IN THE SUPREME COURT OF THE STATE OF NEVADA

JEROME MORETTO, TRUSTEE OF THE JEROME F. MORETTO 2006 TRUST,

Appellant,

vs.

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC,

Respondent.
_____/

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APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

- JEROME MORETTO, TRUSTEE OF THE JEROME F. MORETTO 2006 TRUST
- ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC. does not have a parent corporation, nor does a publicly held company own ten percent or more of its stock.

Karen Winters, Esq. represented Appellant at the district court proceedings.

If litigant is using a pseudonym, the litigant's true name: None.

These entities are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated: July 22, 2021.

Lemons, Grundy & Eisenberg

By: */s/ Todd R. Alexander*

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Ninth Judicial District Court of the State of Nevada in and for Douglas County, the Honorable Nathan Tod Young. Notice of entry of the order was served on January 21, 2021. 4 AA 930-939. The Notice of Appeal was filed on February 18, 2021. 4 AA 940-941. The order is appealable under NRAP 3A(b)(1).

ROUTING STATEMENT

This appeal falls within NRAP 17(a)(11) and (12) and is thereby presumptively retained by the Nevada Supreme Court. The appeal raises as a principal issue a question of first impression involving common law, as well as a question of statewide public importance and precedential value. The principal issue is whether Nevada law should adhere to principles embodied in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). The district court, without explanation, did not apply the applicable principles. Specifically, the issue is whether new restrictive covenants can be unilaterally imposed on individually owned property without the legal authority to do so, and without the owner's consent.

ISSUE PRESENTED

Whether the district court erred by refusing to apply, and seemingly ignoring altogether, applicable principles embodied in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), which should be applicable in Nevada, and which prohibit

a common interest community's implementation of restrictions on the use of individually owned property when such restrictions are not otherwise allowed by statute or by a recorded declaration of CC&Rs.

STATEMENT OF THE CASE

On August 16, 2019, Appellant Jerome Moretto filed a complaint for injunctive and declaratory relief, seeking to have declared invalid and unenforceable new restrictive covenants that had been improperly and impermissibly imposed on his property. 1 AA 1-11. On November 2, 2020, the parties filed competing motions for summary judgment. 1 AA 148-181; 2 AA 294-307. On January 6, 2021, the district court entered an order granting in part and denying in part the summary judgment motions, allowing the restrictive covenants on Moretto's property to remain in place. 4 AA 934-939. This appeal followed. 4 AA 940-941.

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

This is an appeal from the district court's order granting in part and denying in part the parties' competing motions for summary judgment. The order upheld Elk Point Country Club Homeowners Association, Inc.'s ("EPCC") unilateral implementation of new restrictive covenants on the use and enjoyment of individually owned properties within the Elk Point subdivision—restrictions that did

[1] For ease of reading, this Introduction does not include citations to the Appendix. Citations to the Appendix are included in the ensuing sections of this brief.

not exist when Appellant Jerome Moretto purchased his property.

This case is fundamentally about whether new restrictive covenants can be imposed on another's property without the authority to do so and without the property owner's consent. Stated differently, EPCC is attempting to act like a traditional HOA with a recorded declaration of covenants, conditions and restrictions (CC&Rs), which might allow it to impose new restrictive covenants on the individually owned lots within the subdivision if the CC&Rs allow such new restrictions. The problem, however, is that EPCC is not a typical homeowners' association. It has no recorded CC&Rs. As such, EPCC does not have the authority to impose restrictions on the use and enjoyment of the individually owned properties in the subdivision.

EPCC was established in the 1920s as a nonprofit corporation operating a social club for the Reno and Tahoe Elks. The real estate was initially used as a vacation site for the club. Individual units were later sold to the members as their own separate property and through the years the properties have been sold to others who are not necessarily Elks club members. The marina, beach, roads, and a few open spaces were kept as common areas. Moretto took title to his property in 1990, subject only to EPCC's bylaws, which have been amended several times over the years.

In 1991, after Moretto purchased his property, EPCC became a common

interest development as a matter of law when NRS Chapter 116 was adopted. The statute specifies, however, that only a portion of that chapter applies to previously-existing communities, such as EPCC.[2]

In March of 2018, the EPCC Executive Board sought to implement what it referred to as "Rules, Regulations and Guidelines." Those rules purport to impose "Architectural and Design Control Standards and Guidelines" ("ADCSG"), which were not applicable to the individually owned lots in EPCC prior to their unilateral adoption in 2018. Specifically, the ADCSG contain new building height restrictions, new building envelope restrictions, new restrictions on the location of fences and walls, new restrictions for preserving views, new restrictions on exterior lighting, new restrictions on the types of materials that may be used for exterior walls and trims, and new restrictions on approval and location of proposed landscaping elements. All of these new restrictive covenants apply not to the common areas, but to the individually owned properties in the subdivision, resulting in a loss of the individual owners' real property rights.

