IN THE SUPREME COURT OF THE STATE OF NEVADA

ELK POINT COUNTRY CLUB HOMEOWNERS', ASSOCIATION, INC., AKA ELK POINT COUNTRY CLUB, INC., A NEVADA NON-PROFIT, NON-STOCK CORPORATION,
Appellant,
vs.
K. J. BROWN, L.L.C., A NEVADA LIMITED LIABILITY COMPANY; AND 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,
Respondents.

Electronically Filed
Dec 01 2021 02:21 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 82484
District Court Case No. 2020-CV-00124

APPEAL

From the Ninth Judicial District Court, Department 1
The Honorable Nathan Tod Young, District Court Judge

RESPONDENTS' ANSWERING BRIEF

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I. 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 parent corporation of respondents K. J. Brown, L.L.C., and 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 ("Respondents").

The following are counsel of record for Respondents who have appeared in this action:

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Richard H. Bryan, Esq. of the law firm of Fennemore Craig, P.C.

DATED this 1st day of December 2021.

By: */s/ Sophie A. Karadanis, Esq.*
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IV. ROUTING STATEMENT

Appellant inaccurately asserts that the appeal does not involve any of the categories set forth in NRAP 17(b). The subject matter of this appeal is exclusively focused on the district court's order granting a preliminary injunction in Respondents' favor, which is presumptively assigned to the Court of Appeals. NRAP 17(b)(12). There is nothing in the record to support Appellant's claim that this appeal concerns a "matter of first impression" or "public policy" concerns. Appellant's assertion is without merit.

V. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Are Elk Point Country Club ("EPCC" or "Appellant") members permitted to rent their units to non-members and generate revenue by inviting and opening up access to EPCC's privately owned property and facilities when the tax-exempt social club's Bylaws and Rules and Regulations prohibit EPCC from operating its private properties and facilities with the intent of providing profit to its members?

2. Was the district court's determination in clear error when it found that for-profit rental use of member units puts EPCC's 26 U.S.C. § 501(c)(7) ("I.R.C. § 501(c)(7)") tax-exempt status at risk when its conclusion was based on unrefuted testimony from a certified public accountant that was never even challenged by EPCC, let alone contradicted?

3. Whether the district court's finding that EPCC would suffer irreparable harm if it lost its tax-exempt status was in clear error, even though unrefuted evidence established such harm.

VI. STATEMENT OF THE CASE[1]

The Appellant seeks review as to whether the lower court correctly entered a preliminary injunction order enjoining EPCC, a tax-exempt social club, from permitting and facilitating individual social club members from generating revenue through for-profit commercial rental use of their units, including both long-term and short-term rentals. 1AA1-42. EPCC was established in 1925 as a private, members-only Elks Club and since that time has maintained its I.R.C. § 501(c)(7) tax-exempt status. 2AA44 at ¶ 3. It oversees and manages a lakefront, gated subdivision consisting of 100 member-owned units in Zephyr Cove on Lake Tahoe, which are subject to a set of Bylaws and Rules and Regulations. 2AA44 at ¶¶ 3 and 4. The Internal Revenue Service ("IRS") prohibits an I.R.C. § 501(c)(7) tax-exempt social club from providing any commercial benefit to any one of its private social club members, and prohibits a social club from operating to provide pleasure and recreation for a profit. 2AA46 at ¶ 10. EPCC's Bylaws, which all members contractually agree to abide by in order to be accepted as a member, comply with the IRS's mandatory I.R.C. § 501(c)(7) tax-exempt requirements in that the Bylaws prohibit EPCC from operating its property and facilities with the intent of providing

[1] Appellant's Opening Brief fails to include a statement of the case as required by NRAP 28(a)(7).

profit to its members. 2AA47-48 at ¶¶ 13-17. The Rules and Regulations prohibit members from operating a business on their individual property. 2AA48 at ¶ 16.4.

Thus, EPCC was *not* established as a means for its private social club members to capitalize on the recent boom of vacation home rentals and thus, sell the membership's exclusive access to the EPCC's private property and facilities, including a 13-acre beach and marina, to non-members. Rather, since its inception nearly 100 years ago, and in compliance with the Bylaws, Rules, and IRS requirements, EPCC has operated with the primary purpose of providing its members with the pleasure of fellowship and recreation on the pristine shores of Lake Tahoe. That is, until recently. Respondents' lawsuit was initiated because the EPCC Board has been actively encouraging and facilitating a small number of members to generate revenue through for-profit commercial rental use of their units, and thereby profiting from providing access to EPCC's private property and facilities to non-members. 2AA49-50 at ¶¶ 22-27.

The lower court granted Respondents' motion for preliminary injunction following an evidentiary hearing. 7AA595-604. The lower court's order was based on its interpretation of the social club's controlling Bylaws, Rules and Regulations, and unrefuted expert testimony, all of which established that EPCC was at risk of losing its I.R.C. § 501(c)(7) tax-exempt status if such for-profit use by its members was allowed to continue, as well as materially altering the character of the

community, thus constituting irreparable harm. 7AA595-604. Instead of seeking to protect the social club's nearly 100-year-old tax-exempt status, Appellant has appealed the lower court's well-reasoned interpretation of the Bylaws and Rules, and its evidence-based findings that EPCC is in jeopardy of losing its tax-exempt status, while curiously supporting the expanse of commercial rental enterprises within the historic tax-exempt social club. 9AA617-633. Appellant has failed to present any evidence refuting the lower court's order was improper. Thus, Respondents respectfully submit that the preliminary injunction order should be upheld.

VII. STATEMENT OF THE FACTS

Appellant's Statement of Relevant Facts misstates relevant facts and materials. Further, consistent with its conduct in the district court, Appellant provided no credible or admissible evidence to establish the district court erred in granting the preliminary injunction order.

Appellant, EPCC, was established in 1925 as a private, members-only, I.R.C. § 501(c)(7) tax-exempt social club located in Zephyr Cove on Lake Tahoe. 2 AA 45 at ¶¶ 3, 9, and 16. EPCC was originally called the Nevada Elks Tahoe Association and later changed its name to Elk Point Country Club, Inc. 6AA Part 1 at 206-208.

Title to all real property within the social club, other than the 100 individual units, which includes the private roads, private parking, a 13-acre beach, marina,

boat storage, private water system and water tank, beach deck, and barbeque area, as well as water rights certificates for approximately 89-acre feet, is held in the name of EPCC. No owner/member has any right or interest in any of the real property owned by EPCC. 2AA45 at ¶ 8; 6AA Part 3 at 347. A member's ability to utilize EPCC's private property and facilities is because of their status as a member of the private social club. 2AA46 at ¶ 11. EPCC is *not* a homeowners association formed in accordance with NRS 116. There is no copy of any covenants, conditions and restrictions of the real property in the record, because none exist. On or around July 2004, the EPCC Board purported to adopt an amendment to a set of Bylaws changing the name of Elk Point Country Club, Inc. to Elk Point Country Club Homeowners Association, Inc. 6AA Part 2 at 328. The governing documents consist of Amended Bylaws of Elk Point Country Club, Inc., recorded as Document No. 0653319 on August 26, 2005, (6AA Part 1 at 224 and Part 2 at 247) ("Bylaws"), as well as the Articles of Incorporation (6AA Part 1 at 193-196), and the recorded Elk Point Country Club Homeowners Rules, Regulations and Guidelines ("Rules") (6AA Part 2 at 251-252).

