IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellant,

Supreme Court Case No. 825 Jectronically Filed Jul 23 2021 03:44 p.m. Elizabeth A. Brown District Courclerk of Supreme Court Case No. 2019-CV-00242

vs.

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.,

Respondent.

APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT COUNTY OF DOUGLAS THE HONORABLE NATHAN TOD YOUNG, DISTRICT JUDGE

APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME 4

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capital improvements on the commonly owned portions of EPCC, governance of the Executive
 Board and EPCC, and the role of EPCC in approving transfers of the members' parcels. Undisputed
 Fact No. 12.

EPCC is subject to and governed by NRS 116.001 through 116.795, excepting therefrom 4 NRS 116.2101 through 116.2122. NRS 116.3106(1)(d) requires that the Bylaws "[s]pecify the 5 powers the executive board or the officers of the association may delegate to other persons or to a 6 community manager." The EPCC Bylaws only allow the Executive Board to delegate its duties to 7 an Election Committee for annual elections, and a Finance Committee for an annual audit. 8 9 Undisputed Facts Nos. 4 and 5. The EPCC Bylaws do not allow the Executive Board to delegate any of its other duties under the Bylaws, either through an explicit delegation or through an agent. 10 11 Nevertheless, the "Guidelines" created on March 31, 2018 delegate to the Committee the duties of developing and enforcing rules, regulations, standards, protocols and procedures for the design, 12 13 architecture, and construction of structures and landscaping within the EPCC on the individual units 14 such as Mr. Moretto's, in violation of the Bylaws. For example, in Paragraph VI, it includes, as part of the Committee's duties, that it shall "apply and enforce those [Guidelines] which have been 15 16 approved and adopted by the Board and as the Committee sees fit". (Emphasis added.) Undisputed 17 Fact No. 18.

This Paragraph VI of the March 31, 2018 Guidelines is carried over to the current version,
in Paragraph 8, which states that "Committee duties shall be ...(2) to apply and enforce those
ADCSG which have been approved and adopted by the Board". Undisputed Fact No. 19. Once
again, therefore the current Guidelines violate NRS 116.3106(1)(d) in that the Bylaws do not allow
such a delegation of the Board's duties.

Even if the Bylaws were amended to allow delegation of its duties to a committee, the committee would still be required to follow the laws governing the Board. NRS 116.31083(2) requires that: "[T]he secretary or other officer specified in the bylaws of the association shall, not less than 10 days before the date of a meeting of the executive board, cause notice of the meeting to be given to the units' owners." NRS 116.31085(1) further requires that: "[A] unit's owner may attend any meeting of the units' owners or of the executive board and speak at any such meeting. The

executive board may establish reasonable limitations on the time a unit's owner may speak at such 1 a meeting." If the Board were allowed to delegate any duties to the Committee, then that delegation 2 of powers is limited to the powers of the Board, including the statutory requirements that unit owners 3 be given basic due process rights as to committee meetings, including to be noticed of all meetings 4 of the Committee and an opportunity to be heard. The Board cannot delegate to a Committee the 5 authority to act in a manner the Board itself cannot. The Architectural Review Committee meetings 6 were not properly noticed to any unit members, and the Morettos, as well as other unit owners, were 7 not given the opportunity to attend. Undisputed Fact No. 7. 8

In addition to Chapter 116, EPCC, as a nonprofit cooperative association created in 1925, 9 is governed by Chapters 78 and 81. Pursuant to NRS 81.080(3) and the Bylaws, the Bylaws can only 10 be amended by a two-thirds affirmative vote of all its members, or 66 members. If two-thirds of the 11 members choose to amend the Bylaws of EPCC, to allow for delegation of the Board's authority over 12 enforcement of the rules and regulations in place, then and only then could an "Architectural Review 13 Committee" be delegated any duties at all. To date, no effort has been made to amend the Bylaws 14 to allow for this delegation of the Board's duties. Even then, though, the rules and regulations 15 created by anything less than a 100% affirmative vote by the members would not be valid to impose 16 property restrictions on the Moretto property that exceed the initial statement and intent of the 17 Articles of Incorporation and Bylaws, as argued herein above. 18

- The Guidelines violate several other provisions of Chapter 116 of the Nevada Revised
 Statutes, as outlined herein above. The requirements of Chapter 116 include NRS 116.31065, which
 specifically requires the following:
- 22 The rules adopted by an association: 1. Must be reasonably related to the purpose for which they are adopted. 23 2. Must be sufficiently explicit in their prohibition, direction or limitation to inform a person of any action or omission required for compliance. 3. Must not be adopted to evade any obligation of the association. 24 4. Must be consistent with the governing documents of the association and must not 25 arbitrarily restrict conduct or require the construction of any capital improvement by a unit's owner that is not required by the governing documents of the association. 5. Must be uniformly enforced under the same or similar circumstances against all 26 units' owners. Any rule that is not so uniformly enforced may not be enforced against 27 any unit's owner. 6. May be enforced by the association through the imposition of a fine only if the 28 association complies with the requirements set forth in NRS 116.31031.

1 NRS 116.31065. (Emphasis added.)

First, in violation of NRS 116.31065(1), the Guidelines create rules that result in arbitrary 2 and capricious enforcement. One example of this in the initial Guidelines, is where the Guidelines 3 allow the Committee to "enforce ... [Guidelines] ... as the Committee sees fit". Undisputed Fact No. 4 Another example in the initial Guidelines is found in Subparagraph XII(2), in which the 5 18. Committee is given 45 days to review any 'Application' for modification, new construction, 6 painting, replacing light fixtures, etc. on any unit, without regard to the size or complexity of the 7 proposed work to be done. Undisputed Fact No. 26. The 45-day review period has no connection 8 to the size of the project, and further fails to take into consideration the time of year at which any 9 Application is made which would effect some projects under TRPA rules and regulations. 10 Undisputed Fact No. 27. A third example is found in the following subparagraph. At XII(3), the 11 Guidelines state that the "Committee may recommend disapproval ...[of] any Application ... for 12 purely aesthetic reasons." Undisputed Fact No. 28. "Aesthetics" by definition, are the subjective 13 conclusions of individuals as to what constitutes "beauty" and "good taste". As a result, any 14 15 Committee or Board member can decide to disapprove an Application based solely on their individual sense of beauty or good taste, without even considering the aesthetic value to the unit 16 17 owner. These last two examples remain in the current version of the Guidelines. Undisputed Fact 18 No. 29. Second, in violation of NRS 116.31065(2), the Guidelines are vague and not sufficiently explicit to inform unit property owners for compliance. An example of this is found in the section 19 20 regarding the Committee review process of Applications. In Subparagraph XII(6) of the initial 21 Guidelines, the Guidelines impose a \$1,500 "application review fee" of any "Application of a Major 22 Project", however nowhere in the Guidelines is "Major" defined, leaving the definition solely to the 23 Major Project Application itself, which can be changed without unit member input. Not only does 24 it increase the cost to be paid to the Committee, but it increases the cost of the project itself, since 25 Paragraph XIII requires extensive blueprints and documentation to be submitted to the Committee 26 for any "Major Project". Undisputed Fact No. 30. As a result, the Committee could decide that 27 something as simple as replacing a garage door is a "Major Project", greatly increasing the time and 28 cost of each planned improvement of a residence. The current version of the Guidelines reduces this

application review fee from \$1,500 to \$200, but imposes the same extensive documentation as the
 initial Guidelines. Undisputed Fact No. 31. Further, neither version of the Guidelines give objective
 standards for consideration by the Committee, resulting in a potential for arbitrary and capricious
 enforcement of the Guidelines as to any particular project.

Third, the Guidelines are not consistent with the governing documents and arbitrarily restrict
conduct and the construction of the residence by a unit's owner that is not required by the governing
documents of the association.

8 The latest iteration of the Guidelines also retains restrictive covenants that would impose 9 setback requirements and view easements restricting building size and height and landscaping on the 10 Moretto property. Undisputed Fact No. 32. If not enjoined in the instant litigation, nothing would 11 prevent EPCC from reimposing the restrictive covenants previously contained in the March 31, 2018 12 version, including "creating" a three-foot or larger easement across the Moretto property for public 13 pedestrian use, and imposing restrictions on any type of rebuilding of his residence, other than an 14 exact copy of his current residence, including the portion built in 1936.

Third, the Guidelines allow for imposition of fines in violation of the requirements set forth
in NRS 116.31031 which is a violation of NRS 116.31065(6). NRS 116.31065(6) states that: "The
rules adopted by an association: ...(6) May be enforced by the association through the imposition of
a fine only if the association complies with the requirements set forth in NRS 116.31031."

- 19 NRS 116.31031 only allows fines that:
 - 1. [I]f a unit's owner or a tenant or an invitee of a unit's owner or a tenant violates any provision of the governing documents of an association, the executive board may, if the governing documents so provide:
 - (b) Impose a fine against the unit's owner or the tenant or the invitee of the unit's owner or the tenant for each violation, except that:
 - If the violation does not pose an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community, the amount of the fine must be commensurate with the severity of the violation and must be determined by the executive board in accordance with the governing documents, but the amount of the fine must not exceed \$100 for each violation or a total amount of \$1,000, whichever is less.
- 27 NRS 116.31031.

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28 Nowhere in the initial Guidelines is there any stated amounts for any fines (although there is an

1	allusion to a "Fine Schedule" at Paragraph XII, the schedule is not included in the Guidelines), which
2	could result in fines exceeding those allowed under this statute. Undisputed Fact No. 33. This is
3	carried over into the current Guidelines as well. Undisputed Fact No. 34. Further, and of potentially
4	more consequence, neither the initial Guidelines nor the current Guidelines provide for any cure of
5	any violation prior to imposition of a fine, in violation of NRS 116.31031(1)(c).
6	[T]he executive board may, if the governing documents so provide:
7 8 9	 (c) Send a written notice to cure an alleged violation, without the imposition of a fine, to the unit's owner and, if different, the person responsible for curing the alleged violation. Any such written notice must: (1) Include an explanation of the applicable provisions of the governing documents that form the basis of the alleged violation;
10	(2) Specify in detail the alleged violation and the proposed action to cure the alleged violation;
11	(3) Provide a clear and detailed photograph of the alleged violation, if the alleged violation relates to the physical condition of the unit or the grounds of the unit or an
12	act or a failure to act of which it is possible to obtain a photograph; and (4) Provide the unit's owner or the tenant a reasonable opportunity to cure the alleged
13	violation before the executive board may take additional actions, including, without limitation, other remedies available pursuant to this section.
14	NRS 116.31031(1)(c) (emphasis added).
15	Finally, in violation of NRS 116.31065(5), the initial Guidelines allow for a variance from
16	the Guidelines at the discretion of the Committee with no objective standard. At Subparagraph XI(4),
17	it allows a unit owner to request a variance of the "recommendation" that all construction not exceed
18	3500 square feet of floor area, but gives no indication why or under what circumstance a variance
19	would be approved. Undisputed Fact No. 35. Subparagraph XII states that all Applications that
20	include a variance would first be reviewed by the Committee, then forwarded to the Executive Board
21	with the Committee's recommendation to approve or disapprove, however, there is no guidance in
22	that short paragraph to either the Committee or Executive Board in reaching their decisions. As a
23	result, the requests for variances can be treated differently from unit owner to unit owner, with no
24	consistency. Undisputed Fact No. 36. The current Guidelines appear to attempt to resolve this issue,
25	through a more restrictive process for variances in Subparagraph 14(f), however Paragraph 11 of the
26	current Guidelines allow for amendments to the Guidelines on the recommendations of the
27	Architectural Review Committee "as it sees fit", thereby allowing an amendment, however
28	temporary, to be made on the recommendation of the Committee to the Board and without any unit

1 owner involvement. Undisputed Fact No. 37.

Under any one of the foregoing arguments, EPCC's enactment of the Guidelines are in violation of the Bylaws and relevant statutes, therefore summary judgment on the First, Second and Third Causes of Action is appropriate. Taken together, though, it is clear EPCC created a committee and guidelines outside its authority and containing numerous violations of Nevada law, requiring a complete dismantling of these new rules, summary judgment and the entry of a permanent injunction.

8 Further, as stated herein above, in addition to an award of a permanent injunction, Mr.
9 Moretto is entitled to attorney fees pursuant to NRS 116.4117.

The primary relief sought in this action is a permanent injunction to prevent the EPCC, through the and any committee from imposing rules and restrictions beyond those stated in the Bylaws. This appropriate relief, therefore, allows for attorney fees in this matter. Should the injunction not be granted, then the damages for loss in value to Plaintiff's property remain at issue for trial. Without an injunction, the Guidelines are a taking of Plaintiff's property rights, for which Plaintiff is entitled to compensation.

16

E. Plaintiff is entitled to Summary Judgment as to the Fourth Cause of Action for

17 Violation of NRS 116.31175

Plaintiff has asserted a claim for statutory fines under NRS 116.31175 for Defendant's failure to timely produce requested corporate records to Plaintiff, as a member of the nonprofit benefit corporation. Moretto objected to the initial Guidelines and requested to present those objections to the Executive Board through letter dated from May 12, 2018. Undisputed Fact No. 23. In that same letter, Plaintiff demanded, in writing, that the Executive Board provide him with copies of all governing documents, documents pertaining to enactment of the Guidelines, and any records of the Design Review Committee. Undisputed Fact No. 44.

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 1. Except as otherwise provided in subsection 4, the executive board of an association shall, upon the written request of a unit's owner, make available the books, records and other papers of the association for review at the business office of the association or a designated business location not to exceed 60 miles from the physical location of the common-interest community and during the regular working hours of the association ...

28 2. The executive board shall provide a copy of any of the records described in

Ì	paragraphs (a), (b) and (c) of subsection 1 to a unit's owner or the Ombudsman within 21 days after receiving a written request therefor
2	3. If the executive board fails to provide a copy of any of the records pursuant to subsection 2 within 21 days, the executive board must pay a penalty of \$25 for each
3	day the executive board fails to provide the records.
4	NRS 116.31175.
5	EPCC's duty to allow full access to its records to its members are further clarified in NRS
6	116.3118(2):
7	2. All financial and other records of the association must be:(a) Maintained and made available for review at the business office of the
8	association or some other suitable location within the county where the common-interest community is situated or, if it is situated in more than one county,
9	within one of those counties; and
10	(b) Made reasonably available for any unit's owner and his or her authorized agents to inspect, examine, photocopy and audit.
11	This failure of EPCC is no clearer than in its failure to comply with Plaintiff's demand for
12	the records on May 12, 2018. Although some requested documents were provided prior to the 21 day
13	statutory deadline, a number were not presented until December 7, 2018. Undisputed Fact No. 44.
14	Further requested documents were not provided until after the instant litigation began and at the
15	hearing on the preliminary injunction in this matter on March 9, 2020. Undisputed Fact No. 45.
16	Others were not provided at all to date and were the subject of the Order Compelling Further
17	Responses to discovery. Undisputed Fact No. 46. In the Opposition to that Motion, EPCC identified
18	5,422 e-mails potentially discussing the Guidelines between Board members. Less than a dozen were
19	provided in the further documents supplied. Undisputed Fact No. 47. As of the date of the instant
20	motion, therefore, it has been 1,260 days (to 11/2/20) of failure to provide copies of the requested
21	records, therefore Plaintiff is requesting a penalty of \$31,500 be levied as damages for violation of
22	NRS 116.31175.
23	F. Plaintiff is entitled to Summary Judgment as to the Fifth Cause of Action for
24	Declaratory Relief
25	The final Cause of Action for Declaratory Relief requests the Court recognize Plaintiff's
26	assertions that the Guidelines were illegally and improperly imposed on him, as well as all other
27	property owners within the Association, as set forth in the first three causes of action. In accordance
28	with the foregoing discussions regarding those claims, Plaintiff respectfully requests this Court
	- 31 -

acknowledge the dispute as stated in the final claim, and find the Guidelines and the Architectural Review Committee overseeing and enforcing them were illegally enacted and void.

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, 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.

6 NRS 30.040(1).

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7 By the Complaint filed herein, Plaintiff has set forth allegations challenging the validity of any real property guidelines imposed on him as a property owner within the EPCC Homeowner's 8 Association that extend the Board's authority over his individual unit beyond its limited authority 9 10 set forth in the Bylaws, without his approval. As outlined in the instant motion, by creating the 11 Guidelines and the Architectural Review Committee, the Board violated the Bylaws, and Nevada laws governing real property, community-interest communities, and non-profit corporation law. 12 13 Plaintiff is now requesting this Court recognize those violations and find Plaintiff's right to quiet 14 enjoyment of his residence has been violated through those violations. Mr. Moretto requests the Court grant him declaratory relief, as set forth in the Complaint. 15

16 V.

CONCLUSION

17 When "an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary" to grant an injunction. 11A Fed. Prac. & Proc. 18 19 Civ. § 2948.1 (Wright & Miller) (3d ed., Oct. 2020) "As a constitutional violation may be difficult 20 or impossible to remedy through money damages, such a violation may, by itself, be sufficient to 21 constitute irreparable harm." Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 715 (9th Cir. 1997), 22 cited with approval in City of Sparks v. Municipal Court, 129 Nev. 348, 357 (2013). Further, a violation of a constitutional requirement "must be permanently enjoined." Schwartz v. Lopez, 132 23 24 Nev. 732, 755 (2016). Finally, our courts have recognized that "real property and its attributes are 25 considered unique and loss of real property rights generally results in irreparable harm". Dixon y. Thatcher, 103 Nev. 414, 416, 742 P.2d 1029, 1030 (1987). 26

The Executive Board has enacted a set of corporate rules in violation of Moretto's property
rights and in violation of NRS Chapter 116. It put an illegally formed committee in charge of

applying and enforcing those illegally enacted rules. EPCC has violated Mr. Moretto's constitutional
right to acquire, possess and protect his property from intrusion by others, and to have peaceable
enjoyment of his property without illegal restrictions on its use. Further, the Committee itself
violated Mr. Moretto's due process rights. In accordance with the foregoing, Mr. Moretto is entitled
to a permanent injunction, enjoining EPCC from imposing any restrictions on his use of his
individual unit beyond the narrow restrictions set forth in the Bylaws of EPCC.

In the event this Court lets any part of the Board's actions stand, Mr. Moretto's property will
have a reduced monetary value, in an amount to be established at trial. As a result, summary
adjudication of the issue of liability is appropriate and requested here, in the alternative.

Finally, NRS 116.4117(6) entitles Plaintiff to attorney fees as the prevailing party following
the permanent injunction requested here. Although EPCC may have attempted to alter that
requirement, NRS 116.1104 provides that: "Except as expressly provided in this chapter, its
provisions may not be varied by agreement, and rights conferred by it may not be waived." Plaintiff
therefore requests attorney fees be awarded concurrently with the injunction.

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DATED: November 2, 2020

RESPECTFULLY SUBMITTED:

LAW OFFICE OF KAREN L. WINTERS

Karen L. Winters, Esq., SB# 3086 P.O. Box 1987 Minden, Nevada 89423 775-782-7933 Attorney for Plaintiff

1	CERTIFICATE OF MAILING	
2	Pursuant to NRCP 5(a), I certify that I am over the age of 18 years, an employee of the LAW	
3	OFFICE OF KAREN L. WINTERS, and that on this date, I caused to be deposited for mailing at the	
4	United States Post Office at Minden, Nevada, with postage thereupon fully prepaid, a true and	
5	correct copy of the NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT	
6	OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES addressed as	
7	follows:	
8	Prescott Jones, Esq.	
9	Joshua Ang, Esq. Resnick & Louis, P.C.	
10	8925 W. Russell Road, Suite 220 Las Vegas, NV 89148	
11	Dated: November 2, 2020	
12	Judy M. Sheldrew	
13		
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	- 34 -	

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Exhibit B

Exhibit B

Ĭ	CASE NO. 19-CV-0242		
2	DEPT. NO. I		
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4			
5			
6	IN THE NINTH JUDICIAL	DISTRICT OF THE STATE OF NEVADA	
7	IN AND FOR T	HE COUNTY OF DOUGLAS	
8		***	
9 10	JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust,	PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR	
10	Plaintiff,	SUMMARY JUDGMENT	
11	ELK POINT COUNTRY CLUB HOMEOWNERS, ASSOCIATION, INC.,		
12	Nevada non-profit corporation, and DOES 1- 10, inclusive,	S	
14	Defendants.	7	
15		_/	
16	COME NOW Plaintiff Jerome Mo	retto, by and through his attorney, Karen L. Winters of	
17	LAW OFFICE OF KAREN L. WINTERS	, and opposes Defendant Elk Point Country Club	
18	Homeowners, Association, Inc.'s ("EPCC"	") Motion for Summary Judgment as follows.	
19	Concurrently with the filing of Defendant's Motion for Summary Judgment, Plaintiff has filed a		
20	Motion for Summary Judgment as well. By	y reference hereto, Plaintiff incorporates Plaintiff's	
21	Motion for Summary Judgment and its supporting documentation into Plaintiff's Opposition to		
22	Defendant's Motion for Summary Judgment, as though fully set forth here.		
23	I. RESPONSE TO DEFENDAN	T'S STATEMENT OF RELEVANT/UNDISPUTED	
24	FACTS.		
25	Plaintiff must initially address Defe	endant's "Statement of Relevant/Undisputed Facts"	
26	contained in Section II of Defendant's Mo	tion. In support of a motion for summary judgment,	
27	under the Nevada Rules of Civil Procedure	e and the Ninth Judicial District Court Rules the moving	
28	party is required to set forth its alleged unc	lisputed facts, and the source of those allegations.	
		-I- A.App762	

1	(1) Supporting Factual Positions A party asserting that a fact cannot be or is
2	genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions,
3	documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory
4	answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a
5	genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
6	NRCP 56(c)(1)
7	On motions for summary judgment, each party shall file a concise statement setting
8	forth each fact material to the disposition of the motion that the party claims is or is not genuinely in issue, or is in dispute but is not material to the motion, and cite the
9	particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other matter upon which he or she relies in making such argument.
10	NJDC Rule 6(f)
11	Defendant has set forth seven alleged "undisputed facts" in support of its motion, each of
12	which is addressed as follows:
13	First, Defendant contends that: "Plaintiff's Complaint does not dispute that EPCC's
14	Bylaws do not prohibit and do permit the enactment of guidelines such as the ACDSG
15	[Architectural Design Control Standards and Guidelines] at issue, but rather only alleges that
16	certain contents of the ACDSG violate the bylaws." In support of that assertion, Defendant cites to
17	the Plaintiff's Complaint, without any specific reference to a particular paragraph or cause of
18	action. Plaintiff disputes this conclusory statement, in that the First Cause of Action, Breach of
19	EPCC Bylaws, and Fifth Cause of Action, Declaratory Relief, both assert that the Bylaws DO
20	prohibit the creation of the Architectural Review Committee and the Architectural Design Control
21	Standards and Guidelines ("Guidelines")., both under the terms of the Bylaws themselves and
22	NRS 116.3106, making them void ab initio.
23	Second, EPCC contends that: "NRS Chapter 116 does not prohibit Architectural
24	Guidelines such as the subject ACDSG." Plaintiff objects to this statement on the grounds this is
25	not a "fact", let alone an undisputed fact. This is a general assertion of the laws stated in Chapter
26	116 of the NRS. As set forth in Plaintiff's Motion for Summary Judgment filed concurrently with
27	Defendant's Motion herein, this is not even an accurate statement of the law.
28	Third, EPCC contends that: "Plaintiff admits that the subject ACDSG never delegated any

authority of the EPCC's Executive Board to the Architectural Design Review Committee ('ARC'). 1 2 but instead merely permits the ARC to issue non-binding recommendations that must be accepted 3 or rejected by EPCC's Executive Board." Plaintiff objects to this contention not only because it is factually inaccurate, but because it is asserting a legal conclusion, not a factual statement. One of 4 the references made by EPCC in support of this statement is a portion of Jerome Moretto's 5 deposition, however it fails to include previous pages of Mr. Moretto's deposition, in which his 6 7 undersigned counsel raised objections to the questions on the grounds EPCC's counsel was asking 8 Mr. Moretto to make legal conclusions and asking vague, general questions regarding legal claims. 9 See, Deposition of Jerome Moretto, p.12, l. - p.13, l.8, attached as Exhibit A to the Declaration of Karen L. Winters in support of this Opposition, filed herewith. In addition to the fact that the 10 11 excerpts cited by Defendant were objected to by Plaintiff's counsel as asking for a legal conclusion, the Defense counsel was explicitly asking for Mr. Moretto's personal opinion as to 12 13 that legal conclusion, not for any factual contention. As a result, the cited portions of Mr. 14 Moretto's deposition do not support the third contention raised in Defendant's Motion. It should 15 also be noted that Mr. Moretto's deposition had not yet been finalized and certified at the time 16 EPCC filed its Motion for Summary Judgment, and Mr. Moretto has submitted an "Errata" to his deposition, for insertion in the referenced pages, a true and correct copy of which is included in 17 18 Exhibit B to the Declaration of Karen L. Winters in support of this Opposition, filed herewith.

19 The other two cites given by EPCC in support of its third contention are the original set of Guidelines allegedly enacted on March 31, 2018, and the latest version approved in December 20 21 2019. EPCC asserts that both these Guideline versions simply allow the Committee "to issue nonbinding recommendations" to the EPCC Board, however both versions specifically state that: 22 23 "Committee's duties shall be...to apply and enforce those ADCSG which have been approved and adopted by the Board" (emphasis added). See, Defendant's Exhibit C at paragraph numbered VI on 24 25 the first page, and Defendant's Exhibit D at paragraph numbered 8 on the second and third pages, 26 attached to Defendant's Motion for Summary Judgment. As argued in Plaintiff's Motion for 27 Summary Judgment, this phrase authorizes the Committee to act in violation of the Bylaws and 28 NRS 116.31065. As a result of the foregoing discussion of EPCC's third "undisputed fact".

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EPCC's contentions therein are simply legal conclusions and assertions of Plaintiff's opinion of a
 legal conclusion. It is not a "fact".

3 Fourth, EPCC contends that: "Plaintiff admits that he knows of no specific instances of arbitrary and capricious enforcement of the ACDSG rules by the ARC, nor where the said ACDSG 4 rules lent themselves to such arbitrary and capricious enforcement." Plaintiff argues the first part 5 of this statement is irrelevant, particularly considering the fact that the Committee failed to provide 6 7 notices to anyone of its meetings, in which the Committee's actions are taken. See, Deposition of Charles Jennings, p. 14, Il. 17-22. In addition, Plaintiff asserts that whether he is aware of any 8 9 "specific instances of arbitrary and capricious enforcement of the ACDSG rules by the ARC" is not relevant to the issue of whether the Guidelines allow the Committee to act arbitrarily and 10 capriciously. Finally, the second phrase of EPCC's fourth contention is a legal conclusion, not a 11 12 fact, and is not supported by the sole cite given in support of that contention. 13 Fifth, EPCC contends that: "The currently effective 2019 version of the ACDSG permits rebuilding to restore buildings damaged or destroyed by fire or other similar calamities to a form in 14 15 substantial compliance with the design of the original structure, exempting such rebuilding from the ARC's design review process." Plaintiff admits that the current version of the Guidelines state 16 17 that: 18 "Exempt activities are structural repair, structural modifications, structural remodeling, replacement of an existing roof with a metal roof, interior remodeling, 19 buildings damaged or destroyed by fire or other similar calamity that are rebuilt in substantial compliance 20 with the design of the original structure, non-permanent structures, ... and demolition. This also includes like-kind (size, color, quantity, etc.) replacement, or 21 re-painting a residence the exact same color as previously approved and painted ... ? 22 Defendant's Exhibit D at paragraph numbered 14(b) on the fifth page, attached to Defendant's Motion for Summary Judgment. 23 Sixth. EPCC contends that: "Plaintiff cannot demonstrate that he has suffered any 24 25 monetary damages; his experts reviewed a version of the ACDSG dated March 2018, which is different from the current effective December 2019 version that Defendant's appraiser expert has 26 opined would permit Plaintiff's property to be developed to the same size as before the March 27 28 2018 guidelines were adopted." Plaintiff disputes this statement, in that Plaintiff's expert appraiser

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has a very different opinion of the effect of the Guidelines on Plaintiff's property. See, eg., 1 Plaintiff's expert, Ben Johnson's Appraisal, attached as Exhibit E to Defendant's "Ex Parte 2 Request for an Order Shortening Time and Motion for Limited Extension of Discovery" filed 3 herein on or about September 25, 2020. This disputed statement, however, is not relevant to either 4 5 Defendant's Motion for Summary Judgment or Plaintiff's Motion for Summary Judgment, since the diminution of value to Plaintiff's property is only relevant if the Court decides the Guidelines 6 7 were not only properly enacted, but that by allowing them to be permanently enforceable is also allowing them to take some value away from Plaintiff's property. That result is highly unlikely, 8 given that if the Guidelines do, in fact, diminish Plaintiff's property value, then Plaintiff would 9 argue that taking makes the Guidelines void ab initio. Further, though, Plaintiff has asserted 10 money damages for the Board's violation of NRS 116.31175, for failure to produce documents 11 demanded from the Board in May 2018, and for attorney fees pursuant to NRS 116.4117(6), 12 neither of which are addressed in Defendant's assertion that there can be no money damages. 13

14 Seventh, EPCC contends that: "Plaintiff's experts improperly rely on the hypothetical condition of the effectiveness of the March 2018 version of the ACDSG (which is not effective, 15 16 the December 2019 version supercedes), and upon the flawed methodology of Plaintiff's surveyor expert witness in determining an alleged loss of building square footage under said outdated 17 18 March 2018 ACDSG rules; Plaintiff's damages are thus wholly speculative in nature." Plaintiff 19 objects to this statement on the grounds this is not a "fact", let alone an undisputed fact. This is a 20 legal argument. EPCC is simply arguing that Plaintiff's damages are speculative, an argument that 21 is addressed in Plaintiff's Motion for Summary Judgment and an argument that cannot stand when 22 discussing an encroachment on property rights.

In final response to Defendant's "Statement of Relevant/Undisputed Facts", Plaintiff
further incorporates Plaintiff's "Separate Statement of Undisputed/Relevant Facts" set forth in
Section II of Plaintiff's Motion for Summary Judgment filed herein on November 2, 2020.

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II. ARGUMENT

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A. Plaintiff's First Cause of Action for Violation of EPCC's Bylaws is Supported by the Law and Undisputed Facts

Defendant relies entirely on its argument that the creation of the Guidelines and the 4 Architectural Review Committee was not a delegation of the Board's duties, to support its position 5 that the Board did not violate the EPCC Bylaws. EPCC's argument cites only to selected portions 6 7 of the Guidelines and Mr. Moretto's stated opinion about legal positions taken in the Complaint. 8 There is no other cite, and no cite to legal authority to support this argument as required by DCR Rule 13. In opposition to Defendant's argument, Plaintiff incorporates his Motion for Summary 9 Judgment as though fully set forth herein, and in particular Section IV(C) and (D), which 10 11 references the Second Cause of Action, but more accurately supports summary judgment in favor of both Plaintiff's First Cause of Action for Violation of the Bylaws and Second Cause of Action 12 13 for Violation of NRS 116.31065.

14 It appears Defendant's entire argument is that the Board did not delegate any power to the Architectural Review Committee, therefore it did not violate NRS 116.3106(1)(d), which states 15 16 that: "The bylaws of the association must: ... (d) Specify the powers the executive board or the 17 officers of the association may delegate to other persons or to a community manager." In support 18 of this contention, EPCC cites to selected portions of the Guidelines that allegedly limit the Committee's authority to "considering and making recommendations" to the Board regarding the 19 20 contents of the Guidelines and whether any unit member's "Application" for projects on the unit member's own property complies with the Guidelines. 21

This argument, however, fails to address the underlying violation of the Bylaws. As set forth in Plaintiff's Motion for Summary Judgment, the Board did not have the authority to create the Guidelines to begin with, since they go beyond the scope of the Board's authority over individual unit members' properties. That authority is limited under Article XVI of the current Bylaws:

Section 1, No Unit shall transfer membership without the prior approval of an application for membership in the Association by a majority of the Executive Board by appropriate action at any regular or special meeting thereof.
1	Section 2. The property of Unit Owners shall be used for single family residential purposes only.		
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3	Section 3. No structure of any kind shall be erected or permitted upon the premises of any Unit Owner, unless the plans and specifications shall have first been submitted to and approved by the Executive Board. No tent, house trailer, motor		
4	home, camper, or similar housing, permanent or temporary, shall be permitted within the premises and real property of the Corporation at any time under any circumstances, except for loading and unloading.		
6 7	Section 4. No Unit Owner, either individually, or in the name of a family trust, spouse, corporation, limited liability company, partnership, limited partnership or retirement plan, shall own more than three (3) lots at the same time.		
8	Section 5. The grantee or grantees of any property and premises, and the property		
9	and the 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		
10	which shall in turn bind every subsequent grantee, the executors, administrators, successors and or assigns of such grantee.		
11			
12	Complaint on file herein, which is also attached as Exhibit A Defendant's instant motion.		
13	A corporation can exercise no power not granted to it by the legislature. George v. Nevada		
14	Cent. R.R. Co., 22 Nev. 228, 238, 38 P. 441 (Nev. 1894). NRS 78.125(1) gives the Board the		
15	authority to manage the business and affairs of the corporation only, not the Unit Owners'		
16	property. Officers of private corporations have only the authorities delegated to them by their		
17	governing corporate agreements. See George, supra, at 239. Neither the above-cited law nor the		
18	authority given in the EPCC Bylaws give the Board the authority to impose "written guidelines,		
19	controls, standards, rules and regulations concerning the design, architecture and/or construction of		
20	structures" restricting building heights, building envelopes, design, view corridors, fencing,		
21	lighting, and landscaping on a Unit Owner's property. The only authority the Board has is to limit		
22	construction to permanent homes, and approve the home construction plans, as set forth in		
23	subparagraph 3 of Article XVI of the EPCC Bylaws, stated above. The additional "guidelines" go		
24	beyond that authority. "[I]f an act is in excess of the chartered purposes of a corporation, it will		
25	always be outside of the powers delegated to the company's agents, as well as in excess of the		
26	corporate powers which the company is authorized by law to exercise." Id.		
27	Even if, however, the Board had any authority to create any rules imposing restrictions on		
28	Unit Owners' property, it may not give any of that authority to a Committee, which is what the		

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Board is doing in this case, when it gave the Committee the discretion to determine whether a Unit
Owner's Application to make changes to the Unit Owner's property complies with the Guidelines.
One of the paragraphs cited in EPCC's argument, specifically gives the Committee this authority
to exercise its own discretion. (*See*, EPCC's Motion for Summary Judgment, p.7, 11. 20-22, in
which the Guidelines give the Committee discretion to determine if an Application complies.)
That power and duty must be limited to the Board and not delegated to any Committee under NRS
116.31065(d) unless the Bylaws are amended.