EPCC's enactment of the ADCSG, and its application of those restrictions to the individually owned properties within the subdivision is a violation of basic

[2] Pursuant to NRS 116.1201(3)(b), a common-interest community created before January 1, 1992 is not required to comply with the provisions of NRS 116.2101 through 116.2122.

principles of real property law embodied in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). Specifically, Section 6.7 of the Restatement states that an HOA that does not have a recorded declaration of CC&Rs, but merely a "generally worded rulemaking power" in its governing documents, can only impose restrictions on individually owned lots for the prevention of nuisance-like activities or to protect the common property. Section 6.9 of the Restatement further provides that, absent a recorded declaration of CC&Rs, an HOA may not impose restrictions on the structures or landscaping that may be placed on individually owned property, or on the design, materials, colors, or plants that may be used. The authority to impose such restrictions in a typical HOA is contained in a recorded declaration of CC&Rs that apply to all the individually owned lots in the HOA. As noted above, however, EPCC does not have a recorded declaration of CC&Rs.

Moretto sued EPCC in an effort to enjoin the application of the new restrictions on the use of his property, or for a declaratory determination that the restrictions cannot legally be applied to his property.[3] In the underlying case, the

[3] Although Moretto had not, at the time of filing suit, been precluded from making improvements on his property, he sued in recognition that the loss of his property rights results in irreparable harm, as recognized in *Dixon v. Thatcher*, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987) (recognizing that "real property and its attributes are considered unique and loss of real property rights generally results in irreparable harm"), and for declaratory relief under NRS 30.040(1) ("Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance,

parties submitted competing motions for summary judgment. Moretto's motion was granted only insofar as it sought to permanently enjoin EPCC from denying an architectural application for "purely aesthetic reasons." The district court appropriately concluded that such a restriction was too vague to be enforceable. Moretto's motion was denied on all other grounds. Conversely, EPCC's motion was granted on all grounds with the exception of the aforementioned injunction, thereby allowing the new restrictive covenants to remain in place.

The primary issue in this appeal is that the district court completely ignored the law that, absent a recorded declaration of CC&Rs, EPCC cannot implement property restrictions applicable to individually owned properties within the subdivision. The case law interpreting the Restatement provisions is clear: absent a recorded declaration of CC&Rs, an association's authority is limited to restricting the use and enjoyment of the common elements within the community, and to preventing nuisance-like activity on the individually owned lots as may be necessary to protect the common property. The question, simply stated, is whether Nevada's appellate courts will adopt the common law principles embodied in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). This Court has adopted other

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contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.")

provisions of the Restatement in other cases, and the Court should adopt the applicable provisions here.

EPCC entirely ignored the cited Restatement provisions in its opposition to Moretto's motion for summary judgment. The district court did not apply or even address the applicable Restatement provisions in its order, thereby committing reversible error. The appropriate relief in this case is reversal and remand to the district court with instructions to enter summary judgment in Moretto's favor.

STATEMENT OF FACTS

A. Pertinent history of EPCC

EPCC is a Nevada non-profit corporation, formed in 1925 as a social club for the Reno and Tahoe Elks Club members at Zephyr Cove, in Douglas County, Nevada. (1 AA 149). In 1929, EPCC began to allow fee title transfers of parcels to individual members of the club. (1 AA 150). The very first deeds of conveyance contained a provision stating: "It is expressly understood that the Grantee hereof and the property and premises hereby conveyed shall be subject at all times to the by-laws, rules and regulations of said Grantor, which shall in turn bind every subsequent grantee …." (1 AA 150). EPCC continues to operate and maintain the common areas and facilities for the benefit of the individual owners of the lots in the Elk Point subdivision, currently consisting of approximately 99 individually owned lots. (1 AA 150).

EPCC does not now have, nor has it ever had, a recorded declaration of covenants, conditions and restrictions (CC&Rs). (4 AA 935). EPCC's bylaws are recorded, and the bylaws have been amended several times over EPCC's decades of existence. (1 AA 200-220). As of the date of filing this appeal, Article XVI of the most recent bylaws contains the only restrictions on the use and enjoyment of the individually owned lots in the subdivision, which are:

> (2) The property of unit owners shall be used for single family residential purposes only.
>
> (3) No structure of any kind shall be erected or permitted on the premises of any unit owner, unless the plans and specifications shall have first been submitted to and approved by the Executive Board.

(2 AA 450).

Moretto purchased his property in the Elk Point subdivision in 1990, unburdened by any restrictive covenants except those contained in the corporate bylaws. (1 AA 151). EPCC became a common-interest development as a matter of law in 1991, when NRS Chapter 116 was adopted. NRS 116.1201.

B. <u>EPCC's unilateral implementation of new restrictive covenants on individually owned lots</u>

On March 31, 2018, the EPCC Executive Board, by a board motion, without Moretto's consent and without a vote of the members or an amendment of the bylaws, unilaterally created an Architectural Review Committee ("ARC") and adopted what it referred to as "Architectural and Design Control Standards and

Guidelines" ("ADCSG") impacting each individual unit within EPCC. (1 AA 29-38 (erroneously indicating a date of adoption in 2017)). The ARC was made an agent of the Executive Board and was authorized to apply and enforce the ADCSG. (1 AA 29).

