IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTEMIS EXPLORATION COMPANY, A Nevada Corporation; HAROLD WYATT; AND MARY WYATT,

Appellants,

vs.

RUBY LAKE ESTATES HOMEOWNER'S ASSOCIATION,

Respondent,

No. 75323

APPELLANTS' REPLY BRIEF

Appeal from Fourth Judicial District Court, Division 2
Case No. CV-C-12-175

APPELLANTS' REPLY BRIEF

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NRAP 26.1
DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. There is no such corporation.

DATED this 7th day of November, 2018.

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I.

STANDARD OF REVIEW ON APPEAL

This appeal is from the District Court's entry of summary judgment, which judgment construed statutory language and interpreted a contract; therefore, this Court's review is "de novo." *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665–66 (2004); *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 641 (Nev. 2003); *Tore, Ltd. v. Church,* 105 Nev. 183 (1989).

II.

ARGUMENT

A. The District Court erred by holding that Ruby Lake Estates is a "common-interest community" under the definition of NRS 116.021.

Ruby Lake Estates subdivision is not a common-interest community as defined in NRS 116.021 because the Ruby Lake Estates Declaration of Reservations, Conditions and Restrictions ("Declaration") and Plat Map do not describe any common elements, other units, or other real estate for which lot owners are obligated to pay. NRS 116.021. Furthermore, no common elements exist within Ruby Lake Estates. Ruby Lake Estates Homeowner's Association's ("RLEHOA") arguments to the contrary, set forth in Respondent's Answering Brief ("Answering Brief"), are erroneous for the following reasons:

1. Ruby Lake Estates was not a common-interest community in 1989.

RLEHOA states in Subsection VI(C)(1) of its Answering Brief that Ruby Lake Estates was formed in 1989 "through the proper filing and recording of the Plat Map and the CC&Rs" and that it "complied with the law that was in existence at the time." (Answering Brief 22.) However, RLEHOA does not argue or even state that the alleged "proper filing" created a common-interest community in 1989. (*Id.* 22-23.) RLEHOA only argues that "it is undisputed that" Ruby Lake Estates was formed as a common-interest community in 1989, but it does not explain how the formation occurred. (*Id.* 2, 22.) The formation of a common-interest community in 1989 is disputed and did not occur. RLEHOA also fails to cite to the law that was in existence regarding common-interest communities in 1989 or to what law RLEHOA claims Ruby Lake Estates complied with in 1989. (*Id.* 22.) RLEHOA was not a common-interest community in 1989.

Prior to the enactment of the Uniform Common-Interest Ownership Act in Nevada in 1992, a common-interest community was a community wherein unit owners owned common elements for which the unit owners were obligated to pay assessments. *Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 304, 579 P.2d 775, 777 (1978) (condominium owners owned "common areas" and bore the cost of "assessments" related thereto); *See also Colfer v. Harmon*, 108 Nev. 363, 367, 832 P.2d 383, 386 (1992). Furthermore, for unit owners to be bound by the obligations—

or covenants—of the common-interest community, this Court required that the unit owner be given notice of the covenant at the time of the acquisition of the deed. *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 267, 849 P.2d 310, 312 (1993). Thus, a common-interest community in Nevada could not be created under existing law prior to 1992, or after, unless unit owners were put on notice by recorded covenants of common elements for which they were obligated to pay at the time of their deed acquisition, and therefore the enactment of NRS 116.021 did not "take[ ] away or impair[ ] vested rights acquired under existing laws, or create[ ] a new obligation, impose[ ] a new duty, or attach[ ] a new disability, in respect to transactions or considerations already past." *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 821, 313 P.3d 849, 854 (2013) (citations omitted).

First, Ruby Lake Estates was not a common-interest community in 1989 because the recorded Declaration of Ruby Lake Estates did not describe common elements or obligate unit owners to pay for common elements. No provision of the Declaration or Plat Map described any common elements or an obligation for unit owners to pay for common elements. (1 AA 92-95, 97-102; 5 AA 152-160.) Lot owners cannot be bound to pay common expenses without being obligated by recorded covenants. *Caughlin Club*, 109 Nev. at 267; NRS 116.021.

Second, RLEHOA confuses a "subdivision" with a "common-interest community," which are distinct and not equivalent. RLEHOA argues that Ruby Lake

Estates was properly formed "in 1989 through the proper filing and recording of the Plat Map and the CC&Rs"; however, these recordings of Ruby Lake Estates formed a valid subdivision without forming a valid common-interest community. Since 1973, NRS 119.110 has defined "Subdivision" to mean:

> any land or tract of land in another state, in this state or in a foreign country from which a sale is attempted, which is divided or proposed to be divided over any period into 35 or more lots, parcels, units or interests, including but not limited to undivided interests, which are offered, known, designated or advertised as a common unit by a common name or as a part of a common promotional plan of advertising and sale.