Respondents are unit owners and social club members within EPCC. 2AA44 at ¶¶ 1 and 2. On July 2, 2022, Respondents filed a lawsuit seeking injunctive relief against EPCC on the basis that it is refusing to enforce the social club's Bylaws and Rules, and because the EPCC Board was actively encouraging and facilitating

members to generate revenue through the for-profit commercial rental use of its units; thereby, profiting from providing use and access to EPCC's private property and facilities to non-members. 2AA43-61. Specifically, the EPCC Board purported to adopt new Rules, Regulations and Guidelines ("Amended Rules") permitting short-term and long-term rental use of units. 1RA056-061.[2] EPCC also created a rental calendar to coordinate and manage dates; whereby, various owner units are rented, and worked with Douglas County when owners applied for vacation home rental permits. 7AA598, 599 at ¶¶ 9 and 15.

Respondents assert that the Appellant's conduct is in violation of the social club's Bylaws and Rules, and additionally places EPCC's I.R.C. § 501(c)(7) tax-exempt status at risk, which constitutes irreparable harm. 2AA43-61. The IRS prohibits an I.R.C. § 501(c)(7) tax-exempt social club from providing any commercial inurement or benefit to any one of its private social club members, and prohibits a social club from operating to provide pleasure and recreation for a profit. 2AA46 at ¶ 10.

EPCC's Bylaws, which all members contractually agree to abide by to be accepted as a member, are exactly consistent with the IRS's mandatory I.R.C. § 501(c)(7) tax-exempt requirements, in that the Bylaws prohibit EPCC from

[2] Appellant failed to include the Amended Rules in its Appendix, which was an Exhibit at the hearing on the MFPI.

operating its property and facilities from the standpoint of providing profit to its members. 2AA47-48 at ¶¶ 13 and 17. The pertinent sections of the governing documents Respondents seek to enforce are set forth below, and are the basis under which EPCC has operated since 1925. 2AA47-48 at ¶ 16; 6AA Part 1 at 198 to 3AA343.

The Bylaws Preamble has been duplicated and repeated in the various iterations of the bylaws and states in pertinent part (***emphasis added***):

> [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 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.

6AA Part 2 at 226; 7AA598-599.

The Bylaws at Article III, Section 2 state: "The Executive Board shall have the power to conduct, manage and control the affairs and business of the Corporation and to make rules and regulations not inconsistent with the laws of the State of Nevada, the Articles of Incorporation and the Bylaws of the Corporation." 7AA 598; 6AA231. Article III, Section 2 of the Bylaws has been duplicated and repeated in every reiteration of the Bylaws identified herein. 7AA598.

The Bylaws at Article XV provide that no person is eligible to be a member without first having applied for membership, and having been accepted by the Board of Directors, and paying a membership fee. 6AA Part 2 at 239-241.

The Bylaws at Article XVI, Section 2, states: "The property of members shall be used for single family residential purposes only." 6AA Part 2 at 242.

The Bylaws at Article XVI, Property Right of Unit Owners, Section 5, state the Governing Documents run with the land and are binding on all unit owners who purchase an interest within the social club. It states:

> The grantee or grantees of any property or premises, and the property and premises within the tract of the corporation, shall be subject at all times to the Articles of Incorporation, Bylaws, rules and regulations of the corporation which shall in turn bind every subsequent grantor, his or her executors, administrators, successors or assigns.

6AA Part 2 at 242.

The Rules at ¶ 10 state: "No persons shall operate any business on club premises or their individual property within the Club." 6AA Part 2 at 251-252.

On June 29, 2020, Respondents filed a Motion for Preliminary Injunction ("MFPI") seeking to enjoin Appellant from authorizing and condoning unit owners, who advertise their units as "vacation home rentals" for profit to non-members, while offering use of EPCC's social club amenities such as its private gated community, private beach access, private beach deck and marina. Such for-profit use runs afoul of EPCC's Bylaws and Rules, jeopardizes EPCC's I.R.C. § 501(c)(7) tax-

exempt status and impacts the other social club members' quiet and peaceful enjoyment of their property. 1AA1-13. 1RA043-052[3]

On August 5, 2020, Appellant filed its Answer to the First Amended Complaint generally denying the allegations contained therein. 4AA85-95.

On August 6, 2020, Appellant filed its Opposition to MFPI ("Opposition"). 3AA64-84. Appellant's opposition was not supported by *any* evidence. Instead, it was based on its counsel's erroneous and unsupported belief that EPCC's I.R.C. § 501(c)(7) tax-exempt status is not put at risk if social club members are engaged in the transient commercial use of their units because it claims the IRS is only concerned with whether EPCC, itself, is engaged in for-profit activities. *Id.* EPCC argued the IRS is not concerned with the for-profit activities of its social club members. *Id.* As a result, Appellant asserted that EPCC's tax-exempt status is not at risk and thus, Respondents could not establish a reasonable likelihood of success on the merits. *Id.*

On August 24, 2020, Respondents filed their Reply in Support of MFPI ("Reply") and responded to Appellant's flawed interpretation of the effect of social club member's for-profit rental use on EPCC's tax-exempt status. 5AA96-187. Respondents included a Declaration from Michelle L. Salazar, a Certified Public

[3] Appellant failed to include as part of its Appendix, the Declarations of Kurt Brown and Nancy Gilbert, which were Exhibits 2 and 3 to Respondents' MFPI.

Accountant, to respond to and refute Appellant's flawed and unsupported position. The Certified Public Accountant introduced evidence that (1) the rental of member units to non-members would likely fall under the definition of inurement which is in violation of I.R.C. § 501(c)(7) because if a member is renting their unit to a non-member for a profit, a logical conclusion is that the rent and revenue received is in large part due to the benefits the member has available through use of the EPCC exclusive and private facilities, which puts EPCC's tax exempt status at risk; (2) that the activities of private social club members of EPCC are relevant for I.R.C. § 501(c)(7) purposes and that activities of private members would likely be considered by the IRS in determining whether a social club is in compliance with I.R.C. § 501(c)(7); (3) that EPCC's tax-exempt status under I.R.C. § 501(c)(7) could be at risk even if the organization, itself, does not derive any income or profit from vacation rentals in the community, and that EPCC's tax-exempt status could very well be jeopardized by the conduct of its members because it could be determined that EPCC is providing pleasure and recreation on a commercial basis; (4) that is because EPCC is encouraging, facilitating and assisting unit owners in renting their units on a transient short-term basis, it is promoting pleasure and recreation on a commercial basis which puts EPCC's tax-exempt status at risk; (5) that if EPCC is found to be out of compliance with the tax exempt requirements under I.R.C. § 501(c)(7), the IRS could revoke its tax-exempt status, which could mean that EPCC

could be required to file federal income tax returns, and pay all applicable income taxes, including interest, penalties and potentially an excise tax; and (6) that if the IRS opens a tax fraud investigation for inappropriately claiming an I.R.C. § 501(c)(7) tax-exempt status, EPCC and its social club members could be exposed to tax exposure and tax liability from its inception in 1924 through today. 5AA115-122.

