IN THE SUPREME COURT OF THE STATE OF NEVADA

ELK POINT COUNTRY CLUB HOMEOWNERS, ASSOCIATION, INC., also known as ELK POINT COUNTRY CLUB, INC., a Nevada non- profit, non-stock Corporation,

Appellant,

v.

K.J. BROWN, L.L.C., a Nevada limited liability company; TIMOTHY D. GILBERT and NANCY AVANZINO GILBERT, as trustees of the TIMOTHY D. GILBERT AND NANCY AVANZINO GILBERT REVOCABLE FAMILY TRUST DATED DECEMBER 27, 2013,

Respondent.

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Supreme Court Case No.: 82484

District Court Case Number: 2020-CV-0124

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Appellant does not have a parent corporation or publicly held company that owns 10% or more of the party's stock. The attorneys and law firms whose partners or associates have appeared for Appellant are:

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No litigant is using a pseudonym.

DATED this 18th day of October, 2021.

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I.
ROUTING STATEMENT

This appeal falls under NRAP 17(a)(11) & (12) and is thereby presumptively retained by the Nevada Supreme Court. This appeal raises a question of first impression involving the Nevada Constitution and common law and a question of statewide public importance. Specifically, this is a matter of first impression, as this Court has not ruled on whether 26 USCS § 501(c)(7) tax-exempt status concerns are sufficient to forbid an HOA from enforcing its duly enacted rules. Additionally, due process and public policy concerns arise based on the District Court's order invalidating contracts between homeowners and renters. This appeal does not involve any of the categories set forth in NRAP 17(b).

II.
JURISDICTIONAL STATEMENT

This is an appeal from an order of the Ninth Judicial District Court of the State of Nevada in and for Douglas County in which the Honorable Nathan Tod Young granted an injunction in favor of Respondent. The Notice of Entry of the order was

filed on January 5, 2021. 7 AA 592-604. The Notice of Appeal was filed on February 4, 2021. 9 AA 617-633. The Order is appealable under NRAP 3A(b)(3).

III.
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IV.
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are whether the District Court erred in:

1. Finding that Appellant's Bylaws do not contemplate or allow for rentals of homes in the Elk Point Country Club community, thereby making Appellant's Rules and Regulations in conflict with the Bylaws;

2. Finding that Appellant's 26 USCS § 501(c)(7) tax-exempt status would be threatened by allowing either short-term (under 30 days) or long-term rentals of homes in the Elk Point Country Club community;

3. Issuing an order enjoining long-term rentals in the Elk Point Country Club community which was beyond the scope of the requested relief in the Motion for Preliminary Injunction, which sought an injunction as to only short-term rentals;

4. Relying on an unqualified expert's speculative testimony regarding the impact of allowing short-term rentals in the Elk Point Country Club community on Appellant's 26 USCS § 501(c)(7) tax-exempt status; and

5. Invalidating contracts between renters and owners by enjoining short-term (under 30 days) and long-term rentals of homes in the Elk Point Country Club community.

V.
RELIEF SOUGHT

Appellant respectfully requests that the Court issue an order to:

1. Vacate the Order Granting Preliminary Injunction; and

2. Remand this matter for further proceedings.

VI.
RELEVANT FACTS AND PROCEDURAL HISTORY

The underlying civil action was brought by Respondents, two homeowners in the Elk Point Country Club ("EPCC") community, against Appellant, the Elk Point Country Club Homeowner's Association, Inc. related to the fact that short-term vacation rental activities have been conducted by several homeowners within the EPCC community. Appellant is a common-interest homeowner's entity, formed in 1925 as a social club with a 26 USCS § 501(c)(7) tax exempt status, in charge of the EPCC community located in Douglas County, Nevada. 1 AA 2. It is undisputed that Appellant does not operate the community's facilities in any manner that would benefit rental activities (instead it operates the facilities for the benefit of its members, without regard for any ongoing rental activity), nor does Appellant receive any share of the revenue from said rental activities. 3 AA 69; 3 AA 72.

