicial manner, and, of course, there were the concerns raised by businesses, so I will be voting no.

Assemblyman Hansen:
Having made the mistake one time of giving information to a potential litigant without consulting my attorney first, I can say that it is a huge mistake to allow people to do that. Any potential litigation should always be done through an attorney, even something that seems as harmless as turning over a videotape. I think it would be very wise to do the opposite and counsel people, if they are getting letters from attorneys, to be sure to consult an attorney before they give anything to anyone, civil or criminal.

Assemblyman Carrillo:
I will be voting this out of Committee and reserve the right to change my vote on the floor.

Assemblyman Wheeler:
I will be a strong no on this. I believe this bill pulls one person's property right over to another, and I do not think we have any room in Nevada for that.

Assemblyman Martin:
I am a strong yes as a small business owner. One of the businesses I own has cameras and we have had to produce the evidence and, of course, it exonerated us. I believe the good outweighs the bad here, so I am in full support.

Assemblywoman Cohen:
I also believe the good outweighs the bad and that ultimately this is going to help reduce frivolous lawsuits.

Assemblyman Ohrenschall:
I will be supporting the measure today. I know that there are some serious and valid concerns, but I think the good outweighs the bad. With issues like this, letting the cards be out there on the table might actually help resolve suits as opposed to allowing people to keep their cards close to their chest. There is a process in the bill to oppose letting that video out, if there is video at all. There is nothing mandating that video even be at the premises. I think it is carefully constructed and it could help reduce litigation. I will be supporting it.

Chairman Frierson:
Are there any other thoughts on the bill? I will be seeking a motion to do pass.

> ASSEMBLYWOMAN DIAZ MOVED TO DO PASS SENATE BILL 111 (1ST REPRINT).
>
> ASSEMBLYWOMAN COHEN SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN DUNCAN, FIORE, HANSEN, SPIEGEL, AND WHEELER VOTED NO.)

Assemblyman Ohrenschall will handle the floor statement. The next bill is Senate Bill 118.

Senate Bill 118: Revises provisions relating to forfeiture of property. (BDR 14-462)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 118 has to do with criminal procedures. The bill is sponsored by Senator Brower and was heard in this Committee on May 14, 2013. The bill changes the standard of proof that a plaintiff must establish in a proceeding for forfeiture of property from the proceeds attributable to the commission of a crime. It would change the standard of proof from clear and convincing evidence to a preponderance of the evidence (Exhibit HH). There were no amendments.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Diaz:
I have some concerns about the potential impact of changing the language, so I cannot support this bill.

Chairman Frierson:
I will make two points, one that supports the notion, and one that does not. There was a chart providing information about the number of states that have different standards. I think the testimony of the bill's proponents was accurate about there being a majority that had a lower standard. However, this matter was addressed in the Nevada Legislature and, from my review of information, the bill changed because of abuses. That is expressly why it was changed and when it was changed.

Are there any other thoughts on the bill? [There were none.] I will be seeking a motion to do pass.

> ASSEMBLYMAN WHEELER MOVED TO DO PASS SENATE BILL 118.
>
> ASSEMBLYMAN DUNCAN SECONDED THE MOTION.
>
> THE MOTION FAILED. (ASSEMBLYMEN CARRILLO, COHEN, DIAZ, DONDERO LOOP, FRIERSON, MARTIN, OHRENSCHALL, SPIEGEL, AND THOMPSON VOTED NO.)

The next bill is Senate Bill 177 (1st Reprint).

Senate Bill 177 (1st Reprint): Prohibits a minor from committing certain acts relating to the possession and use of tobacco products. (BDR 5-689)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 177 (1st Reprint) has to do with minors in possession of tobacco. It is sponsored by Senator Settelmeyer and was heard in this Committee on May 1, 2013. The bill prohibits a child under the age of 18 from purchasing, possessing, or using tobacco products, or falsely representing his or her age to purchase, possess, or obtain tobacco products. A child who commits an offense related to tobacco is a child in need of supervision and may be ordered by the juvenile court to pay a fine of $25 for the first offense, $50 for the second offense, and $75 for the third or any subsequent offenses. [Continued to read from the work session document (Exhibit II).]

On the day of the hearing, there was an amendment submitted on behalf of the company, Altria. It is attached. It amends the language in a number of

different places to speak to products made from or derived from tobacco. After the hearing, the sponsor forwarded an amendment from the Washoe County Public Defender's Office that addressed two issues. One is the idea that this would not be a primary offense for purposes of a traffic stop, and also that the Washoe County Public Defender's amendment would carve out an exception for religious use. Clark County has also submitted a proposed amendment. All of these amendments are attached. The Clark County amendment would basically set up a system in which this would be handled only pursuant to the authority of a local ordinance adopted by the Board of County Commissioners. For the record, the Washoe County Public Defender's Office asked me to indicate that despite their proposed amendment, they are neutral on the bill.

Chairman Frierson:
I spoke with the bill's sponsor about the desire to get something out that addresses this issue and addresses the frustration on the part of some, in particular in his district. At this time, I would be inclined to entertain a motion to amend and do pass with combining all three of the amendments discussed.

> ASSEMBLYMAN CARRILLO MOVED TO AMEND AND DO PASS SENATE BILL 177 (1ST REPRINT) WITH THE THREE AMENDMENTS DISCUSSED.
>
> ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

Assemblyman Wheeler will handle the floor statement. The next bill is Senate Bill 224 (1st Reprint).

Senate Bill 224 (1st Reprint): Revises provisions governing driving under the influence. (BDR 43-668)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 224 (1st Reprint) has to do with driving under the influence. It was sponsored by Senator Cegavske and heard in this Committee on April 30, 2013. This bill imposes a fee of $500, in addition to any other penalty, if a person pleads guilty or is found guilty of certain charges of driving under the influence (DUI) of intoxicating liquor or a controlled substance. The money collected from the fee must be used to support a specialty court program established to facilitate testing, treatment, and oversight of certain persons who suffer from a mental illness or abuse alcohol or drugs. The measure provides for the imposition of community service if a defendant is unable to pay the fee (Exhibit JJ). There were no amendments.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Diaz:
While I do believe that this is a noble cause and that the specialty courts in this area do provide great service to many of our constituents that have an issue with drinking and driving, we have heard all session long that we just are not getting the monies collected on the fees that we are imposing. I support the DUI specialty courts and Senator Cegavske's intent, but at this point in time I think it is too burdensome. Hopefully, we will see some better times in our state where we can adequately fund these types of programs that benefit everyone.

Chairman Frierson:
I neglected to point out a valid issue that was brought to my attention by Ms. Cohen. The language of the bill as it exists addresses persons arrested for DUI but did not take into account that some folks may not be convicted of DUI and would still be subjected to the additional requirements. Her concern was that there are folks who participate in diversion and get a reduction in their sentence, and should be able to still provide the additional requirements. For those against whom the case was not pursued or it was reduced due to an inability to prove the DUI, it would make sense to not apply this to those individuals. So to make the record clear about what I am talking about, there are times when someone may plead to a reckless driving instead of a DUI. It is my experience that that occurs when the state is unable to prove the charge. That is different from when a person who, as a part of the serious offender program or diversion program, pleads guilty to the offense but the adjudication is stayed so that they can participate in the program. Those individuals would, in fact, be required to do the additional requirements. The sponsor has indicated that that would be consistent with her intent. I wanted to make that clear so when we are having comments on the bill, we understand that that is what we are talking about.

Assemblyman Thompson:
I am in support of this bill. It may be difficult for us to collect. I believe there is a 40 percent collection rate right now. I talked with a few sponsors who were proponents of the bill, and they stated that in our community we have one of the lowest rates of payment for DUI offenders. It is extremely important that we have specialty courts. We have specialty courts that help our veterans. They are dealing with many issues, including mental health issues. We have the DUI courts, we have the mental health courts, and we even have courts for our homeless who are chronic inebriates. It is so important that we try our best to

collect as many coins as possible to keep these specialty courts alive. I will be in full support of this bill.

Assemblyman Ohrenschall:
During the hearing, I had a lot of concerns about some of the issues that my colleagues brought up, but I talked with folks who are involved with specialty courts, and most of my concerns were addressed. I think this bill will help, so I will be supporting it.

Assemblyman Hansen:
As I recall in testimony, the judges were actually the ones who were adamantly opposed, including some of the specialty court ones. Has something been changed with regard to the amendment, or is there anyone from that community who is going to clarify on that? I am going to vote no on it unless the judges were comfortable with it, because they clearly were not.

Chairman Frierson:
As to my recollection of it, and Mr. Ziegler can confirm, I remember Judge Linda Bell testifying in support. I believe the Administrative Office of the Court is not in support.

Dave Ziegler:
The opposition on the day of the hearing was from John McCormick from the Nevada Supreme Court and the Administrative Office of the Court, Judge Alan Tiras, President of the Nevada Judges of Limited Jurisdiction, and Judge John Tatro of Carson City. That was it for the opposition.

Assemblywoman Cohen:
I believe it was the Nevada Judges of Limited Jurisdiction as a whole.

Chairman Frierson:
Judge Tiras is the president of that organization and speaking on behalf of the organization.

Assemblyman Carrillo:
In regard to the fee, the amendment was if they could not come up with the money, they would do some type of community service equivalent. Is that not what they are already doing now? Is it just more community service, so we would probably have the cleanest state in America?

Chairman Frierson:
The bill would increase what is there, so it would increase existing fines by $500 and increase the existing community service requirement. It also

designates where the additional fees would go. Are there any other comments on the bill? [There were none.]

Senator Cegavske, I want to clarify something to make sure I am not misrepresenting your intent. The bill specifically refers to individuals found guilty of that charge or a lesser offense including, without limitation, a traffic violation arising out of the same traffic episode. I think there is comfort in that notion, and I do not want to misrepresent what your intent was as much as your willingness to accommodate that concern.

Senator Barbara K. Cegavske, Clark County Senatorial District No. 8:
You are right. You and I had a discussion, and I was very amenable to the amendments that you discussed. I would like to thank you and the Committee.

Chairman Frierson:
So it was not your intent originally, but you willingly worked with some folks who had concerns.

Assemblywoman Diaz:
How is this bill changing?

Chairman Frierson:
In section 1, subsection 1, starting on line 8, the language "or a lesser included offense, including, without limitation, a traffic violation, arising from the same traffic episode" would be stricken. With that conceptual amendment, I will be seeking a motion to amend and do pass.

> ASSEMBLYWOMAN FIORE MOVED TO AMEND AND DO PASS SENATE BILL 224 (1ST REPRINT).
>
> ASSEMBLYMAN THOMPSON SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN CARRILLO, COHEN, DIAZ, HANSEN, SPIEGEL, AND WHEELER VOTED NO.)

Assemblywoman Fiore will handle the floor statement. The next bill is Senate Bill 373 (2nd Reprint).

Senate Bill 373 (2nd Reprint): Makes various changes relating to judgments. (BDR 2-932)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 373 (2nd Reprint) relates to the enforcement of judgments. It is sponsored by Senator Segerblom and was heard on May 3, 2013. This bill authorizes a court to issue a written order permitting a judgment debtor to pay in installments if the court determines the person is unable to pay the full amount. The bill also increases the portion of a judgment debtor's take-home pay that is exempt from garnishment from 75 percent to 85 percent if the gross annual salary or wage of the debtor is $50,000 or less. [Continued to read from the work session document (Exhibit KK).] The sponsor, Senator Segerblom, has submitted a proposed amendment, and a copy of it is attached. It would reduce the $50,000 amount mentioned to $40,000. The amendment would increase the portion of a judgment debtor's take-home pay that is exempt from garnishment to 85 percent if the gross annual salary or wages of the debtor is $40,000 or less.

Chairman Frierson:
Is there any discussion on the bill itself?

Assemblyman Thompson:
I will be voting for this to get it out of Committee; however, I want to reserve my right to change my vote on the floor. I appreciate the reduction to $40,000 because that helps the consumer, but I want to look out for the small businesses. I really would have hoped that we could have gotten to 80 percent.

Assemblyman Hansen:
It was very interesting discussing this bill with all the various lobbyists. We received a lot of different angles on this. I come from both a blue-collar background and a small business perspective, but most of the people who were bringing it up were using examples of big credit card companies abusing this kind of thing. Having actually gone through this process, I would have to say that my observations are for the small business people in particular. The local judges are very, very supportive on trying to work out payment arrangements, even to getting payments down to $10 a week. I am going to vote no on this bill. There are so many protections in the bill right now for the debtor side of it that, for the small business person in particular, I think this is taking it just a little too far in the wrong direction.

Assemblywoman Diaz:
We have been through really hard times in our state these past couple of years, and our construction industry and other industries were hit especially hard, so when they brought that perspective to me, I did not really have it. When someone who was used to an income and was spending based on that income, now all of a sudden he does not have a job anymore, and he could not get on

his feet for a year or two—and knowing people who committed suicide after losing their job—I am compelled to give them the benefit of the doubt and help those people who might be in a tight situation. This limits the amount that creditors can get when the people are getting back on their feet and trying to make ends meet for their families. I see that as a priority. I think some compromise has been made, to $40,000, and it does not apply to all the cases. It is only $40,000 and lower and 15 percent of that they can garnish. I think that our people in Nevada who have been through such hard times deserve this. I am a strong yes.

Assemblywoman Fiore:
I sat on the trauma prevention program unit for five years, and I basically went on homicides and suicides. My first call was a man who hung himself over a $37 Southwest Gas bill. I will be in strong support of this bill.

Assemblyman Martin:
I fully understand what the intent of this bill is and the goal of trying to protect people and make things more affordable for them. I fundamentally believe that this is the wrong approach. My accounting and finance background is telling me that we need to do much more work and a whole different structure of this. Accordingly, I am a no on this.

Assemblywoman Cohen:
I am going to vote to move this out of the Committee, but I am going to reserve the right to change my vote on the floor. I appreciate everything that my colleagues have said. I have expressed some concerns about abuse and household expenses.

Assemblywoman Spiegel:
I had some initial concerns about this bill. I am really grateful for the amendment. I think there are many Nevadans who are having difficulty paying their bills. I think this could help both Nevadans and businesses because they will be more likely to live within the 15 percent garnishment at the lower end, which will help them avoid bankruptcy and extinguish the debt for the business. I think this would help business and help Nevadans. For that reason, I am going to vote yes.

Assemblyman Ohrenschall:
I am supporting the measure. I think the parties have worked hard to try to get to a compromise. No bill is perfect. There are people who are struggling to stay afloat now, and I think that whatever we can do to help them is important. I think this bill has the potential to help creditors too, because if someone has a manageable payment, it may take a little longer to make the creditor whole, but

it might actually happen as opposed to presenting someone with a garnishment that is just going to set them up for failure. I do not think the law should allow setting people up for failure who have already been devastated. Is the law perfect? Of course not. Is it possible that someone might try to avoid a debt? Yes, but that happens now. I do not think we can legislate against that. I will be supporting the bill.

Chairman Frierson:
I am inclined to entertain a motion to amend and do pass.

> ASSEMBLYWOMAN SPIEGEL MOVED TO AMEND AND DO PASS SENATE BILL 373 (2ND REPRINT).
>
> ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN DUNCAN, HANSEN, MARTIN, AND WHEELER VOTED NO.)

Assemblyman Carrillo will handle the floor statement. The next bill is Senate Bill 107 (1st Reprint) from today's hearing.

Senate Bill 107 (1st Reprint): Restricts the use of solitary confinement and corrective room restriction on children in confinement. (BDR 5-519)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 107 (1st Reprint), having to do with solitary confinement and other similar phenomenon as they relate to minors, is sponsored by the Senate Committee on Judiciary and was heard in this Committee earlier today. The amendment from Senator Segerblom was the amendment that was presented today to the Committee.

Chairman Frierson:
My recollection is that there were two amendments. There was Senator Segerblom's amendment and then the amendment provided by Mr. Patterson reinserting provisions that were struck out by the Senate when the bill was heard there. I believe Mr. Patterson's proposed amendment would apply these provisions to the adult jail and prison facilities as they are to the juvenile facilities. Is there any discussion on the bill?

Assemblyman Hansen:
This is basically just a study at this point, is it not?

Chairman Frierson:
No. The bill proposes to prohibit a child from being detained in solitary confinement.

Dave Ziegler:
In section 1 of the bill, a local or regional juvenile detention facility must not subject a child to solitary confinement. The child detained may be subjected to corrective room restriction only if less restrictive options have been exhausted and only for the purposes specified in the bill. Discipline resulting in corrective room restriction for greater than two hours must be documented in writing and approved by a supervisor. The child may be subjected to corrective room restriction only for the minimum time necessary, and must be returned to the general population as soon as possible. A child subjected to corrective room restriction for more than 24 hours must have at least one hour of exercise per day; access to the same meals, health treatment, contact, and legal assistance as the general population; and a status review at least once every day with continuation documented in writing. The detention facility must report monthly to the Division of Child and Family Services, and the Advisory Commission on the Administration of Justice must conduct the study. This exactly parallels provisions as they would apply to a state-run juvenile detention facility.

Chairman Frierson:
Does that answer your question, Mr. Hansen?

Assemblyman Hansen:
It sounds like a study to me.

Chairman Frierson:
Is there any other discussion on the bill?

Assemblywoman Fiore:
When the juveniles are restricted to their rooms, do they have books to read? Is it a time-out?

Frank Cervantes, Division Director, Juvenile Services, Washoe County:
Yes, they do get certain items in their room, at least in Washoe County. They get a book, schoolwork, and other provisions.

Chairman Frierson:
I have toured some of these facilities, and I do not recall seeing any books or anything in the Clark County facilities.

Frank Cervantes:
You are correct. That is why I am responding just for Washoe County. The bill at least tries to standardize a higher level of care for corrective room restriction statewide, and I think that is what our target is.

Chairman Frierson:
Are there any other thoughts or questions on the bill? [There were none.] I will seek a motion to amend and do pass.

> ASSEMBLYWOMAN DIAZ MOVED TO AMEND AND DO PASS SENATE BILL 107 (1ST REPRINT) WITH THE AMENDMENT PROVIDED BY SENATOR SEGERBLOM.
>
> ASSEMBLYWOMAN FIORE SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

Assemblyman Ohrenschall will handle the floor statement. The next bill is Senate Bill 425 (1st Reprint).

Senate Bill 425 (1st Reprint): Revises certain provisions relating to pari-mutuel wagering. (BDR 41-1111)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 425 (1st Reprint) has to do with pari-mutuel wagering. It is sponsored by the Senate Committee on Judiciary and was heard in this Committee on May 10, 2013. Senate Bill 425 (R1) authorizes a person who is licensed to engage in off-track pari-mutuel wagering to accept wagers for less than full face value, agree to refund or rebate any portion of the full face value of a wager, or increase payoffs or pay bonuses on winning wagers, unless the Nevada Gaming Commission otherwise prohibits such conduct by regulation (Exhibit LL). On the day of the hearing, the Pari-mutuel Association proposed an amendment, and it was not approved by the sponsor. A copy is attached.

Chairman Frierson:
Is there any discussion on the bill?

Assemblyman Hansen:
I was told there was another amendment proposed this morning, or it is still the original amendment?

Chairman Frierson:
This is the only amendment that I am aware of. Are there any other comments or questions on the bill? [There were none.] I will be seeking a motion to amend and do pass.

ASSEMBLYWOMAN DIAZ MOVED TO AMEND AND DO PASS SENATE BILL 425 (1ST REPRINT).

ASSEMBLYMAN CARRILLO SECONDED THE MOTION.

Chairman Frierson:
Is there any discussion on the motion?

Assemblyman Ohrenschall:
That is with the amendment that is not friendly, the one that is not supported by the sponsor?

Chairman Frierson:
I believe that is the only amendment, and it proposes to direct the Gaming Commission to form a study group consisting of members of the Off-Track Pari-Mutuel Wagering Committee. I will say there was a discussion off the record outside the Committee about requiring that the study group be formed and directing that the study group make recommendations. While that was never submitted, it was something that was discussed. I would assume that was not something Assemblywoman Diaz was including in her motion. Are there any other questions on the motion? [There were none.]

THE MOTION PASSED UNANIMOUSLY.

Chairman Frierson:
Assemblyman Ohrenschall will handle the floor statement. The next bill is Senate Bill 312 (1st Reprint).

Senate Bill 312 (1st Reprint): Makes various changes concerning victim impact panels. (BDR 43-888)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 312 (1st Reprint) is sponsored by Senator Manendo and was heard in this Committee on April 30, 2013. The bill makes the Department of Motor Vehicles (DMV) responsible for regulating and registering the organizations that sponsor and conduct victim impact panels. Each meeting of a victim impact panel must be conducted by a qualified coordinator and have security personnel on site. [Continued to read from the work session document (Exhibit MM).]

On the day of the hearing, there were proposed amendments from the Northern Nevada DUI Task Force and also from Judge Richard Glasson at the Tahoe Justice Court. Both of those amendments are attached. There is also another amendment that was put up on the Nevada Electronic Legislative Information System today. It comes from the Chairman and it is somewhat similar to Judge Glasson's proposed amendment, but it does have some differences.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Spiegel:
Would you please walk us through your amendment?

Chairman Frierson:
I have discussed this with Senator Manendo. If you look at section 6, subsection 2, paragraph (d) of my proposed amendment, the first proposed change would be to strike paragraph (d) requiring a curriculum describing the materials to be covered. I think that the title and the nature in itself covers the victim impact panel and the coordinator is able to cater that to their liking. It is clearly a victim impact panel.

Section 6, subsection 5, imposes an administrative fine; it is proposed to add "not more than" a $5,000 administrative fine. Section 7 deals with the qualified coordinator and subsection 1, paragraph (a) provides that the coordinator must have successfully completed a specialized training of victim advocacy including, without limitation, training offered by the National Organization for Victim Assistance or a comparable organization that is nationally recognized. The remainder of the requirements for a coordinator, while certainly positive, seem to be a high standard for a nonprofit organization trying to provide this service, and the comparable training to a national organization seemed to be sufficient. Section 8 requires a victim to submit to the sponsor documentation concerning the events that gave rise to the harm suffered by the victim, and then it gives some particulars that may include without limitation, I thought went without saying. There are certainly different forms of documentation, but if we are going to require a coordinator to be trained, that would be something appropriate for the coordinator to screen and provide flexibility, especially depending on different-sized communities.

Section 8, subsection 3, deals with fines and community service, and I proposed to add "not more than" for both to provide flexibility. Section 9 deals with having requirements for the victim impact panel and excluded a victim who was victimized by their own behavior. I found in my experience that

the victims who hurt themselves are the ones who oftentimes have the greatest impact on other offenders.

Section 9, subsection 1, proposes to strike paragraph (b) and the transitory sentence from paragraph (a) and further, subparagraph (2) dealing with not allowing someone who hurt themselves to be a victim. The existing paragraph (d), which would become paragraph (c), requires there to be security. I propose to strike "who are trained in the detection of a person who is under the influence" of a controlled substance and intoxicating liquor and, frankly, I think my reflection was that in ten years of criminal practice, I did not know what that was or whether that actually existed other than something subjective that a coordinator could do himself with his training or require his security to be on the lookout for.

Section 10 deals with the collection of fees. I propose to strike the sentence that the sponsor shall not generate a profit, because this deals with nonprofits that I think are handled by definition with their registration and would lose it if they were not complying with the requirements of a nonprofit, which I believe is another issue that may come up. Section 10, subsection 5, deals with a fine, adding the words, "not more than." The remainder of the bill I believe is including the amendment provided by the sponsor, Senator Manendo.

Assemblyman Thompson:
Is there any way that we can ask a question of the bill's sponsor?

Chairman Frierson:
Yes. Senator, would you come up?

Assemblyman Thompson:
My question relates to the DMV. I totally agree with having the appropriate standards for this, and I definitely would want it to be where all the victim impact panels that are in the community have a fair chance to get in compliance and to meet all the standards that are listed here. My question is on the DMV end. Do they have designated staff who serve as the regulators, or is it Sally one day and Billy the next day?

Senator Mark A. Manendo, Clark County Senatorial District No. 21:
The Department of Motor Vehicles testified that they had the staff to be able to do this. I do not know how they would do it. I am assuming they would have people in place. In my other hat in my life, I work in the collision repair industry, and DMV regulates that when they inspect from time to time. There are 160 body shops just in southern Nevada that are regulated. They do not do it every day. They come out from time to time and do inspections, just like the

Occupational Safety and Health Administration comes out from time to time. I am assuming that it would be something like that; they would oversee, regulate, and have some people in place to do it. That is probably not going to be all that they do.

Chairman Frierson:
Are there any questions from the Committee? [There were none.]

Alan Byers, Acting Administrator, Compliance Enforcement Division, Department of Motor Vehicles:
The Compliance Enforcement Division is the division that regulates the vehicle industry and many others to include drive schools. We do have dedicated staff and investigators who are dedicated particularly to drive schools who would have the ability to oversee this project, if passed.

Assemblyman Thompson:
Say that an organization said we want to be a certified or a listed victim impact panel. Is this like a certification process? Once an organization has met all of the requirements, are they on the DMV's list as a valid victim impact panel organization?

Alan Byers:
Currently, that would be the process. We take information to show that they are certified. We would then license them as a victim impact panel, and those victim impact panels are made available on our website to the public as far as who is certified by the DMV.

Assemblywoman Fiore:
Even though we watered this down with the amendments, I am still very concerned that we are putting a monopoly in statute, so I will be voting no on this measure. I am not very comfortable with the language.

Chairman Frierson:
Senator, we discussed this on the recess, and I want to get on the record regarding whether or not organizations that provide this service have to be a nonprofit. I say it with someone from DMV here just in case they know. Is it your understanding that these organizations are required to be a nonprofit?

Senator Manendo:
Under current law—and Legal can correct me—the victim impact panels, at the direction of the courts, have to be a nonprofit. I cannot remember the statute that they have to be run not for profit.

Chairman Frierson:
We have located *Nevada Revised Statutes* 484C.530. It indicates that the panel may not be operated for profit. Are you aware of whether or not organizations such as Options are a nonprofit? I tried to look them up and they did not seem to reflect a nonprofit status. My reading of it suggests that a corporation that is a for-profit corporation can do this, but cannot do this for profit. So if I have a business and I want to, as a service to the community, become a coordinator of a victim impact panel, I could do it as long as I was not making money off of it, but that does not mean that I, as a corporation, had to be a nonprofit in order to do it. That is just my quick reading of the language that was pointed out to me. Ms. Cohen and I discussed that. Does it answer your question at all?

Assemblywoman Cohen:
Yes. I was concerned because I know we have some mental health providers in Clark County, and they were interested in providing the service in the future. I wanted to make sure they could do that.

Chairman Frierson:
We are looking at all of the amendments. The bill puts a population cap on it, so that provision would only apply to communities of less than 100,000; however, the Northern Nevada DUI Task Force has proposed a bill that would have raised it to 700,000, meaning it would include all counties except for Clark County in that amendment. I believe that Senator Manendo's proposed amendment did not adopt that change in population cap. In effect, my reading of the bill would be that it would preclude a for-profit corporation from being able to engage in providing a victim impact panel.

Assemblywoman Diaz:
Although I have not had a lot of time to get familiar with the amendment language, I am a little concerned. Not a lot of different people who are in this line of business were brought in on a work group to work on it. That is the concern I have. When you cross something with everyone's voices at the table, you usually have better policy. I am going to vote for it out of Committee and reserve my right to change my vote later.

Assemblywoman Spiegel:
Ditto.

Assemblyman Hansen:
Ditto.

Assemblyman Duncan:
Ditto.

Chairman Frierson:
Of course, you all reserve your right to change your vote. I will be entertaining a motion to amend and do pass with the amendment I provided incorporating Senator Manendo's other amendments with respect to the judge's language.

> ASSEMBLYMAN THOMPSON MOVED TO AMEND AND DO PASS SENATE BILL 312 (1ST REPRINT).
>
> ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN FIORE AND WHEELER VOTED NO.)

Assemblyman Thompson will handle the floor statement. The next bill is Senate Bill 141 (1st Reprint).

Senate Bill 141 (1st Reprint): Revises provisions governing the dissemination of records of criminal history. (BDR 14-881)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 141 (1st Reprint) relates to the dissemination of records of criminal history. It is sponsored by Senator Denis and was heard in this Committee on May 7, 2013. It requires an agency of criminal justice to disseminate a record of criminal history to a court-appointed special advocate program in a county whose population is less than 100,000 as needed to ensure the safety of a child for whom a special advocate has been appointed by a court (Exhibit NN). There were no amendments.

Chairman Frierson:
Is there any discussion on the bill?

Assemblywoman Fiore:
My biggest concern with S.B. 141 (R1) is that our Department of Public Safety right now is 65,000 records behind in implementing them in the system. This would ultimately give volunteers access to criminal reports and, unfortunately, sometimes people get judged by what they read and it could be inaccurate. I am going to be voting no on this.

Assemblywoman Spiegel:
I had a number of concerns about this bill as well, especially relating to privacy. I will be a no also.

Assemblywoman Diaz:
This has been a difficult one for me to come to a conclusion on. I have heard what court-appointed special advocates (CASA) intended to do, but I have also been made aware that in our rural areas they might not operate the same as in our urban areas such as Clark and Washoe Counties. They might be more limited in staff. Maybe something that would procedurally happen in those larger areas might not be happening in the rurals because the personnel is not available. What would give me some comfort in passing this bill would be if we would put a sunset on it, and that it would come before us next session and we would hear that it had a positive or negative effect. I do not want to think of a situation where we placed a child in danger. I would be willing to move it forward with a conceptual amendment to put a sunset on it.

Chairman Frierson:
When would that sunset be?

Assemblywoman Diaz:
It would probably be the next legislative session, so July 2015.

Chairman Frierson:
Are there any other comments or thoughts on the bill?

Assemblyman Ohrenschall:
I share a lot of the reservations that Assemblywoman Fiore had on this measure, and some of the other members, but I think Assemblywoman Diaz' proposal is something that I could live with. We could see what happens at the next session. This will not exist in perpetuity, and then we could decide whether or not this is something we want to continue. I think it is a reasonable proposal. I am willing to support Assemblywoman Diaz' amendment.

Chairman Frierson:
I will entertain a motion to amend and do pass with a two-year sunset.

ASSEMBLYWOMAN DIAZ MOVED TO AMEND AND DO PASS SENATE BILL 141 (1ST REPRINT).

ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN CARRILLO, FIORE, MARTIN, SPIEGEL, AND THOMPSON VOTED NO.)

Assemblywoman Cohen will handle the floor statement. The next bill is Senate Bill 179 (2nd Reprint).

Senate Bill 179 (2nd Reprint): Makes various changes to provisions governing public safety. (BDR 43-79)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 179 (2nd Reprint) relates to public safety. It is sponsored by Senator Manendo and was heard in this Committee on May 15, 2013. This bill authorizes the governing body of a local government or the Department of Transportation to designate a pedestrian safety zone on a highway, after making findings that such a zone is appropriate and necessary. [Continued to read from the work session document (Exhibit OO).]

The Chairman of this Committee has proposed a conceptual amendment which would delete the provisions related to a course of pedestrian, bicycle, and traffic safety. Those provisions that would be deleted appear in section 15 and section 29.

Chairman Frierson:
That notion I brought up in the hearing reflected my hesitation with a reference to a set of classes that do not exist, at least at this time, although a judge certainly could order that without it being mandated in statute if such a class ever was created. Is there any discussion on the bill?

Assemblywoman Fiore:
I know this is not a money committee, but is there not a cost in changing the signage, for instance, from yield to stop?

Chairman Frierson:
I believe that the Department of Transportation agreed that they could absorb the cost.

Assemblywoman Spiegel:
So the amendment would drop the class?

Chairman Frierson:
Section 15, page 14, says that the court may, in addition to the fine, order a driver to attend a course of pedestrian, bicycle, and traffic safety approved by the Department of Transportation. Subsection 4 refers to that course and an exemption, and then later on in the bill it has the same reference. The proposal is not to say that this should not be. It does not exist. We are saying that the court may refer someone to take a class that has not been created yet, so if it is created, the court could certainly do it.

Assemblywoman Spiegel:
If there is the class Erin Breen of the Safe Community Partnership Program had testified that some have already volunteered to give the class—there would not be a fiscal note. There was no discussion about administrative issues that would arise, such as who would be responsible for administering it, who would make sure that the court got the documentation and that the people attended the course, and all of those matters.

Chairman Frierson:
We just heard a bill creating a coordinator and a whole structure for confirmation of the curriculum and whatnot. The court right now refers people to nonprofits for treatment and education without a statute being required, so they can certainly do that when made aware of it. I just did not know, from a drafting standpoint, if it was prudent to make reference to it in the statute itself.

Assemblywoman Spiegel:
Thank you for clarifying it. I still have some reservations, so I think I am going to be a no for now.

Assemblywoman Fiore:
I am concerned with section 16, subsection 1, paragraph (c), where a layman is supposed to know what 250 feet is. I am concerned because as our statute now stands, jaywalking is a misdemeanor, with up to six months in prison. Can we amend that subsection out?

Chairman Frierson:
What subsection are you referring to?

Assemblywoman Fiore:
Section 16 where it talks about the layman is supposed to know what 250 feet is. By the light poles, that is 125 feet, which is not stated anywhere, so it is quite confusing. I am scared of this bill because we have so many laws on the books and now we are going to make jaywalking up to a year in prison.

Chairman Frierson:
You are proposing to strike paragraphs (c) and (d)?

Assemblywoman Fiore:
Yes.

Chairman Frierson:
Are there any other thoughts?

Assemblywoman Spiegel:
There was also a discussion about there being a volunteer workforce and volunteers being used, and I was wondering if there was a plan in place or if there was any contemplation of what it would take to manage all the volunteers?

Chairman Frierson:
Would you refer to a section?

Assemblywoman Spiegel:
I will look through it and come back.

Assemblyman Duncan:
I am going to vote yes out of the Committee. I just need to digest the amendments a little more. I have some concerns about the effect on the smaller communities as well.

Assemblyman Thompson:
I ditto what Assemblyman Duncan stated.

Assemblyman Ohrenschall:
I am going to ditto what Assemblyman Duncan and Assemblyman Thompson stated. I also will be voting to move it out of Committee and reserve my right to change my vote on the floor. I need to digest the amendments.

Assemblyman Wheeler:
I am just a flat, rural county no on this.

Assemblywoman Diaz:
There are many things that give me great discomfort, so at this point I am a no.

Assemblywoman Fiore:
Even with all the amendments, and just because I have so much respect for you, Senator Manendo, I am going to vote no but with my reservation to change my vote on the floor. I am really hoping that we can fix this.

Assemblywoman Dondero Loop:
I absolutely understand everyone's reservations on these, but if you have ever been in a school zone and watched what goes on there, it is a scary sight. It is amazing to me that more things do not happen. We have had children hurt, injured, and killed walking to and from school. I do not know how we can fix this to do something. I do not want to be on the far end of punishing people for something they may not know, but I think this is workable and fixable. I would like to see if we could do something with it, and maybe the sponsor has some suggestions.

Assemblywoman Cohen:
I am going to echo what my colleagues said. I have some concerns, but I will move it out of the Committee.

Assemblyman Martin:
I am going to say ditto to my colleagues who came before me. I am a yes but am reserving the right to change my vote on the floor.

Chairman Frierson:
Are there any other thoughts? [There were none.] I do not know what the Committee's appetite is with respect to the suggestion that was made by Assemblywoman Fiore regarding the 250 feet delineator. Are there any thoughts or questions on the part of the Committee? Any indication as to whether or not there is an appetite for that to be part of the motion? There has not been a motion yet, but that was a suggestion.

Assemblywoman Spiegel:
I think it is a good suggestion because most people do not know what 250 feet is, and I think educating people that they need to count streetlights is going to be a challenge.

Assemblywoman Diaz:
The part of the bill that gives me the most heartburn is the penalties. I think that sometimes the biggest offenders are going to be in my community and, as it is, we already face so much. I am all about keeping our children safe and the area safe, but I think we could do more educational awareness in schools, and maybe create some kind of partnerships between schools and parents by which

the parents help by being crossing guards and such. I just think that there are other remedies that we can try to exhaust.

Assemblywoman Dondero Loop:
Just for clarification purposes, I think most of us have been to a football game and most of us know how long a football field is, which I believe is 300 feet, so we can kind of gauge 250 to 300 feet. While I agree that most of us do not know that, it is a good teacher lesson.

Chairman Frierson:
Are there any other thoughts from the Committee? [There were none.] I will be seeking a motion to amend and do pass with the amendment suggested by Assemblywoman Fiore. I will also be entertaining a motion to incorporate my proposed amendment. First, I will be entertaining a motion to amend and do pass, removing the reference to classes and removing the reference to 250 feet in paragraphs (c) and (d). [There was no response.] I will be seeking a motion to amend and do pass with either proposed amendment.

> ASSEMBLYMAN CARRILLO MOVED TO AMEND AND DO PASS SENATE BILL 179 (2ND REPRINT) WITH THE AMENDMENT BEING THE REMOVAL OF THE REFERENCE TO 250 FEET AND THE REMOVAL OF THE REFERENCE TO THE PEDESTRIAN CLASS.
>
> ASSEMBLYMAN OHRENSCHALL SECONDED THE MOTION.
>
> THE MOTION PASSED. (ASSEMBLYMEN DIAZ, FIORE, AND WHEELER VOTED NO.)

Assemblywoman Dondero Loop will handle the floor session. I am going to recess with respect to Senate Bill 280 (1st Reprint) and Senate Bill 192. I will briefly open it up for anyone to provide public comment. [There was no one.] Assembly Judiciary is now in recess [at 1:52 p.m.] until adjournment of the Assembly Committee on Education.

[The Assembly Judiciary Committee reconvened at 6:20 p.m.]

Chairman Frierson:
Continuing the work session, I am going to call Senate Bill 280 (1st Reprint).

Senate Bill 280 (1st Reprint): Revises provisions relating to common-interest communities. (BDR 10-863)

Dave Ziegler, Committee Policy Analyst:
Senate Bill 280 1st Reprint is related to common-interest communities. It is sponsored by Senator Kihuen and was heard in the Assembly Committee on Judiciary Subcommittee on May 9, 2013 and May 16, 2013. Members, I will spare you the reading of the details of S.B. 280 (R1). I think the idea is to have a replacement amendment. This morning a document was posted on the Nevada Electronic Legislative Information System for today's meeting labeled "S.B. 280 (Replacement)" (Exhibit PP), and I think that is a useful point of reference, although it is not literally what is being proposed, but at least it is in the ballpark, and the Chairman will address the details.

Chairman Frierson:
The mock-up replacement is a result of significant negotiations and replacement of language in the original S.B. 280 (R1). Much of the provisions in the original S.B. 280 (R1) were recently amended into Assembly Bill 98 (R1) in the Senate, so with that there was still an appetite to address some problems, particularly in regard to homeowners' association foreclosures. This is the mock-up that was made part of the record originally to A.B. 98 (R1), but for our purposes, the green language in the mock-up reflects the language that is proposed to be a substitute in S.B. 280 (R1) in its entirety.

In short, that mock-up creates a statutory structure where an HOA is allowed to place a lien for assessments and abatements, the lien has super-priority status, and the HOA is allowed to foreclose on that lien. If there is a subsequent HOA foreclosure sale, this mock-up clarifies that the sale does not extinguish the first; however, the HOA is allowed from that sale to receive the amount of the lien that is owed to them.

I am going to read some language, and it does not necessarily have to be verbatim, but it makes the point that the association can also file a lien for the cost of collecting past-due obligations, and that this lien is to be paid at the sale of the first security interest and should be included in the priority of the sale of that first security interest. Essentially, what we are saying is if an HOA forecloses on an assessment and abatement and subsequently sells in a foreclosure sale, the HOA can get their assessments and abatements. The HOA can also file a lien for collection costs, and the HOA would be able to receive the amount of that lien for collection costs upon the sale of the first. It attempts to clarify that the title is subject when there is an HOA foreclosure sale to the first, and that way when someone makes the purchase of the HOA, they know what they are getting. The intent is to make sure that it stabilizes the market and that there is certainty in that title and folks know what they are getting. Hopefully, it will resolve lawsuits and things that reflect a lack of clarity regarding that title.

The mock-up also authorizes a lender to create an escrow account for the purpose of collecting assessments similar to how banks now have an escrow account for mortgage insurance. This bill would authorize a bank to create an escrow account for assessments. If that were done, it would alleviate the concern for collection costs in its entirety, because not everyone pays their mortgage insurance through an escrow. It needs to be permissive and not mandatory.

For folks who have already read the mock-up, you will notice the very last portion of the bill, subsection 5 of section 15, reflects that it does extinguish the first; however, what we are proposing to move forward today expressly provides that it does not. So the language in section 15, subsection 5, would read, "The foreclosure by sale of the super-priority lien does not extinguish the first security interest." A purchaser of the lien at the foreclosure sale acknowledges they are buying subject to the first security interest or the record deed of trust. That is attempting to clarify that it does not extinguish the first, but sets up a priority system for the HOA to be made whole at the beginning for their assessments and abatements and at the end when it is sold for the cost of collections.

I will say that there is also an appetite at some point, not today but possibly on the floor, to discuss some language that might provide some incentive to HOAs to not send the account to collections in the first place. That is something that we may continue to work on to decrease the incentive for that and to hope to increase the incentive to work with a homeowner to make those payments on the front end. I believe that is essentially what the mock-up does. Because S.B. 280 (R1) is Senator Kihuen's bill, he would be sponsor as well as myself and Senator Segerblom. Are there any questions on the bill?

Assemblyman Hansen:
Did the Subcommittee not get all these options? When we did not hear back from the Subcommittee, what happened to the bill at the Subcommittee stage? I would like to hear from someone about that and why, I assume, these propositions were offered to them at that point. I am wondering why we are hearing it now after we did not get it back from them.

Chairman Frierson:
I can say as Chair of the Committee, because even if they did not move it, I could have. Senate Bill 280 (R1) in its entirety did not move out of the Subcommittee, and none of this language was in S.B. 280 (R1). Senate Bill 280 (R1) dealt with notice provisions prior to collections. That language has since been picked up and adopted into A.B. 98 (R1), which we had already passed out, and it is in the Senate. Because S.B. 280 (R1) died and

there were several of us receiving phone calls from judges, attorneys, and lenders regarding the uncertainty of title in this dilemma during the last couple of years, this language was something that could address it, and this vehicle was an appropriate and germane way to do it. This was not presented before the Subcommittee in Assembly Judiciary.

Garrett Gordon, who had been involved with this concept and actually attempted to provide something similar to A.B. 98 (R1) when it was in our house, was involved in the development of this language, and it was too late when we proposed it for A.B. 98 (R1) to be able to consider it. There has been work on this language since then to get it right. Assemblywoman Spiegel was involved in the conversations as well as Assemblywoman Cohen. Assemblyman Duncan was made aware of it as of late, and we took time to make sure, at least at this point in time, that the concerns that were previously holding this notion up were addressed. Everyone reserves the right to vote one way in the committee and another way on the floor if they so see fit, and I would certainly ask the folks to take a hard look at it. I believe this is strong language that really clarifies some title issues and uncertainty issues in the real estate market.

Having been part of the conversations as well, I would ask for the Committee to consider supporting it, continue to digest it, and ask any questions that they might have. I do not think this bill picked a side. I think this language attempted to take into consideration everyone who had not, at this point, been able to come to an agreement to make sure that the priorities were that the homeowners' associations get the money that they are dependent on in operating, that they can get their collection costs, but that is when everything is sold. At least they know they have certainty and ability to get their monthly assessments and abatements and that the title is clear as far as whether or not it was subject to the first.

I think that Assembly Bill No. 273 of the 76th Session neglected to include a second if there is a second, so the intention is to make sure we do not make that mistake this time and that, if there is a second, it is included as well as the first is. For example, if you have an 80/20 loan and the 20 percent was a second, I think that our conversations contemplated making sure that we did not overlook that.

Assemblyman Duncan:
I was looking back through my notes; maybe Mr. Gordon can address this. In the first presentation of A.B. 98 (R1) and the super-priority lien, there was some worry about the U.S. Department of Housing and Urban Development guidelines

and potentially violating federal underwriting guidelines. Was that addressed in this latest nuance?

Garrett Gordon, representing Olympia Companies:
If you go to page 8 in the conceptual amendment, there is currently a carveout for the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) that the super-priority includes nine months, except if federal regulations provide otherwise. We view that to say if federal regulations provide cost of collecting other than what is in state statute, then they would have their carveout. There was a letter that was distributed by Alfred Pollard, who was general counsel to the Federal Housing Agency. I spoke with him yesterday and he indicated that he wanted to make sure his exemption or carveout was still there for federal preemption law purposes—even if we drafted law that was contrary to Fannie Mae or Freddie Mac guidelines—and that federal law would trump any kind of new state law. I think it is covered, but I can follow up with him when we see all this put together to make sure he is comfortable.

Chairman Frierson:
Are there any questions or comments from the Committee? [There were none.] I will be seeking a motion to amend and do pass with the amendments discussed today.

> ASSEMBLYWOMAN COHEN MOVED TO AMEND AND DO PASS SENATE BILL 280 (1ST REPRINT) WITH THE AMENDMENTS DISCUSSED TODAY.
>
> ASSEMBLYWOMAN SPIEGEL SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

Assemblywoman Cohen will handle the floor statement. There being no more business before Assembly Judiciary, we are now adjourned [at 6:35 p.m.].

RESPECTFULLY SUBMITTED:

_____
Dianne Harvey
Recording Secretary

_____
Linda Whimple
Transcribing Secretary

APPROVED BY:

_____
Assemblyman Jason Frierson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 17, 2013 **Time of Meeting: 8:48 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 107 (R1)	C	Senator Segerblom	Slide Presentation
S.B. 107 (R1)	D	Vanessa Spinazola	Letter
S.B. 107 (R1)	E	Senator Segerblom	Proposed Amendment
S.B. 107 (R1)	F	Mike Patterson	Proposed Amendment
S.B. 107 (R1)	G	Mike Patterson	Testimony
S.B. 107 (R1)	H	Rebecca Gasca	Testimony
S.B. 107 (R1)	I	Mike Patterson	Testimony
S.B. 107 (R1)	J	Mike Patterson	Testimony
S.B. 107 (R1)	K	Mike Patterson	Testimony
S.B. 107 (R1)	L	Vanessa Spinazola	Article
S.B. 107 (R1)	M	Steve Yeager	Article

S.B. 107 (R1)	N	Steve Yeager	Testimony
S.B. 192 (R1)	O	Jason Guinasso	Memorandum
S.B. 192 (R1)	P	Jason Guinasso	Memorandum
S.B. 192 (R1)	Q	Jason Guinasso	Memorandum
S.B. 192 (R1)	R	Jason Guinasso	Statement of the Bauers
S.B. 192 (R1)	S	Father Francisco Nahoe	Testimony
S.B. 192 (R1)	T	Gwen Linde	Testimony
S.B. 192 (R1)	U	Rocio Grady	Testimony
S.B. 192 (R1)	V	Barbara Jones	Testimony of Sheila Ward
S.B. 192 (R1)	W	Vanessa Spinazola	Letter
S.B. 192 (R1)	X	Elisa Cafferata	Letter
S.B. 192 (R1)	Y	Maggie Garrett	Testimony
S.B. 192 (R1)	Z	Lauren Scott	Testimony
S.B. 192 (R1)	AA	Susan Meuschke	Testimony
A.B. 499	BB	Dave Ziegler	Work Session Document
S.B. 314	CC	Dave Ziegler	Work Session Document

S.B. 389 (R1)	DD	Dave Ziegler	Work Session Document
S.B. 424 (R1)	EE	Dave Ziegler	Work Session Document
S.B. 131 (R1)	FF	Dave Ziegler	Work Session Document
S.B. 111 (R1)	GG	Dave Ziegler	Work Session Document
S.B. 118	HH	Dave Ziegler	Work Session Document
S.B. 177 (R1)	II	Dave Ziegler	Work Session Document
S.B. 224 (R1)	JJ	Dave Ziegler	Work Session Document
S.B. 373 (R2)	KK	Dave Ziegler	Work Session Document
S.B. 425 (R1)	LL	Dave Ziegler	Work Session Document
S.B. 312 (R1)	MM	Dave Ziegler	Work Session Document
S.B. 141 (R1)	NN	Dave Ziegler	Work Session Document
S.B. 179 (R2)	OO	Dave Ziegler	Work Session Document
S.B. 280 (R1)	PP	Chairman Frierson	Proposed Amendment

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY
SUBCOMMITTEE

Seventy-Fifth Session
March 25, 2009

The Committee on Judiciary Subcommittee was called to order by Chair Tick Segerblom at 1:39 p.m. on Wednesday, March 25, 2009, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 5100 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

SUBCOMMITTEE MEMBERS PRESENT:

Assemblyman Tick Segerblom, Chair
Assemblyman John Hambrick
Assemblyman Ruben J. Kihuen

SUBCOMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Harvey J. Munford, Clark County Assembly District No. 6
Assemblyman James A. Settelmeyer, Assembly District No. 39
Assemblyman Richard McArthur, Clark County Assembly District No. 4
Assemblywoman Ellen B. Spiegel, Clark County Assembly District No. 21
Assemblyman John C. Carpenter, Assembly District No. 33
Assemblyman Mark A. Manendo, Clark County Assembly District No. 18

STAFF MEMBERS PRESENT:

Alison Combs, Committee Policy Analyst
Nick Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Emilie Reafs, Committee Secretary
Steve Sisneros, Committee Assistant

OTHERS PRESENT:

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada
Monica Wise, Private Citizen, Las Vegas, Nevada
Robert Robey, Private Citizen, Las Vegas, Nevada
Paula McDonough, President, Park Tower Homeowners Association, Reno, Nevada
Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada
Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada
Garrett Gordon, Reno, Nevada, representing Olympia Group, Las Vegas, Nevada
Angela Rock, President, Olympia Management Services, Las Vegas, Nevada
Michael Schulman, Las Vegas, Nevada, representing various homeowners associations throughout Nevada
Randolph Watkins, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Michael Forman, Vice President, Green Valley Ranch Community Association, Henderson, Nevada
Michael Dixon, Private Citizen, Henderson, Nevada
Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada
John Radocha, Private Citizen, Las Vegas, Nevada
Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Frances Copeland, Private Citizen, Las Vegas, Nevada
Robert Allgeier, President, Westwood Park Homeowners Association, Minden, Nevada
Wendell Vining, Vice President, Westwood Park Homeowners Association, Minden, Nevada

Gary Lein, Accountant Representative, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry
Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada
Michael Trudell, General Manager, Caughlin Ranch Homeowners Association, Reno, Nevada
Erin McMullen, representing Bank of America, Las Vegas, Nevada

[Call to order, roll called.]

Chair Segerblom:
The first bill we are going to hear is Assembly Bill 350.

Assembly Bill 350: Makes various changes relating to common-interest communities. (BDR 10-620)

Assemblyman Harvey J. Munford, Clark County Assembly District No. 6:
I call this bill the Homeowners' Bill of Rights.

In many communities today, especially in southern Nevada, it is nearly impossible to purchase a relatively new home that is not in a homeowners' association (HOA). This Committee has heard plenty of testimony about homeowner boards. Many homeowner boards are run in a roughshod way. They sometimes keep the homeowners in the dark about important decisions. They also threaten homeowners' rights to live safely and at peace in their homes.

Section 1 of the bill would change the votes needed to change the declaration of an HOA from a simple majority to 85 percent of homeowners.

I will cover sections 2 and 9 together. These sections will require board members to perform their duties on an informed basis, in good faith, and in the honest belief that their actions are in the best interest of the HOA.

Section 4 would prohibit the HOA from charging interest on a past due fine.

Section 5 would limit consecutive terms for board members to two terms. The person would have to wait six years before serving on the board again. These term restrictions would only apply to HOAs with more than 50 units.

Sections 6, 7, and 8 require associations to give homeowners copies of the minutes at no charge. Under existing laws, homeowners in some HOAs have

the right to request and receive copies of the minutes without having to make prior arrangements, but an HOA may charge the homeowner for the cost of an extra copy. These sections of the bill would require the HOA to provide the copy free of charge in electronic or paper form.

Under existing law, agendas of meetings must include a period for homeowners to comment. Section 6, subsection 4, paragraph (c) expands homeowners' rights to speak at meetings. Homeowners will be able to speak for a minimum of five minutes on each agenda item. The HOA board has discretion over which materials, remarks, or information are included in the minutes. Under section 8, a homeowner's written comments will be required to be included in the minutes if he submitted his comments 24 hours before the meeting.

Section 9 deals mostly with interest rates. The existing law allows HOAs to charge interest of not more than 18 percent on past due assessments. This section would decrease the maximum rate of simple interest to 5 percent. It would only permit interest on assessments that are 60 or more days past due. It would only allow 3 percent interest on special assessments that are more than 90-days past due. Also the HOA would need the approval of two-thirds the homeowners before it can levy special assessments; for example, to repair, replace, or restore major components of common areas. Special assessments are also a way to fund reserves in an adequate way or anything dealing with capital improvements.

Section 9, subsection 11, on page 19 of the bill, would establish schedules for paying special assessments in installments if needed. It would require the HOA to notify homeowners of certain past-due special assessment payments.

Under section 10 homeowners cannot be charged for reviewing or obtaining copies of books, records, or contracts or other documents.

Sections 11 and 21 prohibit foreclosure for overdue assessments. These sections would prevent an HOA from foreclosing on any home; instead, the HOA can place a lien.

Sections 13 and 15 require that purchasers be given more information about life in an HOA. Under these sections, a person purchasing a home would be informed of the covenants, conditions and restrictions (CC&Rs).

The jurisdiction of the Commission for Common-Interest Communities and Condominium Hotels (Commission) would be expanded to include alleged violations of the HOA's governing documents. The Commission would be required to impose fines for violations according to specific limits. An owner or

tenant, under certain circumstances, could be fined up to $100, for certain violations, but no more than $400 in any two-year period. For the HOA, the community manager, any board manager, the declarant or its agent, and other employees or agents of the HOA could be fined up to $2,000 for certain violations.

In certain matters brought before the Commission, attorneys' fees could be granted to the prevailing party, whether or not the HOA's governing documents so provided. A homeowner who brought a matter before the Commission would not be required to pay attorneys' fees to the other party unless the affidavit was filed in bad faith.

This completes my testimony. I would ask that you support this important homeowners' protection bill.

Assemblyman Hambrick:
I understand the intent of the bill, because occasionally some HOA groups may look at themselves with too much self-importance, and we have to level the playing field on these issues.

I have a problem with the minimum/maximum times for speaking. I have not been to a lot of HOA meetings, but I have been to a few. If we were to allow everyone to speak more than five minutes, you would be there all night. I think we could make it a maximum of five minutes. If someone cannot be articulate in five minutes, I am not sure he could be articulate in fifteen.

Regarding the term of office, while I like the idea of term limits, there are times when you ask for help and no one raises his hand. If there are no candidates available, could we come back and allow someone to run again after they have been off the board for a few years?

I have some questions about the cost of documents and also about the use of the word "any" in the prohibition of foreclosure in section 11, subsection 10. I was taught that you never use absolutes, like never, always, any.

These questions might be answered by the witnesses.

Assemblyman Kihuen:
Have homeowners’ associations or common-interest communities charged for copies and if so, how much?

Assemblyman Munford:
There are so many homeowners' associations in Nevada, and it would vary with the various HOAs. Some do charge a fee, and some do not.

Assemblyman Kihuen:
Is there anything in the bill that states that there has to be some type of listing of the fees that the HOA will charge for late fees, lien fees, et cetera? Are you requiring any of that prior to signing the purchase agreement?

Assemblyman Munford:
If it is not covered in the bill, it should be. There should be some transparency as to what the fees are and where they go.

Assemblyman Kihuen:
While my district does not have very many homeowners' associations, I have heard of various situations from people, from southern Nevada in particular, where they are charged for every little thing and the interest rates on some of the fees are 20 or 30 percent.

Assemblyman Munford:
Yes, they are over the top.

Assemblyman Kihuen:
So does the bill mandate that the HOAs provide a copy to the homeowners so they know what they will be charged?

Assemblyman Munford:
Again, if it is not in the bill, it should be. I do not recall whether that is in the bill, but it will be noted, and we can add it in.

Chair Segerblom:
We could ask our staff if it is in the bill or in existing law.

Nick Anthony, Committee Counsel:
We will take a look.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada;
I live in a small homeowners' association known as Rancho Bel Air. [Read from prepared statement (Exhibit C).]

Chair Segerblom:
We do not have your amendments yet, so I will have others speak while we wait.

Monica Wise, Private Citizen, Las Vegas, Nevada:
I own rental property in Rancho Santa Fe. I am one abused homeowner. If any of you want a reason why this bill should pass, please call me. I would be more than happy to give you my horror story, from embezzlement, to misappropriation of funds, to abuse of any number of chapters of the *Nevada Revised Statues* (NRS). I filed a complaint with the Federal Bureau of Investigation (FBI), because going to the board is just impossible. The books have not been balanced since the last audit.

Chair Segerblom:
You support the bill, correct?

Monica Wise:
Absolutely. Some of the language is a bit stringent, but the bill, in all, is supportive of homeowners, and that is what we need: transparency and support.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I wish to acknowledge what the previous speaker said. This bill needs a lot of work, but I am in general support. It is called the homeowners' bill of rights. We need open meetings, and we need to have control of our own lives.

Chair Segerblom:
I will go back to the north, is there anyone else in support? In opposition?

Paula McDonough, President, Park Tower Homeowners Association, Reno, Nevada:
Park Tower is probably the original high-rise building in downtown Reno. It was built about 50 years ago. It was built as an apartment building, and about nine years ago it went condominium. [Read from a prepared statement (Exhibit D).]

Chair Segerblom:
So to summarize, you have two objections: the two-thirds vote and the ability to foreclose?

Paula McDonough:
Right.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
I am a practicing lawyer in Reno, but I am not here as a lawyer but as a homeowner. For 20 years I have been elected to the homeowners' association board called the Caughlin Ranch Homeowners Association. We have been in

existence for 25 years and have 2,250 members. It has become my hobby, and I continue to volunteer.

I have taken some time to put together some materials (Exhibit E).

I would like to make several general comments. The entire system of homeowners' associations depends on volunteers. If neighbors do not step up to donate their time to be on a board, the entire system will fail. Whatever bills you pass and whatever changes you make in the law, if the members will not step up and volunteer their time, the entire system will crumble. You cannot pass a law that mandates that I serve on the board. You cannot mandate that once every five years we must serve on boards.

We have a good board in Caughlin Ranch. Be very cautious about how you tinker with these laws, because right now the bills that are in front of the Legislature are going to subject me to punitive damage claims and subject me to huge fines. I do not make a nickel as a board member. I spend hours and hours reading materials; I get six-inch binders for each meeting. I have six and eight hour meetings. I am not an elected public official, I am a volunteer. Be careful that you do not kill the golden geese, who are the volunteers.

This bill proposes term limits for homeowners' boards. My association has a budget of $2 million. Because of our 2,000 members, we are a big business. We have a volunteer board of good members. It would be detrimental if you were to make everyone get off the board after four years because it takes years to get the experience needed to run the business. If you were to run everyone off after four years, this big business would be run by beginners.

Chair Segerblom:
We have a $5 billion budget, and we are term-limited.

Bill Magrath:
I would hope that you would agree with me that maybe it is not a good idea to have term limits. My point is, among our 2,250 members, we had seven people volunteer in the last election. If the bill were to get rid of the five experienced members, this large business would be run by two people who have been on the board for one year and the rest of the qualified people are ineligible. It is terrible to discourage volunteers, especially people who are elected by the members.

There are nearly 3,000 homeowners' associations in Nevada, and probably 2,900 work fine and are doing a great job for their members. There are clearly some rogue boards and improper board members, but I want to caution again

against passing bills that will make it so destructive that a potential board member will not sign up.

Also, if Assembly Bill 350 passes, I would probably decide it is not worth it. If you lose the volunteers, you lose the entire system, and then two years from now there is no bill you could pass that would put it all back together.

Chair Segerblom:
Is there anything about the bill you do like?

Bill Magrath:
I like the comment that Assemblyman Munford made about boards working in good faith because I think they should and do.

So let me give you some examples. There is a proposal in this bill that says if you do not pay your assessments, the maximum that can be charged is 5 percent interest. It sounds like a good idea to cap the interest rate. But if I have a couple of members who are paying their bills at the end of the month and they have the choice between paying their homeowners' association dues at 5 percent interest or their credit card at 22 percent interest, they will pay their credit card.

Now, the association does not get the payment of the assessment; it cannot fund its reserves, mow the lawns, fix the parking lot, or do whatever needs to be done. Five percent is an artificial cap on the interest rate, and the net result is that you are turning the HOA into a bank. Suddenly all of the members are going to pay other, higher-interest bills first.

There is a provision in the bill, where, if there is a special assessment, the interest rate is capped at 3 percent. You are turning us into a lending institution, when we are not in the business of lending money. We are in the business of performing services. We will collapse if members are suddenly able to borrow money from us at 5 or 3 percent and pay their other bills instead.

There are bad people out there on HOA boards; Senator Schneider and I talked yesterday about bribery, and Senate Bill 182 will take care of it.

There is a cost to having a copy machine. It frustrates me when people say that HOAs should not charge for copies and the law currently states they can at a maximum, of 25 cents per page. If there is no charge, then any new member could walk in and say he wants copies of every set of minutes the association has had since inception. If the copies are free, there is no reasonable restriction on requests, and it encourages harassment of associations.

There is also a provision in this bill that says that any member can demand copies of any document, including legal opinions. That means a person suing the association can request confidential legal opinions to find out what the association's lawyer is doing to defend against the lawsuit.

The bill also states that there shall be no right to foreclose on liens. Right now the statute says a lien is good for three years. Every homeowners' association divides its budget by the number of units, and that is the assessment. When someone does not pay the assessment, the association has to pay the expense without having received that portion of the money.

The statistics are there, the representatives from the Commission will tell you that last year there were 19 total foreclosures. Those 19 homes were the total sold out of 3,000 homeowners' associations in the entire state. It is not something where people are being thrown out of their homes; foreclosures are done after plenty of notice and due process. One of the Senate bills now provides for a right of redemption, which gives owners one more chance to get their house back. Here is the advantage for the ability to foreclose: people realize they are going to have to pay their bills, and it avoids the need for associations to have to sue members who are past due in assessments. If the Committee were to pass the no foreclosure part of the bill, it is true that there will be a lien, but a lien is just a secured right to be paid sometime in the future. If the homeowner sells in the future, the HOA would probably be paid as part of the process to clear the title to the property. If the homeowner does not pay and does not sell the property, the only way the HOA can be paid is to foreclose on the lien. The issue is that the current statute now says that liens are valid for three years. If I cannot foreclose and they have not paid, it is like that member has lived in the association and benefited from services that the association provides without paying for them. This would crush homeowners' associations. They would not be able to fund mandatory reserves.

If, as a board member, I realize that people are not paying their dues, but I can no longer encourage or force them to pay through the foreclosure process, the association would need to hire a lawyer. In my association there are currently about 60 delinquencies, so if the law changed it would be 60 more lawsuits.

Regarding Assemblyman Kihuen's issue, the associations would be more than happy to post our costs so that people are forewarned. I agree with opening up the whole process.

Chair Segerblom:
Why would someone sue you if we take away the right to foreclosure?

Bill Magrath:
I would have to sue that member to collect. Right now, because we have the power to foreclose, everyone in a homeowners' association in Nevada paid their assessments, except 18 people. Foreclosure is a heavy hammer, but without it there will be many more lawsuits, and then everyone will be unhappy because, not only would they have to pay the costs of the foreclosure process, the statute states they would have to pay the attorneys' fees.

There is also a provision in the bill that says if any member submits a written document to the homeowners' association more than 24 hours in advance, that document must be attached to the minutes and someone at the board meeting has to read the entire document into the record before the board can take action or vote. I am not sure which one of you wants to read my handout from start to finish, as a legislator or a volunteer. It is just too much.

My next comment is about the five minute rule. Right now my association allows anyone who wants to speak, to speak. I added up that there are about 30 people in this room, so if 30 people were to speak for five minutes it would take two and a half hours per agenda item. My agendas often have 25-30 items on each one. I think there should be an opportunity to speak; mandating five minutes is difficult.

The final sections of the bill add fines. I would be subject to fines up to $5,000 and unlimited fines, as a board member, if someone were to find that I did not follow every detailed rule, regulation, or governing document. As a lawyer, I think I do a good job of understanding and following the rules, but some of the other volunteers might not want to face those fines.

The bill also says the most the Commission can fine any member is $100 per violation, four times in a two-year period. With those caps, someone might say that they would rather pay the $400 than have to landscape and maintain their property. We do not want to fine anyone. All we want is for our members to comply with the rules, which they agreed to and knew of when they moved in.

If this bill passes, it will be the beginning of the crumbling of the entire system.

Chair Segerblom:
I did not realize that this was the beginning of the domino theory.

Assemblyman Kihuen:
Are you completely against term limits, or would you be okay with increasing the number of terms allowed by the bill?

Bill Magrath:
I am not a supporter of term limits because every election is a term limit. If the homeowners want to support somebody, they should be able to elect me. Even if the terms were increased, there are not a lot of volunteers. If you artificially cut off good, qualified, experienced people who have a history and working knowledge, you would be harming the people who want to elect that person.

Assemblyman Kihuen:
You said that the HOA could charge up to 25 cents per copy. That goes towards the expense of the copy machine?

Bill Magrath:
The copy machine, the paper, and the time of the employee who has to make the copies.

Assemblyman Kihuen:
The bill also says that you can provide an electronic copy. Why would you charge for an electronic copy?

Bill Magrath:
Many homeowners' associations like mine put all of the minutes up on their website, so you can print them out at your own expense. There is an expense and time involved in making an electronic copy as well.

My biggest fear of the copy rule is that, if you give anybody a right to demand copies of anything and everything, it would become the method by which he can harass the association. It seems more reasonable to place the burden on the person who wants the copy rather than making everyone else pay for it.

Assemblyman Kihuen:
Do the dues not cover the copy machine?

Bill Magrath:
Our budget includes business office expenses; we have an in-house member who is a community manager, as an employee. We count into our budget that we will be reimbursed for copying. If you make it free, that is a cost that will be absorbed by the 2,250 members, but it becomes an entitlement to anything, and it could be abused.

Assemblyman Kihuen:
I would not say anything; it would have to relate to the homeowners' association.

Bill Magrath:
Yes, but the association has existed for 24 years, we have rooms full of documents, and if someone were to ask us for copies of all of it, we would have to provide them under the bill, because it is not just the minutes. If the cost is borne by the person requesting the documents, they may be a little more conservative in what they are asking for.

Assemblyman Hambrick:
Is it your interpretation, if this bill is passed, if I were a member of your association, I could walk into your office with the federal tax code and ask you to copy it, and you would be required to read it at your next meeting?

Bill Magrath:
No. If you were to send me the tax code to be read at the next HOA meeting, then yes, I would be so required. Any written materials a member submits must be read into the record and attached in its entirety to the minutes.

Chair Segerblom:
Has anyone tried to harass you in the 20 years you have been on the board?

Bill Magrath:
I would say out of the 2,250 members, there is always someone who is not pleased no matter what you do.

Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada:
I agree with what Mr. Magrath said.

My client sent a letter (Exhibit F) about how, if the foreclosure process were taken away, the courts would be clogged up and how few of those foreclosures proceed into actual foreclosures.

Garrett Gordon, representing Olympia Group, Reno, Nevada:
We also have major concerns with the bill; we sat down with the sponsor of the bill and expressed those concerns. We agree with what Mr. Magrath said.

Angela Rock, President, Olympia Management Services, Las Vegas, Nevada:
I like the concept, but I do not think the language achieves the concept. I want to address a few points that I do not think Mr. Magrath addressed.

In section 1, increasing the necessary vote to amend the CC&Rs to 85 percent would make it virtually impossible to amend a set of documents unless you had a very small association. The largest association we represent has

6,700 homes. At their last election, we had three people put their name in for an open seat. Getting participation is almost impossible. There are certain provisions in documents that do need to be updated and amended; therefore there needs to be a mechanism for the majority of people to control the community in which they live.

The next issue is the ability of the board of directors to levy an assessment to fund the reserve. I think it is necessary that people participate in establishing their budget, but there are statutory requirements that an association must fund a reserve in order to take care of the amenities in the future. If the association would have to get the vote of the membership to fund road repairs 20 to 25 years from now, it stands to reason that you would not be able to get people to vote for it. It is a necessary expense, and is vital to the community. Boards need the ability to levy an assessment to have a fully-funded reserve to take care of the common elements, which are often a safety issue if they are not maintained.

There is a requirement in section 12 that a developer make a multimedia presentation of the documents. In another section, the association must have a multimedia presentation available to potential purchasers. I will allow Mr. Schulman to address the part pertaining to associations, but on behalf of the developer, if you require a multimedia presentation, aside from the cost, which may be minimal, the true effect is that you will have someone reading the CC&Rs and the governing documents so as to not be later claimed as liable for not fully disclosing something.

At the end of the bill is section 21 which repeals certain existing law. This includes current law that allows associations or homeowners, whoever the prevailing party is in a non-binding arbitration, to seek confirmation of the award. With Senator Schneider and other working groups there has been a great deal of discussion about what prompted this language and the attempt to repeal the section. My understanding is that some individuals who participated in the non-binding arbitration process felt that they were not fully informed that the process could become binding. We have worked through some language and some potential steps that the Commission and the Division of Real Estate (Division) are willing to take to make sure those individuals are informed including the timelines for matters to become binding, as opposed to taking away the right of both parties to turn an arbitration award into a binding award, which does decrease some of the load on the courts and is necessary.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I sent a letter to you (Exhibit G). I think Mr. Magrath and Ms. Rock have covered most of my points. I represent 700-800 homeowners' associations.

I think it is important to understand the differences between board meetings and homeowners' meetings. Some of the language in the bill allowing owners to speak applies to owners meetings and board meetings. Generally there is an annual owners' meeting, and generally there is no quorum, so whatever you write regarding it will be irrelevant. Regarding the board meetings, issues have been hit on in the prior testimony that needs to be highlighted.

First, if the association is required to attach anything to the minutes—you have touched on the copying costs, but more importantly, because this has happened to us—people can send in things that are defamatory. If we were required to republish them, we are also committing acts of libel. Right now, most associations have a rule that a member can submit something that is one to two pages, signed, not defamatory, and on one of the issues relevant to homeowners, and it will be included in the minutes.

Regarding section 15, which would require an association to make a presentation available to purchasers, we do not have contractual privity with purchasers. In the law now, NRS Chapter 116 provides that we have a duty to disclose things to our members who are then going to sell to someone. If section 15 became law, we would read the entire document so as not to be involved in killing a sale or being liable if a sale walks away.

From my experience, the 85 percent requirement to amend a document is an impossibility. Legislators have already recognized the inability of associations to reach a quorum in elections, and in Senator Schneider's bill there is a reduction to a 35 percent quorum to recall people.

I could not agree more with what Mr. Magrath said about the foreclosure issue. There will be a number of lawsuits.

While I think this bill was brought with good intent, I am completely against it. I believe there are some very bad boards. In Las Vegas the FBI is investigating one group. The investigation has to do with outsiders bringing in bad boards, but I do not think you can legislate bad behavior out of existence. No matter what you write, it will not stop the really bad actors.

Assemblyman Kihuen:
Is there any part of the bill you could support?

Michael Schulman:
No, I think that I am with Mr. Magrath. I believe in the concept of good faith and community, but one of the things missing is that people look at HOAs as governments, and the law does not treat them that way. They are private corporations, and until such time as a case is decided that says that big associations are governments, I do not agree with any part of this bill. I think at some point there will be an association so big, that it should and will be treated as a government. But if an association is going to be treated like a government, the board members should have immunity, just like Assembly members do, to a certain extent. Throughout every jurisdiction in the country and including the leading case in New Jersey, called *Twin Rivers—Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association*, 929 A.2d 1060 (N.J. 2007)—no associations have been held to be governments or state actors. I am for good faith and community, but I cannot support any part of this bill.

Randolph Watkins, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
Chairman Michael Buckley asked me to make a presentation. In effect, the Commission only supports one section of the bill and opposes all others.

Section 17 proposes to expand the jurisdiction of the Commission by making any violation of the governing documents subject to our jurisdiction. The Commission supports alternative dispute resolution and mediation among the homeowners and associations in regard to governing documents disputes. Under present procedures, the focus of the Commission's jurisdiction is violations of law which are important enough to demand the services of the Attorney General to bring a case before the Commission. The Commission believes these resources should not be devoted to resolve disputes regarding governing documents. Accordingly, we strongly oppose section 17.

Speaking as an individual, I am a licensed community manager in the State of Nevada, live in a large HOA, and work for a developer who develops HOAs, and I am strongly opposed to every aspect of this bill.

Michael Forman, Vice President, Green Valley Ranch Community Association, Henderson, Nevada:
I have submitted a proposed amendment (Exhibit H). I agree with everything that has been said, but I wanted to cover some other items.

One is in section 3 about providing copies: if copies are provided electronically, the association would have to be absolved from any guarantee that the documents are in fact correct and true copies, because if they are not printed,

there is no way to verify right now that what the homeowner received is what was provided.

Section 10, subsection 1, calls for the provision of financial documents over and above the budget, including the end-of-year financial statement and the audit. The audit is usually not completed until three to six months later, so there is no way to provide that with the budget.

Section 10, subsection 3, calls for discussion of the budget after it is sent out for ratification. Again, this makes no sense. Discussion should have occurred before the budget was approved and sent out for ratification.

Section 12, subsection 1, calls for distributing things like draft documents. Draft documents may include confidential information, which is only included so the association board can evaluate if the document should proceed. Draft documents should not be in the public domain and offered to homeowners.

Those are the main points I have; I did not find anything in this bill which got me excited about wanting to pass it.

Michael Dixon, Private Citizen, Henderson, Nevada:
I am speaking as an individual. I am on the board of Sun City Anthem and am a former president. I will not run for reelection.

I would like to echo what Mr. Magrath said. He made some excellent comments. I would like to expand on a couple of things.

First of all, HOA boards are made up of homeowners; they have the same interests as any other homeowner. This is not really a homeowners' bill of rights. This is a homeowner-who-chooses-not-to-volunteer-for-the-board bill of rights. The common elements of HOAs are all owned by the units. The last legislature passed a law saying that the value of all of the common interest of an HOA would be taxed by the units. If the Committee were to pass this bill, you would allow some members of an HOA to get away with not maintaining their property.

In section 3, if one has an honest belief that the association is better off by having the board members in charge of everything, then they would be protected under this law. It is a law that I would describe as a full employment act for court appointed receivers, because once an association no longer has a quorum it goes into receivership. This is not something that will support good governance.

Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada:
We have 255 units, and we have a budget of about $36,000. I object to all of the provisions in A.B. 350. Board members are volunteers, and we find it difficult to get members to run because they are afraid of all of these laws. I object to the mandate of five minutes to speak on each agenda item because we would have to bring sleeping bags to board meetings.

In addition to the resale package, another expense this bill would place on the association is to provide the purchaser with a presentation of our documents. Can the purchaser not read? The purchaser can take his concerns to a lawyer. This idea sounds like someone's son graduated from film school and needs a job in multimedia technology. I can see an association like The Lakes in Las Vegas having this type of presentation because it is a selling point for developers and a great marketing tool for high-end merchandise. But what about the rest of us? Since when did associations become selling agents for contractors? This idea should be up to the individual associations who can afford it.

All I see in this bill is more restrictions and more costs. If all of these laws pass, it will cause a mass termination of associations. Please kill this bill. Since we are a small association, most unit owners know me and know I am here. In the 11 years I have been here, I try to keep all my members informed about what is going on at the legislature, and they are well apprised of what is happening.

John Radocha, Private Citizen, Las Vegas, Nevada:
I would like to review the letters I submitted (Exhibit I). I wish the Committee would define "capital improvement." I am having a big problem with my homeowners' association. I went to a meeting and they said that capital improvements are used for common elements in a gated community. The dictionary says that when you use dues it is for permanent additions. They want to use maintenance fees for speed bumps.

In section 9, line 42, I would like to see a definition of "capital improvement." I would like to specify that speed bumps are capital improvements in gated communities. If things are not defined, then associations do whatever they want.

This bill does not include anything about retaliation and selective enforcement. If you fight the board, go to meetings and ask questions, the next thing you know they are citing you for everything.

In section 11, subsection 5, I would like it to say "a lien for unpaid assessments or any other assessments is extinguished unless proceedings to enforce the lien

are instituted within 3 years after the full amount of the assessments becomes due."

Chair Segerblom:
I think that is a good point about retaliation.

Jonathan Friedrich:
I have several proposed amendments to Assembly Bill 350. Nowhere in existing statute does it state how an owner or tenant can cure an alleged violation. [Read from page 3 of prepared statement, (Exhibit C).]

The last item is with regard to weight limitations on dogs. I have heard all kinds of horror stories about people who are told that they have to get rid of their pet because the dog is over a certain weight. When you buy a puppy, you do not know what the puppy will weigh when he is mature.

Chair Segerblom:
Otherwise you support the bill?

Jonathan Friedrich:
Yes, I do.

Chair Segerblom:
Is there anyone else in support of the bill? [There were none.] Is there anyone else in opposition? [There were none.] Neutral on the bill?

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
Chairman Michael Buckley had several responses regarding this bill in his letter (Exhibit J). In addition to the points that the previous speakers made, we are also in opposition and support the points they made.

We are concerned about the burden that would be inappropriately placed on the Commission, for example, to look at every foreclosure or other particular duties that would be placed on the Commission. We obviously could not do that. We meet several times a year, but some of the requirements would necessitate that we meet very frequently and that would not be appropriate. It would be a burden with our state budget as it is, and it would be a burden having to frequently convene because we must convene as a group in order to make decisions.

Chair Segerblom:
What do you think about the section that states that the HOA cannot foreclose to recover deficiencies?

Marilyn Brainard:
We think it places an unfair burden on associations; they would be a creditor down the line and would be the last to be paid. Assessments do, in fact, fund all of the expenses of the association so if they were not able to foreclose it would be a terrible burden. It would be a business for receiverships because some associations' finances are that bad today. And out of 543 notices of sale that were posted, only 18 were consummated in this fiscal year. It is a very low percentage.

Frances Copeland, Private Citizen, Las Vegas, Nevada:
I would like to speak against certain portions of the bill.

Certain portions of this bill favor HOAs, such as the portion regarding emergency repairs. It seems that every time there is an emergency repair, the onus is put on the owner to take care of it, even if it is between the walls and in common areas. I see nothing in this bill about holding HOAs accountable when they fail to perform emergency repairs promptly. There is culpability on the part of the HOA to perform emergency repairs.

There is also a portion of the bill about arbitrators. The arbitrator is good for arbitrating differences between neighbors, wild parties, illegal cars, et cetera, but when it comes to a construction defect in common areas and financial loss to the owner of the condo, I do not think the arbitrator is in a position to mediate that. These cases belong in the civil courts and not with the arbitrator. I think that every legal situation, whether involving the owner or the HOA, should have compulsory documentation by recording it on tape, otherwise without a record, there is no way to refer back to it.

There are other areas in the bill where the onus is put on the homeowner instead of the HOA for caring for things like mold remediation and construction defects. Homeowners' associations have received millions of dollars from lawsuits, but the money has not been passed on to the homeowners, who have suffered great financial losses.

I notice that there are a number of people here associated with the management, but I think more emphasis should be put on the responsibility of the HOA to homeowners. I would also like to see language dealing with the situation where the owner does not live on the property, but his dependents do.

The bill covers lessees and residents, but it does not differentiate between an owner and a dependent living on the property.

Assemblyman Munford:
Through some of the testimony, I felt like how Custer must have felt at the Little Bighorn. This bill should take into account that this is a time of an economic downturn. Some people are running into difficulties, and having a hard time paying their assessments and dues. I think that boards should be giving them special consideration and understanding. Having sat in on some of these meetings, with some boards, you do get the feeling that this is not a place for the little guy. Sometimes I am grateful that I do not live in a gated community.

In summation, the State of Nevada must assure that all association board members honor the state and federal constitutions, which guarantee equal protection and due process to their citizens. The State of Nevada has a duty to ensure that each common-interest community adheres to the law and protects the rights of its members.

Chair Segerblom:
I will bring A.B. 350 back to the Committee. I will open the hearing on Assembly Bill 311.

Assembly Bill 311: Revises provisions governing the financial statements of common-interest communities. (BDR 10-389)

Assemblyman James A. Settelmeyer, Assembly District No. 39:
The background as to why I brought this bill forward is there are 2,952 associations in Nevada representing about 470,000 units. The other reality is that four homeowners' associations (HOAs) disappear for every one added, so they are decreasing in numbers.

The size ranges from four units with budgets of about $1,300 to 8,000 units in Summerlin with a budget of nearly $54 million. There is a proposed project in Coyote Springs with over 160,000 units.

The current law requires associations with annual budgets of $75,000 or less to have a full-blown audit every four years. This bill seeks to lower the standard to a review, rather than an audit. For HOAs whose annual budgets range from $75,000 to $150,000 there would be an annual review, rather than an audit every four years. The reason for this is cost. For the smaller HOAs with budgets of $1,300 a year, a full audit costs $5,000 to $8,000 and is too costly. The protection will remain within the *Nevada Revised Statutes* (NRS),

which currently states that if 15 percent of the people in an HOA come together, they can order an audit at any time.

What is the difference between a review and an audit? An audit includes an examination on a test basis, using evidence supporting the amounts in disclosures in the financial statement. An audit also includes assessing accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. Everything has to be backed up.

A review, on the other hand, consists principally of inquiries of management and analytical procedures applied to financial data. It is substantially less in scope than an audit, but it is in accordance with generally accepted auditing standards. The objective of a review is the expression of an opinion regarding a financial statement taken as a whole and that the reviewers are not aware of any material modifications that should be made to the accompanying financial statement in order for it to be in conformity with generally accepted accounting principles. It would still be done by a Certified Public Accountant (CPA).

Assemblyman Kihuen:
What is the cost of an audit?

Assemblyman Settelmeyer:
A full-blown audit by a CPA can range from $5,000 to $8,000, depending on the scope. The smaller HOAs with $1,300 budgets are at the lower end of that spectrum. For the larger HOAs that are not touched by this bill, for example Summerlin and its $54 million budget, I have no idea what their audit would cost. I would have to assume that it would be in the tens of thousands of dollars. I have been told by a CPA friend of mine that for a review you can basically remove a zero, so it would be $500 to $800.

Chair Segerblom:
So this bill only applies to homeowners' associations with budgets of $150,000 or less?

Assemblyman Settelmeyer:
Correct.

Chair Segerblom:
So the large ones would not be impacted at all by this?

Assemblyman Settelmeyer:
The breakdown for your information: there are 1,260 HOAs with an annual budget ranging from $0 to $75,000, 563 HOAs with annual budgets from $75,000 to $150,000, and then about 1,200 HOAs are in the $150,000 and above bracket.

Robert Allgeier, President, Westwood Park Homeowners Association, Minden, Nevada:
We represent 84 homeowners in the north end of Minden. The 84 homes are approximately 20 years old. Associated with the homes we have 13.2 acres of common area, which we are required to maintain and service, including the utilities.

Because of the size of the common area we are required to maintain, our annual budget this year is $116,000, so we fall within the $75,000 to $150,000 range. I can tell you, because we get competitive bids on all services that we utilize, the best bid for a review by a CPA would be $2,000 and a full audit would be 200 to 300 percent more.

An annual review is very specifically designed to pinpoint difficulties and things that are out of alignment within the accounting system. The management service we employ prepares monthly financial statements. We require two signatures on every check, and only the officers can sign the checks.

Following is a breakdown of our budget. About 45 percent of our $116,000 is spent for the maintenance and care of the common area. A little over 20 percent is spent for utilities, and the water for the grass, shrubs, and trees. Then 11 to 12 percent is for homeowner sewer services. The management fee is a little over 10 percent, and the office expenses, including the $2,000 for the review, runs about 6 percent. Then, by state law, we have to set aside reserves, and that is another 5 to 6 percent a year.

The things we pay are relatively simple. We have a five-member board and meet every month, so I can assure you that if a review disclosed anything out of financial order, it would not need to be the homeowners who would ask for a full audit. The board would ask for the audit.

We are fighting budget issues the same way you are, and many of the people who live in our homeowners' association have lived there for 20 years and are retired. So every dollar we have to impose upon them is an added burden on them. We have very serious restrictions about dues and assessments, and we try to hone our budget as you all do. We just cannot see the benefit of an audit

unless something is revealed by the review, and then it may not be a full audit, but only a section for example, of the operations or reserves financing.

Chair Segerblom:
Do you have insurance for theft or misappropriation by the board?

Robert Allgeier:
We have insurance to cover the board members and the association. I do not know the answer to your question.

Wendell Vining, Vice President, Westwood Park Homeowners Association, Minden, Nevada:
I fully agree with everything Mr. Allgeier said, and I fully support this bill.

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
The Commission did discuss this bill, and we fully support it. We think it is very fair. We would like to submit the letter from Chairman Buckley (Exhibit K). The expense for the smaller associations to pay for a full-blown audit is an unreasonable burden. I understand that the Nevada State Board of Accountancy also supports this bill.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I am speaking as a private owner. I have been contacted by several members of our sub-associations in Sun City Anthem, Las Vegas and they support this bill.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
My only concern is that it calls for a four-year period between audits, and if you have some unscrupulous board members, a lot of money can be embezzled in a four-year period. A possible alternative could be an annual or biennial review.

Chair Segerblom:
The bill as I read it requires a review every four years for the $75,000 and under and annually for the $75,000 to $150,000.

Jonathan Friedrich:
I was talking about the budgets that are less than $75,000.

Chair Segerblom:
So you would like to see that every year versus every four years.

Jonathan Friedrich:
For a review.

Chair Segerblom:
Is there anyone else in favor? [There were none.] Is there anyone opposed? [There were none.] Is there anyone who is neutral?

Gary Lein, Accountant Representative, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
I am a shareholder with Hilbert and Lein CPAs in Las Vegas. We do audit and review work for a number of associations in southern Nevada.

As a CPA, I do not like the loss of business, but I also understand that for some small associations the audit requirement is a real burden; specifically, for the communities in outlying areas. Few firms do audits because as auditors we are subject to peer review every three years, so many firms elect out of the audit process. I see the benefit of the review, which would free up firms and lower the costs of reviews for many associations. I feel strongly about the audit process, but again, if it is a review, so be it.

One of the concerns I have is in section 1, subsection 1, paragraph (a) where it talks about a review once every four years. That seems to be an arbitrary number. *Nevada Revised Statutes* 116.31152 require reserve studies for homeowners' associations once every five years. What would make sense to me would be to delete "once every 4 fiscal years" and replace it with "for the year preceding the preparation of the reserve study that is required by NRS 116.31152." That way there is a real purpose behind the review of the financial statements. Then the person preparing the reserve study has a solid basis and a confirmation of the true operating and reserve fund balances of the association. I would like to see it tied to the preparation of the reserve study.

Chair Segerblom:
Would that cost any additional money for the homeowners' association?

Gary Lein:
It would not because the reserve study is required every five years. If the reviewed financial statement was done the year prior to the preparation of the reserve study, it would be asking for the reviewed statement every five years versus every four.

Chair Segerblom:
It could still be done with a review? And what other point did you want to make?

Gary Lein:
Yes, absolutely. The other point is on section 1, subsection 1, paragraph (b). The audit requirement was always troublesome. We would do a review for three years and on the fourth year do an audit. The problem was having to go back into the prior year and audit the beginning balances, and it created a lot of additional work and expense to the association. I like paragraph (b) which has us consistently preparing reviewed financial statements. Where I have a problem trying to figure out is where the numbers $75,000 versus $150,000 came from. I do not know how that was developed. I do like the idea of consistently budgeting for a certain service, because there are significant differences between a review and an audit.

Assemblyman Settelmeyer:
I appreciate his disclosure on pecuniary interest, and I think his suggestion might have some merit. I chose four years because it is in existing law. I think this bill will provide some economic relief to people.

Chair Segerblom:
If you would think about the five-year versus four-year, and if it sounds good to you, it sounds good to me.

Assemblyman Settelmeyer:
I would be agreeable to that. It makes sense. If you want to have it go from four years to the year prior to the reserve study, as he indicated, I think it is a very favorable amendment, and I think it would benefit everyone.

Chair Segerblom:
I will call this bill back to the Committee, and I will open Assembly Bill 361.

Assembly Bill 361: Makes changes relating to the destruction or deterioration of foreclosed or vacant units in common-interest communities. (BDR 10-940)

Assemblyman Richard McArthur, Clark County Assembly District No. 4:
The intent of this bill is to do two things: one, to get the lending institutions and the homeowners' associations together early on in the foreclosure and vacancy process, so that the lending institutions can provide some contact information to the homeowners' associations, with their address, phone number, and the department that handles residential mortgages; and two, to make sure the homeowners' associations can maintain the exterior of the foreclosed properties and go on to the property without any liability for trespass.

I will review the bill. Section 1, subsection 1, states that a lending institution must provide the association with contact information. Paragraphs (a), (b), and (c) are the trigger points to make sure the lending institutions have to provide that information to the homeowners' associations (HOAs).

Subsection 2, about halfway through states "the association may enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions...."

Subsection 3 basically says that if a unit is vacant "the association may enter the grounds of the unit to maintain the exterior of the unit." That is the real basis for this bill. That is what people have been worried about because of the foreclosure process. The HOAs did not have any contact information with the lending institutions and there was no guarantee that there would not be liability problems when the HOA tried to keep up the exterior of these homes on their own.

Chair Segerblom:
It sounds from the first section that some of these lending institutions are trying to hide so they cannot be assessed or called on the carpet for not maintaining the property.

Assemblyman McArthur:
They basically do not have any real reason to hurry up and start the foreclosure process. The homeowners' associations have not been able to find out who the lending institutions are.

Garrett Gordon, representing Olympia Group, Reno, Nevada:
To my right is Angela Rock with Olympia Group. To be brief, we support the bill. I have been working with the sponsor on some clarifying language, so we will continue to work with him to come up with a resolution.

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
I worked with the sponsor early on and suggested to him that this kind of bill is a solution to some of the problems we have in the communities where properties are falling into disrepair. My members assure me that once they have the legal authority to do maintenance, they do it, but until there is a foreclosure, they do not own the property and have no right of entry. If the association can do the things the Assemblyman has suggested to at least minimally keep properties in compliance, then we are all better off. So we support this bill.

Michael Schulman, representing various homeowners' associations, Las Vegas, Nevada:
This is one of the best bills we have seen this year. Our clients have a number of issues with houses that are not taken care of, and they are an incredible liability to our associations.

Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada:
I support this bill and give Assemblyman McArthur an "attaboy."

Chair Segerblom:
Is there anyone else in favor the bill? [There were none.] Is there anyone in opposition? [There were none.] Is there anyone neutral? [There were none.]

Assemblyman McArthur:
I will have a couple of wording changes, but it will not change the intent of this bill. I have already talked to Legal and the people who were testifying today, we have one section to clear up, and I will get it to you as soon as I can. The purpose of this bill is to get the homeowners' associations and the lending institutions together so they can work together on it. I think everyone will be happy with it.

Assemblyman Hambrick:
It seems like a common sense bill. It keeps the value of the property up, and it will have a good ripple affect.

Chair Segerblom:
We will bring A.B. 361 back to the Committee. That ends the three bills that had not been heard before. Now we are going to go back to some of the bills that have been heard by the full Judiciary Committee to discuss them further. I will open the hearing on Assembly Bill 108.

Assembly Bill 108: Revises provisions governing community managers of common-interest communities. (BDR 10-178)

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
I have some comments on A.B. 108. I submitted some comments (Exhibit L). I propose one amendment. There are three kinds of homeowners' associations: self-managed, managed with internal employees who are community managers, and others which have outside community managers. This bill is a good bill because it increases the standards for community managers. We will all benefit from that.

Unfortunately, section 7, subsection 1, paragraph (k), subparagraph (1) states that a community manager must have his own insurance policy. Many of the associations which have employees already have insurance on their employees. This bill requires that homeowners' associations (HOAs) get a separate insurance policy on their managers, which means we would have to pay for two policies from two separate insurance companies.

I am hoping you will allow an amendment which would say that the community manager would have to get his own insurance "unless that community manager is a full-time employee of the association and is covered for errors and omissions and professional liability by the association's existing insurance coverage." There is no reason to have an employee covered by two separate policies.

Michael Dixon, Private Citizen, Henderson, Nevada:
Section 1, subsection 1, paragraph (a), subparagraph (3) states the budget for the daily operation of the association must include "for each month in which expenses are estimated to be incurred, an itemized list of the expenses expected to be incurred during that month." At Sun City Anthem, Las Vegas, we run a budget of about $8 million a year. We write 250 to 300 checks a month, and were we to have to itemize all of those checks every month, it would cost an inordinate amount of money to no benefit.

We review our books every month and all of our departments' operating expenses on a quarterly basis. We do all of these things to make sure we are well managed. This would be a terrible burden.

Chair Segerblom:
Do you subcategorize things like utilities, et cetera? Is there a way that you could itemize without being specific for each check?

Michael Dixon:
We group things. We have different operating departments like administrative, maintenance, fitness, and activities, and each of them has subcategories and a budget for various things they do.

Chair Segerblom:
Is it possible that this could be focused on categories, versus specifics?

Michael Dixon:
Of course, it is what we do now.

We are a large association, and there are a lot of large associations. The impacts of *Nevada Revised Statutes* (NRS) Chapter 116 on large associations differ markedly from those with 100 or 200 homeowners. I would like to strongly urge the Legislature to establish an ad hoc commission to look at the effects of NRS Chapter 116 on large associations over the next two years to try to streamline the enforcement and application of these laws without negatively impacting the interests of the members of an association.

Gary Lein, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
Mr. Buckley submitted a letter (Exhibit M), which has more detail on what I am going to cover. Section 8, subsection 9 of Assembly Bill 108 states "cause to be prepared annually a financial audit performed by an independent certified public accountant of the records of the community manager pertaining to the common-interest community, which must be made available to the Division and the executive board." Going back to Assembly Bill 311, we just talked about circumstances where some of the associations will qualify for the reviewed financial statement. This section of A.B. 108 is now requiring a financial audit. I want to make sure we are clear that we are talking about an audit of the association and not of the manager or the management company. It is clear that the two—the association and the manager—cannot comingle funds. If there is a reference to an audit, it would be an audit of the association's books and records.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I am in support of this bill, but I have a couple of specific comments that are included in the letter I wrote to you (Exhibit G).

In section 4, "client" is defined as the executive board. An executive board is not a legal entity, so that definition needs to be changed. I would suggest "association."

In sections 7 and 8, the drafters of the bill have incorporated a number of provisions that are in the regulations which the Commission adopts. I would rather the language be in the regulations, but if it is not going to be, I have some more comments.

I think Mr. Magrath's comments are correct, but we need to go further. He made a comment about protecting individual employees of associations. I would suggest that the law has to recognize the management contract relationship is generally between an association and a management company rather than an individual. So Mr. Magrath's comments should also apply to

management companies: if the management company has insurance, the employee of the management company should not also have to have insurance. It does not make sense.

Section 8, subsection 13, is something the Commission has been dealing with for a number of years: what associations may do with their funds. I will provide the language that the Commission has recently adopted, which makes a little more sense than the language in the bill. Subsection 15 puts responsibilities on the community managers that they cannot fulfill. This subsection states that the community manager must "ensure that the executive board is aware of all legal requirements pursuant to the applicable laws and regulations." They are not lawyers, they cannot be doing that. They already have a duty to tell the board when something is outside of their expertise and to advise the board to get advice in areas of particular expertise. So I suggest that subsection be deleted.

Similarly, subsection 17 deals with the investment funds and states that the manager shall "develop written investment policies and procedures that are approved by the executive board." That, again, is beyond the scope of what any of these managers are capable of or have the background to do. I have suggested language that parallels other language that says, "advise the executive board to engage qualified individuals to draft written investment policies." We have to remember that these managers are not supposed to take actions outside of their expertise.

Chair Segerblom:
I thought we were just codifying the regulations in this bill.

Michael Schulman:
You are codifying, but you also added some. The one regarding investment policies is new, and the one relating to deposit has already been revised by the Commission.

Nick Anthony, Committee Counsel:
The Commission has adopted those regulations, but they have not formally gone through the Legislative Commission yet. Is that correct?

Michael Schulman:
I do not think the one regarding investment has ever appeared. It is a temporary regulation that will expire in November, according to Mr. Lein.

Chair Segerblom:
Unless we make it into law.

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
We discussed this at length in our last Commission meeting in Las Vegas and it is being considered as a temporary regulation, which I understand expires November 1 of this year.

Robert Robey, Private Citizen, Las Vegas, Nevada:
I am in favor of A.B. 108, and I would like to endorse everything Mr. Schulman said.

I have one issue with section 1, subsection 1, paragraph (a), subparagraph (4). Really small associations, such as 18 units, have three-member boards. If more than one member leaves town on vacation, there may not be two people around to sign checks.

I also have a comment about separate insurance for community managers and the board. If someone should be in litigation, I feel the community manager should have his own attorney, as well as the board.

Chair Segerblom:
Just so you know, if an insurance company sells a policy like that, they have to provide separate lawyers for each party, even if it is one policy.

Robert Robey:
If that is the law, then great.

Michael Trudell, General Manager, Caughlin Ranch Homeowners Association, Reno, Nevada:
I wanted to follow up on the comments made by Mr. Magrath and Mr. Lein. Section 8, subsection 9, states, "cause to be prepared annually a financial audit performed by an independent certified public accountant of the records of the community manager." I am an employee of the Caughlin Ranch Homeowners Association, so the same language that Mr. Magrath had indicated before should also be used in this section.

Chair Segerblom:
So you are saying that a community manager is an employee and does not need to be audited?

Michael Trudell:
In my case, I am an employee of the homeowners' association and not an employee of a management company.

Chair Segerblom:
I understand that. You are saying that you do not need to be audited because you are just an employee and the language, as it reads now, would require you to be audited?

Michael Trudell:
True, and the homeowners' association is already being audited.

Chair Segerblom:
We will close the hearing on A.B. 108 and open the hearing on Assembly Bill 204.

Assembly Bill 204: Revises provisions relating to the priority of certain liens against units in common-interest communities. (BDR 10-920)

Assemblywoman Ellen B. Spiegel, Clark County Assembly District No. 21:
I wanted to give you a brief update on the surveys I was doing, speaking with community groups to find out about the impact this bill would have on them. I have received responses that cover over 78,000 doors statewide, and I have not received a response from anyone who said this bill would not be beneficial to them.

I am also here to present an amendment on behalf of Assembly Speaker Buckley (Exhibit N). This amendment is designed to offer consumers and homeowners some additional protection by limiting the cost of collection associated with the fines. The amendment adds a new section to Chapter 116 of *Nevada Revised Statutes* (NRS), designed to limit the collection fees for fines, penalties, or any past due obligation. It starts at $50, if the outstanding balance is less than $200, and then there is a sliding scale based on the amount of the obligation, which maxes-out at $500.

Chair Segerblom:
Mr. Anthony, does this mirror Assemblyman Munford's bill?

Nick Anthony, Committee Counsel:
No, his impacts an existing section, this adds a new section to NRS Chapter 116.

Chair Segerblom:
His placed limitations on fines or penalties...

Nick Anthony, Committee Counsel:
His bill limited the fees and the amount of interest that could be collected. This bill limits the extra costs that may be incurred in collecting a past-due obligation.

Assemblywoman Spiegel:
For example, if a common-interest community association charges a fine, it is not paid, and there is a collection effort to go after the fine, in addition to seeking to collect the penalty for the violation, there would be interest and a collection fee. This amendment would limit the collection fee. My understanding is that Assemblyman Munford's bill limited what the penalty itself could be and the interest rate.

This bill also encompasses regular assessments, what are called HOA dues. They are the general assessments that are due periodically to maintain the operating accounts and balances of the associations and to fund their reserve accounts.

Chair Segerblom:
After the last hearing on this bill, there were questions about whether your extension of the look-back for homeowners' association (HOA) liens to two years would violate Federal Housing Administration (FHA) or Fannie Mae or Freddie Mac regulations. Did you look into that?

Assemblywoman Spiegel:
I believe the bill said to the extent it was not an issue with federal law. If that is not the case, I will put in another amendment if necessary.

Chair Segerblom:
Mr. Uffelman is here, so he will probably give us some language on that.

Assemblywoman Spiegel:
This is something that will help preserve communities.

Chair Segerblom:
I think the intent is fantastic.

Assemblyman Kihuen:
I want to commend you for bringing this bill. Some of these issues came up on the first bill, so I am glad to see this bill.

Chair Segerblom:
Is there anyone here in support?

Neena Laxalt, Elko, Nevada, representing Nevada Association Services, Inc., Las Vegas, Nevada:
David Stone, the president of Nevada Association Services, and I have worked with Assemblywoman Spiegel, and we came up with a friendly amendment that we proposed in the original hearing (Exhibit O). It puts in place a policy for collections for homeowners' associations. We believe that if homeowners' associations actually have policies in place, then perhaps these collections would not take beyond six months.

Chair Segerblom:
So you are adding a subsection (c)? Would that impact the amendment submitted by Speaker Buckley? It seems like it is a different issue.

Assemblywoman Spiegel:
Ms. Laxalt's amendment requires common-interest communities to develop a collections policy and to provide that disclosure to the homeowners. By doing that, it makes it more fair and transparent for everyone and offers additional consumer protection because the homeowners know what their obligations are and they understand the ramifications of their actions. Conversely, it also helps the associations by clearly delineating in the policy the time frames of what would happen and when, which could accelerate the collection process and not have as large of a fiscal impact on the homeowners or the associations.

Neena Laxalt:
We just had a quick look at Speaker Buckley's amendment, and I am sure that my client would have some concerns. We would be happy to speak with the Speaker about our concerns.

Chair Segerblom:
We will not be taking any action today on this bill.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I support this bill because I think it is a good bill. Also the Assemblywoman sits on one of my boards in Henderson, and this will be very beneficial. I have two comments. The amendment that has been offered by Speaker Buckley may conflict or may need to be resolved with NRS 116.31031, which already limits the collection cost in regard to fines.

Chair Segerblom:
The amendment deletes that section and replaces it.

Michael Schulman:
Okay.

I think Michael Buckley, the Chairman of the Commission, wrote to you to state that the FHA does not have rules against this particular type of statute. They have concerns about it because it will affect them, but I do not think their loans are precluded because of it.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
One of the things that is good about extending the time frame from six months to two years would be that it would allow an association to slow the collections process down. If a homeowner gets behind in his assessments and the association knows it has a two-year comfort level, it will allow the association to not race out and hire a lawyer and start the collection process.

Assemblywoman Spiegel:
I just needed to disclose that I am on the board of the Green Valley Ranch Community Association in Henderson, Nevada. This bill will not affect my association any more or less than any other.

Chair Segerblom:
Is there anyone who would like to speak against the bill?

Bill Uffelman, President and CEO, Nevada Bankers Association, Las Vegas, Nevada:
When the bill was first heard in Committee, I submitted a document from the Summerlin North Homeowner Association (Exhibit P), which was amended to change the forbearance time from six months to three months. I think that an aggressive collections policy by an association is the answer to the problem the Assemblywoman is trying to solve.

The policy provides that the association can pursue on a contract theory as well as the normal course of foreclosure. The policy also provides that the association can work out with the homeowner their failure to pay in a timely fashion. It is the collections policy that makes these things work.

I am supportive of the amendment offered by Ms. Laxalt. I would point out that while Assemblywoman Buckley's amendment strikes existing law and moves it to a new section, it increases the lowest level of cost to $50 and the second level to $75, whereas existing law provides for $20 and $50 in those two categories. I am not sure where the reduction is, unless it is an overall reduction in cost.

The letter submitted (Exhibit Q) provided the policy of Fannie Mae, which will not buy a mortgage on a condominium with more than six months of past due assessments. We took a small survey. Other lenders, while they do not have established policies, said the bill if passed will have a negative impact on lending in Nevada. Again, on behalf of the bankers, the answer to the problem the Assemblywoman is trying to address is an aggressive collection policy by the homeowners' association.

Chair Segerblom:
Will Assemblywoman Spiegel's two-year provision prevent some federal mortgages or not?

Bill Uffelman:
It would certainly run afoul of Fannie Mae with regard to condominiums or attached dwellings. They have specifically said they will not buy those kinds of mortgages for the secondary market.

Chair Segerblom:
Do you have any proposed language which would carve out Fannie Mae?

Bill Uffelman:
My proposed amendment would be to eliminate that section of the bill and change the two years back to six months. I had understood that the Assemblywoman was going to exclude condominiums and attached dwellings from these provisions, which would be the kind of amendment you would want to include.

Chair Segerblom:
What percentage of mortgages are Fannie Mae? Pretty high? Would it also include Veterans Administration (VA) loans?

Bill Uffelman:
Yes, it is pretty high. I did not ask a VA lender. So you understand, the latter pages of the letter (Exhibit P) are the guidelines that that lender is publishing for the benefit of mortgage brokers and anyone who is making loans.

Chair Segerblom:
What percentage of homeowners' associations are condominiums?

Bill Uffelman:
In Nevada, I do not know.

Assemblyman Hambrick:
Not only do condominiums have their own HOAs, I also live in Summerlin North and there are condominiums within an HOA. They can be members of other groups.

Bill Uffelman:
A condominium by its very nature would have to have a homeowners' association because of the common areas within it. So yes, there are a lot of condominium associations that are sub-associations of Summerlin, for example. There are a lot of properties in Summerlin that would be affected by this provision.

Assemblywoman Spiegel:
Condominiums represent about 20 percent of associations. I am willing to go through any language or any proposed amendment from Mr. Uffelman.

Chair Segerblom:
It sounds like it would be worth it. Would you be willing to do that Mr. Uffelman?

Bill Uffelman:
I would be happy to give her language on that, but we would still be opposed to the bill.

Erin McMullen, representing Bank of America, Las Vegas, Nevada:
We just want to go on record in opposition to this bill because we believe that it penalizes banks for trying to work with individuals and not foreclosing sooner.

Assemblywoman Spiegel:
I think this would be an important bill in terms of what it means for our values and our state's real estate values and what it means to our homeowners and our communities. I would like to see our communities being kept strong. I am willing to work with everyone because I think this bill is important.

Chair Segerblom:
I will close the hearing on A.B. 204. We will take a short recess.

I will open the hearing on Assembly Bill 207.

Assembly Bill 207: Makes various changes concerning common-interest communities. (BDR 10-694)

Assemblyman John C. Carpenter, Assembly District No. 33:
This bill would basically take agricultural...

Chair Segerblom:
As I recall this, there are something like 7,000 lots in Spring Creek and a $1 a lot assessment?

Assemblyman Carpenter:
There are about 5,500 lots at a $3 assessment.

Chair Segerblom:
So we are talking about $15,000 a year? I move that we recommend your bill.

There is an amendment which states something like 20 units or fewer in a county that is 45,000 or less.

Assemblyman Carpenter:
There was an amendment (Exhibit R) which applies to some really small associations.

Chair Segerblom:
These are the agricultural ones where they have the pond for watering livestock and horses?

Assemblyman Carpenter:
The amendment would exempt those really small associations, which may only have a road and a few culverts, from having to hire a reserve specialist. They could hire another professional like an engineer or building inspector, because reserve specialists cost a lot of money.

Chair Segerblom:
Is there anyone here to speak in favor? [One person indicated they were in favor.] Is there anyone opposed to the bill? [There were none.] Are we agreed that we are going to recommend this bill as amended?

ASSEMBLYMAN KIHUEN MOVED TO RECOMMEND ASSEMBLY BILL 207 AS AMENDED TO THE FULL COMMITTEE.

ASSEMBLYMAN HAMBRICK SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Gary Lein, Accountant Representative, Commission for Common-Interest Communities and Condominium Hotels, Las Vegas, Nevada:
We would like a point of clarification here in Las Vegas about A.B. 207. There will be an amendment to exempt associations of 20 units or less from *Nevada Revised Statutes* (NRS) Chapter 116?

Nick Anthony, Committee Counsel:
The motion was to refer A.B. 207 back to the full committee as an Amend and Do Pass with an amendment to NRS 116.31152 which would exempt associations that contain 20 units or less.

Chair Segerblom:
My understanding is that those are small agricultural cooperatives.

I will open the hearing on Assembly Bill 251.

Assembly Bill 251: Revises provisions relating to common-interest communities. (BDR 10-555)

Assemblyman Mark A. Manendo, Clark County Assembly District No. 18:
We originally heard Assembly Bill 251 on March 18, 2009. At that time one of my constituents was going to testify, and I would like to submit her testimony into the record (Exhibit S). It applies to the second portion of the bill.

We do not have any opposition on this bill. What I hear from many homeowners' associations (HOAs), including the one I live in, is that if there are elections of officers for the board that are unopposed, the HOAs would not have to send out ballots to save on printing, postage, and labor. Regarding the requirements in statute about notice for vacancies on the board and/or that current board members are up for reelection, so people can run if they choose: none of these requirements are deleted.

This only applies if one is running for a position and is the only candidate; then the HOA does not have to go through the expense of sending out ballots.

There is a letter in support from Michael Buckley, Chairman of the Commission for Common-Interest Communities and Condominium Hotels (Exhibit T) and there is a proposed amendment from the Olympia Group (Exhibit U) which helps clarify.

Chair Segerblom:
It clarifies this election issue?

Assemblyman Manendo:
Basically section 1, subsection 8, says, "incumbent member," but say that no incumbent is running.

Chair Segerblom:
So it is just if the seat is unopposed?

Assemblyman Manendo:
The amendment says, "Notwithstanding any provision in this section, no election is required if a candidate is running unopposed." I am okay with the amendment because that was the original intent.

Legal will need to review it and work it into the bill, but at least you know the intent.

The second issue came from my constituent, Marion Ainsworth, who on the day of the original hearing was in the wrong HOA hearing in Las Vegas. The Senate was hearing similar bills that same day. She is an onsite manager where she lives. She was hospitalized and out of work for a while, during which time her license expired. She has no problem with renewing her license and taking the test again, but current statute says that she needs two years of supervision, which is kind of unfair for someone who already has been licensed, passed courses, and done what is necessary for her training.

As an attorney, Assemblyman Segerblom, if your license lapsed, I do not think you would have to have two years of supervision to be reinstated. The fee and the continuing education requirements would remain.

Garrett Gordon, representing Olympia Group, Reno, Nevada:
Assemblyman Manendo did a good job of explaining our amendment. It is just to clarify that any candidate who is running unopposed would not need an election.

Chair Segerblom:
Do you have any issue with the second part of the bill?

Garrett Gordon:
No.

Marilyn Brainard, Commissioner, Commission for Common-Interest Communities and Condominium Hotels, Department of Business and Industry:
I will speak only for myself since the Commission has not discussed removing the word "incumbent." I am totally in favor of the bill and I have tried to do

what this bill is doing ever since I was appointed to the Commission in 2006. It will save associations a lot of money in these very tight times.

We will defer to the Real Estate Division licensing personnel about the second part of the bill. If you have not received anything, I would assume—realizing that it is dangerous to assume—they are not opposed.

Michael Schulman, Las Vegas, Nevada, representing various homeowners' associations throughout Nevada:
I support both sections of this bill, wholeheartedly. I have not had a chance to see the amendment from the Olympia Group. I have suggested in my letter (Exhibit G) that the language needs to be tied to the number of open positions. If the number of candidates does not exceed the number of positions, the board, by acclamation, may state that it is the board as of the date the election would have occurred. But it can only take that action once the nomination process is closed.

On the second issue, I teach classes for managers in Las Vegas, and I think there is a shortage of good managers, so anything you can do to make it easier for someone to return, who is already qualified, would be terrific.

Chair Segerblom:
I was not clear on the first issue how you differ from what Assemblyman Manendo wants to do?

Michael Schulman:
I caught the same issue that Olympia Group did on the use of the word "incumbent," but I do not think it should be written in the singular or about incumbents. The language should be written to state "if at the end of the nomination process, the number of candidates equals or is less than the number of seats open, it should be done by acclamation." There has to be an actual process, and it needs to be spelled out.

Nick Anthony, Committee Counsel:
I had the same concerns when I was looking at it. We just need to spell out some kind of process, if candidates are unopposed, how they would take the seats.

Jonathan Friedrich, Private Citizen, Las Vegas, Nevada:
I support both parts of the bill. There is no language that addresses a write-in candidate.

Maybe it should be allowed.

Chair Segerblom:
It would defeat the purpose because the HOA would have to mail out a blank ballot asking if anyone wanted to write-in a candidate.

Michael Schulman:
There is already a requirement in the law that candidates fill out a nomination disclosure, to say if they are in good standing and whether they have any conflicts of interest. It would be impossible for write-in candidates to disclose that to anyone, which is why at the end of the nomination process it is generally assumed that no one else can be nominated, write-in or otherwise.

Jonathan Freidrich:
I withdraw my comment.

Carole MacDonald, Cottonwoods Homeowners Association, Pahrump, Nevada:
We put on the nomination ballot that there are no write-in candidates. Thank you for saving the associations money.

John Radocha, Private Citizen, Las Vegas, Nevada:
My concern is if you are in a dispute with the board after a fine has been applied, and they allow you to fill out the candidate paperwork but then decide they are going to take your vote away from you. I would like it more defined about disputed fines, selective enforcement, and retaliation.

Chair Segerblom:
We are going to discuss retaliation in regard to Assembly Bill 350.

John Radocha:
What about signs? If you are going to run for the board, or there is an item on the agenda, can you put a sign in your front yard or in the common area? That is what the boards do, they want you to dot every I and cross every T.

Assemblyman Manendo:
Under *Nevada Revised Statutes* (NRS) Chapter 116, signs are permitted in HOAs for political purposes, but I do not know if it is limited to just candidates for public office or ballot questions.

Bill Magrath, President, Caughlin Ranch Homeowners Association, Reno, Nevada:
Current law allows any member of an association to post a sign, not to exceed 24 inches by 36 inches, for any candidate or any position or any issue. So, in theory, you could post one for an initiative petition, running for a homeowners'

association, or anything else. It can only be posted on a piece of property you exclusively control, so it cannot be posted in a common area.

John Radocha:
The board has the advantage because they can use the United States Postal Service to put out their message, so how does the homeowner get their message out if they are so restricted?

Chair Segerblom:
You walk door to door. We will look into that. Is there anyone else to speak on A.B. 251? [There were none.]

> CHAIR SEGERBLOM MOVED TO RECOMMEND ASSEMBLY BILL 251 TO THE FULL COMMITTEE WITH THE CHANGES MADE BY NICK ANTHONY, COMMITTEE COUNSEL.
>
> ASSEMBLYMAN HAMBRICK SECONDED THE MOTION.
>
> THE MOTION PASSED UNANIMOUSLY.

We will have a short second meeting next week to bring a couple of these issues back that we have asked people to work on. Then it will go to full Committee the following week.

We are adjourned [at 4:47 p.m.]

RESPECTFULLY SUBMITTED:

_____
Emilie Reafs
Committee Secretary

APPROVED BY:

_____
Assemblyman Tick Segerblom, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 25, 2009 Time of Meeting: 1:39 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 350	C	Jonathan Friedrich	Prepared Statement and proposed amendments.
A.B. 350	D	Paula McDonough	Prepared Statement.
A.B. 350	E	Bill Magrath	Handout.
A.B. 350	F	Neena Laxalt	Letter from David Stone.
A.B. 108, 204, 207, 251, 311, 350, and 361	G	Michael T. Schulman	Letter addressing concerns in several bills.
A.B. 350	H	Michael Forman	Proposed Amendment.
A.B. 350	I	John Radocha	Letters in support of S.B. 281/ A.B. 350.
A.B. 350	J	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels .
A.B. 311	K	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels.

A.B. 108	L	Bill Magrath	Handout.
A.B. 108	M	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels.
A.B. 204	N	Assemblywoman Spiegel	Mock-up of Amendment 3542.
A.B. 204	O	Neena Laxalt	Proposed Amendment.
A.B. 204	P	Bill Uffelman	Handout.
A.B. 204	Q	Alison Combs	Letter submitted during original hearing, from Holland & Hart re: Fannie Mae regulations.
A.B. 207	R	Assemblyman John Carpenter	Proposed Amendment.
A.B. 251	S	Assemblyman Mark Manendo	Letter from Marion Ainsworth.
A.B. 251	T	Marilyn Brainard	Letter from Michael Buckley, Chairman, Commission for Common-Interest Communities and Condominium Hotels.
A.B. 251	U	Garrett Gordon	Proposed Amendment.

Dear Judicial Subcommittee members:

I am writing to you in opposition to AB 350, which will be heard in your Judiciary subcommittee tomorrow at 1:30pm. There are many problematic issues with the bill. Many items in the bill conflict with existing law and other pending bills. However, I am most concerned with section 11, subsection 10 of AB 350.

My company, Nevada Association Services, Inc. (NAS) is a licensed Nevada collection agency working exclusively with community associations (HOAs) in the state of Nevada. By most accounts, NAS is the largest assessment company collection agency in the state. My company utilizes lien enforcement (foreclosure) in the collection of past due assessments. Such a process is an inexpensive and effective process to collect past due assessments from delinquent owners.

Last year, my company commenced over 10,000 collection accounts against individual owners. Of the 10,000 collection actions that were commenced, my company foreclosed on 6 properties. That is a foreclosure rate of **.06%**. Of the 6 properties NAS foreclosed on last year, 3 were already in foreclosure with the bank. With the collection process already permitted by the statue, NAS collected in excess of $13,000,000 for HOA clients. AB 350 attempts to do away with such an inexpensive and effective process.

It is not NAS' desire to foreclose on anyone. And with over $13,000,000 collected and only 6 foreclosures in 2008, it is clear that NAS has been successful in that pursuit. However, if this collection avenue is not available to HOAs, as proposed under section 11 of AB 350, the only option available to HOAs would be costly and timely litigation.

Again, NAS started over 10,000 collection accounts in 2008. I respectfully ask that you imagine what would happen to the Nevada court system with an additional 10,000 lawsuits being filed each year by my company. Additionally, each of my competitors would be filing 1,000s of lawsuits. Realistically, the court system could easily see an additional 25,000 lawsuits being filed each year. That is assuming, of course, that the HOAs could afford to pursue such litigation. Those HOAs that could not afford to pursue litigation would simply see delinquencies increase and cash flows suffer. Bankruptcy would be a realistic possibility for many cashed strapped HOAs.

I respectfully ask you who this section of AB 350 is trying to protect. I ask you to consider who will be hurt by this section of the bill. Please remove section 11, subsection 10 of AB 350.

I am always available to the subcommittee for questions. I thank you for your time.

David Stone, President

Nevada Association Services, Inc.

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Las Vegas, NV 89146

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JESSE A. WADHAMS
CHRISTINA H. WANG
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CLIFFORD A. JONES (1912 - 2001)
HERBERT M. JONES (1914 - 2008)
GEORGE L. VARGAS (1909 - 1985)
JOHN C. BARTLETT (1910 - 1982)
LOUIS MEAD DIXON (1919 - 1993)
GARY T. FOREMASTER (1953 - 1998)

RICHARD G. BARRIER
ROBERT E. BRUCE
AMANDA J. COWLEY
ALAN B. RASKIN
OF COUNSEL

BRIAN J. MATTER
EXECUTIVE DIRECTOR

March 24, 2009

Assemblyman Ruben Kihuen
Assemblyman Harvey J. Munford
Assemblyman Tick Segerblom

Via e-mail:
rkihuen@asm.state.nv.us
hmunford@asm.state.nv.us
rsegerblom@lvcoxmail.com

Nevada Legislature
401 South Carson St.
Carson City, NV 89701

Re: AB 350

Dear Assemblymen Kihuen, Munford and Segerblom:

The Commission for Common-Interest Communities and Condominium Hotels (the Commission) met on March 20th to discuss proposed legislation affecting the Commission, the Real Estate Division and the Ombudsman, including Assembly Bill 350. At its meeting, the Commission adopted the following comments and responses to AB 350, which we respectfully forward to you for your consideration.