The ADCSG initially purported to take a three-foot pedestrian easement from the front property line of each unit, including Moretto's, without compensation. (1 AA 31). This easement provision was quickly removed from the ADCSG, likely because of its blatant illegality. (1 AA 234).

The unilaterally-imposed restrictive covenants that remain in the ADCSG are equally illegal. They impose new building height restrictions, new building envelope restrictions, new restrictions on the location of fences and walls, new restrictions for preserving views, new restrictions on exterior lighting, new restrictions on types of materials that may be used for exterior walls and trims, and new restrictions on approval and location of proposed landscaping elements. (1 AA 233-234).

The ADCSG have been amended multiple times since their implementation. (1 AA 239). As of the date of the district court's order from which this appeal is taken, the latest iteration of the ADCSG were those issued in December of 2019. (1 AA 239). The unilaterally imposed restrictive covenants discussed above remain in the latest iteration. (1 AA 233-234).

C. Moretto's lawsuit

Moretto's Complaint was filed on August 16, 2019, followed by a motion for a preliminary injunction. (1 AA 1; 1 AA 49-147 (transcript of oral argument hearing on motion for preliminary injunction)). The Complaint asserted claims for breach of EPCC's bylaws, various violations of NRS Chapter 116, violation of Moretto's property rights, and declaratory relief. (1 AA 3-9).

The district court conducted a hearing on Moretto's preliminary injunction motion on March 9, 2020. (1 AA 49-147). Ultimately, the district court declined to issue a preliminary injunction, finding that Moretto was not then facing a threat of irreparable harm for which compensatory damages would be inadequate. (1 AA 144-146). This appeal does not challenge the district court's denial of a preliminary injunction.

D. The parties' competing motions for summary judgment

On November 2, 2020, the parties filed competing motions for summary judgment. (1 AA 148-181; 2 AA 294-306). Moretto's motion first set forth some of the fundamental principles underlying the law of real property ownership, restrictive covenants on the owner's use of the property, and the role of common interest communities or HOAs. (1 AA 165-168). Moretto then showed that absent a recorded declaration of CC&Rs containing a specific grant of power to impose restrictive covenants on individually owned property, an HOA does not have that

power. (1 AA 168-169). Rather, its power is limited to restricting the use and enjoyment of the common elements within the community. (1 AA 168-169).

Moretto made specific reference to the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) and showed that by imposing the ADCSG on the individually owned lots EPCC exceeded the powers reserved to it in its recorded bylaws. (1 AA 168-169). Moretto quoted a lengthy section of comment (b) to Section 6.7 of the Restatement, which explains that without a specific declaration of CC&Rs and with only a "generally worded rulemaking power" contained in its bylaws, a common-interest community cannot impose restrictions on individually owned property. (1 AA 168). Rather, its power is limited to governance of the common property and prevention of nuisance-like activity on the individually owned properties. (1 AA 168).

Moretto's quote from comment (b) explains that the rationale behind the limitation on an HOA's power to adopt restrictions on individually owned property "is based in the traditional expectations of property owners that they are free to use their property for uses that are not prohibited and do not unreasonably interfere with the neighbors' use and enjoyment of their property." (1 AA 168). It further explains that "[p]eople purchasing property in a common-interest community, which is usually subject to specific use restrictions set forth in the declaration, are not likely to expect that the association would be able, under a generally worded rulemaking

power, to impose additional use restrictions on their property." (1 AA 168).

Moretto next showed that the very creation of the ARC was a violation of EPCC's bylaws and the laws governing corporations. (1 AA 170-171). Specifically, Moretto observed, under NRS 78.125, a corporation's board of directors may create committees to manage the business and affairs of the corporation, but "[t]here is no provision allowing the corporation to create rules to manage property it does not own." (1 AA 170).

Moretto next pointed out that corporations that act as common interest communities are further restricted by NRS Chapter 116. (1 AA 170). Specifically, under NRS 116.3106(1)(d), "[t]he bylaws of the association must: … Specify the powers the executive board or the officers of the association may delegate to other persons or to a community manager." (1 AA 170). Moretto observed that EPCC's bylaws only allow for the creation of a financial audit committee and an election committee. (1 AA 170). Thus, in creating the ARC, EPCC breached its own bylaws and violated Nevada law. (1 AA 170).

Citing to evidence that EPCC members were not given notice of ARC meetings and were not given the opportunity to attend such meetings, Moretto next demonstrated that such secret meetings were a violation of NRS 116.31085(1), which requires that "a unit's owner may attend any meeting of the units' owners or of the executive board and may speak at any such meeting." (1 AA 172-173). As

Moretto aptly observed, "[t]he Board cannot delegate to a Committee the authority to act in a manner the Board itself cannot." (1 AA 173).