Respondents' operative Complaint contained claims against Appellant sounding in violations of NRS Chapter 116, Nuisance, Negligence, Trespass, Breach of Contract, Breach of Covenant of Good Faith and Fair Dealing, Contractual & Tortious Breach, and Declaratory Relief. 2 AA 43-63. All of Respondents' claims arose out of their position that short-term vacation rentals are not allowed in the

EPCC community. Appellant filed its Answer largely denying Respondents' claims on August 6, 2020. 4 AA 85-96.

On June 29, 2020, Respondents filed a Motion for Preliminary Injunction seeking to enjoin Appellant from allowing short-term vacation rentals/transient commercial use in the EPCC community. 1 AA 1-42. Specifically, Respondents' motion requested that an injunction be issued to prevent Appellant from allowing homeowners to rent their properties to short-term (30 days or less) renters on the grounds that such rentals are precluded by Appellant's governing documents and threaten Appellant's 26 USCS § 501(c)(7) tax exempt status. 1 AA 2-3. In support of this request, Respondents argued that Appellant's Bylaws prohibit homeowners from using the EPCC community's properties and/or facilities with the purpose or effect of providing a profit to the homeowners. 1 AA 9. Respondents cited parts of Appellant's Bylaws which provide:

> [The Elk Point Country Club] shall not operate its properties or facilities with the view of providing profit to its members but rather such properties and facilities shall be held, operated, and made available to the use and enjoyment of its members upon payment of such assessments and charges as will fairly meet its costs of operation and provide a reasonable accumulation of funds for repairs, replacements and additions.

1 AA 5.

> [EPCC'S] primary purpose is hereby affirmed to be to provide its members the pleasure of fellowship and recreation, and its corporate functioning shall be designed to achieve in highest measure such purpose. It shall not operate its properties or facilities with the view of

> providing profit to its members but rather such properties and facilities shall be held, operated, and made available for the use and enjoyment of its members.

5 AA 99.

Respondents further argued that Appellant's Bylaws place restrictions on homeowners as follows: "The property of members shall be used for single family residential purposes only." 1 AA 5. Thus, Respondents asserted that homeowners allowing short-term vacation rentals constituted unauthorized transient commercial use in violation of the Bylaws and NRS 116.340. *Id.*

Additionally, Respondents relied upon the contention that irreparable harm for which compensatory damages could not adequately remedy would be caused if the short-term rentals were allowed to proceed because the generation of income by the homeowners could potentially threaten Appellant's 26 USCS § 501(c)(7) tax exempt status and the increased activity caused by renters would interfere with the quiet enjoyment of the members of the EPCC community. 1 AA 6-7.

On August 6, 2020, Appellant filed its Opposition to the Motion for Preliminary Injunction. 3 AA 64-84. In the opposition, Appellant asserted that Respondents had failed to demonstrate a reasonable likelihood of success on the merits as to the issue of the permissibility of short-term vacation rentals/transient commercial use. 3 AA 67. Appellant argued that Respondents' interpretation of Appellant's Bylaws contradicted the plain language of the Bylaws/Rules and

Regulations and ran afoul of the plain language of NRS 116.340 including the universal legal principles underlying the statute's adoption which favor the free, unrestricted use of property. 3 AA 67-70.

Additionally, Appellant pointed out Respondents' misconstruction of law, which wrongly asserted that irreparable harm was imminent due to endangerment of Appellant's 26 USCS § 501(c)(7) tax exempt status based on the homeowners' short-term rental activities. 3 AA 71-73. The applicable federal tax law does not focus on the economic activities of the homeowners but rather focuses on whether Appellant *itself* has been engaged in such business-for-profit activity. *Id.* Moreover, Appellant demonstrated that the speculative claim that renters would interfere with the quiet enjoyment of the members of the EPCC community was without merit as Appellant strictly enforced its rules and regulations and the hypothetical issues raised in Respondents' motion regarding increases in trash, noise, and parking, etc. applied to both renters and owners alike. 3 AA 75-77. Lastly, Appellant raised the argument that restrictions regarding short-term rentals were not in the general public interest. 3 AA 77.