Ruby Lake Estates met this definition of subdivision in 1989 and its Plat Map and Declaration complied with the provision because more than 35 lots were created, and the lots were designated under a common name and promotional plan. (5 AA 152-160.) However, the Declaration and Plat Map do not designate any common elements or an obligation that lot owners are obligated to pay for common-elements. (*Id.*) Therefore, Ruby Lake Estates was a valid subdivision, but it was not a common-interest community in 1989 because it did not include any common elements or any obligation to pay for common expenses.

2. Ruby Lake Estates is bound by the definition of common-interest community found in NRS 116.021.

RLEHOA contends in Subsection VI(C)(2) of its Answering Brief that Ruby Lake Estates is a common-interest community because it is "not required to comply

with NRS 116.2101 to NRS 116.2122" pursuant to the exemption found in NRS 116.1201(3)(b). (Answering Brief 23.) However, the NRS 116.1201(3)(b) exemption does not exempt pre-1992 real estate from the definition of common-interest community found in NRS 116.021. All common-interest communities are defined by NRS 116.021 in the State of Nevada.

First, the history and purpose of the enactment of NRS Chapter 116 supports the application of NRS 116.021 to all common-interest communities in Nevada. NRS Chapter 116 was enacted in 1992 to make uniform the laws regarding common-interest communities and unit-owner associations. *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enterprises, LLC*, 125 Nev. 397, 406, 215 P.3d 27, 33 (2009); NRS 116.1109(2). Included in its enactment was NRS 116.110323[1] which provided a uniform definition of "common-interest community." In 1999, the Legislature amended NRS 116.1201 to apply NRS Chapter 116, including the definition of common-interest community then found in NRS 116.110323 and now found in NRS 116.021, to all common-interest communities in Nevada. By applying the same definition of common-interest community to all communities in Nevada, the Legislature uniformly defined which real estate qualified as a common-interest community and which real estate did not qualify. This uniform definition did not

[1] In 2003, NRS 116.110323, was substituted, with identical wording, and became NRS 116.021.

change the character of Ruby Lake Estates because Ruby Lake Estates was never a common-interest community because its Declaration does not describe any common elements, other units, or other real estate for which lot owners are obligated to pay. (5 AA 152-160.) Thus, the Legislature confirmed that a common-interest community must have common elements and an obligation to pay for common expenses, which clearly supported the Legislature's purpose for the act to make all common-interest communities in Nevada uniform. NRS 116.021; NRS 116.1109(2); *See Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) ("the Legislature clearly manifests an intent to apply the statute").

Second, the exemption found in NRS 116.1201(3)(b) does not exempt pre-1992 communities from the definition of common-interest community found in NRS 116.021. NRS 116.1201(3)(b) only exempts pre-1992 common-interest communities from compliance with NRS 116.2101 to NRS 116.2122.[2] In fact, in

[2] RLEHOA contends that because pre-1992 common-interest communities are not obligated to include "[a] legally sufficient description of the real estate included in the common-interest community" in its Declaration pursuant to NRS 116.2105(1)(c), it is not obligated to comply with NRS 116.021. (Answering Brief 25.) However, NRS 116.2105(1)(c) requires a description different from what NRS 116.021 requires. NRS 116.021 requires only that the Declaration describes "real estate with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration," which differs from the much more detailed and broader requirement found in NRS

order for NRS 116.1201(3)(b) to apply to real estate, the real estate must qualify as a "common-interest community" as defined in NRS 116.021 because NRS 116.1201(3)(b) relies on the definition of common-interest community found in NRS 116.021:

> 3. The provisions of this chapter do not: . . . (b) Require a **common-interest community** created before January 1, 1992, to comply with the provisions of NRS 116.2101 to 116.2122, inclusive;

(emphasis added.) Thus, the definition of common-interest community found in NRS 116.021 is utilized in NRS 116.01201(3)(b) demonstrating that all common-interest communities are defined under NRS 116.021, including common-interest communities that are exempt from compliance with NRS 116.2101 to NRS 116.2122. *See PEBP*, 124 Nev. at 154 (Without applying the statute "the Legislature's intent cannot be implemented in any other fashion.")

Third, the enactment of NRS 116.1201(3)(b) confirms that the Legislature specifically considered the application of NRS Chapter 116 to pre-1992 communities and then exempted pre-1992 communities from NRS 116.2101 to NRS 116.2122, but applied NRS 116.021 to all common-interest communities in Nevada.

116.2105(1)(c) that the Declaration include "[a] legally sufficient description of the real estate included in the common-interest community," which requires a legal description of all real estate within the common-interest community, not just the real estate for which lot owners are obligated to pay. NRS 116.021; NRS 116.2105(1)(c).

Therefore, NRS 116.021 applies, as a uniform statute, to all common-interest communities in Nevada and Ruby Lake Estates does not qualify as a common-interest community pursuant to NRS 116.021 because it does not include any common elements or obligate lot owners to pay common expenses. NRS 116.021; NRS 116.1109(2).