In addition, despite efforts by EPCC not to acknowledge delegation of the Board's duties in
the Guidelines, the Guidelines specifically include as a part of the Committee's duties, that the
Committee shall "apply and enforce those ADCSG [Guidelines] which have been approved and
adopted by the Board". This provision is contained in the original Guidelines, as well as the
current Guidelines. (*See*, paragraph 8 of Exhibit D and paragraph 6 of Exhibit C, attached to
EPCC's Motion for Summary Judgment, on file herein.)

Based on the foregoing, Defendant's motion as to Plaintiff's First and Second Causes of Action fail, and Plaintiff's Motion for Summary Judgment as to these causes of action must be granted.

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B. Plaintiff's Second Cause of Action for Violation of NRS 116.31065 is Supported by the Law and Undisputed Facts

EPCC is apparently arguing that there has not yet been any instances of arbitrary and capricious enforcement of the Guidelines, therefore the Guidelines themselves are not arbitrary and capricious. This misses the points made in Plaintiff's Second Cause of Action for violation of NRS 116.31065. The Plaintiff's cited violations address four subsections of NRS 116.31065, only one of which addresses the arbitrary restriction of conduct. EPCC's Motion for Summary Judgment mischaracterizes Plaintiff's Complaint on file herein, in that it fails to address all the sections of NRS 116.31065 Plaintiff alleges were violated.

Once again, EPCC's Motion on this issue cites to Mr. Moretto's stated opinion in his
deposition about legal positions, which has no bearing on the validity of the disputed Guidelines.
On their face, the Guidelines violate NRS 116.31065, therefore whether Mr. Moretto is aware of

any specific instances in which those vague or inconsistent Guidelines were enforced on an unsuspecting Unit Owner is irrelevant. It is not surprising Mr. Moretto is unaware of the Committee's enforcement action, as unit owners are not noticed of the meetings, nor given minutes. This is the substance of his due process ciolations claim against EPCC. Plaintiff's Motion for Summary Judgment on file herein addresses the EPCC Guidelines' violation of NRS 116.31065 in detail and need not be restated here. *See*, "Plaintiff's Motion for Summary Judgment" filed herein, p. 26, l. 19 through p. 30, l. 1.

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Based on Plaintiff's argument set forth in Plaintiff's Motion for Summary Judgment on file
herein, and the foregoing, EPCC's motion as to Plaintiff's Second Cause of Action fail, and
Plaintiff's Motion for Summary Judgment as to that cause of action must be granted.

C. Plaintiff's Third Cause of Action for Violation of Plaintiff's Property Rights is Supported by the Law and Undisputed Facts.

13 Defendant's argument against the third cause of action cites only to a selected portion of 14 the Bylaws, without reference to any legal authority. EPCC simply says there is no such cognizable 15 cause of action for violation of property rights, without cite to any authority as required by DCR 16 Rule 13. No matter the name of the claim, violation of property rights has been recognized in case 17 law, as well as the Nevada Constitution. For example, Gladstone v. Gregory, 95 Nev. 474, 596 18 P.2d 491 (1979) found a neighbor violated a property owner's property rights when the neighbor 19 chose to disregard a restrictive covenant and build a two-story home. The Court granted permanent 20 injunctive, requiring the neighbor to remove the second story. In another example, a zoning 21 ordinance which required the written permission of the owners of property within a certain 22 distance for construction of a building in the residential district for nonresidential purposes, 23 violated the Nevada Constitution, Art. 1, §§ 1, 4 and 8, as applied to the construction of a church. 24 since the ordinance bore no substantial relationship to the promotion of the health, safety, morals, 25 convenience, property, or general welfare of the city or of its residential district, and because the 26 ordinance constituted an invasion of property rights. State ex rel. Roman Catholic Bishop v. Hill, 59 Nev. 231, 90 P.2d 217, 1939. In a case of inverse condemnation involving another government 27 28 entity, a Nevada landowner held a property right in the usable airspace above his property up to

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500 feet; where height restriction ordinances authorized airplanes to make a permanent, physical 1 2 invasion of the landowner's airspace lower than 500 feet, a regulatory taking occurred. McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006), cert. denied, 549 U.S. 1206, 127 S. 3 Ct. 1260, 167 L. Ed. 2d 76, 2007 U.S. LEXIS 2086 (U.S. 2007). Each of these cases include 4 claims in which the offending party violated property rights. Although it is often the case that such 5 disputes involve eminent domain or inverse condemnation based on the acts of a government 6 7 body, the claims are not limited to those types of violations, as seen in *Gladstone*, supra, as well as claims of trespass. 8

9 The violation of Plaintiff's property rights, and due process violations stemming from that
10 invasion of his property rights, is set forth in detail in Plaintiff's Motion for Summary Judgment
11 on file herein, at Section IV(B), and need not be reiterated here.

Based on Plaintiff's argument set forth in Plaintiff's Motion for Summary Judgment on file
herein, and the foregoing, EPCC's motion as to Plaintiff's Third Cause of Action fail, and
Plaintiff's Motion for Summary Judgment as to that cause of action must be granted.

D. Plaintiff's Fourth Cause of Action for Violations of NRS 116.31175 is Supported
 by the Law and Undisputed Facts.

Defendant's argument against Plaintiff's fourth cause of action is solely based on
Defendant's statement that Plaintiff "has not been able to clearly establish that all required
documentation was not provided <u>during discovery</u>". (*See*, "Defendant's Motion for Summary
Judgment", p.11, ll.11-12.) Plaintiff's claim, however, was based on the allegation that EPCC did
not timely produce documents requested by Plaintiff on May 12, 2018 as required pursuant to NRS
116.31175, a year and a half prior to the filing of the Complaint and two years prior to Plaintiff's
requests in discovery for those same documents.

For example, Plaintiff's May 12, 2018 request for documents includes an item numbered 9, which requested: "All Board communications regarding amending the Architectural Guidelines, including any electronic correspondence, written correspondence, notes from Facetime communications, any other telephonic communications, minutes, meeting notes or any other communication of any kind, between Board members, regarding the amendment of the

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1	Architectural Guidelines." (See, "Declaration of Karen L. Winters in Support of Plaintiff's Motion			
2	for Summary Judgment", on file herein, Exhibit 7, p. 2, item number 9.) Those same documents			
3	were again requested in Plaintiff's Request for Production of Documents, as Document Request			
4	No. 9: "All Board communications with anyone regarding amending the Architectural Guidelines,			
5	including but not limited to any electronic correspondence, written correspondence, notes from			
6	Facetime communications, any other telephonic communications whether recorded or			
7	memorialized in writing, minutes, meeting notes or any other communication of any kind." (See,			
8	"Declaration of Karen L. Winters in Support of Plaintiff's Motion to Compel", on file herein,			
9	Exhibit 2, p.3, l. 25 - p.4, l2.) A similar request was made in both the May 12, 2018 request from			
10	Plaintiff and the discovery requests, for communications on the same subject by the Board. (See,			
11	"Declaration of Karen L. Winters in Support of Plaintiff's Motion for Summary Judgment", on file			
12	herein, Exhibit 7, p. 2, item number 10; "Declaration of Karen L. Winters in Support of Plaintiff's			
13	Motion to Compel", on file herein, Exhibit 2, p.4, ll. 3-4).			
14	Some of that documentation was provided for the first time on or about October 7, 2020			
15	following the "Order Compelling Further Responses", two and a half years after it was requested,			
16	rather than the 21 days required under NRS 116.31175. ("Declaration of Karen L. Winters in			
17	Support of Opposition to Defendant's Motion for Summary Judgment", and Exhibit C thereto,			
18	filed herewith.) Even those provided, however, did not include any electronic correspondence			
19	regarding amending the Guidelines that predate the May 12, 2018 request by Plaintiff. (Id.) As Mr.			
20	Jennings stated in his deposition taken in the course of this action, most of his electronic			
21	communications as a member of the Board were not included in any official records of EPCC.			
22	Prior to being a Board member, he was on the Architectural Committee.			
23	Q. What is your position on the Board?A. I'm the vice president.			
24	Q. Have you had any other positions on the Elk Point Country Club Homeowners			
25	Association? A. I was a member of the Architectural Committee.			
26	Deposition of Charles Jennings, dated July 2, 2020, attached as Exhibit D to the Declaration of Karen L. Winters, filed herewith, p.10, II.2 - 7			
27	[Q. D]o you maintain a copy of the emails you get and give out regarding the homeowner association Board?			
28	 THE WITNESS: The Board members, in general, have correspondence on their			
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1	individual email accounts, and, of course, that includes a lot of other emails from			
2	related to other subjects, so the official record of correspondence is kept by the secretary.			
3	BY MS. WINTERS: Q. Do you provide the secretary with a copy of all of your emails regarding			
4	homeowner association business? A. No.			
5	Deposition of Charles Jennings, dated July 2, 2020, attached as Exhibit D to the Declaration of Karen L. Winters, filed herewith, pp. 96:21 to 97:10.			
6 7	Q. Do you keep the electronic copy of emails that you send out regarding			
8	THE WITNESS: I am not the secretary, so it's a personal email account that has emails from all different sources.			
10	BY MS. WINTERS: Q. So you don't keep separate anything that has to do with business of the homeowner association Board, correct? A. No, that's correct.			
11				
12	Deposition of Charles Jennings, dated July 2, 2020, attached as Exhibit D to the Declaration of Karen L. Winters, filed herewith, p. 98, 11.1-12.			
13				
14	Mr. Jennings remains as a member of the EPCC Board, therefore he has a fiduciary duty to			
15	cooperate with the Board and its counsel pursuant to NRS 116.3103(1). Yet, to date, the only			
16	emails regarding the Guidelines in Plaintiff's possession are those in which Plaintiff was one of			
17	the participants, and three emails obtained and addressed in Mr. Jennings' deposition. "Declaration			
18	of Karen L. Winters", filed herewith.			
19	The undisputed facts do not support Defendant's motion for summary judgment on this			
20	claim. The undisputed facts and law regarding this fourth cause of action are further addressed in			
21	Plaintiff's Motion for Summary Judgment, filed herein, at Section IV(E). Based on Plaintiff's			
22	argument set forth in Plaintiff's Motion for Summary Judgment on file herein, and the foregoing,			
23	EPCC's motion as to Plaintiff's Fourth Cause of Action fail, and Plaintiff's Motion for Summary			
24	Judgment as to that cause of action must be granted.			
25	E. Plaintiff's Fifth Cause of Action for Declaratory Relief is Supported by the Law			
26	and Undisputed Facts.			
27	Defendant's argument to find in its favor on the claim for declaratory relief seems only to			
28	address the unrelated issue of Plaintiff's appraisal expert's opinion as to the level of the diminution			
	-12-			

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of value in Mr. Moretto's property if the Guidelines remain in place. The cause of action for 1 2 declaratory relief sets forth the controversies between the parties arising from the EPCC Board's enactment of Guidelines and creation of a Committee. As detailed in Plaintiff's Motion for 3 Summary Judgment, filed herein, at Section IV(F), the undisputed facts and law throughout the 4 Plaintiff's Summary Judgment recognize this controversy must be resolved in favor of Plaintiff's 5 6 contentions. To the extent Defendant is simply arguing that its expert concluded that Plaintiff is 7 not damaged by the Guidelines' encroachment on Plaintiff's property rights, then that would be a disputed fact to be tried by the trier of facts who would necessarily consider both experts' 8 9 opinions. We need never address that disputed fact, however, if the Guidelines are stricken and 10 Plaintiff's summary judgment is granted, since a temporary diminution in value is not compensable in these circumstances. 11

Based on Plaintiff's argument set forth in Plaintiff's Motion for Summary Judgment at Section IV(F), on file herein, and the foregoing, EPCC's motion as to Plaintiff's Fifth Cause of Action fail, and Plaintiff's Motion for Summary Judgment as to that cause of action must be granted.

F. Plaintiff's Claims for Monetary Damages Are Properly Before the Trier of
 Fact, and Are Supported by Admissible Evidence.

18 Finally, Defendant argues that Plaintiff failed to comply with NRCP 16.1(a)(1)(A)(iv) by 19 failing to provide Defendant with a computation of those monetary damages. In support of that, Defendant cites to a case in which the failure to provide a computation of future medical bills not 20 21 provided prior to trial was not sufficient to require a new trial under the circumstances. (Pizarro-Ortega v. Cervantes-Lopez, 396 P.3d 783, 133 Nev Adv Rep 37 (2017). The majority of Plaintiff's 22 23 requested relief is in equity, to obtain a permanent injunction preventing EPCC from imposing any 24 restrictions on his use of his individual unit beyond the narrow restrictions set forth in the Bylaws of EPCC. 25

There are three categories of monetary damages sought by Plaintiff. First, in the event the Court allows EPCC to continue to impose restrictions on Plaintiff's property through guidelines and committees, then those restrictions diminish Plaintiff's property values in an amount which

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remains in dispute. Plaintiff provided that computation of damages in his expert's opinion
 regarding the effect of the Guidelines on Plaintiff's property. As set forth above and in Plaintiff's
 Motion for Summary Judgment on file herein, those portions of the Guidelines most effecting
 Plaintiff's property values remain in the current set of Guidelines. The expert's opinion was
 provided as required under NRCP 16.1 and remains as Plaintiff's computation of damages under
 the scenario of the Court allowing EPCC to retain the Guidelines.

7 The second category of damages is Plaintiff's claim for a \$25 per day statutory fine based on Defendant's failure to comply with the requirement that it produce requested documents to a 8 unit member within twenty-one days of the unit member's request. The fine is ongoing until the 9 demanded documents are produced. The documents were demanded on May 12, 2018. As set forth 10 11 in Plaintiff's Motion for Summary Judgment, the accumulated amount was \$31,500 as of the day 12 that Motion was filed. It continues to accrue. This is simple math, for which EPCC has already been supplied the figures (\$25 per day times the number of days between June 2, 2018 and 13 whenever EPCC produces all the remaining documents requested). It is disingenuous to argue that 14 Plaintiff would be required to supply EPCC with the answer to a simple math problem. 15

Finally, the third category of damages is Plaintiff's attorney fees, allowed pursuant to NRS
116.4117(6). As in the case of the fine under NRS 116.31175, this amount also changes as the case
progresses, therefore any fees sought would necessarily be the subject of a future motion, upon
completion of this initial phase of the case.

- 20 ////
- 21 ////
- 22 ////
- 23 ////
- 24 ////
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- 26 ////
- 27 ////
- 28 ////

III. CONCLUSION

1

2 Defendant's Motion for Summary Judgment is based on legal conclusions and assertions without support in the undisputed facts or the law. Based on the foregoing, and on Plaintiff's 3 Motion for Summary Judgment on file herein, Plaintiff respectfully requests this Court DENY 4 Defendant's Motion for Summary Judgment. 5

6	Dated: November 16, 2020	RESPECTFULLY SUBMITTED:
7		LAW OFFICE OF KAREN L. WINTERS
8		1111
9		Jun Latin
10		KAREN L. WINTERS Nevada Bar No. 3086
11		P.O. Box 1987 Minden, NV 89423 (775) 782-7933
12		(775) 782-7933 Kwinters@nevada-law.us Attorney for Plaintiff
13		Attorney for Plaintiff
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1	CERTIFICATE OF MAILING			
2				
3	LAW OFFICE OF KAREN L. WINTERS, and that on this date, I caused to be deposited for			
4				
5	a true and correct copy of the OPPOSITION TO DEFENDANT'S MOTION FOR			
6				
7	Prescott Jones, Esq.			
8	Joshua Y. Ang, Esq.			
9	8925 W. Russell Road, Suite 220 Las Vegas, NV 89148			
10				
11	Dated this 16 th day of November, 2020			
12	Reneé J. Morris			
13				
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7

Exhibit C

Exhibit C

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Amended BYLAWS

OF

ELK POINT COUNTRY CLUB HOA, INC.

July 7, 2018

This copy of the EPCCHOA Bylaws, recorded as Document 0653319 on August 26, 2005, includes the following amendments incorporated into the Bylaws:

- Bylaw Amendments that were adopted at the Unit Owners Annual Meeting of July 5, 2008 and recorded as Document 0727411 on July 24, 2008 amending ARTICLE I, Section 3c; ARTICLE IV, Section 3 and ARTICLE XV, Section 4.
- Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 4, 2009 and recorded as Document 0758100 on November 7, 2009 amending Article I, Section 3a.
- 3. Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 2, 2011 and recorded as Document 0791527 on October 26, 2011 amending Article XV, Section 4.
- 4. Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 2, 2011 and recorded as Document 0792378 on November 10, 2011 amending Article XV, Section 4.
- 5. Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 6, 2013 and recorded as Document 0828991 on August 16, 2013 amending Article V, Section 1F.
- Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 2, 2016 and recorded as Document 887335 on September 9, 2016 amending Article XX, Section 2.
- 7. Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 2, 2016 and recorded as Document 887439 on September 12, 2016 amending Article V, Section h.
- Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 1, 2017 and recorded as Document 909415 on January 19, 2018 amending Article XIV, Section 1.
- 9. Bylaw Amendment that was adopted at the Unit Owners Annual Meeting of July 7, 2018 and recorded as Document 2018-917776 on August 7, 2018 amending Article XV, Section 4.

I certify this copy of EPCCHOA Bylaws is correct and current based upon the above referenced recorded amendments.

- 1 -

James Gosline

EPCCHOA Secretary

August 7, 2018 Date

2008 BYLAWS OF ELK POINT COUNTRY CLUB HOMEOWNERS' ASSOCIATION INCORPORATED

Preamble

The Elk Point Country Club Homeowners' Association, Inc., is a common-interest development operating as a Nevada non-profit corporation, hereinafter called Elk Point Country Club, Inc, EPCC Association or Corporation, and in operating compliance with Nevada law. Its primary purpose is hereby affirmed to be 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. It shall not operate its properties or facilities with the view of providing profit to its Unit Owners but rather such properties and facilities shall be held, operated, and made available for the use and enjoyment of its Unit Owners upon payment of such assessments and charges as will fairly meet its cost of operation and provide a reasonable accumulation of funds for repairs, replacements and additions.

ARTICLE I

MEETINGS OF UNIT OWNERS

<u>Section 1.</u> All meetings of the Unit Owners shall be held on the property of Elk Point Country Club, Inc., Lake Tahoe, Nevada.

Section 2. A majority of the Unit Owners in good standing as shown on the Official Unit Owners' Roster in person or by proxy shall constitute a quorum for the transaction of business at all Unit Owners' meetings.

Section 3.

1 A C.

a) The annual meeting of the Unit Owners shall be held at Elk Point Country Club, Inc. on the first Saturday of July of each year at the hour of 10:00 a.m. thereof.

b) At such annual meeting each Unit's Owner, as defined in NRS 116.095, in good standing shall be entitled to one vote per unit in person or by proxy.

c) At such meetings, the Unit Owners shall elect the candidates who receive the most votes to the open seats on the Executive Board by using secret written ballots. Eligible candidates are qualified and not suspended Unit Owners as defined by the Articles of Incorporation and the Bylaws. The written ballots will be counted in public by three Unit Owners appointed by the Executive Board.

d) A copy of minutes of all meetings shall be mailed at no charge to each Unit's Owner.

e) Each candidate must comply with the requirements of NRS 116.31034 (5) by submitting the candidate's disclosure to the association secretary for inclusion with the ballot. If the candidate is unable to meet the secretary's schedule the candidate must deliver the disclosure to each Unit's Owner by first class US mail, Federal Express, United Parcel, or by hand at least 15 days prior to the annual meeting at the candidate's own expense. The candidate may submit a statement of 150 words or less regarding the candidacy to the secretary for inclusion with the ballot. Failure to comply with the mandatory requirements of this Section makes the candidate ineligible for serving on the Executive Board.

For additional requirements of the election process see:

NRS 116.31034 Election of members of executive board and officers of association; term of office of member of executive board; staggered terms; eligibility to serve on executive board; required disclosures; procedure for conducting elections; certification by member of executive board of understanding of governing documents and provisions of chapter.

NRS 116.3109 Quorum;

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For requirements of unit's owners meeting See:

NRS 116.3108 Meetings of units' owners of association; frequency of meetings, requirements concerning notice and agendas; dissemination of schedule of fines; requirements concerning minutes of meetings; right of units' owners to make audio recordings of meetings.

Section 4.

a) At any meeting of the Unit Owners, a quorum is 51% of the Unit Owners in good standing as described in Article XX, present in person or by proxy.

 b) A majority of the Unit Owners present in person or by proxy at any meeting representing a quorum can conduct Association business.

Section 5. At all meetings of the members, the order. of business shall be as follows:

- (a) Calling of roll;
- (b) Proof of notice of meeting;
- (c) Approving of Minutes of previous meeting;
- (d) Right of Unit Owners to speak;
- (e) Reports of Directors and Officers;
- (f) Election of Directors;
- (g) Miscellaneous Business.

Section 6. At each meeting of the Association, the President or Board member conducting the meeting shall follow all procedural rules contained in NRS 116, procedural rules contained in the Association Bylaws and generally follow Robert's Rules of Order, to the extent practicable.

For the rights of Unit's Owners to speak at a meeting see:

NRS 116.31085 Right of units' owners to speak at certain meetings; limitations on right; limitations on power of executive board to meet in executive session; procedure governing hearings on alleged violations; requirements concerning minutes of certain meetings.

See:

NRS 116.311 Voting by units' owners; use of proxies; voting by lessees of leased units; association prohibited from voting as owner of unit.

ARTICLE II

EXECUTIVE BOARD

Section 1. The Executive Board shall constitute the ruling and governing body of the Corporation. It shall apply all rules regulating the affairs and conduct of the Corporation, subject in each case to the provisions of these Bylaws the Articles of Incorporation and subject to the laws of the State of Nevada.

Section 2. Qualification for Executive Board Members: An Executive Board Member must be a Unit Owner of the Corporation in good standing for two years prior to election to office. If any

Executive Board member shall cease to be a Unit Owner or fail to continue to be a Unit Owner in good standing, the office of that Executive Board member shall be deemed to be vacant.

Section 3. To avoid conflicts of interest, The Executive Board shall consist of five persons who are unrelated by blood or marriage and do not share a common ownership interest in a unit. They shall fill the terms of office as follows: Beginning with the elections scheduled in July 1991 and thereafter, three (3) Executive Board members shall be elected on even numbered years for two (2) year terms each, and two (2) Executive Board members shall be elected on odd numbered years for two (2) year terms each.

See:

NRS 116.31034 Election of members of executive board and officers of association; term of office of member of executive board; staggered terms; eligibility to serve on executive board; required disclosures; procedure for conducting elections; certification by member of executive board of understanding of governing documents and provisions of chapter.

Section 4. The Executive Board shall meet at such time at the office of the Corporation, or at such other convenient place upon the Corporation property. A meeting of the Board shall be held immediately succeeding every annual meeting of the Unit Owners of the Corporation.

<u>Section 5.</u> Meetings of the Executive Board shall be held when called by the President, or when requested by a majority of the Executive Board.

See:

NRS 116.31083 Meetings of executive board; frequency of meetings; requirements concerning notice and agendas; periodic review of certain financial and legal matters at meetings; requirements concerning minutes of meetings; right of units' owners to make audio recordings of certain meetings.

Section 6.

a) The Executive Board may have an office on the premises of the Corporation.

b) Access to the records shall be allowed upon ten (10) days written notice, during normal business hours.

See:

NRS 116.31175 Maintenance and availability of books, records and other papers of association: General requirements; exceptions; general records concerning certain violations; enforcement by Ombudsman; limitations on amount that may be charged to conduct review.

NRS 116.31177 Maintenance and availability of certain financial records of association; provision of copies to units' owners and Ombudsman.

NRS 117.3118 Maintenance and availability of certain financial records necessary to provide information required for resale of units; right of units' owners to inspect, examine, photocopy and audit records of association.

Section 7. A quorum shall be deemed present throughout any Executive Board meeting if persons entitled to cast 50% of the votes on that Board are present throughout the meeting. See NRS 116.3109. (p59)

Section 8. Any notice required to be given by this Article may be waived by the party to whom such notice is required to be given, provided such waiver is in writing, duly signed either before, at, or after the meeting. The waiver shall be filed with the Secretary of the Corporation.

Section 9. The Executive Board of the Association shall designate an Executive Board member nominating committee for the following year's Executive Board election at their second meeting. The Committee shall be made up of three Unit Owners in good standing. The Committee will be charged with the responsibility of identifying, confirming interest, and placing in nomination a list of recommended Executive Board nominees. The Committee will present the nominees to the Executive Board. for information. No Committee member may be an Executive Board member.

See:

NRS 116.31034 regarding nominations.

ARTICLE III

POWERS OF EXECUTIVE BOARD

Section 1. The Executive Board shall have power to appoint and remove at pleasure, all officers, agents and employees of the Corporation, prescribe their duties, fix their compensation and require from them security for faithful services.

Section 2. The Executive Board shall have 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.

Section 3. The Executive Board shall have power to incur indebtedness, except as limited by Article IV of these Bylaws, the terms and amounts of which shall be entered upon the Minutes of the Executive Board meeting, and the note or writing given for the same shall be signed officially by the Officer or Officers authorized by the Executive Board.

Section 4. The Executive Board may not increase or decrease the number of members of the Executive Board.

For rules requirements see:

NRS 116.31065 Rules.

NRS 116.31031 Power of executive board to impose fines and other sanctions for violations of governing documents; procedural requirements; continuing violations; collection of past due fines.

NRS 116.310305 Power of executive board to impose construction penalties for failure of unit's owner to adhere to certain schedules relating to design, construction, occupancy or use of unit or improvement.

ARTICLE IV

LIMITATIONS OF POWERS

Section 1. 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.

Section 2. The Executive Board shall not borrow money or incur any indebtedness in excess of the annual budget amounts approved by a majority vote of the Unit Owners first had at a regularly called annual or special meeting of the Unit Owners.

<u>Section 3.</u> The Executive Board can enter into any contract, the performance of which would require up to thirty-six (36) months that does not encumber real property. Unit Owners, by majority vote at a duly call Unit Owners' meeting, voting in person or by proxy, may direct the Board to approve and authorize contracts for longer terms that does not encumber real property.

Section 4. The Executive Board shall not sell, convey, or encumber any of the real property of the Corporation without the unanimous consent of the total Unit Owners first obtained. Nothing herein, however, shall preclude the Board of Directors from leasing Club beach property to The Elk Point Yacht Club, Incorporated, A non-profit Corporation, composed of and restricted to Elk Point Club members for the construction of a boating facility only. (Note: Amendment of this section is restricted. See Article XXIV, Section 1.)

Section 5. The compensation of all employees and of all Officers of the Corporation, other than the Executive Board, shall be fixed and determined by the Executive Board as herein provided.

See:

NRS 116.3112 Conveyance or encumbrance of common elements.

NRS 116.31036 Removal of member of executive board; indemnification and defense of member of executive board.

ARTICLE V

DUTIES OF EXECUTIVE BOARD

Section 1. It shall be the duty of the Executive Board:

a) To cause to be kept a complete record of all the accounts and the proceedings of the Unit Owners and to present a full statement thereof at the annual meeting of the Unit Owners, showing in detail the receipts and disbursements and the assets and liabilities of the Corporation, and generally the condition of its affairs, a similar statement shall be presented at any meeting of the Unit Owners when thereby requested by one-third of the unit owners identified on the Official Unit Owners' Roster.

b) To supervise all officers, agents, the caretaker and employees and see that their duties are properly performed.

c) To cause to be kept the Official Unit Owners' Roster and to add new Unit Owners to the Roster upon admission to the Association.

d) To approve the employment of a caretaker.

e) To issue to the caretaker each month, or following each meeting of the Executive Board, orders setting forth a monthly schedule of work to be performed by the caretaker in the ensuing month.

f) The Executive Board may, at its discretion, or at the request of a Unit Owner appoint a Financial Review Committee. This Committee will be charged with conducting an independent review of the financial condition of the Corporation. The report will be submitted to the Executive Board.

The report shall be completed during the month of April and be submitted to the Executive Board at the first scheduled meeting of the Executive Board during the month of May. If the review requested by a Unit Owner is initiated and reported on, then a copy of the report shall be transmitted with the Annual Meeting Package for discussion at the Annual Unit Owner's Meeting.

g) To adopt as necessary, rules for the conduct and government of the Unit Owners, their guests and tenants, in connection with the exercise of their privileges as Unit Owners, tenants and guests and their use of the Corporation property, and cause the same to be published and mailed to each Unit Owner at the address of the Unit Owner as the same appears upon the records of the Corporation. The rules shall be consistent with NRS 116.31065, or any amendments thereto. It shall be each Unit Owner's responsibility to require guests and tenants to obey said rules.

h) The Executive Board shall formally review the status of the Asset Reserve account at its regular scheduled Board meetings and prior to finalizing the annual budget/related assessments. The Treasurer shall be responsible for the coordination of this activity and the associated contractor assessment report. All capital assets whose useful lives will expire within the next five years will be discussed to ensure adequate lunding and plans are in place for their maintenance or replacement. The Board shall document appropriate financial/operational plans to ensure compliance with the 5-year asset management reserve plan as documented by the contracted assessment agency. These plans shall be appropriately communicated to the association.

See:

NRS 116.3103 Duty of executive board to act on behalf of association; adoption and ratification of budget.

NRS 116.31183 Retaliatory action prohibited.

ARTICLE VI

OFFICERS

<u>Section 1.</u> The Officers of the Corporation shall be a President, Vice President, Secretary and Treasurer. No Offices shall be consolidated. The Executive Board shall, at their first regular meeting, elect from its members a President, Vice President, a Secretary and a Treasurer.

Section 2. No Executive Board member may act in the capacity of more than one officer position for any transaction or series or related transactions.

Section 3. The Treasurer and any other Officers with authority to disburse funds of the Corporation shall be bonded for an amount determined by the Executive Board. Each such bond shall be not less than \$2,000.00.

ARTICLE VII

PRESIDENT

Section 1. The President shall be the chief officer of the Corporation and shall, subject to the control of the Executive Board, have general supervision, direction and control of the business and officers of the Corporation. If at any time the President shall be unable to act, the Vice President shall take the place of the President and perform such duties, and, in case of the inability of the Vice President to act, the Executive Board shall appoint a member of the Board to do so, and such member shall be vested for the interim period with all powers and shall discharge and perform all duties and functions of the office.

Section 2. The duties of the President shall be;

a) To preside over all meetings of the Unit Owners and Executive Board.

b) To sign, as President, all contracts and other instruments in writing which have been approved first by the Executive Board.

c) To call the Executive Board together whenever the President shall deem it necessary; and to have, subject to the advice of the Executive Board, charge of all affairs of the Corporation, and generally to discharge such other duties as may be required of the President by the Bylaws of the Corporation.

ARTICLE VIII

VICE PRESIDENT

Section 1. The Vice President shall be vested with the powers and shall perform all of the duties of the President in the absence of the President and at other times shall have authority and shall perform such duties as the Executive Board may prescribe.

ARTICLE IX

SECRETARY

Section 1. The Secretary shall give all required notice of all meetings of the Unit Owners and meetings of the Executive Board, keep minutes of all the meetings of Unit Owners and the Executive Board, keep and update the Official Unit Owners' Roster, countersign contracts, and other instruments in writing requiring the signature of the President, be custodian of the seal and attach the same to all documents and instruments requiring the seal, and in general, perform all acts incident to the office of Secretary.

