IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTEMIS EXPLORATION COMPANY, a Nevada corporation, HAROLD WYATT, and MARY WYATT, individuals,

Appellants,

vs.

RUBY LAKE ESTATES HOMEOWNER'S ASSOCIATION,

Respondent.

Electronically Filed
Oct 08 2018 02:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 75323

District Court Case No. CV-C-12-175

APPEAL

from the Fourth Judicial District Court, Department 2
The Honorable Alvin R. Kacin, District Court Judge
District Court Case No. CV-C-12-175

RESPONDENT'S ANSWERING BRIEF

KAREN M. AYARBE, ESQ., NSB 3358
kayarbe@lkglawfirm.com
LEACH KERN GRUCHOW ANDERSON SONG
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511
Tel: (775) 324-5930
Attorneys for Respondent
Ruby Lakes Estates Homeowner's Association

I. NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Ruby Lake Estates Homeowner's Association
Ruby Lakes Estates Landowners Association

DATED this 8th day of October 2018.

KAREN M. AYARBE, ESQ.
Nevada Bar No. 3358
LEACH KERN GRUCHOW ANDERSON SONG
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511
Tel: (775) 324-5930
Attorneys for Respondent
Ruby Lakes Estates Homeowner's Association

Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

RULES

OTHER AUTHORITIES

II. ISSUE PRESENTED

1. Did the district court err in concluding that Respondent Ruby Lake Estate Homeowner's Association ("RLEHOA") is a valid NRS Chapter 116 Community where Ruby Lake Estates ("RLE") was formed in 1989 through the proper filing and recording of the Plat Map and the Covenants, Conditions and Restrictions ("CC&Rs") before the Nevada Legislature ("the Legislature") adopted the Uniform Common-Interest Ownership Act ("UCIOA") in 1991 in the form of Chapter 116 of the Nevada Revised Statutes ("Chapter 116") and before the Legislature made common-interest communities created by Plan and Declaration prior to 1992 subject to NRS Chapter 116 in 1999?

2. Did the district court err in concluding that RLEHOA is a valid homeowner's association which did not have to comply with NRS 116.3101(1) where it was both *factually and legally impossible in 1989* for RLEHOA to effect compliance with the literal terms of NRS 116.3101(1) when the statute did not even exist then?

3. Did the district court err in concluding that NRS 116.021, as amended in 2009, has no applicability to RLEHOA where it is undisputed that RLEHOA is a common-interest community validly formed in 1989?

III. STATEMENT OF THE CASE

The instant appeal originates from a declaratory relief action filed by Appellants Artemis Exploration Company ("Artemis") and Harold and Mary Wyatt ("the Wyatts") (collectively "Appellants") seeking a declaratory judgment that RLEHOA is not a common-interest community subject to NRS Chapter 116. Appellants filed the *Complaint* after (1) the Office of the Ombudsman for Common-Interest Communities, State of Nevada Department of Business and Industry Real Estate Division ("Ombudsman's Office") issued an opinion declining to declare that RLEHOA is invalid (""*Ombudsman Decision*") and (2) a *Decision and Award* by Arbitrator Leonard Gang ("*Arbitration Decision*") finding that RLEHOA is a common-interest community subject to Chapter 116 and that it was lawfully formed.

After the *Arbitration Decision,* Artemis filed the instant lawsuit for judicial review. While Appellants asserted several claims in the *Complaint* and RLEHOA asserted counterclaims, the only remaining claim on appeal is the cause of action for declaratory relief.

The parties submitted respective motions for summary judgment. The district court denied Appellants' motion and granted RLEHOA's motion. The instant appeal followed.

///

IV. SUMMARY OF ARGUMENTS

1. RLEHOA is a common-interest community formed in 1989 through the proper filing and recording of the Plat Map and the CC&Rs pursuant to the laws in existence at that time, and well before the Legislature adopted the UCIOA in 1991 (and went into effect in 1992) in the form of Chapter 116, and well before the Legislature made common-interest communities created by plat and declaration prior to 1992 subject to NRS Chapter 116 in 1999.

2. RLEHOA is a valid homeowner's association which did not have to comply with NRS 116.3101(1) where it was both *factually and legally impossible* for RLEHOA to effect compliance with the literal terms of NRS 116.3101(1) in 1989 when the statute did not even exist.

3. NRS 116.021, as amended in 2009, has no applicability to RLEHOA as a matter of law where it is undisputed that it is a common-interest community validly formed in 1989.

V. STATEMENT OF FACTS

A. Background Facts.

1. Artemis is a Nevada corporation, whose President, Secretary, Treasurer, and sole director was Elizabeth E. Essington. Volume 2 Appellants'

Appendix at 45 ("__AA__"). Mrs. Essington's husband was George "Mel" Essington, who had full authority to act on behalf of Artemis. 2AA86, 95-96.

2. In compliance with the laws in existence at the time, Stephen and Mavis Wright ("the Wrights") recorded the official Plat Map for RLE in Elko County September 15, 1989. 3AA87-91; 5AA152-154; Volume 1 Respondent's Appendix at 02-05 ("1RA__").

3. Included on the Plat Map are the residential lots within the community as well as the roadways, easements, building set back lines, and street monuments, among other things. 3AA87-91; 5AA152-154.

4. With respect to the roadways, Sheet 1 of 3 of the Plat Map unambiguously states:

> At a regularly held meeting of the Board of Commissioners of Elko County, State of Nevada, held on the 5th day of July, 1989, this Plat was approved as a Final Plat pursuant to NRS 278.328. ***The Board does hereby reject on behalf of the public all streets or roadways for maintenance purposes*** and does hereby accept all streets and easements therein offered for utility, draining and access purposes only as dedicated for public use.

3AA87-91; 5AA152-154 (emphasis added).

5. Elko County has never accepted the roads within RLE for maintenance. 2AA108-109; 3AA87-91; 5AA152-154; 1RA02-16, 26-35.

6. Notwithstanding this fact, Elko County requires the roadways and adjoining ditches and culverts to be maintained for health and safety

reasons (*e.g.*, first responder access and fire fuels mitigation). 2AA60-61, 65-66, 108-109, 154-155, 174, 176, 211, 222, 251; 1RA02-16, 26-35. Consistent with this requirement is the undisputed fact that sometime after 1999, RLE received a letter from the Elko County Fire Department informing the subdivision that the weeds on the roads and in the ditches were fire hazards that needed to be removed. 2AA109.

7. Pursuant to Elko County Code § 12-5-1, Elko County is authorized to use "any appropriate means" to maintain the roads, such as those in RLE. Elko County Code § 12-5-1; *see also* 1RA08, 14. The "appropriate means" employed by Elko County is the requirement that roads within subdivisions, such as RLE, be maintained either through a road maintenance agreement and government improvement district ("GID") or by a common-interest community association. 2AA60; 1RA27.

8. Maintenance of roadways by Elko County through a road maintenance agreement or GID, and having those costs collected through real property taxes is much more expensive to homeowners than maintaining the roads through a common-interest community association. 2AA60-61.

9. The RLE Fire Risk and Hazard Assessment Report prepared as part of the Fire Plan for Elko County shows RLE to be in the "High Hazard" category for fire risk. 1RA74-82. This report calls for fuel reduction treatment

on a community basis and calls for the formation "of a local community-based organization to provide leadership and be responsible for community wide fuels reduction and community fire safety." 1RA80.

10. On October 25, 1989, the Wrights recorded the CC&Rs for RLE in the Office of the Elko County Recorder in Book 703, Page 287. 3AA87-91.

11. Artemis acquired Lot G-6 of RLE June 21, 1994 and Lot H-2 of RLE March 9, 2010. 5AA165-166, 216-217; 1RA18-24.

12. On December 12, 2001, the Wyatts purchased Lot F-5 in RLE. 5AA167.

13. The lots purchased by Artemis and the Wyatts were created by the Plat Map and are subject to the CC&Rs. 3AA87-91; 5AA155-160.