Section 1 [NRS 116.2117]. The Commission opposes the requirement in Section 1 that 85% of the unit owners are required to amend the declaration. This Section, together with Section 21, would also repeal NRS 116.21175, enacted in 2005, setting out a procedure for seeking confirmation from the District Court of an amendment to the declaration approved by a majority of the unit owners. The Commission supported the enactment of NRS 116.21175 in 2005, which derives from a similar procedure in California and provides for a court-supervised approval of an amendment which an association may not otherwise be able to obtain because of documentation requiring supermajority approvals of amendments. This provision of NRS has been particularly effective in correcting declarations which are defective for one reason or another and which by their terms may not be amended without the approval of a supermajority. The Commission believes that if a majority of the unit owners wish to amend their declaration, the will of the majority should prevail, as it does in most other facets of our democratic society. The Commission has not been advised of any abuses under NRS 116.21175 and believes that the protections afforded by judicial supervision of this amendment process adequately protect the interests of all homeowners.

The proposal in Subsection 1 of Section 1 to increase the percentage of owners who must approve amendments from a majority to 85% would effectively mean that a small group, 15% of the homeowners, could effectively thwart the desires of a majority of the homeowners. In the Commission's experience, amending the declaration is a difficult and time-consuming process under existing law and is not undertaken lightly. We see no reason for Nevada to change existing law.

Section 2 [NRS 116.3102]. No comment, conforming change.

Section 3 [NRS 116.3103]. The Commission opposes Section 3 of the Bill. While we believe that the amendment is well-intentioned, we also believe that the standard proposed to be imposed on board members of acting "in good faith and in the honest belief" is too subjective. Good faith and honest belief describe the personal mindset of a board member such that it would be difficult for the Division to prove and for the Commission to find that a person had an improper belief at the time his or her actions were undertaken. Under existing law, members of the board of directors may defend their decisions based on the business judgment rule. The business judgment rule is well-documented in reported court cases and presents a well-accepted and more objective method of defending decisions made by board members.

Section 4 [NRS 116.31031]. The Commission supports the amendment in Section 4 which prohibits fines from bearing interest.

Section 5 [NRS 116.31034]. The Commission opposes Section 5 which imposes term limits on board members in common-interest communities of more than 50 units. As the Commission is often made aware, board members are volunteers elected by their fellow homeowners. We often hear of associations in which it is difficult to find board members to run for office, as well as associations with excellent board members who the homeowners wish to maintain in office. Accordingly, the Commission opposes term limits for board members. The Commission believes that imposing broad, general rules such as this amendment reflect a one-size-fits-all approach that does not make sense in light of the great diversity and types of common-interest communities throughout the state.

Section 6 [NRS 116.3108]; Section 7 [NRS 116.31083]; Section 8 [NRS 116.31085]. These three sections propose: (a) that associations provide copies of the minutes in electric or paper format at no charge to a unit's owner; (b) that each unit owner be entitled to speak a minimum of five minutes on each agenda item; and (c) require that written comments received 24 hours before the meeting be read into the record in their entirety. As a general comment, the reason the Commission opposes these proposals is that they impose a financial burden on the association, that is, all other homeowners not making requests of the documents. Permitting every unit owner to speak for five minutes on every agenda item creates a potential for abuse by homeowners. Even greater problems are created by the proposal in this Bill to require that written remarks received by the association more than 24 hours in advance of the meeting be read into the record before any voter action is taken. As mentioned above, the Commission is aware that board members are volunteers elected by their fellow homeowners to govern the association, through a democratic process. The Commission supports the exercise by directors of their discretion under statutory limitations and believes that changes such as these will discourage involvement by homeowners in their self-governance by turning association meetings into

unproductive and unnecessarily long occasions for personal campaigns. Once again, the Commission is concerned that these proposals adopt a one-size-fits-all approach toward common-interest communities, notwithstanding the great diversity of those communities throughout the state.

Section 9 [NRS 116.3115]. The Commission opposes Section 9, which contains a number of proposals. First, the Commission opposes the proposal in Subsection 3, which would limit interest on assessments to 5% for assessments after they have been unpaid for 60 days or more. Associations pay their expenses from assessments charged to homeowners based on a budget approved pursuant to NRS Chapter 116. Associations have bills which, if unpaid, bear interest and are subject to late charges. Homeowners are aware of the amounts due and payable as assessments. The Commission sees no reason why the association should be placed on a less-than-equal footing with other creditors of the homeowner. When homeowners do not pay their assessments, homeowners who do pay their assessments must bear the burden for those delinquencies.

The proposal in Subsection 10 to define when and how a special assessment may be levied is problematical in two respects. First, it proposes to define when an association may levy a special assessment. Once again, the Commission believes that the management of each association should be left in the hands of its board of directors and. in this case, the homeowners who approve the assessment. Secondly, once again by requiring a supermajority approval of a special assessment this proposal is once again creating a one-size-fits-all rule to all association.

The proposal in Subsection 11 of Section 9 to require specific installment payments once again attempts to usurp the authority of the executive board establishing a payment plan. It stands to reason that a board of directors which adopts a special assessment will not adopt a payment schedule which homeowners (including board members themselves) can't pay. Once again the proposal is an attempt to legislate a matter which should be within the control of the board of directors governing each association.

The proposal in Subsection 12 of Section 9 once again is objectionable by limiting the amount of interest payable on assessments. As mentioned above, the Commission believes that the association should be in a position to require that homeowners who fail to pay assessments should pay interest on those assessments if so required by the declaration.

While the Commission does not object to the requirement that a homeowner receive a statement for an assessment, we do object to the proposal in Subsection 13 which would result in the association's forfeiture of its right to any interest should an association inadvertently fail to mail the statement as required by this provision.

Section 10 [NRS 116.31151]. The Commission believes that the proposals in Section 10 are unnecessary. The first proposed change in Subsection 1 would require the association to deliver the financial statement and audit to every member rather than simply delivering those documents to a homeowner who requests the same, as is presently the case. The result would be expensive to associations. The Commission does not believe that imposing a general rule on all associations, which will cost associations greater expenditures, makes sense in these times, particularly when the documents are already available upon request. We note also that the budget, which looks forward to the next fiscal

year, is to be accompanied by a financial statement and an audit (presumably if available), both of which relate to *the prior fiscal year* and may be significantly misleading in light of the upcoming year. The changes in Subsection 2 are, for the most part, conforming to the change in Subsection 1.

While the Commission believes that the language in Subsection 2(a) regarding the location of the budgets available for review under existing law needs some work, we believe that the proposed language in this Bill is not workable. To begin with, many common-interest communities are planned communities in which there is no designated common area or association business office. That is, many common-interest communities have common elements consisting simply of streets or mini parks or other similar subdivision-type improvements. Perhaps more importantly, the Commission supports the ability of associations and community managers to "go paperless" provided the documents can otherwise be made available to the homeowner in a reasonably convenient way.

Finally, the proposal in Subsection 3 of Section 10 requiring the executive board to provide "full disclosure" and "allow comments" by unit owners is covered under the existing laws in NRS 116 dealing with meetings of the association. Accordingly, the Commission believes that this proposed change is unnecessary and cannot support it.

Section 11 [NRS 116.3116]. Section 11, together with the repealed sections referred to in Section 21 of the Bill, eliminate the trustee's sale rights for association assessments. Very simply these proposals would effectively prevent the viability and continued health of all associations in the State. While the Commission is not an expert in the financing of units in common-interest communities, the Commission suspects that the elimination of lien foreclosure rights may very well make obtaining a home loan for a unit in a common-interest community in Nevada no longer available. This is a serious defect in this Bill. In this regard, I note that in the state of Nevada, according to records prepared by the Real Estate Division, between the period July 1, 2008 to December 31, 2008, the Ombudsman's office received 543 notices of sales for assessment liens and 18 liens were foreclosed. We believe that this proposal in this Bill is a very bad idea and seems unwarranted in light of the number of people affected.

Section 12 [NRS 116.31175]. The Commission has no objection, in Section 12, to making available a copy of the contract between the association and its attorney available to homeowners. The Commission does, however, object to providing draft documents, legal opinions and certain correspondence to homeowners. In particular, legal opinions may reflect attorney-client work product and subject to the attorney-client privilege, which would be lost if made available to individuals other than the client (in this case, the board of directors). Likewise, draft documents may reflect negotiating positions and/or documents which have not been approved by the board of directors. Accordingly, the Commission opposes making these documents available to all homeowners upon request. As mentioned above, the proposal in Subsection 5 of Section 12 to require that the association (i.e., all homeowners) bear the costs for any individual's search through association records imposes an unnecessary burden on the association and those homeowners not seeking the requested information. Therefore the Commission opposes this change.

Finally, the proposal in Subsection 1 to require that books, records and other papers be made available at the business office of the association or a common area within the common-interest community is objectionable for the simple reason that such an office or such a common area may not

exist within the community. As mentioned above, the Commission supports the promotion of paperless records to the extent the same may be conveniently available to homeowners.

Section 13 [NRS 116.4102] and Section 14 [NRS 116.4105]. Both of these provisions require that a presentation be made available to a purchaser, either by the declarant or the association, in person or through the use of multi-media technology, containing a description of and summary of the governing documents. We see two principal problems with these proposals. First, creating a summary of the governing documents will simply be another set of media made available to a purchaser, which may or may not be helpful. Given that prospective purchasers may have different concerns (for example, pets, landscaping requirements, architectural controls, parking, etc.), creating a summary may or may not focus on the concerns of the particular purchaser and, in some respects, may be misleading if the summary neglects to address a particular concern of the purchaser. The Commission and the Real Estate Division believe that homeowners purchasing units in common-interest communities should act on an informed basis and should not rely on summaries of important documents prepared by third parties. The requirement in Subsection 15 is objectionable for the further reason that the presentation and summary are to be prepared at the expense of the association. Once again, these are trying economic times for associations and imposing additional obligations on associations which will result in greater cost to the association and to the homeowners are to be avoided.

Section 16 [NRS 116.41095]. Conforming change, no comment.

Section 17 [NRS 116.745]. Section 17 expands the jurisdiction of the Commission by making any violation of the governing documents subject to the jurisdiction of the Commission. The Commission supports alternative dispute resolution and mediation among homeowners and associations concerning governing document disputes. The present procedures and focus of the Commission's jurisdiction deal with violations of *law* which are important enough to demand the services of the Attorney General to bring a case before the Commission. The Commission believes that these resources should not be devoted to resolving disputes regarding the governing documents. Accordingly, the Commission opposes Section 17.

Section 18 [NRS 116.785]. The Commission opposes Section 18 for a number of reasons. First, the language in Subsection 1(c) seems unnecessary. At present, the existing language permits the association to impose an administrative fine of not more than $1.000 for each violation against any person. New language in Subsection (c) creates different categories of persons who may be fined and amounts relating to those amounts to be fined. The Commission believes that the existing statutory language in Subsection (c) is sufficient. Secondly, the language in Subsections 4 and 5 of Section 18 indicate a misunderstanding of procedures before the Commission. Procedures before the Commission involve the presentation of the case by the Attorney General's office on behalf of the Real Estate Division. Accordingly, attorney's fees awarded by the Commission following a hearing and the finding of a violation represent a reimbursement to the State of Nevada for attorney's fees charged by the Attorney General's office and not by a private attorney. Even should the Commission's jurisdiction expand to violations of the governing documents, which the Commission opposes, the procedures set forth in the Statutes and in the Regulations outline a procedure in which the Attorney General is the prosecuting party. Accordingly, the award of attorney's fees to a private attorney does not come into play. For these reasons, the Commission opposes Section 18.

Section 19 [NRS 278A.170]. Conforming change, no comment.

Section 20 (NRS 649.020]. The Commission supports legislation previously passed in the state, whereby persons who attempt to foreclose association liens be licensed as collection agencies. While this may be a conforming change in this Section 20, the Commission does not support this change to existing law.

Thank you for your consideration of the Commission's comments on AB 350. The Commission would be happy to participate in any working group or otherwise offering suggested language on any of the items mentioned above. Should you have any questions, comments or concerns regarding the above letter, please don't hesitate to contact the undersigned or any member of the Commission.

Very truly yours,

Michael E Buckley by bmc

Michael E Buckley
Chair of the Commission for Common-Interest
Communities and Condominium Hotels

MEB/bmc

cc: Chairman Bernie Anderson (via e-mail banderson@asm.state.nv.us)
John Hambrick (via e-mail jhambrick@asm.state.nv.us)
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ADOPTED REGULATION OF THE

COMMISSION FOR COMMON-INTEREST

COMMUNITIES AND CONDOMINIUM HOTELS

LCB File No. R199-09

Effective May 5, 2011

EXPLANATION – Matter in ***italics*** is new; matter in brackets **[**~~omitted material~~**]** is material to be omitted.

AUTHORITY: §1, NRS 116.310313.

A REGULATION relating to common-interest communities; establishing provisions concerning fees charged by an association or a person acting on behalf of an association to cover the costs of collecting a past due obligation of a unit's owner; and providing other matters properly relating thereto.

Section 1. Chapter 116 of NAC is hereby amended by adding thereto a new section to read as follows:

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.

LEGISLATIVE REVIEW OF ADOPTED REGULATIONS AS REQUIRED BY ADMINISTRATIVE PROCEDURES ACT, NRS 233B.066
LCB FILE NO. R199-09

The following statement is submitted for adopted amendments to Nevada Administrative Code (NAC) 116.

1. A description of how public comment was solicited, a summary of public response, and an explanation how other interested persons may obtain a copy of the summary.

Notice of the proposed regulation was posted on the Real Estate Division website, at each State library and in various other public locations where both the public and other interested persons would have access to that information.

The Division conducted two public workshops and an adoption hearing, all of which were video conferenced to Las Vegas and Carson City. Public comment was solicited at each workshop and at the adoption hearing.

Number of persons who attended:

	CC	LV
Attended Adoption: 12/07/10	7	25
Submitted written comments	0	0
Attended Workshop: 07/08/10	3	20
Submitted written comments:	0	7
Attended Workshop: 03/24/10	15	86
Submitted written comments:	0	6

2. A description of how comment was solicited from affected businesses, a summary of their response, and an explanation how other interested persons may obtain a copy of the summary.

The public was invited to comment at each public workshop and hearing or in writing. Additionally, since March 2005 through December 7, 2010, the Commission has had a standing agenda item each meeting to discuss and review Chapters 116, 116A and 116B of NAC in order to make recommendations for proposed changes, additions, and deletions. At each public meeting, the Commission has considered possible changes to the Nevada Administrative Code for Chapters 116, 116A and 116B and solicited public comment, to discuss and formulate their proposals for changes.

Interested persons were instructed that they could obtain copies of comment summaries by contacting Joanne Gierer, Legal Administrative Officer, at 702-486-4036.

Minutes of the Commission's meetings are available on the Division website and by contacting Joanne Gierer, Legal Administrative Officer, at 702-486-4036.

3. If the regulation was adopted without changing any part of the proposed regulation, a summary of the reasons for adopting the regulation without change.

There were changes made to the regulation based upon public comment made at the two workshops and at the December 7, 2010 Adoption Hearing.

4. The estimated economic effect of the adopted regulation on the business which it is to regulate and on the public. These must be stated separately, and each case must include:

Business which it is to regulate:

(a) Both adverse and beneficial effects:

R199-09 is a result stemming from the passage of AB350, during the 2009 Legislative Session. The intent of this regulation is to authorize an association to charge reasonable fees for costs associated with collecting any past due obligation.

(b) Both immediate and long-term effects.

Same as in (a).

5. Public:

(a) Both adverse and beneficial effects:

Revises provisions relating to costs of collection on certain past due assessments.

(b) Both immediate and long-term effects:

Same as in (a).

6. The estimated cost to the agency for enforcement of the adopted regulation.

The agency currently has the appropriate number of staff to enforce this regulation at no additional cost.

7. A description of any regulations of other state or government agencies which the proposed regulation overlaps or duplicates and a statement explaining why the duplication or overlapping is necessary. If the regulation overlaps or duplicates a federal regulation, the name of the regulating federal agency.

None.

8. If the regulation includes provisions, which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions.

None.

9. If the regulation provides a new fee or increases an existing fee, the total annual amount the agency expects to collect and the manner in which the money will be used.

There are no new fees or increases in existing fees to the Real Estate Division.

LCB FILE No. R199-09

March 24, 2010

Sawyer Building
555 E. Washington, Suite 4412
Las Vegas, NV 89101

Video conferenced to:

Legislative Building
401 S. Carson St.
Room 2134
Carson City, NV 89701

Commissioners present in Las Vegas: Michael Buckley, Favil West, Randy Watkins, Jeannie Redinger, Donna Toussaint and Gary Lein

Commissioners present in Carson City: Marilyn Brainard. Also present: Commission Counsel, Senior Deputy Attorney General, Deonne Contine.

Las Vegas Staff: Joanne Gierer, Teralyn Thompson, Sonya Meriweather, Susan Clark, Bruce Alitt, Nick Haley, Lindsey Waite, Doug Garrin, Ingrid Trillo and Vicky Broadbent.

Division Counsel, Senior Deputy Attorney General, Nancy Savage.

Carson City Staff: Christopher Cooke.

Chairman Buckley conducted the workshop.

Start time: 10:26 a.m.

Section 1: No comment.

Sec. 2: **Las Vegas: Senator Richard Bryan** stated that he is here to give testimony on this regulation because he felt it would be helpful to discuss the fees and put them in some kind of context and the steps taken. Collection fees might not be in the best interest or benefit a homeowner who is in default and that some of the fees are not reasonable. There is also a loophole that he would like point out to the Commission. If the fees are adopted as proposed, it would be possible for a collection agency to create another fee identified as something beyond the scope of what you're adopting and **that** would not be included in the scope of what you are contemplating within this regulation. Senator Bryan stated that he feels that there should be a cap on the fees.

Las Vegas: Anita McFarland discussed what are reasonable collection fees. Every single collection company that uses a 4 step collection process uses a data base that takes 20 – 30 minutes to input data. For the purpose of producing anything on the proposed regulation list of fees, all it takes is the push of a button. It doesn't take any longer to produce a demand or intent to lien letter than it does to produce a notice of default. Ms. McFarland stated that there is a disparity of prices within this regulation that have no relation to the actual work performed.

Charging a homeowner a debt dispute fee of $75 is inappropriate due to the fact that a payoff demand might be wrong 3 times due to timing. Payoffs are good for 10 days, sometimes 1 day, and never good for 30 days. Ms. McFarland feels this fee is totally inappropriate.

Las Vegas: Stephanie Cooper Hardman: Shared her experience with the foreclosure process. Ms. Hardman is concerned about subsection 3 of this regulation. Can see where this will create sub-companies in order to be their own vender for the purpose of adding their fees back in that way. Thinks the fees should be capped by the Commission.

Las Vegas: Puoy Premsrirut: Ms. Premsrirut gave a presentation on Super Priority Liens. Ms. Premsrirut stated that collection fees not only impact the homeowner but also impact the new owner who buys the foreclosed home. Ms. Premsrirut stated that she would urge the Commission to consider the broad framework in reviewing theses collection costs.

Las Vegas: Richard Bryan: We recognize that there are reasonable fees but there are outside abuses that need to be corrected because they damage not only the subsequent purchaser, the association and maybe the individual property owner. The fees must be relevant to the amount of the work that is involved. Secondly, by adopting a fee schedule that is specific, you do leave it open to for other new fees to be categorized in a different way that are numerated here, which in effect, would circumvent the attention of this Commission. There needs to be some mechanism that creates a cap on fees.

Las Vegas: Commissioner West: Concerned about capping anyone's fee's and would like to see the market set the standard.

Las Vegas: Commissioner Toussaint: Commissioner Toussaint stated that she is a fan of the super priority lien.

Las Vegas: Stephanie Cooper Hardman: The free market does reign and if she is able to bring that fair market price to make a profit at that rate, she will do that work, and if not, she will defer the work.

Las Vegas: Chairman Buckley: The collection fees are what the association has to pay and in that since the Commission is charged in seeing that associations do not have to pay unreasonable collection fees.

Las Vegas: Senator Richard Bryan: The fees must be reasonable. Some of these fees bare no relationship to what work is actually done.

Sec. 3: **Las Vegas: David Stone, owner of Nevada Association Services:** Mr. Stone's collection agency only represents community associations. Mr. Stone stated that the R199-09 fee schedule is the maximum of what can be charged. The fees are structured to the risk level of liability as a case goes through the collection process. Mr. Stone said he is here to make money, he charges up and beyond what his costs are to make a profit.

Carson City: Michael Parsons: Concurred with the earlier recommendations made by Senator Richard Bryan. Mr. Parsons suggested that there be no additional fees other than those for the notices that have been Required by statute. Would also like to see the description of fees further reviewed and that there is a cap on fees.

Las Vegas: Sabrina Gayhart: Ms. Gayhart stated that as a matter of business practice the collection agency that she manages likes to notice homeowners throughout the collection process, which is more times than is statutorily required.

Carson City: Sue King: Stated that it is very unclear to associations as to what they can recoup.

Las Vegas: Jack Baron: Stated that collection agencies provide a valuable service for associations. A homeowner has an obligation to pay their fees or the entire association suffers. Huge collection fees are a cost of doing business.

Las Vegas: Sean Stone: Stated that in the interest of full disclosure he is the brother of David Stone. There are consequences of the government in making it so difficult to prevent associations from officially and effectively allowing assessment collections for communities. If you don't let associations in this state hire collection agencies like David Stones, associations will suffer more damages, as in Arizona. Mr. Stone suggested that the Commission keep the fees that are in this regulation as is.

Las Vegas: Steven Parker, RMI: Stated that at the end of the day he is confident that the Commission will come up with an equitable solution, however, as part of that solution it is important there should be a fair comparison as to several things that have been thrown out. Mr. Parker stated that many of the items that he performs in his office as part of the collection process do not appear in the list of fees in this regulation.

Mr. Parker referred to a 12 page packet that was provided to the Commission.

Las Vegas: Chris Yergensen: If a balance is out there, his company has the legal right to collect that amount from the association.

Carson City: Sue King: Ms. King commented on Mr. Stone's comment regarding an association foreclosing on a homeowner. Ms. King asked if the association loses their right to the super priority lien? Ms. King stated that it is very unclear if the association loses that right and if whether that amount can be collected from the next purchaser or the bank.

Las Vegas: Commissioner Randy Watkins: If the association choses to foreclose, the question is how does the super priority lien come into that? Commission Watkins stated that the association is the next owner so they are responsible for the super priority lien and should be treated like any other purchaser.

Las Vegas: Whitney Williams: Mr. Williams stated that he is currently a member of a class action lawsuit against Nevada Association Services. Mr. Williams indicated that he had picked up a paper on the back table that was submitted by Nevada Association Services outlining their collection fee charges. Mr. Williams stated that the agency collected over 5 ½ times what the association would get. David Stone pushes the envelope and nothing will ever be minimum with David Stone, it will always be at a maximum. Five times over what the association will get is not reasonable. Mr. Williams stated that he would rather work with the association to pay their dues, and by pass the collection process in order to make them whole and make nice communities.

Las Vegas: Tracey Donley: Ms. Donley stated that she is attending this workshop because she deals with the people in the pre-foreclosure market whose homes are being forced into foreclosures. Ms. Donley stated that she has sat here today listening to people demonize people who have lost their jobs and have listened to people here villainize people who are out of work. There is a parity for pre-foreclosed upon people and the banks, either you are going to access the whole amount to the bank or you're going to do your super priority lien. The homeowner in default has to be treated the same way as the bank does.

There as to be regulations on both side of the table. You're here to protect the public and not the collection agencies and stop saying the public is the enemy.

Las Vegas: Commissioner West: Asking the same question as was asked of the attorney's. Appreciates Ms. Donley's sympathy towards the homeowners but how would you feel if your commission fees were capped?

Las Vegas: Tracey Donley: I am capped by the banks and earn less money now than ever before. I am here for a different reason. These are different times, this is not business as usual. Maybe these people were sold on a loan that they didn't quite

understand and they're losing their homes. Someone has to step in and help them. In trying to assist homeowners from losing their homes Ms. Donley stated that she is being stonewalled by excessive collection fees.

Las Vegas: Chairman Buckley: Doesn't know how the Commission can get **i**nvolved in saying well, these people get a different break because they are going to get a short sale and these other people don't get a break because they're going into foreclosure.

Las Vegas: Tracey Donley: the solution is this….there are people who just don't want to pay their assessments. And then there people who have an absolute desperate need. If a bank has approved someone for a short sale then they have done all the work. If a bank has already done the work they will already know if that person is in a desperate way and needs the help.

Las Vegas: Commissioner Watkins: Stated that we are getting way off track with this regulation. Commissioner Watkins stated that he would like to move on.

Lunch break 12:15 p.m. to 1:22 p.m.

R199-09 Workshop reconvened at 1:22 p.m.

Las Vegas: Jonathan Friedrich: Stated that a lot has been said today. A lawsuit was filed several weeks ago alleging gross overcharging by 125 homeowner associations and 6 collection agencies. Members and/or principals of the six collection agencies named in the lawsuit appeared before this Commission on December 10, 2009, for the purpose of proposing rates and/or fees they should charge in regulation R199-09. This Commission was letting the fox tell the farmer how the fox wanted to guard the henhouse. The Commission should ignore the fee schedule proposed by the collection agencies and fashion their own fee schedule that will be kinder and gentler to homeowners.

Carson City: Mike Trudell: NRS 116 requires that managers used the experts to collect assessments. Does not have any issues with the proposed fees but feels that there should be limits set as to what can be charged.

Las Vegas: Kay Dwyer: Stated that she is speaking on behalf of collection agencies and the last time she checked, it wasn't illegal to try to make a profit. Feels that the market place sould set the fees charged.

Las Vegas: Mike Lathigee: Would like the Commission to have some impartiality in the decision making process. Mr. Lathigee stated that he was concerned that several of the Commissioners disclosed at the start of the meeting that they do business with collection agencies. Thinks it should be made public whether or not any of the Commissioners either directly or indirectly receive any form of compensation from any of the collection companies now or in the past. There has to be impartiality and possibly a committee who looks at each Commissioner before Commissioners vote on

this subject. Mr. Lathigee stated that there was input from putting the rate schedule together, David Stone and Chris Yergensen from RMI, but he wasn't aware of anyone else who worked on this.

Carson City: Commissioner Brainard: Read Mr. Lathigee's letter to the Commission, which made statements involving a lot of "we's". Are you representing someone? No letterhead on your letter to the Commission. Who are you?

Las Vegas: Mike Lathigee: Mr. Lathigee **s**tated that he runs an investment club called the Real Estate Insiders Club. Mr. Lathigee also commented that he had a petition, signed by members of this club, who would like to see changes in the process that is going on. Mr. Lathigee stated that he is not a non-profit.

Las Vegas: Kevin Wallace, President and CEO of RMI: Associations have many choices out there for who they chose for collection services. Associations routinely evaluate the performance of their attorney or collection service and routinely fire them. Mr. Wallace read from a 3 page document that was presented to the Commission.

Las Vegas: Ebert Mendez, Real Estate Broker since 1999: Concurs with Senator Richard Bryan's group presentation made earlier today. Mr. Mendez stated that the fees of a collection agency are unreasonable and go way beyond what a person can pay.
Las Vegas: Steven Kondrup, Deputy Commissioner of the Financial Institutions Division: Financial Institutions Division is responsible for the licensing and regulatory compliance of collection agencies in the State of Nevada (**NRS 649**). Mr. Kondrup also stated that his Division examines the daily activities of a collection agency as well as the monies collected. Collection agencies cannot collect more than the law allows. Mr. Kondrup stated that if a constituent question fees of a collection agency, per the Fair Debt Collection Practices Act (**Federal**) they have 30 days from being contacted to submit a written letter requesting documentation as to the validity of the debt. If a constituent feels the debt is erroneous they can file a complaint with the Financial Institutions Division.

Las Vegas: Gail Anderson: It is incumbent upon executive boards who establish working relationship contracts with a collection agency to ensure that they are properly licensed in the State of Nevada to do business in the State of Nevada.

Las Vegas: Mike Randolph – HOA Services Collection Agency: The Financial Institutions Division shows up at his office year, looks through everything, and charges them for the pleasure of it. When a complaint is filed with the Financial Institutions Division, the complaint is sent to him and requires a response within 10 days. All forms sent out by his company requires approval by the Financial Institution Division. This is heavily regulated by the Financial Institution Division. They do an excellent job. Mr. Randolph stated that he feels that the fees in this regulation make sense. Postponement of the notice of sale is not listed and should be. Stated he charges $75 for this.

Mr. Randolph presented written comment.

Las Vegas: Mike Yergensen: Mr. Yergensen proposed amended language to curb some of the abuses that do occur:

1) No collection fees shall be charged to the homeowner unless the collection services are provided, and such collection fees shall be charged to the homeowner at the time the services have been provided. The collection fees charged to the homeowner shall comply with the timeline set forth in the adopted collection policy of the Association and Nevada law.
2) No collection fees shall be charged to the homeowner for a period of 30 days immediately following a notice of sale recorded by the first mortgage lien holder.
3) No collection fees shall be charged to the homeowner for a one-time period of 15 days immediately following a request for payoff (i.e., a payoff demand) from the homeowner or agent thereof.
4) No collection fees shall be charged to the homeowner for a period of 30 days immediately following the date of foreclosure by the first mortgage lien holder.
5) Collection fees to the homeowner shall not exceed $1,950 excluding third party costs.
6) Third party costs shall not be through a related party.
7) Only those collection fees listed in this regulation may be charged to the homeowner for any services provided in the attempt to collect any past due obligation to the association.

Las Vegas: Troy Kearns: Finds it a little odd that the Commission would allow the Industry to regulate their own industry as far as fees. These people are walking back to their seats after giving testimony and giving each other "fists." Absurd that everyone is buying off on this. Mr. Kearns suggested that a third party, who is nonexclusive, review this regulation. Collection companies should not be the one to outline their fee structures, it's just not fair. These people are the ones who make the money off their fees and have the most to gain. Please step outside yourselves and ask if it is better to listen to a third party that doesn't have anything to gain by submitting their own fee structure.

Las Vegas: Pam Scott: Stated that the issue here, for this Commission, is in setting a regulation to determine how much money can an association pass on to a homeowner.

Las Vegas: Amanda Lewer: Stated that her law firm supports this regulation as well as the $1,950 cap.

Las Vegas: Lawrence Lutz: Stated that when you work on the fee schedule remember that there is a lot of work that a collection agency does that they don't charge the association, even when an association changes their minds on assessments and fines. When the association fines the homeowner and it goes into collection, it can come in front the board and the board can reduce or eliminate the fine. The collection agency absorbs those charges and doesn't fine the association. Mr. Lutz stated he is worried that the payment schedule will not allow the collection agency to make a decent profit. All

those charges that the collection agencies are absorbing now will be charged to the association and we will be worse off in the future than we are now.

Las Vegas: John Dolka: Reminded the Commission that due to mail ceasing to be delivered on Saturday's he would like to see a regulation regarding eliminating fine due dates on Saturday or Sunday. Fines received on a Monday should not be assessed a late fee.

Workshop concluded at 2:46 p.m.

7-C) <u>Discussion and possible action on proposed changes, additions and deletions to NAC 116A and LCB File No. R199-09; including review of public comments from regulation workshop held March 24, 2010.</u>

The Commission was provided with proposed language from Christopher Yergensen and item #5 on the proposed language stated "Collection fees to the homeowner shall not exceed $1,950.00, excluding third party cost."

Chairman Buckley stated that postponement fees, general limitations and the overall cap should be added to the regulation.

Commissioner West suggested putting an accelerator or a higher cap to avoid having to revisit the regulation in a year.

Commissioner Watkins suggested that the cap be $2,500.00. Commissioner Redinger agreed with Commissioner Watkins.

Chairman Buckley stated that he would like to keep the cap at $1,950.00.

Commissioner Watkins suggested adding the language "No collection fees shall be charged to the homeowner for a one-time period of 15 business days immediately following a request for a payoff from the homeowner or agent thereof."

Commissioner Toussaint and Commissioner Lein stated that they would like to keep the cap at $1,950.00.

Commissioner Brainard moved that the Commission add the language which establishes a maximum fee of $1,950.00 to the association for collection cost excluding third party, into the next draft of the regulation. Seconded by Commissioner Toussaint. Unanimous decision.

The Commission agreed to add Commissioner Watkins' proposed language, "No collection fees shall be charged to the homeowner for a one-time period of 15 business days immediately following a request for a payoff from the homeowner or agent thereof," to the next draft of the regulation.

The Commission agreed to add a postponement fee of $75.00 to the next draft of the regulation.

Chairman Buckley stated that he wanted to remove the Homeowner Debt Dispute Fee.

Deonne Contine stated that the Deputy Director of the Financial Institutions Division testified that collection agencies must comply with the Fair Debt Collection Practices Act. Ms. Contine stated that if a collection agency is not in compliance under the Fair Debt Collection Practices Act, the Financial Institutions Division would handle that issue.

Chairman Buckley requested that Ms. Contine or Ms. Anderson contact the Financial Institutions Division to verify that the Homeowner Debt Dispute Fee is permitted by Federal law.

Commissioner West moved that the Commission accept the language with the fee structure and have the new language proposed by the Commission and Mr. Yergensen added into the regulation and move forward. Seconded by Commissioner Watkins. Unanimous decision.

Chairman Buckley stated that he would like for the Division to conduct a workshop on this regulation rather than wait until the next Commission meeting.

LCB FILE No. R199-09

July 8, 2010

Sawyer Building
555 E. Washington, Suite 4401
Las Vegas, NV 89101

Video conferenced to:

Legislative Building
401 S. Carson St.
Room 2135
Carson City, NV 89701

Start time: 1:00 p.m.

Commissioners present in Las Vegas: Gary Lein, Donna Trudeau, Randy Watkins and Favil West. Sr., Deputy AG Nancy Savage served as Commission Counsel.

Commissioners in Carson City: Marilyn Brainard and Jeannie Redinger.

Las Vegas Staff: Gail Anderson, Joanne Gierer and Susan Clark.

Carson City Staff: Christopher Cooke.

Administrator, Gail Anderson conducted the R199-09 Workshop. Ms. Anderson read the entire regulation before asking for public comment.

Bob Roby – homeowner – Las Vegas: Is there a time when I can make comments other than related to this workshop?

Yvonne Schuman LV: REAL Estate Investments: This proposed regulation leaves out issues pertaining to old outstanding collection fees that can go back many years. Feels this regulation needs a new section that only goes back to the 9 month super priority.

Pam Scott: Las Vegas – Summerlin Community Association: Provided written comment.

H. Amanda Davis – Las Vegas – Community Manager at Nicklin Property Management & Investments, Inc.: Provided written comment.

Mike Lathigee – Las Vegas – Representing himself and is a homeowner investor in the State of Nevada. Mr. Lathigee tried to show his 60 second CD but, was unable to do so because the room was not equipped to do so.

Joe Mitale: Las Vegas - Stated that the $1,950 fee is reasonable.

Ipeani Wyhannes. Las Vegas - Homeowner and realtor: Has lived here for 15 years. There is collection agency abuse to the average Joe, which he stated was the average Joe. Thinks the commissioners are giving the collection agencies free reign.

Rutt Premsrirut – Las Vegas – Homeowner: Commenting on the Intent to Lien Letter. Republic Service does the same kind of letters as collection agencies and they charge far less.

Gail Anderson stated that this regulation was drafted by the agency and not the Legislative Counsel Bureau.

Jonathan Friedrich – Las Vegas – Homeowner: Read from a prepared statement.

Mike Randolph – Las Vegas – Owner of a collection agency: Provided written comment.

Anita McFarland – Las Vegas – Attorney with Cooper Castle Law Firm: They have submitted a document that I have not received as yet.

Ipeani Wyhannes. Las Vegas - Homeowner and realtor stated that $1,950 is too high of a fee.

Workshop concluded @ 2:15 p.m.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
March 24, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:06 a.m. on Thursday, March 24, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Ruben J. Kihuen
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Bradley A. Wilkinson, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Michael Buckley, Commission for Common-Interest Communities and Condominium Hotels
Pamela Scott, Howard Hughes Corporation
Chris Yergensen, RMI Management, LLC
David Stone, Nevada Association Services, Inc.
Stephanie Cooper Herdman
Garrett Gordon, Southern Highlands Homeowners' Association
Angela Rock, Southern Highlands Homeowners' Association
Keith Lee, Lawyers Title Insurance Corporation; First American Title Insurance Company

Jonathan Friedrich
Rana Goodman
Chris Ferrari, Concerned Homeowner Association Members PAC
John Leach
Linda Rheinberger, Nevada Association of Realtors
Joanne Levy, Nevada Association of Realtors
Donna Toussaint
John Radocha
Yvonne Schuman
Jon Sasser, Legal Aid Center of Southern Nevada; Washoe County Senior Law Project
Randolph Watkins, Commission for Common-Interest Communities and Condominium Hotels
Ellen Spiegel
Tim Stebbins
Greg Toussaint, President, The Lakes Association
Robert L. Robey
Favil West, Commission for Common-Interest Communities and Condominium Hotels
Todd Schwartz, President, Spring Mountain Ranch Master Association
Mike Randolph, Homeowner Association Services
Azucena Valladolid, Consumer Credit Counseling Service
Heather Spaniol

CHAIR WIENER:
I will open the hearing on Senate Bill (S.B.) 243.

SENATE BILL 243: Revises provisions relating to financial obligations in common-interest communities. (BDR 10-295)

SENATOR ALLISON COPENING (Clark County Senatorial District No. 6):
I will read from my written testimony (Exhibit C).

I provided a handout that outlines the collections process (Exhibit D).

CHAIR WIENER:
Senator Allison Copening said S.B. 243 closely mirrors regulations that have been worked out. Are there many differences between the regulations and this bill? Section 1, subsection 2 of the bill lists different amounts for different

processes and services. How were these amounts determined? Section 1, subsection 5 of the bill says, "If a unit's owner owns 25 or more units in one common-interest community, the amount described in subsection 1 must not exceed an amount equal to $1,800 multiplied by the number of units owned ... ." What is the limit for a single unit owner?

MICHAEL BUCKLEY (Commission for Common-Interest Communities and Condominium Hotels):
I am on the Commission for Common-Interest Communities and Condominium Hotels (CCICCH) and participated in the working group Senator Copening put together last year.

This bill amends *Nevada Revised Statute* (NRS) 116.310313 passed in 2009 charging the Commission with regulating collection costs. The statute regulates all collection costs a homeowner could be charged. It does not regulate what the association or a collection company can charge.

The Commission adopted a regulation based on that. Over the last year, the regulation and statute have focused on the collection costs associated with a foreclosure. In most cases involving a delinquent homeowner, the association is unlikely to be paid unless the first lien forecloses and the lienholder would pay off the superpriority amount to the association.

It is important for the Committee to understand the foreclosure process. *Nevada Revised Statute* 116.3116 gives the association a lien once the declaration is recorded. That lien is prior to all second mortgages and junior mortgages. It is junior to the first mortgage except for the nine months—or six months for a condominium—which is called the superpriority. It occupies a first lien position regarding that superpriority amount. This bill does not address including these collection costs as part of the superpriority. It sets the amounts and does not address including them.

The foreclosure process for the association is modeled on the deed of trust foreclosure statutes and the execution statutes. To foreclose its lien, the association must first give a notice of delinquent assessment pursuant to NRS 116.31162, subsection 1, paragraph (a). After 30 days have passed and the notice of delinquent assessment has been given, the association may record a notice of default and election to sell pursuant to NRS 116.31162, subsection 1, paragraph (b). Then, a period of 90 days must elapse before the

association can give a notice of sale under NRS 116.311635. A period of publication and additional notice follows, and the foreclosure can occur.

Many of these notices must be given to several parties and must be recorded. The notice of sale must be published and served.

Federal regulations are layered on top of the foreclosure process and the superpriority. *Nevada Revised Statute* 116.3116 includes a limit on the superpriority based on federal regulations. Most of us look to Fannie Mae underwriting guidelines to spell out those limits. The statute states, while we have a nine-month superpriority in a planned community or six months for a condominium, if federal regulations dictate a shorter period, Nevada is governed by that shorter period. When the developer builds most developments and homes, he submits the project for Fannie Mae underwriting approval. Fannie Mae looks through the documents to ensure the project qualifies. For example, Fannie Mae underwriting guidelines B4-2.1-06 and B4-2.2-13 say the documents may provide for a superpriority lien in the amount of six months for a condominium. One Fannie Mae guideline permits that collection costs be included as part of the superpriority.

Other Fannie Mae guidelines are distinct from when Fannie Mae underwrites a project. They deal with Fannie Mae being a lender and foreclosing on a project. Other regulations state Fannie Mae may not pay collection costs.

The association enforces the lien. Associations are managed and operated by community managers licensed by the Real Estate Division of the Department of Business and Industry. Community managers cannot take all the steps to collect or enforce assessment liens. Sometimes, the manager turns the account over to a licensed collection agency, and that collection agency is not licensed by the Real Estate Division but by the Division of Financial Institutions of the Department of Business and Industry. Other players in the scenario are the mortgagees and the first and second lienholders but most often in this context the first lienholders.

The enforcement of the delinquent assessment involves title companies. In order for the collection company to determine who is entitled to or must be notified of a foreclosure, the collection agency contacts a title company and, at a certain stage in the proceedings, orders a trustee sale guarantee (TSG).

Notices must be mailed and served, process servers and newspapers are involved. An attorney may be involved if a homeowner filed bankruptcy. The attorney would make an appearance in the U.S. Bankruptcy Court for the District of Nevada as part of this collection process.

Before 2008, the Legislators were mainly concerned with protecting homeowners regarding foreclosures. They wanted to do everything possible to ensure homeowners got every opportunity to know something drastic would happen if assessment liens were not paid. *Nevada Revised Statute* 116.311635, subsection 1, paragraph (b), subparagraph 3, requires a copy of the notice of sale be given to the Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels. The Ombudsman reports to the Commission on notices he or she has received regarding sales. The Commission cannot do much except offer assistance.

Each time the association takes the next step in the foreclosure process, the fees go up. Collection companies and associations give warnings they are about to take the next step.

Many associations are facing difficulties because so many homeowners are delinquent with their assessments. Associations must dip into their reserves, raise assessments or create special assessments to meet their operating costs.

It might be better if foreclosures were faster. Costs would be lower, and the unit could be sold sooner. The buyer would start paying dues and assessments sooner. There is tension between giving homeowners every possible notice and speeding up the foreclosure process to keep the costs down.

In October 2009, the Commission began conducting workshops with stakeholders in the area. Members of the Commission met in a public meeting to discuss reasonable fees in this process. As a result of that meeting, the regulation, LCB File No. R199-09, was prepared. It listed the different steps in foreclosure and specified how much a collection agency could charge for each step it took.

In March 2010, the Commission heard public comment on collection costs. Much of the public comment during 2010 focused on collection fees from various people. Real estate agents and brokers have not been mentioned, but they are concerned.

In March 2010, a workshop on Proposed Regulation of the Commission for Common-Interest Communities and Condominium Hotels, LCB File No. R199-09, was held. Public comments were received and No. R199-09 was redrafted. Some of the concerns were costs. An important item for the Commission was to differentiate between actual fees a collection agency would receive and costs it would incur. For example, a title company must be paid to get a TSG. The collection agency has mailing costs, publication costs, etc.

Concern was also expressed that a collection company would increase its fees if a payoff was requested.

The Commission approved the regulation on March 24, 2010. Another workshop on No. R199-09 was held on July 8, 2010. In September, the Legislative Counsel Bureau (LCB) produced a revised version of the regulations. The Commission held an adoption hearing on December 7, 2010, when the regulations underwent further changes. Attorney fees were included. The Commission decided attorney fees not relating to foreclosure would not be included. Attorney fees are identified in section 1, subsection 4, paragraph (b) of the bill. That was part of the regulation.

The Commission adopted an overall cap of $1,950 for any foreclosure. The statute adopts a cap of $1,800. For example, if a bank is foreclosing on a developer's 50 unsold lots, it would not make sense to multiply $1,950 or $1,800 times 50 to foreclose on one owner. The regulation intended a balance. There is a certain amount of expense to foreclose on one unit. There is additional expense to foreclose on another unit owned by the same owner. However, the expense might not be the same. We debated the number and settled on 25 units. The idea behind the regulation is if a foreclosure involves 25 units, you are not permitted or bound by the caps. You can charge a multiple of those caps, but you must go to the board and agree upon an amount. The board and collection agency must agree upon the foreclosure and the costs.

A number of changes went into the regulation the Commission approved in December 2010. At that point, the regulation was ready to go back to LCB for approval before it went to the Legislative Commission. At that point, the Governor's moratorium on regulations came in. In most cases, the statute follows the regulation.

PAMELA SCOTT (Howard Hughes Corporation):
In Summerlin, we do not use the collection companies that had input into the regulation. It is important to talk about how this works from day to day. Mr. Buckley talked about the statutory requirements, but there are other charges not included in the statutory requirement. Much of that relates to making sure homeowners are aware of what is happening.

All associations are required to have a collection policy. They are required to send that policy out annually with the budget. Collection policies vary because assessments vary. If an association has a fee in excess of $200 a month, it probably cannot wait several months to start a delinquent collection process. It would probably start within 60 days. On the other hand, if your assessment is less than $50 a month, your policy might be to start the collection in six months. There are many circumstances, and one size does not fit all.

An intent to lien letter is the first item listed in section 1, subsection 2 of the bill. In Summerlin, our policy is that the accounting staff creates a file including the number of homeowners delinquent six months or more. The three master associations in Summerlin have a total of 26,000 units, so hundreds of these letters need to go. We contract the service because we do not have the staff to send that number of letters. That file is sent to a collection company for that service. It charges $40 to send that letter. After it has sent the letters, it does invoices, which are posted to our payables. The $40 charge is posted to the homeowner account. Not all associations do it that way.

This courtesy letter from Summerlin is not required by statute. It tells the homeowners the amount due and the amount of collection costs they have incurred at that point. They will be advised of the next step and the cost for the next step. As a general rule, we give them 35 days. We give the homeowners the manager's name to contact if they want to discuss how they can cure this penalty. After 35 days, if the delinquencies are not cured, liens can be filed against the units. Before that happens, we will probably review each account that received the intent letter to determine what might be in public records. In the management office, we do not have access to as many public records as a collection company has. We will do the best we can to determine whether the bank, a first security lender or someone else has started a foreclosure procedure.

Arguments have been made that an association does not need to perfect its lien by recording it. However, if it is not recorded and another entity has started a foreclosure procedure, that entity may not know a homeowners' association has a lien. It takes research. Some research must be done by a collection company. Once we determine whether a unit needs a lien, we send it to the collection company. Our collection company does the legal work for the lien. The collection company invoices us, and we pay the invoice and post the charge to the individual account. Many associations need the ability to pay those costs at the end of the process. We are fortunate in Summerlin that we can pay the costs up front.

CHAIR WIENER:
The sponsor mentioned the bill mirrors the regulation. What are the differences between the bill and the regulation?

MS. SCOTT:
The differences are mostly in the dollar amounts. A few of the charges in the regulation were eliminated from the bill. A new section 1 in the bill requires collection companies to invoice the associations. The associations would post those charges within 20 days, by the twentieth of the month following the date the charges were incurred. The association is not required to pay the collection company at that point. That would be between the association and collection company. The amount would be posted to the homeowner's account.

CHAIR WIENER:
I heard an amount of $1,950 and the bill says $1,800, the multiplier of the 25 units or more. What would the cap be for a single unit owner?

MS. SCOTT:
Section 1, subsection 1 of the bill says any of those fees in subsection 2 may not exceed a total of $1,800, so that would be the cap.

MR. BUCKLEY:
Section 1, subsection 1 of the bill includes the individual cap of $1,800 per individual foreclosure. Subsection 2 includes specific caps on individual services that could be done in connection with a foreclosure. For each action item, there is a specific limited amount.

Section 1, subsection 3 excludes out-of-pocket costs from the individual dollar amounts and fees. It excludes costs paid to third parties that are unaffiliated with the collection company or the association. Mailing and publishing costs for TSG charges are good examples.

Section 1, subsection 4 of the bill shows additional exclusions from the overall cap. There is a $200 cap on the fee paid to the management company as it prepares the records and sends them to the collection company. The management company cannot enforce the lien. That must be done by the collection agency. The management company must process the bills to send to the collection company. The other exception is reasonable attorney fees without any markup incurred by the association for services other than services with a specific cap. Those are excluded. The example was bankruptcy. Another example is dealing with the Federal Deposit Insurance Corporation (FDIC) on bank takeovers.

Section 1, subsection 5 relates to an association foreclosing on 25 units or more. The fee would not necessarily be 25 times $1,800. You would have to go back to the board for an agreed upon amount.

Section 1, subsection 6 is important and says if there is a payoff demand, the collection process must stop. An exception is when you record a notice, the statute requires mailing within a certain number of days. If a process is started and the statute requires that process be finished, you can continue to do that. When you receive a payoff demand, you may not charge additional fees for 15 days.

Section 1, subsection 7 relates to posting the costs of collection to a unit owner's account. The Commission feels a unit owner should be able to find out what he owes from the association. He or she should not be required to get that information from the collection company. Additionally, if the unit owner or mortgagee does not pay, the association will have to pay. The association has the contract with the collection company. It will reflect an association's payables and the financial status of the association.

CHAIR WIENER:
Is it correct that subsection 7 was not included in the regulation you had promulgated?

MR. BUCKLEY:
Yes. Section 2 of the bill was not in the regulation either. It requires that when a unit owner pays an amount, that amount is applied first to assessments and then to fines. This requires an association to establish a compliance account for fines separate from the assessment liens. When it receives a payment, the association applies it first to assessments unless the owner says otherwise.

Section 3 of the bill is the same as section 2. The reason for its difference is that the statute it amends, NRS 116.310315, changes on October 1. The bill has to amend these two statutes.

CHAIR WIENER:
Does it sunset?

MR. BUCKLEY:
On page 5 of the bill, subsection 2 comes out. It did not sunset. The statute changed effective October 1. *Nevada Revised Statute* 116.310315 remains in effect, but is in different forms between now and October 1.

SENATOR KIHUEN:
How do you determine the $75 contained in section 1, subsection 2, paragraphs (a), (b) and (c)? Is it a template letter you send out?

MR. BUCKLEY:
I was not involved in the working group. The working groups of Commissioners met and came up with this formula. There is a template, but the records must be researched to ensure the correct amounts. There may be different charges for those letters. These numbers have been discussed in various meetings from October 2009 to December 2010. There has been some give and take on these different numbers, but the consensus was these were reasonable amounts.

SENATOR KIHUEN:
Where does the $75 come from? Is it work hours? I am concerned because this is a template letter and $75 is high.

CHAIR WIENER:
This was part of my mirroring question. Where are the regulation and the bill aligned and where are they different? Why are there differences between the two?

SENATOR COPENING:
Ms. Scott, did you bring the comparison sheet with you?

MS. SCOTT:
Yes. I compared the regulation with the bill. The amount for that letter in the regulation was $150. The committee lowered it to $75 because not that much went into it.

SENATOR COPENING:
Please go through the numbers and compare them with the changes from the regulation.

MS. SCOTT:
Regarding section 1, subsection 2, paragraphs (a) through (q), the amounts in the regulation were as follows:

• Paragraph (a), $150.

• Paragraph (b), $90.

• Paragraph (c), $90.

Concerned Homeowner Association Members PAC (CHAMP) objected to paragraph (c), saying the courtesy letter was more than needed to be done because the Ombudsman sends a letter at that point. There was consensus that could be removed.

• Paragraph (d), $325.

• Paragraph (e), $400.

• Paragraph (f), $275.

• Paragraph (g), $125.

• Paragraph (h), $75.

• Paragraph (i), $125.

• Paragraph (j), $30. The committee raised it to $75.

• Paragraph (k), $30. The committee raised it to $75.

• Paragraph (l), $150.

• Paragraph (m), $30. There was a charge of $25 to send a letter about a default on a payment plan. The payment plan should be one process. It could include more than one letter and initiate the payment plan. The committee raised that to $100 and made it one charge for the entire process.

• Paragraph (n) was not in the regulation. I brought that to the attention of the committee as a necessary item because sometimes the association is ready to file a lien and may not file if the bank has already started its process. That process has to be followed and monitored, and we do contract that service.

• Paragraph (o). Superpriority demand letters were not differentiated in the regulation. The demand letters were $150 in the regulation.

• Paragraph (p), $100.

• Paragraph (q) was part of the bankruptcy proof of claim and has been separated in the bill. Both might not be necessary.

We eliminated a couple of charges from the regulation. There was a $2 labor charge for every letter mailed, not the postage charges. We eliminated the insufficient funds charge because it is not part of the collections process. We eliminated the substitution of agent document fee. That does not happen often. The regulation included a foreclosure fee which we eliminated because we have the notice of sale, conducting the sale and recording the deed.

SENATOR KIHUEN:
How do you justify charging $75 for a letter? All you have to do is remove the name of the previous person you sent it to and add the new person. This fee is high.

MS. SCOTT:
It involves more than producing a letter out of a database. Research must be done. The intent to lien will not go out if you discover something else is going on with that account. At each step, research must be done.

SENATOR COPENING:
Can someone enlighten us regarding the process involved with a letter being sent out?

CHRIS YERGENSEN (RMI Management, LLC):
I am in-house counsel for RMI Management. We do collections under Red Rock Financial Services. We manage 275 associations—92,000 homes in northern and southern Nevada. It is disconcerting to hear a question about what goes into preparing a letter. Many things must be done in preparation of a collection account. For example, Red Rock collection services employees 95 people. We have many costs, including rent, insurance, payroll costs, electricity, computers and technology. When an account comes to a collection company, we conduct research to ensure that account is accurate and our systems are working properly. In the process with the CCICCH, we disclosed a lot of our overhead costs and what goes into running our business. We disclosed our hard and variable costs.

For example, I have ten full-time employees who answer phone calls from homeowners. They have nothing to do with preparing the letter, but I must pay them to service what we do for the associations. They answer thousands of calls about homeowner questions a week. When we send out a letter, we receive calls regarding the letter we sent. I have eight full-time people to receive payments on behalf of the associations. There is a lot involved with sending out a letter.

DAVID STONE (Nevada Association Services, Inc.):
We represent many community associations, and we do collections for past due assessments. We do not just push a button to send out a letter. When we prepared our presentation for the Commission over the last year, we evaluated how many telephone calls we get with each demand letter. For each of those demand letters, we get an average of 1.5 phone calls. These people have issues with the association. They have questions on unposted charges and misposted charges. Sometimes they have legitimate concerns and sometimes not. We must have the staff to resolve problems, which we do most of the day. I have

25 employees. If it was as simple as pushing a button to generate a letter, I would not need those people. The requirements for Fair Debt Collection Practices Act compliance are costly. I must hire professional individuals. These people must be able to write a letter and have a basic understanding of the Fair Debt Collection Practices Act and state law. Those I hire must have a certain level of competency and professionalism to service these accounts.

When homeowners call, we try to solve their problems. For example, if we could refer those problems to the management company, we could cut down on charges. We are a full service organization. We try to make things better for the community manager and protect the assessment-paying homeowners.

STEPHANIE COOPER HERDMAN:
I am a licensed collection manager, and I do homeowners' association lien foreclosures as well as mortgage foreclosures. I am one of the two designated counsels for Freddie Mac in Nevada and one of the seven designated counsels for Fannie Mae. I am required to act under the United States regulations on Fannie Mae and Freddie Mac files. I get a flat fee for foreclosures. Senator Kihuen asked why $75 was appropriate for a collection letter. The United States, FDIC, Freddie Mac and Fannie Mae have all decided that is not the way to address this because of that same question. They have said there is a flat fee of $600 for the entire process. It is inane to break it down to $75 per letter. It is a cut-and-paste template process. The charge of $75 might be appropriate for the first letter, but after that the information is in the computer. For assessments of $20 a month, $1,800 is a lot of money. I deal with homes worth from $60,000 to $900,000 and do not charge that much.

SENATOR COPENING:
Is the process you do for the government the exact same process a private collections agency does?

MS. COOPER HERDMAN:
It is similar except the initial notice of intent to assess lien, which is a repetitive process. It is not necessary to file this. Ms. Scott made a valid point when she said her association purposely filed the notice so that the foreclosing entities knew the association existed. However, anyone doing a foreclosure must notify the association. If that person does not, it is a wrongful foreclosure action. It is the same process. The same number of steps are involved.

SENATOR COPENING:
Are you the same as a collections agency where you are employed or retained by a community association? Would you take over a homeowner account and begin that process with the homeowner by taking the calls and communicating back to the association? I am confused by that because I understood you were retained by Freddie Mac and Fannie Mae to do these things. It seems like different processes.

MS. COOPER HERDMAN:
I do represent associations also. I have done both sides of this coin. The foreclosure process for homes, not outside of the association process, requires mediation. That is included in the $600 and $400 fee. That is $1,000, not $1,800, and includes mediation. As an association attorney, I complete foreclosures for them at $1,100 to $1,200 in total costs. The government agencies conduct audits to ensure I have performed the services, mailing for example.

These collection companies are going unfettered and unwatched regarding their costs. When we add the fee on top of that, it can become an egregious process.

GARRETT GORDON (Southern Highlands Homeowners' Association):
I am speaking on behalf of Southern Highlands Homeowners' Association. This bill impacts companies that handle collections, associations and homeowners. When assessments are unpaid, the residents are impacted. Assessments are increased for other homeowners if the association is required to write off bad debt. Bills do not stop for the association if assessments stop. This requires an association to hire a collections company to collect this debt and move forward with a nonjudicial foreclosure process. Without this consequence, many people would pay other bills rather than assessments.

What is a reasonable cost? My clients favor a cap. Much time and effort was expended over the last year to determine the cap was $1,950 and set forth the line items for each step in the process. There is additional reduction to some of these costs. For the record, in an effort to be reasonable, we support the $1,800 and the other line items except for a few clarifications. This is reasonable, and we look forward to discussing whether there is common ground somewhere between $1,800 and $1,950. We are willing to cap this.

I asked the same question as Senator Kihuen regarding the $75 for a letter. Sometimes, unit owners hire an attorney when they get a demand letter. Additional time and effort is required to work with the attorney and answer telephone calls to work through that process. Time is also required to go before the board with a report of delinquency updates.

ANGELA ROCK (Southern Highlands Homeowners' Association):
We have submitted our comments (Exhibit E). Section 1, subsection 2, paragraph (a) talks about the amount that may be charged for a letter. Each community has different policies and procedures. We attempt to send many letters before we get to this stage. We send a letter at 60 days, and the charge is $25. We send another letter at 90 days, and the charge is $50. We need the opportunity and capability to send more than one letter. Events happen on a case-by-case basis that can disrupt, stop and/or reset the process.

For example, if someone received one of these letters, enters a payment plan and makes payments, the lien is released. If the homeowner does not pay off the base amount, there is another intent to lien. Please consider this. I do not know how you would define the per occurrence to ensure you can roll within the time frame.

Section 1, subsection 2, paragraph (m) relates to the payment plan. We request that could be done monthly. I suggest $25 a month. That way, if people can pay off their amounts in two or three months, maybe they are only at $75 rather than $100. People ask for two- and even three-year payment plans. There is a process in managing a payment plan. People often call and want to adjust their payment plans; they may miss a payment or want a new payment plan.

I have testified to the Commission on section 1, subsection 5 of the bill about the process of foreclosing on multiple units—an individual who owns 25 or more units. For consistency, one ought to treat all people equally in the same situations. Just because we are foreclosing on one home, the process is similar to foreclosing on 25 or 50 or 100. Once these units are parceled out individually, they must receive individual liens. You must do things by individual parcel number. I ask you to consider the fact you do have to do work on 25 separate accounts and separate units. When you allow a large landowner to lobby for a discount the individual homeowner does not get, that is a difficult public policy position to put the board in.

On section 1, subsection 6, I am speaking to the 15-day stay. I have two comments, Exhibit E, page 2. Many people confuse that with the 30-day stay they get when they file a dispute. That is not the same, and it confuses people. In the list of line items, you talk about limiting a payoff demand amount at $50. In this section, you refer to it as a demand payoff. I ask for consistency. That should actually be a technical event that happens when they get the official payoff demand. Calling to ask for their account balance is not a payoff request. It needs to be the official document. We need consistent language. The payoff demand is section 1, subsection 2, paragraph (l). That number is low.

I employ a full-time individual. The payoff process is complex, and you need someone who understands these things. At Southern Highlands, we audit the file and send someone to the home to do a final inspection and photograph the home. A lot of work goes into that process. In our case, that is not paid to the collection company. It goes to the management company.

Associations do things differently. The cap of $1,800 is not to a single entity. Different people are involved in this process who get portions of this money.

SENATOR COPENING:
In section 1, subsection 2, paragraphs (d), (e) and (f), you have $300, $350 and $275. Please explain. I understand those are not necessarily profit for a collection company. There are title costs and recordation fees.

MS. ROCK:
There are hard costs. You do engage in title research in doing those documents—finding lienholders, getting a list of those lienholders, determining where they are and how to notify them, and sending certified letters. Those are bigger work items. When you get to those levels, you get more interaction from the homeowner and potentially more calls. You get into higher liability areas, and you need experts and people who are more educated in bringing those things forth.

SENATOR COPENING:
I understood these are actually costs, third-party costs such as a title company, whose charges are passed on to the collections company.

MS. ROCK:
At Southern Highlands, that is the case. I was clarifying a carveout for that in the statute. We have those higher numbers at Southern Highlands because there is a cost to get the TSG, and these items are charges from a third party.

KEITH LEE (Lawyers Title Insurance Corporation; First American Title Insurance Company):
My clients issue TSGs. It is in the nature of a preliminary title report. They do title searches and determine all the people in the line of title—those who have recorded encumbrances and others who, as a matter of law, become part of the chain of title. This is important because NRS 116 requires everyone in the line of title to receive notice of the foreclosure of the lien.

Generally speaking, my clients work for the debt collector. On rare occasions, they will work for the homeowners' association. On some rare occasion, they will work for the community manager. They issue the TSG to the debt collector, and the debt collector does what he or she must do to comply with the law in giving notification. We usually get involved in that process when a notice of default is prepared and ready to be recorded.

Regarding section 1, subsection 2, paragraphs (d) and (e), we do record the lien as an accommodation. There is a fee for recording the lien and the notice of default. There is a fee for recording the notice of sale as well. Generally, we issue the TSG to the debt collector. That debt collector must do his or her due diligence as well with respect to that TSG to make sure the bases are covered.

Title insurance is a competitive business. Our fees are on a schedule posted with the Division of Insurance. They are open to the public. Those fees are set. An exhibit submitted shows costs (Exhibit F). It shows a cost of $290 for the TSG. Generally, the fees run from just under $300 to sometimes as high as $450. If there is a long period of time between issuing the TSG and a sale, the title report may have to be updated to ensure there are no intervening liens recorded. There is often a charge for that. Sometimes, it is done as an accommodation.

The title companies' role in this process is included in section 1, subsection 3, paragraph (a) of the bill. The cost of the TSG and other title costs are specifically excepted from the cap of the costs incurred for the collection.

I have a question regarding section 1, subsection 3, paragraph (b) using the term "agent." On rare occasions, my title company clients work for either the community manager or the board of directors of the homeowners' association. I am fearful in that case we may be an agent. I do not want to get caught up in unintended consequences. There is an agency relationship between us and the collection agency. We are probably okay with the language there. I do not want to be caught up in issues of subagency and implied agency and the problems that may arise. With the Chair's permission, I will speak with Ms. Eissmann and Mr. Wilkinson to make sure we are okay with that.

CHAIR WIENER:
You mentioned it is a competitive business and the fees range. Are those fees capped by the regulatory body?

MR. LEE:
They are not capped by the regulatory body. It is a filing required with the Division of Insurance. Each company has its own sliding scale and has certain nuances to it, but it is pretty much the same. Those are not capped or proved by the Division of Insurance. They are simply a filing to show the rates. That is public record on file with the Division of Insurance. The cap is dictated by the marketplace and competition.

JONATHAN FRIEDRICH:
I have heard self-serving statements by the collection companies. You have my written testimony (Exhibit G). We must not forget the collection agencies get most of this money. The associations only get nine times the monthly assessment. How is the word "reasonable" defined? What is reasonable to me may not be reasonable to the collection companies.

I provided you with a copy of a lien, Exhibit G, page 2. *Nevada Revised Statute* 116 states a homeowners' association can do its own liens. The association spent $14 to place this lien on the property. The home went to foreclosure. The association got its nine months superpriority.

RANA GOODMAN:
With this bill, we are forgetting the human factor. Before any of the management companies turn this over to collection, they do not contact the homeowner. Before I moved into the association where I live, for five years I was president of an association with 1,200 homes. During that time, one of

the management companies filed a foreclosure without board approval. The company had sent one notice to the homeowner who had a renter in that home. The owner was out of the Country. The renter did not notify the owner. The house was sold. He was only two months late. The assessments in that association were $56 a quarter. I called the management company and put it on notice it was being fired. We were sued because this was done. The man paid the fine. We had to stop the sale of the house, and I asked the management company why it did not call the owner and whether it knew the owner did not live in the house. People notify us when they have a renter, and they give a new address where they want the invoices sent. The company replied it had not done that.

I own several properties. My management company sends me notices on a condominium I own. When I retired, I notified the State I no longer had my business. All my properties are now owned by my family trust. They still send me notices in my corporate name.

All the management companies have to do when a property is ready to go into foreclosure or get a lien is make a phone call to the owner. Then, if the owner does not take care of it, they turn it over to collection. The assessments must be paid or the rest of us have to carry the weight.

Section 1, subsection 3 says, "In addition to the fees charged to a unit's owner to cover the costs of collecting a past due obligation ... ." So, the total fees permitted can be more than $1,800. It refers to a lot of other fees, which adds up to more than $1,800. Perhaps you could include language that the unit owner must be called before this process begins.

SENATOR COPENING:
I thought the statutes required management companies to notify the homeowner before it went into collections.

MS. GOODMAN:
They do have to by letter, but they do not do it personally. That step is missing. We spoke to several homeowners who have gone into foreclosure, and not one of them was contacted personally.

MR. FRIEDRICH:
I previously provided you with examples of collection fees. Some of the delinquencies were several hundred dollars, some were $1,500 to $1,700. The bottom line was $4,000 to $6,000.

CHAIR WIENER:
I have that information in my office. It is our intention not to allow the spiraling into the thousands of dollars.

SENATOR KIHUEN:
In what instances do people not receive the letter when it is mailed to them? You say we should require a telephone call.

MS. GOODMAN:
Sometimes, people have a renter in their house. The management company may not be aware there is a renter or does not have the forwarding address or does not look it up. They send it to the address they used to have. Then, the owner does not get the letter.

SENATOR KIHUEN:
If the person is renting the house, picks up the mail and misplaces it or accidentally throws it away, that is the only communication source from the collection company to the owner of the house?

MS. GOODMAN:
Yes, as reported to me by the gentleman whose house was foreclosed on.

SENATOR KIHUEN:
People should be contacted. Constituents have called me about this issue. They have reported they did not receive a letter. The fee is $75 every time a letter is sent. Before you know it, the bill is $3,000, and the owner did not receive the letters.

CHAIR WIENER:
If an owner's telephone number is with the house, the renter may not forward the call to the owner. What telephone number should be provided if the owner is out of the Country or no longer living in the house?

MS. GOODMAN:
The management company should have it. The owner should be responsible for providing the telephone number to the management company. If not, it is the owner's fault.

Many times, once the collection agency has the account, the management company will not discuss anything with the owner.

CHRIS FERRARI (Concerned Homeowner Association Members PAC):
I am neutral on the bill. We are all trying to achieve the same result. There is a problem when collection costs are $2,832 for $308 in past dues (Exhibit H). That is an 819 percent markup. In Demand G, you have $326 in past HOA dues and $3,050 in collection costs, Exhibit H. That is an 835 percent markup. The question is how to address it.

It is important to clarify that my group, CHAMP, consists of real estate investors who buy homes that are sitting, often through foreclosure and other processes. They do not know if the home will have a kitchen or windows, or what condition the property will be in. Before I took this client, I called several people and found this is not just an investor issue. This affects the first-time home buyer, second-time home buyer, someone buying a short sale, and someone buying a foreclosure. This is a widespread issue.

If someone buys a home with a $6,000 lien, it is essentially a new down payment that cannot be financed and will be paid. Often times, it is a $3,000 lien, and $326 will go to the HOA. That is the fundamental problem we are dealing with.

I signed in as neutral because what the Commission is trying to do and what this bill is trying to do is good in its intent. It involves a cap and is getting to the heart of the problem. My concern is in section 1, subsection 3. We have the $1,800 cap for the items in paragraphs (a) through (q). Do you want a solid cap so when someone purchases a home, he knows what the maximum can be? Section 1, subsection 3, paragraph (a) of the bill, includes the words "without limitation."

Section 1, subsection 4 of the bill includes a reasonable management company fee and reasonable attorney fees and actual costs. I am not debating the merit of the intent of this bill, it is a question of having a solid cap. I spoke with

Stephanie Cooper Herdman, and we will propose a bill that includes a $1,475 actual cap.

These fees do not make the HOA whole. I request a cap that cannot be increased with different services and that we provide that consistency to everyone in Nevada who is trying to transact real estate. This impacts everyone in the process of purchasing property.

Regarding title associations, if there is a cost associated with that TSG, we would like to cap that fee, absolutely.

JOHN LEACH:
This should be handled by regulation rather than statute. As Mr. Buckley said, he went through a long process to arrive at that. The 2009 Legislature granted the authority to the Commission. That is not unique. The Commission handles many things. It is experienced in common-interest communities. The Commission members have a unique understanding of the industry. They went through many workshops and public hearings. The regulation was well-thought-out and planned.

The benefit of a regulation over a statute is that you can change it. The Commission meets regularly throughout the next couple years. If something is set in stone in a statute, there are no modifications. For example, the 2009 Legislature had no idea what was going to happen to some of the banks and the FDIC takeover. Please consider the fact there is a regulation. It would be appropriate. If this process must go into a statute, the commencement point should be the Commission's regulation for the various reasons stated.

It is appropriate to have the line item limits. However, a cumulative limit is inappropriate because many things are outside the control of the collection company or the association. For example, if you are dealing with a homeowner who wants to work it out and you are at the notice-of-sale point, you must postpone it. The law allows you to postpone up to three times without having to start over. In addition, many times you are asked for payoff demands from lenders trying to close property. They ask for a payoff demand one month and another one the next. This goes on for many months. The line item caps the total amount you can charge for that component. However, if the cost becomes excessive, you should not have to perform the service for free. It is an

accountability issue. The person asking for the service should be accountable for paying it.

In section 1, subsection 1, the word "directors" should be added. This puts a limit on officers, agents and community managers. It does not mention directors. Nevada law says the directors may act in all instances on behalf of an association. Similarly, that section also talks about officers, employees, community managers or collection agencies and does not reference law firms. Law firms or a catch-all phrase should be added to include any party acting as a third-party collector on behalf of the association, rather than omitting that.

If this goes into statute, the $1,950 in the regulation is appropriate. When we send the first letter, we check the bankruptcy records to ensure if there is a bankruptcy, we do not violate the automatic stay. We check the assessor's records to determine ownership.

We recommend the numbers in the regulation be used regarding section 1, subsection 2, paragraphs (a) through (q) rather than the line items.

CHAIR WIENER:
You are offering language, so if you want us to consider that as amendments, please provide that in writing.

MR. LEACH:
I did send something yesterday. It apparently did not get there.

CHAIR WIENER:
Please resend it.

MR. LEACH:
I want to comment on the payoff demand issued by the escrow company. We are just filling out the demand escrow companies give us, but they do not just ask for a payoff. Usually, they ask for a breakdown on the assessments, any violations on the property, the insurance coverage and whether any litigation is pending. The amount in the statute was $50, the amount in the regulation should be $150 because the companies are asking for a lot of information. It is not simply the assessment. The escrow companies determine what they want, and we try to give them what they want.

A couple of items have been omitted from the statute that were included in the regulation. If nonsufficient fund charges are not collection costs, they should be included in the costs recoverable for the association. That does not go to a collection agency. If a person breaches a payment agreement, there should be correspondence with that person. However, that has been exempted, and the statute includes a line item for preparation of the letter. It is inappropriate to exclude that.

The mailing fee is included because some foreclosures would require only two notices; others may require dozens of notices.

LINDA RHEINBERGER (Nevada Association of Realtors):
I support S.B. 243. I am a member of Senator Copening's working group. We have met and considered the entire process. We received input from representatives from the broad spectrum, which includes members of the working group. This bill addresses the problems in our practices. That is the reason for the bill.

JOANNE LEVY (Nevada Association of Realtors):
I am a member of Senator Copening's working group. I support S.B. 243, especially the capping of collection fees.

DONNA TOUSSAINT:
We are forgetting the people who live in associations. Homeowners' associations cannot collect when a property goes to foreclosure. The rest of the group has to pay those assessments, which means their assessments are raised. A regulation would be better because it can be changed. Please consider those who pay their assessments on time because they are the ones being hurt.

JOHN RADOCHA:
I provided you with an amendment for S.B. 243 or S.B. 195 (Exhibit I). Under NRS 116.31034, subsection 8, paragraph (b), if a homeowner believes retaliation and selective enforcement have been used against him or her, all liens and fines are extinguished. I would like to see that in your bill. I am bringing this up because I have applied for the board. Yesterday, I received a letter and it says:

> I am in receipt of your board candidate application form and supplemental statement. Please be advised that the statements

made have been deemed libel and constitutes defamation against the board of directors per NRS 116.31034, subsection 8, (b).

The association is not obligated to distribute any disclosure pursuant to this subsection if the disclosure contains information that is believed to be defamatory, libelous or profane. This is my letter for application to the board. I said disclosure for board candidate, March 11. I have never been delinquent in my assessments for common expenses. Therefore, I am in good standing. I got a form requiring a candidate for the board to be a member in good standing. A candidate is not in good standing if he or she has any unpaid past due assessments or construction penalties that are to be paid to the association. They have already taken my vote away from me.

SENATE BILL 195: Revises provisions relating to the costs of collecting past due financial obligations in common-interest communities. (BDR 10-832)

YVONNE SCHUMAN:
While searching for a home builder in 2002 and 2003, I was appalled by the home sales process. I saw abuses. I am here today because of abuses by HOA collection agencies. I am not opposed to S.B. 243, I am neutral. I support the general intent, but shortcomings need to be addressed. There should be a cap. For the individual, there is no cap because each of those fees can be charged and are often charged multiple times. There are additional costs. Many collection agencies perform collection services on behalf of HOAs for less than $1,000 on a routine basis. This bill should do more to lower the fees and create a real cap that will not force collection agencies out of business.

JON SASSER (Legal Aid Center of Southern Nevada; Washoe County Senior Law Project):
We get involved in this issue on a slightly different level, usually after the fact. Last Session, you passed a foreclosure mediation process. We represent homeowners who are upside down in their mortgages and are going through the process trying to work out a deal in foreclosure mediation. Often, when you have a large lien as a result of these excessive HOA collection fees, it is a barrier for that homeowner to stay in his home and work out a modification process because of the lien.

We also see people dealing with collection agencies and dealing with something that was a $100 to $300 problem that has escalated to a higher sum they

cannot afford. They try to work out a payment plan. It is hard to navigate the issues between the investors and the collection agencies.

RANDOLPH WATKINS (Commission for Common-Interest Communities and Condominium Hotels):
I am a member of the CCICCH. The Commission vetted the collections issue for over a year. I support S.B. 243 with the amounts in the regulation and not in this bill.

Speaking as a community manager, I want to address some concerns. All homeowners are contacted at their mailing addresses when they have delinquencies or violations. The homeowners are responsible to make sure the management company has their mailing addresses. It is interesting to note that when notice of a meeting is sent to homeowners, they show up at the meeting. If you send a certified letter advising they are behind on their assessments, that letter will go unclaimed. We all know that when we buy into an HOA, we enter into a contract for the covenants, conditions and restrictions to pay assessments in a timely manner and to provide the necessary contact information.

We did not hear from the banking industry in the Commission hearings. No banker associations or groups took a position. I want to note that bankers take the same risk as anyone when they buy a foreclosed home that has collection fees or outstanding assessments.

We heard earlier from an attorney who charges only $600. She said that was a contracted amount with Fannie Mae, Freddie Mac and other federal agencies. That is fine if you have a big client like that and you can accept $600 to do a larger volume of work; perhaps you can do it for that amount.

ELLEN SPIEGEL:
I served on Senator Copening's working group. I support this bill, but I prefer it with the higher numbers. During the 2009 Session, I sponsored A.B. No. 204 of the 75th Session, which required boards to send out their collection policies to all their homeowners annually. Homeowners are given notice of exactly what the process is and what the associated fees are. Nobody should be blindsided.

Not one homeowner I know has ever written to an association. I have asked Commissioners, debt collectors and community managers if people have written

to a HOA, saying they do not like the collection policy or the fees and requesting they be changed. When something is uncontested, people should live up to that.

My association has a budget of approximately $2 million. We have defaults of somewhere between 15 percent and 20 percent of the assessments. We only pay $41 a month. That means we are not collecting somewhere between $285,000 and $380,000 a year in assessments. Even with collection costs, we have a fiduciary responsibility to everyone in the community to collect the money owed to the association. If fees are over the caps, we still have to pay that overage because the costs are not going away. We must collect as much as we can so incremental costs are not passed along to other homeowners.

TIM STEBBINS:
I oppose this bill because it is too high. For a long time the collection agencies have been imposing outrageous fees on people. That is why this issue came before the Legislature last Session and is here again. I support any caps to make sure people who buy know exactly what is involved when they buy a home. It boils down to what the cap should be. That may require breaking it down to every item.

GREG TOUSSAINT (President, The Lakes Association):
Homeowners' associations exist for the benefit of the people who live there. *Nevada Revised Statute* 116 should be looked upon as what is good for the people who live in the community. This argument is about money between collection companies, attorneys, banks and real estate investors.

Last year, our assessments were raised to pay for bad debts. It is vital that we collect money owed to us. These new restrictions may reduce our collections in some ways, in particular the cap. What will a collection company do when it reaches the cap? They will stop working to collect more money. That will result in more costs to our homeowners. We may have to pay the collection company to collect the money owed to the Association, or we may have lower collections. In either case, we would need to raise assessments. I urge the Committee to think about this cap as something that may result in higher assessments for everyone.

SENATOR COPENING:
Do you have any suggestions of what else to do?

MR. TOUSSAINT:
I do not disagree with the cap on individual services. Should we stop collecting? Should we assume there is nothing to be done? Not every collection is a foreclosure. Sometimes, it is just someone who does not want to pay. If you take the weapon away—the collection fees—there is no ability to collect. The cap is the key problem. I do not know what those amounts should be. The last thing I want is the collection company to stop collecting money owed.

ROBERT L. ROBEY:
Mr. Buckley said in the end, the association is responsible for all costs. I assume he was referring to the costs of the attorneys, the collection companies, each mailing and postage. I am concerned if a lien is filed, the association only gets its superpriority lien of nine months. It does not matter if there is $10,000 in collection costs, the association is only going to get nine times the amount.

MS. COOPER HERDMAN:
I am neutral on this bill. I agree with a cap. My opposition to that is the amount of the cap and how inclusive it is. The costs should be inclusive in that cap to make these companies run efficiently. The State does not have the resources to audit to ensure all the costs added on top of the cap are actual costs.

FAVIL WEST (Commission for Common-Interest Communities and Condominium Hotels):
I am a member of the CCICCH. Every person who has testified today has testified at our workshops. We started out looking at this without a cap, and we ended up with a cap because that is what everyone convinced us we should have. I support Mr. Leach when he comments this should not be statutory. This should be regulatory because we are in the middle of an anomaly right now that will go away within three to five years. Then, the investors will not be here and we will be stuck with a law that is probably inappropriate. I support elements of the bill, and I am against other elements of the bill. If these people charge too much, nobody will go to them.

TODD SCHWARTZ (President, Spring Mountain Ranch Master Association):
I am board president for Spring Mountain Ranch Master Association. We cover 1,620 single-family homes. Our budget is over $900,000. In just assessments, excluding late fees, interest, fines and everything else, we have over $150,000 in outstanding assessments. I am not the HOA. The management company is not the HOA. The residents comprise the HOA. That is often forgotten.

I am neutral. I hear and read people's requests for payment plans, and a small minority comes to talk to us. You would think they would show up at the meeting to ask for a payment plan or reductions. I am happy when they come forward because we can work with them. I have noticed a majority of people come forward after the foreclosure has been filed. It is something about responsibility. What else can we do to try to educate them? Maybe caps are not right because of the economic times. Maybe regulation is the way to go. I am neutral because I cannot explain what the actual costs are. I do not know what the full steps are. Costs are involved with sending letters. A time frame between letters is not mentioned.

MIKE RANDOLPH (Homeowner Association Services):
We are a licensed collection agency. I specialize in recovery of homeowners' association assessments. I have a number of issues with the bill. I support some of the bill. I support the cap. This should be regulatory rather than statutory so we can work on it over the years because things will change. We have not seen a market like this before.

Regarding the line item fees, you have removed the insufficient funds fee. When homeowners bounce checks to the collection agency, I cannot charge them even though my bank charges me. Regarding section 1, subsection 7 of the bill, you will increase the cost to the management company and the collection agency making sure that information is going back and forth every month. If someone in the accounting department at the management company does not see the flag on an account saying it is in collections, the homeowner calls. We take the phone calls and handle that account. We give the homeowner figures. When that account is at the collection agency, it is the collection agency's job and responsibility to handle that contact. I can see issues with that.

I heard Stephanie Cooper Herdman mention a $600 fee she charges Fannie Mae and Freddie Mac but said when she does a homeowners' association recovery, she is in the area of $1,100 to $1,200. There are good things in this bill, but it needs work.

AZUCENA VALLADOLID (Consumer Credit Counseling Service):
I will read from my written testimony (Exhibit J).

HEATHER SPANIOL:
Senator Copening mentioned we need to keep the collection agencies in business. Should we allow the collection agencies to rake homeowners so they stay in business? I understand collection agencies and other agencies have costs for paper, pens, stamps and copies. I am here for the homeowners who live in their homes. Why is $75 charged for a letter?

Senate Bill 243 includes fees, reasonable attorney fees. Who determines what is reasonable for attorney fees? I appreciate the cap in the bill. It is a start, but it is high. There is room to add more costs. Everyone who supports this bill was either on the committee who drafted it or will reap the benefits from the bill. If the committee that put the bill together makes money from it, how will it be fair to homeowners? Most people would not buy a home in an HOA.

CHAIR WIENER:
I will close the hearing on S.B. 243. The hearing is open for public comment.

MS. SCHUMAN:
Earlier, a management company representative suggested the cap for a payment plan of $100 was too low, and that figure should be monthly or at least $25 monthly. I am concerned if homeowners are on payment plans of $100 a month or $50 a month to pay off their delinquencies, how will they ever pay it off if they are also paying $25 to $100 a month for the privilege of having that payment plan?

MR. RADOCHA:
The word "belief" is subjective. In NRS 116 there are a lot of subjective words, and it is usually in the homeowners' favor. I am disappointed that NRS 116 seems to override a constitutional right for me to speak.

SENATOR KIHUEN:
I want to express my support to make sure S.B. 195 is rescheduled.

CHAIR WIENER:
There being nothing further to come before the Committee, we are adjourned at 10:54 a.m.

RESPECTFULLY SUBMITTED:

Kathleen Swain,
Committee Secretary

APPROVED BY:

Senator Valerie Wiener, Chair

DATE:

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
S.B. 243	C	Senator Allison Copening	Written testimony
S.B. 243	D	Senator Allison Copening	HOA collection timeline
S.B. 243	E	Angela Rock	Proposed Amendment to SB 243
S.B. 243	F	Keith Lee	Examples of closing costs
S.B. 243	G	Jonathan Friedrich	Comments and Amendments on Senate Bill 243
S.B. 243	H	Chris Ferrari	Slide showing collection costs
S.B. 195	I	John Radocha	Proposed amendment to SB 195
S.B. 195	J	Azucena Valladolid	Written testimony

LAS VEGAS SUN

Regulators propose cap on HOA collection fees

By Buck Wargo

Thursday, March 25, 2010 | 2:05 a.m.

A commission with the authority to regulate collection fees that homeowners associations charge is mulling a cap to prevent collection companies from gouging homebuyers.

Following a lengthy hearing Wednesday at the Sawyer State Office Building, the seven-member Commission For Common-Interest Communities and Condominium Hotels directed it staff to draft a proposal limiting collection-related fees to $1,950 per homeowner association.

The proposal, however, isn't expected to soothe the ongoing battle between investors who are buying foreclosed-upon homes and collection agencies that represent homeowners association trying to collect past due assessments.

Chris Yergensen, corporate counsel for RMI, a property management company, and its affiliate Red Rock Financial Services, a collection company, proposed the cap Wednesday in a hearing that brought dozens of people to talk on both sides of the issue.

"We have heard the horror stories of $8,000, $4,000 and $3,000 in fees," Yergensen said in pushing his proposal. "You put that cap on, and that's not going to happen again."

Investors, meanwhile, said they would unveil their own proposal on what fees collection agencies can charge to counter what the collection companies have recommended.

More public workshops will be scheduled and the proposal will return to the commission for further review over the next two months.

Three commissioners, led by Randolph Watkins, expressed support for setting a higher cap at $2,500 so they wouldn't have to go through the process so soon, but their colleagues said any resetting of fees in the future would be a much simpler task.

Late last year, collection companies worked with the commission on proposing fees to cover the services they charge, but investors balked at proposed charges of $325 for a notice of delinquent assessment lien, $400 for a notice of default and several other fees that exceed $100.

Earlier this year, investment groups filed a class action lawsuit claiming they were overcharged by hundreds of homeowners associations and collection agencies for fines, interest and collection costs that accumulated while homes sat vacant during foreclosure proceedings.

Michael Lathigee, one of the investors who objects to the amount of fees the collection agencies charge, said the latest proposal seems too high and he wants to see it reduced.

Some investors have called on the commission to let their group sit down with collection company officials to develop a proposal or allow a neutral third party to get involved to help set fees.

“I don’t want the proposal coming from the collection industry,” Lathigee said.

Lathigee also expressed concerns about commission members knowing collection company executives and having dealings with them when some, for example, served on homeowner association boards.

Commission members said they have no conflict and can be impartial. Besides, it’s impossible that they haven’t been in contact with people in the industry, some said.

“We are going to do what is just and merciful,” commission member Favil West of Henderson said during the workshop. “I am 73 years old. I know people.”

David Stone, president of collection company Nevada Association Services, said he’s happy with the proposed cap.

“We don’t have a problem with it. I don’t know anywhere we have had fees over $1,950,” Stone said. “What it does is collection agencies that are charging exorbitant fees, which is why we are in this position, will hopefully get in line.”

The proposal would not cap the total amount of collection fees a homeowner may pay if the home falls under several association jurisdictions. A homeowner could pay the $1,950 cap several times.

Some homeowner association officials were leery of a cap that limits profits of collection companies. They were concerned it would result in those firms passing down fees to associations and therefore cutting into their budgets.

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CTADD0939

Posted February 24, 2011 - 2:02am

Bill would cap fees collectible in HOA cases

A state senator is preparing a bill that would limit the fees that collection agencies may recover through superpriority liens on homeowner association dues.

"The premise of the bill is that the fees that a collection agency can charge will be capped, including itemized charges for letters and notices," state Sen. Allison Copening, D-Las Vegas, said in an e-mail Tuesday. "I do believe the collection companies will support it, but won't be thrilled, as they already know that overcharging is not acceptable to legislators and homeowners."

Copening's bill will focus on superpriority liens, which give homeowner associations first priority in recovering unpaid dues when houses are sold.

Collection agencies have contracted with homeowner associations to collect the dues, and these collection agencies add their fees to the total under superpriority liens. As a result, a house cannot be sold until superpriority liens for association dues and collection agency fees are paid.

Leslie Carver of Prudential Americana Realtors said collection fees often far exceed the amount owed in association dues. She mentioned a client who was trying to sell a house and owed $5,000 in fees to a collection agency on top of $500 in unpaid homeowner association dues.

To sell a home, the collection agency fees and association dues must be paid. The total is so large it often kills a deal to sell a home, Carver said.

David Stone, owner of Nevada Association Services, said he supports Copening's proposed bill to cap collection agency fees. However, Stone said he prefers that the fee caps be part of regulations, rather than a law that can only be amended during biennial legislative sessions.

Stone said he also supports a provision in Senate Bill 174, another Copening measure, that clarifies the law and makes it clear that collection agencies for homeowner associations can recover collection fees through superpriority liens.

"Senator Copening and I are in lockstep," Stone said Wednesday.

The Senate Judiciary Committee will consider SB 174 at 8 a.m. today .

Assemblyman James Ohrenschall, D-Las Vegas, also is expected to submit a bill dealing with superpriority liens for collection agency fees.

CTADD0940

The Concerned Homeowner Association Members Political Action Committee believes Ohrenschall's bill would set lower caps on fees under superpriority liens, which the group would favor.

The group wants the Legislature to follow guidelines used by Fannie Mae, a government sponsored mortgage enterprise, and limit collection agency fees to $600, real estate broker James Eaton said. Also, the group favors a bill that would limit homeowner associations to collecting no more than six months of unpaid dues.

Rutt Premsrirut, director of CHAMP, said homeowner associations have no need for collection agency services on unpaid dues because the associations ultimately will collect their dues when the house is sold.

Contact reporter John G. Edwards at jedwards@reviewjournal.com or 702-383-0420.

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LAS VEGAS SUN

Nevada Territory

NEWS ON STATE GOVERNMENT AND POLITICS FROM DAVID SCHWARTZ

Bill to cap collection fees when HOA bills are past due stays alive

By David McGrath Schwartz

Sunday, June 5, 2011 | 5:07 p.m.

CARSON CITY - A bill that would put a $3,300 "hard cap" on collection fees when a homeowner becomes delinquent on HOA dues is still alive during the final scrum at the Nevada Legislature.

Senate Bill 174 got a hearing in the Assembly Judiciary Committee, where members expressed skepticism about the limits set on collection fees, hard costs to file paperwork and attorney fees.

Assemblywoman Olivia Diaz, D-North Las Vegas, referred to them as "junk fees."

Sen. Allison Copening, D-Las Vegas, said the bill is designed to help homeowner associations forced to tap into reserves or raise fees on existing homeowners because of the plague of foreclosures in Nevada.

"This is about helping homeowners, helping HOAs stay solvent," she said.

Two HOAs that she knows of have gone bankrupt, she said. On the other side, investors have pointed to exorbitant collection fees of thousands or tens of thousands of dollars on late payments of a couple of hundred dollars.

Investors are suing collection agencies over the fees, and Senate Bill 174 would clarify the law in favor of collection agencies. Copening said collection agencies are necessary to help homeowner associations remain whole.

She spent a good portion of the last two years working on bills related to homeowner associations. She also took a job late last year with a homeowner association, which she mentioned in the committee hearing Sunday.

The state put regulations in place, establishing a $1,950 cap on some fees. Copening said SB174 represented a "hard cap," unless a property has to go through further litigation.

The bill was idling in the Senate Finance Committee as of Sunday evening. The legislative session ends at 1 a.m. Tuesday, and is expected to see a flurry of controversial bills trying to get out.

Assembly Judiciary Chairman William Horne, D-Las Vegas, said he has concerns about the bill, but said, "There are still some good components in the bill."

Garrett Gordon, a lobbyist with the firm Lewis and Roca, which represents some HOA companies, said the bill represented a "definite compromise." He referred to collection agencies as "a necessary evil, if you want to say, but necessary."

Assemblyman Mark Sherwood, R-Henderson, noted that HOAs would only get the nine months of past dues they currently get.

"The testimony is that collection agencies are a necessary evil," he said. "Right now, they're just evil."

He questioned using the squishy cap of $1,950 in existing legislation to necessitate the need for the new legislation.

"The testimony makes is sound like right now we have a really, really bad law and regulation for homeowners. And now this would just make it a bad law," Sherwood said.

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CTADD0945

Posted February 26, 2011 - 2:02am

Witnesses call Homeowners groups 'Gestapo,"cartels'

CARSON CITY -- Heather Spaniol loved living with a homeowner's association for eight years -- until three years ago, when the harassment began.

Her car was towed twice. She was penalized for putting the trash cans out an hour too early.

"I understand that HOAs are a business and we live in them, but to not feel comfortable in your own home?" she told Nevada legislators on Friday. "I hope none of you have a soccer ball that goes onto your neighbor's lawn. That would be called 'use of your neighbor's enjoyment.'"

Spaniol was one of several dozen disenchanted homeowners' association members who shared their stories about board members they referred to as "the gestapo" and "cartels." One homeowner recited portions of the Magna Carta in his testimony that the governing boards denied fellow residents due process.

Homeowners associations, which are especially common in the Las Vegas area, collect dues from members to maintain security, clean common swimming pools and landscape the neighborhoods.

The bad blood that arises between homeowners and their elected board of directors when associations enforce their strict standards is shaping up to be one of the hottest issues in the legislative session. Numerous bills are in the works, with the first to see action being reform to better protect homeowners.

SB174, the 43-page product of a 30-member working group, changes Nevada statute on HOAs and features many pro-homeowner measures, according to sponsor state Sen. Allison Copening, D-Las Vegas.

The bills on HOAs reflect the recession's blow to Nevada, which has the highest unemployment rate in the nation. As homeowners foreclosed en masse, HOAs have increasingly sent the homeowners' delinquent dues payments to collections agencies.

Some collection agencies -- seeing a business opportunity -- have cashed in.

The reform bill still wasn't enough for one homeowners group that is upset it doesn't address what it called "egregious" collection fees when homeowners fall behind on their monthly association dues. One homeowner who fell behind on a payment of $78.24 racked up $3,300 in collections fees for the debt.

CTADD0946

When homes go into foreclosure, buyers are often deterred by the thousands of dollars in liens from the homeowners associations.

A commission on common interest communities set caps on the fees that collections agencies can charge, but the regulation is on hold after Gov. Brian Sandoval declared a freeze on new regulations the day he took office.

Copening said she has a back-up bill in the works that mirrors the commission's proposed cap, locking the fees at $1,950.

But a lobbying group, Concerned Homeowners Association Members PAC, said the cap still allows for exorbitant fees -- collectors can charge $400 for sending notice that a home is in default -- and is full of loopholes that allow for fees beyond the proposed limit.

Copening said the questionable sections of her bill ensure liens should not be kicked back to HOAs, where homeowners who are keeping up on their payments must pick up the slack. Board members said they have to cut security and other services to balance out the high numbers of foreclosures within the associations.

CHAMP lobbyist Chris Ferrari said he appreciates the work, albeit imperfect, that legislators are doing to reform HOA rules. But the inflated collection fees don't benefit the struggling HOAs themselves, he said.

"Nobody wins on that except the HOA collectors," he said.

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DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE HARBOR PLACE TRUST Plaintiff, vs. SELENE FINANCE, LP; FIDELITY NATIONAL TITLE INSURANCE COMPANY; AARGON COLLECTION AGENCY; WILLIAM O. RICHARDSON AND TERESA M. RICHARDSON; and NEVADA LEGAL NEWS, LLC Defendants.	Case No.: A-13-675032-C Dept. No.: XXIII **ORDER GRANTING SELENE FINANCE, LP'S MOTION FOR SUMMARY JUDGMENT**

This matter came on for hearing before the court on August 27, 2013, on Defendant, Selene Finance, LP's (hereinafter "Selene") Motion for Summary Judgment. Plaintiff, Paradise Harbor Place Trust, filed an Opposition and Selene filed its Reply in Support of the Motion for Summary Judgment. At the hearing, Michael Bohn, Esq., was present for Plaintiff, and Dana Jonathon Nitz, Esq., of the law firm of Wright, Finlay & Zak, LLP, appeared for Selene. The matter had previously come on for hearing on Plaintiff's Motion for Preliminary Injunction on February 19, 2013, and March 5, 2013, at which the COURT granted the motion, enjoining

Defendant Selene, its agents, employees and any person acting on its behalf from conducting a foreclosure sale on the subject property and enjoining Plaintiff from encumbering or transferring the property, unless otherwise ordered by the Court.

After considering the oral argument of counsel as well as all papers and pleadings on file, the Court denied the Preliminary Injunction and the Countermotion to Dismiss was taken under advisement. The court now finds as follows:

A. Statement of Facts

This matter concerns property commonly known as 6188 Stone Hollow Street, Las Vegas, Nevada 89141 (APN 191-05-217-040). COURT adopts the Statement of Stipulated Facts attached to Selene's Request for Judicial Notice in support of its Motion for Summary Judgment as Exhibit "AA." Facts central to this Decision include the following:

A Deed of Trust, recorded on October 31, 2006, names Defendants William O. Richardson and Teresa M. Richardson as trustors, Spectrum Funding Corporation as Lender, Lawyers Title of Nevada as trustee, and Mortgage Electronic Registration Systems, Inc. acting solely as nominee for Lender and Lender's successors and assigns as beneficiary. Various Assignments of the Deed of Trust also followed resulting in an assignment to "U.S. Bank Trust, National Association, not in its individual capacity, but solely as Trustee for SRMOF REO 2011-1 Trust as beneficiary, c/o Selene Finance LP," recorded on July 20, 2012.

A Notice of Delinquent Assessment Lien was recorded on behalf of Nevada Association Services, Inc., as agent for Heritage Estates, on November 12, 2008. A Notice of Default and Election to Sell Under Homeowners Association Lien was recorded on February 27, 2009, and there followed a (third) Notice of Foreclosure Sale, recorded on March 5, 2012. The Foreclosure Sale on the Homeowners Association Lien took place on June 29, 2012. A Foreclosure Deed in favor of Stone Hollow Avenue Trust was recorded on July 5, 2012. A Grant, Bargain, Sale Deed was recorded on July 26, 2012, transferring the property from Stone Hollow Avenue Trust to Paradise Harbor Place Trust.

B. Standard of Review for Motion for Summary Judgment

Defendant asserts that it is entitled to summary judgment under N.R.C.P. Rule 56(c)

because Plaintiff cannot prove essential elements of its claim for quiet title (or entitlement to the remedy of declaratory relief under it). Summary judgment is proper "where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Villescas v. CNA Ins. Co.*, 109 Nev. 1075, 1078, 864 P.2d 288, 290 (1993) (*quoting* Nev. R. Civ. P. 56(c)); *Cuzze v. University and Community College System of Nevada*, 123 Nev. 598, 172 P.3d 131, 136-37 (2007); and N.R.C.P. Rule 56(c). The party moving for summary judgment must make the initial showing that no genuine issue of material fact exists. *Cuzze*, 123 Nev. 598, 172 P.3d at 136-37. A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. See *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1305-06 (9th Cir. 1982).

Where, as here, the non-moving party will bear the burden of persuasion at trial, the party moving for summary judgment need only: "(1) submit[] evidence that negates an essential element of the nonmoving party's claim, or (2) 'point[] out ... that there is an absence of evidence to support the nonmoving party's case.'" *Francis v. Wynn Las Vegas, LLC*, 262 P.3d 705, 714 (Nev. 2011), reh'g denied (Feb. 23, 2012). *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S. Ct. 1598 (1970); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), cert. denied, 460 U.S. 1085, 76 L.Ed.2d 349, 103 S. Ct. 1777 (1983). The plain language of Rule 56(c) "mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). When the moving party has negated an essential element of the nonmoving party's claim, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2554. This standard mirrors the standard for a directed verdict under F.R.C.P. 50(a) – the functional equivalent of N.R.C.P. 50(a) – which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 250, 91 L.Ed.2d 202, 106 S. Ct. 2505 (1986); *and see* N.R.C.P. 50(a)(1) ("If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained … without a favorable finding on that issue.").

The statement of stipulated facts clearly demonstrates the factual background of this matter. As the parties have agreed to the above facts, which are the only *material* facts, there remain only questions of law for this Court to decide.

C. Statutory Interpretation of NRS §116.3116

The question before the court is a clear-cut issue of statutory interpretation. Homeowner's association liens are governed by NRS §116.3116. Here, Plaintiff argues that a foreclosure under NRS §116.3116 extinguishes the senior deed of trust. Defendant argues that this interpretation of the statute is erroneous and would lead to absurd results.

"In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 318 (Nev. 1996); and *Wensley v. First Nat. Bank of Nevada*, 2012 WL 1971773 (D. Nev. 2012). To prevail, Plaintiff must demonstrate that the home owner's association's notice of delinquent assessment was recorded before Selene's Deed of Trust. *See Centeno v. Mortgage Elec. Registration Sys., Inc.*, Case No. 2:11-cv-02105-GMN-RB, 2012. WL 3730528, at *3 (D. Nev. Aug. 28, 2012) (holding that without an allegation that the HOA lien "chronologically precedes" the deed of trust and without submission of the first in time lien, a claim under N.R.S 11.6,3116(2) fails). Upon the facts before the COURT, because Plaintiff cannot prove this central element, its claims for relief to quiet title fail as a matter of law. *Centeno*, 2012 WL 3730528, at *3.

The Court construes the statute under common methods of statutory construction. The court also considers NRS § 116.3116 *in pari materia* with other foreclosure statutes. *See, e.g., Williams v. United Parcel Services*, 129 Nev. Adv. Op. 41 (2013) (stating that statutory provisions are read as a whole with effect given to each word or phrase); *Barney v. Mt. Rose*

Heating & Air Conditioning, 192 P.3d 730 (2008) (statutes must read in context, policy can be considered as an interpretive aid); *State Dept. of Business and Industry v. Nevada Ass'n Srvcs., Inc.*, 294 P.3d 1223 (Nev., 2012) (court considered NRS Chapter 116 and NRS Chapter 649 in a way that harmonizes them as a whole). Accordingly, "it is the duty of this court, when possible, to interpret provisions within a common statutory scheme '**harmoniously with one another** in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *So. Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (emphasis added) (citations omitted).

The statute states in relevant part that an association's lien "is prior to all other liens and encumbrances on a unit except … (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent." NRS §116.3116(2)(b). The statute also creates a super priority interest for 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." *Id.* Any amounts superfluous to the nine months are not afforded a super priority. *Id.*

The Nevada Supreme Court has not addressed what an "action'' means under NRS 116.3116(2)(c). Black's Law Dictionary defines action as "a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law." BLACK' S LAW DICTIONARY 28 (6th ed. 1990). Other departments in the Eighth Judicial District Court Department have held that an action, in the context of §116.3116, means a civil action. *See e.g., Deutsche Bank National Trust Comp. v. The Foothills at Macdonald Ranch*, Case No. A-13-680505 (Nev. 2013); *SFR Investments Pool 1, LLC v, U.S. Bank, N.A., et al.*, Case No. A-13-678814 (Nev. 2013); *Daisy Trust v. Wells Fargo Bank, N.A., et al.*, Case No, A-13-675183 (Nev. 2013).

Furthermore, this interpretation is consistent with Nevada federal district court decisions, *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013) (holding that when an HOA holds a non-judicial foreclosure sale, the buyer takes the property subject to the first security interest); *Weeping Hollow Ave. Trust v. Spencer*, 2013

WL 2296313, at *5 (D. Nev. May 24, 2013) (stating that the super priority Lien does not extinguish the first position deed of trust); *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC.*, 2013 WL 2460452, at *4 (D. Nev. June 6, 2013) (stating that foreclosure of neither a super-priority lien nor a first mortgage will extinguish the other, but first proceeds must go to the super-priority lien); *Salvador v. National Default Servicing Corp.*, 2013 WL 3049084, at *5-6 (D. Nev. June 13, 2013) (denying preliminary injunction for failure to establish likelihood of success on the merits because statute does not eliminate the first security interest as a matter of law).

In addition, NRS §116.3116(2)(b) must be read in conjunction with other portions of NRS 116.3116 which refer to the term "action" as a judicial proceeding. Specifically, NRS 116.3116(7) states "[a] judgment or decree in any **action** under this section must include costs and reasonable attorney's fees for the prevailing party" (emphasis added), and NRS 116.3116(10) provides that a home owner's association may institute an action to collect delinquent assessments and to foreclose a lien and the court may appoint a receiver to collect rents during the pendency of the action. Therefore, "action" under NRS §116.3116 means a civil action filed by either the lender or the HOA.

COURT FINDS that the first security interest Deed of Trust was recorded on October 31, 2006, prior to the home owner's association lien, recorded on November 12, 2008, and the home owner's association's Notice of Default and Election to Sell Under Homeowners Association Lien, recorded February 27, 2009.

COURT FINDS the home owner's association super priority lien only creates a priority to payment from foreclosure proceeds.

COURT FINDS NRS §116.3116 requires an action and is not applicable when the home owner's association forecloses under a non-judicial foreclosure statutes pursuant to NRS. 116.3116 *et seq*.

COURT FURTHER FINDS that the home owner's association foreclosure sale of its lien, under NRS §116.3116, cannot extinguish Selene's Deed Of Trust because it was recorded prior to the home owner association's lien, and Plaintiff Paradise Harbor Place Trust purchased

the property with notice of the first in time Deed of Trust and took the property subject to the first Deed of Trust.

COURT FURTHER FINDS that, while the requirements for preliminary injunction may have been present at the time of hearing of Plaintiff's Motion, Plaintiff no longer enjoys a reasonable probability of success on the merits. *See, Pickett v. Comanche Construction Co.*, 108 Nev. 422, 836 P.2d 42 (1992); *see also, Dixon v. Thatcher*, 103 Nev. 414, 742 P.2d 1029 (1987). Consequently, there is no need to preserve the status quo pending final judgment. *See, Ottenheimer v. Real Estate Division*, 91 Nev. 338, 535 P.2d 1284 (1975); *see also, Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Memorial Gardens, Inc.*, 88 Nev. 1, 492 P.2d 123 (1972); and *Berryman v. International Brotherhood of Electrical Workers*, 82 Nev. 277, 416 P.2d 387 (1966).

COURT FURTHER FINDS that, on February 15, 2013, a judgment of dismissal as to Defendant Nevada Legal News, LLC, was entered, and on May 31, 2013, a judgment of dismissal as to Defendant Fidelity National Title Insurance Company, and, while Defendants Aargon Collection Agency, William O. Richardson and Teresa M. Richardson have been served, and defaults were entered against them, on April 11, 2013, default judgments have neither been sought nor obtained. Consequently, this Decision would not conclude all matters against all parties and would not be a final order absent an express determination by this COURT.

COURT FURTHER FINDS that that there is no just reason for delay and upon an express direction for the entry of judgment in favor of Defendant Selene on its Motion for Summary Judgment. Defendant Selene requested certification under N.R.C.P. 54(b) and Plaintiff agreed to this request.

In light of the foregoing, COURT ORDERS Defendant Selene's Motion for Summary Judgment, GRANTED.

COURT FURTHER ORDERS that the Temporary Restraining Order and Preliminary Injunction previously entered are dissolved.

COURT FURTHER DIRECTS the entry of a final judgment, pursuant to N.R.C.P. 54(b), in favor of Defendant Selene and against Plaintiff.

COURT FURTHER DIRECTS that the trial scheduled to commence September 23, 2013, at 1:00 p.m., is vacated, as are all related pretrial proceedings including the Deadline to file all Motions in Limine on August 30, 2013, and the Calendar call set for September 17, 2013.

IT IS SO ORDERED.

DATED this ____ day of July, 2013. 9-6-13

HONORABLE STEPHANY A. MILEY
DISTRICT COURT JUDGE

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company Plaintiff, vs. WELLS FARGO BANK, N.A., a national association; POLLY MORGAN, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: A-13-679361-C Dept. No.: XXV **ORDER DENYING THE PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION**

The Defendant, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo"), by and through its attorney of record, Chelsea A. Crowton, Esq. of the law firm of Wright, Finlay & Zak, LLP, and the Plaintiff, SFR Investments Pool 1, LLC, by and through their attorney of record, David A. Rosenberg, Esq., having appeared on April 17, 2013 for the hearing on the Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction, which was continued to April 24, 2013, based on the request by the Court for Supplemental Briefing. The Court having heard arguments by all parties on April 24, 2013 and April 17, 2013, the Court having reviewed the Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction, Wells Fargo's Response to the Application for Temporary Restraining Order and Motion for Preliminary Injunction, the Reply in Support of the Plaintiff's Application

for Temporary Restraining Order and Motion for Preliminary Injunction, the Supplemental Brief in Support of the Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction, and Wells Fargo's Response to the Plaintiff's Supplemental Brief, and good cause appearing, hereby rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction is **denied**.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the balance of interests of both the moving and opposing parties are balanced.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff has failed to state a likelihood of success on the merits of the underlying Complaint, based on the fact that the language in N.R.S. 116.3116(2)(c) does not extinguish a first, position Deed of Trust.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff took title to the Property subject to Wells Fargo's May 2006 Deed of Trust, which was executed by Polly Morgan on May 16, 2006 and recorded in the Clark County Recorder's Office as Book and Instrument Number 20060524-0001668.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Wells Fargo's first, position Deed of Trust survived the foreclosure sale by Canyon Willow Owners Association.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that due to the unlikelihood of success on the merits of the underlying Complaint and denial of the Application for Temporary Restraining Order and Motion for Preliminary Injunction, the Defendant, Wells Fargo Bank, N.A., can lawfully proceed with a foreclosure sale on the Property located at 6831 Rolling Boulder Street, Las Vegas, Nevada 89149.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff merely took as much interest in the Property as the Borrower, Polly Morgan, possessed prior to the Homeowner's Association sale.

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IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that N.R.S. 107.090 et seq. and N.R.S. 116.3116 et seq. requirements, while similar with regards to notification and mailings, do not support the Plaintiff's arguments that a Foreclosure Deed executed pursuant to a sale by a Homeowner's Association extinguishes a first, position Deed of Trust.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that N.R.S. 116.310312's abatement lien statute does not lend support to the theory that N.R.S. 116.3116(2)(c) extinguishes Wells Fargo's Lien or any first, position Deed of Trust.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that notwithstanding the foregoing, this Order is stayed and Wells Fargo is enjoined from foreclosing, selling, transferring, or otherwise conveying the Property until May 21, 2013 at 9:00 A.M.

DATED this 4th day of ~~May~~ June, 2013.

DISTRICT COURT JUDGE

CB

Respectfully Submitted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC a Nevada limited liability company, Plaintiff, vs. US BANK, N.A., a national banking association as Trustee for the Certificate Holders of the Banc of America Mortgage Securities 2008-A Trust, Mortgage Pass-Through Certificates, Series 2008-A, CAL-WESTERN RECONVEYANCE CORPORATION, a California corporation, SAN SEVINO WEST AT SOUTHERN HIGHLANDS HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, a Nevada non-profit corporation, GEORGE A. SHERWOOD, an individual, SHARON L. SHERWOOD, an individual, DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: A-12-673671-C Dept. No.: XXVII **ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING COUNTER-MOTION TO DISMISS**

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND GRANTING COUNTER-MOTION TO DISMISS

In this action, after review and consideration of Plaintiff SFR Investments Pool 1, LLC's ("Plaintiff") Motion for Preliminary Injunction, Defendant US Bank, N.A.'s ("US Bank") Opposition thereto and Countermotion to Dismiss, Plaintiff's Reply in Support of Motion for Preliminary Injunction and Opposition to Countermotion to Dismiss, US Bank's Reply in Support of Countermotion to Dismiss, all pleadings and papers on file herein, the oral arguments presented on March 6, 2013 by counsel for Plaintiff Diana S. Cline, Esq. of Howard Kim & Associates and counsel for US Bank Jory C. Garabedian, Esq. of Miles, Bauer, Bergstrom & Winters, LLP, and after taking the matter under advisement, the Court hereby finds as follows:

FINDINGS OF FACT

1. The instant action concerns title to real property commonly known as 11577 Capanna Rosso Place, Las Vegas, Nevada 89141 (APN 191-05-217-040) (hereinafter the "Subject Property").

2. US Bank, through a recorded Assignment, is the record beneficiary of a $885,000.00 first mortgage/deed of trust recorded against the Subject Property on October 23, 2007 in the Office of the Clark County Recorder as document/instrument 20071023-0000688 (hereinafter the "Deed of Trust") and executed by former record Subject Property owners George A. Sherwood and Sharon Sherwood.

3. Non-judicial foreclosure proceedings under the terms of the Deed of Trust were commenced on or around September 17, 2009 by the recording of a Notice of Default and by the recording of a Notice of Trustee's Sale on August 8, 2012. However, the foreclosure sale under the Deed of Trust has not yet gone forward.

4. On or around April 9, 2010, Southern Highlands Community Association through its agents and trustee (hereinafter collectively the "HOA"), recorded a Notice of Delinquent Assessment Lien claiming a lien in the amount of $1,225.19 for collection and/or attorney fees, assessments, interest, late fees, service charges and collection costs.

5. On or around November 16, 2010, the HOA recorded its Notice of Default and Election to Sell indicating that it intended to foreclosure on the Notice of Delinquent Assessment Lien. Said Notice of Default indicates that the total amount due and owing had increased to $2,550.06 and that such amounts would continue to increase until the homeowners' account became current.

6. The HOA then recorded a Notice of Trustee's Sale on September 29, 2011 noting that the total amount due and owing had again increased to $4,542.06.

7. On September 24, 2012, a Trustee's Deed Upon Sale was recorded stating that the HOA foreclosure sale was held on September 5, 2012 where Plaintiff paid $6,000.00 to purchase the Subject Property for the amount that was due and owing to the HOA.

8. Plaintiff commenced the instant quiet title action on or around December 14, 2012, seeking title free and clear of any interest of the defendants named herein, including US Bank's Deed of Trust. Specifically, Plaintiff alleges that the HOA foreclosure sale extinguished US Bank's Deed of Trust due to the foreclosure of the HOA's super priority lien.

9. On December 17, 2012, Plaintiff filed an Ex Parte Application for Temporary Restraining Order (TRO) and Motion for Preliminary Injunction to prevent US Bank from foreclosing on the Subject Property. The Court executed/issued the TRO on December 18, 2012 and set a hearing date.

10. On January 2, 2013, the Court granted a preliminary injunction for 30 days to allow the named defendants time to appear and respond.

11. On January 30, 2013, the Court held a Status Check on the preliminary injunction, at which the Court set a briefing schedule on the Motion for Preliminary Injunction and any Countermotions and relating briefing and further set the hearing on the matters for March 6, 2013.

CONCLUSIONS OF LAW

1. Pursuant to NRCP 65, EDCR 2.10, NRS 33.010 and Nevada case law, when deciding to grant or deny a preliminary injunction, the Court must consider: 1) the plaintiff's likelihood of success on the merits, 2) the reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irrepararable harm for which compensatory damage is an inadequate remedy, and 3) the potential hardships to the relative parties, and others and the public interest.

2. The Court finds that Plaintiff does not enjoy a substantial likelihood of success on the merits. Pursuant to NRS 116.3116(2)(b), an HOA lien is prior to all other liens and encumbrances on the real property unit except, among others, "[a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent." Here, it is undisputed that US Bank has a first security interest through the Deed of Trust, which was recorded approximately two and a half years before the HOA's Notice of Delinquent Assessment Lien and therefore the Deed of Trust would generally have priority over the HOA lien.

3. However, NRS 116.3116(2)(c) creates, for an association, a super priority lien "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budge adopted by the association pursuant to NRS 116.3115. which would have become due in the absence of acceleration during the 9 months immediately preceding ***institution of an action*** to enforce the lien." (***emphasis added***). Massachusetts and Washington require a civil action or judicial foreclosure before a super priority lien is triggered and foreclosed. *See Trustees of MacIntosh Condominium Association v. FDIC*, 908 F. Supp. 58, 63 (D. Mass. 1995); *In Re Stern*, 44 B.R. 15, 19 (Bankr.D.Mass. 1984); *see also Summerhill Vill. Homeowners Ass'n v. Roughley*, 289 P.3d 645, 649 (Wash. Ct. App. 2012). Although the Court acknowledges that authority from other jurisdictions is not binding, the Court finds persuasive the jurisprudence in Massachusetts and Washington requiring judicial foreclosures to trigger and foreclose super priority liens.

4. The Court also acknowledges the recent December 2012 Advisory Opinion from the Nevada Real Estate Division ("Division") wherein the Division opined that a civil action was not necessary to trigger an association's super priority lien, and that it could be triggered by commencing a non-judicial foreclosure. However, the Court is not bound by an opinion that contains a disclaimer at the end of the opinion stating it does not have the force of law. The Court has the ability to review statutory interpretations de novo.

5. Both State and Federal constitutional due process guarantees are offended if the first security mortgagee's interest may be voided by non-judicial foreclosure for an assessment lien, relatively nominal in value, without notice to the otherwise senior interest mortgagee, and if an opportunity is not provided to the mortgagee to argue its position, or to pay the assessment amounts in order to avoid the risk of losing, in this case, an $885,000.00 first security interest in

the Subject Property. While the Court acknowledges that NRS 116.311635(1)(b)(2) does not absolutely require notice to the holder of a recorded security interest, failure to provide notice is a deprivation of due process. Accordingly, NRS 116.3116(2)(c) must be construed to require a civil action to trigger and foreclose an HOA's super priority lien.

6. Because it is undisputed that Plaintiff acquired its ownership interest in the Subject Property through a non-judicial foreclosure HOA sale, and not a judicial foreclosure sale, Plaintiff does not enjoy a substantial likelihood on the merits.

7. For purposes of determining whether to grant injunctive relief, the Court further finds that although real property is considered unique and the loss of which is often not compensable by a monetary award, Plaintiff can be compensated through pecuniary damages in this case.

8. The Court further finds that after balancing the hardships between the parties, US Bank stands to lose an interest valued around $885,000.00 whereas Plaintiff's purchase price was merely $6,000.00. The balance of hardships therefore tips in favor of US Bank to warrant the denial of a preliminary injunction.

9. Finally, because the Court hereby concludes as a matter of law that an association must conduct a judicial foreclosure to trigger and foreclose any super priority lien claimed, and because it is undisputed that Plaintiff acquired its ownership interest in the Subject Property through a non-judicial foreclose sale, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted as to US Bank.

ORDER

NOW WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby DENIES Plaintiff's Motion for Preliminary Injunction, DISSOLVES any

TRO and/or preliminary injunction previously in effect in this matter, and further GRANTS US Bank's Countermotion to Dismiss Plaintiff's Complaint with prejudice. However, the parties to this action are invited to seek a stay pending appeal if they so wish.

IT IS SO ORDERED.

DATED: March 20, 2013

Nancy L Allf
DISTRICT COURT JUDGE

Zion

Respectfully submitted:

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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL I, LLC, a Nevada limited liability company, Plaintiff, vs. WELLS FARGO BANK, N.A., a national association; NV WEST SERVICING, LLC, a Nevada limited liability company, AS TRUSTEE FOR LAKOTA TRUST #8660; BRITTANY L. DONOVAN, an individual; PAMELA DONOVAN, an individual; MICHAEL DONOVAN, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: A-13-682700-C Dept. No. XXVIII **ORDER GRANTING NV WEST SERVICING, LLC'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT** Hearing Date: August 22, 2013 Hearing Time: 9:00 a.m.