Almost two months later, on October 19, 2020, and just four calendar days before the evidentiary hearing on Respondents' MFPI, Appellant filed an *Ex Parte* Request for Order Shortening Time and Motion to Partially Strike Respondent's Reply incorrectly claiming Respondents introduced new arguments and legal theories not previously presented. 8AA605-616. The district court denied both requests at the evidentiary hearing after considering Appellant's delay, its prejudicial last-minute motion, and the fact that Respondents' Reply had clearly responded to Appellant's flawed arguments and legal analysis presented in its Opposition to Motion for Preliminary Injunction. *Id*. 10AA639.

On October 23, 2020, an evidentiary hearing was held on the MFPI. 10AA 634-879. There, Appellant chose not to introduce any evidence to support its flawed position that EPCC's I.R.C. § 501(c)(7) tax-exempt status was not put at risk by the EPCC Board condoning and permitting social club members to engage in for-profit renting of their units to non-members, inclusive of use of EPCC's private property

and facilities. 6AA188-591. In contrast to Appellant's failure to provide any evidence to the district court, Respondents introduced testimony from Michelle L. Salazar, in which she testified that EPCC's tax-exempt status was put at risk by way of members engaging in both short-term and long-term rental use of their units. 10AA770, 785-787. Appellant introduced no evidence challenging Ms. Salazar's testimony.

Following the hearing, the district court entered an oral decision in favor of Respondents, which was reduced to a written order on December 15, 2020. 7AA592-604. A Notice of Entry of the Order Granting Plaintiffs' Motion for Preliminary Injunction was entered on January 5, 2021. The district court made the following findings of fact and conclusions of law:

> 15. The evidence demonstrates that the EPCC Board of Directors have failed, refused, and declined to prohibit transient commercial use within EPCC and have, in fact, encouraged and facilitated such use, including by way of example, adopting the Amended Rules, creating a rental calendar identifying the dates the various Units are rented, and providing information to Douglas County when an owner seeks to have a permit issued for transient commercial use of their Unit.
>
> 16. Plaintiffs initiated this action to enjoin Defendant from encouraging, facilitating, and accommodating EPCC members from renting their Units for a profit, which use violates the Bylaws and puts EPCC's IRC 501(c)(7) tax-exempt status at risk. In addition, Plaintiffs requested that the Defendant be required to enforce its recorded Bylaws and Rules in a manner that avoids jeopardizing the tax-exempt status of EPCC.
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> ///

17. The Court finds that EPCC members are engaged in transient commercial use and/or long-term leasing of their properties and are thus, operating their Units for a profit. The Court further finds that such use is directly contrary to, and in violation of, the language set forth in the Bylaws and the Rules, which specifically prohibits EPCC from operating its properties and facilities with the view of providing profit to its members.

18. The Court finds that EPCC members engaged in renting their Units to obtain revenue constitutes a use of the Units for a profit, including both transient commercial use and long-term rentals, and that use puts EPCC's IRC 501(c)(7) tax-exempt status at risk.

19. The Court finds that Plaintiff has demonstrated a likelihood of success on the merits that EPCC members engaged in transient commercial use and long-term rental use of their Units violates the Bylaws and Rules.

21. The Court finds that EPCC members engaged in renting their Units for profit constitutes an immediate threat of permanent damage to EPCC and its members through the loss of its IRC 501(c)(7) tax-exempt status, and the loss of the character of the community.

22. The Court finds that EPCC members engaged in renting their Units for profit constitutes an immediate threat of permanent damage to EPCC by causing a change in the nature of the entity as a private social club designed to promote the social and recreational benefit to those who are members. Specifically, the Court finds that allowing members to engage in renting their Units for profit changes the nature of the organization to that of a commercial organization.

C. This Court concludes that a consistent reading of the Bylaws that gives meaning to all provisions included therein is that members are not permitted to operate their Units or any EPCC property and facilities in order to generate revenue or for a profit.

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D. This Court finds that any use of a Unit within EPCC to generate revenue or for a profit, including both transient commercial use and long-term rental use, is in violation of the clear and unambiguous terms of the Bylaws, and recorded Rules.

E. This Court finds that any use of a Unit within EPCC to generate revenue or for a profit, including both transient commercial use and long-term rental use, jeopardizes the tax-exempt social club status under the IRC.

F. This Court concludes that it would lead to inconsistent and contradictory results if, as suggested by Defendant, 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. This Court finds that there are many different classifications of tenancies recognized by the State of Nevada, including joint tenancies, tenancies in common, life tenancies, and tenancies for years. Thus, the plain language of the Bylaws, reading it in context and construing it so as to render each word, phrase and term meaningful, unambiguous, and harmonious with the whole, requires a finding that EPCC is not entitled to operate its properties and facilities to generate revenue or for a profit, which necessarily includes any rental of a Unit or EPCC property and facilities for either long-term rental or transient commercial use.

G. This Court concludes that the Amended Rules adopted by EPCC on September 14, 2019, as they relate to rental activity within EPCC, are in violation of the Bylaws, and are 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.

H. This Court concludes that Plaintiffs have met their burden of proving they have a likelihood of success on the merits. Based on the evidence presented, the intent under the Bylaws was for EPCC to be formed as a social club, to maintain that status as a IRC 501(c)(7) tax-exempt social club, and that, under the Bylaws, any use or operation of

> a Unit within EPCC, or any EPCC property and facilities, by any member, to generate revenue or for a profit, is strictly prohibited.
>
> J. Plaintiffs have met their burden, in demonstrating to the satisfaction of this Court, that there is a threat of permanent and irreparable harm if EPCC's IRC 501(c)(7) tax-exempt status is lost in the event EPCC is not immediately enjoined from allowing, facilitating and encouraging EPCC members in renting their Units or any other EPCC property and facilities, and deriving revenue or a profit from such use. An award of compensatory damages would be a futile act by this Court for this type of damage, because, in addition to the loss of the tax-exempt status, such irreparable harm includes 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.
>
> K. Plaintiffs are entitled to injunctive relief requiring EPCC to enforce its Bylaws, and to prohibit the use of any Unit, and any other portion of EPCC's property and facilities, to generate revenue or for profit, during the pendency of this case.

Id. Thus, the district court ordered that EPCC is required to enforce its Bylaws, specifically finding that its Bylaws prohibit EPCC and its social club members from deriving any revenue or profit from the operation of their properties and facilities within EPCC, and that EPCC shall immediately prohibit, prevent, and enjoin any transient commercial use and long-term rental use anywhere within the social club. *Id.*

On February 4, 2021, Appellant filed a Notice of Appeal seeking to overturn the preliminary injunction order so that short-term and long-term rental use of units could proceed unabated within EPCC. 9AA617-633.

VIII. SUMMARY OF THE ARGUMENT

This Court must apply two separate standards of review when evaluating the district court's preliminary injunction order because this appeal involves (1) the interpretation of EPCC's governing documents, which is a question of law subject to *de novo* review, and (2) the lower court's evidence-based findings of fact as to the impact that for-profit rentals have on EPCC's tax-exempt status and the resulting irreparable harm, which is reviewed for clear error. Reading EPCC's Bylaws and Rules in harmony, and ascribing meaning to all the provisions contained therein, the only plausible and proper finding is that the Bylaws and Rules do not permit EPCC social club members to engage in for-profit commercial rental use of their units. Appellant's assertion that EPCC is a homeowner's association is unsupported by the record, and any application of NRS 116.340 is entirely irrelevant. There is nothing to show the lower court's interpretation of the governing documents was anything but proper. As to the district court's conclusion that EPCC's tax-exempt status is at risk, Appellant provides no credible or admissible evidence to establish its decision was in clear error. To the contrary, expert testimony was provided by a Certified Public Account, whose unchallenged testimony was properly admitted at the preliminary injunction hearing. 10AA747-748, 788-789. This testimony confirmed that by EPCC permitting social club members to engage in for-profit rental use within EPCC's social club, its I.R.C. § 501(c)(7) tax-exempt status is and remains

in jeopardy constituting irreparable harm. The record is devoid of anything to refute those findings. Nor is there anything in the record to support Appellant's new claims of public interest and public policy concerns. Those arguments are unsupported distractions. In sum, Respondents demonstrated a reasonable likelihood of success on the merits and the preliminary injunction order should be upheld.