14. Title to these three lots was taken subject to ". . . covenants, conditions, restrictions, exceptions and reservations, easements encumbrances, leases or licenses, rights, and rights of way of record, if any." 1AA104-105, 107-108; 2AA51-57.

15. Mr. and Mrs. Essingtons' ("the Essingtons") personal residence is located on Lot G-6 (the lot Artemis purchased). 2AA111.

16. The owners of the residential lots within RLE have the collective responsibility to maintain the roads and other common elements of the

community. 2AA59-63, 68-71, 108-109, 154-157; 1RA2-5, 26-35. Consistent with the Wrights' expressed "intent that a homeowners association would be created at some future point in time to assume the obligation of road and asset maintenance after all the lots were sold[,]" the Wrights formed Ruby Lakes Estates Landowners Association after the last lot sold in 1997 and thereafter functioned as a common-interest community adopting budgets, collecting assessments, and maintaining roadways, perimeter fences, culverts, cattle guards, entrance sign, and providing weed abatement. 1RA04-05.

17. The Wrights initially created the Architectural Review Committee ("ARC") pursuant to the CC&Rs. 2AA108. The ARC served as the executive body of an informal association of lot owners established by Stephen Wright and referred to as Ruby Lakes Estates Landowners Association. *Id.*

18. After the Wrights sold all the lots in RLE, ARC members acted as the governing body of the informal Ruby Lakes Estates Landowners Association. *Id.* ARC, through Ruby Lakes Estates Landowners Association, regularly assessed lot owners within RLE for assessments. *Id.* The assessments were used to maintain the roadways and perform weed abatement within the community and in the adjoining ditches. *Id.*

19. The Essingtons recognized this collective responsibility well before the formation of RLEHOA in 2006 as evidenced by letters Mr. Essington wrote to their fellow homeowners in August 2005 for Lee Perks' review emphasizing the need for an association and the obligation of the collective homeowners to maintain the roads within the subdivision. 2AA110, 121-122. The Essingtons also prepared draft articles of incorporation for the proposed association. 2AA110, 161.

20. The Essingtons' letters are consistent with the Wrights' sale of the lots in RLE whereby Stephen Wright informed all potential purchasers of the obligation of the homeowners acting through a homeowners' association to maintain the roadways, culverts, cattle guards, signs, and fencing and that assessments would need to be collected by the homeowners' association in order to fulfill this responsibility. 1RA02-05, 26-35; 2AA59-63, 108-109.

21. Mr. Perks filed the Articles of Association for RLEHOA January 16, 2006. 2AA168-172.

22. From 1994 to 2011, the Essingtons implicitly and expressly represented that they owned Lot G-6. Specifically, they wrote checks for RLEHOA assessments from their accounts. 2AA102-105. In August of 2006, Mrs. Essington sent a letter to Mr. Perks enclosing "our personal check in the amount of $150. This amount will cover our Ruby Lakes Homeowners dues

for 2006." 2AA206. Mr. Essington signed into member meetings as the owner of Lot G-6 and represented to members of RLEHOA that he had the capacity and authority to act on behalf of Artemis and/or Mrs. Essington. 2AA129, 133; 1RA42, 64. Mr. Essington sent numerous communications to ARC members, RLEHOA Board of Directors ("Board"), and members of RLEHOA representing he was an owner of Lot G-6. 2AA121-122, 200, 202-204, 206, 214, 220, 222-224, 226-229; 3AA13, 69-70.

23. Mr. Essington served as a member of the Board from 2007 until his resignation January 2011. 3AA69-70. Following his election to the Board, Mr. Essington signed a Declaration of Certification as a Common-Interest Community Board Member as required by NRS 116.31034(9). 2AA208. In this declaration, Mr. Essington declared that he had read and understood ". . . the governing documents of the Association and the provisions of Chapter 116 of Nevada Revised Statutes ("NRS") and the Nevada Administration Code ("NAC")." *Id.*

24. As a Board member, Mr. Essington seconded a motion to approve the Bylaws of RLEHOA. 2AA127. The Bylaws, as approved by Mr. Essington, state: "An assessment fee will be charged yearly for maintenance, roads, fire protection, and other expenditures as the board allows or required by Elko County." 2AA191.

25. In 2006, RLEHOA sent a survey questionnaire to homeowners regarding the maintenance of the roadways, ditches, culverts, and other real property improvements that RLEHOA is required to maintain. 3AA80-82. The Essingtons completed one as "Artemis Exploration-Mel/Beth Essington" and responded that they wanted RLE to maintain the roadways. *Id.* In this same survey, the Essingtons as "Artemis Exploration-Mel-Beth Essington" also agreed that it should take only the approval of a simple majority of landowners to change or raise fees. *Id.* Also in this same survey, the Essingtons as "Artemis Exploration-Mel/Beth Essington" indicated that they were ***not*** in favor of having Elko County provide road maintenance and that they were in favor of having RLEHOA provide road maintenance instead. *Id.*

26. In fact, road maintenance by RLEHOA, including weed abatement, has been an ongoing topic of communications and discussions between members and at members' meetings for many years since the developer turned this maintenance obligation over to the owners in 1997. 2AA59-63, 65-66, 68-71, 73-84, 107-119, 121-122, 126-128, 130-132, 135-139, 174, 176, 178-179, 210-212, 220, 222-224, 231-248, 250; 3AA1-11, 31; 1RA44-47, 49-52, 54-56, 58-60, 66-68, 70-72, 84-86, 91-93, 95-97, 99-101, 103-106, 108-110, 112-114, 116-118.

27. As a member, Mr. Essington voted to levy assessments against all members for roadway maintenance, weed abatement, and the repair of signs and culverts. 2AA137, 210-212, 220, 222-224, 250; 3AA1-11.

28. Both before and during his tenure on the Board, Mr. Essington wrote letters to members of RLEHOA confirming the existence and necessity of RLEHOA, the necessity of enforcing the CC&Rs, the applicability of Chapter 116 to the RLEHOA common-interest community and to RLE, and the ability and responsibility of RLEHOA to levy and collect assessments for maintenance of the common elements. 2AA121-122, 161, 200, 202-204, 206, 214, 216-218, 220, 222-224, 226-229.

29. In addition to the letters to homeowners, Mr. Essington wrote a letter addressed to the President of the Board January 14, 2007 emphasizing RLEHOA's obligation to comply with Chapter 116. 2AA202-204.

30. After RLEHOA's formation, Mr. Essington wrote to homeowners on October 13, 2008 emphasizing the fact that RLEHOA is responsible for maintaining common elements, including the roadways. 2AA222-224. Mr. Essington further wrote that because RLEHOA's budget did not have sufficient funds to repair the roads, it was necessary for RLE to levy a temporary assessment. *Id.* Mrs. Essington thereafter paid the increased

assessments as levied by the Board and as urged by her husband. 2AA102-105.

31. RLEHOA holds title to real property deeded to it by the developer. 3AA119-122. The members of RLEHOA, including Mr. Essington while serving on the Board, voted to accept title to this real property, pay the documentary transfer tax, and procure liability insurance covering this property in the name of RLEHOA. 2AA135-152. Mrs. Essington also admitted RLEHOA holds title to common area real property. 2AA93.

32. In July 2009, the Board, of which Mr. Essington was a member, caused a Reserve Study to be prepared by an independent and licensed community association consultant as required by NRS 116.31153. 2AA231-248. The Reserve Study identified the common elements of RLEHOA as cattle guards, dirt road maintenance, fencing, gates, entrance signs, and street signs. 2AA238, 240, 242, 245-248. It was Mr. Essington who directed the consultant to RLEHOA's common areas. 2AA114-115. Mr. Essington met with and physically traveled to all common areas with the consultant. *Id.*

33. At the August 8, 2009 RLEHOA meeting with the Board and homeowners where the Reserve Study was discussed in detail, Mr. Essington voted to approve it. *Id.*; 2AA250; 3AA1-11. Mr. Essington also voted to levy

assessments in accordance with the Reserve Study and the 2010 budget, which he also approved. 2AA250; 3AA1-11.

