MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
(702) 642-3113 / (702) 642-9766 FAX
Attorney for plaintiff/appellant
Saticoy Bay LLC Series 4641 Viareggio Ct

SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT, Appellant, vs. NATIONSTAR MORTGAGE LLC, Respondent.	CASE NO.: 82449

APPELLANT'S APPENDIX 2

Michael F. Bohn, Esq.
Law Office of Michael F. Bohn, Esq., Ltd.
2260 Corporate Circle, Suite 140
Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
Attorney for Appellant Saticoy Bay LLC
Series 4641 Viareggio Ct

INDEX TO APPENDIX 2

Volume	Date Filed	Document	Bates Stamp
2	04/20/15	Nationstar's Opposition to Motion to Dismiss Counterclaim and Countermotion for Summary Judgment	AA-000198-AA-000332
2	04/29/15	Motion to Dismiss Counterclaimant Nationstar Mortgage, LLC's Counterclaim as to Counter-Defendant/Third Party Defendant Naples Community	AA-000333-AA-000394
2	05/04/15	Reply in Support of Plaintiff's Motion to Dismiss Counterclaim and Opposition to Countermotion for Summary Judgment	AA-000395-AA-000407
2	05/19/15	Nationstar's Opposition to Naples Community Homeowners Association's Motion to Dismiss Counterclaim	AA-000408-AA-000447

ALPHABETICAL INDEX TO APPELLANT'S APPENDIXES

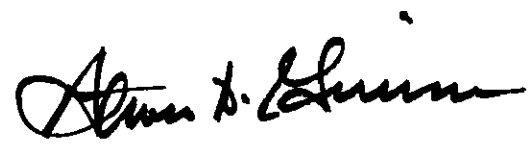
Volume	Date Filed	Document	Bates Stamp
1	10/16/13	Affidavit of Service for Cooper Castle Law Firm	AA-000008
1	10/16/13	Affidavit of Service for Monique Guillory	AA-000009
1	10/29/13	Affidavit of Service for Nationstar Mortgage, LLC	AA-000010
10	02/03/21	Case Appeal Statement	AA-001894-AA-001896
1	09/25/13	Complaint	AA-000001-AA-000007
1	11/19/13	Default as to Monique Guillory	AA-000011
5	09/25/17	Default Judgment Against Defendant Monique Guillory	AA-000983-AA-000985
7	12/19/17	Defendant/Counterclaimant Nationstar Mortgage, LLC's Amended Opposition to Plaintiff's Motion for Summary Judgment	AA-001161-AA-001317

5	09/12/17	Findings of Fact, Conclusions of Law, and Judgment	AA-000955-AA-000967
8	11/02/20	Minute Order	AA-001457-AA-001459
2	04/29/15	Motion to Dismiss Counterclaimant Nationstar Mortgage, LLC's Counterclaim as to Counter-Defendant/Third Party Defendant Naples Community	AA-000333-AA-000394
3	07/31/17	Motion for Default Judgment Against Defendant Monique Guillory	AA-000647-AA-000657
5	08/29//17	Motion for Voluntary Dismissal Against Defendant Cooper Castle Law Firm, LLP	AA-000951-AA-000954
1	03/13/15	Nationstar's Answer to Complaint and Counterclaim	AA-000016-AA-000167
8	01/07/19	Nationstar Mortgage LLC's Case Appeal Statement	AA-001450-AA-001453
8	12/11/18	Nationstar Mortgage LLC's Findings of Fact, Conclusions of Law, and Judgment	AA-001431-AA-001436
10	12/08/20	Nationstar Mortgage LLC's Reply Supporting Its Summary Judgment Motion	AA-001823-AA-001839
9	11/09/20	Nationstar Mortgage LLC's Summary Judgment Motion	AA-001460-AA-001668
5	10/02/17	Nationstar's Motion for Reconsideration, Motion for Relief, and Motion to Alter or Amend Judgment	AA-000991-AA-001011
2	04/20/15	Nationstar's Opposition to Motion to Dismiss Counterclaim and Countermotion for Summary Judgment	AA-000198-AA-000332
2	05/19/15	Nationstar's Opposition to Naples Community Homeowners Association's Motion to Dismiss Counterclaim	AA-000408-AA-000447
4	08/10/17	Nationstar's Opposition to Plaintiff's Motion for Summary Judgment	AA-000658-AA-000814
5	08/10/17	Nationstar's Request for Judicial Notice	AA-000815-AA-000950

8	01/07/19	Notice of Appeal	AA-001447-AA-001449
10	02/03/21	Notice of Appeal	AA-001891-AA-001893
5	09/26/17	Notice of Entry of Default Judgment	AA-000986-AA-000990
5	09/13/17	Notice of Entry of Judgment	AA-000968-AA-000982
8	12/14/18	Notice of Entry of Nationstar Mortgage LLC's Findings of Fact, Conclusions of Law, and Judgment	AA-001437-AA-001446
5	10/05/17	Notice of Entry of Order	AA-001014-AA-001017
10	12/28/20	Notice of Entry of Order Denying Saticoy Bay LLC Series 4641 Viareggio Ct's Summary Judgment Motion	AA-001850-AA-001863
10	01/05/21	Notice of Entry of Order Granting Nationstar Mortgage LLC's Motion for Summary Judgment	AA-001874-AA-001887
10	01/06/21	Notice of Release of Lis Pendens	AA-001888-AA-001890
3	08/12/15	Order to Dismiss Without Prejudice Countrclaimant Nationstar Mortgage, LLC's Counterclaim as to Counter-Defendant/Third Party Defendant Naples Community Homeowners Association Only	AA-000469-AA-000477
10	12/28/20	Order Denying Saticoy Bay LLC Series 4641 Viareggio Ct's Summary Judgment Motion	AA-001840-AA-001849
1	04/15/14	Order Granting Countermotion to Stay	AA-000012-AA-000013
1	02/12/15	Order Granting Motion to Lift Stay	AA-000014-AA-000015
5	10/05/17	Order Granting Motion for Voluntary Dismissal	AA-001012-AA-001013
10	01/04/21	Order Granting Nationstar Mortgage LLC's Motion for Summary Judgment	AA-001864-AA-001873
3	07/28/15	Order Granting Plaintiff's Motion to Dismiss and Denying Nationstar Mortgage, LLC's Countermotion for Summary Judgment	AA-000454-AA-000468

8	09/28/20	Order Setting Further Proceedings	AA-001454-AA-001456
1	03/19/15	Plaintiff's Motion to Dismiss Counterclaim	AA-000168-AA-000197
3	05/11/17	Plaintiff's Motion for Summary Judgment	AA-000478-AA-000646
5	10/07/17	Plaintiff's Opposition to Nationstar's Motion for Reconsideration, Motion for Relief, and Motion to Alter or Amend Judgment	AA-001018-AA-001024
10	11/25/20	Plaintiff's Opposition to Nationstar Mortgage LLC's Summary Judgment Motion	AA-001669-AA-001822
2	05/04/15	Reply in Support of Plaintiff's Motion to Dismiss Counterclaim and Opposition to Countermotion for Summary Judgment	AA-000395-AA-000407
3	06/11/15	Reply Brief in Support of Motion to Dismiss Counterclaimant Nationstar Mortgage, LLC's Counterclaim as to Counter-Defendant/Third Party Defendant Naples Community Homeowners Association Only	AA-000448-AA-000453
8	01/11/18	Reply to Opposition to Motion for Summary Judgment	AA-001318-AA-001430
6	12/19/17	Request for Judicial Notice in Support of Nationstar's Amended Opposition to Plaintiff's Motion for Summary Judgment	AA-001025-AA-001160

Electronically Filed
04/20/2015 05:04:39 PM



CLERK OF THE COURT

OPPM
Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant/Counterclaimant, Nationstar Mortgage, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT, Plaintiff, vs. NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY, Defendants.	Case No.: A-13-689240-C Dept. No.: V **NATIONSTAR'S OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND, IN THE ALTERNATIVE, MOTION FOR CONTINUANCE, AND ITS COUNTERMOTION FOR SUMMARY JUDGMENT** **Hearing Date: 5-15-2015** **Hearing Time: 9:00 A.M.**
NATIONSTAR MORTGAGE, LLC, Counterclaimant, vs. SATICOY BAY LLC SERIES 4641 VIAREGGIO CT; NAPLES COMMUNITY HOMEOWNERS ASSOCIATION; LEACH JOHNSON SONG & GRUCHOW; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Counter-Defendants,	

Defendant/Counterclaimant, Nationstar Mortgage, LLC (hereinafter "Nationstar"), by and through their attorneys of record, Dana Jonathon Nitz, Esq., and Chelsea A. Crowton, Esq.,

of the law firm of Wright, Finlay & Zak, LLP, hereby submits its Opposition to Plaintiff's Motion to Dismiss and in the alternative, Motion For Continuance to conduct discovery under NRCP 56(f), and its Countermotion for Summary Judgment.

The Opposition/Countermotion is based on the attached Memorandum of Points and Authorities, the Declaration of Chelsea A. Crowton in support of the Countermotion for leave to conduct discovery, all papers and pleadings on file herein, all judicially noticed facts, and on any oral or documentary evidence that may be submitted at a hearing on this matter.

DATED this 20th day of April, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant/Counterclaimant, Nationstar Mortgage, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff moves for dismissal, but it cannot meet the legal standard for dismissal simply by citing SFR Investments Pool 1 v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014). Plaintiff states that SFR is dispositive of all issues in the homeowners' association (the "HOA") super-priority litigation, and that means the first Deed of Trust was extinguished. But SFR simply held that, under NRS 116.3116: (1) a HOA super-priority lien is a "true super-priority" lien; (2) a properly conducted foreclosure on the HOA lien may extinguish first deeds of trust under certain circumstances; and (3) the HOA lien may be foreclosed upon non-judicially. The decision left open the question of whether the HOA had properly noticed and conducted its foreclosure in that particular case. Based on that stage of the pleadings, SFR had made sufficient

allegations to have withstood a motion to dismiss, where the district court should have taken as true. Id. at 418 ("On this record, at the pleadings stage, we credit the allegations of the complaint that SFR provided all statutorily required notices as true and sufficient to withstand a motion to dismiss.").

SFR's procedural posture limits the ability of a plaintiff to seek dismissal prior to discovery being conducted in the case, for SFR only dealt with the above issues in the context of a motion to dismiss and not a summary judgment stage. Due to these limitations, the SFR decision is not dispositive of the entirety of the HOA issue and the decision leaves open a myriad of issues for further proceedings upon remand:

- Was there adequate notice to the lender? ("[W]e conclude that U.S. Bank's due process challenge to the lack of adequate notice fails, at least at this early stage in the proceeding."). Id. at 418.
- Were the statutorily required notices sent and received? Id. at 419 ("SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal.").
- Was SFR's purchase "void as commercially unreasonable"? Id. at 418, n. 6.
- Could the lender have determined the precise super priority amount in advance of the sale? Id. at 418.
- Could the lender have paid the entire amount and requested a refund of any amounts exceeding the amount of the super-priority lien? Id. at 418.
- Were CC&Rs that contained the subordination clause in place before the statute, NRS 116.1104, took effect that limited the ability of the HOA to waive or vary the provisions of NRS Chapter 116 by agreement? Id. at 419, n. 7.

In short, SFR was not dispositive of these issues; the Court simply "remand[ed] for further proceedings consistent with this opinion." Id. at 418. It reversed a dismissal under N.R.C.P. 12(b)(6). It did not direct entry of judgment for the buyer. Despite the significance of the SFR opinion, there remain a myriad of issues and defenses that the opinion did not address, many of which are legal issues this Court must consider for the first time. Moreover, this Court

must determine whether SFR can be applied retroactively, rather than prospectively only.

In addition, genuine issues of material fact remain unresolved in the case, such as the amounts included in the HOA lien and the quality of notice, if any, given.

Nationstar makes its Countermotion for Summary Judgment on the grounds that the HOA Sale was not commercially reasonable. Comparing the purchase price to the fair market value of the Property and the unpaid balance of the loan, Plaintiff cannot raise any genuine issues of material fact to demonstrate the sale was commercially reasonable. In addition, the HOA Sale violated NRS 116.311635 and on constitutional grounds. Nationstar is therefore entitled to summary judgment on its Countermotion.

In the alternative, Nationstar moves for leave to conduct discovery. At this point, the parties have not conducted a 16.1 Conference and have not conducted any discovery. Nationstar's Countermotion for leave to conduct discovery should be granted "to permit affidavits to be obtained or depositions to be taken or discovery to be had." If given the opportunity to conduct discovery, Nationstar expects to demonstrate its Deed of Trust was not extinguished by the HOA's non-judicial sale because the sale did not comport with the requirements of NRS Chapter 116 and the CC&Rs. Furthermore, Nationstar would demonstrate that the purchase price at the HOA Sale is commercially unreasonable and violates public policy.

II. STATEMENT OF FACTS

1. On or about January 22, 2007, Guillory purchased the Property.[1]
2. The Deed of Trust executed by Guillory identified First Magnus Financial Corporation as the Lender, Great American Title as the Trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary acting solely as a nominee for lender and lender's successors and assigns, and secured a loan in the amount of $258,400.00 (hereinafter the

[1] A true and correct copy of the Grant, Bargain and Sale Deed recorded in the Clark County Recorder's Office as Book and Instrument Number 20070125-0003582 on January 25, 2007, is attached to Nationstar's Answer/Counterclaim as **Exhibit 1**. All other recordings stated hereafter are recorded in the same manner.

"Guillory Loan").[2]

3. On August 30, 2012, an Assignment of Deed of Trust was recorded by which MERS assigned all its beneficial interest under the Deed of Trust to Nationstar.[3]
4. On August 18, 2011, a Notice of Delinquent Assessment Lien was recorded against the Property on behalf of the HOA by the HOA Trustee.[4]
5. On January 24, 2012, a Notice of Default and Election to Sell under Homeowners Association Lien was recorded against the Property.[5]
6. On July 30, 2012, a Notice of Foreclosure Sale was recorded against the Property by the HOA Trustee.[6]
7. None of the aforementioned notices – the Notice of Lien, the Notice of Default and the Notice of Sale – specified what proportion of the lien, if any, that the HOA claimed constituted a "super-priority" lien.
8. None of the aforementioned notices identified above specified whether the HOA was foreclosing on the "super-priority" portion of its lien, if any, or under the non-super-priority portion of the lien.
9. None of the aforementioned notices provided any notice of a right to cure.
10. The HOA and its Trustee acted in contravention to the provisions of the CC&Rs, including without limitation, the Mortgagee Protection Clause, when they conducted the HOA Sale in a manner that could extinguish the Deed of Trust.