See:

NRS 116.3108 regarding meeting minutes.

Section 2. Written remarks prepared and submitted for inclusion in the minutes of the Executive Board or minutes of the Unit Owners by a Unit Owner must:

- a. Be legible, preferably type written;
- b. NOT contain any information critical, disparaging, or discourteous toward any other EPCC Unit Owner, group of Unit Owners or Board member(s).
- c. Be short and to the point.

Section 3. It shall be the primary responsibility of the Secretary to review all material, remarks, or other information to be included or attached to the minutes keeping in mind Section 2 (b) of this Article. The Secretary may bring any questionable materials, remarks, or other information to be included in the minutes to the attention of the Board for direction.

ARTICLE X

TREASURER

Section 1. The Treasurer shall receive all monies and funds of the Corporation and shall deposit the same in such depository or depositories as from time to time may be selected by the Executive Board.

Section 2. The Treasurer shall perform all other duties respecting monies, funds, securities and property of the Corporation which the Treasurer may receive, or which may be confided to the care of the Treasurer as the Executive Board may from time to time prescribe or direct.

Section 3. The Treasurer shall disburse the funds of the Corporation as may be ordered by the Executive Board or by an authorized Officer of the Corporation, only upon proper vouchers for such disbursements and as required by Article XIV of these Bylaws.

Section 4. The Treasurer shall render to the President and Executive Board at regular meetings of the Board, or whenever they may require it, an account of all actions as Treasurer, and of the financial condition of the Corporation.

Section 5. The Treasurer shall submit to the Executive Board an annual statement showing in detail all receipts and disbursements at the first scheduled meeting of the Executive Board during the month of May.

ARTICLE XI

VACANCIES

Section 1. If the office of any Executive Board member or of any appointed official of the Corporation shall become vacant for any cause, the remaining Executive Board members, if more than a quorum, may elect a successor or successors who shall hold office for the unexpired term, and in the event there is less than a quorum, the remaining Executive Board members shall call a special meeting of the Unit Owners to fill the vacancies.

ARTICLE XII

VALIDATION OF INFORMAL ACTS

<u>Section 1.</u> Any act of a majority of the Executive Board, although not had at a regularly called meeting, and the records thereof, if attested to in writing by all the other members of the Board, shall be as valid and effective in all respects as if passed by the Board in regular meeting.

Section 2. Whenever all Unit Owners entitled to vote at any meeting, whether of Executive Board or of Unit Owners, consent either by writing signed on the records of the meeting, or filed with the Secretary, or by presence at such meeting, and oral consent entered on the Minutes, or by taking part in the deliberations at such meeting without objections, all acts of such meeting shall be as valid as if had at a meeting regularly called and noticed and at such meeting any business may be transacted which is not excepted from the written consent, or to the consideration of which no objection for want of notice is made at the time, and if any meeting is irregular for want of notice, or of such consent, and a quorum is present at such meeting, the proceedings of such meeting may be ratified and approved and rendered valid, and the irregularity or defect waived by a written consent by all members having a right to vote at such meeting, or by a majority vote at any subsequent legally convened meeting, and such consent or approval of Unit Owners may be by proxy or by power of attorney, in writing.

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ARTICLE XIII

CORPORATE SEAL

Section 1. The Corporation shall have a seal upon which shall appear the Corporate name and date when incorporated, which date shall be the date of the issuance of the original certificate of the Secretary of State, and such other designs as the Executive Board may determine.

ARTICLE XIV

DEPOSIT AND DISPOSITION OF FUNDS

Section 1. The Executive Board is authorized to select such depositories as it shall deem proper for the needs of the Corporation. Funds from the Corporation's accounts may be withdrawn only with the signature of at least two members of the Executive Board or one member of the Executive Board and a Community Manager as defined under NRS, Chapter 116 and designated by the Executive Board.

Money may be withdrawn from the operating account without the signatures provided for above in accordance with the terms of NRS 116.31153 (3) & (4).

See: NRS 116.31153 Signatures required for withdrawals of certain association funds; exceptions.

See:

NRS 116.31153 Signatures required for withdrawals from reserve account of association.

ARTICLE XV

UNIT OWNERS

Section 1. No owner of property at Elk Point shall be eligible for membership in this Corporation whose application for membership has not been submitted to the Executive Board and favorably passed upon by a majority vote of Executive Board at any regular or special meeting thereof.

Section 2. Any Owner of property at Elk Point may apply for membership in the Association by application to the Executive Board on a form to be made available by the Executive Board. If a Unit Owner desires to transfer the membership to any such applicant, such Unit Owner shall join in the application and request that the membership be so transferred to such applicant. If such Unit Owner desires to transfer membership to such applicant only one or more of several lots owned by the Unit Owner, but would still retain one or more lots, then such Unit Owner shall join in the application and request permission to transfer membership in such lot or lots proposed to be sold. A copy of the proposed deed or deeds shall be annexed to each application.

Section 3. Upon the sale or transfer of a unit, upon the date the deed is recorded effecting the transfer or sale, all property rights of the grantor or transferor for that unit shall terminate and shall vest in the new Unit Owner.

Section 4. The transfer fee for new Unit Owners shall be \$20,000, which said sum should accompany all applications for membership. In the event the application is rejected, the transfer fee shall be returned to the applicant. The Executive Board shall have the right, if the Asset Reserve account is

fully funded, to allocate initiation fees to either the General Fund or Asset Reserve Account of the Association as may financially be appropriate. The total transfer fee collected in one fiscal year shall be deducted the following year from the contributions that would have been made to the Reserve Account should all of the transfer fees be applied to the Reserve Account.

<u>Section 5.</u> Any Unit Owner who wishes the Secretary to change the Official Unit Owners' Roster to show the recorded Unit Ownership interest in any unit may do so upon presenting a record stamped copy of the deed to the Secretary.

Section 6. No initiation fee shall be required for any change in the Official Unit Owners' Roster as provided in Section 6, unless the change is from an existing Unit Owner to a new Unit Owner.

Section 7. There shall be one class of membership, limited to natural persons.

See:

NRS 116.4109 Resale of units.

NRS 116.41095 Required form of information statement.

ARTICLE XVI

PROPERTY RIGHT OF UNIT OWNERS

Section 1. No Unit shall transfer membership without the prior approval of an application for membership in the Association by a majority of the Executive Board by appropriate action at any regular or special meeting thereof.

Section 2. The property of Unit Owners shall be used for single family residential purposes only.

Section 3. No structure of any kind shall be erected or permitted upon the premises of any Unit Owner, unless the plans and specifications shall have first been submitted to and approved by the Executive Board. No tent, house trailer, motor home, camper, or similar housing, permanent or temporary, shall be permitted within the premises and real property of the Corporation at any time under any circumstances, except for loading and unloading.

Section 4. No Unit Owner, either individually, or in the name of a family trust, spouse, corporation, limited liability company, partnership, limited partnership or retirement plan, shall own more than three (3) lots at the same time.

Section 5. The grantee or grantees of any property and premises, and the property and the 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 grantee, the executors, administrators, successors and or assigns of such grantee.

ARTICLE XVII

ANNUAL ASSESSMENTS

Section 1. Assessments shall be made against each Unit Owner. A Unit Owner is defined as the Owner of a lot as shown on the Elks Subdivision Map plat recorded in the Douglas County Assessor's Map Book originally on May 5, 1927, at Book 1 of Maps, as amended.

Section 2. Maintenance, repair, restoration or replacement of limited common use elements that are used by less than all the Unit Owners, will be assessed against only those Unit Owners benefitting from their usage.

<u>Section 3.</u> The annual assessment shall cover a period of time extending from July 1st to June 30th of the following year and shall be due and payable on August 10th of each year and shall become delinquent on November 10th of that particular year. The Board may establish an interest rate charge on delinquent accounts by Board action at a properly noticed meeting.

Section 4. Special Assessments covering unforeseen emergencies which affect the health, safety and welfare of the Association, and occur between annual budgets, can be authorized by the Executive Board. One or more Special Assessments cannot exceed \$100 per Unit Owner, per year (not to exceed \$10,000 aggregate to the Association). All special assessments to the Unit Owners shall be on a per Unit Ownership (per lot) basis.

See:

NRS 116.3115 Assessments for common expenses; notice of meeting required if assessment for capital improvement or commencement of certain civil actions are to be considered; requirements for commencement of certain civil actions by association; request for dismissal of civil action.

NRS 116.31151 Annual distribution to units' owners of operating and reserve budgets or summaries of such budgets.

NRS 116.31152 Study of reserves; duties of executive board regarding study; qualifications of person who conducts study; contents of study; submission of study to Commission; regulations regarding study; use of money credited against residential construction tax for upkeep of park facilities and related improvements identified in study.

ARTICLE XVIII

LIENS UPON UNIT OWNERS

See:

NRS 116.3116 Liens against units for assessments.

NRS 116.31162 Foreclosure of liens: Mailing of notice of delinquent assessment; recording of notice of default and election to sell; period during which unit's owner may pay lien to avoid foreclosure; limitations on type of lien that may be foreclosed.

NRS 116.31163 Foreclosure of liens: Mailing of notice of default and election to sell to certain interested persons.

NRS 116.311635 Foreclosure of liens: Providing notice of time and place of sale.

NRS 116.31164 Foreclosure of liens: Procedure for conducting sale; purchase of unit by association; execution and delivery of deed; use of proceeds of sale.

NRS 116.31166 Foreclosure of liens: Effect of recitals in deed; purchaser not responsible for proper application of purchase money; title vested in purchaser without equity or right of redemption.

NRS 116.31168 Foreclosure of liens: Requests by interested persons for notice of default and election to sell; right of association to waive default and withdraw notice or proceeding to foreclose.

ARTICLE XIX

TERMINATION OF MEMBERSHIP

Section 1. Membership in the Association shall be terminated by transfer of the last lot owned by a Unit Owner. The transfer of membership shall be effective except upon the approval of an application for membership by the Executive Board as set forth in these Bylaws. Membership obligations shall continue against the new recorded owner and shall continue to be a lien upon said lot or lots. A former Unit Owner, whose membership has been terminated as provided in these Bylaws, immediately forfeits all rights of membership in the Association.

ARTICLE XX

PENALTIES

Section 1. By action of the Executive Board, the Unit Owner's rights shall be suspended for any of the following causes:

a) Violation of or failure by any Unit Owner or the tenant or guests, of the Unit Owner to comply with any Corporation Bylaw, Article of Incorporation, or any of the rules and regulations promulgated by the Executive Board, after due notice and hearing by the Executive Board.

b) Failure, for three months, to pay assessments owing the Corporation.

Section 2. The Executive Board is granted the authority to take any and all suspension actions authorized by the statutory provisions of NRS 116.31031 and shall comply with the procedural requirements for their implementation. Common elements of the association shall include marina facilities and reserved beach deck use. Voting privileges on all association matters shall be denied during the period of the suspension and assessments/interest due on delinquent payments shall continue during the suspension.

Section 3. Any Unit Owner so suspended may be reinstated, by a majority vote of the Executive Board, after completion of remedy imposed by the Executive Board.

Section 4. The prevailing party to any arbitration, administrative proceeding or litigation between Elk Point Country Club, Inc., its agents, directors, or employees and any unit owner or owners, is

entitled to reimbursement of attorney's fees and costs from the other party or parties. Administrative proceeding is defined to include, but is not limited to, any proceeding before any governmental entity, including the Tahoe Regional Planning Agency, Douglas County or any state or local agency.

If any unit owner is liable for attorney's fees or costs pursuant to this section, the debt may be enforced as an assessment against their unit.

See:

NRS 116.31031 Power of executive board to impose fines and other sanctions for violations of governing documents; procedural requirements; continuing violations; collection of past due fines.

ARTICLE XXI

PROPERTY RIGHTS ON UNIT OWNER DEATH

Section 1. Upon the death of a Unit Owner, all provisions of these Bylaws shall apply to the heirs, devisees and personal representatives of the deceased Unit Owner. Should title to any lot or lots of the deceased Unit Owner vest in any heir or heirs, devisee or devisees, of said Unit Owner either by operation of law or decree of distribution, then such heir or heirs, devisee or devisees shall be admitted to this Corporation upon application to and approval by the Executive Board and no initiation fee shall be charged the heir, devisee or personal representatives of any deceased member, and the title of such heir or heirs, devisee or devisees, to the lot or lots of said deceased member shall be recognized by this Corporation; upon the condition, however, that said heir or heirs, devisee or devisees, shall in all respects be bound by and shall adhere to the Bylaws, rules and regulations of this Corporation, including those pertaining to any sale of said lot or lots. Any sale of said lot or lots by any personal representative of a deceased Unit Owner shall not be valid until the purchaser or contemplated purchaser shall be approved by the Executive Board of this Corporation as provided in these Bylaws.

ARTICLE XXII

DISSOLUTION

See:

NRS 116.2118 Termination of common-interest community.

ARTICLE XXIII

FISCAL YEAR

Section 1. The fiscal year of the Corporation shall begin with the first day of July and extend to the 30th day of June, both days, inclusive, unless otherwise provided by the resolution of the Executive Board.

ARTICLE XXIV

AMENDMENTS

Section 1. These Bylaws may be amended except as otherwise provided, by a two-thirds majority vote of all the Unit Owners present in person or by proxy at any regularly called meeting of Unit Owners, provided, however, that written notice of the proposed changes shall have been given to each Unit Owner in the same manner and for the same time as notice for the meeting is required by these Bylaws. Neither Article XXIV nor Article IV Section 4 shall be amended without the unanimous consent of all Unit Owners.

See:

NRS 116.3108 Meetings of units' owners of association; frequency of meetings, requirements concerning notice and agendas; dissemination of schedule of fines; requirements concerning minutes of meetings; right of units' owners to make audio recordings of meetings. Section 3. para a.

NRS 116.12065 Notice of changes to governing documents.

ARTICLE XXV

CARETAKER

Section 1. A caretaker shall be employed by the Executive Board upon terms and conditions to be fixed and approved by the Executive Board. Said caretaker shall be directly responsible to the Executive Board. No caretaker shall be retained by a contract for services in excess of one year.

Section 2. The Caretaker shall reside on the premises throughout the year.

Exhibit D

Exhibit D

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Section 4: Approval of New Construction, Remodel Activity Within EPCCs and Architectural and Design Control Standards and Guidelines

1. Introduction

Pursuant to Nevada Revised Statues (NRS) 116 and Elk Point Country Club Homeowners Association, Inc. (EPCC) By-Laws, EPCC has established guidelines for new construction and remodel of structures within the Elk Point Community. The Executive Board of EPCC, pursuant to NRS 116.31065 and 116.3102 (1) (t), has the right to establish rules and take actions as necessary and proper for the governance and operation of the Association.

Specifically, as permitted by Article V "Duties of the Executive Board" and Article XVI "Property Rights of Unit Owner" of the EPCC By-Laws the following Rules and Regulations for approval of new construction and remodel activity within EPCC have been enacted by the Executive Board.

The goal of the EPCC Architectural and Landscape Guidelines is to maintain and protect property values, preserve view corridors, preserve historic uniqueness and to maintain joint ownership obligations. As set forth in the preamble to the By-Laws: "The primary purpose is hereby affirmed to be to provide Unit Owners the pleasure of fellowship and recreation, and its (EPCC's) corporate functioning shall be designed to civilly achieve in highest measure such purpose." The Bylaws go onto state that EPCC "shall not operate its properties or facilities with the view of providing profit to its Unit Owners but rather such properties and facilities shall be held, operated, and made available for the use and enjoyment of its Unit Owners."

In furtherance of the interest of all Unit Owners and the purpose of EPCC Homeowners Association the following sets forth the rules, requirements and responsibilities of Unit Owners wishing to begin new construction or remodel existing structures. Nothing in this policy is intended to act to discriminate against any individual or protected class.

2. Authority

The Elk Point Country Club Homeowners Association ("EPCC") Architectural and Design Control Standards and Guidelines ("ADCSG") were approved and formally adopted by the EPCC Executive Board of Directors ("Board") on the 31st day of March 2018 and amended by the EPCC Executive Board of Directors (Board) on the 9th day of June 2018, and amended by EPCC Executive Board of Directors (Board) on the 30th day of September 2018.

The EPCC "Board" pursuant to NRS 116.31065 and NRS 116.3102 (1) (t) has the authority to establish and maintain a Design Review Committee ("Committee") on behalf of EPCC to consider and recommend written guidelines, controls, standards, rules and regulations concerning the design, architecture and/or construction of structures within EPCC consistent with EPCC's historical character. The Committee shall develop and recommend rules, regulations, standards, protocols and procedures for the design, architecture, and construction of structures within the EPCC, for consideration and possible adoption by the Board.

3. Policies / Rules / Regulations

No structure shall be demolished or erected, and no exterior alteration or landscape redesign shall be commenced upon the premises of any Unit Owner without approval by the Executive Board (reference NRS 116.2111 (1) (b).

a. Approval by local planning agencies and regulators alone, without Executive Board approval in writing does not constitute approval to begin construction or remodel.

- b. The Executive Board may disapprove any application for reasons of architectural design, configuration and siting and more specifically:
 - i. Because of reasonable dissatisfaction with the location of the structure or improvement having in mind the character of the neighborhood in which it is to be erected, the materials of which it is to be built, the impact on adjacent lots, Community utilities/roadways and harmony thereof with the surroundings.
 - ii. Because of grading plans, finished ground elevation, exterior finish/color, height, materials or aesthetics.
 - iii. Because the effect of the structure or improvement will interfere with the reasonable enjoyment, view and value of any other Unit Owner of his or her property or the common open space. A key consideration will be the protection of long-standing views belonging to adjacent property owners.
 - iv. Because of non-compliance with any of the specific conditions and restrictions contained in this declaration or with reasonable guidelines that the Executive Board may from time to time adopt.
- c. The Executive Board shall be entitled to determine that a proposed construction or improvement or component thereof is unacceptable when proposed for a lot, even if the same or a similar design, improvement or component has been previously approved for use at another location within the Corporation if factors such as drainage, topography or impact on adjacent properties cannot be mitigated to the satisfaction of the Executive Board.
- d. In approving a request for construction, the Executive Board may condition approval upon the adoption of modifications in the plans and specifications or observance of restrictions as to location, noise abatement or similar mitigating conditions.

4. Architectural Committee

The Committee shall serve as an agent of the EPCC, as directed by the Board, concerning the review, enforcement, and other matters described in the ADCSG, as well as the making recommendations to the Board regarding the written guidelines, controls, standards, rules and regulations of design, architecture and/or construction of structures within the EPCC.

5. <u>Committee Members</u>

The Committee shall consist of not less than three and not more than five members, appointed by the Board. Members shall serve until such time as they have resigned or have been removed by the Board. At least one member of the Committee shall be a licensed architect. If no Committee member is a licensed architect, then the Board has the authority to hire and/or appoint a licensed architect to assist the Committee in evaluating submitted design, architectural and/or construction applications concerning any structure(s) proposed to be built and/or improved ("Project") within the EPCC.

6. Selection of Committee Members

Members of the Committee shall be selected and approved by the Board.

7. <u>Resignation of Committee Members</u>

Any member of the Committee may, at any time, resign upon written notice delivered to the Board.

8. Duties

Committee duties shall be: (1) to review, consider, evaluate, and make recommendations to the Board regarding submissions, proposals and/or plans related to any application for the design, architecture and/or construction, remodel, and/or renovation of any structure within the EPCC (Application) that have been

submitted pursuant to the ADCSG; (2) to apply and enforce those ADCSG which have been approved and adopted by the Board and (3) make recommendations to amend the ADCSG to be considered for adoption by the Board.

9. Meetings

The Committee shall meet from time to time as necessary to properly perform its duties. A majority vote of the members shall constitute an act of the Committee. The Committee shall keep on file, in the EPCC Clubhouse all submittals and copies of written responses to owners to serve as record of all actions it has taken.

10. Compensation

No member of the Committee shall receive any compensation for services rendered, unless specifically authorized and approved by the Board. All members are entitled to reimbursement for reasonable expenses incurred. Professional consultants and representatives of the Committee retained for assistance in the review process shall be paid such compensation as the Board determines.

11. Amendment of the ADCSG

The Committee may, from time to time recommend amendments, revisions and/or changes to any portion of the ADCSG that shall be presented to the Board for its consideration, approval and/or adoption as it sees fit. All such approved amendments or revisions will be appended and made a part of the ADCSG.

Owners are responsible for obtaining from the Committee a copy of the most recently revised ADCSG prior to their consideration of any proposed design, architecture and/or construction of any structure within the EPCC.

A recommendation for approval by the Committee of any improvement within EPCC only refers to the ADCSG and in no way implies conformance with local, state or federal government regulations. Complying with all applicable government ordinances and/or regulations, including but not limited to zoning ordinances and/or local building codes, is the sole responsibility of the owner.

In the event of any violation of the ADCSG, the Committee may recommend to the Board the imposition of sanctions, commensurate with the severity of the violation, in addition to restoration expenses, if necessary.

12. Severability

If any component of the ADCSG or the application of the ADCSG in any circumstance is held invalid, the validity of the remainder of the ADCSG will be construed as if such invalid component were never included the ADSCG.

13. ADCSG Design Guidelines

Only single-family dwellings, secondary residences, accessory living and accessory structures to a single-family dwelling, will be permitted on any unit owner lot in the EPCC. The following restrictions shall apply specifically to each of the unit owner lots within the EPCC.

a. <u>Building Height:</u> No single-family dwelling, secondary residences, accessory living and accessory structures constructed on any unit owner lot within the EPCC shall extend up to a point higher than 35 feet above the average natural grade elevation of the lot. The building height is the vertical distance between the average natural grade defined as where the exterior walls of the building are at its highest and lowest point measured from the natural ground elevation and the highest point on the building excluding appurtenances such as a chimney.

- b. <u>Building Envelope:</u> Any renovation, remodel, and/or new construction of a single-family dwelling, secondary residences, accessory living and accessory structures on a unit owner lot within the EPCC shall:
 - i. Be set back from the edge of the front property lot line not less than 25 feet;
 - ii. Be set back from each side property lot line not less than 7 feet;
 - iii. Be set back from the rear property lot line not less than 20 feet;
 - iv. Include at least two (2) off street covered parking spaces, inclusive of garage spaces, within the unit owner lot.
- c. <u>Fences and Walls:</u> The following general fence and wall guidelines shall apply.
 - i. All fences and walls shall be reviewed by, and related detailed plans shall be submitted to, the Committee as in the case of other structures. Replacement of any existing fences and/or walls shall comply with all of the guidelines set forth herein.
 - ii. All property lines to the common area street shall be kept free and open.
 - iii. There shall be no fences nor walls built upon the front property line of any unit owner lot in the EPCC. There shall be no fences or walls over 5 feet in height (from the natural grade) anywhere within the EPCC without prior written Board approval.
- d. <u>View Corridors</u>: View corridors of single-family dwellings, secondary residences, accessory living and accessory structures to common area or the lake will be considered, and design modifications may be recommended during design review.
- e. <u>Applicants Notifications:</u> Upon submittal of an Architectural Review Application for a Major Project to the EPCC Secretary, unit lot owners within a 150-foot radius of the applicant's lot will be sent a copy of the application by the EPCC Secretary and the application will be posted on the EPCC website. Comments received from unit lot owners will be considered by the Committee during the design review process and in the Committee's recommendation to the Board.
- f. <u>Exterior Lighting:</u> All plans for new and/or any replacement of exterior lighting must be submitted to and approved by the Board prior to installation and/or replacement. Exterior lighting shall provide a maximum of 0.05 foot-candles measured at the property line.
- g. <u>Exterior Walls and Trims:</u> Natural wood species (or facsimiles), natural stones, or other materials deemed in the character of the EPCC community for a specific site by the Committee and Board, are required for all exterior walls and fences. An approved EPCC color palette refers to the TRPA color palette for structures visible in scenic areas.
- h. <u>Preservation of Existing Trees and Rock Outcroppings</u>: Existing trees and significant rock outcroppings are a unique feature of the land at the EPCC. All vegetation must meet TRPA and local fire regulations for defensible space.
- i. Landscape Design and Layout:
 - i. All landscaping on a unit owner lot and related detailed plans shall be submitted to the Committee and approved by the Board. Replacement of any landscaping shall comply with all of the guidelines set forth herein.
 - ii. All property lines for any single-family dwellings to the common area street shall be kept free and open of landscaping.

14. The Architectural Review Committee Process

The Committee review will initially determine that an Application is a project and is not an exempt activity. The Committee will then determine if the Application is a Major Project or a Minor Project. The Committee will then conduct a review of the Application for compliance with the ADCSG and provide recommendations to the Board.

- a. <u>Prior Approval of New Structures and Exterior Modifications:</u> All Improvements or visible modifications to a structure, including, but not limited to, new construction, exterior remodels, building additions, painting, installation and/or replacement doors and windows, installation and/or replacement of lighting fixtures, installation of energy saving systems, and landscaping must be submitted to the Committee and approved by the Board prior to construction or installation of such improvements or modifications.
- b. <u>Exempt Activities</u>: Exempt activities are structural repair, structural modifications, structural remodeling, replacement of an existing roof with a metal roof, interior remodeling, buildings damaged or destroyed by fire or other similar calamity that are rebuilt in substantial compliance with the design of the original structure, non-permanent structures, ordinary maintenance and repair, repair of fences, removal of dead trees, and demolition. This also includes like-kind (size, color, quantity, etc.) replacement, or re-painting a residence the exact same color as previously approved and painted; and for like-kind (size, quantity, etc.) landscape replacement

As a result of failure to receive prior written approval from the Board for any Project requiring approval, the Committee may recommend to the Board sanctions and fines that may be assessed against the owner in accordance with EPCC's Governing Documents and fine schedule.

- c. <u>Decisions:</u> The Committee shall endeavor to review and makes its recommendation to the Board on submissions within 45 calendar days of submission of complete Applications. If incomplete, Applications must be resubmitted to the Committee, in which case the Committee shall endeavor to make its recommendations to the Board within 45 calendar days. An Application shall not be approved unless and until the Board receives the Committee's recommendation and grants final written approval. Committee comments and recommendations with respect to any Application shall be considered by the Board before final action on Application is taken by the Board. The decision of a majority of a quorum of the Board, upon any matters submitted or referred to it, shall be final. Any approval by the Board shall not relieve an applicant or unit owner from complying with any requirement of a public authority having jurisdiction and shall not constitute any representation or guaranty by the Board or EPCC of compliance of the submitted matter with any applicable statue, ordinance, or regulation.
- d. <u>Grounds for Disapproval</u>: The Committee may recommend disapproval and the Board may disapprove any Application:
 - i. If such Application does not comply with EPCC Governing Documents including any ADCSG adopted by the Board.
 - ii. Because of the reasonable dissatisfaction with grading plans; location of the proposed improvement on a lot; finished ground elevation; color scheme; exterior finish; design, proportions, architecture, shape, height or style of the proposed improvement; materials used; the kind, pitch or type of roof proposed; or for purely aesthetic reasons.
 - iii. Because the plans are not harmonious with the design and character of the existing house, or adjacent houses and structures.

- iv. Because plans are not consistent with TRPA Plan Area Statement 069, Elk Point.
- e. <u>Reconsideration</u>: Final action by the Board may be reconsidered at the next scheduled Board meeting by submitting a written statement for reconsideration 20 calendar days before the next scheduled Board meeting and the reconsideration placed on the meeting agenda by a Board member. Arguments and basis for reconsideration which are not included in the statement for reconsideration or in the Committee recommendations' shall neither be raised nor considered by the Board. Reconsideration will be limited to the next scheduled Board meeting and may not be continued.
- f. <u>Variances:</u> Any Applications that require a variance to the ADCSG shall be reviewed by the Committee. A majority of the Committee may recommend to the Board to grant or deny variances from the ADCSG. Variances shall not be construed as precedent-setting in any way or manner. A variance may be authorized by the Board when the Board finds that there are exceptional shapes or topographical conditions of a property that would result in exceptional practical difficulties or exceptional undue hardships upon a unit owner. A variance may only be granted when it will relieve the difficulties or hardships and will not be detrimental to the public good, impair affected natural resources, or substantially impair the intent and purpose of the ADCSG.
- g. <u>Administrative Fees for Major Projects Only:</u> As a means of defraying its expenses for review of the Application of a Major Project, the Committee and Board shall require an application review fee of \$200. The Application review fee in the amount of \$200 is required at the time of the Application submittal. Should the Committee incur additional expenses and costs in reviewing an Application, such additional expenses and costs will be recouped from the applicant. The Committee and Board will impose an additional fee of \$200.00 each time an Application re-submittal is required, if the re-submittal(s) is necessary to achieve a final Application that complies with all ADCSG requirements.
- h. <u>Liability:</u> Regardless of the approval by the Board of any Application, neither the Committee, the Board of the EPCC, nor any person acting on their behalf shall be responsible in any way for any defects in any Application plans or specifications nor other material submitted to the Committee, nor for any defects in any pursuant Project work. Each person submitting an Application or specifications shall be solely responsible for their sufficiency and the adequacy of pursuant Project work. No member of the Committee, the Board, the EPCC nor any person acting on their behalf shall be liable to any person, whether an owner of a lot or his/her agents, employees, or assignees, on account of any action or decision of the Committee and/or Board, nor the failure of the Committee and/or Board to take any action nor make any decision. Neither the Committee, EPCC, the Board nor any person acting on behalf of any of them shall be responsible in any manner for any claim, cause of action nor alleged damages resulting from:
 - i. Any design concepts, aesthetics, latent nor patent errors or defects in design or construction relating to improvements constructed on lots, whether shown or omitted on any plans and specifications that may be approved by the Board, nor any buildings or structures erected there from; nor
 - ii. Any waiver of nor failure to enforce an ADCSG provision, nor failure to inspect or certify compliance with approved plans and specifications.

15. Submittal of Application for Major Projects

Major Projects are new construction, exterior remodels, and building additions. Major Project Application submittals to the Committee must include all of the following and must be presented in three formats:

- a. Two regular sets of blueprint size plans in 24" x 36" format or larger and at a scale appropriate to such size presentation. This set shall be referred to as the "submittal set" and will be marked-up with review input and comments. The second copy of the marked-up submittal set will be returned to the applicant. Once it has received full and final design Application approval a regular set of blueprint size plans to be referred to as the "record set" in 24" X 36" format shall be submitted
- b. Duplicate copies of the submittal set and record set of the plans, reduced to 11" x 17" paper, shall be made by the Applicant for distribution to neighbors.
- c. An electronic pdf file of the submittal set, and record set shall be submitted to the Assistant to EPCC's Secretary for distribution to the Committee, Board and required neighboring lot owners.

The Application and fees shall be directed to P.O. Box 9, Zephyr Cove, Nevada 89448, to the Assistant to EPCC's Secretary, who will log in same, and then direct the Application to the Chairperson of the Committee for review and action. The Board shall be copied on this transmittal. The Assistant to EPCC's Secretary shall ensure appropriate follow-up is in place for timely compliance with the Committee's input and response. Once the Committee completes input and review, it will deliver its response to the Assistant to EPCC's Secretary for transmittal to the Board. The Assistant to EPCC's Secretary will also prepare a simple transmittal cover letter with the Committee's recommendation and comments, to the Applicant.

The Major Project Application submittal shall include:

- a. Completed Application. FORM 4: ELK POINT COUNTRY CLUB ARCHITECTURAL REVIEW APPLICATION FOR MAJOR REVISIONS, ADDITIONS AND NEW CONSTRUCTION
- b. Site plan, showing the entire property and the location of the building envelope; the residence and all buildings, driveways, and parking areas; existing and proposed topography; proposed finished floor elevations, all trees of 6-inch diameter or greater, protected plants and/or special terrain features to be preserved, trees and/or special terrain features to be removed, and walls, fences, and utility connections.
- c. Survey of the site, prepared by a registered land surveyor or licensed civil engineer showing lot boundaries and dimensions, topography (2-foot contours or less), major terrain features, all trees of 6-inch diameter or greater, edge and elevation of pavement or curb, utility locations, and easements.
- d. Floor plans showing proposed finished floor elevations relative to contour elevations on the site plan.
- e. All exterior elevations showing both existing and proposed grade lines, ridge heights, roof pitch, and all exterior materials and colors;
- f. Material samples and a color board
- g. Complete landscape plan showing location, size, and type of all existing and proposed plants; irrigation system facilities; decorative materials; paving and/or other impervious surfaces; walls; steps; fences and/or borders.
- h. In addition to the exterior elevations a "conceptual drawing" showing the most prominent and descriptive view of the building in perspective and in relation to the adjoining properties' building structures, and the actual site. This drawing must show all major existing site features and topography in scale. It must also clearly show all design elements, with major building elements labeled for identification;

- i. A study model (same scale as site plan) and/or story poles may be required that accurately depict all the proposed improvements and their relationship to the site and adjoining properties' structures if the Committee deems it appropriate due to slope considerations or complexity of design, and
- j. Any other drawings, materials, or samples requested by the Committee.