Defendant NV West Servicing, LLC, as Trustee for Lakota Trust #8660's ("NV West" or "Defendant") motion to dismiss Plaintiff's amended complaint for failure to state a claim for relief ("Motion") came before this Court at a hearing on August 22, 2013 at 9:00 a.m. Diana S. Cline, Esq. appeared on behalf of Plaintiff SFR Investments Pool I, LLC ("SFR" or "Plaintiff"). Edgar C. Smith, Esq. appeared on behalf of Defendant NV West. The Court, having considered NV West's motion, SFR's opposition, the pleadings and papers on file herein, and arguments of

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counsel, for the reasons set forth on the record and incorporated herein by reference and good cause appearing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Defendants Brittany L. Donovan, Pamela Donovan, and Michael Donovan obtained title to real property located at 8660 Lakota Street, Las Vegas, Nevada 89123, Parcel No. 177-14-311-094 (the "Property") through a Grant, Bargain and Sale Deed from D.R. Horton, Inc. on or around July 29, 2005. The Grant, Bargain and Sale Deed was recorded in the Official Records of the Clark County Recorder as Instrument No. 200507290004165.

2. On July 29, 2005, DHI Mortgage Company, LTD ("DHI") recorded a deed of trust against the Property in the Official Records of the Clark County Recorder as Instrument No. 200507290004166, made by the Donovans as trustors ("First Deed of Trust").

3. On December 21, 2010, Alessi & Koenig, LLC ("A&K"), on behalf of the Wigwam Ranch Master Homeowners Association (the "Association"), recorded a Notice of Delinquent Assessments against the Property in the Official Records of the Clark County Recorder as Instrument No. 201012210001483 ("Notice of Delinquent Assessments").

4. On March 2, 2011, an Assignment of Deed of Trust was recorded in the Official Records of the Clark County Recorder as Instrument No. 201103020000887, whereby DHI transferred and assigned all beneficial interest in the First Deed of Trust to Wells Fargo Bank, N.A. ("Wells Fargo").

5. On May 26, 2011, A&K, on behalf of the Association, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien in the Official Records of the Clark County Recorder as Instrument No. 201105260003699.

6. On January 22, 2013, A&K, on behalf of the Association, recorded a Notice of Trustee's Sale in the Official Records of the Clark County Recorder as Instrument No. 201301220003094,

7. On February 20, 2013, A&K, agent for the Association, conducted a foreclosure sale pursuant to the powers conferred by the Nevada Revised Statutes 116.3116, 116.31162-

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116.31168, , and the Notice of Delinquent Assessments recorded on December 21, 2010 in the Official Records of the Clark County Recorder as Instrument No. 201012210001483.

8. SFR, as the highest bidder at the Association's foreclosure sale, acquired the Property on February 20, 2013 and recorded the corresponding Trustee's Deed Upon Sale in the Official Records of the Clark County Recorder as Instrument No. 201302260003885 on February 26, 2013.

9. On or around April 19, 2013, Wells Fargo foreclosed on the First Deed of Trust pursuant to the power of sale in the First Deed of Trust and under NRS 107.080, et seq. and sold the Property to Defendant NV West, who was the highest bidder at the nonjudicial foreclosure sale. The resulting trustee's deed was recorded in the Official Records of the Clark County Recorder as Instrument No. 201305130001776 on May 13, 2013.

10. On May 31, 2013, Plaintiff initiated this lawsuit alleging causes of action for declaratory relief/quiet title pursuant to NRS 30.010, *et seq.*, NRS 40.10 and 116.3116, *et seq.*, wrongful foreclosure, unjust enrichment, and injunctive relief.

11. Plaintiff asserts that the Association's non-judicial foreclosure of its super priority lien, to which Wells Fargo failed to cure prior to the Association's foreclosure sale, extinguished Wells Fargo's First Deed of Trust pursuant to NRS 116.3116. As such, Plaintiff contends that Wells Fargo's subsequent foreclosure of the First Deed of Trust that was recorded against the Property, and through which NV West claims title, was invalid.

12. In response, Defendant contends that the Association's lien and foreclosure did not disturb or impair the priority or the enforceability of Wells Fargo's First Deed of Trust. As such, Defendant asserts that it has superior title to the Property under NRS Chapter 107.

CONCLUSIONS OF LAW

1. When reviewing a motion to dismiss under NRCP 12(b)(5) for failure to state a claim, Nevada courts will "regard all factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party." *See Stockmeier v. Nevada Dept. of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008).

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2. "A complaint will not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief." *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *see also Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008).

3. The statute at issue in this case, Nev. Rev. Stat. § 116.3116 provides in relevant part::

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 find 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, 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

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the association.

3. The holder of the security interest described in paragraph (b) of subsection 2 or the holder's authorized agent may establish an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 if the unit's owner and the holder of that security interest consent to the establishment of such an account. If such an account is established, payments from the account for assessments for common expenses must be made in accordance with the same due dates as apply to payments of such assessments by a unit's owner.

4. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

5. Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

4. While NRS 116.3116 (5) gives a homeowners association lien rights once the association's declaration is recorded, the lien cannot be enforced on until the assessments are delinquent and statutory notice is given. The homeowner's association can then commence an action to recover the delinquent assessments and it may do so through the nonjudicial foreclosure process. That lien to be foreclosed is senior to all other interests in title except a deed of trust in senior position. As to that first deed of trust, the homeowner's association has a "superpriority lien" for up to nine months of assessments and other charges as permitted by the statute.

5. The homeowner's association "superpriority lien" arises from the commencement of the action to enforce the lien, not from the date of the recording of the CC&R's, so that foreclosure of the lien does not eliminate the first deed of trust. There is typically a substantial difference in the respective amounts of the past due assessments and the loan amount secured by the first deed of trust. If the Legislature intended for the homeowner's association to eliminate the first deed of trust through its foreclosure, the Legislature would have clearly stated as much, and there would be no reason for the exception found in NRS 116.3116(2)(b). This Court finds the reasoning in decisions cited in the brief for the moving party to be more persuasive on the issue.

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6. As Wells Fargo's First Deed of Trust was recorded prior to the Association's Notice of Delinquent Assessments, Wells Fargo's First Deed of Trust survived the Association's foreclosure sale.

7. Plaintiff took title to the Property subject to Wells Fargo's First Deed of Trust with constructive notice of that First Deed of Trust so any improvements made to the Property were made with notice that title could be divested by the foreclosure sale trustee under the First Deed of Trust.

8. Plaintiff failed to state a claim for relief against Defendant NV West, and the first claim for relief for quiet title, third claim for relief for restitution, and the fourth claim for relief for preliminary injunction should be dismissed with prejudice.

Good cause appearing therefor,

IT IS HEREBY ORDERED that Defendant NV West's motion to dismiss is GRANTED and the first, third and fourth claims for relief are dismissed with prejudice.

IT IS SO ORDERED.

Dated this 22 day of Nov, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:

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CLERK OF THE COURT

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Attorney for Defendant,
Wells Fargo Bank, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

LN MANAGEMENT LLC SERIES 3225 CASEY 204

Plaintiff,

vs.

PHILIP R. THOMAS, an individual; CECILIA V. THOMAS, an individual; WELLS FARGO BANK, N.A.; and DOES 1 through 10, inclusive;

Defendants.

Case No.: A-13-678626-C
Dept. No.: XXX

ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Plaintiff's Motion for Preliminary Injunction having come on for hearing in the above-entitled Court on July 23, 2013 at the hour of 9:00 A.M. The Plaintiff, LN Management LLC Series 3225 Casey 204, appearing by and through its counsel of record, Kerry P. Faughnan, Esq., the Defendant, Wells Fargo Bank, National Association, appearing by and through its counsel of record, Chelsea A. Crowton, Esq., of Wright, Finlay & Zak, LLP, and the Court having considered all arguments presented, the pleadings on file herein, and determining that good cause appearing, hereby rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Preliminary Injunction is hereby DENIED and the Temporary Restraining Order is EXPUNGED.

CTADD0290

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff does not have a likelihood of success on the merits of the Complaint because N.R.S. 116.3116 merely creates a priority in payment and not a lien priority.

IT IS SO ORDERED.

Dated this 08 day of August, 2013.

DISTRICT COURT JUDGE

Respectfully Submitted by:

WRIGHT, FINLAY & ZAK, LLP

Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
5532 South Fort Apache Road, Suite 110
Las Vegas, Nevada 89148
Attorney for Defendant, Wells Fargo Bank, N.A.

Approved as to form, but all rights reserved or appellate purposes:

Kerry P. Faughnan, Esq.
Nevada Bar No. 12204
P.O. Box 335361
North Las Vegas, Nevada 89086
Attorney for Plaintiff, LN Management LLC Series 3225 Casey 204

REGISTER OF ACTIONS

CASE NO. A-13-678626-C

LN Management LLC Series 3225 Casey 204, Plaintiff(s) vs. Philip Thomas, Defendant(s)	§	Case Type:	**Title to Property**
	§	Subtype:	**Quiet Title**
	§	Date Filed:	**03/20/2013**
	§	Location:	**Department 30**
	§	Cross-Reference Case Number:	**A678626**
	§	Supreme Court No.:	**63764**

PARTY INFORMATION

		Lead Attorneys
Defendant	**Thomas, Cecilia V**	
Defendant	**Thomas, Philip R**	
Plaintiff	**LN Management LLC Series 3225 Casey 204**	**Kerry P Faughnan, ESQ** *Retained* 702-301-3096(W)

EVENTS & ORDERS OF THE COURT

07/16/2013 **Motion for Preliminary Injunction** (9:00 AM) (Judicial Officer Wiese, Jerry A.)
07/16/2013, 07/23/2013
Plaintiff's Ex Parte Order Granting TRO and Setting Preliminary Hearing

Minutes

07/16/2013 9:00 AM
- Mr. Faughnan indicated the Opposition was just submitted and requested continuance in order to reply. There being no objection. COURT SO ORDERED. CONTINUED....7/23/13 9:00 AM

07/23/2013 9:00 AM
- Plft's Ex Parte Order Granting TRO and Setting Preliminary Hearing Mr. Faughnan argued in support of the motion. Ms. Crownton submitted on pleading. COURT ORDERED, motion DENIED; Temporary Restraining Order, EXPUNGED.

07/23/2013 9:00 AM

Parties Present
Return to Register of Actions

RECD MAY 25 1999

ESCROW NO. 100027PAH

RECORDING REQUESTED BY, AND WHEN RECORDED, MAIL TO:

2348877

WEINTRAUB GENSHLEA & SPROUL
Law Corporation
Attn: Curtis C. Sproul, Esq.
400 Capitol Mall, Suite 1100
Sacramento, California 95814

(Space Above For Recorder's Use)

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DECLARATION

OF

COVENANTS, CONDITIONS AND RESTRICTIONS

FOR

D'ANDREA

A Master Planned Golf Community

DECLARATION
OF
COVENANTS, CONDITIONS AND RESTRICTIONS
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D'ANDREA
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MASTER DECLARATION
OF
COVENANTS, CONDITIONS AND RESTRICTIONS FOR
D'ANDREA
A Master Planned Golf Community

This Declaration is made by D'ANDREA NEVADA LLC, a Delaware limited liability company ("Declarant").

RECITALS

A. Declarant is the owner of that certain real property located in the City of Sparks, County of Washoe, State of Nevada , commonly known as D'Andrea, a Master Planned Golf Community and more particularly described in Exhibit "A" (the "Overall Development").

B. This Declaration shall initially apply only to that portion of the Overall Development described in attached Exhibit "B" (the Properties"). It is the present intention of the Declarant that the Properties constitute the initial Phase of a multi-Phased development. Other portions or Phases of the Overall Development, identified in Exhibit "C" (the Annexable Property) may be made subject to this Declaration by annexation in accordance with the terms of Article XV, below. Article XV also includes provisions which authorize the deannexation of property from this Declaration under certain terms and conditions.

C. Declarant hereby declares that all of the Properties shall be held, sold and conveyed subject to the following easements, restrictions, associations, reservations, covenants and conditions, all of which are for the purpose of enhancing and protecting the value, desirability and attractiveness of the Properties. These covenants, easements, restrictions, conditions, associations and reservations are (i) for the benefit and protection of the Properties and for the protection and enhancement of the desirability, value and attractiveness of all Lots, Common Elements and other parcels of property located therein; (ii) run with the Properties and bind all parties having or acquiring any right, title or interest in the Properties or any part thereof; and (iii) inure to the benefit of the successors and assigns of each Owner of any property within the Properties.

D. It is the further intention of the Declarant to sell and convey residential Lots to Owners, subject to the protective covenants, conditions, restrictions, limitations, reservations, liens, grants of easements, rights, rights of way, charges and equitable servitudes between Declarant and such Owners as set forth in this Declaration and any duly adopted amendments thereto.

E. As an integral element of the common plan of development contemplated by this Declaration, the Declarant has formed the D'Andrea Community Association, a Nevada nonprofit corporation, for the benefit of all Owners of Lots within the D'Andrea development. The Community Association shall have the powers and duties describe in, or imposed by, the Governing Documents, including, without limitation, the following principal purposes: (i) to acquire, operate, manage and maintain the Association's Common Elements and Common Facilities; (ii) to manage and maintain certain parcels owned by the City of Sparks consisting of certain drainage areas, street lights, public hiking trails and landscaping located on property owned by the City (all as more particularly described in the Maintenance Agreement identified in Section 1.25, below); (iii) to establish, levy, and collect Assessments and other charges imposed hereunder; (iv) to pay all Common Expenses of the Association; and (v) as the agent and representative of the Members to administer and enforce all provisions and covenants of this Declaration in the manner provided in Article XIII, below.

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F It is the further intention of Declarant to convey to the Association the "Common Elements" and "Common Facilities" located within the Properties to be owned and maintained by the Association and reserved exclusively for the use and enjoyment of the Members of the Association, their tenants, lessees, guests and invitees, subject to the terms and conditions of this Declaration and the other Governing Documents.

G. The Properties comprising D'Andrea also include Club Property, including a Golf Course. As of the recordation date of this Declaration, the Club Property is not part of the Association's Common Elements or Common Facilities. Accordingly, Owners of Lots within the Properties do not, by virtue of their Lot ownership, obtain and rights or interests in the Club Property, including the Golf Course.

H. It is further anticipated that certain Phases of the Annexable Property may subsequently be annexed to the Properties and be developed as a real estate development in which the occupancy of Residences is restricted to Qualifying Residents and Qualified Permanent Residents, as these terms are defined in Sections 1.36 and 1.35, respectively. Such restrictions on occupancy shall only apply in the event that the Supplemental Declaration of Restrictions applicable to the annexed Phase specifically provides that it is

the intention of the Declarant or other developer of the annexed Phase to impose the restrictions set forth in Article XVII, below, to the Phase. If and to the extent that occupancy of Residences within a future Phase is restricted in the manner described in Article XVIII, below, it is the intention of the subdivider of the annexed Phase to qualify the Phase as a Senior Citizen Housing Development under section 51.3 of the California Civil Code. By adhering to the occupancy age restrictions set forth in Article XVIII it is the further intent of the Declarant or other subdivider of the Phase for the project within the Phase to constitute housing for older persons under the terms and conditions of the Fair Housing Act Amendments of 1988 and the Housing for Older Persons Act of 1995 and applicable regulations thereunder.

I. Notwithstanding the anticipated development of the Overall Development in accordance with the plan of phased development contemplated by this Declaration, nothing in this Declaration shall be construed or interpreted to commit Declarant to the development of any portion of the Overall Development in accordance with any present planning, or to the annexation of all or any part of the Overall Development to this Declaration, whether or not it is so developed. Accordingly, nothing contained herein shall obligate Declarant to refrain from the further subdivision or resubdivision of the lands comprising the Overall Development, and Declarant shall be free to so further subdivide or resubdivide. Nothing contained herein shall obligate Declarant to refrain from the further subdivision, resubdivision or reversion to acreage of portions of the Overall Development not theretofore annexed, and Declarant shall be free to so further subdivide or resubdivide, or revert those portions of the Overall Development.

J. Also included within the boundaries of the Overall Property, but not included in the Properties subject to this Declaration, are parcels of real property, approximately 200 acres in size which are being developed as an 18 hole golf course and related facilities (collectively referred to herein as the "Golf Course"). It is not the intention of the Declarant to annex the Golf Course to the Properties or to subject the Golf Course property to this Declaration, or to convey any of the improvements or lands comprising the Golf Course to the Association. Nevertheless, various provisions of this Declaration are for the benefit of the owner of the Golf Course. At the present time it is not certain that the Golf Course, or any other improvement presently planned or contemplated for the Golf Course property, will be constructed within the Overall Property.

K. Finally, located within the Overall Property there may be other private areas which may be developed with commercial structures or activities, recreational facilities, real estate sales offices or other improvements without being annexed to the Properties or subjected to this Declaration.

ARTICLE I
Definitions

Section 1.01. "Act" means the Nevada Common Interest Ownership Act, Nevada Revised Statutes, Chapter 116.1101, et seq., as it may be amended from time to time.

Section 1.02. "Annexable Property" means the real property more particularly described in Exhibit "C".

Section 1.03. "Articles" means the Articles of Incorporation of the Association.

Section 1.04. "Assessment" means any Regular, Special or Special Individual Assessment made or assessed by the Association against an Owner and his or her Lot in accordance with the provisions of Article V, below.

Section 1.05. "Association" means the D'Andrea Community Association, a Nevada nonprofit corporation, its successors and assigns.

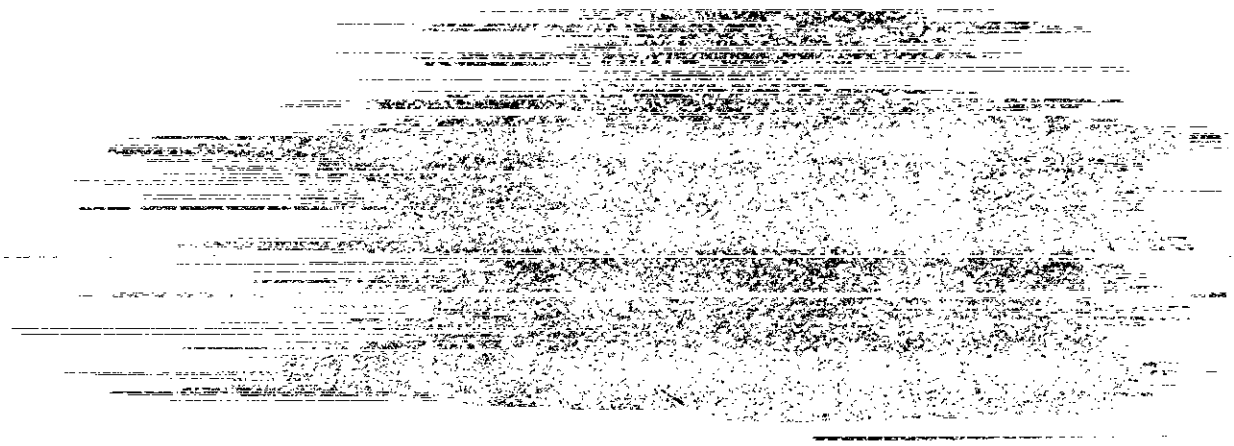
Section 1.06. "Association Rules" means the rules, regulations and policies adopted by the Board of Directors, pursuant to Section 3.08, below, as the same may be in effect from time to time. Once the Design Review Committee is a committee whose members are all appointed by the Association's Board of Directors (see Section 5.02, below) the Association Rules shall also include the Design Guidelines.

Section 1.07. "Board of Directors", "Executive Board" or "Board" means the Board of Directors of the Association. The Board of Directors is an "Executive Board" as defined by Section 116.110345 of the Act.

Section 1.08. "Bylaws" means the Bylaws of the Association, as such Bylaws may be amended from time to time.

Section 1.09. "City" means the incorporated municipal City of Sparks in the County of Washoe, State of Nevada, and its various departments, divisions, employees and representatives.

Section 1.10. "Club Property" means those parcels of real property and improvements thereon which are owned, managed and maintained by the Club Property Owner. The Club Property is intended to be operated by the Club Property Owner for



recreational and social purposes, but said property does not constitute part of the Common Elements or Common Facilities as those terms are defined herein. The Club Property includes or is planned to include the Golf Course, golf practice facilities, a clubhouse, tennis facilities, a swimming pool and other related recreational and social facilities.

Section 1.11. "Club Property Owner" means D'Andrea Nevada LLC, a Delaware limited liability company, and its successors and assigns as to all or any portion of the Club Property.

Section 1.12. "Common Elements" means all real property owned, controlled or maintained by the Association for the common use and enjoyment of the Owners, all areas designated as a "common element" on the Map, and all interests as provided in Section 116.110318 of the Act. The Common Elements to be owned by the Association at the time of the conveyance of the first Lot is more particularly described in Exhibit "D". Unless the context clearly indicates a contrary intent, any reference herein to the "Common Elements" shall also include any Common Facilities located thereon. The Maintenance Agreement attached as Exhibit "E" identifies certain trails, drainage areas, and landscaped areas located on public property or rights-of-way within the Properties which the Association is obligated to maintain in accordance with the terms of the Maintenance Agreement. The Common Elements do not mean or include Club Property or any property which is described as common elements in any Supplemental Declaration pertaining to a separate residential subdivision within a particular Phase of the Properties and which is owned or controlled by a separate Sub-Association applicable only to that subdivision.

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Section 1.13. "Common Expense" means any use of Common Funds authorized by Article IV, below, and Article IX of the Bylaws and includes, without limitation: (a) all expenses or charges incurred by or on behalf of the Association for the management, maintenance, administration, insurance, operation, repairs, additions, alterations or reconstruction of the Common Elements and Common Facilities; (b) all expenses or charges reasonably incurred to procure insurance for the protection of the Association and its Board of Directors; (c) any amounts reasonably necessary for reserves for maintenance, repair and replacement of the Common Elements and Common Facilities, and for nonpayment of any Assessments; and (d) the use of such funds to defray the costs and expenses incurred by the Association in the performance of its functions or in the proper discharge of the responsibilities of the Board as provided in the Governing Documents.

Section 1.14. "Common Facilities" means the trees, hedges, plantings, lawns, shrubs, landscaping, fences, utilities, berms, pipes, lines, lighting fixtures, buildings, structures and other facilities constructed or installed, or to be constructed or installed, or currently located within the Common Elements and owned or maintained by the Association. The Club Property is not a component of the Common Facilities.

Section 1.15. A "Cost Center" shall be a designation assigned by the Association to a discrete portion of the Properties (and to the Owners of Lots located therein) for the purpose of expense accounting and Assessment, all as more particularly provided in Sections 4.01(e) and 4.02(b), below. A Cost Center is likely to be created when the Association is maintaining property or Common Facilities located within the designated Cost Center area which are fully or partially restricted to Owners of the Lots within the Cost Center.

Section 1.16. "County" means the County of Washoe, State of Nevada, and its various departments, divisions, employees and representatives

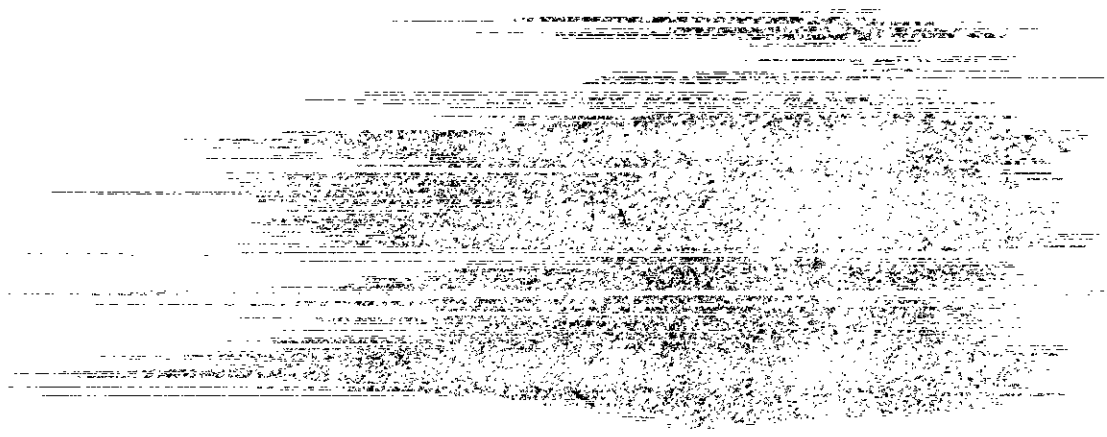
Section 1.17. "Declarant" means D'Andrea Nevada LLC, a Delaware limited liability company, its successors and assigns. Declarant does not, however, mean a person to whom D'Andrea Nevada LLC conveys property within the Properties except in connection with a sale or conveyance of all or substantially all of the property described in Exhibit "A" and then only if an instrument of conveyance specifically states that the purchaser is intended to be a successor Declarant and the instrument specifically conveys the rights of Declarant hereunder.

Section 1.18. "Declaration" means this instrument, as it may be amended from time to time.

Section 1.19. "Design Guidelines" means the Design guidelines and procedural rules of the Design Review Committee, adopted pursuant to Section 5.05, below.

Section 1.20. "Design Review Committee" means the committee created in accordance with Article V, below.

Section 1.21. "Golf Course" means the lots or parcels described in Exhibit "E", which are planned for development and use as a golf course, including but not limited to roughs, fairways, and greens. The term "Golf Course" shall also include any property subsequently added to the Golf Course by lot line adjustment, parcel map, final map, record of survey or otherwise.



Section 1.22. "Governing Documents" is a collective term that means and refers to this Declaration and to the Articles, the Bylaws and the Association Rules.

Section 1.23. "Improvement" as used herein includes, without limitation any improvement or project undertaken or contemplated by an Owner (other than the Declarant) within any portion of the Properties involving the construction, installation, alteration or remodeling of any Residence structures, garages, out buildings, walls, fences, swimming pools, landscaping, landscape structures, solar heating equipment, spas, antennas, television satellite reception equipment, utility lines or any other structure of any kind. Improvement projects are subject to Design review and approval pursuant to Article V, below.

Section 1.24. "Lot" means any parcel of real property designated by a number on the Subdivision Map for any portion of the Properties, excluding the Common Elements. When appropriate within the context of this Declaration, the term "Lot" shall also include the Residence and other Improvements constructed or to be constructed on a Lot.

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Section 1.25. "Maintenance Agreement" means that certain Agreement between the Declarant, the Community Association and the City of Sparks which agreement sets forth the rights and obligations of the Association and the City with respect to the maintenance, repair and eventual replacement of certain landscaping, street lighting, drainage and hiking trail improvements located on public lands within D'Andrea that are more particularly identified in the Maintenance Agreement. The Maintenance Agreement, as in effect on the recordation date of this Declaration is attached hereto as "Exhibit "E" and incorporated herein by reference.

Section 1.26. "Majority of a Quorum" means the vote of a majority of the votes cast at a meeting or by written ballot when the number of Members attending the meeting in person or by proxy or the number of Members casting written ballots equals or exceeds the quorum requirement for Member action, as specified by the Bylaws or otherwise by statute.

Section 1.27. "Member" means every person or entity who holds a membership in the Association and whose rights as a Member are not suspended pursuant to Section 13.06, below.

Section 1.28. "Mortgage" means any security device encumbering all or any portion of the Properties, including any deed of trust. "Mortgagee" shall refer to a beneficiary under a deed of trust as well as to a mortgagee in the conventional sense.

Section 1.29. "Overall Development" means the property described in attached Exhibit "A".

Section 1.30. "Owner" means any person, firm, corporation or other entity which owns a fee simple interest in any Lot, except that if a Lot is transferred or conveyed to a trust, the Owner is the trustee or the co-trustees of such trust. The term "Owner" shall include the Declarant for so long as the Declarant possesses any Lot within the Properties, and, except where the context otherwise requires, the family, guests, tenants and invitees of an Owner.

Section 1.31. "Permitted Health Care Resident" means a person hired to provide live-in, long-term, or terminal health care to a Qualifying Resident. This term shall only be relevant to Phases of development that are subjected to Article XVIII, below, by the express terms of a Supplemental Declaration.

Section 1.32. "Phase" means any Lots and/or Common Elements which are simultaneously made subject to the provisions of this Declaration either by recording this Declaration or by recording a Declaration of Annexation in accordance with Article XV, below.

Section 1.33. "Properties" means all parcels of real property (Common Elements and Lots) described in Exhibit B", together with all buildings, structures, utilities, Common Facilities, and other Improvements now located or hereafter constructed or installed thereon, all appurtenances thereto. The term "Properties" shall also include any portion of the Annexable Property that is hereafter annexed to the real property described in Exhibit "B" and made subject to this Declaration pursuant to Article XV, below.

Section 1.34. "Qualified Permanent Resident" means a person who meets all of the following requirements:

(a) was residing with the Qualifying Resident prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the Qualifying Resident;

(b) was forty-five (45) years of age or older, or was a spouse, co-habitant (co-habitants being defined by statute as two persons who live together as husband and wife), or person providing primary physical or economic support to the Qualifying Resident; and

(c) has an ownership interest in, or is in expectation of an ownership interest in, the Residence. This term shall only be relevant to Phases of development that are subjected to Article XVIII, below, by the express terms of a Supplemental Declaration.

Section 1.35. "Qualifying Resident" means a person fifty-five (55) years of age or older. This term shall only be relevant to Phases of development that are subjected to Article XVIII by the express terms of a Supplemental Declaration.

Section 1.36. "Regular Assessment" means an Assessment levied against an Owner and his or her Lot in accordance with Section 4.02, below.

Section 1.37. "Residence" means a private, single-family dwelling constructed or to be constructed on any Lot.

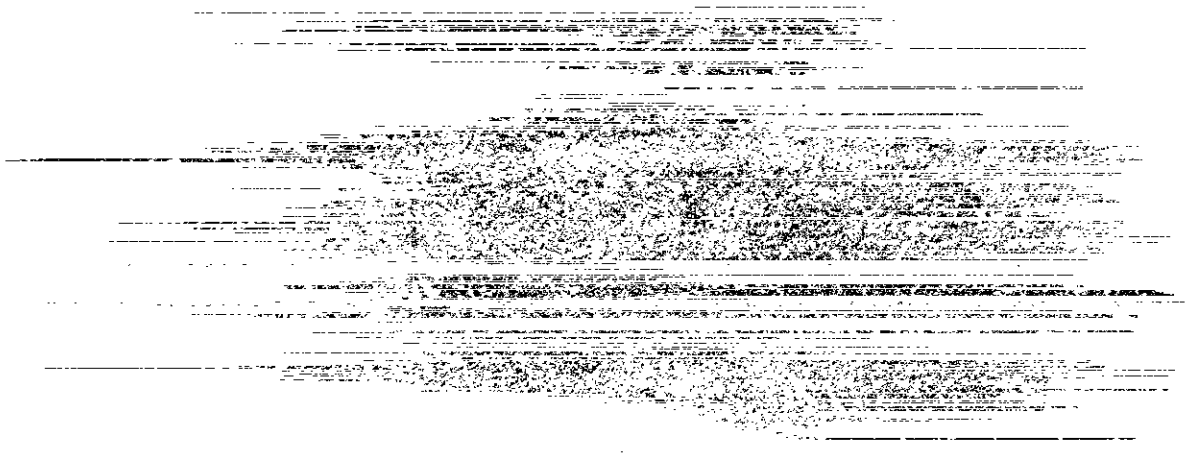
Section 1.38. "Single Family Residential Use" means occupation and use of a Residence for single family dwelling purposes in conformity with this Declaration and the requirements imposed by applicable zoning or other applicable laws or governmental regulations limiting the number of persons who may occupy single family residential dwellings.

Section 1.39. "Special Assessment" means an Assessment levied against an Owner and his or her Lot in accordance with Section 4.03, below.

Section 1.40. "Special Individual Assessment" means an Assessment levied against an Owner and his or her Lot in accordance with Section 4.04, below.

Section 1.41. "Sub-Association" means any incorporated or unincorporated association organized to own and maintain Common Elements or residence exteriors within a Phase developed as a condominium project or a cluster home or townhome planned development. Sub-Associations may be authorized and established pursuant to a Supplemental Declaration recorded in connection with the annexation of Subsequent Phase Property.

Section 1.42. "Subdivision Map" means the map or plat for any portion of the Properties.



preceding paragraph; or (ii) earlier commencement is necessary to preserve the quiet enjoyment of other residents or to prevent further damage to, or destruction of, the Properties or any portion thereof.

The notice and hearing procedures set forth in this Section 13.06, above, shall not apply to any actions by the Association or its duly authorized agents to collect delinquent assessments. Assessment collections shall be subject to Section 5.11, above, and any other notice, hearing and/or dispute resolution requirements or procedures as may be specifically applicable by law to Association assessment collection.

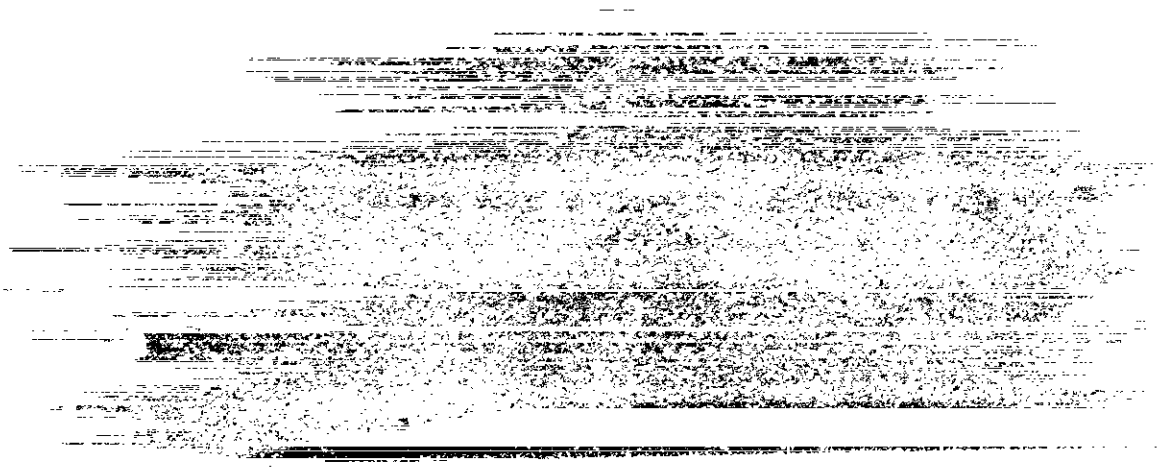
(e) Notices. Any notice required by this Article shall, at a minimum, set forth the date and time for the hearing, a brief description of the action or inaction constituting the alleged violation of the Governing Documents and a reference to the specific Governing Document provision alleged to have been violated. The notice shall be in writing and may be given by any method reasonably calculated to give actual notice; provided, however, that if notice is given by mail it shall be sent by first-class or certified mail sent to the last address of the Member shown on the records of the Association.

(f) Rules Regarding Disciplinary Proceedings. The Board, or an appropriate committee appointed by the Board to conduct and administer disciplinary hearings and related proceedings, shall be entitled to adopt rules that further elaborate and refine the procedures for conducting disciplinary proceedings. Such rules, when approved and adopted by the Board, shall become a part of the Association Rules.

Section 13.07. Court Actions. Court actions to enforce the Governing Documents may only be initiated on behalf of the Association by resolution of the Board.

ARTICLE XIV
Protection of Mortgagees

Section 14.01. Assessment Lien Subordinated. Any lien created or claimed under the provisions of Section 4.10, above, shall be subject and subordinate to the lien of any first Mortgage given in good faith and for value. No such Mortgagee who acquires title to any Lot by judicial foreclosure or by exercise of power of sale contained in the Mortgage shall be obligated to cure any breach of this Declaration by a former Owner of such Lot or shall be liable for any unpaid Assessments made against the Lot which accrued prior to the date the Mortgagee acquired such title. No lien created or claimed under the



provisions of Section 4.10, above, shall in any way defeat, invalidate or impair the rights of any Mortgagee under any such recorded Mortgage.

Section 14.02. Amendment of This Declaration. Except where an amendment has been approved in accordance with Section 14.12, below, no amendment of this Declaration shall affect any of the rights of the holder of any Mortgage described in Section 15.01, above, which is made in good faith and for value, if such Mortgage is recorded and notice of the delivery and recording thereof is given to the Association prior to the recording of such amendment.

Section 14.03. Default by Owner; Mortgagee's Right to Vote. In the event of a default by any Owner under a Mortgage encumbering such Owner's Lot, the Mortgagee under such Mortgage shall, upon: (a) giving written notice to the defaulting Owner; (b) recording a Notice of Default in accordance with Nevada law; and (c) delivering a copy of such recorded Notice of Default to the Association, have the right to exercise the vote of the Owner at any regular or special meeting of the Association held only during such period as such default continues.

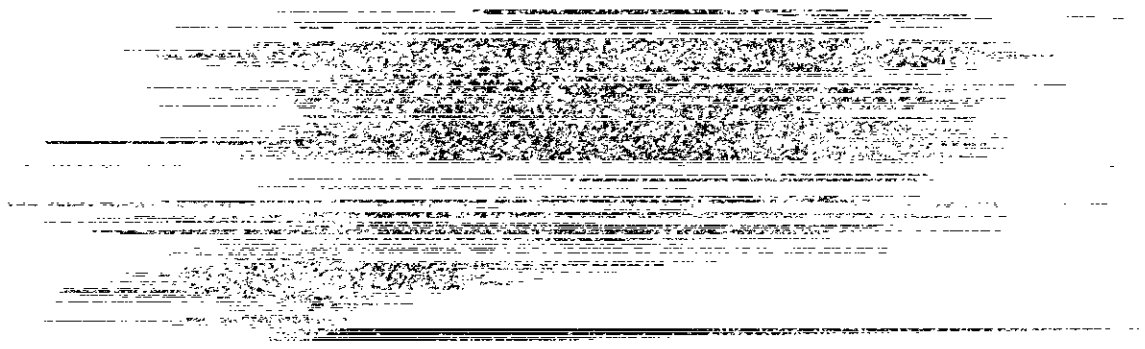
Section 14.04. Breach; Obligation After Foreclosure. No breach of any provision of this Declaration by Declarant, the Association or any Owner shall impair or invalidate the lien of any recorded Mortgage made in good faith and for value and encumbering any Lot. The Declarant, the Association or their successor and assigns shall be obligated to abide by all of the covenants, conditions, restrictions, limitations, reservations, grants of easements, rights, rights-of-way, liens, charges and equitable servitudes provided for in this Declaration as it may be amended from time to time with respect to any person who acquires title to or any beneficial interest in any Lot through foreclosure, trustee's sale or otherwise.

Section 14.05. Exchange of Information. The Association shall, at the written request of any Mortgagee, insurer or guarantor, notify such party of:

(a) Any condemnation or casualty loss that affects either a material portion of the Properties or the Lot(s) security the Mortgage;

(b) Any delinquency of 60 days or more in the payment of Assessments or charges owed by the Owner(s) of the Lot(s) securing the Mortgage;

(c) A lapse, cancellation or material modification of any insurance policy or fidelity bond maintained by the Association; and



Section 14.07. Right of First Mortgagees to Make Certain Payments and Right of Reimbursement Therefor. The holders of first Mortgages on the Lots shall have the right (but not the obligation), jointly or singly: (a) to pay taxes or other Assessments or charges which are in default and which may or have become a lien or charge against the Common Facilities; (b) to pay overdue premiums on casualty insurance policies for the Common Facilities; and (c) to secure and pay for new casualty insurance coverage on the Common Facilities upon the lapse of any such policy, in the amount and against the risks provided for in Section 10.01, above. Any first Mortgagee making such payment shall be entitled to immediate reimbursement therefor from the Association. Upon the request of any first Mortgagee, the Association shall, by separate instrument, signed by the president or any vice president and the secretary, evidence its agreement to the provisions of this section as the same affects the Mortgage held by such Mortgagee.

Section 14.08. Right to Examine Books and Records of the Association. All Mortgagees, insurers and guarantors of any Mortgages on any Lot shall have the right, upon written request to the Association, to:

(a) Examine current copies of the Governing Documents and the Association's books, records and financial statements, during normal business hours;

(b) Require the Association to provide an audited statement for the preceding fiscal year: (i) at no expense to the requesting entity when the Properties consist of 50 or more Lots; and (ii) at the requesting entity's expense when the Properties consist of fewer than 50 Lots and no audited statement is available; and

(c) Receive a written notice of all meetings of the Association and designate a representative to attend all such meetings.

Section 14.09. Notices to First Mortgagees. The Association shall furnish to the holder of any first Mortgage on any Lot or on the Common Elements, upon written request by the first Mortgagee, 30 days prior written notice of: (a) abandonment or termination of the Association; (b) the effective date of any proposed material amendment to the Declaration; (c) the effectuation of any decision by the Association to terminate professional management, if any, and assume self-management of the Properties; (d) any condemnation or eminent domain proceeding; and (e) any extensive damage to or destruction of any Improvements located in or on the Common Elements.

Section 14.10. Superiority of Mortgage to Condemnation Proceeds. If any Lot, or portion thereof, or the Common Elements, or any portion thereof, is made the subject

of any condemnation or eminent domain proceeding, the lien of any first Mortgage shall be prior and superior to the claims of the Owners of said Lots or Common Elements with respect to any distribution of the proceeds of any condemnation award or settlement.

Section 14.11. Superiority of Mortgage to Insurance Proceeds. In the event of any substantial damage to or destruction of the Improvements on any Lot, or on any part of the Common Elements, the lien of any first Mortgage shall be prior and superior to the claims of the Owners of said Improvements with respect to any distribution of any insurance proceeds relating to such damage or destruction.

Section 14.12. Approval of Material Amendments or Termination.

(a) Material Amendments. In addition to the approvals required by Article XIX, below (Amendments), Eligible Mortgagees who represent at least 51 percent of the votes of Lots that are subject to Mortgages held by Eligible Mortgagees must approve any amendment to this Declaration of a material nature. An Eligible Mortgagee is the beneficiary of a first Mortgage who has requested the Association to notify it of any proposed action that requires the consent of a specified percentage of Eligible Mortgagees. A change to any of the following would be considered as material:

(i) voting rights;

(ii) assessments, assessment liens or the priority of assessment liens;

(iii) reserves and responsibility for maintenance, repair and replacement of the Common Elements;

(iv) convertibility of Lots into Common Elements and vice versa;

(v) annexation or deannexation of property to or from the Properties;

(vi) insurance or fidelity bonds;

(vii) leasing of Lots;

(viii) imposition of any restrictions on an Owner's right to sell or transfer his or her Lot;

IN WITNESS WHEREOF, this Agreement has been executed by the parties on the day and year first above written, as authorized by ordinance of the City Council, to be effective on and after the Effective Date hereof. The parties agree, acknowledge and represent that all corporate authorizations have been obtained for the execution of this Agreement and for the compliance with each and every term hereof. Each undersigned officer, representative or employee represents that he or she has the authority to execute this Agreement on behalf of the party for whom he or she is signing.

"Owner"

D'Andrea Nevada LLC.
By: Jonathan A. Cohen, Managing Member

"City"

City of Sparks, Nevada
By: Phil Zive, Vice Mayor

Attest: Deborjie J. Dolan, City C

"Association"

D'Andrea Community Association
By: Jonathan A. Cohen, Declarant

APPROVED AS TO FORM:

City Attorney

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OFFICIAL RECORDS
WASHOE COUNTY NEV.
RECORD REQUESTED BY
WESTERN TITLE COMPANY, INC.

JUN 08 1999

COUNTY RECORDER
FEE 11.00 DEP

CITY OF SPARKS
OFFICE OF THE CITY CLERK

MAY 0 . 1999

CTADD0314

124-22-310-001 THROUGH 073 124-22-311-001 THROUGH 095
124-22-410-001 THROUGH 005
124-22-411-001 THROUGH 093
124-22-312-001 THROUGH 048
APN: 124-22-313-001 THROUGH 100
124-22-314-001 THROUGH 084

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WHEN RECORDED RETURN TO:

(54)

JAMES, DRIGGS, WALCH, SANTORO,
KEARNEY, JOHNSON & THOMPSON
3773 Howard Hughes Parkway, Suite 290N
Las Vegas, Nevada 89109
Attention: Rodney S. Woodbury, Esq.

DECLARATION
OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR
THE PARKS

This instrument is delivered to the Recorder's office as an accommodation only, for placement of record, and has not been examined as to its effect.

TABLE OF CONTENTS

DECLARATION
OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR
THE PARKS

THIS DECLARATION (the "Declaration") is made this 15th day of August, 2000, by Centex Homes of Nevada, a Nevada general partnership (the "Declarant").

I.

Recitals

1.01 Real Property. Declarant is the owner of certain real property located entirely in Clark County, Nevada, more particularly described in Exhibit "A" attached hereto (the "Property"). The Property shall include any additional real property that may from time to time be annexed to the property.

1.02 Planned Community. Declarant desires to develop the Property and, if Declarant so elects, the adjacent land described in Section 2.02 (the "Annexable Area") as a residential community and to establish covenants, conditions, and restrictions relating to the use, enjoyment, maintenance, improvement, and occupancy of the Property. The residential community shall be developed as a planned community under a general plan of development pursuant to NRS Chapter 116 and shall be named The Parks (the "Development"). If the entire Annexable Area is annexed as provided herein, the planned community will consist of up to a maximum of four hundred fifty-five (455) Lots (as hereinafter defined).

1.03 Owners Association. Declarant desires to establish The Parks Homeowners Association, a Nevada nonprofit corporation (the "Association"), for the purpose of maintaining and administering the Common Areas (as hereinafter defined) of the Property, administering and enforcing these covenants, conditions, and restrictions, and collecting and disbursing funds pursuant to Assessments and charges established by these covenants, conditions, and restrictions. Each Lot shall have appurtenant to it a membership in the Association.

1.04 The Development. Declarant contemplates developing the Property, constructing the Development, and conveying the Association Property (as hereinafter defined) to the Association in a planned multi-phase development. Although Declarant contemplates completing all phases of the Development and subjecting the Annexable Area to this Declaration, there is no guarantee that any or all of the phases of the Development or that any or all of the Annexable Area will be developed by Declarant.

1.05 Covenants Running With Land. This Declaration shall run with the Property and all parts and parcels thereof and shall be binding on all parties having any right, title, or interest in the Property and their heirs, successors, successors-in-title, and assigns and on the Association and all of its successors in interest and shall inure to the benefit of each owner or member thereof. Each of the limitations, easements, uses, obligations, covenants, conditions, and restrictions imposed hereby shall be deemed to be and construed as equitable servitudes enforceable by any of the owners of any

portion of the Property subject to this Declaration against any other owner, tenant, or occupant of the Property or portion thereof similarly restricted by this Declaration.

1.06 Declaration. Declarant hereby declares that all of the Property shall be held, sold, conveyed, hypothecated, encumbered, leased, rented, used, occupied, and improved subject to the following easements, restrictions, covenants, and conditions, which are for the purpose of protecting the value and desirability of the Property.

II.

Definitions

In addition to the terms elsewhere defined herein, the following terms shall have the following meanings whenever used in this Declaration.

2.01 "Act" shall mean the Nevada Common Interest Ownership Act, NRS 116.1101 et seq.

2.02 "Annexable Area" shall mean the real property described in Exhibit "B" hereto.

2.03 "Architecture Committee" shall mean the committee created by Article VII of this Declaration.

2.04 "Articles" shall mean the articles of incorporation of the Association as may be amended from time to time.

2.05 "Assessment" shall mean those Assessments set forth in Article V of this Declaration.

2.06 "Association" shall mean The Parks Homeowners Association, a Nevada nonprofit corporation, and its successors and assigns.

2.07 "Association Property" shall mean all property, real and personal, owned or leased by the Association.

2.08 "Board" shall mean the Board of Directors of the Association.

2.09 "Bylaws" shall mean the Bylaws of the Association as may be amended from time to time.

2.10 "Common Area" shall mean all real property (including the improvements thereto) designated as common elements on the Site Development Plan (as hereinafter defined) or any subsequent subdivision or parcel map of the Property, that is now or hereafter conveyed by Declarant to the Association, including private streets, sewer and water lines, easements, park areas, and other such property.

2.11 "Declarant" shall mean Centex Homes of Nevada, a Nevada general partnership, and its successors and assigns.

2.12 "Design Guidelines" shall mean the guidelines adopted by the Architecture Committee as set forth in Article VII.

2.13 "Development" shall mean the residential community referred to as The Parks being developed by Declarant as a planned community pursuant to NRS Chapter 116.

2.14 "Eligible Holder" shall mean the Persons (as hereinafter defined) described in Article VIII of this Declaration.

2.15 "Improvement" shall mean the buildings, structures, improvements, roadways, parking areas, lighting fixtures, fences, walls, hedges, plantings, planted trees and shrubs, swimming pools, patios, decks, outbuildings, athletic facilities, and all other structures or landscaping of every type and kind upon the Property.

2.16 "Lessee" shall mean any Person who rents, leases, or subleases any Lot from an Owner (as hereinafter defined) or a Person in privity with an Owner.

2.17 "Lot" shall mean each of the lots, with the exception of the Common Area, shown on the Site Development Plan or any subsequent subdivision or parcel map of the Property, and all Improvements erected, constructed, or located thereon.

2.18 "Member" shall mean each of those Owners who are members of the Association.

2.19 "Mortgage" shall mean a mortgage or deed of trust that encumbers any Lot.

2.20 "NRS" shall mean the Nevada Revised Statutes.

2.21 "Owner" shall mean the record owner, whether one or more persons or entities, of a fee simple title to any Lot, including contract sellers but excluding those having such interest merely as security for the performance of an obligation.

2.22 "Party Walls" shall mean those walls, other than Perimeter Walls (as hereinafter defined), located anywhere on the Development that form Lot boundaries.

2.23 "Perimeter Walls" shall mean those walls all or a part of which are located on Association Property or separate a Lot from Association Property.

2.24 "Person" shall mean a person, partnership, corporation, trustee, or other legal entity.

2.25 "Property" shall mean that real property located entirely in Clark County, Nevada, more particularly described in Exhibit "A" attached hereto. The Property shall include any additional real property that may from time to time be annexed to the property.

2.26 "Record, "Recording," or Recorded" shall mean to file, the filing, or filed of record a legal instrument in the Office of the Recorder of Clark County, Nevada, or such other place as may be designated as the official location for recording deeds, plats, and similar documents affecting title to real property in Clark

2.27 "Residence" shall mean and refer to any dwelling constructed on a Lot in accordance with all local, state, and federal laws and this Declaration.

2.28 "Rules and Regulations" shall mean the rules and regulations adopted by the Board pursuant to Section 4.10 of this Declaration.

2.29 "Site Development Plan" shall mean the general plot plan of the Development attached hereto as Exhibit "C"

2.30 "Subdivision Map" shall mean the map or plat of the Development Recorded or to be Recorded in the Office of the Recorder of Clark County, Nevada

III.

Property and Property Rights

3.01 Description of the Property. The Property shall consist of the Lots and the Common Area

3.02 No Representations or Warranties. No representations or warranties of any kind, express or implied, other than the standard warranty required by VA and FHA, have been given or made by Declarant or its agents or employees in connection with the Property or any portion thereof, or any Improvement thereon, its physical condition, zoning, compliance with applicable laws, or fitness for intended use, or in connection with the subdivision, sale, operation, maintenance, cost of maintenance, taxes, or regulation thereof as a common-interest community, except as specifically and expressly set forth in this Declaration and except as may be filed by Declarant from time to time with any governmental authority. To the extent permitted by law, the Association, each and every Owner, and their successors and assigns hereby waive, and Declarant hereby expressly disclaims, any and all implied warranties created by NRS 116.4114 and other applicable laws, including, without limitation, any implied warranty of quality, merchantability, fitness for a particular purpose, habitability, and workmanship. By virtue of obtaining its ownership interest in the Property or any portion thereof, the Association and each and every Owner hereby covenant and agree that the period for commencing any action against Declarant for breach of any obligations or warranties arising under NRS 116.4113 or 116.4114 shall be two (2) years after the cause of action accrues.

3.03 Lots.

(a) Reciprocal Easements. Each Lot and its Owner shall have an easement and the same is hereby granted by the Declarant over all adjoining parcels for the purpose of accommodating any encroachment due to engineering errors, errors in original construction, settlement or shifting

the special Assessment and the date or dates of payment of the same. No payment shall be due fewer than fifteen (15) days after the written notice has been given. Failure of the Association to give notice of the special Assessment shall not affect the liability of the Owner of any Lot, but the date when payment shall become due in such a case shall be deferred to a date fifteen (15) days after the notice shall have been given.

5.06 Collection of Assessments. Regular Assessments shall commence no later than sixty (60) days following the close of the first sale of a Lot by Declarant to an Owner other than Declarant. Both regular and special Assessments must be fixed at a uniform rate for all Lots and shall be billed and collected on a monthly basis or at such frequency as the Board shall determine in its discretion.

5.07 Unpaid Assessments. The amount of any delinquent Assessment, whether regular or special, assessed against any Lot, a late payment charge of five percent (5%) of the delinquent Assessment, plus interest on such Assessment and late payment charge at a rate not to exceed eighteen percent (18%) per annum simple interest, and the costs of collecting such Assessment, late payment charge, and interest, including reasonable attorneys' fees, shall be a lien upon the Lot assessed until paid. Such lien shall be prior to any declaration of homestead, and except as provided in Section 5.08 hereof, such lien shall survive and not be affected by the conveyance of the Lot subject to the delinquent Assessment to a third-party purchaser. Such lien shall be created in accordance with NRS § 116.3116 and shall be foreclosed in the manner provided for in NRS § 116.31162-116.31168 as is now or hereafter may be in effect. A certificate executed and acknowledged by any two (2) members of the Board stating the indebtedness secured by such lien shall be conclusive upon the Association as to the amount of such indebtedness as of the date of the certificate in favor of all Persons who rely thereon in good faith, and such certificate shall be furnished to any Owner upon request at a reasonable fee not to exceed Ten Dollars ($10.00). In addition to foreclosure of the Assessment lien, the Association may, but is not obligated to, bring an action to recover judgment against the Member personally obligated to pay the delinquent regular or special Assessment after having provided to that Member thirty (30) days' written notice of the delinquency. The Board may suspend the voting rights in the Association and right to use any of the recreational facilities of the Common Area of any Owner during any period any Assessment due from such Owner is unpaid. In the event an Assessment is past due more than fifteen (15) days, the Board may declare immediately due and payable the total amount assessed against the Owner and the Lot for that fiscal year. The Association may not foreclose a lien for the Assessment of a fine for a violation of this Declaration, the Bylaws, or the Rules and Regulations, unless the violation is of a type that threatens the health, safety, or welfare of the residents of the Development.

5.08 Mortgage Protection. Notwithstanding any other provision of this Declaration, no lien created under this Article V or under any other Article of this Declaration, nor any lien arising by reason of any breach of this Declaration, nor the enforcement of any provision of this Declaration, shall defeat or render invalid the rights of the beneficiary under any Recorded Mortgage of first and senior priority now or hereafter upon a Lot, made in good faith and for value, perfected before the date on which the Assessment sought to be enforced became delinquent. However, after the foreclosure of any such first Mortgage, such Lot shall remain subject to this Declaration and shall be liable for all regular Assessments and all special Assessments levied subsequent to the date six (6) months prior to the institution of an action to foreclose on any such first Mortgage.

5.09 Effect of Amendments on Mortgages. Notwithstanding the provisions of Section 10.04 hereof, no amendment of Section 5.08 of this Declaration shall affect the rights of any beneficiary whose Mortgage has senior priority as provided in Section 5.08 and who does not join in the execution thereof, provided that its Mortgage is Recorded in the real property records of Clark County, Nevada, prior to the Recordation of such amendment; provided, however, that after foreclosure or conveyance in lieu of foreclosure, the property that was subject to such Mortgage shall be subject to such amendment.

5.10 Annual Assessments Paid By Declarant. Declarant shall pay all Assessments on all Lots owned by Declarant that not on any Lots in any Annexable Area until both of the following shall occur: (a) such Annexable Area is actually annexed to and becomes a part of the Property, and (b) the first day of the month following the close of the first sale by Developer to an Owner other than Developer of a Lot within that particular portion of the Annexable Area); including those Lots owned by Declarant that have not been sold to Owners other than Declarant; provided, however, that Declarant may receive as a credit the costs or value of any maintenance or repair performed by Declarant on the Association Property.

VI.

Permitted Uses and Restrictions

In addition to all of the covenants contained herein, the use of the Property and each Lot therein is subject to the following:

6.01 Improvements and Use. Except as expressly provided herein, the Lots shall be used exclusively for single-family residential purposes. Timesharing is prohibited. No mobile home may be placed or located on any Lot.

6.02 Animals. No animals of any kind shall be raised, bred, or kept on any Lot, except that a reasonable number of dogs, cats, or other household pets may be kept on a Lot provided that they are not kept, bred, or maintained for any commercial purpose nor in violation of any applicable local ordinance or any other provision of this Declaration. A "reasonable number" shall ordinarily mean three (3) or fewer pets per Lot. If an animal is not confined within the Residence, the animal must be leashed and under direct control of the Owner or Lessee. It shall be the absolute duty and responsibility of each Owner or Lessee to remove any solid animal waste after such animals have used any portion of the Property or any public property in the vicinity of the Property. No pet shall be permitted to be kept within any portion of the Property if it makes excessive noise or is otherwise determined by the Board to be a nuisance. If a pet is determined to be a nuisance, the Board may give notice to the Owner or Lessee to resolve the offending problem within seventy-two (72) hours, and if the problem is not resolved during that period of time, order the removal of the pet.

6.03 Commercial or Other Non-Residential Uses. No commercial, professional, industrial institutional, or other non-residential use (including residential day care facilities) shall be conducted on any Lot without the written approval of the Board, except such temporary uses as shall be permitted by Declarant while the Development is being constructed and Lots are being sold by Declarant. Any owner wishing to conduct any commercial, institutional or other non-residential uses on any Lot shall first apply to the Board for approval of such use and shall provide to the Board any information deemed

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:

NEVADA TITLE COMPANY

08-18-2000 14:55 DED 54
OFFICIAL RECORDS
BOOK: 20000818 INST: 01058

FEE: 60.00 RPTT: .00

CTADD0326

APN # 124-34-101-016

RECORDING REQUESTED BY:

NORTH AMERICAN TITLE COMPANY

WHEN RECORDED, MAIL TO:

KIMBALL HILL HOMES NEVADA INC.
8 SUNSET WAY, SUITE 101
HENDERSON, NV 89014
ATTN: MR. STAN GUTSHALL

20040512-0002413
Fee: $90.00
05/12/2004 10:00:28 T20040019696
Req: NORTH AMERICAN TITLE COMPANY
Frances Deane
Clark County Recorder Pgs: 85

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

AND RESERVATION OF EASEMENTS

FOR

HARTRIDGE

4/27/04

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DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

AND RESERVATION OF EASEMENTS

FOR

HARTRIDGE

CTADD0331

C. Declarant hereby declares that all the Property included within Phase One (1) is to be held, conveyed, hypothecated encumbered, leased, rented, used, occupied and improved subject to the limitations, restrictions, reservations, rights, easements, conditions and covenants contained in this Declaration, all of which are declared and agreed to be in furtherance of a plan for the protection, subdivision, maintenance, improvement and sale of the Property for the purpose of enhancing the value, desirability and attractiveness of the Property. All provisions of this Declaration, including without limitation the easements, uses, obligations, covenants, conditions and restrictions hereof, are hereby imposed as equitable servitudes upon the Property. All of the limitations, restrictions, reservations, rights, easements, conditions and covenants herein shall run with and burden the Property and shall be binding on and for the benefit of all of the Property and all Persons having or acquiring any right, title or interest in the Property, or any part thereof, and their successive owners and assigns.

ARTICLE I

1. Definitions.

Unless otherwise expressly provided, the following words and phrases when used herein shall have the following specified meanings.

1.1 Architectural Committee or Committee.

Architectural Committee or Committee shall mean the Architectural and Landscaping Committee provided for in this Declaration.

1.2. Association.

Association shall mean "HARTRIDGE HOMEOWNERS ASSOCIATION" Inc., a Nevada nonprofit corporation, its successors and assigns.

1.3. Association Property.
Association Property shall mean all of the real and personal property and Improvements to which the Association shall hold fee title for the common use and enjoyment of the Members as provided herein. The Association Property in the planned development shall include:

CL "A" "HARTRIDGE AVENUE" (COMMON LOT, PRIVATE STREET, PUBLIC UTILITY EASEMENT TO BE PRIVATELY MAINTAINED BY THE HOA); CL "A" "INDIAN ROSE STREET" (COMMON LOT, PRIVATE STREET, PUBLIC UTILITY EASEMENT TO BE PRIVATELY MAINTAINED BY THE HOA); CL "A" "COLORFUL RAIN AVENUE" (COMMON LOT, PRIVATE STREET, PUBLIC UTILITY EASEMENT TO BE PRIVATELY MAINTAINED BY THE HOA) AND COMMON LOT CL "C" OF FINAL PLAT OF HARTRIDGE UNIT 1 (A COMMON INTEREST COMMUNITY) AS SHOWN BY MAP THEREOF ON FILE IN BOOK 111 OF PLATS, PAGE 95 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

1.4. Beneficiary.
Beneficiary shall mean a Mortgagee under a Mortgage or a Beneficiary under a Deed of Trust, as the case may be, and the assignees of such Mortgagee or Beneficiary.

1.5. Board or Board of Directors.
Board or Board of Directors shall mean the Board of Directors of the HARTRIDGE HOMEOWNERS ASSOCIATION.

1.6. Bylaws.
Bylaws shall mean the Bylaws of the HARTRIDGE HOMEOWNERS ASSOCIATION as adopted by the Board, as such Bylaws may be amended from time to time.

1.7. City.
City shall mean and refer to the City of North Las Vegas, Nevada, and its various departments, divisions, employees and representatives.

1.8. Close of Escrow.
Close of Escrow shall mean the date on which a deed is Recorded conveying a Lot.

1.9. Common Expenses.
Common Expenses shall mean those expenses for which the Association is responsible under the Declaration, including the actual and estimated costs of: maintenance, management, operation, repair and replacement of the Association Property, unpaid Common Residential Assessments, Supplemental Assessments and Capital Improvement Assessments; costs of management and administration of the Association including, but not limited to, compensation paid by the Association to managers, accountants, attorneys and other employees; the costs of all gardening, security, and other services benefitting the Association Property; the costs of fire, casualty and liability insurance, workers' compensation insurance, errors and omissions and director, officer and agent liability insurance, worker's compensation insurance, and other insurance covering the Association Property, and the directors, officers and agents of the Association; the costs of bonding of the members of the Board, taxes paid by the Association, including any blanket tax assessed against the Association Property; amounts paid by the Association for discharge of any lien or encumbrance levied against the Property, or portions thereof; and the costs of any other item or items incurred by the Association, for any reason whatsoever in connection with the Association Property, for the common benefit of the Owners.

1.10. Common Elements.
Common Elements, as defined in Nevada Revised Statutes Section 116.110318, shall mean the Association Property.

1.11. Declarant.
Declarant shall mean KIMBALL HILL HOMES, INC., A NEVADA CORPORATION, its successors, and any Person to which it shall have assigned any of its rights hereunder by an express written assignment.

1.12. Declaration.
Declaration shall mean this instrument, as it may be amended from time to time.

1.13. Deed of Trust.
Deed of Trust shall mean a Mortgage as further defined herein.

1.14. Family.
Family shall mean one or more natural persons related to each other by blood, marriage or adoption, or one or more natural persons not all so related, but who maintain a common household in a Residence.

1.15. FHLMC.
FHLMC shall mean the Federal Home Loan Mortgage Corporation (also known as The Mortgage Corporation) created by Title II of the Emergency Home Finance Act of 1970, and any successors to such corporation.

1.16. Fannie Mae.
Fannie Mae shall mean the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and any successors to such corporation.

1.17. GNMA.
GNMA shall mean the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and any successor to such association.

1.18. Improvements.
"Improvements" for the purpose of the Association Property shall include landscaping, planted trees, shrubs, sprinkler pipes, private streets, and perimeter walls. "Improvements" for the purpose of each Lot shall include all structures and appurtenances thereto of every type and kind.

1.19. Lot.
Lot shall mean any legal subdivision lot or parcel of land shown upon any recorded subdivision map or parcel map of the Project together with the improvements, if any thereon. A Lot shall also mean and refer to a Unit as defined in Nevada Revised Statutes Section 116.11039 and any amendments thereto.

1.20. Member, Membership.
Member shall mean any Person holding a membership in the Association, as provided in this Declaration. Membership shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations contained in the Restrictions.

1.21. Mortgage.
Mortgage shall mean any Recorded mortgage or deed of trust or other conveyance of one or more Lots or other portion of the Property to secure the performance of an obligation, which conveyance will be reconveyed upon the completion of such performance.

1.22. Mortgagee, Mortgagor.
Mortgagee shall mean a Person to whom a Mortgage is made and shall include the Beneficiary of a Deed of Trust. "Mortgagor" shall mean a Person who mortgages his or its property to another (i.e., the maker of a Mortgage), and shall include the Trustor of a Deed of Trust. The term "Trustor" shall be synonymous with the term "Mortgagor" and the term "Beneficiary" shall be synonymous with the term "Mortgagee."

1.23. Notice and Hearing.
Notice and Hearing shall mean written notice and a hearing before the Board, at which the Owner concerned shall have an to be heard in person, or by counsel at the Owner's expense, in the manner further provided in the Bylaws.

1.24. Owner.
Owner shall mean the Person or Persons, including Declarant holding fee simple interest to a Lot. The term "Owner" shall include a seller under an executory contract of sale but shall exclude Mortgagees.

1.25. Person.
Person shall mean a natural individual or any other entity with the legal right to hold title to real property.

1.26. Property or Project.
Property or Project shall mean all of the real property described in Paragraph A of the Preamble to this Declaration. The Property is a "common interest community" as defined in Section 116.110323 of the Nevada Revised Statutes and any amendments thereto.

1.27. Record, File, Recordation.
Record, File, or Recordation shall mean, with respect to any document, the recordation or filing of such document in the Office of the Clark County Recorder.

1.28. Residence.
Residence shall mean a Lot, intended for use by a single Family.

1.29. Restrictions. Restrictions shall mean and refer to this Declaration of Restrictions, the Articles of Incorporation of the Association, the adopted Bylaws of the Association, and the Rules and Regulations of the Association.

10.5. Notice to Owners and Mortgagees.
The Board, upon learning of any taking affecting a material portion of the Property, or any threat thereof, shall promptly notify all Owners and those Beneficiaries, insurers and guarantors of Mortgages on Lots in the Project who have filed a written request for such notice with the Association. The Board, upon learning of any taking affecting a Lot, or any threat thereof, shall promptly notify any Beneficiary, insurer or guarantor of a Mortgage encumbering such Lot who has filed a written request for such notice with the Association.

ARTICLE XI

11. Rights of Mortgagees.
Notwithstanding any other provisions of this Declaration, no amendment or violation of this Declaration shall operate to defeat or render invalid the rights of the Beneficiary under any Deed of Trust upon one (1) or more Lots made in good faith and for value, provided that after the foreclosure of any such Deed of Trust such Lot(s) shall remain subject to this Declaration, as amended. For purposes of this Declaration, "first Mortgage" shall mean a Mortgage with first priority over other Mortgages or Deeds of Trust on a Lot, and "first Mortgagee" shall mean the Beneficiary of a first Mortgage. For purposes of any provision of this Declaration or the other Restrictions which require the vote or approval of a specified percentage of first Mortgagees, such vote or approval shall be determined based upon one (1) vote for each Lot encumbered by each such first Mortgagee. In order to induce FHLMC, GNMA and Fannie Mae to participate in the financing of the sale of Lots within the Project, the following provisions are added hereto (and to the extent these added provisions conflict with any other these provisions of the Restrictions, these added provisions control):

(a) Each Beneficiary, insurer and guarantor of a first Mortgage encumbering one (1) or more Lots, upon filing a written request for notification with the Board, is entitled to written notification from the Association of:

(1) any condemnation or casualty loss which affects either a material portion of the Project or the Lots(s) securing the respective first Mortgage; and

(2) any delinquency of sixty (60) days or more in the performance of any obligation under the Restrictions, including without limitation the payment of assessments or charges owed by the Owner(s) of the Lot(s) securing the respective first Mortgage, which notice each Owner hereby consents to and authorizes; and

(3) a lapse, cancellation, or material modification of any policy of insurance or fidelity bond maintained by the Association; and

(4) any proposed action of the Association which requires consent by a specified percentage of first Mortgagees.

(b) Each Owner, including each first Mortgagee of a Mortgage encumbering any Lot who obtains title to such Lot pursuant to the remedies provided in such Mortgage, or by foreclosure of the Mortgage, or by deed or assignment in lieu of foreclosure, shall be exempt from any "right of first refusal" created or purported to be created by the Restrictions.

(c) Each first Mortgagee of a Mortgage encumbering any Lot which obtains title to such Lot, pursuant to the remedies provided in such Mortgage or by foreclosure of such Mortgage, shall take title to such Lot free and clear of any claims for unpaid assessments or charges against such Lot which accrued prior to the time such Mortgagee acquires title to such Lot in accordance with Section 4.10.

This Declaration is dated April 27, 2004 for identification purposes.

KIMBALL HILL HOMES NEVADA, INC.,
A NEVADA CORPORATION

By: _____
R. Lee Venable

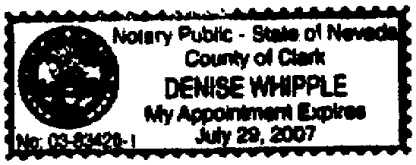
Its: Division President

"Declarant"

4/27/04

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

On this 5th day of May, 2004, personally appeared before me, the undersigned, a Notary Public, **R. Lee Venable** personally known to me to be the person whose name is subscribed to the above instrument, who acknowledged that he executed the instrument.



Denise L. Whipple
Notary Public

20050412-0001131

Fee: $95.00
N/C Fee: $0.00

04/12/2005 09:25:45
T20050065223
Requestor:
NORTH AMERICAN TITLE COMPANY

Frances Deane JKA
Clark County Recorder Pgs: 82

APN # 139-10-510-035 thru 038
040 thru 045
RECORDING ~~REQUESTED~~ BY:

NORTH AMERICAN TITLE COMPANY

WHEN RECORDED, MAIL TO:

U.S. HOME CORPORATION
3016 W. CHARLESTON
SUITE 200
LAS VEGAS, NV 89102
ATTN: MS. SANDEE MACKALL

82

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

AND RESERVATION OF EASEMENTS

FOR

CANYON SPRINGS

4/5/05

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CANYON SPRINGS

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS

AND RESERVATION OF EASEMENTS

FOR

CANYON SPRINGS

THIS DECLARATION is made by U.S. HOME CORPORATION, A DELAWARE CORPORATION ("Declarant").

P R E A M B L E:

A. Declarant is the owner of certain real property, located in the North Las Vegas, Clark County, Nevada, and described as follows:

LOT ONE HUNDRED TWENTY-THREE (123) TO LOT ONE HUNDRED TWENTY-SIX (126), INCLUSIVE, LOT ONE HUNDRED TWENTY-EIGHT (128) TO LOT ONE HUNDRED THIRTY-THREE (133), INCLUSIVE, OF FINAL MAP OF ALEXANDER AND N. FIFTH UNIT 1, A COMMON INTEREST COMMUNITY AS SHOWN BY MAP THEREOF ON FILE IN BOOK 119 OF PLATS, PAGE 10 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA ("Phase One (1)").

B. It is the desire and intention of Declarant to create a "planned community" of detached residences to be developed in multiple phases with an initial maximum of two hundred forty-six (246) Lots in the above described Property, as said quoted term is defined within the Nevada Revised Statutes and to impose mutually beneficial restrictions under a general plan of improvement for the benefit of all of the Lots within the planned community in accordance with the Uniform Common Interest Ownership Act as set forth in the Nevada Revised Statutes Sections 116.1101 et. seq. and any amendments thereto.

C. Declarant hereby declares that all of Phase One (1) as described in Preamble, Paragraph A herein is to be held, conveyed hypothecated, encumbered, leased, rented, used, occupied and improved subject to the limitations, restrictions, reservations, rights, easements, conditions and covenants contained in this Declaration, all of which are declared and agreed to be in furtherance of a plan for the protection, subdivision, maintenance, improvement and sale of the Property for the purpose of enhancing the value, desirability and attractiveness of the Property. All provisions of this Declaration, including without limitation the easements, uses, obligations, covenants, conditions and restrictions hereof, are hereby imposed as equitable servitudes upon the Property. All of the limitations, restrictions, reservations, rights, easements, conditions and covenants herein shall run with and burden the Property and shall be binding on and for the benefit of all of the Property and all Persons having or acquiring any right, title or interest in the Property, or any part thereof, and their successive owners and assigns.

ARTICLE I

1. Definitions.
Unless otherwise expressly provided, the following words and phrases when used herein shall have the following specified meanings.

1.1. Architectural Committee or Committee.
Architectural Committee or Committee shall mean the Architectural and Landscaping Committee provided for in this Declaration.

1.2. Association.
Association shall mean "CANYON SPRINGS HOMEOWNERS ASSOCIATION" Inc., a Nevada nonprofit corporation, its successors and assigns.

1.3. Association Property.
Association Property shall mean all of the real and personal property and Improvements to which the Association shall hold fee title for the common use and enjoyment of the Members as provided herein. There is no Association Property in Phase One (1).

1.4. Beneficiary.
Beneficiary shall mean a Mortgagee under a Mortgage or a Beneficiary under a Deed of Trust, as the case may be, and the assignees of such Mortgagee or Beneficiary.

1.5. Board or Board of Directors.
Board or Board of Directors shall mean the Board of Directors of the CANYON SPRINGS HOMEOWNERS ASSOCIATION.

1.6. Bylaws.
Bylaws shall mean the Bylaws of CANYON SPRINGS HOMEOWNERS ASSOCIATION, as adopted by the Board, as such Bylaws may be amended from time to time.

1.7. City.
City shall mean the City of North Las Vegas, Nevada, and its various departments, divisions, employees and representatives.

1.8. Close of Escrow.
Close of Escrow shall mean the date on which a deed is Recorded conveying a Lot.

1.9. Common Expenses.
Common Expenses shall mean those expenses for which the Association is responsible under the Declaration, including the actual and estimated costs of: maintenance, management, operation, repair and replacement of the Association Property, unpaid Common Residential Assessments, Supplemental Assessments and Capital Improvement Assessments; costs of management and administration of the Association including, but not limited to, compensation paid by the Association to managers, accountants, attorneys and other employees; the costs of all gardening, security, and other services benefitting the Association Property; the costs of fire, casualty and liability insurance, workers' compensation insurance, errors and omissions and director, officer and agent liability insurance, worker's compensation insurance, and other insurance covering the Association Property, and the directors, officers and agents of the Association; the costs of bonding of the members of the Board, taxes paid by the Association, including any blanket tax assessed against the Association Property; amounts paid by the Association for discharge of any lien or encumbrance levied against the Property, or portions thereof; and the costs of any other item or items incurred by the Association, for any reason whatsoever in connection with the Association Property, for the common benefit of the Owners.

1.10. Common Elements.
Common Elements, as defined in Nevada Revised Statutes Section 116.110318, shall mean the Association Property.

1.11. Declarant.
Declarant shall mean U.S. HOME CORPORATION, A NEVADA CORPORATION, its successors, and any Person to which it shall have assigned any of its rights hereunder by an express written assignment.

1.12. Declaration.
Declaration shall mean this instrument, as it may be amended from time to time.

1.13. Deed of Trust.
Deed of Trust shall mean a Mortgage as further defined herein.

1.14. Family.
Family shall mean one or more natural persons related to each other by blood, marriage or adoption, or one or more natural persons not all so related, but who maintain a common household in a Residence.

1.15. FHLMC.
FHLMC shall mean the Federal Home Loan Mortgage Corporation (also known as The Mortgage Corporation) created by Title II of the Emergency Home Finance Act of 1970, and any successors to such corporation.

1.16. Fannie Mae.
Fannie Mae shall mean the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and any successors to such corporation.

1.17. GNMA.
GNMA shall mean the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and any successor to such association.

1.18. Improvements.
"Improvements" for the purpose of the Association Property shall include sprinkler pipes, landscaping, planted trees, shrubs, private streets and street lights, and perimeter walls. "Improvements" for the purpose of each Lot shall include all structures and appurtenances thereto of every type and kind.

1.19. Lot.
Lot shall mean any legal subdivision lot or parcel of land shown upon any recorded subdivision map or parcel map of the Project together with the improvements, if any thereon. A Lot shall also mean and refer to a Unit as defined in Nevada Revised Statutes Section 116.11039 and any amendments thereto.

1.20. Member, Membership.
Member shall mean any Person holding a membership in the Association, as provided in this Declaration. Membership shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations contained in the Restrictions.

1.21. Mortgage.
Mortgage shall mean any Recorded mortgage or deed of trust or other conveyance of one or more Lots or other portion of the Property to secure the performance of an obligation, which conveyance will be reconveyed upon the completion of such performance.

1.22. Mortgagee, Mortgagor.
Mortgagee shall mean a Person to whom a Mortgage is made and shall include the Beneficiary of a Deed of Trust. "Mortgagor" shall mean a Person who mortgages his or its property to another (i.e., the maker of a Mortgage), and shall include the Trustor of a Deed of Trust. The term "Trustor" shall be synonymous with the term "Mortgagor" and the term "Beneficiary" shall be synonymous with the term "Mortgagee."

1.23. Notice and Hearing.
Notice and Hearing shall mean written notice and a hearing before the Board, at which the Owner concerned shall have an to be heard in person, or by counsel at the Owner's expense, in the manner further provided in the Bylaws.

1.24. Owner.
Owner shall mean the Person or Persons, including Declarant holding fee simple interest to a Lot. The term "Owner" shall include a seller under an executory contract of sale but shall exclude Mortgagees.

1.25. Person.
Person shall mean a natural individual or any other entity with the legal right to hold title to real property.

1.26. Property or Project.
Property or Project shall mean all of the real property described in Paragraph A of the Preamble to this Declaration, together with any and all Annexable Property which is subjected to this Declaration by Annexation Amendment pursuant to Sections 16.3 and 16.4 hereof. The Property is a "common interest community" as defined in Section 116.110323 of the Nevada Revised Statutes and any amendments thereto.

1.27. Record, File, Recordation.
Record, File, or Recordation shall mean, with respect to any document, the recordation or filing of such document in the Office of the Clark County Recorder.

1.28. Residence.
Residence shall mean a Lot, intended for use by a single Family.

1.29. Restrictions. Restrictions shall mean and refer to this Declaration of Restrictions, the Articles of Incorporation of the Association, the adopted Bylaws of the Association, and the Rules and Regulations of the Association.

4.7. Delinquency.

Any installment of an assessment provided for in this Declaration shall be delinquent if not paid within fifteen (15) days of the due date as established by the Board of Directors of the Association. The Board shall be authorized to adopt a system pursuant to which any installment of Annual Assessments, Capital Improvement Assessments, Special Assessments, or Reconstruction Assessments not paid within thirty (30) days after the due date, plus all reasonable costs of collection (including attorneys' fees) and late charges as provided herein, shall bear interest commencing thirty (30) days from the due date until paid at the rate of up to eighteen percent (18%) per annum, but in no event more than the maximum rate permitted by law. The Board may also require the delinquent owner to pay a late charge. The Association need not accept any tender of a partial payment of an installment of an assessment and all costs and attorneys' fees attributable thereto, and any acceptance of any such tender shall not be deemed to be a waiver of the Association's right to demand and receive full payments thereafter.

4.8. Creation and Release of Lien.

In accordance with and subject to NRS Section 116.3116, the Association shall have a lien on a Lot for any for any construction penalty that is imposed against the Lot's Owner pursuant to Section 47 of Chapter 116, any assessment levied against that Lot or fines imposed against the Lot Owner, from the time the construction penalty, assessment or fine becomes due. Any penalty, fees, charges, late charges, fines, and interest charged in accordance with paragraphs (j), (k) and (l) of subsection 1 of NRS 116.3102 are enforceable as assessments. 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 lien is prior to all other liens and encumbrances on a lot except: (a) liens and encumbrances recorded before the recordation of this Declaration; (b) a first security interest on the Lot recorded before the date on which the assessment sought to be enforced becomes delinquent; and (c) liens for real estate taxes and other governmental assessments or charges against the Lot. The lien is also prior to the first security interest described herein as (b) to the extent of the assessments for common expenses based on the periodic budget adopted by the Association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to enforce the lien. The language provided for herein

does not affect the priority of mechanic's or materialmen's liens, or the priority of liens for other assessments made by the Association. Recordation of this Declaration constitutes record notice and perfection of the lien provided for herein. No further recordation of any claim of lien for assessment is required. A lien for unpaid assessments is extinguished unless proceeding to enforce the lien are instituted within three (3) years after the full amount of the assessments becomes due.

Notwithstanding the language provided for herein, the Association is not prohibited from actions to recover sums provided for herein nor is prohibited from taking a deed in lieu of foreclosure. A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

The Association, upon written request shall furnish to a Lot Owner a statement setting forth the amount of unpaid assessments against the Lot. If the interest of the Lot Owner is real estate or if a lien for the unpaid assessment's may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within ten (10) business days after receipt of the request, and is binding on the Association, the Board of Directors of the Association and each Owner of a Lot.

4.9. Enforcement of Liens.

It shall be the duty of the Board of Directors to enforce the collection of any amounts due under this Declaration by one or more of the alternative means of relief afforded by this Declaration. The lien on a Lot enforced by sale of the Lot conducted by the Association, the Association attorneys, any title insurance company authorized to do business in Nevada, or other persons authorized by the Association to conduct the sale as a trustee, after failure of the Owner to pay any Annual, Capital Improvement or Reconstruction Assessment, or installment thereof, as provided herein. The sale shall be conducted in accordance with the provisions of the Nevada Revised Statutes, applicable to the exercise of powers of sale in mortgages and deeds of trust or in any manner permitted by law. An action may be brought to foreclose the lien of the association by the Board, or by any Owner if the Board fails or refuses to act, after the expiration of at least thirty (30) days from the date on which the Notice of Lien was Recorded; provided that at least ten (10) days have expired since a copy of the Notice of Lien was mailed to the Owner affected thereby. The Association, through its agents, shall have the power to bid on the Lot at the foreclosure sale, and to acquire and hold, lease, mortgage and convey the same.

Upon completion of the foreclosure sale, an action may be brought by the Association or the purchaser at the sale in order to secure occupancy of the defaulting Owner's Unit, and the defaulting Owner shall be required to pay the reasonable rental value for such Unit during any period of continued occupancy by the defaulting Owner or any persons claiming under the defaulting Owner. Suit to recover a money judgment for unpaid assessments shall be maintainable without foreclosing or waiving any lien securing the same, but this provision or any institution of suit to recover a money judgment shall not constitute an affirmation of the adequacy of money damages. Any recovery resulting from a suit in law or in equity initiated pursuant to this Section may include reasonable attorneys' fees as fixed by the court.

4.10. Priority of Assessment Lien.
Subject to the priorities established by NRS 116.3116 Lien for Assessments., the lien of the assessments provided for herein, including interest and costs (including attorneys' fees), shall be subordinate to the lien of any previously Recorded first Mortgage upon one or more Lots. Sale or transfer of any Lot shall not affect the assessment lien. However, the sale or transfer of any Lot pursuant to judicial or nonjudicial foreclosure of a first Mortgage shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liens for any assessments thereafter becoming due. When the Beneficiary of a first Mortgage of record or other purchaser of a Lot obtains title pursuant to a judicial or nonjudicial foreclosure of the first Mortgage, such Person, his successors and assigns, shall not be liable for the share of the Common Expenses or assessments by the Association chargeable to such Lot which became due prior to the acquisition of title to such Lot by such Person. Such unpaid share of Common Expenses or assessments shall be deemed to be Common Expenses collectible from all of the Owners of the Lot including such Person, his successors and assigns.

4.11. Capital Contributions to the Association.
Upon acquisition of a Lot from Declarant, each Owner of a Lot in each Phase of the Project subject to this Declaration shall contribute to the capital of the Association an amount equal to one-sixth (1/6th) of the amount of the then Annual Assessment for that Lot as determined by the Board. This amount shall be deposited by the buyer into the purchase and sale escrow and disbursed therefrom to the Association or to Declarant if Declarant has previously advanced such funds to the Association, unless such funds were paid by the Declarant to the Association as an Owner of a Lot.

4.12. Reduction in the Annual Assessment.
In order to maintain the overall financial stability of the Association on a long term basis, the Board of Directors may not, without the approval of fifty-one percent (51%) of the Owners, reduce the annual assessment in excess of five percent (5%) per year.

This Declaration is dated April 5, 2005 for identification purposes.

U.S. HOME CORPORATION,
A DELAWARE CORPORATION

By: _____
Larry Bach

Its: Project Manager

"Declarant"

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

On this 07th day of April, 2005, personally appeared before me, the undersigned, a Notary Public, **Larry Bach** personally known to me to be the person whose name is subscribed to the above instrument, who acknowledged that he executed the instrument.

Notary Public

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
L. H. SALVADOR
Appt. No. 04-92687-1
My Appt. Expires Nov. 2, 2008

EXHIBIT "A"

"ANNEXABLE PROPERTY"

LOT ONE (1) TO LOT FORTY-NINE (49), INCLUSIVE, AND COMMON ELEMENT LOTS "A", "B", "C" AND "D" OF FINAL MAP OF ALEXANDER AND N. FIFTH UNIT 3, A COMMON INTEREST COMMUNITY, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 121 OF PLATS, PAGE 1, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

LOT FIFTY (50) TO LOT EIGHTY-EIGHT (88), INCLUSIVE, AND LOT ONE HUNDRED THIRTY-FOUR (134) TO LOT ONE HUNDRED FORTY-THREE (143), INCLUSIVE, AND COMMON ELEMENT LOTS "A", "B" AND "C" OF FINAL MAP OF ALEXANDER AND N. FIFTH UNIT 2, A COMMON INTEREST COMMUNITY, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 120 OF PLATS, PAGE 100 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

LOT EIGHTY-NINE (89) TO LOT ONE HUNDRED TWENTY-TWO (122), INCLUSIVE, LOT ONE HUNDRED TWENTY-SEVEN (127), LOT ONE HUNDRED FORTY-FOUR (144) TO LOT ONE HUNDRED FIFTY NINE (159), INCLUSIVE, COMMON ELEMENT LOTS "A1", "A" AND "B" OF FINAL MAP OF ALEXANDER AND N. FIFTH UNIT 1, A COMMON INTEREST COMMUNITY AS SHOWN BY MAP ON FILE IN BOOK 119 OF PLATS, PAGE 10 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

MODEL PHASE:

LOT NINETY-TWO (92) TO LOT NINETY-FIVE (95), INCLUSIVE, OF FINAL MAP OF ALEXANDER AND N. FIFTH UNIT 1, A COMMON INTEREST COMMUNITY AS SHOWN BY MAP THEREOF ON FILE IN BOOK 119 OF PLATS, PAGE 10 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

RECORDING REQUESTED BY:

NEVADA TITLE COMPANY

WHEN RECORDED PLEASE
RETURN TO:

JACKSON, DeMARCO
& PECKENPAUGH (FSJ)
~~Post~~ Office Box 19704
Irvine, CA 92623-9704

(Space Above for Recorders Use)

**AMENDED AND RESTATED MASTER
DECLARATION OF COVENANTS, CONDITIONS
AND RESTRICTIONS AND GRANT OF EASEMENTS
FOR
SPRING MOUNTAIN RANCH**

CTADD0362

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FOR
SPRING MOUNTAIN RANCH

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DESCRIPTION **PAGE**

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AMENDED AND RESTATED MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT OF EASEMENTS FOR SPRING MOUNTAIN RANCH

THIS AMENDED AND RESTATED MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT OF EASEMENTS FOR SPRING MOUNTAIN RANCH (***"Declaration"***) is made by SPRING MOUNTAIN RANCH, LLC, a Delaware limited liability company (***"Declarant"***) with reference to the following facts.

A Declarant is the owner of certain real property located in Clark County, Nevada, more particularly described on ***Exhibit "A"*** attached hereto and incorporated herein by reference (***"Initial Property"***). Declarant intends that the Initial Property be developed and improved as a master Planned Community for residential purposes, which will be known as Spring Mountain Ranch

B Declarant has deemed it desirable, for the efficient preservation of the values and amenities in the Community to create a corporation under the laws of the State of Nevada which shall be known as the Spring Mountain Ranch Master Association and which shall be delegated and assigned the powers of, among other things, owning, maintaining and administering the Common Elements for the private use and benefit of its Members and authorized guests and invitees and performing such other acts as shall generally benefit the Community

C Declarant will cause or has caused such corporation, the Members of which shall be the Owners of Lots or Condominiums, to be formed for the purpose of exercising such functions

D The Declarant desires to subject the Initial Property to certain covenants, conditions and restrictions for the benefit of Declarant and any and all future owners of Lots or Condominiums in accordance with a common plan and scheme of improvement and development.

E On November 9, 1997, Declarant Recorded a Master Declaration of Covenants, Conditions and Restrictions and Grant of Easements for Spring Mountain Ranch in Book 170909, Instrument No 01825, Official Records, Clark County, Nevada Recorder (the ***"Original Declaration"***) Additional Property has been annexed to the Property subject to the Declaration pursuant to recorded instruments. The Declarant now desire to amend and restate by this Declaration

NOW, THEREFORE, the Declarant hereby declares, establishes and annexes the following general plan for the protection and benefit of the Community, and for the following protective covenants, conditions and restrictions as covenants and equitable servitudes running with the Community upon each and every ownership interest in the Community under, and pursuant to which each such ownership interest shall hereafter be held, used, occupied, leased, sold, encumbered,

conveyed or transferred. Each and all of the covenants, conditions and restrictions set forth herein are for the purpose of protecting the value and desirability of the Community, and each and every Lot or Condominium, and inure to the benefit of, run with, and shall be binding upon and pass with each and every ownership interest therein and shall inure to the benefit of and apply to and bind the Declarant and any Participating Builders and their respective successors in interest and each Owner and his or her respective successors in interest

ARTICLE I

1 Definitions. Unless otherwise expressly provided, when used in this Declaration, the following words and phrases shall have the meanings hereinafter specified

1.1 Act. Act means Chapter 116 of the Nevada Revised Statutes (the Nevada Common - Interest Ownership Act) as now or hereafter in effect.

1.2 Additional Property. Additional Property means the real property described in ***Exhibit "B"*** attached hereto, all or any portion of which may be made subject to this Declaration from time to time

1.3 Allocated Interests. Allocated interests means the liability for Common Expenses and votes in the Master Association allocated to each Lot or Condominium.

1.4 Apartment Building. Apartment Building means a building constructed on a Multi-Family Residential Lot which contains Apartment Units.

1.5 Apartment Unit. Apartment Unit means a dwelling space for lease or rent only by a Person or Family within a building constructed on a Multi-Family Residential Lot.

1.6 Articles. Articles means the Articles of Incorporation of the Master Association as filed or to be filed in the Office of the Secretary of State of the State of Nevada.

1.7 Assessments. Assessments collectively means Capital Improvement Assessments, Common Assessments and Special Assessments.

1.8 Assessment Unit. Assessment Unit means the arithmetical value allocated to each Owner based upon the number of Single Family Residential Lots, Apartment Units or Condominiums owned by such Owner

1.9 Assessment Year. Assessment Year means the calendar year or such other twelve (12) consecutive calendar month period selected by the Executive Board for the levying, determining and assessing of Common Assessments under this Declaration.

1.10 Authorized Apartment Unit. Authorized Apartment Unit has the meaning given that term in Section 5.2(e).

1.11 Bylaws. Bylaws means the Bylaws of the Master Association which have or will be adopted by the Executive Board, as such Bylaws may be amended from time to time.

1.12 Capital Improvement Assessment. Capital Improvement Assessment means a charge against each Owner and his Lot or Condominium, representing a portion of the costs to the Master Association for installation, construction, or reconstruction of any Improvements on any portion of the Common Elements which the Master Association may from time to time authorize, pursuant to the provisions of this Declaration.

1.13 City. City means the City of Las Vegas, in the County of Clark, State of Nevada, and its various departments, divisions, employees and representatives.

1.14 Close of Escrow. Close of Escrow means the date on which a deed is Recorded conveying a Lot or Condominium to a member of the home buying public.

1.15 Common Assessment. Common Assessment means an annual charge against each Owner and his Lot or Condominium representing each Owner's liability for Common Expenses, as authorized by the Restrictions.

1.16 Common Elements. Common Elements means any real property and Improvements within the Community owned by the Master Association in fee or which the Master Association has the obligation to maintain, repair and replace for the common benefit of all Owners or, in the case of Limited Common Elements, one or more but fewer than all Owners, including but not limited to: Perimeter Walls, multi-purpose recreational trails, parks and related Improvements, entry monuments, private streets, sidewalks and arterial setback landscaping along the private streets and adjoining public streets.

1.17 Common Expenses. Common Expenses means the expenditures made by, or financial liabilities of, the Master Association, together with any allocations to reserves, including actual and estimated costs of: (a) maintaining, managing, operating, repairing and replacing the Common Elements; (b) any unpaid Special Assessments and Capital Improvement Assessments, including those costs not paid by the Owner responsible for payment; (c) managing and administering the Master Association including, but not limited to, compensation paid by the Master Association to managers, accountants, attorneys and other employees; (d) all utilities, gardening, trash pickup and disposal and other services benefiting the Common Elements and the Master Association; (e) fire, casualty and liability insurance, workers' compensation insurance, and other insurance covering the Common Elements or for the benefit of the Master Association; (f) bonding the members of the management body, any professional managing agent or any other Person handling the funds of the Master Association; (g) taxes paid by the Master Association; (h) amounts paid by the Master Association for the discharge of any lien or encumbrances levied against the Common Elements or the Community, or portions thereof; (i) maintaining areas within the public

right-of-way of public streets in the vicinity of the Community as provided in this Declaration; (j) cost of repairing or replacing Common Elements in excess of insurance proceeds and reserves; and (k) any other costs incurred by the Master Association for the common benefit of the Owners.

1.18 Community. Community means the Initial Property (including Lots, Condominiums and Common Elements), together with all or a portion of the Additional Property that may be added to the property subject to this Declaration and the jurisdiction of the Master Association. The Community is located in the City, in Clark County, Nevada.

1.19 Condominium. Condominium means an interest in a portion of real estate within a common-interest community wherein portions of real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions, as defined by NRS 116.110325. The boundaries of each Condominium created by the Declaration are shown on the Plats and Plans as numbered Units, along with their identifying number.

1.20 Cost Center. Cost Center means an area within the Community with Limited Common Elements, the maintenance and use of which are limited to the Owners within that area. A Cost Center may be designated in a Notice of Annexation or Supplemental Declaration, and the expenses of maintaining, replacing and operating the Limited Common Elements within the Cost Center are borne solely or disproportionately by the Owners within the Cost Center. There are no Cost Centers designated in the Initial Property. Cost Centers may be designated in connection with future Phases of Development.

1.21 County. County means the County of Clark, State of Nevada, and its various departments, divisions, employees and representatives.

1.22 Declarant. Declarant means Spring Mountain Ranch, LLC, a Delaware limited liability company, its successors and any Participating Builders and any other Person to whom Declarant expressly assigns any rights hereunder by a Recorded instrument. Any such assignment may include all or only specific rights of the Declarant hereunder and may be subject to such conditions and limitations as Declarant may impose in its sole and absolute discretion.

1.23 Declarant Control Period. Declarant Control Period means the period, described in Section 4.2(b) during which Declarant may unilaterally appoint and remove officers of the Association and members of the Executive Board.

1.24 Declaration. Declaration means this Master Declaration of Covenants, Conditions and Restrictions and Grant of Easements for Spring Mountain Ranch, as it may be amended from time to time.

1.25 Developmental Rights. Developmental Rights means those rights, described in NRS 116.11034, which are reserved by the Declarant under Section 2.4 and Article XII of this

Declaration to create Lots and Condominiums, Common Elements and Limited Common Elements within the Community and the Additional Property

1.26 Dwelling Unit. Dwelling Unit means a building located on a Single Family Residential Lot designed and intended for use and occupancy as a residence by a single Family

1.27 Executive Board. Executive Board means the Board of Directors of the Master Association.

1.28 Family. Family means one or more persons (i) related by blood, marriage or adoption, or (ii) a group of natural persons who are not all related, but who maintain a common household in a Dwelling Unit or Apartment Unit.

1.29 FHA. FHA means the Federal Housing Administration of the United States Department of Housing and Urban Development and any department or agency of the United States government which succeeds to FHA's function of insuring notes secured by Mortgages on residential real estate.

1.30 FHLMC. FHLMC means the Federal Home Loan Mortgage Corporation created by Title II of the Emergency Home Finance Act of 1970, and its successors.

1.31 Fiscal Year. Fiscal Year means the fiscal accounting and reporting period of the Master Association selected by the Board.

1.32 FNMA. FNMA means the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and its successors.

1.33 GNMA. GNMA means the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and its successors.

1.34 Improvements. Improvements means all structures and appurtenances thereto of every type and kind placed in the Community, including buildings, outbuildings, walkways, entry monuments, basketball courts, portable basketball standards, hiking trails, barbecue pits, waterways, sprinkler pipes, garages, swimming pools, jacuzzi spas and other recreational facilities, paint on all surfaces, carports, roads, driveways, parking areas, fences, screening walls, retaining walls, stairs, decks, landscaping, hedges, windbreaks, plantings, planted trees and shrubs, poles or signs, exterior air conditioning and water softener fixtures or equipment.

1.35 Initial Property. Initial Property means the real property described in ***Exhibit "A"*** attached hereto, and which is subject to this Declaration.

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1.36 Land Classification. Land Classification means real property or Improvements within the Community that are designated in this Declaration, a Notice of Annexation or Supplemental Declaration as one of the following classifications: (a) Single Family Residential Area, (b) Multi-Family Residential Area, or (c) Common Elements.

1.37 Limited Common Elements. Limited Common Elements means a portion of the Common Elements designated in this Declaration, a Notice of Annexation or a Supplemental Declaration or by operation of the Act for the exclusive use of one or more but fewer than all of the Lots. There are no Limited Common Elements in the Initial Property.

1.38 Lot. Lot means physical portion or parcel of the Community designated for separate ownership or occupancy, as shown on the Plats and Plans, together with the Improvements thereon, but excepting any Common Elements or Limited Common Elements. The term "Lot" includes a Single Family Residential Lot and a Multi-Family Residential Lot. The identifying number of each Lot is shown on the Plats and Plans for the Community. The boundaries of each Lot created by the Declaration are shown on the Plats and Plans as numbered lots, along with their identifying number.

1.39 Master Association. Master Association means the Spring Mountain Ranch Master Association, a Nevada nonprofit corporation.

1.40 Master Association Maintenance Funds. Master Association Maintenance Funds means the accounts created for Master Association receipts and disbursements pursuant to Article IV hereof.

1.41 Member. Member means every Person holding a Membership in the Master Association, pursuant to Article IV.

1.42 Membership. Membership means a membership in the Master Association pursuant to Article IV.

1.43 Mortgagee. Mortgagee means the holder of a Security Interest, including a mortgagee of a mortgage and a beneficiary of a deed of trust.

1.44 Multi-Family Residential Area. Multi-Family Residential Area means the real property that may be so classified in this Declaration, a Notice of Annexation or a Supplemental Declaration, to be developed with Apartment Units for rent or lease to the public, or with Condominiums for sale or lease to the public.

1.45 Multi-Family Residential Lot. Multi-Family Residential Lot means a Lot located within a Multi-Family Residential Area, upon which Apartment Units or Condominiums may be constructed.

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1.46 Notice of Annexation. Notice of Annexation means an amendment to the Declaration Recorded pursuant to Section 2.5 hereof to annex all or a portion of the Additional Property, submitting the real estate described therein to the Declaration and the jurisdiction of the Master Association.

1.47 Notice of Change of Land Classification. Notice of Change of Land Classification means an amendment to the Declaration Recorded pursuant to Section 2.1 hereof to redesignate the Land Classification of a Lot.

1.48 Owner. Owner means the Person or Persons, including Declarant and any Participating Builder, who owns (a) a fee simple interest to a Lot or Condominium, or (b) a leasehold interest of a Lot or Condominium with an initial term of more than twenty (20) years, including options to renew, excluding those Persons holding title solely as security for the performance of an obligation other than sellers under executory contracts of sale. Declarant or a Participating Builder is the owner of any Lot or Condominium created by this Declaration until that Lot or Condominium is conveyed to another Person.

1.49 Participating Builder. Participating Builder means a Person who acquires a portion of the Community for the purpose of constructing Dwelling Units or Apartment Units and related Improvements on Lots for purposes of sale or lease to the general public, provided, however that the term "Participating Builder" shall not mean or refer to Declarant or its successors.

1.50 Perimeter Walls. Perimeter Walls means certain walls around the perimeter of the Community which the Master Association is responsible for maintaining (structure, cap and exterior surface of wall facing Common Elements only). The Perimeter Walls in the Initial Property are shown on ***Exhibit "C"*** attached hereto.

1.51 Person. Person means a natural individual, a partnership, a limited liability company, a corporation, a government and governmental subdivision or agency or other legal entity which may legally hold title to real property.

1.52 Phase of Development. Phase of Development means each portion of real property designated as such in this Declaration, in a Notice of Annexation or a Supplemental Declaration.

1.53 Planned Community. Planned Community means a common-interest community of the type defined in NRS 116.110368.

1.54 Plats and Plans. Plats and Plans means plats and the plan of development for the Community, as further provided in NRS 116.2109.

1.55 Record, Recorded, Filed and Recordation. Record, Recorded, Filed and Recordation means, with respect to any document, the recordation or filing of such document in the Office of the Clark County, Nevada Recorder.

1.56 Restrictions. Restrictions means this Declaration, the Articles, the Bylaws, any rules and regulations of the Master Association and any Notice of Annexation or Supplemental Declaration.

1.57 Security Interest. Security Interest means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of leases or rents intended as security, pledge of an ownership interest in the Master Association and any other consensual lien or contract for retention of title intended as security for an obligation.

1.58 Single Family Residential Area. Single Family Residential Area means the real property classified as such in this Declaration, a Notice of Annexation or a Supplemental Declaration, to be developed with Dwelling Units for sale or lease to single Families.

1.59 Single Family Residential Lot. Single Family Residential Lot means a Lot located within a Single Family Residential Area upon which a Dwelling Unit may be constructed.

1.60 Special Assessment. Special Assessment means a charge against a particular Owner and his Lot or Condominium directly attributable to or reimbursable by the Owner, to reimburse the Master Association for costs incurred in bringing the Owner and his Lot or Condominium into compliance with the provisions of this Declaration, or a charge levied by the Executive Board as a reasonable fine or penalty for non-compliance with the Restrictions, plus interest and other charges on such Special Assessment as provided for in this Declaration. Special Assessments shall not include any late payment penalties, interest charges, attorneys' fees or other costs incurred by the Master Association in its efforts to collect Common Assessments or Capital Improvement Assessments.

1.61 Special Declarant's Rights. Special Declarant's Rights means those rights described in NRS §§ 116.110385 and reserved by Declarant under Article XII to (1) Complete improvements indicated on Plats And Plans filed with the Declaration. (2) Exercise any Developmental Right. (3) Maintain sales offices, management offices, signs advertising the Community and models. (4) Use easements through the Common Elements for the purpose of making improvements within the Community or within real estate that may be added to the Community; or (5) Appoint or remove an officer of the Master Association or any association or any Executive Board member during any period of Declarant control.

1.62 Sub-Association. Sub-Association means any Nevada non-profit corporation, or unincorporated association, or its successor in interest, the membership of which is composed of Owners of Lots within one or more Phases of Development or other portion of the Community, which is organized and established or authorized pursuant to or in connection with a Supplemental Declaration.

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(f) A stenographic record of the hearing shall be made, provided that the record shall remain confidential except as may be necessary for post-hearing motions and any appeals.

(g) The arbitrator's statement of decision shall contain findings of fact and conclusions of law to the extent applicable; and

(h) The arbitrator shall have the authority to rule on all post-hearing motions in the same manner as a trial judge.

15.2 Limitation on Expenditures for Legal Proceedings. The Master Association may not incur expenses, including without limitation attorneys' or consultants' fees, if the Master Association initiates legal proceedings or is joined as a plaintiff in legal proceedings for recovery of damages of fifty thousand dollars ($50,000) or more unless it has obtained the approval of a majority of the Master Association's voting power (excluding the voting power of any Owner who would be a defendant in such proceedings). Nothing in this Section shall preclude the Master Association from initiating legal proceedings in order to toll any applicable statute of limitation provided, however that the Master Association may not further prosecute such legal proceedings until the requisite Owner approvals have been obtained.

15.3 Limitation on Damages. Each Owner, by acceptance of a deed conveying a Lot or Condominium in the Community, agrees that any damages recoverable against Declarant or a Participating Builder, or their respective contractors or sub-contractors, for "constructional defects" (as defined in NRS 40.615), shall be limited to such damages arising from constructional defects which reduce the stability or safety of an Improvement below acceptable standards or restrict the normal intended use of all or a part of an Improvement. In no event shall an Owner recover any damages solely for variations in the construction of Improvements from any plans or specifications or local building ordinances which do not reduce the stability or safety of an Improvement below acceptable standards or restrict the normal intended use of all or a part of an Improvement.

ARTICLE XVI

16 Rights of Mortgagees. Except as otherwise required in Section 5.10(b), liens created hereunder upon any Lot or Condominium shall be subject and subordinate to, and shall not affect, the rights of a first Mortgagee under any Recorded first Security Interest upon such Lot or Condominium made in good faith and for value, provided that after the foreclosure of any such Security Interest, the amount of all Assessments assessed hereunder to the purchaser at such foreclosure as an Owner after the date of such foreclosure shall become a lien upon such Lot or Condominium. No amendment to this Declaration shall impair the rights of any first Security Interest who does not join in the execution thereof, provided that prior to recordation of such

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amendment its Security Interest is recorded. No breach of this Declaration shall defeat or render invalid the lien of any first Security Interest made in good faith and for value, but this Declaration shall be binding upon and effective against any Owner whose title is derived through foreclosure or trustee's sale or otherwise.

For purposes of any provisions of the Restrictions which require the vote or approval of a specified percentage of first Security Interest(s), such vote or approval is determined based upon one (1) vote for each Lot or Condominium encumbered by each Security Interest. In order to induce VA, FHA, FHLMC, GNMA and FNMA to participate in the financing of the sale of Lots, the following provisions are added hereto (and to the extent these added provisions conflict with any other provisions of the Restrictions, these added provisions control):

(a) Each Mortgagee, insurer and guarantor of a first Security Interest encumbering one or more Lots or Condominiums, upon filing a written request for notification with the Board, is entitled to written notification from the Master Association of:

(1) any condemnation or casualty loss which affects either a material portion of the Community or the Lots or Condominiums securing the Security Interest, and

(2) any delinquency of sixty (60) days or more in the performance of any obligation under the Restrictions, including without limitation the payment of assessments or charges owed by the Owners of Lots or Condominiums securing the respective first Security Interests, which notice each Owner hereby consents to and authorizes; and

(3) a lapse, cancellation, or material modification of any policy of insurance or fidelity bond maintained by the Master Association, and

(4) any proposed action of the Master Association which requires consent by a specified percentage of first Security Interest.

(b) Each Owner, including each first Security Interest(s) of a first Security Interest encumbering any Lot or Condominium which obtains title to such Lot or Condominium pursuant to the remedies provided in such Security Interest, or by foreclosure of such Security Interest, or by deed or assignment in lieu of foreclosure, shall be exempt from any "right of first refusal" created or purported to be created by the Restrictions.

EXHIBIT "C"

DESCRIPTION OF COMMON ELEMENTS
RELATING TO THE INITIAL PROPERTY

20040518-0005837
Fee $116.00
05/18/2004 15:58:53 T20040024488
Req GOOLD PATTERSON ETAL
Frances Deane
Clark County Recorder Pgs 103

APN: ptn of: 161-15-610-001
161-15-611-003 through 161-15-611-006
161-15-611-020 through 161-15-611-024
161-15-611-038 through 161-15-611-044
161-15-712-005 through 161-15-712-018
161-15-712-020, 161-15-712-022
161-15-712-069, 161-15-712-073
161-15-712-112, 161-15-712-118
161-15-712-114 through 161-15-712-115
161-15-712-120 through 161-15-712-124
ptn of: 161-15-810-003

WHEN RECORDED, RETURN TO:

WILBUR M. ROADHOUSE, ESQ.
Goold Patterson Ales Roadhouse & Day
4496 South Pecos Road
Las Vegas, Nevada 89121
(702) 436-2600

(Space Above Line for Recorder's Use Only)

MASTER DECLARATION
OF
COVENANTS, CONDITIONS AND RESTRICTIONS AND RESERVATION OF EASEMENTS

FOR

SUNRISE RIDGE

(a Nevada Master Planned Community)

CLARK COUNTY, NEVADA

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whether or not any reference to these restrictions is contained in the instrument by which such person acquired an interest in the Properties, or any portion thereof.

Section 1.12 Compliance with Applicable Laws. The Association shall comply with all applicable laws, including, but not limited to, applicable laws prohibiting discrimination against any person in the provision of services or facilities in connection with a Dwelling because of a handicap of such person. The provisions of the Governing Documents shall be upheld and enforceable to the maximum extent permissible under applicable law. Subject to the foregoing, in the event of irreconcilable conflict between applicable law and any provision of the Governing Documents, the applicable law shall prevail and the affected provision of the Governing Document shall be deemed amended (or deleted) to the minimum extent necessary to remove such irreconcilable conflict. In no event shall the Association adhere to or enforce any provision of the Governing Documents which irreconcilably contravenes applicable law.

ARTICLE 2
DEFINITIONS AND CONCEPTS

Capitalized terms shall be defined as set forth below. Other capitalized terms used in the Governing Documents shall generally be given their natural, commonly accepted definitions, unless otherwise defined in NRS Chapter 116 within an appropriate context.

Section 2.1 "Act": Chapter 116 of Nevada Revised Statutes, as may be amended from time to time.

Section 2.2 "Area of Common Responsibility": The Common Elements, together with such other areas, if any, for which the Association has or assumes responsibility pursuant to the terms of this Declaration, any Supplemental Declaration, or other applicable covenants, contracts, or agreements (including, but not necessarily limited to, overflow area and public and private drainage easements and Improvements related to the Trail System and Park or otherwise as shown on the Plat, and certain wetlands, including but not limited to wetland mitigation (re)vegetation, within or adjacent to the Properties).

Section 2.3 "Articles of Incorporation" or "Articles": The Articles of Incorporation of the Association, as filed with the Nevada Secretary of State.

Section 2.4 "Assessments": Each and all of Base Assessments, Neighborhood Assessments, Special Assessments, and Specific Assessments, as applicable.

Section 2.5 "Association": SUNRISE RIDGE MASTER HOMEOWNERS ASSOCIATION, a Nevada nonprofit corporation, and its successors or assigns.

Section 2.6 "Base Assessment": Assessments levied on all Lots subject to assessment under Article 8 to fund Common Expenses for the general benefit of the Community. Each and all of the Neighborhood Assessments, Special Assessments, and Specific Assessments, as applicable, are in addition to Base Assessments.

Section 2.7 "Board of Directors" or "Board": The Board of Directors of the Association, elected or appointed in accordance with the Bylaws and this Declaration. The Board of Directors is an "Executive Board" as defined by NRS § 116.045.

Section 2.8 "Builder": Any Person who purchases one or more Lots for the purpose of constructing Improvements for later sale to consumers, or who purchases one or more Parcels

within the Community for further subdivision into Lots, development, and/or resale in the ordinary course of such Person's business.

Section 2.9 "Bylaws": The Bylaws of the Association, as may be amended from time to time.

Section 2.10 "Common Elements": All real and personal property, including easements, which the Association owns, leases, or otherwise holds possessory or use rights in for the common use and enjoyment of the Owners; all areas designated as a "common element" or "common area" on the Plats; and all interests as provided in NRS Chapter 116. The term shall include: (a) all Neighborhood Common Elements, subject to Article 14 below, and (b) all Community-Wide Common Elements, and (c) any other areas, if owned or possessed by the Association, as may be designated from time to time by a Majority of the Declarants, and the Improvements respectively thereon.

Section 2.11 "Common Expenses": The actual and estimated expenses incurred, or anticipated to be incurred, by the Association for the general benefit of the Owners, including any reasonable reserve, as the Board may find necessary and appropriate pursuant to the Governing Documents.

Section 2.12 "Community": SUNRISE RIDGE, a Nevada master residential common-interest planned community.

Section 2.13 "Community Standards": The standards of conduct, maintenance, or other activity generally prevailing throughout the Properties. Such standards shall or may be established initially by Declarants acting together. Any subsequent amendments to the standards shall meet or exceed the standards set by Declarants and Board during the Declarant Rights Period. Such standards may contain both objective and subjective elements. The Community Standards may evolve as development progresses and as the needs and demands of the Community change.

Section 2.14 "Community-Wide Common Elements": All Common Elements and Improvements respectively thereon (*other than* the Neighborhood Common Elements), as more particularly set forth in Section 1.1(d) and Section 1.5 above. Community-Wide Common Elements shall or may include, without limitation, any Community-wide recreational facilities, entry features, signage, landscaped medians, Private Streets, Trail System and Park, Lift Station and Sewer Lines, rights of way and roads, lakes, ponds, parks, greenbelts, enhanced and native open space, trails, and sidewalks.

Section 2.15 "County": County of Clark, Nevada, together with its successors and assigns.

Section 2.16 "Declarants": Ryland (with regard to the Ryland Neighborhood), Signature Homes (with regard to the Signature Homes Neighborhood), Greystone (with regard to the Greystone Neighborhood), and Laing (with regard to all of the Community other than the Neighborhoods), subject to the provisions of this Declaration (including, but not limited to Section 1.5 above and Section 2.56 below) and/or their respective successors, successors-in-title, and/or assigns who take title to any portion of the property described in Exhibits "A" or "B" for the purpose of development and/or sale and who are expressly designated as a Declarant in a Recorded Assignment of Special Declarant Rights executed by an immediately preceding Declarant, subject to the provisions of this Declaration (but specifically excluding Purchasers as defined in NRS 116.079). See also "Relevant Declarant."

Section 2.17 "Declarant Control Period": The period of time during which Declarants are entitled to appoint and remove the Board of Directors (or a Majority thereof), pursuant to Section 6.5, below.

Section 2.18 "Declarant Rights Period": The period of time during which any Declarant owns any property subject to this Declaration or which may become subject to this Declaration by annexation in accordance with Section 10.1, and during which period of time, Declarants have reserved certain rights as set forth in this Declaration.

Section 2.19 "Director": A duly appointed or elected and current member of the Board of Directors.

Section 2.20 "Dwelling": The A single Family detached residential building located on a Unit (or, in a condominium, a condominium Unit) designed and intended for use and occupancy as a residence by a single Family, but specifically excluding "manufactured housing" or mobile homes, neither of which shall be permitted as Dwellings. Notwithstanding the above, an approved ancillary "casita", "guest house" or "in-law suite" on a Lot shall not be a separate Dwelling, but instead, shall be deemed a part of the structure serving primary as the Dwelling on the Lot.

Section 2.21 "Family": A group of natural persons related to each other by blood or legally related to each other by marriage or adoption, or a group of natural persons not all so related, but who maintain a common household in a Dwelling, all as subject to and in compliance with all applicable federal and Nevada laws and local health codes and other ordinances.

Section 2.22 "Governing Documents": The documents listed in Section 1.6. Any inconsistency among the Governing Documents shall be governed pursuant to Section 1.8.

Section 2.23 "Home Owner": A Purchaser or other Owner, other than a Declarant or a Builder.

Section 2.24 "Improvement": Any structure or appurtenance thereto of every type and kind, whether above or below the land surface, placed in the Properties, including, but not limited to, Dwellings and other buildings, walkways, sprinkler pipes, swimming pools, spas and other recreational facilities, carports, garages, roads, driveways, parking areas, hardscape, Private Streets, Trail System and Park, Lift Station and Sewer Lines, streetlights, curbs, gutters, walls, perimeter walls, fences, screening walls, block walls, retaining walls, stairs, decks, landscaping, antennae, hedges, windbreaks, patio covers, railings, plantings, planted trees and shrubs, poles, signs, exterior air conditioning and water softener fixtures or equipment.

Section 2.25 "Invitees": The Each and all of the following: tenants, guests, and other invitees (including, as may be applicable, agents, employees, suppliers, and contractors).

Section 2.26 "Lift Station and Sewer Lines": The private water/sewer lift station and water/sewer lines connected thereto or associated therewith, as described further in Section 13.2 below. The Lift Station and Sewer Lines comprise a part of the Common Elements.

Section 2.27 "Lot": The real property of any residential Unit, as shown on a Plat (subject to this Declaration and the Plat), and shall mean all interests defined as a "Unit" in NRS 116.093. The term shall refer to the land which is part of the Lot as well as any Improvements, including any Dwelling thereon. The boundaries of each Lot shall be delineated on a Recorded Plat. Prior to Recording a Plat, a Parcel shall be deemed to contain the number of Lots designated for residential use for such parcel on the applicable preliminary plat or site plan approved by the Relevant Declarant, whichever is more current. Until a preliminary plat or site plan has been approved, such

Parcel shall contain the number of Lots set by a Declarant in conformance with the Master Plan or otherwise by mutual agreement of the Relevant Declarants

Section 2.28 "Majority": Unless otherwise specifically defined in a provision of the Governing Documents, a majority of those votes, Owners, Directors, Declarants, or other groups, as the context may indicate, totaling more than fifty percent (50%) of the total eligible number.

Section 2.29 "Manager": A person, firm or corporation possessing all licenses and certifications required by the Act, employed or engaged to perform management services for the Properties and the Association.

Section 2.30 "Master ARC": The Master Architectural Review Committee, if any, created pursuant to Section 4.2 (c).

Section 2.31 "Master Plan": The master land use plan for the Community approved by Clark County, Nevada, as may be amended from time to time. Inclusion of property on the Master Plan shall not, under any circumstances, obligate any Declarant to subject such property to this Declaration, nor shall the omission of property from the Master Plan bar its later annexation to this Declaration

Section 2.32 "Maximum Lots": The maximum number of Lots approved or reasonably expected to be approved for development within the Community under the Master Plan, as amended from time to time; provided, however, that nothing in this Declaration shall be construed to require Declarants to develop the maximum number of lots approved. The Maximum Lots as of the date of this Declaration is not to exceed one thousand three hundred (1,300) Units.

Section 2.33 "Member": A Person subject to membership in the Association pursuant to Section 6.2

Section 2.34 "Member in Good Standing": A Member who is not delinquent in payment of any Assessment, and (if applicable) who, after Notice and Hearing related thereto, has: (a) no unpaid fine owing to the Association, and/or (b) no uncorrected violation of a Governing Document.

Section 2.35 "Mortgage": A mortgage, a deed of trust, a deed to secure debt, or any other form of security instrument affecting title to any Lot. A "Mortgagee" shall refer to a beneficiary or holder of a Mortgage.