---

[2] A true and correct copy of the Deed of Trust recorded as Book and Instrument Number 20070125-0003583 on January 25, 2007, is attached to Nationstar's Answer/Counterclaim as **Exhibit 2.**

[3] A true and correct copy of the Assignment of Deed of Trust recorded as Book and Instrument Number 20120830-0000676 on August 30, 2012, is attached to Nationstar's Answer/Counterclaim as **Exhibit 3**.

[4] A true and correct copy of the Notice of Delinquent Assessment Lien recorded as Book and Instrument Number 20110818-0002904 on August 18, 2011, is attached to Nationstar's Answer/Counterclaim as **Exhibit 4.**

[5] A true and correct copy of the Notice of Default and Election to Sell Under Homeowners Association Lien recorded as Book and Instrument Number 20120124-0000764 on January 24, 2012, is attached to Nationstar's Answer/Counterclaim as **Exhibit 5.**

[6] A true and correct copy of the Notice of Foreclosure Sale recorded as Book and Instrument Number 20120730-0001448 on July 30, 2012, is attached to Nationstar's Answer/Counterclaim as **Exhibit 6.**

11. The HOA Sale was commercially unreasonable or not conducted in good faith, given the sales price to Plaintiff, when compared to the outstanding balance of Nationstar's Note and Deed of Trust and the fair market value of the Property.

III. STATEMENT OF DISPUTED FACTS

The following facts, among others, are in dispute:

1. Whether the HOA or its trustee mailed the Notice of Lien, the Notice of Default and the Notice of Sale to Nationstar and/or its agents.
2. Whether Nationstar actually received the Notices of Lien, of Default and of Sale.
3. Whether Nationstar or its trustee, servicer, agent or attorney requested the super priority amount in advance of the sale.
4. Whether the HOA or its trustee refused to accept the super priority amount in advance of the sale.
5. Whether Nationstar or its trustee, servicer, agent or attorney did or attempted to tender the super priority amount or even the entire amount in advance of the sale.
6. Whether there were an adequate number of bidders in attendance at the HOA Sale to ensure a commercially reasonable sale.
7. If the HOA Sale is not commercially unreasonable on its face, given the disparity in purchase price to fair market value and the outstanding balance of Nationstar's Note and Deed of Trust and the fair market value of the Property.
    a. Whether every aspect of the HOA Sale, including the method, manner, time, place, and terms, was commercially reasonable.
    b. Whether there was quality of the publicity of the HOA Sale to ensure a commercially reasonable sale.
    c. Whether there were an adequate number of bidders in attendance at the HOA Sale to ensure a commercially reasonable sale.

These questions of fact, among others, need to be investigated through discovery before any dispositive motion by Plaintiff is considered.

IV. LEGAL ARGUMENTS

A. PLAINTIFF CANNOT MEET THE LEGAL STANDARD FOR DISMISSAL SIMPLY BY CITING SFR V. U.S. BANK.

Pursuant to N.R.C.P. Rule 12(b)(5), "failure to state a claim upon which relief can be granted," is a basis to dismiss a Complaint where the moving party can demonstrate beyond doubt that the Petitioner cannot provide a set of facts in support of his claim which would entitle them to relief, such that this Motion to Dismiss should be granted. Edgar v. Wagner, 101 Nev. 226, 227, 699 P.2d 110, 111 (1985). In making a determination, the allegations made in the Complaint are generally taken as true and viewed in the light most favorable to the non-moving party. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. Adv. Rep. 21, 181 P.3d 670, 672 (2008). However, the Court should dismiss if the factual allegations of the Complaint, if accepted as true, are insufficient to establish essential elements of a claim for relief. Edgar, 101 Nev. at 228, 699 P.2d at 112.

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6)[7] motion…. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Nevada Rules of Evidence (NRS 47.130(2)), a court may take judicial notice of "matters of public record." Accord Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986). Accordingly, this Court may consider the recorded documents attached to the Request for Judicial Notice filed simultaneously herewith without the Motion to Dismiss being converted into a motion for

---

[7] F.R.C.P. 12(b)(6) is the functional equivalent of N.R.C.P. 12 (b)(5). The provision of N.R.C.P. 12(b) regarding matters outside the pleading that are presented to and not excluded by the court, are treated identically in F.R.C.P. 12(d).

summary judgment.

Based on the facts on record and extrinsic evidence, Plaintiff cannot produce sufficient, admissible evidence from which a trier of fact must find it had superior title to Nationstar on the Property. Here, undisputed evidence negates essential elements of Plaintiff's claims and there are genuine issues of material fact which prevents Plaintiff from establishing its claims. Accordingly, Plaintiff's Motion to Dismiss must be denied at this time.

B. NATIONSTAR MEETS THE LEGAL STANDARD ON ITS COUNTERMOTION FOR SUMMARY JUDGMENT.

Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubts exist, summary proceedings promote judicial economy and reduces litigation expenses associated with actions clearly lacking in merit. Id. Summary judgment enables the trial court to "avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried." Id., quoting Coray v. Hom, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964). "Summary judgment is appropriate if, when viewed in the light most favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." DTJ Design, Inc. v. First Republic Bank, 130 Nev. Adv. Op. 5, 318 P.3d 709, 710 (2014) (citing Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)). The plain language of Rule 56(c) "mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 323, 106 S.Ct. at 2552 (adopted by Wood v. Safeway, Inc., 121 Nev. at 731, 121 P.3d at 1031). In such a situation, there can be "no genuine issue as to any material fact" because a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Id. While the party moving for summary judgment must make the initial showing that no genuine issue of material fact exists, where, as here, the non-moving party will bear the burden of persuasion at trial, the party moving for summary judgment need only: "(1) submit[] evidence that negates an essential element of the nonmoving party's claim, or (2) 'point[] out ... that there

is an absence of evidence to support the nonmoving party's case.'" Francis v. Wynn Las Vegas, LLC, 127 Nev. Adv. Op. 60, 262 P.3d 705, 714 (2011). Once this showing is met, summary judgment must be granted unless "the nonmoving party [can] transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." Cuzze, 123 Nev. at 603, 172 P.3d at 134

Here, Nationstar demonstrates that Plaintiff cannot prove that the sale was commercially reasonable, or if the burden rests on Nationstar, Plaintiff cannot overcome Nationstar's proof that the sale was not commercially reasonable. Plus, Nationstar can prove that the HOA and/or its agent Leach Johnson Song & Gruchow (hereinafter "Leach Johnson) failed to comply with NRS 116.311635 and the HOA Sale violates the constitutional rights of Nationstar.

C. PLAINTIFF'S MOTION SHOULD BE DENIED AND PLAINTIFF'S COUNTERMOTION SHOULD BE GRANTED BECAUSE THE HOA LIEN VIOLATES NRS 116.3116.

Under NRS Chapter 116 and the Nevada Real Estate Division's ("NRED") Advisory Opinion 13-01, a lien under NRS 116.3116(1) can only include costs and fees that are specifically enumerated in the statute.[8] NRS Chapter 116 specifically excludes attorney's fees and the costs of collection from being included in an HOA Lien. The language in NRS 116.3102(1) lists five categories of penalties, fees, charges, late charges, fines, and interest that an HOA can include in the association's lien. The costs of collecting and attorney's fees are not listed in any of the five categories under NRS 116.3102(1). The HOA Notices show that the HOA included collection costs into the HOA Lien.[9] The inclusion of attorney's fees and collection costs in the association's lien violates NRS Chapter 116; therefore, a question of fact exists as to whether the HOA Lien is statutorily improper and whether the HOA Sale must be found invalid.

Several Judges in the Eighth Judicial District Court of Clark County, Nevada have issued opinions consistent with the above interpretation of NRS Chapter 116. The Court in Stanford

---

[8] NRED Opinion 13-01 is attached hereto as **Exhibit 3.**

[9] See **Exhibits 4, 5,** and **6** attached to Nationstar's Answer/Counterclaim

Burt v. Sutter Creek Homeowners Association, et al., Case No. A-12-672790-C, stated that an HOA Lien was statutorily improper and the foreclosure sale by the HOA should be rescinded because the HOA Lien included the costs of collection.[10] The Court in Wingbrook Capital, LLC v. Peppertree Homeowners Association, Case No. A-11-636948-B, Order, confirms that an association's lien does not include any fees, cost of collection, or additional costs outside the scope of NRS Chapter 116. Wingbrook concluded,

> [T]he **Super Priority Lien amount is not without limits** and NRS 116.3116 provides that the amount of the Super Priority Lien (i.e. the amount of a homeowners' associations' Statutory Lien which retains priority status over the First Security Interest) is limited "to the extent" of those assessments for common expenses based upon the associations' periodic budget that would have become due in the nine (9) month period immediately preceding an associations' institution of an action to enforce its Statutory Lien and "to the extent" of external repaid costs pursuant to NRS 116.310312.[11]
>
> Therefore after the foreclosure by a First Security Interest holder … the monetary limit of a homeowners' association's Super Priority Lien is limited to a maximum amount equaling nine (9) times the homeowners' association's monthly assessment amount to unit owners for common expenses based on the periodic budget which would have become due immediately preceding the institution of an action to enforce the lien plus external repair costs pursuant to NRS 116.310312.[12]

Therefore, the Court in Wingbrook and Burt reaffirm the NRED Opinion and statutory language in NRS Chapter 116 that the HOA Lien cannot include attorney's fees or collection costs.

The NRED Opinion 13-01 has also stated that attorney's fees and the costs of collecting on an HOA Lien cannot be included in the lien. In August of 2012, the Nevada Supreme Court recognized that NRED is responsible for interpreting NRS Chapter 116 and issuing advisory opinions relating to the extent and priority of the association super-priority lien. See State, Bus. & Indus. v. Nev. Ass'n Servs., 128 Nev. Adv. Op. 34, 294 P.3d 1223, 1227 (2012) ("We therefore determine that the plain language of the statutes requires that the CCICCH and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116."). It has also stated that courts generally give "great deference" to an agency's interpretation of a statute that the agency is charged with enforcing. State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 116

---

[10] See the Burt Court Minutes are attached hereto as **Exhibit 2.**
[11] Id.
[12] Id.

Nev. 290, 293 (2000); see also Dutchess Business Services v. Nev. State Bd. Of Pharmacy, 124 Nev. 701, 709 (2008) (stating that it "defer[s] to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute."). NRED's Advisory Opinion 13-01 is directly on point. The Opinion was asked three questions that dealt with the enforcement of an HOA Lien. The Opinion strongly stated that the association's lien cannot include the costs of collection as defined in NRS 116.310313. The Opinion cites to the Commission for Common Interest Communities and Condominium Hotels Advisory Opinion No. 2010-01 to support the assertion that the cost of collecting is not included in the association's lien. The Advisory Opinion No. 2010-01 states, "An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313."

The NRED Opinion clearly states that the "Costs of collecting" defined by NRS 116.310313 is too broad to fall within the parameters of charges for late payment of assessments.[13] By definition, the "costs of collecting" relate to the collection of past due "obligations," which are in turn defined as "any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner."[14] Since the instant HOA Notices include the cost of collection in the HOA Lien, the HOA Lien and subsequent sale are invalid and in direct violation of NRS Chapter 116. Based on the above, the plain language of NRS 116.3116(1) and the statutory interpretation of the NRED Opinion, the costs of collecting cannot be included in an association's lien.

Therefore, Plaintiff's Motion to Dismiss should be denied because a genuine issue of material fact exists as to whether the HOA lien comports with NRS 116 et seq. and NRED.

---

[13] Charges for late payment of assessments come from NRS 116.3102(1)(k) and are incorporated into NRS 116.3116(1).

[14] NRS 116.310313.

D. PLAINTIFF'S MOTION SHOULD BE DENIED AND NATIONSTAR'S COUNTERMOTION SHOULD BE GRANTED BECAUSE THE HOA SALE WAS COMMERCIALLY UNREASONABLE.

The SFR decision did not address the commercial reasonableness arguments asserted by the bank, because that concept was not appropriate at that pleadings stage – namely, a complaint followed by a motion to dismiss. Here, at the summary judgment stage, Nationstar can properly assert that the sale was not conducted in good faith and was not commercially reasonable. Even if an HOA sale could otherwise eliminate a senior deed of trust, which it cannot, the sale in this case would be void as commercially unreasonable if it did, as Plaintiff claims, eliminate the senior deed of trust. Nevada's version of the UCIOA imposes an express obligation of good faith on an HOA. NRS 116.31164 provides, "Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." This requirement is verbatim from Section 1-113 of the Uniform Common Interest Ownership Act ("UCIOA"), which was adopted by the Nevada Legislature in 1991. See Assembly Bill 221 (1991), Section 44. The Comment to Section 1-113 of the UCIOA states as follows:

> This section sets forth a basic principle running throughout this Act: in transactions involving common interest communities, good faith is required in the performance and enforcement of all agreements and duties. Good faith, as sued (sic) in this Act, means observance of two standards: "honesty in fact", and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.
>
> The term "commercial reasonableness" has been interpreted in several Nevada cases.

See Levers v. Rio King Land & Inv. Co., 93 Nev. 95, 560 P.2d 917 (1977); Dennison v. Allen Group Leasing Corp., 110 Nev. 181871 P.2d 288 (1994); and Savage Canst., Inc. v. Challenge-Cook Bros., Inc., 102 Nev. 34 (1986). These cases hold that a sale by a creditor must be done in a commercially reasonable manner. The Levers Court, 93 Nev. at 98-99, 560 P.2d at 919-20, stated:

> In addition to giving reasonable notice, a secured party must, after default, proceed in a commercially reasonable manner to dispose of collateral. NRS 104.9504(3) (Citation omitted). Every aspect of the disposition, including the method, manner, time, place, and terms, must be commercially reasonable. NRS 104.9504(3). Although the price obtained at the sale is not the sole determinative factor, nevertheless, it is one of the relevant factors in determining whether the sale was commercially reasonable.... A wide

discrepancy between the sale price and the value of the collateral compels close scrutiny into the commercial reasonableness of the sale. This is especially true where, as here, the secured party purchases the collateral and subsequently resells it for a vastly greater amount than was credited to the debtor. (Citations omitted; emphasis added.)