34. Since RLEHOA's formation in 2006, budgets were adopted by members of RLEHOA and assessments have been levied for road maintenance, fire protection, and maintenance of RLEHOA's real property, including the gates, sign, culverts, cattle guards, and perimeter fencing. 2AA68-84, 135-152, 210-212, 220, 222-224, 250; 3AA1-11. Mr. Essington approved these budgets and assessments to pay for maintenance of these community improvements at each annual meeting he attended from 2006 through and including 2010. 2AA126-133, 135-152, 210-212, 250; 3AA1-11; 1RA44-97. The Essingtons paid these assessments without objection. 2AA102-105.

35. In 2009, a dispute arose between Mrs. Essington and ARC regarding the construction of a large building to house equipment. 3AA15. On October 26, 2009, Mrs. Essington wrote a letter to the Board expressing her contempt for this structure. *Id.* The Board and ARC took the position that the structure was permitted. 3AA17-18.

36. The Essingtons disagreed with the Board and ARC, and thereafter commenced their campaign to have RLEHOA declared invalid

because it no longer suited their needs. 1AA1-26. Although the Essingtons have since passed, their campaign continues through Appellants.

37. Invoices generated in the ordinary course for RLEHOA were sent to Artemis in care of the Essingtons, but Artemis ceased paying its assessments, all of which Mr. Essington approved as a Board member. 3AA33-67. RLEHOA was forced to retain a collection agency to try and collect Artemis' delinquent assessments. *Id.*

B. Procedural Background.

1. Artemis initially filed an Intervention Affidavit with the Ombudsman's Office December 18, 2009. 3AA84. On July 1, 2010, the Ombudsman's Office completed its case file review and issued its opinion: ". . . [I]t is our view that this Association is required to comply with the laws pertaining to homeowners associations, specifically, NRS 116 and related laws and regulations." 3AA84-85.

2. Artemis then commenced with arbitration proceedings pursuant to Chapter 38 of the Nevada Revised Statutes May 6, 2011. 3AA75-78. In this proceeding, the parties conducted discovery, including interrogatories, requests for admissions, and depositions, and submitted briefs and oral arguments before the arbitrator. *Id.*

3. The Arbitrator concluded that RLEHOA "is a Common-Interest Community and is subject to NRS Chapter 116. It is lawfully formed and is a validly existing non-profit common-interest association." 3AA88.

4. The Arbitrator further stated the following and awarded fees and costs in favor of RLEHOA:

> ***It is difficult to understand why, faced with the overwhelming evidence that RLHOA is a valid HOA, any one would continue to maintain that it is not. The HOA owns property within the subdivision, it maintains roads, signs, gates, culverts and fencing.*** It is incorporated as required by law. Indeed, Mr. Essington was at one time on the board of directors of RLHOA and was a moving force in its formation and incorporation. He signed and filed a "Declaration of Certification Common-Interest Community Board Member" with Real Estate Division certifying that he read and understood the governing documents of the Association and the provisions of Chapter 116 of Nevada Revised Statutes and Administrative Code. His wife, Elizabeth Essington, apparently owns all the stock in Artemis.
>
> . . . I have carefully considered all of the many allegations and arguments of the Claimant and find them unpersuasive. Indeed, I find the interpretation of counsel that the Real Estate Ombudsman took no action when it opined that RLEHOA had to comply with the laws of the Nevada pertaining to homeowners association illogical. The Ombudsman clearly opined that the HOA was subject to the laws of Nevada that applied to HOA's . . . The Ombudsman took no action on the complaint of Artemis because the RLHOA was validly formed and obliged to comply with the law relating to HOA's . . .

3AA76-77 (emphasis added).

5. Undeterred by both the *Ombudsman Decision* and the *Arbitration Decision*, Artemis filed the *Complaint*. 1AA1-26.

6. The district court ordered the joinder of all property owners within RLEHOA. 4AA100-107. All property owners were joined and defaulted except for Artemis and the Wyatts. 4AA189-196. While Appellants asserted a number of claims in the *Complaint* and the *Second Amended Complaint,* and RLEHOA asserted counterclaims, the only remaining claim at issue for this appeal is the cause of action for declaratory relief. The Wyatts stipulated and agreed to be bound by the district court's summary judgment in favor of RLEHOA. 5AA123-131.

7. The parties submitted respective motions for summary judgment. 1AA58-226; 2AA1-250; 3AA1-164, 171-249; 4AA1-49; 5AA104-115, 155-160, 173-174; 1RA1-121. The district court denied Appellants' motion and granted RLEHOA's motion. 4AA50-71. The instant appeal followed.

VI. ARGUMENT

A. Standard of Review.

This Court reviews a district court's grant of summary judgment *de novo*, without deference to the findings of the lower court." *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005). Accordingly, this Court affirms a district court order granting summary judgment if the district court reached the correct result, even if for the wrong reason. *LN Mgmt. LLC Series 5105 Portraits Place v. Green Tree Loan,* __ Nev. __, 399 P.3d 359, 361 (2017).

Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Wood,* 121 Nev. at 730, 121 P.3d at 1030. In the present case, the record as a whole could not lead a rational trier of fact to find for Appellants, and this Court should affirm the district court's decision granting summary judgment in favor of RLEHOA.

B. A Historical Perspective of Chapter 116.

A historical perspective of Chapter 116 is necessary and pertinent to the instant appeal. In 1991 (two years after the Wrights recorded the official Plat Map and the CC&Rs for RLE in 1989), the Legislature adopted the UCIOA as Chapter 116 (which went into effect in 1992). 1991 Nev. Stats., ch. 245 at 535.

One legislature aptly summed the catalyst for doing so:

> The state of Nevada has, for probably the last ten to fifteen years begun to see the planned unit development, large subdivision, condominium projects. We see very few cooperatives. . . The advent of that kind of land planning activity has resulted in the creation of a number of associations and the law, as it currently exists in Nevada under NRS 117 which is our condominium act, or 278(a) which is our planned unit development act, are permissive in the allowance of creation of associations to manage the property . . . those associations controls or own. ***It is that problem, the association issue, the ability to handle government at this very base grass-roots level, . . . a result of the abdication by local government that said, "well we don't want to maintain those streets, we don't want to maintain that park, we don't***

> ***want to be involved with those recreational facilities, those are yours, your consumer demands you have those amenities that you own in common," that has given rise to the need for associations***, but it has also complicated how those associations must act by the fact we have no law on that form.

Nevada Legislature Sixty-sixth Session 1991 Minutes of the Nevada State Legislature Assembly Committee on Judiciary February 20, 1991 at 7 (emphasis added); *see also Nevada Legislature Sixty-sixth Session 1991 Minutes of the Nevada State Legislature Assembly Committee on Judiciary May 21, 1991* at 1 (". . . the federal government had passed a lot of responsibility in this area to the states; the states passed it on to the local governments, and the local governments had passed it on to common interest projects. The bill would regulate those common interest groups.").

These same concerns were reiterated to the Legislature in 1999:

> We need to look at the factors that have led to the creation of common interest communities in the United States and particularly in Nevada. Just as condominiums were created to not only meet a market demand (i.e. persons who no longer wanted the sole responsibility for maintenance, yard care, etc.) ***planned communities were also created because of the market demand and because our municipalities and counties saw them as a means of providing amenities*** **(parks, pools, community buildings)** ***without placing a burden on the tax structure of these government entities as the owners of these common amenities have taken on the burden of maintaining them with private assessments (while still paying their taxes for services they do not necessarily benefit from). Government has encouraged this development and the buyers who would otherwise not be able to afford homes with these amenities have***

> ***been able to enjoy them in their communities by sharing the cost with their neighbors. . .***

Nevada Legislature Seventieth Session 1999 Minutes of the Senate Committee on Commerce and Labor March 19, 1999 at Exhibit F (emphasis added).