Section 2.36 "Neighborhood": Any residential area within the Properties designated by this Declaration or a Relevant Declarant as a Neighborhood. A Neighborhood may be comprised of more than one housing type and may include noncontiguous parcels of property. If the Association provides benefits or services to less than all Lots within a particular Neighborhood, then such benefited Lots shall be assessed an additional Specific Assessment for such benefits or services. Neighborhood boundaries may be established and modified as provided in Section 6.8.

Section 2.37 "Neighborhood ARC": A Neighborhood Architectural Review Committee, if any, created pursuant to Section 4.2(b).

Section 2.38 "Neighborhood Assessments": Assessments levied against the Lots in a particular Neighborhood to pay for the Neighborhood Expenses, if any, within such Neighborhood, as described in Section 8.5 Neighborhood Assessments are additional to each and all of Base Assessments, Special Assessments, and Specific Assessments, as applicable.

Section 2.39 "Neighborhood Common Element": Any portion of the Common Elements, designated by a Relevant Declarant in a Recorded instrument as Neighborhood Common Element, which shall constitute a Limited Common Element, as contemplated in NRS § 116.059, allocated for the primary or exclusive use and benefit of one or more designated Neighborhood(s) (but less than the entire Community), as more particularly described in Article 14 hereof.

Section 2.40 "Neighborhood Expenses": The expenditures made by, or financial liabilities of, the Association, together with any allocations to reserves, for maintenance, management, operation, repair, replacement and insurance of Neighborhood Common Elements, if any, or for the particular benefit of Owners of Units within a particular Neighborhood, together with a reasonable administrative charge, all as may be authorized pursuant to this Declaration or in any applicable Supplemental Declaration.

Section 2.41 "Neighborhood Representative(s)": The representative or alternate selected by the Members within each Neighborhood to represent the Neighborhood with regard to Association matters other than those requiring a vote of the membership, as described in Sections 6.10 and 6.11, subject to Section 6.9 below.

Section 2.42 "Notice and Hearing": Written notice and an opportunity for a hearing before the Board, at which the Owner concerned shall have the opportunity to be heard in person, or by counsel at the Owner's expense, in the manner further provided in the Bylaws.

Section 2.43 "NRS": Nevada Revised Statutes.

Section 2.44 "NRS Chapter 116": Nevada's Uniform Common-Interest Ownership Act, Chapter 116 of Nevada Revised Statutes, as may be amended from time to time.

Section 2.45 "Officer": A duly elected or appointed and current officer of the Association.

Section 2.46 "Owner": One or more Persons, which may include Declarant, or a Builder, who hold the record title to any Lot, but excluding in all cases any party holding an interest merely as security for the performance of an obligation. The term "Owner" shall include sellers under executory contracts of sale, but shall exclude Mortgagees.

Section 2.47 "Parcel": A parcel of land within the Community, conveyed by a Declarant to a Builder, and/or owned by a Builder, for the purpose of constructing improvements for later sale to consumers (i.e., for further subdivision into Lots, development, and/or resale in the ordinary course of such Builder's business).

Section 2.48 "Person": A natural person, a corporation, limited liability company, partnership, trustee, or any other legal entity.

Section 2.49 "Plat": The final plat maps of portions of the Community, as Recorded from time to time, as may be amended and supplemented from time to time of Record.

Section 2.50 "Private Amenities": Certain real property and any improvements and facilities thereon (including, but not necessarily limited to Golf Course), located adjacent to, in the vicinity of, or within, the Properties, which are privately owned and operated by Persons other than the Association for recreational and related purposes, on a club membership basis or otherwise. Private Amenities are **NOT A PART OF** the Properties and **NOT A PART OF** the Common Elements and **NOT SUBJECT TO** this Declaration. Private Amenity ownership and/or membership is **NOT A PART OF** and is separate from Membership in the Association. See also Sections 21.1 - 21.3 below.

Section 2.51 "Private Streets": All private streets, rights of way, street scapes, and vehicular ingress and egress easements, in the Properties, shown as such on a Plat.

Section 2.52 "Project Design Guidelines": The architectural, design, and construction guidelines and application and review procedures applicable to the Properties, as promulgated and administered pursuant to Article 4, as may be amended from time to time.

Section 2.53 "Properties": The real property described in Exhibits "A-1," "A-2," and "A-3," together with such additional property from time to time as is made subject to this Declaration in accordance with Article 10 and NRS Chapter 116.

Section 2.54 "Purchaser": A Purchaser, as defined in NRS § 116.079.

Section 2.55 "Record", "Recording", or "Recorded": To file, filing, or filed of record in the official records of the Office of the County Recorder of Clark County, Nevada. The date of Recording shall refer to that time at which a document, map, or Plat is Recorded.

Section 2.56 "Relevant Declarant": The relevant one of: (a) Ryland, Signature Homes, and/or Greystone, with regard to a particular Neighborhood (e.g., Ryland is the Relevant Declarant with respect to the Ryland Neighborhood; Signature Homes is the Relevant Declarant with respect to the Signature Homes Neighborhood; and Greystone is the Relevant Declarant with respect to the Greystone Neighborhood), and/or (b) Laing, with regard to all portions of the Community other than the Neighborhoods (e.g., Laing is the Relevant Declarant with regard to the Trail System and Park, Lift Station and Sewer Lines, and other Community-Wide Common Elements or other portions of the Community which are not located within a particular Neighborhood).

Section 2.57 "Requisite Membership Percentage": Eighty percent (80%) or more of the total aggregate voting power of the Membership of the Association.

Section 2.58 "Requisite Neighborhood Percentage": Eighty percent (80%) or more of the total aggregate voting power of those certain Association Members who are Owners of Units in the relevant Neighborhood.

Section 2.59 "Resident": Unless otherwise specified in the Governing Documents, shall mean any person who is physically residing in a Unit.

Section 2.60 "Rules and Regulations": The restrictions relating to an Owner's use of his or her Unit and conduct of Persons on the Properties, as more specifically authorized and provided for in Article 3 and NRS Chapter 116.

Section 2.61 "Special Assessment": Assessments levied in accordance with Section 8.6. Special Assessments are additional to each and all of Base Assessments, and Specific Assessments, as applicable.

Section 2.62 "Special Improvement District": A service and utility district which may be created as a special purpose unit of local government in accordance with Nevada law to provide certain community services and certain infrastructure to some or all of the Community.

Section 2.63 "Specific Assessment": Assessments levied against a particular Unit or Units for expenses incurred or to be incurred by the Association for purposes described in Section 8.7 below (or in any other section of this Declaration specifically referring to Specific Assessments).

Specific Assessments are additional to each and all of Base Assessments, Neighborhood Assessments, and Special Assessments, as applicable.

Section 2.64 "Supplemental Declaration": An instrument Recorded by a Declarant or with the express prior written consent of a Declarant, which shall be supplemental to this Declaration, and which may impose supplemental obligations, covenants, conditions, or restrictions, or reservations of easements, with respect to a particular Neighborhood or other land described in such instrument. Any purported Supplemental Declaration Recorded without the express prior written consent of a Declarant shall be null and void.

Section 2.65 "Trail System and Park": The trail system and related park, located generally on or adjacent to the Las Vegas Wash, as described further in Section 13.3 below.

Section 2.66 "Unit". A contiguous portion of the Properties, whether improved or unimproved (other than Common Elements, any Neighborhood Common Elements, Area of Common Responsibility, and property dedicated to the public), which may be independently owned and conveyed and which is intended to be developed, used, and occupied as a Dwelling for a single Family (as shown and separately identified on a Plat). The term shall mean all interests defined as "Unit" in NRS § 116.093. The term shall refer to the land, if any, which is part of the Unit as well as any improvements thereon. The boundaries of each Unit shall be delineated on a Plat.

PART TWO: CREATION AND MAINTENANCE OF COMMUNITY STANDARDS

The standards for use, conduct, maintenance, and architecture at the Community are what give the Community its identity and make it a place which people want to call "home". Each Owner and Resident, in upholding such standards, can take pride in the results of that common effort. This Declaration establishes procedures for adopting, modifying, applying and enforcing such standards, while providing flexibility for Community Standards to evolve as the Community changes and grows over time, and as customs, requirements, technology, standards, and laws evolve.

ARTICLE 3
USE AND CONDUCT

Section 3.1 General Framework for Regulation. The Governing Documents establish, as part of the general plan of development for the Properties, a framework of affirmative and negative covenants, easements, and restrictions governing the Properties. Within that framework, the Board and the Members must have the ability to respond to unforeseen problems and changes in circumstances, conditions, needs, desires, trends, and technology which inevitably will affect the Community, its Owners and Residents. Therefore, this Article 3 establishes procedures for modifying and expanding the initial Rules and Regulations, and additional Rules and Regulations which may be created and revised from time to time, and also sets forth initial use restrictions applicable to the Community.

Section 3.2 Rule Making Authority.

(a) Authority of Declarants. During the Declarant Rights Period, each Declarant shall be entitled to create, modify, cancel, limit, create exceptions to, expand, and/or enforce, Rules and Regulations applicable to said Declarant's Neighborhood. The Declarants, acting together, shall be so entitled with respect to the Community generally as a whole.

and convey the same. Notices of default and election to sell shall be provided as required by NRS § 116.31163. Notice of time and place of sale shall be provided as required by NRS § 116.311635.

Section 9.5 Limitations on Foreclosure. Any other provision in the Governing Documents notwithstanding, the Association may not foreclose a lien by sale for the assessment of a fine or for a violation of the Governing Documents, unless the violation is of a type that threatens the health and welfare of the Owners and Residents of the Community. The foregoing limitation shall not apply to foreclosure of a lien for a Base Assessment, Neighborhood Assessment, or Special Assessment, or any portion respectively thereof.

Section 9.6 Cure of Default. Upon the timely cure of any default for which a notice of default and election to sell was filed by the Association, the Officers thereof shall Record an appropriate release of lien, upon payment by the defaulting Owner of a reasonable fee to be determined by the Board, to cover the cost of preparing and Recording such release. A certificate, executed and acknowledged by any two (2) Directors or the Manager, stating the indebtedness secured by the lien upon any Unit created hereunder, shall be conclusive upon the Association and, if acknowledged by the Owner, shall be binding on such Owner as to the amount of such indebtedness as of the date of the certificate, in favor of all Persons who rely thereon in good faith. Such certificate shall be furnished to any Owner upon request, at a reasonable fee, to be determined by the Board.

Section 9.7 Cumulative Remedies. The assessment liens and the rights of foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies which the Association and its assigns may have hereunder and by law or in equity, including a suit to recover a money judgment for unpaid assessments, as provided above.

Section 9.8 Mortgagee Protection. Notwithstanding all other provisions hereof, no lien created under this Article 9, nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the beneficiary under any Recorded first deed of trust encumbering a Unit, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Unit by judicial foreclosure, other foreclosure, or exercise of power of sale, such Unit shall remain subject to this Declaration and the payment of all installments of assessments accruing subsequent to the date such Beneficiary or other Person obtains title. The lien of the assessments, including interest and costs, shall be subordinate to the lien of any first Mortgage upon the Unit. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the first Mortgagee shall not relieve the prior Owner of his personal obligation for the payment of such unpaid assessments.

Section 9.9 Priority of Assessment Lien. Recording of the Declaration constitutes Record notice and perfection of a lien for assessments. A lien for assessments, including interest, costs, and attorneys' fees, as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for: (a) liens and encumbrances Recorded before the Declaration was Recorded, (b) a first Mortgage Recorded before the delinquency of the assessment sought to be enforced (except to the extent of assessments which would have become due in the absence of acceleration during the six (6) months immediately preceding institution of an action to foreclose the lien), and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. The sale or transfer of any Unit shall not affect an assessment lien. However, subject to the provisions of this Section 9.9, the sale or transfer of any Unit pursuant to judicial or nonjudicial foreclosure of a first Mortgage shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Unit from lien rights for any assessments which thereafter become due. Where the Beneficiary of a First Mortgage of Record or other purchaser of a Unit obtains title pursuant to a judicial or nonjudicial foreclosure or "deed in lieu thereof," the Person who obtains title and his successors

3. Association. From and after annexation of the Annexation Property all Owners within the Annexation Property shall automatically become Members of the Association, and all Owners and occupants of Lots within the Annexation Property shall be subject to the Association's jurisdiction and the provisions of the Association's Governing Documents.

4. Reallocation of Allocated Interests. There shall be ~~ninety-eight (98)~~ thirty-two (32) additional Lots annexed to the Community as a result of this annexation. Accordingly, the interests allocated to each Lot in the Community shall be reallocated such that each Lot, including the lots annexed hereby, shall have one (1) equal voting right in the Association and one (1) equal assessment obligation, as more fully set forth in the Declaration. Annual assessments for Lots in the Annexation Property shall commence on the first (1st) day of the month immediately following the recording of this Notice.

Dated this 20th day of October, 2004.

RELEVANT DECLARANT

Greystone Nevada, LLC,
a Delaware Limited Liability Company

By: _____

Name: Tim Kent

Title: President

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

On the 20th day of October, 2004, before me, a Notary Public in and for said County and State, personally appeared TIM KENT PRESIDENT of Greystone Nevada, LLC, a Delaware Limited Liability Company, known to me or who acknowledged to me that he executed the within instrument.

E. A. Blackstead
NOTARY PUBLIC
STATE OF NEVADA
Date Appointment Exp. Feb. 1, 2006
Certificate No 98-1158-1

E A Blackstead
Notary

EXHIBIT "A"

Legal Description of the Annexation Property

LOTS FOUR (4) THRU EIGHT (8) INCLUSIVE IN BLOCK ONE (1); LOTS NINE (9) THRU FIFTEEN (15) INCLUSIVE IN BLOCK TWO (2); LOTS NINTY-EIGHT (98) THRU NINTY-NINE (99) INCLUSIVE IN BLOCK SIX (6) AND LOTS ONE HUNDRED THIRTEEN (113) THRU ONE HUNDRED THIRTY (130) INCLUSIVE IN BLOCK SIX (6) OF THE FINAL MAP OF DESERT INN MASTER PLAN LOT "D" – PHASE 1 (A COMMON INTEREST COMMUNITY) AS SHOWN BY MAP THEREOF ON FILE IN BOOK 114 OF PLATS, PAGE 68, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA.

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MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ELKHORN

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MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND RESERVATION OF EASEMENTS FOR ELKHORN

THIS MASTER DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND RESERVATION OF EASEMENTS ("Master Declaration") is made on the 16th day of March, 1995, by WATT/MORADI CO., a California General Partnership ("Declarant"), and WATT RESIDENTIAL PARTNERS, a California general partnership ("WRP").

RECITALS:

Declarant and WRP are the owners of certain real property in the City of Las Vegas, Nevada, more particularly described in Exhibit "A" attached hereto (the "Initial Property"), and Declarant is the owner of other real property, more particularly described in Exhibit "B" attached hereto (the "Annexable Area"), all or portions of which may from time to time be annexed to the Project, pursuant to this Master Declaration. Declarant intends to develop the Project (as hereinafter defined) and hereby reserves the right to develop, a maximum of 2,950 residential dwelling units within the Project when fully completed. Consistent with Declarant's intent to establish a balanced community accommodating a mix of residential and other land uses, including open space, and to develop and convey portions or all of the properties included in the Project (as hereinafter defined), pursuant to a general plan for the maintenance, care, use and management of the Project, Declarant has deemed it desirable to establish certain protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges upon the Project, all for the purpose of enhancing and protecting the value, desirability and attractiveness of the Project, and enhancing the quality of life within the Project. All property within the Project shall be held and conveyed subject to such covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges.

In furtherance of its desire for efficient management and preservation of the values and amenities in the Project, Declarant has deemed it desirable to create a corporation to which shall be delegated and assigned the powers of owning, managing, maintaining and administering the Association Property (as hereinafter defined) for the private use of its Members (as hereinafter defined) and authorized guests, administering and enforcing the covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, collecting and disbursing the assessments and charges created hereby and performing such other acts as are required hereby.

Elkhorn Community Association, a Nevada non-profit corporation (the "Master Association"), the Members of which shall be the respective owners (as hereinafter defined) of Lots or Condominiums in the Project, has or will be incorporated under the Laws of the State of Nevada for the purpose of exercising the powers and functions stated above.

NOW, THEREFORE, in consideration of the foregoing recitals, the provisions hereinafter contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Declarant and WRP hereby declares that all property in the Project shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the following protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Project, in furtherance of a general plan for the protection, maintenance, subdivision, improvement, sale and lease of Lots and/or Condominiums within the Project, or any portion thereof. The protective covenants, conditions, restrictions, reservations, easements and equitable servitudes set forth herein shall run with the Project and shall be binding upon all Persons having any right, title or interest in the Project, or any part thereof, their heirs, successive owners and assigns; shall inure to the benefit of every portion of the Project and any interest therein; and shall inure to the benefit of and be binding upon Declarant, WRP and any Participating Builders (as hereinafter defined), their successor owners and each owner and his or her respective successors-in-interest; and may be enforced by any Owner or by the Master Association.

ARTICLE I
DEFINITIONS

Unless otherwise expressly provided, when used in this Master Declaration, the following words and phrases shall have the meanings hereinafter specified.

Section 1.1. "Agency"

Shall mean the Nevada Department of Commerce, Real Estate Division, or any other such governmental agency which administers the sale of subdivided lands pursuant to Chapter 119 of NRS, or any similar statute or ordinance hereinafter enacted.

Section 1.2. "Annexable Area"

Shall mean the real property described in Exhibit "B", all or any portion of which may from time to time be annexed hereto and made subject to this Master Declaration pursuant to the provisions of Article II hereof.

Section 1.3. "Annexed Territory"

Shall mean portions of the Annexable Area from time to time added to the Initial Property covered by this Master Declaration.

Section 1.4. "Architectural Guidelines"

Shall mean those certain development and construction parameters promulgated from time to time by the Design Review Committee as set forth in Article VIII.

Section 1.5. "Articles"

Shall mean the Articles of Incorporation of the Master Association or any Sub-Association as filed or to be filed in the Office of the Secretary of State of the State of Nevada.

Section 1.6. "Assessment Year"

Shall mean the calendar year or such other twelve (12) consecutive calendar month period selected by the Board of Directors for the levying, determining and assessing of Common Assessments under this Master Declaration.

Section 1.7. "Association Property"

Shall mean all the real and personal property, including Improvements, now or hereafter owned by the Master Association, or over which the Master Association has an easement for the use, care or maintenance thereof, held for the common benefit, use and enjoyment of all of the owners, as further provided in Article III hereof.

Section 1.8. "Beneficiary"

Shall mean a Mortgagee under a Mortgage or a beneficiary under a Deed of Trust and the assignees of such Mortgagee or beneficiary.

Section 1.9. "Board of Directors" or "Board"

Shall mean the Board of Directors of the Master Association, elected in accordance with the Articles and the Bylaws of the Master Association and this Master Declaration.

Section 1.10. "Bylaws"

Shall mean the Bylaws of the Master Association which have or will be adopted by the Board of Directors, as such Bylaws may from time to time be amended.

Section 1.11. "Capital Improvement Assessment"

Shall mean a charge against each Owner and his Lot or Condominium, representing a portion of the costs to the Master Association for installation, construction, or reconstruction of any Improvements on any portion of the Association Property which the Master Association may from time to time authorize, pursuant to the provisions of this Master Declaration.

Section 1.12. "Close of Escrow"

Shall mean the date on which a deed or other such instrument conveying a Lot or Condominium in the Project is Recorded, with the exception of deeds between Declarant and Participating Builders or between Participating Builders.

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Section 1.13. "Common Area"

Shall mean any portion of the Project designated herein or in a Supplemental Declaration for the primary benefit of, or maintenance by, the Owners of Lots within a particular Phase of Development, or the Owners of Condominiums within a Condominium Project, to be owned (a) in fractional undivided interests in common by such Owners (within a Condominium Project), (b) by a Sub-Association in which all Owners within such Sub-Association shall be entitled to membership, or (c) separately by individual Owners (within a Phase of Development) over which a Sub-Association may have an easement for maintenance purposes.

Section 1.14. "Common Expenses"

Shall mean the actual and estimated costs of: maintenance, management, operation, repair and replacement of the Association Property; unpaid Remedial Assessments and Capital Improvement Assessments, including those costs not paid by the Owner responsible for payment, if any, and management and administration of the Master Association.

Section 1.15. "Condominium"

Shall mean a Condominium as defined in Section 116.110325 of NRS, or any similar Nevada statute hereinafter enacted.

Section 1.16. "Condominium Area"

Shall mean the real property which may be so classified from time to time in Declaration of Annexation or Supplemental Declaration, as provided in Article II hereof, and which has been developed or is being developed as a Condominium Project.

Section 1.17. "Condominium Project"

Shall mean a Condominium Project as defined in Section 116.110325 of NRS, or any similar Nevada statute hereinafter enacted.

Section 1.18. "Declarant"

Shall mean Watt/Moradi Co., a California general partnership, its successors and any Participating Builder or other Person to which it shall have assigned any rights hereunder by an express written and Recorded assignment as provided herein. Any such assignment may include all or only specific rights of the Declarant hereunder and may be subject to such conditions and limitations as Watt/Moradi Co. may impose in its sole and absolute discretion.

Section 1.19. "Declaration of Annexation"

Shall mean a Declaration of Annexation as described in Article II, subsection 2.3 (b) hereof.

Section 1.20. "Delegate"

Shall mean a Delegate as described in Article IV, Section 4.5 hereof.

Section 1.21. "Delegate District"

Shall mean a Delegate District as described in Article IV, Section 4.5 hereof.

Section 1.22. "Design Review Committee"

Shall mean the Elkhorn Design Review Committee created pursuant to Article VIII hereof.

Section 1.23. "Family"

Shall mean (a) a group of natural Persons related to each other by blood or legally related to each other by marriage or adoption, or (b) a group of natural Persons not all so related, who maintain a common household in a Residence on Lot or in a Condominium.

Section 1.24. "FHA"

Shall mean the Federal Housing Administration.

Section 1.25. "FHLMC"

Shall mean the Federal Home Loan Mortgage Corporation.

Section 1.26. "FNMA"

Shall mean the Federal National Mortgage Association.

Section 1.27. "First Mortgage"

Shall mean a Mortgage or Deed of Trust with first priority over other Mortgages or Deed of Trust on a Lot or Condominium.

Section 1.28. "First Mortgagee"

Shall mean the holder of a First Mortgage.

Section 1.29. "GNMA"

Shall mean the Government National Mortgage Association.

Section 1.30. "Improvements"

Shall mean all structures and appurtenances thereto of every type and kind placed in the Project, including but not limited to buildings, outbuildings, walkways, hiking trails, equestrian trails, sprinkler pipes, roads, driveways, parking areas, fences, screening walls, retaining walls, landscaping, hedges, windbreaks, plantings, planted trees and shrubs, poles, signs, exterior air conditioning and water softener fixtures or equipment, if any.

Section 1.31. "Initial Property"

Shall mean the real property described in Exhibit "A" to this Master Declaration.

Section 1.32. "Land Classification"

Shall include (a) Single Family Residential Areas, (b) Condominium Areas, (c) Association Property or (d) Common Area.

Section 1.33. "Lot"

Shall mean any lot or parcel of land shown upon any Recorded final subdivision map, together with the Improvements, if any, thereon, but excepting any Common Area, the Association Property and any Condominium in a Condominium Project. The term "Lot" shall include, without limitation, a Single Family Residential Lot. If two or more Lots are merged they shall remain as two Lots for the purposes of Articles IV and VI hereof.

Section 1.34. "Maintenance Funds"

Shall mean those accounts created for the receipts and disbursements of the Master Association pursuant to Article VI hereof.

Section 1.35. "Manager"

Shall mean the Person, whether an employee or independent contractor, employed by the Master Association and delegated the authority to implement the duties, powers or functions of the Master Association.

Section 1.36. "Master Assessment"

Shall mean an annual charge representing a portion of the total, ordinary cost of maintaining, improving, repairing, replacing, managing and operating the Association Property and the Master Association.

Section 1.37. "Master Association"

Shall mean Elkhorn Community Association, a Nevada non-profit corporation, formed under the Laws of the State of Nevada, its successors and assigns.

Section 1.38. "Master Association Budget"

Shall mean the annual budget for the Master Association for each fiscal year, as amended.

Section 1.39. "Master Declaration"

Shall mean this Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Elkhorn, as amended or supplemented from time to time.

Section 1.40. "Member"

Shall mean every Person holding a Membership in the Master Association, pursuant to Article IV, Section 4.3 hereof.

Section 1.41. "Membership"

Shall mean a membership in the Master Association pursuant to Article IV, Section 4.3 hereof.

Section 1.42. "Mortgage"

Shall mean any unreleased mortgage or deed of trust or other similar instrument of Record, given voluntarily by the Owner of a Lot or Condominium, encumbering the Lot or Condominium to secure the performance of an obligation or the payment of a debt and which is required to be released upon performance of the obligation or payment of the debt. The term "Deed of Trust" or "Trust Deed" when used shall be synonymous with the term "Mortgage." "Mortgage" shall also mean any executory land sales contract, whether or not Recorded, in which the FHA, the VA, or the Secretary of the Department of Veterans Affairs is identified as the seller, whether such contract is owned by or has been assigned by the FHA, the VA, or the Secretary of the Department of Veterans Affairs.

Section 1.43. "Mortgagee"

Shall mean a Person or entity to whom a Mortgage is made and shall include the beneficiary of a Deed of Trust. The term "Beneficiary" shall be synonymous with the term "Mortgagee".

Section 1.44. "Mortgagor"

Shall mean a Person who mortgages his or its property to another (i.e., the maker of a Mortgage), and shall include the trustor of a Deed of Trust. The term "Trustor" shall be synonymous with the term "Mortgagor".

Section 1.45. "Notice of Lien"

Shall mean a notice of lien as described in Article VI hereof.

Section 1.46. "Notice and Hearing"

Shall mean written notice and a hearing before the Board of Directors or the Design Review Committee, as applicable, at which the Owner concerned shall have an opportunity to be heard in person, or, at the Owner's expense, by counsel, in the manner further provided in the Bylaws.

Section 1.47. "NRS"

Shall mean the Nevada Revised Statutes.

Section 1.48. "Owner"

Shall mean the person or Persons, including Declarant and Participating Builders, holding a fee simple interest to a Single Family Residential Lot or Condominium (excluding those Persons holding title as security for the performance of an obligation other than sellers under executory contracts of sale).

Section 1.49. "Participating Builder"

Shall mean a Person who acquires a portion of the Annexable Area with the intention of annexing same into the Project for the purpose of improving such portion for either resale or lease to the general public; provided, however, that the term "Participating Builder" shall not mean or refer to Declarant or its successors.

Section 1.50. "Person"

Shall mean a natural individual, a corporation or any other entity with the legal right to hold title to real property.

Section 1.51. "Phase of Development"

Shall mean (a) the Initial Property, and (b) each portion of real property designated as a Phase of Development in a Declaration of Annexation Recorded pursuant to Article II hereof or herein or in a Recorded sales document with a Participating Builder.

Section 1.52. "Project"

Shall mean the Initial Property, together with such portions of the Annexable Area which are annexed to the property subject to this Master Declaration and to the jurisdiction of the Master Association pursuant to Article II hereof.

Section 1.53. "Record", "Recorded", "Filed" and Recordation

Shall mean, with respect to any document, the recordation or filing of such document in the Office of the County Recorder of the County of Clark, State of Nevada.

Section 1.54. "Remedial Assessment"

Shall mean a charge against a particular owner and his Lot or Condominium, directly attributable to or reimbursable by the Owner, to reimburse the Master Association for costs incurred in bringing the owner and his Lot or Condominium into compliance with the provisions of this Master Declaration, or a charge levied by the Board of Directors as a reasonable fine or penalty for noncompliance with the Restrictions, plus interest and other charges on such Remedial Assessment as provided for in this Master Declaration. Remedial Assessments shall not include any late payment penalties, interest charges, attorneys' fees or other costs incurred by the Master Association in its efforts to collect Master Assessments or Capital Improvements Assessments.

Section 1.55. "Residence"

Shall mean a dwelling on a Single Family Residential Lot or within a Condominium Project, intended for use and occupancy by a single Family.

Section 1.56. "Restrictions"

Shall mean this Master Declaration, the Articles, the Bylaws, the Rules and Regulations of the Master Association, the Architectural Guidelines and any Supplemental Declaration with respect to the property covered by such Supplemental Declaration unless otherwise provided therein from time to time in effect.

Section 1.57. "Rules and Regulations"

Shall mean the Rules and Regulations of the Master Association adopted by the Board of Directors pursuant to Article V, section 5.2 hereof, as they may be amended and supplemented from time to time.

Section 1.58. "Single Family Residential Area"

Shall mean (a) all of the real property in the Initial Property which is a classified in accordance with Article II, Section 2.2 hereof, and (b) all of the real property in the Annexable Area which may hereafter be so classified pursuant to such Section 2.2.

Section 1.59. "Single Family Residential Lot"

Shall mean a Lot located within a Single Family Residential Area, together with the Improvements, if any, thereon.

Section 1.60. "Specified Action"

Shall be those actions of the Master Association requiring an extraordinary majority vote, as described in Article IV, subsection 4.3(b) hereof

Section 1.61. "Sub-Association"

Shall mean any Nevada non-profit corporation, or unincorporated association, or its successor in interest, the membership of which is composed of Owners of Condominiums within a Condominium Project, or Owners of Lots within a Phase of Development, which is organized and established or authorized pursuant to or in connection with a Supplemental Declaration.

Section 1.62. "Supplemental Declaration"

Shall mean any declaration of covenants, conditions and restrictions, or similar such document, which affects only a discrete Condominium Project or Phase of Development.

Section 1.63. "VA"

Shall mean the U.S. Department of Veterans Affairs.

Section 6.16. Mortgagee Protection.

Notwithstanding all other provisions hereof, no lien created under this Article VI, nor the enforcement of any provision of this Master Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Lot or Condominium, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Lot or Condominium by a judicial foreclosure or exercise of power of sale, such Lot or Condominium shall remain subject to this Master Declaration and the payment of all installments of assessments accruing subsequent to the date such Beneficiary or other Person obtains title. The lien of the assessments, including interest and costs, shall be subordinate to the lien of any previously Recorded First Mortgage upon the Lot or Condominium except as may be otherwise required in accordance with NRS Section 116.3116, as amended. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the First Mortgagee shall not relieve the prior Owner of his personal obligation for the payment of such unpaid assessments.

Section 6.17. Priority of Assessment Lien.

The lien of the assessments, including interest and costs (including attorneys' fees) as provided for herein, shall be subordinate to the lien of any previously Recorded First Mortgage upon any Lot or Condominium. The sale or transfer of any Single Family Residential Lot or Condominium shall not affect an assessment lien. However, the sale or transfer of any Single Family Residential Lot or Condominium pursuant to judicial or nonjudicial foreclosure of a previously Recorded First Mortgage shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer except as set forth in NRS Section 116.3116. No sale or transfer shall relieve such Lot or Condominium from lien rights for any new assessments thereafter becoming due. Where the Beneficiary of a First Mortgage of Record or other purchaser of a Single Family Residential Lot or Condominium obtains title pursuant to a judicial or non-judicial foreclosure or "deed in lieu thereof," the Person who obtains title and his successors and assigns shall not be liable for the share of the Common Expenses or assessments by the Master Association chargeable to such Single Family Residential Lot or Condominium which became due prior to the acquisition of title to such Lot or Condominium by such Person. Such unpaid share of Common Expenses and assessments shall be deemed to become expenses collectible from all of the Single Family Residential Lots and Condominiums, including the Single Family Residential Lot or Condominium belonging to such Person and his successors and assigns.

ARTICLE VII
RESIDENCE AND USE RESTRICTIONS

Section 7.1. Residential Use. Each Lot and/or Condominium shall be used for residential purposes only; and no part of the Project shall be used or caused, allowed or authorized to be used in any way directly or indirectly for any business, commercial, manufacturing, mercantile, storing, vending or other nonresidential purpose. Notwithstanding the foregoing, Owners or occupants of the Lots and/or Condominiums may use a room or rooms in the Residence constructed thereon as an office, provided

setting forth the amendatory language requested by such agency or institution. Recordation of such a certificate shall be deemed conclusive proof of the agency's or institution's request for such an amendment, and such certificate, when Recorded, shall be binding upon all of the Project and all Persons having an interest therein. (ii) It is the desire of Declarant to retain certain controls over the Master Association and its activities during the anticipated period of planning and development of the Project. If any amendment requested pursuant to the provisions of this subsection 12.2(d) deletes, diminishes or alters such controls, Declarant shall have the right to prepare, provide for and adopt as an amendment hereto, other and different control provisions. (iii) In the event this Master Declaration is Recorded or used for any purpose prior to having been approved by the FHA, the VA or any governmental or public agency with jurisdiction, Declarant shall have the absolute right to amend the provisions hereof without the approval of any agency or any percentage of the Membership whatsoever until such approval is first obtained. Such amendment shall be effective when signed by the Declarant and duly Recorded.

Section 12.3. Mortgagee Protection.

Notwithstanding any other provision of this Master Declaration, no amendment or violation of this Master Declaration shall operate to defeat or render invalid the rights of the Beneficiary under any Deed of Trust upon a Lot or Condominium made in good faith and for value, and Recorded prior to the Recordation of such amendment, provided that after the foreclosure of any such Deed of Trust such Lot or Condominium shall remain subject to this Master Declaration, as amended. Notwithstanding any and all provisions of this Master Declaration to the contrary, in order to induce FNMA, FHLMC, GNMA, FHA and the VA to participate in the financing of the sale of Lots and Condominiums within the Project, the following provisions are added hereto (and to the extent these added provisions, pertaining to the rights of Mortgagees, the FHA and the VA, conflict with any other provisions of this Master Declaration or any other of the Restrictions, these added restrictions shall control):

(a) Each holder, insurer and guarantor of a First Mortgage encumbering any Lot or Condominium, upon filing a written request for notification with the Board of Directors, is entitled to written notification from the Master Association of any default by the Mortgagor of such Lot or Condominium in the performance of such Mortgagor's obligations under this Master Declaration, the Articles or Bylaws, if such default is not cured within thirty (30) days after the Master Association learns of such default;

(b) Every Owner, except an Owner who is a Participating Builder, including every First Mortgagee of a Mortgage encumbering any Lot or Condominium (other than a First Mortgagee whose mortgagor is a Participating Builder), which obtains title to such Lot or Condominium pursuant to the remedies provided in such Mortgage, or pursuant to foreclosure of the Mortgage, or by deed (or assignment) in lieu of foreclosure, shall be exempt from any right of first refusal created or purported to be created by the Restrictions;

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(c) Each First Mortgagee of a Mortgage encumbering any Lot or Condominium which obtains title to such Lot or Condominium pursuant to either judicial foreclosure or the powers provided in such Mortgage, shall take title to such Lot or Condominium free and clear of any claims for unpaid assessments or charges pursuant to this Master Declaration against such Lot or Condominium which accrued prior to the acquisition of title by the First Mortgagee to such Lot or Condominium other than as set forth in NRS 116.3116(2); and

(d) When professional management has been previously required by a holder, insurer or guarantor of a First Mortgage, any decision to undertake self management by the Master Association shall require the prior approval of Members representing sixty-seven percent (67%) of the voting power of the Master Association and the holders of seventy-five (75%) of the First Mortgages on Lots or Condominiums.

(e) Unless at least sixty-seven percent (67%) of the First Mortgagees have given their prior written approval, neither the Master Association nor the Owners shall; (i) Subject to any provisions of the Navada non-profit corporation law to the contrary, by act or omission seek to abandon, partition, subdivide, encumber, sell or transfer the Association Property or the Improvements thereon which are owned, directly or indirectly, by the Master Association (the granting of easements for public utilities or conveyance of title for roadway purposes to a governmental entity or for other public purposes consistent with the intended use of such property by the Master Association shall not be deemed a transfer within the meaning of this clause); (ii) Change the method of determining obligations, assessments, dues or other charges which may be levied against any Owner, or the method of allocating distributions of hazard insurance proceeds or condemnation awards; (iii) By act or omission change, waive or abandon any scheme of regulations, or enforcement thereof, pertaining to the architectural design of the exterior appearance of the dwelling units on the Lots or Condominiums, the exterior maintenance of the dwelling units on the Lots or Condominiums, or the upkeep of lawns and plantings on Association Property; (iv) Fail to maintain fire and extended coverage insurance on insurable Association Property on a current replacement cost basis in an amount as near as possible to one hundred percent (100%) of the insurable value (based on current replacement cost); (v) Use hazard insurance proceeds for losses to any Association Property for other than the repair, replacement or reconstruction of such Improvements; provided, however, if there are excess proceeds, then such proceeds shall be used at the Board of Directors' discretion; or (vi) Amend this Master Declaration or the Articles or Bylaws in such a manner that the rights of any First Mortgagee will be adversely affected.

(f) All holders, insurers and guarantors of Mortgages on Lots or Condominiums, upon written request, shall have the right to (i) examine the books and records of the Master Association during normal business hours, (ii) require from the Master Association the submission of an annual financial statement (without expense to the holder, insurer or guarantor requesting such statement) and other financial data concerning the Master Association, (iii)

receive written notice of all meetings of the Members, and (iv) designate in writing a non-voting representative to attend all such meetings.

(g) All holders, insurers and guarantors of Mortgages of Lots or Condominiums who have a written request on file with the Master Association shall be given (i) thirty (30) days written notice prior to the effective date of any proposed, material amendment to this Master Declaration, the Articles or Bylaws, and prior to the effective date of any termination of an agreement for professional management of the Project following a decision of the owners to assume self-management of the Project; and, (ii) immediate written notice as soon as the Board of Directors receives notice or otherwise learns of any damage to the Association Property where the cost of reconstruction exceeds Seventy-Five Thousand Dollars ($75,000), and as soon as the Board of Directors receives notice or otherwise learns of any condemnation or eminent domain proceedings for acquisition of any portion of the Project.

(h) Mortgagees may, jointly or singly, pay taxes or other charges which are in default and which may or have become a charge against an Association Property and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for such property, and Mortgagees making such payments shall be owed immediate reimbursement therefrom from the Master Association.

(i) In addition to the foregoing, the Board of Directors may, in its sole discretion, enter into such contracts or agreements on behalf of the Master Association as are required in order to satisfy the guidelines of FHA, VA, FHLMC, FNMA, GNMA or any similar entity, so as to allow for the purchase, guaranty or insurance, as the case may be, by such entities of First Mortgages encumbering Lots or Condominiums with Residences thereon. Each Owner hereby agrees that it will benefit the Master Association and the Membership of the Master Association as a class of potential Mortgage borrowers and potential sellers of their respective Lots or Condominiums if such agencies approve the Project as a qualifying community under their respective policies, rules and regulations, as adopted from time to time.

Section 12.4. Notices.

Any notice permitted or required to be delivered as provided herein shall be in writing and may be delivered either personally, by mail or by telegraph, telex, telecopy or cable. For the purposes of this provision, personal delivery shall include service by a reputable overnight carrier which provides a receipt indicating date and time of delivery, location of delivery and person to whom transmitted. If delivery is made by mail, it shall be deemed to have been delivered forty-eight (48) hours after a copy of the same has been deposited in the United States mail, postage prepaid, addressed to any Person at the address given by such Person to the Master Association for the purpose of service of such notice, or to the Residence of such Person if no address has been given to the Master Association. Such address may be changed from time to time by notice in writing to the Master Association. If delivery is made by telegraph or

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STATE OF CALIFORNIA)
) ss.
COUNTY LOS ANGELES)

On _____, before me, _____,
personally appeared _____ and _____
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that such he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____
NOTARY PUBLIC

STATE OF CALIFORNIA)
) ss.
COUNTY LOS ANGELES)

On _____, before me, _____,
personally appeared _____ and _____,
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that such he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signatures on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____
NOTARY PUBLIC

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:

NEVADA TITLE COMPANY
03-22-95 08:00 PAC 71
BOOK 950322 OFFICIAL RECORDS INST: 00346
FEE: 77.00 RPTT: .00

4.

990601.00687

WHEN RECORDED, RETURN TO:

WILBUR M. ROADHOUSE, ESQ.
Goold Patterson DeVore Ales & Roadhouse
4496 South Pecos Road
Las Vegas, Nevada 89121
(702) 436-2600

79

(Space Above Line for Recorder's Use Only)

SUPPLEMENTAL DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS AND RESERVATION OF EASEMENTS

FOR

DESERT BLOOM

(a Nevada Residential Common-Interest Planned Community)
LAS VEGAS, CLARK COUNTY, NEVADA

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SUPPLEMENTAL DECLARATION
OF COVENANTS, CONDITIONS, AND RESTRICTIONS
AND RESERVATION OF EASEMENTS

FOR

DESERT BLOOM

(LAS VEGAS, CLARK COUNTY, NEVADA)

THIS SUPPLEMENTAL DECLARATION ("Declaration") is made as of this 27th day of May, 1999, by NIGRO DESERT BLOOM, LLC, a Nevada limited-liability company ("Declarant").

WHEREAS:

A. Declarant owns certain real property in or near the City of Las Vegas, Clark County, Nevada, as more particularly described in Exhibit "A" attached hereto ("Original Property"); and

B. Declarant intends that, upon Recordation of this Declaration, the Original Property shall be a Common-Interest Community, as defined in NRS § 116.110323, and a Planned Community, as defined in NRS § 116.110368 ("Community"); and

C. The name of the Community shall be DESERT BLOOM, and the name of the Nevada nonprofit corporation organized in connection therewith shall be DESERT BLOOM HOMEOWNERS ASSOCIATION ("Association"); and

D. Declarant further reserves the right from time to time to add all or any portion(s) of certain other real property more particularly described in Exhibit "B" attached hereto (the "Annexable Area") to the Community, up to a total maximum of two hundred and four (204) aggregate Units; and

E This Declaration is intended to set forth a dynamic and flexible plan of governance of the Community, for the overall development, administration, maintenance and preservation of a master residential community in which the Owners enjoy a quality life style as "good neighbors"; and

F. Declarant intends to develop and convey all of the Original Property, and any Annexable Area which may be annexed thereto ("Annexed Property"), pursuant to a general plan and subject to certain protective covenants, conditions, restrictions, rights, reservations, easements, equitable servitudes, liens and charges; and

G. In addition to this Declaration, the Properties, as hereinafter defined, are subject to the Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Summerlin Community Association, recorded by Howard Hughes Properties, Limited Partnership, a Delaware limited partnership, in the Office of the County Recorder of Clark County, Nevada, on September 25, 1990, as Instrument No. 01274 in Book No. 900925, as the same from time to time may have been or may be amended and/or restated ("Master Declaration"); and

H. The Master Declaration provides that Supplemental Declarations may be recorded which affect the various Phases of Development within the project (as such is defined in the Master Declaration), and that Sub-Associations may be established for the purpose of managing and administering said Phases of Development; and

I. Declarant desires that the Properties be subject to further covenants, conditions and restrictions and reservations of easements, in addition to those set forth in the Master Declaration (taking into account certain unique aspects of the Properties), and that a Sub-Association be established for the purpose of assessing, managing and administering said Phases of Development; and

J. Declarant has deemed it desirable, for the efficient preservation of the value and amenities of the Original Property and any Annexed Property, to organize the Association, to which shall be delegated and assigned the powers of owning, maintaining and administering the Common Elements (as defined herein), administering and enforcing the covenants and restrictions, and collecting and disbursing the assessments and charges hereinafter created. Declarant will cause, or has caused, the Association to be formed for the purpose of exercising such functions; and

K. This Declaration is intended to set forth a dynamic and flexible plan for governance of the Community, and for the overall development, administration, maintenance, and preservation of a harmonious residential community, in which the Owners will enjoy a quality lifestyle as "good neighbors";

NOW, THEREFORE, Declarant hereby declares that all of the Original Property, and, from the date(s) of respective annexation, all Annexed Property (collectively, "Properties") shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the following protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Properties (as defined in Article 1 hereof), in furtherance of a general plan for the protection, maintenance, subdivision, improvement and sale of the Properties or any portion thereof. The protective covenants, conditions, restrictions, reservations, easements, and equitable servitudes set forth herein shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties, or any part thereof, their heirs, successors and assigns; shall inure to the benefit of every portion of the Properties and any interest therein; and shall inure to the benefit of and be binding upon, and may be enforced by, Declarant, the Association, each Owner and their respective heirs, executors and administrators, and successive owners and assigns. All Units within this Community shall be used, improved and limited exclusively to single Family residential use.

ARTICLE 1
DEFINITIONS

Section 1.1 "Annexable Area" shall mean the real property described in Exhibit "B," attached hereto and incorporated by this reference herein, all or any portion of which real property may from time to time be made subject to this Declaration pursuant to the provisions of Article 15 hereof. At no time shall any portion of the Annexable Area be deemed to be a part of the

Community or a part of the Properties until such portion of the Annexable Area has been duly annexed hereto pursuant to Article 15 hereof.

Section 1.2 "Annexed Property" shall mean any and all portion(s) of the Annexable Area from time to time added to the Properties covered by this Declaration, by Recordation of Annexation Amendment(s) pursuant to Article 15 hereof.

Section 1.3 "ARC" shall mean the Architectural Review Committee created pursuant to Article 8 hereof.

Section 1.4 "Articles" shall mean the Articles of Incorporation of the Association filed in the office of the Secretary of State of Nevada, as such Articles may be amended from time to time.

Section 1.5 "Assessments" shall refer collectively to Annual Assessments, Capital Assessments, and any applicable Special Assessments.

Section 1.6 "Assessment, Annual" shall mean the annual or supplemental charge against each Owner and his Unit, representing a portion of the Common Expenses, which are to be paid by each Owner to the Association in the manner, times, and amounts provided herein.

Section 1.7 "Assessment, Capital" shall mean a charge against each Owner and his Unit, representing a portion of the costs to the Association for installation, construction, or reconstruction, of any Improvements on any portion of the Common Elements which the Association may from time to time authorize, pursuant to the provisions of this Declaration. Such charge shall be levied among all Owners and their Units in the same proportion as Annual Assessments.

Section 1.8 "Assessment, Special" shall mean a charge against a particular Owner and his Unit, directly attributable to, or reimbursable by, that Owner, equal to the cost incurred by the Association for corrective action, performed pursuant to the provisions of this Declaration, or a reasonable fine or penalty assessed by the Association, plus interest and other charges on such Special Assessments as provided for herein.

Section 1.9 "Assessment Commencement Date" shall mean that date, pursuant to Section 6.7 hereof, duly established by the Board, on which Annual Assessments shall commence.

Section 1.10 "Association" shall mean DESERT BLOOM HOMEOWNERS ASSOCIATION, a Nevada nonprofit corporation, its successors and assigns. The Association shall be a "Sub-Association" as such term is defined in Section 1.68 of the Master Declaration.

Section 1.11 "Association Funds" shall mean the accounts created for receipts and disbursements of the Association, pursuant to Article 6 hereof.

Section 1.12 "Beneficiary" shall mean a Mortgagee under a Mortgage or a beneficiary under a Deed of Trust, as the case may be, and the assignees of such mortgagee or beneficiary.

Section 1.13 "Board" or "Board of Directors" shall mean the Board of Directors of the Association. The Board of Directors is an "Executive Board" as defined by NRS §116.110345.

Section 1.14 "Budget" shall mean a written, itemized estimate of the expenses to be incurred by the Association in performing its functions under this Declaration, prepared and approved pursuant to the provisions of this Declaration.

Section 1.15 "Bylaws" shall mean the Bylaws of the Association which have or will be adopted by the Board, as such Bylaws may be amended from time to time.

Section 1.16 "City" shall mean the city in which the Properties are located (i.e., the City of Las Vegas, Nevada).

Section 1.17 "Close of Escrow" shall mean the date on which a deed is Recorded conveying a Unit from Declarant to a Purchaser.

Section 1.18 "Club House" shall mean the club house constructed by Declarant on the Common Recreational Area.

Section 1.19 "Cluster Units" shall mean those Units "clustered" around Common Driveways.

Section 1.20 "Common Driveway" shall mean a common or "shared" driveway area, shown as a Common Element on the Plat, which is closed at one end, and which connects Cluster Units to a "through" Private Street. Common Driveways constitute a portion of the Private Streets, and are a Common Element, subject to the provisions of this Declaration (including, but not limited to, Sections 2.14, 2.15, and 10.19, below).

Section 1.21 "Common Elements" includes private entry gate(s) and entry monumentation for the Community, Private Streets, Common Driveways, decorative street lighting, street signs, walkways, curbs and gutters, and certain drainage and sewer easement areas delineated as Common Elements on the Plat, and shall mean all real property or interests therein (and any personal property) owned or leased in the Properties by the Association, but shall exclude Units. Without limiting the foregoing, Common Elements shall include all of that real property designated as Common Lots "A" through "R," inclusive, and/or "Private Street, Public Utility Easements & City of Las Vegas Sewer Easements" on the Plat, and Improvements respectively thereon. Common Elements shall constitute Common Elements as to the Properties, as provided in NRS §116.110318. Declarant has reserved certain rights with regard to the Club House and Common Recreational Area as set forth in detail in Section 14.1(c), below. Parking on Common Elements shall be subject to the limitations and restrictions set forth in this Declaration (including, but not necessarily limited to, those set forth in Sections 2.2, 2.14, 2.15, and 10.19, below).

Section 1.22 "Common Expenses" shall mean expenditures made by, or financial liabilities of, the Association, together with any allocations to reserves, including the actual and estimated costs of: maintenance, insurance, management, operation, repair and replacement of the Common Elements; painting over or removing graffiti on Exterior Walls; unpaid Special Assessments and/or Capital Assessments; the costs of any commonly metered utilities and other commonly metered charges for the Properties; costs of management and administration of the Association including, but not limited to, compensation paid by the Association to Managers, accountants, attorneys and employees; costs of all utilities, gardening, trash pickup and disposal, and other services benefitting the Common Elements; costs of fire, casualty and liability insurance, workers' compensation

insurance, and any other insurance covering the Common Elements or Properties; costs of bonding the Board, Officers, any Managers, or any other Person handling the funds of the Association; any statutorily required ombudsman fees; taxes paid by the Association; amounts paid by the Association for discharge of any lien or encumbrance levied against the Common Elements or Properties, or portions thereof; costs of any other item or items incurred by the Association for any reason whatsoever in connection with the Properties, for the benefit of the Owners; prudent reserves; and any other expenses for which the Association is responsible pursuant to this Declaration or pursuant to any applicable provision of NRS Chapter 116.

Section 1.23 "Common Recreational Area" shall mean the common recreational area located on Common Element Lot "C," and the Improvements thereon (including, but not limited to, the Club House).

Section 1.24 "Community" shall mean a Common-Interest Community, as defined in NRS § 116.110323, and a Planned Community, as defined in NRS § 116.110368.

Section 1.25 "County" shall mean Clark County, Nevada.

Section 1.26 "Declarant" shall mean NIGRO DESERT BLOOM, LLC, a Nevada limited-liability company, its successors and any Person to which it shall have assigned any rights hereunder by an express written and Recorded assignment (but specifically excluding Purchasers as defined in NRS § 116.110375).

Section 1.27 "Declaration" shall mean this instrument as it may be amended from time to time.

Section 1.28 "Deed of Trust" shall mean a mortgage or a deed of trust, as the case may be.

Section 1.29 "Director" shall mean a duly appointed or elected and current member of the Board of Directors.

Section 1.30 "Dwelling" shall mean a building located on a Unit designed and intended for use and occupancy as a residence by a single Family.

Section 1.31 "Eligible Beneficiary" shall mean each Beneficiary, insurer and/or guarantor of a first Mortgage encumbering any Unit, which has filed with the Board a written request for notification as to certain specified matters.

Section 1.32 "Exterior Wall(s)" shall mean the exterior only side of Perimeter Walls (visible from public streets or other areas outside of and abutting the exterior boundary of the Properties).

Section 1.33 "Family" shall mean (a) a group of natural persons related to each other by blood or legally related to each other by marriage or adoption, or (b) a group of natural persons not all so related, but who maintain a common household in a Dwelling, all as subject to and in compliance with all applicable federal and Nevada laws and local health codes and other applicable County and City ordinances.

Section 1.34 "FHA" shall mean the Federal Housing Administration.

Section 1.35 "FHLMC" shall mean the Federal Home Loan Mortgage Corporation (also known as The Mortgage Corporation) created by Title II of the Emergency Home Finance Act of 1970, and any successors to such corporations.

Section 1.36 "Fiscal Year" shall mean the twelve (12) month fiscal accounting and reporting period of the Association selected from time to time by the Board.

Section 1.37 "FNMA" shall mean the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and any successors to such corporation.

Section 1.38 "GNMA" shall mean the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and any successors to such association.

Section 1.39 "Governing Documents" shall mean the Declaration, Articles, Bylaws, Plat, and the Rules and Regulations. Any inconsistency among the Governing Documents shall be governed pursuant to Section 17.9 below.

Section 1.40 "HHP" shall mean Howard Hughes Properties Limited Partnership, a Delaware limited partnership, and any affiliated or related entity, which is or may be the declarant under any Summerlin Community Declaration, and/or their respective successors or assigns.

Section 1.41 "Identifying Number", pursuant to NRS § 116.110348, shall mean the number which identifies a Unit on the Plat.

Section 1.42 "Improvement" shall mean any structure or appurtenance thereto of every type and kind, whether above or below the land surface, placed in the Properties, including but not limited to Dwellings and other buildings, walkways, sprinkler pipes, garages, swimming pools, spas and other recreational facilities, carports, roads, driveways, parking areas, hardscape, Private Streets, street lights, curbs, gutters, walls, Perimeter Walls, fences, screening walls, block walls, retaining walls, stairs, decks, landscaping, antennae, hedges, windbreaks, patio covers, railings, plantings, planted trees and shrubs, poles, signs, exterior air conditioning and water-softener fixtures or equipment.

Section 1.43 "Lot" shall mean the real property of any residential Unit, as shown on the Plat (specifically not including any area shown on the Plat as a Common Lot or Private Street).

Section 1.44 "Manager" shall mean the Person, if any, whether an employee or independent contractor, appointed by the Association and delegated the authority to implement certain duties, powers or functions of the Association as further provided in this Declaration and in the Bylaws.

Section 1.45 "Master Association" shall mean SUMMERLIN COMMUNITY ASSOCIATION, a Nevada non-profit corporation, its successors or assigns. The rights and duties of the Master Association are as set forth in the Master Declaration.

Section 1.46 "Master Association Documents" shall mean the Master Declaration, the Master Association Articles of Incorporation and Bylaws, and the Master Association Rules.

Section 1.47 "Master Declarant" shall mean HHP.

Section 1.48 "Master Declaration" shall mean the Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Summerlin Community Association, recorded by Master Declarant, in the Office of the County Recorder of Clark County, Nevada, on September 25, 1990, as Instrument No. 01274 in Book No. 900925, as the same from time to time may have been or may be amended and/or restated.

Section 1.49 "Member," "Membership." "Member" shall mean any Person holding a membership in the Association, as provided in this Declaration. "Membership" shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations, including liability for Assessments, contained in this Declaration and the Articles and Bylaws.

Section 1.50 "Mortgage," "Mortgagee," "Mortgagor." "Mortgage" shall mean any unreleased mortgage or deed of trust or other similar instrument of Record, given voluntarily by an Owner, encumbering his Unit to secure the performance of an obligation or the payment of a debt, which will be released and reconveyed upon the completion of such performance or payment of such debt. The term "Deed of Trust" or "Trust Deed" when used herein shall be synonymous with the term "Mortgage." "Mortgage" shall not include any judgment lien, mechanic's lien, tax lien, or other similarly involuntary lien on or encumbrance of a Unit. The term "Mortgagee" shall mean a Person to whom a Mortgage is made and shall include the beneficiary of a Deed of Trust. "Mortgagor" shall mean a Person who mortgages his Unit to another (i.e., the maker of a Mortgage), and shall include the trustor of a Deed of Trust. "Trustor" shall be synonymous with the term "Mortgagor;" and "Beneficiary" shall be synonymous with "Mortgagee."

Section 1.51 "Notice and Hearing" shall mean written notice and a hearing before the Board, at which the Owner concerned shall have an opportunity to be heard in person, or by counsel at Owner's expense, in the manner further provided in the Bylaws.

Section 1.52 "Officer" shall mean a duly elected or appointed and current officer of the Association.

Section 1.53 "Original Property" shall mean that real property described on Exhibit "A," attached hereto and incorporated by this reference herein, which shall be the initial real property made subject to this Declaration, immediately upon the Recordation of this Declaration.

Section 1.54 "Other Units" shall mean all Units other than Cluster Units and Perimeter Units.

Section 1.55 "Owner" shall mean the Person or Persons, including Declarant, holding fee simple interest of Record to any Unit. The term "Owner" shall include sellers under executory contracts of sale, but shall exclude Mortgagees.

Section 1.56 "Perimeter Units" shall mean those Units abutting the Perimeter Wall.

Section 1.57 "Perimeter Wall(s)" shall mean the walls and/or fences located generally around the exterior boundary of the Properties, constructed or to be constructed by or with the approval of Declarant.

Section 1.58 "Plat" shall mean the final map of DESERT BLOOM, Recorded on April 1, 1999, in Book 89 of Plats, Page 19, as said map from time to time may be amended or supplemented of Record.

Section 1.59 "Private Streets" shall mean all private streets, rights of way, street scapes, and vehicular ingress and egress easements, in the Properties, shown as such on the Plat.

Section 1.60 "Properties" shall mean all of the Original Property described in Exhibit "A," attached hereto, together with such portions of the Annexable Area, described in Exhibit "B" hereto, as hereafter may be annexed from time to time thereto pursuant to Article 15 of this Declaration.

Section 1.61 "Purchaser" shall have that meaning as provided in NRS §116.110375.

Section 1.62 "Record," "Recorded," "Filed" or "Recordation" shall mean, with respect to any document, the recordation of such document in the official records of the County Recorder of Clark County, Nevada.

Section 1.63 "Resident" shall mean any person who is physically residing in a Unit.

Section 1.64 "Rules and Regulations" shall mean the rules and regulations adopted by the Board pursuant to this Declaration and the Bylaws, as such Rules and Regulations from time to time may be amended.

Section 1.65 "Unit" (which shall refer generically to a Perimeter Unit, Cluster Unit, and/or Other Unit), shall consist of that portion of this Community to be separately owned by each Owner (as shown and separately identified on the Plat), and shall include a Lot and all Improvements thereon (which, with regard to a Perimeter Unit, shall specifically include the Unit Wall, pursuant to Section 9.6 below). Subject to the foregoing, and subject to Section 9.5 hereof, the boundaries of each Unit shall be the property lines of the Lot, as shown on the Plat.

Section 1.66 "Units That May Be Created" shall mean the total "not to exceed" maximum number of aggregate Units within the Original Property and the Annexable Area (i.e., 204 Units). Such number shall not be increased without written consent of the Master Declarant.

Any capitalized terms not defined herein shall have the meaning set forth in NRS Chapter 116.

appropriate release of lien, upon payment by the defaulting Owner of a reasonable fee to be determined by the Board, to cover the cost of preparing and Recording such release. A certificate, executed and acknowledged by any two (2) Directors or the Manager, stating the indebtedness secured by the lien upon any Unit created hereunder, shall be conclusive upon the Association and, if acknowledged by the Owner, shall be binding on such Owner as to the amount of such indebtedness as of the date of the certificate, in favor of all Persons who rely thereon in good faith. Such certificate shall be furnished to any Owner upon request, at a reasonable fee, to be determined by the Board.

Section 7.7 Cumulative Remedies. The assessment liens and the rights of foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies which the Association and its assigns may have hereunder and by law or in equity, including a suit to recover a money judgment for unpaid assessments, as provided above.

Section 7.8 Mortgagee Protection. Notwithstanding all other provisions hereof, no lien created under this Article 7, nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Unit, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Unit by judicial foreclosure, other foreclosure, or exercise of power of sale, such Unit shall remain subject to this Declaration and the payment of all installments of assessments accruing subsequent to the date such Beneficiary or other Person obtains title. The lien of the assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the First Mortgagee shall not relieve the prior Owner of his personal obligation for the payment of such unpaid assessments.

Section 7.9 Priority of Assessment Lien. Recording of the Declaration constitutes Record notice and perfection of a lien for assessments. A lien for assessments, including interest, costs, and attorneys' fees, as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for: (a) liens and encumbrances Recorded before the Declaration was Recorded; (b) a first Mortgage Recorded before the delinquency of the assessment sought to be enforced, and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. The sale or transfer of any Unit shall not affect an assessment lien. However, the sale or transfer of any Unit pursuant to judicial or nonjudicial foreclosure of a First Mortgage shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Unit from lien rights for any assessments which thereafter become due. Where the Beneficiary of a First Mortgage of Record or other purchaser of a Unit obtains title pursuant to a judicial or nonjudicial foreclosure or "deed in lieu thereof," the Person who obtains title and his successors and assigns shall not be liable for the share of the Common Expenses or assessments by the Association chargeable to such Unit which became due prior to the acquisition of title to such Unit by such Person. Such unpaid share of Common Expenses and assessments shall be deemed to become expenses collectible from all of the Units, including the Unit belonging to such Person and his successors and assigns.

waiver shall not be effective as to any loss covered by a policy of insurance which would be voided or impaired thereby.

Section 12.7 Notice of Expiration Requirements. If available, each of the policies of insurance maintained by the Association shall contain a provision that said policy shall not be canceled, terminated, materially modified or allowed to expire by its terms, without thirty (30) days' prior written notice to the Board and Declarant and to each Owner and each Beneficiary, insurer and/or guarantor of a first Mortgage who has filed a written request with the carrier for such notice, and every other Person in interest who requests in writing such notice of the insurer. All insurance policies carried by the Association pursuant to this Article 12, to the extent reasonably available, must provide that: (a) each Owner is an insured under the policy with respect to liability arising out of his interest in the Common Elements or Membership; (b) the insurer waives the right to subrogation under the policy against any Owner or member of his Family; (c) no act or omission by any Owner or member of his Family will void the policy or be a condition to recovery under the policy; and (d) if, at the time of a loss under the policy there is other insurance in the name of the Owner covering the same risk covered by the policy, the Association's policy provides primary insurance.

ARTICLE 13
MORTGAGEE PROTECTION CLAUSE

In order to induce any Mortgagees to participate in the financing of the sale of Units within the Properties, the following provisions are added hereto (and to the extent these added provisions conflict with any other provisions of the Declaration. these added provisions shall control):

(a) Each Eligible Beneficiary is entitled to written notification from the Association of any default by the Mortgagor of such Unit in the performance of such Mortgagor's obligations under this Declaration, the Articles of Incorporation, or the Bylaws, which default is not cured within thirty (30) days after the Association learns of such default. For purposes of this Declaration, "first Mortgage" shall mean a Mortgage with first priority over other Mortgages or Deeds of Trust on a Unit, and "first Mortgagee" shall mean the Beneficiary of a first Mortgage.

(b) Each Owner, including every first Mortgagee of a Mortgage encumbering any Unit which obtains title to such Unit pursuant to the remedies provided in such Mortgage, or by foreclosure of such Mortgage, or by deed or assignment in lieu of foreclosure, shall be exempt from any "right of first refusal" created or purported to be created by the Governing Documents.

(c) Except as provided in NRS §116.3116(2), each Beneficiary of a first Mortgage encumbering any Unit which obtains title to such Unit or by foreclosure of such Mortgage, shall take title to such Unit free and clear of any claims of unpaid assessments or charges against such Unit which accrued prior to the acquisition of title to such Unit by the Mortgagee.

(d) Unless at least sixty-seven percent (67%) of first Mortgagees (based upon one (1) vote for each first Mortgage owned) or sixty-seven percent (67%) of the Owners (other than Declarant) have given their prior written approval, neither the Association nor the Owners shall:

(i) subject to Nevada nonprofit corporation law to the contrary, by act or omission seek to abandon, partition, alienate, subdivide, release, hypothecate, encumber, sell or transfer the Common Elements and the Improvements thereon which are owned by the Association; provided that the granting of easements for public utilities or for other public purposes consistent with the intended use of such property by the Association as provided in this Declaration shall not be deemed a transfer within the meaning of this clause.

(ii) change the method of determining the obligations, assessments, dues or other charges which may be levied against an Owner, or the method of allocating distributions of hazard insurance proceeds or condemnation awards;

(iii) by act or omission change, waive or abandon any scheme of regulations, or enforcement thereof, pertaining to the architectural design of the exterior appearance of the Dwellings and other Improvements on the Units, the maintenance of Exterior Walls or common fences and driveways, or the upkeep of lawns and plantings in the Properties;

(iv) fail to maintain Fire and Extended Coverage on insurable Common Elements on a current replacement cost basis in an amount as near as possible to one hundred percent (100%) of the insurance value (based on current replacement cost);

(v) except as provided by any applicable provision of NRS Chapter 116, use hazard insurance proceeds for losses to any Common Elements property for other than the repair, replacement or reconstruction of such property; or

(vi) amend those provisions of this Declaration or the Articles of Incorporation or Bylaws which provide for rights or remedies of first Mortgagees.

(e) Beneficiaries, insurers and/or guarantors of first Mortgages, upon express written request in each instance therefor, shall have the right to (1) examine the books and records of the Association during normal business hours, (2) require from the Association the submission of an annual audited financial statement (without expense to the Beneficiary, insurer or guarantor requesting such statement) and other financial data, (3) receive written notice of all meetings of the Members, and (4) designate in writing a representative to attend all such meetings.

(f) All Beneficiaries, insurers and guarantors of first Mortgages, who have filed a written request for such notice with the Board shall be given thirty (30) days' written notice prior to: (1) any abandonment or termination of the Association; (2) the effective date of any proposed, material amendment to this Declaration or the Articles or Bylaws; and (3) the effective date of any termination of any agreement for professional management of the Properties following a decision of the Owners to assume self-management of the Properties. Such first Mortgagees shall be given immediate notice: (i) following any damage to the Common Elements whenever the cost of reconstruction exceeds Ten Thousand Dollars ($10,000.00); and (ii) when the Board learns of any threatened condemnation proceeding or proposed acquisition of any portion of the Properties.

(g) First Mortgagees may, jointly or singly, pay taxes or other charges which are in default and which may or have become a charge against any Common Elements property and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance

coverage on the lapse of a policy, for Common Elements property, and first Mortgagees making such payments shall be owed immediate reimbursement therefor from the Association.

(h) The Reserve Fund described in Article 6 of this Declaration must be funded by regular scheduled monthly, quarterly, semiannual or annual payments rather than by large extraordinary assessments.

(i) The Board shall require that any Manager, and any employee or agent thereof, maintain at all times fidelity bond coverage which names the Association as an obligee; and, from such time as Declarant no longer has the power to appoint or remove a majority of the Directors, as set forth in Section 3.7(c) above, the Board shall secure and cause to be maintained in force at all times fidelity bond coverage which names the Association as an obligee for any Person handling funds of the Association.

(j) When professional management has been previously required by a Beneficiary, insurer or guarantor of a first Mortgage, any decision to establish self-management by the Association shall require the approval of at least sixty-seven percent (67%) of the voting power of the Association and of the Board respectively, and the Eligible Beneficiaries of at least fifty-one percent (51%) of first Mortgages of Units in the Properties.

In addition to the foregoing, the Board of Directors may enter into such contracts or agreements on behalf of the Association as are required in order to satisfy the requirements of Mortgagees, so as to allow for the purchase, insurance or guaranty, as the case may be, by such entities of first Mortgages encumbering Units. Each Owner hereby agrees that it will benefit the Association and the Membership, as a class of potential Mortgage borrowers and potential sellers of their Units, if such agencies approve the Properties as a qualifying subdivision under their respective policies, rules and regulations, as adopted from time to time. Mortgagees are hereby authorized to furnish information to the Board concerning the status of any Mortgage encumbering a Unit.

ARTICLE 14
DECLARANT'S RESERVED RIGHTS

Section 14.1 Declarant's Reserved Rights. Any other provision herein notwithstanding, pursuant to NRS §116.2105(1)(h), Declarant reserves the following developmental rights and other special Declarant's rights, on the terms and conditions and subject to the expiration deadlines, if any, set forth below:

(a) Right to Complete Improvements and Construction Easement. Declarant reserves, for a period terminating on the fifteenth (15th) anniversary of the Recordation of this Declaration, the right, in Declarant's sole discretion, to complete the construction of the Improvements on the Properties and an easement over the Properties for such purpose; provided, however, that if Declarant still owns any property in the Properties on such fifteenth (15th) anniversary date, then such rights and reservations shall continue for one additional successive period of ten (10) years thereafter. The foregoing right shall include, but not be limited to, the right of Declarant to retrofit party walls, or to install walls generally on property lines of Units following

[redacted]

990601.0687

EXHIBIT "B"

ANNEXABLE AREA

All of the real property described in DESERT BLOOM, as shown by map thereof in Book 89 of Plats, Page 19, in the Office of the County Recorder of Clark County, Nevada.

EXCEPTING THEREFROM: **Lots One Hundred Seventy-Two (172)** through **One Hundred Eighty-One (181)**, inclusive, of **Block One (1)**; **Lots One Hundred Ninety-Four (194)** through **One Hundred Ninety-Seven (197)**, inclusive, of **Block Three (3)**; **Lots Nineteen (19)** and **Twenty (20)** of **Block Four (4)**; **Lots One Hundred Eighty-Three (183)**, **One Hundred Ninety-Two (192)**, and **One Hundred Ninety-Three (193)**, of **Block Five (5)** of DESERT BLOOM, as shown by map thereof in **Book 89** of Plats, **Page 19**, in the Office of the County Recorder of Clark County, Nevada.

When Recorded, Return To:

WILBUR M. ROADHOUSE, ESQ.
Goold Patterson DeVore Ales & Roadhouse
4496 South Pecos Road
Las Vegas, Nevada 89121
(702) 436-2600

wmn1936 21\Supp\cons 02.wpd

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:
GOOLD PATTERSON ET AL
06-01-99 11:43 CDU 79
OFFICIAL RECORDS
BOOK: 990601 INST: 00687
FEE: 65.00 RPTT: .00

RECORDING REQUESTED BY:

NEVADA TITLE COMPANY

(44)

WHEN RECORDED PLEASE RETURN TO:

JACKSON, DeMARCO
& PECKENPAUGH (FSJ)
Post Office Box 19704
Irvine, CA 92623-9704

96-05-0683 JM

(Space Above for Recorders Use)

DECLARATION OF COVENANTS, CONDITIONS

AND RESTRICTIONS AND GRANT OF EASEMENTS

FOR

SOUTH VALLEY RANCH

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6/25/96

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT OF EASEMENTS FOR SOUTH VALLEY RANCH

THIS DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS AND GRANT OF EASEMENTS ("Declaration") is made by SOUTH VALLEY RANCH, LLC, a Delaware limited liability company ("Declarant"), with reference to the following facts:

A KAUFMAN AND BROAD OF NEVADA, INC., a Nevada corporation ("K&B"), is the owner of certain real property located in Clark County, Nevada, more particularly described on Exhibit "A" as Parcel 2, and Declarant is the owner of certain real property located in Clark County, Nevada, more particularly described on Exhibit "A" as Parcel 1, which Exhibit is attached to and incorporated in this Declaration by this reference (the "Initial Property"). Declarant intends that the Initial Property be developed and improved as a master Planned Community for residential purposes, which will be known as South Valley Ranch.

B Declarant has deemed it desirable, for the efficient preservation of the values and amenities in the Project to create a corporation under the laws of the State of Nevada which shall be known as the South Valley Ranch Community Association and which shall be delegated and assigned the powers of, among other things, owning, maintaining and administering the Common Elements for the private use and benefit of its Members and authorized guests and invitees and performing such other acts as shall generally benefit the Project.

C. Declarant will cause or has caused such corporation, the Members of which shall be the Owners of Lots, to be formed for the purpose of exercising such functions.

D. Declarant and K&B desire to subject the Initial Property to certain covenants, conditions and restrictions for the benefit of Declarant and any and all future owners of Lots in accordance with a common plan and scheme of improvement and development. The development plan of the Initial Property shall be consistent with the overall development plan, if any, submitted to VA and FHA.

NOW, THEREFORE, Declarant and K&B hereby declare and establish the following general plan for the protection and benefit of the Project, and has fixed and does hereby fix the following protective covenants, conditions and restrictions as covenants and equitable servitudes running with the Project upon each and every ownership interest in the Project under and pursuant to which each such ownership interest shall hereafter be held, used, occupied, leased, sold, encumbered, conveyed or transferred. Each and all of the covenants, conditions and restrictions set forth herein are for the purpose of protecting the value and desirability of the Project, and each and every Lot, and inure to the benefit of, run with, and shall be binding upon and pass with each and every ownership interest therein and shall inure to the benefit of and apply to and bind Declarant, K&B and any Participating Builders and their respective successors in interest and each Owner and his or her respective successors in interest.

ARTICLE I

1. Definitions.

Unless otherwise expressly provided, when used in this Declaration, the following words and phrases shall have the meanings hereinafter specified.

1.1. Act.

Act means NRS ch. 116 (the Nevada Common - Interest Ownership Act).

1.2. Additional Property.

Additional Property means the real property described in Exhibit "B", all or any portion of which may from time to time be made subject to this Declaration.

1.3. Allocated Interests.

Allocated interests means each Lot's liability for Common Expenses and votes in the Association.

1.4. Articles.

Articles means the Articles of Incorporation of the Association as filed or to be filed in the Office of the Secretary of State of the State of Nevada.

1.5. Assessments(s).

Assessments(s) collectively means Capital Improvement Assessments, Common Assessments and Special Assessments.

1.6. Assessment Unit.

Assessment Unit means the arithmetical value allocated to each apartment unit, condominium unit, Lot, or parcel pursuant to Section 3.10 for purposes of calculating each Owner's proportionate share of Common Assessments and Capital Improvement Assessments, and voting rights.

1.7. Assessment Year.

Assessment Year means the calendar year or such other twelve (12) consecutive calendar month period selected by the Executive Board for the levying, determining and assessing of Common Assessments under this Declaration.

1.8. Association.

Association means the South Valley Ranch Community Association, a Nevada nonprofit corporation.

1.9. Association Maintenance Funds.

Association Maintenance Funds means the accounts created for Association receipts and disbursements pursuant to Article IV hereof

1.10. Bylaws.

Bylaws means the Bylaws of the Association which have or will be adopted by the Executive Board, as such Bylaws may from time to time be amended.

1.11. Capital Improvement Assessment.

Capital Improvement Assessment means a charge against each Owner and his Lot, representing a portion of the costs to the Association for installation, construction, or reconstruction of any Improvements on any portion of the Common Elements which the Association may from time to time authorize, pursuant to the provisions of this Declaration.

1.12. Common Assessment.

Common Assessment means an annual charge against each Owner and his Lot representing a portion of the total, ordinary costs of maintaining, improving, repairing, replacing, managing and operating the Common Elements.

1.13. Common Elements.

Common Elements means any real estate within the Project owned, in fee or easement, by the Association, other than a Lot, which the Association has the obligation to maintain, repair and replace for the common benefit of all Owners.

1.14. Common Expenses.

Common Expenses means the expenditures made by, or financial liabilities of, the Association, together with any allocations to reserves, including actual and estimated costs of:

(a) maintenance, management, operation, repair and replacement of the Common Elements;

(b) unpaid Special Assessments and Capital Improvement Assessments, including those costs not paid by the Owner responsible for payment;

(c) management and administration of the Association including, but not limited to, compensation paid by the Association to managers, accountants, attorneys and other employees;

(d) all utilities, gardening, trash pickup and disposal and other services benefiting the Common Elements and the Association;

(e) fire, casualty and liability insurance, workers' compensation insurance, and other insurance covering the Common Elements;

(f) any other insurance obtained by the Association;

(g) bonding the members of the management body, any professional managing agent or any other Person handling the funds of the Association;

(h) taxes paid by the Association;

(i) amounts paid by the Association for the discharge of any lien or encumbrance levied against the Common Elements or the Project, or portions thereof;

(j) maintenance by the Association of areas within the public right-of-way of public streets in the vicinity of the Project as provided in this Declaration; and

(k) any other item or items designated by the Association for any reason whatsoever directly benefitting the Common Elements or the Project, for the common benefit of the Owners.

1.15. Condominium.

Condominium means an interest in a portion of real estate within a common-interest community wherein portions of real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions, as defined by NRS Section 116.110325.

1.16. Declarant.

Declarant means South Valley Ranch, LLC, a Delaware limited liability company, its successors and any Participating Builder or other Person to which South Valley Ranch, LLC shall have assigned any rights hereunder by an express written and Recorded assignment as provided herein. Any such assignment may include all or only specific rights of the Declarant hereunder and may be subject to such conditions and limitations as Declarant may impose in its sole and absolute discretion.

1.17. Declaration.

Declaration means this Declaration of Covenants, Conditions and Restrictions and Grant of Easements for the Project, as such Declaration may be amended from time to time.

1.18. Declarant's Rights.

Declarant's Rights means special declarant's rights granted to Declarant pursuant to the Act and this Declaration, including, without limitation, Declarant's right to:

(a) Add the Additional Property to the Project;

(b) Create Lots, Common Elements or Limited Common Elements within the Project;

(c) Subdivide Lots or convert Lots into Common Elements;

(d) Complete Improvements indicated on the Plat, the Plan or in this Declaration;

(e) Maintain sales offices, management offices, signs, flags or other devices advertising the Project and models;

(f) Withdraw property from the Project;

(g) Merge or consolidate the Project with another Planned Community of the same form of ownership;

(h) Use easements through the Common Elements for the purpose of making Improvements within the Project;

(i) To establish Phases of Development and to enlarge, reduce and to otherwise modify such Phases of Development.

(j) Appoint or remove any officer of the Association or any member of the Executive Board during the period of Declarant's control set forth in Section 3.6.

Declarant reserves the right to exercise Declarant's Rights with respect to the entire Project, including the Initial Property and Additional Property.

1.19 Dwelling Unit.

Dwelling Unit means a building located on a Lot designed and intended for use and occupancy as a residence by a single Family

1.20 Executive Board.

Executive Board means the Board of Directors of the Association.

1.21. FHA.

FHA means the Federal Housing Administration of the United States Department of Housing and Urban Development and any department or agency of the United States government which succeeds to FHA's function of insuring notes secured by Mortgages on residential real estate.

1.22. FHLMC.

FHLMC means the Federal Home Loan Mortgage Corporation created by Title II of the Emergency Home Finance Act of 1970, and its successors.

1.23. Fiscal Year.

Fiscal Year means the fiscal accounting and reporting period of the Association selected by the Board.

1.24. FNMA.

FNMA means the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and its successors.

1.25. GNMA.

GNMA means the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and its successors.

1.26. Improvements.

Improvements means all structures and appurtenances thereto of every type and kind placed in the Project, including buildings, outbuildings, walkways, entry monuments, basketball courts, hiking trails, tennis courts, lakes, barbecue pits, waterways, sprinkler pipes, garages, swimming pools, jacuzzi spas and other recreational facilities, paint on all surfaces, carports, roads, driveways, parking areas, fences, screening walls, retaining walls, stairs, decks, landscaping, hedges, windbreaks, plantings, planted trees and shrubs, poles or signs, exterior air conditioning and water softener fixtures or equipment.

1.27. Initial Property.

Initial Property means the real property described in Exhibit "A" to this Declaration. The Initial Property includes two separate Phases of Development as described in Exhibit "A."

1.28. Land Classification.

Land Classification includes: (a) Single Family Residential Areas; (b) Multi-Family Residential Areas; and (c) Common Elements.

1.29. Limited Common Elements.

Limited Common Elements means a portion of the Common Elements allocated by this Declaration, a Notice of Annexation or a Supplemental Declaration or by operation of the Act for the exclusive use of one or more but fewer than all of the Lots. As of the date of Recordation of this Declaration, there are no Limited Common Elements.

1.30. Lot.

Lot means a physical portion or parcel of the Project designed for separate ownership or occupancy, as shown on the Plat or any subsequently Recorded final subdivision, parcel and condominium maps, together with the Improvements, if any, thereon, but excepting any

Common Elements. The term "Lot" shall include Single Family Residential Lots, and Multi-Family Residential Lots. The identifying number of each Lot is shown on a Recorded final subdivision, parcel and condominium maps for the Project.

1.31. Member.

Member means every Person holding a Membership in the Association, pursuant to Article III.

1.32. Membership.

Membership means a membership in the Association pursuant to Article III.

1.33. Mortgagee.

Mortgagee means the holder of a Security Interest, including a mortgagee of a mortgage and a beneficiary of a deed of trust

1.34. Multi-Family Residential Area.

Multi-Family Residential Area means the real property that may be so classified from time to time in this Declaration, a Notice of Annexation or a Supplemental Declaration, which has been developed or is being developed with Improvements suitable for Multi-Family Residential Lots.

1.35. Multi-Family Residential Lot.

Multi-Family Residential Lot means a Lot located within a Multi-Family Residential Area.

1.36. NRS.

NRS means the Nevada Revised Statutes, as amended from time to time.

1.37. Notice of Annexation.

Notice of Annexation means an amendment to the Declaration Recorded pursuant to Section 2.5 hereof to annex all or a portion of the Additional Property, submitting the real estate described therein to the Declaration and the jurisdiction of the Association.

1.38. Owner.

Owner means the Person or Persons, including Declarant and any Participating Builders, holding: (a) a fee simple interest to a Lot; or (b) a leasehold interest of Record to a Lot with an initial term of more than twenty (20) years, including options to renew, excluding those Persons holding title solely as security for the performance of an obligation other than sellers under executory contracts of sale. Declarant is the owner of any Lot created by this Declaration until that Lot is conveyed to another Person.

1.39. Participating Builder.

Participating Builder means a Person who acquires a portion of the Project for the purpose of improving such portion of the Project for either resale or lease to the general public; provided, however, that the term "Participating Builder" shall not mean or refer to Declarant or its successors.

1.40. Person.

Person means a natural individual, a partnership, a corporation or any other entity with the legal right to hold title to real property.

1.41. Phase of Development.

Phase of Development means each portion of real property designated as such in this Declaration, in a Notice of Annexation or a Supplemental Declaration.

1.42. Plan.

Plan means a plan or plans of development for the Project, if any, prepared by Declarant or a Participating Builder, as the same may be amended from time to time by Declarant or a Participating Builder.

1.43. Planned Community.

Planned Community means a common-interest community that is not a condominium or cooperative, as defined in NRS Section 116.110368.

1.44. Project.

Project means the Initial Property, together with the Additional Property that may be added to the property subject to this Declaration and the jurisdiction of the Association, and all Improvements thereto. The Project is and will be entirely situated in Clark County, Nevada.

1.45. Record, Recorded, Filed and Recordation.

Record, Recorded, Filed and Recordation means, with respect to any document, the recordation or filing of such document in the Office of the County Recorder of the County of Clark, State of Nevada.

1.46. Restrictions.

Restrictions means this Declaration, the Articles, the Bylaws, the rules and regulations of the Association and any Supplemental Declaration with respect to the property covered by such Supplemental Declaration unless otherwise provided therein, from time to time in effect.

1.47. Security Interest.

Security Interest means an interest in real estate or personal property, created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, contract for deed, land sales contract, lease intended as security, assignment of leases or rents intended as security, pledge of an ownership interest in an association and any other consensual lien or contract for retention of title intended as security for an obligation.

1.48 Single Family Residential Area.

Single Family Residential Area means the real property that may be so classified from time to time in this Declaration, a Notice of Annexation or a Supplemental Declaration, which has been developed or is being developed with Improvements suitable for Single Family Residential Lots.

1.49 Single Family Residential Lot.

Single Family Residential Lot means a Lot located within a Single Family Residential Area.

1.50 Special Assessment.

Special Assessment means a charge against a particular Owner and his Lot directly attributable to or reimbursable by the Owner, to reimburse the Association for costs incurred in bringing the Owner and his Lot into compliance with the provisions of this Declaration, or a charge levied by the Executive Board as a reasonable fine or penalty for non-compliance with the Restrictions, plus interest and other charges on such Special Assessment as provided for in this Declaration. Special Assessments shall not include any late payment penalties, interest charges, attorneys' fees or other costs incurred by the Association in its efforts to collect Common Assessments or Capital Improvement Assessments.

1.51. Sub-Association.

Sub-Association means any Nevada non-profit corporation, or unincorporated association, or its successor in interest, the membership of which is composed of Owners of Lots within one or more Phases of Development or other portion of the Project, which is organized and established or authorized pursuant to or in connection with a Supplemental Declaration.

1.52. Supplemental Declaration.

Supplemental Declaration means any declaration of covenants, conditions and restrictions, or similar such document, which affects only a discrete Phase of Development or other portion of the Project.

1.53 VA.

VA means the Department of Veterans Affairs of the United States of America and any department or agency of the United States government which succeeds to VA's function of issuing guarantees of notes secured by Mortgages on residential real estate.

ARTICLE II

2. Development of the Project, Land Classification; Additional Property.

2.1 Land Classifications.

Declarant intends, but is not obligated, to develop the Project, and all portions thereof, as a master Planned Community used primarily for residential purposes consistent with this Declaration. At the time Declarant exercises its option to add any of the Additional Property to the Project pursuant to Section 2.3, Declarant shall designate in the Notice of Annexation each Lot that is added as being one of the Land Classifications specified in Section 2.2. Declarant

Declarant's control, and any attempted exercise of those rights is void. So long as a successor Declarant may not exercise Declarant's Rights under this section, such successor Declarant is not subject to any liability or obligation as a Declarant other than liability for acts or omissions pursuant to such Declarant's right to appoint and remove the officers and members of the Executive Board as provided in Section 3.6.

11.4. Successor Not Subject to Certain Claims Against or Other Obligations of Transferor of Declarant's Rights.

Any successor to a Declarant's Right is not subject to any claims against or other obligations of a transferor declarant, other than claims and obligations arising by operation of law or under this Declaration.

11.5. General

No Owner nor the Association shall do anything to interfere with, and nothing in this Declaration shall be understood or construed to, prevent Declarant or any successor declarant, including a Participating Builder, their successors or assigns, or their contractors or subcontractors, from the exercise of Declarant's Rights. All Participating Builders shall be "dealers", as that term is defined in the Act. Accordingly, in addition to the right to exercise Declarant's Rights that may be assigned to them under this Article, Participating Builders shall have the obligation to comply with the Act, including Article 4 of the Act, with respect to the Phase of Development acquired by each of them.

ARTICLE XII

12. General Provisions.

12.1. Mortgagee Protection

Except, as otherwise required by law, liens created hereunder upon any Lot shall be subject and subordinate to, and shall not affect, the rights of the Mortgagee under any Recorded first Security Interest upon such Lot made in good faith and for value, provided that after the foreclosure of any such Security Interest, the amount of all Assessments assessed hereunder to the purchaser at such foreclosure as an Owner after the date of such foreclosure shall become a lien upon such Lot. No amendment to this Declaration shall impair the rights of any first Mortgagee who does not join in the execution thereof, provided that prior to recordation of such amendment its Security Interest is recorded. No breach of this Declaration shall defeat or render invalid the lien of any first Security Interest made in good faith and for value, but this Declaration shall be binding upon and effective against any Owner whose title is derived through foreclosure or trustee's sale, or otherwise.

12.2. Severability

Invalidation of any one of these covenants or restrictions by judgment or a court order shall not affect any other provisions, which shall remain in full force and effect.

EXHIBIT B

DESCRIPTION OF ADDITIONAL PROPERTY

ALL THAT LAND LYING WITHIN THE EXTERIOR BOUNDARIES OF SOUTH VALLEY RANCH, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 66 OF PLATS, PAGE 74, AND THE AMENDED MAP OF A PORTION OF SOUTH VALLEY RANCH, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 74 OF PLATS, PAGE 58, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY NEVADA;

EXCEPTING THEREFROM THE FOLLOWING DESCRIBED PARCELS OF LAND:

PARCEL ONE (1):

ALL THAT LAND LYING WITHIN THE EXTERIOR BOUNDARIES OF SOUTH VALLEY RANCH - PARCEL 6B UNIT B1 AND LOTS 777 THROUGH 781 OF PARCEL 7A UNIT A4 AS SHOWN BY MAP THEREOF ON FILE IN BOOK 74 OF PLATS, PAGE 62, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA.

PARCEL TWO (2):

ALL THAT LAND LYING WITHIN THE EXTERIOR BOUNDARIES OF SOUTH VALLEY RANCH - PARCEL 7B UNIT A1 AS SHOWN BY MAP THEREOF ON FILE IN BOOK 74 OF PLATS, PAGE 61, IN THE OFFICE OF THE COUNTY RECORDER, CLARK COUNTY, NEVADA.

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:
NEVADA TITLE COMPANY

07-25-96 08:00 TML 64
OFFICIAL RECORDS
BOOK: 960725 INST: 00004
FEE: 70.00 RPTT: .00

C:\DOCS\FSJ\037\25722.000\CCRS\0222984.02
6/25/96

20060210-0003396

APN #: 139-10-411-049 Through 139-10-411-055

Fee: $103.00
N/C Fee: $0.00

02/10/2006 15:00:43
T20060026518
Requestor:
PLASTER DEVELOPMENT CO INC

Frances Deane ADF
Clark County Recorder Pgs: 90

WHEN RECORDED, RETURN TO:

Attn.: Shari O'Donnell
Plaster Development Company, Inc.
801 South Rancho Drive, Suite E-4
Las Vegas, Nevada 89106

90

DECLARATION OF

COVENANTS, CONDITIONS, AND RESTRICTIONS

AND RESERVATION OF EASEMENTS

FOR

SUNCREST HOMEOWNERS ASSOCIATION

(a Nevada Residential Common-Interest Planned Community)
CITY OF NORTH LAS VEGAS, NEVADA

TABLE OF CONTENTS

DECLARATION
OF COVENANTS, CONDITIONS, AND RESTRICTIONS
AND RESERVATION OF EASEMENTS
FOR
SUNCREST HOMEOWNERS ASSOCIATION

(NORTH LAS VEGAS, NEVADA)

THIS DECLARATION of Covenants, Conditions and Restrictions and Reservation of Easements (the "Declaration") is made as of this _____ day of_____, 2006, by PLASTER DEVELOPMENT COMPANY, INC., dba Signature Homes, a Nevada corporation ("Declarant"). All capitalized terms used herein shall have the meaning set forth in Article 1 or otherwise in Chapter 116 of the Nevada Revised Statutes.

RECITALS

A. Declarant owns certain real property located in the City of North Las Vegas, Nevada, on which Declarant intends to subdivide, develop, construct, market and sell a single family attached and detached residential common-interest planned community, to be known as "SUNCREST HOMEOWNERS ASSOCIATION"; and

B. A portion of said property, as more particularly described in Exhibit "A" attached hereto, shall constitute the property initially covered by this Declaration ("Original Property"); and

C. Declarant intends that, upon Recordation of this Declaration, the Original Property shall be a Nevada Common-Interest Community, as defined in NRS § 116.021, and a Nevada Planned Community, as defined in NRS § 116.075 ("Community"); and

D. The name of the Community shall be SUNCREST HOMEOWNERS ASSOCIATION, and the name of the Nevada nonprofit corporation organized in connection therewith shall be SUNCREST HOMEOWNERS ASSOCIATION("Association"); and

E. Declarant further reserves the right from time to time to add all or any portion(s) of certain other real property more particularly described in Exhibit "B" hereto (the "Annexable Area"); and

F. The total maximum number of Units that may (but need not) be created in the Community is one hundred seventy-nine (179) aggregate Units ("Units That May Be Created"); and

G. Declarant intends to develop and convey all of the Original Property, and any Annexable Area which may be annexed from time to time thereto ("Annexed Property"), pursuant to a general plan and subject to certain protective covenants, conditions, restrictions, rights, reservations, easements, equitable servitudes, liens and charges; and

H. Declarant has deemed it desirable, for the efficient preservation of the value and amenities of the Original Property and any Annexed Property, to organize the Association, to which shall be delegated and assigned the powers of owning, maintaining and administering the Common Elements (as defined herein), administering and enforcing the covenants and restrictions, and collecting and disbursing the assessments and

charges hereinafter created. Declarant will cause, or has caused, the Association to be formed for the purpose of exercising such functions; and

I. This Declaration is intended to set forth a dynamic and flexible plan for governance of the Community, and for the overall development, administration, maintenance and preservation of a unique residential community, in which the Owners enjoy a quality lifestyle as "good neighbors";

NOW, THEREFORE, Declarant hereby declares that all of the Original Property, and, from the date(s) of respective annexation, all Annexed Property (collectively, "Properties") shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the following protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Properties, in furtherance of a general plan for the protection, maintenance, subdivision, improvement, and sale and lease, of the Properties or any portion thereof. The protective covenants, conditions, restrictions, reservations, easements, and equitable servitudes set forth herein shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties, or any part thereof, their heirs, successors and assigns; shall inure to the benefit of every portion of the Properties and any interest therein; and shall inure to the benefit of and be binding upon, and may be enforced by, Declarant, the Association, each Owner and their respective heirs, executors and administrators, and successive owners and assigns. All Units within this Community shall be used, improved and limited exclusively to single Family residential use.

ARTICLE I
DEFINITIONS

Section 1.1 Act: "Act" shall mean Chapter 116 of Nevada Revised Statutes, as may be amended from time to time.

Section 1.2 Annexable Area: "Annexable Area" shall mean the real property described in Exhibit "B," attached hereto and incorporated by this reference herein, all or any portion of which real property may from time to time be made subject to this Declaration pursuant to the provisions of Article 15 hereof. At no time shall any portion of the Annexable Area be deemed to be a part of the Community or a part of the Properties until such portion of the Annexable Area has been duly annexed hereto pursuant to **Article 15** hereof.

Section 1.3 Annexed Property: "Annexed Property" shall mean any and all portion(s) of the Annexable Area from time to time added to the Properties covered by this Declaration, by Recordation of Annexation Amendment(s) pursuant to **Article 15** hereof.

Section 1.4 ARC: "ARC" shall mean the Architectural Review Committee created pursuant to Article 8 hereof.

Section 1.5 Articles: "Articles" shall mean the Articles of Incorporation of the Association as filed or to be filed in the office of the Secretary of State of Nevada, as such Articles may be amended from time to time.

Section 1.6 Assessments: "Assessments" shall refer collectively to Annual Assessments, and any applicable Capital Assessments and/or Special Assessments.

Section 1.7 Assessment, Annual: "Assessment, Annual" shall mean the annual or supplemental charge against each Owner and his or her Unit, representing a portion of the Common Expenses, which are to

be paid in equal periodic (monthly or quarterly, as determined from time to time by the Board) installments commencing on the Assessment Commencement Date, by each Owner to the Association in the manner, and at the times, and proportions provided herein.

Section 1.8 Assessment, Capital: "Assessment, Capital" shall mean a charge against each Owner and his or her Unit, representing a portion of the costs to the Association for installation, construction, or reconstruction, of any Improvements on any portion of the Common Elements which the Association may from time to time authorize, pursuant to the provisions of this Declaration. Such charge shall be levied among all Owners and their Units in the same proportion as Annual Assessments.

Section 1.9 Assessment, Special: "Assessment, Special" shall mean a charge against a particular Owner and his or her Unit, directly attributable to, or reimbursable by, that Owner, equal to the cost incurred by the Association for corrective action, performed pursuant to the provisions of this Declaration, or a reasonable fine or penalty assessed by the Association, plus interest and other charges on such Special Assessments as provided for herein.

Section 1.10 Assessment Commencement Date: "Assessment Commencement Date" shall mean that date, pursuant to **Section 6.7** hereof, duly established by the Board, on which Annual Assessments shall commence.

Section 1.11 Association: "Association" shall mean SUNCREST HOMEOWNERS ASSOCIATION, a Nevada nonprofit corporation, its successors and assigns.

Section 1.12 Association Funds: "Association Funds" shall mean the accounts created for receipts and disbursements of the Association, pursuant to **Article 6** hereof.

Section 1.13 Aircraft: "Aircraft" shall mean any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air or space regardless of the form of propulsion which powers said aircraft in flight.

Section 1.14 Beneficiary: "Beneficiary" shall mean a Mortgagee under a Mortgage and the assignees of such mortgagee or beneficiary.

Section 1.15 Board or Board of Directors: "Board" or "Board of Directors" shall mean the Board of Directors of the Association. The Board of Directors is an "Executive Board" as defined by NRS §116.045.

Section 1.16 Budget: "Budget" shall mean a written, itemized estimate of the expenses to be incurred by the Association in performing its functions under this Declaration, prepared and approved pursuant to the provisions of this Declaration, including, but not limited to, **Section 6.4** below.

Section 1.17 Bylaws: "Bylaws" shall mean the Bylaws of the Association which have or will be adopted by the Board, as such Bylaws may be amended from time to time.

Section 1.18 City: "City" shall mean the incorporated city, if any, in which the Properties are located (i.e., City of North Las Vegas).

Section 1.19 Close of Escrow: "Close of Escrow" shall mean the date on which a deed is Recorded conveying a Unit from Declarant to a Purchaser.

Section 1.20 Common Elements: "Common Elements" shall mean all (i) real property, other than Units, owned or leased by the Association, (ii) real property over which the Association holds an easement for the use and enjoyment of the Owners, but excluding the "Landscape Area" easements over certain Units as

shown on the Plat, (iii) any landscape or other areas located within public rights-of-way near or adjacent to the Properties, for which the Association is or becomes obligated to maintain, (iv) any personal property owned by the Association for the use and enjoyment of the Owners, and (v) any other property or Improvements owned or held by the Association for the use and enjoyment of the Owners, including without limitation, Private Streets, project monumentation and monumentation lighting (if any), drainage areas, sidewalks, street lights, perimeter landscaping areas, interior streetscaping areas, detention basin and other landscape areas (together with the Improvements constructed or installed thereon by Declarant). The Common Elements shall additionally initially consist of the real property (together with the Improvements constructed thereon) described on Exhibit "C" attached hereto and incorporated herein by this reference.

Section 1.21 Common Expenses: "Common Expenses" shall mean expenditures made by, or financial liabilities of, the Association, together with all allocations to reserves, including the actual and estimated costs of: maintenance, insurance, management, operation, repair and replacement of the Common Elements; painting over or removing graffiti on the exterior surface of the Perimeter Walls pursuant to **Section 9.10** below, unpaid Special Assessments and/or Capital Assessments; the costs of any commonly metered utilities and other commonly metered charges for the Properties; costs of management and administration of the Association including, but not limited to, compensation paid by the Association to Managers, accountants, attorneys and employees; costs of all utilities, gardening, trash pickup and disposal, and other services benefiting the Common Elements; the Association's costs of the weeding services for the Landscape Areas as required in Section 9.3 below; costs of fire, casualty and liability insurance, workers' compensation insurance, and any other insurance covering the Common Elements or Properties or deemed prudent and necessary by the Board; costs of bonding the Board, Officers, any Managers, or any other Person handling the funds of the Association; any statutorily required common interest community fees; taxes paid by the Association; amounts paid by the Association for discharge of any lien or encumbrance levied against the Common Elements or Properties, or portions thereof; adequate reserves; and any other expenses for which the Association is responsible pursuant to this Declaration or pursuant to any applicable provision of the Act.

Section 1.22 Community: "Community" shall mean a Common-Interest Community, as defined in NRS § 116.021, and a Planned Community, as defined in NRS § 116.075.

Section 1.23 County: "County" shall mean the county in which the Properties are located (i.e., Clark County, Nevada).

Section 1.24 Declarant: "Declarant" shall mean PLASTER DEVELOPMENT COMPANY, INC., a Nevada corporation, and its successors and any Person(s) to which it shall have assigned any rights hereunder by an express written and Recorded assignment (but specifically excluding Purchasers as defined in NRS § 116.079).

Section 1.25 Declarant Control Period: "Declarant Control Period" shall have the meaning set forth in **Section 3.7**, below.

Section 1.26 Declaration: "Declaration" shall mean this instrument as it may be amended from time to time.

Section 1.27 Director: "Director" shall mean a duly appointed or elected and current member of the Board of Directors.

Section 1.28 Dwelling: "Dwelling" shall mean a residential building located on a Unit designed and intended for use and occupancy as a residence by a single Family.

Section 1.29 Eligible Holder: "Eligible Holder" shall mean each Beneficiary, insurer and/or guarantor of a First Mortgage encumbering a Unit, which has filed with the Board a written request for notification as to relevant specified matters.

Section 1.30 Family: "Family" shall mean (a) a group of natural persons related to each other by blood or legally related to each other by marriage or adoption, or (b) a group of natural persons not all so related, but who maintain a common household in a Dwelling, all as subject to and in compliance with all applicable federal and Nevada laws and local health codes and other applicable County and City ordinances.

Section 1.31 FHA: "FHA" shall mean the Federal Housing Administration.

Section 1.32 FHLMC: "FHLMC" shall mean the Federal Home Loan Mortgage Corporation (also known as The Mortgage Corporation) created by Title II of the Emergency Home Finance Act of 1970, and any successors to such corporations.

Section 1.33 Fiscal Year: "Fiscal Year" shall mean the twelve (12) month fiscal accounting and reporting period of the Association designated in the Bylaws.

Section 1.34 Fire Wall: "Fire Wall" shall have the meaning set forth in **Section 9.11** below.

Section 1.35 FNMA: "FNMA" shall mean the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and any successors to such corporation.

Section 1.36 Foundation Facilities: "Foundation Facilities" shall have the meaning set forth in **Section 9.12(b)** below.

Section 1.37 GNMA: "GNMA" shall mean the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and any successors to such association.

Section 1.38 Governing Documents: "Governing Documents" shall mean the Declaration, Articles, Bylaws, Plat, and the Rules and Regulations. Any irreconcilable inconsistency among the Governing Documents shall be governed pursuant to **Section 18.10 below**.

Section 1.39 Improvement: "Improvement" shall mean any structure or appurtenance thereto of every type and kind, whether above or below the land surface, placed in the Properties, including but not limited to Dwellings and other buildings, walkways, sprinkler pipes, garages, swimming pools, spas and other recreational facilities, carports, roads, driveways, parking areas, hardscape, Private Streets, streetlights, curbs, gutters, walls, Perimeter Walls, Party Walls, Roof Facilities, fences, screening walls, block walls, retaining walls, stairs, decks, landscaping, antennae, hedges, windbreaks, patio covers, railings, plantings, planted trees and shrubs, poles, signs, exterior air conditioning and water-softener fixtures or equipment.

Section 1.40 Landscape Area: "Landscape Area" shall mean each portion of a Unit now or hereafter designated on the Plat as a "Landscape Area." Each Owner shall be responsible to maintain any Landscape Area located on such Owner's Unit pursuant to Sections 9.8(b) and 10.7, except that the Association shall be responsible to keep all Landscape Areas free from weeds pursuant to Section 9.3 below.

Section 1.41 Manager: "Manager" shall mean a Person possessing all licenses and certifications required by the Act, employed or engaged to perform management services for the Properties and the Association.

Section 1.42 Member: "Member" shall mean any Person holding a membership in the Association, as provided in this Declaration. "Membership" shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations, including liability for Assessments, contained in this Declaration and the Articles and Bylaws.

Section 1.43 Mortgage: "Mortgage" shall mean the interest in a Unit created by contract or conveyance, which secures payment or performance of an obligation. The term includes a lien created by a mortgage, deed of trust, trust deed, security deed, lease intended as security, assignment of lease or rents intended as security, pledge of an ownership interest in a Unit, and any other consensual lien or title retention contract intended as security for an obligation.

Section 1.44 Notice and Hearing: "Notice and Hearing" shall mean written notice and an opportunity for a hearing before the Board, at which the Owner concerned shall have an opportunity to be heard in person, or by counsel at Owner's expense, in the manner further provided in the Bylaws.

Section 1.45 NRS: "NRS" shall mean Nevada Revised Statutes.

Section 1.46 Officer: "Officer" shall mean a duly elected or appointed and current officer of the Association.

Section 1.47 Original Property: "Original Property" shall mean that real property described on Exhibit "A," attached hereto and incorporated by this reference herein, which shall be the initial real property made subject to this Declaration, immediately upon the Recordation of this Declaration.

Section 1.48 Owner: "Owner" shall mean one or more Persons, which may include Declarant, holding the record title to any particular Unit, but excluding in all cases any party holding an interest merely as security for the performance of an obligation. The term "Owner" shall include sellers under executory contracts of sale, but shall exclude Mortgagees.

Section 1.49 Party Wall: "Party Wall" shall have the meaning set forth in Section 9.6 below.

Section 1.50 Perimeter Wall(s): "Perimeter Wall(s)" shall mean the walls and/or fences generally around the exterior boundary of the Properties, constructed or to be constructed by or with the approval of Declarant. Each Owner is responsible to maintain and insure that portion of the Perimeter Wall that is located on or forms apart of such Owner's Unit pursuant to Section 9.7 hereof. The Association shall have no responsibility for the maintenance or insurance of the Perimeter Walls, except to the extent that the Association elects to undertake under Section 9.10 hereof for the removal or painting over of graffiti.

Section 1.51 Person: "Person" shall mean a natural individual, a corporation, limited liability company, partnership, trustee, or any other legal entity.

Section 1.52 Plat: "Plat" shall mean the final map of REVERE AND COLTON, Recorded in Book 119 of Plats, Page 0047, as said Plat map from time to time may be amended or supplemented of Record by Declarant, together with other any map which may, in the future, be Recorded with respect to the Annexable Area.

Section 1.53 Private Streets: "Private Streets" shall mean all private drives, rights of way, streetscapes, and vehicular ingress and egress easements, in the Properties, shown as such on the Plat.

Section 1.54 Properties: "Properties" shall mean all of the Original Property described in Exhibit "A" and Exhibit "C" attached hereto, together with such portions of the Annexable Area, described in Exhibit "B" hereto, at such time as such portions thereof have been annexed from time to time hereto pursuant to **Article 15** of this Declaration.

Section 1.55 Purchaser: "Purchaser" shall have that meaning as provided in NRS §116.079.

Section 1.56 Record: "Record," "Recorded," "Filed" or "Recordation" shall mean, with respect to any document, the recordation of such document in the official records of the County Recorder of Clark

County, Nevada. The date of Recording shall refer to that time at which a document, map, or Plat is Recorded.

Section 1.57 Resident: "Resident" shall mean any Owner, tenant, or other person, who is physically residing in a Unit.

Section 1.58 Roof Facilities: "Roof Facilities" shall have the meaning set forth in **Section 9.13** below.

Section 1.59 Rules and Regulations: "Rules and Regulations" shall mean the rules and regulations, if any, adopted by the Board pursuant to this Declaration and the Bylaws, as such Rules and Regulations from time to time may be amended.

Section 1.60 Sight Visibility Restriction Zones: "Sight Visibility Restriction Zones" shall mean those areas portions of which are or may be located on portions of Common Elements and/or Units, identified on the Plat as "Sight Visibility Zone," in which the height of landscaping and other sight restricting Improvements (other than official traffic control devices) is restricted to a maximum height of twenty-seven (27) inches measured from the top of the adjacent asphalt, gravel or pavement, or as otherwise set forth in the Plat.

Section 1.61 Unit: "Unit" shall mean the physical portion of the Community designated for separate ownership and occupancy under this Declaration. The term shall refer to a separately platted lot as well as any Improvements located thereon, including the Dwelling and its foundation constructed by Declarant on such separately platted lot. The boundaries of each Unit shall be as delineated on the Plat, provided, however that regardless of settling or lateral movement of the Improvements, and regardless of minor variations between Unit boundaries shown on the Plat, the Unit shall be deemed to include the entire Dwelling, including without limitation, the roof and the exterior finished surface of all Fire Walls which may be located on the separately platted lot or within any encroachment easement areas burdening an adjacent Unit pursuant to Section 2.7 below.

Section 1.62 Units That May Be Created: "Units That May Be Created" shall mean the total "not to exceed" maximum number of aggregate Units within the Original Property and the Annexable Area (which Declarant has reserved the right, in its sole discretion, to create) (i.e., 179 Units).

Section 1.63 VA: "VA" shall mean the U.S. Department of Veterans Affairs.

ARTICLE II
OWNERS' PROPERTY RIGHTS

Section 2.1 Owners' Easements of Enjoyment. Each Owner shall have a nonexclusive right and easement of ingress and egress and of use and enjoyment in, to and over the Common Elements, which easement shall be appurtenant to and shall pass with title to the Owner's Unit, subject to the following:

(a) the right of the Association to reasonably limit the number of guests and tenants an Owner or his or her tenant may authorize to use the Common Elements;

(b) the right of the Association to establish uniform Rules and Regulations pertaining to the use of the Common Elements;

(c) the right of the Association in accordance with the Declaration, Articles, and Bylaws, with the vote of at least two-thirds (2/3) of the voting power of the Association and a majority of the voting power of the Board, to borrow money for the purpose of improving or adding to the Common Elements, and in aid thereof, and further subject to the mortgagee protection provisions of **Article 13**

Association, and the name and address of the Person authorized by the Board to enforce the lien by sale. The notice of default and election to sell shall be signed and acknowledged by an Association Officer, Manager, or other Person designated by the Board for such purpose, and such lien shall be prior to any declaration of homestead Recorded after the date on which this Declaration is Recorded. The lien shall continue until fully paid or otherwise satisfied.

Section 7.4 Foreclosure Sale. Subject to the limitation set forth in **Section 7.5** below, any such sale provided for above may be conducted by the Board, its attorneys, or other Person authorized by the Board in accordance with the provisions of NRS §116.31164 and Covenants Nos. 6, 7 and 8 of NRS §107.030 and §107.090, as amended, insofar as they are consistent with the provisions of NRS §116.31164, as amended, or in accordance with any similar statute hereafter enacted applicable to the exercise of powers of sale in Mortgages and Deeds of Trust, or in any other manner permitted by law. The Association, through its duly authorized agents, shall have the power to bid on the Unit at the foreclosure sale and to acquire and hold, lease, mortgage, and convey the same. Notices of default and election to sell shall be provided as required by NRS §116.31163. Notice of time and place of sale shall be provided as required by NRS §116.311635.

Section 7.5 Limitation on Foreclosure. Any other provision in the Governing Documents notwithstanding, the Association may not foreclose a lien by sale for the assessment of a Special Assessment or for a violation of the Governing Documents, unless the violation is of a type that substantially and imminently threatens the health, safety, and welfare of the Owners and Residents of the Community. The foregoing limitation shall not apply to foreclosure of a lien for an Annual Assessment, or Capital Assessment, or any portion respectively thereof, pursuant to this Article 7.

Section 7.6 Cure of Default. Upon the timely cure of any default for which a notice of default and election to sell was filed by the Association, the Officers thereof shall Record an appropriate release of lien, upon payment by the defaulting Owner of a reasonable fee to be determined by the Board, to cover the cost of preparing and Recording such release. A certificate, executed and acknowledged by any two (2) Directors or the Manager, stating the indebtedness secured by the lien upon any Unit created hereunder, shall be conclusive upon the Association and, if acknowledged by the Owner, shall be binding on such Owner as to the amount of such indebtedness as of the date of the certificate, in favor of all Persons who rely thereon in good faith. Such certificate shall be furnished to any Owner upon request, at a reasonable fee, to be determined by the Board.

Section 7.7 Cumulative Remedies. The assessment liens and the rights of foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies which the Association and its assigns may have hereunder and by law or in equity, including a suit to recover a money judgment for unpaid assessments, as provided above.

Section 7.8 Mortgagee Protection. Notwithstanding all other provisions hereof, no lien created under this Article 7, nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Mortgage encumbering a Unit, made in good faith and for value; provided that after such Beneficiary or some other Person obtains title to such Unit by judicial foreclosure, other foreclosure, or exercise of power of sale, such Unit shall remain subject to this Declaration and payment of all installments of assessments accruing subsequent to the date such Beneficiary or other Person obtains title. The lien of the assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the First Mortgagee shall not relieve the prior Owner of his or her personal obligation for the payment of such unpaid assessments.

Section 7.9 Priority of Assessment Lien. Recording of the Declaration constitutes Record notice and perfection of a lien for assessments. A lien for assessments, including interest, costs, and attorneys' fees, as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for: (a) liens and encumbrances Recorded before the Declaration was Recorded; (b) a First Mortgage Recorded before the

delinquency of the assessment sought to be enforced, and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. The sale or transfer of any Unit shall not affect an assessment lien. A lien for assessments under this Declaration is also prior to all Mortgages described in part (b) of this **Section 7.9** to the extent that the assessments are based on the periodic budget adopted by the Association pursuant to **Section 6.5** and would have become due in the absence of acceleration, during the six (6) months immediately preceding institution of an action to enforce the Association's lien.

ARTICLE VIII
ARCHITECTURAL AND LANDSCAPING CONTROL

Section 8.1 ARC. The Architectural Review Committee, sometimes referred to in this Declaration as the "ARC," shall consist of three (3) committee members; provided, however, that such number may be increased or decreased from time to time by resolution of the Board. Notwithstanding the foregoing, Declarant shall have the sole right and power to appoint and/or remove all of the members to the ARC until such time as Declarant no longer owns any property in, or has any power to annex, the Annexable Area or any portion thereof; provided that Declarant, in its sole discretion, by written instrument, may at any earlier time turn over to the Board the power to appoint the members to the ARC; thereafter, the Board shall appoint all members of the ARC. A member of the ARC may be removed at any time, without cause, by the Person who appointed such member. Unless changed by resolution of the Board, the address of the ARC for all purposes, including the submission of plans for approval, shall be at the principal office of the Association as designated by the Board.

Section 8.2 Meetings of the ARC. The ARC shall meet from time to time as necessary to perform its duties hereunder. The members of the ARC need not be Members of the Association or representatives of Members, and may, but need not, include architects, engineers, or similar professionals, whose compensation, if any, the Board shall establish from time to time. The ARC may from time to time, by resolution unanimously adopted in writing, designate an ARC representative (who may, but need not be, one of its members) to take any action or perform any duties for and on behalf of the ARC, except the granting of variances pursuant to **Section 8.8** below. In the absence of such designation, the vote of a majority of the ARC, or the written consent of a majority of the ARC taken without a meeting, shall constitute an act of the ARC.

Section 8.3 Architectural Guidelines. Declarant may prepare the initial Architectural Guidelines ("ARC Guidelines. The ARC Guidelines are intended to provide guidance to Owners regarding matters of particular concern to the ARC Committee ("ARC") in considering applications. The Board shall make the ARC Guidelines available to Owners. Declarant shall have sole and full authority to amend the ARC Guidelines during the Declarant Control Period. Upon termination of Declarant's right to amend, the ARC shall have the authority to amend the ARC Guidelines, with the Board's consent. Any amendments to the ARC Guidelines shall be prospective only, and shall not require modifications to or removal of structures previously approved once the approved construction or modification has commenced. There shall be no limitation on the scope of amendments to the ARC Guidelines, and such amendments may remove requirements previously imposed or otherwise make the ARC Guidelines less restrictive.

Once the Declarant's Control Period has terminated, the ARC, from time to time, may recommend revisions, deletions, and/or additions to existing Architectural Guidelines for the Community to the Board for the Board's approval.

Section 8.4 Review of Plans and Specifications. The ARC shall consider and act upon any and all proposals, plans and specifications, drawings, and other information or other items (collectively in this Article 8, "plans and specifications") submitted, or required to be submitted, for ARC approval under this Declaration and shall perform such other duties as from time to time may be assigned to the ARC by the

IN WITNESS WHEREOF, Declarant has executed this Declaration the day and year first written above.

"DECLARANT"

PLASTER DEVELOPMENT COMPANY, INC.,
a Nevada corporation

By: Amanda K. Hahn
Amanda K. Hahn, Vice President

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

This instrument was acknowledged before me on this 10 day of Feb, 2006 by *Amanda K. Hahn* as Vice President of PLASTER DEVELOPMENT COMPANY, INC., a Nevada corporation.

Notary Public - State of Nevada
County of Clark
MARSHA LOUISE BEAN
My Appointment Expires
No: 99-29474-1 May 1, 2007

Marsha Louise Bean
NOTARY PUBLIC
(seal)

Not Reported in F.Supp.2d, 2012 WL 3730528 (D.Nev.)
(Cite as: 2012 WL 3730528 (D.Nev.))

C
Only the Westlaw citation is currently available.

United States District Court,
D. Nevada.
Martin CENTENO, Plaintiff,
v.
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; Bank of America, N.A.; MTC Financial, Inc., d/b/a Trustee Corps; Nevada Legal News; et al., Defendants.

No. 2:11–cv–02105–GMN–RJJ.
Aug. 28, 2012.

Martin Centeno, Las Vegas, NV, pro se.

Ariel E. Stern, Steven G. Shevorski, Akerman Senterfitt, LLP, Las Vegas, NV, Diana S. Cline, Howard Kim & Associates, Henderson, NV, Richard J. Reynolds, Turner Reynolds Greco & O'Hara, Irvine, CA, Michael E. Sullivan, Robison Belaustegui Sharp & Low, Reno, NV, for Defendants.

ORDER

GLORIA M. NAVARRO, District Judge.

*1 This action, filed by *pro se* Plaintiff Martin Centeno, arises out of foreclosure proceedings initiated against the property located at 5966 Spanish Mustang Ct., Las Vegas, NV 89122, APN # : 161–15–410–057 ("the property"). Before the Court are the Motion to Dismiss (ECF No. 8) filed by Defendant MTC Financial, Inc. ("MTC Financial"), and the Motion to Dismiss and to Expunge Lis Pendens (ECF No. 36) filed by Defendant Bank of America, N.A. ("Bank of America"). Plaintiff's Motions for Consolidation (ECF No. 35), Temporary Restraining Order (ECF No. 39), and Preliminary Injunction (ECF No. 40) are also pending.

1. *BACKGROUND*

The February 2008 Deed of Trust on the property indicates that the Lender was Bank of America, the Trustee was PRLAP, Inc., and the Borrowers were Lateef Durosinmi and Ramya Durosinmi. (Ex. A to RJN, ECF No. 8–2.) On April 22, 2010, Bank of America, as Beneficiary, signed a Substitution of Trustee naming MTC Financial as trustee in place of the original trustee, PRLAP, Inc. (Ex. C to RJN, ECF No. 8–4.) The next day, on April 23, 2010, MTC Financial (dba "Trustee Corps") recorded a Notice of Default as trustee and agent for Bank of America, as beneficiary. (Ex. B. to RJN, ECF No. 8–3.) In July 2011, a Certificate of Mediation was issued by the State of Nevada Foreclosure Mediation Program stating that the property was a "Non–Applicable Property" and that the "Beneficiary may proceed with the foreclosure process." (Ex. D. to RJN, ECF No. 8–5.) In November 2011, MTC Financial issued the Notice of Trustee's Sale, and recorded it on December 1, 2011, setting a sale date of December 27, 2011. (Ex. E to RJN, ECF No. 8–6.) The Trustee's Deed Upon Sale was issued the next day, on December 28, 2011, and recorded January 3, 2012. (Ex. F to RJN, ECF No. 8–7.)

On December 23, 2011, Plaintiff filed the instant action and a Notice of Lis Pendens on the property, claiming to be "a co-owner beneficiary of the property subject of this case having acquired the same in a HOA Trustee Sale on or about June 7, 2011." (Compl., 4: ¶ 13; Notice of Lis Pendens, ECF No. 1–2.) Attached to his Complaint, Plaintiff submits MTC Financial's November 2011 Notice of Trustee's Sale, and a Trustee's Deed Upon Sale recorded June 8, 2011 ("HOA Trustee's Deed Upon Sale"). (ECF No. 1–1.)