Likewise, the Court in Dennison, 110 Nev. at 186, 871 P.2d at 291, stated,

The conditions of a commercially reasonable sale should reflect a calculated effort to promote a sales price that is equitable to both the debtor and the secured creditor. The "quality of the publicity, the price obtained at the auction, [and] the number of bidders in attendance are important factors to consider when analyzing the commercial reasonableness of a public sale. (Citations omitted.)

Nevada has also adopted the Uniform Commercial Code ("UCC"). See generally, NRS Chapter 104. Section 2-103(1)(b) of the UCC states, "Good faith ... means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." (Emphasis added). Moreover, NRS 104.1201 defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." (Emphasis added.)

In Will v. Mill Condominium Owners' Assn, 176 Vt. 380, 386, 848 A.2d 336, 340 (2004), the only case the undersigned could find that had interpreted the language of UCIOA Section 1-113, the Court found that "the official comment to § 1-113 expresses in unequivocal terms the Legislature's intent to import the commercial reasonableness standard into the UCIOA." Thus, the Will court held that "the enforcement mechanisms provided for in § 3-116 must be conducted in good faith as defined in § 1-113, that is, in a commercially reasonable manner." 48 A.2d. at 342 (emphasis added). The court voided an HOA super-priority foreclosure sale, holding that sale of the property for $3,510.10 was not commercially reasonable when the property had a fair market value of $70,000. The holding in Will is correct because of UCIOA § 3-116 and NRS 116.3116's "unconventional" split-lien approach, which is "[a] significant departure from existing practice." See SFR, 334 P.3d at 412. A foreclosure under NRS 116.3116, which elevates a nominal HOA lien over a first position deed of trust, would have to be done in a commercially reasonable manner. There is no evidence before this Court that the HOA's Sale was commercially reasonable. In Will, 48 A.2d. at 342, the court noted that the burden of proof to demonstrate commercial reasonableness belonged to the HOA: "In the case at hand, in order to support the summary judgment under this standard, the court would

have to find that the Condominium Association ... had proved specific facts which, when 'viewed in totality,' constituted a commercially reasonable disposition of appellant's property."

The Eighth Judicial District Court has repeatedly dismissed quiet title cases involving HOA foreclosure sales on the independent basis that such sales were not commercially reasonable. In SFR Investments Pool I, LLC v. Nationstar Mortgage, LLC, the Court found that a $7,000 purchase price was one factor the court considered in determining that the plaintiff buyer was not a bona fide purchaser, because the plaintiff did not provide valuable consideration for the property. SFR Investments Pool I, LLC v. Nationstar Mortgage, LLC, Order Denying Application for Temporary Restraining Order n. 9, Case No. A-13-684596-C, Dept. XXXI, entered on August 5, 2013; see also Design 3.2 LLC v. Bank of New York Mellon, Case No. A-10-621628, Dept. XV, "Design 3.2 Order", entered on June 15, 2011 (finding that the purchaser at the HOA foreclosure sale was not a bona fide purchaser, in part because plaintiff purchased for only $3,743.84 and the deed of trust was $576,000). Courts from other jurisdictions have reached this same conclusion. Thus, commercial reasonableness in this matter is a relevant line of inquiry. And it remains a relevant line of inquiry after SFR, as Judge Robert Jones observed in Thunder Properties, Inc. v. Wood, 2014 WL 6608836 *2 (D. Nev.): "The Nevada Supreme Court itself noted the remaining due process and commercial reasonableness arguments, which it did not determine but remanded for determination in the district court. See SFR Invs. Pool 1, LLC, 334 P.3d at 418 & n. 6."

According to Will, "the burden of proof to demonstrate commercial reasonableness belong[s] to the HOA." 848 A.2d at 342. This places the buyers in the awkward position of having to explain why it is reasonable to obtain clear title to a property for less than 10% of its FMV when doing so divests a secured lender of an interest that is probably worth as much or more as the property itself.

The foreclosure sale in this case was void as commercially unreasonable if it did, as Plaintiff claims, eliminate the senior deed of trust. The HOA made no effort to obtain the best price or to protect either Nationstar. The sales price of $5,563.00 demonstrates that it was not made in good faith as a matter of law, as the property secures a loan in excess of $300,216.00.

The sales price is indisputable evidence of the lack of good faith because the assessed taxable value of the Property exceeds $130,000.00.[15] Further, rather than credit bid only the super-priority lien, the HOA credit bid its entire lien. If the HOA truly had a super-priority lien, it would only be able to recover that portion of its lien rather than the full amount. To be sure, the recent 2014 amendments to the Uniform Common Interest Ownership Act contain comments and illustrations of how distribution works when an association forecloses on a super-priority lien. See UCIOA (As Amended in 2014).[16] In Illustrations 1 & 2, the association completes foreclosure on an assessment lien containing both a super-priority lien and subpriority lien and in both illustrations the association applies the sale proceeds first to its super-priority lien, then to the first mortgage/deed of trust, and the remainder of the proceeds (if any) to the remaining balance of the association's lien. See Id. at pg. 191.

Plaintiff is not a bona fide purchaser if it purchased property with notice of another party's interest in the property. See Hewitt v. Glaser Land & Livestock Co., 97 Nev. 207, 208, 626 P.2d 268, 268-269 (1981). As a matter of law, Plaintiff purchased the Property with knowledge of the existence of Nationstar's senior Deed of Trust and the fact that the HOA sale was not being conducted pursuant to NRS 116.3116(2)(c). First, the recording statutes deem Plaintiff to have knowledge of a prior recorded interest.

> Recording statutes provide "constructive notice" of the existence of an outstanding interest in land, thereby putting a prospective purchaser on notice that he may not be getting all he expected. "Constructive notice is that which is imparted to a person upon strictly legal inference of matters which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know."

Allison Steel Mfg. Co. v. Bentonite, Inc., 86 Nev. 494, 497, 471 P.2d 666, 668 (1970) (quoting 8 Thompson on Real Property § 4293, at 245 16). Under the Nevada recording act, "A subsequent

---

[15] See Assessor's printout attached hereto as **Exhibit 4.**

[16] Available at http://www.uniformlaws.org/shared/docs/Common%20Interest%20Ownership/2014_UCIOA_Final_08.pdf (last visited March 16, 2015). The recent UCIOA amendments do not change the overall distribution following a foreclosure sale, but rather change the amount of the super-priority lien to include 6 months of assessments per year, plus reasonable attorney's fees/costs. Compare Sec. 3-116 in UCIOA (2014), pgs. 182-188, to UCIOA (1994), pgs. 185-189. And compare NRS 116.31164 with UCIOA (1994), Sec. 3-116(k)(3), pg. 189.

purchaser with notice, actual or constructive, of an interest in the land superior to that which he is purchasing is not a purchaser in good faith, and not entitled to the protection of the recording act." 86 Nev. at 499, 471 P.2d at 669. Nevada's recording statute, NRS 111.320, provides:

> Every such conveyance or instrument of writing, acknowledged or proved and certified, and recorded in the manner prescribed in this chapter or in NRS 105.010 to 105.080, inclusive, must from the time of filing the same with the Secretary of State or recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

Plaintiff bought the Property after the CC&Rs were recorded and Nationstar's Deed of Trust was recorded in the Clark County Recorder's Office. Plaintiff therefore purchased the property with record notice of both the mortgage protection clause and Nationstar's senior Deed of Trust.

Chapter 116 also deems Plaintiff to have purchased the property subject to the CC&Rs. NRS 116.310312(7) provides as follows:

> A person who purchases or acquires a unit at a foreclosure sale pursuant to NRS 40.430 or a trustee's sale pursuant to NRS 107.080 is bound by the governing documents of the association and shall maintain the exterior of the unit in accordance with the governing documents pursuant to this chapter.

A person who buys property at a foreclosure sale cannot pick and choose which parts of the CC&Rs are applicable to it. Plaintiff is bound by the provisions of the CC&Rs, which include the mortgage protection clause and the effect the common law. It would have had record notice[17] and inquiry notice because the foreclosure documents themselves stated that the sale was being conducted pursuant to the CC&Rs.

Based on the above, the HOA sale in this case was commercially unreasonable and cannot eliminate Nationstar's Deed of Trust.

E. PLAINTIFF'S MOTION SHOULD BE DENIED AND NATIONSTAR'S COUNTERMOTION SHOULD BE GRANTED BECAUSE THE CC&RS ATTEST TO THE PRESERVATION OF NATIONSTAR'S DEED OF TRUST AFTER THE FORECLOSURE SALE BY THE HOA.

The CC&Rs establish that a homeowner's association foreclosure sale does not extinguish a first position Deed of Trust and that title to the Property is sold subject to that Deed

---

[17] Berger v. Fredericks, 95 Nev. 183, 189, 591 P.2d 246, 249 (1979) ("The authorities are unanimous in holding that [the purchaser] has notice of whatever the search would disclose.").

of Trust. Plaintiff's arguments regarding the extinguishment of Nationstar's Deed of Trust is negated by the rules and regulations regarding Naples. Article X clearly establishes that Naples intended the sale of the Property, pursuant to NRS 116.3116, to be subject to the First Mortgage secured against the Property.[18] This section clearly states that the First Mortgage secured against the Property survives the HOA's foreclosure sale and implies that the First Mortgage secured by the Property will eventually foreclose and extinguish the "Super-Priority Lien" established under NRS 116.3116 et seq.

Plaintiff argues that the CC&Rs violate NRS 116.1104, which provides:

> Except as expressly provided in this chapter, its provisions may not be varied by agreement, and rights conferred by it may not be waived. Except as otherwise provided in paragraph (b) of subsection 2 of NRS 116.12075, a declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.

While there was no bargained for exchange between the HOA and Nationstar regarding the terms of the CC&Rs, Nationstar and similar lenders to purchasers of units within Naples were the intended third party beneficiaries of the CC&Rs. CC&Rs are a real property instrument that burdens the land. A mortgage protection clause incentivizes lenders to lend to would be purchasers of units in the community.

The original lender on Guillory's Deed of Trust and Note lent money in an HOA with the express reservation of its interest being protected from any sale conducted under the CC&Rs. The CC&Rs that were recorded at or near the time the loan was being financed clearly preserved a first mortgage from being extinguished by an HOA Sale based on delinquent assessments. The prohibition against varying the provisions of Chapter 116 by agreement is not applicable to a real property instrument such as a CC&R. The HOA should be able to contract around the NRS lien priority statute unless the contract is against public policy. If the agreement is not against public policy, the HOA is free to contract around it.

Contrast the mortgage protection clause with provisions of declarations which, for example, require the unit owners and the association to submit construction defect claims by the

---

[18] See **Exhibit 1** attached hereto.

homeowners association or its members against responsible contractors under NRS Chapter 40 to mandatory, binding arbitration because those provisions clearly are against public policy as they act to act to the detriment of the unit's owners and the associations. Here, the existence of the mortgage protection clause benefits the HOA because it enables the purchase of the units and the funding of the HOA coffers to allow it to function for the benefit of all members to avoid having to "increas[ing] the assessment burden on the remaining unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities)." SFR, 334 P. 3d at 414, quoting JEB, The Six-Month "Limited Priority Lien," at 5-6. Here, the CC&Rs reinforce the view that the non-judicial HOA Sale could not have extinguished the first Deed of Trust because the HOA intended the lien to be subordinate to the Deed of Trust.

These provisions distinguish this case from SFR. And to the extent SFR conflicts with the premise that the HOA could choose to subordinate its interests to the first mortgagee for the greater good of the association and to promote the associations' interests by permitting subordination of the HOA lien to the first mortgagee, it should be overturned. It favors public policy to permit such subordination – something not considered by the Nevada Supreme Court.

Many sections of Chapter 116 itself recognize that an HOA only has as much power as it grants itself in its Declaration. NRS 116.3116(1) provides, "**Unless the declaration otherwise provides**, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section." (Emphasis added.) NRS 116.3116(4) provides, "**Unless the declaration otherwise provides**, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority." (Emphasis added.) NRS 116.3116(10)(b) provides, "In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien: (2) **If the declaration so provides**, may be foreclosed under NRS 116.31162 to 116.31168, inclusive." (Emphasis added.) NRS 116.31164(2) provides:

> [T]he person conducting the sale may sell the unit at public auction to the highest cash bidder. **Unless otherwise provided in the declaration or by agreement,** the association may purchase the unit and hold, lease, mortgage or convey it. The association may purchase by a credit bid up to the amount of the unpaid assessments and any permitted costs, fees and expenses incident to the enforcement of its lien. (Emphasis added.)

Here, the HOA granted itself the power to preserve the first mortgage to enable its growth and survival. And this promise to the mortgage lenders was necessarily relied on by them when they financed the owners' purchases. The HOA should be estopped from claiming after the fact that lenders like Nationstar should not have relied on those clauses. In addition, Plaintiff attended the sale and bid on the Property with at least record and inquiry notice that the mortgage protection clause shielded the First Mortgages like Nationstar's Deed of Trust from extinguishment.

Plaintiff has not presented any evidence that Nationstar received any notice from the HOA that the "mortgage protection" clause of the CC&Rs were null and void nor have Plaintiff presented any evidence that the CC&Rs were amended after the initial recording to exclude the "mortgage protection" clause. Nationstar was on record notice that its interest would be protected after an HOA sale.[19] Consistent with the Nevada Legislature, CC&Rs are described in terms of a real property instrument that must be executed and recorded like a deed upon real property and is searchable by the grantor-grantee index. NRS 116.2101.

Therefore, Plaintiff cannot establish a cause of action for quiet title because the HOA expressly provided notice to Nationstar, at the time it lent money to the borrower to purchase the Property, that Nationstar's Deed of Trust would not be extinguished by an HOA Sale held pursuant to the CC&Rs. Consequently, Plaintiff's Motion to Dismiss should be denied and Nationstar's Countermotion should be granted.