In reemphasizing the necessity of Chapter 116, the following remarks by Senator Schneider were noted during an assembly committee meeting in 1999:

> There had been proliferation of homeowner associations over the past 30 years. Many of those associations had been mismanaged with loosely written codes, covenants, and restrictions (CC and R). He discussed a mismanaged association in his Senate district of Las Vegas, Bradford Place Condos. The streets were dirt because there were no money to maintain the streets. The roofs were given back to the owners because there was no money to repair the roofs of the association. The reason for including the mismanaged associations was to bring up the property values at the request of the members. . .

Nevada Legislature Seventieth Session 1999 Minutes of the Nevada State Legislature Assembly Committee on Judiciary May 14, 1999 at 7.

Significantly, the Essingtons recognized these very same concerns as expressed before the 1991 and 1999 Legislature. In an August 22, 2005 letter, Mr. Essington wrote to fellow lot owners advocating for an association:

> I am writing to each of you concerning the ***need to revitalize Ruby Lakes Estate property owners association***. The organizer of the subdivision and property owners association, Mr. Steve Wright, has stepped aside and turned his duties and responsibilities over to the property owners as was described to each of us in the sales literature. . . ***Many of the other the owners***

> *I have spoken with and I believe it is important for the property owners to reorganize and vitalize the association.*
>
> *Each of us purchased lots in the subdivision with the knowledge, understanding, and acceptance of the [CC&Rs] that attended our property deeds. The CCR's [sic] were designed to work for the good of the owners, assure the aesthetic qualities of the subdivision, protect the value of our investments, and the beauty of Ruby Valley. The association also has the capability of providing services for the subdivision that might otherwise elude the individual owners. Those services include: assisting in acquiring telephone service, periodic road maintenance, coordinating with County officials on planning issues . . . and getting regular snow removal on CCC road, . . . The effectiveness of the CCR's [sic] and the association is the responsibility of the owners as expressed through the association;* although any individual owner may pursue the enforcement of the CCRs.
>
> Mr. Leroy Perks and others recognized and accepted the responsibility past [sic] on by Mr. Wright several years ago when they organized the association and worked towards achieving progress toward its stated goals. . . Several years have passed now and due largely to a period of inactivity at the subdivision that organizational attempt has become dysfunctional. *I have discussed the situation with Mr. Perks as well as some of the other owners and believe he and nearly all of the other property owners agree we need to reorganize the association and move ahead with its intent. . .*

2AA121-122 (emphasis added).

In 1999 the Legislature amended Chapter 116. One of the amendments significant to this appeal concerns NRS 116.1201 and NRS 116.1206.

NRS 116.1201(1) provides that with certain limited exceptions, "this chapter applies to all common-interest communities created within this state."

NRS 116.1201 (1). NRS 116.1201(2) delineates certain limited exceptions to subsection 1, none of which pertain to RLEHOA. NRS 116.1201(2).

NRS 116.2101 (3)(b) further provides that because the Plat Map and CC&Rs were recorded ***prior*** to 1992, RLEHOA is ***not*** required to comply with the provisions of NRS 116.2101 to NRS 116.2122. NRS 116.2101(3)(b). The Legislature also amended NRS 116.1206 revising all existing common interest communities' governing documents, such as CC&Rs or bylaws, to comply with Chapter 116. NRS 116.1206. In summary, common-interest communities created ***before*** January 1, 1992, such as RLE, are provided certain exemptions which will not invalidate the original governing documents.

After RLEHOA's formation, Mr. Essington wrote to members of RLEHOA on October 13, 2008 emphasizing the facts that RLEHOA is a valid common-interest community and that as a valid association RLEHOA is required to comply with Chapter 116:

> ***The Ruby Lakes Estates is a common-interest ownership community as defined by State statute. The Community has been established by proper recording of the CCR's . . . with the county and the Homeowners Association (HOA) through filing with the Secretary of State.*** Within the State of Nevada, ***the community and the HOA are governed primarily by Chapter 116 of the Nevada Revised Statutes. . .***
>
> Under section 3107 of the statutes, "the Association is responsible for maintenance, repair and replacement of the

> common elements, and each unit's owner is responsible for maintenance, repair and replacement of his unit". ***The common elements in the Ruby Lakes Estates include two small land parcels and several access roads. . .***
>
> ***Under the statutes both the HOA and each individual unit owner share responsibility and liability for the common elements. It is the expressed responsibility of the HOA executive to insure sufficient maintenance of the common elements in this instance the community roads.*** Our roads are open to the public and carry responsibility and liability. Accepted surface road maintenance standards include shoulder and drainage features as well as the road surface. Because community roads have not received any maintenance for 8 years the shoulders have become weed and brush infested, and some sections lack adequate drainage. Obviously, it is past time to reestablish minimal road maintenance requirements. The HOA's budget does not currently permit meeting a contractor's fee to perform such maintenance. Hence, a temporary annual fee increase is necessary to raise those funds.

2AA222-224 (emphasis added).

In 2009, the Legislature amended NRS 116.021(1). As more fully discussed below, the 2009 amendment does not, and cannot as a matter of law affect a common-interest community formed ***prior*** to 1992. In other words, NRS 116.021, originally enacted and effective in 1992, cannot be retroactively applied to a common interest community formed prior to the enactment of the statute. Accordingly, Appellants' reliance upon the 2009 amendment is entirely misplaced, and the amendment lends no support to their untenable position.

C. The District Court did not err in concluding that RLEHOA is a Common-Interest Community.

Appellants' first contention is that RLEHOA is not a common-interest community pursuant to NRS 116.021 because neither the CC&Rs nor the Plat Map describes any "common elements, other units or other real estate" for which unit owners are obligated pay. This contention is factually and legally untenable.

1. In compliance with the applicable law at the time, the Wrights formed RLE in 1989.

It is undisputed that the Wrights formed RLE in 1989 through the proper filing and recording of the Plat Map and the CC&Rs. 3AA87-92; 5AA152-160; 1RA2-6. When the Wrights formed RLE in 1989, they complied with the law that was in existence at the time. 1RA2-6; 2AA59-63; 3AA165-170.

There is no evidence in the record, and Appellants produced none before the district court, showing that the formation of RLE in 1989 failed to comply with the applicable law in existence at the time. Instead, the gravamen of Appellants' argument is that RLEHOA failed to comply with statutes that were not in existence at the time and therefore the district court erred in granting summary judgment in RLEHOA's favor. Appellants' position that a

common-interest community formed prior to 1992 and in compliance with the laws in existence at the time can no longer be valid because the Legislature declared that Chapter 116 applies to these pre-1992 communities is contrary to NRS 116.1201(3)(b) and, as discussed more fully below is factually and legally untenable.

Conspicuously absent before the district court and conspicuously absent in their *Opening Brief* is a discussion as to how the Wrights could have factually and legally complied with statutes that were not in effect in 1989. That is because it was both *factually and legally impossible* for the Wrights to comply with statutes that were not in existence at the time of RLE's formation as a common-interest community; the Legislature recognized this when, in 1999, it made Chapter 116 applicable to pre-1992 communities, but did not require those communities to comply with all of Chapter 116's requirements.

2. Common-interest communities formed prior to 1992 are not required to comply with NRS 116.2101 to NRS 116.2122.

In 1989 when the Wrights formed RLE, the Legislature had not adopted the UCIOA in the form of Chapter 116 and did not do so until 1991. Although it adopted the UCIOA in 1991, effective in 1992, it was not until 1999 when the Legislature made common-interest communities created by plat and declaration prior to 1992 subject to Chapter 116.