IX. ARGUMENT

A. THIS COURT MUST APPLY TWO SEPARATE STANDARDS OF REVIEW IN REVIEWING THE LOWER COURT'S PRELIMINARY INJUNCTION ORDER.

Generally, the scope of review on an appeal from a preliminary injunction order pursuant to NRAP 3A(b)(3) is generally limited to whether the district court abused its discretion. *Univ. & Cmty. College Sys. v. Nevadans for Sound Gov't,* 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). 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. *Id.; Dangberg Holdings v. Douglas Co.,* 115 Nev. 129, 142, 978 P.2d 311, 319 (1999); NRS 33.010.

Here, the district court's preliminary injunction order was based on its reading of the Bylaws and Rules, in that they do no permit for-profit use of social club member units, and also on the evidence that any use of a unit within EPCC to

generate revenue for a profit jeopardizes its I.R.C. § 501(c)(7) tax-exempt social club constituting irreparable harm. 7AA595-604. Thus, there is a distinct question of law as well as specific findings of fact at issue, which should each be reviewed separately by this court under their respective standards of review.

Questions of law are reviewed under a *de novo* standard, even in the context of an appeal from a preliminary injunction. *Univ. & Cmty. College Sys.,* 120 Nev. at 721, 100 P.3d at 187 (2004); *SIIS v. United Exposition Servs. Co*., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). Contract interpretation when the facts are not in dispute is a question of law that is reviewed *de novo*. *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 155 (2016); accord *Clark Cnty. Pub. Emps. Ass'n v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990) ("[T]he reviewing court is obligated to make its own independent determination, and should not defer to the district court's determination.").

Findings of fact are reviewed for clear error. *Cortes v. State*, 127 Nev. 505, 509, 260 P.3d 184, 187 (2011). Thus, this Court will not disturb a district court's findings on appeal unless the findings are clearly erroneous or are not based on substantial evidence. *Gibellini v. Klindt*, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994). Plain error is "error [that] is so unmistakable that it reveals itself from a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting *Torres v. Farmers Ins. Exch*., 106 Nev. 340 n.2, 793 P.2d

839 842 n.2 (1990)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Contrary to Appellant's arguments, this Court's review does not require any interpretation of NRS 116.340 because that statute is irrelevant. Significant to its lack of relevance is that the district court did not even include NRS 116.340 as part of its analysis or order. Further, this Court's review of the lower court's preliminary injunction order does not require this Court to interpret I.R.C. § 501(c)(7), because the appeal turns on whether the evidence sufficiently established that EPCC's I.R.C. § 501(c)(7) tax-exempt status *is at risk*, which is a question of fact. The appeal does not turn upon the meaning of the statute, as Appellant incorrectly asserts.

B. THE CORRECT INTERPRETATION OF EPCC'S BYLAWS AND RULES CONFIRMS FOR-PROFIT COMMERCIAL RENTAL USE OF MEMBER UNITS IS NOT PERMITTED.

It is not contested that EPCC is subject to its Bylaws and Rules. EPCC's Bylaws and Rules are contracts governed by general principles of contract law. *May v. Anderson,* 121 Nev. 668, 672, 199 P.3d 1254, 1257 (2005). Contracts will be construed from their written language and enforced as written. *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 20 (2001). Thus, when a contract's

language is unambiguous, this Court must construe and enforce it according to that language. *See In re Amerco Derivative Litig*., 127 Nev. 196, 211, 252 P.3d 681, 693 (2011). The law further provides that contractual provisions should be harmonized whenever possible, and no provisions should be rendered meaningless. *Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996); *Musser v. Bank of Am.,* 114 Nev. 945, 949, 964 P.2d 51, 54 (1998).

Turning to the language of the Preamble of EPCC's Bylaws, duplicated and repeated in the numerous reprintings, it states: "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 to the use and enjoyment of its members."

Appellant's desired interpretation is that rental use is "perfectly legitimate" because there is no explicit language prohibiting such use and that EPCC is only required to operate its property 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." *See* Appellant's Opening Brief, p.16, ll. 1-14.

This analysis is flawed and assumes its desired result without giving actual meaning to the language used in the Preamble. EPCC's Preamble is clear: There shall be no operation of EPCC's properties or facilities which provide profit to EPCC or its social club members. With such a clear statement against any commercial use,

which would have the effect of destroying the social club's tax-exempt status, it is absurd to expect the social club's Bylaws to include a list itemizing every actual or potential prohibited activity when the prohibition itself does not permit *any* activities that allow members to generate a profit through the use of EPCC's property or facilities.

Appellant's tunnel vision interpretation of the Bylaws asks this Court to ignore the underlying basis for which EPCC unit owners are even allowed to use EPCC's tax-exempt private property and facilities—it is only because of their status as *members* of the private social club allowing them exclusive access and use to EPCC's facilities and property. 7AA597 at ¶ 6; 10AA698-699, 705-709. No individual or entity that owns a unit within EPCC has any ownership interest in EPCC's real property. 7AA597 at ¶¶ 4 and 5; 10AA649-650, 661-664, 700, 346-347. Purchasers of Units located within EPCC, prior to becoming a member, must apply for and be accepted as a member and must pay an initial membership fee to EPCC, which is currently $20,000.00. *Id.* The membership applications require that each unit owner agree to be contractually bound by the Bylaws and Rules of EPCC's social club. 10AA698-699, 705-709. In exchange for one's membership, EPCC members are permitted exclusive access and use of EPCC's private property and facilities. 7AA597 at ¶ 6. Contrary to Appellant's unsupported assertion, EPCC unit owners do not have any special right to the "free and unrestricted use of

property" that permits them to destroy EPCC's tax-exempt status and the social club itself, expose individual social club members to tax liability, and override their agreed-upon contractual obligations under EPCC's Bylaws and Rules.

The Preamble provision should be analyzed and harmonized with the Bylaws as a whole. Appellant ignores the actual language of the Preamble and Bylaws as a whole or separately.

The first part of the Bylaws Preamble phrase provides: "***It*** [the Elk Point Country Club] shall not ***operate*** . . ." 6AA226 (***emphasis added***). Under Article II, § 1 of the Bylaws, the EPCC Board of Directors is the ruling and governing body of the corporation, and it "shall apply all rules regulating the affairs and conduct of the Corporation, subject in each case to the provisions of [the] Bylaws and the Articles of Incorporation and subject to the laws of the State of Nevada. 6AA229. Further, Article III, § 2 of the Bylaws, the EPCC Board has the power to "conduct, manage and control" the social club. 7AA598; 6AA231. Thus, the responsibility of ensuring that the operations of the social club are in compliance with the Bylaws and the Rules lies directly with the EPCC Board of Directors. It is nonsensical that EPCC's Board is allowed to ignore and disregard the activities of its social club members when it is directly their responsibility to ensure that each of its members are in compliance.