On August 24, 2020, Respondents filed a Reply in Support of Motion for Preliminary Injunction. 5 AA 97-189. In support of Respondents' arguments therein, a newly disclosed declaration of Michelle L. Salazar, a certified public accountant who was apparently retained to provide an expert opinion, was cited to

and attached as an exhibit. 5 AA 114-122. Respondents also cited to and attached a photo of a signboard near the entrance to the EPCC community, a declaration by Timothy Gilbert, two Short-Term Vacation Rental Revenue Estimate spreadsheets, various Short-Term Vacation Rental listings online for the EPCC community, and EPCC Board Candidate survey documentation. 5 AA 112-187.

On October 19, 2020, Appellant filed a Motion to Partially Strike Respondents' Reply in Support of Motion for Preliminary Injunction. 8 AA 605-616. Appellant argued that the addition of the exhibits and the information contained therein amounted to new arguments and legal theories that had not been previously presented in the proceeding briefs and that Appellant had not been able to review and respond to the same. 8 AA 608-609. Appellant requested the District Court to strike all of the inappropriate exhibits and new legal theories raised accordingly. 8 AA 609.

On October 23, 2020, the District Court held the hearing on Respondents' Motion for Preliminary Injunction. 10 AA 634-879. At the outset of the hearing, the District Court outright denied Appellant's Motion to Partially Strike Respondents' Reply in Support of Motion for Preliminary Injunction and allowed consideration of the same without providing any reasoning for the denial. 10 AA 639.

On January 5, 2021, the District Court entered an Order granting Respondents' Motion for Preliminary Injunction. 7 AA 592-604. The District Court

found that a consistent reading of the Bylaws that gave meaning to all provisions included therein, was that members are not permitted to operate their Units or any EPCC property and facilities in order to generate revenue or for a profit. 7 AA 601. The District Court further found that that any use of a Unit within the EPCC community to generate revenue or for a profit, including both transient commercial use and long-term rental use, was in violation or the clear and unambiguous terms of the Bylaws, and recorded Rules. *Id.* The District Court also determined that any use of a Unit within the EPCC community to generate revenue or for a profit, including both transient commercial use and long-term rental use, would jeopardize the tax-exempt social club status under the IRC. 7 AA 602. Furthermore, the District Court found that it would lead to inconsistent and contradictory results if the references to the term "tenant" within the Bylaws and the Rules was used as a means to justify allowing EPCC members to rent their Units to generate revenue or for a profit. *Id.*

Thus, the District Court concluded that the Amended Rules adopted by EPCC on September 14, 2019, as they relate to rental activity within EPCC, were in violation of the Bylaws, and were therefore unenforceable to the extent they permit members to derive revenue or a profit through the rental of their Units for both transient commercial use and long-term rentals. *Id.* The District Court also concluded that there was a threat of permanent and irreparable harm if Appellant's

26 USCS § 501(c)(7) tax-exempt status was lost and that an award of compensatory damages would be a futile for this type of damage. 7 AA 603. Additionally, such irreparable harm would include a change in the overall nature and character of the community, from one originally designed to promote the social and recreational benefit to those who are members, to simply a commercial organization. *Id.*

Therefore, the District Court granted the Motion for Preliminary Injunction and ordered Appellant to enforce its Bylaws and prohibit the use of any Unit, and any other portion of Appellant's property and facilities, to generate revenue or for profit, during the pendency of the underlying case. 7 AA 603-604.

VII.
SUMMARY OF ARGUMENT

Respondents moved for a preliminary injunction against Appellant requesting that Appellant be prevented from allowing homeowners to rent their properties to short-term (30 days or less) renters on the grounds that such rentals are precluded by Appellant's governing documents and 26 USCS § 501(c)(7) tax exempt status. The District Court granted the Respondents' request for a preliminary injunction and enjoined Appellant from allowing its homeowners to rent to short-term renters and (*sua sponte*) enjoined Appellant from allowing its homeowners to rent to long-term renters as well.