When the Legislature did so in 1999, it also expressly made clear that pre-1992 common-interest communities are ***not*** required to comply with the provisions of NRS 116.2101 to NRS 116.2122: "The provisions of [NRS Chapter 116] do not . . . [r]equire a common-interest community created before January 1, 1992, to comply with the provisions of NRS 116.2101 to NRS 116.2122, inclusive . . ." NRS 116.1201(3)(b). When "the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Attorney General v. Nevada Tax Comm'n,* 124, 232, 240, 181 P.3d 675, 680 (2008) (quotations omitted). The language of NRS 116.1201(3)(b) is plain and unambiguous, and its meaning clear and unmistakable where it expressly states that pre-1992 common-interest communities do ***not*** have to comply with NRS 116.2101 to NRS 116.2122.

Here, because the Plat Map and CC&Rs were recorded prior to 1992, RLEHOA is ***not*** required to comply with the provisions of NRS 116.2101 to NRS 116.2122. NRS 116.2101(3)(b). NRS 116.2105, which the Legislature unambiguously declared has no application to pre-1992 common-interest communities and therefore no application to RLEHOA, specifies the contents of the covenants, conditions and restrictions. NRS 116.2105.

Where RLEHOA is not required as a matter of law to comply with the mandates set forth in NRS 116.2105, there is no requirement that the CC&Rs contain a description of the real estate included in the common-interest community of RLEHOA (this is particularly so where NRS 116.2105 had not even been enacted in 1989). NRS 116.2105(1)(c). As a pre-1992 common-interest community, there is also no requirement that the CC&Rs contain a description of "any real estate that is or must become common elements." NRS 116.2105(1)(f).

Appellants conveniently ignore the provisions of NRS 116.2101(3)(b) and continue to insist without any basis in fact and law that RLEHOA is not a common-interest community because the CC&Rs and Plat Map do not comply with Chapter 116. Contrary to Appellants' erroneous contentions, the CC&Rs and the Plat Map must be reviewed consistent with the express language of NRS 116.2101(3)(b) exempting pre-1992 common-interest communities from having to comply with NRS 116.2101 to NRS 116.2122.

Appellants' contention that RLEHOA is not a common-interest community because the common elements are not described in the CC&Rs as purportedly required by NRS 116.2105 fails as a matter of law. The Legislature made it patently pellucid that pre-1992 communities do ***not*** have to comply with NRS 116.2101 to NRS 116.2122, and NRS 116.2105 is no

exception. NRS 116.1201(3). While the Legislature recognized that Chapter 116 is a consumer protection statute and therefore wanted all common-interest communities in Nevada to be subject to these protections, the Legislature concomitantly recognized that it was not feasible for common-interest communities created prior to 1992 to change all of their governing documents to meet the newly enacted statutory requirements and therefore adopted certain exceptions and exemptions for communities formed prior to 1992. NRS 116.1201(3)(b), NRS 116.1206(1).

3. The CC&Rs include "common elements, other units or other real estate".

Even assuming for argument sake that RLEHOA had to comply with NRS 116.201 to NRS 116.2122 (it, however, did not because it is undisputedly a pre-1992 common-interest community), the CC&Rs include "common elements, other units or other real estate." NRS 116.2101 provides that a common-interest community is created through the recording of the covenants, conditions and restrictions in the county in which any portion of the common-interest community is located. NRS 116.2101.

As recorded with Elko County, Article I of the CC&Rs provides:

> ***The real property affected hereby is subjected to the imposition of the covenants, conditions, restrictions*** and reservations specified herein to provide for the development ***and maintenance of an aesthetically pleasing and harmonious***

> ***community of residential dwellings for the purposes of preserving a high quality of use and appearance and maintaining the value of each and every lot and parcel of said property.***

5AA155 (emphasis added).

NRS 116.2109 provides that the plat map is deemed part of the covenants, conditions and restrictions. NRS 116.2109. The Plat Map clearly depicts the common elements, including the roads that Appellants claim should not be maintained by RLEHOA. 3AA87-91; 5AA152-154.

More specifically, the Plat Map for RLE establishes 51 residential lots, one commercial lot, roadways, easements, and set back requirements, as well as the lot which the Wrights deeded to RLEHOA as common area in 2007. 3AA87-91, 119-122; 5AA152-154. The roads in RLE, the same roads which Elko County rejected for maintenance purposes, are all clearly identified on the Plat Map as well as other common elements of the common-interest community RLEHOA is required to maintain. 3AA87; 5AA152.

Specifically, Sheets 2 and 3 of the Plat Map identify such common elements as the roadways, entrance sign, culverts, perimeter fencing, cattle guards, and a small lot which RLEHOA is required to maintain. 3AA87-91; 5AA152-154. A subsequent Reserve Study prepared by an independent Reserve Specialist with whom Mr. Essington met and physically travelled with to all the common areas of RLEHOA identified the common elements as

cattle guards, dirt road maintenance, fencing, gates, entrance signs, and street signs. 2AA114-115, 231-248.

Of further significance is Sheet 1 of 3 of the Plat Map:

> At a regularly held meeting of the Board of Commissioners of Elko County, State of Nevada, held on the 5th day of July, 1989, this Plat was approved as a Final Plat pursuant to NRS 278,328. ***The Board does hereby reject on behalf of the public all streets or roadways for maintenance purposes*** and does hereby accept all streets and easements therein offered for utility, draining and access purposes only as dedicated for public use.

3AA87-91; 5AA152-154 (emphasis added).

The Plat Map, the CC&Rs, and the uncontroverted Affidavits of Stephen Wright, Lee Perks, and Robert Wines clearly establish that although the public has access to the roadways of RLEHOA, these same roadways have never been accepted by Elko County for maintenance. 2AA107-119; 3AA87-91, 165-170; 5AA152-154; 1RA02-05.

> Elko County required that I record the CC&Rs for the RLE subdivision but would not accept the roadways for maintenance, although it did accept the roadways for public use. Maintenance of the roadways, culverts, and cattle guards within the roadways, as well as weed abatement on the surface and along the side of the roads, was required by Elko County for public access as well as fire and safety reasons.

///

///

///

1RA03. Mr. Wright's statement is consistent with Sheet 1 of the Plat Map: "***The Board does hereby reject on behalf of the public all streets or roadways for maintenance purposes*** . . ." 3AA87-91; 5AA152-154 (emphasis added).[1]

The fact that Elko County accepted the roadways for public use does not automatically mean that it also accepted the roadways for maintenance. It appears that Appellants are assuming and contrary to the express language of the Board of Commissioners of Elko County that its acceptance of the roadways for public use somehow means that RLEHOA must automatically abdicate all maintenance responsibilities to no one. Appellants' position also conflicts with the undisputed fact that the owners recognized that the roads would have to be brought up to Elko County Code before Elko County would accept them for maintenance and further recognized that this would cost them hundreds if not millions of dollars. 2AA211; *see also* 3AA81 (the Essingtons recognized and wanted RLEHOA to maintain the community roads and

---

[1] Although as a pre-1992 common-interest community, the CC&Rs are not required to describe either the real property which is subject to the CC&Rs or the common elements of the community, the real property which is subject to the CC&Rs is undeniably described on the Plat Map, which is part of the CC&Rs. NRS 116.1201(3)(b), 116.2101, 116.2109. Appellants' deeds also describe Lots G-6, F-5, and H-2 with reference to the Plat Map. 5AA165-167. The deeds, therefore, unequivocally reference the fact that Appellants took title to the recorded CC&Rs.

indicated that they were willing to pay $150-$200 per year for this maintenance and for other community expenses).

Elko County stopped accepting roads for maintenance in approximately 1986. 2AA60; 3AA166. RLE's formation as a common-interest community in 1989 and Elko County's rejection of RLE's roads for maintenance is consistent with this unrefuted fact. Appellants presented no evidence to the contrary.

Instead, Appellants state that "Elko County's literature is directly at odds with the District Court's finding because many rural subdivisions in Elko County and throughout the state have unmaintained roads, such as Osino, Ryndon, Last Chance Ranchos, and others." *Opening Brief* at 15 n.3. Appellants, however, provide no citation to the record to support this factual assertion. NRAP 28(e)(1) requires that "every assertion in briefs regarding matters in the record shall be supported by a reference to the page and volume number, if any, of the appendix where the matter relied upon is to be found." NRAP 28(e)(1).