The Committee will review the Application and respond in writing within 15 calendar days after the review, but no later than 45 calendar days after an Application submittal is complete. If, in the opinion of the Committee, the Application is in substantial compliance with the ADCSG, a recommendation for approval will be made to the Board. Should the design be a substantial variance with the ADCSG or violate any of these guidelines, a recommendation for disapproval will be made to the Board.

The Committee will consult by conference call or in person in considering the approval of an Application. The Owner may request and attend a meeting with the Committee and the Committee will make reasonable attempts to accommodate this request. In the event of any disapproval by the Board of an Application submittal, a resubmission of the Application should follow the same procedures as an original

16. Submittal of Application for Minor Projects

Minor project are replacement of exterior paint color or materials, windows and doors, lighting fixtures, and roofs, installation of driveway pavers and energy saving systems, and landscaping. An electronic pdf file of the submittal shall be submitted to the Assistant to EPCC's Secretary for distribution to the Committee, Board and required neighboring lot owners.

Minor Project Application shall include:

- a. Completed Application. FORM 5: ELK POINT COUNTRY CLUB ARCHITECTURAL REVIEW APPLICATION FOR MINOR PROJECT
- b. Any other drawing, materials or samples requested by the Committee.

The Committee will review the Application with and respond in writing within 15 calendar days after the review, but no later than 45 calendar days after an Application with final design is complete. If, in the opinion of the Committee, the Application is in substantial compliance with the ADCSG, a recommendation for approval will be made to the Board. Should the design be in substantial variance the ADCSG or violate any of these guidelines a recommendation for disapproval will be made to the Board.

No submittal to any governmental agency, including but not limited to the TRPA and Douglas County, shall precede or otherwise commence until final design approval is first obtained from the EPPC Board. Failure to obtain final design review approval from the EPCC Board, in advance of submission of the applicant's plans to any governmental agency, including but not limited to TRPA and Douglas County, may require plan revisions required to comply with the ADCSG be submitted to any governmental agency for approval.

17. Commencement of Major Project Construction

After the Board's approval of the Major Project Application and satisfactory completion of all Douglas County and Tahoe Regional Planning Agency's (TRPA) review processes, the owner shall then have satisfied all conditions and commence the construction and/or any work pursuant to the Application within one year from the date of such approval. If the owner fails to begin construction within this time period, any given EPCC approval shall be revoked. The owner shall, in any event, complete the construction of any and all improvements on the owner's lot within two years after commencing construction, except and upon a showing that such completion is rendered impossible due to legal tolling (such as an estoppal), labor strikes, fires, national emergencies, natural calamities and/or unusual inclement weather.

18. Subsequent Changes

Additional construction and/or other improvements to a residence or lot, and/or changes during construction and/or after completion of an approved structure, including landscaping and color modification, must first be submitted to the Board appointed designee for review and approval of the Board prior to making such changes or additions.

19. Final Major Project Release

Permittees shall provide evidence of final inspections from Douglas County and TRPA for EPCC records within 30 calendar days of receiving such inspections.

The approval by the Board of any plans, drawings, or specifications for any work done or proposed shall not be deemed to constitute a waiver of any right to withhold approval of any similar plan, drawing or specification subsequently or additionally submitted for approval. Failure to enforce any of the ADCSG shall not constitute a waiver of same.

20. Utility Maintenance Buildings

Utility and maintenance buildings and other structures located on common area portions of EPCC are exempt from the "ADCSG" portion of this document; however, EPCC will endeavor to attain as high a level or conformance with the ADCSG as is practical for these types of facilities. 4821-7655-8163, v. 1

Elk Point Country Club Home Owners Association Rules Managing Construction / Remodeling Within the Association Application for Major Revisions, Additions and New Construction Application for Minor Projects

> Original release 5/18/2011 Amended 1/18/2014 Amended 7/29/2017 Revised 3/23/2019

Architectural and Design Control Standards and Guidelines ("ADCSG")

Original release 3/31/2018 Amended 6/9/2018 Amended 9/30/2018

Section 4: Approval of New Construction, Remodel Activity Within EPCC and Architectural and Design Control Standards and Guidelines

Adopted: 10/26/2019 Amended: 12/7/2019
Section 5: Managing Construction / Remodeling Within EPCC

Original release 5/18/2011 and last amended 1/18/2014

Unit Owner(s) shall comply with the following Elk Point Country Club Association (EPCC) "on site" construction guidelines/rules upon receipt of Regulatory Agency/EPCC Executive Board approvals.

The Unit Owner and General Contractor shall prior to start of construction meet with the Executive Board to confirm understanding of the following rules. Both Unit Owner and General Contractor shall also confirm in writing to the Executive Board prior to start of construction that the rules which follow have been communicated to all Sub-Contractor personnel and will be posted on site and complied with.

- 1. Final copies of architectural and construction drawings shall be provided to the EPCC Executive Board Secretary prior to start of construction.
- 2. The General Contractor shall review these rules with all involved construction workers and post the rules on-site in a protected manner.
- 3. Prompt resolution of any problems arising from construction/remodeling activities will be the responsibility of the Unit Owner and General Contractor once notified by the Executive Board, Caretaker or affected Unit Owner.
- 4. Unit construction will comply with all survey, dimensional, location, material and appearance plans approved by both Regulatory Agency and EPCC Executive Board in the final drawings.
- 5. Contractors will comply with Douglas County and State on-site management, security, safety, and environmental and clean-up requirements. Appropriate security around the building site shall be provided to avoid injury.
- 6. Only certified and bonded workers may work on EPCC property.
- 7. Only personnel directly related to the construction activity are allowed on-site. Friends and families of construction workers are not permitted to enter EPCC grounds or use Club beaches/facilities at any time.
- 8. Construction workers and sub-contractors who bring pets to work shall keep their animal(s) leashed on-site.
- 9. The site shall be placarded with the 24-hour emergency contact number of the General Contractor.
- 10. Construction may only be performed from 7AM to 7PM Monday through Friday consistent with Douglas County ordinances. Only limited construction activity, not involving heavy construction vehicles (i.e. Cranes, graders, cement trucks, bobcats, etc.), and loud industrial/construction tools (i.e. jackhammers, table/radial hand power saws, nail-guns, etc.) is permitted from 8AM through 7PM Saturday and Sunday. Weekend work may be done providing all power tools are located within the structure to minimize noise. No construction of any kind is permitted over the following 3-day holiday weekends: Memorial Day, 4th of July and Labor Day and on Thanksgiving, Christmas and New Year's Eve.
- 11. Assigned Contractor gate codes are to be used exclusively for entry to EPCC. This gate code will be assigned by the Security Committee Administrator and will expire upon completion of the project.

- 12. The construction site shall be maintained in an organized manner throughout the building period. The roadway in front of the project will be swept or otherwise cleared of debris, including nails/screws at the end of each working day.
- 13. Construction workers shall not park on other Unit Owner properties without first receiving approval from the Unit Owner. Non-essential construction worker vehicles (those not absolutely required on-site) shall park at the Caretakers parking area.
- 14. The Unit Owner and/or Contractors shall be responsible for any damage to EPCC and Unit Owner property. Contractor personnel shall report any damage immediately to the EPCC Caretaker and the impacted Unit Owner.
- 15. The General Contractor shall coordinate construction activity so as to avoid blocking roadways and encroaching on adjacent Unit Owner property. The Caretaker shall be notified in advance in the event that roadways may need to be blocked for a short period of time to accomplish essential construction activities, which can only be performed by vehicles required to be positioned in the street. Notification shall be provided well in advance of the construction activity so as to allow impacted Unit Owners to have access to and from their property. Construction vehicles may not be allowed to block roadways for extended periods except for immediate loading and unloading. Appropriate signage notifying other Unit Owners of road blockages shall be positioned well up-stream of the construction activity.
- 16. Construction vehicles, materials and equipment shall not be left on roadways so as to block or restrict emergency vehicle access.
- 17. Vehicles, equipment, construction materials and supporting tools shall not be stored for any period of time on Elk Point Country Club common property or roadways. Such vehicles and materials may not be stored on another Unit Owner's property even if the Unit Owner has given such approval (see EPCCHOA By-Laws Article XVI, section 3). Equipment and material to be on site to facilitate new construction /remodeling shall be planned for immediate use so as to avoid unsightly appearance within the Community.
- 18. Contractors shall not use other Unit Owner utilities including water without first receiving approval from the affected Unit Owner.
- 19. No loud music may be played while on-site.
- 20. No fires are to be used to clean-up construction debris.
- 21. Portable toilets shall be serviced appropriately so as to minimize offensive odors carrying over to adjacent Unit Owner properties.
- 22. Damage to EPCC common property and roadways shall be repaired in a timely manner and in a fashion approved by EPCC
- 23. The Unit Owner must complete all exterior construction per the approved plans within four (4) months of final Douglas County/TRPA approvals and issuance of a certification of occupancy.
- 24. FORM 6: ACKNOWLEDGEMENT OF CONSTRUCTIONS RULES must be signed by the Unit Owner and the general contractor prior to the start of construction and returned to the EPCC BOD.

EPCC Executive Board

Original Release 5/18/2011 Amended 7/6/2013 Amended 9/21/2013 Amended 1/18/14

	DECLARATION OF CHARLES JENNINGS
	I, Charles Jennings, pursuant to NRS 53.045, declares:
1.	I am over the age of 21 and am the current Vice President of the Defendant in this ma
	(Moretto v. Elk Point HOA; 19-CV-0242), Elk Point Country Club Homeown
	Association, Inc. (hereinafter "EPCC" or "the HOA").
2,	That I have personal knowledge about facts stated below, except where stated up
	information or belief.
3.	That the documents bates-numbered ("DEFT-ELK 000317-DEFT-ELK 000328") are t
	and correct copies of the current, operative version of EPCC's Architectural and Des
	Control Standards and Guidelines, officially amended on 12/7/19, as stated on page DE
	ELK 000325. (Attached as "Exhibit A").
4.	That I have personal knowledge of the authenticity thereof because I was involved in
	process of drafting, adopting and finally archiving this latest effective set of EPC
	Architectural and Design Control Standards and Guidelines.
5.	That the EPCC board does not have any intention of amending EPCC's Architectural
	Design Control Standards and Guidelines again anytime soon, and that this version sho
	remain in effect for the foreseeable future.
6.	I declare under the penalty of perjury that the foregoing is true and correct, to the best of
	understanding, memory and knowledge.
	Dated this 15 day of October, 2020.
	1. 7 mis
	CHARLES JENNINGS
	1

Exhibit E

Exhibit E

A.App._808

ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION Architectural and Design Control Standards and Guidelines

I. Authority

The Elk Point Country Club Homeowners Association ("EPCC") Architectural and Design Control Standards and Guidelines ("ADCSG") were approved and formally adopted by the EPCC Executive Board of Directors ("Board") on the 31st day of March 2017.

The EPCC "Board" has the authority to establish and maintain a Design Review Committee ("Committee") on behalf of EPCC to consider and recommend written guidelines, controls, standards, rules and regulations concerning the design, architecture and/or construction of structures within EPCC consistent with EPCC's historical character. The Committee shall develop and recommend rules, regulations, standards, protocols and procedures for the design, architecture, and construction of structures within the EPCC, for consideration and possible adoption by the Board.

The Committee submits the following provisions concerning the nature and structure of the Committee as well as the proposed written guidelines, controls, standards, rules and regulations concerning the design, architecture and/or construction of structures within the EPCC to the Board for its consideration and final adoption.

II. Relationship with the EPCC

The Committee shall serve as an agent of the EPCC, as directed by the Board, concerning the review, enforcement, and other matters described in the ADCSG, as well as the making recommendations to the Board regarding the written guidelines, controls, standards, rules and regulations of design, architecture and/or construction of structures within the EPCC.

III. Committee Members

The Committee shall initially consist of not less than three and not more than five members. Members shall hold their office until such time as they have resigned or have been removed or the Board has appointed their successor. At least one member of the Committee shall be a licensed architect. If no Committee member is a licensed architect, then the Board has the authority to hire and/or appoint a licensed architect to assist the Committee in evaluating submitted design, architectural and/or construction Applications concerning any structure(s) proposed to be built and/or improved ("Project") within the EPCC.

IV. Selection of Committee Members

Members of the Committee shall be selected at the reasonable discretion of the Board.

V. Resignation of Committee Members

Any member of the Committee may, at any time, resign upon written notice delivered to the Board.

VI. Duties

Committee duties shall be: (1) to review, consider, evaluate, and make recommendations to the Board regarding submissions, proposals and/or plans related to any Application for the design, architecture and/or construction, remodel, and/or renovation of any structure within the EPCC (Application) that have been submitted pursuant to the ADCSG; (2) to apply and enforce those ADCSG which have been approved and adopted by the Board and as the Committee sees fit; and (3) in a manner deemed appropriate by the Committee, make recommendations to amend the ADCSG to be considered for adoption by the Board.

VII. Meetings

The Committee shall meet from time to time as necessary to properly perform its duties. A majority vote of the members shall constitute an act of the Committee. The Committee shall keep on file all submittals and copies of written responses to owners to serve as record of all actions it has taken.

VIII. Compensation

No member of the Committee shall receive any compensation for services rendered, unless specifically authorized and approved by the Board. All members are entitled to reimbursement for reasonable expenses incurred. Professional consultants and representatives of the Committee retained for assistance in the review process shall be paid such compensation as the Board determines.

IX. Amendment of the ADCSG

The Committee may, from time to time recommend amendments, revisions and/or changes to any portion of the ADCSG that shall be presented to the Board for its consideration, approval and/or adoption as it sees fit. All such approved amendments or revisions will be appended and made a part of the ADCSG.

Owners are responsible for obtaining from the Committee a copy of the most recently revised ADCSG prior to their consideration of any proposed design, architecture and/or construction of any structure within the EPCC.

A recommendation for approval by the Committee of any improvement within EPCC only refers to the ADCSG and in no way implies conformance with local, state or federal government regulations. Complying with all applicable government ordinances and/or regulations, including but not limited to zoning ordinances and/or local building codes, is the sole responsibility of the owner.

In the event of any violation of the ADCSG, the Committee may recommend to the Board the imposition of a fine, commensurate with the severity of the violation, in addition to restoration expenses, if necessary. Such fine shall be paid to the EPCC, and secured by the EPCC in the same manner that any other EPCC expenses and assessments are paid to and/or secured by the EPCC.

X. Severability

If any component of the ADCSG or the application of the ADCSG in any circumstance is held invalid, the validity of the remainder of the ADCSG will be construed as if such invalid component were never included the ADSCG.

XI. ADCSG Design Guidelines

Only single-family dwellings, guesthouses, and/or such other outbuildings as are usually an accessory to a single-family dwelling, will be permitted on any lot in the EPCC. The following restrictions shall apply specifically to each of the lots within the EPCC.

1. Maximum Area. Any single-family dwellings, guesthouses, and/or such other outbuildings to be constructed within the EPCC shall have a maximum lot coverage of which the floor area(s) collectively is not more than 35% of the total square footage of the lot (inclusive of exterior decks, roofed porches, garages, carports, guesthouses or other outbuildings).

2. Height Limitations. No single-family dwelling, guesthouse and/or outbuilding, or portion thereof (except chimneys) constructed on any lot within the EPCC shall extend up to a point higher than 35 feet above the average natural grade elevation of the lot.

3. Building Envelope. Any renovation, remodel, and/or new construction of a single-family dwelling, guesthouse, and/or outbuilding on a lot within the EPCC shall:

- a) Be set back from the edge of the common area street and/or the front property lot line not less than 25 feet:
- b) Include a 3-foot walkway area for pedestrian foot travel which parallels and adjoins the edge of the common area street within the 25 feet set back from the edge of the street and/or from the front property lot line;
- c) Be set back from each side property lot line not less than 7 feet;
- d) Be set back from the rear property lot line not less than 20 feet;
- e) Not exceed 35 feet above the average natural grade elevation;
- f) Not exceed a two-story structure;
- g) Include at least one (1) off street parking space, inclusive of garage spaces, within the lot for each sleeping area identified within any building structure;
- h) Not interfere nor block the existing lake view corridors of all neighboring structures, including neighbors across the street. Written input of any proposed Application must first be obtained from all neighboring lots prior to any submission for approval of an Application to the Committee. Such written input from the neighboring lots shall be provided to the Committee and may be considered by the Committee in evaluating proposed Application.

It is recommended that all single-family dwellings, guesthouses, and/or such other outbuildings constructed on a lot collectively not exceed 3,500 square feet of floor area. Any Application that exceeds this recommendation may apply for a variance.

4. Fences and Walls. The following general fence and wall guidelines shall apply.

- a) All fences and walls shall be reviewed by, and related detailed plans shall be submitted to, the Committee as in the case of other structures. Replacement of any existing fences and/or walls shall comply with all of the guidelines set forth herein. Receipt of city and/or county approval shall not override Board approval or the ADCSG.
- b) All property lines for any single-family dwellings to the common area street shall be kept free and open.
- c) There shall be no fences nor walls built upon the front property line of any lot in the EPCC. There shall be no fences nor walls built within 3 feet of the front property line nor any other property line which adjoins and/or abuts the common area streets. No fences, walls, hedges nor tree lines shall be installed which interfere or block the existing lake view corridors of all neighboring structures, including neighbors across the street. There shall be no fences, hedges, nor walls over 5 feet in height (from the natural grade) anywhere within the EPCC without prior written Board approval.
- d) Fences and walls shall be kept in good condition at all times. Damaged, split, broken, missing, or hinging boards, posts, etc., shall be promptly repaired. Fences subject to sun and water damage should be treated each spring as soon as outdoor temperatures allow for painting and/or staining. Perimeter lot fences shall be treated in a consistent manner throughout. Fences may be repaired, painted or stained in order to restore them to their original condition. Any changes, including but not limited to, paint and stain color, shall be pre-approved in writing by the Board. Owners, who have a fence and/or wall in disrepair after having been sent written notice to repair or replace fences and/or walls, shall be subject to fines and penalties.

5. <u>View Corridors.</u> The Committee may recommend, and the Board may impose additional building height limitations in order to preserve the view corridors of neighboring dwellings to common areas and/or toward the lake. Additional building height limitations may also be imposed to minimize the impact of structures upon sensitive natural areas of the EPCC. The initial height limitation is set forth in Section XI.3(e) above, and

additional height limitations may be recommend where appropriate, during the Committee's application review process.

Incorporated within XI(3)(h) above, and 15 days prior to submission of an Application to the Committee, applicants must send a letter with a copy of their full and complete Application to all neighboring owners within a 300 foot radius of the applicant's lot. Proof of service is required of the applicant's letter and the accompanying full and complete Application on each of the neighboring lots. A copy of same shall be submitted to the Committee with the applicant's Application. The neighboring lot owners shall have 14 business days from receipt of said letter and Application to express their concerns and provide input, comments and/or requests in writing to the applicant and to the Committee. The applicant's letter to neighboring owners shall advise each of them of the time deadline to provide their respective input, comments and/or requests to the applicant and the Committee may incorporate the neighboring owner(s)' written input, comments, and/or requests into its Application review process. Upon completion of the Application review process, the Committee shall distribute its analysis with the applicant and those neighboring lot owners who had timely provided written input, comments and/or requests to the committee shall distribute its analysis with the applicant and those neighboring lot owners who had timely applicant and/or the neighboring owner(s) be dissatisfied with the Committee's preliminary design review analysis, either may take their respective concerns to the Board for further review.

7. Exterior Lighting. All plans for new and/or any replacement of exterior lighting must be submitted to and approved by the Board prior to installation and/or replacement. Exterior lighting shall not shine or reflect past the boundaries of the lot from which it originates, nor interfere with the visual enjoyment of neighboring property owners.

8. <u>Exterior Walls and Trims.</u> Natural wood species (or facsimiles), natural stones, or other materials deemed in the character of the EPCC community for a specific site by the Committee, are required for all exterior fences and/or walls. An approved EPCC color palette and material sampler will be available to the applicant by request from the Committee.

9. <u>Preservation of Existing Trees and Rock Outcroppings.</u> Existing trees and significant rock outcroppings are a unique feature of the land at the EPCC. They should be carefully preserved and featured in all planning for structures and landscaping. During construction, special care must be taken to avoid damage to these rock elements and the lichens growing on their surfaces, and existing trees. Such damage can be caused by heavy machinery, chemicals or other irritants.

10. Landscape Design and Layout. The following general landscape design and layout apply.

- e) All landscaping around the perimeter of the structure and upon the lot shall be approved by, and related detailed plans shall be submitted to, the Committee. Replacement of any landscaping shall comply with all of the guidelines set forth herein.
- All property lines for any single-family dwellings to the common area street shall be kept free and open of landscaping.
- g) There shall be no landscaping installed which interferes and/or blocks the existing lake view corridors of all neighboring structures, including neighbors across the street. There shall be no hedges or other vegetation over 5 feet in height (from the natural grade) anywhere within the EPCC without prior written Board approval.

XII. The Architectural Review Committee Process

Prior Approval of Exterior Modifications. All Improvements or visible modifications to a lot structure, including, but not limited to, new construction, exterior remodels, building additions, painting, replacement of

garage doors, installation and/or replacement of lighting fixtures, installation of energy saving systems, landscaping additions or removals, etc., must be submitted to the Committee prior to construction or installation of such improvements or modifications. The only exception is for like-kind (size, color, quantity, etc.) replacement, or re-painting a residence the exact same color as previously approved and painted; and for likekind (size, quantity, etc.) replacement only of flowers, groundcovers and/or shrubs. The Committee requires an Application for review and final approval for any new construction, exterior remodel(s) and/or renovation(s) Projects.

The Committee shall review and make its recommendation on an Application as provided for herein

As a result of failure to receive prior written approval from the Board for any Project requiring approval, the Committee has the authority to recommend to the Board the requirement for the removal of the improvement(s) and/or the restoration to the original state or condition. Additionally, fines and construction penalties may be assessed against the owner in accordance with the Fine Schedule set by the Board and the EPCC's Governing. Documents.

2. <u>Decisions.</u> The Committee shall endeavor to review and makes its recommendation to the Board on submissions within 45 days of submission of complete Applications. If requested by the Committee, Applications must be resubmitted to the Committee, in which case the Committee shall endeavor to comment on such resubmission within 45 days. An Application shall not be approved unless and until the Board receives the Committee's recommendation and grants final written approval. Committee comments and recommendations with respect to any Application shall be considered by the Board before final action on Application is taken by the Board. The decision of a majority of a quorum of the Board, its sole discretion, upon any matters submitted or referred to it, shall be final. Any decision or approval by the Board shall not relieve an applicant nor lot owner from complying with any requirement of a public authority having jurisdiction, and shall not constitute any representation nor guaranty by the Board or EPCC of compliance of the submitted matter with any applicable statue, ordinance, or regulation.

3. <u>Grounds for Disapproval.</u> The Committee may recommend disapproval and the Board may disapprove any Application:

- a) If such Application does not comply with EPCC Governing Documents including any ADCSG adopted by the Board.
- b) Because of the reasonable dissatisfaction with grading plans; location of the proposed improvement on a lot; finished ground elevation; color scheme; exterior finish; design, proportions, architecture, shape, height or style of the proposed improvement; materials used; the kind, pitch or type of roof proposed; or for purely aesthetic reasons.
- c) Because the plans are not consistent with the overall character and scheme of the EPCC.

4. <u>Variances.</u> Any Applications that would involve a variance to the ADCSG shall be forwarded to the Committee who shall review all variance requests. A majority of the Committee shall have the authority to recommend to the Board to grant or deny variances from the ADCSG. Variances shall not be construed as precedent-setting in any way or manner.

5. <u>Certification of Compliance</u>. At any time prior to completion of any Project, the Committee may require a certification in such form as it shall furnish from the contractor, owner or licensed surveyor that such Project does not violate any set-back rules, ordinances or statutes, nor encroach upon any easement nor right-of-way of record; and/or that all construction is in strict compliance with the Application approved by the Board.

6. <u>Administrative Fees for Major Projects Only</u>. As a means of defraying its expenses for review of the Application of a Major Project, the Committee shall require an application review fee of \$1,500.00 and/or an

amount determined by the Board, which may vary depending on the scope and extent of the Application. (See also Section XVII, below.) The Application review fee in the amount of \$1,500.00 is required at the time of preliminary design Application submittal. (See also Section XVII, below). This fee will cover the preliminary design Application submittal, preliminary design Application review and final Application submittal. Should the Committee incur additional expenses and costs in reviewing an Application, such additional expenses and costs will be recouped from the applicant. At its discretion, the Committee will impose an additional fee of not less than \$500.00 each time an Application re-submittal is required, if the re-submittal(s) become necessary to achieve a final Application that complies with all ADCSG requirements.

7. <u>Inspection Required</u>. An inspection of structure by the Committee shall be scheduled with the owner's qualified and licensed architect and engineer(s) when the foundation is complete, and again when the framing is complete. Any member of the Committee or the Board has the right, after providing a minimum 48-hour written notice to the owner, to inspect all improvements and/or modifications for the purpose determining if, during the construction process, all improvements and/or modifications are in compliance with the Application approved by the Board.

8. <u>Liability.</u> Regardless of the approval by the Board of any Application, neither the Committee, the Board, the EPCC, nor any person acting on their behalf shall be responsible in any way for any defects in any Application plans or specifications nor other material submitted to the Committee, nor for any defects in any pursuant Project work. Each person submitting an Application or specifications shall be solely responsible for their sufficiency and the adequacy of pursuant Project work. No member of the Committee, the Board, the EPCC nor any person acting on their behalf shall be liable to any person, whether an owner of a lot or his/her agents, employees, or assignees, on account of any action or decision of the Committee and/or Board, nor the failure of the Committee and/or Board to take any action nor make any decision. Neither the Committee, EPCC, the Board nor any person acting on behalf of any of them shall be responsible in any manner for any claim, cause of action nor alleged damages resulting from:

- a) Any design concepts, aesthetics, latent nor patent errors or defects in design or construction relating to improvements constructed on lots, whether shown or omitted on any plans and specifications that may be approved by the Board, nor any buildings or structures erected there from; nor
- b) Any waiver of nor failure to enforce an ADCSG provision, nor failure to inspect or certify compliance with approved plans and specifications.

9. Enforcement. If any improvement and/or construction commences without Board approval as required, or any improvement and/or construction are not in conformance with plans approved by the Board, or not in conformance with the EPCC's Governing Documents, the same shall constitute a violation of the EPCC's Governing Documents. In addition to the remedies for any violation of any portion(s) of the EPCC's Governing Documents, the EPCC shall have the power and authority to institute legal or other appropriate proceedings to enjoin or otherwise prevent any such violations. All fees and costs incurred by the Committee, the Board and/or EPCC pertaining in any way to the violation, including, without limitation, attorneys' fees and costs, shall be assessed, charged and/or paid by the lot owner as an assessment, should the EPCC prevail in an action concerning same. In the event the EPCC is not successful, each party shall pay its own costs and attorneys' fees.

XIII. Submittal of Application with Preliminary Design for Major Projects

When the preliminary design is complete, Application submittals to the Committee must include all of the following and must be presented in three formats:

1. Two regular sets of blueprint size plans in 24" x 36" format or larger and at a scale appropriate to such size presentation. This set shall be referred to as the "submittal set" and will be marked-up with review input and comments. The second copy of the marked-up submittal set will be returned to the applicant.

Once it has received full and final design Application approval a regular set of blueprint size plans to be referred to as the "record set" in 24" X 36" format shall be submitted

- 2. Duplicate copies of the submittal set and record set of the plans, reduced to 11" x 17" paper, shall be made by the Applicant for distribution to neighbors.
- 3. An electronic pdf file of the submittal set and record set shall be submitted to the Committee, and upon request to neighboring owners.

The Application and fees shall be directed to P.O. Box 9, Zephyr Cove, Nevada 89448, to the Assistant to EPCC's Secretary (currently, Jennifer Frates), who will log in same, and then direct the Application to the Chairperson of the Committee for review and action. The Board shall be copied on this transmittal. The Assistant to EPCC's Secretary shall ensure appropriate follow-up is in place for timely compliance with the Committee's input and response. Once the Committee completes input and review, it will deliver its response to the Assistant to EPCC's Secretary for transmittal to the Board. The Assistant to EPCC's Secretary will also prepare a simple transmittal cover letter with the Committee's recommendation and comments, to the Applicant.

The preliminary design Application submittal shall include:

- Site plan, showing the entire property and the location of the building envelope; the residence and all buildings, driveways, and parking areas; existing and proposed topography; proposed finished floor elevations; all trees of 6 inch diameter or greater and protected plants and/or special terrain features to be preserved; and trees and/or special terrain features to be removed;
- Survey of the site, prepared by a registered land surveyor or licensed civil engineer showing lot boundaries and dimensions, topography (2 foot contours or less), major terrain features, all trees of 6 inch diameter or greater, edge and elevation of pavement or curb, and utility locations;
- 3. Floor plans showing proposed finished floor elevations;
- All exterior elevations showing both existing and proposed grade lines, plate heights, ridge heights, roof
 pitch, and a preliminary proposal of all exterior materials and colors;
- 5. Site sections that include the exterior elevations of all adjoining lot structures as well as the exterior elevation of the proposed structure on said lot;
- 6. In addition to the exterior elevations in Item 4 above, a "conceptual drawing" showing the most prominent and descriptive view of the building in perspective and in relation to the adjoining properties' building structures, and the actual site. This drawing must show all major existing site features and topography in scale. It must also clearly show all design elements, with major building elements labeled for identification;
- 7. A study model (same scale as site plan) and/or story poles may be required that accurately depict all the proposed improvements and their relationship to the site and adjoining properties' structures if the Committee deems it appropriate due to slope considerations or complexity of design, and
- 8. Any other drawings, materials, or samples requested by the Committee.

The Committee will review the preliminary plans and respond in writing within 15 days after the review, but no later than 45 days after an Application submittal is complete. If, in the opinion of the Committee, the Application is in substantial compliance with the ADCSG, a recommendation for approval will be made to the Board. Should the design be a substantial variance with the ADCSG or violate any of these guidelines, a recommendation for disapproval may result, and a revised submittal will be required.

The Committee will consult by conference call or in person in considering the approval of preliminary plans. The Owner may request and attend a meeting with the Committee and the Committee will make reasonable attempts to accommodate this request. No applicant, architect or builder may approach a Board or Committee

member to discuss Application details. Any response an owner may wish to make regarding the results of an Application design review must be addressed to the Committee in writing. In the event of any disapproval by the Committee of an Application submittal, a resubmission of the Application should follow the same procedures as an original

XIV. Submittal of Application with Final Design for Major Projects

After the Board approves an Application, the following documents are to be submitted for final review in all 3 size formats outlined for the Application review process. The log in and response process will be as outlined for the Application review will commence until the submittal is complete and inclusive of the preliminary design Application submittal items as well as the following:

- 1. Site plan with final proposed finished floor elevations; all utility sources and connections; and all site walls, fences, or similar structures;
- 2. Floor plans showing all final proposed floor elevations;
- 3. Roof plan showing all final proposed roof pitches;
- 4. Building section, showing existing and final proposed grade lines;
- 5. All exterior elevations showing both existing and final grade lines, plate heights, roof pitch and the final approved exterior materials and colors;
- 6. Samples, color boards showing actual materials and colors depicting or describing all approved exterior materials, finishes, and colors;
- Complete landscape plan showing location, size, and type of all existing and proposed plants; irrigation system facilities; decorative materials; paving and/or other impervious surfaces; walls; steps; fences and/or borders; and,
- 8. On-site staking of all building corners and other improvements.

The Committee will review the Application with final design plans and respond in writing within 15 days after the review, but no later than 45 days after an Application with final design is complete. If, in the opinion of the Committee, the Application with final design is in substantial compliance with the approved preliminary drawings and is otherwise in compliance with the ADCSG, a recommendation for approval will be made to the Board. Should the design be a substantial variance with the approved Application with preliminary design or violate any of the ADCSG, a recommendation for disapproval may result, and a revised Application with final design will be required.

No submittal to any governmental agency, including but not limited to the TRPA and Douglas County, shall precede or otherwise commence until final design approval is first obtained from the EPPC Board. Failure to obtain final design review approval from the EPCC Board, in advance of submission of the applicant's plans to any governmental agency, including but not limited to TRPA and Douglas County, automatically renders the applicant's plans rejected and disapproved by the EPCC Board until such time as the ADCSG is complied with.

XV. Site Inspection

As soon as the review of the Application with final design is complete, a representative of the Committee may inspect the site to determine that the conditions as depicted in the Application with final design are accurate and complete.

XVI. Pre-Construction Conference

Prior to commencing construction, the builder must meet with a representative of the Committee to review construction policies and procedures set forth in the document commonly referred to as "Managing

Construction Within the Elk Point Country Club Association" ("Construction Rules"), available upon request, and to coordinate his/her activities with the Committee, the Elk Point Caretaker, and the Board.