The HOA Trustee's Deed Upon Sale submitted by Plaintiff refers to an August 2010 Notice of Delinquent Assessment Lien and an October 2010 Notice of Default in which Absolute Collection Services, LLC, was named as trustee. (*Id.*) The amount of the unpaid debt is listed as $5,150.00. (*Id.*) The document purports to transfer all of Absolute Collection Services, LLC's "right, title and interest" in the property to Mustang Family Trust, "pursuant to the powers granted to Estates at Stallion Mountain HOA." (*Id.*)

Plaintiff's Complaint alleges the following causes of action: (1) Defendants are not real-parties-in-interest and they have no legal standing in court; (2) The Defendants' lien, if any, has been cancelled or wiped out by the HOA trustee sale in favor of Plaintiff; (3) Quieting of title of Plaintiff; (4) Defendants have violated the unfair lending practice

law; and (5) issuance of temporary restraining order and/or injunction. (Compl., ECF No. 1-1 .) Plaintiff voluntarily dismissed Defendant Mortgage Electronic Registration Systems, Inc. (ECF No. 28.) Defendant Nevada Legal News, LLC, was dismissed by the Court for Plaintiff's failure to effect timely service. (ECF No. 34.)

II. *LEGAL STANDARD*

*2 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. *See North Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir.1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In considering whether the complaint is sufficient to state a claim, the Court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986).

The Court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 555) (emphasis added).

A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b) for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "Prolix, confusing complaints" should be dismissed because "they impose unfair burdens on litigants and es." *McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir.1996). Mindful of the fact that the Supreme Court has "instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.1987), the Court will view Plaintiff's pleadings with the appropriate degree of leniency.

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.... However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994). Under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir.1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.2001).

*3 If the court grants a motion to dismiss, it must then decide whether to grant leave to amend. The court should "freely give" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant ... undue prejudice to the opposing party by virtue of ... the amendment, [or] futility of the amendment...." Fed.R.Civ.P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.1992).

III. *DISCUSSION*

As an initial matter, Plaintiff's standing to bring suit is unclear, since the Durosinmis were the borrowers on the Deed of Trust, and the HOA Trustee's Deed Upon Sale names Mustang Family Trust as the purchaser.[FN1] Plaintiff's Response to MTC Financial's motion includes a document dated June 10, 2011, and styled as "Appointment of Co-Trustee" in which Plaintiff is purportedly appointed co-trustee of the Mustang Family Trust by "the current beneficiaries," who are un-named. (Ex. 1 to Pl.'s Resp., ECF No. 11.)

The signature of the purported authorizing beneficiary is illegible, the document is not notarized, and Plaintiff does not allege that the document was publicly recorded. (*Id.*) However, as discussed below, even if Plaintiff is authorized to represent the Mustang Family Trust as trustee, the Court finds that his claims fail to meet the required pleading standard, and the Complaint will be dismissed.

FN1. In another case filed by Plaintiff, a virtually identical complaint also refers to Mustang Family Trust, but with a different property and different borrowers on the Deed of Trust. *See Centeno v. Mortgage Electronic Registration System*, No. 2:12-cv-00056-KJD-RJJ (D.Nev.2012).

In his first cause of action, styled as "Defendants are not real-parties-in-interest and they have no legal standing in court," Plaintiff alleges that Defendants colluded and conspired with each other to foreclose or sell the property at the trustee sale. (Compl., 3: ¶ 8.) Plaintiff alleges that "Defendants have no legal standing or power to do so because they have not shown that they are in possession of the pertinent Promissory Note and/or Deed of Trust and the various transfers thereof to prove that they are the present owners or beneficiaries who have the right to conduct said foreclosure." (Compl., 3: ¶ 8.) The publicly recorded documents submitted by Defendants establish that Defendants conducted foreclosure proceedings in accordance with Nevada statutes, and Plaintiff states no valid claim that Defendants were required to produce a promissory note or deed of trust in order to foreclose. Accordingly, Plaintiff's claim for collusion and conspiracy against Defendants must fail, and will be dismissed.

In his second cause of action, styled as "the Defendants' lien, if any, has been cancelled or wiped out by the HOA trustee sale favor of Plaintiff," Plaintiff cites NRS 116.3116 and NRS 116.31166 and alleges that Defendants have no right to foreclose on the property because an "HOA Trustee Sale" occurred "in favor of plaintiff," which "has cancelled or wiped out other junior liens, including the lien, if any, of the defendants over the subject property." (Compl., 5: ¶ 15.) This statute provides that liens against HOA units for assessments are prior to all other liens and encumbrances on a unit except those recorded before the recordation of the declaration [creating the common-interest community]. NRS 116. 3116(2), 116.037. However, Plaintiff does not submit a copy of the assessment lien on which the HOA Trustee's Deed Upon Sale is based, and does not allege that it chronologically precedes the 2008 Deed of Trust. Without such an allegation, Plaintiff cannot state a valid claim based upon this statute. To the extent that Plaintiff is alleging a cause of action based on NRS 116.31166, his cause of action fails as well. This statute provides that the "sale of a unit pursuant to NRS 116. 31162, 116.31163, and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166. Plaintiff does not allege that the property was sold pursuant to these statutes, and the Court finds no basis on which to make such an inference. Accordingly, this cause of action must be dismissed.

*4 In his third cause of action, styled as "quieting of title of Plaintiff," Plaintiff alleges that he "has acquired subject property free from any right or equity of redemption in a public Trustee Sale as evidenced by the Trustee's Deed Upon Sale," and that therefore "the title of subject property must be quieted in the name of plaintiff and/or MUSTANG FAMILY TRUST." (Compl., 5: ¶ 19.) As discussed above, Plaintiff's reliance upon the HOA Trustee's Deed Upon Sale appears to be invalid. Accordingly, this cause of action must be dismissed.

In his fourth cause of action, styled as "Defendants have violated the unfair lending practice law," Plaintiff alleges that "Defendants have violated the Unfair Lending Practice Law because they did not make a study if the owner-borrower can afford to pay the monthly amortization in 30 years considering that the owner-borrowers will be retired in the near future and will have no means to pay amortization." (Compl., 5–6: ¶ 21.) Plaintiff also alleges that "[Defendants] did not give an opportunity to make a loan modification by reducing the interest and/or the principal in violation of their agreement with the Office of the Attorney General or other government entity considering that they have received bail out money for this purpose." (Compl., 6: ¶ 21.) Finally, Plaintiff alleges that "[Defendants] also have not shown to be in possession of the pertinent Promissory Note and pertinent assignments of the subject loan as now required by the Supreme Court of Nevada." (Compl., 6: ¶ 21.) As discussed above, Plaintiff has not alleged any law or statute requiring Defendants to produce the promis-

sory note, and the publicly recorded documents submitted by the parties demonstrate Defendants' compliance with statutory foreclosure requirements. Also, since Plaintiff does not allege that he has standing to assert violations of lending practices laws on behalf of the borrowers, the Durosinmis, Plaintiff's cause of action for unfair lending practices fails as well.

Plaintiff's fifth cause of action, for "issuance of temporary restraining order and/or injunction," is a remedy, not a cause of action. (*See* Compl., 6: ¶ ¶ 23–25.) Accordingly, it will be dismissed.

Because Plaintiff's standing to assert claims on behalf of Mustang Family Trust is unclear, and because the allegations contained in the Complaint do not appear to support a likelihood that the Complaint's deficiencies may be cured, the Court will not grant leave to amend.

IV. *CONCLUSION*

IT IS HEREBY ORDERED that Defendant MTC Financial, Inc.'s Motion to Dismiss (ECF No. 8) is **GRANTED.**

IT IS FURTHER ORDERED that Defendant Bank of America, N.A.'s Motion to Dismiss and to Expunge Lis Pendens (ECF No. 36) is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Motion for Consolidation (ECF No. 35), Emergency Ex Parte Motion for Temporary Restraining Order (ECF No. 39), and Motion for Preliminary Injunction (ECF No. 40) are **DENIED.**

*5 **IT IS FURTHER ORDERED** that Plaintiff's Complaint is **DISMISSED.** The Clerk shall enter judgment accordingly, and thereafter close the case.

D.Nev.,2012.
Centeno v. Mortgage Electronic Registration Systems, Inc.
Not Reported in F.Supp.2d, 2012 WL 3730528 (D.Nev.)

END OF DOCUMENT

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BAYVIEW LOAN SERVICING, LLC, Plaintiff, vs. ALESSI & KOENIG, LLC et al., Defendants.	2:13-cv-00164-RCJ-NJK ORDER

This quiet title action arises out of the foreclosure of a lien for delinquent homeowner's association ("HOA") fees. Pending before the Court are cross motions for summary judgment. For the reasons given herein, the Court grants Plaintiff's motion and denies Defendant's.

I. FACTS AND PROCEDURAL HISTORY

Third-party Defendant Jesus Simiano ("Borrower") gave Third-party Defendant Silver State Financial Services ("Lender") a promissory note for $176,000, secured by a deed of trust ("DOT"), to refinance real property located at 5124 Lost Canyon Dr., North Las Vegas, NV 89031 (the "Property"). (Compl. ¶ 9, Jan. 30, 2013, ECF No. 1; DOT 1–3, July 27, 2004, ECF No. 1, at 9). Mortgage Electronic Registration Systems, Inc. ("MERS") was the beneficiary of the DOT and Lender's nominee for the purpose of transferring the beneficial interest in the promissory note. (*See* DOT 1–3). MERS later assigned both its own interest in the DOT and Lender's interest in the promissory note to Plaintiff Bayview Loan Servicing, LLC ("Bayview"). (Compl. ¶ 10; *see* Assignment, Apr. 14, 2010, ECF No. 1, at 27).

Defendant Alessi & Koenig, LLC ("A&K") later caused to be recorded a Notice of

Delinquent Assessment (Lien) ("NODA") against the Property on behalf of Defendant Hometown Ovation Owners Association ("HOOA") based upon $3391.58 in delinquent fees, assessments, interest, late fees, service charges, and collection costs. (Compl. ¶ 13; *see* NODA, Feb. 6, 2012, ECF No. 1, at 29). A&K then caused to be recorded a Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD") against the Property on behalf of HOOA, alleging a total of $3541.58 in delinquencies. (Compl. ¶ 14; *see* NOD, Mar. 12, 2012, ECF No. 1, at 31). A&K then caused to be recorded a Notice of Trustee's Sale ("NOS") as to the Property on behalf of HOOA, indicating a sale for December 5, 2012 based upon a total delinquency of $4386.06. (Compl. ¶ 15; *see* NOS, Oct. 22, 2012, ECF No. 1, at 33).

Bayview contacted A&K concerning the NOS, and A&K postponed the sale until January 16, 2013. (Compl. ¶ 16). Bayview alleges it tendered the full amount due to A&K several times before that date, but that A&K refused to accept payment. (*See id.* ¶¶ 17–18). A&K sold the Property at the instruction of HOOA at the January 16, 2013 foreclosure sale to Defendant SFR Investments Pool 1, LLC ("SFR Pool 1") or Defendant SFR Investments, LLC ("SFR") (collectively, "SFR Defendants") for approximately $10,000. (*Id.* ¶¶ 19, 22). SFR later contacted Bayview and communicated its position that the sale had extinguished Bayview's DOT. (*Id.* ¶ 23).

Bayview sued A&K, HOOA, and SFR Defendants in this Court on two causes of action: (1) Wrongful Foreclosure; and (2) Declaratory Relief.[1] A&K and HOOA jointly moved for defensive summary judgment against the wrongful foreclosure claim, and while that motion was pending, SFR Pool 1 filed its Answer, which included counterclaims and third-party claims for quiet title against Bayview, Borrower, and Lender. The Court granted the motion for summary

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[1]The declaratory relief claim is essentially a quiet title claim. *See Kress v. Corey*, 189 P.2d 352, 364 (Nev. 1948). Plaintiff asks the Court to declare in the alternative that under state law the trustee's sale was void or that it did not extinguish the first mortgage. (*See id.* ¶¶ 34–36).

judgment as against the wrongful foreclosure claim. The parties have now moved for summary judgment on their remaining quiet title claims.

II. LEGAL STANDARDS

A court must grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). In determining summary judgment, a court uses a burden-shifting scheme:

> When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case.

C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 480 (9th Cir. 2000) (citations and internal quotation marks omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party meets its initial burden, the burden then shifts to the opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *Celotex Corp.*, 477 U.S. at 324.

At the summary judgment stage, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. ANALYSIS

In Nevada, HOAs have immediate liens against real property when HOA assessments or other costs against a unit become delinquent. *See* Nev. Rev. Stat. § 116.3116(1). Under Nevada law, a lien for delinquent HOA assessments is not prior to "[a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent," *id.* § 116.3116(2)(b), except:

> *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 . . . .

Id. § 116.3116(2) (unnumbered paragraph following subsection (2)(c) (emphases added)).[2] In other words, a first mortgage recorded before HOA assessments become delinquent is senior to an HOA lien, except to the extent of nine months of regular HOA dues immediately preceding the action to enforce the HOA lien and any HOA fees and costs related to exterior maintenance of the unit at issue or the removal or abatement of a public nuisance related to the unit at issue.[3] It seems clear that the super-priority amount is unextinguished by foreclosure of a first mortgage, even if the first mortgage is otherwise senior under the first mortgage rule. The question is whether the foreclosure of an HOA lien including some super-priority amount extinguishes a first mortgage that has benefit of the first mortgage rule. The Court believes that the best interpretation of the statutes is that it does not.

Bayview's interpretation of the statute, with which the Court agrees, is that the first mortgage rule prevents a prior-recorded first mortgage from being extinguished by foreclosure of an HOA lien that contains a super-priority amount. Under this interpretation, an HOA lien arising *before* a first mortgage is recorded is senior to the first mortgage in all traditional respects, i.e., it survives a foreclosure of the first mortgage, and its own foreclosure extinguishes the first mortgage. But an HOA lien arising *after* a first mortgage is recorded operates unorthodoxly in relation to traditional liens. The super-priority amount is senior to an earlier-recorded first mortgage in the sense that it must be satisfied before a first mortgage upon its own foreclosure, but it is *in parity with* an earlier-recorded first mortgage with respect to

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[2]Section 116.310312 concerns HOA fines and costs imposed when an HOA must maintain the exterior of a unit in accordance with the CC&R or remove or abate a public nuisance on the exterior of the unit where the unit owner has failed to do so. *See id.* § 116.310312(2). Section 116.3115 governs regular HOA dues. *See id.* § 116.3115.

[3]The Court will refer to this amount as the "super-priority amount" and will refer to the section of the statute defining it as the "super-priority rule." The Court will refer to any excess portion of an HOA lien, i.e., the total amount of a lien under subsection (1) minus the super-priority amount, as the "sub-priority amount." The Court will refer to subsection (2)(b) as the "first mortgage rule."

extinguishment, i.e., the foreclosure of neither extinguishes the other.

In practice, two options present themselves under this theory when a first mortgage is recorded before an HOA lien arises. First, an HOA may of course foreclose its lien under the statutes so providing, but the first mortgagee's lien survives such a foreclosure, and the first mortgagee may later foreclose against the buyer at the HOA foreclosure sale if that buyer (or someone else) does not satisfy the first mortgage out of the proceeds of the HOA foreclosure sale or otherwise. An HOA conducting a foreclosure sale will be made whole under the statute so long as the super-priority amount is satisfied by the foreclosure sale price, and if an HOA's foreclosure sale leaves some portion of its "super-priority" lien unsatisfied—which circumstances are unlikely ever to occur—it must pursue the unit owner for the deficiency. Second, a first mortgagee may foreclose while an HOA lien exists. In such a case, the super-priority amount of the HOA lien survives foreclosure, and the HOA may later foreclose against the buyer at the foreclosure sale if that buyer (or someone else) does not satisfy the super-priority amount out of the proceeds of the foreclosure sale or otherwise. In either case, any sub-priority amount of an HOA lien is extinguished along with any other junior liens. Those junior liens are satisfied in sequence of priority out of the foreclosure proceeds after the lien upon which the foreclosure was based is fully satisfied, and junior lien holders must pursue the defaulted party for any deficiencies, if they can.

In summary, an HOA may effectively have two liens: a super-priority lien, and a sub-priority lien. The foreclosure of neither a super-priority lien nor a first mortgage extinguishes the other. They are in parity with one another in this regard. But a super-priority lien must be satisfied first out of the proceeds of the foreclosure of a junior lien. It is "first amongst equals" in this regard. The sub-priority lien, on the other hand, like any other junior lien, is extinguished by the foreclosure of either the super-priority lien or the first mortgage.

Another court of this District recently ruled consistently with this interpretation, though

with less discussion. *See Dinkonos Holdings, LLC v. Countrywide Home Loans*, No. 2:12-cv-00949, 2013 WL 531092, at *2–3 (D. Nev. Feb. 11, 2013) (Dawson, J.) (ruling that the foreclosure of an HOA lien containing a super-priority amount does not extinguish a first mortgage protected by the first mortgage rule). Moreover, the real estate community in Nevada clearly understands the statutes to work the way the Court finds. In the current real estate market in Nevada, most homes sold at foreclosure are purchased by investors for cash in order to renovate the homes and then resell them for a quick profit or rent them. If investors believed that HOA foreclosures extinguished first mortgages, homes sold at HOA foreclosure sales would sell for significant fractions of their fair market value, not for the tiny fractions of their fair market value approximating the HOA lien at which HOA-foreclosed homes invariably sell. That investors will not pay significant amounts, i.e. fair amounts, for HOA-foreclosed homes indicates their perception that the first mortgage survives, preventing any profit through resale. If the actors in the real estate market in Nevada believed that an HOA foreclosure extinguished the first mortgage, one would expect the Property here to have sold for something on the order of $80,000 (assuming the home is worth roughly half of the $176,000 for which Borrower refinanced it in 2004). But the Property sold for a mere $10,000, only slightly more than HOOA's lien. This shows that the Nevada real estate community does not operate as if HOA foreclosures extinguish first mortgages recorded before the HOA delinquency arises.

SFR Pool 1's interpretation of the statute is different. Under its theory, the foreclosure of HOOA's lien completely extinguished Bayview's first mortgage in the same way that the foreclosure of a first mortgage extinguishes a second mortgage (although SFR Pool 1 presumably agrees that Bayview was entitled after HOOA's foreclosure sale to satisfy its first mortgage out of the proceeds after any super-priority amount was satisfied and before any sub-priority amount was satisfied). SFR Pool 1 argues that the foreclosure of an HOA lien that includes any super-priority amount—and they always will, as the super-priority amount is defined—extinguishes a

first mortgage. Under this theory, an HOA may foreclose its lien, and the first mortgagee's lien would not survive, though it would be entitled to satisfaction from the proceeds after the super-priority amount is satisfied and before any sub-priority amount is satisfied. And a first mortgagee could still foreclose the first mortgage while an HOA lien exists, but the super-priority amount of the HOA lien would survive.

SFR Pool 1 argues that the Division of Real Estate has interpreted the statutes this way. But a close look at the relevant document indicates no such authoritative interpretation. *See* Dep't of Business and Indus., Real Estate Div., Adv. Op. No. 13-01 (Dec. 12, 2012). The relevant advisory opinion answers three questions: (1) whether the super-priority amount includes "costs of collecting" as defined under section 116.310313 (no); (2) whether the super-priority amount may ever exceed nine months of regular dues plus removal, abatement, and maintenance costs (no); and (3) whether an HOA must institute a "civil action" as defined under Nevada Rules of Civil Procedure 2 and 3 to create the super-priority lien (no). There is *obiter dicta* on page nine of the advisory opinion supporting SFR Pool 1's view. *See id.* at 9 ("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."). The opinion quotes the comments to section 3-116 of the Uniform Act, noting that first mortgagees will typically pay HOA liens rather than suffer foreclosure. But that says nothing of extinguishment. A first mortgagee may pay an HOA lien rather than suffer foreclosure because it will inevitably have to foreclose itself anyway and does not wish to experience the hassle of waiting for the first foreclosure to be completed, or because it may wish to take a deed in lieu of foreclosure or authorize a short sale, and those options would be frustrated by an intermittent foreclosure by an HOA. A first mortgagee's practical desire to avoid an HOA foreclosure does not necessarily imply that the first mortgagee thinks its security would be lost thereby. The Real

Estate Division engaged in no further statutory analysis. Its *obiter dicta* in an advisory opinion directed to other issues is unpersuasive.

The Court rejects this reading of the statues. It is clear to the Court that the legislative intent was to ensure that no matter which entity forecloses, an HOA will be made whole (up to a limited amount), while also ensuring that first mortgagees who record their interest before notice of any delinquencies giving rise to a super-priority lien do not lose their security. The Court does not believe that the legislature intended the extreme result of extinguishment of a first mortgage in any case where an HOA forecloses its own lien.

The Court agrees with Bayview that interpreting the statutes as SFR Pool 1 does reads the first mortgage rule out of the statutes. The statute creating the HOA lien (subsection 116.3116(1)) is the rule. The first mortgage rule (subsection (2)(b)) is an exception to the rule. The super-priority rule (the unnumbered paragraph following subsection (2)(c)) is an exception to the exception. Because the exception to the exception here necessarily includes all instances of the rule itself—there can be no subsection (1) lien that does not include some super-priority amount, because that amount includes virtually every kind of assessment that could be delinquent, except for collection fees and costs arising therefrom—the exception under subsection (2)(b) would be totally subsumed by the exception to the exception, rendering it meaningless if its operation were not limited in a way that permits the exception to have some application. That is, in order to give each part of the statutes some effect, the Court must read them together to mean that the super-priority rule affects the priority of reimbursement, but not extinguishment. Reading the super-priority rule to affect extinguishment would read the first mortgage rule out of the statutes almost entirely.

It is true that under SFR Pool 1's interpretation, the first mortgage rule would continue to have effect in a limited class of cases when an HOA forecloses a lien containing some sub-priority amount. In such cases, the first mortgage rule will still ensure that the first mortgage is

satisfied before the sub-priority amount of the HOA lien, giving the first mortgage rule some effect. Imagine a property of fair market value V, with a first mortgage balance of M and an HOA lien with super-priority amount H1 and sub-priority amount H2. If the HOA forecloses, and if the foreclosure extinguishes the first mortgage, the order of reimbursement will be H1–M–H2. The first mortgagee is therefore no better off under the first mortgage rule in cases where V≥H1 + H2 + M, because in such cases the priority of reimbursement as between H2 and M is of no consequence—the first mortgagee will be made whole in either case. The first mortgagee is only better off under SFR Pool 1's interpretation of the first mortgage rule in cases where V<H1+H2+M, because in such cases the first mortgagee's losses are limited to H1, whereas without the first mortgage rule, the first mortgagee's losses would be H1 + H2. So SFR Pool 1's interpretation of the statutes does retain some effect for the first mortgage rule. But the effect is only seen in cases where the fair market value of the property at the time of foreclosure is less than the amount due on the first mortgage or no more than a few thousand dollars more. Although that circumstance is common today, it is not the historical norm, and it was not common when the statutes were first adopted in 1991, over a decade before the real estate market crash made "underwater" mortgages common. *See* 1991 Nev. Stat 535, 567–68.

The legislature cannot possibly have intended the super-priority rule to divest the equally or more conspicuous first mortgage rule of any effect except in a class of cases that was rare when the statutes were adopted. Not only would such an interpretation divest the first mortgage rule of any significant application, it would cause an extreme result that the Court does not believe the legislature intended in light of long-standing historical practice, including the practice of the actors in the real estate market even after the statutes were adopted.[4]

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[4]The Court also notes that the federal Contract Clause would likely be violated by any application of such a reading of the statutes, at least as to first mortgages recorded before the statutes took effect.

The Court rejects SFR Pool 1's argument that an HOA lien necessarily extinguishes a first mortgage because the HOA foreclosure statutes indicate, just as the general non-judicial foreclosure statutes do, that foreclosure gives the purchaser title "without equity or right of redemption." *Compare id.* § 116.31166(3), *with id.* § 107.080(5). These statutes have nothing to do with the extinguishment of junior liens. It simply means, in both cases, that a defaulted owner cannot redeem his default after the sale has occurred. These are simple and otherwise uninteresting recitations of the ancient common law rule that a sale after default "forecloses" (ends the possibility of) the "equity of redemption" (cure of the default). From here, SFR Pool 1 argues that it is indisputable that foreclosure of a senior lien extinguishes all junior liens. That is of course true as a general matter, but if the statutes in this case work as Bayview argues they do, and the Court believes they do, they work a twist on the general rule as between first mortgages and HOA liens. *See supra*. SFR Pool 1 also argues that Bayview's position that foreclosure of an HOA lien can never extinguish a first mortgage would render the last sentence of section 116.310312(4) meaningless. But this conclusion is both factually and legally wrong. Bayview does not appear to argue, and the Court does not believe, that foreclosure of an HOA lien can never extinguish a first mortgage. It seems plain that when delinquencies giving rise to an HOA lien occur *before* a first mortgage is recorded, foreclosure of the resulting HOA lien extinguishes the first mortgage, but SFR Pool 1 admits those circumstances are not present here.[5] Also, the sentence at issue reads, "The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive." *Id.* § 114.310312(4). A statute permitting foreclosure is not rendered meaningless simply because another statute permits some other lien to survive such a foreclosure. The State of Nevada may structure its foreclosure and priority laws however it sees fit. It may structure its

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[5]It appears undisputed that the DOT to Bayview's predecessor-in-interest was recorded on August 4, 2004, such that SFR Pool 1 is clearly not a bona fide purchaser protected from Bayview's interest by the recording statute, and Defendants admit that HOA dues did not become delinquent until 2006.

laws to ensure that prior-recorded first mortgagees do not entirely lose their interest upon an HOA foreclosure, while also ensuring that HOAs are protected for certain costs they have incurred and up to nine months of delinquent fees.

In conclusion, the Court believes Bayview's interpretation of the statutes is correct. Bayview's position appears to represent the dominant understanding of the actors in the real estate market. Bayview's interpretation also gives each section of the statutes significant application and avoids an extreme result that was almost certainly not intended by the state legislature, i.e., that the foreclosure of a small lien for even $1000 of delinquent HOA dues could extinguish an earlier-recorded security interest on the order of hundreds of thousands of dollars, when the purpose behind the super-priority statute was simply to ensure that HOA's are made whole up to a certain amount.

Finally, even if HOOA's foreclosure had extinguished Bayview's first mortgage, that would not end the matter here. Bayview would still have been entitled to satisfy its first mortgage out of the sale proceeds after satisfaction of the super-priority amount of HOOA's lien. It therefore has standing to challenge the commercial reasonableness of the foreclosure sale, and the sale for $10,000 of a Property that was worth $176,000 in 2004, and which was probably worth somewhat more than half as much when sold at the foreclosure sale, raises serious doubts as to commercial reasonableness. *See Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917, 919–20 (Nev. 1977).

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CONCLUSION

IT IS HEREBY ORDERED that the Motion for Summary Judgment (ECF No. 33) is GRANTED. The mortgage of Bayview Loan Servicing, LLC against the Property at 5124 Lost Canyon Dr., North Las Vegas, NV 89031 was not extinguished by the foreclosure sale at which SFR Investments Pool 1, LLC obtained title to the Property.

IT IS FURTHER ORDERED that the Motion for Summary Judgment (ECF No. 35) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall enter judgment and close the case.

IT IS SO ORDERED.

Dated this 6th day of June, 2013.

ROBERT C. JONES
United States District Judge

Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.

United States District Court for the District of Nevada
February 11, 2013, Decided; February 11, 2013, Filed
Case No. 2:12-CV-00949-KJD-RJJ

Reporter
2013 U.S. Dist. LEXIS 18718

DIAKONOS HOLDINGS, LLC, Plaintiff, v. COUNTRYWIDE HOME LOANS, INC., et al., Defendants.

Subsequent History: Reversed by, Remanded by, Without prejudice, Motion denied by, As moot *Diakonos Holdings LLC v. Countrywide Home Loans, Inc., 2015 U.S. App. LEXIS 14711 (9th Cir. Nev., Aug. 21, 2015)*

Core Terms

foreclosure, security interest, trust deed, allegations, extinguish, motion to dismiss, delinquent, recorded

Counsel: **[*1]** For Diakonos Holdings LLC, Trustee on behalf of Coventry Green Trust, Plaintiff: Ryan D Hastings, Sean L. Anderson, LEAD ATTORNEYS, Leach Johnson Song & Gruchow, Las Vegas, NV.

For Countrywide Home Loans, Inc., Bank of America Inc., Mortgage Electronic Registration Systems, Inc., Defendants: Kevin Hahn, LEAD ATTORNEY, Malcolm & Cisneros, Irvine, CA.

For MTC Financial Inc., doing business as Trustee Corps, Defendant: Michael E Sullivan, LEAD ATTORNEY, Robison Belaustegui Sharp & Low, Reno, NV; Richard J. Reynolds, LEAD ATTORNEY, Burke, Williams & Sorensen, LLP, Santa Ana, CA.

Judges: Kent J. Dawson, United States District Judge.

Opinion by: Kent J. Dawson

Opinion

ORDER

Before the Court is the Motion to Dismiss (#17) filed by Defendants Bank of America, Inc., Countrywide Home Loans, Inc., and Mortgage Electronic Registration Systems, Inc. (Collectively ″Defendants″). Plaintiff Diakonos Holdings, LLC filed an opposition and Countermotion to Remand (#23, #24). Defendants responded (#25) and Plaintiff replied (#27). The Court directed Defendants to file a further reply (#37).

I. Background

Luis and Mirna Alfaro owned a property at 2704 Coventry Green Avenue, Henderson, Nevada 89074 (the ″Property″). In 2007, the Alfaros took **[*2]** out a mortgage on the Property and secured it with a Deed of Trust. Defendant Bank of America subsequently obtained all beneficial interest in under the Deed of Trust.

The Alfaro's defaulted on their HOA dues and the HOA recorded a lien (the ″Assesment Lien″) on January 24, 2011. The Alfaros did not pay off the Lien and the property was sold to Plaintiff at a foreclosure auction on March 9, 2012. Defendants did not appear at the foreclosure sale.

On April 14, 2012, Defendants filed a Notice of Trustee's sale pursuant to the Deed of Trust. The Foreclosure Sale was scheduled for May 21, 2012. Plaintiff filed this action in state court seeking an injunction precluding the May 21, foreclosure sale and quieting title in its favor. Judge Adair entered a preliminary injunction prohibiting Defendants from conducting the sale. Defendants then removed the action here.

II. Motion to Remand

Plaintiff asks this court to use its discretion to remand this case to state court. Plaintiff acknowledges that no articulated abstention doctrine applies in this case. However, Plaintiff urges that the Court remand this case based on ″principles identified by the United States Supreme Court in *Burford v. Sun Oil, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1043)*.″ **[*3]** Specifically, Plaintiff claims that federal adjudication would be disruptive to Nevada's efforts to establish a cohesive policy of interpretation and application of *NRS116.3116*.

The Court declines to exercise its discretion to remand this case. District courts regularly predict how state courts would rule on issues of statutory interpretation. As discussed below, *NRS 116.3116* is clear and the Court sees no reason that the issues in this case cannot be properly adjudicated here. Accordingly, the Countermotion to remand is denied.

III. Motion to Dismiss

A. Legal Standard

A court may dismiss a plaintiff's complaint for ″failure to state a claim upon which relief can be granted.″ *Fed. R. Civ. P. 12(b)(6)*. A properly pled complaint must provide ″a short and plain statement of the claim showing that the pleader is entitled to relief.″ *Fed. R. Civ. P. 8(a)(2)*; *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While *Rule 8* does not require detailed factual allegations, it demands ″more than labels and conclusions″ or a ″formulaic recitation of the elements of a cause of action.″ *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citations omitted). ″Factual allegations must be enough to rise **[*4]** above the speculative level.″ *Twombly, 550 U.S. at 555*. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to ″state a claim to relief that is plausible on its face.″ *Iqbal, 556 U.S. at 678* (citation omitted).

In Iqbal, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual

allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id. at 1950*. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id. at 1949*. Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id. at 1950*. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id. at 1949*. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has ″alleged—but not shown—that the pleader is entitled to relief.″ Id. (internal **[*5]** quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly, 550 U.S. at 570*.

B. *NRS 116.3116*

N.R.S. 116.3116(2)(b) relates to liens by homeowner's associations and reads as follows:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (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 . . .
>
> The statute also provides that:
>
> 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 . . .

Plaintiff argues that **[*6]** this statute operates so that foreclosure of a delinquent assessment lien by the HOA extinguishes the first security interest on the property. [1] According to Plaintiff, because Defendants were provided with notice of the foreclosure sale and chose not to take any action, their lien was extinguished when the HOA completed its non-judicial foreclosure. Plaintiff argues that foreclosure by the HOA must extinguish all other liens, including the first security interest, or else HOAs would be unable to initiate foreclosure and would not be able to recover any deficiencies until the holder of the first deed of trust foreclosed. In support of this argument, Plaintiff cites *Summerhill Village Homeowners Ass'n v. Roughly, 270 P.3d 639 (Wash.App. Div. 1, Feb. 21, 2012)* (opinion corrected and superseded by *Summerhill Vill. Homeowners Ass'n v. Roughley, 166 Wn. App. 625, 289 P.3d 645) (Wash.App. Div. 1, Feb. 21, 2012)*. In Summerhill, the court held that a judicial foreclosure had the effect of extinguishing the interest held by the first deed of trust. However, *Summerhill* does not support Plaintiff's contentions. The Washington statute at issue in that case specifically provides that when an association pursues **[*7]** nonjudicial foreclosure, it is not entitled to lien priority which would extinguish the first security interest. Nevada's statutory scheme does not draw such a distinction, and even if it did, the foreclosure in this case was nonjudicial.

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[1] Plaintiff does not address the language of subsection 2(b) which specifically states that HOA liens do not extinguish a first security interest recorded prior to the time the assessment became delinquent.

NRS 116.3116(2)(c) 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. Contrary to Plaintiff's assertion, the statutory scheme does not require an HOA to wait until the holder of the deed of trust forecloses. Instead, as in this case, the HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the purchaser at the sale takes the property subject to the security interest. There is no dispute that the Deed of Trust was recorded on August 30, 2007, and the Assessment Lien was recorded on January 24, 2011. Accordingly, the Deed is prior to the Assessment Lien and Plaintiff's claims for quiet title and declaratory **[*8]** relief fail as a matter of law.

IV. Conclusion

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#17) is **GRANTED.**

IT IS FURTHER ORDERED that Plaintiff's Countermotion to Remand (#24) is **DENIED.**

DATED this 11th day of February 2013.

/s/ Kent J. Dawson

Kent J. Dawson

United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WEEPING HOLLOW AVENUE TRUST, Plaintiff, ASHLEY B. SPENCER, *et al.*, Defendants.	Case No. 2:13-CV-00544-JCM-VCF **ORDER**

Presently before the court is defendant Wells Fargo Bank's ("defendant") motion to expunge lis pendens. (Doc. # 6). Plaintiff Weeping Hollow Avenue Trust ("plaintiff") filed a response in opposition (Doc. # 13), and defendant filed a reply (Doc. # 17).

Also before the court is defendant's motion to dismiss with prejudice. (Doc. # 9). Plaintiff filed a response in opposition (Doc. # 15), and defendant filed a reply (Doc. # 19).

Also before the court is plaintiff's motion for summary judgment. (Doc. # 14). Plaintiff filed the summary judgment against defendant First American Title Insurance Company. No response has been filed even though the response date has elapsed.

Also before the court is plaintiff's motion to remand to state court. (Doc. # 16). Defendant filed a response in opposition. (Doc. # 20).

Also before the court is plaintiff's emergency motion for temporary restraining order. (Doc. # 21).

Also before the court is plaintiff's emergency motion for preliminary injunction. (Doc. # 22).

Also before the court is defendant's motion for hearing. (Doc. # 24).

I. Background

There are seven pending motions in this action. The oldest motion, the motion to expunge lis pendens, became ripe on April 29, 2013. Some motions, such as the emergency motion for preliminary injunction, are not currently ripe. The court finds that these motions turn on the same issue and facts. No further briefing is necessary as the current motions overlap and repeat the same arguments. The court will dispose of all motions in this order.

A. Factual Background

On November 24, 2008, Ashley Spencer ("Spencer") purchased real property located at 9234 Weeping Hollow Avenue in Las Vegas.[1] The grant, bargain, and sale deed was recorded in Clark County, Nevada. On or about December 8, 2008, Spencer executed a deed of trust and note for $166,961. Defendant Wells Fargo loaned plaintiff the money to purchase the property. Sometime thereafter, Spencer failed to make two payment obligations: (1) Spencer failed to make her homeowner association fees ("HOA fees"); and, (2) Spencer defaulted under the note and deed of trust.

On March 3, 2010, a notice of delinquent assessment lien was properly recorded in Clark County for failing to pay the HOA fees. On June 28, 2010, a notice of default and election to sell under the homeowners association lien was properly recorded in Clark County. On February 24, 2011, a notice of foreclosure sale for being in default under a delinquent assessment lien was properly recorded in Clark County. On May 4, 2012, a second notice of foreclosure sale for being in default under a delinquent assessment lien was properly recorded in Clark County. On or about October 5, 2012, plaintiff purchased the property at the properly

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[1] The court must lean heavily on the documents provided by defendant to understand the factual background. Plaintiff's complaint provides very few specific facts. The court judicially recognizes all of the following documents: the deed of trust, the note, notice of lien, notice of default, notice of sale, assignments, second notice of sale, substitutions, foreclosure deed, notice of default, state court orders. *See Intri-Plex Technology, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) ("A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment as long as the facts are not subject to reasonable dispute.").

noticed foreclosure sale in accordance with NRS 116.3116 for approximately $3,004. (Doc. # 1, compl. at ¶ 7).

The above referenced paragraph of facts pertains to the HOA fees. This paragraph of facts pertain to the deed of trust. On September 28, 2011, a corporate assignment of the deed of trust was properly recorded in Clark County, whereby MERS as nominee for PrimeLending transferred and assigned all beneficial interest in the note and deed of trust to Wells Fargo. On September 10, 2012, a substitution of trustee was properly recorded in Clark County, whereby Wells Fargo substituted National Default Servicing Corporation as trustee under the deed of trust. On December 12, 2012, a notice of default and election to sell under the deed of trust was properly recorded in Clark County based on Spencer's default on the December 2008 note. Defendant Wells Fargo has scheduled a trustee sale on May 28, 2013.

B. Procedural History

Plaintiff filed the instant action in state court on February 8, 2013. The complaint seeks to quiet title and declaratory relief against defendants Wells Fargo, Spencer, and First American Title Insurance Company. Defendant Wells Fargo removed the action to federal court on March 29, 2013.

In the short history of the case, the parties have filed the following motions: expunge lis pendens; motion to dismiss; motion for summary judgment; motion to remand; motion for preliminary injunction; emergency motion for a temporary restraining order; and a motion for a hearing. This motion will resolve all the following motions and dispose of the case.

II. Remand

A. Legal Standard

A complaint filed in state court may be removed to federal court if the federal court would have had original jurisdiction over the action had it been brought in federal court in the first place. 28 U.S.C. § 1441(a). This court has original jurisdiction, pursuant to 28 U.S.C. § 1332(a), over suits between citizens of different states for which the amount in controversy exceeds $75,000.

"The removal statute is strictly construed against removal jurisdiction." *Provincial*

Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1087 (9th Cir. 2009). "The defendant bearsthe burden of establishing that removal is proper." *Id.*

"[O]ne exception to the requirement of complete diversity is where a non-diverse defendant has been 'fraudulently joined.'" *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001). "Joinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, 'if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'" *Id.* (quoting *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987). "Further, the defendant is entitled to present the facts showing the joinder to be fraudulent." *Id.* (internal citation omitted).

B. Discussion

Plaintiff seeks to remand to state court by arguing this court does not have diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff argues that it is a citizen of Nevada and that defendant Spencer is a citizen of Nevada. Plaintiff argues that Spencer is a proper defendant because plaintiff is attempting to quiet title to the property and Spencer is the former property owner. Plaintiff also alleges that no defendant has not shown the amount in controversy exceeds $75,000.

As an initial matter, defendant Wells Fargo has submitted properly authenticated documents that demonstrate the outstanding balance on the loan is $161,625.48. Additionally, the assessor's office values the property $132,711. The amount in controversy easily exceeds the minimum requirement for diversity jurisdiction.

The court now turns to whether Spencer is a fraudulently joined defendant. She is. Plaintiff is attempting to quiet title and establish that its interest in the subject property is superior to that of Spencer. In plaintiff's motion for remand, it rightly asserts that Spencer is the former owner of the property–*former*, being the operative word.

Plaintiff foreclosed on the property pursuant to NRS 116.3116 because of Spencer's delinquency in paying the HOA fees and/or dues. Plaintiff's complaint affirmatively states that it properly complied with all the requirements of NRS 116 and that the foreclosure was lawful

and proper. The complaint also fails to allege that Spencer is, or has even threatened to, assert any interest or rights in the property. Plaintiff's proper foreclosure pursuant to NRS 116 extinguished Spencer's rights or interest in the property. NRS 116.31166 states "[t]he sale of a unit pursuant [to this statutory scheme] vests in the purchaser the title of the unit's owner without equity or right of redemption." Finally, Spencer's statutory period of time, which could be 90 or 120 days depending on the circumstances, has expired. Spencer is a fraudulently joined defendant and is dismissed from the action. This court has original, diversity jurisdiction and denies the motion to remand.

III. Injunctive Relief

Plaintiff has filed two motions seeking injunctive relief.[2] The motion for a temporary restraining order moves the court to enjoin the trustee sale scheduled by Wells Fargo for May 28, 2013. The motion for preliminary injunction moves the court to enjoin Wells Fargo from conducting a trustee sale pending resolution of this lawsuit on the merits.

A. Legal Standard

According to Federal Rule of Civil Procedure 65, a court may issue a temporary restraining order when the moving party provides specific facts showing that immediate and irreparable injury, loss, or damage will result before the adverse party's opposition to a motion for preliminary injunction can be heard. Fed. R. Civ. P.65. The purpose of a temporary restraining order is to preserve the status quo before a preliminary injunction hearing may be held. Its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment. *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984). "Thus, in seeking a temporary restraining order, the movant must demonstrate that the denial of relief will expose him to some significant risk of irreparable injury." *Associated Gen. Contractors of California v. Coalition of Economic Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991).

A preliminary injunction is an extraordinary remedy never awarded as a right." *Winter*

[2] Plaintiff's emergency motion for a preliminary injunction and emergency motion for a temporary restraining order are actually identical documents.

v. N.R.D.C., 555 U.S. 7, 24 (2008). The Supreme Court has stated that a plaintiff must establish that he can establish each of the following to secure an injunction: (1) a likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; and (4) advancement of the public interest. *Winter*, 555 U.S. at 20-24 (2008). Plaintiff must "make a showing on all four prongs." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

B. Discussion

The court finds that plaintiff does not have a likelihood of success on the merits. *See* section IV.B *infra*. Plaintiff's argument is based on its foreclosure on the property pursuant to NRS 116.3116 because of Spencer's delinquency in paying HOA fees and/or dues. Plaintiff argues that its foreclosure extinguished the bank's first position deed of trust. As discussed more thoroughly in section IV.B, the plain language of the NRS 116.3116, the legislative history and intent of the statute, and a mountain of Nevada state and federal cases all hold to the contrary. Plaintiff does not have a likelihood of success on the merits. The motion for a preliminary injunction and the motion for a temporary restraining order are both denied.

IV. Motion to Dismiss

Defendant Wells Fargo has filed a motion to dismiss plaintiff's complaint.

A. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citation omitted). "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949 (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id*. at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id*. at 1949. Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id*. at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id*. at 1949.

Where the complaint does not "permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief." *Id*. (internal quotations and alterations omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). The *Starr* court stated, "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.*

B. Discussion

Plaintiff's argues that it properly foreclosed on the property pursuant to NRS 116.3116 because Spencer became delinquent and defaulted on her HOA fee obligations. Plaintiff argues that its foreclosure extinguished the interest of the bank's first position deed of trust. Plaintiff's complaint seeks to quiet title and declaratory relief. Defendant argues that an HOA foreclosure pursuant to NRS 116 does not extinguish a first position deed of trust. The court agrees with defendant.

/ / /

NRS 116.3116(2) states:

A lien under this section is prior to all other liens and encumbrances on a unit except:

. . .

(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 . . . .

The clear language of this statute states that an HOA's lien is prior to all other liens and encumbrances secured by the property, except a first security interest on the property recorded before the date on which the assessment became delinquent. In this case, Wells Fargo properly recorded its deed of trust on December 8, 2008. The plaintiff HOA recorded its notice of delinquent assessment lien on March 3, 2010. The bank's first position deed of trust was recorded almost fifteen months prior to plaintiff HOA's lien.

Additionally, plaintiff is required to (1) produce a copy of the assessment lien upon which the foreclosure was based and (2) allege that the assessment lien chronologically precedes the deed of trust. *Centana v. Mortg. Elec. Registration Sys.*, no. 2:11-cv-02105-GMN-RJJ, 2012 WL 3730528, at *3 (D. Nev. Aug. 28, 2012). In this case, the complaint does not allege that the assessment lien chronologically predates the deed of trust. The complaint could not allege such a fact in good faith because the deed of trust was recorded almost fifteen months prior to the assessment lien.

Also, relevant is NRS 116.3116(2)(c), which carves out a limited exception to NRS 116.3116(2)(b). 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. This nine month period of unpaid charges is known as a "super priority lien." However, the super priority lien does not extinguish the first position deed of trust.

NRS 116.3116(2)(c) states:

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 lines, or the priority of liens for other assessments made by the association.

This subsection has already been interpreted by a court in this district. "NRS 116.3116(2)(c) 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 a the first security interest." *Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*, no. 2:12-cv-00949-KJD-RJJ, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013). "[T]he HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the purchaser at the sale takes the property subject to the security interest." *Id.*; *see also First 100, LLC v. Wells Fargo Bank, N.A. et al*, 2:13-cv-00431-JCM-PAL.

The plain language of NRS 116.3116(2)(c) provides an HOA with two options: (1) the HOA may initiate a non-judicial foreclosure to recover the delinquent assessments and the purchaser at the sale takes the property subject to the security interest; or, (2) initiate a judicial action to pursue the assessments. In this case, plaintiff HOA properly pursued option one, but

the proper of execution of option did not extinguish the security interest in the first position deed of trust. Accordingly, plaintiff's claims for quiet title and declaratory relief fail as a matter of law.

Additionally, defendant Wells Fargo has cited no fewer than seven Nevada state court cases confirming this interpretation of the NRS 116 statutory scheme and the super priority lien. Plaintiff has cited no cases in support of its position and states only that the Nevada Supreme Court has not decided the issue. The court is unpersuaded the Nevada Supreme Court would reach a different interpretation if it decide the issue.

V. Summary Judgment

Plaintiff has also moved for summary judgment against defendant First American Title Insurance Company ("FATIC"). Plaintiff asserts that defendant FATIC appeared in a title search of the subject property.

FATIC has not responded to plaintiff's motion even though the response deadline has elapsed. However, plaintiff has attached as an exhibit to its summary judgment motion a motion purporting to be filed by defendant FATIC in state court before removal to this court. The FATIC motion filed in state court seeks Rule 11 sanctions against plaintiff for frivolously and unnecessarily naming FATIC as a defendant in this case. In the motion, FATIC claims "no right, title or interest in the Property which is the subject matter of this litigation." Defendant FATIC also correctly points out that plaintiff's complaint does not assert that FATIC is, or intends to, assert any interest in the subject property. Finally, defendant FATIC's motion points out that it has a judgment against a person with an alias of Ashley E. Spencer. However, the prior owner of the property in this litigation was Ashley B. Spencer. There is no evidence this is the same person.

To the extent plaintiff is attempting to establish it has a superior right to the subject property than defendant FATIC, then the motion is granted. However, this superior right against defendant FATIC, who appears to have been unnecessarily named in this lawsuit, has no bearing whatsoever on the superiority of interests between the plaintiff HOA and defendant Wells Fargo.

VI. Lis Pendens

Plaintiffs have failed to state a cause of action. Therefore, the lis pendens recorded by plaintiffs must be expunged pursuant to NRS 14.015(2) and (3).

VII. Motion for Hearing

The court finds that the legal issues in the present action would not have been aided by oral argument. The motion is denied.

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, DECREED that defendant's motion to expunge lis pendens (doc. # 6) be, and the same hereby, is GRANTED.

IT IS FURTHER ORDERED that defendant's motion to dismiss (doc. # 9) be, and the same hereby, is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (doc. # 14) be, and the same hereby, is GRANTED consistent with the foregoing.

IT IS FURTHER ORDERED that plaintiff's motion to remand to state court (doc. # 16) be, and the same hereby, is DENIED.

IT IS FURTHER ORDERED that plaintiff's emergency motion for a temporary restraining order (doc. # 21) be, and the same hereby, is DENIED.

IT IS FURTHER ORDERED that plaintiff's emergency motion for a preliminary injunction (doc. # 22) be, and the same hereby, is DENIED.

IT IS FURTHER ORDERED that defendant's motion for a hearing (doc. # 24) be, and the same hereby, is GRANTED.

IT IS FURTHER ORDERED that the complaint be dismissed. The clerk of the court shall enter judgment and close the case.

DATED this 24th day of May, 2013.

UNITED STATES DISTRICT JUDGE

Premier One Holdings, Inc. v. BAC Home Loans Servicing LP

United States District Court for the District of Nevada

August 9, 2013, Decided; August 9, 2013, Filed

2:13-CV-895 JCM (GWF)

Reporter
2013 U.S. Dist. LEXIS 112590; 2013 WL 4048573

PREMIER ONE HOLDINGS, INC., Plaintiff(s), v. BAC HOME LOANS SERVICING LP, et al., Defendant(s).

Core Terms

trust deed, homeowner, extinguish, foreclosure, services, Loans, security interest, first position, foreclose, neighborhood, mortgage, courts, delinquent assessment, recorded, absurd, lender, Banks, prior deed, assessments, buyer, deed, purchase the property, factual allegations, cause of action, absurd result, purchaser

Counsel: **[*1]** For Premier One Holdings, Inc., Plaintiff: Charles D Lombino, LEAD ATTORNEY, Lombino Law Studio, Ltd., Henderson, NV.

For BAC Home Loans Servicing LP, formerly known as Countrywide Home Loans Servicing, Defendant: Edward Chang, LEAD ATTORNEY, Abran E. Vigil, Ballard Spahr, Las Vegas, NV; Matthew David Lamb, Ballard Spahr LLP, Las Vegas, NV.

Judges: James C. Mahan, UNITED STATES DISTRICT JUDGE.

Opinion by: James C. Mahan

Opinion

ORDER

Presently before the court is defendant BAC Home Loans Servicing LP motion to dismiss. (Doc. # 2). Plaintiff Premier One Holdings, Inc. filed a response in opposition (doc. # 9), and the defendant filed a reply (doc. # 14).

I. Background

In 2006, non-parties Conrado and Catherne Teotico obtained a mortgage loan for $305,992 from Countrywide Home Loans, Inc. The loan was secured by a deed of trust recorded on May 31, 2006. The deed of trust encumbers real property located at 3825 Pastel Ridge Street in Las Vegas, NV.

The deed of trust names Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee and beneficiary. On or about August 15, 2009, MERS assigned the deed of trust to defendant BAC Home Loans Servicing ("BAC Home Loans"). Countrywide Home Loans Servicing LP is the successor **[*2]** by merger to BAC Home Loans, meaning that it currently holds the deed of trust.

On January 4, 2012, Canyon Springs Homeowner Association recorded a notice of lien against the property for HOA assessments that the Teoticos never paid. Canyon Springs HOA recorded a notice of default and election to

sell under the HOA lien on February 27, 2012. The HOA delinquent assessments totaled $3,190.47. At a foreclosure sale on December 14, 2012, plaintiff purchased the property for $13,700.

Plaintiffs filed this lawsuit in state court after purchasing the property at the foreclosure sale. The clams are for quiet title and for "cancellation of instruments." Defendants removed to this court.

II. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While *Rule 8* does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements **[*3]** of a cause of action." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citation omitted). "Factual allegations must be enough to rise above the speculative level." *Twombly, 550 U.S. at 555*. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal, 129 S.Ct. at 1949* (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id. at 1950*. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id. at 1949*. Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id. at 1950*. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id. at 1949*.

Where the complaint does not "permit the court to infer more than the **[*4]** mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief." *Id.* (internal quotations and alterations omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly, 550 U.S. at 570*.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*. The *Starr* court stated, "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.*

III. Discussion

Plaintiff argues that a properly conducted foreclosure pursuant to *NRS 116.3116* permits an HOA's lien for delinquent assessments to extinguish a first position deed of trust. Defendant argues **[*5]** that a properly conducted foreclosure sale pursuant to NRS chapter 116 does not extinguish a first position deed of trust. The court agrees with defendant.

"In Nevada, HOAs have immediate liens against real property when HOA assessments or other costs against a unit become delinquent." *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, no. 2:13-cv-00164-RCJ, 2013 U.S. Dist. LEXIS 80502, 2013 WL 2460452, at *3 (D. Nev. June 6, 2013)* (citing *NRS 116.3116(1)*). Under the NRS chapter 116 statutory scheme, an HOA lien is prior to all other liens and encumbrances on a unit except " a first security interest on the unit recorded before the date on which the assessment sought to be enforcement became delinquent. . . ." *NRS 116.3116(2)(b)*.

"Also relevant is *NRS 116.3116(2)(c)*, which carves out a limited exception to *NRS 116.3116(2)(b)*." *Weeping Hollow Ave. Trust v. Spencer, no. 2:13-cv-00544-JCM-VCF, 2013 U.S. Dist. LEXIS 74065, 2013 WL 2296313, at*

*5 (D. Nev. May 24, 2013). Subsection (2)(c) states in relevant part that an HOA 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 assessments for common expenses based on **[*6]** 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)(c).

NRS 116.3116(2)(c) creates a super priority lien "to the extent of" charges incurred by the HOA pursuant to NRS 116.310312 (the cost of removal or abatement of a public nuisance related to the unit at issue), NRS 116.3115 (assessments for common expenses), or, for nine months of regular HOA dues immediately proceeding a foreclosure or trustee sale. The words "to the extent of" are words of limitation and limit the amount of the HOA lien that is given "super priority" status over a first security interest. The only part of the HOA lien that is a super priority lien is the part expressly provided for in NRS 116.3116(2)(c), which are charges and/or fees pursuant to NRS 116.310312, NRS 116.3115, and nine months of regular HOA dues that became due "immediately preceding institution of an action to enforce the lien." No other part of an HOA lien is prior to or given super priority status above a first security interest.

The super priority lien affords **[*7]** an HOA significant protections. First, the HOA may foreclose on the property with delinquent assessments (either through a non-judicial or judicial action) to recover its lien, and the limited super priority lien is superior to the first position deed of trust. If an HOA forecloses on the property, then the purchaser takes the property subject to the prior security interest. *See* Weeping Hollow, 2013 U.S. Dist. LEXIS 74065, 2013 WL 2296313; First 100, LLC v. Wells Fargo Bank, N.A., no. 13-cv-431-JCM-PAL, 2013 U.S. Dist. LEXIS 97029, 2013 WL 3678111 (D. Nev. July 11, 2013). The HOA foreclosure does not extinguish the prior deed of trust even if part of the HOA lien qualifies as a limited super priority lien under subsection (2)(c). *Id.*

Second, the HOA may wait until the bank (or other holder of the note and deed of trust) forecloses on the property. In such a case, the first cut of the proceeds from the sale must be paid to satisfy the super priority amount of the HOA lien and the remainder of the proceeds are dedicated to satisfying the first position deed of trust (and thereafter and junior liens in accordance with payment priorities).

Either option affords the HOA protections to recover a portion of its assessments. However, if the HOA pursues **[*8]** the first course of action and conducts a foreclosure pursuant to NRS chapter 116, the HOA foreclosure does not extinguish the first position deed of trust. The purchaser at the HOA foreclosure takes the property subject to the first security interest.

IV. Absurd Results

Every federal court in this district to decide this issue has held that an HOA's super priority lien does not extinguish a first position deed of trust. *See* Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., no. 2:12-cv-00949-KJD-RJJ, 2013 U.S. Dist. LEXIS 18718, 2013 WL 531092 (D. Nev. Feb. 11, 2013); Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, no. 2:13-cv-00164-RCJ, 2013 U.S. Dist. LEXIS 80502, 2013 WL 2460452 (D. Nev. June 6, 2013); Weeping Hollow Ave. Trust v. Spencer, no. 2:13-cv-00544-JCM-VCF, 2013 U.S. Dist. LEXIS 74065, 2013 WL 2296313 (D. Nev. May 24, 2013); Kal-Mor-USA, LLC v. Bank of America, N.A., no. 2:13-cv-0680-LDG-VCF, 2013 U.S. Dist. LEXIS 98375, 2013 WL 3729849; *see also* Centeno v. Mortgage Electronic Registration Systems, Inc., no. 2:11-cv-02105-GMN-RJJ, 2012 U.S. Dist. LEXIS 121932, 2013 WL 3730528 (D. Nev. Aug. 28, 2012) (relying on, and justifiably so, the importance of the chronological order of recordation dates in a bank's deed of trust and an HOA's assessment); *but see SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A. et al*, no. 2:13-cv-01153-APG-PAL **[*9]** (granting injunctive relief in favor of the HOA).

This court is aware that some state courts have interpreted the NRS 116.3116 in a way that permits the HOA super priority lien to extinguish the bank's prior deed of trust, even though most state courts have agreed with the interpretation of the federal courts. This court is also aware that the Nevada Supreme Court has granted

injunctions that enjoin a bank from foreclosing or conducting a trustee sale if an HOA has foreclosed on its super priority lien under the statute.

"Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey, 123 Nev. 399, 403, 168 P.3d 712, 715 (Nev. 2007)*. The plain and clear meaning of the statute is that it affords an HOA a super priority lien of nine months of delinquent assessments, but nothing more than that. The plain language of the statute does not permit an HOA foreclosure of its super priority lien to extinguish a prior recorded deed of trust.

However, even if the statute were ambiguous, there is still only one acceptable interpretation of the statute. "[A] statute's language should not be read to produce **[*10]** absurd or unreasonable results." *Leven, 168 P.3d at 716*; *Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982)* ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *U.S. v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 20112) ("Our law, however, recognizes the principle that courts do not construe statutes in a manner that would lead to absurd results."). To construe *NRS 116.3116* to permit an HOA foreclosure to extinguish a first position deed of trust would be an absurd result for at least the following four reasons.

First, from a practical standpoint, to permit an HOA delinquent assessment, which normally arises years after the recordation of the deed of trust, and the amount of the HOA delinquent assessment will almost always be a small fraction of the amount outstanding under the note and deed of trust, would be completely absurd. [1] Further, "Nevada is a race notice state." *Buhecker v. R.B. Peterson & Sons Constr. Co., 112 Nev. 1498, 1500, 929 P.2d 937, 939 (Nev. 1996)* (citing *NRS 111.320*; *111.325*)). Permitting an HOA super priority lien to **[*11]** wipe out a prior deed of trust contravenes the principles and purpose of a race-notice jurisdiction. The court finds that it would be unjust and absurd to permit an HOA super priority lien to extinguish a first position deed of trust, and potentially violate due process. [2]

The court **[*12]** finds it instructive to demonstrate how the absurdity that would result in this case from a contrary interpretation of the statute. In this case, the delinquent assessments comprising the HOA lien totaled $3,190.47. The court will assume that the entire $3,197.47 qualifies as the super priority lien under *NRS 116.3116(2)(c)*, though it is not clear the entire $3,197.47 would even qualify as super priority under the statute. The deed of trust is for $305,992. The HOA lien is worth approximately one-one hundredth (1/100) of the value of the deed of trust. Additionally, the deed of trust was recorded on or about May 31, 2006. The HOA recorded its lien on or about January 4, 2012, which is about five and one half years after the recordation of the deed of trust. To permit an HOA lien recorded five and one half years later and worth one-one hundredth of the value of the first security interest to completely extinguish the first security interest would be an absurd result.

Second, courts that have held in favor of the HOAs on this issue have reasoned that permitting an HOA super priority lien to extinguish a prior recorded deed of trust would incentivize the banks to foreclose at a faster pace. **[*13]** This logic misunderstands greater points, but, more importantly, encourages a first option by the bank—foreclosure or trustee sale by the bank—which should not be the first option. [3]

A bank like this defendant has made thousands of loans, potentially tens of thousands, in this district to allow Nevada residents to purchase homes. A bank like this defendant has easily made tens of thousands of loans

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[1] This is true even though, in the wake of the subprime lending induced mortgage crises, banks are not sympathetic defendants. However, it is also true that, at least in this district, HOAs are not sympathetic defendants either. *See, e.g., USA v. Alcantar et al*, 2:12-cr-00113-JCM-VCF; *USA v. Priola*, 2:13-cr-00016-APG-VCF.

[2] In a hearing on a temporary restraining order on this exact issue in a different case, *see First 100, LLC v. Wells Fargo Bank*, 2:13-cv-431-JCM, (doc. # 24), counsel for the HOA argued that an HOA might have a cause of action for unjust enrichment against the bank if the court declined to grant the injunction in favor of the HOA to enjoin the bank's trustee sale. The easy answer is no. The tougher answer is if a bank with a prior deed of trust would have a cause of action for unjust enrichment against an HOA if the HOA foreclosure under NRS 116.3116 extinguished the bank's prior deed of trust.

[3] This is especially true in Nevada, which experiences one of the highest percentage rates of foreclosures in the country.

across the country to home purchasers. Meanwhile, an HOA's scope is limited to a single neighborhood or two. As a practical manner, it is much easier for an HOA to be the first entity to act at the first sign of distress by a homeowner. An HOA is monitoring, at most, a few dozen properties. A bank must monitor tens of thousands of properties, so it is more difficult for a bank to be quicker to foreclose than an HOA.

Additionally, courts should not incentivize banks to foreclose on property at the first sign of distress. Banks should be encouraged to work with homeowners so that the bank may recoup as much of its loan as possible and the homeowner can remain in the home. **[*14]** Banks should also be encouraged to participate in a program like the State of Nevada Foreclosure Mediation Program (FMP) in good faith. Banks have considerations that an HOA does not have when considering foreclosure, such as: if the property value on the market is fluctuating; the homeowner's long term ability to pay back the loan; and, whether the bank should allocate resources first to foreclosing on property owners with no chance at paying back their mortgage versus working with home owners that may merely be struggling to pay back their mortgages. An HOA has none of these considerations and merely wants to collect its statutorily entitled fees in the easiest manner possible.

Third, it would be absurd to elevate an HOA super priority lien over other entities that collect from a homeowner because the HOA takes the smallest amount of risk among the creditors and provides the least (both in volume and in importance) amount of services to the homeowner. A homeowner must pay primarily three fees associated with the purchase of a home. First, the homeowner must pay his or her mortgage. The lender bank should get the first cut and the first to be paid back because the lender (1) finances **[*15]** the entire, or a significant amount of, the purchase of the property, and (2) takes the greatest amount of risk in lending to the homeowner. Second, a homeowner must pay taxes on the property. These taxes contribute to state and local services that are greatly beneficial to a homeowner (such as public schools, roads, police, and firefighters). Third, the homeowner must pay fees and assessments if they live within the jurisdiction of an HOA. However, the HOA does not take any risk associated with the purchase of the property and does not advance a significant amount of money to the homeowner. The services provided by an HOA are luxuries, not necessities. And, in any event, many neighborhoods function fine without the services of an HOA. The HOA, in exchange for a small amount of services, levies a surcharge on the homeowner based on little more than the street on which the homeowner lives. It would be absurd to elevate the entire HOA lien over a bank considering the comparatively small amount of risk taken by the HOA to finance the purchase of the property, the small amount of services provided by an HOA compared to the other entities seeking to collect from a homeowner, and the small **[*16]** amount (if any) capital advanced by the HOA to the homeowner.

Fourth, it would be absurd to permit an HOA foreclosure to extinguish a bank's deed of trust because it would risk plunging the local economy back towards a recession. Banks will not lend money to buy houses when their deed of trust could be eliminated by HOA charges.

Mortgage lenders would become extremely reluctant to originate loans for properties in this state that are part of an HOA since the lender would face the threat of having its deed of trust extinguished by a subsequent HOA lien. This would negatively affect a potential homeowner's ability to buy in an HOA neighborhood because the risk would be too great for the lender. Lenders would become, and understandably so, hesitant and cautious about lending to the purchaser of a property in an HOA neighborhood in this state. The construction of *NRS 116.3116* which extinguishes the prior deed of trust would restrict a potential homeowner's options. If the buyer could not pay for the majority of the property with the buyer's own money, then the buyer would likely be forced to purchase a home in a non-HOA neighborhood. [4]

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[4] Along this same vein, it is arguably better for the **[*17]** HOA if its super priority lien does not extinguish the first security interest. It would likely become very difficult to sell a home in an HOA neighborhood to any purchaser other than an all (or almost all) cash buyer. Lenders would likely decline to make loans to purchase a home in an HOA neighborhood. If HOAs get the construction of the statute that they seek, it could lead to a number of indefinite "for sale" signs in their neighborhoods. Of course, it is possible that all cash buyers would buy the HOA properties. However, the vast majority of the time, all cash buyers are buying the property for investment purposes and would rent out the home. HOAs seek homeowners, not renters that are

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion to dismiss (doc. # 2) be, and the same hereby, is GRANTED. The clerk of the court shall enter judgment and close the case.

DATED August 9, 2013.

/s/ James C. Mahan

UNITED STATES DISTRICT JUDGE

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either indifferent or unaware of the HOA. It is in the HOAs best interest if the super priority lien does not extinguish the first position deed of trust.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

COLLEGIUM FUND, LLC, SERIES 5, a Nevada limited liability company, Plaintiff, vs. WELLS FARGO BANK, N.A.; SHAUN DONOVAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; ADELE KADANS; DOROTHY L. KEMP; DONALD R. KEMP; RAFAEL GIRALDO; LEONA MARTIN; and DOES I through X inclusive, Defendants.	Case No.: 2:13-cv-01550-GMN-VCF **ORDER**

Pending before the Court is the Motion for Injunction Pending Appeal (ECF No. 43) filed by Plaintiff Collegium Fund, LLC, Series 5 ("Plaintiff"). Defendant Housing and Urban Development filed a Response. (ECF No. 44.) Plaintiff has not yet filed a Reply, although the deadline by which to do so has not yet passed.

I. BACKGROUND

This case arises from the foreclosure sale based on a homeowners association lien recorded against real property located at 324 Wild Plum Ln., Las Vegas, Nevada 89107. (Notice of Removal Ex. A ("Compl.") ¶ 1, 9, ECF No. 1-2.) Plaintiff initially filed an action in state court alleging two causes of action: (1) Quiet Title as to All Defendants; (2) Declaratory Relief; (3) Unjust Enrichment; and (4) Injunctive Relief . (*Id.* ¶¶ 29-71.) The state court granted Plaintiff's request for a Temporary Restraining Order and set the matter for a hearing on the Motion for Preliminary Injunction to be held on August 28, 2013. (Notice of Removal

Ex. A at 16-19, ECF No. 1-2.) However, prior to that date, on August 27, 2013, Defendant Housing and Urban Development ("HUD") removed the case to this Court. (Notice of Removal, ECF No. 1.)

After removal, the Court extended the temporary restraining order and ordered briefing on Plaintiff's Motion for Preliminary Injunction. (ECF No. 6.) Based on the briefing, the Court denied Plaintiff's Motion. (ECF No. 14.) Subsequently, Plaintiff filed a timely Notice of Appeal as to the Court's denial of the Motion for Preliminary Injunction. (ECF No. 19.) More recently, Defendant noticed a foreclosure sale of the subject property to take place on December 19. (ECF No. 43.) In response, Plaintiff filed the instant Motion for Injunction Pending Appeal to stay the foreclosure sale until after the Ninth Circuit decides the appeal. (ECF No. 43.)

II. JURISDICTION

Although a notice of appeal generally acts to deprive the district court of jurisdiction over the subject of the appeal, Rule 62(c) of the Federal Rules of Civil Procedure recognizes an exception which allows the district court to retain jurisdiction to "suspend, modify, restore, or grant an injunction during the pendency of the appeal . . .." *Mayweathers v. Newland*, 258 F.3d 930, 935 (9th Cir. 2001) (citing Fed. R. Civ. P. 62(c)); *see* Fed. R. Civ. P. 62(c) ("While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction."). Thus, under Rule 62(c), "[t]he district court retains jurisdiction during the pendency of an appeal to act to preserve the status quo." *Mayweathers*, 258 F.3d at 935 (quotation marks omitted). However, this rule does not permit a district court to "materially alter the status of the case on appeal." *Id.*

Here, HUD has noticed a foreclosure sale that will be held on December 19, 2013. (Mot. 2:24–27, ECF No. 43.) In response, Plaintiff now requests that the Court "stay the foreclosure during this action and pending appeal." (*Id.* at 2:27–28.) In opposition, Defendants first assert

that the Court lacks jurisdiction to grant the relief that Plaintiff requests. Defendants are partially correct. True enough, the Court lacks jurisdiction to grant an injunction to maintain the status quo during the entire pendency of this action. Plaintiff previously requested this relief and the Court denied that motion. Thus, Plaintiff's appeal of the Court's denial of Plaintiff's Motion for Preliminary Injunction deprives the Court of jurisdiction to reconsider that order. However, under Rule 62(c), the Court retains jurisdiction to maintain the status quo during the pendency of an appeal. Enjoining the December 19, 2013 foreclosure sale would certainly maintain the status quo until the Ninth Circuit determines whether this Court erred in denying Plaintiff's motion for preliminary injunction.

III. RULE 62(C) INJUNCTION

Granting the requested injunction is "an exercise of judicial discretion that is dependent upon the circumstances of the particular case." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (internal quotation marks omitted). A court may issue an injunction or stay if the party requesting the relief establishes each of four prongs:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. (quoting *Nken v. Holder*, 556 U.S. 418, 433-34 (2009)).

A. Strong Showing that Success is Likely on the Merits

The Ninth Circuit has held that the party seeking relief is not required "to show that it is more likely than not that they will win on the merits." *Lair*, 697 F.3d at 1204. Rather, the petitioner need only show "that there is a substantial case for relief on the merits." *Id.* The Ninth Circuit has further recognized that one interchangeable formulation of this standard is whether there are "serious legal questions raised." *Id.* "Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more

deliberative investigation." *Republic of the Phil. v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

In this case, given the developing split on the interpretation of section 116.3116, the Court concludes that Plaintiff has carried this burden. *Compare SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A.*, No. 2:13-cv-01153-APG-PAL (D. Nev. July 25, 2013) (concluding that the HOA had established a likelihood of succeeding on the merits of its claim that foreclosure of the super priority portion of the HOA lien extinguished a first recorded Deed of Trust) (attached as Exhibit 1), *and First 100, LLC v. Burns*, No. A677693 (8th Judicial D. Ct. Clark Cnty., Nev. May 30, 2013) (concluding that, pursuant to Chapter 116 of the Nevada Revised Statutes, the non-judicial foreclosure of an HOA lien extinguishes prior recorded security interests) (attached as Exhibit 2), *with Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, No. 2:13-cv-00164-RCJ-NJK, 2013 WL 2460452 (D. Nev. June 6, 2013) (granting summary judgment in favor of lender's assignee and holding that the foreclosure of an HOA lien did not extinguish the first mortgage) (attached as Exhibit 3). *See also CitiMortgage, Inc. v. Country Gardens Owners' Ass'n*, 2:13-cv-02039-GMN-VCF, 2013 WL 6409951, at *3 (D. Nev. Dec. 5, 2013). Accordingly, this factor favors granting the requested relief because Plaintiff established a substantial case for relief on the merits by showing the existence of serious legal questions.

B. Irreparable Injury to the Plaintiff

The second prong of the Rule 62(c) analysis requires the petitioner "to show . . . that there is a *probability* of irreparable injury." *Lair*, 697 F.3d at 1214; *see also Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (recognizing that a petitioner's "burden with regard to irreparable harm is higher that it is on the likelihood of success prong, as [it] must show that an irreparable injury is the more probable or likely outcome").

Here, Plaintiff asserts that this prong is satisfied by virtue of the fact that this case

involves real property. "It is well-established that the loss of an interest in real property constitutes an irreparable injury." *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1159 (9th Cir. 2011). However, in *Park Village*, the irreparable harm resulted from the probable eviction of the residents absent the requested injunction. *Id.* ("[T]he individual Plaintiffs were likely to suffer irreparable harm absent preliminary relief because they faced eviction from their rental units."). Plaintiff has not provided the Court with similarly compelling facts. Plaintiff's motion lacks any allegation that a current resident of the subject property will be evicted if the Court were to deny the requested injunction and allow the foreclosure sale to proceed. (*See generally* Mot. 4:18–5:12, ECF No. 43.)

Furthermore, Plaintiff has failed to persuade the Court that its potential injuries could not be compensable through money damages. *See Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 12-16868, 2013 WL 6224288, at *8 (9th Cir. Dec. 2, 2013) (finding an abuse of discretion where the district court's finding of irreparable injury was "grounded in platitudes rather than evidence, and relate[d] neither to whether irreparable injury [wa]s *likely* in the absence of an injunction nor to whether legal remedies, such as money damages, [we]re inadequate" (internal quotation marks and citation omitted)). Plaintiff merely asserts that it will be "denied the ability to protect is [sic] property rights" and that "after HUD's foreclosure sale there may be another person and/or entity claiming title to the property." (Mot. 5:5–8, ECF No. 43.) Plaintiff also acknowledges that it could incur additional litigation costs as a result of the foreclosure sale. (*Id.* at 5:7–9.) Each of these potential sources of harm is compensable with legal remedies and Plaintiff's motion lacks any evidence to prove otherwise.

Additionally, Plaintiff previously recorded a *lis pendens* pursuant to section 14.010 of the Nevada Revised Statutes. Section 14.010(3) expressly provides that "[f]rom the time of recording . . . the pendency of the action is constructive notice to a purchaser or encumbrancer of the property affected thereby." By virtue of the *lis pendens*, any purchaser at the foreclosure

sale will be deemed to have notice of this pending litigation.

Finally, Plaintiff argues that the Court should issue the requested injunction because "Plaintiff will suffer substantial harm if the sale is allowed to proceed . . .." (*Id.* at 5:11–12.) However, "substantial harm" is not necessarily irreparable harm. The Court finds that Plaintiff has failed to carry its burden of establishing that irreparable harm is probable.

C. Substantial Injury to Other Parties Interested in the Proceeding & Public Interest

Having determined that Plaintiff failed to establish the second prong, the Court need not address the remaining two prongs of the Rule 62(c) analysis.

IV. CONCLUSION

IT IS HEREBY ORDERED that the Motion for Injunction Pending Appeal filed by Plaintiff Collegium Fund, LLC is **DENIED**.

DATED this 17th day of December, 2013.

Gloria M. Navarro
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

NADINA BEVERLY, Plaintiff, v. GAYLE WEAVER-FARLEY; et al., Defendants.	3:13-CV-0348-LRH-VPC ORDER

Before the court are defendant Wells Fargo Bank, N.A.'s ("Wells Fargo") motion to dismiss (Doc. #2[1]) and motion to expunge lis pendens (Doc. #3). Plaintiff Nadina Beverly, trustee of the Beverly-Blair Meadowridge Trust ("Beverly"), filed oppositions (Doc. ##12, 13) to which Wells Fargo replied (Doc. ##14, 15).

I. Facts and Procedural History

In October 2004, defendant Gayle Farley ("Farley") purchased real property in Reno, Nevada through an executed deed of trust listing non-party Sierra Financial Mortgage, LLC as the lender and the Mortgage Electronic Registration System ("MERS") as the beneficiary. On April 16, 2009, a corporate deed of trust was recorded on the property whereby MERS, as nominee for Sierra Financial Mortgage, LLC, transferred and assigned all beneficial interest in the first deed of trust to defendant Wells Fargo.

[1] Refers to the court's docket number.

Later that year, on May 27, 2009, a notice of delinquent assessment for homeowner's association ("HOA") dues was recorded on the property. On September 3, 2010, a notice of HOA sale was recorded. At that HOA sale, plaintiff Beverly purchased the property for $16,000.

Subsequently, on May 31, 2013, Beverly filed a complaint against defendants to quiet title alleging that her purchase of the property from the HOA sale extinguished all the other liens, including the first deed of trust. Doc. #1, Exhibit A. Thereafter, Wells Fargo filed the present motion to dismiss. Doc. #2.

II. Legal Standard

Wells Fargo seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That is, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require detailed factual allegations; however, a pleading that offers "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" will not suffice. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Furthermore, Rule 8(a)(2) requires a complaint to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 1949 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference, based on the court's judicial experience and common sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at 1949 (internal quotation marks and citation omitted).

In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as true. *Id.* However, "bare assertions . . . amount[ing] to nothing more than a formulaic recitation of the elements of a . . . claim . . . are not entitled to an assumption of truth." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original) (internal quotation marks omitted). The court discounts these allegations because "they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation." *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Id.*

III. Discussion

In her complaint, Beverly alleges that pursuant to NRS 116.3116(2)(b), Wells Fargo's first deed of trust was extinguished by the HOA's foreclosure and sale of the underlying property. *See* Doc. #1, Exhibit A.

The court has reviewed the documents and pleadings on file in this matter and finds that Beverly misconstrues the language of Section 3116(2)(b). NRS 116.3116 relates to liens by homeowner's associations and reads as follows:

> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
> (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 . . .

By its very language, Section 3116(2)(b) specifically states that an HOA lien is prior to all other liens and encumbrances on the property *except* a first security interest recorded before the date the HOA assessment became delinquent.

Here, the first deed of trust was recorded in October 2004. Defendant Wells Fargo was assigned all rights under the first deed of trust in April 2009, a full month before the delinquent HOA assessment was recorded on the subject property. Thus, Wells Fargo's lien meets the statutory requirements of NRS 116.3116(2)(b) and survived the HOA sale. As such, Beverly took

title to the property subject to the first deed of trust.

As an alternative argument, Beverly contends that Section 3116(2)(c) carves out a limited exception to Section 3116(2)(b) that is applicable in this matter. NRS 116.3116(2)(c) provides in pertinent part that:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association . . .would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . .

Beverly contends that this section provides that the foreclosure of a delinquent HOA assessment lien extinguishes the first security interest on the property if it relates to charges incurred during the nine (9) months prior to the foreclosure. However, once again Beverly misconstrues the statute. The plain language of NRS 116.2116(2)(c) simply creates a limited super priority lien for nine (9) months of HOA assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest. Contrary to Beverly's assertion, the statutory scheme does not require an HOA to wait until the holder of the deed of trust forecloses on its interest. Rather, as in this case, the HOA may initiate a non-judicial foreclosure to recover delinquent assessments and the purchaser at the HOA sale takes the property subject to the first security interest. Therefore, based on the express language of the statutes, the court finds that Beverly's claim for quiet title fails as a matter of law. Accordingly, the court shall grant Wells Fargo's motion to dismiss.

IT IS THEREFORE ORDERED that defendant's motion to dismiss (Doc. #2) is GRANTED. Plaintiff's complaint (Doc. #1, Exhibit A) is DISMISSED in its entirety.

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IT IS FURTHER ORDERED that defendant's motion to expunge lis pendens (Doc. #3) is GRANTED. Defendant Wells Fargo Bank, N.A. shall have ten (10) days after entry of this order to prepare an appropriate proposed order expunging lis pendens and submit the same for approval and signature.

IT IS SO ORDERED.

DATED this 8th day of October, 2013.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

KAL-MOR-USA, LLC, a Nevada limited liability company

Plaintiff,

v.

BANK OF AMERICA, N.A., a National Association; RECONTRUST COMPANY, N.A., a National Association; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE ON BEHALF OF THE CERTIFICATE HOLDERS OF THE CWHEQ INC., CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2005-F, a Remic Trust; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. 2:13-cv-0680-LDG-VCF

ORDER

Presently before the court is Defendants Bank of America N.A. and Recontrust Company, N.A.'s (Bank of America) Motion to Dismiss Amended Complaint. (Doc. #4). Plaintiff Kal-Mor-USA, LLC filed a response in opposition (Doc. #6), and Bank of America filed a reply (Doc. #10).

I. Background

In 2005, George Gilbert obtained a mortgage loan to purchase property located at 3047 Casey Drive, Unit 103, Las Vegas, Nevada. The loan was secured by a first deed of trust which was properly

recorded August 23, 2005. As a result of Gilbert's failure to pay homeowner's association fees, Canyon Willow Owners Association recorded a lien for delinquent assessments in January 2012. Canyon Willow later foreclosed on the property and First 100, LLC, purchased the property at the foreclosure auction on February 2, 2013. First 100 then sold the property to Kal-Mor one month later. The deed of sale was recorded on March 4, 2013.

On February 26, 2013, First 100 commenced this lawsuit against the holder of the first deed of trust and any other junior lien holders. The complaint seeks quiet title, declaratory relief, and to enjoin any party from foreclosing on the property during the duration of this lawsuit. Bank of America removed the action to federal court on April 22, 2013.

II. Motion to Dismiss

Defendants' motion to dismiss, brought pursuant to Rule 12(b)(6), challenges whether the plaintiffs' complaint states "a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In ruling upon this motion, the court is governed by the relaxed requirement of Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." As summarized by the Supreme Court, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds'of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citations omitted). In deciding whether the factual allegations state a claim, the court accepts those allegations as true, as "Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Further, the court "construe[s] the pleadings in the light most favorable to the nonmoving party." *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

Kal-Mor argues that it purchased the property free from all encumbrances and seeks to quiet title. Kal-Mor argues that Canyon Willow's foreclosure pursuant to NRS 116.3116 extinguished Bank of America's interest through its first position deed of trust. Bank of America argues that an HOA foreclosure pursuant to NRS 116.3116 does not extinguish a first position deed of trust. The court agrees with Bank of America.

NRS 116.3116(2) states in relevant part:

> A lien under this subsection is prior to all other liens and encumbrances on a unit except:
> . . .
> (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 . . . .

The clear language of this statute states that an HOA's lien is prior to all other liens and encumbrances secured by the property except a first security interest on the property recorded before the date on which the assessment became delinquent. In this case, Bank of America properly recorded its deed of trust on August 23, 2005. Canyon Willow recorded its lien for delinquent assessments in January 2012. Bank of America's first position deed of trust was recorded nearly seven years prior to Canyon Willow's HOA lien.

Additionally, Kal-Mor is required to (1) produce a copy of the assessment lien upon which the foreclosure was based, and (2) allege that the assessment lien chronologically precedes the deed of trust. *Centana v. Mortg. Elec. Registration Sys.*, Case No. 2:11-cv-2105-GMN-RJJ, 2012 WL 3730528 at *3 (D. Nev. Aug. 28, 2012). In this case, the amended complaint does not allege that the assessment lien chronologically predates the deed of trust. The deed of trust was recorded almost seven years prior to the assessment lien.

Also relevant is NRS 166.3116(2)(c), which delineates a limited exception to NRS 116.3116(2)(b). NRS 166.3116(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 in question after the foreclosure of the first position deed of trust. This nine-month period of unpaid charges is known as a "super priority lien." However, the super priority lien does not extinguish the first position deed of trust.

NRS 116.3116(2)(c) states:

> 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.**

Several courts of this district have recently interpreted this subsection. "NRS 116.3116(2)(c) 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." ***Diakonos Holdings, LLC v. Countrywide Home Loans, Inc.*****, Case No. 2:12-cv-00949-KJD-RJJ, 2013 WL 531092 at *3 (D. Nev. Feb. 11, 2013). "[T]he HOA may initiate a nonjudicial foreclosure to recover delinquent assessments and the purchaser at the sale takes the property subject to the security interest."** ***Id.*** **"The plain language of NRS 116.3116(2)(c) provides an HOA with two options: (1) the HOA may initiate a non-judicial foreclosure to recover the**

delinquent assessments and the purchaser at the sale takes the property subject to the security interest; or (2) initiate a judicial action to pursue the assessments." ***Weeping Hollow Avenue Trust v. Ashley B. Spencer*****, Case No.** 2:13-cv-0544-JCM-VCF (D. Nev. May 24, 2013)**.**

In this case, Canyon Willow's foreclosure did not extinguish Bank of America's security interest in the first position deed of trust. Therefore, Kal-Mor's claims for quiet title and declaratory relief fail as a matter of law.

Accordingly,

IT IS HEREBY ORDERED that Bank of America's motion to dismiss (Doc. #4) is GRANTED.

DATED this 8th **day of July, 2013.**

Lloyd D. George
United States District Judge

ORDR

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RCO File No. 7518.55695
Attorneys for Defendant
Bank of America, N.A.

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA

JASON FRENCH, an individual,

Plaintiff,

vs.

SWEETWATER HOMEOWNERS' ASSOCIATION, INC., a Nevada Corporation; NEVADA ASSOCIATION SERVICES, INC., A Nevada Corporation; SFR INVESTMENTS POOL 1, LLC, A Domestic Limited-Liability Company; BANK OF AMERICA, N.A.; DOE Individuals I Through X; And ROE Corporations I Through X, inclusive,

Defendants.

Case No.: A-12-667931-C

Dept.: III

SFR INVESTMENT POOL 1, LLC, A Domestic Limited-Liability Company,

Counter-Claimant/Cross-Claimant,

vs.

JASON FRENCH, An Individual,

Counter-Defendant,

And

SWEETWATER HOMEOWNERS' ASSOCIATION, INC., A Nevada Corporation; NEVADA ASSOCIATION SERVICES, INC., A Nevada Corporation; BANK OF AMERICA, N.A.; DOE Individuals I Through X; And ROE Corporations I Through X, inclusive,

Cross-Defendants.

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND CROSS-COMPLAINT

Defendant and Cross-Defendant, Bank of America, N.A.'s Motion to Dismiss Complaint and Cross-Complaint ("Motion") came on for hearing before the Court at 9:00 a.m. on March 13, 2013. Brett P. Ryan, Esq. appeared on behalf of Bank of America, N.A., Diana S. Cline, Esq. and Howard C. Kim, Esq. appeared on behalf of SFR Investments Pool I, LLC. No one appeared on behalf of plaintiff, Jason French, or on behalf of Defendants and Cross-Defendants Nevada Association Services, Inc. and Sweetwater Homeowners' Association, Inc.

The Court, having considered the moving papers, its own files, the arguments of counsel, and good cause appearing, makes the following findings:

1. Plaintiff's Complaint contains no allegations or claims against Bank of America, N.A. Accordingly, Bank of America, N.A.'s Motion is GRANTED as to Plaintiff's Complaint;

2. Under Nevada Revised Statutes 116 .3116, for an HOA's lien to obtain super priority status an HOA must institute an "action to enforce the lien";

3. Under Nevada Revised Statutes 116 .3116, an "action to enforce the lien" means a judicial foreclosure, not a non-judicial foreclosure;

4. Sweetwater Homeowners' Association, Inc. conducted or caused to be conducted a non-judicial foreclosure sale of the property located at 3900 Wharton Street, Las Vegas, NV 89130 ("Property");

5. Because Sweetwater Homeowners' Association, Inc. conducted or caused to be conducted a non-judicial foreclosure sale of the Property, its lien did not obtain super priority status;

6. SFR Investments Pool I, LLC purchased the Property at the non-judicial foreclosure;

7. When SFR Investments Pool I, LLC purchased the Property at a non-judicial foreclosure, it took title to the Property subject to Bank of America, N.A.'s interest in the Property, as described in the Deed of Trust, Instrument No. 20090616-0000566, which constitutes a first security interest on the Property recorded before the date on which the assessment sought to be enforced became delinquent pursuant to NRS 116.3116(2)(b);

8. SFR Investments Pool I, LLC's ownership interest in the Property remains subject to Bank of America, N.A.'s interest in the Property.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Bank of America, N.A.'s Motion to Dismiss is GRANTED. Plaintiff's Complaint and SFR Investments Pool I, LLC's Cross-Complaint are DISMISSED as to Defendant Bank of America, N.A.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that certification for appeal is granted in accordance with Rule 54(b) of the Nevada Rules of Civil Procedure.

DATED this 19 day of April, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:
RCO LEGAL, P.S.

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Attorney for Defendant
Bank of America, N.A.

APPROVED AS TO FORM:
HOWARD KIM & ASSOCIATES

DIANA S. CLINE
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Attorney for Defendant
SFR Investments Pool I, LLC

REGISTER OF ACTIONS

CASE NO. A-12-667931-C

Jason French, Plaintiff(s) vs. Sweetwater Homeowners Association Inc, Defendant(s)	§	Case Type:	**Title to Property**
	§	Subtype:	**Foreclosure**
	§	Date Filed:	**09/05/2012**
	§	Location:	**Department 3**
	§	Cross-Reference Case Number:	**A667931**
	§	Supreme Court No.:	**63313**

PARTY INFORMATION

Counter Claimant	**SFR Investments Pool I LLC**	**Lead Attorneys** **Howard C. Kim** *Retained* 702-485-3300(W)
Counter Defendant	**French, Jason**	**Pro Se**
Defendant	**SFR Investments Pool I LLC**	**Howard C. Kim** *Retained* 702-485-3300(W)
Defendant	**Sweetwater Homeowners Association Inc**	**Richard J. Vilkin** *Retained* 702-476-3211(W)
Plaintiff	**French, Jason**	**Pro Se**

EVENTS & ORDERS OF THE COURT

03/13/2013 **Motion to Dismiss** (9:00 AM) (Judicial Officer Herndon, Douglas W.)
Defendant Bank of America N.A.'s Motion to Dismiss Complaint and Cross-Claim

Minutes

02/27/2013 9:00 AM

03/13/2013 9:00 AM

- Brett Ryan, Esq. present on behalf of Bank of America, NA. Diana Cline, Esq. and Kim Howard, Esq. present on behalf of SFR Investments Pool I LLC. Court stated that previous rulings granting motions on this issue were made by Judge Weise and Judge Dawson, and Court agrees with those rulings. Additionally, Court stated it granted a motion on this issue last week. Argument by Mr. Ryan and Ms. Cline. Court stated that under 116 and the way the word action is used, Court believes it is a Court action. Further argument by Ms. Cline. COURT ORDERED, Defendant Bank Of America's Motion to Dismiss Complaint is GRANTED and Certification is GRANTED.

Further, COURT ORDERED, Calendar Call and Jury Trial are VACATED.

Return to Register of Actions

ORDR
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Attorney for Plaintiff, Wells Fargo Bank, N.A.

DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Plaintiff, vs. WELLS FARGO BANK, N.A., a national association; HOUSING AND URBAN DEVELOPMENT, a government agency; MARY E. WHITNEY, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive. Defendants.	Case No.: A-13-681847-C Dept. No.: 3 **ORDER GRANTING WELLS FARGO'S MOTION TO DISMISS WITH PREJUDICE THE PLAINTIFF'S COMPLAINT AND MOTION TO EXPUNGE LIS PENDENS**

The Defendant, Wells Fargo Bank, N.A.'s, Motion to Dismiss with Prejudice the Plaintiff's Complaint having come on for hearing in the above-entitled Court on July 24, 2013, at the hour of 9:00 A.M and Wells Fargo Bank, N.A.'s, Motion to Expunge Lis Pendens having come on for hearing in the above entitled Court on July 31, 2013 at the hour of 9:00 A.M. The Plaintiff, SFR Investments Pool 1, LLC, appearing by and through its counsel of record, Victoria Hightower, Esq., of Howard Kim & Associates, the Defendant, Wells Fargo Bank, N.A., appearing by and through its counsel of record, Chelsea A. Crowton, Esq., of Wright, Finlay & Zak, LLP, the Court having considered all arguments presented, the pleadings on file herein, and determining that good cause appearing, hereby rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, Wells Fargo Bank, N.A.'s, Motion to Dismiss with Prejudice the Plaintiff's Complaint, is hereby GRANTED and the Complaint is dismissed with **prejudice** as to Defendant, Wells Fargo Bank,

☐ Voluntary Dis	☐ Stip Dis	☐ Sum Jdgmt	FINAL DISPOSITIONS
☐ Involuntary (stat) Dis	☐ Stip Jdgmt	☐ Non-Jury Trial	☐ Time Limit Expired
☐ Jdgmt on Arb Award	☐ Default Jdgmt	☐ Jury Trial	☐ Dismissed (with or without prejudice)
☑ Mtn to Dis (by deft)	☐ Transferred		☐ Judgment Satisfied/Paid in full

N.A.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Super-Priority Lien created under N.R.S. 116.3116 is merely a payment priority lien that does not extinguish a first recorded Deed of Trust upon a sale by a Homeowners Association.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Nevada Real Estate Division's Opinion is flawed and inaccurate.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the HOA Lien was recorded after Wells Fargo's Deed of Trust and under N.R.S. 116.3116(2)(b) Wells Fargo's Lien was not extinguished by the HOA Sale.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Defendant, Wells Fargo Bank, N.A.'s, Motion to Expunge Lis Pendens is hereby GRANTED because there does not exist a fair chance or likelihood of success on the merits of the Complaint and the underlying Complaint has been dismissed with prejudice in this case.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any Pendency of Action or Lis Pendens recorded by the Plaintiff in the Official Records of Clark County, Nevada on May 15, 2013 as Book and Instrument Number 20130517-0000334, relating to this action and the real property that is the subject of this action located at 2824 Crystal lantern Drive, Henderson, Nevada 89704, APN: 177-13-310-020, legally described as:

> LOT TWENTY (20) IN BLOCK TWO (2) OF OAK FOREST VILLAS II PHASE 1, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 50 OF PLATS, PAGE 79, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

is hereby cancelled, expunged, or voided, pursuant to N.R.S. 14.015 and it shall have from this day forward have no force or effect.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to N.R.S. 14.015(5), the Plaintiff shall record a copy of this Order or other appropriate notice cancelling the Notice of Pendency of Action or Lis Pendens, with the Clark County Recorder's Office within five (5) business days of its entry, and if there is a failure to do so, any party may record a copy of this Order.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Stay is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there is no just cause for delay and Judgment in favor of Wells Fargo shall be entered and be certified as final, pursuant to N.R.C.P. Rule 54(b).

IT IS SO ORDERED.

Dated this 14 day of August, 2013.

DISTRICT COURT JUDGE

Respectfully Submitted by:

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Approved as to form, but all rights reserved for appellate purposes:

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DISTRICT COURT
CLARK COUNTY, NEVADA

3182 TARPON 103 TRUST Plaintiff, vs. VINCENT SAMMARCO, an individual; SHIRLEY SAMMARCO, an individual; WELLS FARGO BANK, NATIONAL ASSOCIATION; and any and all other persons unknown claiming any right, title, estate, lien or interest in the Property adverse to the Plaintiff's ownership, or any cloud upon Plaintiff's title thereto (DOES 1 through 10, inclusive); Defendants.	Case No.: A-13-676718-C Dept. No.: IV **ORDER DENYING THE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

The Defendant, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo"), by and through its attorney of record, Chelsea A. Crowton, Esq. of the law firm of Wright, Finlay & Zak, LLP, and the Plaintiff, 3182 Tarpon 103 Trust, by and through their attorney of record, Zachary P. Takos, Esq., of the law firm of Green Infuso, LLP, having appeared on April 16, 2013 for the hearing on the Plaintiff's Motion for Preliminary Injunction. The Court having heard arguments from Wells Fargo and the Plaintiff in this case, the Court having reviewed the Motion for Preliminary

Injunction and the Response to the Motion for Preliminary Injunction, and good cause appearing, hereby rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Preliminary Injunction is **denied**.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff has failed to state a likelihood of success on the merits of the underlying Complaint, because the Court holds that the Homeowner's Association foreclosure of its super-priority lien under N.R.S. 116 did not extinguish Wells Fargo's first security interest on the Subject Property.

IT IS SO ORDERED.

DATED this 10 day of May, 2013.

DISTRICT COURT JUDGE

Respectfully Submitted:

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Wells Fargo Bank, N.A.

Reviewed by:

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Attorneys for Spring Mountain Ranch Master Association

9

DISTRICT COURT

CLARK COUNTY, NEVADA

KORBEL FAMILY TRUST

Plaintiff,

v.

SPRING MOUNTAIN RANCH MASTER ASSOCIATION; BAY CAPITAL CORP.,

Defendants.

Case No.: 06-A-523959-C
Dept. No.: V

ORDER

Hearing Date: November 20, 2006
Time: 9:00 A.M.

ORDER

The above-referenced matter having come before this Court, the Plaintiff being represented by Marty G. Baker, Esq. of The Cooper Castle Law Firm, and Defendant Spring Mountain Ranch Master Association (the "Association") being represented by John E. Leach, Esq. of the law firm of Santoro, Driggs, Walch, Kearney, Johnson & Thompson, each party having briefed the issues, good cause appearing therefore and thereby no just reason for delay;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Nevada Revised Statutes 116.3116(2), a portion of the Association's assessment lien has priority over the first deed of trust. This portion of the Association's assessment lien comprises the super-priority portion of the lien. The Association's assessment lien, with the exception of the super-priority portion of the lien, is extinguished by a foreclosure of the first deed of trust.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the Association's super-priority claim shall include the following amounts:

(a) Six (6) months of the assessments for common expenses;

(b) Six (6) months of late fees imposed for non-payment of the assessments for common expenses;

(c) Interest on the principal amount of six (6) months of the unpaid assessments for common expenses, as set forth in the Association's governing documents;

(d) The Association's costs of collection, which may include legal fees and costs, that accrue prior to the date of foreclosure of the first deed of trust; and

(e) The transfer fee for conveyance and change of ownership of the property foreclosed pursuant to the first deed of trust.

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the Defendant Association's assessment lien has priority over the second deed of trust and any claims originating from the second deed of trust. *See* NRS 116.3116(2).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Association's super-priority claim, in the case at hand, to be paid by the Plaintiff to the Defendant Association is $1,963.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the remaining balance of the Association's claim is $5,565.07, and that said claim has priority over all other claimants in this action.

. . .

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of the Court shall issue a check payable to the Spring Mountain Ranch Master Association, in the amount of $5,565.07, which payment shall be issued from the funds previously deposited with the Court on October 4, 2006, by Miles, Bauer, Bergstrom & Winters, LLP, on behalf of the Intervenor, Reconstrust Company, N.A.

Dated this 20 day of December, 2006

DISTRICT COURT JUDGE

Submitted by:

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Attorneys for Defendant Spring Mountain Ranch Master Association

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Attorneys for Defendant First Horizon Home Loans, a division of First Tennessee Bank National Association

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL1, LLC, a Nevada limited liability company, Plaintiff, vs. FIRST HORIZON HOME LOANS, a Division of First Tennessee Bank, N.A., a national association; REPUBLIC SILVER STATE DISPOSAL, INC., a Nevada corporation; DONALD J. O'SHEA, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No. A-13-674958-C Dept No. X

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff SFR Investments Pool 1, LLC's ("Plaintiff") Motion for Preliminary Injunction on an Order Shortening Time filed January 17, 2013 (the "Motion") came on for hearing before the Court on April 9, 2013. Diana S. Cline, Esq. and Jacqueline A. Gilbert, Esq. appeared on behalf of Plaintiff and Edward T. Chang, Esq. appeared on behalf of defendant First Horizon Home Loans, a division of First Tennessee Bank National Association ("First Horizon"). The Court having examined the complaint, the Motion, the Opposition to Motion for Preliminary Injunction, the Reply in

Support of Motion for Preliminary Injunction and the Request for Judicial Notice finds as follows:

I. **FINDINGS OF FACT**

1. A Deed of Trust was recorded March 14, 2008 in the Official Records of Clark County, Nevada (the "Official Records") in Book 20080314 as Document No. 0002309 (the "Deed of Trust") against real property commonly known as 8057 Eurorail Street, Las Vegas, Nevada 89131 bearing APN 125-09-412-016 (the "Property"). The Deed of Trust lists Donald J. O'Shea ("O'Shea") as the borrower, First Horizon as the lender, Nevada Title as the trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as the nominee and beneficiary. The Deed of Trust secures a promissory note signed by O'Shea and dated March 5, 2008 in the amount of $401,355.

2. An Assignment of Deed of Trust was recorded on July 14, 2009 in the Official Records in Book 20090714 as Document No. 0001633 whereby MERS granted, assigned and transferred to Chase Home Finance LLC ("Chase") all beneficial interest under the Deed of Trust.

3. A Substitution of Trustee was recorded on July 14, 2009 in the Official Records in Book 20090714 as Document No. 0001634 whereby Chase substituted The Cooper Castle Law Firm, LLP ("Cooper Castle") as the new trustee under the Deed of Trust.

4. Cooper Castle recorded a Notice of Breach and Default and of Election to Cause Sale of Real Property under Deed of Trust on October 21, 2009 in the Official Records as Instrument Number 200910210001476.

5. An Assignment of Deed of Trust was recorded on November 9, 2010 in the Official Records as Instrument Number 201011090002066, whereby Chase granted, assigned and transferred to First Horizon all beneficial interest under the Deed of Trust.

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6. A Notice of Trustee's Sale was recorded on January 8, 2013 in the Official Records as instrument number 201301080000720, whereby Cooper Castle scheduled a sale of the Property for January 30, 2013 at 1:00 p.m. The sale did not proceed.

7. A Notice of Delinquent Assessment (Lien) was recorded on February 26, 2009 in the Official Records in Book 20090226 as Document No. 0003233 (the "Day Dawn Crossing Lien"), whereby the Day Dawn Crossing Homeowners Association ("Day Dawn Crossing HOA") recorded a lien against the Property for unpaid assessments in the amount of $810 as of February 23, 2009.

8. A Notice of Default and Election to Sell under Homeowners Association Lien was recorded on June 25, 2009 in the Official Records in Book 20090625 as Document No. 0004477.

9. A Notice of Trustee's Sale was recorded on August 21, 2012 in the Official Records as instrument number 201208210001698 whereby Alessi & Koenig LLC as agent of the Day Dawn Crossing HOA would sell the Property at public auction to the highest bidder.

10. A Trustee's Deed upon Sale was dated January 9, 2013 and recorded on January 11, 2013 in the Official Records as instrument number 201301110003180, whereby Alessi & Koenig, LLC, as agent for Day Dawn Crossing HOA, granted the Property to Plaintiff without warranty expressed or implied. According to the Trustee's Deed upon Sale, the amount of the Day Dawn Crossing Lien at the time of the sale was $7,195 and the amount paid by Plaintiff for the Property was $10,100.

11. Article V, Section 5.08 of the Declaration of Covenants, Conditions, and Restrictions for Day Dawn Crossing ("CC&Rs") recorded on February 25, 2005 in the Official Records in Book 20050225 as Document No. 0003215 provides:

> Notwithstanding any other provision of this Declaration, no lien created under this Article V or under any other Article of this Declaration, nor any lien arising by reason of any breach of this Declaration, nor the enforcement of any provision of this Declaration, shall defeat or render invalid

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> the rights of the beneficiary under any Recorded Mortgage of first and senior priority now or hereafter upon a Lot, made in good faith and for value, perfected before the date on which the Assessment sought to be enforced became delinquent. However, after the foreclosure of any such first Mortgage, such Lot shall remain subject to this Declaration and shall be liable for all regular Assessments and all special Assessments levied subsequent to the date six (6) months prior to the institution of an action to foreclose on any such first Mortgage.

12. Plaintiff seeks a declaration that the Property vested in Plaintiff free and clear of all liens and encumbrances and that defendants, including First Horizon, have no right, title or interest in the Property and are enjoined from initiating or continuing foreclosure proceedings against the Property.

13. Upon inquiry of counsel, the Court finds that there are no additional facts to be discovered to influence the Court's decision in whether an injunction should issue.

II. CONCLUSIONS OF LAW

1. "For a preliminary injunction to issue, the moving party must show that there is a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm for which there is no adequate remedy at law." Dep't of Conservation & Natural Res. v. Foley, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005); see also Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

2. The Court finds persuasive the decision issued by the United States District Court for the District of Nevada in Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., Case No. 2:12-CV-00949-KJC-RJJ, 2013 U.S. Dist. LEXIS 18718 (D. Nev. Feb. 11, 2013). The Court agrees with the holding of Diakonos Holdings that "NRS 116.3116(2)(c) creates a limited super priority lien for 9 months of HOA

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assessments leading up to the foreclosure of the first mortgage, but it does not eliminate the first security interest." Diakonos Holdings at *3.

3. As the highest bidder, Plaintiff purchased the Property without equity or right of redemption. See NRS 116.31166(3) ("The sale of a unit pursuant to NRS 116.31162, 116.311663 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.").

4. Since the Deed of Trust was recorded on March 14, 2008 and the Day Dawn Crossing Lien was recorded on February 26, 2009, the Deed of Trust is prior to the Day Dawn Crossing Lien. Plaintiff purchased the Property subject to the Deed of Trust. See NRS 116.3116(2)(b) ("A lien under this section is prior to all other liens and encumbrances on a unit except [a] first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . ."); NRS 116.3116(2)(c) ("The 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 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 . . . .")

5. Since Plaintiff's interest in the Property is subject to the Deed of Trust, Plaintiff has failed to demonstrate a likelihood of success on the merits.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's request for injunctive relief as set forth in its Motion for Preliminary Injunction on an Order Shortening Time filed January 16, 2013 is DENIED.

IT IS HEREBY FURTHER ORDERED that the Temporary Restraining Ordered entered on March 28, 2013 is hereby dissolved and that First Horizon may exercise its rights pursuant to the Deed of Trust including, among other things,

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selling the Property at a public sale.

IT IS HEREBY FURTHER ORDERED that Plaintiff's oral motion for an injunction pending appeal is DENIED.

Dated ~~April~~ May 13th 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:

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REGISTER OF ACTIONS

CASE NO. A-13-674958-C

SFR Investments Pool 1 LLC, Plaintiff(s) vs. First Horizon Home Loans, Defendant(s)	§	Case Type:	**Title to Property**
	§	Subtype:	**Quiet Title**
	§	Date Filed:	**01/14/2013**
	§	Location:	**Department 10**
	§	Cross-Reference Case Number:	**A674958**
	§	Supreme Court No.:	**63451**

PARTY INFORMATION

Defendant	**First Horizon Home Loans**	**Lead Attorneys** **Edward T Chang** *Retained* 702-471-7000(W)
Defendant	**O'Shea, Donald J**	
Plaintiff	**SFR Investments Pool 1 LLC**	**Howard C. Kim** *Retained* 702-485-3300(W)

EVENTS & ORDERS OF THE COURT

04/02/2013 **Motion for Preliminary Injunction** (9:30 AM) (Judicial Officer Walsh, Jessie)
04/02/2013, 04/09/2013
Plaintiff's Ex Parte Temporary Restraining Order: Order Enjoining Foreclosure and Order Setting Hearing on Motion for Preliminary Injunction

Minutes

04/02/2013 9:30 AM
- Upon Court's inquiry, Ms. Cline advised she filed the Reply yesterday. Copies provided to counsel and the court. Mr. Chang requested time to read the Reply. COURT ORDERED, matter CONTINUED. 4/09/13 9:30 AM Plaintiff's Ex Parte Temporary Restraining Order: Order Enjoining Foreclosure and Order Setting Hearing on Motion for Preliminary Injunction

04/09/2013 9:30 AM
- Following arguments by counsel, Court Stated its Findings and ORDERED, motion DENIED. FURTHER ORDERED, Plaintiff's oral request for Stay, DENIED. Mr. Chang to prepare the order.

Parties Present
Return to Register of Actions

Electronically Filed
06/03/2011 10:04:45 AM

CLERK OF THE COURT

ORD

JAMES R. ADAMS, ESQ.
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ASSLY SAYYAR, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

WINGBROOK CAPITAL, LLC., Plaintiff, vs. PEPPERTREE HOMEOWNERS ASSOCIATION; and DOES 1-10 and ROE ENTITIES 1-10, INCLUSIVE Defendants.	Case No. A-11-636948-B Dept. No. XI **ORDER**

This matter came before the Court on May 24, 2011 at 9:00 a.m., upon the Plaintiff's Motion for Summary Judgment on Claim of Declaratory Relief. James R. Adams, Esq., of Adams Law Group, Ltd., and Puoy K. Premsrirut, Esq., of Puoy K. Premsrirut, Esq., Inc., appeared on behalf of the Plaintiff. Kurt Bonds, Esq., of Alverson, Taylor, Mortensen & Sanders appeared on behalf of the Defendant. The Honorable Court, having read the briefs on file and having heard oral argument, and for good cause appearing hereby rules:

WHEREAS the Parties have engaged in and have concluded a Nevada Real Estate Division mediation (ADR #11-25) wherein the Parties mediated a dispute over the sum of $13,190.33; and

WHEREAS the subject of the mediation was whether NRS 116.3116 permitted Defendant to charge to Plaintiff $14,037.83, or whether some lesser amount was due pursuant to NRS 116.3116; and

WHEREAS, the Court has determined that a justiciable controversy exists in this matter as Defendant claims it has a right pursuant to NRS 116.3116 to charge and retain proceeds in the amount $14,037.83 from Plaintiff and Plaintiff, a purchaser of a home at foreclosure which is located within the Defendant homeowners' association, contests this charge and claims that Defendant exceeded the limits of NRS 116.3116 and overcharged it for the super priority lien; and

WHEREAS there exists in this case a controversy in which a claim of right is asserted by Plaintiff against Defendant who has an interest in contesting it; and

WHEREAS Plaintiff and Defendant, the contesting parties hereto, are clearly adverse and hold different views regarding the meaning and applicability of NRS §116.3116 (including whether Defendant charged too much for the super priority lien); and

WHEREAS Plaintiff has a legal interest in the controversy as it was Plaintiff's money which had been demanded and transferred to Defendant and it was Plaintiff's property that had been the subject of a homeowners' association lien by Defendant; and

WHEREAS the issue of the meaning, application and interpretation of NRS 116.3116 is ripe for determination in this case as the present controversy is real, it exists now, and it affects the Parties hereto; and

WHEREAS, therefore, the Court finds that issuing a declaratory judgment relating to the meaning and interpretation of NRS 116.3116 would terminate some of the uncertainty and controversy giving rise to the present proceeding; and

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WHEREAS, pursuant to NRS 30.040 Plaintiff and Defendant are parties whose rights, status or other legal relations are affected by NRS 116.3116 and they may, therefore, have determined by this Court any question of construction or validity arising under NRS 116.3116 and obtain a declaration of rights, status or other legal relations thereunder;

THE COURT, THEREFORE, DECLARES, ORDERS, ADJUDGES AND DECREES as follows:

1. NRS 116.3116 is a statute which creates for the benefit of Nevada homeowners' associations a lien against a homeowner's 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 (the "Statutory Lien"). The homeowners' associations' Statutory Lien is noticed and perfected by the recording of the associations' declaration and, pursuant to NRS 116.3116(4), no further recordation of any claim of lien for assessment is required.

2. Pursuant to NRS 116.3116(2), the homeowners' association's Statutory Lien is junior to a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent ("First Security Interest") except for a portion of the homeowners' association's Statutory Lien which remains prior to the First Security Interest (the "Super Priority Lien").

3. Homeowners' associations, therefore, have a Super Priority Lien which has priority over the First Security Interest on a homeowners' unit. However, the Super Priority Lien amount is not without limits and NRS 116.3116 provides that the amount of the Super Priority Lien (i.e., that amount of a homeowners' associations' Statutory Lien which retains priority status over the First Security Interest) is limited "to the extent" of those assessments for common expenses based upon the associations' periodic budget that would have become due in the 9 month period immediately preceding an

associations' institution of an action to enforce its Statutory Lien and "to the extent of" external repair costs pursuant to NRS 116.310312.

4. The words "to the extent of" contained in NRS 116.3116(2) mean "no more than," which clearly indicates a maximum figure or a cap on the Super Priority Lien which cannot be exceeded.

5. Therefore, after the foreclosure by a First Security Interest holder of a unit located within a homeowners' association, pursuant to NRS 116.3116 the monetary limit of a homeowners' association's Super Priority Lien is limited to a maximum amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the institution of an action to enforce the lien (the "Assessment Cap Figure") plus external repair costs pursuant to NRS 116.310312.

6. While assessments, penalties, fees, charges, late charges, fines and interest may be included within the Assessment Cap Figure, in no event can the total amount of the Assessment Cap Figure exceed an amount equaling 9 times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the association's institution of an action to enforce the lien.

7. The Super Priority Lien equals the Assessment Cap Figure plus external repair costs pursuant to NRS 116.310312.

8. After providing a homeowner with notice and hearing, NRS 116.310312 permits a homeowners' association to enter the grounds of a homeowners' unit and maintain the exterior of the unit in accordance with the standards set forth in the association's governing documents. Pursuant to NRS 116.310312(2)(b), a homeowners' association may also remove or abate a public nuisance on the exterior of a unit. The association may order that the costs of such maintenance or abatement, including interest, inspection fees, notification fees and collection costs for such maintenance

or abatement to be charged against the unit ("Exterior Repair Costs"). NRS 116.310312(9)(a) provides that "Exterior" of the unit includes, without limitation, all landscaping outside of a unit and the exterior of all property exclusively owned by the unit owner.

9. Therefore, the Super Priority Lien consists solely and exclusively of the Assessment Cap Figure and the Exterior Repair Costs. No other costs, fees, fines, penalties, assessments, charges, late charges, or interest or any other costs may be included within the Super Priority Lien.

10. Pursuant to NRS 116.3116, the maximum amount of the Assessment Cap Figure portion of Defendant's Super Priority Lien cannot exceed $1,552.50 which equals 9 times the Defendant's monthly assessments. As Defendant has assessed against Plaintiff $1,552.50 for past due assessments incurred prior to Plaintiff's ownership of the property, the additional late fees of $135.00 and accrued interest on the Assessment Cap Figure are impermissible and cannot be included in the Assessment Cap Figure as the addition of those costs exceed the Assessment Cap Figure of $1,552.50 and violates NRS 116.3116.

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11. The External Repair Costs portion of the Super Priority Lien shall be determined by this Court at a later date when the Court is provided with all necessary evidence to make that determination.

IT IS SO ORDERED.

DISTRICT COURT JUDGE

June 2, 2011
Date

BK

Submitted by:

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Attorneys for Defendants BAC Home Loan Servicing LP FKA Countrywide Home Loan Servicing, LP and ReconTrust Company

DISTRICT COURT

CLARK COUNTY, NEVADA

OLIVER SAGE DRIVE TRUST, Plaintiff, v. BAC HOME LOAN SERVICING LP FKA COUNTRYWIDE HOME LOAN SERVICING, LP; RECONTRUST COMPANY, a Subsidiary of Bank of America; NEVADA LEGAL NEWS; and PHILLIP R. WYNSRYG, AS TRUSTEE OF THE PHILLIP R. WYNSRYG REVOCABLE TRUST; Defendants.	CASE NO. A-13-674872-C DEPT NO. XIII

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Oliver Sage Drive Trust's ("Plaintiff") Ex Parte Motion for Temporary Restraining Order or Alternatively for Order to Show Cause why a preliminary injunction should not be entered filed January 16, 2013 (the "Motion") came on for hearing before the Court on February 21, 2013. Michael F. Bohn, Esq. appeared on behalf of the plaintiff and Edward T. Chang, Esq. and Abran E. Vigil, Esq. appeared on behalf of defendants BAC Home Loan Servicing LP FKA Countrywide Home Loan Servicing LP and ReconTrust Company (collectively, "Bank of America, N.A."). The Court having examined the amended complaint, the Motion, Supplement to the

Motion, Opposition to Motion for Preliminary Injunction, Request for Judicial Notice, and the Court finds as follows:

I. FINDINGS OF FACT

1. A Deed of Trust was recorded on May 8, 2007 in the Official Records of Clark County, Nevada (the "Official Records") as instrument number 20070508-0003997 (the "Deed of Trust") against real property commonly known as 3797 Monument Street, Las Vegas, Nevada, 89121 bearing APN 161-18-310-161 (the "Property"). The Deed of Trust lists Countrywide Home Loans, Inc. as the lender and ReconTrust Company, N.A. as the trustee.

2. A Corporation Assignment of Deed of Trust was recorded on January 3, 2011 in the Official Records as instrument number 20110103000923 (the "Assignment") whereby Countrywide Home Loans, Inc. granted, assigned and transferred to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP all beneficial interest under the Deed of Trust.

3. A Notice of Trustee's Sale was recorded on January 10, 2013 in the Official Records as instrument number 20130110000335 1 whereby ReconTrust Company, N.A. as trustee of the Deed of Trust will sell the Property on January 29, 2013 at 10:00 a.m.

4. A Notice of Delinquent Assessment Lien was recorded on April 20, 2011 in the Official Records as instrument number 20110420000112 8 (the "HOA Lien") whereby the Heritage Square South Owners Association, Inc. ("Heritage Square South HOA") recorded a lien against the Property for unpaid assessments in the amount of $1,158.26 as of April 19, 2011.

5. Heritage Square South HOA caused a Notice of Default and Election to Sell under Notice of Delinquent Assessment Lien to be recorded on May 24, 2011 in the Official Records as instrument number 20110524000087 6.

6. A Notice of Sale was recorded on May 3, 2012 in the Official records as instrument number 20120503000181 8 whereby Angius & Terry Collections, LLC as

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agent of the Heritage Square South HOA would sell the Property at public auction to the highest bidder on May 29, 2012 at 10:00 a.m.

7. Among other things, the Notice of Sale stated:

> The sale will be made without covenant or warranty, expressed or implied regarding, but not limited to, title or possession, encumbrances, obligations to satisfy any secured or unsecured liens or against all right, title and interest of the owner, without equity or right of redemption to satisfy the indebtedness secured by said Lien, with interest thereon, as provided in the Declaration of Covenants, Conditions and Restrictions, recorded on 8/19/2002, in Book Number 20020819, as Instrument Number 00834 Page: County of Clark, State of Nevada and any and all amendments or annexations of record thereto.

8. A Trustee's Deed Upon Sale was dated June 21, 2012 and recorded on July 9, 2012 in the Official Records as instrument number 201207090019952 whereby ATC Assessment Collection Group as agent for Heritage Square South HOA granted and conveyed without warranty expressed or implied the Property to Monument Street Trust.

9. Among other things, the Trustee's Deed Upon Sale stated:

> ATC Assessment Collection Group as agent for Heritage Square South Owners Association, Inc. does hereby grant and convey, but without warranty express or implied to Monument Street Trust (herein called Grantee), that portion of its right, title and interest secured by the non-priority portion of its lien under NRS 116.3116 in and to that certain property legal described as: Legal Unit No.: Lot 47 Tract Heritage Square South Unit No. 2, Block 12 Book 13 Page 16 of Maps.

10. A Grant, Bargain, Sale Deed dated and recorded July 23, 2012 in the Official Records as instrument number 201207230001737 whereby Resources Group, Trustee of the Monument Street Trust granted, bargained, sold and conveyed the Property to Oliver Sagebrush Drive Trust.

11. Article VI, Section 11 of the Declaration of Covenants and Restrictions ("CC&Rs") recorded on January 19, 1971, in Book No. 94, as Instrument No. 74574

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that governs Heritage Square South HOA provides that "[t]he lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage."

12. Article XII, Section 12.1 of the Amended Declaration of Covenants and Restrictions ("Amended CC&Rs") recorded on August 19, 2002, in Book No. 20020819, as Instrument No. 00834, that governs Heritage Square South HOA states "[n]ot withstanding any other provisions of this declaration, no amendment or violation of this declaration shall operate to defeat or render invalid the rights of the beneficiary under any deed of trust upon one (1) or more units made in good faith and for value . . . ."