Moretto continued by pointing out the many ways the adoption and substance of the ADCSG constituted violations of various other provisions of NRS Chapter 116. (1 AA 173-177). Moretto showed that the rules result in arbitrary enforcement, they allow for an excessive application review period, they allow for disapproval for "purely aesthetic reasons," they require an excessive "application review fee," they are inconsistent with EPCC's bylaws, they allow for excessive fines if not followed, and they allow for a "variance" from the rules for unspecified reasons "as [the ARC] sees fit." (1 AA 173-177).

Finally, Moretto argued in support of his claim for declaratory relief, urging that the ADCSG be declared illegally enacted and void. (1 AA 178-179). As Moretto put it, the ADCSG constitute restrictive covenants imposed on his property, in excess of EPCC's authority over his individually owned property and without his consent. (1 AA 178-179).

EPCC began its opposition to Moretto's motion by arguing that Nevada law does not recognize a claim for "Violation of Plaintiff's Property Rights," ignoring this Court's directive that a claim is to be analyzed "according to its substance, rather than its label." *Otak Nev., LLC v. Eighth Judicial Dist. Ct.*, 129 Nev. 799, 809, 312 P.3d 491, 489-99 (2013). (3 AA 523).

The focus of EPCC's opposition was its contention that certain provisions of its bylaws permitted it to enact the ADCSG. (3 AA 524-526). Specifically, EPCC quoted the following provision:

> The enumeration of the powers and duties of the Executive Board in these Bylaws shall not be construed to exclude all or any of the powers and duties, except insofar as the same are expressly prohibited or restricted by the provisions of these Bylaws or Articles of Incorporation, and the Board shall have and exercise all other powers and perform all such duties as may be granted by the laws of the State of Nevada and do not conflict with the provisions of these Bylaws and the Articles of Incorporation.

(3 AA 524).

EPCC next provided the following quote from its bylaws:

> 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.

(3 AA 524).

EPCC contended that these clauses from its bylaws allowed it to unilaterally adopt restrictive covenants applicable to the individually owned lots in the community. (3 AA 524-526). The opposition did not mention the Restatement at all. (3 AA 513-538).

Had it not entirely ignored the Restatement provisions cited by Moretto, EPCC certainly would have recognized that the quoted clauses from its bylaws are precisely what the Restatement refers to as a "generally worded rulemaking power,"

which only allow an HOA to restrict the use of its own common property—not individually owned property. (1 AA 168-169). Perhaps strategically, EPCC chose to ignore that important distinction. (3 AA 523-537).

In fact, EPCC took an approach directly opposite from the principles embodied in the Restatement, arguing that in its governing documents there are no "explicit prohibitions" against EPCC enacting the ADCSG. (3 AA 524). Applying this logic, it was EPCC's apparent contention that it had the authority to impose whatever restrictive covenants it wanted against its members' individually owned property, as long as there was no "explicit prohibition" contained in its governing documents. (3 AA 524-526).

EPCC went on to argue that the ARC was authorized to recommend, apply and enforce the ADCSG because it only acts in an advisory capacity to the Executive Board. (3 AA 527-529). As Moretto had previously and correctly pointed out, however, "[t]he Board cannot delegate to a Committee the authority to act in a manner the Board itself cannot." (1 AA 173).

In response to Moretto's argument that the ARC meetings were improperly and illegally conducted without the members having an opportunity to be present and be heard, EPCC argued that the statutes upon which Moretto relied applied only to Executive Board meetings and not to "meetings of mere Committees." (3 AA 531). Applying this logic, any HOA board can circumvent the public meeting statute

by simply forming committees for the business it wants to conduct in secret.

Notably (and central to this appeal), nowhere in EPCC's opposition does it even acknowledge the existence of the applicable Restatement provisions cited in Moretto's motion. (3 AA 513-538). EPCC chose not to address the fact that its bylaws granted it only a "generally worded rulemaking power," which does not confer the authority to impose restrictive covenants on the individually owned properties in its community. (3 AA 513-538).

In the reply in support of his motion, Moretto again cited Sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). (3 AA 668-669). Moretto correctly reiterated that "[a]bsent specific authorization in the declaration [of CC&Rs], the common-interest community does not have the power to adopt rules … that restrict the use or occupancy of, or behavior within, individually owned lots or units." (3 AA 668). Moretto further explained that "[e]xcept to the extent provided by statute or authorized by the declaration, a common-interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property, or on the design, materials, colors, or plants that may be used." (3 AA 669).

EPCC's motion for summary judgment, filed the same day Moretto filed his motion, asserted the same arguments set forth in its opposition to Moretto's motion. (2 AA 294-307). It maintained its argument that "Violation of Plaintiff's Property

Rights" is not a cognizable claim under Nevada law, as though a claim's label is determinative of its merit. (2 AA 303).