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EPCC is prohibited from operating in a manner that is in conflict with the Bylaws and Rules, and no evidence exists authorizing the EPCC Board to unilaterally make up how it wants to operate the social club outside of the Bylaws and Rules.

The second part of the phrase provides: "its properties or facilities. . ." 6AA 226. EPCC's property and facilities consist of all property held in the name of Elk Point Country Club, Inc., which includes a gated subdivision with private roads, private parking, a private beach, marina, boat storage, private water system and water tank, beach deck, barbeque area, water rights certificates for approximately 89-acre feet, and a large water tank and water pumping system. 2AA45 at ¶ 8; 6AA Part 3, 347 (Assessor Parcel Map). The real property and facilities are solely owned by the EPCC. *Id.* EPCC members do not have any ownership interest in that property. 7AA597 at ¶¶ 4 and 5; 10AA649-650, 661-664, 700, 346-347.

The third part of the phrase provides: "with the view of providing ***profit*** to its members . . ." 6AA226. (***Emphasis added***). Profit is defined as "[t]he excess of revenues over expenditures in a business transaction; gain (2).Cf. earnings; income." PROFIT, Black's Law Dictionary (11th ed. 2019). Earnings is defined as "[r]evenue gained from labor or services, from the investment of capital, or from assets." EARNINGS, Black's Law Dictionary (11th ed. 2019). As applied to the rental issue on appeal, it is undisputed that a small number of EPCC members are renting their units as both long-term rentals and short-term vacation

home rentals. 2AA49 at ¶¶ 22-24. Regardless of whether the rental use is short-term or long-term, if a member is generating revenue from the transaction, no matter the duration, it is a for-profit use, and this rationale is consistent with the IRS's analysis when reviewing tax-exempt entities. 10AA785-787, 790-793.

The final part of the phrase provides: "but rather such properties and facilities ***shall*** be held, operated, and made available to the use and enjoyment ***of its members***." 6AA226. (***Emphasis added***). Stated in the inverse, there is a mandatory requirement that EPCC's private property and facilities cannot be "held, operated or made available" to be used by non-members, because the use and enjoyment is restricted to its members only. Thus, only members, and their non-paying guests, are authorized to use and enjoy access to EPCC's properties and facilities.

Ascribing meaning and giving import to all the language used in EPCC's Preamble, its only plausible and proper reading is that the EPCC Board has no authority to haphazardly permit a small number of EPCC members to engage in commercial rental activities anywhere within the social club. Appellant's flawed interpretation fails to connect all the dots. The short-term rental rates for units range from $311.00 to $671.00 per night as evidenced by various advertisements on vacation home rental websites, each of which prominently offer and advertise full access to EPCC's private beach and marina. 6AA at Part 3, 349 to 6AA Part 5 at 421. The singular act of a member renting a unit cannot be viewed in a vacuum

when there is a vital interplay between what benefits, in the form of profits, EPCC's properties and facilities are affording to social club members who decide to run a rental business through their units. Moreover, the rentals impermissibly allow non-members to use the properties and facilities, which use is expressly prohibited.

Further, EPCC, through its Board, is not just an innocent bystander to the commercial rental activities being conducted by a small number of its membership. Appellant conveniently omits facts that the EPCC Board of Directors has actively coordinated, encouraged, and facilitated for-profit rental use of units within EPCC's social club by purporting to adopt Amended Rules that permit the short-term and long-term rental use of units. 1RA053-095. Notably, those Amended Rules were omitted from Appellant's Appendix. The EPCC Board created and manages a rental calendar that identifies and coordinates the dates various units are being rented and also provides necessary information to Douglas County when an owner seeks to have a permit issued for transient commercial use of their unit within EPCC. 7AA598, 599 at ¶¶ 9 and 15. Thus, based on these specific affirmative acts, the EPCC Board is, in fact, coordinating and assisting in the violation of the very Bylaws the EPCC Board is required to uphold.

Finally, logic follows that if social club members rent their units to non-members, then non-members are using and enjoying EPCC's property and facilities, which violates EPCC's Bylaws. Therefore, the district court properly found that a

small number of EPCC social club members engaged in transient commercial use or long-term leasing of their units is contrary to, and in violation of EPCC's Bylaws. This is consistent and in harmony with the Bylaws at Article XVI, § 2 that provide: "The property of Unit Owners shall be used for single family residential purposes only." 6AA Part 2 at 242. It is also consistent with EPCC's Rules at ¶ 10, which state "[n]o person shall operate any business on the Club premises, nor on their individual property, within the Club." 6AA Part 2 at 248. That is because social club members engaged in renting a unit to obtain revenue is unauthorized commercial activity. The district court aptly pointed out the obvious fact that EPCC is not acknowledging that when social club members are in the business of renting property out, making $600.00 a night to rent their units, that constitutes a business. 7AA 819.

1. Appellant's argument that prohibiting short-term vacation rentals is a violation of NRS 116.340(1) is without merit.

First, EPCC failed to establish anywhere in the record that EPCC is a common interest community under NRS Chapter 116 for which NRS 116.340(1) applies. The record only established that the social club's name was changed to "Elk Point Country Club Homeowners Association" but nothing more. 6AA Part 2 at 328. Simply inserting "homeowners association" as part of the corporation's name does not magically morph it into a common interest community under NRS 116. NRS 116.2101 sets forth specific requirements for the creation of a common interest

community and states:

> A common-interest community may be created pursuant to NRS Chapter 116 only by ***recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every county in which any portion of the common-interest community is located*** and must be indexed in the grantee's index in the name of the common-interest community and the association and in the grantor's index in the name of each person executing the declaration.

(***Emphasis added***).

Further, the Bylaws at Article IV, § 4 provide that "[t]he Board of Directors shall not sell, convey, or encumber any of the real property of the Corporation without the unanimous consent of the total membership first obtained." 6AA Part 2 at 232. No evidence exists that any portion of NRS 116.2101 occurred to create a new homeowners association entity, or that any unanimous consent was obtained from the membership to dissolve the social club and convey or sell EPCC's real property. EPCC's social club's properties and facilities remain owned by the social club entity, Elk Point Country Club, Inc., and the IRS tax-exemption still exists is in favor of Elk Point Country Club, Inc. 7AA597 fn. 1.

NRS 116.340(1) applies only to common interest communities subject to a declaration. *See* NRS 116.340(1) states:

> 1. . . . 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 units for a transient commercial use only if:

(a) The ***governing documents of the association and any master association*** do not prohibit such use;

. . .

(***Emphasis added***).

EPCC points to no instrument that exists that creates a common interest community. NRS 116.037 defines "declaration" as "any instruments . . . that create a common-interest community." NRS 116.021(1) defines "common-interest community" to mean "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. NRS 116.075 defines "planned community" as "a common-interest community that is not a condominium or a cooperative." Regardless of adding "Homeowners Association" to its name, when no declaration exists making EPCC a common-interest community under NRS 116, and where no property within EPCC is held in the name of any homeowner's association, there is no legal basis for this Court to even consider any argument concerning NRS 116.340(1). It is entirely inapplicable to EPCC, which is an I.R.C. § 501(c)(7) tax-exempt social club. 7AA596.