13. Plaintiff seeks a declaration that the Property vested in Plaintiff free and clear of all liens and encumbrances and that defendants, including Bank of America, N.A., have no estate, right, title or interest in the Property and are forever enjoined from asserting any estate, title, right, interest, or claim to the Property adverse to Plaintiff.

14. Upon inquiry of counsel, the Court finds that there are no additional facts to be discovered to influence the Court's decision in whether an injunction should issue.

II. CONCLUSIONS OF LAW

1. "For a preliminary injunction to issue, the moving party must show that there is a likelihood of success on the merits and that the nonmoving party's conduct, should it continue, would cause irreparable harm for which there is no adequate remedy at law." Dep't of Conservation & Natural Res. v. Foley, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005); see also Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

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2. As the highest bidder at the public auction June 20, 2012, Monument Street Trust purchased the Property without equity or right of redemption. See NRS 116.31166(3) ("The sale of a unit pursuant to NRS 116.31162, 116.311663 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption.").

3. Subsequently, when Monument Street Trust conveyed its interest in the Property to Plaintiff pursuant to the Grant, Bargain, Sale Deed recorded on July 23, 2012, Plaintiff also took the Property without equity or right of redemption. See NRS 116.31166(3).

4. Furthermore, the CC&Rs and the Amended CC&Rs explicitly subordinated the HOA Lien to Bank of America, N.A.'s Deed of Trust. See CC&Rs at Art. VI, Sec. 11 and Amended CC&Rs at Art. XII, Sec. 12.1

5. Finally, pursuant to the Trustee's Deed Upon Sale recorded on July 9, 2012, Heritage Square South HOA "grant[ed] and convey[ed] . . . to Monument Street Trust . . . that portion of its right, title and interest secured by the non-priority portion of its lien under NRS 116.3116 in and to [the Property]."

6. Since Plaintiff's interest in the Property is subject to the Deed of Trust, Plaintiff failed to demonstrate that a likelihood of success on the merits.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's request for injunctive relief as set forth in its Ex Parte Motion for Temporary Restraining Order or Alternatively for Order to Show Cause filed January 16, 2013 is DENIED.

IT IS HEREBY FURTHER ORDERED that the Temporary Restraining Ordered filed on February 8, 2013 is hereby extended for thirty (30) days after the notice of entry of this order is filed to allow Plaintiff to file an immediate appeal.

Dated March 26, 2013.

DISTRICT COURT JUDGE

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Respectfully submitted by:

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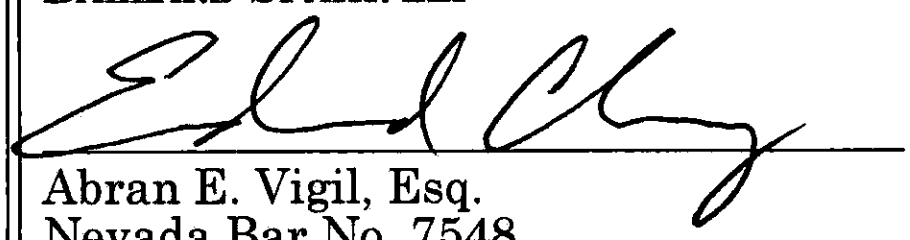

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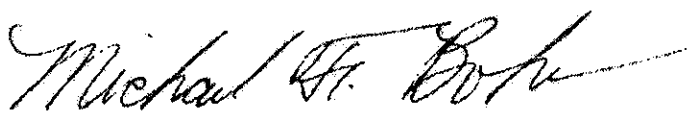

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Attorney for Plaintiff

REGISTER OF ACTIONS

CASE NO. A-13-674872-C

Saticoy Bay, Plaintiff(s) vs. BAC Home Loan Servicing LP , Defendant(s)	§	Case Type:	**Title to Property**
	§	Subtype:	**Quiet Title**
	§	Date Filed:	**01/14/2013**
	§	Location:	**Department 13**
	§	Cross-Reference Case Number:	**A674872**
	§	Supreme Court No.:	**64014**

PARTY INFORMATION

		Lead Attorneys
Counter Claimant	**BAC Home Loan Servicing LP *Formerly Known As* Countrywide Home Loan Servicing LP**	**Ariel E. Stern** *Retained* 702-634-5000(W)
Counter Defendant	**Saticoy Bay LLC Series 3797 Monument St**	**Michael F Bohn** *Retained* 702-642-3113(W)
Defendant	**BAC Home Loan Servicing LP *Formerly Known As* Countrywide Home Loan Servicing LP**	**Ariel E. Stern** *Retained* 702-634-5000(W)
Plaintiff	**Oliver Sage Drive Trust**	**Michael F Bohn** *Retained* 702-642-3113(W)
Plaintiff	**Saticoy Bay LLC Series 3797 Monument St**	**Michael F Bohn** *Retained* 702-642-3113(W)

EVENTS & ORDERS OF THE COURT

02/21/2013 **Preliminary Injunction Hearing** (9:00 AM) (Judicial Officer Denton, Mark R.)

Minutes

02/21/2013 9:00 AM

- Argument by Counsel on PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION. Mr. Bohn argued Plaintiff purchased a property at a homeowner association's foreclosure sale for $1200 and was requesting the preliminary injunction to prevent Bank of America, as lender on the Deed of Trust, to foreclose. Argument as to statutory interpretation of the super-priority lien over the first secured deed of trust; remedies available to lenders to preserve their rights, and whether the new purchaser extinguishes the Banks lien automatically. Upon Court's inquiry into the status of the parties following foreclosure sales by both the HOA and the Bank, Mr. Vigil advised a buyer of the HOA foreclosure purchases a possessory right subject to the first lien and that does not give the buyer a lien right. Upon Court's further inquiry, Mr. Bohn stated there are no genuine facts as to status of the parties left in the case. Following discussion, COURT STATED ITS

FINDINGS that it agreed with defendant's position but wanted to rule in such a way that allowed plaintiff to file an immediate appeal. COURT ORDERED preliminary injunction DENIED; TRO extended for THIRTY (30) DAYS AFTER notice of entry of this Court's Order and previous bond STANDS. Mr. Vigil to prepare proposed Order with appropriate findings of facts; Mr. Bohn to approve as to form and content.

Parties Present
Return to Register of Actions

REGISTER OF ACTIONS

CASE NO. A-10-621628-C

Design 3.2 LLC, Plaintiff(s) vs. Bank of New York Mellon, Defendant(s)	§	Case Type:	**Title to Property**
	§	Subtype:	**Quiet Title**
	§	Date Filed:	**07/26/2010**
	§	Location:	**Department 2**
	§	Cross-Reference Case Number:	**A621628**
	§	Supreme Court No.:	**63605**

PARTY INFORMATION

Defendant	**Bank of New York Mellon**	**Lead Attorneys** **Kevin Hahn** *Retained* 9492529400(W)
Plaintiff	**Design 3.2 LLC**	**James S. Kent** *Retained* 702-385-1100(W)

EVENTS & ORDERS OF THE COURT

06/15/2011 **Motion for Summary Judgment** (8:30 AM) (Judicial Officer Silver, Abbi)
Bank of New York Mellon's Motion for Summary Judgment

Minutes
06/15/2011 8:30 AM
- Mr. Hahn present through Court Call. Matter argued and submitted. COURT ORDERED, ruling is deferred and the Court will issue a decision through minute order today. Following the hearing, COURT FURTHER ORDERED, pursuant to NRCP 56, NRS 116.3116, Brophy Min. Co. v. Brophy & Dale Gold & Silver Min. Co., 15 Nev. 101 (1880), Leasepartners Corp. v. Robert L. Brooks Trust, 113 Nev. 747 (1997), and Industrial Dev. v. Benedetti, 103 Nev. 360 (1987), Bank of New York Mellon's Motion for Summary Judgment is GRANTED. Defendant Bank of New York Mellon ("BNYM") seeks summary judgment on the two claims in Plaintiff's Complaint: quiet title and unjust enrichment. Defendant has put forth evidence that it has a priority lien on the property sufficient to warrant summary judgment. Furthermore, Defendant submits it has gained nothing unjustly such that a claim for unjust enrichment in favor of Plaintiff is appropriate. NRS 116.3116 governs liens against units for assessments. It states that an assessment lien by a homeowner's or unit-owner's association "is prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recordation of the declaration and . . . (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . . ." NRS 116.3116(2)(a)-(b). Here, Defendant's first security interest Deed was recorded on August 16, 2006. The assessment lien was recorded on June 6, 2008 two years later. Therefore, the security lien is first in time prior to the assessment lien of the Homeowner's association. Plaintiff was on notice of the recorded 2006 secured lien on the property at the 2009 foreclosure sale in which it purchased the property. The security interest and priority lien was not extinguished by the foreclosure sale of the HOA and the plaintiffs took title of the property subject to the lien pursuant to NRS 116.3116. Accordingly, there are no genuine issues of material fact as a matter of law, and Defendant is entitled to judgment as a matter of law. Further, a bona fide purchaser for value must show that "the purchase was made in good faith, for a valuable consideration; that the purchase price was wholly paid, and that the conveyance of the legal title was received before

notice of the equities of [other parties]." Brophy, 15 Nev. at 106. Here, because BNYM's interest in the property was duly recorded prior to Design 3.2's purchase, Design 3.2 purchased with actual or constructive notice of BNYM's interest. Furthermore, Design 3.2 did not pay valuable consideration to qualify as a bona fide purchaser for value. In 2006, McKnight purchased the property and executed a promissory note secured by a deed of trust encumbering the property in the amount of $576,000. In 2009, Plaintiff purchased real property, a residence in Las Vegas, at a foreclosure sale by the HOA for only $3,743.84. Accordingly, plaintiff cannot be deemed a bona fide purchaser for value in this case because Plaintiff took title in the property with knowledge of the Defendant's priority lien which remains in place. Finally, BNYM is entitled to summary judgment on its unjust enrichment claim. The doctrine of unjust enrichment or recovery in quasi contract "applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but deliver to another . . . ." Leasepartners, 113 Nev. at 756 (internal citations omitted). Furthermore, "unjust enrichment is the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." Industrial, 103 Nev. at 363 n. 2. Here, there is no evidence BNYM received a benefit which in equity and good conscience belongs to Design 3.2. As a result of this Court granting Summary Judgment in favor of Defendant in this case, it follows that Plaintiff's claim for unjust enrichment must fail. COURT FURTHER ORDERED, pursuant to NRCP 37, Plaintiff's Motion for Sanctions and Defendant's Countermotion for Sanctions are advanced and DENIED. NRCP 37 states that for failure to comply with discovery, the Court may compel disclosure or sanction a party. The request must be accompanied by a certification that the movant in good faith conferred or attempted to confer with the other party to secure the discovery prior to court action. NRCP 37(a) (2) (A). Under NRCP 37(a) (4) (A), a prevailing movant is entitled to fees and costs unless Plaintiff did not first make a good faith effort to obtain the discovery without court action. Under NRCP 37(a)(4) (B), if the motion is denied, the Court shall, after affording an opportunity to be heard, require the movant to pay the defending party the reasonable expenses incurred in opposing the motion, unless the Court finds the motion was substantially justified or that other circumstances make an award of expenses unjust. Here, Plaintiff has failed to comply with the requirement of NRCP 37(a) (2) (A) by providing a certification that it conferred or attempted to confer with the Defendant in an effort to secure the disclosure without court action. Furthermore, none of the claims rises to the level of sanctionable behavior. Accordingly, the motion is advanced and denied. The Defendant has requested sanctions pursuant to NRCP 37(a) (4) (B). Although the Court finds that Plaintiff failed to comply with the certification requirement of NRCP 37 (a)(2)(A) and that the Defendant's actions do not rise to the level of sanctionable behavior, the Court finds that because of the vagueness of some of the Defendant's submitted discovery, the Plaintiff's motion was substantially justified. Accordingly, Defendant's Countermotion is advanced and denied. Accordingly, COURT FURTHER ORDERED, the June 29, 2011 hearing on Plaintiff's Motion for Sanctions and Defendant's Countermotion for Sanctions before the Discovery Commissioner is advanced and VACATED. The December 7, 2011 Pre-Trial Conference, December 21, 2011 Calendar Call, and January 3, 2012 Bench Trial are VACATED. Attorney Hahn is directed to prepare and submit the written order.

Parties Present
Return to Register of Actions

OGM/JUDG
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DISTRICT COURT

CLARK COUNTY, NEVADA

JP MORGAN CHASE BANK, N.A. a National Association, Plaintiff, vs. COUNTRYWIDE HOME LOANS, INC., a New York corporation; COUNTRYWIDE WAREHOUSE LENDING, INC., a California corporation; CITIMORTGAGE, INC., a New York corporation; NV MORTGAGE, INC., a Nevada corporation d/b/a SOMA FINANCIAL; SOMA FINANCIAL, INC., a Nevada corporation; NEVADA ASSOCIATION SERVICES, INC., a Nevada corporation; JOHNATHAN D. AMOS, an individual; MELISSA SMILEY a/k/a MELISSA AMOS, an individual, DOES 1 through 10, ROE CORPORATIONS 1 through 10, inclusive, Defendants.	CASE NO.: 08-A562678 DEPT.: XVI **ORDER AND JUDGMENT** **Date:** April 7, 2011 **Time:** 9:00 a.m.
ALL RELATED CLAIMS.	

Defendant Nevada Association Service, Inc.'s Motion for Determination of Priority Amount Including Attorney's Fees and Costs ("Motion") came on for rehearing on April 7, 2011. Debra L. Pieruschka, Esq. of Martin & Allison Ltd. appeared on behalf of Nevada Association Services, Inc. ("NAS"), Jason D. Smith, Esq. of Santoro, Driggs, Walch, Kearney, Holley & Thompson appeared on behalf of JP Morgan Chase Bank ("Chase"), and no other party or counsel having appeared at the

05-10-11 14:59 RCVD

rehearing of this matter. The Court having reviewed the moving papers, opposition papers and reply papers submitted by counsel and hearing oral argument, good cause appearing, the Court issued a decision on April 8, 2011, and enters the following findings of fact and conclusions of law:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. On August 27, 2010, this Court issued an order denying Chase's Motion for Summary Judgment and granting NAS's Countermotion for Summary Judgment in part, determining that NAS has a "super priority" position for no more than nine (9) months of assessments senior to Chase's equitable lien finding that:

a. The Property at issue in this matter is part of a common-interest ownership community. As such, NRS 116 governs the priority of NAS's lien over Chase's equitable lien.

b. NRS 116.3116(1) establishes NAS's statutory right to a lien for any assessments from the time they become due.

c. Pursuant to NRS 116.3116, recording of the Declaration by the Association constitutes record notice and perfection of the lien – no further recordation of any claim of lien is required.

d. NRS 116.3116(2) establishes the priority of NAS's liens against the Property. Specifically, NRS 116.3116(2) provides that NAS's lien is prior to all other liens and encumbrances except:

(1) a lien or encumbrance recorded prior to the recording of the Declaration of the association;

(2) a first security interest recorded before the date on which the assessment sought to be enforced became delinquent; and

(3) liens for real estate taxes and other governmental assessments.

e. NRS 116.3116(2) further provides NAS with a limited priority even over a first security interest recorded against the property for nine (9) months of assessments that would have become due immediately preceding institution of an action to enforce the lien.

f. Chase's equitable lien attached to the property on August 9, 2007 when its Deed of Trust was recorded against the property.

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2. The Court further directed NAS to submit further briefing to the Court to determine the extent and amount of NAS' "super priority" lien that it has against the subject property, including the issue of attorney's fees and costs.

3. After briefing by both parties, on September 16, 2010 this Court held oral arguments regarding the amount of NAS' "super priority" lien amount and granted NAS' Motion in part and denied it in part.

4. The Court found that pursuant to NRS 116.3116(2) an association has a "super priority" position over a first security interest recorded against the property for nine (9) months of assessments immediately preceding institution of an action to enforce the lien.

5. The Court further found that pursuant to NRS 116.310313 an association can recover as part of its collection costs reasonable attorney's fees and costs associated with enforcement of its assessment lien. The Court noted, however, that an analysis must be performed by the Court to determine the reasonableness of the attorney's fees using the factors articulated in Brunzell v. Gold Gate National Bank, 85 Nev. 345, 349 (1969).

6. The Court further found that pursuant to NRS 116.3116(2) an association can recover as part of its "super priority" lien amount collection costs associated with enforcement of its assessment lien.

7. As such, the Court granted NAS' Motion, in part, and awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $5,909.91 out of the $23,480.16 requested in delinquent assessments. The Court further awarded, as part of its "super priority" lien amount pursuant to NRS 116.3116(2), NAS $6,000.00 out of the $49,035.28 for reasonable attorney's fees and costs as part of its collection costs.

8. The Court, however, denied NAS the following requested portions of its "super priority" lien amount because it failed to provide adequate documentation to support the claim:

(a) $135.00 out of the total amount of $525.00 in late fees relating to the nine (9) months of delinquent assessments as permitted by NRS 116.3116;

(b) $1,352.00 for collection costs related to the nine (9) months of delinquent assessments as permitted by NRS 116.310313 and NRS 116.3116; and

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(c) $43,035.28 in legal fees as part of its collection costs related to the collection of the "super priority" amount as permitted by NRS 116.310313 and NRS 116.3116.

9. On October 28, 2010, NAS filed a Motion for Partial Reconsideration of the Court's October 4, 2010 Order denying NAS its full collection costs including attorney's fees and costs pursuant to NRS 116.3116.

10. After supplemental briefing by the parties, on February 17, 2011, the Court granted NAS' Motion for Partial Reconsideration.

11. On April 7, 2011, after further supplemental briefing by the parties, the Court entertained oral arguments by Counsel.

12. The Court concluded that NAS can recover as part of its "super priority" its costs associated with enforcement of the Association's assessment lien including late fees and collection costs pursuant to NRS 116.3116(1) and (2).

13. The Court found that NAS properly supported its claim for $135.00 in late fees relating to the nine (9) months of delinquent assessments, pursuant to NRS 116.3116(1).

14. The Court further found that NAS properly supported its claim for $1,352.00 in collection costs relating to the nine (9) months of delinquent assessments but disallowed $743.00 of the requested $1,352.00 because $743.00 related to costs incurred by NAS after the lawsuit was filed to enforce any past due obligation and are, thus, precluded by statute.

153. The Court further found that NAS properly supported its claim for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien, pursuant to NRS 116.3116(7).

16. NAS's documented attorney's fees in the amount of $47,400.00 meet the Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349 (1969) factors. That based on the qualities of the advocate, the character of the work to be done, the work actually performed by the lawyer, and the result obtained, the amount of attorney's fees and costs to be included as part of NAS' collection costs relating to its "super priority" lien amount are reasonable and necessary.

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ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that NAS' Motion for Determination of NAS' Priority Amount Including Attorney's Fees and Cost is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that NAS's "super priority" lien amount totals **$55,689.19** comprised as follows:

(1) An award of $5,909.91 for nine (9) months of delinquent assessments, pursuant to NRS 116.3116;

(2) An award of $135.00 in late fees relating to the nine (9) of delinquent assessments, pursuant to NRS 116.3116;

(3) An award of $609.00 in collection costs, pursuant to NRS 116.310313 and NRS 116.3116;

(4) An award of for $49,035.28 in attorney's fees and costs through August 27, 2010 comprised of $1,635.28 in costs and $47,400.00 in attorney's fees in defending and protecting its statutory right to an assessment lien as collection costs, pursuant to NRS 116.3116(7), NRS 116.310313, and NRS 116.3116.

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Las Vegas, Nevada 89120-3147

IT IS FURTHER ORDERED ADJUDGED AND DECREED that NAS shall recover **$55,689.19** plus statutory interest from Plaintiff JP Morgan Chase Bank, N.A., a National Association the judgment amount as follows:

1. $6,653.91 for delinquent assessments and partial collection costs; and

2. $49,035.28 for reasonable attorney's fees and costs comprised of $1,635.28 in costs and $47,400.00 in attorney's fees as part of NAS' collection costs.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the judgment will accrue interest in the manner permitted by Nevada law until the judgment has been satisfied.

IT IS SO ORDERED.

Dated this 11th day of May, 2011.

DISTRICT COURT JUDGE

Submitted by:

MARTIN & ALLISON LTD.

By
Debra L. Pieruschka (Bar No. 10185)
3191 East Warm Springs Road
Las Vegas, Nevada 89120-3147
Attorneys for Nevada Association Services, Inc.

Approved/Disapproved as to form and content:

SANTORO, DRIGGS, WALCH, KEARNEY, HOLLEY & THOMPSON

By
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Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT FOR

CLARK COUNTY, NEVADA

VILLA PALMS COURT 102 TRUST Plaintiff, v. WILLIAM L. RILEY, an individual; DEUTSCHE BANK NATIONAL TRUST COMPANY; an expired Nevada Corporation, in its capacity as indenture trustee for the Noteholders of AAMES MORTGAGE INVESTMENT TRUST 2005-3, a Delaware Statutory Trust; and any and all other persons unknown claiming any right, title, estate, lien or interest in the Property adverse to the Plaintiff's ownership, or any cloud upon Plaintiff's title thereto (DOES 1 through 10, inclusive); Defendants.	Case No. A-13-674595-C Dept. No. XVI **ORDER DENYING PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION**

Plaintiff Villa Palms Court 102 Trust's ("Plaintiff") Application for Preliminary Injunction ("Application") having come on for hearing on the 17th day of January, 2013 before the above-referenced Court, the Court having considered Plaintiff's Application, Deutsche Bank National Trust Company's ("Deutsche") opposition to the Application, and all statements made by counsel at the hearing, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Application is DENIED. Specifically, the Court finds that Plaintiff failed to demonstrate a reasonable likelihood of success on the merits

because the Court holds that the homeowner's association's foreclosure of its super-priority lien under NRS Chapter 116 did not impact or extinguish Deutsche's first security interest on the subject property.

DATED this 22nd day of January, 2013.

DISTRICT COURT JUDGE

E.P.

Respectfully submitted by:

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Zachary P. Takos, Esq., Nevada Bar No. 11293
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Telephone: (702) 685-0329
Facsimile: (866) 339-5691

Attorney for Defendant, Quality Loan Service Corporation

DISTRICT COURT

CLARK COUNTY, NEVADA

9320 POKEWOOD CT TRUST, Plaintiff vs. WELLS FARGO BANK, N.A.; QUALITY LOAN SERVICE CORPORATION; JOSEPH A. ZWIJAC; and JESSICA ZWIJAC, Defendants	CASE NO. A-13-677406-C DEPT. NO: XVII **ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff, 9320 POKEWOOD CT TRUST's Motion for Preliminary Injunction came on for hearing before the Court at 9:00 a.m. on April 3, 2013. Michael F. Bohn, Esq., appeared on behalf of Plaintiff and Christopher M. Hunter, Esq., appeared on behalf of QUALITY LOAN SERVICE The Court, having considered the moving papers, its own files, and good cause appearing, finds that the super priority lien reference in NRS 116.3116 is merely a priority of payment lien and does not permit the foreclosure of a first deed of trust. As a result, Plaintiff is unlikely to succeed on the merits in this action.

ACCORDINGLY, THE COURT ORDERS that Plaintiff's Motion for Preliminary Injunction is denied.

THE COURT FURTHER ORDERS that a stay of any action by Defendant to continue its foreclosure is stayed for a period of 30 days from notice of entry of this Order.

DATED this 5 day of April, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:
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CLERK OF THE COURT

ORDM

DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC,

Plaintiff,

vs.

U.S. BANK, N.A., LUCIA PARKS,

Defendants.

CASE NO. A-13-678814-C
DEPT NO. XVIII

ORDER FOR DISMISSAL AND CANCELLATION OF NOTICE OF PENDENCY OF ACTION

Defendant U.S. Bank N.A.'s Motion to Dismiss with Prejudice Plaintiff's Complaint, and Motion to Expunge Lis Pendens, and Defendant Lucia Parks' Joinders thereto came on for a hearing before the above-entitled Court on June 4, 2013, with Judge David Barker presiding. The Court, having considered all of the pleadings on file herein, and having considered the arguments of counsel, hereby finds as follows:

1. This matter concerns property commonly known as 2270 Nashville Avenue, Henderson, Nevada, 89052, Parcel No. 178-19-712-012 (the "Property").

2. On or about January 5, 2006, Defendant Lucia Parks obtained title to the Property through a Grant Bargain Sale Deed from Albert Brandelli and Mary Brandelli which was recorded in the Clark County Recorder's Office. Parks executed a Deed of Trust and Note whereby Wells Fargo Bank, N.A. was stated as the Lender and United Title of Nevada as the Trustee under the Deed of Trust.

3. On or about February 24, 2010, a Notice of Default and Election to Sell under Deed of Trust was recorded in the Clark County Recorder's Office.

4. On or about May 24, 2012, a Notice of Delinquent Assessment Lien was recorded in the Clark County Recorder's Office.

DAVID BARKER
DISTRICT JUDGE
DEPARTMENT 18

5. On or about June 7, 2012, Wells Fargo Bank, N.A. recorded an Assignment of Deed of Trust against the Property to U.S. Bank National Association ("U.S. Bank, N.A."), as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through, Certificates Series 2006-AR4 in the Clark County Recorder's Office.

6. On or about February 7, 2013, Nevada Association Services, Inc., agent for Copper Ridge Community Homeowners Association ("HOA") recorded a Notice of Trustee's Sale in the Clark County Recorder's Office.

7. On or about March 6, 2013, Plaintiff acquired the Property in a foreclosure sale and the Foreclosure Deed was recorded in the Clark County Recorder's Office.

8. NRS 116.3116 governs homeowners' association liens. It states in part that an assessment lien by a homeowners' association "is prior to all other liens and encumbrances on a unit except...(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent..." NRS 116.3116(2)(b).

9. Here the first security interest Deed of Trust was first in time and prior to the assessment lien of the homeowner's association.

10. While NRS 116.3116 provides that the assessment lien is prior to the first security interest Deed "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," this provision refers to a judicial foreclosure "action" and is not applicable when the HOA foreclosed its lien under NRS 116.31162-NRS 116.31168, the nonjudicial foreclosure statutes.

11. The HOA may have a priority for payment of its lien, but the first security interest Deed was not extinguished by the foreclosure sale conducted by the HOA.

DAVID BARKER
DISTRICT JUDGE
DEPARTMENT 18

12. Plaintiff cannot quiet title or obtain declaratory relief seeking to extinguish the first security interest Deed.

13. Plaintiff has not presented a viable basis upon which the Court could grant a preliminary or permanent injunction.

14. Plaintiff has not presented a viable claim for Unjust Enrichment.

IT IS THEREFORE ORDERED that Defendant U.S. Bank, N.A.'s Motion to Dismiss With Prejudice Plaintiff's Complaint is GRANTED. And, it is further

ORDERED, that Defendant Lucia Parks' Joinder in Defendant U.S. Bank, N.A.'s Motion to Dismiss With Prejudice Plaintiff's Complaint is GRANTED. And it is further

ORDERED, that Defendant U.S. Bank, N.A.'s Motion to Expunge Lis Pendens, joined by Defendant Lucia Parks, is GRANTED. And, it is further

ORDERED, that the notice of pendency of action is hereby cancelled, and this cancellation has the same effect as an expungement of the original notice. And it is further

ORDERED, that Plaintiff shall record with the Clark County Recorder a copy of this order of cancellation of the notice of pendency of action. And, it is further

ORDERED, that this case is dismissed in its entirety.

DATED this 11th day of June, 2013

DISTRICT JUDGE

I hereby certify that on the date filed, I mailed or placed a copy of this Order in the Attorney's folder in the Clerk's Office to:

Chelsea Crowton, Esq. (Wright, Finlay & Zak)
Diana Cline, Esq. (Howard Kim & Associates)
D. Chris Albright, Esq. (Albright, Stoddard, Warnick & Albright)

DIANE SANZO , Judicial Assistant

DAVID BARKER
DISTRICT JUDGE
DEPARTMENT 16

REGISTER OF ACTIONS
CASE NO. A-13-678814-C

SFR Investments Pool 1, LLC, Plaintiff(s) vs. US Bank, Defendant(s)

Case Type: Title to Property
Subtype: Quiet Title
Date Filed: 03/22/2013
Location: Department 18
Conversion Case Number: A678814

PARTY INFORMATION

Defendant	Parks, Lucia	Lead Attorneys D. Chris Albright *Retained* 702-384-7111(W)
Defendant	US Bank	Chelsea A. Crowton, ESQ *Retained* 702-475-7964(W)
Plaintiff	SFR Investments Pool 1, LLC	Kim C. Howard *Retained* 702-485-3300(W)

EVENTS & ORDERS OF THE COURT

05/16/2013 All Pending Motions (8:15 AM) (Judicial Officer Barker, David)

Minutes
05/16/2013 8:15 AM
- PLTF'S MOTION FOR PRELIMINARY INJUNCTION...DEFT. LUCIA PARKS' NOTICE OF JOINDER IN PLTF'S MOTION FOR PRELIMINARY INJUNCTION: Ms. Cline stated Plff. purchased property from a foreclosure HOA sale which is now facing foreclosure by the first deed of trust which according to NRS 116.3116 was extinguished at the time of the HOA foreclosure sale. NRS 116.3116 creates a lien that the HOA has on a property that is perfected, noticed at time the declaration of CCR's recorded on the property and in this case that was before the deed of trust was recorded on the property. Colloquy. Further, Ms. Cline argued it is a significant departure but it is something that has been around since 1980 because HOA are similar to taxing agencies. Additionally, this is a limited amount first security has to pay and there are several exceptions. One of the exceptions are for tax liens and the other exception is for anything that was recorded before the CCR's were formed. Ms. Cline further stated bank has to pay nine months of assessments and also any charges for abatement. As to abatement provisions adopted in 2009, they way they were incorporated into NRS 116.3116, it is clear when HOA has super priority, can foreclose non judicially and anything that is junior including first security interest can be extinguished by the foreclosure. Ms. Crowton argued Plff. fails to address 2(b) at all and no rebuttal from the Plff. that 2(b) has been met by US Bank. There is a December 2005, deed of trust recorded in the Clark County Recorders Office over six years after that the recording of notice of delinquent assessment lien by the HOA. Additional argument by Ms. Cline. COURT ORDERED, matter UNDER ADVISEMENT and the Court will enter order this afternoon. DEFT. US BANK'S MOTION TO EXPUNGE LIS PENDENS...DEFT. LUCIA PARKS' NOTICE OF JOINDER IN DEFT. US BANK N.A.'S MOTION TO EXPUNGE LIS PENDENS: Ms. Crowton advised there is a pending motion to dismiss and requested these matters be continued to that date. COURT ORDERED, motion and joinder CONTINUED. CONTINUED TO: 6/4/13 8:15 AM

Parties Present
Return to Register of Actions

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CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE HARBOR PLACE TRUST, Plaintiff, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, et al., Defendants.	CASE NO.: A-13-687846 DEPARTMENT NO. XX **AMENDED ORDER ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

This matter having come on for hearing on the 18th day of December, 2013; Michael F. Bohn, Esq. appearing for and on behalf of the Plaintiff; Michael R. Brooks, Esq. and Christopher S. Connell, Esq., appearing for and on behalf of the Defendant Barrett Daffin Frappoer Treder Weiss, LLP; Dana J. Nitz, Esq., appearing for and on behalf of Defendant, Deutsche Bank; and the Court having heard arguments of counsel, and being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion by Defendant Deutsche Bank National Trust Company to Dismiss the Complaint or, in the alternative, for Summary Judgment.

(2) This dispute relates to residential property located at 5005 Paradise Harbor Place, North Las Vegas, Nevada ("the Property"), formerly owned by Mimi Ralph. (Complaint, paragraphs 1-3, 6). According to the Complaint, the Property is

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

located within a common-interest community governed by a homeowners' association known as the Tierra de las Palmas Owners Association ("HOA"). (Complaint, para. 3). The Plaintiff avers that it obtained title to the Property from Ms. Ralph by way of foreclosure deed recorded June 21, 2012 after the HOA initiated a foreclosure pursuant to the provisions of NRS Chapter 116 after Ms. Ralph failed to pay monthly assessments required by the HOA. (Complaint, paras. 2-4). The Defendant is the beneficiary of a Deed of Trust recorded against the Property on November 7, 2003. (Complaint, para. 4). The Complaint asserts that the foreclosure initiated by the HOA pursuant to NRS Chapter 116 extinguished any interest in the property held by the Defendant by operation of law, and seeks declaratory relief from this Court to that effect.

(3) By this Motion, the Defendant seeks a determination by this Court that the foreclosure initiated by the HOA pursuant to NRS Chapter 116 did not extinguish its prior interest in the Property.

(4) The parties appear to agree that the facts relevant to this action are not in dispute. Therefore, the Court is confronted with a pure question of law, and specifically a question of statutory interpretation.

(5) The question whether a foreclosure initiated by a homeowners' association pursuant to the provisions of NRS Chapter 116 extinguishes any and all prior encumbrances upon a property is one that has been litigated before numerous Departments of this Court as well as before different judges in the U.S. District Court for the District of Nevada. The Court is aware that the decisions of various judges regarding the answer to this question have been inconsistent.

(6) In *SFR Investments Pool 1 LLC v. U.S. Bank National Association*, Case No. A-13-678858, this Court solicited briefing *in amicus curaie* from the Real Property Section of the State Bar of Nevada, as well as from the Nevada Bankers' Association, regarding the question before the Court. (*See*, Amicus Curiae Brief of the Real Property Section of the State Bar of Nevada filed August 1, 2013; Amicus Curiae Brief

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of the Nevada Bankers' Association filed August 1, 2013). The Court was particularly interested in the views of the Real Property Section because its Chairperson was one of the drafters of the model legislation that ultimately became NRS Chapter 116 as well as one of the principal witnesses before the Legislature when the bill was considered and subsequently amended. The briefing submitted by the Real Property Section argues that the unambiguous intent of the model legislation that was presented to the Nevada Legislature and became NRS Chapter 116 was that a foreclosure initiated by a homeowners' association based upon unpaid assessments extinguishes any and all prior encumbrances upon the property. The Court also notes the existence of a December 12, 2012 administrative opinion of the Nevada Department of Business and Industry which reaches the same conclusion.

(7) In this Court's "Order Denying Defendant's Motion to Dismiss" dated May 30, 2013, in *First 100 LLC v. Burns*, Case No. A677693, this Court concluded that, as a matter of law, the provisions of NRS Chapter 116 must be interpreted such that a foreclosure upon real property initiated by a homeowners' association based upon unpaid assessments extinguishes all other prior encumbrances on the property except to the extent that other lienholders also participate in the foreclosure proceedings. The Plaintiff urges this Court to adhere to the same reasoning in the case at bar.

(8) Because of the manner in which the question was originally presented to the Court by the parties, this Court's Order in *First 100 LLC v. Burns* did not address certain questions that may relate to the validity of a foreclosure conducted pursuant to NRS Chapter 116. For example, the Order did not address the question whether a junior lienholder's interest in the foreclosed property may be constitutionally extinguished if the junior lienholder did not receive actual notice of the initiation of foreclosure proceedings against the property. NRS 116.11635(1)(b)(2) requires notice to be given to certain parties, but notably does not, by its plain terms, require that notice be given to all junior or subordinate stakeholders whose interests in the property may be extinguished by a foreclosure. It is axiomatic that under the U.S. and Nevada

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Constitutions, an interest in real property may not be extinguished by operation of law or any governmental action unless and until the owner has been afforded "due process of law" which includes, at a minimum, notice and a reasonable opportunity to object to the extinguishment. *See generally, Brown v. Brown*, 96 Nev. 713, 715-716 (1980) (due process requires notice and the opportunity to be heard). Yet, as literally written, NRS 116.11635(1)(b)(2) permits a junior property interest to be extinguished by a foreclosure initiated by a homeowners' association even if neither the property owner nor the association bother to give any notice whatsoever to any other lienholder regarding the pendency of the foreclosure proceedings and the potential destruction of their property interests.

(9) Thus, as literally drafted, NRS Chapter 116 permits an outcome that, at least in some cases, may contravene the Due Process Clause of both the U.S. and Nevada Constitutions. This potential outcome was not noted nor argued by the parties in *First 100 LLC v. Burns*, and therefore was not addressed by this Court in its May 30 Order. It is also not addressed in the *amicus curiae* brief of the Real Property Section, nor by the December 12, 2012 administrative opinion of the Nevada Department of Business and Industry interpreting the meaning of NRS Chapter 116. Indeed, in this Court's "Order Denying Defendant's Motion to Dismiss Complaint" filed August 9, 2013, in *SFR Investments Pool 1 LLC v. U.S. Bank National Association*, the Court expressly noted that while the question of due process had been presented in the *amicus* brief of the Nevada Bankers' Association, it had not been raised by the parties and therefore was not properly before the Court. The Court therefore declined to address the argument. However, the question of due process or lack thereof is a very serious flaw inherent in the plain language of the statute that has been noted by other parties in other cases pending before other Departments of this Court, and one that has troubled this Court for some time, because if a statute, as literally interpreted and applied by this Court, potentially (and in some cases actually) results in an unconstitutional deprivation of a party's property interest without even minimal notice or an opportunity to be heard,

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then one of two conclusions must logically follow: either the statue is unconstitutional and therefore void, or the statute has not been understood correctly by the parties and/or the Court.

(10) The parties in this case have now squarely presented to this Court the question of due process which was not before the Court in either *SFR Investments Pool 1 LLC v. U.S. Bank National Association* or *First 100 LLC v. Burns*.

(11) As an initial observation, in this case the Defendant does not assert as a factual matter that it did not actually know of the foreclosure proceedings at issue when they were initiated. Therefore, some question exists whether the Defendant has legal "standing" to challenge or argue the constitutionality of the statute, because if the Defendant was given actual notice, then although the Defendant may have been generally harmed by the loss of its property interest, it has not been harmed in any way that resulted particularly from a lack of Due Process in the underlying foreclosure proceeding. *See, Thayer v. City of Worcester*, 2013 WL 5780445 at *3 (D.Mass. October 24, 2013) (discussing standards of "constitutional standing"). Perhaps for this reason, in its briefing the Defendant does not actually assert that NRS Chapter 116 is unconstitutional, but this is a question that must be confronted. Whether or not this particular Defendant was afforded notice in this particular case, if the interpretation of NRS Chapter 116 proffered by the Real Property Section and by the Nevada Department of Business and Industry is literally correct, then the statute is unconstitutional because it facially permits some property rights to be extinguished in at least some cases without any notice or any opportunity to be heard.

(12) For these reasons, the Court is compelled to conclude that the broad interpretation of NRS Chapter 116 proffered by the Real Property Section and by the Nevada Department of Business and Industry (and by this Court in its May 30 Order in *First 100 LLC v. Burns*) cannot be literally correct in all cases of any kind in which a homeowners' association forecloses upon a property, because such an interpretation could potentially result in an unconstitutional outcome in at least some cases in which

subordinate interests were never given notice of, or an opportunity to object to, the foreclosure proceedings and the deprivation of their property interests as a consequence thereof.

(13) If that interpretation is not correct, the question before the Court then becomes whether there exists an interpretation that is consistent with the express language of the statute, the intent of the Legislature in enacting the statute, and the Due Process clause of the U.S. and Nevada Constitution. If an interpretation exists that is consistent with all three, then that must be the correct interpretation. If there is no such interpretation, and if the only interpretation available to the Court is incompatible with the Constitution, then the statute (or at least the foreclosure and extinguishment portions of it) is unconstitutional and therefore void.

(14) The Defendant asserts that the proper interpretation of NRS Chapter 116 must be that foreclosures initiated by homeowners' associations only operate to extinguish other liens if the foreclosure was conducted judicially. If the foreclosure was non-judicial, then the Defendant asserts that the non-judicial foreclosure operates only as a scheme of "payment priority" affecting only the distribution of proceeds from the sale, and not the validity of any other liens or interests. The Defendant avers that this interpretation is necessitated by the reference within NRS 116.3116(2) to the phrase "action." (NRS 116.3116(2): "during the nine months immediately preceding institution of an action to enforce the lien"). The Defendant asserts that "action" must necessarily be interpreted as a judicial proceeding such as a lawsuit or other court proceeding, citing NRCP 3; *Seaborn v. District Court*, 29 P.2d 500, 505 (Nev. 1934) ("an action is a judicial proceeding"); Black's Law Dictionary (8th Ed. 2004) ("bring an action" means "to sue; institute legal proceedings"). However, this argument is dubious at best, because the Court notes that the Legislature has expressly defined the phrase "action" to encompass non-judicial foreclosures in at least one other instance in the NRS. *See*, NRS 40.430(1) ("one action rule" defined to encompass non-judicial foreclosures). Moreover, a more recent edition of Black's Law Dictionary (9th Ed.

2009) defines "action" to include non-judicial behavior: "the process of doing something; conduct or behavior." Furthermore, the Defendant's argument asserts that the Legislature intended the word "action" as used in NRS Chapter 116 to have precisely the same meaning as the term "civil action," which means a lawsuit or judicial action. However, this argument ignores that fact that the Legislature typically uses the phrase "action" throughout the NRS to mean something entirely different than "civil action" or "judicial action." *E.g.*, NRS 40.430(1). Indeed, NRS Chapter 116 itself contains the phrase "civil action" in sixteen different sections (NRS 116.31031(10); 116.31083(6)(f); 116.31088; 116.4117; 116.770(2); 116.790(6)(c)), yet also uses the phrase "action" (without the qualifier "civil" or "judicial") in ten other sections (NRS 116.310312; 116.3104(2)(a); 116.3111; 116.31155(9); 116.3116(2)(c); 116.4112(1); 116.795(1)). Under established principles of statutory interpretation, the Court must presume that, by using different terms in different sections, the Legislature intended to use the words that it did and that it therefore intended the terms "action" and "civil action" to mean different things. But the Defendant proposes that the Court instead assume that the Legislature, for reasons completely unexplained by the Defendant, used different terms in no fewer than twenty-six different sections of NRS Chapter 116 to all mean the same thing. Put another way, under the Defendant's proposal, the Legislature's express use of the word "civil" to qualify the word "action" in no fewer than sixteen different sections of NRS Chapter 116 constitutes mere useless surplusage.

(15) . Fundamentally, the Defendant's argument explicitly reads NRS Chapter 116 to create something of a complex "binary" system under which two completely different outcomes are produced with respect to other liens (one in which all other liens are extinguished and one in which they are not) depending upon whether the association chooses to proceed judicially or non-judicially. But there is nothing in the plain language of NRS Chapter 116 that can be read as creating *anything* remotely approaching such a complex, two-tiered system producing radically different potential outcomes. Quite to the contrary, the statute expressly permits an association to initiate

"foreclosure" upon a property (NRS 116.31162 is titled "foreclosure of liens"). The text of the statute does not include any reference to two potentially different types of "foreclosures" producing two different outcomes. The Defendant proposes that NRS Chapter 116 was designed to create one scheme relating to judicial foreclosures, and one scheme for mere "payment priority," something that does not exist anywhere else in Nevada law. However, Comment 5 to the section of the UCIOA that eventually became NRS 116.3116 expressly states:

> The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the State...

Under Nevada law, a "foreclosure" has long been held to be a process that extinguishes all other encumbrances upon the foreclosed property as a matter of law. *E.g., Brunzell v. Lawyers Title Ins. Co.*, 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). Moreover, NRS 116.31166(3) recites that a foreclosure sale initiated pursuant to NRS 116.3116 "vests in the purchaser the title of the unit's owner without equity or right of redemption" which the Nevada Supreme Court has defined as acquisition of title free and clear of any encumbrances. *E.g., Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867) (a sale "without equity or right of redemption" is one that vests the purchaser with "absolute legal title as complete, perfect and indefeasible as can exist...and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court"), quoted in *In re Grant*, 303 B.R. 205, 209 (Bankr.D.Nev. 2003). The Defendant's proposal simply ignores this express provision. The Court can find nothing in the text or legislative history of NRS Chapter 116 that suggests any intention to create the unprecedented, complex, dual-outcome scheme proposed by the Defendant under which an association's foreclosure might, or might not, extinguish junior interests depending upon how the association opts to conduct the foreclosure, and notably the Defendant cites to no such language in its brief. If

anything, the express intention of the Legislature in creating the entirety of NRS Chapter 116 was to simplify the process by which associations could recoup unpaid monthly assessments, and it strikes the Court that creating a complex two-tiered system of foreclosures which produces two entirely different outcomes *vis-a-vis* other liens is something akin to the exact opposite of "simplification."

(16) Contrary to the Defendant's argument, NRS 116.31162 through 116.31168 provide a detailed mechanism for foreclosure quite independent of the judicial foreclosure process embodied in NRS Chapter 40. If, as the Defendant argues, the Legislature merely intended that an association must employ existing procedures for conducting a judicial foreclosure outlined in NRS Chapter 40 in order to foreclose upon a property, then virtually everything contained in NRS 116.31162 through 116.31168 becomes utterly meaningless. The Court cannot interpret a statute in such a way that multiple lengthy and detailed sections expressly included within it become meaningless, while simultaneously importing into the statute a complex, dual-outcome substitute scheme that is totally unsupported by any language actually contained within the statute.

(17) Nonetheless, the Court must reconcile, in some way, the fact that the foreclosure mechanism explicitly outlined in NRS 116.31162 through 116.31168 permits associations to foreclose upon properties in a way that, at least in some instances, violates the requirements of due process. As interpreted by the Real Property Section of the State Bar (chaired by a drafter of the legislation) and the Nevada Department of Business and Industry, a foreclosure conducted pursuant to NRS Chapter 116 extinguishes all other existing encumbrances on the property, including any pre-existing first mortgage on the property whose holder did not participate in the foreclosure proceedings. This was the conclusion reached by this Court in its May 30 Order in *First 100 LLC v. Burns* based upon the plain language of the statute. But this interpretation violates the requirements of due process in at least some cases, because NRS 116.11635(1)(b)(2) expressly does not require notice of the foreclosure to be

given to all lienholders before their property interests are completely erased by operation of law.

(18) In view of the foregoing, the Court concludes as follows. NRS 116.31162 clearly establishes that when a homeowners' association imposes a lien for unpaid assessments, a portion of the unpaid assessments (not exceeding nine months) are entitled to "super priority" status over existing liens and mortgages including any first mortgage or deed of trust. NRS 116.3116(2). If the association initiates foreclosure proceedings against the property based upon its "super priority" lien, any existing subordinate claims are paid off with any surplus proceeds of the foreclosure sale. NRS 116.31164(3)(c)(4). However, after the foreclosure sale is completed, any unpaid subordinate claims (including any prior first mortgage) are automatically extinguished by operation of law. NRS 116.31162 through 116.31168 sets forth a detailed mechanism for conducting such a foreclosure that was apparently designed to represent a simpler and cheaper method than existed under NRS Chapter 40 or NRS Chapter 107. However, the simplified foreclosure mechanism set forth in NRS 116.31162 through 116.31168 is unconstitutional because it facially permits subordinate interests to be erased without proper notice or any opportunity to object. Therefore, any foreclosure conducted in accordance with solely these provisions is null and void. However, the remaining "super priority" provisions of NRS 116.3116 et seq. are not unconstitutional merely because they artificially elevate the priority of liens based upon certain unpaid monthly assessments over the priority of other liens, for the same reasons that laws elevating the priority of liens based upon unpaid taxes over other liens are not unconstitutional. Therefore, a foreclosure initiated by a homeowners association based upon a "super priority" lien that was or is conducted in accordance with established, recognized, Constitutional foreclosure procedures (such as those set forth in NRS Chapter 40 or 107) other than (or in addition to) the procedures set forth in NRS 116.31162-31168 would be valid and would operate as a matter of law to

extinguish all other liens on the property, including any pre-existing first mortgage on the property rendered artificially subordinate by operation of NRS 116.3116.

(19) In this case, the Plaintiff's Complaint does not allege whether the foreclosure at issue in this case was, or was not, properly conducted in accordance with established and Constitutional foreclosure procedures (such as NRS Chapters 40 or 107). The Plaintiff simply asserts that the foreclosure was conducted under the procedures set forth in NRS 116.31162 through 116.31168 which do not comply with the requirements of Due Process. Therefore, the Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, is GRANTED IN PART to the extent that the Court concludes that the Plaintiff has failed to plead or establish that the foreclosure at issue through which it acquired the Property met the standards set forth in this Order. However, in lieu of dismissal based upon a legal standard that is now being adopted for the first time by this Order, the Plaintiff is hereby permitted leave to amend its Complaint. The Defendant's Motion is DENIED in all other respects.

(20) Because of the considerable public interest in the proper interpretation of NRS Chapter 116 and the inconsistencies in how the statute has been interpreted to date by different Judges of this Judicial District, this Order is hereby STAYED and this matter is CERTIFIED FOR APPEAL pursuant to NRCP 54(b).

DATED: January 13, 2014

JEROME T. TAO
DISTRICT COURT JUDGE

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing, by mailing, by placing copies in the attorney folder's in the Clerk's Office or faxing as follows:

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DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Plaintiff, v. GREEN TREE SERVICING, LLC, a foreign limited liability company, *et al.* Defendants.	Case No.: A-13-683133 Dept.: XXII **ORDER GRANTING MOTION TO DISMISS**

Defendant Green Tree Servicing, LLC's (collectively referred to herein as "Defendant") Motion to Dismiss Pursuant to NRCP 12(b)(5) having come before the Honorable Susan H. Johnson, on August 20, 2013, at 8:30 a.m.; said Defendant was represented by and through Michael R. Brooks, Esq. of the law firm of Brooks Bauer LLP; Plaintiff was represented by Diana S. Cline of the law firm of Howard Kim & Associates;

The Court, having reviewed Defendant's Motion and Reply, Plaintiff's Opposition, the representations of counsel, the papers and pleadings on file herein, and good cause appearing makes the following Findings and Orders:

THE COURT HEREBY FINDS that Plaintiff has failed to state a claim upon which relief can be granted, pursuant to NRCP 12(b)(5);

[ ] Jury Dis	[ ] Stip Dis	[ ] Sum Jdgmt
[ ] Non-Jury (stat) Dis	[ ] Stip Jdgmt	[ ] Non-Jury
[ ] Judgment on Arb Award	[ ] Default Jdgmt	[ ] Jury Trial
[X] Mtn to Ds (by def)	[ ] Transferred	

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NOW THEREFORE IT IS HEREBY ORDERED that Defendant Green Tree Servicing, LLC's Motion to Dismiss Pursuant to NRCP 12(b)(5) be, and is hereby GRANTED in its entirety.

IT IS FURTHER ORDERED that all claims against Defendant Green Tree Servicing, LLC are adjudicated in favor of Defendant Green Tree Servicing, LLC.

IT IS FURTHER ORDERED that there is no just cause for delay in entering judgment as to Defendant Green Tree Servicing, LLC.

IT IS FURTHER ORDERED that this judgment shall be deemed final and appealable pursuant to NRCP 54(b).

DATED this 3rd day of Sept., 2013.

DISTRICT COURT JUDGE

Submitted by:
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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, Plaintiff, vs. GREEN TREE SERVICING, LLC, Defendant.	CASE NO. A-683133 DEPT. XXII

BEFORE THE HONORABLE SUSAN H. JOHNSON, DISTRICT COURT JUDGE

AUGUST 20, 2013

RECORDER'S TRANSCRIPT OF HEARING RE:
DEFENDANT GREEN TREE SERVICING, LLC'S MOTION TO DISMISS PURSUANT TO NRCP 129(b)(5); REQUEST FOR JUDICIAL NOTICE

APPEARANCES:

For the Plaintiff: DIANA S. CLINE, ESQ.

For the Defendant: MICHAEL R. BROOKS, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

TUESDAY, AUGUST 20, 2013 AT 9:28:19 A.M.

THE COURT: SFR Investment Pool 1 versus Green Tree Servicing, case number A13-683133-C.

MR. BROOKS: Good morning, Your Honor. Michael Brooks appearing on behalf of Defendant Green Tree Servicing.

MS. CLINE: Good morning. Diana Cline on behalf of SFR.

THE COURT: Okay. Counsel, we've got a Motion to Dismiss Pursuant to Rule 12(b)(5) and a Request for Judicial Notice. Mr. Brooks?

MR. BROOKS: Yes, Your Honor. We've -- as we've set forth in our arguments this issue of the HOA's super priority lien has been before Your Honor and briefed a number of times. We believe as a matter of law that we've established the case that the -- as it relates to the first position deed of trust that the quiet title claims have no impact on the first position deed of trust and as the result of the fact that the foreclosure proceedings -- it was a foreclosure of a lien by sale, powers that were granted under 106 and not by virtue of a judicial foreclosure of that right and therefore the -- the claims have no merit at least as it relates to our particular client Green Tree who we presented -- and it's been acknowledged that our client holds a first position deed of trust and is -- has certain protections that aren't afforded to other creditors and lien holders on the property.

And with that I will -- given the amount of briefing, the quality of briefing -- not to pat myself on the back but rather to --

THE COURT: Well, I thought you were talking about both sides.

MR. BROOKS: Yes, I was --

MS. CLINE: I would agree both sides.

MR. BROOKS: -- frankly referring to counsel's arguments. I think we've done as well as we could have done and I'll leave it at that and answer any questions Your Honor might have and possibly respond to comments from counsel.

THE COURT: Counsel.

MS. CLINE: Thank you, Your Honor.

I won't go into everything that is in the briefing, I know that Your Honor is familiar with everything that we've written and all of the different support that my client has cited for its position that the first deed of trust was in fact extinguished. I got to thinking -- counsel brought up NRS 108, the mechanic's lien statute, in the motion and saying, you know, the -- it requires the judicial foreclosure because action always means a lawsuit. As you can see in NRS 108 it uses the word action to talk about filing a complaint and a lawsuit and also points to the Nevada Rules of Civil Procedure too that says there's one action -- one type of action and it's a civil action.

Now going back to law school first year, I vaguely remember there is -- there was -- and it used to be that there were two different types of courts, there used to be a court in equity, a court of law and -- for different types of relief. For example, foreclosure you had to go to a court of equity to do that and then if you wanted a deficiency then you would go to the court of law. And the reason why it's defined in the Nevada Rules of Civil Procedure is because our state has done away with it as has pretty much every other state and that is -- that's why that's included in the Nevada Rules of Civil Procedure, it doesn't necessarily mean that action has to mean lawsuit in NRS 116. And what the legislature did in NRS 108 is they created a mechanic's lien that's a statutory lien just like the one in NRS 116 it's a statutory lien, it's not something that would necessarily exist without the statute there and the

priorities are listed in the statutes in both cases. What the legislature did in 108 though is provide specifically a procedure to foreclose judicially and it was limited to judicial foreclosure. This is what our -- this is what our legislature does, they say you have a lien and if they decide to give you the ability to foreclose on that lien rather than wait for somebody else to foreclose on the property or the property to be sold in order to collect they'll tell you how you can exercise that power of sale. Now, in NRS 116 they set forth the non-judicial foreclosure procedures, what they didn't do was reference another statute somewhere else that gave the association the ability to foreclose judicially.

Another example of a lien that's created by statute is the one for municipal solid waste management and you find that in NRS 400.44 section 520. And in subsection 3 that was added in 2005 and it gave the power -- the ability of the city or through Republic Services to actually foreclose on the lien. And it says that the lien may be foreclosed in the same manner as provided for in the foreclosure of mechanic's liens. So that's an easy fix, you just go to NRS 108 and see here's the way that you foreclose on a mechanic's lien, it's judicially -- that's -- that's the end of it.

THE COURT: Counsel, I'm gonna just tell you I've listened to what you've had to say. NRS 108 is totally different than NRS 116; I don't know that you even need to go there.

MS. CLINE: It is totally different but what's the same about it is that it actually tells how to enforce the lien. NRS 116 also says how to enforce the lien. In a deed of trust there is the ability to do a judicial foreclosure or a non-judicial foreclosure.

THE COURT: Well, I -- you know, whenever -- the statute talks about action and as you know I have interpreted that to mean a lawsuit or a suit in a courtroom. I

have never said that it is limited to a judicial foreclosure. I mean -- in fact I think I used in one of the decisions I wrote, the Duetsche Bank decision that I wrote, that you might be able to do it by declaratory relief, you know, move the Court -- bring a complaint for declaratory relief on what are -- what the HOA super priority lien is. I'm surprised I haven't been presented with that by anyone.

But in any event, I have interpreted the statute to mean that you -- that the homeowners association needs to establish their super priority lien by an action because it's nine months before the institution of an action.

MR. CLINE: Right. And I understand that, Your Honor. And just for the record, as you know this will be up on appeal. I just want to point out that if the legislature intended that -- that an association would have to file a lawsuit either to judicially foreclose or to enforce its lawsuit or to enforce its lien, just a declaratory relief some other way they wouldn't have done -- they wouldn't have made the statute the way that it is now giving the ability to foreclose by sale and they wouldn't have gone specifically to NRS 40.433 and exclude NRS 116. And that's the -- that is where you find the procedures for foreclosing judicially under a mortgage.

In the Uniform Common Interest Ownership Act it says -- like the actual language from it -- and it's Exhibit 13 to our temporary restraining order application. The way that the uniform act was written is -- it says, you know: "The association's lien must be foreclosed in the like manner as a mortgage or real estate". And then in brackets: "Or a power of sale and start an appropriate state statute here". Our legislature chose not to include that. Counsel cites to Massachusetts which did adopt to that very specific provision, but in that state the only way that you can foreclose on a mortgage is through judicial foreclosure.

Now, our legislature said, "No, we're not going to include that, we're

gonna go over to 40 and say this doesn't apply and also we're going to just give the non-judicial foreclosure procedures". That is what the legislature meant to do. You've got the drafters of the Uniform Common Interest Act saying action just means taking action to enforce the lien. A few years after this was -- this was adopted the legislature also adopted NRS 38.310 which requires the associations to go through our arbitration or mediation before there can be a judicial action. It's just not something that the legislature intended was to have to require all of the associations to go through both the mediation process and then file a lawsuit in order to create the super priority lien. The very purpose behind this provision is to protect the associations so that they can collect fees from the -- from the banks, the first security interest holders. And if you say that the super priority portion of the lien does not come into existence until there is a lawsuit then that goes against all of the policy that the legislature has relied on to adopt NRS 38 and also just behind NRS 116.

We're talking about nine months worth of assessments; we're not talking about a large amount of money. If an association is required to go first to arbitration and mediation and then file a lawsuit before their lien can even exist -- before the super priority lien can even exist then if the bank forecloses somewhere in that process or in the meantime then their entire lien is extinguished and that is certainly not what the legislature intended.

THE COURT: Well, I didn't get from the statute that the HOA is limited solely to just the monthly assessments. There's -- of course as you know there's issues about costs -- collection costs and things of that nature. So, you're telling me that you think that first the HOA would have to go to arbitration, incur costs there which may be more than the monthly assessments and then -- and not be able to collect

those as part of the super priority lien?

MS. CLINE: Yes, Your Honor.

THE COURT: Okay. All right. Thank you.

MR. BROOKS: Your Honor, first of all with respect to Chapter 38, that only affects the relationship between the homeowner and the association. There would be no need for an association to seek declaratory relief first through a mediation or arbitration through Chapter 38 before it attempted to perfect its rights.

Secondly, the way it's broken out lots of states have just 3116, they don't have 31162, 31163 all of which refer to foreclosure of lien by sale. They don't say action; they say foreclosure of lien by sale, foreclosure of lien by sale. Foreclosure of lien by sale is an expedited process for homeowners associations. It can be completed in about 90 days, at most about 120 days. You don't need nine months of super priority if you can foreclose your lien out within 120 days. If they moved quickly they would be able to secure title to that. Subject to the first position deed of trust they can either sell it back to the first position deed of trust holder, maybe there's payment delinquencies there. Alternatively they could take that asset and do other things with it, possibly put a renter in there to somehow mitigate their losses. But they're -- so they're not without a remedy. That argument just simply fails to recognize the realities of the situation.

The -- it says action. Lots of states have -- do just fine using judicial foreclosure actions and establishing lien priorities the way that they do. Our legislature -- I don't think it's a credible argument to say that you can't exercise a judicial power of sale, there is nothing in the statutes. Nowhere does it say that you cannot exercise judicial authority to foreclose on your lien under a HOA statute. The fact that Chapter 40 provisions of a foreclosure of a deed of trust don't apply doesn't

mean that you can't engage in a -- in a foreclosure action on an -- on a 116 statute -- under 116, excuse me. There's nothing in -- more importantly, there's nothing in 116 that says that you can't do that, they're saying you just can't use Chapter 40 for that purpose.

The -- with respect to the -- their argument -- and this is something that we've tried to stress all along. Their argument -- they've spent a lot of time really poking holes and trying to say, oh, this is what it means. And again, they've done a nice job of briefing this issue but at the end they can't possibly be right. The reason they can't be possibly be right is it would cause a huge disruption and inefficient bidding at these foreclosure auctions every single time because their position is that there is a factual presumption that every single HOA foreclosure lien sale is a super priority lien sale. That -- the factual presumption is that, one, the HOA foreclosure lien auction was conducted pursuant to nine months of assessments adopted in accordance with the provisions of 3115. Guess what? Their notice of delinquent assessment doesn't say anything about compliance of the budgetary requirements of 3115 nor does it say anything about the lien abatement under statute -- under 116 which has like six digits and I can't remember it exactly, but it's an abatement lien statute and we've cited to it in our papers, Your Honor.

The important thing is that in order to establish that super priority portion there has to be evidence of the existence of that super priority and at a minimum it's gotta be in the notice of delinquent assessment, it has to be in the notice of default, and it has to be in the notice of trustee sale so that everybody when they go to this auction they understand what's being bought and sold at that so that bidding is efficient. What we have here is a case where you have, you know, a thousand percent profits potentially being made on this property in a very short

period of time because there's not sufficient information for the parties to make reasoned and rational decisions as to how much to bid, what to pay to protect the security interest if in fact it's at risk, and how much -- and ultimately the big loser in all this is the borrower. The borrower has an asset that can be used to discharge a portion of its indebtedness and if it's a $200,000.00 house that bidding ought to be approaching about 170 to $180,000.00 under a competitive bidding scenario. But you're not getting that, you're getting cases like this where you have maybe 10 to $15,000.00 being paid to purchase a property that is worth significantly --

THE COURT: I've --

MR. BROOKS: -- more.

THE COURT: -- seen fifteen hundred, counsel.

MR. BROOKS: Yeah, it's -- it's ridiculous, over and over and over again. And the scenario curiously is the same but there has to be -- again, the important thing is -- and they say, "Well, if the Supreme Court decides that this is always super priority then it will eliminate the question for all purposes". The reality of it is that an HOA has multiple different lien rights it can enforce. It can enforce -- there's certain lien rights that it can't foreclose on such as fines and penalties, it has lien rights that it can foreclose on such as abatement fines. It has the assessments; it has multiple liens, multiple rights that it can assert. It has to clearly spell out which ones that it's asserting in the context of that non-judicial even just to give fair notice. So, their reading of the statute can't possibly be right. And in the end the only reading of the statute, if it makes any sense, is as Your Honor has indicated that an action must be established with due process and fair notice to alert all of the parties as the rights that are being asserted and the existence of that priority with evidence to demonstrate compliance with 3115 or compliance with the abatement lien statute

which are all factual prerequisites to the creation of the super priority lien. And without that everything else is unfair and unjust and ultimately strips the borrower of the most powerful debt paying device that it has which is its property interest.

So, with that I'll -- I think we've -- I've created enough of a record and I'm done. Thank you, Your Honor.

THE COURT: Okay. Counsel, what I'm gonna do -- now it's motion, opposition, reply so I'm not gonna hear any further argument. I am gonna grant the motion to dismiss and I'm gonna be consistent with the way I've ruled before.

In my view if the HOA decides that they want to foreclose on their lien that's fine and good, but it does not wipe out the first security interest lien holder unless they seek their nine months of assessments and so forth and establish that by the institution of an action. I have not been faced with yet what specifies action except I have determined that it is a lawsuit. I have not said that it is just a judicial foreclosure. Something for you all to think about. Another thing for you guys to think about even though I know this is gonna be what the 84th case going up on -- up to the Supreme Court.

MS. CLINE: About the 40th.

THE COURT: And I don't take that personally by the way.

I'm gonna tell you that we -- the civil judges or the judges hearing primarily civil cases and those that are doing the half and half are doing a very good job of clearing out our civil docket. I think our clearance rate last year was 152 percent meaning that for every case that came in that was filed we resolved 1.52 of them. We are resolving our cases; you're able to get your cases to court much quicker, so you might want to think about that judicial route because I know we can get you in and out, okay?

MS. CLINE: Yes, Your Honor. I don't represent any homeowners associations so I wouldn't be able to bring --

THE COURT: I understand.

MR. CLINE: -- that type of --

MR. BROOKS: It would be too late for her client in that respect. I'm sorry, I don't --

MS. CLINE: But I --

MR. BROOKS: Procedurally --

MS. CLINE: -- do appreciate that.

MR. BROOKS: -- it's not positioned well for that.

THE COURT: Okay. I understand.

MR. BROOKS: Yeah.

THE COURT: But I'm just saying that something that the HOA's and the collection folks should really think about that we can get you to court very quickly to establish what that super priority lien is, but in this case if there's a foreclosure they take subject to the first in my view until that super priority lien is established.

MR. BROOKS: Your Honor -- and I -- for -- one housekeeping matter and we've had this discussion on a number of occasions, because this only disposes this matter as to my client -- there's no joinders that I'm aware of, I believe that in order for this to go any further there would have to be certification of this issue for appeal.

MS. CLINE: A 54(b) certification.

THE COURT: So, I -- am I hearing a joint motion for certification?

MS. CLINE: Yes, Your Honor.

MS. BROOKS: Yes. I have no objection, Your Honor, I mean, we've had -- like I said, had this discussion a number of times.

THE COURT: In other words you want it to be Plaintiff's motion but you're not gonna object?

MR. BROOKS: That's right because I'm expecting to have to draft the order and I know that that language is going to be requested so --

THE COURT: Are you gonna make an oral motion?

MS. CLINE: Yes, Your Honor. We orally move to have a 54(b) certification of this case so we can take it up on appeal.

THE COURT: And there's no objection?

MR. BROOKS: No objection. And I will prepare an order consistent with this Court's ruling.

THE COURT: Okay. I'll grant your oral motion for a Rule 54(b) certification and hopefully we will hear soon what the ruling is because I know that we judges are all over the place on this issue and that is not a good thing, you should have some consistency and I hope that the right decision is determined one way or another.

MS. CLINE: I know. And I -- you know, just for the record, Your Honor, I understand that you've said that an action not necessarily judicial foreclosures are required to create the lien. And just for practical purposes, I would just want to make sure that I'm in line with Your Honor's thinking. That would mean that any foreclosure sale that took place by the bank would extinguish the junior --

THE COURT: It takes --

MS. CLINE: -- portion of the association's --

THE COURT: -- it would --

MS. CLINE: -- lien?

THE COURT: -- extinguish the entire lien. Why? Because the super priority portion has never been established. So, the bank would not take subject to the

super priority lien if one has never been established. And I think I set forth that in my Duetsche Bank decision. You got a copy of that, didn't you?

MR. BROOKS: I've got a copy.

MS. CLINE: Yes, Your Honor.

MR. BROOKS: I can -- have I shared that with you?

MS. CLINE: And I have seen that. I just wanted to make sure for purposes of this case that that was clear for the record.

THE COURT: It is.

MR. BROOKS: Thank you, Your Honor.

MS. CLINE: Thank you, Your Honor.

THE COURT: Okay. Thank you.

[Proceedings concluded at 9:50:38 a.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

NORMA RAMIREZ
Court Recorder
District Court Dept. XXII
702 671-0572

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee of the INDYMAC INDX MORTGAGE TRUST 2007-AR15, MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2007-AR15 under the Pooling and Servicing Agreement dated June 1, 2007,	**Case No. A-13-680505-C** Electronically Filed **Dept. No. XXII** 06/03/2013 09:44:33 AM
Plaintiff,	
Vs.	
THE FOOTHILLS AT MACDONALD RANCH; NEVADA SSOCIATION SERVICES, INC.; DOES 1-10 CORPORATIONS; and DOES and ROES 1-10 individuals, partnerships, and anyone claiming an interest to the property described in this action,	
Defendants.	

Steven D. Grierson
CLERK OF THE COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter concerning Plaintiff's Motion for Preliminary Injunction filed April 23, 2013 came on for hearing, on an Order Shortening Time on the 30th day of April 2013 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY appeared by and through its attorney I-CHE LAI, ESQ. of the law firm, BROOKS BAUER; Defendant THE FOOTHILLS AT MACDONALD RANCH appeared by and through its attorney, SEAN L. ANDERSON, ESQ. of the law firm, LEACH JOHNSON SONG & BRUCHOW; and Defendant NEVADA ASSOCIATION SERVICES, INC. appeared by and through its attorney,

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

RICHARD VILKIN, ESQ. Having reviewed the papers and pleadings on file herein, heard oral arguments of counsel and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. CHRISTOPHER and DANIELLE ARNOLD are the record owners of certain real property located at 552 Regents Gate Drive in Henderson, Nevada. On or about May 27, 2005, the ARNOLDS obtained a mortgage loan from INDYMAC BANK in the amount of $1,276,000, which was secured by a deed of trust recorded against the subject property. The loan and deed of trust were thereafter modified, and both were assigned to Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY in or about March 2011.[1]

2. The subject property is located within a common-interest community governed by a homeowners' association, Defendant THE FOOTHILLS AT MACDONALD RANCH, which was established pursuant to NRS Chapter 116. Defendant NEVADA ASSOCIATION SERVICES, INC. is alleged to be the collection agency retained and authorized by Defendant THE FOOTHILLS AT MACDONALD RANCH to pursue unpaid assessments, fines and other costs, by way of foreclosure or otherwise, from the association's delinquent owner-members.[2]

3. On June 17, 2011, Defendant NEVADA ASSOCIATION SERVICES, INC. recorded a Notice of Delinquent Assessment Lien on behalf of Defendant THE FOOTHILLS AT MACDONALD RANCH against the subject property, noting, as of June 14, 2011, $3,183.40 was owed. This amount included delinquent assessments, as well as late charges and collection fees and interest in the amount of $803.40.[3]

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[1] *See* Exhibits 2 through 5 of Plaintiff's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time filed April 23, 2013.

[2] *See* Complaint filed April 19, 2013, p. 2, paragraphs 2 and 3.

[3] *See* Exhibit 6 of Plaintiff's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary

4. On November 2, 2011, Defendant NEVADA ASSOCIATION SERVICES, INC., on behalf of Defendant THE FOOTHILLS AT MACDONALD RANCH recorded a Notice of Default and Election to Sell Under Homeowners Association Lien against the subject property.[4] This Notice indicated the amount owing as of October 27, 2011 was $5,360.50, along with the caveat such would increase "until your account becomes current."[5] Thereafter, on December 7, 2012, Defendant NEVADA ASSOCIATION SERVICES, INC. recorded a Notice of Foreclosure Sale against the property. At that time, the unpaid balance due was $4,427.67.[6]

5. Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY claims it later discovered Defendant NEVADA ASSOCIATION SERVICES, INC. scheduled a non-judicial sale to foreclose the homeowners' association's lien to take place May 3, 2013. According to Plaintiff, it has requested Defendants NEVADA ASSOCIATION SERVICES, INC. and THE FOOTHILLS AT MACDONALD RANCH provide it the balance of the "super priority" portion of the association's lien[7] so it can arrange payment, and essentially avoid the necessity of a foreclosure sale.[8] Defendants have refused to provide that information as communication regarding a debt with any person other than the consumer (meaning the ARNOLDS) would violate the Federal Fair Debt Collection Practices Act. *See* Title 15 U.S.C. §1692(b) *and* NRS 649.370. Further, in Defendants' view, the association's lien interest can be reduced to a "super lien priority" amount after a foreclosure of "inferior" security interest, such as the First Deed of Trust held by Plaintiff

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Injunction on Order Shortening Time filed April 23, 2013.

[4]*See* Exhibit 7 of Plaintiff's *Ex Parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time filed April 23, 2013.

[5]*Id.*

[6]*See* Exhibit 8 of Plaintiff's *Ex parte* Application for Temporary Restraining Order and Motion for Preliminary Injunction on Order Shortening Time filed April 23, 2013.

[7]The parties dispute what amounts can be included within the "super priority lien," whether it be only nine (9) months of assessments or include the association's costs of collection.

[8]Plaintiff's counsel indicated in his declaration attached to the *Ex Parte* Application filed April 23, 2013: "Based on my prior experiences with and knowledge of [NEVADA ASSOCIATION SERVICES, INC.'S] operations, [NEVADA ASSOCIATION SERVICES, INC.], upon sale of the foreclosed property, will convey title to the property free and clear of any liens and encumbrances[,]" which would include DEUTSCHE BANK NATIONAL TRUST COMPANY'S interest. *See* Declaration of I-Che Lai, paragraph 9.

DEUTSCHE BANK NATIONAL TRUST COMPANY. Likewise, absent foreclosure of the bank's First Deed of Trust or other "inferior" security interest, neither Plaintiff nor Defendants can properly calculate the amounts due and owing under NRS 116.3116(2). Plaintiff disagrees with Defendants' stance, noting, while homeowners' associations may have *the right* to foreclose upon properties for non-payment of its fees, assessments and even collection costs[9] within a non-judicial foreclosure proceeding, they must institute an "action" to establish their liens' "super priority" status over other encumbrances. As a consequence, Plaintiff has filed its Complaint, seeking declaratory relief and to quiet title in the subject property.

6. The crux of this matter hinges upon the effect of the non-judicial foreclosure sale by Defendants. Defendants propose the successful bidder at the non-judicial foreclosure sale will take the property free of security interests "inferior" or junior to the homeowners' association's "super priority lien," which would include Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY'S First Deed of Trust. Plaintiff does not share that view, but appreciates the non-judicial foreclosure sale would result in controversy and jeopardize its security interest in the property. As a consequence, Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY now moves this Court for preliminary injunction to:

a. Compel disclosure of the homeowners' association's lien secured by the real property located at 552 Regents Gate Drive, Henderson, Nevada;

b. Compel the homeowners' association and NEVADA ASSOCIATION SERVICES, INC. to accept "any payments from Deutsche Bank on the HOA's lien;"

. . .

. . .

[9]Again, as set forth in Footnote 7 above, the parties dispute what amounts can be included within the "super priority lien," whether it be only nine (9) months of assessments or include the association's costs of collection.

c. Enjoin any foreclosure sale of the property during the pendency of this action; and

d. Grant any other relief this Court deems just and proper.

CONCLUSIONS OF LAW

1. NRS 33.010(1) authorizes an injunction when it appears from the complaint the plaintiff is entitled to the relief requested, and at least part of the reprieve consists of restraining the challenged act. University and Community College System of Nevada v. Nevadans for Sound Government, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). Before a preliminary injunction will issue, the applicant must show: "(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy." S.O.C., Inc. v. The Mirage Casino-Hotel, 117 Nev. 403, 408, 23 P.3d 243, 247 (2001), *citing* Dangberg Holdings v. Douglas County, 115 Nev. 129, 142-143, 978 P.2d 311, 319 (1999). In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, as well as the public interest. University and Community College System of Nevada, 120 Nev. at 721, 100 P.3d at 187, *citing* Clark County School District v. Buchanan, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996).

2. Determining whether to grant or deny a preliminary injunction is within the district court's sound discretion. Attorney General v. NOS Communications, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004). The district court's decision will not be disturbed absent an abuse or unless it is based upon an erroneous legal standard. *Id.* Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence; however, questions of law are reviewed *de novo*. S.O.C., Inc., 117 Nev. at 407, 23 P.3d at 246.

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3. NRS 116.3116 discusses homeowner association liens against units or homes for unpaid or delinquent assessments. It states in pertinent part:

> 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 assessment 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,* .... (Emphasis added)

4. Notably, a lien under NRS 116.3116(2) is "prior" to "all other liens and encumbrances on a unit," without the requirement of an enforcement action, *except for*, *inter alia*, "[a] first security interest." *See* NRS 116.3116(2)(b). That exception specifies the association's lien is junior to the first security interest at least until an "action" is commenced. *See* NRS 116.3116(2)(c). Indeed, if the association's lien was anything but junior to the first security interest, there would be no reason to require an "action" be instituted in order to grant that lien "super priority" status.

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5. NRS Chapter 116 does not specifically define the term "action" with respect to one "enforc[ing] the lien," as described in NRS 116.3116(2)(c). In this case, each party appears to advance a different interpretation of the term "action." Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA ASSOCIATION SERVICES, INC. propose they can seek enforcement of the lien at a non-judicial foreclosure sale to a bona fide purchaser, thereby extinguishing the interests of inferior or junior security interests including that asserted by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY.[10] Alternatively, they propose the amount of their "super priority lien" can be established by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY foreclosing upon its own security interest.[11] Plaintiff takes a different view, proposing the establishment or determination of the "super priority lien" must be through legal action.

6. While NRS Chapter 116 does not specifically define "action," this Court notes Rule 2 of the Nevada Rules of Civil Procedure (NRCP) does; it states: "'There shall be one form of action to be known as 'civil action.'" Further, NRCP 3 provides "[a] civil action is commenced by filing a complaint with the court." *Also see* Black's Law Dictionary, p. 26 (5th Ed. 1979)("Term in its usual legal sense means a suit brought in a court; a formal complaint within the jurisdiction of a court of law."). In this Court's view, the definition of "action" as expressed in NRS 116.3116 was intended by the legislators enacting this statutory provision to be its ordinary meaning as expressed above, i.e. a suit brought in a court. That is, the "super priority" nature and extent of the homeowners' association lien over Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY'S First Deed of Trust will be defined or established when Defendants THE FOOTHILLS AT MACDONALD

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[10]In so stating, Defendants appear to advance the position at least part of the homeowners' association lien would have "super priority" status over the First Deed of Trust.

[11]*See* The Foothills at MacDonald Ranch's Opposition to Plaintiff's Ex Parte Application for Temporary Restraining Order and Motion for Preliminary Injunction filed April 29, 2013, p. 8, lines 6-7.

RANCH and NEVADA ASSOCIATION SERVICES, INC. institute "an action to enforce the lien." *See* NRS 116.3116(2)(c). Stating it a different way, the institution of an action or suit brought in a court is a condition precedent to elevating the status of the association's junior lien to "super priority." Further, the extent of the "super priority" is limited to that which would have become due in the absence of acceleration during the nine (9) months immediately preceding the institution of the action to enforce the lien.

7. In so stating, this Court is not suggesting a lawsuit is required before any lien for unpaid homeowners' association fees and assessments can be enforced or its "super priority" status can be found to exist. However, it is a step necessary to elevate the status of the lien to a position superior to first security interests other than real estate taxes and other governmental assessments.

8. With the aforementioned said, this Court disagrees with Defendants' position Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY could foreclose upon its security interest, and upon doing so, establish and then satisfy the "super priority" lien. Again, as set forth above, the elevation of the association's lien from junior to "super priority" must be instituted by an "action." *See* NRS 116.3116(2)(c). That is, a foreclosure sale by the bank—whether done judicial or non-judicially—will not result in any part of the association's lien achieving "super priority" status. If anything, a foreclosure by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY would extinguish any subordinate lien existing at the time, which could include the Association's lien for unpaid assessments and fees.[12] *See* Trustees of MacIntosh Condominium Association v. FDIC, 908 F.Supp. 58, 64 (D.C.Mass. 1995), *citing* Osborne v. Burke, 1 Mass.App.Ct. 838, 300 N.E.2d, 450, 451 (1973).

. . .

[12]While the bank's foreclosure would extinguish any existing subordinate or junior lien recorded against the property, such a statement is not meant to suggest it would eliminate the debt owed by the homeowners, who, in this case, are CHRISTOPHER and DANIELLE ARNOLD.

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9. In light of the aforementioned, this Court concludes, until Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA ASSOCIATION SERVICES, INC. institute an action to enforce, their lien has no "super priority" status. That is, their lien for unpaid association assessments, fees and the like are junior to the First Deed of Trust held by Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY. As the Association's lien currently is "junior," and the extent of any "super priority" has not been established, this Court concludes Plaintiff has met its burden of showing a likelihood of success upon the merits. However, given this Court's conclusions set forth above, it likewise finds Plaintiff did not show a reasonable probability the non-moving parties' conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. It therefore denies Plaintiff's Motion for Preliminary Injunction as it seeks to compel Defendants to disclose the extent of their lien secured by the real property located at 552 Regents Gate Drive, Henderson, Nevada or to accept "any payments from Deutsche Bank on the HOA's lien." This Court further denies the Motion for Preliminary Injunction to enjoin any foreclosure sale of the property during the pendency of this action. With the latter said, the bona fide purchaser at any non-judicial foreclosure sale conducted by Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA ASSOCIATION SERVICES, INC. takes the property subject to all liens and security interests that have priority or seniority over the Association's; such include, but are not necessarily limited to (1) the First Deed of Trust assigned to Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY in or about March 2011, and (2) real estate taxes and other governmental assessments.

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Plaintiff's Motion for Preliminary Injunction filed April 23, 2013 is denied. Again, as noted above, while this Court does not enjoin or prohibit Defendants THE FOOTHILLS AT MACDONALD RANCH and NEVADA

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ASSOCIATION SERVICES, INC. from conducting its non-judicial sale, the bona fide purchaser must take the property, to wit: 552 Regents Gate Drive in Henderson, Nevada, subject to all liens and security interests that have priority or seniority over the Association's, including, but not limited to the First Deed of Trust assigned to Plaintiff DEUTSCHE BANK NATIONAL TRUST COMPANY in or about March 2011, and real estate taxes and other governmental assessments.

DATED and DONE this 3rd day of June 2013.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify, on the 3rd day of June 2013, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to the following counsel and parties of record, and that first-class postage was fully prepaid thereon:

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SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

IN THE SUPREME COURT OF THE STATE OF NEVADA

K& P HOMES, A SERIES LLC OF DEK HOLDINGS, LLC, a Nevada limited liability company,,

Appellant,

vs.

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, FSB, NOT IN ITS INDIVIDUAL CAPACITY BUT AS TRUSTEE OF ARLAP TRUST 3

Respondent.

Supreme Court Case No.: 69966

(A certified question from U.S. District Court, District of Nevada, Case No. 2:15-cv-01534-RJC-VCF)

RESPONDENT'S ANSWERING BRIEF

Respectfully Submitted by:
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Attorneys for Respondent, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3

RULE 26.1 DISCLOSURE

Respondent, Christiana Trust, a Division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3 certifies that there are no other known interested parties other than those disclosed in this disclosure. No publicly-held company owns 10% or more of Christiana Trust's stock.

DATED this 27th day of June, 2016.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this certified question pursuant to NRAP 5 because the United States District Court for the District of Nevada certified a question to the Nevada Supreme Court concerning an issue of Nevada law. NRAP 5(a) provides that:

> The Supreme Court may answer questions of law certified to it by...a United States District Court … when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state.

The Order Accepting Certified Question, Directing Briefing and Direction Submission of Filing Fee, was entered on April 8, 2016, and directed that the K&P file and serve its opening brief within 30 days thereafter. The Order also directed that Christiana Trust, A Division Of Wilmington Savings Fund Society, FSB, Not In Its Individual Capacity But As Trustee Of Arlap Trust 3 ("Christiana") file and serve its Answering Brief 30 days from the date the opening brief is filed and served. K&P filed the opening brief on April 26, 2016. The parties stipulated, with court approval, to extend the due date for the Answering Brief to June 27, 2016. Therefore, Christiana has timely filed this Brief.

I. STATEMENT OF CERTIFIED QUESTION

The following question was certified to this Court:

Does the rule of SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) that foreclosures under NRS 116.3116 extinguish first security interests apply retroactively to foreclosures occurring prior to the date of that decision?

II. STATEMENT OF THE CASE

This certified question comes to the Court following a dismissal of a quiet title claim filed by Appellant K& P Homes, A Series LLC of DEK Holdings, LLC ("K&P" or "Appellant"). K&P contends the first Deed of Trust held by Respondent Christiana Trust ("Christiana") was extinguished by a May 31, 2013 homeowners association ("HOA") non-judicial foreclosure sale ("HOA Sale"), leaving K&P with title free and clear, under its view of the Nevada Supreme Court ruling in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 334 P.3d 408 (Nev. 2014) ("SFR"). SFR interpreted NRS 116.3116 (2011) ("the Statute")[1] to mean that a HOA could non-judicially foreclose its assessment liens and, if there was a super-priority portion of the lien remaining unsatisfied, a properly conducted foreclosure could extinguish a first deed of trust. Judge Jones of the U.S. District Court for Nevada dismissed K&P's counterclaim[2] because Christiana's Deed of Trust could not have been extinguished, in part because SFR should not be applied retroactively, pursuant to Chevron Oil v. Huson, 404 U.S. 97 (1971) ("Chevron"). He ruled the Chevron factors precluded retroactive application of SFR because it announced a new principle of law that was not clearly foreshadowed, overruled

[1] The versions of NRS 116.3116 for 1991, 1993, 2009, 2011, 2013 and 2015 attached in the Addendum as ADD:53(a)-(f).

[2] Christina Trust v. K&P Homes, 2015 WL 6962860 (D. Nev. Nov. 9, 2015). (3:WFZ0537-0548) (Note: actually, the correct case name is "Christiana Trust v. K&P Homes.")

past precedent upon which litigants relied, did not further the purpose of the Statute, was inherently unfair considering the industry practice to the contrary amongst all parties involved, and has produced substantial inequitable results.

III. STATEMENT OF RELEVANT FACTS

On or about July 25, 2007, Rita Wiegand ("Wiegand") purchased the real property located at 7461 Glimmering Sun Avenue Las Vegas, Nevada ("Property"). I:WFZ0017-0022. The Deed of Trust executed by Wiegand secured a loan in the amount of $284,200.00. I:WFZ0024-0042. Ultimately, on January 30, 2014, an Assignment was recorded identifying Christiana as the beneficiary under the Deed of Trust. I:WFZ0044.

On July 31, 2012, a Notice of Delinquent Assessment Lien was recorded against the Property by Nevada Association Services, Inc. ("NAS"), as agent for Tuscalante Homeowners Association ("Tuscalante"). I:WFZ0046. On January 30, 2013, a Notice of Default and Election to Sell under Homeowners Association Lien was recorded. I:WFZ0048-0049. On May 7, 2013, a Notice of Foreclosure Sale was recorded. I:WFZ0051-0052. The HOA Sale apparently occurred on May 31, 2013, whereby K&P purchased its interest in the Property for $40,000.00. On June 4, 2013, a Foreclosure Deed was recorded by which K&P claims its interest. I:WFZ0054-0056.

The Property, and any HOA lien thereon, is subject to Tuscalante's

Declaration of Covenants, Conditions, and Restrictions ("Tuscalante CC&Rs"), recorded on January 9, 2007. I:WFZ0058-0136. Section 4.10 of the Tuscalante CC&Rs expressly provides that first deeds of trust maintain priority over an HOA Assessment Lien: "**the lien of the assessments provided for herein shall be subordinate to the lien of any previously recorded first Mortgage upon one or more Lots**." I:WFZ0094 (emphasis added).[3]

On August 12, 2015, Christiana filed a quiet title action against K&P. I:WFZ0001-0137. On September 10, 2015, K&P filed an answer and counterclaim against Christiana and third party claim against Wiegand. I:WFZ0138-0152. Christiana moved to dismiss K&P's Counterclaim. I:WFZ0153-0180. K&P filed a Response to the Motion to Dismiss and a Countermotion for Summary Judgment. III:WFZ 430-0536 and II:WFZ0323-0429.

On November 9, 2015, Judge Jones entered an Order granting Christiana's Motion and denying K&P's Countermotion, on the basis that SFR should not apply retroactively. III:WFZ0537-0548. Thereafter, K&P filed a Motion for Reconsideration Pursuant to F.R.C.P. 60(b) (IV:WFZ0549-0698), which Judge Jones denied on December 3, 2015. IV:WFZ0699-0702. On January 6, 2016, K&P

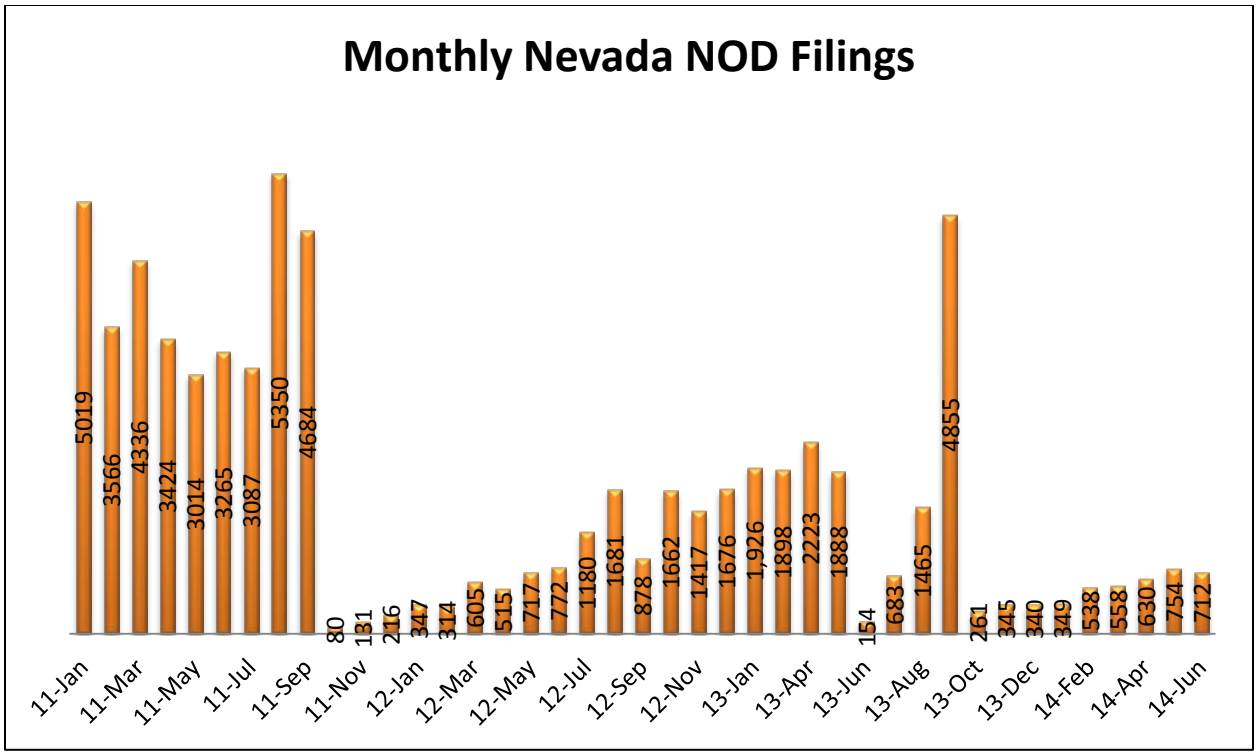
[3] Citations refer to Respondent's Appendix and indicate the Volume in Roman numerals and Bates-stamped page number where the material may be found. Citations to documents of which this Court may take judicial notice, refer to Respondent's Addendum by the exhibit number where it may be found—e.g., "ADD:1."

filed a Motion to Certify Question of Law to the Supreme Court of Nevada, specifically regarding whether SFR applies retroactively. IV:WFZ0703-0713. Christiana opposed the motion[4], but Judge Jones nonetheless certified the question to this Court.

This HOA Sale and these court actions came against the backdrop of changes in NRS Chapter 107 by the Nevada Legislature in 2009, 2011, 2013 and 2015, all of which impact, unrecognized by SFR, the ability of first security holders to foreclose. The effects of these amendments are dramatically shown by the bar graph (ADD:51)[5], created from data compiled from the Nevada Foreclosure Mediation Program ("FMP") and Ombudsman.

[4] IV:WFZ0722-0749.

[5] *See also* the tables and article by Nick Timiraos, *Foreclosure Squeeze Crimps Las Vegas Real-Estate Market*, Wall Street Journal, July 9, 2013. (ADD:52)



This hard data directly challenges the assumptions made by the SFR Court.

After SFR was issued, SB 306 went into effect on October 1, 2015, amending Chapter 116 by adding several provisions in response to SFR like a requirement that HOA foreclosure notices be mailed to the holder of a first deed of trust and a limited right of redemption. These amendments were needed because the real estate industry was not prepared for, and had not foreseen, the holdings of SFR.

IV. SUMMARY OF THE ARGUMENT

This Court should find that SFR does not apply retroactively to sales taking place prior to September 18, 2014, because it decided a new principle of law on an issue of first impression whose resolution was not clearly foreshadowed, overruled

past precedent upon which litigants relied, and interpreted the Statute in a manner that was ***contrary*** to both legislative intent and industry interpretation. The SFR Court, in issuing its decision, operated under certain assumptions regarding the Statute, which were contrary to the evidence presented in the federal court by Christiana. Specifically, it assumed:

(1) **That HOAs would provide super-priority lien payoff**, or even a full lien payoff demand to a lienholder prior to the lender's foreclosure[6];

(2) **That HOAs would accept payment of the super lien** prior the lender's foreclosure and not proceed to sale[7];

(3) **That the lion's share of most HOA liens will be the unpaid dues**, which have superpriority status[8];

(4) **That lenders purposefully, en masse, delayed foreclosure of their liens**, and should thus bear the brunt of the loss when an HOA goes to sale[9]; and

(5) **That lenders did not rely upon Mortgagee Protection Clauses** contained in the CC&Rs, many of which were drafted after 1991.

These assumptions are in fact unsupported, as shown by legislative history,

[6] 334 P.3d at 413 and 418.
[7] 334 P.3d at 414.
[8] 334 P.3d at 413, n. 3.
[9] 334 P.3d at 414.

admissions by HOAs and their agents in court documents, court orders, newspaper articles and other judicially noticeable sources. In the face of clear evidence of legislative intent, and how the players in the industry interpreted, relied upon and operated in relation to the Statute, this Court cannot let an interpretation made in the absence of such critical evidence apply retroactively to permit extinguishment for sales occurring before SFR.

The recent foreclosure crisis, and subsequent legislation which caused the slowing of bank foreclosures, led to increased foreclosures by HOAs. This brought about an incredible opportunity for investors to purchase homes at HOA foreclosure sales and rent them for a profit until the bank foreclosed. The ambiguity of the Statute, and the steady stream of rental income, allowed these investors to delay or challenge the bank's subsequent foreclosure on the chance that they could obtain a substantial windfall. In any case, no matter how long litigation took, the rental stream flowed.

Prior to SFR, the idea that buyers at HOA foreclosure sales would obtain an interest superior to the holder of a first deed of trust was simply not anyone's general practice and understanding. To the contrary, since the enactment of NRS 116.3116, the super-priority lien under the Statute was always understood to be a payment priority, triggered by, and calculated in relation to, the foreclosure of a

first deed of trust **which it could not extinguish**.[10] Buyers at HOA foreclosure sales purchased with the understanding that they merely had a quasi-property interest until the bank foreclosed.[11] This was also the understanding of the Nevada Legislature, evident from testimony from legislators and industry leaders, and from the passed and proposed bills and amendments concerning HOA liens and their priority. And it was the understanding of most state district judges and all but two federal district judges, first security holders, lenders and servicers, and HOAs and their collection agents, foreclosure trustees and attorneys.

SFR followed an appeal from a motion to dismiss. As such, there was a very thin record available for the Court's consideration. Nonetheless, as a result of this Court's decision, a properly conducted judicial or non-judicial HOA foreclosure sale conducted from that day forward could extinguish a first deed of trust notwithstanding the fact that this was contrary to the common understanding and expectation. But SFR left unclear how it affected properties sold at HOA sales prior to the decision. The uncertainty this created also put pressure on title insurers, which had previously relied upon Mortgagee Protection Clauses ("MPCs") in the

[10] Id. *See* Section A.1.f, infra, and ADD:3 and 4.
[11] Hubble Smith, *Shrewd Investors Snap up HOA Liens, Rent Out Houses*, Las Vegas Review Journal, March 18, 2013, (ADD:1); Melissa Waite, *The HOA Foreclosure and Priority: Who is in First?*, Communiqué, November 2013, ("Communiqué") (ADD:2).

HOAs' CC&Rs, when insuring first deeds of trust against priority liens.[12] The sweeping changes to the Statute by the 2015 Legislature blunt the effect of SFR going forward, cure the inequities of its application and provide evidence that the decision should not be applied retroactively. However, the status of properties foreclosed upon by HOAs prior to SFR still needs to be dealt with fairly, taking into account the prevailing interpretation of lien priority at that time. This Court now has an opportunity to mitigate the uncertainty and unfairness (and tsunami of litigation) that has flowed and would continue to flow from retroactive application of the principal holdings of SFR.[13]

Judge Jones ruled that SFR should not apply retroactively to permit extinguishment of a first deed of trust by HOA foreclosure sales completed prior to September 18, 2014, such as in this case. In reaching his decision, he evaluated each of the three Chevron factors considered in a civil case to determine if a new

[12] SFR also held that MPCs in CC&Rs recorded after the enactment of NRS Chapter 116 were unenforceable if they conflicted with provisions in NRS 116.3116. MPCs, standard in the majority of CC&Rs before and after the enactment including for Tuscalante recorded in last 2007, generally state that enforcement of the HOA's lien would not impair or render invalid a first deed of trust recorded against the property. *See also* Communiqué, p. 26 and ADD:1, p.2.

[13] While counsel could not locate official statistics for how many HOA super-priority lien cases were filed pre- and post-SFR, counsel's firm was referred 576 HOA lien cases for handling before SFR and 981 in the 21 months since. Extrapolating beyond one of a handful of law firms in the Las Vegas area that handle HOA litigation on behalf of lenders, the number of HOA super-priority cases is easily in excess of 5,000.

rule is applied retroactively: "(1) whether the decision 'establish[es] a new principle of law'; (2) 'whether retrospective operation will further or retard [the rule's] operation' in light of its history, purpose, and effect; and (3) whether [the] decision 'could produce substantial inequitable results if applied retroactively.'" [14] All three factors weighed heavily in favor of non-retroactivity.

This Court should also find, based on the Chevron factors and the evidence presented by Christiana, that SFR should not be applied retroactively to HOA sales occurring before it was decided.

V. ARGUMENT

A. THE FEDERAL DISTRICT COURT PROPERLY CONCLUDED THAT SFR SHOULD NOT BE APPLIED RETROACTIVELY TO PERMIT EXTINGUISHMENT OF CHRISTIANA'S LIEN.

Judge Jones ruled that this Court's interpretation of NRS Chapter 116 (as it existed *prior to* the revisions made by SB 306), should not be applied retroactively to permit extinguishment of a first deed of trust by HOA foreclosure sales completed prior to September 18, 2014.[15] In reaching his decision, he first recognized that the Nevada Supreme Court had itself quoted the three Chevron factors with approval in Breithaupt v. USAA Prop. & Cas. Ins. Co., 867 P.2d 402, 405 (Nev. 1994). K&P argues, at pp. 10-11, that, ordinarily, a court's

[14] 334 P.3d at 412.
[15] 2015 WL 6962860 *5.

interpretation of a statute reflects what the statute has meant from its inception[16] but, in the face of clear evidence of what the Legislature intended, and how the industry interpreted, relied upon and operated in relation to the Statute, this Court cannot let stand a previous, contrary interpretation issued in the absence of this critical information.[17] As observed by the U.S. Supreme Court, in SEC v. Chenery Corp., 332 U.S. 194, 203 (1947),

> Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.…*See* Addison v. Holly Hill Co., 322 U.S. 607, 620 [(1944)].

The question before this Court is whether retroactivity of SFR is the lesser or greater evil?[18] The evidence overwhelmingly shows retroactivity to cause more "mischief" than it cures. Although, as K&P argues, at p. 11, "This Court has the final authority to interpret issues of Nevada law. Danforth v. Minnesota, 552 U.S. 264, 291-92 (2008)," it must do so within the limitations of the U.S. (and Nevada) Constitutions. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 315, (1950), relied on by the SFR Dissent, 334 P.3d at 422.

The pertinent point of Chevron, 404 U.S. at 106-07, is that "the decision to

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[16] *See* Morales-Izquerdo v. Department of Homeland Security, 600 F.3d 1076, 1087-1088 (9th Cir. 2010).
[17] Montgomery Ward & Co. v. FTC, 691 F.2d 1322 (9th Cir. 1982), *citing to* SEC v. Chenery Corp., 322 U.S. 194, 203 (1947).
[18] Addison, 322 U.S. at 622.

be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied (citation omitted), ***or by deciding an issue of first impression whose resolution was not clearly foreshadowed*** (citation omitted)." (Emphasis added.) SFR was not clearly foreshadowed because all the players in the industry treated the HOA lien as a payment priority not capable of extinguishing a first deed of trust, and no Nevada Courts prior to 2012 had ever addressed the issue. Even SFR recognized, "Nevada's state and federal district courts are divided on whether NRS 116.3116 establishes a true priority lien."[19]

1. The First Chevron Factor Weighs In Favor Of Prospective Application Only Because SFR Decided An Issue Of First Impression Whose Resolution Was Not Clearly Foreshadowed.

Judge Jones found the first factor weighed heavily in favor of non-retroactivity, stating,

> It is not disputed that both state and federal trial courts were in sharp disagreement as to whether an HOA foreclosure sale under NRS 116.3116 extinguished a prior-recorded first mortgage...[and that] the practice in the real estate industry prior to the announcement of [the SFR decision] was to treat such sales as not extinguishing first mortgages, such that traditional investors would not bother to bid at such sales where the home was worth less than the first mortgage.[20]

Thus, SFR was not clearly foreshadowed and should not apply retroactively.

[19] 334 P.3d at 412.
[20] 2015 WL 6962860 *4.

While lenders[21] such as Christiana have had constructive notice of the Statute, none of the participants (lenders, HOAs and third party buyers) could foresee that the Statute could permit extinguishment of a first deed of trust prior to SFR. For over two decades, all believed that the first mortgage survived the HOA's non-judicial foreclosure. The belief was so pervasive that most CC&Rs contain mortgage protection clauses that protect deeds of trust from extinguishment. Furthermore, there was no debate about the lien priority of the HOA lien as no court prior to 2012 had ever addressed the issue. In 2012, BAC Home Loans Servicing sued ten HOAs and six collection agents for a declaratory judgment to allow them to pre-pay the super-priority lien, and the HOA and HOA Trustees admitted that the HOA super-priority lien was not even "triggered" until the first security holder foreclosed.[22]

These observations show the radical departure from the expectations of the parties affected by HOA sales. Additionally, the recently enacted SB 306, amending the Statute to include mandatory notice to lenders and a right of redemption, demonstrates the Legislature's recognition of the infirmities of the

[21] Christiana uses "lender" to include the original lender, or a subsequent investor, servicer, or beneficiary of the deed of trust.

[22] *See* Stonefield Leach MTD at 4:7, 8:14-18, 9:25-28. (ADD:3) *See also* Arbitration Order, which followed that case, at p. 4 ("All parties to this matter seem to agree that a super-priority lien attaches or is "triggered" when the first deed of trust holder forecloses upon its deed of trust."). (ADD:3(a))

Statute as interpreted by SFR.

a. The overwhelming majority of State and Federal court decisions prior to SFR showed that the ability of an association lien to extinguish a first deed of trust was not clearly foreshadowed.

Prior to SFR, most Nevada courts ruled that foreclosure sales pursuant to NRS 116.3116 *et seq*. did not eliminate a first deed of trust and NRS 116.3116(2) merely created payment priority liens. A representative sample of these cases appears at ADD:12(a)-(bb). These included federal Judges George, Dawson, Hicks, Jones, Navarro and Mahan and state Judges Herndon, Early, Glass, Walsh, Gonzalez, Denton, Silver, Williams, Villani, Barker, Tao, Johnson, Miley, Delaney, Allf, Israel, and Wiese. Indeed, Judge Dawson commented, in Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, 2013 U.S. Dist. LEXIS 112590*8, "Every federal court in this district to decide this issue has held that an HOA's super-priority lien does not extinguish a first position deed of trust." The notable exception was the *later* decision by Judge Pro in 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 2013 WL 5780793 (D. Nev. Oct. 28, 2013), which was also issued *after* the HOA Sale in the instant case occurred May 31, 2013.

b. Other UCIOA States' decisions prior to SFR also showed that the ability of an association lien to extinguish a first deed of trust was not clearly foreshadowed.

SFR ran contrary to statutes and decisions in other Uniform Common

Interest Ownership Act ("UCIOA") States, which concluded that a non-judicial HOA foreclosure sale cannot eliminate a senior deed of trust. Colorado, Connecticut, Delaware, Vermont, Alaska, and West Virginia—six of eight UCIOA jurisdictions—did not allow a non-judicial HOA foreclosure sale to eliminate a senior deed of trust, and only allow an HOA to foreclose its super-priority lien judicially or "like a mortgage on real estate."[23] Minnesota, the seventh state, did not give HOA assessment liens a super-priority unless a senior lienholder forecloses.[24] The sole exception was the D.C. Court of Appeals' decision three weeks before SFR in Chase Plaza Condo. Ass'n, Inc. v. JPMorgan Chase Bank, N.A., 2014 WL 4250949 (Aug. 28, 2014), which permitted extinguishment. However, due to the closeness in time to SFR, and distant location—in contrast to decisions from courts in California, other neighboring jurisdictions and the Ninth Circuit regularly cited by Nevada courts—it was not reasonable that participants in the Nevada industry, operating under Nevada statutes, would have taken it as clearly foreshadowing the SFR interpretation of the Statute.

When SFR was *argued*, no jurisdiction had adopted a rule that a non-judicial foreclosure of an HOA lien could (1) have super-priority effect; and (2) extinguish

[23] Colo. Rev. Stat. § 38-33.3-316 (11)(b); Conn. Gen. Stat. § 47-258 (j); Del. Code Ann. Tit. 25, § 81-316(j); Vt. Stat. Ann. Tit. 27A, § 3-116(j); Alaska Stat. § 34.08.470 (j); W. Va. Code § 36B-3-116 (f).
[24] Minn. Stat. § 515B.3-116.

a deed of trust. In fact, only Washington, **a non-UCIOA jurisdiction**, allowed for non-judicial foreclosure of a HOA lien.[25] In Summerhill Vill. Homeowners Ass'n v. Roughly, 289 P.3d 645, 649 (Wash. Ct. App. 2012), the court found that because a lender did not respond to a *judicial* HOA lien foreclosure, it lost a first security interest in the property. **The Washington law was in sharp contrast to the Nevada statute**. Washington provided that if an HOA chose to enforce its super-priority lien, **it must foreclose *judicially*, or its super-priority was waived**.[26] Just over a year after the Summerhill decision, the Washington Legislature revised its statute to provide a *right of redemption* and *right to a payoff demand* for lienholders[27]—unlike Nevada's statute at the time of SFR—and clarify and support the idea that first position lienholders had protection under the statute as applied.[28] Consequently, the Summerhill case and rule of extinguishment, relied upon by the SFR Court, had no applicability to the Nevada statutory HOA lien foreclosure scheme and could not have foreshadowed a similar result in Nevada.

c. The continued inclusion of mortgagee protection clauses after the adoption of the UCIOA in NRS 116.3116 demonstrates the HOAs' belief and intention that first deeds of trust would not be extinguished by HOA lien sales.

The CC&Rs for many HOAs, **including Tuscalante in the instant case**,

[25] Wash. Rev. Code Ann. § 64.34.364.
[26] Wash. Rev. Code Ann. § 64.34.364(5).
[27] Wash. Rev. Code Ann. § 64.34.364(9) and (15).
[28] RCW 6.23.010(1)(b), 2013 Wash. Sess. Law Ch. 53.

contain mortgagee protection or savings clauses ("MPCs"), which explicitly protect the superior lien position of the first deed of trust. MPCs were routinely found in CC&Rs *after* the adoption of the UCIOA in NRS 116.3116 *et seq.* in 1991. Some MPCs reference that statute but still provide for either a prohibition towards any enforcement which would "defeat or render invalid" the mortgagee's rights[29], or a subordination of the HOA's lien to the first mortgagee.[30] [31] Thus, pre-SFR CC&Rs demonstrated that HOAs believed first deeds of trust were protected by the law and CC&Rs, and, understandably, lenders relied on them. But, as with extinguishment through nonjudicial sales, the determination in SFR that MPCs violated NRS 116.1104 and could not be enforced (at least if recorded after January 1, 1992, the effective date of NRS 116.3116 (1991)), was not clearly foreshadowed and ran contrary to the clear expectation of *all* parties.

Retroactive application of SFR does more than neutralize MPCs. Viewed as a contract or a covenant running with the land, MPCs were the manifest expression of an understanding and assurance by HOAs to lenders which fund loans that deeds

[29] *See* The Parks HOA CC&Rs, recorded in 2000, 5.08 Mortgage Protection (ADD:12(b)); Hartridge HOA CC&Rs, recorded in 2004, Section 11 Rights of Mortgagees. (ADD:12(c))

[30] *See* D'Andrea HOA CC&Rs, recorded in 1999. Article XIV Protection of Mortgagee, Section 14.01 Assessment Lien Subordinated. (ADD:12(a)); and Canyon Springs HOA CC&Rs, recorded in 2005, 4.10 Priority of Assessment Lien (ADD:12(d))

[31] Some examples of MPCs prior to SFR appear in the Addendum at ADD:12(a) - 12(j).

of trust are protected from loss through HOA foreclosure sales. Until SFR, no one had any reason to expect the courts would not defer to the manifest expression of the parties' understanding. Retroactive application of SFR eviscerates the contract and covenant that lenders had relied upon to fund every loan within the community. Such a seismic shift away from precedents cannot be characterized as anything but unforeseeable.

While typically there is no direct bargained-for exchange between HOAs and lenders regarding the terms of the CC&Rs, the inclusion of MPCs indicates that lenders were intended third party beneficiaries. MPCs assured lenders that their interests would be protected from extinguishment in any lien sales and incentivized them to lend to potential purchasers of units in the HOA community, most of whom required loans to make their purchases. Importantly, even though the Statute creates the lien priority, HOAs do not have to invoke that priority against first security holders where there are MPCs; they could foreclose a sub-priority lien as proposed by the SFR Dissent. HOAs that assert superiority over the first deed of trust *deliberately choose* to violate the MPCs.

As a matter of public policy, HOAs should be able to contract around the Nevada lien priority statute. The MPCs clearly *benefit* the HOAs because they enable the purchase of units, thus funding the HOA to allow it to function for the benefit of all members and avoid having to "increas[ing] the assessment burden on

the remaining unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities)."[32] The MPCs thus contrast with provisions of declarations which, for example, require unit owners and the association to submit construction defect claims against responsible contractors under NRS Chapter 40 to mandatory, binding arbitration because those provisions clearly are against public policy as they act to the detriment of the owners and the associations.

Many sections of Chapter 116 (2013) recognize that an HOA only has as much power as it grants itself in its CC&Rs. NRS 116.3116(1) provides, "*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." (Emphasis added.) NRS 116.3116(3) provides, "*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." (Emphasis added.) And NRS 116.31164(2) provides, "*Unless otherwise provided in the declaration or by agreement*, the association may purchase the unit and hold, lease, mortgage or convey it…." (Emphasis added.) The CC&Rs provide for mortgage protection, and they should be enforced because they form the bounds of the HOA's right to

[32] 334 P.3d at 414, quoting JEB, "The Six-Month "Limited Priority Lien," at 5-6.

foreclose.

Notably, even MPCs recorded *after* SFR provide for subordination. For example, the CC&Rs for Savona, recorded May 8, 2015, Section 7.8, "Mortgagee Protection," (ADD:13(a)) states both that its liens "shall [not] defeat or render invalid the rights of the Beneficiary," and "shall be subordinate to the lien of any First Mortgage." The continued use of MPCs demonstrates that HOAs understand it is in their best interest to assure lenders their security interest is protected, SFR notwithstanding.

On the other hand, some HOAs recording CC&Rs after SFR eliminated or severely limited lien protection for mortgagees—because SFR altered the industry's and the HOAs' understanding of lien priority. For example, the CC&Rs for Altura, recorded May 18, 2015, contain **no reference** to "mortgage protection" or "mortgage savings" and priority is determined in accordance with NRS 116.3116(2) in Section 6.15(a). (ADD:13(b)) There is some limited protection under Section 10.1, "Effect of Amendment on Rights of Mortgagees," but that protection is not directed at lien priority. Even the seemingly straightforward MPC in the Savona CC&Rs above may be limited by Section 13 therein, which provides no mortgagee lien protection other than requiring the HOA to send a 30-day notice when the homeowner defaults. (ADD:13(a))

CC&Rs with MPCs after 1991 reinforce the view that before SFR, HOAs

with MPCs intended to subordinate their liens to first deeds of trust and lenders relied on that promise. Changes in CC&Rs after SFR underscore that point. That aspect of SFR rejecting their enforcement should not be given retroactive effect. Moreover, the existence of MPCs, and the parties' reliance thereon in entering into the loans, require limiting the SFR extinguishment rule to prospective application.

d. The legislative history demonstrates the Legislature's belief and intention that the first deeds of trust would not be extinguished by an association lien sale.

Testimony from the Legislature and amendments to NRS 116.3116 support Christiana's assertion that the SFR decision permitting extinguishment was not clearly foreshadowed.

At the time NRS 116.3116 was adopted in 1991, UCIOA (1982) required that HOA lien foreclosures be done in accordance with traditional foreclosures requirements in the state, and so did NRS 116.3116.[33] But the version of NRS 116.3116 in place at the time of SFR (and prior to the amendments of SB 306), follows from the radical revision passed by the 1993 Legislature that removed the notice requirements and ability to cure found in non-judicial foreclosures under NRS 107.080 and created the variant foreclosure scheme under NRS 116.31163.

[33] UCIOA (1982) provided at § 3-116(j)(4): "The association's lien may be foreclosed as provided in this subsection: … (4) In the case of foreclosure under [insert reference to state power of sale statute], **the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected**." (Emphasis added.)

Unlike UCIOA (1982) § 3-116(j)(4), in Nevada, the HOA can bring a judicial foreclosure action; assert its super-priority lien on a foreclosure under a deed of trust; or non-judicially foreclose under the unique procedures in NRS 116.3116 *et seq*. But none of these options mandate extinguishment of the first deed of trust. When the first security holder is no longer required to get notice of the sale, and is no longer expressly permitted to cure the deficiency, due process is violated. On the other hand, if the first security holder's interest cannot be extinguished by the HOA foreclosure, that lienholder's due process rights are not violated by the removal of rights to notice and cure.

NRS 116.3116(2)(c) was amended by AB 204 in 2009.[34] In its original form, AB 204 extended the period of priority from six months to two years, but this provision was reduced to nine months. Extending the priority period was "necessary…because foreclosures are now taking up to two years. At the time the original law was written, they were taking about six months."[35] The "super-priority" treatment of the dues thus went hand in hand with the foreclosure of the first deed of trust. Differing treatment of six or nine or 24 months of delinquent dues only makes sense if the first deed of trust remains in first position. *All* the delinquent dues would be protected if the first deed of trust could be displaced

[34] *See* 2009 Nev. Stat., p. 1207.
[35] *See* Hearing Minutes, AB 204, March 6, 2009, Assemblyperson Ellen Spiegel, p. 34. (ADD:14).

from its first position and extinguished. **Extending the priority period to protect the HOAs would have been unnecessary if HOAs could simply foreclose on their super-priority lien before a senior deed of trust beneficiary foreclosed and extinguish the deed of trust.**

K&P argues, at 23-24, that CCICCH Advisory Opinion No. 2010-01 gave notice to lenders that the first deed of trust could be extinguished, but nothing in the quoted passage even mentions that possibility. While it may be "abundantly clear that Lenders and Fannie Mae were involved in the drafting of the UCIOA and its amendments," that involvement was limited to the 6-months versus 9-months debate.[36]

In 2011, Nevada's legislature again considered amending NRS 116.3116(2)(c) with SB 174.[37] Michael Buckley, Chair, Commission for Common-Interest Communities and Condominium Hotels, testified regarding the 2009 amendment to NRS 116.3116(2)(c), and explained super-priority liens: "The [UCIOA] was adopted wherein, if a first mortgage holder forecloses on a common-

[36] *See* Hearing Minutes, AB 204, March 6, 2009, Michael Buckley, p. 44; March 6, 2009, Assemblyperson Ellen Spiegel, p. 45 (ADD:14); March 25, 2009, Bill Uffelman, pp. 36-37(ADD:15); April 29, 2009, Assemblyperson Ellen Spiegel, pp. 17-19 ("I understand there are regulations or requirements that say for loans Fannie Mae and Freddie Mac underwrite, there is no more than a six-month super priority associated with that….Fannie Mae and Freddie Mac's Federal regulations take precedence over Nevada law."). (ADD:16)

[37] *See* Hearing Minutes, SB 174, February 24, 2011, p. 4. (ADD:17).

interest community (CIC) unit, the association can be paid six months of the dues owed, which is called superpriority."[38] In later hearings, he again explained, "The association can only get the super priority lien if there is a foreclosure by the first mortgage."[39] Senator Allison Copening testified regarding the existing state of the law, and the meaning of "super-priority," "When a bank forecloses, the super-priority letter from an HOA, asking for up to nine months of the assessments and collection costs for the association, goes to the first security lien holder. The lender complies and then pays the association."[40]

In 2013, Nevada's Legislature again considered amending NRS 116.3116 with SB 280. In the Minutes of May 17, 2013 before the Assembly Committee on Judiciary, 77th Session, pp. 65-68, it was acknowledged by Chairman Frierson that there had been a move to amend NRS 116.3116 to provide that a HOA foreclosure sale would extinguish the first deed of trust. Instead the committee adopted an amendment that expressly provided, in Section 15(5), "'The foreclosure by sale of the super-priority lien does not extinguish the first security interest.' A purchaser of the lien at the foreclosure sale acknowledges they are buying subject to the first security interest or the record deed of trust." SB 280 (R1) with the amendments

[38] Id., February 24, 2011, Michael Buckley, p. 4. (ADD:17)
[39] *See* Hearing Minutes, SB 174, May 17, 2011, p. 12. (ADD:18)
[40] *See* Hearing Minutes, SB 174, June 4, 2011, Senator Copening, p. 22. (ADD:18(a))

discussed that day was then passed unanimously. The amendment was an "attempt[] to clarify that it does not extinguish the first, but sets up a priority system for the HOA to be made whole at the beginning for their assessments and abatements and at the end when it is sold for the cost of collections," because Chairman Frierson and several other legislators had been "receiving phone calls from judges, attorneys, and lenders regarding the uncertainty of title in this dilemma during the last couple of years, this language was something that could address it, and this vehicle was an appropriate and germane way to do it."[41] [42]

The proposed and passed amendments show the Legislature's view that the first deed of trust had priority over the HOA lien and would not be extinguished by the HOA foreclosure sale.