3. The Declaration and Plat Map of Ruby Lake Estates do not describe any "common elements, other units or other real estate" for which unit owners are obligated to pay.

RLEHOA contends in Subsection VI(C)(3) that Ruby Lake Estates is a common-interest community because the Plat Map "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," and the Ruby Lake Estates lot owners are required to maintain this property. (Answering Brief 27.) However, RLEHOA's conclusion does not analyze the correct legal statute at issue—NRS 116.021—nor does it cite to any provision of the Declaration that describes common elements, other units or other real estate for which lot owners are obligated to pay. NRS 116.021.

NRS 116.021(1)-(2) provides:

> 1. "Common-interest community" means real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes,

> insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration.
>
> 2. The term does not include an agreement described in NRS 116.1209.

As explained below, The Declaration and Plat Map do not describe any common elements, other units or other real estate for which lot owners are obligated to pay; therefore, Ruby Lake Estates is not a common-interest community under Nevada law. NRS 116.021; (5 AA 152-160.).

In reviewing the Declaration and Plat Map, the documents should be "enforced as written," and since real property covenants are being reviewed, "they should be construed against the person seeking enforcement"—RLEHOA. *Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015); *Caughlin Club*, 109 Nev. at 268; *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665–66 (2004).

Ruby Lake Estates does not contain any common elements, nor does its Declaration and Plat Map describe any common elements. RLEHOA falsely contends that "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." (Answering Brief 27.) The Plat Map only shows the lot subdivisions, and roads which were expressly dedicated to the County. (5 AA 152-154.) RLEHOA admits that Elko County accepted dedication of the

streets and easements on July 5, 1989. (*Id.*; Answering Brief 28.) Given that this property was accepted by Elko County in 1989, it is not a common element of Ruby Lake Estates. NRS 116.017. Moreover, the Declaration did not obligate lot owners to pay for any common expenses whatsoever.

The "small lot" that RLEHOA refers to is not a common element because the Plat Map expressly states that it was to be "DEDICATED TO THE COUNTY OF ELKO." (5 AA 153; Answering Brief 27.) However, RLEHOA and the Developer violated the express terms of the Plat Map when the Developer, who personally owned the lot until 2007, deeded the Property to RLEHOA in 2007. (1 AA 58-160; 5 AA 153, 175-177.) Thus, this "small lot" is not a common element and lot owners cannot be obligated to pay for its maintenance when it was not described in the Declaration or Plat Map as a common element or that it could become a common element eighteen years after the Plat Map was recorded. NRS 116.017; *See Caughlin Club*, 109 Nev. at 268 ("a grantee can only be bound by what he had notice of, not the secret intentions of the grantor") (citations omitted). Clearly, therefore, this small lot was never intended to be a common element.

RLEHOA does not point to any common elements described in the Declaration or Plat Map, nor can it because a plain reading of the Declaration and

Plat Map show that none exist.[3] *See Soro*, 359 P.3d at 106 ("enforced as written"). Therefore, Ruby Lake Estates is not a common-interest community because Ruby Lake Estates' Declaration describes no common elements, other units or other real estate for which lot owners are obligated to pay. NRS 116.021.

Additionally, the Declaration does not describe any obligation to pay for common elements, other units or other real estate. NRS 116.021. RLEHOA contends that lot owners allegedly have an obligation to maintain roads that were dedicated to the County just because it would be a good idea to obligate lot owners to pay for road maintenance or weed abatement. (Answering Brief 28.) RLEHOA contends that Elko County requires roads within subdivisions to be maintained for safety reasons, including public roads, through a "road maintenance agreement and GID or by a common-interest community association" and because a road maintenance agreement and GID are "much more expensive" than a "common-interest community association" that Ruby Lake Estates should be a common-interest community. (*Id.* 33.) This argument has no basis in law or fact and RLEHOA fails

[3] As explained in Appellants' Opening Brief, the District Court in its Order Granting Defendant's Motion for Summary Judgment erroneously stated that the Plat Map describes common elements, "including fixtures such as gates." (Opening Brief VII(A)(3); 4 AA 70, Ft. 4.) RLEHOA does not defend this finding in its Answering Brief or even contend that the Plat Map describes fixtures such as gates, which proves that the District Court's Order Granting Defendant's Motion for Summary Judgment is clearly erroneous because even RLEHOA will not defend the District Court's findings.

to cite to any law or competent fact that supports this conclusion because no supporting law or competent fact exists.

First, the Declaration and Plat Map do not describe any obligation to pay for common elements, other units or other real estate. NRS 116.021. No provision of the Declaration or Plat Map obligate Ruby Lake Estates lot owners to pay for maintenance of county roads or any other county property. (5 AA 152-160.)