F. PLAINTIFF MISCHARACTERIZES THE EFFECT OF THE RECITALS IN A FORECLOSURE DEED.

Plaintiff, like all opportunistic homeowner association sale buyers, mischaracterizes NRS 116.31166(2), which does not stand for the proposition that a foreclosure deed is conclusive proof of everything recited therein. A strict reading of NRS 116.31166 suggests the foreclosure deed is entitled to conclusive proof of (1) default; (2) mailing of delinquent assessment; (3) recording of notice of default and election to sell; (4) elapsing of 90 days; and (5) giving of

---

[19] See **Exhibit 1** attached hereto.

notice of sale.[20] Nothing in the statute says that the foreclosure deed is conclusive proof that the homeowner association is foreclosing on or selling a super-priority lien. In fact, NRS 116.31164(3)(a) expressly states that the foreclosure deed conveys title to the property without warranty of title.

In this case, the Foreclosure Deed states:

> Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.

Based on these recitals and pursuant to NRS 116.31166(2), the Foreclosure Deed issued by the HOA is not conclusive as to "mailing of copies of notices," other than mailing a copy of the delinquent assessment. NRS 116.31166(2) does not include such blanket conclusions. Not to mention that none of the aforementioned notices describe whether the HOA is foreclosing on a "superpriority piece" or a "subpriority piece."

The Nevada Supreme Court has illustrated with the SFR decision that the Foreclosure Deed is not conclusive to enter a quiet title judgment in favor of the third-party purchaser at the HOA Sale. The Nevada Supreme Court remanded the SFR case back to state court to conduct discovery. If the Foreclosure Deed was conclusive proof to establish judgment in favor of Plaintiff, then the Nevada Supreme Court would have entered judgment in its favor in lieu of remand. The Foreclosure Deed also states that it is conveying title to Plaintiff without warranty, express or implied, which is consistent with NRS 116.31164(3)(a). Thus, the recitals in the Foreclosure Deed does not definitively or conclusively prove that the HOA was foreclosing on a super-priority lien and/or that Plaintiff has a superior interest in title to the Property over Nationstar.

Based on the above, Plaintiff's Motion to Dismiss should be denied.

---

[20] It is of course an affront to the principle of due process that, if the HOA and the HOA must give these notices to the first mortgagee, they can preclude any inquiry into whether they did in fact give the notices simply by recording a document that says they gave the notices.

G. THERE IS NO PRESUMPTION THAT THE HOA FORECLOSED ON A SUPER-PRIORITY LIEN AND EVEN SO NATIONSTAR HAS ALLEGED SUFFICIENT FACTS AND PROVIDED SUFFICIENT EVIDENCE THAT ANY FORECLOSURE ON A SUPER-PRIORITY LIEN WAS IMPROPER AND WRONGFUL.

Plaintiff once again appears to contend that every foreclosure sale under NRS Chapter 116 is presumed to be a valid sale on a super-priority lien. However, and again, NRS Chapter 116 sales are sold without warranty of title pursuant to NRS 116.31164(3)(a). Also, first mortgages or deed of trust are afforded general priority over association liens pursuant to NRS 116.3116(2)(b). In fact, NRS Chapter 116 contains no express provision requiring an association to record a partial release or full satisfaction of the assessment lien once a super-priority portion is paid. However, none of the recorded foreclosure notices in this case even hint that a super-priority lien was being foreclosed, that a first mortgage could be extinguished by the foreclosure sale or what amount was necessary to cure that portion of the HOA's lien. First mortgages or deed of trust hold general priority over an HOA's assessment liens, except up to nine months of common assessments and any nuisance abatement costs. See NRS 116.3116(2). Noticeably absent from Plaintiff's Motion or Affidavit, is the amount of the super-priority lien that it claimed existed at the time of sale. There is further no attestation, under oath, that neither Plaintiff nor Leach Johnson received any payment of the super-priority lien. Thus, Plaintiff's Motion must be denied due to absence of any admissible evidence of a super-priority lien. Therefore, none of the foreclosure notices can be presumed compliant with Nevada law that there was a proper foreclosure on a super-priority lien.

H. THE NOTICE OF DEFAULT FAILS TO ADEQUATELY DESCRIBE THE DEFICIENCY IN PAYMENT.

The Notice of Default recorded by Leach Johnson fails to describe the deficiency in payment and to alert anyone as to what exactly it is foreclosing on. NRS 116.31162(1)(b)(1) requires the Notice of Default to describe the deficiency in payment. NRS 116.31162(1)(b)(1). Given the varying level in priority of association liens compared to first mortgages or deed of trust holders, the association or its agent must signal whether the association is foreclosing on

assessments, fines, nuisance abatement charges or some other amount constituting a super-priority lien.

The Notice of Default in this case is devoid of any such description of the deficiency in payment other than a total amount owing. It appears to attempt to describe the amount, but contains a generic statement that "payments have not been made of homeowner's assessments ... and all subsequent homeowner's assessments, monthly or otherwise less credits and offsets, plus late charges, interest, trustee's fees and costs, attorney's fees and costs and association fees and costs." (Emphasis added.) This generic description does not provide adequate notice, is not helpful and suggests that there were credits and offsets on the delinquent amounts. The lack of an adequately described deficiency of payment in the Notice of Default shows a faulty sale. Thus, Plaintiff's Motion to Dismiss should be denied.

I. THE NON-JUDICIAL FORECLOSURE PROVISIONS OF NRS CHAPTER 116 VIOLATE DUE PROCESS RENDERING THE STATUTE VOID AND UNENFORCEABLE.

The fatal flaw of NRS Chapter 116 – which SFR did not address – is that none of its express notice provisions provide for mandatory notice to lenders;[21] despite the fact that their property rights are directly threatened by an HOA's non-judicial foreclosure. Instead of mandating notice to lenders, the statutes provide various "opt-in" provisions that would allow "any person with an interest" to request notice in advance of a foreclosure sale by submitting a written notice request to the HOA. Thus, under the statutes, the affirmative duty is on the lender to request notice, not on the HOA to provide notice. This is true even when the lender has a prior recorded interest. Such facially defective notice requirements establish the constitutional infirmity of NRS 116.3116 and necessitate setting aside the HOA sale and dismissing the case as a matter of law in favor of Nationstar.

1. Nationstar's Facial Challenge Is a Legal Issue of First Impression Which This Court Can Consider Despite the SFR Decision.

The distinction must be drawn between facial verses as-applied challenges. An as-

[21] Nationstar uses "lender" to include the original lender or owner of the loan, or a subsequent investor, servicer, or beneficiary of the deed of trust at issue.

applied challenge asks a court to hold that a statute is unconstitutional under the specific facts of a case. See Ezell v. City of Chicago, 651 F.3d 684, 698-99 (7th Cir. 2011). Conversely, a facial challenge asks a court to hold that a statute is void because the alleged violation is intrinsic to the statutes' terms, not its application. 651 F.3d at 698-99 (holding that the City Council violated the Second Amendment *when* it created a gun law mandating firing-range training)., Black's Law Dictionary (9th ed. 2009) makes the distinction between the respective challenges thusly: an as-applied challenge is "a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party" while a facial challenge is "a claim that a statute is unconstitutional on its face - that is, that it always operates unconstitutionally." See also Seguin v. City of Sterling Heights, 968 F.2d 584, 589-90 (6th Cir. 1992) (in a due process challenge holding that plaintiffs' injury occurred *when* the city council passed the zoning ordinance at issue).

Importantly, "individual application of facts do not matter" in a facial challenge and "the plaintiff's personal situation becomes irrelevant." Ezell, 651 F.3d at 697 (citing Reno v. Flores, 507 U.S. 292 (1993)); see also John Doe No. I v. Reed, 561 U.S. 186 (2010). Accordingly, facial challenges attack the terms of a statute and as-applied challenges attack its execution – that is, was a facially sound law applied in an unconstitutional manner to a particular plaintiff. As a consequence, if a statute is unconstitutional as applied, the State may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances. Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 193 (6th Cir. 1997).

This distinction underscores the point that SFR addressed the as-applied challenge and not a facial challenge since that plaintiff should have survived the motion to dismiss where its complaint alleged that the statutorily required notices were given, not whether the statutorily required notices were insufficient as a matter of law to protect the lender's due process rights.[22]

---

[22] There, U.S. Bank made an as-applied – not facial – challenge to the HOA's compliance with the notice provisions of the statutes, arguing that "the content of the notice it received" was not specific enough to satisfy statutory requirements. 334 P.3d at 418.

Indeed, the Supreme Court never addressed whether notice was or was not constitutionally required. This distinction also demonstrates that it would not matter to a facial challenge if, in an individual case, the lender had *actual* notice but the statutes permit the taking without requiring notice.

This Court need only evaluate whether the terms of the statutes themselves violate a constitutional right. This is a purely legal issue appropriate for determination even at the motion to dismiss stage. Ezell, 651 F.3d at 697. For the reasons set forth below, NRS Chapter 116 is unconstitutional because its "opt-in" notice provisions do not comply with the due process requirements.

2. Due Process Requires That Lienholders Receive Notice Prior To Foreclosure Of Real Property.

The due process provisions of the United States Constitution require that "at a minimum, [the] deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).[23] The United States Supreme Court has established the well-settled rule that state action affecting real property must be accompanied by notice of the action. "An elementary and fundamental requirement of due process … is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Tulsa Prof. Collection Services, Inc. v. Pope, 485 U.S. 478, 484 (1988).

The Court made this point particularly clear in Mennonite Bd. of Missions v. Adams,

---

[23] The Nevada Supreme Court has "consistently relied upon the [United States] Supreme Court's holdings interpreting the federal Due Process Clause to define the fundamental liberties protected under Nevada's due process clause." State v. Eighth Jud Dist. Ct. (Logan D.), 306 P.3d 369, 377 (2013); Hernandez v. Bennett-Haron, 287 P.3d 305, 310 (2012) (holding that "the similarities between the due process clauses contained in the United States and Nevada Constitutions, permit us to look to federal precedent for guidance as we determine whether the procedures utilized … are consistent with the due process clause set forth in the Article 1, Section 8(5) of the Nevada Constitution.") (citing Rodriguez v. Dist. Ct., 120 Nev. 798, 808 n. 22, I 02 P.3d 41, 48 n. 22 (2004) ("[t]he language in Article I, Section 8(5) of the Nevada Constitution mirrors the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution")).

holding that any party with an interest in real property subject to deprivation must receive actual notice of the event that causes the deprivation. 465 U.S. 791 (1983). Moreover, "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice." Mennonite, 462 U.S. at 798. While diligence may differ depending on the context, Mennonite requires that reasonable steps be taken to provide actual notice to interested parties. 462 U.S. at 795-800.

a. Statutory "opt in" notice provisions do not satisfy Federal due process requirements.

"Opt-in" notice provisions have repeatedly been held to violate Constitutional due process requirements. In the years following the Mullane and Mennonite decisions, several states attempted to circumvent notice requirements when real property was at issue. Among the most popular was the use of an "opt in" provision – meaning that a state's foreclosure statute would require no notice to interested parties unless that interested party affirmatively requested such notice, as is the case here. For example, in Small Engine Shop, Inc. v. Cascio, 878 F.2d 883, 893 (5th Cir. 1989), the Fifth Circuit analyzed Louisiana's "opt in" clause and concluded it did not satisfy due process requirements because it did not mandate notice to all interested parties. Instead, just like NRS Chapter 116, it required an individual or entity to affirmatively request notice. Id. at 885-86. This "burden-shifting" was at the center of the controversy. The court applied Mennonite and Mullane and held that the statute failed Mennonite's allocation of notice burdens. Id. at 890. Thus, where a statute's sole notice provision is a burden-shifting "opt-in" provision, like NRS Chapter 116, the statute is unconstitutional because it does not meet Federal due process requirements.

b. Nevada's "opt in" Statute does not satisfy the minimum notice requirements mandated by the Supreme Court, rendering the statutes void and unenforceable.

NRS Chapter 116 does not include any express or mandatory notice provision requiring notice to the lender. This is the primary constitutional defect. While the statutes expressly address notice requirements in four separate provisions, none of them mandate actual notice to

the lender. Instead, each requires the lender to "opt in" and affirmatively request notice, as detailed below.

NRS 116.31162 governs the mailing of notice of delinquent assessments but only to "the unit's owner or his or her successor in interest." It does not require that an HOA provide any notice to the lender of the delinquent assessment, in violation of due process requirements.

NRS 116.31163 governs the mailing of the notice of default and election to sell but only to "Each person who has requested notice pursuant to NRS 107.090 or 116.31168; [and] Any holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest." This express notice provision does not require mandatory notice to the lender, again in violation of basic due process requirements, and each subsection instead governs how to "opt in" and request notice. Reference therein to NRS 107.090 and 116.31168 does not save this provision, as both govern a request for notice (and further fail as detailed below).

NRS 116.31165, governs mailing the notice of sale, but again only to

> Each person entitled to receive a copy of the notice of default and election to sell notice under NRS 116.31163; [and] The holder of a recorded security interest or the purchaser of the unit, if either of them has notified the association, before the mailing of the notice of sale, of the existence of the security interest, lease or contract of sale, as applicable.

This third notice provision does not mandate affirmative, actual notice to the lender, again in violation of due process.

NRS 116.31168, "Foreclosure of liens: Requests by interested persons for notice of default and election to sell…," also unconstitutionally shifts the burden to lenders, requiring they "opt in" to receive notice of foreclosure as under NRS 107.090 "as if a deed of trust were being foreclosed" with a *request* that "must identify the lien by stating the names of the unit's owner and the common-interest community." Moreover, NRS 116.31168 only applies to a notice of default and election to sell and does not apply to any other form of notice –specifically, the notice of trustee's sale.

The reference in NRS 116.31168 to NRS 107.090(3) (notice of default) and (4) (notice of sale) does not save the statute since these sections cannot apply to lenders for purposes of notice

because their interest is not "*subordinate* to the deed of trust" (emphasis added) – their interest *is* the deed of trust. This inconsistency makes it unlikely that any HOA or its foreclosure trustee would understand they must give notice to the holder of that first deed of trust. As the dissent in SFR acknowledged, "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."' 334 P.3d at 422 (citing Mullane, 339 U.S. at 315. NRS 116.31162-116.31168 fail this requirement.