"A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable

harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits." *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009); NRS 33.010. In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest. *Clark Co. School Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996).

Pursuant to a plain reading of Appellant's Bylaws, short-term rentals occurring in the EPCC community would be perfectly legitimate and thus, allowable under NRS 116.340(1). Therefore, the District Court erred when finding that Respondents demonstrated a reasonable likelihood of success on the merits as to the issue of the permissibility of short-term vacation rentals/transient commercial use.

Furthermore, it is clear that 26 USCS § 501(c)(7) is only concerned with business that the 26 USCS § 501(c)(7) tax-exempt club/HOA/organization ***itself*** engages in (i.e., transacts itself) and that the rental activity of private members is irrelevant. There was no dispute that, although there are homeowners in the community who engage in short and/or long-term vacation rental activities, Appellant does not operate the community's facilities in any manner that would benefit such activities, nor does it receive any share of the revenue from said rental activities. Thus, Appellant's tax-exempt status under 26 USCS § 501(c)(7) was in no danger from the private rental activity of individual members and there was

simply no imminent "irreparable harm for which compensatory relief is inadequate" to justify a preliminary injunction.

A finding of either of the above-articulated central legal issues in favor of Appellant would essentially eliminate fulfilment of one of the factors required for granting a preliminary injunction (reversal of the Bylaws issue would eliminate fulfillment of factor (1), while reversal of the 26 USCS §501(c)(7) tax-exempt status issue would eliminate fulfillment of factor (2)) and would require the District Court's order to be vacated. Furthermore, the public interest in allowing the status quo of homeowners engaging in short and/or long-term vacation rental activities would also be protected. Based on the District Court's errors discussed herein, the underlying order must be vacated.

VIII.
ARGUMENT

A. STANDARD OF REVIEW

A district court's decision to grant a preliminary injunction "'will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard.'" *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (quoting *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 397 (9th Cir. 1992)). Generally, appellate courts review preliminary injunctions for abuse of discretion. *Labor Comm'r of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 28 (2007). However, when the

underlying issues in the motion for preliminary injunction involve questions of statutory construction and questions of law, an appellate court reviews those questions of law de novo. *See, State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev., Adv. Op. 34, 128 Nev. 362, 294 P.3d 1223, 1226 (2012) (quoting *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 122 Nev. 894, 901, 141 P.3d 1235, 1240 (2006)). Each and every issue key to the outcome of this appeal is squarely a question of law or statutory interpretation which is subject to de novo review.

"A preliminary injunction is available when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits." *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009); NRS 33.010. In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest. *Clark Co. School Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996). In Respondents' request for a preliminary injunction, the analysis of whether Respondents met their burden in demonstrating a reasonable likelihood of success on the merits turned on the contractual interpretation of Appellant's Bylaws and statutory interpretation of NRS 116.340. Similarly, the analysis of whether Respondents met their burden in

demonstrating irreparable harm for which compensatory relief is inadequate turned on statutory interpretation of 26 USCS § 501(c)(7). Thus, the questions of law at issue in this appeal are subject to de novo review.

B. THE DISTRICT COURT COMMITTED ERROR WHEN FINDING THAT RESPONDENTS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE APPELLANT'S BYLAWS DO ALLOW FOR RENTALS; THEREFORE, THE MOTION FOR PRELIMINARY INJUNCTION SHOULD HAVE BEEN DENIED.

The District Court committed error when finding that Respondents demonstrated a reasonable likelihood of success on the merits as to the issue of the permissibility of short-term vacation rentals/transient commercial use, where the interpretation of Appellant's Bylaws contradicted the plain language of said Bylaws and ran afoul of NRS 116.340 and the universal legal principles favoring the free, unrestricted use of property. Interpretation of a contract's terms is question of law. *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003). Contractual provisions should be harmonized whenever possible, and no provisions should be rendered meaningless. *See, Eversole v. Sunrose Villas VIII Homeowners Ass 'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996); *Musser v. Bank of Am.*, 114 Nev. 945, 964 P.2d 51, 54 (1998).