Regardless of whether NRS 116.340 applies, Appellant's logic that EPCC's Bylaws could not impose restrictions on property therein, is nonsensical and in

direct conflict with Nevada law which allows homeowners associations to impose restrictions and assert control over an individual's unit. *See* NRS 116.3102. That is the nature of living in a common interest community. Further, a plain reading of NRS 116.340 clearly acknowledges that an association's declaration can expressly prohibit transient commercial use. NRS 116.340(1). Therefore, hypothetically, even if NRS 116.340 applied to EPCC's social club, which it does not, the statute offers no safe haven to the Appellant because the Bylaws and Rules do, in fact, prohibit for-profit rental use of units.

Appellant's analysis that "transient commercial use" qualifies as a "residential use" and thus does not violate the "single-family residential purposes only" provision set forth in Article XVI, § 2 of the Bylaws, is misguided and equally a distortion of any fair reading of the Bylaws and Rules, read as a whole. 6AA Part 2 at 242. The Nevada legislature has specifically defined short-term vacation rentals as a "commercial use" and *not* "residential use." NRS 116.340(4)(b) defines transient ***commercial*** use as the "use of a unit . . . vacation rental or other form of transient lodging if the term of the occupancy, possession or use of the unit is for less than 30 consecutive calendar days." While this Court may not have specifically addressed whether short-term rentals constitute a residential use or a commercial use, Nevada law has already defined such use as commercial use. NRS 116.340(4)(b). While other jurisdictions may be split on the issue that is because

those Courts have determined that "residential use" is ambiguous in the context of whether renting for less than 30-consecutive days is a residential or a commercial use. *Santa Monica Beach Property Owners Ass'n v. Acord,* 219 So.3d 111 (Fla. Dist. Ct. App. 2017) (holding that ***ambiguous restrictive covenants*** should be strictly interpreted to favor the free and unrestricted use of property). *See also Yogman v. Parrott,* 325 Or. 358, 937 P.2d 1019 (1997) concluding that "commercial" and "residential" were ambiguous. In Nevada, there is no ambiguity because the use of a unit for less than 30 consecutive days for remuneration is, as a matter of law, a commercial use. *See* NRS 116.340(4)(b) (defining "transient commercial use"). Thus, EPCC social club members renting their units for less than 30 consecutive days are violating EPCC's Bylaws and Rules by engaging in commercial activities per NRS 116.340.

In sum, the district court's interpretation of the Bylaws and Rules was correct and the lower court's conclusion should be upheld.

C. THE UNREFUTED EVIDENCE CONFIRMS EPCC'S TAX-EXEMPT STATUS IS JEOPARDIZED BY THE EPCC BOARD PERMITTING THE FOR-PROFIT RENTAL USE OF MEMBER UNITS.

1. The lower court correctly permitted expert testimony by a certified public accountant to opine on questions of fact relating to EPCC's tax-exempt status.

The lower court's findings of fact in the injunction order concluded that

short-term and long-term rental use of member-owned units puts EPCC's I.R.C. § 501(c)(7) status at risk. 7AA598-599 at ¶¶ 13, 16, 18, and 21. The record is devoid of any evidence in support of Appellant's claim that the district court's findings were in clear error. In an effort to avoid the potential consequence of not being able to cite to a single piece of evidence in the record on appeal, EPCC wrongly misinterprets the issue on appeal through the argument that the risk to EPCC's I.R.C. § 501(c)(7) tax-exempt status is a question of statutory interpretation subject to *de novo* review. The district court's conclusion was not based on its interpretation of I.R.C. § 501(c)(7), the applicable tax code. What is instead at issue is the determination of what a tax-exempt entity can, and cannot do, to protect and maintain its I.R.C. § 501(c)(7) tax-exempt status. This determination is a question of fact reviewed for clear error, not a question of law. *Cortes v. State*, 127 Nev. 505, 509, 260 P.3d 184, 187 (2011).

The district court's findings were based on the expert testimony presented by Michelle L. Salazar, a Certified Public Accountant. 7AA 598-599 at ¶¶ 13, 16, 18, and 21. This Court should reject Appellant's attempt to discredit her as an "unqualified" expert witness because the record below found that she was fully qualified. 10AA747-748, 788-789. The district court is best suited to rule on the qualifications of an expert witness, and the appellate court should not substitute its evaluation of a witness's credentials for that of the district court, absent a showing

of clear error. *Hanneman v. Downer*, 110 Nev. 167, 179, 871 P.2d 279, 287 (1994). *See also Johnson v. Egtedar*, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996) (holding that the appellate court will not disturb a district court's determination as to the scope of a witness' testimony and whether a witness will be permitted to testify as an expert unless there is an abuse of discretion). Plain error is "error [that] is so unmistakable that it reveals itself from a casual inspection of the record." *Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) (quoting *Torres v. Farmers Ins. Exch*., 106 Nev. 340 n.2, 793 P.2d 839 842 n.2 (1990)). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 211-12, 626 P.2d 1272, 1273 (1981) (quoting *United States v. Gypsum Co*., 333 U.S. 364, 395 (1948)).

Ms. Salazar's informed opinions were based on her review of EPCC's financial statements, IRS Forms 990, EPCC's Bylaws and Rules, the organizational documents of Nevada Elks Tahoe Association and Elk Point Country Club, Inc. documents, and Internal Revenue Service tax court cases including guidance and bulletins published by the Internal Revenue Service relating to I.R.C. § 501(c)(7) organizations. 5AA116. Despite not liking her ultimate opinion, Appellant failed to cite to anything in the record to show, with a definite and firm conviction that a

mistake was made by the district court in allowing Ms. Salazar's testimony, or that she was anything but fully qualified to offer her opinions regarding EPCC's I.R.C. § 501(c)(7) tax-exempt status. *Patterson*, 111 Nev. at 1530, 907 P.2d at 987 (1995).

Appellant elected not to call its own expert witness to testify and refute Ms. Salazar's opinions.

2. The incontrovertible evidence shows that EPCC permitting for-profit use of member units violates the IRS criteria for tax-exempt entities.

Appellant's primary contention is that Respondents failed to show it had a likelihood of success on the merits because its "interpretation" of I.R.C. § 501(c)(7) was incorrect, in that the IRS is only concerned with the activities of the club itself and not the private members. Yet Appellant's self-serving argument is belied by the incontrovertible evidence in the record.

I.R.C. § 501(c)(7) provides an exemption from federal income tax for social and recreational clubs, if certain criteria are met: (1) an established membership of individuals, commingling, and fellowship; (2) organized for pleasure, recreation and other not profitable purposes; it does not provide pleasure and recreation on a commercial basis; and (3) substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder. 5AA117; 10AA755. The Internal Revenue Service's rationale for a social club's tax-exempt status is so that the private social club members will be in

the same financial position with or without the club. 10AA757. Social club members must comply with the requirements of I.R.C. § 501(c)(7) to avoid obtaining an unfair advantage over the general public through their utilization of a tax-exempt social club's property for their for-profit commercial activities. 10AA764-766. The Preamble to EPCC's Bylaws is exactly consistent with what the IRS identifies as necessary factors for a tax-exempt social club. 10AA758. Even so, regardless of the Bylaws, the IRS looks at the conduct of the social club, and its membership, and it can revoke a tax exemption based on conduct not fitting within its tax-exempt criteria. 10AA773-774, 777-778, 800.