Relying on the generally worded rulemaking power contained in its bylaws, and contrary to the Restatement provisions cited by Moretto, EPCC argued that "though there is no specific grant of authority to the Executive Board to enact the manner of ADCSG architectural restrictions complained about by Plaintiff, it is plainly evident that such an omission is equivalent to a grant of authority." (2 AA 303). EPCC failed to grasp the fact that, as dictated in the Restatement, a specific grant of authority in a recorded declaration of CC&Rs, is precisely what is necessary for EPCC's Executive Board to impose real property restrictions on the individually owned lots in its subdivision. (3 AA 668-669).

E. The district court's order granting summary judgment in favor of EPCC

On November 30, 2020, the district court held a hearing on the parties' competing summary judgment motions. (4 AA 828-929). On December 8, 2020, the district court issued its *Order Granting in Part and Denying in Part Motions for Summary Judgment*. (4 AA 934-938 (the Order appears to be signed on December 8, 2020 but not filed until January 6, 2021)). Although Moretto had repeatedly cited the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), nowhere in the district court's order are those provisions even mentioned, let alone addressed and analyzed. (4 AA 934-938). Somehow, the most important and directly applicable law relied

upon by Moretto was simply ignored by both EPCC and the district court. (4 AA 934-938).

The district court found that EPCC "does not have a Covenant of Conditions and Restrictions, and instead has developed Rules and Regulations," and EPCC "has developed Architectural Design Guidelines which have been incorporated into the Rules and Regulations." (4 AA 935).

Without ever addressing the Restatement provisions cited by Moretto, the district court concluded that "Article 16, section 3 of [EPCC's] Bylaws […] gives the Board the authority to create rules and regulations…." (4 AA 936). It further concluded that Moretto's "claim for 'violation of property rights' is not a cognizable claim in Nevada; but even if it was, Plaintiff's property rights were not violated in this matter." (4 AA 936).

Ultimately, the only concession made to Moretto was that EPCC was enjoined from denying an architectural application "for purely aesthetic reasons." (4 AA 937). Moretto's motion was denied as to all other claims and, conversely, EPCC's motion was granted as to all other claims. (4 AA 938).

By ignoring the applicable provisions of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), the district court never recognized or appreciated the distinction between a common-interest community's extremely limited ability to impose property restrictions on individually owned lots absent a recorded

declaration of CC&Rs, as opposed to the broader authority to impose restrictions on the common elements within the community. (4 AA 934-938). This was error.

ARGUMENT

A. Standard of Review

A district court's order granting summary judgment is reviewed *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

B. The district court erred by entirely ignoring the applicable principles embodied in the *Restatement (Third) of Property (Servitudes)*.

EPCC's enactment of the ADCSG and its application of those restrictions to the individually owned properties within the subdivision is a violation of basic principles of real property law embodied in the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). The district court erred by failing to apply, and indeed completely ignoring, these principles. (4 AA 934-938). Although this Court has not expressly adopted the specific Restatement sections applicable here, this Court has adopted other sections of the same Restatement, as discussed below. This Court should adopt and apply the sections applicable in this appeal.

Section 6.7 of the Restatement reads, in pertinent part, as follows:

> (1) Except as limited by statute or the governing documents, a common-interest community has an implied power to adopt reasonable rules to
> (a) govern the use of the common property, and

(b) govern the use of individually owned property to protect the common property.

(2) If the declaration grants a general power to adopt rules, the common-interest community also has the power to adopt reasonable rules designed to

(a) Protect community members from unreasonable interference in the enjoyment of their individual lots or units and the common property caused by use of other individually owned lots or units; and

…

(3) Absent specific authorization in the declaration, the common-interest community does not have the power to adopt rules, other than those authorized under subsections (1) and (2), that restrict the use or occupancy of, or behavior within, individually owned lots or units.

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.7 (2000).

Comment b. to Section 6.7 is extremely instructive, as it explains the rationale behind the rule. Because it tracks and explains precisely what EPCC has improperly done in this case, it is useful to include it here, almost in its entirety.[4] Comment b. explains as follows:

> As the term is used here, "rules" are different from the provisions of a declaration. The declaration is recorded before individual properties are sold and usually can be amended only with the consent of a supermajority of the property owners. By contrast, rules are usually adopted by the governing board, or by a simple majority of the owners

[4] Despite this author's intense dislike of lengthy block quotations, Comment b. is so directly applicable to this case as an explanation and illustration of the impropriety of EPCC's adoption of the ADCSG that, with apologies to the Court, this lengthy block quotation was deemed necessary.

who vote on the question, and are seldom recorded. Restrictions that might be valid if included in a declaration may be invalid if effected by a rule because property owners lack notice and the safeguards afforded by the supermajority vote needed for an amendment to the declaration. ….

Statutes and the governing documents of common-interest communities commonly grant rulemaking authority to the governing board of an association in furtherance of the association's power and responsibility to manage the common property. Even in the absence of an express grant of authority, an association enjoys an implied power to make rules in furtherance of its power over the common property. **The association has no inherent power to regulate use of the individually owned properties in the community, however, except as implied by its responsibility for management of the common property.** …. Because rulemaking powers may be exercised to limit property interests, implied powers over individually owned property are limited to those reasonably necessary for protection of the common property.