Second, hypothetically, even if Elko County required residents to maintain county roads and easements, a county ordinance would not transform Ruby Lake Estates into a common-interest community. A county ordinance could levy assessments against property owners, but it could not create a common-interest community because a common-interest community is created by governing documents of a subdivision that obligate payment of common expenses for common elements. NRS 116.021 and decisions of this Court require real property covenants to be expressly stated in vesting documents, such as the Declaration, not in a county ordinance. *See Caughlin Club*, 109 Nev. at 268. Furthermore, an Elko County ordinance obligating road maintenance does not exist.

Third, Ruby Lake Estates lot owners have no obligation to maintain Elko County roads. RLEHOA contends that Ruby Lake estates is "required to maintain" the County roads, which is allegedly an "uncontroverted" fact. (Answering Brief 27; 33.) However, RLEHOA's only evidence of the County's alleged maintenance

requirement comes from affidavits of a lot owner (2 AA 107-119), RLEHOA's attorney (2 AA 60-61), and Ruby Lake Estates' developer (1 RA 2-5); a letter from RLEHOA's attorney (1 RA 8, 27); and RLEHOA Board of Director Minutes (2 AA 211). (Answering Brief 28, 29, 33, and 34.) These documents constitute hearsay and are inadmissible to prove that the County requires lot owners to maintain County roads because they are not documents produced by the County or statements of a representative of the County. NRS 51.035; NRS 51.065. Any such requirement would be law and RLEHOA does not cite to any County law because none exists. Elko County's literature directly conflicts with these alleged requirements because Elko County's literature plainly states that many roads "are not maintained by anyone!"[4] (1 AA 156; 5 AA 218.) Therefore, RLEHOA falsely asserts that the County requires lot owners to maintain roads.

RLEHOA then equivocates and admits in its Answering Brief that there may be a possibility that Elko County does not require maintenance of County 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." (Answering

[4] RLEHOA disputes the authenticity of Elko County's publication "Rural Living in Elko County *Things You Need to Know About Rural Living*" for the first time on appeal. (Answering Brief 32.) Arguments not presented to the district court are considered waived on appeal. *See Wolff v. Wolff*, 112 Nev. 1355, 1363–64, 929 P.2d 916, 921 (1996).

Brief 32-33.) This speculation is unsupported and demonstrates that RLEHOA is grasping for straws to support an argument made up by affidavits and a letter from its own attorney, developer, and a single lot owner.

Further, RLEHOA admits that Elko County does not and cannot require roads to be maintained through a common-interest community. RLEHOA cites Elko County Code § 12-5-1 as giving Elko County "'any appropriate means' to maintain the roads . . . ."[5] (*Id.* 33). These "means" can allegedly be achieved "either through a road maintenance agreement and GID or by a common-interest community association."[6] (*Id.*) RLHEOA contends that a road maintenance agreement or GID is "much more expensive" than maintaining the roads through a common-interest community, and therefore a common-interest community should be utilized. (*Id.* 33; 36.) This proves that Ruby Lake Estates lot owners have options to maintain public roads and are not bound by any covenants to maintain the roads. Nevada law is clear that lot owners cannot be bound by a common-interest community unless they are bound by a Declaration that provides for common elements and an obligation to pay common expenses. NRS 116.021.

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[5] RLEHOA cites to Elko County Code § 12-5-1, which was repealed.

[6] This argument was speculative legal advice found only in a letter written by RLEHOA's legal counsel in 1999 to Ruby Lake Estates' developer (1 RA 27) and an affidavit from RLEHOA's legal counsel (2 AA 60), which further demonstrates the lack of legal authority and that there are no recorded covenants to obligate lot owners to pay dues.

RLEHOA's admission that Ruby Lake Estates could use a road maintenance agreement to maintain the County roads and comply with the County's alleged maintenance requirement, proves that Ruby Lake Estates is not a common-interest community.[7] (Answering Brief 33.) NRS 116.021(2) and NRS 116.1209(3) expressly state that a common-interest community is not created by a road maintenance agreement:

> [a]n agreement between the owners of separately owned parcels of real estate to share costs or other obligations associated with a . . . road . . . does not create a common-interest community unless the owners otherwise agree . . .

NRS 116.021(2); NRS 116.1209(3). Thus a common-interest community can only be created by a Declaration, which includes covenants to pay for common expenses, and Ruby Lake Estates is not a common-interest community because its Declaration did not create a common-interest community.

Fourth, RLEHOA's attorney's letter written in 1999 expressly admits that

> **the declaration of Reservation, Conditions and Restrictions does not specifically provide that the homeowners will be required to pay annual dues** . . . .

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[7] RLEHOA's attorney's advice in 1999, prior to the organization of RLEHOA, was for the Ruby Lake Estates' developer to have all lot owners "enter into a roadway maintenance agreement." (1 RA 27.) The attorney attaches a draft roadway maintenance agreement to his letter of advice as an example and recommends that the Ruby Lake Estates' developer adapt the agreement for use by Ruby Lake Estates lot owners. (*Id.*) This letter is directly contrary to RLEHOA's position because road maintenance agreements do not create common-interest communities and the letter does not even address common-interest communities. (*Id.*); NRS 116.021(2).