Appellants then provide the following proposition: "In those subdivisions, efforts have been made to form voluntary associations, and the associations are strictly voluntary because they are not common-interest communities and they lack the authority to compel the payment of dues, even

if there is a cost sharing agreement in effect" and cite to NRS 116.021(2), 1AA169 and 5AA170-172 as purported support for this assertion. *Opening Brief* at 15 n.3. The citations Appellants provide are irrelevant, misleading and violate NRAP 28(e)(1).

First, NRS 116.021(2) does not support this factual assertion. Second, 1AA169 is a citation to the legislative history of Chapter 116. 1AA169. Nothing in NRS 116.021(2) and 1AA169 support Appellants' proposition that Osino, Ryndon, Last Chance Ranchos, and other subdivisions in Elko County have formed voluntary associations because they are not common-interest communities. NRS 116.021(2) and 1AA169.

Lastly, 5AA169-172 is the April 27, 2006 Legislative Counsel Bureau Opinion Letter to Senator Randolph J. Townsend ("LCB Opinion Letter"), and nowhere in this letter does it support the proposition that various subdivisions in Elko County, and specifically those identified by Appellants, have formed voluntary associations because they are not common-interest communities. 5AA169-172. In any event, this opinion letter lends Appellants no support where it pertains specifically to Hidden Valley Homeowners Association. *Id.*

Contrary to RLEHOA, Hidden Valley Homeowners Association "does not own or maintain any buildings or common elements." 5AA170. It is

undisputed that RLEHOA owns buildings and common elements. 2AA231-248; 3AA119-122. This opinion letter, therefore, has no applicability to the instant case.

Appellants also rely upon a document titled "Rural Living in Elko County *Things You Need to Know About Rural Living*". *Opening Brief* at 15-16 n.3 (citing 5AA218). This document does not comply with NRCP 56 as it would be inadmissible at trial. *See, e.g., Collins v. Union Fed. Sav. & Loan Ass'n,* 99 Nev. 284, 662 P.2d 610 (1983). The authenticity of this document is questionable where there is nothing to indicate that Elko County actually published this document. 5AA218. Even assuming that this document constitutes competent evidence, it does not support Appellants' position but rather RLEHOA's position.

According to this document and consistent with Elko County's practice of not accepting roads for maintenance in approximately 1986, it states that "[t]here are many roads that are not maintained by the county . . ." 5AA218; 2AA60; 3AA160. As for the statement that the "even some public roads . . . are not maintained by anyone[,]" it is unclear how this statement lends Appellants support. Is this Court required to assume that "some public roads" specifically include RLEHOA's roads? It is highly unlikely that Elko County

does not require roads leading to homes to be maintained in some manner as this would create a public safety issue.

In any event, nothing in this statement negates the undisputed fact that originally the Wrights, RLE, and subsequently RLEHOA are required to maintain RLEHOA's roads. 1RA02-16, 26-35; 2AA59-63, 107-119; 3AA165-170. Significantly, even the Essingtons recognized this obligation as evidenced by their October 13, 2008 letter. 2AA222-224.

Appellants' position that Elko County does not require roads in subdivisions, such as RLE, to be maintained and their reliance upon incompetent evidence is contrary to the unrefuted evidence presented. Pursuant to Elko County Code § 12-5-1, Elko County is authorized to use "any appropriate means" to maintain the roads, such as those in RLE. Elko County Code § 12-5-1; *see also* 1RA08, 14. The "appropriate means" employed by Elko County is the requirement that roads within subdivisions, such as RLE, be maintained either through a road maintenance agreement and GID or by a common-interest community association. 2AA60; 1RA27. Maintenance of roadways by Elko County through a road maintenance agreement or GID, and having those costs collected through real property taxes is much more expensive to homeowners than maintaining the roads through a common-interest community association. 2AA60-61. This evidence is uncontroverted.

Moreover, lenders also require the roadways, culverts, and cattle guards within the roadways, as well as weed abatement on the surface and along the side of the roads to be maintained. 1RA03, 26-35. In fact, lenders are unwilling to loan money for lot purchases or home construction unless there is some obligation to maintain the roads within the subdivision. 1RA03, 26-35. This evidence is also refuted.

Indeed, the fact that Elko County stopped accepting roads for maintenance is consistent with the concerns expressed in the Legislature in 1991 ("It is that problem, the association issue, the ability to handle government at this very base grass-roots level, . . . a result of the abdication by local government that said, 'well we don't want to maintain those streets . . .'") and in 1999 ("planned communities were also created because of the market demand and because our municipalities and counties saw them as a means of providing amenities . . . without placing a burden on the tax structure of these government entities as the owners of these common amenities have taken on the burden of maintaining them with private assessments (while still paying their taxes for services they do not necessarily benefit from). Government has encouraged this development ...). *Nevada Legislature Sixty-sixth Session 1991 Minutes of the Nevada State Legislature Assembly Committee on Judiciary February 20, 1991* at 7; *Nevada Legislature*

Seventieth Session 1999 Minutes of the Senate Committee on Commerce and Labor March 19, 1999 at Exhibit F.

A community cannot be of "high quality of use and appearance" if its streets are not maintained. 5AA155. Furthermore, failure to maintain the streets, culverts, cattle guards, fencing, and other common elements directly contradicts the purpose of the CC&Rs mandating "maintenance" in order to assure "an aesthetically pleasing and harmonious community of residential dwellings for the purpose of preserving high quality of use and appearance and maintaining value of each and every lot and parcel of said property." *Id.*

4. The cases Appellants rely upon are inapplicable.

The cases Appellants rely upon are factually distinguishable and involve entirely different issues. They are, therefore, inapplicable and have no persuasive value to the instant case.

In *Diaz v. Ferne,* the court addressed the issue of whether a manufactured home was a mobile home for purposes of the conditions, covenants, and restrictions prohibiting mobile homes on lots designated for single-family homes. 120 Nev. 70, 84 P.3d 664 (2004). That is not the issue currently before this Court.

Caughlin Ranch Homeowners Ass'n v. Caughlin Club is also inapplicable. 109 Nev. 264, 849 P.2d 310 (1993). The issue in that case was

whether the plaintiff's deed could be made subject to later amendments to restrictive covenants made by the association. *Id.*, 849 P.2d at 310. That is not the issue currently before this Court. RLEHOA is a common-interest community governed by the provisions of Chapter 116 *because of legislative mandate* and *not* because of any attempt by RLEHOA to add, change, or enforce a covenant in the CC&Rs.

Appellants failed to address the obvious below and in their *Opening Brief*: Who is responsible for maintaining RLEHOA's roads for public health and safety reasons? Where the RLE Fire Risk and Hazard Assessment Report identifies RLEHOA as a "High Hazard" category for fire risk, who bears the responsibility of ensuring that the roads are passable for fire crews and free of excess fire fuels? 1RA74-82. If the roads are not maintained and cleared of weeds, the fire danger is increased and access to homes is compromised. If the roads are not maintained, first responders will have difficulty responding to emergencies and thereby jeopardizing the safety and health of those living in RLE.

Due to the obvious public health and safe reasons, Elko County requires a road maintenance agreement be executed and a general improvement district be formed to ensure that roads in subdivisions be maintained. 1RA02-16, 26-35; 2AA59-63, 107-119; 3AA165-170; *see also* Elko County Code § 12-5-1.

The obligation to maintain RLEHOA's roads for first responder access and fire protection, therefore, can only be fulfilled by either RLEHOA or through a publicly formed improvement district. 1RA02-16, 26-35; 2AA59-63; 3AA165-170; *see also* Elko County Code § 12-5-1.