XVII. Compliance Deposit for Major Projects

To assure the owner's and builder's compliance with the ADCSG and their agreement to build all structures, landscaping, and other improvements in complete conformance with approved Application with final design, the owner shall deliver to the EPCC a Compliance Deposit in the amount of \$ 5,000.00 at the time of the Pre-Construction Conference. This deposit must be made payable to the EPCC prior to any commencement of any Project activities; and same will be held by the EPCC until the final release described below has been issued by the Committee. \$2,500.00 of the Compliance Deposit is non-refundable. Out of this non-refundable portion, \$1,500.00 is to aid in defraying costs to the Board and Committee for additional consultant and other fees incurred during the Applicant's construction process of the Project; and \$1,000.00 of which may be deposited in the EPCC's general and/or reserve accounts for any street repair(s) and/or replacement(s) due to construction traffic, particularly heavy trucks. \$2,500.00 of the compliance deposit will be refundable, unless the owner, the builder, and/or their respective agents and/or employees fail to comply in any way with the EPCC's Governing Documents, the ADCSG, the Committee's approved plans, and/or the EPCC's Construction Rules. Should same be violated in any way, then the deposited funds held as part of the Compliance Deposit may be used by the EPCC to pay the costs of damages, the cost of compliance and/or the cost of the correction of such failure(s). including any attorney fees or costs incurred by the EPCC in gaining said compliance. Any funds remaining in such Compliance Deposit after the final release has been issued will be promptly returned to the owner. No interest shall be due to the owner from the Compliance Deposit. If expenses exceed the amount of the Compliance Deposit, then the owner shall be liable for the excess, and said excess may be charged against the owner's lot as a special assessment.

Any and all funds held or disbursed as, and/or from, receipt of design review fees, Compliance Deposits, payments of fines, and payments and/or reimbursements from expenses of enforcing compliance with the ADCSG will be held by and/or paid through the EPCC designated account(s) and will in all instances be the property of the EPCC.

XVIII. Commencement of Construction

After the Board's approval of the Application with final design, the payment of the Compliance Deposit, and satisfactory completion of all Douglas County and Tahoe Regional Planning Agency's (TRPA) review processes, the owner shall then have satisfied all conditions and commence the construction and/or any work pursuant to the Application with final design within one year from the date of such approval. If the owner fails to begin construction within this time period, any given EPCC approval shall be revoked.

The owner shall, in any event, complete the construction of any and all improvements on the owner's lot within two years after commencing construction, except and upon a showing that such completion is rendered impossible due to labor strikes, fires, national emergencies, natural calamities and/or unusual inclement weather.

If the owner fails to comply with this schedule, the Board shall have the right to either have the exterior of the improvement completed in accordance with the approved plans and/or have the right to remove the improvement, with all expenses incurred to be reimbursed to EPCC by the owner.

XIX. Inspections of Work in Progress

The Committee may inspect all Project work in progress and give notice of noncompliance. Absence of such inspection or notification during the construction period does not constitute an approval by the Committee nor EPCC of Project work in progress and/or compliance with the ADCSG.

XX. Subsequent Changes

Additional construction and/or other improvements to a residence or lot, and/or changes during construction and/or after completion of an approved structure, including landscaping and color modification, must first be submitted to the Committee for review and approval of the Board prior to making such changes or additions.

XXI. Final Release

Upon completion of any residence and/or other improvement, the owner shall give written notice of completion to the Committee. Within 10 days of such notification, a representative of the Committee may inspect the residence and/or other improvements for compliance. If all improvements comply with the ADCSG, the Committee may recommend that the Board issue a written approval to the owner, constituting a final release of the entire Project by EPCC. If the Committee fails to recommend approval or disapproval of the Project within 45 days of receipt of owner's notice, EPCC's right to approve shall be waived.

If it is found that the Project was not done in strict compliance with the approved Application with final design or any portion of the ADCSG, the Committee may issue a written notice of noncompliance to the owner, specifying the particulars of noncompliance; said notice to be issued within 45 days of the final inspection. The owner shall have 45 days from the date of notice of noncompliance to remedy the noncomplying portions of his/her improvement. If, by the end of this time period, the owner has failed to remedy the noncompliance, the Committee may recommend to the Board action to remove, repair and/or reconstruct the noncomplying improvements as provided for in the ADCSG, and in addition, may without limitation seek injunctive relief against occupancy of the site until compliance is achieved and/or full payment of the imposed sanction and/or fine against the owner.

The approval by the Board of any plans, drawings, or specifications for any work done or proposed shall not be deemed to constitute a waiver of any right to withhold approval of any similar plan, drawing or specification subsequently or additionally submitted for approval. Failure to enforce any of the ADCSG shall not constitute a waiver of same.

XXII. Right of Waiver

The Board reserves the right to waive and/or vary any of these declared procedures at its sole discretion.

XXIII. Exemptions

Utility and maintenance buildings and other structures located on nonresidential portions of EPCC are exempt from the "ADCSG" portion of this document; however, EPCC will endeavor to attain as high a level or conformance with the ADCSG as is practical for these types of facilities.

XXIV. Review of Minor or Major Alterations to Existing Structures

EPCC, through the Committee and Board, reserves the right to review Application(s) for alterations to existing structures and to require certain upgrades to meet current codes compliance when the Committee deems it appropriate, on a case-by-case basis.

4821-7655-8163, v. 1

Exhibit F

Exhibit F

A.App._819

1 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA 2 IN AND FOR THE COUNTY OF DOUGLAS 3 JEROME MORETTO, Trustee of the Jerome) 4 F. Moretto 2006 Trust,) 5) Plaintiffs,) 6 vs.)Case No. 7)19-CV-0242 ELK POINT COUNTRY CLUB) HOMEOWNERS ASSOCIATION, INC., a 8) Nevada non-profit corporation, and) DOES 1-10 inclusive, 9)) 10 Defendants.) 11 12 13 14 ZOOM VIDEOCONFERENCE DEPOSITION OF JEROME MORETTO 15 Taken at the Law Offices of Karen L. Winters 16 Minden, Nevada 17 18 19 On Monday, September 28, 2020 20 At 9:20 a.m. 21 22 23 24Job Number. 665346 25 Reported by: Deborah Ann Hines, CCR #473, RPR

Page 13 BY MR. JONES: 1 2 Q. Go ahead, sir. MS. WINTERS: If you understand that you can 3 4 answer it. 5 THE WITNESS: Yes. 6 BY MR. JONES: 7 0. Okay. 8 Α. What my attorney said. Okay. I understand that, sir. 9 Q. Your attorney will -- I should have mentioned this 10 earlier. Your attorney from time to time will state 11 12 objections for the record. Unless she instructs you 13 to not answer, you're still to answer the question. 14 She's just making an objection for the record. So I'm going to go ahead and ask the 15 question one more time, sir. What authority do you 16 allege is being delegated by the executive board? 17 18 Α. None. 19 Q. Are you alleging that the authority of the executive board is being delegated to some other 20 21 party in your complaint? 2.2 Α. I'm not sure. 23 0. Okay. Let's go to -- one second here. Go 24 to number two on paragraph 11, and I'm just going to read that again very quickly into the record. 25 "The

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	D 14
1	Page 14 Guidelines create rules that result in arbitrary and
2	capricious enforcement in violation of NRS
3	116.31065(1)." Are you aware of what rules you're
4	alleging result in arbitrary and capricious
5	enforcement, sir?
6	MS. WINTERS: Objection. That calls for a
7	legal conclusion.
8	BY MR. JONES:
9	Q. Go ahead and answer, sir.
10	A. I object.
11	MS. WINTERS: Do you know?
12	THE WITNESS: No.
13	BY MR. JONES:
14	Q. Let me ask you this, sir: Have you read
15	this complaint before?
16	A. Yes.
17	Q. Okay. And let me move on to the next one
18	then very quickly, number 3. "The Guidelines are
19	vague and not sufficiently explicit to inform unit
20	property owners for compliance in violation of NRS
21	116.31065(2)." What guidelines do you believe are
22	vague and not sufficiently explicit to inform unit
23	property owners for compliance?
24	MS. WINTERS: Objection. It's overbroad.
25	You're talking about several pages of guidelines. Do

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Page 15 you want him to go through all of them right now? 1 2 MR. JONES: I'm curious to hear what his answer is, Counsel. 3 4 THE WITNESS: I didn't hear you, sir. 5 BY MR. JONES: 6 ο. Sure. Which guidelines do you believe are vague and not sufficiently explicit as stated in this 7 objection? 8 I don't know. 9 Α. 10 I want to turn to number 5 of paragraph 11, 0. and I'm going read again that very quickly into the 11 12 record. "The Guidelines allow for a variance from 13 the Guidelines at the discretion of the Design Review 14 Committee with no objective standard in violation of NRS 116.31065(5)." Are you aware of any examples 15 where a variance from the guidelines was issued at 16 the discretion of the Design Review Committee? 17 18 Not really. Α. 19 Q. Okay. All right. Number 7 of the same paragraph 11 reads, "The Guidelines impose setback 20 requirements on improvements that would effectively 21 22 take Moretto's property right to rebuild in the event 23 of fire or natural catastrophe without Moretto's 24 consent." 25 Are you aware of any situation where any

1	Page 22 expertise. I'm going to direct him not to answer
2	legal conclusions.
3	MR. JONES: Well, I mean, Counselor, I don't
4	believe you can direct him to not answer, you can
5	he can answer the question to the best of his
6	knowledge, and if it's objectionable, then the court
7	can rule that down the road, but he does have to
8	answer, unless it's privileged.
9	MS. WINTERS: I don't think that's how it
10	works, Mr. Jones.
11	BY MR. JONES:
12	Q. I'll tell you what, Mr. Moretto, let's try
13	this a different way then. Let me in that
14	Exhibit 2 to your complaint, which I hope you're
15	looking at right now, page one, paragraph two, do you
16	have that in front of you, sir?
17	A. I think so.
18	Q. Okay. I'm going to read that into the
19	record, the first full sentence. "The EPCC 'Board'
20	has the authority to establish and maintain a Design
21	Review Committee on behalf of EPCC to consider and
22	recommend written guidelines, controls, standards,
23	rules and regulations concerning the design,
24	architecture and/or construction of structures within
25	EPCC consistent with EPCC's historical character."

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Page 23 Do you see where I'm reading, sir? 1 2 Α. Yes, sir. Okay. Do you see where it says "consider 3 0. 4 and recommend written guidelines"? I see that. 5 Α. 6 Q. Okay. Sir, are you -- do you believe that 7 is a delegation of duty, as you've alleged in your complaint? 8 9 MS. WINTERS: Objection. It calls for a legal conclusion. 10 11 MR. JONES: Counselor, I'm entitled to get 12 the basis of his claims being made against my client. 13 I'm entitled to answer that -- or to ask that 14 question and to receive an answer. 15 MS. WINTERS: Well, then try to ask him 16 factual stuff. You're not entitled to ask any legal argument in a deposition. 17 BY MR. JONES: 18 19 0. Sure. Sir, do you see where it says "consider and recommend written guidelines"? And, 20 21 sir, I'm looking at the second paragraph, the second 22 line where it says, "consider and recommend written 23 guidelines." Do you see where I'm talking about? Yes. I found it now. 24 Α. Do you believe the authority to consider and 25 Q.

Page 24 1 recommend written guidelines is a delegation of duty? 2 And, sir, I'm not asking -- I'm asking for your opinion. 3 Α. No. 4 ο. Thank you. The next sentence reads, "The Committee shall develop and recommend rules, 5 6 regulations, standards, protocols and procedures for the design, architecture, and construction of 7 structures within the EPCC, for consideration and 8 9 possible adoption by the Board." Do you see where I'm reading, sir? 10 11 Α. Yes. 12 Do you see where it says "developed and Q. 13 recommend rules"? 14 Α. Yes. Do you believe that, in your opinion, to be 15 Q. a delegation of authority by the executive board? 16 Α. 17 No. 18 Thank you, sir. I want to turn your Q. 19 attention to page two of the guidelines. Sir, are 20 you on page two? 21 Α. Yes. 22 Q. You'll see a subsection IX, Amendment of the 23 ADCSG. Do you see where I'm talking about, sir? 24 Yes, sir. Α. And that section has four paragraphs. 25 Q. Ι

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Page 62 1 CERTIFICATE OF REPORTER 2 STATE OF NEVADA) 3 SS: 4 COUNTY OF CLARK) 5 I, Deborah Ann Hines, RPR, Nevada CCR No. 473, 6 California CSR No. 11691, Certified Court Reporter, certify: 7 That I reported the taking of the deposition 8 of the witness, Jerome Moretto, commencing on Monday, September 28, 2020, at 9:20 a.m.; 9 That prior to being examined, the witness was by me duly sworn to testify to the truth, the 10 whole truth, and nothing but the truth; 11 That I thereafter transcribed my shorthand 12 notes into typewriting and that the typewritten transcript of said deposition is a complete, true and 13 accurate record of testimony provided by the witness at said time to the best of my ability; 14 I further certify (1) that I am not a relative, employee or independent contractor of 15 counsel of any of the parties; nor a relative, employee or independent contractor of the parties 16 involved in said action; nor a person financially interested in the action; nor do I have any other 17 relationship with any of the parties or with counsel of any of the parties involved in the action that 18 may reasonably cause my impartiality to be 19 questioned; and (2) that transcript review pursuant to NRCP 30(e) was not requested. 20 IN WITNESS WHEREOF, I have hereunto set my 21 hand in my office in the County of Clark, State of Nevada, this 13th day of October, 2020. 22 Aebrah Hims 23 Deborah Ann Hines, CCR #473, RPR 24 25

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3	IN THE NINTH JUDICIAL COURT OF THE STATE OF NEVADA
4	IN AND FOR THE COUNTY OF DOUGLAS
5	
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7	TRANSCRIPT OF VIDEO-RECORDED
8	HEARING IN THE MATTER OF
9	JEROME MORETTO V. ELK POINT COUNTRY CLUB HOMEOWNERS
10	ASSOCIATION, INC.
11	
12	NOVEMBER 30, 2020
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14	CASE NO. 19-CV-0242
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1 [2020-11-30 10.09.26.014]

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3 THE COURT: This is case 19-cv-0242, Jerome 4 Moretto v. The Elk Point Country Club Homeowner's 5 Association.

6 Ms. Winters is appearing remotely via the 7 GoToMeeting application and she represents the 8 plaintiff. Mr. Jones is appearing remotely via the 9 GoToMeeting application and he represents the 10 defendants.

11 Now today we have set to hear argument on 12 competing motions for summary judgment. Please 13 understand that I know that it's difficult to 14 communicate and to present your case sometimes 15 remotely.

But we can do this. I've heard now many, many, cases in excess of over 100 via this application. And so I know that we can do it.

Sometimes it requires that we speak slowly.
Sometimes it requires that we speak a little louder.
And sometimes, almost always, it requires that we have
a little patience with each other. But those are
things that we can all do.

And for the record, this is done to promote the safety of the community, of the parties, and of their attorneys, and the court staff. The record will
 reflect that the number of COVID-19 cases in Douglas
 County has risen by a great deal in the last several
 days even.

5 And I was informed as of yesterday that there 6 were people in the hospital in Carson City who are 7 having to be kept in the hallways because there were 8 not rooms available for them.

9 So the court has determined that this is the 10 safest and most effective way to allow the parties to 11 be heard and to have access to justice. And I 12 appreciate the attorneys working with me on this. We 13 will get through this. And I'll hear your arguments. 14 And I appreciate both of you working with me.

Now if at any point during these proceedings you have difficulty hearing me, understanding me, or hearing or understanding the other party or their attorney, please just let me know. And we'll make certain that we slow down or we repeat whatever we have to repeat so that everybody gets a full opportunity to participate.

As I have looked at these motions, the parties should rest assured I've read your documentation. But there are several issues here. And obviously, if a summary judgment is granted to either side, it

immaterially impacts that side's case. And I will
allow you to at any point, either now or prior to a
decision on your motions, to convert this to a
settlement conference if you wish to do so.

5 I understand very well that you've had a 6 mediation and that that did not result in a 7 resolution. But if the parties desire to discuss a 8 settlement at some point, not knowing how I'm going to 9 rule on these summary judgment motions, I'm happy to 10 convert this to a settlement conference also.

11 So with that having been said, what we're going 12 to do, the order that I intend to address this is, 13 because you both have motions for summary judgment, 14 and many of the issues are -- are generally, they meld 15 into each other, I'd like to hear from the plaintiff 16 first.

And you may discuss your motion in any order that 17 you wish. But, I've got it right in front of me. And 18 again, Mr. Jones, I have your motion right in front of 19 me, and the oppositions, and all of the pleadings. 20 So I'm going to turn to Ms. Winters, and ask 21 prior to arguing the motion, is there any just 22 introductory statement that you'd like to make, ma'am? 23 MS. WINTERS: I -- I don't really have anything, 2.4 25 Your Honor. I think my issue right now is that we have

each provided probably 100 pages worth of arguments.
And I know Your Honor is diligent in reviewing all of
the documentation prior to these hearings. So I -- I'm
really not going to have that much more to add than
what has been in the motion documentation and
arguments.

7 THE COURT: Okay. Mr. Jones, did you have an 8 opening statement that you wanted to make, sir? Not 9 necessarily argument on your motion, just in -- in the 10 form of an opening statement.

11 MR. JONES: Your Honor, I'm not sure I have an 12 opening statement beyond -- it would go more towards 13 the merits of the arguments and some points that I 14 want to make that would be traditionally considered to 15 be oral argument.

And as -- as far as an introductory statement, Your Honor, this has been certainly a -- an interesting case I think for all of us involved. What I think is a threshold issue for the Court to consider, is that it's undisputed that the plaintiff took title to the property subject to at all times the bylaws, and the rules and regulations of the HOA.

And it's also undisputed that the bylaws state in Article 16, Section 3, that no structure of any kind shall be erected or permitted upon the premises of any unit owner unless the plans and specification shall
 have first been submitted to, and approved by, the
 executive board.

4 So really, what this case revolves around is what 5 criteria would the board utilize to approve any plans 6 that must be submitted to it in order to approve these 7 plans and specifications prior to any construction 8 going on the property.

If you take the plaintiff's argument at face 9 10 value, they're saying there should be none. They don't dispute that the board has authority and the 11 requirement to approve these plans. What the board --12 all the board is trying to do, Your Honor, is give 13 some clarity and some predictability to its unit 14 owners who are trying to construct, or modify, the 15 buildings on the property. 16

Plaintiff's argument is essentially there should not be any rules and any regulations that address this. In a way, ironically, their position would support vagueness, ambiguity, and unpredictability of the construction process.

22 So Your Honor, I think it's clear that first of 23 all the plaintiff took title to the property subject 24 to the bylaws, subject to the rules and regulations. 25 And the bylaws clearly allow a board this type --

1 these type of guidelines to be presented [inaudible].

There's a number of smaller issues as well that we can address as the morning goes on. But I think that's the biggest issue that's involved in this case and one which I think we'd -- a -- decision from this court on before any additional settlement negotiations can take place. Thank you, Your Honor.

8 THE COURT: Okay. Thank you. Ms. Winters, I'll 9 allow you to argue your motion. And, you're right, I 10 did --

MS. WINTERS: Your Honor, as I mentioned --THE COURT: I have read them, but there are a number of different issues, if you want to talk about any of them individually or so, just feel free to go ahead, ma'am.

MS. WINTERS: Thank you, Your Honor. I believe the issues in this case are -- are three simple questions that are raised in the -- in both the motions for summary judgment. One is whether the homeowner's association has the authority to create guidelines and a design review committee.

22 Second, if it did have the authority to create 23 guidelines, do those guidelines they created comply 24 with the laws, including the laws of Nevada and the 25 requirements of the articles of incorporation and the

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1 bylaws of the homeowner's association.

And third, whether or not the board violated NRS 116.31175 when it failed to provide all the documents requested by Mr. Moretto on May 12, 2018.

5 The first question is, from our perspective, the 6 most important one. And that is that the board does 7 not have the authority to create the guidelines and 8 the design review committee.

9 The entirety of the guidelines are regarding 10 regulating what a unit owner can do on their own 11 property.

And the laws that we've cited in our motion and 12 the articles and bylaws all limit the homeowner's 13 association's authority to just prohibiting any 14 improvements other than a residence, and requiring a 15 unit owner just to submit those plans to the board 16 prior to beginning the construction, to allow the 17 board to confirm that the construction is going to be 18 within the stated bylaws, which is that it's a 19 permanent residence and it is a -- a single family 20 residence. 21

That's it. The argument that is raised by the defendant appears to state that whatever is not in the bylaws and the articles, by default, is allowed. And as we have argued throughout our motion, that is

1 simply not the law.

The law specifically says that in governing 2 documents of a homeowner's association, there must be 3 a specific statement about what can be done and what 4 cannot be done by a committee or by the board as far 5 as governing anything on the unit property. 6 And in this case there is nothing specific in the 7 bylaws or articles, or anything prior to these 8 guidelines that governs --9 10 THE COURT: Okay. Let me -- let me stop you there for a minute, Ms. Winters. And this is a -- it's a 11 little bit difficult for me to interject here, but 12 I've got a question there. 13 Assuming that there were not an architecture 14 review committee, could the board itself review or --15 or make a rule as to what you could build, how you had 16 to build it, a setback, a height, a -- a view, or 17 anything like that? Would the executive board itself 18 have that authority? 19 20 MS. WINTERS: It would have very limited authority under the bylaws and the articles. It simply 21 22 says that the plans for any construction need to be submitted to the board and approved by it. And there's 23 no further ability for the board to make any kind of 2.4

25 restrictions other than the fact that it has to be a

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single family residence. The -- the board is --

THE COURT: So what -- what limitation does the board have when -- when the bylaws say that the board has to approve. What authority does it have approve or reject? I mean are the -- are there no standards?

6 Are there other than single family and permanent? 7 Do you think that the board has discretion to reject 8 a particular architectural design, for instance?

9 MS. WINTERS: There's nothing in the authority of 10 the bylaws that allow them to dictate architectural 11 design.

12 It's simply to determine whether or not it's a 13 single family residence and whether or not it complies 14 with the intent of this social club organization to 15 have single family homes in that subdivision.

16 THE COURT: So, the board's -- in your position, 17 the board's discretion here is very limited as to its 18 ability to approve a particular design.

19 MS. WINTERS: Yes, Your Honor.

THE COURT: And so assuming that the architectural review committee, that their only -their only authority is to make a recommendation to the board, if that's accurate, and that's Mr. Jones' position.

25

1

If it's accurate that the architectural review

committee simply is making a recommendation, without the authority to act on that recommendation, does the architectural review committee then, is -- is it still invalid?

5 MS. WINTERS: Yes. For one, because of the fact 6 that all that the board has authority to do is 7 authorize a plan that comports with the idea that this 8 is a -- a subdivision of single family residences.

9 And so it leaves nothing for the committee to 10 decide. It needs -- it leaves nothing for the 11 committee to even consider because there is no other 12 requirements or limitations on what the building can 13 be outside of, you know, the governmental entities, 14 you know, Douglas County building codes and the TRPA. 15 Aside from those, by the homeowner's association

16 itself, it can only make the determination based on 17 whether or not it's a single family permanent home. 18 And whether or not ancillary buildings are in line 19 with the idea that it's a single family home. So 20 [inaudible] --

THE COURT: What if that's all that, what if that's all that the architectural review committee does? What if all they do is they decide is -- is this a single family residence that's been proposed? Is it a permanent residence? What if it -- if it limited its

review and recommendation to the board based on what
 you just said were the limitations of the board?
 MS. WINTERS: That would still be a delegation of
 power, Your Honor. The --

5 THE COURT: What power are they delegating? If 6 it's just a review and a recommendation, what power 7 has been delegated?

8 MS. WINTERS: The power to review and recommend. 9 I mean that alone is a delegation, the fact that the 10 board didn't review. They are just taking the 11 recommendation of a committee. That's a delegation.

12 If the unit owner goes to the architectural 13 review committee with a set of plans, and that 14 committee is reviewing it, and that committee decides 15 that those plans don't comply with the single family 16 residence requirement, then that recommendation, and 17 that review, is a delegation of power under the law of 18 agency.

And it specifically says in the guidelines that the committee is an agent of the board. And so by definition an agent of a principal is being delegated certain powers and duties. And that includes reviewing.

24 Whether or not the committee has the ability to 25 go beyond that is debatable because of the fact that

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it also says in those guidelines that they are to
 enforce the guidelines and apply the guidelines. That
 is still in current version of the guidelines.

And what that means is ambiguous at best. Because as the defendant's motions point out, there are other portions of the guidelines that say the committee is just making recommendations. But in fact it goes on to include enforcing the guidelines.

These are all delegations of power. Whether or 9 10 not it is a soft power that is delegated to the committee to just review and hand it over with 11 recommendations, or if it's a -- a more concrete power 12 that allows them to go back to the unit owner and say, 13 if you don't make these changes, we won't recommend 14 this to the board. That's a delegation that -- that 15 the board has given to the committee. 16

So in fact, even the current set of guidelines go beyond what's allowed under the bylaws, the articles, the Nevada constitution, and NRS 116.3106, I believe, that limits what -- 3106 and 3108, that limits, what a board can do if it is not specifically set out in the bylaws and the governing documents.

The guidelines here are entirely addressing what a unit owner can do on their property, whether it is something as large as demolishing the current house

and reconstructing an entirely different house on the same footprint, or if it is something as small as deciding to paint their house white instead of what they've done in the past with, you know, stain or something.

6 So those are limitations that are put on the unit 7 owners for the very first time in the 95 year history 8 of this homeowner's association, that are dictating, 9 what the unit owners can do on their own property.

10 This includes landscaping. This includes every 11 aspect of what goes on in the -- on that unit owner's 12 property. And it's new, and it's not allowed under the 13 bylaws, and it's not allowed under the law.

Even if the guidelines were allowed to be, kept in some form in this in this homeowner's association, the guidelines that are set forth, even the current guidelines that are set forth do not comply with NRS 16.31065 under several sections of that statute, in that they're not consistent with the governing documents.

There's nothing in the bylaws or the articles of incorporation that allow the board or any committee, to dictate what kind of landscaping is put on the property, or whether or not one type of garage door over another is appropriate for the homeowner for that

1 subdivision.

2 So the effort of the guidelines to make everybody 3 conform to a certain architectural design is beyond 4 the scope of anything that his homeowner's association 5 has done in the past. And it's beyond the scope of 6 what's allowed under the law.

7 And Your Honor, I don't believe that there's any 8 question that this set of guidelines is not allowed 9 under any portion of NRS 116, or 81, or 78, or the 10 articles of the -- article 1 of constitution, of the 11 Nevada constitution, that allow it to get into an 12 aspect of governing a unit owner's own decisions about 13 what can be done on their own property.

The motion covers most of this. I don't need to reiterate. But I would point out that in, I believe it is NRS 116.3102, it limits the powers of an association.

And it -- and one of those things that it limits, it says the association may grant easements, leases, licenses, and concessions through or over the common elements.

There is nothing in the NRS 116 or in that particular statute that gives it any authority to grant any easements, or licenses, or concessions, through or over a unit property owner's property. So by extension, the same goes for any other restrictions
 that are being put on these guidelines that are simply
 not covered under the law.

4 One of the aspects of the statute requires that 5 there be notice of all meetings, an attending notice 6 is required for all meetings. And that is one thing 7 that is required of the board.

8 The board is now arguing and the homeowner's 9 association is now arguing that that particular aspect 10 of the board's authority -- they can delegate to a 11 committee to allow them to have meetings without 12 notice.

And as we set forth in our motion, that's a violation of the unit members' due process rights, in that the board cannot delegate to anyone an authority it does not itself have.

And in this case, the board is allowing the committee to meet without notice, and to meet without any agenda being published without any notice, let alone 10 days' notice. So under those circumstances, it goes well beyond what is allowed in the authority of the board.

I don't have a whole lot more to add other than what is in the motions themselves [inaudible] --THE COURT: Well, I -- I've got a couple -- I

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have a couple questions, ma'am. And, so the -- the, and if I'm -- you could jump back to wherever you were if you want.

But one of the points that you started out with, 4 and that the defense makes, is that there's this, 5 generally very broad statement in the bylaws that --6 that's quoted in -- in the response to your motion 7 that says, the enumeration of the powers and duties of 8 the executive board in these bylaws shall not be 9 10 construed to exclude all or any of the powers and duties except insofar as the same are expressly 11 prohibited or restricted by the provisions of these 12 bylaws or articles of incorporation. 13

And the board shall have and exercise all other 14 powers and perform all such duties as may be granted 15 by the laws of the state of Nevada. The defense's 16 position is kind of exactly the -- the converse of 17 yours. Your position is -- is that if it's not 18 specifically enumerated in the bylaws, then that power 19 20 doesn't exist. And the defense position is that, well if it's not excluded, then we get to do it. 21

And I ask you to address that a bit more specifically. And if you need reference either to pages in your motion or pages in the -- in the defense response or so, I'd be glad to help you with that. But

1 I know you're familiar with that argument.

And the arguments are just kind of converse of each other. You have the position that if it's not expressly a power granted to them, then the power doesn't exist. And they've taken the position that that very broad statement, if we're not prohibited, then we get to do it, is their entitlement.

8 MS. WINTERS: Well, Your Honor, I think that the 9 focus is really on if in that section where it 10 references that, you know, that -- that the board has 11 these broad powers, are limited by what is in the 12 articles, and the bylaws, and under Nevada law.

And under Nevada law, the requirements are that there have to be a specific authority to -- to act on anything that may impact the unit owner. And under, 16 116.3106, the board can only oppose those guidelines 17 if the homeowner's association has an affirmative authority to do so. And there's no specific affirmative authority.

The bylaws state that the board shall have the power to conduct, manage, and control the affairs and business of the corporation. And the affairs and business of the corporation is simply to govern the common elements of the -- of the homeowner's association, and to approve any membership, any addition to the membership, to approve any plans of
 new construction of homes, and to audit the finances
 annually, and to hold elections annually.

There's no other specific power under the articles of -- and the bylaws. And so it is beyond the power of the board to impose design controls. These are -- these are not simply whether or not they can do particular landscape, or particular colors, or anything.

10 These are -- go beyond that to even property restrictions that are imposed under the guidelines, 11 and the setbacks that are imposed under the guidelines 12 that had never been present in any previous iteration 13 of the bylaws or the articles, or any other rules or 14 regulations. These are entirely new and they're not 15 necessary to the effective functioning of the 16 community. 17

Under the restatement of properties, the third restatement of properties, this is spelled out as being recognized throughout the case law that is cited there. And it is further recognized under 116.3106, that it is going well beyond their authority.

Even -- even though it is broadly stated in the bylaw that there are certain authorities to the board, there's nothing specific to it. And frankly, the law

on nonprofits under Chapter 81 allows those types of
 committees and allows for a delegation.

But that's further restricted by 116. And under Chapter 116 it specifically says that this does not aggregate or replace any of the laws of a corporation, or property rights, or any of the common law that is applicable to the real estate in a homeowner's association.

9 But to the extent that in our Chapter 15 applies 10 to this homeowner's association and further restricts 11 what this homeowner's association can do, the 12 [inaudible] what can be done here. And the law is 13 very, very clear that the statutes are limiting what a 14 board can do to only those things specifically set 15 forth in the governing documents.

The guidelines are not governing documents. They are simply going beyond the scope of what those governing documents are. And unless the bylaws are amended with a two-thirds vote of the members, they are not allowed to go beyond the -- what is stated in the bylaws now, which is simply to approve the plans of a permanent residence only.

They are -- they would have to get the approval of two thirds of the members to make a change that would include any kind of guidelines. And to the

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extent that these guidelines pose restrictions on the property like setbacks and view restrictions, then that would require 100 percent vote of the members. Because those are property restrictions under the restatement of property regarding servitude.

So under NRS 116, as I pointed out, 116.1108, the 6 principles of law and equity, including the law of 7 corporations and any other form of organization 8 authorized by law of this state, the law of 9 10 unincorporated associations, the law of real property, and the law relative to capacity to contract, 11 principal and agent, imminent domain, estoppel fraud, 12 misrepresentation, and so on and so forth, substantial 13 performance or other validating or invalidating cause 14 supplement the provisions of this chapter, except to 15 the extent that they're inconsistent. 16

And under -- under this chapter, the bylaws must specify the powers the executive board or the officers of the association may delegate to any other person or to [inaudible] manager. So it's not just that they cannot impose restrictions under the bylaws. With the very small exception of reviewing permanent resident plans.

But that they can't delegate anything outside of the board itself to some committee, whether it's to

review it or to make a recommendation. That's still a
 delegation of duty.

THE COURT: So let me ask you this, ma'am. The homeowner's association has -- or -- has argued, and they quote part of the bylaws, they say the executive board shall have the power to conduct, manage, and control the affairs and business of the corporation.

8 Now you -- you've argued that the corporation is 9 to control the common area and the business of the 10 corporation. But it goes on and it says, and to make 11 rules and regulations not inconsistent with the laws 12 of the state of Nevada, the articles of incorporation, 13 and the bylaws of the corporation.

That phrase, to make -- to make law -- rules and regulations, your argument is that that is directed directly towards common areas, and not rules and regulations about individual property owner's property, is that right?