The Nevada Legislature knows how to draft an express notice requirement- it has done so in many places throughout the statutes. But as to lenders, NRS Chapter 116's notice provisions are constitutionally flawed, rendering the statutes invalid on their face. Accordingly, Plaintiff cannot prevail on any of its claims against Nationstar since its claim to title is founded on a statutory scheme that is facially unconstitutional. Instead, judgment should be entered in favor of Nationstar as a matter of law because the foreclosure sale is unconstitutional.

J. NRS CHAPTER 116'S NON-JUDICIAL FORECLOSURE PROVISIONS VIOLATES THE TAKINGS CLAUSES OF THE UNITED STATES AND NEVADA CONSTITUTIONS.

The Fifth Amendment to the U.S. Constitution prohibits "private property be[ing] taken for public use without just compensation." U.S. Const. Amend. V.; Chicago, B & Q.R. Co. v. Chicago, 166 U.S. 226, 228-29 (1897). The Nevada Constitution likewise provides that "[p]rivate property shall not be taken for public use without just compensation having been first made." Nev. Const., Art. I., Sec. 8. As the Nevada Supreme Court has held, the Takings Clause of the Nevada Constitution is more protective of property rights than the United States Constitution. McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 670, 137 P.3d 1110, 1127 (2006). Nonetheless, permitting the extinguishment of a first deed of trust in favor of a de minimis homeowners' association lien to recover several months of assessments is a taking that violates both Constitutions.

The Nevada Supreme Court held in McCarran that "a per se regulatory taking occurs when a public agency seeking to acquire property for a public use enumerated in NRS 37.010 fails to follow the procedures set forth in NRS Chapter 37. Nevada's statutory provision on eminent domain, and appropriates or permanently invades private property for public use without

first paying just compensation." 137 P.3d at 1127. SFR's interpretation of NRS Chapter 116 has done precisely that: transferring property free and clear of a beneficiary's rights under a deed of trust without just compensation is a regulatory taking.

A lien is undoubtedly "property" within the meaning of the Takings Clause. United States v. Sec. Indus. Bank, 459 U.S. 70, 76-77 (1982). Thus, the extinguishment or destruction of a lien can be a taking under the Clause. Id. at 77-78. The U.S. Supreme Court has struck down a regulation that impermissibly took a bank's security interest in its own collateral. In Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 580-81 (1935), the Court held the Frazier-Lemke Act unconstitutional because it allowed farmers to buyer their property at the current appraised value on a deferred payment plan. The Act's infringement of a mortgagee's right to recover full payment before being divested of its security interest was impermissible because that is "the essence" of a mortgage. Id. The Court held the Act impaired substantive property rights and that the Fifth Amendment eminent domain proceedings and compensation were required to alter the mortgagee's interest in such a way. Id. The Court concluded:

> For the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

Id. at 601-02.

Similarly, in Armstrong v. United States, 364 U.S. 40, 48 (1960), involving materialman's liens for materials delivered to a contractor for use in construction navy boats, the Court held that the government committed a taking when it took title to and possession of the vessels, because that made it impossible for the materialman to enforce their liens. Id. The Supreme Court explained that the "total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' . . ." Id. In other words, the lienholders had compensable property, but "[i]mmediately

afterwards, they had none." Id. "This was not because their property vanished into thin air," but rather because the value of the liens had been destroyed. Id.

Just like the liens in Armstrong, the value of Nationstar's lien has been purportedly destroyed and impermissibly taken. It is of no consequence that in Armstrong the government itself physically acquired the liened property at issue. A "takings analysis is not necessarily limited to outright acquisitions by the government itself." Sec. Indus. Bank, 459 U.S. at 77-78 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)). "[S]imply impos[ing] a general economic regulation," which "in effect transfers the property interest from a private creditor to a private debtor" constitutes a governmental taking. 459 U.S. at 78.

NRS Chapter 116 is a direct product of government conduct and regulation. The government has not only created a statutory lien for associations but has elevated the lien over first in time deeds of trust. This lien was designed for public use in support of common interest communities for the maintenance of common areas and units within the community. The government further has created the "opt-in" or fast and loose statutory foreclosure scheme which associations can use to extinguish other prior lienholders without justly compensating them. The foreclosure provisions of NRS Chapter 116 constitute a taking in violation of the U.S. and Nevada Constitutions. Therefore, the Court cannot allow Plaintiff to take free and clear title of Nationstar's first Deed of Trust.

K. THE SFR DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO PERMIT EXTINGUISHMENT OF NATIONSTAR'S DEED OF TRUST.

The SFR decision was issued September 18, 2014, displacing over 20 years of practice with respect to the relationship of first deeds of trust to HOA assessment liens. The decision should not be applied retroactively to permit extinguishment of Nationstar's Deed of Trust.

In Chevron Oil Co. v. Hudson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971), the U.S. Supreme Court expanded the application of the doctrine of nonretroactivity outside the criminal area, in both constitutional and nonconstitutional cases. The Court noted

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, (citation omitted) or by deciding an issue of first impression whose resolution

> was not clearly foreshadowed (citation omitted). Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." (Citation omitted.) Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the `injustice or hardship' by a holding of nonretroactivity." (Citation omitted.)

In this case, SFR should be applied prospectively only, for it establishes a new principle of law by overruling clear past precedent on which litigants may have relied and by deciding an issue of first impression whose resolution was not clearly foreshadowed. Weighing the merits and demerits by looking to the prior history of NRS 116.3116 et seq., in general, and NRS 116.3116(2), in particular, its purpose and effect, favors prospective application only.

There is ample basis for avoiding the injustice or hardship by a holding of non-retroactivity:

- For nearly two decades, homeowner's associations and first mortgagees jointly believed that the first mortgage survived the homeowner's association's non-judicial foreclosure – as evidenced by many CC&Rs providing "mortgagee protection clauses" to this day. What happens to older sales now? Does the purchaser at a homeowner's association sale in 1993 now hold title or does the person who bought the same property from the foreclosing first mortgagee? Large numbers of properties sold at homeowner's association non-judicial sales over the last couple of decades could now be tied up in title disputes. Applying the SFR decision prospectively and requiring judicial foreclosure to establish their super-priority status for past liens will eliminate this risk.

- The SFR decision must however be viewed in accordance with the Official Comments to UCIOA § 3-116 (1982): "[T]he 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and *the obvious necessity for protecting the priority of the security interests of lenders*." (Emphasis added.) By initially adopting UCIOA (1982), the Legislature implicitly recognized this equitable balance. The Majority abandoned the balance and advanced only the interests of the homeowner's association – and more particularly, the interests of the investors or speculators like Plaintiff. To restore the balance, the Court should adopt

prospective application, requiring the homeowner's association to judicially foreclose to establish a super-priority, for all loans and deeds of trust executed prior to September 18, 2014.

- Applying the SFR decision retroactively creates administration problems under NRS 116.31164(3)(c) avoided by judicial foreclosure to establish the super-priority for past liens. That statute does not account for the fact that the liens may include super-priority and sub-priority portions and provides for reimbursement of expenses which do not enjoy super-priority under NRS 116.3116(2)(c), before satisfaction of the first mortgage. Prospective application avoids both these problems since a non-judicial sale for past liens would not trigger the super-priority and the entire homeowner's association lien would be superior to all lienholders subordinate to the first mortgage so all the expenses are properly recoverable against them.
- While the SFR decision accepted as true the allegation in the complaint that that homeowner's association gave all statutory notices, many homeowner's associations did not give those notices and are exposed to enormous liability to the first mortgagees whose interests would be extinguished by prior sales, likely to exceed the E&O insurance carried by the homeowner's associations.
- Applying the SFR decision retroactively creates problems due to the lack of guidance whether the homeowner's association must provide the 9-month amount and accept the amount from the mortgagee in every instance. The lack of guidance puts the burden on homeowner's associations to choose whether to give notice, give the 9-month quote, and accept the 9-month payoff. Applying retroactively exposes homeowner's associations who choose wrong to significant liability for wrongfully foreclosing out the first mortgagee's interest, as well as the cost of defending those suits. Applying the SFR decision prospectively such that the past liens require judicial foreclosure to establish super-priority will rescue them from liability if they did not give notice of its sale to the first mortgagee or provide it with or accept the 9-month payoff amount.
- Applying the SFR decision retroactively eliminates the important borrower protections

designed to help borrowers stay in their homes under the Foreclosure Mediation Program, Homeowner Bill of Rights ("HOBR") and CFPB[24] regulations, with which the homeowner's associations need not comply. Applying retroactively undermines the intent of these rules by allowing a homeowner's association to foreclose ahead of a deed of trust and eliminate the very thing the lender is working with the borrower to preserve.

- Applying the SFR decision prospectively will permit the lenders to establish and manage "an escrow account, loan trust account or other impound account for advance contributions for the payment of assessments" created upon the adoption of NRS 116.3116(3), effective October 1, 2013.

These reasons mandate application of the SFR decision prospectively only: For past liens, there could be no super-priority without a judicial foreclosure action and there could be no extinguishment of the first Deed of Trust. For future liens, the homeowner's associations, the lenders and the borrowers and the buyers are all apprised of the effects of the assessment lien and enforcement through non-judicial foreclosure and can plan accordingly. Prospective application avoids the horrific impact that the retroactive application of the SFR decision would likely have on borrowers, HOAs, property values and sales, first mortgagees, the courts, investors, and new loan originations in Nevada.

L. NATIONSTAR REQUESTS LEAVE TO CONDUCT DISCOVERY AS THERE ARE MATERIAL ISSUES OF FACT.

Plaintiff has called its motion simply a motion to dismiss, which means the Court must generally take all allegations of the Counterclaim as true and view them in the light most favorable to the non-moving party. To the extent that motion however presents new "matters outside the pleading..., the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." N.R.C.P. 12(b). Taking the allegations of

---

[24] 12 C.F.R. 1024.41(f), concerning "dual-tracking," prohibits a servicer from making the first notice or filing required for a foreclosure process until a mortgage loan account is more than 120 days delinquent.

the Counterclaim as true, the Court must deny the Motion to Dismiss, as Nationstar has demonstrated "claim[s] upon which relief can be granted." N.R.C.P. 12(b)(5). The only way Plaintiff could prevail is to go beyond the allegations and present evidence that all the notices were given to Nationstar and tender was refused, among other things. Therefore, to the extent these matters are considered by the Court, the motion must be treated as a motion for summary judgment. The motion must therefore stand up to the legal standard for summary judgments, and Nationstar may oppose the motion as if it were a motion for summary judgment. In other words, Nationstar, as a party defending a motion for summary judgment, must be given a reasonable opportunity to complete discovery to show a genuine issue of material fact. See Ottenheimer v. Real Estate Div. of Nev. Dept. of Commerce, 91 Nev. 338, 535 P.2d 1284 (1975); Harrison v. Falcon Products, Inc., 103 Nev. 558, 746 P.2d 642 (1987). A court may, in its discretion, refuse to grant summary judgment if the motion is made at the early stage of discovery because further development is needed to assist with a decision. See Collins v. Union Federal Sav. & Loans Ass'n, 99 Nev. 284, fn. 8, 662 P.2d 610 (1983) citing 10 Wright & Miller, Federal Practice & Procedure: Civil § 2728 at 558 (1978).

Nationstar requests leave to conduct discovery. A 16.1 conference has just been conducted in this case. The documents and correspondence of the HOA and its foreclosure trustee Leach Johnson have not been produced, nor have the depositions of their Rule 30(b)(6) designees been taken to clarify the content of the documents and to address material, disputed facts in this matter. These documents bear on the issue of the nature and sufficiency of notice and compliance with all statutory requirements for a non-judicial foreclosure sale. What was the amount of the lien? Were only permissible items sought in the lien? Were the foreclosure notices sent by certified mail to Nationstar or its agents, servicers or trustees? Was Nationstar or its agents, servicers or trustees given notice that the Deed of Trust could be extinguished by the HOA Sale? Was Nationstar or its agents, servicers or trustees given notice that they had a right to cure the deficiency and prevent the HOA Sale? These are just some of the unanswered questions of material fact discovery would explore.

In any event, the discovery still needed in this case includes requests for admissions,

interrogatories, requests for production to Leach Johnson and the HOA followed by depositions of the same parties. Plaintiff obviously is the one with knowledge as to what notices it had as to the HOA sale and what knowledge it had as to any super-priority lien. It is also within its knowledge as to whether publicly recorded documents were reviewed and whether Plaintiff contacted a title company regarding the insurability of title before and after the HOA sale. Also, it is within Plaintiff's knowledge as to what communications it had with the HOA and any of the other bidders or investors about the HOA sale and the policy and procedures regarding handling of a super-priority lien. These issues of fact are all relevant to prove or disprove Plaintiff's status as bona fide purchaser and the commercial reasonableness of the HOA sale. Finally, Plaintiff has knowledge as to how it has been using the property (e.g. lease/renting) which is relevant to Nationstar's unjust enrichment claim.

Similarly, discovery is needed as to Leach Johnson and the HOA and its policies and procedures for handling super-priority liens and payments; and the time, manner and place of the HOA sale including what notices were sent, published and posted, and how many bidders were at the HOA sale. An accounting of the amounts stated in the Notices of Delinquent Assessment, Notice of Default, Notice of Sale, and Foreclosure Deed is needed. Additionally, the disposition of the funds allegedly paid for the Property, and the commercial reasonableness of the sale also warrant investigation. Finally, if necessary, Nationstar would use an expert to opine and testify regarding the value of the Property at the time of the HOA sale in support of its commercial unreasonableness claim.

V. CONCLUSION

Based on the above, Plaintiff's Motion to Dismiss should be denied and Nationstar's Countermotion for Summary Judgment should be granted. In the alternative, Nationstar's Countermotion for Continuance should be granted to permit discovery to oppose Plaintiff's Motion to Dismiss.

DATED this 20th day of April, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant/Counterclaimant, Nationstar Mortgage, LLC

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **NATIONSTAR'S OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND, IN THE ALTERNATIVE, MOTION FOR CONTINUANCE, AND ITS COUNTERMOTION FOR SUMMARY JUDGMENT** filed in Case No. A-13-689240-C **does not** contain the social security number of any person.