Statutes and governing documents frequently confer broad rulemaking powers on common-interest community associations, but may fail to specify the extent of that power over individually owned property. Subsections (2) and (3) provide rules for interpretation of the scope of such powers. Those interpretive rules limit the scope of the power to restrict use of individually owned property. **Unless a statute, or the declaration, provides a more expansive power, an association's authority to impose restrictions on individually owned property, under a generally worded rulemaking power, is limited to prevention of nuisance-like activities** ….

The rationale for not giving an expansive interpretation to an association's power to make rules restricting use of individually owned property is based in the traditional expectations of property owners that they are free to use their property for uses that are not prohibited and

> do not unreasonably interfere with the neighbors' use and enjoyment of their property. People purchasing property in a common-interest community, which is usually subject to specific use restrictions set forth in the declaration, are not likely to expect that the association would be able, under a generally worded rulemaking power, to impose additional use restrictions on their property. On the other hand, they are likely to expect that the association will be able to protect them from neighborhood nuisances by adoption of preventative rules. Securing private protection from nuisance-like activity is one of the frequently cited attractions of common-interest communities. By exercising its rulemaking power, the association can provide a more efficient means to prevent or abate nuisances than resort to municipal authorities or to the judicial system.
>
> Subsection (3) makes it clear that, absent a specific grant of power, an association does not have the power, by adoption of a rule or regulation, to impose restrictions on use or occupancy of individually owned lots or units, or on behavior within individually owned property, beyond those permitted to protect the common property under subsection (1), or to protect other community members from nuisance-like activity under subsection (2). An association that wishes to impose such restrictions on individual lots must do so through amending the declaration rather than through its rulemaking power. ….

RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.7 cmt. b (2000).

As already stated, EPCC does not have a recorded declaration of CC&Rs. (4 AA 935). Rather, it used a generally worded rulemaking power contained in its corporate bylaws to adopt the ADCSG. (2 AA 303). In doing so, EPCC imposed restrictive covenants on the individually owned lots in the community. (2 AA 370-371). It did so without the proper authority and without Moretto's consent, to Moretto's detriment.

Section 6.9 of the Restatement provides that "[e]xcept to the extent provided by statute or authorized by the declaration, a common-interest community may not impose restrictions on the structures or landscaping that may be placed on individually owned property, or on the design, materials, colors, or plants that may be used." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.9 (2000). In other words, when an HOA does not have a recorded declaration of CC&Rs, its powers are limited to regulating the use of the common property and preventing nuisance-like activity on the individually owned lots. It cannot simply adopt the equivalent of CC&Rs unilaterally and without the consent of the owners of the individually owned lots. It certainly cannot make those restrictions applicable retroactively to owners who purchased their properties long before the restrictions were adopted. That is precisely what EPCC has done here.

Ignoring the applicable Restatement principles, the district court failed to appreciate the distinction between a common interest community's broad, general rulemaking power to regulate the use of its *common property*, as opposed to the far more limited power to regulate the use of *individually owned property*. This was error.

This Court has routinely adopted and applied other sections of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). *See, e.g., St. James Village, Inc. v. Cunningham*, 125 Nev. 211, 212-13, 210 P.3d 190, 191 (2009) (adopting and

applying Section 4.8); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 125 Nev. 449, 457, 215 P.3d 697, 703 (2009) (adopting and applying Section 6.11); *Artemis Exploration Company v. Ruby Lake Estates Homeowner's Ass'n*, 135 Nev. 366, 372, 449 P.3d 1256, 1260 (2019) (adopting and applying Section 6.2). It is unclear why EPCC and the district court simply ignored those Restatement provisions that are applicable in this case. Indeed, exhaustive research has revealed no cases from any jurisdiction in which, when given the opportunity, a court has declined to adopt and apply the Restatement sections at issue in this case. There is simply no reason the Restatement principles should not be adopted. They protect "the traditional expectations of property owners that they are free to use their property for uses that are not prohibited and do not unreasonably interfere with the neighbors' use and enjoyment of their property." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.7 cmt. b (2000).

The pertinent Restatement provisions were examined and applied in the persuasive case of *Estates at Desert Ridge Trails Homeowners' Ass'n v. Vasquez*, 300 P.3d 736 (N.M. App. 2013). In that case, an HOA attempted to implement restrictions on an owner's ability to rent his home on a short-term basis. The permissible scope of an HOA's rule-making authority to govern the use of individually owned property was a matter of first impression in New Mexico, just as it appears to be in Nevada. *Vasquez*, 300 P.3d at 744.

The *Vasquez* Court agreed with the approach articulated in the Restatement. *Id*. It held that a homeowners' association has the "implied power to adopt reasonable rules to (a) govern the use of the common property, and (b) govern the use of individually owned property to protect the common property." *Id*. (citing RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.7(1)(a) & (b)). It stated that if the HOA's declaration grants a general power to adopt rules, the association may adopt "reasonable rules designed to ... protect community members from unreasonable interference in the enjoyment of their individual lots or units and the common property caused by use of other individually owned lots or units." *Id*.