MS. WINTERS: Not entirely, Your Honor. It goes on, as you just quoted, to say it's not inconsistent with the laws of the state of Nevada. And to the extent that these guidelines [inaudible] what the laws of the state of Nevada allow, then they are outside of the scope of the authority of the board to act on. They are limited, not just by the articles of

incorporation, not just by the bylaws, but also by NRS
 Chapter 78 and 81, and by most of Chapter 116.

And all of those statutes and the Nevada constitution itself, that the board not go beyond what it has initially in its bylaws, to not go beyond imposing -- imposing restrictions, property restrictions on these unit members that are not specifically set out in the bylaws.

9 There's -- this is not a -- what your typical 10 homeowner's association is -- looks like in most 11 states, let alone in the state of Nevada. It does not 12 have a declaration of covenants, conditions, and 13 restrictions. It is -- it was created prior to any 14 laws regarding homeowner's association came into 15 effect.

16 It was begun as a social club, simply to allow 17 people to have a home on the lake, a residence on the 18 lake that were members of the Elks' Club. And now it 19 is trying to impose on those Elks' Club members' 20 properties a set of restrictions that is normally only 21 done prior to a transfer of any fee title to the unit 22 members.

In this case they're overlaying what is -- what is normally CC&Rs that are put into place prior to any transfer of fee title. And it is not possible to do

that. You would have to have a higher percent buy in
by all of the unit members to be allowed to impose
these kinds of restrictions on the properties that are
now owned by the individual members.

5 The only restrictions are what is stated on the 6 deed itself and in the bylaws. And there is nothing in 7 those limitations that are set out in the deed and in 8 the bylaws that allow a homeowner's association to 9 impose their own perception of what the homeowners, 10 should be allowed to improve on on their property 11 beyond having a permanent residence.

So this is not something you can compare, that can be compared to any other kind of homeowner's association that were created, you know, after -after NRS 116 went into effect, or even after, some of the general laws of incorporation came into effect.

This is something that was created in 1925 in the general laws of corporations, I believe were passed, that same year or maybe the year before.

But the imposition of the requirement is -- was such at that time that it became clear when this homeowner's association was initially created, that it was not intended to be anything more than a social club.

25

And now it is trying to impose a modern day

perception of what a homeowner's association is on, a subdivision, that was never intended to go that far with regulation of the unit members' properties [inaudible] --

5 THE COURT: Well, let me ask you about another 6 subject. I've got, I'd like to move to your argument 7 about the documents that were not provided, and that 8 being the subject of a motion for summary judgment.

9 It's the difficult thing for me with that
10 argument is that, one, I don't have all of those
11 documents. I don't know what they are.

I don't know that they're actually subject to, having to have been provided. There's an argument that there's some 5,000 different emails and that they weren't provided. And the phrase that I keep reading is that they may have been relevant.

Well, somebody has to determine whether they're relevant. And that seems to me to be a question of fact.

How can I decide that on a summary judgment motion? It -- you may have been -- now I realize that there was a delay there of a couple of months in providing some of the documents.

But as to the argument with this -- this huge bulk of documents, how is that an appropriate subject

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for a motion for summary judgment if I don't, you know, review those documents. And it's a question of fact, isn't it, whether they are -- they should have been provided or not.

5 MS. WINTERS: Your Honor, it is a question of 6 fact, but it's an undisputed fact. The evidence that 7 we provided in the declaration of Mr. Moretto, or of 8 Mrs. Moretto, actually in support of our reply to the 9 summary judgment motion points out [inaudible] --

10 THE COURT: I've got it here in front of me. Go 11 ahead. I'm sorry. I'm sorry for interrupting you. But 12 I want you to know I have that right in front of me. 13 Go ahead.

MS. WINTERS: Those documents, those pieces of evidence that are presented in as exhibits to the declaration of Mrs. Moretto, have the board members admitting that they have not -- they had not produced, those documents that were requested in a timely manner.

20 So it's not so much relevant, whether or not, you 21 know, there's a comparison of what the requested 22 documents are versus what documents are in front of 23 the court, so much as it's an admission against 24 interest that's already been made by the board and by 25 the documents that are presented as exhibits to not

only to Mrs. Moretto's declaration, but also the
 initial documentation that supported that.

In that -- I believe it's the reply in support of counter motion to procure legibility [ph] that was filed by defense on November 15, 2019, in this matter. That acknowledges that prior to that date, we had not received legible copies of all of the bylaws that govern the homeowner's association.

9 And that was over a year, well a year and a half, 10 after those actual documents themselves were requested 11 by Mr. Moretto in his May 2018 letter. So it's not so 12 much an -- a matter of looking at the list. The list 13 simply requires any communications that should be part 14 of the board records to be produced. And to provide 15 Mr. Moretto with a copy of the governing documents.

And those were not provided by the defendant's own admission until at least November of 2019. So under these circumstances, it's not necessary to take a look at what particular documents were produced or not produced.

In the court's own decision on the motion to compel, it recognized that all of the incomplete response to the discovery that we have requested, particularly the discovery for production of documents needed to be produced in a further response by the

1 defendants just a month or so ago.

And those exact same requests for production of documents that are included in the motion to compel are verbatim what was listed in the request Mr. Moretto made in May of 2018. And the court's order specifically recognizes that not all of those documents were produced on --

8 THE COURT: Well, but Ms. Winters, aren't --9 isn't that really kind of an apples and oranges thing, 10 that what -- what may have been required to be 11 produced in discovery and what would be required to be 12 provided pursuant to Mr. Moretto's request, could be 13 two different things. I don't -- I don't know that 14 that's the exact same standard.

MS. WINTERS: I understand, I think, what the 15 Court is asking. And it's -- it's a matter of -- well, 16 number one, the NRS 116.31175, I believe is the 17 statute that references this. And that specifically 18 requires the board to turn over any documents related 19 to the board's business, any documents that are in 20 reference to the governance of the homeowner's 21 association. 22

And those documents were not produced either after the request made in May of 2018, or in the request under the discovery for production of

documents. And I don't think that there is any apples 1 and oranges here. I think it is all one fruit. 2 The documents that are required to be produced in 3 this case under that section are simply the documents 4 that are required to be kept by the board in governing 5 this homeowner's association [inaudible] --6 THE COURT: But how can I say that any particular 7 document meets that requirement, meets that definition 8 without reviewing the document and making a factual 9 determination based on each document? 10 It is -- it is not so much whether 11 MS. WINTERS: or not each document complies with the statute. It's 12 simply that even one document that should have been 13 supplied was not supplied. 14 THE COURT: Which one? 15 MS. WINTERS: And under NRS --16 THE COURT: Which one? Because I need to know 17 which one I would be sanctioning the defense for. Not 18 5,000 and some odd that may be appropriate. Which one? 19 The -- well, first of all, in the 20 MS. WINTERS: exhibits that were attached to Mrs. Moretto's 21 declaration in support of the reply, the -- there is a 22 -- there are a couple of portions of the depositions 23 of board members that were included as exhibits. 2.4 25 And in I believe Mr. Jennings' deposition, he

references that business of the board was conducted through personal email accounts, and that those email accounts were not -- those particular emails that were regarding conducting board business were not turned over to anyone to be part of the corporate record that should have been produced in this matter.

And so in that respect, the board has not
produced all of the records of the communications
between the board members regarding board business.
But not just those.

The requests that were made, and I can pull out 11 the list, but the requests that were made in May of 12 2018 were regarding production of the actual legible 13 copies of the articles and of any governing documents. 14 And under this homeowner's association, the only 15 governing documents are the articles of incorporation 16 and the bylaws. And none of those documents were 17 turned over until November of 2019 in the pleadings in 18 this case, so that alone --19

THE COURT: Let me ask you -- let me ask you a different question. You've talked about this penalty. And I've looked at the statute and the reference to the \$25 a day. And who does that penalty get paid to? MS. WINTERS: Mr. Moretto.

25 THE COURT: Why? Where's it say that? Where in

the statute does it say that the -- that the private citizen gets to collect the penalty? And if it's in there and I missed it, you can educate me on that, and I'm sure that you will. But I'm wondering which statute is that?

MS. WINTERS: It's under the same statute, 31175, I believe. I would argue basically that the statute, 31175, and Subsection 3 of that, is only referring to the unit member's right to obtain copies of those records.

And to the extent that the unit owner is the only 11 one referenced in Section 1 as to who has the right to 12 those records, then it follows that the unit owner is 13 the one that would be entitled to the penalty payment. 14 THE COURT: Well, wait a minute. It talks about 15 it being a penalty, not a reward. And, you know, 16 there's a discussion about attorneys' fees and that 17 sort of thing. 18

But there's -- it's not quite really a whistleblower act, where a whistleblower, you know, there are some statutes where a whistleblower can receive some compensation or something like that.

But those statutes really specifically grant those funds to the whistleblower, to whomever. This statute does -- this statute talks about it being a

penalty. And generally in civil law in the United
 States, individuals don't collect penalties. Now they
 can collect judgments based on different theories. And
 they can even get punitive damages.

5 But this doesn't really talk about punitive 6 damages. It just really says a penalty. And so I'm not 7 certain where the statute thinks that this money is 8 supposed to go, if in fact there is a penalty 9 assessed. Would it go to the realty board? Would it go 10 to the county? It doesn't say that the plaintiff gets 11 this penalty.

12 And I think that that's a concern. It's certainly 13 a concern that I have, ma'am.

MS. WINTERS: I think under the circumstance, you would have to read the entire statute as a whole, rather than simply looking to subparagraph 3. Subparagraph 3 sets forth penalty. But subparagraph 1 refers to the unit owner's request, not the unit owners as a whole, not some other portion of the homeowner's association.

But the unit member that is requesting this set of documents is the only one that is referred to in this entire statute as being able to request that -that penalty be imposed. So by extension, and looking at the whole of the statute, the unit owner would be

1 entitled to that.

THE COURT: Okay, thank you. Now I drifted you off of the argument that you were making. A couple times you've told me that you thought that was about it. But I'm not cutting you off. If there's something else that you want to tell me, Ms. Winters, please go ahead.

8 MS. WINTERS: Thank you. I really think that this 9 is set forth at length in the written pleadings. I 10 simply am here to answer any questions the court may 11 have regarding that. And I have nothing further to 12 add, unless Your Honor has any further questions.

13 THE COURT: Well, I'll work on that. Let me refer 14 to Mr. Jones now and see what he would like to tell 15 me. Mr. Jones? I want to let you know --

16 MR. JONES: Good morning --

17 THE COURT: Good morning, sir. That I only 18 received this morning, via mail, your reply in support 19 of your motion for summary judgment. So, I need to 20 tell both of you that I have not read that. And there 21 is a disc attached with some exhibits. And so that 22 just came in today's mail.

And so everybody should note I haven't read that. And if you've got -- if you've got some exhibits attached thereto, I don't know that if you shared

those with Ms. Winters. I have what has been marked as 1 Exhibit 1. 2 And I don't know who was offering it. There is, a 3 transcript of an executive board meeting of December 4 15 of the year 2018. Who was offering that? 5 MS. WINTERS: I believe that might have been 6 included in my -- I don't know why it would be 7 separated from anything that I provided to the court 8 though. 9 10 THE COURT: Well, --MS. WINTERS: So I'm not sure that --11 THE COURT: It would be -- the reason it would be 12 separated is because if you just attach something as 13 an exhibit to a motion, it doesn't necessarily make it 14 an exhibit in the hearing. 15 And so when it came in, it was separate. And we 16 marked it as an exhibit to this hearing. And it does 17 seem to be a transcript to that meeting of the 18 homeowner's association. 19 20 Is there an objection to the court admitting Exhibit 1? 21 No objection, Your Honor. 22 MR. JONES: THE COURT: And Ms. --23 MS. WINTERS: No, Your Honor. I --2.4 25 THE COURT: Okay. Then Exhibit 1 is admitted.

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Exhibit 1 is admitted to this hearing. Now there are exhibits -- Mr. Jones, they are attached to your reply in support of your motion for summary judgment, there is a disc. I have no idea what's on it, sir. And handwritten on it, it says defendant's reply in support of defendant's motion for summary judgment, exhibits.

8 And so, I don't know if Ms. Winters has had 9 opportunity to look at that yet, and if she's received 10 that document. Did you get that document, ma'am? 11 MS. WINTERS: Yes, Your Honor.

12 THE COURT: And have you had an opportunity to 13 look at those exhibits? I - again, I don't know what 14 they are.

MS. WINTERS: It appears to me they were simply pleadings that had been previously filed in this case, including my motion, which I'm not sure why that was attached. But yes --

19 THE COURT: I -- I don't --

20 MS. WINTERS: I have reviewed them.

THE COURT: I don't know. I -- you know, when I read the document, which I will, perhaps over the lunch hour, I'll look at what those exhibits are. Are these just intended to be exhibits in support of the argument that were previous pleadings as Ms. Winters

said? And they're not exhibits that you want to
 introduce in evidence today?

MR. JONES: Largely correct, Your Honor. I guess the benefit of having competing motions for summary judgment is that by the time both sides got to the reply brief stage, I think the arguments have already been set out pretty well. And there's really nothing largely new there, Your Honor.

9 I've been going through the reply exhibits
10 myself. And it's -- again, yes, it's largely the
11 briefs that have been submitted by the parties, as
12 well as again the architectural guidelines, and some 13 THE COURT: Do you have any objection to those,
14 Ms. Winters?

15 MS. WINTERS: No.

16 THE COURT: Okay. Thank you. The court will 17 consider them then just to make the record clear. So, 18 Mr. Jones, I stopped you before I let you get started 19 arguing, just to make it clear that I hadn't read your 20 last pleading. Because it came into the court room as 21 Ms. Winters was arguing.

And so, as I indicated, I will read it over the lunch hour, but what would you like to tell me, sir? MR. JONES: I appreciate that, Your Honor. Again, Prescott Jones on behalf of the defendant. I will note for the court's indulgence that the parties exchanged
 the reply briefs by email last week, Tuesday, given
 the short notice or the short number of business days
 between the reply deadline and today's hearing.

I have to assume it was my staff's error in not emailing the Court. That was our intention to do so. But regardless, the arguments are largely contained in the other briefs.

9 The only point I might want to make out of what 10 was contained in the reply brief is actually on the 11 last page of the reply brief.

12 It's the certificate of the reporter for the 13 deposition of the plaintiff, Jerome Moretto. The 14 reporter notes that the transcript review, pursuant to 15 NRCP 30E, was not requested by either counsel of the 16 party prior to the end of the deposition.

17 So that went to, I think what is really, the only 18 new argument contained in the brief. And that's that 19 any reference to the errata of Mr. Moretto's 20 deposition should be stricken.

The document itself should be stricken as the Rule 30E, review as not requested prior to the end of the deposition.

But I didn't hear counsel rely on any portions of the errata to the deposition. So it's largely just an

1 objection to that being included in the record.

THE COURT: Well, I'll look at that argument. Again, I haven't had a chance to read that. But go ahead.

5 MR. JONES: Certainly. And that's a small point I 6 think in the grand scheme of things, Your Honor. I 7 want to start with perhaps where counsel left off. And 8 that's regarding Mr. Moretto's fourth cause of action. 9 And that has been argued almost as a [inaudible] 10 motion today by counsel.

But we have to look at the claim that's being presented by Mr. Moretto in his complaint. And that claim is a simple one. It's a violation of NRS 14 116.31175. It's not a general objection to documents not being provided. It's a very specific statute that contains very specific provisions.

I appreciate Your Honor's discussion and
questioning of counsel as to who would be paid the \$25
daily penalty under Subsection 3.

I tend to agree with Your Honor in that there's no real discussion as to who that would be paid to, whether it's to a private party or probably more likely would be to the ombudsman or the NRED.

But, I argue not surprisingly that there should be no penalty imposed. Because Subsection 3 reads --

1 I'll read it just briefly into the record.

If the executive board fails to provide a copy of any of the records pursuant to Subsection 2 within 21 days, the executive board must pay a penalty of \$25 for each day the executive board fails to provide the records.

That reference to Subsection 2 is notable. 7 Because Subsection 2 starts off by saying, the 8 executive board shall provide a copy of any of the 9 10 records described in paragraphs A, B, and C of Subsection [inaudible] ombudsman. That refers back to 11 only Subsection A, B, and C, of Subsection 1, which is 12 a very discrete, very particular category of 13 documents. 14

What does Subsection A, Subsection B, and Subsection C say? The financial statement of the association, the budgets of the association required to be prepared pursuant to NRS 116.31151, and C, a study of the reserves of the association required to be conducted pursuant to sub- -- to NRS 116.31152. That's it.

That's the only categories of documents that provide the penalty specified in Subsection 3. There's no argument made by counsel that any of the document requests made by the Morettos encompass these three

1 subsections.

2 On those grounds alone, their claim for a 3 violation of 31175, it fails as a matter of law. 4 Certainly there's -- there's no evidence, there's no 5 request for documents within those categories.

Now to the extent that they're making some other 6 type of cause of action for failure to produce 7 documents during discovery, well, you heard counsel 8 herself say that the original bylaws, the original, 9 10 the current architectural guidelines were provided either at the time of the filing of the answer, during 11 initial disclosures, during discovery. That claim is 12 moot at this point, Your Honor. 13

I don't see any evidence. I don't see any specific references to any documents, what those documents might be that fall under this subsection that not have been produced by the association. And even regardless of that, Your Honor, if we look at the title of the statute itself for 31175, it says enforcement by ombudsman.

I don't even think this dispute, Your Honor, to the extent that it involves documents outside of Subsection 3, I don't -- I'm not even sure that's properly before this court.

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But regardless, if you look at Subsection 6 of
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the statute, it says if the executive board refuses to allow a unit owner -- units owner to review the books, records, or other papers of the association, the ombudsman may on behalf of the unit owners and upon request review the books.

6 Or if the ombudsman is denied access to the 7 books, then they can issue a subpoena for their 8 production. I don't -- I don't see anything on the 9 record, Your Honor, that indicates that the plaintiff 10 requested through the NRED or whatever means, they 11 deemed proper, to request that the ombudsman issue a 12 subpoena to the HOA.

All they did, Your Honor, and they didn't even, as far as I know, they didn't request to actually review the books.

16 They requested that my client, the HOA board, 17 provide them with documents; which in multiple 18 occasions and multiple times in the record, they have 19 provided them with documents.

The plaintiff [inaudible] simply well it's not enough. There's these emails that are out there that may or may not contain information related to discussions among the board members about the guidelines.

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Your Honor, I don't see that type of document

request being any part of 116.31175. I think it should
be undisputed because they don't fall into Subsection
1, A, B, or C's specifications of categories of
documents that carry with it this \$25 statutory
penalty.

Given what the plaintiff has pled as a cause of
action, I think there's no doubt that [inaudible] -THE COURT: Mr. Jones, we lost you for a minute.
Mr. Jones?

MR. JONES: Yes. I just lost the video of Your
Honor.

12 THE COURT: Well, and you froze up for a minute. 13 So, we'll let you get reconnected. And your -- we --14 you got cut off at the point where you said, you 15 didn't think that there was any doubt that something. 16 So I have no idea what you don't think there's any 17 doubt of. Well, I have an idea, but I'll let you pick 18 back up.

Can Your Honor hear me okay? 19 MR. JONES: 20 THE COURT: Yes. Can you see and hear me, sir? MR. JONES: I cannot see you, I can hear you, 21 22 oddly enough. But I'm happy to at least finish my thought for now as to what I believe there is no doubt 23 that there should be summary judgment entered in favor 2.4 25 of my client.

1 The particular cause of action that the plaintiff 2 chose to bring against my client is for violation of 3 NRS 116.31175.

There's no evidence whatsoever presented to the court, either in the plaintiff's motion or their opposition to my client's motion for summary judgment, that would defeat summary judgment.

8 Because there's no specific document that they 9 can show a specific document request they can show 10 that is in violation of NRS 116.31175.

They haven't requested that the ombudsman issue a subpoena. They haven't requested to view the books in my client's -- the association. They've simply requested documents be provided to them and are claiming that not enough documents were provided to them.

And that is not a violation of 116.31175. So unless Your Honor has any questions on this section, I'm happy to move on.

20 THE COURT: Let's move on. Are you connected 21 with us, sir?

22 MR. JONES: I can hear you fine. I just still 23 can't see you. Can you hear me and see me, Your Honor? 24 THE COURT: Yes, sir. I can hear and see you. 25 MR. JONES: There we go. Now I can see you again.

Very good. Well, Your Honor, let's turn to the main, I
 guess the main point of contention among the plaintiff
 and my client. And that goes to their -- I'd say their
 other four causes of action.

And I had originally anticipated doing a cause of 5 action by cause of action analysis. But really what 6 this comes down to are the questions that plaintiff's 7 counsel raised. And it's whether or not the HOA has 8 the authority to create the guidelines and create the 9 10 committee, and whether or not those guidelines comply with the laws of the state of Nevada and the bylaws of 11 the association. 12

And, Your Honor, I think [inaudible] caught on to the -- the point of contention between our respective sides.

And that is, do the bylaws have to explicitly authorize a particular power of the board in order for them to create the guidelines, create the committee? Or is it simply a process of elimination that set the guidelines or the bylaws say you can't do this.

21 And, Your Honor, I think we win on both grounds. 22 The bylaws are very broad in their grant of power to 23 the association.

Your Honor pointed out, Article 3, Section 2,
which says the executive board shall have the power to

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make rules and regulations not inconsistent with the
 laws of the state of Nevada, the articles of
 incorporation, and the bylaws of the corporation.

Not inconsistent with the bylaws. I want to start with that. And it's the first thing I said to Your Honor this morning. The bylaws in Article 16, Section 3, not only permit the the association to review and approve guidelines. But it requires them to review and approve -- I'm sorry, not guidelines, plans and specifications for construction.

And it's not just out -- the building envelope. It's not just common elements. It's very clear. Article 16, Section 3, no structure of any kind shall be erected or permitted upon the premises of any unit owner.

The premises of any unit owner, not property of the corporation, not common elements, not simply the building element outwards. The premises of any unit owner unless the plans and specifications shall have first been submitted to and approved by the board.

21 That's the grant of power right there, Your 22 Honor, is that the power to review and the power to 23 approve has been granted to the board. And it 24 necessarily --

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25 THE COURT: But well -- well wait a minute, Mr.
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Jones. The argument is, yeah, there is that power. But it's limited as to whether that review concludes that this is a single family permanent residence. And how is it broader than that?

5 MR. JONES: Well, that's a separate section, Your 6 Honor. Counsel refers to Article 16, Section 3, which 7 specifies -- give me one second here, I'll pull it up. 8 But that's separate and apart, I think, Your Honor. 9 Because -- one second, Your Honor. Apologize here.

10 THE COURT: Take your time, sir.

Sure. Because Article 2 does refer to 11 MR. JONES: only single family homes are allowed at the 12 association. But Section 3, which is the section I 13 just quoted, makes it very clear that plans and 14 specifications are what are submitted to and approved 15 by the board. Not just a designation of -- really what 16 it comes down to, is a zoning ordinance saying single 17 family residential homes only. 18

This goes well beyond that, Your Honor. And plans and specifications have a definition that refine and build upon the single family home requirement that's in the prior section.

Plans and specifications, Your Honor, is - certainly you've tried a number of construction defect
 cases before. Plans and specifications go to every

1 aspect of the construction of the home.

And it's not -- and it's not just in the prior part. It's not just again, it's the type of structure that's being completed. It's no structure of any kind shall be erected or permitted without the plans and specs being reviewed, Your Honor.

7 That -- I mean -- that broadens the scope of the 8 grant of authority to the HOA beyond simply the prior 9 section saying it's just single family residential.

10 THE COURT: Well, wait a minute, Mr. Jones. Your -- if I follow your argument, and help me out here, 11 but if I follow your argument, it could be so broad as 12 to be completely unlimited, plans and specifications. 13 I mean you -- if we just don't limit that somehow, 14 then it goes to whether you have to put gold shiny 15 numbers on your house for an address, or whether you 16 have to use, you know, matted black ones, or whatever. 17

And you're taking that phrase to have no boundaries whatsoever. And I'm not too sure that that would be appropriate for the Court to find.

I think don't you have to read these two sections together, Section 2 and Section 3? Because Section 2 has the limitation that the bylaws are imposing, a single family unit.

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And then it gives -- Section 3 gives the

executive board the authority to review the plans and 1 specifications to make certain that they are in 2 conformance with Section 2. How -- what's the purpose 3 of a definition in Section 2, if Section 3 is going to 4 be so all-encompassing, it could just mean anything? 5 MR. JONES: Well, Your Honor, I don't necessarily 6 read Section 3 that way to only apply to what is said 7 in Section 2. I see these particular sections to be, 8 sequential, a list if you will. 9 10 And it's not necessarily -- there's no explicit limitation in Section 3 that the review of the plans 11 and specs is only for compliance with Section 2. 12 There's -- there's simply no such language, Your 13 Honor, so --14 THE COURT: Well, then -- then how is a homeowner 15 on notice of what can and cannot be built under the 16 bylaws? 17 MS. WINTERS: [inaudible] 18 MR. JONES: So can -- can you hear [inaudible] 19 20 MS. WINTERS: I hear you, sir. She just said, I lost you both, Your 21 MR. JONES: Honor. If you don't mind, I wouldn't mind waiting --22 MS. WINTERS: I can't hear. 23 THE COURT: Ms. Winters, I'm sorry. We can hear 2.4 25 you. We'll pause for a minute and -- we see you and we
hear you. We'll give you -- Mr. Jones, I'm sorry, but 1 let's just allow her a minute to reconnect to, um --2 3 MR. JONES: Sure. Absolutely. MS. WINTERS: [inaudible] 4 MR. JONES: We can hear you. 5 THE COURT: Yeah. I'm not sure that she can see 6 us or hear us. 7 MR. JONES: I don't think so either. 8 THE COURT: It gives you almost this voyeur sort 9 10 sort of a feeling to -- you can peer in at her and she can't see you. Ms. Winters, hello? 11 MS. WINTERS: [inaudible] no, I can't hear 12 anything. 13 THE COURT: So --14 MS. WINTERS: There, now I hear you. 15 THE COURT: There you are, ma'am. Okay. So, I'm 16 going to just ask Mr. Jones to back up for a minute, 17 make sure that you get to hear his argument. Mr. 18 Jones, thank you for that courtesy. 19 20 And, if you would -- you know, what you were explaining to me that you believe that Section 3 is 21 22 broader, and more encompassing, and goes beyond Section 2 of Article 16. 23 And, Ms. Winters, are you with us there? 2.4 25 MS. WINTERS: Yes, Your Honor.

1 THE COURT: Thank you very much. Mr. Jones, thank 2 you, sir.

MR. JONES: Great. So the question -- correct, Your Honor. We do believe not only is it a broader grant of power than Section 2, but there's no language, there's not for example a common -- a comma, if, or a comma, and, or a comma, or, contained at the end of Section 2. There's a period.

9 These are two separate provisions that, well, 10 encompass under Article 16, property right of unit 11 owners are otherwise separate.

And there's no -- there's no limiting language in Section 2 that would say the review of the plans and specifications are related only to whether or not it's a single family residential purpose.

There's -- there's just simply no language. And what is the limitation, Your Honor? You're correct. It's not -- it's not an unlimited grant of power. It's limited by the bylaws, the articles of incorporation, and Nevada law.

And Nevada law has the section which counsel has referred to a number of times, NRS 116.31065 rules, there's six sections in there that govern what can be contained in the rules and what can't be.

25 But even more than that, Your Honor, these rules

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were voted on and approved by the members of the
 homeowner's association.

So in terms of what's the check on the HOA board 3 from implementing, like you said, only shiny gold 4 numbers on the houses can be -- well it was voted on 5 by the association, Your Honor. 6 And not only was it voted on by the association, 7 it was proposed by the executive board. The executive 8 board was up for election this past July and they were 9 10 all reelected, Your Honor. So the check, is in a sense, a political --11 THE COURT: Well, wait a minute. Wait, Ms. 12 Winters, did we lose you again? 13 MS. WINTERS: I don't think so. I was objecting 14 to his reference to the -- the recent election as not 15 part of the record. 16 THE COURT: Okay. Well, that's -- I'm not 17 regarding it as evidence. It's just argument. But 18 here's the thing. Mr. Jones, if as Ms. Winters has 19 20 argued, this is a restriction on a property right, and that that right existed prior to the adoption of this 21 22 regulation. She's argued that -- because there are not CC&Rs 23

here that were in place when this property was
purchased. That a -- that a majority of surrounding

homeowners can't simply vote to limit someone's
 property rights that were in existing when they
 acquired fee title.

And so the notion that they voted on this, well it, you know, the executive committee voted on it. And even if the executive committee were reelected, can your neighbors, without CC&Rs, simply vote to take away some property right that you have.

MR. JONES: Well, Your Honor, this is a -- this 9 10 is a common interest community under 116. That -that's certainly undisputed. I agree there's no CC&Rs. 11 But, I want to I guess go back to a little bit about 12 why these quidelines were created in the first place. 13 The Morettos, and in fact my client, Mr. 14 Jennings, who's [inaudible] as well, they have more 15 traditional older homes at the Elk Point community. 16

Smaller footprints on the lot size. You know, Mr.
Moretto's property is 80 years old. Mr. Jennings'
property is about the same.

The issue came up and why these guidelines happened in the first place is because, and I think I've told Your Honor this before, I walked the property before. And there's one home that was built that is a glaring -- it stands out in a very bad way. And it stands out because it's a three story,

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I'll call it a monstrosity, that goes all the way to
the edges of the property line, goes up straight three
stories, no setbacks from the property line, no
setbacks as you move up on all the floors.

Just absolute -- talking about the character in the community, just it stands in stark contrast to the character of the community and what the bylaws stand for.

9 If Mr. Moretto were to build this type of 10 property on what is a prime lakefront piece of 11 property, the view of his neighbors across the street, 12 the view of the rest of the homeowners who walk on the 13 private streets, walk down the walkways, would be 14 decimated.

And that's exactly why the bylaws have provided for the past 75 years, 80 years, have provided for the ability of the HOA to review and approve any construction at the property with -- within the HOA.

19 It's because -- it's because it's a common 20 interest community. It's because property owners have 21 interests that go simply beyond their property lines. 22 It's because it's a social club. It's because it was 23 designed like this that the property owner --

THE COURT: Mr. Jones, let's say that you're right, that there's a property which is a monstrosity.

1 Okay? The homeowner's association seemed to allow that 2 to happen.

And so is there -- I mean assuming that your argument is correct, and I don't know that anyone's home is a monstrosity, but let's just assume that it is, and that it changes the nature or the character of the community.

8 Well, then the nature of the character of the 9 community has already been changed and the homeowner's 10 association didn't do anything about that. So if they 11 pick and choose whose home they're going to do 12 something about, isn't that rather arbitrary and 13 capricious?

MR. JONES: Well, I think, Your Honor, that points to the exact need for architectural review guidelines. I'm not sure exactly when this home was built, but I believe it was before the current board members were on the board.

And they were elected in small part, if not big part, because of the existence of this monstrosity. You need to have guidelines that were voted on --

THE COURT: Well, that -- that's not part of the record. And so maybe that's the case and maybe that's not. But the fact is, there were bylaws when that home was built, right?

1 MR. JONES: Correct. And it --

2 THE COURT: Which would require approval, right?

3 MR. JONES: Correct.

4 THE COURT: And that --

5 MR. JONES: But isn't that exactly the issue, 6 Your Honor? I apologize --

7 THE COURT: Well, that was -- well but that was 8 approved apparently.

9 MR. JONES: Well, correct. Isn't that the issue 10 then, Your Honor, and really shows the need for 11 specific guidelines that have specific provisions in 12 them for the board to determine whether or not 13 construction would be approved or rejected?

Because that's exactly the issue, Your Honor, is there was this grant of power without any guidelines, the board would decide one day, well you know what, we're going to approve this monstrosity for whatever reason.

And that -- that compared to the current state of affairs where we have specific guidelines that have been approved by the homeowners of the board that set forth what is and what isn't allowed at the HOA. I mean I think if anything, Your Honor, that shows the need for the guidelines.

25

You know, the guidelines are certainly well

within any provision of NRS 116 or as I said before,
 allowed by the bylaws given the authority to review
 and approve construction plans.

4 So it necessarily follows that in order to avoid 5 any arbitrariness and capriciousness, that there has 6 to be some sort of written guidelines that give 7 predictability to homeowners if assurances --

8 THE COURT: Well, these guidelines are 9 limitations on a homeowner's ability to use their 10 property as they see fit, right?

11 MR. JONES: Mm-hmm.

16

12 THE COURT: Yes. And so, the HOA could certain 13 propose and create a system of codes, covenants and 14 restrictions, right, and have them approved by all of 15 the members of the association, right?

MR. JONES: I assume they could.

17 THE COURT: All right. But what if somebody 18 didn't approve, and did not vote for that, did not 19 agree?

20 Could the -- could his neighbors, his or her 21 neighbors, simply define for them without the 22 preexisting existence of CC&Rs, can the neighbors just 23 vote on what you can do with your property? 24 Because that's what happened here. When the

25 property was purchased by Mr. Moretto, and there still

1 is not -- there's no CC&Rs.