DATED this 2nd day of April, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant/Counterclaimant, Nationstar Mortgage, LLC

CERTIFICATE OF SERVICE

I HERBY CERTIFY that I am an employee of WRIGHT, FINLAY & ZAK, LLP; that service of the foregoing **NATIONSTAR'S OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND, IN THE ALTERNATIVE, MOTION FOR CONTINUANCE, AND ITS COUNTERMOTION FOR SUMMARY JUDGMENT** was made on the 20 day of April, 2015, by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

Michael F. Bohn, Esq.
Law Offices of Michael F. Bohn, Esq. Ltd.
376 East Warm Springs Road, Suite 125
Las Vegas, NV 89119

An Employee of WRIGHT, FINLAY & ZAK, LLP

Exhibit 1

Exhibit 1

Exhibit 1

200003 07
.00911

APN: 163-19-310-013

WHEN RECORDED, RETURN TO:

WILBUR M. ROADHOUSE, ESQ.
Gould Patterson DeVore Ales & Roadhouse
4496 South Pecos Road
Las Vegas, Nevada 89121
(702) 436-2600

(Space Above Line for Recorder's Use Only)

DECLARATION
OF
COVENANTS, CONDITIONS AND RESTRICTIONS
AND RESERVATION OF EASEMENTS

FOR

NAPLES

(a Nevada Residential Common-Interest Planned Community)
CLARK COUNTY, NEVADA

TABLE OF CONTENTS

20000307
00911

DECLARATION
OF
COVENANTS, CONDITIONS AND RESTRICTIONS
AND RESERVATION OF EASEMENTS
FOR
NAPLES

THIS DECLARATION ("Declaration"), made as of the ___29"___ day of February, 2000, by PERMA-BILT a Nevada corporation ("Declarant").

WITNESSETH:

WHEREAS:

A Declarant owns certain real property located in Clark County, Nevada, on which Declarant intends to subdivide, develop, construct, market and sell a single family detached residential common-interest planned community, to be known as "NAPLES", and

B A portion of said property, as more particularly described in Exhibit "A" attached hereto, shall constitute the property initially covered by this Declaration ("Original Property"); and

C Declarant intends that, upon Recordation of this Declaration, the Original Property shall be a Nevada Common-Interest Community, as defined in NRS § 116.110323, and a Nevada Planned Community, as defined in NRS § 116.110368 ("Community"); and

D. The name of the Community shall be NAPLES, and the name of the Nevada nonprofit corporation organized in connection therewith shall be NAPLES HOMEOWNERS ASSOCIATION ("Association"); and

E. Declarant further reserves the right from time to time to add all or any portion of certain other real property, more particularly described in Exhibit "B" hereto ("Annexable Area"); and

F The total maximum number of Units that may (but need not) be created in the Community is two hundred and twelve (212) aggregate Units ("Units That May Be Created"); and

G Declarant intends to develop and convey all of the Original Property, and any Annexable Area which may be annexed from time to time thereto ("Annexed Property"), pursuant to a general plan and subject to certain protective covenants, conditions, restrictions, rights, reservations, easements, equitable servitudes, liens and charges; and

H. Declarant has deemed it desirable, for the efficient preservation of the value and amenities of the Original Property and any Annexed Property, to organize the Association, to which shall be delegated and assigned the powers of owning, maintaining and administering the Common Elements (as defined herein), administering and enforcing the covenants and restrictions, and collecting and disbursing the assessments and charges hereinafter created. Declarant will cause, or has caused, the Association to be formed for the purpose of exercising such functions; and

20060307
0511

I This Declaration is intended to set forth a dynamic and flexible plan for governance of the Community, and for the overall development, administration, maintenance and preservation of a unique residential community, in which the Owners enjoy a quality life style as "good neighbors".

NOW, THEREFORE Declarant hereby declares that all of the Original Property, and, from the date(s) of respective annexation, all Annexed Property (collectively, "Properties") shall be held, sold, conveyed, encumbered, hypothecated, leased, used, occupied and improved subject to the following protective covenants, conditions, restrictions, reservations, easements, equitable servitudes, liens and charges, all of which are for the purpose of uniformly enhancing and protecting the value, attractiveness and desirability of the Properties (as defined in Article 1 hereof), in furtherance of a general plan for the protection, maintenance, subdivision, improvement, sale, and lease, of the Properties or any portion thereof. The protective covenants, conditions, restrictions, reservations, easements, and equitable servitudes set forth herein shall run with and burden the Properties and shall be binding upon all Persons having or acquiring any right, title or interest in the Properties, or any part thereof, their heirs, successors and assigns; shall inure to the benefit of every portion of the Properties and any interest therein; and shall inure to the benefit of and be binding upon, and may be enforced by, Declarant, the Association, each Owner and their respective heirs, executors and administrators, and successive owners and assigns. All Units within this Community shall be used, improved and devoted limited exclusively to single Family residential use.

ARTICLE 1
DEFINITIONS

Section 1.1 "Annexable Area" shall mean the real property described in Exhibit "B" hereto, all or any portion of which real property may from time to time be made subject to this Declaration pursuant to the provisions of Article 15 hereof. At no time shall any portion of the Annexable Area be deemed to be a part of the Community or a part of the Properties until such portion of the Annexable Area has been duly annexed hereto pursuant to Article 15 hereof.

Section 1.2 "Annexed Property" shall mean any and all portion(s) of the Annexable Area from time to time added to the Properties covered by this Declaration, by Recordation of Annexation Amendment(s) pursuant to Article 15 hereof.

Section 1.3 "ARC" shall mean the Architectural Review Committee created pursuant to Article 8 hereof.

Section 1.4 "Articles" shall mean the Articles of Incorporation of the Association as filed or to be filed in the office of the Secretary of State of Nevada, as such Articles may be amended from time to time.

Section 1.5 "Assessments" shall refer collectively to Annual Assessments, and any applicable Capital Assessments and Special Assessments.

Section 1.6 "Assessment, Annual" shall mean the annual or supplemental charge against each Owner and his Unit, representing a portion of the Common Expenses, which are to be paid in equal periodic (monthly or quarterly, as determined from time to time by the Board)

installments commencing on the Assessment Commencement Date, by each Owner to the Association in the manner and proportions provided herein.

Section 1.7 "Assessment, Capital" shall mean a charge against each Owner and his Unit, representing a portion of the costs to the Association for installation, construction, or reconstruction of any Improvements on any portion of the Common Elements which the Association may from time to time authorize, pursuant to the provisions of this Declaration. Such charge shall be levied among all Owners and their Units in the same proportion as Annual Assessments.

Section 1.8 "Assessment, Special" shall mean a charge against a particular Owner and his Unit, directly attributable to, or reimbursable by, that Owner, equal to the cost incurred by the Association for corrective action, performed pursuant to the provisions of this Declaration, or a reasonable fine or penalty assessed by the Association, plus interest and other charges on such Special Assessments as provided for herein.

Section 1.9 "Assessment Commencement Date" shall mean that date, pursuant to Section 6.7 hereof, duly established by the Board, on which Annual Assessments shall commence.

Section 1.10 "Association" shall mean NAPLES HOMEOWNERS ASSOCIATION, a Nevada nonprofit corporation, its successors and assigns

Section 1.11 "Association Funds" shall mean the accounts created for receipts and disbursements of the Association, pursuant to Article 6 hereof.

Section 1.12 "Beneficiary" shall mean a Mortgagee under a Mortgage or a beneficiary under a Deed of Trust, as the case may be, and the assignees of such mortgagee or beneficiary.

Section 1.13 "Board" or "Board of Directors" shall mean the Board of Directors of the Association The Board of Directors is an "Executive Board" as defined by NRS § 116.110345.

Section 1.14 "Budget" shall mean a written, itemized estimate of the expenses to be incurred by the Association in performing its functions under this Declaration, prepared and approved pursuant to the provisions of this Declaration.

Section 1.15 "Bylaws" shall mean the Bylaws of the Association which have or will be adopted by the Board, as such Bylaws may be amended from time to time.

Section 1.16 "Close of Escrow" shall mean the date on which a deed is Recorded conveying a Unit from Declarant to a Purchaser.

Section 1.17 "Common Elements" shall mean all real property or interests therein (and any personal property) owned or leased by the Association, but shall exclude Units (other than easements on portions thereof), as provided in NRS § 116.110318. Common Elements shall include all real property in the Community (other than Units), including, but not necessarily limited to, all real property designated on the Plat as "Private Landscape Easement", "Private Drainage Easement"; "Public Utility Easement," or "Private Street and Public Utility Easement," and any Improvements respectively thereon, as "Common Elements" on the Plat, and Improvements thereon. Without limiting the generality of the foregoing, Common Elements shall include private entry gates and entry monumentation, emergency access easements, utility easements, private

streets, street lights, curbs and gutters, sidewalks and walkways (all of which may be located on easements over portions of Lots), Common Element landscaping, and designated drainage and sewer easement areas, all or some of which are or may be located on easements over portions of Lots) Without limiting the foregoing, Declarant reserves the right, but not the obligation, in Declarant's sole discretion, to develop and include a common recreational area within the Community (which may include, but not necessarily be limited to, a tot lot, park, and/or pool) as a part of the Common Elements of this Community, as set forth in further detail in Article 14, below.

Section 1.18 "Common Expenses" shall mean expenditures made by, or financial liabilities of, the Association, together with any allocations to reserves, including the actual and estimated costs of: maintenance, insurance, management, operation, repair and replacement of the Common Elements; painting over or removing graffiti on the exterior side of perimeter walls, pursuant to Section 9 10 **[Article 9 only has 8 sections]** below, unpaid Special Assessments, or Capital Assessments; costs of any commonly metered utilities and other commonly metered charges for the Properties; costs of management and administration of the Association including, but not limited to, compensation paid by the Association to Managers, accountants, attorneys and employees; costs of all utilities, gardening, trash pickup and disposal, and other services benefiting the Common Elements, costs of fire, casualty and liability insurance, workers' compensation insurance, and any other insurance covering the Common Elements or Properties or deemed prudent and necessary by the Board; costs of bonding the Board, Officers, any Managers, or any other Person handling the funds of the Association; any statutorily required "ombudsman" fees; taxes paid by the Association; amounts paid by the Association for discharge of any lien or encumbrance levied against the Common Elements or Properties, or portions thereof; costs of any other item or items incurred by the Association for any reason whatsoever in connection with the Properties, for the benefit of the Owners; prudent reserves; and any other expenses for which the Association is responsible pursuant to this Declaration or pursuant to any applicable provision of NRS Chapter 116

Section 1.19 "Community" shall mean a Common-Interest Community, as defined in NRS § 116.110323, and a Planned Community, as defined in NRS § 116.110368.

Section 1 20 "County" shall mean the county in which the Properties are located (i.e., Clark County, Nevada).

Section 1.21 "Declarant" shall mean PERMA-BILT, a Nevada corporation, and its successors and any Person(s) to which it shall have assigned any rights hereunder by express written and Recorded assignment (but specifically excluding Purchasers as defined in NRS § 116 110375).

Section 1 22 "Declaration" shall mean this instrument as it may be amended from time to time

Section 1 23 "Deed of Trust" shall mean a mortgage or a deed of trust, as the case may be.

Section 1 24 "Director" shall mean a duly appointed or elected and current member of the Board of Directors.

Section 1.25 "Dwelling" shall mean a residential building located on a Unit, designed and intended for use and occupancy as a residence by a single Family.

Section 1.26 "Eligible Holder" shall mean each Beneficiary, insurer and/or guarantor of a first Mortgage encumbering any Unit, which has filed with the Board a written request for notification as to relevant specified matters.

Section 1.27 "Exterior Wall(s)" shall mean the exterior only face of Perimeter Walls (visible from public streets or other areas outside of and generally abutting the exterior boundary of the Properties).

Section 1.28 "Family" shall mean (a) a group of natural persons related to each other by blood or legally related to each other by marriage or adoption, or (b) a group of natural persons not all so related, but who maintain a common household in a Dwelling, all as subject to and in compliance with all applicable federal and Nevada laws and local health codes and other applicable County ordinances.

Section 1.29 "FHA" shall mean the Federal Housing Administration.

Section 1.30 "FHLMC" shall mean the Federal Home Loan Mortgage Corporation (also known as The Mortgage Corporation) created by Title II of the Emergency Home Finance Act of 1970, and any successors to such corporations.

Section 1.31 "Fiscal Year" shall mean the twelve (12) month fiscal accounting and reporting period of the Association selected from time to time by the Board.

Section 1.32 "FNMA" shall mean the Federal National Mortgage Association, a government-sponsored private corporation established pursuant to Title VIII of the Housing and Urban Development Act of 1968, and any successors to such corporation.

Section 1.33 "GNMA" shall mean the Government National Mortgage Association administered by the United States Department of Housing and Urban Development, and any successors to such association.

Section 1.34 "Governing Documents" shall mean the Declaration, Articles, Bylaws, Plat, and any Rules and Regulations. Any inconsistency among the Governing Documents shall be governed pursuant to Section 17.12 below.

Section 1.35 "Identifying Number", pursuant to NRS § 116.110348, shall mean the number which identifies a Unit on the Plat.

Section 1.36 "Improvement" shall mean any structure or appurtenance thereto of every type and kind, whether above or below the land surface, placed in the Properties, including but not limited to Dwellings and other buildings, walkways, waterways, sprinkler pipes, swimming pools, spas and other recreational facilities, carports, garages, roads, driveways, parking areas, walls, perimeter walls, party walls, fences, screening walls, block walls, retaining walls, stairs, decks, landscaping, antennae, hedges, windbreaks, patio covers, railings, plantings, planted trees and shrubs, poles, signs, storage areas, exterior air conditioning and water-softener fixtures or equipment.

Section 1.37 "Lot" shall mean the residential real property of any residential lot to be owned separately by an Owner, as shown on the Plat (subject to Common Element easements over Lots as shown on the Plat, including, but not limited to, Private Street easements). Notwithstanding the foregoing, in the event that certain Lots, shown as such on the Plat, are expressly designated by Declarant, in its sole and absolute discretion, by separate Recorded instrument to constitute Common Elements (such as, for example, a common recreational area), pursuant to Declarant's reserved rights as set forth in Article 14 below, then such specifically designated Lots shall not be Lots for purposes of this Declaration and the other Governing Documents, but shall be conclusively deemed a portion of the Common Elements.