Legislation regarding Cap on HOA Trustee Fees

One of the assumptions in SFR was that the "lion's share of most HOA liens would be unpaid dues, which have superpriority status.…This does not make NRS 116.3116(2)(b) superfluous as U.S. Bank suggests … [i]t simply reflects the policy

[41] Hearing Minutes, SB 280, May 17, 2013, pp. 82-83. (ADD:19)
[42] Part of SB 280 was enacted and went into effect October 1, 2013. NRS 116.31162 was amended to add subsection 6, which provided that the HOA could not foreclose its lien on owner-occupied housing if the holder of the first deed of trust or its successors or agents had recorded a notice of default and election to sell, proceeded through the FMP and recorded the certificate permitting it to foreclose under NRS 107.086(2)(d)(1) or (2).

choices underlying the statute as structured."[43] However, the amount of the HOA lien is actually typically much higher than the 9-month super-priority amount, so much so that legislation and regulations have been promulgated multiple times to put a limit on collection fees charged by an HOA or its collection agent.[44] The outrageous collection fees being charged were well-documented in the local newspapers.[45] Consideration of AB 350 in 2009, and SB 174 and SB 243 in 2011, involved efforts to curb disproportionately high collection fees being charged by HOAs and their agents, with proposed limits ranging from $1,950 to $3,300.[46] In the instant case, for example, the amount of the monthly assessments was $49.25

[43] 334 P.3d at 413, n. 3.

[44] *See* Hearing Minutes, AB 350, March 25, 2009, at pp. 3-5, and Exhibit F (eliminates HOA's ability to foreclose; opponents cited extremely low number of completed foreclosures making the bill unwarranted) (ADD:20); *see* Adopted Regulation of the Commission for Common-Interest Communities and Condominium Hotels, LCB File No. R199-09, Effective May 5, 2011 (ADD:21); and *see* Hearing Minutes on SB 174, February 24, 2011, pp. 10, 14-18 (discussing "imaginary" and "egregious" fees). (ADD:17); Hearing Minutes, SB 243, March 24, 2011 (ADD:22); and *see* Buck Wargo, *Regulators propose cap on HOA collection fees*, March 25, 2010 (ADD:23); John G. Edwards, *Bills would cap fees collectible in HOA cases,* Las Vegas Review Journal, February 24, 2011 (ADD:24); David McGrath Schwartz, *Bill to cap collection fees when HOA bills are past due stays alive*, Las Vegas Sun, June 5, 2011 (ADD:25); and *see Witnesses call Homeowners groups 'Gestapo,' 'cartels'*, Las Vegas Review Journal, February 26, 2011 (homeowner reports $3,300 in collection fees for $78.24 delinquent assessment) (ADD:26).

[45] *See* id.

[46] *See* Hearing Minutes, SB 243, March 24, 2011, p. 14. (ADD:22)

per month[47], which would have made the super-priority lien equal to $443.25.[48] However, the total lien foreclosed upon by Tuscalante was at least $3,942.29.[49] The "lion's share" of the lien foreclosed upon was non-priority amounts of approximately 88%. Thus, the assumption by the Majority in SFR, that the lender would not be prejudiced by paying the total lien and seeking reimbursement, was incorrect because the super-priority portion is regularly a small fraction of HOAs' liens. More importantly, HOAs would not give payoffs or accept payoffs of the super-priority lien[50] so lenders could not be assured that they would be reimbursed for any overages. Is it really to be expected that the very HOA that refused to give a super-priority lien payoff or accept its tender would turn around after payment of the full lien claimed and reimburse the excess just because the lender asked?

This legislative history of NRS 116.3116 and related bills prior to SFR demonstrates that even the Legislature treated the HOA super-priority lien as not

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[47] *See* NAS account ledger dated 7/1/2012, marked as K&P00038, attached as Exhibit 1 (p. 19) to Opposition to Motion by K&P Homes to Reopen Chapter 7 Case and Retroactively Annul the Automatic Stay, filed by Christiana in U.S. Bankruptcy Court Case No. 12-12508-mkn, concerning the Property and the bankruptcy of Lynn C. Burke, co-owner with Christiana's borrower, Wiegand. (ADD:49)

[48] *See* Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35 (April 28, 2016) ("Ikon") (holding that an HOA's super-priority lien is equal to exactly nine months of assessments and does not include any costs of collection).

[49] Notice of Foreclosure Sale, dated May 1, 2013. (I:WFZ0051-0052)

[50] *See* Section A.1.e, infra.

arising until the bank foreclosed. It demonstrates that the "super-priority lien" merely allowed HOAs a payment priority after a first security holder forecloses. So why should the lenders be penalized for sharing that same belief?

e. The industry standard and public perception was consistent with recognition that super-priority liens enjoyed payment priority only and not the ability to extinguish a first deed of trust.

Prior to SFR, the idea that buyers at HOA foreclosure sales would obtain an interest superior to the first security holder was simply not the general practice and understanding of the parties in the industry. Buyers of properties at HOA foreclosure sales purchased with the expectation that they receive a quasi-property interest until the bank foreclosed.[51] These buyers who purchased properties for a couple thousand dollars would rent the properties out and recoup their investment multiple times over until the bank, delayed by its compliance with consumer protection laws, foreclosed several months or years later. When the bank foreclosed, if it had not already tendered an HOA payoff, it was understood that the HOA would be paid its super-priority lien out of the deed of trust foreclosure sale proceeds prior to the proceeds satisfying the bank's lien.[52] Everyone treated the HOA's super-priority lien as a payment priority, rather than a true priority lien.

[51] *See* footnote 8, supra.
[52] *See* Leach MTD at 4:4-10. (ADD:3)

Newspaper and Journal Articles Reflect the Understanding in the Industry

In addition to articles cited from the Las Vegas Review Journal and the Las Vegas Sun, the Clark County Bar Association's official publication, the Communiqué, also featured an article in its November 2013 issue (less than a year before SFR), specifically addressing the understanding of the industry regarding super-priority liens prior to SFR. The article demonstrated the assumptions relied upon by the SFR Court regarding super-priority liens were incorrect and offered some important statistics:

- FYE June 30, 2012—2,913 Notices of Sale by HOAs, with 244 properties sold to third party bidders.[53]
- FYE June 30, 2013—3,811 Notices of Sale by HOAs, with 1,151 properties sold to third party bidders.
- Typical sales price $3,000- $12,000.

The Communiqué recognized that the lenders relied upon the customary course of dealing in Nevada regarding HOA foreclosure sales and upon subordination or mortgagee protection clauses as a "belt and suspenders protection," leaving a borrower's failure to pay property tax as the primary threat

[53] Compare to July 1, 2008-December 2008, 543 Notices of Sale by HOAs, with 18 total properties foreclosed. *See also* Hearing Minutes, AB 350, March 25, 2009, Exhibit J-4, Michael E. Buckley. (ADD:20)

of extinguishment of their deeds of trust.[54] In fact, the superiority of the first deed of trust was deemed so pervasive that "title companies routinely issue[d] to banks a lender's title insurance policy insuring a first position security interest subject to few exceptions and not specifically including amounts payable to an HOA."[55]

The Communiqué also recognized that prior to SFR, "[b]anks were seemingly unaware of any ambiguity in the [Nevada] UCIOA, **as were third party bidders** who historically were rarely willing to pay much more than the amount owed to the HOA, presumably because it understood they would not be acquiring the property free and clear of liens," and that "all of those concepts which historically seemed to be so widely accepted and never before questioned, are now being examined [referring to the mass litigation leading up to SFR]."[56]

Lastly, the Communiqué also corroborates Christiana's assertion that the widespread industry understanding that lenders' attempts to obtain super-priority lien payoffs and to tender payoffs were thwarted by HOAs and collection agents who refused to comply.[57]

Admissions by HOAs and Trustees

Even the HOAs and their collection agents held the belief that the HOA's

[54] Communiqué, p. 26.
[55] Id.
[56] Id. p. 27.
[57] Id. p. 28.

super-priority lien was a payment priority, as they refused to provide super-priority lien payoffs to lenders. Prior SB 280 (2013), and arguably not until SB 306 (2015), there was no provision in the Nevada Revised Statutes regarding the right of a lienholder to obtain a payoff demand from an HOA or the duty of an HOA to accept a payoff of the super-priority lien. **HOAs and their agents routinely argued that the super-priority lien could not be calculated except in relation to a deed of trust foreclosure.** In 2011, BAC Home Loan Servicing ("BAC"), sued **ten HOA's and six HOA trustees** ("HOA Defendants")[58] for a declaration that BAC had the right to pre-pay the super-priority lien, prior to its foreclosure of a property. BAC Home Loans Servicing, LP v. Stonefield II Homeowners Association, et al. ("Stonefield"), 2011 U.S. Dist. LEXIS 83228. There, the HOA Defendants had refused to provide super-priority lien payoffs to BAC prior to BAC's foreclosure of the property. The parties also disputed whether late fees, interest and collection costs were included in the super-priority lien. The HOA Defendants claimed that BAC's attempt to pre-pay the super-priority lien was a

[58] The HOA Defendants included some of the largest HOA trustee organizations at the time, which were Leach Johnson Song & Gruchow, NAS, Red Rock Financial Services, Terra West Property Management, Homeowner Association Services, Inc., and Phil Frink & Associates, Inc., which, combined, serviced over a thousand HOAs throughout Nevada.
Additionally, reference to BAC is particularly relevant in this case as its successor, Bank of America, is Christiana's predecessor in interest, and was the beneficiary of record at the time that Tuscalante foreclosed and K&P took title.

"**cooked up a scheme**,"[59] and justified their refusal to accept on an interpretation of NRS 116.3116, shown by their admissions:

- "The Super Priority Lien is **triggered** by foreclosure of the first deed of trust." 4:7 (emphasis in the original). *See also* 9:25-28.
- "If the first trust deed holder takes title to the property at the foreclosure sale, the Association's lien is extinguished except for the Super Priority portion of the lien, which survives foreclosure and entitles the HOA to recover that amount from the lender." 4:7-10.
- "BAC's attempt to prepay the Super Priority Lien is based upon a fundamental misunderstanding of NRS Chapter 116 and the foreclosure process." 7:18-21.
- "NRS 116.3116 does not provide [BAC] the right to settle the amounts owing under the Super Priority Lien in the absence of a foreclosure." 7:27-28.
- "[I]f [BAC] does not foreclose its interest then there is no cognizable reason to analyze NRS 116.3116(2)(c) because there is no priority analysis." 8:3-8.
- "Simply stated, the Super Priority Lien cannot be calculated unless a first security interest is foreclosed and the relevant 9 month period determined." 9:11-19; and *see* 9:21-24.
- "Accordingly, it is absurd for [BAC] to assert that it is entitled to 'prepay' an association's Super Priority Lien when, as here, [BAC] has failed to initiate an action to enforce its lien as required by NRS 116.3116…." 10:22-26.

Similarly, Alessi & Koenig, LLC ("Alessi"), another prominent HOA collection agent, often sent a letter in response to lenders' requests for a super-priority lien payoff that "the nine-month super-priority is not triggered until the beneficiary under the first deed of trust forecloses," and thus lacked the ability to

[59] *See* Leach Johnson's Motion to Dismiss filed as ECF No. 71 ("Leach MTD"), at 3:18-21. (ADD:3)

extinguish a deed of trust.[60]

Senate Bill 280 in 2013

Effective October 1, 2013, SB 280 amended Chapter 116 to include a provision allowing a holder of a first deed of trust to request a "statement of demand" from an HOA or its collection agent. At least NAS, the self-proclaimed largest assessment collection agency in Nevada, handling collection accounts for 1,100 Nevada HOAs, resisted and argued the amendment applied only to resales of units.[61]

Just prior to the enactment of SB 306, a question regarding the effect of the failure of an HOA to provide a payoff demand on the HOA's foreclosure was a certified question to this Court in GMAC Mortgage, LLC v. Keynote Properties, LLC, et. al., Nevada Supreme Court Case No. 65260 ("GMAC"). (ADD:4) While this Court ultimately declined to answer the certified question, the briefs of the parties reveal the understanding of industry players regarding their relative rights

[60] *See* Exhibit E to BAC's Motion for Summary Judgment, filed in Eighth Judicial District Court, Case No. A-13-685172-C (letter from Alessi to BAC Home Loans Servicing. (ADD:27). *See also* Exhibit F to Plaintiff's Reply in Support of Motion to Dismiss and Opposition to SFR's Motion for Summary Judgment, filed in the District of Nevada, Case No. 3:15-cv-00241-RCJ-WGC (letter from Alessi to HOAs regarding guaranteed sales to third parties). (ADD:28)

[61] *See* NAS's website at www.nas-inc.com, front page and http://www.nas-inc.com/pdfs/5903960r.pdf (ADD:29).

and duties in relation to the Statute and the super-priority lien.[62] Christiana adopts the position taken by the lender in GMAC.

In GMAC, Peccole Ranch Community Association ("Peccole") and NAS refused to provide a payoff statement to the lender. In their Answering Brief, Peccole and NAS insisted, as did other HOAs and collection agents, that they did not have a duty to provide payoffs or accept payoffs from anyone other than the homeowner:

- NAS argued that NRS 116.4109(7) "only applies when an owner resells a unit and does not apply to HOA lien foreclosures." (p. 22)
- The "HOA Board and NAS were acting pursuant to their duties under the Statute because none of the FDCPA [Fair Debt Collection Practices Act] exceptions apply to the rule barring communications with third-parties, such as GMAC.… Therefore the Court should not require [them] to participate in conduct…which… may expose the Board or the Association to liability for violation of the FDCPA by discussing debts of the Borrower with third-party, GMAC." (p. 29)
- "There is no provision within the Statute [NRS 116.3116] which requires or permits the HOA to: (1) determine a super-priority amount of the Lien, (2) bifurcate the HOA's Lien, (3) respond to junior lien holder's inquiries, or (4) accept a partial Lien payment on the Lien, and then (5) release only a portion of the Lien." (pp. 18, 21; and *see* p. 25)
- "The Statute ensures that when a lender forecloses a first security instrument, that the HOA gets paid at least portion [sic] of its delinquent assessments. (p. 19)

NAS's policy to refuse to provide payoff demands extended to a flat out refusal to accept partial payments, which practice continued *after* SFR. On June 2,

[62] *See* Respondent's Answering Brief, filed on May 14, 2015, by NAS and Peccole. (ADD:30).

2015, in response to a trial subpoena in a different case, NAS's corporate counsel, Christopher Yergensen, testified regarding NAS policies and procedures and requests for payoffs.[63] He first testified, "The policy of NAS [in June 2011] was to not disclose the nature of the debt in violation of the Federal Debt Collection Practices Act unless there was written consent from the debtor"; it was NAS's policy "to provide nothing" to the lender, not even the full lien amount, with all collection costs and fees.[64] If something less than the full amount of the lien, plus all collection fees and costs was tendered, NAS would go forward with the sale—which "policy has been in effect since before my time, and it still stands today, because most of our contracts do not provide for a [sic] application of partial payments."[65] Finally, he testified,

> The policy of NAS in June of 2011 was, if a letter from Miles Bauer came that claimed to be payment in full of the super priority amount … and it did not pay the amount that we believed to be the true amount, then NAS rejected it and simply handed it right back to the process server, typically…. And that—**that policy still exists today**, sir.[66]

Under these policies in place through at least June 2015, tender of the super-priority portion of the HOA lien to NAS, handling collections for nearly 1/3 of the

[63] *See* Excerpts of the Transcript of Proceedings in Case No. A-13-681541-C, June 2, 2015, at 34:2-7; 35:10-11; 35:20-25; 36:1-5. (ADD:32)
[64] Id. at 57:2-15.
[65] Id. at 60:23-61:18.
[66] Id. at 62:10-63:1 (emphasis added).

HOAs in Nevada, would have been an exercise in futility.[67]

With all parties treating the HOA's super-priority lien as a "payment priority" for over 20 years since the enactment of NRS 116.3116 *et seq.*, the SFR decision was clearly *not* foreshadowed and should not be applied to HOA foreclosure sales *prior* to the decision.

f. Permitting extinguishment of first deeds of trust is contrary to public policy concerning homeowner protection from foreclosures.

SFR suggests that lenders intentionally delayed foreclosure, and, thus, loss of the first deed of trust is justified.[68] But this assertion did not consider the many requirements implemented as a result of the FMP (2009) (NRS 107.086), AB 284 (2011) (NRS 107.080), SB 321, also known as the Homeowners Bill of Rights ("HOBR") (2013) (NRS 107.086, NRS 107.040 *et seq.*, and 107.050 *et seq.*), and other consumer protection legislation which significantly lengthened the foreclosure process without regard to the lender's intent. By their very terms, these new requirements legislatively imposed a slow-down on the bank foreclosures—*as*

[67] SB 306 corrected these "ambiguities" left by SB 280 and required the HOA to provide payoffs and accept a lender's tender of the super-priority lien. But it was not until the Ikon decision that a definitive ruling was issued as to the amount of the super-priority lien.
[68] *See* 334 P.3d at 413.

intended.[69]

From 2009 to 2013, the Legislature enacted several laws to address the foreclosure crisis, to keep Nevadans in their homes where possible, and to provide opportunities for them to discuss foreclosure prevention alternatives with their lenders. AB 149 (2009) required that homeowners be given an opportunity to be reviewed for foreclosure alternatives prior to losing their home. On July 1, 2009, the FMP went into effect implementing mandatory mediation between lenders and homeowners prior to a deed of trust foreclosure. On October 1, 2011, AB 284 went into effect revising Chapter 107 to require affidavits of authority to be attached to a Notice of Default and Election to Sell under Deed of Trust. AB 300 (2013) further refined that requirement. On October 1, 2013, SB 321, "HOBR," went into effect amending Chapter 107 to require beneficiaries of deeds of trust to make contact with the homeowner at certain intervals to inquire about foreclosure alternatives

[69] *See Shrewd Investors Snap up HOA Liens, Rent Out Houses* (discussing AB 284 (2011) slowing mortgage foreclosures, creating a "log jam") (ADD:1); Hubble Smith, *New State Law slows banks from starting foreclosures*, Las Vegas Review Journal, November 4, 2011 (ADD:33); David McGrath Schwartz, *Banks press for changes to 2011 foreclosure law*, December 9, 2012 (when AB 284 went into effect foreclosure NODS dropped to 80 in October 2011, from 5,350 in August 2011) (ADD:34); John G. Edwards, *Mediation in home foreclosures 'slowing the process'*, Las Vegas Review Journal, October 13, 2009, (ADD:35); Channel 8 News Now, *Nevada No Longer Leads in Foreclosures*, December 10, 2009 (discussing how the FMP is working to keep people in their homes, reducing Nevada to fifth in the nation for rate of foreclosure) (ADD:36).

[69] Id.

and to, prevent foreclosure from taking place if a foreclosure alternative or review was in process. As a result, lenders were forced to put foreclosures on hold in order to comply.[70] The Las Vegas Sun reported that the month prior to AB 284 taking effect, there were 4,684 notices of default recorded by banks, but only 80 were recorded the month the bill took effect.[71] FMP and HOBR both extended the deed of trust foreclosure process by granting homeowners additional opportunities and time to seek foreclosure alternatives, which required lenders to participate and comply.

During this same period, the federal government acted with the same goals in mind through the Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted July 21, 2010, which created the Consumer Financial Protection Bureau ("CFPB").[72] Other federal programs, such as Making Home Affordable, Troubled Asset Relief Program, Home Affordable Modification Program, Home Affordable Foreclosure Alternative Program, Home Price Decline Protection, Principal Reduction Alternative, and Home Affordable Unemployment Program

[70] Id. *See also* Eli Segall, *While banks adapt to new law, Nevada foreclosures plunge*, July 10, 2013. (ADD:50)
[71] *See Banks press for changes to 2011 foreclosure law* (ADD:34).
[72] 12 C.F.R. 1024.41(f), concerning "dual-tracking," prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent.

were enacted to further the same goal of avoiding foreclosures.[73] These federal programs also delayed foreclosures on deeds of trust.

Paradoxically, while deed of trust foreclosure sales were slowing down, HOA foreclosure sales were on the rise.[74] Prior to 2009, it was rare for an HOA to foreclose; in part due to the understanding that a foreclosure by the HOA would inevitably require it to take title to the property *and bring the mortgage current.*[75] [76] However, as **none of the aforementioned homeowner protections applied to HOA foreclosures,** while lenders' foreclosures ground to a halt, and homeowners and lenders worked to avoid foreclosures on deeds of trust securing hundreds *of* thousands of dollars of loans, homeowners lost their homes at HOA foreclosure sales, involving hundreds *or* thousands of dollars, at an ever increasing rate. At least if lenders' foreclosures could have gone forward, the lenders would have been

[73] *See* Office of the Special Inspector General for the Troubled Asset Relief Program, Quarterly Report to Congress, July 24, 2013, available at https://www.sigtarp.gov/Quarterly%20Reports/July_24_2013_Report_to_Congress.pdf, at 47. Excerpts regarding Housing Support Programs overview are provided in the Addendum, pp. 55-57. (ADD:37)

[74] The Communiqué reported that for June 2011- June 2012, of 2,913 HOA Notices of Trustee Sale 244 properties sold to third parties, but for June 2012-June 2013, of 3,811 HOA Notices of Trustee Sale 1,151 properties sold to third parties.

[75] *See* Hearing Minutes, AB 383, May 17, 2005 (regarding a right of redemption for HOA foreclosure sales), and Exhibit G thereto, letter to Steve Urbanetti, Assistant to the Ombudsman. (ADD:38)

[76] Contrast statistics by Marilyn Brainard, NRED Commissioner, for the 2008-2009 fiscal year (ADD:20), which showed 543 HOA notices of sale, but only 18 actual sales, with the statistics in the Communiqué for June 2012-June 2013, supra.

partially repaid, homeowners would have had reduced deficiencies, and HOAs would have been paid their 9 months dues **as all parties expected for over 20 years**. Lenders should not be further harmed by retroactive application of the unforeseen SFR decision.

g. SB 306, amending NRS 116.3116, shows that prior statute did not contemplate extinguishment of the first deed of trust.

Approximately six months after SFR, SB 306 was signed into law on May 27, 2015. SB 306 amended NRS 116.3116 to include important protections for first security holders including the lender's right to demand a super-priority lien payoff and the HOA's duty to both accept a super-priority lien payoff and discharge the super-priority lien.[77] SB 306 also included an express requirement that HOAs give notice of their foreclosure to each lienholder of record,[78] standards of commercial reasonableness for the sale, and requiring an "Affidavit," (analogous to AB 284) by the foreclosing HOA as to its authority to foreclose and compliance with notice requirements.[79] Importantly, SB 306 also added a right of redemption for both homeowners and lienholders.

[77] *See* Hearing Minutes, SB 306, April 7, 2015. (ADD:39(a))
[78] SFR recognized that the Legislature did not adopt the requirement under the UCIOA for "reasonable notice to all lienholders of record" whose interest would be affected and instead chose a complicated notice scheme. 334 P.3d at 411.
[79] *See*, *e.g.*, Notice of Default and Election to Sell, recorded against a different property on March 8, 2016. (ADD:48)

h. Other legislation proposed shortly after SFR shows that extinguishment was not clearly foreshadowed.

After SFR was published, the Legislature immediately went to work, proposing about 25 HOA-related bills[80] to remedy the fallout from SFR.[81] These bills included: AB 141 (ensures holders of a security interest in the property receive fair notice and an opportunity to participate in the HOA foreclosure proceeding)[82]; AB 233 (repealed NRS Chapter 116 in favor of a new statutory scheme)[83]; SB 355[84] (clarified that an HOA foreclosure would not extinguish any subordinate interest without notice of the foreclosure); SB 306 (amended NRS

[80] *See* Hearing Minutes, AB 233, April 2, 2015, Assemblyman Ira Hansen, p. 14. (ADD:40)

[81] *See* Hearing Minutes, AB 141, February 25, 2015, Assemblywoman Irene Bustamante Adams, p. 25. ("[I]t is imperative that whatever may occur with legislation addressing broader HOA priority lien issues, this legislation proceed independently to ensure that, at minimum, those with duly recorded security interests are given an opportunity to be heard. Last year, the Supreme Court of Nevada issued an opinion, *SFR Investments Pool 1, LLC. v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75 (2014), wherein the court held that an HOA lien holds a position superior to that of a first deed of trust."). (ADD:41)

[82] Id. ("This bill ensures that everyone with a security interest in a property receives fair notice and an opportunity to participate in a foreclosure proceeding impacting that interest… similar to the basic premise of due process and a concept invented within the American property law."). (ADD:41)

[83] *See* Hearing Minutes, AB 233, April 2, 2015, Robert Robey, p. 18; Michael Buckley, p. 22. (ADD:40)

[84] *See* SB 355, Bill Text. As introduced, "Section 12 of this bill provides that the foreclosure of the association's lien does not terminate any subordinate interest unless the association has provided notice of the foreclosure to each person that is a record holder of the subordinate interest as of certain dates." [p. 3:79-82] (ADD:42).

116.3116, as discussed further *supra*); AB 259 (included HOA foreclosures in the FMP); AB 240 (required judicial foreclosure for HOA liens going forward); and most telling, AB 359 (included amendments to SB 306 to nullify the effect of SFR such that an HOA foreclosure could not extinguish a first or second deed of trust).[85] During the hearing on AB 359, there was discussion regarding the concern that Fannie Mae and Freddie Mac would pull out of the Nevada market if nothing was done to stop the fallout from SFR. Senator Hammond reported, "[The] FHFA supported S.B. 306 (R1), but believed the bill did not go far enough. The FHFA believed a crisis was looming in the mortgage lending industry in Nevada, and there would be significant future litigation with Fannie Mae and Freddie Mac regarding foreclosures." Senator Hammond warned the FHFA would vigorously oppose any foreclosure process that included extinguishment of the first and second liens.[86]

During the hearing on AB 359, Kevin Sigstad, President, Nevada Association of Realtors, testified in favor of the bill (particularly Exhibit I),[87] discussing his experience with HOA foreclosures, representing homeowners,

[85] *See* Hearing Minutes, AB 359, June 1, 2015, pp. 35 and 37 ("There had been some very disturbing incidents that had occurred with HOA foreclosures of houses where the owners owed only a small assessment amount."). (ADD:43) and Exhibit I, pp. I-4 and p. I-9. (ADD:43).
[86] Id., Kevin Sigstad, p. 36.
[87] Id., p. 38 ("[T]ake action to provide balance of equity between HOAs, lenders, and homeowners.").

having sat on his own HOA board, and having dealt with homeowners and first-time home buyers on a daily basis. He said it was not until one year earlier that his HOA board realized that its foreclosure extinguished the first and second lien on those units.[88]

In the wake of SFR, it is apparent from these proposed bills that the Legislature felt the need to remedy Chapter 116 to adapt to this Court's interpretation in SFR. These bills were proposed to rectify a statutory scheme that was **not equipped**[89], **nor intended**[90], to result in the extinguishment of a first deed of trust. If Chapter 116 had always allowed a non-judicial HOA foreclosure to extinguish a first deed of trust, then these protective measures for lenders and homeowners (regarding notice, right of redemption, mediation) would have already been in place and there would have been no need to rush to amend the Statute. The concerns expressed in the legislative history demonstrate that SFR caught legislators and the real estate industry by surprise and was clearly not foreshadowed.

[88] Id., p. 39.
[89] *See* Hearing Minutes, AB 259, March 19, 2015, Assemblyman Elliot T. Anderson, pp. 28-29. (ADD:44).
[90] *See* Hearing Minutes, AB 240, March 19, 2015, Assemblyman David M. Gardner, p. 4. (ADD:45).

i. SFR creates a legal uncertainty regarding the validity of prior HOA sales of real property.

SFR created a grave uncertainty regarding the status of the HOA sales that occurred over the last couple of decades where third-party purchasers and HOAs assumed that a first position deed of trust could not be extinguished by a non-judicial HOA sale on delinquent assessments. Quiet title litigation initiated by third-party purchasers only became common in the last five years.[91] But retroactive application of SFR creates a serious risk that large numbers of properties already foreclosed on prior to its issuance will now be tied up in quiet title litigation, particularly where there HOA sales were followed by deed of trust foreclosures. Retroactive application of SFR would increase litigation and adversely impact the housing market even more; conversely, limiting SFR to prospective application would decrease litigation.

2. The Second Chevron Factor, "Furthering The Purpose Of The Rule," Weighs In Favor Of Prospective Application Only.

Judge Jones found that the second Chevron factor also weighs heavily in favor of non-retroactivity because "retroactive application of the rule would not

[91] *See* Communiqué, p. 28 (third party bidders began suing the banks for quiet title after HOA foreclosure sales, despite no Nevada district court decisions ruling in favor of a third party bidder); and Kyle Gloeckner, *Nevada's Foreclosure Epidemic: Homeowner associations' Super-Priority Liens Not So "Super" for Some*, 15 Nev. L.J. 326 (Fall 2014). (ADD:46).

further the purpose of the rule."[92] He could not find a case in which the HOA was unable to fully satisfy its entire lien, let alone its smaller super-priority portion. Additionally, SFR must be viewed in accordance with the Official Comments to UCIOA § 3-116 (1982): "[T]he 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***." (Emphasis added.) The Majority in SFR abandoned the balance and advanced only the interests of HOAs and, of even greater concern, those of investor/speculators like K&P. Abandoning the balance was contrary to the legislative history and UCIOA.

As discussed in Section A.1.d above, UCIOA and the Legislature clearly intended to protect the interest of mortgagees in crafting the language of the super-priority lien. Retroactive application of SFR impairs the purpose of the rule. To restore the balance, the Court should reject retroactive application of SFR, and preclude extinguishment of first deeds of trust by HOA sales conducted prior to September 18, 2014.

3. The Third Chevron Factor, Regarding "Inequitable Result," Weighs In Favor Of Prospective Application Only.

Judge Jones found that the third Chevron factor also favors non-retroactivity

[92] *See* Christina Trust at 5. (3:WFZ0537-0548).

because allowing the extinguishment of a first deed of trust where the notice to the mortgagee "is not robust enough to satisfy basic principles of due process…where the extinguishment rule was not only unclear but presumed within the relevant industry to at the time of the foreclosure to be to the contrary, would be an extremely, not just substantially, inequitable result."[93] [94] He recognized all parties believed the first deed of trust survived an HOA foreclosure. The inequity is also evident in the actions of many, if not most, HOAs and their collection agents preventing lenders from satisfying the super-priority lien.

The unfairness not only violates procedural due process, but also substantive due process as the interpretation of the Statute in SFR deprives

[93] *See* Christina Trust at 5. (3:WFZ0537-0548).

[94] There is a long line of cases holding that a foreclosure by an HOA raises serious due process issues: LN Mgmt. LLC Series 5204 Painted Sands v. Wells Fargo Bank, N.A., 2013 WL 6535247 at *I (D. Nev. Dec. 12, 2013) (ADD:5); Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, 2013 WL 4048573 at *4 (D. Nev. Aug. 9, 2013) (ADD:6); First 100, LLC v. Wells Fargo Bank, NA., 2:13-cv-00431-JCM-PAL (Apr. 30, 2013) (extinguishment of a lender's first-in-time deed of trust under the Statute "would be a violation of [the lender's] State and Federal due process rights") (ADD:7); Paradise Harbor Place Trust v. Deutsche Bank National Trust Co., Case No. A-13-687846 (January 22, 2014) (NRS 116.3116 "is unconstitutional because it facially permits subordinate interests to be erased without proper notice or any opportunity to object") (ADD:8); Thunder Properties, Inc. v. Greater Nevada Mortgage Services, LLC, Case No. CV 13-01840 (January 13, 2014) (ADD:9); SFR Investments Pool I, LLC v. Nationstar Mortgage, LLC, Case No. A-13-684596-C (August 5, 2013) (ADD:10). These and other unpublished orders identified herein are not binding authority, but they address specific issues that have yet to be decided by this Court, and, Respondent respectfully submits, provide persuasive guidance.

Christiana of its fundamental property rights. In Obergefell v. Hodges, the U.S. Supreme Court struck down a state statute as violating the Fourteenth Amendment.[95] Under the Fourteenth Amendment, where a law deprives a person of a right to life, liberty, or property, that a court in its "reasoned judgment" believes is "fundamental," a court may strike down such a law even if the proffered right is not specifically listed in the Constitution, so long as the right can be perceived from history, tradition, or "new insight."[96]

Retroactive application of SFR deprives Christiana, and similarly situated lenders, of the fundamental right to property. The SFR interpretation was not clearly foreshadowed. The decision launched a tsunami of litigation[97], led to the enactment of SB 306, and led to this Court taking up numerous facial constitutional challenges. A reasonable lender, taking a first deed of trust against a property within an HOA bound by MPCs in its CC&Rs, would not have anticipated that this Court would, years later, interpret the Statute to allow the HOA to renege on that promise and assert priority. Weighing the merits and

[95] 576 U.S. ___, 135 S. Ct. 2584; 192 L. Ed. 2d 609 (2015).
[96] U.S. Bank, N.A. v. SFR Investments Pool 1, LLC, 2015 WL 5023450, *5, citing Obergefell v. Hodges.
[97] *See* Compilation of U.S. District Court, District of Nevada, cases filed between January 1, 2009 and June 20, 2016, with the filing code 290, "Real Property: Other," which shows that such filings averaged 4 to about 7.5 per month in the years prior to SFR but jumped to 18 per month in 2015 and 25 per month in 2016. (ADD:47) The constancy prior to SFR and the spikes afterwards suggest the change was increased HOA lien case filings.

demerits, by looking to the parties' practices and the prior history, purpose and effect of NRS 116.3116 *et seq.*, in general, and NRS 116.3116(2), in particular, SFR should only be applied prospectively.

Applying SFR only to HOA sales from September 18, 2014, forward puts all participants back on an even playing field. Properties sold at HOA foreclosure sales prior to SFR would be deemed sold subject to the first deed of trust. HOAs would keep the super-priority portion of the proceeds from their sale. Professional property purchasers, such as K&P, would still be in possession of the properties, could continue collect rent until the deed of trust foreclosure, and then could choose whether to pay off the deed of trust, settle with the lender, or let the property go. Lenders could better assess their risks of lending in Nevada, and title insurers would be not exposed to liability for unforeseeable extinguishments of first deeds of trust.

B. THIS COURT HAS NOT ADDRESSED CHRISTIANA'S PROSPECTIVE APPLICATION ARGUMENTS.

K&P blithely contends, pp. 16-20, that this Court's refusal to rehear SFR eliminated any possibility of a successful request that SFR not be applied retroactively. However, the denial of a rehearing carries no precedential or even

persuasive value.[98]

Moreover, K&P's argument is not supported by that Order. The Court first recognized two essential requirements petitions for rehearing must meet under NRAP 40(c)(1) and (2): (1) matters may not be reargued; and (2) the Court must be persuaded it overlooked or misapprehended a material question of law or statute. The Order merely stated, "This petition for rehearing reargues matters the court already heard and decided and so does not meet the requirements of NRAP 40(c)," **thus only ruling on the first requirement**. No ruling was made on the second requirement as it was not necessary.

In a similar vein, K&P also argues, at p. 20, that "prior to issuing its decision in this case, on August 15, 2015, the very same federal court determined that SFR did apply retrospectively," in U.S. Bank, N.A, v. SFR Investment Pool I, LLC, 2015 U.S. Dist. LEXIS 112807 (D. Nev.). This argument is disingenuous and completely ignores Judge Jones's order dismissing K&P's Counterclaim in this case. (3:WFZ0537-0548) Judge Jones expressly stated that his prior ruling on retroactivity "resolved the motions before it on different grounds and therefore did not address the issue closely; rather, [he] assumed the Nevada Supreme Court

[98] Marshak v. Reed, 229 F.Supp. 2d 179, 184 (E.D.N.Y. 2002); Landreth v. Comm'r, 859 F.2d 643, 648 (9th Cir. 1988); Exxon Chemical Patents, Inc. v. Lubrizol Corp., 137 F.3d 1475, 1479-1480 (Fed. Cir. 1998); Luckey v. Miller, 929 F.2d 618, 622 (11th Cir. 1991).

would apply its ruling retroactively...[and upon a] closer look...[SFR] is silent on retroactivity and [] the Nevada Supreme Court approved the Huson [Chevron] Rule." In other words, Judge Jones did not fully consider the retroactivity argument previously, and he could and did change his view on the issue. This Court, too, should hold SFR does not apply retroactively.

C. LENDERS DID NOT MISUNDERSTAND THE STATUTE.

It is clear from the evidence presented above that lenders, HOAs and HOA collection agents all treated the super-priority lien as a payment priority, due upon the foreclosure of the first deed of trust. When the super-priority lien is viewed a as payment priority, MPCs included in many CC&Rs throughout Nevada make sense. Further, the legislative history of NRS 116.3116 *et seq.* and post-SFR legislation demonstrate that the rule of extinguishment was not foreshadowed to anyone in the industry.

K&P argues, at pp. 24-25, "Further, banks, and in particular, Bank of America, N.A., ["BANA"] Christiana's predecessor in this case, have been aware of the reality that an HOA foreclosure would extinguish their deed of trust for several years prior to the NRED Advisory Opinion and the SFR decision." In support, K&P then refers to "countless numbers of sworn affidavits" by BANA's counsel claiming that it forwarded letters to various HOAs and their agents which show "BANA's understanding of the implications of an HOA foreclosure are

clearly expressed in those letters." There is no citation to the record, and no such letters were provided by Appellant. Accordingly, Christiana provides an example of the actual letters in the Addendum.[99] The letters merely make a "super-priority tender" for the properties:

> Based on Section 2(b), a portion of your HOA lien is *arguably* prior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees [i.e., charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest] that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n). (Emphasis added.)

There is no mention of extinguishment; the dual nature of a super-priority portion and sub-priority portion is made clear. The letters then tendered the 9-month amount without fees and costs, as the Ikon decision now makes clear was the proper amount. They demonstrate BANA's efforts to meets its obligations as to the super-priority lien. It is unfortunate NAS and Alessi would routinely return those letters with the tender checks unopened.

D. THE RECORDING OF THE CC&RS IS IRRELEVANT TO THE RELATIVE SUPERIORITY OF THE HOA LIEN VERSUS THE FIRST DEED OF TRUST.

The real estate industry could not have predicted that this Court in SFR would permit extinguishment of first deeds of trust by the limited exception

[99] *See* ADD:27 Exhibit F(2), marked BAC158-159.

created by the super-priority rule—the exception to the exception: "A lien under this section is…also prior to all security interests described in paragraph (b)…to the extent of the 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…." This exception contemplates a super-priority portion of an assessment lien (the 9 months) and a sub-priority portion (anything due earlier than 9 months). The industry took care of the issue for over 20 years by protecting the deed of trust from extinguishment and making sure the HOAs were paid their 9 months of assessments.

As the court explained in Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 962 F. Supp. 2d 1222, 1227 (D. Nev. 2013),

> Because…there can no [NRS 116.3116] subsection (1) lien that does not include some super-priority amounts because that amount includes every kind of assessment that could be delinquent…the exception under subsection (2)(b) would be totally subsumed by the exception to the exception, rendering it meaningless…. That is, in order to give each part of the statutes some effect, the Court must read them together to mean that the super-priority rule affects the priority of reimbursement, but not extinguishment. Reading the super-priority rule to affect extinguishment would read the first mortgage rule [subsection (2)(b)] out of the statutes almost entirely.

Numerous other state and federal district judges adopted this view, some calling it the "payment priority rule." While the SFR Court did not accept that reasoning, that is how the Legislature and the real estate industry applied the statutes for over two decades. A foreclosure of a HOA lien could not extinguish a

first deed of trust but the foreclosure of the deed of trust also could not extinguish the super-priority amount—just the sub-priority amount—and the HOA was paid out of the proceeds of the deed of trust foreclosure.

K&P argues, at pp. 25-26, that since the lien exists from the moment of recording of the declaration CC&Rs, it is prior to any deed of trust and, therefore, under the common law notion "first in time, first in right," obviously extinguishes any "junior" lien including the first deed of trust. Consequently, K&P insists, "there should be no doubt that any lenders learned counsel would be able to recognize that the bank's deed of trust, if recorded after the declaration of the CC&Rs, would be extinguished by the foreclosure of and (sic) HOA super-priority lien." Opening Brief, p. 28. Despite Appellant's certitude, the reality is that, prior to SFR, *all* lenders, legislators, HOAs and their collection agents, foreclosure trustees and attorneys, investors and most state and federal district court judges—not to mention the three dissenting justices in SFR who recognized the potential for extinguishment but concluded it could only happen through judicial foreclosure—did not grasp such an "obvious" concept. Appellant's argument is overly simplistic and ignores the very language of NRS 116.3116(2)(b) as well as the effect of the MPCs; as such, it "obviously" fails.

NRS 116.3116(2)(b) provides that this HOA lien, in existence from the time of the recording of the declaration, is subordinate to the first security interest

"recorded before the date on which the assessment sought to be enforced became delinquent…." Thus, a first security interest, such as Christiana's Deed of Trust, recorded before the date on which the assessment became delinquent is prior to an HOA's lien. The "date on which the assessment became delinquent" is demonstrated by the recording of a notice of delinquent assessment (lien). As the date of delinquency was subsequent to the recording of the deed of trust, the deed of trust maintains priority pursuant to NRS 116.3116(2)(b).

NRS 116.3116(2)(b) is an express exception to the common law. And where common law conflicts with statute, the statutory command controls. NRS 1.030; *see, e.g.* Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969). This subsection, while ignored by K&P, cannot be ignored by this Court as that would fly in the face of the well-established rule of construction that "no part of a statute should be rendered meaningless" through a court's interpretation. Harris Associates v. Clark Cnty. Sch. Dist., 119 Nev. 638, 642, 81 P.3d 532, 534 (2003); *see also* Padash v. I.N.S., 358 F.3d 1161, 1170 (9th Cir. 2004) (noting that the rule against interpreting language as surplusage is based on a presumption that legislatures intend to create a coherent regulatory scheme). The effect of this statutory exception is that foreclosure of a first deed of trust would extinguish a HOA lien and, more importantly, the buyer at a HOA lien sale would take subject to the first deed of trust. This is consistent with how countless HOAs treated liens

by their inclusion of MPCs.

Not only did SFR have to resolve whether the super-priority lien was a true lien that could extinguish a first deed of trust, it had to resolve the ambiguity whether "institution of an action to enforce the lien" meant judicial only or either judicial or nonjudicial foreclosure proceedings. Again the Court bucked the trend among Nevada courts and other UCIOA states. Before SFR, other state and federal judges who did not necessarily adopt the payment priority rule, and some judges who did, provided the alternative basis for denying buyers' relief in quiet title actions that, even if the super-priority lien could extinguish the first deed of trust, it could only do so upon the institution of a judicial foreclosure action.

As noted above, the Legislature does not share the SFR Majority's view. At no point did the Legislature ever contemplate that the foreclosure of a HOA lien could extinguish a first deed of trust, let alone that it could do so by a nonjudicial foreclosure sale. Indeed, the SFR Dissent observed that Chapter 116's use of the phrase "institution of an action" regarding enforcement of assessment lines in the super-priority portion of NRS 116.3116(2) meant "a judicial action, rather than just any enforcement action, … as the method for extinguishing a first deed of trust,"[100] though it could enforce its lien through nonjudicial foreclosure "of everything

[100] 334 P.3d at 419-420.

else,"[101]—including "its lien for maintenance and abatement charges, charges that may be included in the superpriority portion of the association's lien. *See* NRS 116.310312(4)."[102] Since SFR's holding that *nonjudicial* foreclosures of HOA liens could extinguish ran counter to the understanding of the industry, the Legislature and the courts, it should be given prospective effect only.

K&P, at pp. 25-26, quotes Judge Jones's Order:

> Under that recent interpretation, a first mortgage recorded before an HOA lien even arises is extinguished by a foreclosure of the HOA lien so long as the declaration creating the HOA was recorded before the first mortgage was. In other words, the mere recordation of an HOA declaration that could in theory give rise to future HOA liens is treated under Chapter 116 as essentially constituting record notice of yet nonexistent HOA liens.

It then suggests that Judge Jones's "misconception" that the lien was "non-existent" led to his conclusion that SFR should not be applied retroactively. But there is no misconception; there is simply recognition that there is no lien *capable of enforcement* until there is a delinquency.

Even the concept advanced by K&P, that the recording of the declaration establishes the timing of the creation of an association's lien under NRS 116.3116 and the priority under the common law rules, is fraught with ambiguities. NRS 116.3116(1), which states, in pertinent part, "The association has a lien on a unit for ... any assessment levied against that unit ... *from the time the ... assessment ...*

[101] 334 P.3d at 414 (majority opinion).
[102] 334 P.3d at 420 (dissenting opinion).

becomes due" (emphasis added), conflicts with NRS 116.3116(4), which states, "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."

In order for a lien, whether created by law (*e.g.*, assessment lien) or agreement (*e.g.*, deeds of trust), to be effective against non-parties to the lien transaction itself, the lien or security interest must be *perfected*, "usually by filing a statement with some public office or by taking possession of the collateral."[103] For the HOA lien, recording the declaration accomplished that notice, but the delinquency must occur before it becomes enforceable.[104] As implied by Judge Jones, there is no lien *capable of enforcement* until there is a delinquency. Consequently, perfection of the HOA lien merely means that, once a delinquency occurs, the lien may be enforced. It is irrelevant to the issue of priorities under NRS 116.3116(2).

[103] *See* Black's Law Dictionary, Ninth Edition (2009).
[104] Property tax liens operate in similar ways. The lien exists, but the amount is determined annually, per NRS 361.450, and is enforceable only if not paid.

VI. CONCLUSION

For all of the above reasons, this Court should determine that the SFR decision should not be applied retroactively to HOA lien foreclosure sales occurring prior to September 18, 2014.

DATED this 27th day of June, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,969 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be

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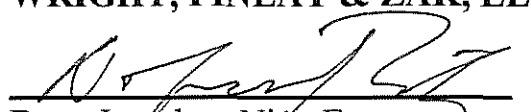
found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 27th day of June, 2016.

WRIGHT, FINLAY & ZAK, LLP



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PROOF OF SERVICE

I certify that I electronically filed on the 27th day of June, 2016, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

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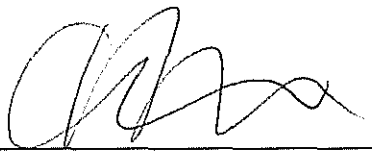

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	w. SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC, et al., Case No. A-13-683133-C, Dept. 22 (Judge Susan Johnson), Order granting Green Tree's Motion to Dismiss	**0241-0255**
	x. DBNT v. The Foothills at MacDonald et al., Case No. A-13-680505-C, Dept. 22 (Judge Susan Johnson), Findings of Fact and Conclusions of Law denying the Motion for Preliminary Injunction	**0256-0265**

	y. Paradise Harbor Place Trust v. Selene Finance, LP, et al., Case No. A-13-675032-C, Dept. 23 (Judge Stefany Miley), Order granting Selene Finance, LP's Motion for Summary Judgment	**0266-0273**
	z. SFR Investment Pool, LLC v. Wells Fargo Bank et al, A-13-679361-C, Dept. 25 (Judge Kathleen Delaney), Order	**0274-0276**
	aa. SFR Investments Pool 1 LLC v. US Bank N.A., et al., Case No. A-12-673671-C, Dept. 27 (Judge Nancy Allf), Order denying Motion for Preliminary Injunction and granting Counter-Motion to Dismiss.	**0277-0283**
	ab. SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., et al., Case No. A-13-682700-C, Dept. 28 (Judge Ronald J. Israel), Order granting NV West Servicing, LLC's Motion to Dismiss Plaintiff's Amended Complaint	**0284-0289**
	ac. LN Management LLC Series 3225 Casey 204 v. Wells Fargo Bank et al, A-13-678626-C, Dept. 30 (Judge Jerry A. Wiese), Order and Minutes	**0290-0292**
12.	**Sampling of pre-SFR CC&Rs with Mortgagee Protection Clauses:**	
	a. Declaration of Covenants, Conditions and Restrictions for **D'Andrea**, recorded June 8, 1999 in the Washoe County Recorder's Office, as Document Number 2348877.	**0293-0314**
	b. Declaration of Covenants, Conditions, and Restrictions for **The Parks**, recorded August 18, 2000 in the Clark County Recorder's Office, as Instrument Number 20000818-01058.	**0315-0326**
	c. Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for **Hartridge**, recorded May 12, 2004 in the Clark County Recorder's Office, as Instrument Number 20040512-0002413.	**0327-0341**
	d. Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for **Canyon Springs**, recorded April 12, 2005 in the Clark County Recorder's Office, as Instrument Number 20050412-0001131.	**0342-0361**

	e. Amended and Restated Master Declaration of Covenants, Conditions and Restrictions and Grant of Easements for **Spring Mountain Ranch**, recorded November 25, 1998 in the Clark County Recorder's Office, (Instrument No. not legible).	**0362-0379**
	f. Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for **Sunrise Ridge**, recorded May 18, 2004 in the Clark County Recorder's Office, as Instrument Number 20040518-0005837.	**0380-0395**
	g. Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for **Elkhorn**, recorded March 22, 1995 in the Clark County Recorder's Office, as Instrument Number 950322-00346.	**0396-0414**
	h. Supplemental Declaration of Covenants, Conditions, and Restrictions and Reservation of Easements for **Desert Bloom**, recorded June 1, 1999 in the Clark County Recorder's Office, as Instrument Number 990601-00687.	**0415-0432**
	i. Declaration of Covenants, Conditions and Restrictions and Grant of Easements for **South Valley Ranch,** recorded July 25, 1996 in the Clark County Recorder's Office, as Instrument Number 960725-00004.	**0433-0449**
	j. Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for **Suncrest HOA,** recorded on February 10, 2006, in the Clark County Recorder's Office, as Instrument Number 20060210-0003396.	**0450-0465**
13.	**Sampling of post-<u>SFR</u> CC&Rs with Mortgagee Protection Clauses:**	
	a. Supplemental Declaration of Covenants, Conditions & Restrictions and Reservation of Easements for **Savona**, recorded May 8, 2015 in the Clark County Recorder's Office, as Instrument Number 20150508-0001538.	**0466-0488**
	b. Declaration of Covenants, Conditions, Restrictions and Reservation of Easements for **Altura**, recorded May 18, 2015 in the Clark County Recorder's	**0489-0507**

	Office, as Instrument Number 20150518-0001894.	
14.	Hearing on Assembly Bill 204 before Assemb. Comm. on the Judiciary, 75th Legislature (2009), March 6, 2009, p. 34 (Statement of Assemblyperson Ellen Spiegel); p. 44 (Statement of Michael Buckley); p. 45 (Statement of Assemblyperson Ellen Spiegel).	**0508-0555**
15.	Hearing on Assembly Bill 204 before Assemb. Comm. on the Judiciary, 75th Legislature (2009), March 25, 2009, pp. 36-37 (Statement of Bill Uffelman).	**0556-0601**
16.	Hearing on Assembly Bill 204 before Senate Comm. on the Judiciary, 75th Legislature (2009), April 29, 2009, pp. 17-19 (Statement of Assemblyperson Ellen Spiegel)	**0602-0628**
17.	Hearing on Senate Bill 174 before Senate Comm. on the Judiciary, 76th Legislature (2011), February 24, 2011, p. 4 (Statement of Michael Buckley).	**0629-0657**
18.	Hearing on Senate Bill 174 before Assembly Comm. on the Judiciary, 76th Legislature (2011), May 17, 2011, p. 12 (Statement of Michael Buckley); pp. 21-22 (Statement of Senator Copening). a. Hearing on SB 174 Before Senate Comm. on the Finance, 76th Legislature (2011), June 4, 2011, p. 22 (Statement of Senator Copening).	**0658-0742**
19.	Hearing on Senate Bill 280 before Nevada Assembly Comm. on the Judiciary, 77th Session, (2013), May 17, 2013, pp. 82-83 (Statement of Chairman Frierson).	**0743-0830**
20.	Hearing on Assembly Bill 350, before the Assembly Committee on Judiciary Subcommittee, 75th Legislature (2009), March 25, 2009, at pp. 3-5, (Statement of Chairman Frierson) and Exhibit F; p. 20 (Statement of Marilyn Brainard, NRED Commissioner, for the 2008-2009 fiscal year; Exhibit J to Minutes (Statement of Michael Buckley).	**0831-0883**
21.	Adopted Regulation of the Commission for Common-Interest Communities and Condominium Hotels, LCB File No. R199-09, Effective May 5, 2011, also available at http://www.leg.state.nv.us/register/2009Register/R199-09A.pdf	**0884-0902**
22.	Hearing on Senate Bill 243 Before Senate Committee On Judiciary, 76th Legislature (2011), March 24, 2011,	**0903-0935**

	Statement of Stephanie Cooper Herdman.	
23.	Buck Wargo, *Regulators propose cap on HOA collection fees*, Las Vegas Sun, March 25, 2010, available at http://lasvegassun.com/news/2010/mar/25/regulators-propose-cap-hoa-collection-fees/	**0936-0939**
24.	John G. Edwards, *Bill would cap fees collectible in HOA cases*, Las Vegas Review-Journal, February 24, 2011, available at http://www.reviewjournal.com/business/housing/bill-would-cap-fees-collectible-hoa-cases	**0940-0941**
25.	David McGrath Schwartz, *Bill to cap collection fees when HOA bills are past due stays alive*, Las Vegas Sun, June 5, 2011, available at http://lasvegassun.com/news/2011/jun/05/bill-cap-fees-when-hoa-bills-are-past-due-stays-al/	**0942-0945**
26.	*Witnesses call Homeowners groups 'Gestapo,' 'cartels'*, Las Vegas Review-Journal, February 26, 2011, available at http://www.reviewjournal.com/business/housing/witnesses-call-homeowners-groups-gestapocartels	**0946-0947**
27.	Defendant BAC's Motion for Summary Judgment **a. Exhibit E** to BAC's Motion for Summary Judgment, filed in Eighth Judicial District Court, Case No. A-13-685172-C (letter from Alessi & Koenig, LLC to BAC Home Loans Servicing) b. **Exhibit F(2)** Miles Bauer Letter to Alessi & Koenig, LLC	**0948-1170** **1017-1029** **1047-1050**
28.	**Exhibit F** to Plaintiff's Reply in Support of Motion to Dismiss and Opposition to SFR's Motion for Summary Judgment, filed in the U.S. District Court, District of Nevada, Case No. 3:15-cv-00241-RCJ-WGC. (Letter from Alessi & Koenig, LLC)	**1171-1207**
29.	*Hot Topics: As co-host of Homeowner Talk, David Stone educates, informs homeowners and HOAs*, NAS's website www.nas-inc.com, also available at http://www.nas-inc.com/pdfs/5903960r.pdf	**1208-1209**
30.	GMAC Mortgage, LLC v. Keynote Properties, LLC, et al., Supreme Court of Nevada, Case No. 65260, Respondent's Answering Brief, filed on May 14, 2015, on	**1210-1247**

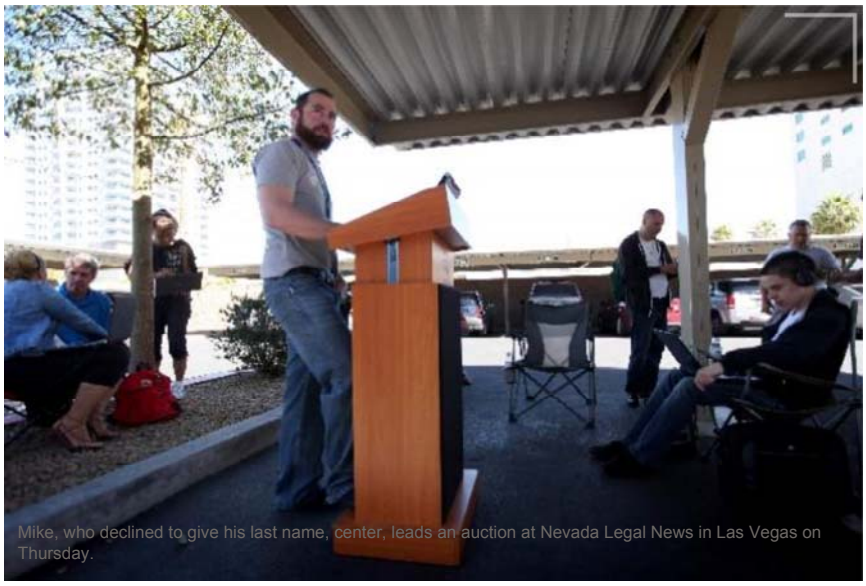
	behalf of Nevada Association Services, Inc. and Peccole Ranch Community Association	
31.	GMAC Mortgage, LLC v. Keynote Properties, LLC, et al., Supreme Court of Nevada, Case No. 65260, GMAC's Opening Brief, filed on March 2, 2015	**1248-1273**
32.	Excerpts of the Transcript of Proceedings of Christopher Yergensen, corporate counsel for NAS, in Case No. A-13-681541-C, June 2, 2015	**1274-1286**
33.	Hubble Smith, *New state law slows banks from starting foreclosures*, Las Vegas Review-Journal, November 4, 2011, available at http://www.reviewjournal.com/business/housing/new-state-law-slows-banks-starting-foreclosures	**1287-1288**
34.	David McGrath Schwartz, *Banks press for changes to 2011 foreclosure law*, Las Vegas Sun, December 9, 2012, available at http://lasvegassun.com/news/2012/dec/09/banks-press-changes-strict-2011-foreclosure-law/	**1289-1293**
35.	John G. Edwards, *Mediation in home foreclosures 'slowing the process'*, Las Vegas Review-Journal, October 13, 2009, available at http://www.reviewjournal.com/news/mediation-home-foreclosures-slowing-process	**1294-1296**
36.	Channel 8 News Now, *Nevada No Longer Leads in Foreclosures*, December 10, 2009, available at http://www.lasvegasnow.com/news/nevada-no-longer-leads-in-foreclosures	**1297-1298**
37.	Office of the Special Inspector General for the Troubled Asset Relief Program, Quarterly Report to Congress (Excerpts), July 24, 2013, available at https://www.sigtarp.gov/Quarterly%20Reports/July_24_2013_Report_to_Congress.pdf	**1299-1359**
		Reserved 1360-1706)
38.	Hearing on Assembly Bill 383 before the Senate Committee on Commerce and Labor, 73rd Legislature (2005), May 17, 2005, Assembly Minutes and Exhibit G thereto, letter to Steve Urbanetti, Assistant to the Ombudsman	**1707-1748**

39.	a. Hearing on Senate Bill 306, before the Senate Committee on Judiciary, 78th Legislative Session (2015), April 7, 2015 b. Hearing on Senate Bill 306, before the Assembly Committee on Judiciary, 78th Legislative Session (2015), April 28, 2015, Senator Aaron D. Ford); Assemblyman Elliot T. Andertson; Samuel McMullen, Nevada Banker's Association; and Senator Ford	**1749-1788** **1789-1856**
40.	Hearing on Assembly Bill 233 Before the Assembly, 78th Legislature (2015), April 2, 2015, Assemblyman Ira Hansen; Statement of Robert Robey; Statement of Michael Buckley	**1857-1889**
41.	Hearing on Assembly Bill 141 Before the Assembly, 78th Legislative Session (2015), February 25, 2015, Assemblywoman Irene Bustamante Adams	**1890-1925**
42.	Senate Bill 355, 78th Legislature (2015), Bill Text – As introduced	**1926-1969**
43.	Hearing on Assembly Bill 359 Before the Assembly Committee on Ways and Means, 78th Legislature (2015), June 1, 2015, Statement of Kevin Sigstad; Exhibit I	**1970-2043**
44.	Hearing on Assembly Bill 259 before the Assembly Committee on Judiciary Subcommittee, 78th Legislature (2015), March 19, 2015, Assemblyman Elliot T. Anderson	**2044-2091**
45.	Hearing on Assembly Bill 240 before the Assembly Committee on the Judiciary, 78th Legislature, March 19, 2015, Assemblyman David M. Gardner	**2092-2139**
46.	Kylee Gloeckner, *Nevada's Foreclosure Epidemic: Homeownerassociations' Super-Priority Liens Not So "Super" for Some,* 15 Nev. L.J. 326 (Fall 2014).	**2140-2168**
47.	Compilation of U.S. District Court, District of Nevada, cases filed between January 1, 2009 and June 20, 2016, with the filing code 290, "Real Property: Other.".	**2169-2200**
48.	Examplar affidavit required by SB306, Notice of Default and Election to Sell, recorded in the Clark County Recorder's Office against a different property, on March 8, 2016, as instrument 20160308-0000565.	**2201-2205**
49.	NAS account ledger dated 7/1/2012, marked as	**2206-2257**

	K&P00038, attached as Exhibit 1 to Opposition to Motion by K&P Homes to Reopen Chapter 7 Case and Retroactively Annul the Automatic Stay, filed by Christiana Trust in U.S. District Court Case No. 12-12508-mkn	
50.	Eli Segall, *While banks adapt to new law, Nevada foreclosures plunge*, July 10, 2013, also available at http://vegasinc.com/business/tourism/2013/jul/10/while-banks-adapt-new-law-nevada-foreclosures-plun/	**2258-2261**
51.	Monthly Nevada NOD Filings, a compilation of public records from January 2011through June 2014 (Michael Brooks, Esq. of Brooks Hubley Law Firm).	**2262**
52.	Nick Timiraos, Foreclosure Squeeze Crimps Las Vegas Real-Estate Market, Wall Street Journal, July 9, 2013, also available at http://www.wsj.com/articles/SB10001424127887323687604578467260571838502	**2263-2269**
53.	NRS Chapter 116 a. 1991 b. 1993 c. 2009 d. 2011 e. 2013 f. 2015	 **2270-2272** **2273-2275** **2276-2278** **2279-2281** **2282-2284** **2285-2290**
54.	Compilation of NRED Statistics	**2291**

Posted March 18, 2013 - 2:22am

Shrewd investors snap up HOA liens, rent out houses



Mike, who declined to give his last name, center, leads an auction at Nevada Legal News in Las Vegas on Thursday.

By HUBBLE SMITH
LAS VEGAS REVIEW-JOURNAL

Savvy investors in Las Vegas are buying up small homeowner's association liens at auction and making money by renting out homes they don't actually own until the mortgage-holder comes knocking, in some cases as long as two years later.

Community associations can collect up to nine months of unpaid HOA assessments through "superpriority" liens, plus up to $1,900 in collection charges, according to Nevada law. While liens can amount to several thousand dollars when collection fees and other charges are applied, they're dwarfed by mortgages and in the past have received little notice.

But a 2010 change in state law aimed at preventing improper foreclosures has dramatically expanded the length of time between a mortgage default and the bank taking possession.

And investors have found that the combination of a small HOA debt and the delay in bank foreclosures can lead to a big payoff. That, in turn, is driving bids for liens through the roof.

CALENDAR

WED	THU	FRI	SAT	SUN	MON	TUE	A
25	26	27	28	29	30	31	All Week

GONDOLA RIDES
Grand Canal Shoppes
Wednesday, May 25, 10:00 am-11:00 pm

JERSEY BOYS
Paris Las Vegas
Wednesday, May 25, 7:00 pm

V - THE ULTIMATE VARIETY SHOW
Miracle Mile Shops at Planet Hollywood
Wednesday, May 25, 7:00 pm

Star Train at the Nevada Northern Railway Museum
Nevada Northern Railway Museum
Friday, May 27,

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CTADD0001

Danny Garcia, an agent who goes to trustee auctions on behalf of a private client, said he's seen bids for HOA liens increase from about $6,000 to upward of $30,000 in the past two years. The highest he ever paid was $20,000.

"They've gone up," he said. "People have started to figure out they can settle with the bank. They have some kind of strategy."

In the past, HOAs seldom went after members for unpaid dues, but cash-strapped associations faced with fewer dues-paying members are now much more likely to go after residents, using collection agencies to place liens on the property.

"If we were talking about this four years ago, it would be a totally different conversation," said David Stone, president of Nevada Association Services, a collection agency for HOAs.

The HOA writes a "dirty deed" on the home and its collection agency proceeds with foreclosure ahead of the mortgage-holding bank.

"That's a big problem in this town," said Zolt Szorenyi, president of Lenders Clearing House Las Vegas, a firm that buys and sells foreclosed homes. "These HOA collection agencies are selling debt to private investment companies and they're taking them down to the auction and foreclosing on them for nonpayment of HOA dues."

After the lien is auctioned, buyers get a "quiet title" that allows them to take control of the home and rent it out until the mortgage-holding bank gets around to foreclosing and trying to take possession. If the buyer gets the lien cheap enough and can rent the property long enough, their investment makes money.

Investors are buying HOA foreclosures because traditional trustee foreclosures have dried up, which in turn dried up their rental pool, Stone said.

"I'm having a dozen go every week," Stone said. "People are picking them up and renting them out. They have fee-simple ownership of the property."

But like nearly everything in Las Vegas, the lien scheme isn't a sure bet.

The risk in buying HOA liens is that the holder of the first deed of trust might come in and quickly foreclose, taking possession of the home before the investor can rent it out.

That doesn't necessarily mean the lien buyer loses everything, though. A conundrum in Nevada law helps investors hedge their bets.

Real estate attorney Zachary Ball said the state's HOA foreclosure law is "revolutionary" in many ways.

In one chapter of the law, the first deed of trust is never wiped out, he said. Statutes dealing with HOAs say an association's "superpriority" liens are ahead of the first deed and any other loans.

That means HOA liens are "junior" to the first deed on the mortgage, but they have to be paid off before the title can be transferred to a new owner, said Richard Lee, vice president of Ticor Title of Nevada.

The risk, Garcia said, comes in bidding too much at auction and paying more for the lien than a home is worth. When that happens, investors will try to cut their loss by working out a short sale with the lender for 50 cents to 60 cents on the dollar, he said.

When an investor pays more than the face amount of the lien and collection costs, any excess goes to pay off junior lienholders: property taxes, unpaid garbage bills and the like. Anything left after that is sent to the previous homeowner.

Scott Sibley, publisher of Nevada Legal News, said many HOA management firms are conducting lien sales at their offices. They're held at different times and in different locations, sometimes in packed conference rooms that restrict the number of bidders, he said.

How much longer the HOA lien scheme will work is unclear.

CTADD0002

Lawmakers in Carson City are debating adjustments to AB284, the 2011 law that slowed the foreclosure process by making banks prove their right to take a home rather than processing "robo-signed" documents.

Banks have complained the procedures needless delay inevitable foreclosures, causing a logjam of houses in limbo that can be rented through the HOA lien scheme.

"It'll be interesting to see how it plays out going forward because the banks are close to reaching an agreement to amend AB284," Sibley said.

Contact reporter Hubble Smith at hsmith@reviewjournal.com or 702-383-0491.

Bank of America experiments... Nevada still leads nation...

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View Comments

CTADD0003

The HOA Foreclosure and Priority: Who Is In First?

By Melissa Waite

Many of us own or rent a home in a Common Interest Community, commonly referred to as a Home Owner's Association ("HOA"). Many others have strategically attempted to avoid a neighborhood subject to the various restrictions an HOA puts in place, particularly the requirements of complying with the Declaration of Covenants, Conditions and Restrictions ("CC&Rs") and paying association dues to fund the operation of the HOA, maintenance of the common area, and enforcement of the CC&Rs. In 1991, Nevada adopted, with certain modifications, the provisions of the Uniform Common Interest Ownership Act (1982) and today HOAs in Nevada are governed by NRS Chapter 116 known as the Nevada Uniform Common Interest Ownership Act ("NUCIOA").

HOA Super priority lien

Prior to the downturn in the real estate market, the incidence of foreclosure and the implication of the foreclosure provisions applicable to HOAs in the NUCIOA were not frequently encountered. When Nevadans began defaulting on their home loans, more frequently than not, they also stopped paying their HOA association dues. Following the rampant defaults on home loans, banks began to foreclose on their deeds of trust, which in turn triggered applicability of the HOA's "super priority lien." This is a statutory lien created by NRS 116.3116(2), which essentially provides that the HOA's lien is prior to all other liens, except (i) liens recorded against the property before the CC&Rs, (ii) first deeds of trust, and (iii) real estate taxes or other governmental assessments. NRS 116.3116(2) also sets forth an exception to these exceptions, which makes a portion of the HOA lien (the amount of 9 months of assessments) prior to the first deed of trust, hence the name "super priority."

First position bank foreclosing on its deed of trust

Until recently, the most common scenario was a first position bank foreclosing on its deed of trust, after which the bank would voluntarily pay to the HOA the amount equal to the nine months of assessments to "extinguish" the HOA's lien, resulting in clear title to the third party bidder or the bank, as the case may be. If this amount is not paid after the foreclosure sale, it would arguably remain a lien on the property which itself could subsequently be foreclosed.

Wave of HOA initiated foreclosures

Due to market forces and new legislation, banks slowed or in some cases altogether halted their foreclosure proceedings. A corresponding impact to HOAs was that they stopped receiving payment from the foreclosing bank for the nine month super priority lien. This put HOAs into a difficult financial position and led to the next wave of foreclosures—foreclosures initiated by the HOA. The frequency of third party bidders successfully purchasing a property at an HOA foreclosure sale has increased drastically in the last two years. According to statistics published by the State of Nevada Department of Business and Industry-Real Estate Division, there has been a marked increase in both the number of foreclosures initiated by HOAs and the number of properties sold to a third party at an HOA foreclosure sale. For the fiscal year ending June 30, 2012, there were a total of 2,913 Notices of Sale reported by HOAs and 244 properties were sold to a third party bidding at the sale. For the fiscal year ending June 30, 2013, there were a total of 3,811 Notices of Sale reported by HOAs and 1,151 properties sold to a third party bidding at the sale. The HOA foreclosure sales prices are very low in relation to the fair market value of the property being sold and investors typically pay slightly more than the amount owed to the HOA, with a typical sales price being between $3,000-$12,000.

Historic & customary conduct in Nevada

Historically, banks have ignored HOA foreclosure sales, relying on the customary course of dealing in Nevada, which suggested that the primary threat of extinguishment of their deed of trust would come from a borrower's failure to pay property tax. Title companies routinely issue to banks a lender's title insurance policy insuring a first position security interest subject to few exceptions and not specifically including amounts payable to an HOA. The banks also relied on subordination or mortgagee protection clauses in the CC&Rs as a "belt and suspenders" protection. Banks were

seemingly unaware of any ambiguity in the NUCIOA, as were third party bidders who historically were rarely willing to pay much more than the amount owed to the HOA, presumably because it was understood they would not be acquiring the property free and clear of liens. However, all of those concepts which historically seemed to be so widely accepted and never before questioned, are now being examined in great detail.

Current litigation

In an instance where the HOA initiates and completes a non-judicial foreclosure and there is a first position deed of trust on the property, the question has now become: is the super priority lien a right to payment or is it a senior lien that will cut off the rights of the first position bank? Who is really in first? Is it the bank that has a "first position" deed of trust? Or is it the HOA who has a "super priority lien" that can cut off the rights of a bank that would otherwise be in first position? This issue has led to a spike in litigation in both the Nevada and federal courts. Third party bidders and banks have filed requests for injunctions to halt the other parties' pending foreclosure and actions for declaratory relief or quiet title requesting that courts rule on this issue. Currently it is estimated that there are over 50 appeals pending in the Nevada Supreme Court on the issues related to the effect of an HOA foreclosure. Countless cases have been stayed in the lower courts pending a binding decision by the Nevada Supreme Court.

Non-binding authority

A majority of the arguments from both the third party bidders and banks relate to statutory construction of various provisions of the NUCIOA and are far too complex to detail in this article. The center of the debate revolves around NRS 116.3116(2) which states that the HOA's super priority lien arises at the time of "institution of an action to enforce the lien." NRS 116.3116(2). There are numerous arguments based on the canons of statutory construction as to when the lien arises and whether the term "action" refers only to a judicial action or whether it also includes a non-judicial foreclosure action. Both sides have also looked to various instances of non-binding authority to support their position, including decisions from other jurisdictions and from federal court judges here in Nevada. For example, in *Summerhill Village Homeowners Association v. Roughly*, 166 Wash. App. 625, 270 P.3d 639 (2012), the court ruled that an HOA's judicial foreclosure of its super priority lien completely extinguished a first deed of trust. Banks have attempted to distinguish this case by arguing that in Nevada, almost all HOA foreclosures

HOA Foreclosure Priority *continued on page 28*

HOA Foreclosure Priority *continued from page 27*

are done nonjudicially and NUCIOA does not require notice to a first position bank in order for an HOA to foreclosure non-judicially. There are also several federal district court decisions that have found in favor of the first position bank holding that the HOA's super priority lien does not extinguish a first position deed of trust. Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., 2:12–cv–00949–KJD–RJJ, 2013 WL 531092 (D.Nev. Feb. 11, 2013); Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, 2:13–cv–00164–RCJ, 2013 WL 2460452 (D. Nev. June 6, 2013); Weeping Hollow Ave. Trust v. Spencer, 2:13–cv–00544–JCM–VCF, 2013 WL 2296313 (D.Nev. May 24, 2013); Kal–Mor–USA, LLC v. Bank of America, N.A., 2:13–cv–0680–LDG–VCF, 2013 WL 3729849 (D.Nev. July 8, 2013); Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, 2:13-CV-895 JCM GWF, 2013 WL 4048573 (D. Nev. Aug. 9, 2013). Banks are also setting forth equitable arguments and have focused on the economic impact a decision wiping out their interest would have on the lending industry in Nevada, as well as setting forth some of the practical obstacles they face. It has been reported that in Nevada, certain HOA's will not cooperate with providing payoffs to lenders and in some instances, will not accept a payment in satisfaction of a past due balance unless the lender obtains written approval of the borrower.

Third party bidders have relied on Nevada Attorney General Opinion AG13-01, which addresses which costs an HOA can include in the calculation of the dollar amount of its super priority lien. Dep't of Business and Indus., Real Estate Div., Adv. Op. No. 13-01 (Dec. 12, 2012). In the course of the analysis set forth by the Attorney General's Office, the opinion offers the following language, albeit not accompanied by any citation to authority or other analysis, "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." This opinion, although not binding on the courts, has bolstered the claims of third party bidders who are relying on this language to suggest that a bank would in fact lose its security interest following an HOA foreclosure. While there are no known Nevada district court decisions where a judge has ruled in favor of a third party bidder and extinguished a first position deed of trust, there are many instances where the courts have stayed the actions or refused to grant a bank's motion to dismiss a quiet title action and are now requiring that the parties proceed to discovery or to an expedited trial.

Until the Nevada Supreme Court clarifies the status of the law on this issue, it is anticipated that third party bidders will continue to acquire properties at HOA foreclosure sales and continue to attempt to quiet title to the property and cut off the rights of the first position bank. Banks will continue to defend against these suits and attempt to avoid a scenario where their first position deed of trust is extinguished. We can only hope that we will soon have an answer to the pressing question, "Who is in first?"

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BAC HOME LOANS SERVICING, LP,

Plaintiffs,

vs.

STONEFIELD II HOMEOWNERS ASSOCIATION; ANTHEM HIGHLANDS COMMUNITY ASSOCIATION; MONECITO AT MOUNTAIN'S EDGE HOMEOWNERS ASSOCIATION; HERITAGE SQUARE SOUTH HOMEOWNERS' ASSOCIATION, INC.; SIERRA RANCH HOMEOWNERS ASSOCIATION; CORTEZ HEIGHTS HOMEOWNERS ASSOCIATION; SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION; ELKHORN – CIMMARRON ESTATES HOMEOWNERS ASSOCIATION; ELKHORN COMMUNITY ASSOCIATION, a Nevada non-profit corporation; CANYON CREST ASSOCIATION; LAS BRISAS HOMEOWNERS ASSOCIATION; ALIANTE MASTER ASSOCIATION; MOUNTAIN'S EDGE MASTER ASSOCIATION; ALESSI & KOENIG, LLC; ALLIED TRUSTEE SERVICES, INC.; ANGIUS & TERRY COLLECTIONS, LLC; ASSESSMENT MANAGEMENT GROUP INC.; ASSET RECOVERY SERVICES, INC.; LJS&G,LTD., d/b/a Leach Johnson Song & Gruchow; HOMEOWNER ASSOCIATION SERVICES, INC; NEVADA ASSOCIATION SERVICES, INC.; PHIL FRINK & ASSOCIATES, INC.; G.J.L., INCORPORATED, d/b/a Pro Forma Lien & Foreclosure; K.G.D.O. HOLDING

Case No.: 2:11-cv-00167-JCM-RJJ

MOTION TO DISMISS

COMPANY, INC., d/b/a Terra West Property Management; RMI MANAGEMENT LLC, d/b/a Red Rock Financial Services; SILVER STATE TRUSTEE SERVICES, LLC,

Defendants.

Defendants Anthem Highlands Community Association, Homeowners Association Services, Inc., LJS&G, LTD., d/b/a Leach Johnson Song & Gruchow, Heritage Square South, Nevada Association Services, Inc., K.G.D.O. Holding Company, Inc., d/b/a Terra West Property Management, Sierra Ranch Homeowners Association, Cortez Heights Homeowners Association, Elkhorn Cimarron Estates Homeowners Association, Mountain's Edge Master Association, Montecito at Mountain's Edge Homeowners Association, RMI Management, L.L.C. d/b/a Red Rock Financial Services, Stonefield II Homeowners Association, Phil Frink & Associates, Inc., Heritage Square South Homeowners Association, Aliante Master Association, and Elkhorn Community Association. (collectively "Defendants"), by and through their undersigned attorneys, herby submit this Motion to Dismiss Plaintiff's Complaint ("Motion").

This Motion is based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and any oral argument the Court may allow.

DATED this 23rd day of March, 2011.

LEACH JOHNSON SONG & GRUCHOW

By: /s/ Sean Anderson

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Ignoring the most basic tenets of lien and foreclosure law, Plaintiff asks this Court to issue a declaration permitting lenders to pay off statutorily superior liens for pennies on the

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dollar without completing the requisite step of foreclosing on the property subject to the lien. This means that lenders obtain clear title to the asset subject to their security interest without ever owning the property. In this way, lenders insulate the asset from foreclosure by the homeowners' association and, at the same time, avoid all of the obligations of property ownership, including the payments of assessments prospectively and maintaining the property in accordance with the covenants, conditions and restrictions recorded against the property. Lenders, such as Bank of America, may then sit on the property without maintaining it or paying assessments to the homeowners' association for whatever period of time it takes for the real estate market to improve enough to enable Plaintiff to maximize its profit. Plaintiff's paradigm, if employed, would result in a tremendous windfall for lenders and bankruptcy or receivership for Nevada common-interest communities.

Pursuant to N.R.S. 116.3116, a homeowners' association ("HOA") has a statutory lien against a unit owner's real property for delinquent assessments. A delinquent assessment lien is afforded superiority over virtually every other lien or encumbrance against the property as to the full amount of the lien, including the first deed of trust, to the extent of assessments accrued in the 9 months preceding an action to enforce the lien. This delinquent assessment lien is referred to as the Super Priority Lien. Pursuant to Nevada law, late fees, interest and the costs associated with collection are included in the Super Priority Lien. Lenders and investors are required to satisfy the Super Priority Lien to secure marketable title and sell the home. In an attempt to avoid this obligation, BAC cooked up a scheme of refusing to foreclose on the property and demanding that HOAs release their Super Priority Liens for a payment of much less than the amount of the lien.

BAC now asks this Court to legitimize its scheme by issuing a declaration based entirely on an interpretation of a Nevada statute that is: (1) currently being litigated in virtually every available forum in the Nevada judicial and administrative system; (2) is the subject of several bills currently pending in the Nevada Legislature; and (3) has already been interpreted by the Commission for Common-Interest Communities and Condominium Hotels ("Commission"), the administrative body that the Nevada Legislature specifically empowered and directed to interpret

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the precise statute that Plaintiff asks this Court to interpret. It is well understood by all parties that this hotly debated state law issue will ultimately be determined by the Supreme Court of Nevada.

BAC's claims, in the meantime, are not ripe for adjudication in this Court. BAC seeks a declaration from the Court that it may "prepay" a Super Priority Lien by tendering payment of a reduced amount prior to foreclosing on the property and demanding the release of the entire lien. The Super Priority Lien is **triggered** by foreclosure by the first deed of trust. If the first trust deed holder takes title to the property at the foreclosure sale, the Association's lien is extinguished except for the Super Priority portion of the lien, which survives foreclosure and entitles the HOA to recover that amount from the lender. However, until such time as BAC actually forecloses on the property, there is and can be no priority dispute regarding the competing encumbrances and liens recorded against the property. Accordingly, BAC's claim for declaratory relief is not ripe for adjudication and should be dismissed.

Alternatively, should this Court find this matter ripe for judicial determination, the Plaintiff has failed to satisfy the amount in controversy requirement, and this Court's jurisdiction should be restrained to allow Nevada state courts to determine the merits, if any, of Plaintiff's arguments regarding the interpretation and application of NRS § 116.3116. On these alternative bases, the Complaint must be dismissed.

II. FACTS

In its Complaint, Plaintiff alleges that it services thousands of mortgage loans in Nevada on behalf of certain "first security interests." Complaint ¶ 47. Plaintiff acknowledges that HOAs are permitted to charge owners assessments for common expenses and, when owners fail to pay these assessments, HOAs have a lien against the property that can be foreclosed. *Id.* ¶¶ 48-50. Plaintiff further acknowledges that an HOA's lien for delinquent assessments is entitled to priority over the first deed of trust to the extent of assessments accruing in the 9 months preceding "an action to enforce the lien" (the "Super Priority Lien"). Plaintiff further alleges that HOAs and the entire collections industry generally believe that the Super Priority Lien "attaches only after a first-priority deed of trust is foreclosed." *Id.* ¶ 53.

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Plaintiff, sometimes before foreclosing on a property, tenders payment of the Super Priority Lien amount calculated as 9 times the monthly assessment amount, excluding interest, late fees and costs of collection. *Id.* ¶¶ 54, 65-67. Plaintiff alleges that Defendants sometimes refuse to communicate with Plaintiff regarding the pay-off amount of the Super Priority Lien. *Id.* ¶ 56. Plaintiff alleges that the trustees "wrongfully rejected tender of the payment by BAC that would have satisfied the full lien amount[.]" *Id.* ¶ 66. Plaintiff further alleges that Defendants "will continue to refuse BAC payments" and that Defendants sought to collect an amount in excess of that which is allowed pursuant to N.R.S. § 116.3116. *Id.* ¶¶ 67, 71. On this basis Plaintiff seeks a judicial declaration that "(1) BAC has a right to pay off or redeem an association's super-priority lien [and demand release of the entire lien], and (2) only budgeted common assessments, but not attorneys' fees or collection costs, are included within the super-priority lien amount under § Nev. Rev. Stat. 116.3116." *Id.* at p. 10.

III. ARGUMENTS

1. Legal Standard

Declaratory relief is available only if: (1) a justiciable controversy exists between parties with adverse interests; (2) the plaintiff has a legally protectable interest; and (3) the issue is ripe. *See Knittle v. Progressive Casualty Ins. Co.*, 908 P.2d 724, 725 (Nev. 1996). Further, a claim is fit for declaratory relief only if the issues raised involve a legally cognizable claim. *US West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir .1999). If a case is not ripe for review, then there is no case or controversy and the court cannot exercise subject-matter jurisdiction over the action. *See American States Ins. Co. v. Kearns,* 15 F.3d 142, 143 (9th Cir.1994). Declaratory judgments generally serve to resolve uncertainty faced by potential defendants who face threats of litigation and who may accrue legal liability while waiting for potential plaintiffs to initiate a suit. *See Societe de Conditionnement en Aluminum v. Hunter Engineering Co., Inc.*, 655 F.2d 938 (9th Cir. 1981).

The decision whether or not to hear a declaratory judgment action is left to the discretion of the federal court. *See Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 533 (9th Cir.2008). Thus, the federal court may decline to address a claim for declaratory relief "[w]here the

substantive suit would resolve the issues raised by the declaratory judgment action, ... because the controversy has 'ripened' and the uncertainty and anticipation of litigation are alleviated." *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir.1987).

2. Plaintiff's Claims are Not Ripe for Judicial Determination.

Plaintiff's Complaint may be summarized as follows: (1) Plaintiff has a right to tender payment of the Super-Priority Lien, thereby implying a corresponding legal obligation of the Defendants to accept the payment as settlement in full on a property against which Plaintiff has a recorded deed of trust; and (2) that Defendants' super-priority lien amounts are in excess of those amounts allowed for pursuant to NRS § 116.3116. For the following reasons, Plaintiff's claims are not ripe for judicial determination.

a. Plaintiff Failed to Foreclose on the Property as Required Under NRS § 116.3116.

NRS § 116.3116 establishes a Super Priority Lien for delinquent assessments. N.R.S. § 116.3116 provides, in relevant part, as follows:

> 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.

Based on the forgoing, any fees, charges, fines and interest pursuant to N.R.S. § 116.3102(j)-(n) are also enforceable as assessments under N.R.S. § 116.3116. Because these fees, charges, fines and interest are enforceable as assessments, they must be included in the Super Priority Lien amount described in N.R.S. § 116.3116(2)(c). Plaintiff incorrectly alleges that these and similar costs specifically accounted for by statute as part of a common-interest communities super-priority lien are "junior to [BAC's] first deed of trust." *See* Complaint, Exhibits 1 and 2.

The falsity of BAC's assertion is plainly shown by the very language of the statute. NRS

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§ 116.3116 (2), further provides as follows:

> **A lien under this section is prior to all other liens and encumbrances** on a unit except:
>
> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
>
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.
>
> **The lien is also prior to all security interests** described in paragraph (b) to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration **during the 9 months immediately preceding institution of an action to enforce the lien.**

(Emphasis added.)

BAC has ignored and continues to ignore the express language of N.R.S. § 116.3116 which provides that a common-interest community has a lien for all amounts due and owing and a 9 month super-priority interest which becomes due upon the "institution of an action to enforce the lien." *Id.* Instead of simply foreclosing, like virtually every other lender in Nevada, Plaintiff tendered payment of less than the Super Priority Lien and demanded that Defendants release the lien. *Id.* ¶¶ 58-62. BAC's attempt to prepay the Super Priority Lien is based upon a fundamental misunderstanding of NRS Chapter 116 and the foreclosure process.

Plaintiff is a "beneficiary/servicer of the first deed of trust loan secured by the property." *See* Complaint, Exhibits 1 and 2. Plaintiff is not the record owner of a property until it exercises its right to foreclose on the property and take title at the foreclosure sale. As a result, it is unclear how Plaintiff can pre-pay a super-priority lien amount prior to foreclosure of its interest when NRS § 116.3116 only has a liquidated existence upon the foreclosure of an otherwise superior lien holder. NRS § 116.3116 does not provide Plaintiff the right to settle the amounts owing under the Super Priority Lien in the absence of a foreclosure. Importantly, Plaintiff's Complaint

failed to identify any statutory language within NRS § 116.3116 that would grant to Plaintiff this right or standing to assert this right.

The reason for this omission is clear—no such language exists. As stated above, if Plaintiff does not foreclose its interest then there is no cognizable reason to analyze NRS § 116.3116(2)(c) because there is no priority analysis. Absent the foreclosure of a superior lienholder, there is nothing to wipe out any of the inferior liens on the property. Unless and until a foreclosure does wipe out any of the inferior liens, the property will continue to serve as security for the full debts owed.

b. Absent Foreclosure of Its Lien, Neither the Plaintiff Nor Defendants can Properly Calculate the Super-Priority Lien Amount.

NRS § 116.3116(2)(c) provides that the super-priority lien survives the foreclosure of Plaintiff's superior interest to the extent of 9 months' worth of common expense 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. The only way to determine the pertinent 9 month period is to determine the event that triggers the lien priority system provided for in NRS § 116.3116. In the absence of foreclosure there is no point of reference by which either the Plaintiff or the common-interest community could correctly identify the 9 months term at issue as numerous variables may impact the amount due under the Super Priority Lien. For example, the assessments frequently change annually and that budget may also include special assessments and reserve assessments levied periodically throughout the year, which is reflected in an association's budget.

In addition, amounts levied by an association that are entitled to lien priority under NRS § 116.3116(2)(c) may include amounts incurred by an association in abating a public nuisance or performing exterior maintenance on a property within the community. Under NRS § 116.310312, an association may recover costs from an owner as follows:

> The association may order that the costs of any maintenance or abatement conducted pursuant to subsection 2 or 3, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged

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> against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.
>
> . . .
>
> (6) **Except as otherwise provided in this subsection, a lien described in subsection 4 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116.** . . ."

(Emphasis added.)

Based on the foregoing, an association has a lien for any costs that it incurs in the maintenance of a property or abatement of a public nuisance on a property. *Id.* NRS § 116.310312 further provides that the lien is recoverable as part of the Super Priority Lien and that it includes collection costs and other charges. *Id.*

Simply stated, the Super Priority Lien cannot be calculated unless a first security interest is foreclosed and the relevant 9 month period determined. If the Defendants were to accept a payment from Plaintiff for the Super Priority Lien, any assessments levied or charges levied pursuant to NRS § 116.310312 after that acceptance would not be secured by those statutory liens. If Plaintiff were correct in its position on NRS § 116.3116 in that it has a right to pay the Super Priority Lien, the tender of payment to Defendants would arbitrarily cut off the Defendants' right to secure other assessments that may come due after that payment but would also cut off their lien rights as provided in NRS § 116.310312.

Furthermore, the amounts owed under the Super Priority Lien may, from time to time, include many more charges and other assessments based on a periodic budget than just the bare amount of regular assessments as determined conveniently by Plaintiff. Until a first security interest is foreclosed, there is no way to determine the specific charges and assessments that are entitled to protection under the Super Priority Lien. Accordingly, Plaintiff allegations that the Defendants, by and through their trustees, have incorrectly rejected Plaintiff's tender of certain payments are simply incorrect. *Id.* ¶¶ 58-65. Prior to Plaintiff's foreclosure, there is no application of NRS § 116.3116, as the event triggering Plaintiff's interest in a property has not yet taken place and the calculation of the Super Priority Lien is not yet possible.

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c. BAC's Paradigm Incorrectly assumes that it will take Record Title to a Property at a Foreclosure Sale.

BAC's proposed paradigm and Complaint are based on hypothetical suppositions that can never be known until the foreclosure sale. As set forth above, if the first deed of trust holder takes record title to a property at a foreclosure sale an association's lien claim is extinguished except for the nine-month super-priority amount. Pursuant to NRS § 116.3116, the 9 month super-priority amount survives the foreclosure sale and entitles an association to its superior 9 month super-priority claim against the foreclosing lender. The 9 month super-priority claim is then governed by NRS 116.3116 as well as an association's governing documents. *See* NRS § 116.3116(1)("Unless the declaration otherwise provides[.]")

However, the foregoing assumes that the first deed of trust takes record title to the property at the foreclosure sale. This supposition fails to account for the possibility that there are bidders at the lender's foreclosure sale and that the property is transferred to someone other than the holder of first deed of trust. In such cases, an association still has a 9 month super-priority claim to the foreclosure sale proceeds, however, an association also has an additional claim to any remaining balance it is owed in the event that the first deed of trust holder is paid in full from the foreclosure sale proceeds. A HOA's remaining balance claim takes precedence over all lenders except for the first deed of trust holder's claim.

Plaintiff's Complaint erroneously assumes that a HOA will never get more from a lender foreclosure than the "maximum 9 months worth of delinquent assessments recoverable by the HOA." Complaint, Exhibits 1 and 2. However, if there are sufficient sale proceeds an association may be entitled to an amount in excess of that which is prioritized pursuant NRS § 116.3116. Accordingly, it is absurd for Plaintiff to assert that it is entitled to "prepay" an association's Super Priority Lien when, as here, Plaintiff has failed to initiate an action to enforce its lien as required by NRS § 116.3116, and the proceeds from the sale, in certain cases, have not come to fruition.

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d. Plaintiff's Hypothetical Injuries are Insufficient to Raise an Actionable Case or Controversy, And, As Such, Are Not Ripe.

Here, Plaintiff's claim for declaratory relief rests on an assortment of arguments, demand letters and hypothetical actions wherein BAC alleged a "right to pay off or 'redeem' the associations' super-priority liens" on the basis that BAC is the holder of a first deed of trust. Complaint ¶¶ 47, 74. There are no allegations in the Complaint that BAC took any action against or asserted its interest over the properties in any recognizable way: BAC is not the record owner of the property by virtue of the first deed of trust and BAC did not foreclose on a property or participate in filing any documents against a given property. BAC's Complaint is based solely on possible, hypothetical actions that could be taken by BAC. Hypothetical injuries are insufficient to raise an actionable case or controversy and invoke the court's subject-matter jurisdiction. *See e.g., Coast Range Conifers v. Board of Forestry,* 83 P.3d 966 (Or. 2004). If a case is not ripe for review, then there is no case or controversy and the court cannot exercise subject-matter jurisdiction over the action. *See American States Ins. Co. v. Kearns,* 15 F.3d 142, 143 (9th Cir.1994). Thus, BAC's Complaint fails to establish the existence of a case or controversy as it is not ripe for review and, therefore, should be dismissed.

3. Plaintiff's Complaint as Pled does not call for a Recovery or Relief in an Amount Valued at more than $75,000.00.

Alternatively, should this Court determine that Plaintiff may file the present action without foreclosing on its first deed of trust, there remain additional grounds for dismissal of this action. Under 28 U.S.C. §1332(a), the amount in controversy must exceed $75,000.00. Whether or not this monetary threshold is met is determined under the rule of law that holds if it appears from the complaint to a legal certainty that the plaintiff is not entitled to that relief, then jurisdiction is wanting under 28 U.S.C. §1332(a). *St. Paul Mercury Indemnity Co.,* 303 U.S. at 288-289.

In determining whether Plaintiff is entitled to any relief and thus able to satisfy 28 U.S.C. §1332(a), the Court must look to the face of the Complaint and the allegations therein. *St. Paul Mercury Indemnity Co.,* 303 U.S. at 292; *see e.g., Crum v. Circus Circus Enterprises,* 231 F.3d. 1129, 1131 (9th Cir. 2000) (stating that the "amount in controversy is determined from the face

of the pleading."). In doing so, the Court must consult pertinent state law to determine if the Plaintiff can lawfully recover what it is seeking. *See e.g., Duderwicz v. Sweetwater Sav. Ass'n. v.* 595 F.2d 1008, 1012 (5th Cir. 1979) (stating "[t]he determination of whether the requisite amount in controversy exists is a federal question; however, 'State law is relevant to this determination insofar as it defines the nature and extent of the right plaintiff seeks to enforce.'" (quoting *Johns-Manville Sales Corp. v. Mitchell Enterprises, Inc.,* 417 F.2d 129, 131 (5th Cir. 1969)).

If the state law upon which Plaintiff's prayer for relief rests does not contain the rights and obligations that Plaintiff claims it does, then it is with legal certainty that Plaintiff will fail at recovering any of the amount of alleged damages as stated in its complaint. *See Pachinger v. MGM Grand Hotel-Las Vegas, Inc.,* 802 F.2d 362, 364 (9th Cir. 1986) (ruling that the legal certainty standard is met if a specific rule of law limits or does not otherwise allow the recovery sought). Moreover, federal courts are required to exercise restraint in the reach of their jurisdiction out of deference to state courts and limit otherwise frequent and unnecessary access to the federal court system through diversity jurisdiction. *See Healy v. Ratta,* 292 U.S. 263, 270; 54 S.Ct. 700, 703 (1934) (stating of the amount in controversy requirement that Congress' intent was to limit narrow federal jurisdiction over cases otherwise heard by state courts and ruled, "[t]he power reserved to the states, under the Constitution (Amendment 10), to provide for the determination of controversies in their courts, may be restricted only the action of Congress in conformity to the judiciary sections of the Constitution (article 3). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." (internal citations omitted)); *see also Lorraine Motors, Inc., v. Aetna Casualty and Surety Company, et. al.,* 166 F. Supp. 319, 321 and 322 (E.D.N.Y. 1958) (ruling, "[o]f course, the purpose of making the amount in controversy in a case determinative of jurisdiction has always been to prevent the dockets of the federal courts from being overcrowded with small cases which should be brought in the State courts which are fully equipped to decide such cases." Also noting, "[i]t is known that 'the dominant note in the successive enactments of Congress relating

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to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts in order to keep them free for their distinctive federal business.'" (internal citations omitted)).

For the amount in controversy to be sufficient to satisfy the jurisdictional requirements under 28 U.S.C. § 1332(a), there must at least be a valid legal basis on the face of the complaint supporting that amount alleged. Plaintiff's position under NRS § 116.3116 is wholly misplaced and evidences a clear misunderstanding of its application. Second, at least some prospect of Plaintiff recovering more than $75,000.00 must appear in the allegations in the Complaint. Yet, Plaintiff's Complaint actually acknowledges that it has not yet incurred any such damages and provides no other factual basis that would support a recovery of more than $75,000.00. Lastly, the amount of assessments that constitute the super-priority lien under NRS 116.3116 cannot be determined until an otherwise superior lienholder forecloses its interest in a property subject to the super-priority lien. Therefore, any argument by Plaintiff that it has a right to redeem the super-priority lien amount prior to foreclosure is not ripe until a foreclosing event triggers the super-priority lien.

Plaintiff's Complaint fails to assert sufficiently any basis for the requisite recovery under 28 U.S.C. § 1332(a). The only allegation in Plaintiff's Complaint regarding the value of the damages incurred by Plaintiff is in paragraph 44, which states, "[t]he amount in controversy exceeds $75,000.00 because, as shown below, the value of the object of this litigation—clear, marketable title for real property securing hundreds of mortgage loans—exceeds $75,000.00." This allegation serves as the only allegation in the complaint that purports to support any damage claim. Yet, this allegation is merely self serving for the purpose of giving the appearance of an actual amount in controversy without actually pleading that amount.

If marketable title to all of the properties that Plaintiff services is the object of the litigation, then Plaintiff has at least a minimal responsibility to provide some factual background or basis as to how marketable value is determined and to what extent marketable title is devalued as a result of the Super Priority Lien. There is no methodology provided as to how the value of

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marketability is calculated. There is nothing in the Complaint that suggests that Plaintiff has lost a sale as a result of the Super Priority Lien. There are no facts that allege that one foreclosure of a deed of trust it services would have sold for more than another in the absence of the super-priority lien nor is there any factual allegation that Plaintiff as the servicer of any deeds of trust has been prevented from carrying out its duties or responsibilities as the servicer. In fact, on the issue of amount in controversy, Plaintiff's Complaint contains nothing more than an all too convenient statement that marketability is worth more than $75,000.00. A complaint invoking jurisdiction under 28 U.S.C. § 1332(a) that is based exclusively on state law must be accountable to some standard of pleading beyond what Plaintiff has displayed in this case. A mere statement as to an unsupported value of marketability does not pass even the legal certainty test as set forth above.

In addition, Plaintiff did not allege any actual damages. Plaintiff argues that the amounts that the Defendants are charging under the super-priority lien exceed the amounts permitted under NRS § 116.3116. However, Plaintiff has not actually paid any of these amounts. As Plaintiff states in its Complaint, the trustees "rejected tender of the payment by BAC that would have satisfied the full lien amount[.]" Complaint ¶ 66. Furthermore, unless and until it becomes the owner of a property subject to a Super Priority Lien, Plaintiff is not liable for any of the amounts owing under the Super Priority Lien. As such, there is no way that Plaintiff can recover any amounts close to more than $75,000.00 in actual damages based on the allegations as pled by Plaintiff.

Finally, although not a 9th Circuit case, *Middle Tennessee News Co., Inc. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077 (7th Cir. 2001) holds that a Plaintiff normally cannot aggregate the amount owed by each defendant to satisfy the amount in controversy requirement. It states, "[i]n diversity cases, when there are two or more defendants, plaintiff may aggregate the amount against the defendants to satisfy the amount in controversy requirement only if the defendants are jointly liable; however, if the defendants are severally liable, plaintiff must satisfy the amount in controversy requirement against each individual defendant." Here, Plaintiff is unable to satisfy the amount in controversy as Plaintiff cannot aggregate the amounts against the Defendants.

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For the reasons above, this Court should dismiss Plaintiff's Complaint for lack of jurisdiction under 28 U.S.C § 1332(a).

4. This Court should allow Nevada State Courts and other State Proceedings to Decide the Scope and Application of NRS 116.3116.

As stated in *Healy, supra*, this Court's jurisdiction should be restrained and allow Nevada state courts to determine the merits of any arguments under NRS § 116.3116. The extent and scope of NRS § 116.3116 is currently the basis of numerous Nevada state court actions and arbitration proceedings and will undoubtedly be decided by the Nevada Supreme Court. A few of those currently pending cases or arbitration proceedings include: *Higher Ground, et al. v. Nevada Association Services, et al.*, Clark County Case No. A609031, *Higher Ground, et al. v. Aliante Master Association, et al.*, Clark County Case No. A-10-608741-C, *Edgewater Equities, LLC v. Alessi & Koenig, LLC, et. al.*, Clark County Case No. A607221, *Prem Deferred Trust, et al. v. Nevada Association Services, et al.*, Clark County Case No. A608112, and *Elkhorn Community Association v. Valenzuela, et al.*, Clark County Case No. A-10-607051-C.[1] To resolve these cases, it is paramount that Nevada state courts be allowed to speak as to the application and scope of NRS § 116.3116 without concern of conflicting rulings from the federal courts. NRS § 116.3116 is an act of the Nevada legislature and any ambiguity as to its meaning or basis for its application should be left to the courts of Nevada. In conjunction with the discussion above, this Court should exercise the restraint as pronounced by the United States Supreme Court in *Healy*, and dismiss the Plaintiff's Complaint.

1 At this time, all of these cases have been dismissed by the District Court pursuant to NRS 38.310 and are proceeding through arbitration, except *Elkhorn Community Association*.

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IV. CONCLUSION

For the foregoing reasons, the Defendants respectfully request that this Court dismiss the Complaint as this matter is not ripe for judicial determination. Alternatively, Defendants request dismissal of the Complaint on the basis that Plaintiff failed to adequately plead or satisfy the amount in controversy and, as set forth in *Healy*, this Court's jurisdiction should be restrained and allow Nevada state courts to determine the merits, if any, of any arguments regarding the interpretation and application of NRS § 116.3116.

DATED this 23rd day of March, 2011.

LIPSON NEILSON COLE SELTZER & GARIN, P.C. _/s/Kaleb Anderson__ Kaleb Anderson, Esq. Nevada Bar No. 007582 9080 W. Post Rd. #100 Las Vegas, Nevada 89148 Phone: (702)382-1500 *Attorneys for Anthem Highlands Community Association and Homeowner Association Services, Inc.* DATED: March 23, 2011.	**LEACH JOHNSON SONG & GRUCHOW** _/s/Sean Anderson_____ Sean Anderson Nevada Bar No.7259 Ryan Reed Nevada Bar No.11695 8945 West Russell Road, Suite 330 Las Vegas, Nevada 89148 Phone: (702) 538-9074 *Attorneys for LJS&G* DATED: March 23, 2011.
ALVERSON, TAYLOR, MORTENSEN & SANDERS _/s/Kurt Bonds, Esq. ___ Kurt Bonds, Esq. Nevada Bar No. 006228 7401 West Charleston Blvd Las Vegas, Nevada 89117 Phone: (702) 384-7000 *Attorney for Heritage Square South HOA, Aliante Master Association & Elkhorn Community Association* DATED: March 23, 2011.	**LAW OFFICES OF RICHARD VILKIN P.C.** _/s/Richard Vilkin_____ Richard Vilkin, Esq. Nevada Bar No. 008301 1286 Crimson Sage Avenue Henderson, Nevada 89012 Phone: (702)476-3211 *Attorney for Nevada Association Services, Inc.* DATED: March 23, 2011.

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KERN & ASSOCIATES, LTD. /s/Gayle A, Kern, Esq. Gayle A. Kern, Esq. Nevada Bar No. 1620 Kern & Associates, Ltd. 5421 Kietzke Lane Suite 200 Reno, Nevada 89511 (775) 324-6173 fax gaylekern@kernltd.com *Attorney for Stonefield II Homeowners Association and Phil Frink & Associates, Inc.* DATED: March 23, 2011.	**WOLF RIFKIN SHAPIRO SCHULMAN & RABKIN, LLP** /s/Don Springmeyer Don Springmeyer, Esq. Nevada Bar No. 001021 3556 E. Russell Road, 2nd Floor Las Vegas, Nevada 89120 Phone: (702)341-5200 *Attorney for Sierra Ranch Homeowners Association, Cortez Heights HOA, Elkhorn Cimarron Estates, Mountain's Edge Master Association and Montecito at Mountain's Edge, and K.G.D.O. Holding Company, Inc., d/b/a Terra West Property Management* DATED: March 23, 2011.
RMI MANAGEMENT, INC. d/b/a RED ROCK FINANCIAL SERVICES /s/Christopher V. Yergensen, Esq. Christopher V. Yergensen, Esq. Nevada Bar No. 6183 1797 Mezza Court Henderson, Nevada 89012 Phone: (702)940-7110 *Attorney for RMI d/b/a Red Rock Financial Services* DATED: March 23, 2011.	

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the undersigned, an employee of LEACH JOHNSON SONG & GRUCHOW, hereby certified that on the 23rd day of March, 2011, she served a true and correct copy of the foregoing, MOTION TO DISMISS by:

X Depositing for mailing, in a sealed envelope, U.S. postage prepaid, at Las Vegas, Nevada

X Electronic Service via CM/ECF System

_____ Personal Delivery

_____ Facsimile

_____ Federal Express/Airborne Express/Other Overnight Delivery

_____ Las Vegas Messenger Service

addressed as follows:

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Arbitrator

NEVADA DEPARTMENT OF BUSINESS & INDUSTRY

REAL ESTATE DIVISION

Bank of America, N. A., Claimant, vs. Stonefield Homeowners Association, et. al. Respondents	NRED Control No.: 12-58 **NON-BINDING ARBITRATION AWARD**

On or about June 13, 2012 the Arbitrator in this action ruled this matter would be decided upon the briefing of the parties, without hearing, unless objection to this procedure was made by a party. With no party objecting to the matter being decided upon the briefs of the parties, and the hearing being waived by the parties, this arbitration award follows. The Arbitrator rules that all parties participated in good faith in this matter.

Having considered the extensive pleadings submitted by the parties to this matter, the Arbitrator finds as follows:

1. Claims Presented

This arbitration involves two primary claims for relief. Firstly, the Claimant seeks a declaration establishing whether it has a right to pay-off or redeem a Homeowners Association

("HOA") super-priority lien before it forecloses under a senior deed of trust. Secondly, the Claimant seeks a declaration establishing that a HOA's super-priority lien does not include attorneys' fees and costs when such costs increase the amount of the lien to a sum greater than nine months of monthly assessments. These requests for declaration are ruled upon below in reverse order.

2. Assessments Enforceable Under NRS 116.3116 Include all Reasonable Collection Costs and Fees Relating to the Nine Month Period

In a departure from traditional lien property law, and to *expand* the rights of homeowners associations, Nevada has adopted the Uniform Common Interest Ownership Act. This act is codified in NRS 116. The instant matter involves the interpretation of NRS 116. As is relevant herein, NRS 116.3116 generally provides that, upon a foreclosure, an association's lien to a new owner of property for moneys due the association by a prior owner is superior to all other liens, including those filed earlier, such as the first mortgagee's interest. It is the *nature and extent* of this "priority" lien which is the subject of this suit.

The Arbitrator appreciates that there has been differing decisions made by different administrative bodies, judges and arbitrators regarding the interpretation of NRS 116.3116. See CCIC Opinion No.2010-11; Korbel Family Trust v. Spring Mountain Ranch Master Ass'n, Clark County District Court Case No.: 06-AO523959-C; Elkhorn Community Assoc. v. MERS, Clark County District Court No. A607051; JP Morgan v. Countrywide Home Loans, Clark County District Court Case No. A562678. See differing opinions found in the November 18, 2010 advisory opinion of the Nevada Financial Institution Division, and by the Court in Wingbrook Capital v. Peppertree HOA, Clark County District Court Case No. A-11-636948-B. The Arbitrator also appreciates the fact that the issues raised in this matter will ultimately be heard by the Nevada Supreme Court. However, as of this date, the Nevada Supreme Court has not published a decision interpreting NRS 116.3116. Thus, this action is being reviewed by this Arbitrator as a case of first impression.

It is not disputed that interest, late fees, and third party costs of collection are considered a part of the assessments under NRS 116.3116, and are subject to inclusion into a HOA priority lien. Claimant argues nevertheless that 116.3116 1.(C) limits the priority lien to a gross figure not to exceed an amount equal to 9 months of *normal homeowners assessments or monthly dues*. The Arbitrator disagrees.

NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." The plain reading of the *entirety* of this statute and the *entirety* of Chapter 116 indicates that what is meant by the words "would have become due" was to allow homeowners associations a priority lien to the extent of, and in a gross amount equal to, what these associations would have been able to be awarded for a nine month period had lien priority not been an issue. This gross amount would include all association dues in arrears, as well as all other costs and fees the association might be entitled to. For example, in a *non-foreclosure setting*, if a property owner was delinquent for 9 months in paying his $200 per month hypothetical homeowner's dues, there could not be a dispute that the homeowners association could sue for, obtain a lien for, and be awarded the sum of $1,800, *plus* all costs associated with collection. In this example, let us assume that collection costs and other charges equal $2,000. In this hypothetical, the homeowners association could obtain a lien for, and be awarded the total sum of $3,800.

Again, NRS 116.3116 states that the homeowners association priority lien is limited to "what ***would have become due*** ... in the 9 months immediately preceding institution of the action to enforce the lien." In the hypothetical noted above had action been taken prior to foreclosure, what "would have become due" to the homeowners association by the home owner would be $3,800. Thus, using the figures in our example, in a foreclosure setting, the homeowners association would be limited to a priority lien in the sum of $3,800, or an amount equal to what "***would have become due*** ... in the 9 months immediately preceding institution of the lien."

The lien limitation set forth in NRS 116.3116 requires the trier of fact to look-back and to the limit a lien to what "would have become due" had an action been filed at the end of a nine month period. That amount would include delinquent homeowners' dues, attorneys' fees, interest, penalties, interest and all other charges which a homeowners association legally could seek in a non-foreclosure setting. While the 9 month limitation is a cap, it is cap which includes collection costs and fees, because those costs "would have become due" had a matter been filed outside foreclosure. See Hudson House Condo. V. Brooks, 611 A.2d 862 (Conn. 1992) in support. [1] The Claimant's request for relief in this regard is denied.

3. Absent Foreclosure of a Lien Respondents Are Not Obligated to Resolve Lien Disputes

All parties to this matter seem to agree that a super-priority lien attaches or is "triggered" when the first deed of trust holder forecloses upon its deed of trust. The Claimant nevertheless seeks a declaration establishing that it has an absolute right to pay-off or redeem a Homeowners Association ("HOA") super-priority lien before it is triggered or attaches, or before it forecloses under a senior deed of trust. Claimant argues that the respondent homeowners associations must, in effect, pre-determine the likely amount of the super-priority lien, and do so before collection costs and other charges are incurred, so that entities such as the Claimant can avoid the imposition of these fees and costs.[2]

---

[1] The Respondents make several additional arguments in support of the proposition that the super priority lien includes costs of collection. The merits of those additional arguments are not ruled upon herein.

[2] The Respondents have set forth many reasons why it would be difficult, if not impossible, to determine exact lien amounts prior to foreclosure, so that an appropriate demand can be made upon a pending or potential super-priority lien. The Respondents also point out the several pitfalls of accepting a lien pay-off prior to attachment of the lien. The Arbitrator finds the Respondents arguments in this regard to be persuasive. However, these arguments are not necessary to support the Arbitrator's decision herein.

While the Claimant certainly has the *right* to *negotiate a settlement* with homeowners associations regarding liens prior to foreclosure, there is nothing in the law which requires or sets forth an *obligation* of homeowners associations to either negotiate with the Claimant, or to enter into a settlement or resolution. There is simply no provision in the law which requires Respondents to pre-determine likely lien amounts before those liens are triggered or attach. There is simply no provision in the law which requires Respondents to then accept that amount in lieu of going forward with the procedures now followed by the Respondents. The Claimant's request for relief in this regard is denied.

4. Conclusion

Based upon the foregoing, non-binding arbitration award is herewith granted **in favor of the Respondents**, and each of them, and against the Claimant on all claims for relief.

Dated: September 18, 2012

Ara H. Shirinian
Arbitrator

Proof Of Service By Mail

I, Ara Shirinian, do hereby declare that I am employed in the County of Clark, State of Nevada. I am over the age of 18 years old and not a party to the within action. My business address is 10651 Capesthorne Way, Las Vegas, Nevada 89135. On the date below, I caused to be mailed by first class United States mail, postage pre-paid, the foregoing document(s): Arbitration Award to all parties in this action addressed as follows:

See attached list

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct and that this declaration was made in Las Vegas on the below date.

DATED: 9/10/12

ARA SHIRINIAN

IN THE SUPREME COURT OF THE STATE OF NEVADA

*****

CASE NUMBER: 65260

GMAC MORTGAGE, LLC,

Appellant,

vs.

KEYNOTE PROPERTIES, LLC; NEVADA ASSOCIATION SERVICES, INC., and PECCOLE RANCH COMMUNITY ASSOCIATION,

Respondents,

*****

Certified Question from the U.S. District Court, District of Nevada,

Case No. 2:13-cv-1157-GMN-NJK.

*****

RESPONDENTS' ANSWERING BRIEF

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Docket 65260 Document 2015-14748

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible recusal or disqualification.

Respondent Nevada Association Services, Inc. is a domestic corporation licensed to do business in Nevada. Respondent Peccole Ranch Community Association is a Domestic Non-Profit Cooperative Corporation. Nevada Association Services, Inc. and Peccole Ranch Community Association have been represented in this litigation by Kaleb Anderson of Lipson, Neilson, Cole, Seltzer Garin, P.C.

Dated May 13, 2015

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

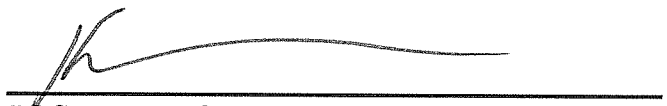

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TABLE OF AUTHORITIES

Cases

Statutes

I. STATEMENT OF ISSUES

The question of law certified to this Court is as follows:

> What effect, if any, is there upon a foreclosure sale conducted pursuant to Nev. Rev. Stat. § 116.31162 when the association refuses to provide the holder of a first security interest under a deed of trust secured by the unit with the specific amount due under the portion of the association's delinquent assessments lien that has been made prior to the deed of trust by Nev. Rev. Stat. § 116.3116(2)(c).

II. STATEMENT OF THE CASE

A. Nature of the Case.

This case is about a lender's failure to exercise its contractual right to pay a nominal lien in order to protect its deed of trust from the effect of a foreclosure of a homeowners association's ("HOA") superior lien. There is nothing an HOA can do to prevent any junior lien holder from paying an HOA's lien. From the time a Nevada HOA records its declaration ("CC&Rs") the HOA has a perfected lien for assessments for common expenses. When a homeowner within the HOA fails to pay assessments, the HOA can enforce the lien, through foreclosure if necessary. As this Court has ruled, an HOA's assessment lien is superior to a first deed of trust. *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014). When an HOA properly forecloses on its assessment lien, the first deed of trust is extinguished. *Id.*

The *SFR* decision does not discuss the content of most deeds of trust, which establishes the rights and obligations of the parties thereto, as well as the

mechanism for a lender to protect itself from ***any*** lien. Lenders knowingly take risks when they make loans, so their deeds of trust address those risks. According to deeds of trust, in exchange for money, the borrower promises to repay the money and to protect the lender's deed of trust by paying assessment, taxes, and liens, among other obligations. If the borrower fails to protect the deed of trust, the deed of trust provides the mechanism for the lender to step in and protect the deed of trust. This mechanism is available to the lender regardless of the HOA's conduct and regardless of the nature of the threat to the deed of trust.

If the borrower fails to protect the deed of trust, the lender may protect it. The lender has little to lose because amount the lender pays in order to protect the deed of trust is added to the balance of the underlying debt which the deed of trust secures. Thus, by operation of the provisions in the deed of trust, if the lender pays the lien, the deed of trust is protected, and the lender may recover its payment from the borrower who promised to protect the deed of trust in the first place.

The HOA is not a party to the deed of trust and is not involved in the loan transaction between the lender and borrower or the borrower's obligations to the lender. ***Accordingly, waiting for a super-priority computation should not deter a lender from choosing to protect its deed of trust because whatever amount the lender pays, including any non-super-priority amount, the lender recovers by adding the amount, automatically, to the debt secured by the deed of trust.***

Thus, the certified question considers only a portion of the issue, the association's conduct, and cannot be fully answered without an analysis of the lender's conduct as well, especially when viewed in light of the lender's rights and remedies regarding the protection of the deed of trust. *See* Nev. Rev. Stat. § 116.1108 (principles of law and equity supplement Nev. Rev. Stat. §116). The effect of the lender's conduct can be stated as a corollary question, which may inform the Court as it considers the certified question:

> What effect, if any, is there upon a foreclosure sale conducted pursuant to Nev. Rev. Stat. § 116.31162 when the lender refuses to protect itself by paying a lien pursuant to the contractual rights and remedies stated within a deed of trust, and instead pursues the HOA for an injury caused by the lender's borrower's breach of the obligation to protect the deed of trust, and the lender's failure to protect itself by paying the lien, and the lender's failure to protect itself by bidding at the publically noticed foreclosure sale?

A lender's inaction should not equate an HOA's liability. Each of the foreclosure notices in this case included the lien amount, and as this Court said, "[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right.... [and] nothing appears to have stopped" the lender from paying the entire lien. *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 418 (2014). The lender failed to protect its deed of trust when its borrower stopped paying assessments. This Court should not do for the lender what the lender was unwilling to do for itself.

NRS 116 is silent with respect to a volunteer HOA Board's or its agent's obligation to answer a junior lien holder's request for a "super-priority" amount. There is disagreement among the HOAs, the Courts, within the Nevada Real Estate Division, and among many other, as to the "super-priority" amount of an HOA's lien. It is unreasonable to expect a private group of volunteer home-owners who comprise the typical HOA Board or the HOA's agent, to embark as legal vanguards on the path of parsing a lien into separate portions and declaring each separate portion's respective priorities—when such a path is not set forth within the CC&Rs or within NRS 116. The borrower's and lender's failure to protect a deed of trust should not add to the volunteer HOA's obligations under NRS 116, which contains no provision requiring the HOA to parse lien amounts and determine their respective priorities at the request of junior lien holders.

The issue is particularly troubling in this case, where the lender slept on its rights for nearly two years without taking any action relative to the HOA's lien. The Notice of Delinquent Assessment Lien was recorded in August of 2011 (II JA000336), and the HOA's foreclosure sale took place in April of 2013 (II JA000337). In that 20 month window of opportunity, the lender admits it knew about that lien and contacted the HOA "and/or" Nevada Association Services ("NAS") about the foreclosure. (Opening Brief p. 3). However, the lender's "failed attempts to satisfy the lien" did not include actually trying to satisfy the lien. In

other words, the lender's efforts to protect the deed of trust did not involve actually paying the lien or pursuing the borrower for the borrower's failure to protect the deed of trust. The sum total of the lender's effort was merely asking questions about an ethereal "super-priority" amount, questions which neither NAS nor the volunteer HOA Board was obligated to respond.

B. Course of Proceedings.

This certification proceeding arises from an underlying nonjudicial foreclosure of the Peccole Ranch Community Association's (the "Association") super-priority assessment lien (the "Lien"). After the Association's foreclosure, the lender ("GMAC") filed a complaint in the U.S. District Court, District of Nevada. (I JA00001). The Association and co-respondent, Nevada Association Services, Inc. ("NAS") filed an Answer on September 13, 2013 (I JA000051-60). Co-defendant Keynote Properties, LLC ("Keynote") filed an Answer and Counterclaim. (I JA000064-83). GMAC filed a Motion to Dismiss Keynote's Counterclaims. (I JA000089-97). Keynote and GMAC filed Motions to Certify Questions to this Court (II JA000282-97 and II JA000320-32 respectively). The U.S. District Court submitted its Order requesting certification of the questions.