(1 RA 28) (emphasis added). Thus, in 1999, after the enactment of NRS Chapter 116, RLEHOA's own attorney advised Ruby Lake Estate's developer that the Ruby Lake Estates Declaration does not provide for an obligation for lot owners to pay annual dues or common expenses! (*Id.*) Given that RLEHOA's attorney admits the Declaration does not specifically put lot owners on notice of an obligation to pay for common elements, Ruby Lake Estates is not a common-interest community. *Caughlin Club*, 109 Nev. at 268 ("When construing real property covenants of doubtful import, they should be construed against the person seeking enforcement.")

Fifth, the two provisions of the Declaration and Plat Map that Ruby Lake Estates cites do not create a common-interest community. RLEHOA states that the purpose of Ruby Lake Estates' Declaration is to provide for the "development and maintenance of an aesthetically pleasing and harmonious community of residential dwellings . . . ." (Answering Brief 26-27.) This provision does not describe any common elements, other units or other real property for which lot owners are obligated to pay and it does not create a common-interest community by implication; therefore, it does not create a common-interest community. NRS. 116.021; *Caughlin Club*, 109 Nev. at 268 ("a grantee can only be bound by what he had notice of").

RLEHOA also cites the Plat Map wherein Elko County accepted dedication of the roads but rejected maintenance of the County roads. (Answering Brief 29.) This dedication did not describe any obligation that lot owners would have to pay

for the county roads or common elements, other units or other real property; therefore, it does not create a common-interest community. This is especially the case when these provisions are construed against RLEHOA, which is the attempted enforcer of non-existent covenants to pay. *Caughlin Club*, 109 Nev. at 268.

Consequently, Ruby Lake Estates is not a common-interest community because its Declaration does not describe real estate "with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance or improvement of, or services or other expenses related to, common elements, other units or other real estate described in that declaration." NRS 116.021.

4. This Court's decisions support the conclusion that Ruby Lake Estates is not a common-interest community.

In Subsection VI(C)(4) of its Answering Brief, RLEHOA attempts to narrowly define the findings of this Court in previous cases to avoid the cases' holdings. (Answering Brief 35-36.) Specifically, RLEHOA contends that *Diaz v. Ferne*, 120 Nev. 70, 84 P.3d 664 (2004) only stands for the proposition that a manufactured home is distinct from a mobile home. RLEHOA states that *Caughlin Ranch Homeowners Ass'n v. Caughlin Club*, 109 Nev. 264, 849 P.2d 310 (1993) only applies to amendments to restrictive covenants. (Answer Brief 35-36.) However, *Diaz* and *Caughlin Club* specifically apply to this case because in those

cases this Court 1) set forth the rules of interpretation of real property covenants, 2) held that a purchaser of real property can only be bound by what he had notice of at the time of purchase, 3) found that affirmative real property covenants are not valid merely because a property owner complied with them,[8] and 4) determined that if a declaration is "silent" regarding a real property covenant, the alleged covenant cannot be enforced. *Caughlin Club*, 109 Nev. at 264-268; *Diaz*, 120 Nev. at 70-75. These findings directly relate to the case at hand because 1) Ruby Lake Estates' Declaration must be interpreted in accordance with the rules of interpretation of real property covenants, 2) RLEHOA cannot bind Ruby Lake Estates lot owners to covenants that did not exist and that they had no notice of at the time of purchase, 3) payment of RLEHOA's assessment by a resident does not validate those assessments, and 4) the Declaration is "silent," and therefore does not contain any covenants describing or obligating lot owners to pay for common elements.

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[8] In *Caughlin Club*, the lot owner initially paid assessments; however, the Court found that the payment did not validate the assessments. *Caughlin Club*, 109 Nev. at 264-268; *see also Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 557 (2006). RLEHOA is unwilling to admit this finding and claims that because the husband of the sole stockholder, sole director, and sole officer of Artemis, Mel Essington, initially participated in RLEHOA, Artemis's claims are "specious." (Answering Brief 38.) Participation by a resident that is not a lot owner does not validate real property covenants; therefore, RLEHOA's heavy reliance on Mel Essington's opinions and initial support has no bearing on Ruby Lake Estates' and RLEHOA's validity as to each of the 51 lot owners.

B. Ruby Lake Estates Homeowner's Association is not a valid homeowners' association because it was not organized prior to the conveyance of the first unit as required by NRS 116.3101(1).