Appellant's Bylaws provide that:

> [The Elk Point Country Club] shall not operate its properties or facilities with the view of providing profit to its members but rather such properties and facilities shall be held, operated, and made available to the use and enjoyment of its members upon payment of such assessments and charges as will fairly meet its costs of operation

> and provide a reasonable accumulation of funds for repairs, replacements and additions.

1 AA 5.

> [EPCC'S] primary purpose is hereby affirmed to be to provide its members the pleasure of fellowship and recreation, and its corporate functioning shall be designed to achieve in highest measure such purpose. It shall not operate its properties or facilities with the view of providing profit to its members but rather such properties and facilities shall be held, operated, and made available for the use and enjoyment of its members.

5 AA 99.

Additionally, Article XVI, Section 2 of the Bylaws provides that, "The property of members shall be used for single family residential purposes only." 1 AA 5.

First, Respondents contended that the restriction on property to be used for single family residential purposes prohibits only short-term vacation rentals. However, if this clause were construed in such a manner, this would be in direct violation of NRS 116.340(1). NRS 116.340(1) provides that:

> …a person who owns, or directly or indirectly has an interest in, one or more units within a planned community that are restricted to residential use by the declaration ***may use that unit or one of those unit for a transient commercial use only if: (a) the governing documents of the association and any master association do no prohibit such use***; (b) the executive board of the association and any master association approves the transient commercial use of the unit, except that such approval is not required if the planned community and one or more hotels are subject to the governing documents of master association and those governing documents do not prohibit such use; and (c) the unit is

> properly zoned for the transient commercial use and any license require by the local government for the transient commercial use is obtained.

See, NRS 116.340(1) (Emphasis added).

NRS 116.340(1), by its plain language, explicitly provides that regardless of and notwithstanding any "residential use only" restrictions in the operative Bylaws of a community, rental activity is permissible, unless there is an explicit and direct prohibition of such activity in the governing documents. This codified mandate of NRS 116.340(1), specifically overriding any possible prohibition of rental activity through vague "residential use only" clauses, reflects the prevailing position of courts all across the United States that short-term vacation rentals do not violate restrictive covenants requiring property to be used only for residential purposes and prohibiting its use for business purposes. *See Santa Monica Beach Prop. Owners Ass'n v. Acord*, 219 So. 3d 111, 114-5 (Fla. 1st Dist. Ct. App. 2017) (Citing to a litany of cases from disparate states with holdings consistent with the foregoing).

If a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes, no matter how short the rental duration, this use is residential and not commercial (thus consistent with any restrictions to "residential use"), and the nature of the property's use is not transformed from residential to business simply because the owner earns income from the rentals. *See Id*. (Citing to *Wilkinson v. Chiwawa Communities Ass'n*, 327 P.3d 614, 620 (Wash. 2014) (en banc); *Slaby v. Mountain River Estates Residential Ass'n*, 100 So. 3d 569, 579 (Ala. Civ. App.

2012). Indeed, "[N]either [the] financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial." *Santa Monica Beach Prop.*, 219 So. at 115 (Quoting *Slaby*, 100 So. at 580 (Ala. Civ. App. 2012)). Thus, the fact that certain owner-members of the EPCC community may derive financial benefit from the rental activity (and the fact of any advertisements by them of their homes for rental activity) is not prohibited by the residential use restriction in the Bylaws.

Second, Respondents contended that the preamble of Appellant's Bylaws prohibits short-term vacation rentals. However, no plausible reading of the plain language of this clause constitutes a prohibition on rental activities in the EPCC community. The clause merely prohibits Appellant from operating its properties or facilities "***with the view of providing profit to its members***" (e.g., tailoring its operations of its properties or facilities with the intention to enhance its members' profits from rental activity, which Appellant does not do). Appellant does not conduct operations of its properties or facilities in a manner to enhance its members' profits from rental activity, but rather conducts ordinary maintenance and operation of such properties and facilities in a manner consistent with facilitation of ordinary member use of these properties and facilities. 3 AA 69.