D. The District Court did not err in concluding that RLEHOA did not have to comply with NRS 116.3101(1) where it was both factually and legally impossible for RLEHOA to do so in 1989 when the statute did not exist then.[2]

---

[2] Appellants further contend that a resident's participation in an association or the payment of assessments does not make a homeowner's association valid or precludes the owner from challenging the association's validity, relying upon *Caughlin Ranch Homeowners Ass'n v Caughlin Club,* 109 Nev. at 267, 849 P.2d 317, and *Armstrong v. Ledges Homeowners Assoc., Inc.,* 633 S.E.2d 78 (N.C. 2006). In reviewing the specific page cited by Appellants, there is nothing in *Caughlin Club* that supports this proposition. As stated earlier, *Caughlin Club* has no applicability to the instant case where the issue in that case was whether the plaintiff's deed could be made subject to later amendments to restrictive covenants. 109 Nev. at 264, 849 P.2d at 310. Appellants cannot ignore the undisputed fact that RLEHOA is a common-interest community governed by the provisions of Chapter 116 *because of legislative mandate* and *not* because of any attempt by RLE to add, change, or enforce a covenant in the CC&Rs.

Similarly, Appellants' reliance upon *Armstrong* is also misplaced. 633 S.E.2d at 78. First, while North Carolina has adopted the Uniform Condominium Act, it has not adopted the UCIOA. *Id.* at 81 (noting that homeowner's association in North Carolina are subject to the provisions of North Carolina's Planned Community Act, codified in Chapter 47F of the North Carolina General Statutes); *see also* N.C. Gen. Stat. § 47C-1-101, *et seq.* (North Carolina's Uniform Condominium Act). Second, the subdivision in *Armstrong* was "not subject to North Carolina's Planned Community Act."

Appellant' second argument on appeal is the most illogical and nonsensical one. Appellants contend that RLEHOA cannot be a valid homeowners' association as defined in NRS 116.3101(1) because RLEHOA was not formed prior to the conveyance of the first unit in RLE in 1989 and therefore, the district court erred in refusing to apply NRS 116.3101(1). *Opening Brief* at 17-23.

NRS 116.3101(1) provides that an association be formed "no later than the date the first unit in the common-interest community is conveyed." NRS 116.3101(1). According to Appellants, because RLEHOA was formed 17 years after the first lot was conveyed in 1989, RLEHOA violated this statute. This argument can readily be dismissed.

It is undisputed that the Wrights conveyed the first lot in RLE in 1989. It is undisputed that the Legislature did not enact Chapter 116 until 1991 to become effective in 1992.

How could RLE and the Wrights comply with NRS 116.3101(1) in 1989 when the Legislature had yet to enact the statute? It was both *factually*

Id. Lastly, the issue in *Armstrong* was to what extent a declaration could be amended. *Id.* Once again, RLEHOA is a common-interest community subject to the provisions of Chapter 116 *because of legislative mandate* and *not* because of any attempt by RLEHOA to amend the CC&Rs. In any event, Appellants' conduct, in particular the Essingtons' conduct, clearly shows the speciousness of the instant lawsuit.

and legally impossible for RLEHOA to effect compliance with the literal terms of NRS 116.3101(1) in 1989 when the statute did not even exist then. When the Legislature made Chapter 116 applicable to all pre-1992 common-interest communities in 1999, it remained *factually and legally impossible* for RLEHOA to effect compliance with NRS 116.3101(1) where the first lot was conveyed in 1989 - well before the Legislature enacted Chapter 116 and made it applicable to pre-1992 common-interest communities.

If this Court were to accept Appellants' argument, then all common-interest communities formed before 1992 could *never* become valid homeowners' associations subject to the protections and requirements of Chapter 116. In other words, Appellants' position is that a requirement that was not even in existence in 1989 would forever be a bar to the filing of the articles of incorporation of a common interest homeowners association such as RLEHOA. Furthermore, according to Appellants' position, a developer who fails to file articles of incorporation for a community association could avoid the obligations of Chapter 116 and deprive the homeowners of the protections afforded by Chapter 116 in perpetuity. These results cannot be the intended effect of NRS 116.3101(1).[3]

---

[3] It should further be noted nothing in NRS 116.3101 provides that, absent formation at the time of conveyance of the first unit, the ability or

Appellants' argument directly conflicts with the Legislature's intent to make the protections and requirements of Chapter 116 applicable to members of all common-interest communities. NRS 116.1201(1). Appellants' illogical and nonsensical position is the complete antithesis to the Legislature's intent for enacting Chapter 116 and making it applicable to pre-1992 communities in 1999. It is peculiar how Appellants can argue that "[t]he purpose of NRS Chapter 116 is to make uniform the laws regarding unit-owner associations and to protect Nevada residents in their homes. . ." and concomitantly argue that the protections afforded by Chapter 116 have no application to the homeowners of RLEHOA. *Opening Brief* at 20.

Once the Legislature decided to make Chapter 116 applicable to all pre-1992 communities in 1999, the only practical effect of NRS 116.3101(1) must

---

requirement to form a valid association is forever lost. *See generally* NRS 116.3101. Chapter 116 was not in effect as to RLE until 1999. Notwithstanding this fact, consistent with the Wrights expressed "intent that a homeowners association would be created at some future point in time to assume the obligation of road and asset maintenance after all the lots were sold[,]" the Wrights formed Ruby Lakes Estates Landowners Association after the last lot sold in 1997 and thereafter functioned as a common-interest community adopting budgets, collecting assessments, and maintaining roadways, perimeter fences, culverts, cattle guards, entrance sign, and providing weed abatement. 1RA04-05. There is nothing in Nevada law precluding the filing of articles of incorporation for a homeowners association at any time, particularly where there is the clear necessity of such an association for purposes of maintaining the common areas for many years.

be those communities formed prior to 1992 must take the necessary steps to form an entity if one had not been formed prior. Any other reading of NRS 116.3101(1) would result in a completely absurd result. *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.,* 123 Nev. 468, 477, 168 P.3d 731, 738 (2007) (this Court avoids interpretation of statutes that cause absurd results).

Appellants criticize the district court for failing to cite to any legal authority to support and explain its holding that NRS 116.3101(1) has no application to pre-1992 communities and, in a twist of irony, contend that the district court "assumed a flawed point of reasoning[.]" *Opening Brief* at 22. The district court did not cite to any authority and should not have to do so where it is unequivocally clear that Appellants' position is absurd, illogical, and nonsensical. Appellants failed to explain below and in their *Opening Brief* how RLE and the Wrights could have effected compliance with NRS 116.3101(1) in 1989 when the Legislature had yet to enact the statute. In other words, how could RLE and the Wrights comply with a non-existent statute in 1989? No matter how much mental gymnastics Appellants engage in they cannot explain how RLE and the Wrights could have accomplished this.

In short, the district court did not err in concluding that NRS 116.3101(1) has no application to RLEHOA. RLE and the Wrights could not have effected compliance in 1989 with a statute that the Legislature had yet

to enact. It was both *factually and legally impossible* for RLE and the Wrights to comply with a non-existent statute in 1989.

E. NRS 116.021 as Amended in 2009 Is Not Applicable to RLEHOA.

Appellants' final argument on appeal is that NRS 116.021 as amended in 2009 purportedly confirms that RLEHOA is not a common-interest community because the real estate of the community must be "described in a declaration." NRS 116.021 as amended, however, is not applicable to RLEHOA.

1. RLE meets the historical definition of a common-interest community.

Historically, a "common-interest community" was defined as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit." NRS 116.021 (substituted in revision for NRS 116.110323) and as enacted in 1991 pursuant to Assembly Bill 221. Appellants do not dispute the fact that in 1992 RLE met this definition even though NRS 116.110323 had no application to the subdivision.

In 1999 when the Legislature made Chapter 116 applicable to pre-1992 communities, NRS 116.110378 defined "real estate" as:

> . . . any leasehold or other estate or interest in, over, or under the land, including structures, fixtures and other improvements and interest that by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. . .