RLEHOA contends in Subsection VI(D) of its Answering Brief that it is impossible for RLEHOA to comply with NRS 116.3101(1), and therefore the statute does not apply to RLEHOA. (Answering Brief 37-42.) RLEHOA states that "the only practical effect of NRS 116.3101(1) must be those communities formed prior to 1992 must take the necessary steps to form an entity if one had not been formed prior" to 1992. (*Id.* 40-41.) RLEHOA cites to no authority for its position that NRS 116.3101(1) has no application to RLEHOA, and RLEHOA further states that the District Court should not have to cite any authority "where it is unequivocally clear that Appellants' position is absurd, illogical, and nonsensical." *Id.*

RLEHOA does not dispute that if NRS 116.3101(1) applies to RLEHOA, then RLEHOA would not be a valid homeowners' association. (*Id.*) Thus, the only legal question presented is whether NRS 116.3101(1) applies to RLEHOA. (*Id.*) The following points demonstrate that NRS 116.3101(1) applies to RLEHOA:

First, NRS 116.3101(1) was validly enacted by the legislature in 1992 and was applied to all pre-1992 communities in 1999. NRS 116.1201; NRS 116.3101(1). RLEHOA cites to no statute or authority that exempts Ruby Lake Estates and RLEHOA from the application of NRS 116.3101(1). Given that NRS 116.3101(1) is "clear on its face" the District Court and this Court cannot "go beyond the statute

. . . ." *Robert E. v. Justice Court of Reno Twp., Washoe Cty.*, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983). Therefore, NRS 116.3101(1) applies to Ruby Lake Estates and RLEHOA and must be enforced as written.

Second, the Legislature intended to apply NRS 116.3101(1) to Ruby Lake Estates, RLEHOA, and all pre-1992 communities. In 1999, the Legislature expressly considered the application of NRS Chapter 116 to pre-1992 communities when it exempted pre-1992 communities from the requirements of NRS 116.2101-2122 by enacting NRS 116.1201(3)(a)-(d). However, the Legislature did not exempt pre-1992 communities from the application of NRS 116.3101(1). Thus, the Legislature considered the effect that NRS Chapter 116 would have on pre-1992 communities and exempted them from some provisions of NRS Chapter 116, but applied NRS 116.3101(1) to all communities.

Third, the application of NRS 116.3101(1) to Ruby Lake Estates and RLEHOA is not an "illogical and nonsensical position" or an impossible position as RLEHOA alleges. (Answering Brief 39-40.) Membership in a homeowners' association and mandatory assessments that must be paid to an HOA are affirmative covenants. *Armstrong*, 360 N.C. at 557 (*citing Long v. Branham*, 271 N.C. 264, 268 (1967)). This Court has consistently held that for lot owners to be bound by a covenant, the lot owner must be given notice of the covenant at the time of the owner's purchase of the lot. *Caughlin Club*, 109 Nev. at 268; *Diaz*, 120 Nev. at 75

("a grantee can only be bound by what he had notice of, not the secret intentions of the grantor") (citations omitted). Thus, it is not illogical, nonsensical, or "impossible" for pre-1992 communities to organize an HOA and record notice of covenants and the existence of a homeowners' association prior to the sale of lots to lot owners. It is certainly possible, and communities exist with homeowners' associations that were created prior to 1992 by recorded covenants. *See Caughlin Club*, 109 Nev. at 268. Notice to existing lot owners of a covenant, such as membership in a homeowners' association, is a requirement in Nevada and was a requirement prior to 1992, even before the enactment of NRS Chapter 116. *Id.*; *Deal*, 94 Nev. at 304. RLEHOA does not explain how Ruby Lake Estates lot owners were put on notice of the organization of a future, mandatory homeowners' association, nor does RLEHOA cite to any authority that supports its position. The Declaration of Ruby Lake Estates simply does not give notice to lot owners that an HOA would be organized after the recording of the Declaration or the sale of the Ruby Lake Estates lots. (5 AA 152-160.)

Fourth, RLEHOA was organized in 2006 after the enactment and application of NRS 116.3101(1) to Ruby Lake Estates. NRS 116.3101(1) was enacted in 1992 and was applied to Ruby Lake Estates in 1999. Ruby Lake Estates Declaration did not provide for the creation of an HOA at any time and RLEHOA was not organized at that time. Therefore, the organization of RLEHOA in 2006—seven years after the

application of NRS 116.3101(1) to Ruby Lake Estates—did not comply with NRS 116.3101(1), which was and is a valid and existing statute. NRS 116.3101(1); (2 AA 169; 5 AA 173-174).

Fifth, the purpose of NRS Chapter 116 shows that it was the legislature's intent to apply NRS 116.3101(1) to all homeowners' associations. NRS Chapter 116 was enacted in 1992 to make uniform the laws regarding common-interest communities and unit-owner associations, and to protect Nevada residents in their homes. *See Boulder Oaks Cmty. Ass'n*, 125 Nev. at 406; NRS 116.1109(2); (5 AA 194; 1 AA 169-226). The application of NRS 116.3101(1) protects Nevada residents in their homes by requiring developers to record notice to prospective lot owners when membership in a homeowners' association is mandatory. NRS 116.3101(1)'s application also makes all communities with homeowners' associations uniform. If NRS 116.3101(1) did not apply, as RLEHOA contends, any community in the state formed prior to 1992 with a recorded declaration could organize a homeowners' association now or at any time, even if the Declaration provides no notice to the lot owners. Failing to apply NRS 116.3101(1) to pre-1992 communities would render the statute "meaningless" and would "produce absurd or unreasonable results." *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). Simply, RLEHOA wants to organize an HOA with no recorded covenants or notice to lot owners.