2 So what you're telling me is that these bylaws 3 act almost like CC&Rs, and grant to an executive board 4 the ability to create by majority vote a system of 5 CC&Rs. Which is a limitation on the ability of a 6 homeowner to use his or her property as they wish to 7 do.

8 Now if you buy into a homeowner's association 9 that already has a set of CC&Rs, then you buy in 10 knowing that. And you -- and clearly you're limited 11 under those rules. But if you own the property 12 already, you're telling me that a majority of your 13 neighbors can then vote on what you can do with your 14 property and that that's legal.

MR. JONES: But Your Honor, that's the nature of 15 HOAs in Nevada. It was one thing that, you know, 16 surprised me moving from western New York out to 17 Nevada, an area that doesn't have a lot of HOAs, 18 doesn't really have much in the way of common interest 19 communities, is that a lot of newer developments --20 granted this one is an older development -- but a lot 21 of newer developments have HOAs. Almost the majority 22 of them [inaudible] --23

THE COURT: And they have CC&Rs that go with them.

MR. JONES: Well, correct. Some of them have 1 CC&Rs. Some of them, like the Elk Point Country Club 2 do not. But Mr. Moretto can't claim that he was 3 surprised by the existence of any restrictions to his 4 ability to use his property as he see fit. His title 5 to the -- he took title to the property subject to all 6 times the bylaws and the rules and regulations of the 7 8 HOA.

And at the time then as now, rules and
regulations are allowed to be approved with 50 percent
approval, 51 percent approval, of the homeowners.

12 If Mr. Moretto wanted a piece of property on the 13 lakefront that doesn't -- that's not subject to rules 14 and regulations, then buy a piece of property that's 15 not subject to rules and regulations.

But when he took title, he accepted the fact that there may be rules and regulations that can be changed at any time during the course of his ownership of the property.

20 So he presumably, and there's no evidence that 21 this wasn't the case, but he presumably was provided 22 with the bylaws at the time that he purchased or took 23 title to the property, presumably saw that the HOA has 24 the ability to regulate and approve any new 25 construction -- erection of any property -- or of any

building on his piece of property, and would therefore then be on notice that there could be rules and regulations that are changed at some point in the future for 50 percent approval, or by 50 percent approval of the community, that could affect his property rights to his piece of property that he now owns.

So, to say that any regulation is a taking that 8 has to be justified, just there -- there's no 9 10 precedent for that in the state of Nevada, Your Honor. It's in direct conflict with the bylaws and with the 11 deed by which Mr. Moretto took title to the property. 12 So I agree, there has to be -- it's not just an 13 unlimited grant of authority. There's no doubt about 14 that, Your Honor. 15

But to say that there can be no regulation to Mr. Moretto's ability to do whatever he wants with the property as he sees fit, is just simply not supported by the way Mr. Moretto took title, and the bylaws, and the common interest community in which he purchased the property.

22 THE COURT: Okay. Thank you.

23 MR. JONES: Sure. And Your Honor, just a few 24 more points here. Because again, I agree with counsel, 25 I think we briefed a lot of the issues pretty well

here. But, when we started talking about the second
 cause of action, which is essentially goes to the
 vagueness and the ambiguous nature of the rules.

It's ironic to me in that if the plaintiff were to get their way and that there would be no guidelines, this would be just, I don't want to say catastrophic, but it would be -- there's no -- there's now simply no guidelines.

9 And we're back to a community where the executive 10 board can do whatever they want in terms of approving, 11 or rejecting any plans and specifications for any new 12 construction at the property.

But regardless of that, Your Honor, the discovery that's been conducted so far, because let's not forget, today was supposed to be the first day of trial, discovery has been close for quite a while now. There is no evidence of any inconsistent application of the guidelines, any ambiguity that has arose in implementation or enforcing the guidelines.

20 And in fact plaintiff himself during his own 21 deposition couldn't identify a single provision of the 22 guidelines that he believed was vague or ambiguous. 23 [inaudible] objected on the grounds that it's a legal 24 objection.

25

But it's plaintiff who's here today virtually,

must be stricken because they're vague and ambiguous. Well, Your Honor, we're not in preliminary injunction anymore. We are at essentially a trial of these issues that have no factual dispute. Where's the vagueness? Where's the ambiguity? Where's the unequal enforcement? There's simply none, Your Honor.

bringing his claim, and saying that these guidelines

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8 So this stage of the case, which should have been 9 the first day of trial, but essentially we're on the 10 eve of trial, you have to have something more than 11 just general allegations that, well this is vague, 12 this is ambiguous.

And to the extent that there are arguments to be made, legal arguments to be made regarding vagueness and ambiguity, almost every single one of the arguments made in either plaintiff's motion for summary judgment or opposition to my motion for summary judgment are based upon an old version of the guidelines that simply doesn't exist anymore.

For example, one of the arguments they make in their motion is that the term major project is not defined. Therefore, 116.31065 is violated.

23 Well, problem is they relied on a 2018 version of 24 the guidelines. The 2019 version of the guidelines 25 sets forth what a major project is, new construction,

1 exterior remodels, building additions.

This happens time and time again in their motion. And our opposition simply refers to the current set of the guidelines and shows that in fact, well, maybe plaintiff's argument isn't exactly what it seems on its face.

7 So Your Honor, I think, you know, turning now to 8 the violation of the property rights argument, I think 9 that's set forth pretty well in the briefs. We don't 10 believe it's a viable cause of action. But to the 11 extent it is a cause of action, it's really subsumed 12 by the major issues that we have discussed before.

One other point that I want to touch on as well 13 is an argument that -- it's sort of a smaller 14 argument, in terms of how much space it took up in our 15 briefs, but I think has a good significance for, you 16 know, to the extent we're going to move forward in 17 this case. And that's our argument that plaintiff 18 violated NRS 16.1 Subsection Ala4. And that relates to 19 20 a computation of damages, Your Honor.

Plaintiff, at no point in this litigation, provided any computation of damages in any of their 16.1 disclosures. There's references to monetary damages being made by, for example, their claim of a \$25 per day, statute for a penalty, which has been

discussed at length. But no attempt to compute that in
 their 16.1 presale disclosures to my client.

There is expert testimony by two of plaintiff's experts attempting to value a diminution of value to the plaintiff's property in the event that these guidelines are enforceable. Came up with a nice number too. That's not included in the computation of damages.

9 And again, Your Honor, we're at the time of 10 trial. Today was the first day of trial. Discovery's 11 been closed. Pretrial disclosures have been made. 12 We're essentially on the -- we're on the verge of 13 compiling exhibits prior to the trial being vacated of 14 course due to the COVID pandemic.

But regardless, the time for plaintiff to provide 15 their computation of damages has long since passed. So 16 to the extent that there's requests for relief that 17 are monetary and go beyond the injunctive relief that 18 we've discussed for so much of this morning so far, my 19 20 client is absolutely entitled to summary judgment based on the fact that no computation of damages was 21 22 provided.

23 So beyond liability as it relates to damages, 24 there's no triable issue of fact as it relates to this 25 because there was never any damages ever attempted to

1 be computed by the plaintiff.

THE COURT: Well, let me ask you about that. I want to not specifically talk to you about the \$25, a day. Because I'm frankly -- I'm not certain that those are damages. It's referred to in the statute as a penalty.

And I don't -- and again, I don't know that they
-- that that's a penalty that's due to the plaintiff.
And I don't see authority that says that it would be.
But as to the computation of damages, generally
the idea is to make certain that -- that you are on
notice of what the plaintiff is claiming in the form
of damages.

And what that figure would be so that you're able to defend that allegation. And you have acknowledged that the plaintiff's expert has given you what you just referred to as a very nice number.

You have that information. Now it may be that you 18 didn't receive it in another form. But you certainly 19 20 did receive that number in the process of the discovery here. And tell me why there -- there's any 21 22 equity in not allowing the -- and disregard other reasons, okay. Just going strictly to this issue. 23 Why is there any equity in not allowing the 2.4 25 plaintiff to pursue those damages which you're on

1 notice

notice of, uh, throw their [inaudible]

2 MR. JONES: [inaudible] that -- that's a fair 3 question, Your Honor. And I, of course, want to 4 preserve my right to object to introduction of that 5 evidence through other means, including motions 6 [inaudible] which was acknowledged by Your Honor. The 7 issue is that --

8 THE COURT: I'm not asking you -- I'm not asking 9 you to waive any of that argument, sir. I'm just 10 addressing the argument you've already made.

I think the issue is that given the 11 MR. JONES: fact that this case was set on a preferential trial 12 setting, despite the fact that it's been around since 13 2019, we got an expert report from the plaintiffs, I 14 don't want to say out of the blue, but it was 15 certainly shocking to see that they were -- and I 16 think I can say that the expert is thinking, \$1 17 million claim for diminution of value. 18

We only discovered that at the time of the expert disclosures of that, Your Honor. That was not -- and I have to imagine this wasn't something that plaintiff only thought about quantifying exactly on the day of expert disclosure. This is something that they were sitting on for some period of time.

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And I don't know how long that period of time is,
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Your Honor, but I've been on the other side of this
 issue before, and I've had experts stricken, and
 damage claims dismissed because of this.

And the equitable issues that this court has to consider are the element of surprise to my client. We had to scramble to retain two different experts to rebut this million dollar claim that came -- I will say it came out of the blue to us.

9 We were in front of Your Honor for a preliminary 10 injunction hearing back in March. There was no mention 11 of any damage -- any damage claim to diminution of 12 value.

There was discussion of, you know, setbacks impacting the property. But as far as a million-dollar claim, Your Honor, that came as a surprise to us.

And NRCP 16.1 is designed to reduce the element of surprise and not have that be a tactic in litigation. And especially considering the fact that these reports were disclosed just a few months ago, we have a preferential trial setting, we were supposed to be going to trial today.

That's the basis of my client's claim that the damages -- calculation needed to be included. Because if not, they should be precluded in from presenting that.

1 THE COURT: Okay. Thank you. Anything else? 2 MR. JONES: Unless Your Honor has any other 3 questions, you know, I think we're all set. I 4 certainly would like to reserve my right to offer a 5 call it a reply argument to the extent that counsel 6 makes any further argument. Other than that --7 THE COURT: Well, yeah. I'm -- because you both

had arguments, I'm going to allow Ms. Winters to reply and then I'm going to allow you to reply. And to be fair to both of you, I really feel like I ought to read the document that you've provided me that I got just today.

And sir, you may have emailed that to my judicial executive assistant. She has been ill and out of the office. And so if it came in, I did not see that. That would be my fault, and no one else's. But, I did get the hard copy today. And so I do want to read that also.

Ms. Winters, we're almost at noon. And I think it would be fair if we took a break and let me read this, give you an opportunity to have a break, and then have you both come back about 1:30 or so. And --

23 MS. WINTERS: Your Honor?

24 THE COURT: Yes, ma'am.

25 MS. WINTERS: Before we break --

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1 THE COURT: Yes, ma'am.

2 MS. WINTERS: I do have a question.

3 THE COURT: Yes, ma'am.

MS. WINTERS: I had a couple of requests for judicial notice that I would request the court grant at this point.

7 And to the extent that it's necessary, I would 8 move to allow the court to consider all the exhibits 9 that are attached to the declarations that were filed 10 in this matter on plaintiff's behalf.

11

THE COURT: Mr. Jones?

MR. JONES: Your Honor, I have no objection to admission of plaintiff's requests for judicial notice. My recollection was that they were simply out of state authority in cases and some treatises, I believe,

16 correct Ms. Winters?

17 MS. WINTERS: Yes.

18 THE COURT: Okay.

MR. JONES: But to the extent that the exhibits and the declaration are being requested to be admitted, I would renew my objection to the errata to Mr. Moretto's testimony based again on the fact that a 30E review was not requested by counsel or client before the end of the deposition, which is attested to by the court report on the last page of that 1 deposition.

2	THE COURT: And that's so that's an argument
3	that you've made in the document I said I was going to
4	go read. And so I'm going to read that first.
5	MR. JONES: That's correct.
6	THE COURT: So I'm going to look at that first.
7	But, as to the judicial notice, there's no objection
8	thereto, and I will consider those items, okay?
9	Let me because I I've got a little bit of
10	reading to do, we're going to be in recess until
11	we're scheduled to be here all day, so, it doesn't
12	prejudice you for me to recess us till 1:30. And
13	that's my intention.
14	We're going to recess till then. And I'll see you
15	all back at that hour. And I thank you. And I look
16	forward to seeing you then. Also, I'm just going to
17	put both of you on notice of this.
18	One of the concerns that we have is this trial
19	date. And I have some people who are in custody who
20	are demanding speedy trials.
21	And I don't know that I can do a jury a jury
22	trial right now. I'm very concerned about doing any
23	jury trials at this point.
24	
	And I want you to consider that your trial date

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replace it with a criminal jury trial. It may not 1 happen when it's schedule right now. But we can 2 3 discuss that. MS. WINTERS: [inaudible] date scheduled at this 4 5 point, Your Honor. THE COURT: I thought we had moved it. I -- I'm 6 sorry. 7 8 MS. WINTERS: No. THE COURT: Then never mind. 9 MR. JONES: [inaudible] 10 THE COURT: I thought you had been given a date. 11 Maybe I just discussed it with staff and you weren't 12 given one. So we'll look at that then, okay. Thank 13 14 you. Thank you. It could just be something I talked, 15 to my staff about the other day and had not shared 16 with you yet. So thank you. All right. I'll see you at 17 1:30. 18 19 MS. WINTERS: Thank you. 20 MR. JONES: Thank you. 21 [2020-11-30_13.32.16.818] 22 23 THE COURT: Good afternoon. I see Mr. Jones. Is 2.4 25 Ms. Winters available?

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[talking over each other]

2 MR. JONES: I did see her pop up before.

3 THE COURT: I see your name on there, ma'am. I 4 don't see you.

5 MS. WINTERS: And I don't know why that it is. It 6 says my webcam is on.

7 THE COURT: We're seeing HP MediaSmart webcam.
8 MR. JONES: Hmm. And it says, please [inaudible]
9 MediaSmart webcam, below that.

10 THE COURT: Maybe there's one more button to 11 push, ma'am.

MS. WINTERS: I'm looking for all the buttons here.

14 THE COURT: Well, as you do that, I'll just make 15 the record that we're back in session on 19CV0242 16 Moretto v. Elk Point Country Club. Mr. Jones is back, 17 via GoToMeeting.

And Ms. Winters is available on audio. I don't see her, but she's working on that. And we will give her such time as she needs. Ma'am, please don't feel pressured. Take a moment. We'll figure it out.

I think something happens. I get a border around your -- around your appearance, but I don't get your picture.

25

MR. JONES: And Ms. Winters, when you first

appeared, I saw the video for a split second before it 1 went back to the MediaSmart webcam --2 3 MS. WINTERS: I did too. I did too. And I don't know why -- I didn't touch anything when that 4 happened. 5 MR. JONES: Hmm. 6 THE COURT: There you are. 7 MR. JONES: There we go. 8 MS. WINTERS: 9 Okay. 10 THE COURT: Can you see -- can you see and hear 11 us, ma'am? MS. WINTERS: I didn't change -- yes, I can, Your 12 Honor. 13 THE COURT: Okay. Very well. All right. So we're 14 back in session. And Ms. Winters, it was your turn to 15 speak, ma'am. 16 MS. WINTERS: I just wanted to touch on a couple 17 things that were raised by Mr. Jones --18 19 THE COURT: Okay. 20 MS. WINTERS: -- in his argument. And initially, he mentioned that the expert's listing of damages were 21 a surprise to the defendants. And that's why they were 22 allegedly scrambling to get a response to that. 23 But in every cause of action or with maybe one or 2.4 25 two exceptions, but in -- out of the five causes of

action, at least three ask at the conclusion of those causes of action that the case recognizes a diminution of value, in regards to Mr. Moretto's property having a diminution of value in the event that the guidelines are allowed to stand.

And so it should not have been a surprise that that diminution of value would have been an issue in this case because it's actually in the complaint from the get go.

10 What that value was, was not determined unless an 11 expert could place that value on this particular piece 12 of property, which could not have been done without an 13 expert.

14 So in that regard, being able to establish a 15 dollar amount was only after an expert had an ability 16 to review the guidelines and to apply them to Mr. 17 Moretto's property.

As far as arguing that there was no evidence of 18 vagueness or any of the guidelines being arbitrary or 19 20 capricious, in any practical application --THE COURT: Wait, can I -- wait, wait, wait wait. 21 22 I want to take you back to that computation of damages. And tell me where that was provided. 23 MS. WINTERS: The computation was provided for 2.4 25 the first time that it was available. And that was in

the expert's disclosures. The fact that there would be
 a computation was stated throughout the complaint
 itself in the initial pleading file.

And in that pleading, each of the first three at least cause of action state that the impact of the guidelines on Mr. Moretto's property would be a diminution of value.

8 There was simply no way to provide that prior to 9 the expert establishing an amount. And under the 10 discovery rules, discovery was still open at the time 11 that the expert provided that value.

12 That was the first time we knew the exact value. 13 And we provided that immediately upon determining what 14 that amount was.

15 THE COURT: Thank you.

MS. WINTERS: So, aside from that though, this diminution of value has no bearing on this case in the event that the guidelines are enjoined from being enforced in, in this homeowner's association. Because if the guidelines are enjoined, then there will be no diminution of value.

There is no level of damages that can be asserted for a temporary restriction on property that haven't had an immediate effect on the property.

25 THE COURT: Thank you.

MS. WINTERS: So we're not asking for diminution of value just during the course of the litigation. If the court grants a permanent injunction, that diminution becomes a moot point. So in that regard, it's only if the guidelines are allowed to stand in any form will there be any diminution of value.

And to the extent they are allowed to stand, what
in the guidelines would be allowed to stand would
affect that value.

10 So if only one paragraph out of all the 11 guidelines is allowed to stand, then that paragraph 12 may or may not have a -- an impact on the value of Mr. 13 Moretto's property.

But if they stand at all in a form similar to or as written as of today, there is going to be a diminution.

And that will be a question of fact that is not 17 going to be subject to summary judgment. Because the 18 experts disagree as to what that value, how much that 19 20 value is diminished by the impact of these guidelines. So in that regard, I would argue that whatever 21 22 the damages are as far as these guidelines, it is irrelevant to our request now for a summary judgment 23 because it doesn't impact anything on the value if the 24 25 guidelines are permanently enjoined.

1 THE COURT: Well, when - when you put it that 2 way, let's say that there's a portion of the 3 guidelines that I find inappropriate or that should be 4 enjoined, but not other portions.

5 Do you believe that the court should then, even 6 though you may disagree, that you think all of them 7 should be enjoined, do you think the court should 8 grant summary judgment as to simply a portion, and an 9 injunction against enforcement of a portion of the 10 guidelines?

MS. WINTERS: Well, Your Honor, obviously our argument is focused on enjoining the entirety of the guidelines based on the laws that are argued in the case and the motion.

But to the extent that any guidelines are allowed to stand, they would have an impact on the value of the property.

And so to the extent that there's any portion of it, then there would be a trial on the fact of the amount of damages, which can't be determined until the court rules whether or not the guidelines are allowed to stand in any form.

23 THE COURT: Okay. Go ahead.

MS. WINTERS: Mr. Jones also brought up that there is no evidence of the vagueness, as I mentioned

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before, or any arbitrary or capricious application of
 the guidelines, and argued against, that based on Mr.
 Moretto's deposition.

I -- even without the errata, first of all, Mr. Moretto's statements in his deposition were subject to objections on my part based on the fact that they were calling for a legal conclusion by a layperson, first and foremost.

9 But also, the fact is that there is undisputed 10 fact that the committee meetings were not noticed. 11 That was a violation of the unit members' due process 12 rights and a violation of a section of NRS 116.

But it also prevented Mr. Moretto from learning of what the committee was doing or not doing with regard to any applications that were made for any major or minor project that was going to be requested by any unit members. So there was no way of him knowing whether or not the guidelines were being applied arbitrarily.

And on that basis, it's not only a violation of the due process rights of the unit members, but also potentially opens up the ability for the committee to make recommendations to the board based on fairly arbitrary reasoning.

25

Even in trying to apply the guidelines, they are

insufficiently written to have been applied
consistently amongst all of the unit members. And even
if as they stood, they could have been applied
consistently.

5 The guidelines allow for amendments to the 6 guidelines themselves. And those amendments could be 7 simply short-term amendments to allow one unit member 8 to do something that other unit members could not do, 9 and then revert the guidelines back to the way they 10 were prior to that unit member making an application 11 for a project.

So they are arbitrary, but there is no way that 12 any particular unit member could determine that the 13 guidelines were being applied consistently or not. 14 THE COURT: Well, wait a minute, wait a minute. 15 That's -- let's stop there for a minute. If --16 everything that is done under the guidelines or the 17 architecture committee, everything they did would have 18 to be approved by the executive board. And the 19 20 executive board's meetings are open. And they're noticed. 21

And so every unit member, every unit owner and member of the association would have the opportunity to appear, be noticed of that meeting, and know of any proposed amendments to the guidelines. So that's not

1 something that would be done in secret, ma'am.

2 MS. WINTERS: It's also not something that would 3 be done by the unit members as a whole. It's done by 4 the board.

5 And then the board becomes the sole decider of 6 who -- of what guidelines are going to be imposed, 7 which ones are not even going to come before the 8 board, because the committee doesn't think it warrants 9 board approval.

10 It allows the unit members to see ahead of time, 11 sufficiently to determine whether or not the 12 recommendations made by the committee are consistent 13 with the guidelines.

14 THE COURT: Why not?

15 MS. WINTERS: There's not --

16 THE COURT: What -- wait -- wait a minute. Just 17 stop at that statement right there. Why doesn't it 18 allow them sufficient time? They get notice of the 19 meeting. The agenda is posted. And they can appear. 20 And then if they do object to it, they could seek an 21 injunction then I suppose, right?

MS. WINTERS: That would require that the guidelines be enforced piecemeal rather than consistently throughout the unit -- unit members. It would presume that everything that the committee 1 reviewed was being included in what was noticed to all 2 of the unit members. It would --

3 THE COURT: But it isn't that the case, ma'am? I 4 mean everything that the committee does has to be 5 approved by the executive board. So you know, that 6 approval would happen at an open meeting, which would 7 be noticed, right?

8 MS. WINTERS: In -- not necessarily in practice, 9 Your Honor. There's nothing in the guidelines that 10 requires that the committee provide anything other 11 than a recommendation. It doesn't require that the 12 committee turn over any documentation that they 13 obtained from the unit members.

14 THE COURT: So --

MS. WINTERS: It doesn't require the committee to provide any reasoning behind their recommendation. It just simply says they recommend to the board.

18 THE COURT: Okay. But the committee doesn't 19 really take an action. They engage in a review and 20 they make a recommendation.

And so, the board then is the one that takes the real action. And that meeting -- that is noticed, agendized, and open to every member. And it would be piecemeal because every -- every recommendation has to be weighed on its own. 1 So, there would be an opportunity for the unit 2 owners to appear in front of the executive board and 3 oppose any particular recommendation. Or actually be 4 in favor, support any recommendation, right?

5 MS. WINTERS: Certainly. But without any of the 6 background of what the committee has done prior to 7 providing any recommendations to the board.

8 Prior to, you know, prior to that board meeting, 9 there's nothing that requires that the committee 10 convey to the board anything about its correspondence 11 between any unit member that's making an application 12 or any unit member that's a neighbor that has -- that 13 may have some thoughts on the application.

There's no back and forth until you get to the board. And by then, the committee has already done a substantial amount of work reviewing what the unit member has provided to the committee, which includes, potentially saying, well, we're not going to recommend approval unless you do XYZ to change the plan.

20 Well, there's no way of knowing that once it's 21 before the board. The board simply has a 22 recommendation to thumbs up or thumbs down a 23 particular project.

And so there's no requirement in there that all of that correspondence, all that back and forth, is

not simply the committee arbitrarily saying I think
 you need to make this change because aesthetically,
 you know, your house is a monstrosity.

It doesn't say any of that until -- and then when it gets to the board, it only requires that the committee say whether or not they recommend that the project go forward.

8 So I don't -- I don't think that it's equivalent, 9 to how this -- at the board, at the last minute, when 10 everything that preceded it is not allowed -- is not 11 being considered by any of the members at large, that 12 may have some interest in what that project is.

And why they have an interest in this project to begin with is the subject of why we argue that the HOA does not have the authority to impose these kind of guidelines on the unit members.

17 It restricts far more than what is allowed under 18 the bylaws, far more than is allowed under NRS 19 116.3106, far more than is allowed by Article 1 of the 20 Nevada constitution.

21 And there's nothing to prevent if the court is 22 allowing these guidelines to go forward, there's 23 nothing to prevent the board from going back to the 24 original version of these guidelines.

25 There's nothing that prevents them from imposing

further restrictions or further vague references to,
 applications. There's nothing that prevents the board
 from reverting back to those initial guidelines.

Mr. Jones also argued that the arguments in my motion for summary judgment were just based on the initial guidelines. And that's simply not the case. Throughout my undisputed facts, I point out what the initial guidelines were and how they violated NRS 116.31086, I believe, 31065 [inaudible].

But I also point out in my undisputed facts how those same sections of the guidelines that were opposed in the initial complaint remain in the latest version of the guidelines, that the requirement that the unit members comply with, the setback requirements if new construction is put on there, those remain.

The view easements remain in the final guidelines that are in place at this point. There are guidelines regarding landscaping and color of the house. Those remain.

There are still restrictions in the final guidelines that violate the property rights of the unit members, including Mr. Moretto. So it's not just the initial guidelines that are addressed here. But in fact as I have said already, there's nothing that prevents the board from going back to the

initial guidelines. Mr. Jones also mentioned that the
 guidelines were voted on and approved by the members.
 But the undisputed facts do not support that.

There was a so-called advisory -- advisory vote that was done by the members. It was not voted on by all the members. It was perhaps two thirds of the members that actually ended up voting. And there's no indicating in any of the undisputed facts that that yote actually --

10 THE COURT: Well, there you have the same problem 11 there that I think Mr. Jones has. I don't know that 12 that's actually in the record, the two thirds issue or 13 something like that.

I understand that there was a vote. But I don't know that that's in the record, is it, that vote number?

MS. WINTERS: I don't believe the actual vote number, but there was an undisputed fact that there are 99 units in the homeowner's association at this point. Undisputed fact number nine in my motion was that the development currently consists of approximately 99 parcels.

There is no fact disputed or undisputed in here regarding a vote. So without that particular fact in place one way or the other, I would say that the --
issue of whether or not the guidelines were voted on or approved by the members is not for the board. It's simply that they have been imposed upon 100 percent of the union me- -- unit members.

5 And those unit members did not 100 percent agree 6 to those guidelines because Mr. Moretto has in the 7 undisputed facts, it's clear Mr. Moretto objected to 8 all of these guidelines based on them overstepping the 9 boundaries of the authority of the board and the 10 homeowner's association.

I -- one last point that was brought up is, Mr. Jones referred to the house as a monstrosity. But the board approved it, you know, before the guidelines, obviously. But they did approve it.

15 So they complied with the bylaws when that 16 property was approved. And now, they're going -- there 17 would be no basis for them disapproving it, if it 18 complies with the bylaws.

19 If they want to limit what a unit owner can do 20 with a particular parcel in the homeowner's 21 association, then the only avenue is to have 100 22 percent vote of an amendment to the bylaws allowing 23 for what effectively is a declaration of covenants, 24 conditions, and restrictions.

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And without that, they are limited by law and by
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the governing documents to simply approve or disprove, the fact that there's going to be a single family home erected on a particular parcel.

The guidelines now would not allow Mr. Moretto to 4 tear down his house and build another house on the 5 footprint, with the same dimensions on the outside and 6 a totally different set of architectural quide --7 architectural appearances, you know, different 8 windows, different covering, different outside texture 9 10 of the building, total different inside appearance to the building. That would not be allowed under the 11 quidelines. 12

13 So there's a restriction on Mr. Moretto's 14 property rights that imposed by these guidelines, that 15 cannot stand under the current law. I don't have 16 anything more to add than what has been in the motion 17 and what has been argued.

18 THE COURT: All right.

19 MS. WINTERS: Uh --

20 THE COURT: Thank you, ma'am. I appreciate it. 21 So, Mr. Jones, I told you I'd give you one more chance 22 to --

23 MR. JONES: Thank you, Your Honor. I'll be brief. 24 Again, Prescott Jones on behalf of the defendant. A 25 couple points I want to make in response. 1 Regarding the vote, I agree, it's probably not in 2 evidence as to what the result of the vote was. I know 3 there was a vote alluded to during some of the 4 depositions.

5 But, in a way, Your Honor, for the purposes of 6 this motion, it doesn't matter because Article 3, 7 Section 2 of the bylaws state specifically that the 8 executive board shall have the power to make rules and 9 regulations not inconsistent with the laws of the 10 state of Nevada, articles of incorporation, and the 11 bylaws of the corporation.

12 So the rulemaking power isn't even contingent on 13 a vote of the HOA. The HOA board did so, just to make 14 sure that -- essentially it's the will of the 15 homeowners to move forward with these guidelines, 16 which ultimately it was.

But, I sort of want to step back just very briefly and remind the court that Mr. Moretto is complaining to this court about violations of his property rights. But he doesn't have unlimited property rights pursuant to the deed by which he took title.

That deed and the title that he took was subject to explicitly not only the bylaws, but the rules and regulations of the HOA, the bylaws which allow for the

executive board to develop rules and regulations.

1

The rules of course, as I think both sides agree, are governed by NRS 116.31065, which provide in part that the board is allowed to develop rules that are consistent with the governing documents of the association.

7 And that gets back to Article 16, Section 3, 8 which again gives the board the right to review and 9 approve building plans and specifications. So 10 certainly the rules are -- that are undeniably allowed 11 to be developed by the executive board, relate to its 12 purpose of reviewing and approving construction 13 documents.

So not only is there no Nevada law that prevents 14 15 these guidelines from being formed and promulgated by the executive board, there's no portion of the bylaws 16 that prevent it either. And I haven't heard anything 17 from counsel as to a specific portion of the bylaws or 18 a specific Nevada statute that prevents these 19 20 guidelines from being enacted and being enforced. So counsel's point a few minutes ago about the 21 22 vagueness, and the arbitrariness, and the capriciousness of the rules and the -- sorry, the 23 architectural review committees potential inconsistent 2.4 25 enforcement of those rules, there's no evidence before

1 this court, Your Honor.

The board -- the executive board makes all the decisions. They don't just give a thumbs up or a thumbs down, as indicated by counsel. There's no evidence of that. In fact, the board reviewed all portions of recommendation at its meetings and makes decisions based on that.

8 There's simply no delegation of power here, Your 9 Honor. So there's no -- there can be no complaint 10 that, first of all, that the committee's meetings have 11 to be noticed. There's no statute, there's no portion 12 of the bylaws that require that.

But common sense would dictate that if it's just 13 simply a recommendation being given to the board, and 14 the board in due course reviews that and makes 15 decisions based on the entirety of the recommendation. 16 It's the board itself that's exercising 17 authority. And it's doing so of course pursuant to the 18 various notice requirements of NRS 116. 19 THE COURT: Well, what about the arbitrary and 20 capriciousness of the definition of aesthetics? 21 MR. JONES: Well, that's the -- it's an 22

interesting point, Your Honor. Because the initial
arguments made in plaintiff's motion omitted revised
2019 guidelines which do go into the aesthetics of,

the -- I guess the criteria by which the board will evaluate aesthetics for the purposes of issuing a decision.

Your Honor, I'm trying to -- but yeah, the full
guidelines, the 2019 revised guidelines contain four
categories of why plans may be rejected.

Not just simply saying as they did in the older
 version, admittedly, just purely aesthetic reasons. So
 there's specific guidelines that are included, Your
 Honor --

THE COURT: Well, wait a minute, Mr. Jones. Wait 11 a minute. Even the new rules, it's in the disjunctive. 12 It's in Subsection 2i, D2i, ii. It gives 13 different numbers because of reasonable 14 dissatisfaction, grading plans, location of the 15 improvement, the finished elevation, the color scheme. 16 There are some very specifics mentioned there. 17 And then it has, semicolon, or, which is in the 18 disjunctive, for purely aesthetic reasons. 19 20 Now, so aesthetic reasons does not include the

finished ground elevation, the location, the exterior finish, the design, the proportions.

It's something else. Because you it is phrased in the disjunctive, meaning it's something else. Purely aesthetic reasons meaning we think it's a monstrosity

1 or we don't like it.