NRS 116.110378; *see also Thirteen South Ltd. v. Summit Village Inc.*, 109 Nev. 1218, 1221, 866 P.2d 257, 259 (1993) (covenants, conditions, and restrictions have been found to be separate property interest from land with which they run). This same definition was in effect in 2006 as NRS 116.081 when Mr. Essington urged for the formation of an association and Mr. Perks filed the Articles of Incorporation. NRS 116.081; *see also* 5AA155-160. Appellants do not this dispute either.

2. NRS 116.021 as amended has no application to RLEHOA.

Appellants nevertheless contend that NRS 116.021, as amended in 2009, applies to RLEHOA, and purportedly confirming that the association is not a common-interest community. This argument fails as a matter of law for two reasons. First, as discussed earlier, the Plat Map includes the roads and all real estate and, because the CC&Rs include the Plat Map, the CC&Rs cover and encompass real estate.

Second, the current requirements of what must be included in a declaration are not applicable to RLEHOA as discussed at length earlier. NRS 116.1201(3). The 2009 amendment to NRS 116.021 was intended to address

communities that had no maintenance responsibilities for real estate. This is borne out by the LCB Opinion Letter involving Hidden Valley Homeowner's Association. 5AA168-172. In stark comparison to RLEHOA, Hidden Valley Homeowner's Association has no maintenance responsibilities for real estate and other common areas. *Id.*

The amendment to NRS 116.021 was not intended to create a situation where roads would be completely abandoned due to no maintenance and, therefore, creating dangerous conditions for the public and property owners. Such a result runs antithesis to the purpose of Chapter 116 to afford protections to homeowners and to ensure compliance with Chapter 116.

Appellants misconstrue the Legislative intent in amending NRS 116.021. This amendment was not intended to prevent a community from maintaining its roads and other common areas because such an interpretation directly conflicts with the purpose and intent of Chapter 116.

3. Once a community meets the definition of a common-interest community, the requirements and protections of Chapter 116 apply regardless of the provisions of the CC&Rs.

Appellants produced no evidence below that when the Wrights formed RLE as a valid a common-interest community pursuant to existing law in 1989, the subdivision did not qualify as a common-interest community. Instead, Appellants can only contend that the 2009 amendment to NRS

116.021 somehow applies to RLEHOA to invalidate the common-interest community that the Wrights properly formed in 1989.

It is unclear how a common-interest community validly formed in 1989 three years before Chapter 116 came into effect, 10 years before the Legislature declared that pre-1992 common-interest community are subject to Chapter 116, and 20 years before the Legislature amended NRS 116.021 in 2009, can be declared invalid. Appellants offer no logical and valid explanation to this question.

The Legislature enacted NRS 116.021 in 1991 as part of Chapter 116, and it became effective in 1992. The statute remained unchanged until the Legislature amended it in 2009.

NRS 116.021 was intended to apply to common-interest communities formed *after* the amendment was intended to take effect. According to Appellants, the amendment was meant to clarify NRS 116.021 and therefore has a retroactive application. Even assuming for argument sake that Appellants are correct, then NRS 116.021 was intended to apply to common-interest communities formed ***after NRS 116.021 became effective in 1992.***

It is undisputed that the Wrights formed RLE as a common-interest community in 1989. It is further undisputed that when Chapter 116 became effective in 1992, it still had no application to pre-1992 common-interest

communities. The Legislature did not make pre-1992 common-interest communities subject to the requirements and requirements of Chapter 116 until 1999. No matter how this Court views NRS 116.021 when it became effective in 1992 and as amended in 2009, this statute has no application to RLEHOA as a common-interest community formed prior to 1992.

Appellants offer no facts, competent or otherwise, to suggest that the Wrights' formation of RLE as a common-interest community in 1989 was improper or invalid. Instead, they can only contend that a 2009 amendment purportedly having retroactive effect renders all pre-1992 communities validly formed pursuant to existing law at the time as invalid. This simply cannot be the case.

The requirement that the common areas be described in a declaration is not applicable to RLEHOA. Such requirement is inapplicable to *any* common-interest communities formed prior to 1992 when NRS 116.021 took effect and made applicable to pre-1992 communities in 1999. NRS 116.1201(3). The amendment to NRS 116.021 in 2009 could not feasibly have been made retroactive to common-interest communities formed prior to 1992.

The Legislature recognized this as reflected in NRS 116.1206(1)(a)-(1)(b):

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

NRS 116.1206(1)(a)-(1)(b).

Appellants' interpretation of NRS 116.021 and attempted application to RLEHOA conflicts with the Legislature's intent and purpose in enacting Chapter 116. Appellants urge this Court to deprive the homeowners of RLEHOA the protections afforded to them by Chapter 116. This Court should not do so.

VII. CONCLUSION

Three different arbiters have reviewed this case and all three arbiters reached the same conclusion: RLEHOA is a validly formed common-interest community subject to the requirements of Chapter 116.

It is, therefore, unclear how Appellants can continue to contend otherwise. This is particularly so where Appellants' arguments are illogical, nonsensical, and unsupported by the facts and law.

The gravamen of Appellants' arguments is that RLE and the Wrights were required to comply with statutes that the Legislature had yet to enact in 1989. The well-established doctrine of factual and legal impossibility renders Appellants' position fatal as a matter of law.

This Court should, therefore, conclude the following:

1. RLEHOA is a common-interest community formed in 1989 through the proper recording of the Plat Map and the CC&Rs pursuant to the laws in existence at that time and well before the Legislature adopted the UCIOA in 1991 in the form of Chapter 116 and well before the Legislature made common-interest communities created by plat and declaration prior to 1992 subject to Chapter 116 in 1999.

2. RLEHOA is a valid homeowner's association which did not have to comply with NRS 116.3101(1) where it was both *factually and legally impossible* to effect compliance with the literal terms of NRS 116.3101(1) in 1989 when the statute did not even exist then.

3. NRS 116.021, as amended in 2009, has no applicability, to RLEHOA as a matter of law where it is undisputed that RLEHOA is a common-interest community validly formed in 1989 pursuant to the laws in existence then. The 2009 amendments cannot be deemed to apply

retroactively to communities formed before Chapter 116 was enacted in 1991 and went into effect in 1992.

VIII. VERIFICATION

Under the penalty of perjury, the undersigned declares that she is the attorney for Respondent named in the instant Brief and knows the contents of the Brief. The pleading and facts stated therein are true of her own knowledge, excepts as to those matters stated on information and belief, and that as such matters she believes them to be true. This verification is made by the undersigned attorney pursuant to NRAP 21(a)(5).

IX. CERTIFICATE OF COMPLIANCE

1. I 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 it has been prepared in proportionally spaced typeface using Word in 14 point Times New Roman font.

2. I further certify that this Brief complies with the page-or type-volume limitations of NRAP 32(a)(7), excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface font of 14 points or more, and contains 10,242 words.

3. I certify that I have read this 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 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 8th day of October 2018.

KAREN M. AYARBE, ESQ.
Nevada Bar No. 3358
LEACH KERN GRUCHOW ANDERSON SONG
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511
Tel: (775) 324-5930
Attorneys for Respondent
Ruby Lakes Estates Homeowner's Association

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I certify that I am an employee of the law firm of Leach Kern Gruchow Anderson Song, and that on this day I served the foregoing document described as ***RESPONDENT'S ANSWERING BRIEF*** on the parties set forth below, at the address listed below by:

✓ Placing an original or true copy thereof in a sealed envelope place for collection and mailing in the United States Mail, at Reno, Nevada, first-class mail, postage paid, following ordinary business practices, addressed to:

Travis W. Gerber, Esq.
Zachary A. Gerber, Esq.
Gerber Law Offices, LLP
491 4th Street
Elko, NV 89801

✓ Electronic notification will be sent via the master service list to the following:

Zachary Gerber, Esq.
Karen M. Ayarbe, Esq.

DATED this 8th of October 2018.

Christine A. Lamia
CHRISTINE A. LAMIA