Consequently, NRS 116.3101(1) applies to Ruby Lake Estates, RLEHOA, and all pre-1992 communities. RLEHOA was not organized prior to the conveyance of the first lot, RLEHOA was not organized in a common-interest community, and the Declaration of Ruby Lake Estates does not form or provide for an HOA; therefore, RLEHOA is not a valid, compulsory homeowners' association.

C. The 2009 NRS 116.021 amendment clarified existing law, applies to Ruby Lake Estates, and confirms that Ruby Lake Estates is not a common-interest community.

The 2009 amendment to NRS 116.021 clarified NRS 116.021 and is therefore applied retroactively to Ruby Lake Estates.

1. Ruby Lake Estates was not a common-interest community pursuant to NRS 116.021 prior to the 2009 amendment.

RLEHOA contends in Subsection VI(E)(1) of its Answering Brief that Ruby Lake Estates met the definition of NRS 116.021 prior to the 2009 amendment, even though RLEHOA contends the original statute nor the 2009 amendment apply to Ruby Lake Estates. (Answering Brief 42.) RLEHOA contends that Ruby Lake Estates met the definition because Ruby Lake Estates had a recorded Declaration, which in and of itself allegedly constituted "real estate," which points to RLEHOA's continued reliance on the unofficial Attorney General opinion that was rejected by the Real Estate Division and overruled by the 2009 amendment. (5 AA 178-190, 194.)

NRS 116.021 applies to Ruby Lake Estates because the statute was validly enacted and applied to Ruby Lake Estates in 1999 when the Legislature applied NRS Chapter 116 to pre-1992 common-interest communities pursuant to NRS 116.1201. No statute exempts Ruby Lake Estates from complying with NRS 116.021. The Legislature expressly exempted pre-1992 communities from certain provision of NRS Chapter 116; however, it did not exempt pre-1992 communities from the application of NRS 116.021.

Second, Ruby Lake Estates was not a common-interest community prior to the amendment of NRS 116.021 in 2009. Prior to the 2009 amendment, NRS 116.021 ("pre-2009 NRS 116.021") was ambiguous because it was "capable of being understood in two or more senses by reasonably informed persons . . . ." *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 649 (1986) (citing *Robert E.*, 99 Nev. at 445). The ambiguity is clear because the 2006 Legislative Counsel Bureau legal opinion diverged with the 2008 unofficial opinion written by a member of the Attorney General's office, which was initially adopted and then rejected by the Nevada Real Estate Division. (5 AA 168-172, 178-190, 194.)

Under the rules of statutory construction, the ambiguities in a statute are resolved by ascertaining the legislative intent in enacting the statute. *See Harris Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642 (2003) (quoting *Harvey v. Dist. Ct.*, 117 Nev. 754, 770, 32 P.3d 1263, 1274 (2001)) (internal quotations

omitted). In 2009, the Nevada Legislature clarified its intent and resolved any ambiguity by declaring that it was never its intent for common-interest communities to be created by a recorded declaration alone, and that any obligation to pay for common expenses must be "described" in the Declaration. (5 AA 194-195)

Furthermore, RLEHOA's contention that Ruby Lake Estates Declaration constitutes "real estate" produces an "absurd or unreasonable result[ ]" and conflicts with the purpose of NRS Chapter 116 and what "the legislature intended." *Harris Associates*, 119 Nev. at 642; *McKay*, 102 Nev. at 649 (1986) (quoting *Robert E.*, 99 Nev. at 445). "[T]he express purpose of NRS Chapter 116, [ ] is to 'make uniform the law with respect to the subject of this chapter among states enacting it.'" *Boulder Oaks Cmty. Ass'n*, 125 Nev. at 406; NRS 116.1109(2). RLEHOA's argument would allow any subdivision created with a recorded declaration prior to 2009 to claim to be a common-interest community at any time without notice, even where a common-interest community did not exist or was not intended; whereas, identical communities created after 2009 would not be considered common-interest communities. This directly conflicts with the purpose to make uniform the laws regarding common-interest communities and would create an absurd result. The Nevada Real Estate Division rejected this interpretation, which further proves that RLEHOA's continued reliance on this position is unreasonable. (5 AA 194.)

Thus, NRS 116.021 applies to Ruby Lake Estates and confirms that it is not a common-interest community because the Declaration of Ruby Lake Estates does not obligate lot owners to pay common expenses.

2. The 2009 amendment to NRS 116.021 applies to Ruby Lake Estates.

RLEHOA contends in Subsection VI(E)(2) of its Answering Brief that the 2009 amendment to NRS 116.021 does not apply to Ruby Lake Estates because Ruby Lake Estates' Plat Map identifies County roads and Ruby Lake Estates lot owners have maintenance responsibilities of the County roads. (Answering Brief 44.)