Ms. Salazar testified that EPCC's tax exempt status is jeopardized by the fact that the EPCC board members are condoning, facilitating, and participating with social club members who are profiting financially from selling access to EPCC's private social club properties and facilities to non-members because that constitutes providing pleasure and recreation on a commercial basis. 10AA769. Ms. Salazar further testified that from the IRS's standpoint in reviewing I.R.C. § 501(c)(7) tax-exempt entities, the IRS does not look to the duration of the rental, or the type of tenancy, but rather the IRS only cares about inurement and whether there is a private benefit to the individual owners through the use of the club's private facilities. 10AA770, 785-787.

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Ms. Salazar's Declaration in support of Respondent's Motion for Preliminary Injunction explained that in regard to "inurement," to not run afoul of federal tax code, thereby subjecting a social club and its membership to federal tax liability, if any part of the organization's net earnings "inures" to the benefit of any person having a personal and private interest in the organization's activities, exemption is not permitted. 5AA117-118. Inurement is not limited to overt distributions; even distributed earnings may benefit members by decreasing membership dues or increasing the services the social club makes available to its members without a corresponding increase in dues or other fees paid for club support may be inurnment to members. *Id.* A social club that engages in recurring, non-incidental, profit-driven activities that result in the inurement of a private benefit to its members is considered to be engaging in nonexempt activities. *Id.* The Internal Revenue Service considers whether an impermissible benefit has been conferred on someone as a question of fact. *Id.*

Thus, the evidence in the record confirms that the activities of individual social club members are *very* relevant to the IRS because if a member is generating income or profit from the use of the private tax-exempt facilities, that creates the clear potential of jeopardizing the entity's tax-exempt status and constitutes impermissible inurement to private members. 10AA799-760; 5AA117-118. This undisputed expert testimony eradicates Appellant's unsupported position that the

IRS is not at all concerned with the individual acts of EPCC's private, social club members who are personally profiting from the use of a social club's tax-exempt properties and facilities.

Appellant's argument that the IRS narrowly views a social club's activities in a vacuum, looking solely at its own transactions completed and profits earned, and not the commercial activities of its club members is also contradicted by the evidence. Ms. Salazar explained that member's income from rentals constitutes an impermissible financial benefit, because individual members/unit owners are generating income or profit from the rental of their unit and advertising for the use of EPCC's private social club facilities and properties. 10AA762. Therefore, any benefit derived is improper if earned through any use of the private social club's facilities and properties.

Therefore, the irrefutable evidence is that EPCC's tax-exempt status is at risk even if the social club, itself, does not derive income or profit from the transient commercial rental activities engaged in by a small number of its private social club members, and even if EPCC is not actively advertising the short-term rentals in its organizational capacity. That is because the required criteria for being a tax-exempt entity are not satisfied. 10AA790-793. EPCC cannot hide behind its argument that its lack of "direct" involvement is a shield from federal tax liability exposure, and its attempt to do so is not supported by any evidence.

Appellant's interpretation of the holdings in *Augusta Golf Ass'n v. United States*, 338 F. Supp. 272 (S.D. Ga. 1971) and *Pittsburgh Press Club v. United States,* 615 F.2d 600 (3d Cir. 1980) is misguided and overbroad. Those cases do *not* stand for the proposition that federal tax code is only concerned with the business and economic activity that the tax-exempt organization itself is engaged in. Those cases did not analyze nor even address private social club member's conduct using private club facilities for profit. Rather, those cases simply confirm that a social club has the burden of proving that it was organized for and, operates exclusively for pleasure, recreation and other non-profitable purposes, and that no part of its net earnings inures to benefit any member. *Augusta Golf Ass'n, Inc.,* 338 F. Supp. 272 at 275.

Specifically, *Augusta* addressed whether a golf Association's "calcutta" events, which were open to the public and were a source of Association funds, allowed the Association to be exempt from federal income tax as a social club. The court found that the calcuttas were an essential part of the Association's social and recreational activities and that none of the membership, individually and collectively, had benefitted in any way from the calcuttas, other than in a way of the "companionship of fellow golf devotees and the satisfaction of contributing to the promotion of golf through its share of the calcuttas." *Id.* at 278. The *Augusta* court did *not* address any private social club members' activities that would allow them

to derive profits from selling use of their private membership rights to access and use club facilities and properties to non-members, which is at issue here and which does undisputedly violate I.R.C. § 501(c)(7). *See* Rev. Rul. 69-527, 1969-2C.B. 125 (A social club formed to assist its members in their business endeavors does not qualify for exemption under I.R.C. § 501(c)(7)); Rev. Rul. 70-32, 1970-1C.B. 132 (A flying club which provides economical flying facilities for its members, does not qualify for exemption as a social club, under I.R.C. § 501(c)(7)). In other words, if a social club financially benefits the private club's members, the IRS has found, and Ms. Salazar has confirmed, that constitutes grounds for the club to lose its tax-exempt status. *See* Rev. Rule 65-219, 1965-2, C.B. 168, Rev. Rule 67-302, 1967-2, C.B. 203, Rev. Rul. 66-225, 1966-2 C.B. 227, Rev. Rul. 66-360, 1966-2C.B. 228. Regardless, there is an important confirming takeaway from *Augusta* - the court confirmed that to maintain its social club tax-exempt status, a social club's activities must be directly related to the underlying purposes for which the club was formed, and its activities cannot amount to any business for profit. *Id.* at 275 (citing Rev. Rule 69-68, 1969-1 C.B. 153). The underlying purpose of EPCC is to provide pleasure and recreation to its members only. 6AA Part 2 at 226.

Here, the conduct of a small number of EPCC social club members who are engaged in for-profit rental use within EPCC are inextricably linked with the conduct of EPCC and its Board, all of whom are repeatedly facilitating, permitting

and engaging in commercially renting to the public, and offering full access to EPCC's social club properties and facilities throughout the year. This is because under no stretch of the imagination could for-profit rental use of social club member's units fall within the purview of EPCC's primary social club purpose to provide "its Unit Owners the pleasure of fellowship and recreation, and its corporate functioning shall be designed to civilly achieve in highest measure such purpose." 6AA Part 1 at 226.

Similarly, *Pittsburgh Press Club* addressed whether a private club's trade with nonmembers justified the revocation of its tax exemption as a nonprofit social club. The court found that the club's trade with nonmembers constituted an impermissible business for profit. *Pittsburg Press Club,* 615 F.2d at 601. Entirely absent from the court's decision in *Pittsburg Press* is any finding that supports Appellant's position that a social club is immune from tax liability when its social club members are utilizing the social club properties and facilities for their own profit.