Additionally, the plain language of the phrase "…shall not operate its properties or facilities with the view of providing profit to its members…," by

operation of the words "***with the view of***" only indicates that the EPCC board cannot operate its properties and facilities in a manner ***that affords any benefits*** to profitable operations within the community such as rentals, and is only required to operate its properties and facilities in an ordinary manner as if only for the enjoyment of its members, ***without any regard*** for whether rentals of any sort are occurring in the community or not, as any explicit language prohibiting the same is absent. This interpretation is furthered by the requirement that any alleged restrictions on activities such as rentals be clear, specific, direct, and unambiguous to be enforceable, in the interest of "favoring the free and unrestricted use of property" (implicitly acknowledged in Nevada by the codification of NRS 116.340(1). *See* NRS 116.340(1); *Forshee v. Neuschwander*, 381 Wis. 2d 757, 764-6, 769 (Wis. 2018); *Santa Monica Beach Prop.* 219 So. at 116.

With this interpretation of the Bylaws, current short-term rentals occurring in the EPCC community would be perfectly legitimate per Appellant's Bylaws and thus, allowable under NRS 116.340(1). Therefore, Respondents failed to demonstrate a reasonable likelihood of success on the merits as to the issue of the permissibility of short-term vacation rentals/transient commercial use and the District Court should have found accordingly.

Furthermore, Respondents entirely failed to demonstrate a reasonable likelihood of success on the merits as to the issue of the permissibility of long-term

rentals since this issue was not addressed in their motion or reply. 1 AA 1-42; 5 AA 97-189. The District Court's *sua sponte* order for preliminary injunction against long-term rental activities was wholly unsupported and constituted clear error.

C. THE DISTRICT COURT COMMITTED ERROR WHEN FINDING THAT RESPONDENTS DEMONSTRATED THAT IRREPARABLE HARM WOULD BE CAUSED IF THE PRELIMINARY INJUNCTION WAS NOT ISSUED BECAUSE APPELLANT'S 26 USCS § 501(C)(7) TAX-EXEMPT STATUS WAS NOT THREATENED BY ALLOWING EITHER SHORT-TERM OR LONG-TERM RENTALS OF HOMES IN THE EPCC COMMUNITY.

Whether Appellant was in any real danger of losing its 26 USCS § 501(c)(7) tax-exempt status, is also wholly a question of law subject to de novo review. Appellant reiterates that all facts applicable to this question are not in dispute. There are homeowners in the community who engage in short and/or long-term vacation rental activities, and the EPCC Board does not operate the community's facilities in any manner that would benefit such activities, nor does it receive any share of the revenue from said rental activities. 3 AA 72. Whether a real danger of Appellant's 26 USCS § 501(c)(7) tax-exempt status existed hinges on the interpretation of the applicable legal provisions/standards governing this issue, and whether this interpretation as applied to these undisputed facts would result in a loss of said tax-exempt status.

The relevant Federal Regulation, 26 CFR l.501(c)(7)-l, provides in part that the exemption provided by section 501(a) [26 USCS § 501(a)] for organizations described in section 501(c)(7) [26 USCS § 50l(c)(7)] applies only to clubs which are

organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, but does not apply to any club if any part of its net earnings inures to the benefit of any private shareholder. When a statute's language is clear and unambiguous, it must be given its plain meaning . . . ." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). "A statute is ambiguous if it is capable of being understood in two or more senses by reasonably well-informed persons." *Id.* "When construing an ambiguous statute, '[t]he meaning of the words used [in the statute] may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it.'" *Id.* at 476, 168 P.3d at 737-38 (alterations in original)(quoting *McKay v. Bd. Of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986)).