And how can that standard -- how can that even be 2 a standard? I understand how grading and elevation may 3 be a standard. Tell me how purely aesthetic reasons is 4 a standard. Because what you like, I may not like. 5 Sure. Admittedly, Your Honor, the MR. JONES: 6 simply aesthetic reasons in itself is inherently 7 subjective. But the additional categories, again 8 admittedly before the disjunctive and after the 9 10 disjunctive, are the attempts by the board to include some of the categories that would be discussed for 11 purely aesthetic reasons. 12 But the fact that these applications are 13 ultimately being decided by the board and open to 14 discussion of the whole membership, noticed to the 15 entire membership, and ruled on by the entire board, 16 is simply put, Your Honor, there are aesthetic --17 there are some aesthetic decisions that the board has 18 to make when evaluating an application for new 19 construction. 20 The board certainly gave it its best attempt to 21 22 to qualify and to identify those particular items that

it believes to be aesthetic. But, uh --

THE COURT: No, sir. No, sir. No, sir. That's just not true. Because if they were just aesthetic,

those -- and true, color may be aesthetic. But it's -it's listed as something other than aesthetic, under the way that this is phrased, under the way these bylaws are written.

5 And it may be that just that last phrase is not 6 legal. And the last phrase maybe has to be enjoined. I 7 don't know. But I don't see any way that you can argue 8 the the authority of the board to reject an 9 application based on, quote, purely aesthetic reasons, 10 is in any way legal.

11 MR. JONES: Well, Your Honor, that goes back to 12 the bylaws, main -- almost a preamble. And that's to 13 maintain the character of the -- of the community.

Could the word "purely aesthetic reasons" probably be amended to include more detail? Yeah. It probably could. Is it subjective? I agree, it is subjective.

But, Your Honor, that section represents the board's best attempt to list out some things that it believed would be aesthetic issues. But regardless, Your Honor, there's no evidence that this [inaudible]

THE COURT: No. That's not the English language, sir. That's not what it says. That's not how English works. Those do not list out purely aesthetic reasons

because of the semicolon and the word "or." That's not
 how English language works.

3 MR. JONES: Understood, Your Honor. And I'll concede that it's probably not the best written 4 sentence. But that doesn't invalidate the rest of the 5 design, rules and standards. 6 THE COURT: 7 It may not. Again, it was the board's --8 MR. JONES: THE COURT: But that part, I can't see how that 9 part is valid. 10 MR. JONES: Mm-hmm. Mm-hmm. Understand, Your 11 Honor. Its aesthetic reasons is, certainly it's hard 12 to make specific -- to identify specific aesthetic --13 aesthetic related guidelines that would preserve the 14 character of the community. You know, like I said 15 before --16 So if -- so if you can't -- so, sir, THE COURT: 17 if you can't define them, how do you regulate them? 18 MR. JONES: Well, by having board meetings, Your 19 20 Honor. By having the executive [inaudible] decide --

21 decide it with commentary from the homeowners, Your
22 Honor.

And that's why -- that's part of the reason why the committee has no authority to issue decisions on this. They simply issue recommendations, Your Honor.

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1 THE COURT: Okay. You know, a standard without a 2 standard is not a standard.

MR. JONES: Understood, Your Honor. It may be that. And I suspect the court was going to rule this way. But it may be that the word and the phrase needs to be amended. But certainly defer to the court on that.

8 But, Your Honor, I do want to just briefly touch 9 on one other issue, and that was the 16.1 calculation 10 of damages discussion that counsel had. And she made 11 the point, Ms. Winters made the point that damages 12 were specified in her initial complaint, I believe in 13 being in excess of \$15,000.

In my mind, Your Honor, that shows even more that they at least were aware they were making claims for these damages way back in 2019. They still neglected to include them in their computation of damages. I'm not frankly really believing that the computation of damages suddenly arrived on the day of expert disclosures.

Your Honor, my firm and I think almost every firm in the state of Nevada will at least, if they know categories of damages, will include so in their computation of damages, even if it includes a to be determined later, or some other type of qualifying

1 language, an initial estimate, that sort of thing.

But, there's -- on its face, NRCP 16.1 requires computation of damages. I think it's undisputed that none was included here. You can't include a 16.1 computation of damages in a complaint, especially when it is as required by law. [inaudible] as vague as being simply in excess of \$15,000.

8 So I think if anything that shows even more that 9 counsel was aware of the category of damages that was 10 being alleged and simply neglected to do so 11 nthroughout the course of discovery. So, with that, 12 Your Honor, I'm happy to submit, unless Your Honor has 13 any other questions.

14 THE COURT: I do not. Thank you.

15 MR. JONES: Thank you.

16 THE COURT: Okay. I've got a number of notes 17 here. What I'd like to do is take about 20 minutes to 18 put them together and then tell you what I'm going to 19 do. And I'll see you at 2:30.

And let me just put my thoughts in order and,
I'll give you a ruling then. Thank you.

22 MR. JONES: Thank you.

23

24 [2020-11-30_14.43.30.728]

1 THE COURT: -- presentations today. And for all 2 of the -- the work that you did in this case - in your 3 pleadings. I, quite frankly, I enjoyed reading them. 4 And I appreciated your work. So I thank you for that.

5 Here's where we are. I'll just let you know, I 6 think that if I spent a bunch of money on some 7 property, I would -- and my initial reaction would be 8 that I'd want to be able to do with it anything that I 9 wanted to do with it.

But as is so often, around the country, that's not exactly what we get to do. And often when we buy property, particularly where we have neighbors around us, there are limitations on what we're able to do. Now there's not in this neighborhood a set of, CC&Rs, that prohibit certain conduct. But there is a set of bylaws. And those bylaws were in place when Mr.

17 Moretto purchased his property.

And so given your competing motions, these are my rulings on each one of them. And just what I'm going to go and what I'm going to do, going through them cause of action by cause of action.

And as to the first cause of action in the complaint, which refers to a breach of the Elk Point, Country Club bylaws, it's the Court's determination that Mr. Moretto purchased the property subject to the bylaws and any amendments thereto. The bylaws
 specifically allow for the creation of rules and
 regulations, which would include the subject of
 architecture.

5 There was -- in looking at all of the documents, 6 there is no authority that has been passed on to the 7 architecture review committee. They're simply 8 advisory. And all the authority was retained by the 9 executive board.

10 Section 3 of Article 16 does not merely modify 11 Section 2. It's an independent section of the bylaws. 12 And based on that, all of that, the court finds that 13 the summary judgment will issue for the defense as to 14 first cause of action.

Now as to the second cause of action, I think, Mr. Jones, you could tell that I have some real trouble with this aesthetic business. And generally, the guidelines, the architectural standard, the architectural design control standards and guidelines, are not arbitrary.

However, the 2019 version of that architectural design control standards and guidelines, which gives the board the authority to deny an application, quote, for purely aesthetic reasons, end quote, is vague and ambiguous.

1 It's not subject to any standard of review. And 2 therefore it is subject to a permanent injunction. And 3 the board is enjoined, and I'm issuing summary 4 judgment in favor of the plaintiff on that one issue 5 as to purely aesthetic reasons.

6 So to be clear, the board is enjoined from 7 denying an application based on, quote, purely 8 aesthetic reasons. As to the other arguments in -- or 9 the other points in count two, summary judgment issues 10 for the defense.

As to count three, or cause of action three, I'm 11 sorry, I cannot find any authority in which Nevada has 12 recognized a cause of action for violation of 13 constitutional property rights. I think that there are 14 causes of action related to property rights. There are 15 plenty of them. But there's -- I've never seen one, 16 and I cannot find one where Nevada has recognized a 17 cause of action for a violation of constitutional 18 19 property rights.

Even if such cause of action did exist, it doesn't exist in this case. Here, title was taken subject to the homeowner's association bylaws which permit the creation of rules and regulations.

And Mr. Moretto purchased property knowing that those rules and regulations could be put in place. And, therefore, summary judgment for the defendant is
 granted on the third cause of action.

On the fourth cause of action, which is basically related to Nevada Revised Statutes 116.31175, review of that statute is pretty specific.

The demand for the written materials, the books, 6 records, and other papers of the association, that 7 statute specifically refers to the financial statement 8 of the association, budgets of the association 9 10 required to be prepared pursuant to NRS 116.31151, the study of the reserves of the association required to 11 be conducted pursuant to Nevada law, and all contracts 12 to which the association is a party. 13

Now the requirement to -- of the executive board to provide copies of those to the unit's owner or to the ombudsman refers only to the financial statement of the association, the budgets, and the reserves.

And, the penalty of \$25 per day refers specifically to those records. Because it refers to Subsection 2 -- under Subsection 3 it refers back to Subsection 2. And Subsection 2 refers to the financial statements, the budgets, and the reserves.

And therefore the material that is requested by plaintiff in this action that she -- he alleges was not provided, does not fall within that statute and

isn't subject to the \$25 a day penalty. And therefore
summary judgment issues for the defense as to that
cause of action.

As to the fifth cause of action, which is a 4 request that the Court issue a declaratory relief, the 5 summary judgment will issue for the defense except as 6 to count -- or except as to the second cause of 7 action, the aesthetic issue. And the court has 8 indicated that it will enjoin the defendant from 9 10 invoking that provision of of its rules for enforcement. And, Mr. Jones, you'll prepare this 11 order. 12

13 MR. JONES: Certainly, Your Honor.

14 THE COURT: And that's the court's determination. 15 Now where that leaves you as far as trial, I'm not too 16 sure. I doubt that there's a lot to be tried left in 17 this case. And Ms. Winters has acknowledged that if 18 she got injunctive relief, that that would abate the 19 issue of damages. And she got injunctive relief on one 20 issue. And that is the aesthetic issue.

21 So, I'm not sure that you'll need to set trial 22 here. And I'll leave it to the parties to proceed 23 accordingly. Any questions? Hearing no questions, 24 we're in recess. Thank you very much.

25 MR. JONES: Thank you.

1 MS. WINTERS: Your Honor?

2 THE COURT: Yes, ma'am.

3 MS. WINTERS: Uh, was this hearing [inaudible]

4 THE COURT: I couldn't hear you.

5 MS. WINTERS: Was the hearing today, uh, taped? 6 THE COURT: It's on the JAV system.

7 MS. WINTERS: Okay. Thank you.

8 THE COURT: That's the Jefferson Audio Visual

9 system that is recorded.

10 MS. WINTERS: So I can contact the clerk for

11 [inaudible]

12 THE COURT: Certainly you may, ma'am.

13 MS. WINTERS: Thank you.

14 THE COURT: Yes, ma'am. We're in recess.

15 MR. JONES: Thank you, Your Honor.

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I, Chris Naaden, hereby declare under penalty of perjury that to the best of my ability the above pages contain a full, true and correct transcription of the tape-recording that I received regarding the event listed on the caption on page 1. б I further declare that I have no interest in the event of the action. April 30, 2021 Chris Naaden (Moretto v. Elk Point CC HOA, 11-30-20)

1	RESNICK & LOUIS, P.C.	
2	Prescott Jones, Esq., Nevada Bar No. 11617	
3	<u>pjones@rlattorneys.com</u> Joshua Ang, Esq.	
4	Nevada Bar No. 14026 jang@rlattorneys.com	
5	8925 W. Russell Road, Suite 220	
6	Las Vegas, NV 89148 Telephone: (702) 997-3800	
7	Facsimile: (702) 997-3800 Attorneys for Defendant	
8	Elk Point Country Club Homeowners Assn., Inc.	
9		
10	IN THE NINTH JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
11	IN AND FOR THE CO	UNTY OF DOUGLAS
12		
13	JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust,	CASE NO.: 19-CV-0242
14		DEPT: 1
15	Plaintiffs, v.	
16	ELK POINT COUNTRY CLUB	
17	HOMEOWNERS ASSOCIATION, INC., a	
18	Nevada non-profit corporation, and DOES 1-10 inclusive,	
19	Defendants.	
20		
21		
22		
23	NOTICE OF EN	TRY OF ORDER
24		
25	PLEASE TAKE NOTICE that DEFENI	DANT'S ORDER GRANTING IN PART AND
26	DENYING IN PART THE MOTIONS FOR SUI	MMARY JUDGMENT was entered on the 8 th
27		
28		

1	day of December, 2020, a copy of which is attached hereto.
2	DATED this 21^{5+} day of January, 2021.
3	RESNICK & LOUIS, P.C.
4	
5	By:
6	⁴ Prescott Jones, Esq., Nevada Bar No. 11617
7	Joshua Ang, Esq. Nevada Bar No. 14026
8	8925 W. Russell Road, Suite 220 Las Vegas, NV 89148
9	Telephone: (702) 997-3800
10	Facsimile: (702) 997-3800 Attorneys for Defendant
11	Elk Point Country Club Homeowners Assn., Inc.
12	
13	
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1	CERTIFICATE OF SERVICE		
2	I HEREBY CERTIFY that service of the foregoing NOTICE OF ENTRY OF		
3	ORDER was served this 21 st day of January, 2021, by:		
4			
5 6	[X] BY U.S. MAIL : by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as set forth below.		
7 8 9	[] BY FACSIMILE : by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document.		
10			
11	[] BY PERSONAL SERVICE : by causing personal delivery by an employee of Resnick & Louis, P.C. of the document(s) listed above to the person(s) at the		
12	address(es) set forth below.		
13	[] BY ELECTRONIC SERVICE : by transmitting via the Court's electronic filing		
14	services the document(s) listed above to the Counsel set forth on the service list on this date.		
15			
16	Karen L. Winters, Esq.		
17	LAW OFFICE OF KAREN L. WINTERS P.O. Box 1987		
18	Minden, NV 89423		
19	Counsel for Plaintiff		
20			
21			
22	Monnek Morrow An Employee of Resnick & Louis, P.C.		
23			
24			
25			
26			
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A.App._932



REPLY TO: NEVADA OFFICE 8925 West Russell Road, Suite 220 Las Vegas, Nevada 89148 (702) 997-3800

December 14, 2020

RECEIVED

DEC 17 2018

Douglas County District Court Clerk

VIA U.S. MAIL

Clerk of the Court Ninth Judicial District Court Douglas County P.O. Box 218 Minden, NV 89423

> Re: Moretto v. Elk Point Country Club Homeowners Assn., Inc. Case No.: 19-CV-0242 Dept. 1

Dear Sir/Madam:

Enclosed please find an original and one copy of Defendant's Order Granting in Part and Denying in Part the Motions for Summary Judgment to be submitted to the Judge for signature.

Kindly return the file-stamped copy in the self-addressed, stamped envelope provided for your convenience. Please contact me at (702) 997-8506 should you have any questions or concerns.

Thank you for your professional courtesies.

Very truly yours,

RESNICK & LOUIS, P.C.

151 Susan Carbone

Susan Carbone Legal Assistant For the Firm

sc Enc.

ALBUQUERQUE | BAKERSFIELD | CHARLESTON | DENVER | LAS VEGAS | MIAMI | ORANGE COUNTY | ORLANDO | PHOENIX | RIVERSIDE | SACRAMENTO | SALT LAKE CITY | SAN DIEGO | TAMPA | LONDON www.rfattornevs.com

	e e e e e e e e e e e e e e e e e e e	
1 2 3 4 5 6 7 8 9	RESNICK & LOUIS, P.C. Prescott Jones, Esq., Nevada Bar No. 11617 pjones@rlattorneys.com Joshua Ang, Esq. Nevada Bar No. 14026 jang@rlattorneys.com 8925 W. Russell Road, Suite 220 Las Vegas, NV 89148 Telephone: (702) 997-3800 Facsimile: (702) 997-3800 Attorneys for Defendant Elk Point Country Club Homeowners Assn., Inc.	2021 JAH -O PH 4: 22 ECLISSING MANS K. WILFERT BULLED DEPUTY
10	IN THE NINTH JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
11 12		OUNTY OF DOUGLAS
 13 14 15 16 17 18 19 20 	JEROME MORETTO, Trustee of the Jerome F. Moretto 2006 Trust, Plaintiffs, v. ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC., a Nevada non-profit corporation, and DOES 1-10 inclusive, Defendants.	CASE NO.: 19-CV-0242 DEPT: 1 ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT
21	On November 30, 2020, at 10:00 a.	-1 m., the above-captioned case came before the
 22 23 24 25 26 27 28 	Summary Judgment or, in the Alternative, M Defendant ELK POINT COUNTRY CLUB H for Summary Judgment, with Karen Winters,	ng Plaintiff JEROME MORETTO's <i>Motion for</i> <i>Jotion for Summary Adjudication of Issues</i> , and OMEOWNERS ASSOCIATION, INC.'s <i>Motion</i> Esq. appearing on behalf of Plaintiff JEROME ESNICK & LOUIS P.C. appearing on behalf of HOMEOWNERS ASSOCIATION, INC. The

1	Court, having reviewed the Motions, the papers and pleadings on file herein, and the arguments		
2	of counsel	, finds and orders as follows:	
3		FINDINGS OF FACT	
4	١.	The Court finds that the Jerome F. Moretto 2006 Trust is the owner of the property	
5		located at 476 Lakeview Avenue, Zephyr Cove, Nevada, which is a part of the Elk	
6		Point Country Club development.	
7	2.	The Court finds that Plaintiff Jerome Moretto first took title to the property located at	
8		476 Lakeview Avenue in 1990, and he took title "subject at all times to the by-laws,	
9		and rules and regulations" of the Elk Point Country Club.	
10	3.	The Court finds that the Bylaws of the Elk Point Country Club state, in Article 3.	
		section 2, that the Executive Board shall have the authority to make rules and	
12		regulations not inconsistent with the laws of the State of Nevada, the Articles of	
13		Incorporation, and the Bylaws of the Corporation."	
14	4.	The Court finds that the Bylaws of the Elk Point Country Club, in Article 16, Section	
15 16		2, restrict properties to single family residential use only.	
17	5.	The Court finds that the Bylaws of the Elk Point Country Club state, in Article 16,	
18		Section 3, that "[n]o structure of any kind shall be erected or permitted upon the	
19		premises of any Unit Owner, unless the plans and specifications shall have first been	
20		submitted to and approved by the Executive Board.	
21	6.	The Elk Point Country Club does not have a Covenant of Conditions and Restrictions.	
22		and instead has developed Rules and Regulations.	
23	7.	The Elk Point Country Club has developed Architectural Design Guidelines which	
24		have been incorporated into the Rules and Regulations.	
25	8.	The Elk Point Country Club has created an Architectural Review Committee which	
26		issues recommendations to the Executive Board on issues related to Architectural	
27		issues in the community.	
28			
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1	CONCLUSIONS OF LAW
2	THE COURT CONCLUDES that while Plaintiff has an expectation of free use of his
3	property, that expectation is limited because he took title to the property subject to the bylaws
4	and rules and regulations of the Elk Point Country Club.
5	THE COURT FURTHER CONCLUDES that the Elk Point Country Club has the
6	authority under the Bylaws to create Rules and Regulations, including those that regulate
7	architecture at the community.
8	THE COURT FURTHER CONCLUDES that Article 16, section 3 of the Bylaws,
9	which gives the Board authority to create rules and regulations, does not simply modify Article
10	16, section 2 of the Bylaws, it is a completely separate section.
11	THE COURT FURTHER CONCLUDES that the Executive Board has not delegated
12	any authority to the Architectural Review Committee because the Committee only issues
13	recommendations to be taken up by the Executive Board.
14	THE COURT FURTHER CONCLUDES that the architectural guidelines promulgated
15 16	by the Elk Point Country Club are not arbitrary and capricious under NRS 116.31065, with the
17	sole exception of the provision that allows the Executive Board to deny applications for "purely
18	aesthetic reasons."
19	THE COURT FURTHER CONCLUDES that Plaintiff's claim for "violation of
20	property rights" is not a cognizable claim in Nevada; but even if it was, Plaintiff's property rights
21	were not violated in this matter.
22	THE COURT FURTHER CONCLUDES that documents requested by the Plaintiff in
23	his fourth cause of action do not fall within NRS 116.31175, and the statutory penalty of \$25 per
24	day set forth in NRS 116.31175(3) is inapplicable because the documents requested are not those
25	set forth in NRS 116.31175(1)(a) through (c).
26	THE COURT FURTHER CONCLUDES that there are no genuine issues of material
27	fact at issue in this matter.
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A.App._936

	ORDER
TI	IS ORDERED THAT, based on the findings above, Plaintiff's Motion for Summary
Judgment	or, in the Alternative, Motion for Summary Adjudication of Issues, is granted in part
and denie	d in part as follows:
1.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary
	Adjudication of Issues is denied as to the first cause of action for Breach of Elk Point
	Country Club Bylaws.
2.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary
	Adjudication of Issues is granted in part as to the second cause of action for
	Violations of NRS 116.31065 only such that the Elk Point Country Club is enjoined
	from denying any architectural application for "purely aesthetic reasons." Plaintiff's
	Motion for Summary Judgment or, in the Alternative, Motion for Summary
	Adjudication of Issues is otherwise denied as to the remaining architectural
	guidelines.
3.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary
	Adjudication of Issues is denied as to the third cause of action for Violation of
	Plaintiff's Property Rights.
4.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary
	Adjudication of Issues is denied as to the fourth cause of action for Violation of NRS
	116.31175.
5.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary
	Adjudication of Issues is granted in part as to the fifth cause of action for Declaratory
	Relief only such that the Elk Point Country Club is enjoined from denying any
	architectural application for "purely aesthetic reasons." Plaintiff's Motion for
	Summary Judgment or, in the Alternative, Motion for Summary Adjudication of
	Issues is otherwise denied as to the remaining architectural guidelines.
1	
	Judgment and denied 1. 2. 3. 4.

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1	IT IS FURTHER ORDERED THAT, based on the findings above, Defendant's Motion
2	for Summary Judgment is granted in part and denied in part as follows:
3	1. Defendant's Motion for Summary Judgment is granted as to the first cause of action
4	for Breach of Elk Point Country Club Bylaws.
5	2. Defendant's Motion for Summary Judgment is denied in part as to the second cause
6	of action for Violations of NRS 116.31065 only such that the Elk Point Country Club
7	is enjoined from denying any architectural application for "purely aesthetic reasons."
8	Defendant's Motion for Summary Judgment is otherwise granted as to the remaining
9	architectural guidelines.
10	3. Defendant's Motion for Summary Judgment is granted as to the third cause of action
11	for Violation of Plaintiff's Property Rights.
12	4. Defendant's Motion for Summary Judgment is granted as to the fourth cause of action
14	for Violation of NRS 116.31175.
15	5. Defendant's Motion for Summary Judgment is denied in part as to the fifth cause of
16	action for Declaratory Relief only such that the Elk Point Country Club is enjoined
17	from denying any architectural application for "purely aesthetic reasons."
18	Defendant's Motion for Summary Judgment is otherwise granted as to the remaining
19	architectural guidelines.
20	DATED this day of December, 2020.
21	1/ meters al Mars
22	DISTRICT COURT JUDGE
23	
24	
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DATED this 14th day of December, 2020 RESNICK & LOUIS, P.C. Prescott Jones, Esq., Nevada Bar No. 11617 Joshua Ang, Esq. Nevada Bar No. 14026 8925 W. Russell Road, Suite 220 Las Vegas, NV 89148 Telephone: (702) 997-1029 Facsimile: (702) 997-3800 Attorneys for Defendant ŷ Elk Point Country Club Homeowners Assn., Inc.

x r	۲		•
1	6005 Plumas Street, Suite 300 Reno, Nevada 89519	ECEIVED	FILED 2021 FEB 18 PM 12: 19
3 4 5	Attorneys for Plaintiff	ouglas County anist Court Clerk	Electronically Filed Mar 02 2021 09:54 a.m Elizabeth A. Brown Clerk of Supreme Court
6 7	IN THE NINTH JUDICIAL DIS	TRICT COURT OF	
8 9 10	JEROME MORETTO, Trustee of the Jero F. Moretto 2006 Trust,		
11 12 13 14	Plaintiff, vs. ELK POINT COUNTRY CLUB HOMEOWN ASSOCIATION, INC., a Nevada non-pr corporation, and DOES 1-10, inclusive,	ofit	-CV-0242
15 16	Defendants.	DTICE OF APPEAL	
17 18 19 20	NOTICE IS HEREBY GIVEN that I Moretto 2006 Trust hereby appeals to entered on January 8, 2021 (attached a made final and appealable by the foreg	the Nevada Supr as Exhibit A), and	
21 22 23 24		affirm that the pr	RACA
25 26 27			R. Alexander, Esq. eneys for Plaintiff
28 LEMONS, GRUNDY & EISENBERG BOOS PLUMAB STREET THIRD FLOOR RENO, NV 8519-508 (775) 785-8868		1	et 82565 Document 2021-06053

. •		
1	CERTIFICATE OF MAILING	
2	Pursuant to NRCP 5(b), I certify that I am an employee of Lemons, Grundy & Eisenberg	
3	and that on February <u>18</u> , 2021, I deposited in the United States Mail, with postage fully	
4	prepaid, a true and correct copy of the within NOTICE OF APPEAL, addressed to the following:	
5	Karen L. Winters, Esq.	
6	P. O. Box 1987 Minden, Nevada 89423	
7	Attorney for Plaintiff	
8	Prescott Jones, Esq. Resnick & Louis, P.C.	
9	8925 West Russell Road, Suite 220 Las Vegas, Nevada 89148	
10	Attorney for Defendant	
53	Suran H. Dairs	
12	Susan G. Davis	
13		
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28 LEMONS. GRUNDY & EISENBERG		
A PROFESSIONAL CORFURATION BOOM PLUMAB STREET THIRD PLOOR		1
RENO, NY 59519-6089 (775) 7 95-66 64	 A.App941	

5 10000 ţ



EXHIBIT A

EX.20.20 . 200 .

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		11日1日日 11日日 11日日 11日日 11日日 11日日 11日日 1
	RESNICK & LOUIS, P.C. Prescott Jones, Esq.,	
2	Nevada Bar No. 11617	K WILFERT
3	piones/drlattorneys.com Joshua Ang, Esq.	N VYILLER L
4	Nevada Bar No. 14026 jang@rlattornevs.com	
5	8925 W. Russell Road, Suite 220 Las Vegas, NV 89148	
6	Telephone: (702) 997-3800	
-	Facsimite: (702) 997-3800 Attorneys for Defendant	
8	Elk Point Country Club Homeowners Assn., Inc.	
0		
:0	IN THE NINTH JUDICIAL DISTRICT	COURT OF THE STATE OF NEVADA
Чļ	IN AND FOR THE CO	UNTY OF DOUGLAS
2		
3	JEROME MORETTO, Trustee of the Jerome	CASE NO.: 19-CV-0242
↓↓	F. Moretto 2006 Trust,	DEPT: I
15	Plaintiffs.	ORDER GRANTING IN PART AND
16	V.	DENYING IN PART MOTIONS FOR
7	ELK POINT COUNTRY CLUB	SUMMARY JUDGMENT
18	Nevada non-profit corporation, and DOES 1-10	
19 1	inclusive.	
20	Defendants.	
-" 21	On November 30, 2020, at 10:00 a.m	i, the above-captioned case came before the
22		g Plaintiff JEROME MORETTO's Motion for
23		tion for Summary Adjudication of Issues, and
24		DMEOWNERS ASSOCIATION. INC.'s Motion
25		Esq. appearing on behalf of Plaintiff JEROME
26		SNICK & LOUIS P.C. appearing on behalf of
27	Defendant ELK POINT COUNTRY CLUB	
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Court, hav	ing reviewed the Motions, the papers and pleadings on file herein, and the arguments
of counsel	, finds and orders as follows:
	FINDINGS OF FACT
 I.	The Court finds that the Jerome F. Moretto 2006 Trust is the owner of the property
	located at 476 Lakeview Avenue. Zephyr Cove, Nevada, which is a part of the Elk
	Point Country Club development.
2.	The Court finds that Plaintiff Jerome Moretto first took title to the property located at
	476 Lakeview Avenue in 1990, and he took title "subject at all times to the by-laws.
	and rules and regulations" of the Elk Point Country Club.
5.	The Court finds that the Bylaws of the Elk Point Country Club state, in Article 3.
	section 2, that the Executive Board shall have the authority 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."
4.	The Court finds that the Bylaws of the Elk Point Country Club, in Article 16, Section
	2, restrict properties to single family residential use only,
5.	The Court finds that the Bylaws of the Elk Point Country Club state, in Article 16.
	Section 3, that "[n]o structure of any kind shall be erected or permitted upon the
	premises of any Unit Owner, unless the plans and specifications shall have first been
	submitted to and approved by the Executive Board.
i ().	The Elk Point Country Club does not have a Covenant of Conditions and Restrictions.
	and instead has developed Rules and Regulations.
7.	The Elk Point Country Club has developed Architectural Design Guidelines which
	have been incorporated into the Rules and Regulations.
8.	
1	issues recommendations to the Executive Board on issues related to Architectural
	issues in the community.
	2
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	of counsel 1. 2. 3. 4. 5. 1. 6. 7. 8.

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and a set of the set of the

CONCLUSIONS OF LAW

THE COURT CONCLUDES that while Plaintiff has an expectation of free use of his property, that expectation is limited because he took title to the property subject to the bylaws and rules and regulations of the Elk Point Country Club.

THE COURT FURTHER CONCLUDES that the Elk Point Country Club has the authority under the Bylaws to create Rules and Regulations, including those that regulate architecture at the community.

THE COURT FURTHER CONCLUDES that Article 16, section 3 of the Bylaws.
 which gives the Board authority to create rules and regulations, does not simply modify Article
 16. section 2 of the Bylaws, it is a completely separate section.

THE COURT FURTHER CONCLUDES that the Executive Board has not delegated any authority to the Architectural Review Committee because the Committee only issues recommendations to be taken up by the Executive Board.

THE COURT FURTHER CONCLUDES that the architectural guidelines promulgated
by the Elk Point Country Club are not arbitrary and capricious under NRS +16.31065, with the
sole exception of the provision that allows the Executive Board to deny applications for "purely
aesthetic reasons."

THE COURT FURTHER CONCLUDES that Plaintiff'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.

18

28

THE COURT FURTHER CONCLUDES that documents requested by the Plaintiff in his fourth cause of action do not fall within NRS 116.31175, and the statutory penalty of \$25 per day set forth in NRS 116.31175(3) is inapplicable because the documents requested are not those set forth in NRS 116.31175(1)(a) through (c).

THE COURT FURTHER CONCLUDES that there are no genuine issues of material tact at issue in this matter.

[]	-		
1		<u>ORDER</u>	
2	ſŢ	1S ORDERED THAT, based on the findings above, Plaintiff's Motion for Summary	
3	Judgment	or, in the Alternative, Motion for Summary Adjudication of Issues, is granted in part	
4	and denied	in part as follows:	
5 į.	Į I.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary	
6		Adjudication of Issues is denied as to the first cause of action for Breach of Elk Point	
7 1		Country Club Bylaws.	
81	2.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary	
a [Adjudication of Issues is granted in part as to the second cause of action for	
10		Violations of NRS 116.31065 only such that the Elk Point Country Club is enjoined	
!		from denying any architectural application for "purely aesthetic reasons." Plaintiff's	
121		Motion for Summary Judgment or, in the Alternative, Motion for Summary	
13		Adjudication of Issues is otherwise denied as to the remaining architectural	
[+] 		guidelines.	
15	3.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary	
16 		Adjudication of Issues is denied as to the third cause of action for Violation of	, ‡
18		Plaintiff's Property Rights.	-
19	╡ 4.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary	
20		Adjudication of issues is denied as to the fourth cause of action for Violation of NRS	
21		116.31175.	
22	5.	Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Summary	
23		Adjudication of Issues is granted in part as to the fifth cause of action for Declaratory	
24		Relief only such that the Elk Point Country Club is enjoined from denying any	ł
25		architectural application for "purely aesthetic reasons." Plaintiff's Motion for	ļ
26		Summary Judgment or, in the Alternative, Motion for Summary Adjudication of	
27	16 1	Issues is otherwise denied as to the remaining architectural guidelines.	
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ì	i IT IS FURTHER ORDERED THAT, based on the findings	above, Defendant's Motion
2	2 for Summary Judgment is granted in part and denied in part as follows	:
3	3 1. Defendant's Motion for Summary Judgment is granted as	to the first cause of action
4	4 for Breach of Elk Point Country Club Bylaws.	
5	5 2. Defendant's Motion for Summary Judgment is denied in	part as to the second cause
ъļ	of action for Violations of NRS 116.31065 only such that t	the Elk Point Country Club
7	is enjoined from denying any architectural application for	"purely aesthetic reasons."
8	8 Defendant's Motion for Summary Judgment is otherwise	granted as to the remaining
4	architectural guidelines.	
10	3. Detendant's Motion for Summary Judgment is granted as	to the third cause of action
	for Violation of Plaintiff's Property Rights.	
	 Defendant's Motion for Summary Judgment is granted as t 	o the fourth cause of action
	13 I for Violation of NRS 116.31175.	
	 5. Defendant's Motion for Summary Judgment is denied in 	part as to the fifth cause of
	action for Declaratory Relief only such that the Elk Poin	t Country Club is enjoined
17	from denying any architectural application for "p	urely aesthetic reasons."
	Defendant's Motion for Summary Judgment is otherwise	granted as to the remaining
	architectural guidelines.	
20	\therefore DATED this \checkmark day of December, 2020.	11
21	21 U/ netero la	Mart
22	22 DISTRICT COURT JUR	GF
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