First, Ruby Lake Estates does not dispute the case law from this Court regarding the retroactive effect of clarifying amendments, which was fully set forth in Appellants' Opening Brief. The 2009 amendment was a clarifying amendment and therefore applies retroactively to Ruby Lake Estates. (5 AA 195); *Howell v. Ricci*, 124 Nev. 1222, 1231, 197 P.3d 1044, 1050 (2008); *State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 115, 127 P.3d 1082, 1085 (2006).

Second, RLEHOA's arguments do not explain why it contends that the 2009 amendment does not apply to Ruby Lake Estates. RLEHOA only contends that Ruby Lake Estates allegedly has common elements because of the County roads and that its lot owners have an alleged duty to maintain those roads; however, these

arguments only contend why RLEHOA believes Ruby Lake Estates is a common-interest community, but RLEHOA offers no explanation or argument for why it claims the 2009 amendment does not apply to RLEHOA.

Third, as explained above, County roads are not common elements of Ruby Lake Estates, and the alleged requirement for lot owners to maintain County roads does not transform Ruby Lake Estates into a common-interest community. The alleged requirement to pay for County roads is not described in the Declaration or anywhere. Moreover, the alleged requirement can be fulfilled by a road maintenance agreement, as admitted by RLEHOA and as advised by its legal counsel. NRS 116.021; (Answering Brief 33; 1 RA 27). Therefore, RLEHOA has provided no explanation for why the 2009 clarifying amendment does not apply to Ruby Lake Estates. The 2009 clarifying amendment to NRS 116.021 applies to all common-interest communities.

3. Ruby Lake Estates was not and is not a common-interest community.

RLEHOA contends, again, in Subsection VI(E)(3) of its Answering Brief that NRS 116.021 does not apply to Ruby Lake Estates because NRS 116.021 was not enacted until after Ruby Lake Estates' Declaration was recorded. (Answering Brief 44-47.) RLEHOA contends that Ruby Lake Estates was "validly formed pursuant to existing law at the time . . . ." (*Id.* 46-47.)

First, Ruby Lake Estates fails to cite what it claims was existing common-interest law in Nevada in 1989 when Ruby Lake Estates was formed. The practical effect of NRS 116.021—providing notice to lot owners of an obligation to pay for common elements prior to the conveyance of their lot—was already the basic common law relating to covenants, deed restrictions, and conveyances prior to 1992. *Deal*, 94 Nev. at 304; *Caughlin Club*, 109 Nev. at 267. Recorded declarations must put lot owners on notice, at the time of the acquisition of their lot, of common elements for which the lot owners are obligated to pay. *Id.* The Legislature confirmed this requirement for common-interest communities when it enacted NRS 116.021 in order to codify already existing common law and make the definition of common-interest community uniform. *Boulder Oaks Cmty. Ass'n*, 125 Nev. at 406; NRS 116.1109(2).

Second, NRS 116.1206(1)(a)-(1)(b) does not transform real estate into a common-interest community, as RLEHOA contends. Ruby Lake Estates is not a common-interest community because its Declaration does not describe any common elements, other units or other real estate for which lot owners are obligated to pay. NRS 116.021. NRS 116.1206(1)(a)-(1)(b) does not create common elements or create an obligation to pay for common elements. Those covenants and elements must exist and be described in the Declaration at the time of its recording. NRS 116.021; *Deal*, 94 Nev. at 304; *Caughlin Club*, 109 Nev. at 267. Therefore, Ruby

Lake Estates is not a common-interest community because its Declaration does not describe common elements, other units or other real estate for which lot owners are obligated to pay. *Id.*

III.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Honorable Court reverse the District Court's findings in the District Court's Order Granting Defendant's Motion for Summary Judgment and the District Court's Order Denying Plaintiff's Motion for Summary Judgment, and specifically find that:

1. The NRS 116.021's 2009 clarifying amendment applies retroactively to Ruby Lake Estates subdivision;

2. Ruby Lake Estates is not a common-interest community under NRS 116.021;

3. RLEHOA is not a valid Nevada homeowners' association because it violated NRS 116.3101(1);

4. RLEHOA cannot compel the payment of dues or assessments; and

5. For such other relief as the Court deems just and proper.

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DATED this 7th day of November, 2018.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this Reply 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 Office Word 360 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), excluding the parts of the brief exempted by NRAP 32(a)(7)(C), because it is proportionately spaced, has a typeface of 14 points or more, and contains 6,989 words.

3. Finally, I hereby certify that I have read this appellate reply 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 7th day of November, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of GERBER LAW OFFICES, LLP, and that on this date, I caused the foregoing document to be served on all parties to the action by:

X E-filing pursuant to Section IV of District of Nevada Electronic Filing Procedures

X Placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Elko, Nevada.

fully addressed as follows:

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DATED this 7th day of November, 2018.

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