It is clear from the plain language of the foregoing Regulation that the 26 USCS § 501(c)(7) is only concerned with business that the 26 USCS § 501(c)(7) tax-exempt club/HOA/organization ***itself*** engages in (i.e., transacts itself) and that the rental activity of private members is irrelevant. This construction is further supported by corresponding caselaw. *See e.g.; Augusta Golf Ass'n v. United States*, 338 F. Supp. 272, 275-6 (S.D. Ga. 1971) (holding that activities are not inconsistent with the enumerated 26 USCS § 501 (c)(7) purposes of "pleasure, recreation, and other nonprofitable purposes" as long as such activities did not amount to the conducting of business for profit/a situation where business is being transacted with the general

public); *Pittsburgh Press Club v. United States*, 615 F.2d 600, 606 (3rd Cir. 1980) (Engaging in exclusive analysis of the proportion of member and non-member monetary receipts of the subject tax-exempt club itself, in evaluating whether it engaged in business that would make it non-exempt).

Appellant is not engaged in, and does not transact, any rental business activity whatsoever (for a profit or otherwise); such activity is conducted wholly independently of Appellant by individual members. 3 AA 72. Appellant derives no income or profit from the private rental activity of its individual members. *Id.* Nor does Appellant transact business or derive incidental income or profit from visitors to the community by permitting them to utilize its facilities for fee. *Id.*

Thus, per 26 USCS § 50l(c)(7) and 26 CFR 1.501(c)(7)-1, concerned only with transactions of/engagement business by the HOA/club *itself*, it is beyond dispute that Appellant has not engaged in any conduct that would jeopardize its tax-exempt status under said statutes in this manner and the District Court should have found accordingly. Additionally, in the absence of a case or example on point, it was inappropriate for the District Court to speculate on what a federal court "could" rule regarding federal tax regulations.

There can also be no advertising-based presumption of a prima facie case that Defendant has engaged in impermissible business transactions, where like here, Defendant has had zero involvement in advertisements for rental activity in the

EPCC community. While advertisement for rental activity in the EPCC community does exist, Appellant has no involvement whatsoever with such advertisements, which are put out by private members without any input or involvement of Appellant. 3 AA 72-73. Appellant reiterates that per 26 CFR 1.50l(c)(7)-1, and cases like *Augusta Golf Ass'n*, 338 F. Supp. at 275-6 and *Pittsburgh Press Club*, 615 F.2d at 606, federal tax law is only concerned with the subject tax-exempt club/organization itself engaging in the transaction of business or advertising activity in furtherance thereof.

Furthermore, 26 USCS § 501(c)(7) also requires that "no part of the net earnings ... " of organizations/clubs exempt from tax under it (such as EPCC) " ... inures to the benefit of any private shareholder." The *Rochester* Court stated that a club's funds that were derived from profitable transactions with the general public improperly inured to the benefit of its members/private shareholders in violation of 26 USCS § 501 (c)(7) if the members/private shareholders obtained some sort of financial benefit from said income that the public did not such as lower dues or better club operations; conversely no inurement occurs if funds raised exclusively from member activity is used to benefit members. *See, Rochester Liederkranz, Inc. v. United States*, 456 F.2d 152, 155-7 (2nd Cir. 1972).

No such impropriety has occurred here. Appellant derives no income from non-members or the general public, its only sources of income being its yearly

assessment fee that all members must pay, initial membership fees that every new buyer of a home in the EPCC community must pay, and rental fees charged to members for rental of boathouses/places to park their boats (only members are permitted to use/rent these facilities). 3 AA 72-74. Such funds are utilized equitably for the normal upkeep of the HOA's facilities for the benefit and use of its members. 3 AA 74. No special improvements, maintenance or other types of activities, have been conducted by the HOA to facilitate, encourage or assist private members engaged in rental activity, using the aforementioned member-derived funds or otherwise. *Id*. Thus, no preferential benefit has inured towards any subset of private member engaged in rental activity out of Appellant's funds. Consequently, no inurement "to the benefit of any private shareholder" in violation of 26 USCS § 501(c)(7) has occurred, and the HOA has not endangered its tax-exempt status in this manner.