On November 13, 2014, this Court issued its Order declining one question, which had been resolved by the *SFR* ruling, and certifying the other question. (II JA000335-44).

III. STATEMENT OF FACTS

A. The Association, the Property, the Deed of Trust.

In 1991, Nevada adopted the UCIOA codified as Nev. Rev. Stat. § 116.

The property at issue in this case is located at 9740 Ravine Avenue, Las Vegas, Nevada 89117, APN 163-06-316-165 (the "Property") (Order at II JA000335). The Property is subject to a Declaration ("CC&Rs") which was recorded by Peccole Ranch Community Association (the "Association") (Order at II JA000336).

On June 26, 2006, Carolyn M. Brown (the "Borrower") executed and delivered a deed of trust (the "Deed of Trust"). (I JA000010-28). The Borrower initialed or signed each page of the Deed of Trust. (*Id.*) On August 3, 2006, the Deed of Trust was recorded. (II JA00035).

The Deed of Trust secured a promissory note memorializing a $245,000.00 loan. (I JA000011). The Deed of Trust contains a Planned Unit Development Rider ("PUD Rider"). (I JA000025-28). GMAC received an Assignment of the Deed of Trust on August 9, 2011, (Assignment of Deed of Trust, I JA 000142)

The Lender had actual knowledge of the Association's lien for assessments as memorialized references to the CC&Rs and to the lien within the Deed of Trust and the PUD Rider. (*See* Deed of Trust and PUD Rider at JA000011, ¶ K; JA000014, § 4; JA000016, § 9; PUD Rider, JA000025-26).

Paragraph K of the Deed of Trust defines "Community Association Dues, Fees and Assessments" as "all dues, fees, assessments and other charges that are imposed on Borrower or the Property by [the Association]." (I JA000011).

Section 4 of the Deed of Trust states that the Borrower "shall pay all taxes, assessments, charges, fines ... which can attain priority over this [Deed of Trust and shall pay] Community Association Dues, Fees, and Assessments..." (Deed of Trust § 4, JA000014). Section 4 of the Deed of Trust also expressly obligates the Borrower to pay "any lien" which has priority over the Deed of Trust. *Id.*

Section 9 of the Deed of Trust relates to GMAC's remedies in the event the Borrower fails to perform the obligations under the Deed of Trust. (JA00016-17).

Section 9 of the Deed of Trust states that the Lender may "do and pay for whatever is reasonable or appropriate to protect [the Deed of Trust]." *Id.*

Section 9 of the Deed of Trust states that the Lender may pay reasonable attorneys' fees to protect the Deed of Trust. *Id.*

In the event GMAC did decide to protect the Deed of Trust, as was its right, then "[a]ny amounts disbursed by Lender under this Section 9 ***shall become additional debt of Borrower secured by this*** [***Deed of Trust***]." (I JA000017) (emphasis added).

The PUD Rider also requires the Borrower to perform all the obligations in the CC&Rs. (PUD Rider, ¶ A, I JA000025).

The PUD Rider echoes § 9 of the Deed of Trust and states that, in the event the Borrower fails to pay dues and assessments, then the Lender may pay them, and that any amount paid by the Lender is added to the underlying debt secured by the Deed of Trust. (PUD Rider at ¶ F, JA000026)

B. The Foreclosure of the HOA's Lien

The Borrower stopped paying the Association's monthly assessments which resulted in Notice of Delinquent Assessment Lien recorded on August 26, 2011 and which included the amount due: $1,188.94. (Notice of Delinquent Assessment Lien; I JA000032).

The total lien amount, $1,188.94 is less than ½ of 1% of the loan amount secured by the Deed of Trust.[1] Still neither the Borrower nor GMAC paid the Lien.

A Notice of Default and Election to Sell Under Homeowner Association Lien was recorded on October 27, 2011 which included the amount due: $2,276.04. (Notice of Default, I JA000034-35). The total lien amount, $2,276.04, is less than 1% of the loan amount secured by the Deed of Trust. Still, the Borrower never paid the Lien, nor did GMAC.

On May 31, 2012, a Notice of Foreclosure Sale was recorded, which included the amount due: $3,807.46. (Notice of Foreclosure Sale, JA000037-38).

[1] This Court may take judicial notice of information which is "Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." Nev. Rev. Stat. § 47.130.

By then, the total lien amount, $3,807.46 was about 1 ½ % of the loan secured by the Deed of Trust. The Borrower never paid this amount, nor did GMAC.

On April 27, 2013, the sale took place and the Property was sold to Keynote; a Foreclosure Deed was recorded on May 21, 2013. (Foreclosure Deed, I JA000040). The Foreclosure Deed contains recitals regarding the legal compliance of the foreclosure notices. (*Id.*)

GMAC alleged in its Complaint that prior to the sale it requested the super-priority lien amount so it could pre-pay the Lien and stop the pending foreclosure sale. (Compl. ¶ 16; I JA0000004.) Other than the allegations in the Complaint, there is no evidence to that effect in the record of this case.

IV. SUMMARY OF THE ARGUMENTS

The Borrower and the Lender entered into the loan transaction with their eyes wide open with respect to the Association's Lien and the Borrower's and Lender's respective obligations and rights under the Deed of Trust. The Borrower's obligations are to the Lender, both to repay the loan and to protect the Deed of Trust. The Borrower has obligations to the Association, to pay assessments, and to pull weeds, among others. The Association did not participate in the negotiations or the transaction between GMAC and the Borrower. The Association's obligations are to the Association's homeowners.

GMAC's rights to protect the Deed of Trust are expressed in the Deed of Trust itself which allows GMAC to pay assessments (or any liens) when the Borrower fails to do so. GMAC had actual knowledge of the Association's Lien because GMAC alleges it contacted the Association and NAS to obtain a super-priority payoff amount. Assuming that fact as true, and assuming further than the Association and NAS did not provide the information requested, GMAC still refused to do what GMAC had contemplated at the time of the transaction, and contracted with the Borrower, and what would have been reasonable, i.e., to protect itself as expressly stated within the Deed of Trust by paying the Lien.

GMAC could have, and should have, paid the nominal Lien to protect the Deed of Trust because any such payment by GMAC would have automatically been added to the debt secured by the Deed of Trust. GMAC also elected not to appear at the Association's foreclosure sale to protectively bid on the Property in order to protect the value of the Deed of Trust. Other than complaining about not receiving a partial lien payoff amount from NAS or the Association, GMAC did nothing to protect the Deed of Trust by paying the entire Lien and adding the payment to the debt secured by the Deed of Trust.

Whether NAS or the Association provide a partial payoff amount to GMAC has nothing to do with the GMAC's rights to protect the Deed of Trust or to enforce its Deed of Trust, on behalf of, or against GMAC's Borrower, and has

nothing to do with GMAC's election to do nothing.[2] GMAC's choice not to pay the Lien should not invalidate the Association's foreclosure sale. Similarly, the "good faith" requirement for contracts and duties applies to the Association for contracts with the Association, and the duties of the Association's to its members. There is no contract between the Association and GMAC, and the HOA Board's duties to the Association are to comply with the Nev. Rev. Stat. § 116.

Nev. Rev. Stat. § 116 (the "Statute") does not require an HOA to parse a lien or to provide partial lien "payoff amounts" to third-parties. On the other hand, the Statute requires that the foreclosure notices contain the lien amount and that the notices are publically recorded. Nev. Rev. Stat. § 116 prescribes the content of the Notice of Delinquent Assessment (Nev. Rev. Stat. § 116.61162(1)(a)), the Notice of Default (Nev. Rev. Stat. § 116.61162(1)(b)), and the Notice of Sale (Nev. Rev. Stat. § 116.311635). And as this Court has stated in the *SFR* decision, that it is proper for the notices to state the entire lien amount because the notices go to the homeowner as well as other junior lien holders. Thus, whether the Association responds to a junior lien holder's request for a partial lien amount, which is not required under Nev. Rev. Stat. § 116, should have no effect on the validity of the Association's foreclosure sale.

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[2] As a result of GMAC's inaction, GMAC is subject to multitude of equitable defenses such as laches, estoppel, waiver, and failure to mitigate.

The volunteer HOA board's duties and obligations are stated within the CC&Rs and Nev. Rev. Stat. § 116. There is no provision of Nev. Rev. Stat. § 116 which requires the Association to protect GMAC or that the Association owes a duty to GMAC. The good faith obligation of the HOA board attaches to contracts entered into by the volunteer HOA Board on behalf of the Association. Likewise, the duties are "governed by this chapter" require the board to comply with Nev. Rev. Stat. § 116, which does not require any disclosure of partial payoffs or other debtor information to third-parties such as GMAC.

Finally, under the FDCPA, NAS and the Board could be subject to liability by improperly disclosing information regarding association member's debts to third-parties, such as GMAC.

V. ARGUMENT

GMAC's failure to avail itself to its contractual rights and remedies under the Deed of Trust undermines its position that the HOA somehow prevented GMAC from paying the Lien. As set forth in the Deed of Trust, only the Borrower was obligated to protect the Deed of Trust. As set forth in the Deed of Trust, GMAC could pay the Lien when the Borrower failed to protect the Deed of Trust. As set forth in the Deed of Trust, GMAC's protective payment would be added to the debt secured by the Deed of Trust. The Association and NAS did nothing to deprive GMAC's "ability to control its fate." (Opening Brief p. 12).

The volunteer HOA Board is obligated to comply with the Statute, and is not obligated to engage in creative statutory construction with might violate the HOA Board's duties as a fiduciary of the Association subject to the business judgment rule, or otherwise expose the Association to liability for discussing association member's debt with third-party junior lien holders.

A. The Lender's Failure to Avail itself to its Contractual Rights and Remedies under the Deed of Trust does not Create Additional Obligations or Liability on the HOA.

GMAC knew about the Lien but refused to take the action necessary to protect the Deed of Trust. *See, e.g., Alliance Property Management & Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d 30, 34, 518 N.Y.S.2d 804, 807, (N.Y. App. Div. 1st Dep't 1987) ("those who lend money secured by real property are aware that the security provided by the real property is dependent on the payment by owners of the real property of real estate taxes, and that they should inform themselves of the relevant statutory provisions.") (dictum in dissent).

A promissory note and deed of trust are contracts which expressly define the contracting parties' rights and obligations. *See Garand v. JPMorgan Chase Bank*, 532 F. App'x 693, 696 (9th Cir. 2013) ("the rights and obligations of the parties are dictated by express contracts—the first mortgage note and deed of trust."). Contracts such as the Deed of Trust in this case, expressly provide for the remedies in the event of a breach by one of the parties. "We recognized long ago that a deed of trust 'provides the remedies for its own enforcement.' *Spruill v. Ballard*, 61

App.D.C. 112, 58 F.2d 517, 519 (1932)." *Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511, 513 (D.C. Cir. 1974).

It is axiomatic that a contract bind only the parties to the contract. *See Wallace, Saunders, Austin, Brown, & Enochs, Chtd. Vs. Rahm,* 963 S.W.2d 419,422 (Mo. Ct. App. W.D. 1998) (holding that "A contract generally binds no one but the parties thereto, and it cannot impose any contractual obligation or liability on one not a party to it." [citation omitted]); *See also, Kovacs, M.D. vs. Freeman, et. al.*, 957 S.W.2d 251 (Ky. 1997) (holding it is a "basic principle that the obligations of a contract are limited to the parties thereto and cannot be imposed on a stranger to the contract....").

The Association is not a party to the Deed of Trust (see Deed of Trust, I JA000010-11, (setting forth the parties thereto)). There is no provision within the Deed of Trust, and no authority which obligates the HOA to protect the Deed of Trust. (*Id.*) *See also, Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, No. 2:13-CV-00649-PMP, 2015 WL 301063, at *5 (D. Nev. Jan. 23, 2015) (granting summary judgment against the lender, noting that the lender does not "point to evidence or legal authority indicating that beyond selling the property to the highest bidder, the HOA was responsible for protecting [the lender's] interests in addition to the homeowners' interests.").

It is axiomatic that equity requires clean hands. *See Smith v. Smith*, 68 Nev. 10, 20, 226 P.2d 279, 284 (1951). ("[H]e who seeks equity must do equity, and must come into court with clean hands.").

There are multiple points in time when GMAC could have avoided the loss of the Deed of Trust but failed to do so. At any time prior to the HOA Lien Foreclosure Sale, GMAC could have paid the past due assessments to protect the Deed of Trust. On the day of the HOA Lien Foreclosure Sale, GMAC could have appeared at the public auction, and protectively bid to preserve the Deed of Trust. Instead of taking action, however, GMAC chose inaction. GMAC cannot, through its own inaction, cause a specific and avoidable result and then complain at the result, even if based on an erroneous assumption regarding the effect of the HOA's sale. It is a long held maxim that a mistake of law, where the party knows the facts but is ignorant of the consequences, is no ground for relief, and money paid under such mistake cannot be recovered back. *Upton v. Tribilcock*, 91 U.S. 50 (1875).

Stated more recently by this Court: "[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right." *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 418 (2014) (*quoting In re Medaglia*, 52 F.3d 451, 455 (2d Cir.1995)).

In this case, it is undisputed that GMAC knew about the Association's Lien and what GMAC's rights and remedies were with respect to the Deed of Trust because GMAC's Deed of Trust expressly references the Association and the Association's Lien and CC&Rs. *See* Deed of Trust and PUD Rider at JA000011, ¶ K; JA000014, § 4; JA000016, § 9; PUD Rider, JA000025-26). Paragraph K of the Deed of Trust defines "Community Association Dues, Fees and Assessments" as "all dues, fees, assessments and other charges that are imposed on Borrower or the Property by [the Association]." (I JA000011). Section 4 of the Deed of Trust states that the Borrower "shall pay all taxes, assessments, charges, fines ... which can attain priority over this [Deed of Trust and shall pay] Community Association Dues, Fees, and Assessments..." (Deed of Trust § 4, JA000014). Section 4 of the Deed of Trust also expressly obligates the Borrower to pay "any lien" which has priority over the Deed of Trust. *Id.* Section 9 of the Deed of Trust relates to GMAC's remedies in the event the Borrower fails to perform the obligations under the Deed of Trust. (JA00016-17). Section 9 of the Deed of Trust states that the Lender may "do and pay for whatever is reasonable or appropriate to protect [the Deed of Trust]" and that the Lender may pay and recover against the borrower, reasonable attorneys' fees to protect the Deed of Trust. *Id.*

In the event GMAC did decide to protect the Deed of Trust, as was its right, then "[a]ny amounts disbursed by Lender under this Section 9 ***shall become***

additional debt of Borrower secured by this [Deed of Trust]. (I JA000017) (emphasis added).

The PUD Rider also requires the Borrower to perform all the obligations in the CC&Rs. (PUD Rider, ¶ A, I JA000025). The PUD Rider echoes § 9 of the Deed of Trust and states that, in the event the Borrower fails to pay dues and assessments, then the Lender may pay them, and that any amount paid by the Lender "shall" be added to the underlying debt secured by the Deed of Trust. (PUD Rider at ¶ F, JA000026).

In addition to the express references in the Deed of Trust and the PUD Rider to the HOA, assessments, and liens, at the time of the loan in 2006, the Lender had notice of the Association's Lien because Nevada had adopted Nev. Rev. Stat. § 116 in the year 1991, placing GMAC on notice "by operation of the statute....[thus, an HOA lien foreclosure extinguishing a] first deed of trust recorded prior to a notice of delinquent assessments, does not violate [the lender's] due process rights." *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 418 (2014) (*quoting 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F.Supp.2d 1142, 1152, D. Nev. 2013); s*ee also, Alliance Property Management & Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d at 34 (lender should inform themselves of applicable statutes).

It is further undisputed that GMAC knew about the Lien because the Complaint alleges GMAC made multiple contacts with "NAS and/or Peccole Ranch" prior to the HOA Lien Foreclosure Sale. (Opening Brief p. 3; I JA000004:4-7; II JA000337:3-5). Knowing about a lien but refusing to pay the lien does not provide GMAC with an excuse to ignore its contract with the Borrower and choose not pay the lien. Refusing to enforce a contract is not a basis for GMAC to request this Court to void a foreclosure sale. *SFR Investments Pool 1 v. U.S. Bank,* 130 Nev. Adv. Op. 75, 334 P.3d 408, 418 (2014) (person with notice must exercise due diligence and take reasonable steps).

Despite having actual knowledge of the Lien, GMAC elected to take no action to protect the Deed of Trust. Instead, GMAC acts as if the HOA somehow prevented GMAC from paying the nominal Lien. The Court should not do for GMAC that which GMAC was unwilling to do for itself.

B. Nev. Rev. Stat. § 116 Does Not Require HOAs or their Agents to Determine the "Super-priority" portion of an HOA's Assessment Lien or to Provide such Determinations at the Request of Junior Lienholders.

There is no provision within the Statute which requires or permits the HOA to: (1) determine a super-priority amount of the Lien, (2) bifurcate the HOA's Lien, (3) respond to junior lien holder's inquiries, or (4) accept a partial lien payment on the Lien, and then (5) release only a portion of the lien.

The Statute is Nevada's implementation of the UCIOA, which was designed to protect HOAs and balance the power between HOAs and lenders. (Opening Brief, p. 10). The Statute's purpose is well chronicled in the legislative history which the Court considered in the *SFR* decision. As the Court is acutely aware, there is much debate and litigation about the about the precise amount of this super-priority portion of the lien, (e.g., *Horizon at Seven Hills Homeowners Association vs. Ikon Holdings*, NV Supreme Court Case No. 63178).

The Statute ensures that ***when a lender forecloses*** a first security instrument, that the HOA gets paid at least portion of its delinquent assessments as set forth in Nev. Rev. Stat. § 116.3116(2). When a lender timely forecloses, the HOA's lien survives the lender's foreclosure ensuring that the HOA gets paid at least a portion of past due assessments. Nev. Rev. Stat. § 116.3116(2). And when a lender forecloses first and pays the HOA as a result, there is no need for the HOA to foreclose.

On the other hand, if the HOA forecloses its superior lien first, the Statute provides for the distribution of the foreclosure proceeds as follows:

> (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.

Nev. Rev. Stat. § 116.31164(3)(c) (emphasis added). The Statute does not provide for separate priority tranches for the Association's Lien. The Lender's interest is in the fourth priority position for any excess proceeds. Thus, there is no suggestion that Nev. Rev. Stat. § 116.31164(3) requires the HOA make a "super-priority" determination or to conduct any bifurcation of the HOA Lien and then publish or provide the information prior to the foreclosure sale to third-parties.

Additionally, the Statute sets forth the notice requirements. This Court has already determined that the total amount of the lien is appropriately stated in the foreclosure notices. *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 418 (2014) ("The notices went to the homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to state the total amount of the lien.").

In this case, the Complaint admits the foreclosure notices included the amounts. (Complaint ¶¶ 12, 13, 14; I JA000003). The Notice of Delinquent Assessment included the amount of the Lien pursuant to Nev. Rev. Stat. § 116.61162(1)(a). *See* Notice of Delinquent Assessment Lien (I JA000032). The Notice of Default and Election to Sell Under Homeowners Association Lien

included the amount of the Lien pursuant to Nev. Rev. Stat. § 116.61162(1)(b). *See* Notice of Default (I JA000034). And finally, the Notice of Foreclosure Sale included the amount of the lien pursuant to Nev. Rev. Stat. § 116.311635. *See* Notice of Foreclosure Sale (I JA000037-38).

GMAC posits that "there must be a requirement that when a junior lien holder tenders funds to pay off a lien, the lienholder must accept those funds." (Opening Brief p. 8. (*citing SFR,* 334 P.3d at 414). While that may be true, the facts do not exist in this case. The operative language of GMAC's statement is a junior lien holder offering to "pay off a lien" rather than merely attempting to make a partial payment on a lien. The argument is a non-starter in this case because the Complaint does not allege that GMAC tendered anything. (Compl. ¶ 18, I JA000004). And because the Statute does not require or establish how the volunteer HOA Board or NAS would: (1) determine the highly disputed "super-priority" amount of the Lien, and then (2) bifurcate the Lien, and then (3) communicate the bifurcated lien amount to third-parties, and then (4) accept payment on a bifurcated portion of the Lien, and then (5) release a bifurcated portion of the Lien, [3] the volunteer HOA Board would not be acting in the best interest of the Association as fiduciaries subject to the business judgment rule.

[3] Even application of the principle of Equitable Subrogation requires the junior lien to completely "pay[] off" the senior lien, rather than making a partial payment in order to leapfrog the priority of the senior lien. *See Am. Sterling Bank v. Johnny*

1. The 2013 Amendment Does Not Apply to Foreclosures.

GMAC notes that after the foreclosure sale in this case, Nev. Rev. Stat. § 116.4109(7) was amended to ensure that a holder of a security interest in a unit would receive a "statement of demand" which includes: "the amount of the monthly assessment for common expenses and ***any unpaid obligation of any kind***, including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees and attorney's fees currently ***due from the selling unit's owner***" Nev. Rev. Stat. § 116.4109(7) (emphasis added). However, in addition to taking effect after this foreclosure sale, the new requirement does not apply to HOA lien foreclosures.

First, as stated by the title of this subsection, "***Resales of units***" this subsection of the Statute applies only when an owner resells a unit and does not apply to HOA lien foreclosures. As emphasized above, this subsection is not part of the lien foreclosure subsection, Nev. Rev. Stat. § 116.3116. Additionally, the clear and unambiguous language of the statute requiring the statement of demand applies to "fees currently due from the ***selling unit's owner***." Nev. Rev. Stat. § 116.4109(7) (emphasis added). Thus the unit's owner is the seller, not a foreclosing entity.

Mgmt. LV, Inc., 126 Nev. Adv. Op. 41, 245 P.3d 535, 539 (2010) (*quoting Houston v. Bank of America*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003) (*quoting Mort v. U.S.*, 86 F.3d 890, 893 (9th Cir.1996)).

Second, the statement of demand includes all fees and costs, but does not require a determination of any priority of each of the fees and costs. Thus, when a ***unit owner*** is selling a unit, a secured creditor may request a statement of demand and the HOA must provide the statement, including all fees and costs, assuming the requester pays the fee. (Nev. Rev. Stat. § 116.4109(7)). In addition, because the unit owner is conducting the sale, a statement of demand is useful because there are no foreclosure notices or other notices which would inform the requester of any outstanding lien amounts.

Also, through this subsection of the Statute, the Unit's Owner consents to the HOA's third-party disclosure of the homeowner's debt information. Such consent of the unit's owner is not obtained in an involuntary HOA Lien Foreclosure Sale, where each of the foreclosure notices already appropriately contains the total Lien amount.

GMAC's choice to ignore the publically recorded foreclosure notices does not provide a basis for the Court to set aside an HOA Lien Foreclosure Sale.

C. The Volunteer HOA Board's Duties and Obligations are to the Association, and to Comply with the Statute and the Volunteer HOA Board has no duty to Construe the Statute in a way which adds requirements.

The Volunteer HOA Board's duties and obligations are to the Association and are set forth in the CC&Rs and in Nev. Rev. Stat. § 116 which states:

> [The HOA Board] acts on behalf of the association. In the performance of their duties, the officers and members of the executive board are fiduciaries

> and shall act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association. Officers and members of the executive board: (a) Are required to exercise the ordinary and reasonable care of officers and directors of a nonprofit corporation, subject to the business-judgment rule…

Nev. Rev. Stat. § 116.3103(1). The business judgment rule is "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006) (citation omitted). The same year Nevada adopted the UCIOA, Nevada codified the Business Judgment Rule as Nev. Rev. Stat. 78.138.

In this case, the volunteer HOA Board and NAS were acting pursuant to their fiduciary duties, subject to the business judgment rule, by complying with the Statute as it was written, which sets forth the notice requirements for a foreclosure sale. As GMAC admits, the Statute does not say that the HOA or NAS must: (1) determine the super-priority amount, (2) bifurcate the lien, and (3) respond to junior lien holder's questions regarding the HOA's determination regarding the bifurcation and priority of the lien. *See* Opening Brief pp. 4-5 (discussing "unstated requirements" that are "too time-consuming and voluminous" to state expressly and "goes without saying."). Nevertheless, GMAC would have the group of volunteers HOA Board members and NAS unilaterally modify the Statute to include unstated requirements.

The Association and NAS respectfully disagree. A fiduciary duty subject to the business judgment rule does not requires a volunteer HOA Board to add requirements to the Statute, or to otherwise invent additional obligations on the Association where none existed. *See, e.g., Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, No. 2:13-CV-00649-PMP, 2015 WL 301063, at *5 (D. Nev. Jan. 23, 2015) (no "evidence or legal authority indicating that beyond selling the property to the highest bidder, the HOA was responsible for protecting [the lender's] interests in addition to the homeowners' interests.")

Indeed, GMAC recognizes the importance of statutory compliance when it cites a case applying Nev. Rev. Stat. § 107.080, where failure to comply with that statute was fatal to the foreclosure. (Opening Brief, p. 6, (*citing Title Ins. & Trust Co. v. Chicago Title Ins. Co.*, 97 Nev. 523, 527, 634 P.2d 1216, 1218 (1981))).

The Association and NAS do not provide the super-priority amount because, as fiduciaries of the Association acting under the business judgment rule, the Statute does not require the Association or NAS to provide GMAC with information that would require the HOA Board and NAS to engage in speculative computations. As noted *ad nauseam*, above, each of the foreclosure notices provide GMAC with the information need for GMAC to protect the Deed of Trust. GMAC's cries that the Association and NAS have somehow prevented GMAC from protecting the Deed of Trust ring hollow. In a word, the answer to the

certified question before the Court is: none. There is no effect on a foreclosure sale conducted pursuant to Nev. Rev. Stat. § 116.31162 when the Association does not delineate the super-priority amount of its lien.

D. The Statute's Notice Provision Provides all Junior Lien Holders with Sufficient Information to Protect their Interests.

The Statute provides sufficient notice to all junior lien holders who are actually interested in protecting their interests. The Statute already requires the foreclosure notices to contain the information required for all junior lien holders to protect their interests. (Nev. Rev. Stat. §§ 116.31163-31165).

GMAC argues that the HOA is obligated to provide "interested parties" with current payoff figures and deems the non-requirement as "universally understood" because there is no authority in twenty-one other UCIOA adopting jurisdictions. (Opening Brief p. 9). However, a more logical interpretation of the absence of authority is that the other UCIOA jurisdictions have concluded what this Court has already stated, that the foreclosure notices required by the Statute are sufficient and appropriately contain the total lien amount. *SFR Investments Pool 1* 130 Nev. Adv. Op. 75, 334 P.3d at 418.

The notice provisions of the Statute do not say "if you hold a Deed of Trust, then you may contact the HOA for a different lien amount." What a junior lien holder elects to do (or not do) with the publically recorded lien payoff information

is completely up to the junior lien holder and completely beyond the control of the HOAs.

1. The Association and NAS have not violated Nev. Rev. Stat. § 116.1113.

GMAC argues that the foreclosure was not in good faith due to the Association's and NAS's "oppressive and unfair actions" and cites Nev. Rev. Stat. § 116.1113 in support. (Opening Brief pp. 16, 17). GMAC's characterization of oppression is unpersuasive. A more accurate description of the Association's conduct is that, by recording the foreclosure notices as required by the Statute, the Association and NAS have put the entire world on notice of the Association's Lien, the amount of the Lien, and of the steps any junior lien holder could take to pay the Lien to protect the junior lien. *See Allen v. Webb*, 87 Nev. 261, 272, 485 P.2d 677, 684 (1971) (recording of real property instrument provides notice to the world).

The Association's and NAS's undisputed actions were simply complying with the notice provisions of the Statute, i.e., recording the Notice of Delinquency, Notice of Default, and Notice of Sale. It is undisputed that GMAC knew about the sale, even to the point that the sale was postponed once. (Complaint ¶ 15; I JA000004). But rather than protect the Deed of Trust, GMAC chose to do nothing.

E. The Volunteer HOA Board is Not Obligated to Risk Liability Under the Fair Debt Collections Practices Act ("FDCPA") simply because a Lender refuses to protect its Deed of Trust.

The volunteer HOA Board hired NAS to effect collection of the Borrower's HOA debt through the enforcement of the HOA's Lien pursuant to the Statute. Debt collection is subject to the statutes which apply to such activities. One such statute is the FDCPA, which states:

> (b) Communication with third parties
> Except as provided in section 1692b of this title, ***without the prior consent of the consumer given directly to the debt collector***, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, ***a debt collector may not communicate***, in connection with the collection of any debt, ***with any person other than the consumer***, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

15 U.S.C. § 1692c(b). Violation of the FDCPA subjects NAS and the Association to civil liability, including damages and the costs of any resulting litigation. 15 U.S.C. § 1692k.

In this case, as noted above, the Association's duties and obligations, are set forth in the CC&Rs and in Nev. Rev. Stat. § 116.3103(1) (fiduciary in best interests of association, subject to the business judgment rule).

As noted above, the business judgment rule requires the HOA Board to act in the Association's best interest. *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006).

In this case, the volunteer HOA Board and NAS were acting pursuant to their duties under the Statute because none of the FDCPA exceptions apply to the rule barring communications with third-parties, such as GMAC. The Complaint does not allege that: (1) GMAC has obtained the Borrower's consent to discuss the Borrower's debt with NAS or the Association, or that (2) GMAC has a court order requiring NAS or the Association to discuss the consumer's debt, or (3) that GMAC was trying to effect a postjudgment judicial remedy. *See* Complaint I JA000001-42.

Therefore, the Court should not require the volunteer HOA Board or its agent NAS to participate in conduct (the disclosure of debt information to third-parties) which, in the volunteer HOA Board's business judgment, and as a fiduciary of the Association, may expose the Board or the Association to liability for violation of the FDCPA by discussing debts of the Borrower with the third-party, GMAC.

VI. CONCLUSION

The Court should not do for GMAC, what GMAC was unwilling to do for itself. Contrary to GMAC's allegations, neither the Association nor NAS acted as an impenetrable barrier to GMAC's right to pay the Lien in order to protect its Deed of Trust. Each of the publically recorded foreclosure notices communicated,

to all persons who gazed upon them, the amount of the lien. GMAC chose to ignore the obvious and failed to protect its Deed of Trust, either by paying the Lien or by protectively bidding at the foreclosure sale. The Court should answer the certified question as follows:

> There is no effect on a foreclosure sale conducted pursuant to Nev. Rev. Stat. § 116.31162 when an association does not provide a super-priority amount because the Statute already provides lenders with sufficient information to enable them to protect their Deeds of Trust. Communicating a lien amount, through the publically recorded foreclosure notices is not thwarting a lender's effort to protect its Deed of Trust, especially in instances where the Deed of Trust, and any riders thereto, expressly provide a mechanism for lenders to protect the Deed of Trust, and contains remedies for the borrower's failures to protect the Deed of Trust. Creating additional requirements on the HOAs or their agents, which are not already stated within the text of the Nev. Rev. Stat. § 116, is the province of the legislature.

Respectfully submitted, this 13 day of May, 2015.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14 point Times New Roman type style.

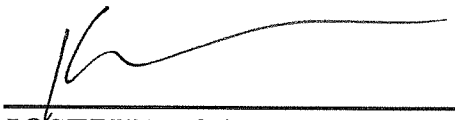
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 7,456 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of appellate procedure, in particular NRAP 28(C)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcripts or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated May 13, 2015

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.



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CERTIFICATE OF SERVICE

I certify that I am an employee of Lipson, Neilson, Cole, Seltzer, Garin, P.C. and that on this 13th day of May, 2015 the **RESPONDENTS' ANSWERING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court and therefore electronic service was made in accordance with the master service list as follows:

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Job Number: 34003839

Document(1)

1. *LN Mgmt. Llc Series 5204 Painted Sands v. Wells Fargo Bank, N.A., 2013 U.S. Dist. LEXIS 177696*
   Client/Matter: wiegand
   Search Terms: 2013 WL 6535247
   Search Type: Natural Language

LN Mgmt. Llc Series 5204 Painted Sands v. Wells Fargo Bank, N.A.

United States District Court for the District of Nevada

December 12, 2013, Decided; December 12, 2013, Filed

2:13-cv-1200-LDG-PAL

Reporter
2013 U.S. Dist. LEXIS 177696; 2013 WL 6535247

LN MANAGEMENT LLC SERIES 5204 PAINTED SANDS, Plaintiff, v. WELLS FARGO BANK, N.A.; et al., Defendants.

Core Terms

notice, foreclosure, preliminary injunction, motion to dismiss, trust deed, extinguishment, lienholders, holder, preliminary injunctive relief, exclusive jurisdiction, due process analysis, legislative intent, supplemental brief, foreclosure sale, due process, reply brief, diversity, mandatory, briefing, enacting, parties, reply, days

Counsel: **[*1]** For LN Management LLC Series 5204 Painted Sands, Plaintiff: Kerry P. Faughnan, LEAD ATTORNEY, North Las Vegas, NV.

For Wells Fargo Bank, N.A., Defendant: Chelsea Crowton, LEAD ATTORNEY, Wright, Finlay & Zak, LLP, Las Vegas, NV.

Judges: Lloyd D. George, United States District Judge.

Opinion by: Lloyd D. George

Opinion

On July 7, 2013, the court granted plaintiff's motion for a temporary restraining order (#8) pending a ruling on plaintiff's motion for preliminary injunction. This matter comes before the court on defendant Wells Fargo Bank, N.A.'s motion to dismiss, and plaintiff's motion for preliminary injunction. On August 6, 2013, the court conducted a hearing and determined that it should consider the motion to remand before considering preliminary injunctive relief. The briefing on the motion to remand (#15, response #22, reply #24), which was still pending at the time of the hearing, has now been completed.

Plaintiff asserted two general arguments in support of remand: application of the prior exclusive jurisdiction doctrine and lack of diversity. In its reply brief, plaintiff withdrew its prior exclusive jurisdiction argument. Regarding its diversity argument, plaintiff maintains that Quixote Ventures Opportunity **[*2]** Fund, LLC, is properly named as a defendant, indeed a necessary party, because Quixote Ventures may have a claim for wrongful foreclosure against the homeowners association, and plaintiff cannot obtain title insurance without that party's inclusion. However, plaintiff's complaint does not allege any facts specific to Quixote Ventures, and fails to assert a case and controversy against it. Moreover, as Wells Fargo points out, Nevada law eliminates any legal necessity to quiet title and legal remedies available to Quixote Ventures against the plaintiff with regards to the foreclosure sale. Accordingly, the motion to remand will be denied.

The court has also reviewed the briefs on defendant Wells Fargo's motion to dismiss (#4, response #12, reply #20) and motion for preliminary injunction (#6, response #7), which highlight the divide in this district over whether,

pursuant to NRS 116.3116(2), a first, position deed of trust is extinguished upon an HOA foreclosure sale. With two exceptions, the courts of this district, including this court, see Kal-Mor-USA, LLC v. Bank of America, N.A., No. 2:13-cv-0680-LDGVCF, 2013 U.S. Dist. LEXIS 98375, 2013 WL 3729849 (D. Nev. July 8, 2013), have held that NRS 116.3116(2)(c) creates **[*3]** a limited super priority lien for nine months of HOA assessments leading up to the foreclosure, but it does not eliminate the first security interest. See Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, No. 2:13-CV-895-JCM-GWF, 2013 U.S. Dist. LEXIS 112590, 2013 WL 4048573 at *3 (D. Nev. Aug. 9, 2013) (citing cases); see also LVDG Series 125 v. Welles, No. 3:13-cv-0503-LRH-WGC, 2013 U.S. Dist. LEXIS 167176, 2013 WL 6175813 (D. Nev. Nov. 25, 2013) (accord); but see SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., No. 2:13-cv-1153-APG-PAL (granting injunctive relief in favor of the HOA) and 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., No. 2:13-cv-0506-PMP-GWF, 2013 U.S. Dist. LEXIS 154250, 2013 WL 5780793 (D. Nev. Oct. 28., 2013).

As a result of the issue being raised initially in defendants' reply brief, the 7912 Limbwood court's due process analysis did not take into account the argument of the holder of the first deed of trust, Wells Fargo, that, because the statutory notice provisions of Chapter 116 do not require notice to a first deed of trust holder, it afforded inadequate due process to prior lienholders to protect their interests and is at odds with the general non-judicial foreclosure requirements of Chapter 107. See 2013 U.S. Dist. LEXIS 154250, 2013 WL 5780793 at *10. **[*4]** Notwithstanding that procedural ruling, this court considers the lack of mandatory notice to prior lienholders to be relevant both to a due process analysis and a consideration of the legislature's intent regarding extinguishment when enacting NRS 116.3116. See Fairway Estates Assoc. of Apartment Owners v. Unknown Heirs and Devisees of Young, 172 Wash. App. 168, 181, 289 P.3d 675, 682 (Wash. Ct. App. 2012) (the legislature could not have intended that a fee simple holder could be divested of property through foreclosure without notice and through no fault of its own, while a HOA's interests are fully protected by a lien attaching to a leasehold interest). Accordingly, the court will order supplemental briefing on that issue before considering the motion to dismiss and preliminary injunctive relief.

THE COURT HEREBY ORDERS that plaintiff's motion to remand (#15) is DENIED.

THE COURT FURTHER ORDERS that the parties shall have 30 days from the date of this order in which to file supplemental briefs on whether a lack of mandatory notice to prior lienholders bears on due process or the legislature's intent regarding extinguishment when enacting NRS 116.3116.

THE COURT FURTHER ORDERS that any **[*5]** responses shall be filed within 10 days after the filing of the supplemental briefs.

DATED this 12 day of December, 2013.

/s/ Lloyd D. George

Lloyd D. George

United States District Judge

Document(1)

1. *Premier One Holdings, Inc. v. BAC Home Loans Servicing LP, 2013 U.S. Dist. LEXIS 112590*

   Client/Matter: wiegand
   Search Terms: 2013 WL 4048573
   Search Type: Natural Language

Premier One Holdings, Inc. v. BAC Home Loans Servicing LP

United States District Court for the District of Nevada

August 9, 2013, Decided; August 9, 2013, Filed

2:13-CV-895 JCM (GWF)

Reporter
2013 U.S. Dist. LEXIS 112590; 2013 WL 4048573

PREMIER ONE HOLDINGS, INC., Plaintiff(s), v. BAC HOME LOANS SERVICING LP, et al., Defendant(s).

Core Terms

trust deed, homeowner, extinguish, foreclosure, services, Loans, security interest, first position, foreclose, neighborhood, mortgage, courts, delinquent assessment, recorded, absurd, lender, Banks, prior deed, assessments, buyer, deed, purchase the property, factual allegations, cause of action, absurd result, purchaser

Counsel: **[*1]** For Premier One Holdings, Inc., Plaintiff: Charles D Lombino, LEAD ATTORNEY, Lombino Law Studio, Ltd., Henderson, NV.

For BAC Home Loans Servicing LP, formerly known as Countrywide Home Loans Servicing, Defendant: Edward Chang, LEAD ATTORNEY, Abran E. Vigil, Ballard Spahr, Las Vegas, NV; Matthew David Lamb, Ballard Spahr LLP, Las Vegas, NV.

Judges: James C. Mahan, UNITED STATES DISTRICT JUDGE.

Opinion by: James C. Mahan

Opinion

ORDER

Presently before the court is defendant BAC Home Loans Servicing LP motion to dismiss. (Doc. # 2). Plaintiff Premier One Holdings, Inc. filed a response in opposition (doc. # 9), and the defendant filed a reply (doc. # 14).

I. Background

In 2006, non-parties Conrado and Catherne Teotico obtained a mortgage loan for $305,992 from Countrywide Home Loans, Inc. The loan was secured by a deed of trust recorded on May 31, 2006. The deed of trust encumbers real property located at 3825 Pastel Ridge Street in Las Vegas, NV.

The deed of trust names Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee and beneficiary. On or about August 15, 2009, MERS assigned the deed of trust to defendant BAC Home Loans Servicing ("BAC Home Loans"). Countrywide Home Loans Servicing LP is the successor **[*2]** by merger to BAC Home Loans, meaning that it currently holds the deed of trust.

On January 4, 2012, Canyon Springs Homeowner Association recorded a notice of lien against the property for HOA assessments that the Teoticos never paid. Canyon Springs HOA recorded a notice of default and election to

sell under the HOA lien on February 27, 2012. The HOA delinquent assessments totaled $3,190.47. At a foreclosure sale on December 14, 2012, plaintiff purchased the property for $13,700.

Plaintiffs filed this lawsuit in state court after purchasing the property at the foreclosure sale. The clams are for quiet title and for "cancellation of instruments." Defendants removed to this court.

II. Legal Standard

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. A properly pled complaint must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*; *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While *Rule 8* does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements **[*3]** of a cause of action." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citation omitted). "Factual allegations must be enough to rise above the speculative level." *Twombly, 550 U.S. at 555*. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal, 129 S.Ct. at 1949* (citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, the court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id. at 1950*. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id. at 1949*. Second, the court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id. at 1950*. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id. at 1949*.

Where the complaint does not "permit the court to infer more than the **[*4]** mere possibility of misconduct, the complaint has alleged, but it has not shown, that the pleader is entitled to relief." *Id.* (internal quotations and alterations omitted). When the allegations in a complaint have not crossed the line from conceivable to plausible, plaintiff's claim must be dismissed. *Twombly, 550 U.S. at 570*.

The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*. The *Starr* court stated, "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.*

III. Discussion

Plaintiff argues that a properly conducted foreclosure pursuant to *NRS 116.3116* permits an HOA's lien for delinquent assessments to extinguish a first position deed of trust. Defendant argues **[*5]** that a properly conducted foreclosure sale pursuant to NRS chapter 116 does not extinguish a first position deed of trust. The court agrees with defendant.

"In Nevada, HOAs have immediate liens against real property when HOA assessments or other costs against a unit become delinquent." *Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, no. 2:13-cv-00164-RCJ, 2013 U.S. Dist. LEXIS 80502, 2013 WL 2460452, at *3 (D. Nev. June 6, 2013)* (citing *NRS 116.3116(1)*). Under the NRS chapter 116 statutory scheme, an HOA lien is prior to all other liens and encumbrances on a unit except " a first security interest on the unit recorded before the date on which the assessment sought to be enforcement became delinquent. . . ." *NRS 116.3116(2)(b)*.

"Also relevant is *NRS 116.3116(2)(c)*, which carves out a limited exception to *NRS 116.3116(2)(b)*." *Weeping Hollow Ave. Trust v. Spencer, no. 2:13-cv-00544-JCM-VCF, 2013 U.S. Dist. LEXIS 74065, 2013 WL 2296313, at*

*5 (D. Nev. May 24, 2013). Subsection (2)(c) states in relevant part that an HOA 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 assessments for common expenses based on **[*6]** 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)(c).

NRS 116.3116(2)(c) creates a super priority lien "to the extent of" charges incurred by the HOA pursuant to NRS 116.310312 (the cost of removal or abatement of a public nuisance related to the unit at issue), NRS 116.3115 (assessments for common expenses), or, for nine months of regular HOA dues immediately proceeding a foreclosure or trustee sale. The words "to the extent of" are words of limitation and limit the amount of the HOA lien that is given "super priority" status over a first security interest. The only part of the HOA lien that is a super priority lien is the part expressly provided for in NRS 116.3116(2)(c), which are charges and/or fees pursuant to NRS 116.310312, NRS 116.3115, and nine months of regular HOA dues that became due "immediately preceding institution of an action to enforce the lien." No other part of an HOA lien is prior to or given super priority status above a first security interest.

The super priority lien affords **[*7]** an HOA significant protections. First, the HOA may foreclose on the property with delinquent assessments (either through a non-judicial or judicial action) to recover its lien, and the limited super priority lien is superior to the first position deed of trust. If an HOA forecloses on the property, then the purchaser takes the property subject to the prior security interest. *See* Weeping Hollow, 2013 U.S. Dist. LEXIS 74065, 2013 WL 2296313; First 100, LLC v. Wells Fargo Bank, N.A., no. 13-cv-431-JCM-PAL, 2013 U.S. Dist. LEXIS 97029, 2013 WL 3678111 (D. Nev. July 11, 2013). The HOA foreclosure does not extinguish the prior deed of trust even if part of the HOA lien qualifies as a limited super priority lien under subsection (2)(c). *Id.*

Second, the HOA may wait until the bank (or other holder of the note and deed of trust) forecloses on the property. In such a case, the first cut of the proceeds from the sale must be paid to satisfy the super priority amount of the HOA lien and the remainder of the proceeds are dedicated to satisfying the first position deed of trust (and thereafter and junior liens in accordance with payment priorities).

Either option affords the HOA protections to recover a portion of its assessments. However, if the HOA pursues **[*8]** the first course of action and conducts a foreclosure pursuant to NRS chapter 116, the HOA foreclosure does not extinguish the first position deed of trust. The purchaser at the HOA foreclosure takes the property subject to the first security interest.

IV. Absurd Results

Every federal court in this district to decide this issue has held that an HOA's super priority lien does not extinguish a first position deed of trust. *See* Diakonos Holdings, LLC v. Countrywide Home Loans, Inc., no. 2:12-cv-00949-KJD-RJJ, 2013 U.S. Dist. LEXIS 18718, 2013 WL 531092 (D. Nev. Feb. 11, 2013); Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC, no. 2:13-cv-00164-RCJ, 2013 U.S. Dist. LEXIS 80502, 2013 WL 2460452 (D. Nev. June 6, 2013); Weeping Hollow Ave. Trust v. Spencer, no. 2:13-cv-00544-JCM-VCF, 2013 U.S. Dist. LEXIS 74065, 2013 WL 2296313 (D. Nev. May 24, 2013); Kal-Mor-USA, LLC v. Bank of America, N.A., no. 2:13-cv-0680-LDG-VCF, 2013 U.S. Dist. LEXIS 98375, 2013 WL 3729849; *see also* Centeno v. Mortgage Electronic Registration Systems, Inc., no. 2:11-cv-02105-GMN-RJJ, 2012 U.S. Dist. LEXIS 121932, 2013 WL 3730528 (D. Nev. Aug. 28, 2012) (relying on, and justifiably so, the importance of the chronological order of recordation dates in a bank's deed of trust and an HOA's assessment); *but see SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A. et al*, no. 2:13-cv-01153-APG-PAL **[*9]** (granting injunctive relief in favor of the HOA).

This court is aware that some state courts have interpreted the NRS 116.3116 in a way that permits the HOA super priority lien to extinguish the bank's prior deed of trust, even though most state courts have agreed with the interpretation of the federal courts. This court is also aware that the Nevada Supreme Court has granted

injunctions that enjoin a bank from foreclosing or conducting a trustee sale if an HOA has foreclosed on its super priority lien under the statute.

"Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language." *Leven v. Frey, 123 Nev. 399, 403, 168 P.3d 712, 715 (Nev. 2007)*. The plain and clear meaning of the statute is that it affords an HOA a super priority lien of nine months of delinquent assessments, but nothing more than that. The plain language of the statute does not permit an HOA foreclosure of its super priority lien to extinguish a prior recorded deed of trust.

However, even if the statute were ambiguous, there is still only one acceptable interpretation of the statute. "[A] statute's language should not be read to produce **[*10]** absurd or unreasonable results." *Leven, 168 P.3d at 716*; *Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982)* ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *U.S. v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 20112) ("Our law, however, recognizes the principle that courts do not construe statutes in a manner that would lead to absurd results."). To construe *NRS 116.3116* to permit an HOA foreclosure to extinguish a first position deed of trust would be an absurd result for at least the following four reasons.

First, from a practical standpoint, to permit an HOA delinquent assessment, which normally arises years after the recordation of the deed of trust, and the amount of the HOA delinquent assessment will almost always be a small fraction of the amount outstanding under the note and deed of trust, would be completely absurd. [1] Further, "Nevada is a race notice state." *Buhecker v. R.B. Peterson & Sons Constr. Co., 112 Nev. 1498, 1500, 929 P.2d 937, 939 (Nev. 1996)* (citing *NRS 111.320*; *111.325*)). Permitting an HOA super priority lien to **[*11]** wipe out a prior deed of trust contravenes the principles and purpose of a race-notice jurisdiction. The court finds that it would be unjust and absurd to permit an HOA super priority lien to extinguish a first position deed of trust, and potentially violate due process. [2]

The court **[*12]** finds it instructive to demonstrate how the absurdity that would result in this case from a contrary interpretation of the statute. In this case, the delinquent assessments comprising the HOA lien totaled $3,190.47. The court will assume that the entire $3,197.47 qualifies as the super priority lien under *NRS 116.3116(2)(c)*, though it is not clear the entire $3,197.47 would even qualify as super priority under the statute. The deed of trust is for $305,992. The HOA lien is worth approximately one-one hundredth (1/100) of the value of the deed of trust. Additionally, the deed of trust was recorded on or about May 31, 2006. The HOA recorded its lien on or about January 4, 2012, which is about five and one half years after the recordation of the deed of trust. To permit an HOA lien recorded five and one half years later and worth one-one hundredth of the value of the first security interest to completely extinguish the first security interest would be an absurd result.

Second, courts that have held in favor of the HOAs on this issue have reasoned that permitting an HOA super priority lien to extinguish a prior recorded deed of trust would incentivize the banks to foreclose at a faster pace. **[*13]** This logic misunderstands greater points, but, more importantly, encourages a first option by the bank—foreclosure or trustee sale by the bank—which should not be the first option. [3]

A bank like this defendant has made thousands of loans, potentially tens of thousands, in this district to allow Nevada residents to purchase homes. A bank like this defendant has easily made tens of thousands of loans

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[1] This is true even though, in the wake of the subprime lending induced mortgage crises, banks are not sympathetic defendants. However, it is also true that, at least in this district, HOAs are not sympathetic defendants either. *See, e.g., USA v. Alcantar et al*, 2:12-cr-00113-JCM-VCF; *USA v. Priola*, 2:13-cr-00016-APG-VCF.

[2] In a hearing on a temporary restraining order on this exact issue in a different case, *see First 100, LLC v. Wells Fargo Bank*, 2:13-cv-431-JCM, (doc. # 24), counsel for the HOA argued that an HOA might have a cause of action for unjust enrichment against the bank if the court declined to grant the injunction in favor of the HOA to enjoin the bank's trustee sale. The easy answer is no. The tougher answer is if a bank with a prior deed of trust would have a cause of action for unjust enrichment against an HOA if the HOA foreclosure under NRS 116.3116 extinguished the bank's prior deed of trust.

[3] This is especially true in Nevada, which experiences one of the highest percentage rates of foreclosures in the country.

across the country to home purchasers. Meanwhile, an HOA's scope is limited to a single neighborhood or two. As a practical manner, it is much easier for an HOA to be the first entity to act at the first sign of distress by a homeowner. An HOA is monitoring, at most, a few dozen properties. A bank must monitor tens of thousands of properties, so it is more difficult for a bank to be quicker to foreclose than an HOA.

Additionally, courts should not incentivize banks to foreclose on property at the first sign of distress. Banks should be encouraged to work with homeowners so that the bank may recoup as much of its loan as possible and the homeowner can remain in the home. **[*14]** Banks should also be encouraged to participate in a program like the State of Nevada Foreclosure Mediation Program (FMP) in good faith. Banks have considerations that an HOA does not have when considering foreclosure, such as: if the property value on the market is fluctuating; the homeowner's long term ability to pay back the loan; and, whether the bank should allocate resources first to foreclosing on property owners with no chance at paying back their mortgage versus working with home owners that may merely be struggling to pay back their mortgages. An HOA has none of these considerations and merely wants to collect its statutorily entitled fees in the easiest manner possible.

Third, it would be absurd to elevate an HOA super priority lien over other entities that collect from a homeowner because the HOA takes the smallest amount of risk among the creditors and provides the least (both in volume and in importance) amount of services to the homeowner. A homeowner must pay primarily three fees associated with the purchase of a home. First, the homeowner must pay his or her mortgage. The lender bank should get the first cut and the first to be paid back because the lender (1) finances **[*15]** the entire, or a significant amount of, the purchase of the property, and (2) takes the greatest amount of risk in lending to the homeowner. Second, a homeowner must pay taxes on the property. These taxes contribute to state and local services that are greatly beneficial to a homeowner (such as public schools, roads, police, and firefighters). Third, the homeowner must pay fees and assessments if they live within the jurisdiction of an HOA. However, the HOA does not take any risk associated with the purchase of the property and does not advance a significant amount of money to the homeowner. The services provided by an HOA are luxuries, not necessities. And, in any event, many neighborhoods function fine without the services of an HOA. The HOA, in exchange for a small amount of services, levies a surcharge on the homeowner based on little more than the street on which the homeowner lives. It would be absurd to elevate the entire HOA lien over a bank considering the comparatively small amount of risk taken by the HOA to finance the purchase of the property, the small amount of services provided by an HOA compared to the other entities seeking to collect from a homeowner, and the small **[*16]** amount (if any) capital advanced by the HOA to the homeowner.

Fourth, it would be absurd to permit an HOA foreclosure to extinguish a bank's deed of trust because it would risk plunging the local economy back towards a recession. Banks will not lend money to buy houses when their deed of trust could be eliminated by HOA charges.

Mortgage lenders would become extremely reluctant to originate loans for properties in this state that are part of an HOA since the lender would face the threat of having its deed of trust extinguished by a subsequent HOA lien. This would negatively affect a potential homeowner's ability to buy in an HOA neighborhood because the risk would be too great for the lender. Lenders would become, and understandably so, hesitant and cautious about lending to the purchaser of a property in an HOA neighborhood in this state. The construction of *NRS 116.3116* which extinguishes the prior deed of trust would restrict a potential homeowner's options. If the buyer could not pay for the majority of the property with the buyer's own money, then the buyer would likely be forced to purchase a home in a non-HOA neighborhood. [4]

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[4] Along this same vein, it is arguably better for the **[*17]** HOA if its super priority lien does not extinguish the first security interest. It would likely become very difficult to sell a home in an HOA neighborhood to any purchaser other than an all (or almost all) cash buyer. Lenders would likely decline to make loans to purchase a home in an HOA neighborhood. If HOAs get the construction of the statute that they seek, it could lead to a number of indefinite "for sale" signs in their neighborhoods. Of course, it is possible that all cash buyers would buy the HOA properties. However, the vast majority of the time, all cash buyers are buying the property for investment purposes and would rent out the home. HOAs seek homeowners, not renters that are

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion to dismiss (doc. # 2) be, and the same hereby, is GRANTED. The clerk of the court shall enter judgment and close the case.

DATED August 9, 2013.

/s/ James C. Mahan

UNITED STATES DISTRICT JUDGE

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either indifferent or unaware of the HOA. It is in the HOAs best interest if the super priority lien does not extinguish the first position deed of trust.

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UNITED STATES DISTRICT COURT
CLARK COUNTY, NEVADA

FIRST 100, LLC, a Nevada Limited Liability Company, Plaintiff, vs. WELLS FARGO BANK, N.A., a National Association; MTC FINANCIAL INC. d/b/a TRUSTEE CORPS, a Foreign corporation; CITY OF LAS VEGAS, a Political Subdivision; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No.: 2:13-CV-00431-JCM-PAL **DEFENDANT, WELLS FARGO BANK, N.A.'S, ORDER DENYING THE PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER**

The Defendant, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo"), by and through its attorney of record, Chelsea A. Crowton, Esq. of the law firm of Wright, Finlay & Zak, LLP, and the Plaintiff, First 100, LLC, by and through their attorney of record, Luis A. Ayon, Esq. of the law firm of Maier Gutierrez Ayon, having appeared on April 19, 2013 for the hearing on the Plaintiff's Emergency Motion for Temporary Restraining Order. The Court having heard arguments from all parties in the case, the Court having reviewed the Emergency Motion for Temporary Restraining Order and the Response to the Emergency Motion for Temporary Restraining Order, and good cause appearing, hereby rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's Emergency Motion for Temporary Restraining Order is **denied**.

CTADD0079

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Nevada is a Race-Notice State and that based on the fact that Wells Fargo Bank, N.A.'s April 2006 Deed of Trust was recorded prior to the Notice of Delinquent Lien filed by the Homeowner's Association, Wells Fargo's April 2006 Deed of Trust has priority over the Homeowner's Association Lien.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff has failed to state a likelihood of success on the merits of the underlying Complaint, based on the fact that the language in N.R.S. 116.3116(2)(c) does not extinguish a first, position Deed of Trust and that the language in N.R.S. 116.3116(2)(c) is solely a payment priority lien for nine (9) months of assessments, dues, and expenses owed to the Homeowner's Association.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff took title to the Property subject to Wells Fargo's April 2006 Deed of Trust, which was executed by Jan Werner on April 24, 2006 and recorded in the Clark County Recorder's Office as Book and Instrument umber 20060501-0004562.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that under N.R.S. 116.3116(2)(b), Wells Fargo's April 2006 Deed of Trust has priority in the chain of title for the Property located at 220 Newport Lane Unit #201, Las Vegas, Nevada 89107.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that Wells Fargo's first, position Deed of Trust survived the foreclosure sale by Meadows Condominium Unit Owners Association.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that due to the unlikelihood of success on the merits of the underlying Complaint and denial of the Emergency Motion for Temporary Restraining Order, the Defendant, Wells Fargo Bank, N.A., can lawfully proceed with a foreclosure sale on the Property located at 220 Newport Lane Unit #201, Las Vegas, Nevada 89107.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff has a temporary, possessory interest in the Property, subject to Wells Fargo's 2006 Deed of Trust.

CTADD0080

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff merely took as much interest in the Property as the Borrower, Jane Werner, possessed prior to the Homeowner's Association foreclosure sale, wherein Jan Werner's interest was subject to Wells Fargo's 2006 Deed of Trust.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the argument regarding N.R.S. 116.3116(2)(c) extinguishing Wells Fargo's 2006 Deed of Trust would be a violation of Wells Fargo's State and Federal due process rights.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Lien created under N.R.S. 116.3116(2)(c) is junior to Wells Fargo's 2006 Deed of Trust and cannot legally extinguish Wells Fargo's first, priority Lien.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the Nevada Real Estate Division Advisory Opinion 13-01 is not binding law in Nevada and dismissed as irrelevant to the Plaintiff's situation.

DATED April 30, 2013.

James C. Mahan
U.S. DISTRICT COURT JUDGE

Respectfully Submitted:

WRIGHT, FINLAY & ZAK, LLP

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Wells Fargo Bank, N.A.

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CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE HARBOR PLACE TRUST,

Plaintiff,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, et al.,

Defendants.

CASE NO.: A-13-687846
DEPARTMENT NO. XX

AMENDED ORDER ON DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

This matter having come on for hearing on the 18th day of December, 2013; Michael F. Bohn, Esq. appearing for and on behalf of the Plaintiff; Michael R. Brooks, Esq. and Christopher S. Connell, Esq., appearing for and on behalf of the Defendant Barrett Daffin Frappoer Treder Weiss, LLP; Dana J. Nitz, Esq., appearing for and on behalf of Defendant, Deutsche Bank; and the Court having heard arguments of counsel, and being fully advised in the premises, finds:

(1) This matter comes before the Court on a Motion by Defendant Deutsche Bank National Trust Company to Dismiss the Complaint or, in the alternative, for Summary Judgment.

(2) This dispute relates to residential property located at 5005 Paradise Harbor Place, North Las Vegas, Nevada ("the Property"), formerly owned by Mimi Ralph. (Complaint, paragraphs 1-3, 6). According to the Complaint, the Property is

JEROME TAO
DISTRICT JUDGE
DEPARTMENT XX

located within a common-interest community governed by a homeowners' association known as the Tierra de las Palmas Owners Association ("HOA"). (Complaint, para. 3). The Plaintiff avers that it obtained title to the Property from Ms. Ralph by way of foreclosure deed recorded June 21, 2012 after the HOA initiated a foreclosure pursuant to the provisions of NRS Chapter 116 after Ms. Ralph failed to pay monthly assessments required by the HOA. (Complaint, paras. 2-4). The Defendant is the beneficiary of a Deed of Trust recorded against the Property on November 7, 2003. (Complaint, para. 4). The Complaint asserts that the foreclosure initiated by the HOA pursuant to NRS Chapter 116 extinguished any interest in the property held by the Defendant by operation of law, and seeks declaratory relief from this Court to that effect.

(3) By this Motion, the Defendant seeks a determination by this Court that the foreclosure initiated by the HOA pursuant to NRS Chapter 116 did not extinguish its prior interest in the Property.

(4) The parties appear to agree that the facts relevant to this action are not in dispute. Therefore, the Court is confronted with a pure question of law, and specifically a question of statutory interpretation.

(5) The question whether a foreclosure initiated by a homeowners' association pursuant to the provisions of NRS Chapter 116 extinguishes any and all prior encumbrances upon a property is one that has been litigated before numerous Departments of this Court as well as before different judges in the U.S. District Court for the District of Nevada. The Court is aware that the decisions of various judges regarding the answer to this question have been inconsistent.

(6) In *SFR Investments Pool 1 LLC v. U.S. Bank National Association*, Case No. A-13-678858, this Court solicited briefing *in amicus curaie* from the Real Property Section of the State Bar of Nevada, as well as from the Nevada Bankers' Association, regarding the question before the Court. (*See*, Amicus Curiae Brief of the Real Property Section of the State Bar of Nevada filed August 1, 2013; Amicus Curiae Brief

of the Nevada Bankers' Association filed August 1, 2013). The Court was particularly interested in the views of the Real Property Section because its Chairperson was one of the drafters of the model legislation that ultimately became NRS Chapter 116 as well as one of the principal witnesses before the Legislature when the bill was considered and subsequently amended. The briefing submitted by the Real Property Section argues that the unambiguous intent of the model legislation that was presented to the Nevada Legislature and became NRS Chapter 116 was that a foreclosure initiated by a homeowners' association based upon unpaid assessments extinguishes any and all prior encumbrances upon the property. The Court also notes the existence of a December 12, 2012 administrative opinion of the Nevada Department of Business and Industry which reaches the same conclusion.

(7) In this Court's "Order Denying Defendant's Motion to Dismiss" dated May 30, 2013, in *First 100 LLC v. Burns*, Case No. A677693, this Court concluded that, as a matter of law, the provisions of NRS Chapter 116 must be interpreted such that a foreclosure upon real property initiated by a homeowners' association based upon unpaid assessments extinguishes all other prior encumbrances on the property except to the extent that other lienholders also participate in the foreclosure proceedings. The Plaintiff urges this Court to adhere to the same reasoning in the case at bar.

(8) Because of the manner in which the question was originally presented to the Court by the parties, this Court's Order in *First 100 LLC v. Burns* did not address certain questions that may relate to the validity of a foreclosure conducted pursuant to NRS Chapter 116. For example, the Order did not address the question whether a junior lienholder's interest in the foreclosed property may be constitutionally extinguished if the junior lienholder did not receive actual notice of the initiation of foreclosure proceedings against the property. NRS 116.11635(1)(b)(2) requires notice to be given to certain parties, but notably does not, by its plain terms, require that notice be given to all junior or subordinate stakeholders whose interests in the property may be extinguished by a foreclosure. It is axiomatic that under the U.S. and Nevada

Constitutions, an interest in real property may not be extinguished by operation of law or any governmental action unless and until the owner has been afforded "due process of law" which includes, at a minimum, notice and a reasonable opportunity to object to the extinguishment. *See generally, Brown v. Brown*, 96 Nev. 713, 715-716 (1980) (due process requires notice and the opportunity to be heard). Yet, as literally written, NRS 116.11635(1)(b)(2) permits a junior property interest to be extinguished by a foreclosure initiated by a homeowners' association even if neither the property owner nor the association bother to give any notice whatsoever to any other lienholder regarding the pendency of the foreclosure proceedings and the potential destruction of their property interests.

(9) Thus, as literally drafted, NRS Chapter 116 permits an outcome that, at least in some cases, may contravene the Due Process Clause of both the U.S. and Nevada Constitutions. This potential outcome was not noted nor argued by the parties in *First 100 LLC v. Burns*, and therefore was not addressed by this Court in its May 30 Order. It is also not addressed in the *amicus curiae* brief of the Real Property Section, nor by the December 12, 2012 administrative opinion of the Nevada Department of Business and Industry interpreting the meaning of NRS Chapter 116. Indeed, in this Court's "Order Denying Defendant's Motion to Dismiss Complaint" filed August 9, 2013, in *SFR Investments Pool 1 LLC v. U.S. Bank National Association*, the Court expressly noted that while the question of due process had been presented in the *amicus* brief of the Nevada Bankers' Association, it had not been raised by the parties and therefore was not properly before the Court. The Court therefore declined to address the argument. However, the question of due process or lack thereof is a very serious flaw inherent in the plain language of the statute that has been noted by other parties in other cases pending before other Departments of this Court, and one that has troubled this Court for some time, because if a statute, as literally interpreted and applied by this Court, potentially (and in some cases actually) results in an unconstitutional deprivation of a party's property interest without even minimal notice or an opportunity to be heard,

then one of two conclusions must logically follow: either the statue is unconstitutional and therefore void, or the statute has not been understood correctly by the parties and/or the Court.

(10) The parties in this case have now squarely presented to this Court the question of due process which was not before the Court in either *SFR Investments Pool 1 LLC v. U.S. Bank National Association* or *First 100 LLC v. Burns*.

(11) As an initial observation, in this case the Defendant does not assert as a factual matter that it did not actually know of the foreclosure proceedings at issue when they were initiated. Therefore, some question exists whether the Defendant has legal "standing" to challenge or argue the constitutionality of the statute, because if the Defendant was given actual notice, then although the Defendant may have been generally harmed by the loss of its property interest, it has not been harmed in any way that resulted particularly from a lack of Due Process in the underlying foreclosure proceeding. *See, Thayer v. City of Worcester*, 2013 WL 5780445 at *3 (D.Mass. October 24, 2013) (discussing standards of "constitutional standing"). Perhaps for this reason, in its briefing the Defendant does not actually assert that NRS Chapter 116 is unconstitutional, but this is a question that must be confronted. Whether or not this particular Defendant was afforded notice in this particular case, if the interpretation of NRS Chapter 116 proffered by the Real Property Section and by the Nevada Department of Business and Industry is literally correct, then the statute is unconstitutional because it facially permits some property rights to be extinguished in at least some cases without any notice or any opportunity to be heard.

(12) For these reasons, the Court is compelled to conclude that the broad interpretation of NRS Chapter 116 proffered by the Real Property Section and by the Nevada Department of Business and Industry (and by this Court in its May 30 Order in *First 100 LLC v. Burns*) cannot be literally correct in all cases of any kind in which a homeowners' association forecloses upon a property, because such an interpretation could potentially result in an unconstitutional outcome in at least some cases in which

subordinate interests were never given notice of, or an opportunity to object to, the foreclosure proceedings and the deprivation of their property interests as a consequence thereof.

(13) If that interpretation is not correct, the question before the Court then becomes whether there exists an interpretation that is consistent with the express language of the statute, the intent of the Legislature in enacting the statute, and the Due Process clause of the U.S. and Nevada Constitution. If an interpretation exists that is consistent with all three, then that must be the correct interpretation. If there is no such interpretation, and if the only interpretation available to the Court is incompatible with the Constitution, then the statute (or at least the foreclosure and extinguishment portions of it) is unconstitutional and therefore void.

(14) The Defendant asserts that the proper interpretation of NRS Chapter 116 must be that foreclosures initiated by homeowners' associations only operate to extinguish other liens if the foreclosure was conducted judicially. If the foreclosure was non-judicial, then the Defendant asserts that the non-judicial foreclosure operates only as a scheme of "payment priority" affecting only the distribution of proceeds from the sale, and not the validity of any other liens or interests. The Defendant avers that this interpretation is necessitated by the reference within NRS 116.3116(2) to the phrase "action." (NRS 116.3116(2): "during the nine months immediately preceding institution of an action to enforce the lien"). The Defendant asserts that "action" must necessarily be interpreted as a judicial proceeding such as a lawsuit or other court proceeding, citing NRCP 3; *Seaborn v. District Court*, 29 P.2d 500, 505 (Nev. 1934) ("an action is a judicial proceeding"); Black's Law Dictionary (8th Ed. 2004) ("bring an action" means "to sue; institute legal proceedings"). However, this argument is dubious at best, because the Court notes that the Legislature has expressly defined the phrase "action" to encompass non-judicial foreclosures in at least one other instance in the NRS. *See*, NRS 40.430(1) ("one action rule" defined to encompass non-judicial foreclosures). Moreover, a more recent edition of Black's Law Dictionary (9th Ed.

2009) defines "action" to include non-judicial behavior: "the process of doing something; conduct or behavior." Furthermore, the Defendant's argument asserts that the Legislature intended the word "action" as used in NRS Chapter 116 to have precisely the same meaning as the term "civil action," which means a lawsuit or judicial action. However, this argument ignores that fact that the Legislature typically uses the phrase "action" throughout the NRS to mean something entirely different than "civil action" or "judicial action." *E.g.*, NRS 40.430(1). Indeed, NRS Chapter 116 itself contains the phrase "civil action" in sixteen different sections (NRS 116.31031(10); 116.31083(6)(f); 116.31088; 116.4117; 116.770(2); 116.790(6)(c)), yet also uses the phrase "action" (without the qualifier "civil" or "judicial") in ten other sections (NRS 116.310312; 116.3104(2)(a); 116.3111; 116.31155(9); 116.3116(2)(c); 116.4112(1); 116.795(1)). Under established principles of statutory interpretation, the Court must presume that, by using different terms in different sections, the Legislature intended to use the words that it did and that it therefore intended the terms "action" and "civil action" to mean different things. But the Defendant proposes that the Court instead assume that the Legislature, for reasons completely unexplained by the Defendant, used different terms in no fewer than twenty-six different sections of NRS Chapter 116 to all mean the same thing. Put another way, under the Defendant's proposal, the Legislature's express use of the word "civil" to qualify the word "action" in no fewer than sixteen different sections of NRS Chapter 116 constitutes mere useless surplusage.

(15) . Fundamentally, the Defendant's argument explicitly reads NRS Chapter 116 to create something of a complex "binary" system under which two completely different outcomes are produced with respect to other liens (one in which all other liens are extinguished and one in which they are not) depending upon whether the association chooses to proceed judicially or non-judicially. But there is nothing in the plain language of NRS Chapter 116 that can be read as creating *anything* remotely approaching such a complex, two-tiered system producing radically different potential outcomes. Quite to the contrary, the statute expressly permits an association to initiate

"foreclosure" upon a property (NRS 116.31162 is titled "foreclosure of liens"). The text of the statute does not include any reference to two potentially different types of "foreclosures" producing two different outcomes. The Defendant proposes that NRS Chapter 116 was designed to create one scheme relating to judicial foreclosures, and one scheme for mere "payment priority," something that does not exist anywhere else in Nevada law. However, Comment 5 to the section of the UCIOA that eventually became NRS 116.3116 expressly states:

> The section provides that the association lien in a condominium or planned community is to be foreclosed according to the rules generally applicable to real estate mortgages in the State...

Under Nevada law, a "foreclosure" has long been held to be a process that extinguishes all other encumbrances upon the foreclosed property as a matter of law. *E.g., Brunzell v. Lawyers Title Ins. Co.*, 101 Nev. 395 (1985); *Erickson Construction Co. v. Nevada National Bank*, 89 Nev. 350 (1973). Moreover, NRS 116.31166(3) recites that a foreclosure sale initiated pursuant to NRS 116.3116 "vests in the purchaser the title of the unit's owner without equity or right of redemption" which the Nevada Supreme Court has defined as acquisition of title free and clear of any encumbrances. *E.g., Bryant v. Carson River Lumbering Co.*, 3 Nev. 313, 317-18 (1867) (a sale "without equity or right of redemption" is one that vests the purchaser with "absolute legal title as complete, perfect and indefeasible as can exist...and a sale, upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court"), quoted in *In re Grant*, 303 B.R. 205, 209 (Bankr.D.Nev. 2003). The Defendant's proposal simply ignores this express provision. The Court can find nothing in the text or legislative history of NRS Chapter 116 that suggests any intention to create the unprecedented, complex, dual-outcome scheme proposed by the Defendant under which an association's foreclosure might, or might not, extinguish junior interests depending upon how the association opts to conduct the foreclosure, and notably the Defendant cites to no such language in its brief. If

anything, the express intention of the Legislature in creating the entirety of NRS Chapter 116 was to simplify the process by which associations could recoup unpaid monthly assessments, and it strikes the Court that creating a complex two-tiered system of foreclosures which produces two entirely different outcomes *vis-a-vis* other liens is something akin to the exact opposite of "simplification."

(16) Contrary to the Defendant's argument, NRS 116.31162 through 116.31168 provide a detailed mechanism for foreclosure quite independent of the judicial foreclosure process embodied in NRS Chapter 40. If, as the Defendant argues, the Legislature merely intended that an association must employ existing procedures for conducting a judicial foreclosure outlined in NRS Chapter 40 in order to foreclose upon a property, then virtually everything contained in NRS 116.31162 through 116.31168 becomes utterly meaningless. The Court cannot interpret a statute in such a way that multiple lengthy and detailed sections expressly included within it become meaningless, while simultaneously importing into the statute a complex, dual-outcome substitute scheme that is totally unsupported by any language actually contained within the statute.

(17) Nonetheless, the Court must reconcile, in some way, the fact that the foreclosure mechanism explicitly outlined in NRS 116.31162 through 116.31168 permits associations to foreclose upon properties in a way that, at least in some instances, violates the requirements of due process. As interpreted by the Real Property Section of the State Bar (chaired by a drafter of the legislation) and the Nevada Department of Business and Industry, a foreclosure conducted pursuant to NRS Chapter 116 extinguishes all other existing encumbrances on the property, including any pre-existing first mortgage on the property whose holder did not participate in the foreclosure proceedings. This was the conclusion reached by this Court in its May 30 Order in *First 100 LLC v. Burns* based upon the plain language of the statute. But this interpretation violates the requirements of due process in at least some cases, because NRS 116.11635(1)(b)(2) expressly does not require notice of the foreclosure to be

given to all lienholders before their property interests are completely erased by operation of law.

(18) In view of the foregoing, the Court concludes as follows. NRS 116.31162 clearly establishes that when a homeowners' association imposes a lien for unpaid assessments, a portion of the unpaid assessments (not exceeding nine months) are entitled to "super priority" status over existing liens and mortgages including any first mortgage or deed of trust. NRS 116.3116(2). If the association initiates foreclosure proceedings against the property based upon its "super priority" lien, any existing subordinate claims are paid off with any surplus proceeds of the foreclosure sale. NRS 116.31164(3)(c)(4). However, after the foreclosure sale is completed, any unpaid subordinate claims (including any prior first mortgage) are automatically extinguished by operation of law. NRS 116.31162 through 116.31168 sets forth a detailed mechanism for conducting such a foreclosure that was apparently designed to represent a simpler and cheaper method than existed under NRS Chapter 40 or NRS Chapter 107. However, the simplified foreclosure mechanism set forth in NRS 116.31162 through 116.31168 is unconstitutional because it facially permits subordinate interests to be erased without proper notice or any opportunity to object. Therefore, any foreclosure conducted in accordance with solely these provisions is null and void. However, the remaining "super priority" provisions of NRS 116.3116 et seq. are not unconstitutional merely because they artificially elevate the priority of liens based upon certain unpaid monthly assessments over the priority of other liens, for the same reasons that laws elevating the priority of liens based upon unpaid taxes over other liens are not unconstitutional. Therefore, a foreclosure initiated by a homeowners association based upon a "super priority" lien that was or is conducted in accordance with established, recognized, Constitutional foreclosure procedures (such as those set forth in NRS Chapter 40 or 107) other than (or in addition to) the procedures set forth in NRS 116.31162-31168 would be valid and would operate as a matter of law to

extinguish all other liens on the property, including any pre-existing first mortgage on the property rendered artificially subordinate by operation of NRS 116.3116.

(19) In this case, the Plaintiff's Complaint does not allege whether the foreclosure at issue in this case was, or was not, properly conducted in accordance with established and Constitutional foreclosure procedures (such as NRS Chapters 40 or 107). The Plaintiff simply asserts that the foreclosure was conducted under the procedures set forth in NRS 116.31162 through 116.31168 which do not comply with the requirements of Due Process. Therefore, the Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, is GRANTED IN PART to the extent that the Court concludes that the Plaintiff has failed to plead or establish that the foreclosure at issue through which it acquired the Property met the standards set forth in this Order. However, in lieu of dismissal based upon a legal standard that is now being adopted for the first time by this Order, the Plaintiff is hereby permitted leave to amend its Complaint. The Defendant's Motion is DENIED in all other respects.

(20) Because of the considerable public interest in the proper interpretation of NRS Chapter 116 and the inconsistencies in how the statute has been interpreted to date by different Judges of this Judicial District, this Order is hereby STAYED and this matter is CERTIFIED FOR APPEAL pursuant to NRCP 54(b).

DATED: January 13, 2014

JEROME T. TAO
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing, by mailing, by placing copies in the attorney folder's in the Clerk's Office or faxing as follows:

Michael F. Bohn, Esq. - Via Facsimile: 642-9766
Michael R. Brooks, Esq., and Christopher S. Connell, Esq. - Brooks Bauer, LLP - Via Facsimile: 851-1198
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Paula Walsh

Paula Walsh, Executive Assistant

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Joey Orduna Hastings
Clerk of the Court
Transaction # 4254379

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THUNDER PROPERTIES, INC, a Nevada company,

Plaintiff,

vs.

GREATER NEVADA MORTGAGE SERVICES, LLC, a Nevada limited liability company; FEDERAL NATIONAL MORTGAGE ASSOCIATION; PATERNO, C. JURANI, ESQ., an individual; CARLOS MEJIA and GISSELA MEJIA individuals; DOES 1 THROUGH 20, AND ROE CORPORATIONS 1 THROUGH 20, inclusive,

Defendants.
_____/

Case No.: CV13-01840

Dept. No.: 7

ORDER

On October 8, 2013, Defendant PATERNO C. JURANI (Jurani), filed a *Motion to Dismiss*. On October 23, 2013, Plaintiff filed an *Opposition to Motion to Dismiss*. On October 24, 2013, Defendants GREATER NEVADA MORTGAGE SERVICES (Greater Nevada), and FEDERAL NATIONAL MORTGAGE ASSOCIATION (FNMA), filed a *Joinder* to Jurani's *Motion to Dismiss* and *Motion for Summary Judgment*. On November 5, 2013, Jurani filed his *Reply in Support of Motion to Dismiss*. On November 12, 2013, Plaintiff filed a *Countermotion for*

Summary Judgment; Opposition to Motion for Summary Judgment. On November 25, 2013, GNV and FNMA filed a *Joinder to Jurani's Reply as Basis for Reply in Support of Summary Judgment & Opposition to Countermotion for Summary Judgment.* On November 26, 2013, Jurani filed a *Joinder to Defendants' Opposition to Countermotion for Summary Judgment.* On December 5, 2013, Plaintiff filed a *Reply in Support of Countermotion for Summary Judgment.* On December 9, 2013, Plaintiff submitted the *Countermotion for Summary Judgment* for decision. On December 12, 2013, Plaintiff filed a *Supplement to the Reply in Support of the Countermotion for Summary Judgment.* On December 16, 2013, Jurani submitted the *Motion to Dismiss* for decision.[1]

Background

This Court is asked to decide whether the judicial or non-judicial foreclosure of real property by a home owner's association extinguishes a first deed of trust. Certainly a prolific issue throughout the State, district courts have come down on both sides of the issue. However, guided by Nevada's public policy, this question is answered in the negative.

In 2004, Carlos and Gissela Mejia acquired real-property in Sun Valley, Nevada. To purchase the property the Mejias obtained a loan from Greater Nevada. Greater Nevada was also the beneficiary under the first Deed of Trust. The property is subject to the Highland Ranch Homeowner's Association (HOA) and CC&Rs, which require residents to pay monthly assessments. In September of 2010, the Mejias failed to pay the monthly assessments required by the HOA and CC&Rs. On September 24, 2010, the HOA took action to foreclose. On December 14, 2012, the HOA recorded a Notice of Default and Election to Sell. On April 4, 2013, a Notice of HOA Lien Foreclosure was recorded. The HOA's foreclosure sale was set for July 26, 2013. Plaintiff, Thunder Properties, acquired title to the property at the HOA foreclosure. On July 9, 2013, Jurani, as trustee under the

[1] Several of these pleadings violate WDCR 10.9 which requires all motions be filed in separate moving documents.

Deed of Trust, recorded a notice of trustee's sale which was set for August 5, 2013. FNMA acquired title to the property at the August fifth sale.

Legal Standard

In reviewing motions to dismiss under NRCP 12(b)(5), the district court must liberally construe the pleadings, accept as true the facts in the pleadings, and draw all inferences in favor of the nonmoving party. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). A claim will be dismissed "only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Id.* Thus, the standard to grant a motion to dismiss is very high. *Stubbs v. Strickland*, 129 Nev. Adv. Op. 15, 297 P.3d 326, 328 (2013) (stating a motion to dismiss under NRCP 12(b)(5) is "subject to a rigorous standard of review on appeal.").

Additionally, both parties have requested this Court take judicial notice of public documents included in the moving papers as exhibits. Pursuant to NRS 47.130(1)-(2) the Court will take judicial notice of facts generally known within this jurisdiction and facts capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned.

Discussion

At its core, the issue here is whether NRS 116.3110(2)(c)'s provisions permit nine months of assessments to become a first-in-time encumbrance which extinguishes all junior liens upon foreclosure, including a first deed of trust. Defendants' argue: 1) NRS 116.3116(2)(b) conclusively establishes that an encumbrance recorded before the assessments became delinquent receives priority status; 2) the legislative history of NRS 116.3116(2)(c) establishes that subsection (2)(c) merely creates a payment schedule upon foreclosure; 3) the plain language of NRS 116.3116 requires a judicial foreclosure; 4) permitting a non-judicial foreclosure violates due process; and 5) the CC&Rs contain protections which subordinate the HOA's lien to the first deed of trust.

Plaintiff counters: 1) Defendants misread NRS 116.3116(2)(c), which provides for a super priority lien in the amount of nine months of assessments and creates a super priority position for these liens – senior to the first-in-time deed of trust; 2) legislative intent and Nevada's Real Estate Division supports this view; 3) notice was provided to the parties negating Defendants' due process argument; 4) NRS 116.3116 - 3117, do not require a judicial foreclosure; and 5) the CC&Rs are pre-empted by NRS 116 *et seq*. For the reasons that follow, Nevada's public policy rejects the interpretation that NRS 116.3116(2)(c)'s super priority provision permits an HOA foreclosure sale to extinguish the first deed of trust.

A. Policy and Historical Overview of NRS 116.3116

NRS Chapter 116 is Nevada's codification of the Uniform Common Interest Ownership Act (UCIOA). UCIOA was initially promulgated in 1982 as a comprehensive scheme for states to manage HOAs. Only seven (7) states have enacted UCIOA in its entirety. Nevada is one of them. NRS 116.3116(2)(b) & (c) are the focus of the parties' dispute and, indeed, are the current focus of this issue, which is prolific throughout the Nation. Although most courts agree the statute is not ambiguous, Nevada decisions interpreting this statute have come down on both sides of the argument.

NRS 116.3116 provides in relevant part:

> 1. The [HOA] 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.
>
> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:
> . . . .
> (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) 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.[2]

NRS 116.3116(1),(2)(b)-(c).

UCIOA's purpose is to strike a balance between the first deed of trust holder's rights to foreclosure and the HOA's need for assessments. The drafters, recognizing that HOAs derive income from timely paid assessments, provided a super priority for six months (nine in Nevada) worth of assessments, which are collected upon swift foreclosure by either the lender or the HOA.[3] The intent of the drafters was to spur action by either the lender or the HOA to settle the issue of assessments through foreclosure. *Id.* It should also be stated that a foreclosure under NRS Chapter 116 has relaxed notice requirements, i.e., the HOA is only required to send the notice of default and notice of sale to junior interest holders who request such notice. NRS 116.31163, 31165. However, swift foreclosure is no longer in Nevada's public policy and these considerations are no longer in balance. *See infra* Part C.

B. History and Nature of a Homeowner's Association

HOAs gained popularity in the latter half of the Twentieth Century when homeowners, dealing with rising land costs, sought alterative avenues to share the costs of private parks and schools within a community.[4] "Today, an estimated

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[2] In 2009 the six month provision was extended to nine months in light of the time it takes foreclosures to reach a conclusion. *Hearing on AB 204 Before Assemb. Comm. on the Judiciary, 75th Leg.* p. 34 (2009) (statement of Assemb. Ellen Spiegel).

[3] *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* (JEB Report June 1, 2013).

[4] Casey Perkins, *Privatopia in Distress: The Impact of the Foreclosure Crisis on Homeowners' Associations*, 10 Nev. L.J. 561, 563 (2010).

60,000 million Americans live in over 300,000 association-governed communities in the United States." *Id.* Rapid growth cities, such as Las Vegas, have seen an exponential increase in HOAs primarily due to two driving factors: 1) consumer demand; and 2) so-called "load-shedding." *Id.*

Increasingly, consumers are purchasing homes in common-interest communities governed by HOAs with the express desire to live in a maintained neighborhood with private amenities that help maintain property values. Municipalities encourage the construction of common-interest communities because HOAs help bear the cost of maintaining common-areas and neighborhood aesthetics which would otherwise be borne by the overall tax base. Thus, a municipality increases its tax base while simultaneously "load-shedding" the accompanying facilities and services costs onto the developer and the HOA. *Id.* at 564.

C. Nevada's Public Policy of Real Property Foreclosures

Adopted in 2009, Nevada's Foreclosure Mediation Program (FMP) was enacted to encourage deed of trust beneficiaries and homeowners to exchange information and negotiate possible debt restructuring to avoid both judicial and non-judicial foreclosure. FMR Rule 1(2) & 8(1); NRS 40.437. The program's enactment began with Assembly Bill 149 (A.B. 149).[5] The primary sponsor of A.B. 149, Assemblywoman Barbara Buckley, commented that the purpose of this program is to "make foreclosure a remedy of last resort." *Id.* The program's broad swath applies to any grantor or person who holds title of record and is the owner-occupant of a residence. FMR Rule 7(1). Any trustee or person presenting a notice of default and election to sell must notice the grantor/homeowner of the default and provide an "Election of Mediation" allowing the grantor/homeowner to opt into the program within ten (10) days'. FMR 8(1). Prior to a trustee's sale being conducted, a mediator's certificate must issue. FMR Rule 7(3). Thus, each lender or

[5] *Foreclosure Mediation Program: Joint Meeting on A.B. 149 Before the Assemb. & Senate Comm. on Commerce & Labor* 2009 Leg. 75th Sess. (Nev. 2009) (statement by Assemb. Barbara Buckley).

beneficiary seeking to foreclose must first comply with the requirements of the program. FMR Rule 7(1). HOAs do not.

Nevada's Foreclosure Mediation Program is not the only protection afforded to homeowners facing foreclosure. In 2013, the Seventy-Seventh (77th) regular session of the Nevada Legislature enacted NRS 107.400 *et seq.*, Nevada's Homeowner's Bill of Rights. This section was enacted as additional consumer protection in response to the mortgage foreclosure crisis. *See* S.B. 321, 77th Leg., Reg. Sess. (Nev. 2013). At its core, S.B. 321, now NRS 107.400 *et seq.*, requires large lending institutions seeking either judicial or non-judicial foreclosure in which a notice of default and election to sell is recorded on or after October 1, 2013, to provide certain information to the borrower concerning the borrower's account, the foreclosure prevention alternatives offered by the mortgage servicer, mortgagee or beneficiary and a statement of facts supporting the right of the mortgagee or beneficiary to foreclose. *Id.* Moreover, homeowners may elect to seek mediation under the FMP. NRS 40.437(1)(a)(3). HOAs are not subject to the Homeowner's Bill of Rights or the Foreclosure Mediation Program.

D. Analysis

The facts here are not in dispute; these issues boil down to statutory interpretation. In Nevada, "words in a statute should be given their plain meaning unless this violates the spirit of the act." *V & S Ry. LLC v. White Pine Cnty.*, 125 Nev. 233, 239, 211 P.3d 879, 882 (2009) (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)). Further, a statute should not be read in a manner that renders a part of a statute meaningless or produces an absurd or unreasonable result. *Id.*; s*ee also, Sheriff, Clark Cnty. v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008). Therefore, where the legislative intent is clear, the court must effectuate that intent. However, statutory construction should always avoid an absurd result.

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A court should apply a statute as written unless "doing so would frustrate [the Legislature's] clear intention or yield patent absurdity." *Hubbard v. United States*, 514 U.S. 695, 703 (1995). The absurdity doctrine is an exception to the plain meaning rule. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). Nevada has adopted the absurdity doctrine. *See V & S Ry. LLC*, 125, Nev. at 239, *and see Cote H. v. Eighth Judicial Dist. Court ex. Rel. County of Clark*, 124 Nev. 36, 175 P.3d 906 (2008). "A 'statutory outcome is absurd if it defies rationality' by 'render[ing] a statute nonsensical or superfluous' or if it creates 'an outcome so contrary to perceived social values that [the Legislature] could not have intended it.'" *United States v. Cook*, 594 F.3d 883, 891 (D.C. Cir. 2010) (internal quotations omitted).

Defendants argue that by allowing a first deed of trust to be extinguished by an HOA's assessment, renders nugatory NRS 116.3116(2)(b)'s exception to liens taking priority over the first deed of trust. However, the language of NRS 116.3116(2)(c) is clear: up to nine months of the assessment shall be "prior to all security interests described in paragraph (b)," thereby creating a super priority for up to nine months of assessments over the first deed of trust. NRS 116.3116(2)(c). Thus, subsection (2)(c) is an exception to the exception.

A fundamental principle of property law is that the foreclosure of a senior encumbrance extinguishes all junior encumbrances. *Erickson Const. Co. v. Nevada Nat. Bank*, 89 Nev. 350, 353, 513 P.2d 1236, 1238 (1973). As applied, NRS 116.3116(2)(c) subordinates the first deed of trust to nine months of the HOA's assessment, extinguishing the first deed of trust upon foreclosure.

Although a literal reading of NRS 116.3116(2)(c) gives nine months of an HOAs assessments a super priority position, senior to a first-in-time deed of trust, application of the statute in this manner creates an absurd result by allowing an HOA to expedite foreclosure, eject the homeowners, engage relaxed notice

requirements and extinguish the first deed of trust. This is expressly contrary to Nevada's public policy regarding foreclosures.

In both 2009 and 2013, the Nevada Legislature announced that home retention is Nevada's current public policy regarding real-estate foreclosures, thereby repealing previous public policies. By allowing an HOA to foreclose on a property already encumbered by a first deed of trust and subsequently extinguish the first deed of trust completely undermines Nevada's current public policy. HOAs are not on equal footing with lenders. HOAs are not subject to the Homeowner's Bill of Rights (as they will most likely never foreclose on more than 100 properties per year) or the Foreclosure Mediation Program. NRS 107.460, FMR Rule 7(1). Nor is an HOA subject to the heightened foreclosure requirements of NRS Chapter 40.

Allowing an assessment to take priority over a first-in-time deed of trust and extinguish that deed of trust upon foreclosure is patently inequitable. To hold otherwise would create an incentive for HOAs to foreclose on encumbered properties without notice unless requested[6] and eject the home owners without engaging the current protections afforded to homeowners under the FMP program and the Home Owner's Bill of Rights. Further, if NRS 116.3116(2)(c) permits foreclosure by an HOA and extinguishes the first-in-time deed of trust, a disincentive is created for lenders to issue loans to Nevada residents seeking to purchase property subject to an HOA. Plaintiff's current position furthers a policy to steer would-be homeowners away from properties governed by HOAs. This cannot be what the Nevada Legislature had in mind when it enacted NRS 116.3116.

Conclusion

This Court understands that HOAs provide a necessary service to rapid growth cities, such as Las Vegas. However, permitting an HOA foreclosure to extinguish the first deed of trust creates a disincentive for lending institutions to

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[6] *See* NRS 116.31163, NRS 116.31165.

lend in Nevada, materially hampering the HOA, Nevada's real-estate economy and all other would-be Nevada home owners seeking to purchase property subject to an HOA. Reading NRS 116.3116(2)(c) as a payment schedule avoids this absurd result and comports with Nevada's current public policy. This conclusion strikes the appropriate balance by providing HOAs the first cut of any monies recovered after sale while also providing protections to the homeowner trying to retain their home. As this issue is dispositive, the Court declines to consider the remaining arguments.

Based on the foregoing, the first deed of trust was not extinguished at the HOA's trustee sale and Defendants' Motion to Dismiss is **GRANTED** as to Defendants Jurani, Greater Nevada Mortgage Services, Greater Nevada, LLC, and the Federal National Mortgage Association. As this *Motion* is dispositive of the case, the remaining motions for summary judgment are **DENIED** as moot.

IT IS FURTHER ORDERED that the status hearing currently set for January 17, 2014, at 10:00 a.m. is hereby vacated.

DATED this 13 day of January, 2014.

Patrick Flanagan

PATRICK FLANAGAN
District Judge

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 13 day of January, 2014, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Marilyn Fine, Esq. and Rachel Donn, Esq. for Thunder Properties, Inc.;

Douglas Gerrard, Esq. for Greater Nevada Mortgage Services, et al.; and

Jory Garabedian, Esq. for Paterno Jurani

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Judicial Assistant

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08/05/2013 01:21:44 PM

CLERK OF THE COURT

ORDR

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC., a Nevada limited liability company,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC., a foreign limited liability company; SANDRA SALAS, an individual; and DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-13-684596-C

Dept. No. XXXI

ORDER DENYING APPLICATION FOR TEMPORARY RESTRAINING ORDER ON ORDER SHORTENING TIME AND MOTION FOR PRELIMINARY INJUNCTION AND DIRECTING BRIEFING AND ORAL ARGUMENT ON PLAINTIFF'S NRCP 54B MOTION

This matter originally came on for hearing before Department XXXI on Plaintiffs application for temporary restraining order and preliminary injunction on July 17, 2013. David A. Rosenberg, Esq., and Victoria Hightower, Esq. appeared on behalf of Plaintiff, SFR INVESTMENTS POOL 1, LLC ("SFR"). Jacob D. Bundick, Esq. and Darren T. Brenner Counsel for Defendant, NATIONSTAR MORTGAGE, LLC appeared and informed the Court that they had been retained that morning by Defendant and thus had not had the opportunity to prepare a brief. In order to ensure that there was proper notice of the pending Motions and

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DISTRICT JUDGE
DEPARTMENT XXXI
LAS VEGAS, NEVADA 89155

to provide all parties an opportunity to fully brief the matter, the Court stayed the matter pending a continued hearing set for July 30, 2013.

On July 30, 2013 a hearing lasting over two hours regarding Plaintiff, SFR INVESTMENT POOL 1, LLC.'S Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction was conducted by Department XXXI. Present at the hearing were Diana S. Cline, Esq. and David A. Rosenberg, Esq., Counsel for Plaintiff, SFR INVESTMENTS POOL 1, LLC and Jacob D. Bundick, Esq. and Darren T. Brenner Counsel for Defendant, NATIONSTAR MORTGAGE, LLC. Having reviewed the papers and pleadings on file herein, heard oral arguments of counsel and based on the evidence, this Court makes the following Findings of Fact and Conclusions of Law[1]:

FINDINGS OF FACT

1. In 1991 Nevada adopted Uniform Common Interest Ownership Act as NEV. REV. STAT. § 116, including NEV. REV. STAT. § 116.3116(2).

2. On or about June 27, 1997 (the "Association"), recorded its Declaration of CC&Rs. Reply 2.

3. On or about September 9, 2005 Sandra Salas obtained title to certain real property located at 3365 Sheep Canyon Street, Las Vegas, NV 89122; Parcel No. 161-15-615-010 (the "Property") through Grant Bargain Sale

[1] The parties requested and contended that this case and A-13-684630 were to be argued and considered legally together with there being some factual distinctions given the different properties at issue. Accordingly, the present Order and that in A-13-684630 have been prepared consistent with that agreement of the parties

Deed. Application for Temporary Restraining Order on Order Shortening Time and Motion for Preliminary Injunction (hereinafter "Application") 9.

4. On or about June 15, 2007, Meridias Capital, Inc. recorded a first deed of trust against the Property in the Official Records of the Clark County Recorder as Instrument No. 200706150000678 ("Deed of Trust"). Application, Ex. 7. The amount of the loan was approximately $228,000.00 Opp. 3; Application, Ex. 7. The loan and deed of trust were thereafter modified, and both were assigned to Defendant. Opp. 3.

5. The subject property is located within a common-interest community governed by the Sunrise Ridge aka Sunrise Ridge Master Homeowners Association's (the "Association") , which was established pursuant to NEV. REV. STAT. § 116. Compl. paragraph 25.

6. On or about May 1, 2009 Salas became delinquent on the loan secured by First Deed of Trust.[2] Reply 2.

7. On or about November 5, 2009 Salas became delinquent on Association assessments. Reply 3.

8. On or about, November 5, 2009 a Notice of Delinquent Assessment Lien, was recorded on in the Official Records of the Clark County Recorder as Instrument Number 2009110050003109 ("Association Lien"). Compl. Paragraph 8.

9. On or about January 29, 2010 the Association recorded Notice of Default. Reply 3.

[2] Sandra Salas is also named in the Complaint but given the current request for injunctive relief is limited to preventing Defendant Nationstar from foreclosing on the property, and no other party has filed any pleadings, the Court is only addressing whether Nationstar can foreclose as that is the only issue presented to the Court at this juncture.

10. On or about May 7, 2012, Elsi Navarro, assistant secretary for Mortgage Electronic Registration Systems, Inc. executed an assignment, that transferred the beneficial interest in the Deed of Trust, together with the underlying promissory note, to Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP ("BOA"), as Trustee of Meridias Capital, Inc.

11. The assignment was recorded on May 9, 2012 against the Property in Official Records of the Clark County Recorder as Instrument No.201205090000046. Compl. paragraph 27.

12. On or about August 8, 2012 Deb Backus, assistant secretary for Mortgage Electronic Registration Systems, Inc. executed an assignment that transferred the beneficial interest in the Deed of Trust, together with the underlying promissory note, to Nationstar Mortgage, LLC. The assignment was recorded on August 30, 2012 against the Property in Official Records of the Clark County Recorder as Instrument No. 201208300000494. Compl. paragraph 28.

13. On or about October 23, 2012 Lisa Nix, Assistant Vice President for Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP executed an assignment, that transferred the beneficial interest in the Deed of Trust, together with the underlying promissory note, to Nationstar Mortgage, LLC. The assignment was recorded on November 25, 2012 against the Property in Official Records of the Clark County Recorder as Instrument No. 20122112500000026. Compl. paragraph. 29.

14. On or about November 1, 2012, Ricky Broxton, Assistant Secretary for Nationstar Mortgage, LLC, executed a document that substituted Cooper Castle

Law Firm, LLP ("Cooper Castle"), as trustee of the Deed of Trust. Id 30 The substitution of trustee was recorded in the Official Records of the Clark County Recorder as Instrument No. 201212040002963. Compl. paragraph 30.

15. On or about December 6, 2012, the Association recorded Notice of Foreclosure Sale listing the amount of the delinquent assessment lien plus costs, expenses and advances as $6,441.84. Reply 3.

16. Based on the Foreclosure Deed attached to the Application and the Complaint, the foreclosure sale was conducted by Nevada Association Service, Inc. ("NAS"), agent for Sunrise Ridge aka Sunrise Ridge Master HOA (the "Association")[3], on or about on January 4, 2013. Application, Ex. 1.

17. Plaintiff asserts it acquired the Property for $7,000.00 at the foreclosure sale. Since the Association foreclosure sale, Plaintiff asserts that it has expended additional funds and resources in relation to the Property. Application, Ex. 1.

18. On or about January 8, 2013, the resulting foreclosure deed was recorded in the Official Records of the Clark County Recorder as Instrument Number 201301080001229 ("Association Foreclosure Deed"). Application, Ex. 1.

19. On or about January 22, 2013, Matthew Dayton, of Cooper Castle, as Trustee for Nationstar Mortgage executed a notice of default and election to sell pursuant to the terms of the Deed of Trust. Opp. 3. The notice of default was

[3] In contrast to the Complaint and the Forclosure Deed, Plaintiff's Reply and the Declaration of Christopher J. Hardin attached thereto as Exhibit 2 state that Alessi & Koenig, LLC ("Alessi"), were involved in the sale. Given the conflicting information it is unclear from the record what role they played, if any, or if the reference to them was in error. For example Mr. Hardin's declaration states in relevant part: "9. On Wednesday, January 4, 2013 at approximately 2:00 p.m., I attended a foreclosure auction that was noticed to be held at the offices of Alessi & Koenig, LLC at 9500 W. Flamingo Rd., Suite #205, Las Vegas, Nevada 89147." Reply, Ex. 2 at paragraph 9 but the foreclosure deed states that NAS conducted the sale. Application, Ex. 1.

recorded on January 28, 2013 in Official Records of the Clark County Recorder as Instrument No. 201301280001031. Opp. 3.

20. On or about June 24, 2013, Cooper Castle, as Trustee for Nationstar Mortgage recorded in the Official Records of the Clark County Recorder as Instrument No. 201306240002425 a Notice of Trustee's Sale stating that the Property would be sold at a public auction pursuant to the terms of the Deed of Trust on July 23, 2013 at 1:00 p.m. Cmpl. paragraph 33.

21. On July 2, 2013 Plaintiff filed a Complaint alleging causes of Action for Declaratory Relief/Quiet Title Pursuant to NEV. REV. STAT. § 30.010, et. seq., NEV. REV. STAT. § 40.10 & NEV. REV. STAT. § 116.3116, Unjust Enrichment and Preliminary and Permanent Injunction. The present Motion for a Temporary Restraining Order and Preliminary Injunction is pled only against Defendant Nationstar as the entity who is attempting to foreclose on the property. Compl. 6-8.

22. Plaintiff asserts *inter alia* that it is entitled to injunctive relief as it purchased the Property from the Association after a foreclosure sale pursuant to NEV. REV. STAT. § 116 and, according to statute, it is entitled to rely on the recitations in the deed. Thus, it contends its payment of $6,005.32 entitles them to the property outright since the Association's foreclosure wiped out the security interest of Defendant Nationstar and any other interests in the property.[4] As such Plaintiff contends that it is likely to succeed on the merits of its claims of quiet title and unjust enrichment. It further contends that if Defendant is allowed to move forward with its foreclosure sale, it will be irreparably harmed as the

[4] Neither party contends that there are outstanding taxes or other governmental liens so that issue is not addressed.

property will be sold and monetary damages would not compensate it for the loss. Compl. 6-8.

23. In response, Defendant contends that Plaintiff cannot prevail on the merits of its claims because, Plaintiff's interpretation of the statute would violate due process in general and as to the case at bar there is no evidence of any notice to Defendant Nationstar, much less a notice relating to the "super priority" amount. Defendant also contends that the HOA's Covenants, Conditions, & Restrictions (CC&Rs) expressly state that the HOA's lien does not discharge Defendant Nationstar's deed of trust. It also asserts that the amount paid, $7000 is a commercially unreasonably price which cannot wipeout Defendant Nationstar's interest. As to the assertion of irreparable harm, Defendant asserts that Plaintiff cannot show a threat of immediate and irreparable injury since its only harm is the amount it paid to the Association and any other monetary sums. Opp. 4-15.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over both the subject matter of this case and the parties to this case.[5]

2. Article 6, Section 6 of the Nevada Constitution and NEV. REV. STAT. § 33.010 authorize this Court to grant injunctive relief in the following cases:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the

[5] Given the relief actually sought in the Motion, Plaintiff was seeking a Preliminary Injunction rather than an Temporary Restraining Order. Nevertheless, the Court addressed both standards in its ruling and the outcome would be the same given the operative facts and law.

> commission or continuance of the act complained of, either for a limited period or perpetually.
> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
> 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

3. "A preliminary injunction is available when the moving party can demonstrate that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits." Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009)[6] Put another way, NRS 33.010(1) authorizes an injunction when it appears from the complaint the plaintiff is entitled to the relief requested, and at least part of the reprieve consists of restraining the challenged act. Univ. and Cmty Coll. Sys. of Nev. v. Nevadans for Sound Gov't, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

4. Before a preliminary injunction will issue, the applicant must show: "(1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable

[6] In accordance with NEV. R. CIV. P. 65, before or after the commencement of a hearing of an application for a preliminary injunction, "the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." NEV. R. CIV. P. 65 (a)(2). In the present case there was no request that the matter be combined with a trial on the merits nor did the Court order such, so the ruling herein is based on the motion for a temporary restraining order and preliminary injunction.

harm for which compensatory damage is an inadequate remedy." S.O.C., Inc. v. The Mirage Casino-Hotel, 117 Nev. 403, 408, 23 P.3d 243, 247 (2001), citing Dangberg Holdings v. Douglas Cnty, 115 Nev. 129, 142-143, 978 P.2d 311, 319 (1999). In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, as well as the public interest. Univ. and Cmty Coll. Sys. of Nev., 120 Nev. at 721, 100 P.3d at 187, (1996) (citing Clark Cnty Sch. Dist. v. Buchanan, 112 Nev. 1146, 1150, 924 P.2d 716, 719).

2. Determining whether to grant or deny a preliminary injunction is within the district court's sound discretion. Att'y Gen. v. NOS Commc'ns, 120 Nev. 65, 67, 84 P.3d 1052, 1053 (2004). The district court's decision will not be disturbed absent an abuse or unless it is based upon an erroneous legal standard. *Id.* Factual determinations will be set aside only when clearly erroneous or not supported by substantial evidence; however, questions of law are reviewed de novo. S.O.C., Inc., 117 Nev. at 407, 23 P.3d at 246.

3. The statute at issue in this case, NEV. REV. STAT. § 116.3116, discusses homeowner association liens against units or homes for unpaid or delinquent assessments. It states in pertinent part:

> 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 assessment 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.

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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 . . .

4. Notably, a lien under NEV. REV. STAT. § 116.3116(2) is "prior" to "all other liens and encumbrances on a unit," without the requirement of an enforcement action, except for, inter alia, "[a] first security interest." See NEV. REV. STAT. § 116.3116(2)(b). That exception specifies the association's lien is junior to the first security interest at least until an "action" is commenced. See NEV. REV. STAT. § 116.3116(2)(c).

5. NEV. REV. STAT. § 116 does not specifically define the term "action" with respect to one "enforc[ing] the lien," as described in NEV. REV. STAT. § 116.3116(2)(c).

6. The Court is aware of many cases in both the state and federal court system that have addressed in differing contexts the statutory interpretation

of NEV. REV. STAT. § 116.3116 and its application to Association foreclosures and first deeds of trust. While much of the inquiry in those cases focused on whether the statute was ambiguous or not and the ramifications of that determination, given that Plaintiff in this case seeks injunctive relief from this Court not as an Association but as a purported bona fide purchaser of the property, this Court's first area of inquiry is to determine whether Plaintiff would likely establish that it is a bona fide purchaser.

7. The law on whether a party is a bona fide purchaser is clear and does not appear disputed between the parties. Specifically, the cases cited by Plaintiff provide *inter alia* that "[t]he bona fide doctrine protects a subsequent purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance." 25 Corp., Inc. v. Eisenman Chem. Co., 101 Nev. 664, 675, 709 P.2d 164, 172 (1985) (citing 77 Am. Jur. 2d *Vendor and Purchaser* § 633 at 754 (1975). Indeed, Nevada has long protected bona fide purchasers. See, e.g., Moresi v. Swift, 15 Nev. 215, 223 (1880) ("The rule that a man who advances money bona fide and without notice, will be protected in equity, applies equally to real estate, chattels, and personal estate.") (internal citation omitted)). In addition to having paid value without notice, the buyer must be acting in good faith to be a bona fide purchaser. See Berge v. Fredericks, 95 Nev. 183, 188, 591 P.2d 246, 249 (1979).

8. Other states such as California have a similar analysis. For example in Countrywide Home Loans, Inc. v. United States, CV:F:02:6405:AWI:SMS, 2007 WE 87827 (E.D. Cal. Jan. 9, 2007), at *11, the Court held that: "A bona fide purchaser is one who pays value for property,

without notice of any adverse interest or of any irregularity in the sale proceedings."

9. Given the law is undisputed, the Court needs to apply the law to the evidence and facts in the present case. In so doing, the Court looked to the declaration of the Manager of Plaintiff, Christopher Hardin.[7] In that declaration, Mr. Hardin sets forth inter alia that "[a]s part of my duties for SFR, I attend and bid on real property at multiple public foreclosure auctions held on behalf of homeowners' associations by their agents." Reply, Ex. 2. He also states that "Prior to attending the auctions, I research which properties will be available for sale...." Reply, Ex. 2.

10. Taking into account Mr. Hardin's declaration as the manager of Plaintiff that researches the properties that will be available for sale and has attended multiple foreclosure auctions, makes it unlikely that Plaintiff was not aware of competing claims for the property which would be necessary to be considered a bona fide purchaser.

[7] In paragraph ten of his declaration in case number A-13-684630-C which the parties requested be argued and considered concurrently with this instant matter and which the parties contended was legally similar, Mr. Hardin states in relevant part: "10. In my experience, the amount of the bids at auction are directly affected by on-going litigation regarding the interpretation of NRS 116.3116 and information that impacts or may impact the litigation. The same factors also impacted the amount SFR was willing to pay for this property." The declaration was signed three days after the declaration that was presented in the instant case such that the court would have no reason to believe that he was retracting the statement referenced herein. Although the Court does not rely on evidence provided in a companion case for the instant ruling, based on the declaration of Plaintiff's own manager that the price Plaintiff paid was impacted by the uncertainty over what rights that entities such as Plaintiff SFR would obtain in these circumstances, could be further support an assertion that Plaintiff was aware of or was on reasonable notice of competing legal or equitable claims to the property. If the Court were to hold Plaintiff to its own words, it has not established that it will likely prevail as a bona fide purchaser nor will it have the attendant protections pursuant to Nevada law.

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11. Plaintiff's Reply mirrors the statements of its manager further demonstrating that it will not likely be deemed a bona fide purchaser. In its Reply, Plaintiff asserts that:

> Defendant's argument does not consider the market inefficiency caused by the ambiguity and inconsistency among Nevada courts in the interpretation of NEV. REV. STAT. § 116.3116. Once the application of the statute is clear enough for title companies to issue title insurance without a quiet title action, the bids at the auctions will reflect market rate without the discounts caused by the current uncertainty in the law.

Reply 9.

12. Plaintiff's argument in its Reply that the small purchase price it paid for the property is realistic in the marketplace due to the lack of certainty of whether the purchase will be upheld by the courts further shows that Plaintiff knew there were adverse interests in the property and that there was a likelihood that their asserted interest would not survive judicial scrutiny. Reply 9.

13. The Court having found that Plaintiff has not established that it is likely to be found to be a bona fide purchaser, Plaintiff cannot rely on the provisions of NEV. REV. STAT. § 116.31166. Huntington v. Mila, Inc., 119 Nev. 355, 357, 75 P.3d 354, 356 (2003) ("A subsequent purchaser with notice, actual or constructive, of an interest in property superior to that which he is purchasing is not a purchaser in good faith, and is not entitled to the protection of the recording act."); 25 Corp., Inc. v. Eisenman Chemical Corp., 101 Nev. 664, 665, 709 P.2d 164, 165 (1985) ("The bona fide doctrine protects a subsequent purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance."); Berge v. Fredericks, 95 Nev. 183, 186, 591 P.2d 246, 247 (1979) ("[A] party claiming title to the land by a

subsequent conveyance must show that the purchase was made in good faith, for a valuable consideration; and that the conveyance of the legal title was received before notice of any equities of the prior grantee.").

14. Instead, the Court then would need to determine if the provisions of NEV. REV. STAT. § 116 were properly followed to determine if Defendant's due process rights were taken into account and what if any interest it passed on to Plaintiff pursuant to the quitclaim deed. Both Art. 1, §8(5) of the Nevada Constitution and the 14th Amendment, § 1 of the U.S. Constitution guarantee due process of law prior to a deprivation of property. Defendant's contention that "senior deed of trust beneficiaries must receive notice of the super priority amount so they can cure and protect their secured interest in the property. SFR does not and cannot state that Nationstar ever received any notice of what the putative super priority amount was, whom to pay, or how long it had to pay" is well founded.

15. The Court was not provided with evidence that Defendant's due process rights were taken into account or that Defendant was properly noticed within the provisions of NEV. REV. STAT. § 116 as would be required from a party seeking injunctive relief. See e.g. Dangberg Holdings v. Douglas Cnty, 115 Nev. 129, 142-143, 978 P.2d 311, 319 (1999) (movant for a temporary restraining order must show a substantial likelihood of success on the merits). Plaintiff only asserts that "[u]nder the provisions of NRS 116, Defendant was given notice of the association's lien at least three times: first, through the recording of the declaration of CC&Rs; second, when the Association sent its notice of default; and third, when the Association sent its notice of sale. Reply 6. While Plaintiff argues that the Association sent notices to Defendant, there is no evidentiary

support for that argument. Mere argument in a Reply is not sufficient to establish a likelihood of success on the merits of Plaintiff's claims. Similarly, although Plaintiff correctly points out that the CC &Rs were recorded, prior to the loan being recorded, the recording of the CC&Rs would put Defendant on notice that the Association could assert a lien if assessments were delinquent but it did not put them on notice that the association would institute foreclosure proceedings several years later given the potential delinquency had not yet occurred.[8]

16. In sum, Plaintiff has not provided the Court with evidence that it would succeed on the merits of its claims for either quiet title or unjust enrichment because it has not shown that it is a bona fide purchaser and in the absence of such a determination it has not shown that Defendant was given due process and appropriate notice prior to any claim that its security interest was being eliminated. In the absence of any such evidence, the Court does not find that Plaintiff has a likelihood of success on the merits.[9] See, e.g. "A quiet title claim requires a plaintiff to allege that the defendant is unlawfully asserting an adverse claim to title to real property." Kemberling v. Ocwen Loan Servicing, LLC, No. 2:09-cv- 00567, 2009 WL 5039495, at *2 (D. Nev. Dec. 15, 2009), citing See Clay v. Scheeline Banking & Trust Co., 40 Nev. 9, 16, 159 P. 1081, 1082 (1916)." The very object of the proceeding assumes that there are other

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[8] To the extent that Plaintiff's Motion could also be read to state that notice was not required pursuant to NEV. REV. STAT. § 116, given that Plaintiff is not likely to prevail as a bona fide purchaser, any such reading of the statute would be a violation of Defendant's due process rights. Thus, even if Plaintiff were attempting such an argument, it would have no merit as the interpretation would be Unconstitutional and hence unenforceable.

[9] In light of the Court's ruling that Plaintiff is not likely to succeed on the merits, the Court need not address the other defenses raised by Defendant including whether the purported mortgage savings clause in the CC&Rs was in effect given the provisions of NEV. REV. STAT. § 116, or whether in certain circumstances NEV. REV. STAT. § 116.3116 allows a first security interest to be wiped out. With respect to Defendant's assertion that Plaintiff's claim would fail as it was not commercially reasonable, the Court took into account the purchase price in analysis of whether Plaintiff was a bona fide purchaser.

claimants adverse to the Plaintiff, setting up titles and interests in the land or other subject-matter hostile to his [own]." Clay, 40 Nev. at 16, 159 P. at 1082. Where such adverse claims exist, the party seeking to have another party's right to property extinguished bears the burden of overcoming the "presumption in favor of the record titleholder." See Breliant v. Preferred Corp., 112 Nev.663, 669, 918P.2d 314, 318(1996); Clay, 40 Nev. at 16, 159 P. at 1082.

17. Although the Court has found that there is not a likelihood of success on the merits, the Court deems it appropriate to address the other factors Courts review when injunctive relief is sought including the irreparable harm component, weighing the potential hardships to the relative parties and others, as well as evaluating the public interest. See e.g. Univ. and Cmty Coll. Sys. of Nev., 120 Nev. at 721

18. As noted above, Plaintiff asserts consistent with Nevada precedent that the loss of real property rights generally constitutes irreparable harm. See e.g. Dixon v. Thatcher 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (holding that real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm)(citing Leonard v. Stoebling, 102 Nev. 543, 728 P.2d 1358 (1986) and Nevada Escrow Service, Inc. v.Crockett, 91 Nev. 201, 533 P.2d 471 (1975) (denial of injunction to stop foreclosure reversed because legal remedy inadequate)).

19. Defendant contends that Plaintiff cannot establish irreparable harm as Plaintiff's damages are limited to its monetary investment, given it did not purchase the property. Neither party directly addressed the balance of hardships or public interest factors.

20. Based on all the evidence presented to the Court and given that if Defendant were to proceed with its foreclosure it could eliminate not only any property interest Plaintiff contends it has but also any other lien rights he may have purchased from the Association and the lack of clarity asserted by the parties relating to certain aspects of NEV. REV. STAT. § 116 that could be addressed at further proceedings in this matter, the Court finds that there would be irreparable harm to Plaintiff if he were able to establish a property interest in the property.

21. When weighing the potential hardships and public interest, the Court finds that although Plaintiff could lose the $7000 investment and other sums he may have spent on the property, Defendant is at risk to lose several hundred thousand dollars. Further, as Defendant notes, the underlying borrower is at risk to continue to owe a more significant sum of money if Plaintiff's argument prevails. Accordingly, the balance of hardships favors Defendant. Public interest also comes into play in favor of Defendants if they were to be deprived of their property interest without due process.

CONCLUSION

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff has not shown a likelihood of success on the merits and thus its Motion for a Temporary Restraining Order and Preliminary Injunction is DENIED.

IT IS further ORDERED, ADJUDGED AND DECREED that the Court will hear Plaintiffs NEV. R. CIV. P. 54(b) motion after providing Defendant an Opportunity to Respond to the Motion. In so doing the Court notes that the

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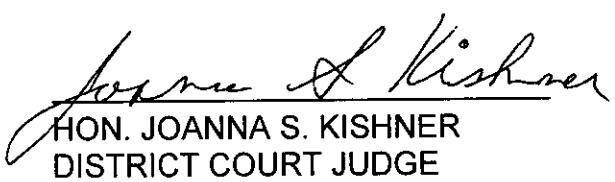
request was brought up for the first time in its Reply. The Court will hear oral argument on the proposed NEV. R. CIV. P. 54(b) Certification on Tuesday, August 13, 2013 at 9:00 a.m. in Courtroom 12B. Defendant's Opposition is due to be filed, with a courtesy copy to the Court, on August 9, 2013 by 5:00 p.m. and Plaintiff's Reply is due Monday, August 12, 2013 by 12:00 pm. Given the importance of the issue and to not thwart the ends of justice, the Court is staying enforcement of the denial of the Motion for a Temporary Restraining Order and Preliminary Injunction and staying the case until such time the hearing on the 54(b) request. At the time of the hearing the Court will consider whether a further stay is necessary.

Dated this 2nd day of August, 2013.



HON. JOANNA S. KISHNER
DISTRICT COURT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on or about the date filed, this document was copied through email, or a copy of this ORDER was placed in the attorney's folder in the Clerk's Office and/or mailed to the proper party as follows:

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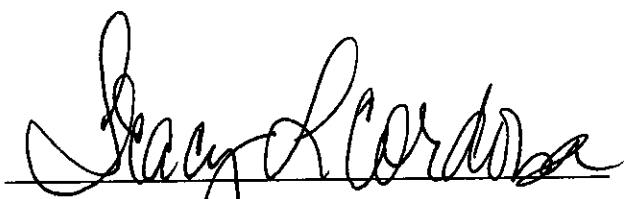

TRACY CORDOBA
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