Section 1.38 "Manager" shall mean the Person, if any, whether an employee or independent contractor, appointed by the Association and delegated the authority to implement certain duties, powers or functions of the Association as further provided in this Declaration and in the Bylaws.

Section 1.39 "Member," "Membership." "Member" shall mean any Person holding a membership in the Association, as provided in this Declaration. "Membership" shall mean the property, voting and other rights and privileges of Members as provided herein, together with the correlative duties and obligations, including liability for Assessments, contained in the Governing Documents.

Section 1.40 "Mortgage," "Mortgagee," "Mortgagor." "Mortgage" shall mean any unreleased mortgage or deed of trust or other similar instrument of Record, given voluntarily by an Owner, encumbering his Unit to secure the performance of an obligation or the payment of a debt, which will be released and reconveyed upon the completion of such performance or payment of such debt. The term "Deed of Trust" or "Trust Deed" when used herein shall be synonymous with the term "Mortgage." "Mortgage" shall not include any judgment lien, mechanic's lien, tax lien, or other similarly involuntary lien on or encumbrance of a Unit. The term "Mortgagee" shall mean a Person to whom a Mortgage is made and shall include the beneficiary of a Deed of Trust. "Mortgagor" shall mean a Person who mortgages his Unit to another (i.e., the maker of a Mortgage), and shall include the trustor of a Deed of Trust. "Trustor" shall be synonymous with the term "Mortgagor;" and "Beneficiary" shall be synonymous with "Mortgagee."

Section 1.41 "Notice and Hearing" shall mean written notice and a hearing before the Board, at which the Owner concerned shall have an opportunity to be heard in person, or by counsel at Owner's expense, in the manner further provided in the Bylaws.

Section 1.42 "Officer" shall mean a duly elected or appointed and current officer of the Association.

Section 1.43 "Original Property" shall mean that real property described on Exhibit "A," attached hereto and incorporated by this reference herein, which shall be the initial real property made subject to this Declaration, immediately upon the Recordation of this Declaration.

Section 1.44 "Owner" shall mean the Person or Persons, including Declarant, holding fee simple interest of Record to any Unit. The term "Owner" shall include sellers under executory contracts of sale, but shall exclude Mortgagees.

Section 1.45 "Perimeter Walls" shall mean the walls, initially constructed by Declarant, and located generally around the exterior perimeter of the Properties.

Section 1.46 "Person" shall mean a natural individual, a corporation, or any other entity with the legal right to hold title to real property.

Section 1.47 "Plat" shall mean the final plat map of CONQUISTADOR/TOMPKINS - UNIT 1, Recorded on December 27, 1999, in Book 92 of Plats, Page 68, as said plat map from time to time may be amended or supplemented of Record by Declarant.

Section 1.48 "Private Streets" shall mean all private streets, rights of way, street scapes, and vehicular ingress and egress easements, in the Properties, shown as such on the Plat.

Section 1.49 "Properties" shall mean all of the Original Property described in Exhibit "A," attached hereto, together with such portions of the Annexable Area, described in Exhibit "B" hereto, as may from time to time hereafter be annexed thereto pursuant to Article 15 of this Declaration.

Section 1.50 "Purchaser" shall have that meaning as provided in NRS § 116.110375.

Section 1.51 "Record," "Recorded," "Filed" or "Recordation" shall mean, with respect to any document, the recordation of such document in the official records of the County Recorder of Clark County, Nevada.

Section 1.52 "Resident" shall mean any Owner, tenant, or other person who is physically residing in a Unit.

Section 1.53 "Rules and Regulations" shall mean the rules and regulations, if any, adopted by the Board pursuant to the Declaration and Bylaws, as such Rules and Regulations from time to time may be amended.

Section 1.54 "Sight Visibility Restriction Area" shall mean those areas, portions of which are or may be located on portions of Common Elements and/or Lots, identified on the Plat as "Sight Visibility Restriction Easements," in which the height of landscaping or other sight restricting Improvements shall be limited to 24 inches (or as otherwise set forth on the Plat).

Section 1.55 "Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plat), and shall include such Lot and all Improvements thereon (specifically including the portion of Perimeter Walls located on or within the Unit's boundaries, pursuant to Section 9.6, below). Subject to the foregoing, and subject to Section 9.5 below, the boundaries of each Unit shall be the property lines of the Lot, as shown on the Plat.

Section 1.56 "Units That May Be Created" shall mean the total "not to exceed" maximum number of aggregate Units within the Original Property and the Annexable Area (which Declarant has reserved the right, in its sole discretion, to create) (i.e., 212 Units).

Section 1.57 "VA" shall mean the U.S. Department of Veterans Affairs.

Any capitalized term not separately defined in this Declaration shall have the meaning ascribed thereto in applicable provision of NRS Chapter 116.

ARTICLE 2
OWNERS' PROPERTY RIGHTS

Section 2.1 Owners' Easements of Enjoyment. Each Owner shall have a nonexclusive right and easement of ingress and egress and of use and enjoyment in, to and over the Common Elements, which easement shall be appurtenant to and shall pass with title to the Owner's Unit, subject to the following:

(a) the right of the Association to reasonably limit the number of guests and tenants an Owner or his tenant may authorize to use the Common Elements;

(b) the right of the Association to establish uniform Rules and Regulations pertaining to the use of the Common Elements;

(c) the right of the Association in accordance with the Declaration, Articles and Bylaws, with the vote of at least two-thirds (2/3) of the voting power of the Association and a majority of the voting power of the Board, to borrow money for the purpose of improving or adding to the Common Elements, and in aid thereof, and further subject to the Mortgagee protection provisions of Article 13 of this Declaration, to mortgage, pledge, deed in trust, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred, provided that the rights of such Mortgagee shall be subordinated to the rights of the Owners;

(d) subject to the voting and approval requirements set forth in Subsection 2.1(c) above, and the provisions of Article 13 below, the right of the Association to dedicate, release, alienate, transfer or grant easements, licenses, permits and rights of way in all or any portion of the Common Elements to any public agency, authority, utility or other Person for such purposes and subject to such conditions as may be agreed to by the Members;

(e) subject to the provisions of Article 14 hereof, the right of Declarant and its sales agents, representatives and prospective Purchasers, to the nonexclusive use of the Common Elements, without cost, for access, ingress, egress, use and enjoyment, in order to show and dispose of the Properties and/or any other development(s), until the last Close of Escrow for the marketing and/or sale of a Unit in the Properties or such other development(s); provided, however, that such use shall not unreasonably interfere with the rights of enjoyment of the other Owners as provided herein;

(f) the other easements, and rights and reservations of Declarant as set forth in Article 14 and elsewhere in this Declaration;

(g) the right of the Association (by action of the Board) to reconstruct, replace or refinish any Improvement or portion thereof upon the Common Elements in accordance with the original design, finish or standard of construction of such Improvement, or of the general Improvements within the Properties, as the case may be; and if not materially in accordance with such original design, finish or standard of construction only with the vote or written consent of the Owners holding seventy-five percent (75%) of the voting power of the Association, and the vote

or written consent of a majority of the voting power of the Board, and the approval of the Eligible Holders of fifty-one percent (51%) of the first Mortgages on Units in the Properties;

(h) the right of the Association, acting through the Board, to replace destroyed trees or other vegetation and to plant trees, shrubs and other ground cover upon any portion of the Common Elements,

(i) the right of the Association, acting through the Board, to place and maintain upon the Common Elements such signs as the Board reasonably may deem appropriate for the identification, marketing, advertisement, sale, use and/or regulation of the Properties or any other project of Declarant;

(j) the right of the Association, acting through the Board, to uniformly and reasonably restrict access to and use of portions of the Common Elements;

(k) the right of the Association, acting through the Board, to reasonably suspend voting rights and to impose fines as Special Assessments, and to suspend the right of an Owner or Resident to use Common Elements, for nonpayment of any regular or special Assessment levied by the Association against the Owner's Unit, or if an Owner or Resident is otherwise in breach of obligations imposed under the Governing Documents; and

(l) the obligations and covenants of Owners as set forth in Article 9 and elsewhere in this Declaration;

(m) the use restrictions set forth in Article 10 and elsewhere in this Declaration; and

(n) the easements reserved in Sections 2.2 through 2.7, inclusive, Article 14, and/or any other provision of this Declaration.

Section 2.2 Easements for Parking. Subject to the parking and vehicular restrictions set forth in Section 10.19 below, the Association, through the Board, is hereby empowered to establish "parking" and/or "no parking" areas within the Common Elements, and to establish Rules and Regulations governing such matters, as well as to enforce such parking rules and limitations by all means lawful for such enforcement on public streets, including the removal of any violating vehicle by those so empowered, at the expense of the Owner of the violating vehicle. If any temporary guest or recreational parking is permitted within the Common Elements, such parking shall be permitted only within any spaces and areas clearly marked or designated by the Board for such purpose.

Section 2.3 Easements for Vehicular and Pedestrian Traffic. In addition to the general easements for use of the Common Elements reserved herein, there shall be reserved to Declarant and all future Owners, and each of their respective agents, employees, guests, invitees and successors, nonexclusive, appurtenant easements for vehicular and pedestrian traffic over the private main entry gate areas and all Private Streets, and any walkways within the Common Elements, subject to parking provisions set forth in Section 2.2, above, and the use restrictions set forth in Article 10, below.

Section 2.4 Easement Right of Declarant Incident to Construction, Marketing and/or Sales Activities. An easement is reserved by and granted to Declarant, its successors and assigns, and their respective officers, managers, employees, agents, contractors, sales representatives, prospective purchasers of Units, guests and other invitees, for access, ingress, and egress over, in, upon, under, and across the Properties, including Common Elements, including but not limited to the right to store materials thereon and to make such other use thereof as may be reasonably necessary or incidental to Declarant's use, development, advertising, marketing and/or sales related to the Properties, or any portions thereof; provided, however, that no such rights or easements shall be exercised by Declarant in such a manner as to interfere unreasonably with the occupancy, use, enjoyment, or access by any Owner, his Family, guests, or invitees, to or of that Owner's Lot, or the Common Elements. The easement created pursuant to this Section 2.4 is subject to the time limit set forth in Section 14.1(a) below. Without limiting the generality of the foregoing, until such time as the Close of Escrow of the last Unit in the Properties, Declarant reserves the right to control entry gate(s) to the Properties, and neither the Association nor any one or more of the Owners shall at any time, without the prior written approval of Declarant in its discretion, cause any entry gate in the Properties to be closed during regular marketing or sales hours (including weekend sales hours) of Declarant, or shall in any other way impede or hinder Declarant's marketing or sales activities.

Section 2.5 Easements for Public Service Use. In addition to the foregoing easements over the Common Elements, there shall be and Declarant hereby reserves and covenants for itself and all future Owners within the Properties, easements for: (a) placement of any fire hydrants on portions of certain Lots and/or Common Elements, and other purposes regularly or normally related thereto; and (b) County, state, and federal public services, including but not limited to, the right of postal, law enforcement, and fire protection services and their respective employees and agents to enter upon any part of the Common Elements or any Lot for the purpose of carrying out their official duties.

Section 2.6 Easements for Water, Sewage, Utility, and Irrigation Purposes. In addition to the foregoing easements, there shall be and Declarant hereby reserves and covenants for itself and all future Owners within the Properties, easements for purposes of public and private utilities, power, telephone, cable TV, water, and gas lines and appurtenances (including but not limited to, the right of any public or private utility or mutual water and/or sewage district of ingress or egress over the Properties, including portions of Lots, for purposes of reading and maintaining meters, and using and maintaining any fire hydrants located on the Properties). Declarant further reserves and covenants for itself and the Association, and their respective agents, employees and contractors, easements over the Common Elements and all Lots, for the control, installation, maintenance, repair and replacement of water and/or sewage lines and systems for watering or irrigation of any landscaping on, and/or sewage disposal from or related to, Common Elements. In the event that any utility exceeds the scope of this or any other easement reserved in this Declaration, and causes damage to property, the Owner of such property shall pursue any resultant claim against the offending utility, and not against Declarant or the Association.

Section 2.7 Additional Reservation of Easements. Declarant hereby reserves for the benefit of each Owner and his Unit reciprocal, nonexclusive easements over the adjoining Unit(s) for the control, maintenance and repair of the utilities serving such Owner's Unit. Declarant further expressly reserves for the benefit of all of the real property in the Properties, and for the benefit of all of the Units, the Association and the Owners, reciprocal, nonexclusive easements over all Units and the Common Elements, for the control, installation, maintenance and repair of utility services

and drainage facilities serving any portion of the Properties (which may be located on portions of Lots, pursuant to the Plat), for drainage of water resulting from the normal use thereof or of adjoining Units or Common Elements, for the use, maintenance, repair and replacement of Private Streets and/or Perimeter Walls (subject to Section 9.6 below), and for any required customer service work and/or maintenance and repair of any Dwelling or other Improvement, wherever located in the Properties, and for compliance with Sight Visibility Restriction Area maximum permitted height requirements. In the event that any utility or governmental body exceeds the scope of any easement pertaining to the Properties, and thereby causes bodily injury or damage to property, the injured or damaged Owner or Resident shall pursue any and all resultant claims against the offending utility, and not against Declarant or the Association. In the event of any minor encroachment upon the Common Elements or Unit(s), as a result of initial construction or as a result of reconstruction, repair, shifting, settlement or movement of any portion of the Properties, a valid easement for minor encroachment and for the maintenance of the same shall exist so long as the minor encroachment exists. Declarant and each Owner of a Unit on which there is constructed a Dwelling along or adjacent to such Unit, shall have an easement appurtenant to such Unit, over such property line, to and over the adjacent Unit and/or adjacent Common Elements, for the purposes of accommodating any natural movement or settling of any Dwelling or other Improvement located on such Unit, any encroachment of such Improvement due to minor engineering or construction variances, and any encroachment of eaves, roof overhangs, patio walls and architectural features comprising parts of the original construction of such Improvement. Declarant further reserves (a) a nonexclusive easement on or over the Properties, and all portions thereof (including Common Elements and Units), for the benefit of Declarant and its agents and/or contractors, for any required warranty repairs, and (b) a nonexclusive easement on and over the Properties, and all portions thereof (including Common Elements and Units), for the benefit of the Association, and its agents, contractors, and/or any other authorized party, for the maintenance and/or repair of any and all landscaping and/or other improvements located on the Common Elements and/or Units

Section 2.8 Waiver of Use. No Owner may exempt himself from personal liability for assessments duly levied by the Association, nor release the Unit or other property owned by said Owner from the liens and charges hereof, by waiver of the use and enjoyment of the Common Elements or any Improvement thereon, or by abandonment of his Unit or any other property in the Properties.