Referencing the comments to the Restatement, the court held that unless there is "specific authorization" in the HOA's declaration, it has no authority to "restrict the use or occupancy of, or behavior within, individually owned lots or units" beyond those rules permissible under subsections 1 and 2 of the Restatement. *Id*. (emphasis added). "Therefore," the court held, "under a general grant of rule-making authority, the HOA's authority to restrict individually owned property pursuant to the HOA Rules was limited to protecting common property and individually owned lots from any unreasonable interference by another lot owner's use of his or her property." *Vasquez*, 300 P.3d at 744. Based on these principles, the court declared the HOA's rental restriction invalid and unenforceable because an owner's decision to rent his home cannot, as a matter of law, be characterized as

nuisance activity. *Id*. at 745.

Another persuasive case applying Section 6.7 of the Restatement is found in *Wilson v. Playa de Serrano*, 123 P.3d 1148 (Ariz. App. 2005). In *Wilson*, a townhome association attempted to convert itself into an age-restricted community by amending its bylaws to impose a requirement that each townhouse be occupied by a person fifty-five years of age or older. 123 P.3d at 1149. The owners in the community even passed the bylaws amendment by a vote of twenty-five to six. *Id*. A homeowner sued the association seeking a declaratory judgment that the amendment was invalid and injunctive relief, and the parties filed cross-motions for summary judgment. *Id*. The association in *Wilson* had a declaration of CC&Rs that referred to the community as an "adult" community. *Id*. at 1150. The trial court granted summary judgment in favor of the association. *Id*. The appellate court reversed. *Id*. at 1153.

Applying Section 6.7 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), the Arizona Court of Appeals recognized that the declaration of CC&Rs did not expressly restrict occupancy to persons fifty-five years of age or older. *Id*. at 1150. Nor did the declaration expressly grant the association's board the power to impose such a restriction. *Wilson*, 123 P.3d at 1150. Thus, the *Wilson* Court held that "the Declaration does not specifically authorize either the Board or a majority of the owners to impose an occupancy restriction, as the Restatement

§ 6.7(3) requires." *Id*. at 1152. The court further expressed its agreement "with the Restatement that such a fundamental restriction of the individual owners' expected property rights must be set forth in the Declaration with sufficient specificity that purchasers are on notice that the occupancy of their property could be severely restricted." *Id*. It therefore reversed the trial court's judgment and remanded the matter to the trial court for entry of judgment in favor of the homeowner. *Id*. at 1153.

The rationale expressed in *Vasquez* and *Wilson* applies with equal force here, and the same result should be reached. EPCC has no recorded declaration of CC&Rs. Its bylaws can, at the very most, be construed as a general grant of rulemaking authority. EPCC even admitted that "there is no specific grant of authority to the Executive Board to enact the manner of ADCSG architectural restrictions complained about by Plaintiff." (2 AA 303). Instead, EPCC contended that the lack of a "specific prohibition" against adopting restrictive covenants "is equivalent to a grant of authority." (2 AA 303). In this manner, EPCC not only ignored the Restatement principles, it turned those principles on their heads.

Just like the rental activity discussed in *Vasquez*, an owner's decision to build within a chosen building envelope or to choose the location of fences and walls cannot be characterized as nuisance activities. Likewise, an owner's ability to determine his or her own preference of reasonable exterior lighting, to choose which types of materials may be used for exterior walls and trims, and to determine the

location of landscaping elements cannot be characterized as nuisance activities. Accordingly, the EPCC Executive Board has no authority to restrict such activities.

Sections 6.7 and 6.9 of the Restatement were also adopted in another persuasive case, *Sainani v. Belmont Glen Homeowners Ass'n, Inc.*, 831 S.E.2d 662 (2019). *Sainani* is instructive because it illustrates the limits of an HOA's power to implement restrictions on the use of individually owned property, even when the HOA does have a recorded declaration of CC&Rs.

In *Sainani*, the HOA had a recorded declaration of CC&Rs which allowed the HOA to adopt rules and regulations that it deemed necessary or appropriate and to regulate the external appearance of the individually owned properties. 831 S.E.2d at 665. The HOA subsequently adopted "seasonal guidelines," which purported to regulate the individual owners' displays of holiday lighting and decorations. *Id*. at 664. The homeowners in *Sainani* displayed lights in celebration of various Hindu, Sindhi and Sikh religious holidays throughout the year, which the HOA considered to be violations of the seasonal guidelines. *Id*. at 665. The trial court entered judgment for the HOA, imposing fines against the homeowners and enjoining them from violating the seasonal guidelines. *Id*. at 665-66.