Thus, Appellant's tax-exempt status under 26 USCS § 501(c)(7) was in no danger from the private rental activity of individual members. There was simply no imminent "irreparable harm for which compensatory relief is inadequate" of this nature (or indeed any so of possible imminent harm at all) to justify a preliminary injunction.

In reaching its decision that there was a threat of permanent and irreparable harm if Appellant's 26 USCS § 501(c)(7) tax-exempt status was lost and that an

award of compensatory damages would be a futile for this type of damage, the District Court also improperly relied on speculative testimony from Michelle L. Salazar who was not properly qualified as an expert witness. NRS 50.275 states that there are three requirements a witness must satisfy as an expert: (1) The expert "must be qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement), (2) the expert's specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement), and (3) the expert's testimony must be limited to matters within the scope of [his or her] knowledge (the limited scope requirement)." *Hallmark v. Eldridge*, 124 Nev. Adv. Rep. 48, 189 P.3d 646, 650 (2008) (referencing NRS 50.275).

Michelle L. Salazar, through her declaration and testimony, was not qualified to testify as an expert as it relates to tax exempt entities. The qualifications that were provided were as to her knowledge of valuation and examination of fraud, which were not at issue. 10 AA 756. Consequently, any experience she may have had would not speak to the situation at hand and any opinions she may have had were outside the scope of her knowledge. Thus, the District Court should have precluded any opinions or testimony from Michelle L. Salazar regarding Appellant's 26 USCS § 501(c)(7) tax-exempt status.

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D. THE DISTRICT COURT COMMITTED ERROR BY FAILING TO CONSIDER PUBLIC INTEREST AND POLICY CONCERNS WHICH WEIGH AGAINST INVALIDATING CONTRACTS BETWEEN RENTERS AND HOMEOWNERS THROUGH ENJOINING SHORT-TERM AND LONG-TERM RENTALS OF HOMES IN THE EPCC COMMUNITY.

Another factor that Courts must consider when determining whether to grant a preliminary injunction is whether doing so would be in the public interest. *See, Clark Co. School Dist.*, 112 Nev. at 1150. The District Court did not address this issue. However, restrictions on rental activity are not in the general public interest of the EPCC community because regulations governing rental activity were duly enacted by the Board. 10 AA 824-827. Thus, this factor also cuts against granting a preliminary injunction.

If Respondents' desire was to restrict rental activity in the EPCC community, litigation is not the proper forum. Instead, Respondents should have endeavored to advance this agenda through the proper, democratic forum (i.e., running for the HOA Board to gain control thereof or engaging in democratic voting/opinion-gauging process(es) for members). The issue of restrictions on rental activity is an internal problem of the EPCC community, which should also be resolved internally. To permit Respondents to undemocratically override the will of the majority of EPCC members flies in the face of the public interest of said community members, and public policy considerations, which strongly favor democratic decision-making in this regard and the District Court should have found accordingly.

VI.
CONCLUSION

Based on the foregoing, Appellant respectfully requests that the Court issue an order to:

1. Vacate the Order Granting Preliminary Injunction; and

2. Remand this matter for further proceedings.

DATED this 18th day of October, 2021.

RESNICK & LOUIS, P.C.

/s/ Prescott Jones

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VII.
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this opening 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, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus, Times New Roman 14 point and the type-volume limitation. This brief also complies with the length requirements of NRAP 32(7) because this brief does not exceed 30 pages nor 14,000 words (the entirety of this brief contains 24 pages and 6,898 words).

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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.

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VII.
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **APPELLANT'S OPENING BRIEF** was served this 18th day of October, 2021, by:

[X] **BY ELECTRONIC SERVICE**: by transmitting via the Court's electronic filing services the document(s) listed above to the Counsel set forth on the service list on this date as follows:

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