Therefore, there is nothing in the record to show the district court erred when it found that that for-profit rental use of social club member units puts EPCC's I.R.C. §501(c)(7) tax-exempt status at risk. Based upon all the unrefuted evidence, the district court correctly determined that Respondents met their burden of proving they have a likelihood of success on the merits

D. THE EVIDENCE CONFIRMS THAT THE LOSS OF EPCC'S I.R.C. § 501(c)(7) TAX-EXEMPT STATUS CONSTITUTES IRREPARABLE HARM.

Irreparable harm is that harm for which compensatory damages would be inadequate. *Dixon v. Thatcher,* 103 Nev. 414, 415, 742 P.2d 1029, 1029-30 (1987). The entirety of the evidence in the record supports the finding that EPCC's tax-exempt status is jeopardized by the fact that the EPCC board members are facilitating and permitting a small number of its social club members to profit by selling access to EPCC's private properties and facilities to non-members, and that regardless of whether the rental use is short-term or long-term, EPCC's I.R.C. § 501(c)(7) status is still jeopardized. 10AA769, 770, 785-787. If the social club loses its tax-exempt status, it will lose the very intent and purpose for which it was created almost 100 years ago: a place of fellowship and recreation for its members. 6AA Part 2 at 226. There is nothing to contradict the obvious implication that converting a private-members only social club to a publicly accessed facility filled with transient vacation home rentals will forever alter the historic character and charm that each member had bought into, contractually agreed to be part of, and for which each member paid a significant membership fee. Destroying that aspect of the community is an irreparable harm for which compensatory damages would be futile, because real property and its attributes are considered unique, and loss of real property rights generally results in irreparable harm. *See Leonard v. Stoebling*, 102 Nev. 543, 728

P.2d 1358 (1986) (view from home is unique asset; injunction issued to preserve view); *see also Nevada Escrow Service, Inc. v. Crockett*, 91 Nev. 201,533 P.2d 471 (1975) (denial of injunction to stop foreclosure reversed because legal remedy inadequate).

Additionally, if the social club loses its tax-exempt status, the evidence in the record shows that Kurt R. Brown, on behalf of Respondent K.J. BROWN, L.L.C, would likely be forced to sell his property because of the financial devastation in having to contribute toward paying back taxes, penalties, back interest and other IRS penalties. 1RA043-048 at ¶¶ 8 and 12. An award of compensatory damages would be an inadequate remedy for this harm. *Id.*

The expert testimony from Michelle L. Salazar stated that if the IRS were to be made aware of the impermissible for-profit rental use within EPCC, the IRS could take away its tax-exempt status, start a tax fraud investigation, and require an opening of the tax files beginning from the inception of the entity in 1924 to the present, subjecting members to almost 100 years of tax exposure and liability. 5AA115-122, 10AA775-776. Irreparable harm from the threat of tax liability is both real and unrestricted in its extent. While the exact damages are unknown, by allowing the rental activities to continue, EPCC is triggering potential issues that violate the IRS's criteria for tax-exempt entities, and the misconduct should be resolved before the IRS becomes aware. 10AA776-777. The fact that no IRS

investigation has been opened is inconsequential because the EPCC membership should not be forced to wait until the IRS comes knocking, because as the district court confirmed, at that point, it would be too late. 10AA778-779.

Appellant failed to even acknowledge much less dispute that the loss of EPCC's nearly 100-year tax-exempt status constitutes irreparable harm, or the district court's acknowledgement of same. This evidence was uncontroverted. Appellant cannot manufacture evidence at this juncture when this Court is ***required*** to rule on the evidence and law based on the actual record. *Toigo v. Toigo*, 109 Nev. 350, 350, 849 P.2d 259, 259 (1993).

Therefore, the district court properly concluded that Respondents met their burden that there is a threat of permanent and irreparable harm if EPCC's I.R.C. § 501(c)(7) tax-exempt status is lost should EPCC not be immediately enjoined from allowing, facilitating and encouraging EPCC members in renting their units within EPCC, or any other EPCC properties and facilities therein, and deriving revenue or a profit from such use. 7AA600, 603.

E. PUBLIC INTEREST AND POLICY CONCERNS ARE NOT SUPPORTED BY ANY EVIDENCE.

Appellant asks this Court to consider some unarticulated "public interest" argument relating to rental activity within EPCC's private social club, in that it baselessly asserts that rental activity is the "will of the majority of EPCC members." *See* Appellant's Opening Brief at p. 23. No evidence in the record exists for EPCC's

argument. This Court need not consider contentions that were not cogently argued or argued to the district court. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Further, an argument or issue not raised before the district court is deemed waived and cannot be advanced on appeal. *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Powers v. Powers,* 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (holding that "[a] party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.")

EPCC made brief mention of this alleged concern in its Opposition, but EPCC failed to cite to any evidence, nor did it provide any evidence for its new proposition that Respondents behaved "undemocratically" by seeking to enjoin violations of EPCC's Bylaws or any additional argument regarding this matter at the evidentiary hearing. 3AA84. Thus, this Court should quickly dispose of this manufactured argument. Moreover, vague criticism of undemocratic behavior is irrelevant in light of the unambiguous Bylaw mandates that no member actions or operations within EPCC may result in profits and non-members are not allowed access into or use its social club properties and facilities.

Appellant's only citation to the record is testimony from Robert Felton, the EPCC Board president, which did nothing more than confirm the EPCC Board's misconduct. He confirmed that (1) the Board purported to adopt the Amended Rules

and Regulations which on their face, contradict the plain language of the EPCC's Bylaws in that the Amended Rules state: "Unit owners may engage in a business activity within their residence as long as there is no customer-employee contact within EPCC"; (2) that the Board did not seek any advice or obtain any opinion from a CPA as to the impact of its amended Rules on the tax-exempt status of EPCC; (3) the Board never caused the Amended Rules to be recorded; and (4) that they were "probably" drafted with knowledge that EPCC was already engaged in litigation seeking to enjoin short-term rental use of units. 10AA824-829.

Mr. Felton's testimony confirmed that the EPCC Board knowingly engaged in efforts to sabotage EPCC's social club tax-exempt status and confirms Respondents' position that the EPCC Board actively facilitated member rental activities in violation of the Bylaws. The district court agreed and found the unrecorded Amended Rules to be in violation of, and contrary to, the Bylaws of EPCC in that the Amended Rules permit, facilitate, and encourage renting Units to generate revenue for profit, and as a result, they are not enforceable as they relate to any rental activity for profit within EPCC. 7AA600 at ¶ 20. As such, this Court should reject Appellant's manufactured public policy and public interest arguments because this is the first time they have been raised and the arguments are not supported by the record.

F. THE PRELIMINARY INJUNCTION ORDER WAS SUPPORTED BY THE EVIDENCE AND A PROPER INTERPRETATION OF THE LAW AND SHOULD BE UPHELD BY THIS COURT.

Substantial evidence confirms that Respondents have a likelihood of success on the merits in establishing that EPCC is violating the social club's Bylaws and Rules by allowing a small number of social club members to derive income from long-term and short-term rental use of their units to non-members, and also that Respondents are at risk of losing their I.R.C. § 501(c)(7) tax-exempt status, constituting irreparable harm. *Univ. & Cmty. College Sys,* 120 Nev. at 721, 100 P.3d at 187. *See also State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion.") EPCC has failed to show that the district court committed error, and this Court should disregard EPCC's conclusory and novel legal propositions that are unsupported by legal authority or citations to the record. *SIIS v. Buckley*, 100 Nev. 376, 382, 682 P.2d 1387, 1390 (1984); *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978) (declining "to consider appellant's constitutional challenge … because he [had] failed to cite any relevant authority in support of that argument.") The district court's grant of the preliminary injunction was proper.

X. CONCLUSION

Respondents respectfully request this Court affirm all decisions of the district court within its preliminary injunction order.

XI. 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 10,979 words.

3. I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any of the transcript or appendix where the matter relied on is to be 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 1st day of December 2021.

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XII. PROOF 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:

☒ NEFCR 9 Electronic notification will be sent to the following:

Prescott Jones, Esq. of Resnick & Louis, P.C.

Gayle A. Kern, Esq. of Leach Kern Gruchow Anderson Song

☒ 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:

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DATED this 1st day of December 2021.

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