The Supreme Court of Virginia reversed the trial court's judgment. *Sainani*, 831 S.E.2d at 669. It held that, even though the HOA had a recorded declaration of restrictive covenants, those restrictive covenants had to be strictly construed. *Id*. at

666. Applying Sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), the court recognized that "[w]hile *express* design-control powers granted by statute or by the declaration are generally enforceable, the scope of *implied* powers is limited to governing or protecting the common property and preventing 'nuisance-like activities' on individually owned property." *Id*. at 669 (emphasis in original). Because the HOA's seasonal guidelines were not specifically articulated in the recorded declaration of restrictive covenants, the *Sainani* Court rejected the HOA's assertions that it had the broad authority to adopt design-control rules or that it had the implied power to regulate the aesthetics of individually owned lots. *Id*. at 669. It therefore held that the seasonal guidelines were not within the HOA's authority under its restrictive covenants and were thus unenforceable. *Id*.

Unlike in *Sainani*, EPCC does not have a recorded declaration of restrictive covenants that would even arguably permit it to impose the ADCSG on the individually owned properties in the community. Under Sections 6.7 and 6.9 of the Restatement, the general grant of rulemaking authority in EPCC's bylaws only allows it to govern or protect the common property and prevent nuisance-like activity on the individually owned lots. As the *Sainani* Court held, a generally worded rulemaking power does not confer the implied power to regulate the aesthetics of individually owned lots. *Sainani*, 831 S.E.2d at 668-69.

The ADCSG go far beyond a common interest community's power to regulate

individually owned properties to prevent nuisance-like activity. They constitute unilaterally imposed restrictive covenants on the use of individually owned property. In effect, EPCC is attempting to operate as though it has a recorded and operative declaration of CC&Rs that explicitly permit it to impose specific restrictions on the use of individually owned units within the community. It admittedly does not.

An example of an HOA's ability to impose rules restricting the use of *common property*, as explicitly distinguished from its ability to regulate the use of *individually owned property*, is found in *Ripsch v. Goose Lake Ass'n*, 989 N.E.2d 752 (Ill. App. 2013). In *Ripsch*, a homeowner sued to enjoin the HOA from enforcing a rule prohibiting the use of large pontoon boats on a lake, which was regarded as common area. 989 N.E.2d at 754-55. The homeowner relied on cases addressing restrictions on an owner's use of his individually owned property, rather than common property. *Id*. at 756.[5]

The Appellate Court of Illinois was quick to point out that if the HOA attempted to limit the owner's "use of his own land, supposedly for some common good, then it would be prevented from doing so by the holdings" of those cases relied upon by the owner. *Id*. Because of the specific distinction between an HOA's ability

[5] The two cases relied upon by the homeowner in *Ripsch*, *Hartman v. Wells*, 257 Ill. 167, 100 N.E. 500 (1912), and *Westfield Homes, Inc. v. Herrick*, 229 Ill.App.3d 445, 593 N.E.2d 97 (1992) do not make express reference to the subject provisions of the Restatement, but they express the same principles embodied by the Restatement.

to restrict the use of common property and its ability to restrict the use of individually owned property, the *Ripsch* Court upheld the subject restriction. In doing so, the Court cited to Section 6.7 of the Restatement, finding it persuasive authority for the distinction between an HOA's ability to restrict the use of common property, rather than individually owned property. *Id*. at 757. As such, *Ripsch* is an apt illustration of how EPCC has drastically overstepped its bounds in this case.

Rather than limiting itself to governing and regulating the common elements within the community, EPCC has unilaterally adopted and imposed restrictive covenants on the use and enjoyment of the individually owned properties. The ADCSG contain new building height restrictions, new building envelope restrictions, new restrictions on the location of fences and walls, new restrictions for preserving views, new restrictions on exterior lighting, new restrictions on types of materials that may be used for exterior walls and trims, and new restrictions on approval and location of proposed landscaping elements. (2 AA 370-371). EPCC wrongfully implemented these new restrictions using only a generally worded rulemaking power contained in its bylaws.

Under Sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES), EPCC does not have the power or authority to impose such restrictions on the individually owned lots. The district court erred by concluding otherwise. The decision of the district court should be reversed, and this matter

should be remanded with instructions for the entry of judgment in Moretto's favor.

CONCLUSION

This Court is urged to expressly adopt Sections 6.7 and 6.9 of the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES). Without those legal principles in place, an association such as EPCC's Executive Board, without any CC&Rs in place and without the individual owners' consent, could simply decide it wants to unilaterally enact restrictive covenants on the individual owners' property, even though the individual owners took title unencumbered by such restrictions.

Although Moretto had repeatedly cited and relied upon the applicable sections of the Restatement, neither EPCC nor the district court ever addressed them. This oversight resulted in reversible error. The district court's summary judgment order,

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which upheld EPCC's adoption of the ADCSG, should be reversed and this matter should be remanded with instructions for the district court to enter judgment in Moretto's favor.

Dated: July 22, 2021.

Lemons, Grundy & Eisenberg

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(b)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman type style.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 7,621 words.

3. Finally, 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, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject

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to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 22, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the within **APPELLANT'S OPENING BRIEF and APPENDIX** was filed electronically with the Nevada Supreme Court on July 22, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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