Section 2.9 Easement Data. The Recording data for all easements and licenses reserved pursuant to the terms of this Declaration is the same as the Recording data for this Declaration. The Recording data for any easements and licenses created by the Plat is the same as the Recording data for the Plat.

Section 2.10 Owners' Right of Ingress and Egress. Each Owner shall have an unrestricted right of ingress and egress to his Unit reasonably over and across the Common Elements, which right shall be appurtenant to the Unit, and shall pass with any transfer of title to the Unit

Section 2.11 No Transfer of Interest in Common Elements. No Owner shall be entitled to sell, lease, encumber, or otherwise convey (whether voluntarily or involuntarily) his interest in any of the Common Elements, except in conjunction with conveyance of his Unit. No transfer of Common Elements, or any interest therein, shall deprive any Unit of its rights of access. Any attempted or purported transaction in violation of this provision shall be void and of no effect.

Section 2.12 Taxes. Each Owner shall execute such instruments and take such action as may reasonably be specified by the Association to obtain separate real estate tax assessment of each Unit. If any taxes or assessments of any Owner may, in the opinion of the Association, become a lien on the Common Elements, or any part thereof, they may be paid by the Association as a Common Expense or paid by the Association and levied against such Owner as a Special Assessment.

ARTICLE 3
NAPLES HOMEOWNERS ASSOCIATION

Section 3.1 Organization of Association. The Association is or shall be incorporated under the name of NAPLES HOMEOWNERS ASSOCIATION, or similar name, as a non-profit corporation under NRS §§ 81.410 through 81.540, inclusive. Upon dissolution of the Association, the assets of the Association shall be disposed of as set forth in the Governing Documents and in compliance with applicable Nevada law

Section 3.2 Duties, Powers and Rights. Duties, powers and rights of the Association are those set forth in this Declaration, the Articles and Bylaws, together with its general and implied powers as a non-profit corporation, generally to do any and all things that a corporation organized under the laws of the State of Nevada may lawfully do which are necessary or proper, in operating for the peace, health, comfort, safety and general welfare of its Members, including any applicable powers set forth in NRS § 116.3102, subject only to the limitations upon the exercise of such powers as are expressly set forth in the Governing Documents, or in any applicable provision of NRS Chapter 116. The Association shall make available for inspection at its office by any prospective purchaser of a Unit, any Owner, and the Beneficiaries, insurers and guarantors of the first Mortgage on any Unit, during regular business hours and upon reasonable advance notice, current copies of the Governing Documents, and all other books, records, and financial statements of the Association

Section 3.3 Membership. Each Owner, upon purchasing a Unit, shall automatically become a Member and shall remain a Member until such time as his ownership of the Unit ceases, at which time his membership in the Association shall automatically cease. Memberships shall not be assignable, except to the Person to which title to the Unit has been transferred, and each Membership shall be appurtenant to and may not be separated from the fee ownership of such Unit. Ownership of such Unit shall be the sole qualification for Membership, and shall be subject to the Governing Documents.

Section 3.4 Transfer of Membership. The Membership held by any Owner shall not be transferred, pledged or alienated in any way, except upon the sale or encumbrance of such Owner's Unit, and then only to the purchaser or Mortgagee of such Unit. Any attempt to make a prohibited transfer is void, and will not be reflected upon the books and records of the Association. An Owner who has sold his Unit to a contract purchaser under an agreement to purchase shall be entitled to delegate to such contract purchaser said Owner's Membership rights. Such delegation shall be in writing and shall be delivered to the Board before such contract purchaser may vote. However, the contract seller shall remain liable for all charges and assessments attributable to his Unit until fee title to the Unit sold is transferred. If any Owner should fail or refuse to transfer his Membership to the purchaser of such Unit upon transfer of fee title thereto, the Board shall have

the right to record the transfer upon the books of the Association. Until satisfactory evidence of such transfer (which may, but need not necessarily, be a copy of the Recorded deed of transfer) first has been presented to the reasonable satisfaction of the Board, the purchaser shall not be entitled to vote at meetings of the Association, unless the purchaser shall have a valid proxy from the seller of said Unit, pursuant to Section 4.6, below. The Association may levy a reasonable transfer fee against a new Owner and his Unit (which fee shall be added to the Annual Assessment chargeable to such new Owner) to reimburse the Association for the administrative cost of transferring the Membership to the new Owner on the records of the Association. The new Owner shall, if requested by the Board or Manager, timely attend an orientation to the Community and the Properties, conducted by an Association Officer or Manager, and will be required to pay any costs necessary to obtain entry gate keys and/or remote controls, if not obtained from the prior Owner at Close of Escrow

Section 3.5 Articles and Bylaws. The purposes and powers of the Association and the rights and obligations with respect to Owners as Members of the Association set forth in this Declaration may and shall be amplified by provisions of the Articles and Bylaws, including any reasonable provisions with respect to corporate matters; but in the event that any such provisions may be, at any time, inconsistent with any provisions of this Declaration, the provisions of this Declaration shall govern. The Bylaws shall provide:

(a) the number of Directors (subject to Section 3.6, below) and the titles of the Officers;

(b) for election by the Board of an Association president, treasurer, secretary and any other Officers specified by the Bylaws;

(c) the qualifications, powers and duties, terms of office and manner of electing and removing Directors and Officers, and filling vacancies;

(d) which, if any, respective powers the Board or Officers may delegate to other Persons or to a Manager;

(e) which of the Officers may prepare, execute, certify and record amendments to the Declaration on behalf of the Association;

(f) procedural rules for conducting meetings of the Association; and

(g) a method for amending the Bylaws.

Section 3.6 Board of Directors.

(a) The affairs of the Association shall be managed by a Board of not less than three (3), nor more than seven (7) Directors, all of whom (other than Directors appointed by Declarant pursuant to Section 3.7 below) must be Members of the Association. In accordance with the provisions of Section 3.7 below, upon the formation of the Association, Declarant shall appoint the Board, which shall initially consist of three (3) Directors. The number of Directors may be increased to five (5) or seven (7) by Declarant (during the Declarant Control Period), or by resolution of the Board, and otherwise may be changed by amendment of the Bylaws, provided that there shall not be less than any minimum number of Directors nor more than any maximum number

of Directors from time to time required by applicable Nevada law. The Board may act in all instances on behalf of the Association, except as otherwise may be provided in the Governing Documents or any applicable provision of NRS Chapter 116 or other applicable law. The Directors, in the performance of their duties, are fiduciaries, and are required to exercise the ordinary and reasonable care of directors of a corporation, subject to the business-judgment rule. Notwithstanding the foregoing, the Board may not act on behalf of the Association to amend the Declaration, to terminate the Community, or to elect Directors or determine their qualifications, powers and duties or terms of office, provided that the Board may fill vacancies in the Board for the unexpired portion of any term. Notwithstanding any provision of this Declaration or the Bylaws to the contrary, the Owners, by a two-thirds vote of all persons present and entitled to vote at any meeting of the Owners at which a quorum is present, may remove any Director with or without cause, other than a Director appointed by Declarant. If a Director is sued for liability for actions undertaken in his role as a Director, the Association shall indemnify him for his losses or claims, and shall undertake all costs of defense, unless and until it is proven that the Director acted with willful or wanton misfeasance or with gross negligence. After such proof, the Association is no longer liable for the costs of defense, and may recover, from the Director who so acted, costs already expended Directors are not personally liable to the victims of crimes occurring within the Properties Punitive damages may not be recovered against Declarant or the Association, subject to applicable Nevada law. An officer, employee, agent or director of a corporate Owner, a trustee or designated beneficiary of a trust that owns a Unit, a partner of a partnership that owns a Unit, or a fiduciary of an estate that owns a Unit, may be an Officer or Director. In every event where the person serving or offering to serve as an Officer or Director is a record Owner, he shall file proof of authority in the records of the Association. No Director shall be entitled to delegate his or her vote on the Board, as a Director, to any other Director or any other Person; and any such attempted delegation of a Director's vote shall be void. Each Director shall serve in office until the appointment (or election, as applicable) of his successor.

(b) The term of office of a Director shall not exceed two (2) years. A Director may be elected to succeed himself. Following the Declarant Control Period, elections for Directors (whose terms are expiring) must be held at the Annual Meeting, as set forth in Section 4.3 below.

(c) A quorum is deemed present throughout any Board meeting if Directors entitled to cast fifty percent (50%) of the votes on that Board are present at the beginning of the meeting

Section 3.7 Declarant's Control of the Board. During the period of Declarant's control ("Declarant Control Period"), as set forth below, Declarant at any time, with or without cause, may remove or replace any Director appointed by Declarant. Directors appointed by Declarant need not be Owners Declarant shall have the right to appoint and remove the Directors, subject to the following limitations.

(a) Not later than sixty (60) days after conveyance from Declarant to Purchasers of twenty-five percent (25%) of the Units That May Be Created, at least one Director and not less than twenty-five percent (25%) of the total Directors must be elected by Owners other than Declarant.

(b) Not later than sixty (60) days after conveyance from Declarant to Purchasers of fifty percent (50%) of the Units That May Be Created, not less than one-third of the total Directors must be elected by Owners other than Declarant.

(c) The Declarant Control Period shall terminate on the earliest of: (i) sixty (60) days after conveyance from Declarant to Purchasers of seventy-five percent (75%) of the Units That May Be Created, (ii) five years after Declarant has ceased to offer any Units for sale in the ordinary course of business, or (iii) five years after any right to annex any portion of the Annexable Area was last exercised pursuant to Article 15 hereof.

Section 3.8 Control of Board by Owners. Subject to and following the Declarant Control Period (a) the Owners shall elect a Board of at least three (3) Directors, and (b) the Board may fill vacancies in its membership (e.g., due to death or resignation of a Director), subject to the right of the Owners to elect a replacement Director, for the unexpired portion of any term. After the Declarant Control Period, all of the Directors must be Owners, and each Director shall, within thirty (30) days of his appointment or election, certify in writing that he is an Owner and has read and reasonably understands the Governing Documents and applicable provisions of NRS Chapter 116 to the best of his or her ability. The Board shall elect the Officers, all of whom (after the Declarant Control Period) must be Owners and Directors. The Owners, upon a two-thirds (2/3) affirmative vote of all Owners present and entitled to vote at any Owners' meeting at which a quorum is present, may remove any Director(s) with or without cause; provided, however that any Director(s) appointed by Declarant may only be removed by Declarant.

Section 3.9 Election of Directors. Not less than thirty (30) days before the preparation of a ballot for the election of Directors, which shall normally be conducted at an Annual Meeting, the Association Secretary or other designated Officer shall cause notice to be given to each Owner of his eligibility to serve as a Director. Each Owner who is qualified to serve as a Director may have his name placed on the ballot along with the names of the nominees selected by the Board or a nominating committee established by the Board. The election of any Director must be conducted by secret written ballot. The Association Secretary or other designated Officer shall cause to be sent prepaid by United States mail to the mailing address of each Unit within the Community or to any other mailing address designated in writing by the Unit Owner, owner, a secret ballot and a return envelope. Election of Directors must be conducted by secret written ballot, with the vote publicly counted (which may be done as the meeting progresses).

Section 3.10 Board Meetings.

(a) A Board meeting must be held at least once every 90 days. Except in an emergency, the Secretary or other designated Officer shall, not less than 10 days before the date of a Board meeting, cause notice of the meeting to be given to the Owners. Such notice must be: (1) sent prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by the Owner; or (2) published in a newsletter or other similar publication circulated to each Owner. In an emergency, the Secretary or other designated Officer shall, if practicable, cause notice of the meeting to be sent prepaid by United States mail to the mailing address of each Unit. If delivery of the notice in this manner is impracticable, the notice must be hand-delivered to each Unit within the Community or posted in a prominent place or places within the Common Elements.

(b) As used in this Section 3.10, "emergency" means any occurrence or combination of occurrences that: (1) could not have been reasonably foreseen; (2) affects the health, welfare and safety of the Owners; (3) requires the immediate attention of, and possible

action by, the Board, and (4) makes it impracticable to comply with regular notice and/or agenda provisions.

(c) The notice of the Board meeting must state the time and place of the meeting and include a copy of the agenda for the meeting (or the date on which and the locations where copies of the agenda may be conveniently obtained by Owners). The notice must include notification of the right of an Owner to: (1) have a copy of the minutes or a summary of the minutes of the meeting distributed to him upon request (and, if required by the Board, upon payment to the Association of the cost of making the distribution), and (2) speak to the Association or Board, unless the Board is meeting in Executive Session.

(d) The agenda of the Board meeting must comply with the provisions of NRS § 116.3108.3. The period required to be devoted to comments by Owners and discussion of those comments must be scheduled for the beginning of each meeting. In an emergency, the Board may take action on an item which is not listed on the agenda as an item on which action may be taken.

(e) At least once every 90 days, the Board shall review at one of its meetings: (1) a current reconciliation of the Operating Fund (as defined in Section 6.2 below); (2) a current reconciliation of the Reserve Fund (as defined in Section 6.2 below); (3) the actual revenues and expenses for the Reserve Fund, compared to the Reserve Budget for the current year; (4) the latest account statements prepared by the financial institutions in which the accounts of the Association are maintained; (5) an income and expense statement, prepared on at least a quarterly basis, for the Operating Fund and Reserve Fund; and (6) the current status of any civil action or claim submitted to arbitration or mediation in which the Association is a party.

(f) The minutes of a Board meeting must be made available to Owners in accordance with NRS § 116.3108.5.

Section 3.11 Attendance by Owners at Board Meetings; Executive Sessions. Owners are entitled to attend any meeting of the Board (except for Executive Sessions) and may speak at such meeting, provided that the Board may establish reasonable procedures and reasonable limitations on the time an Owner may speak at such meeting. The period required to be devoted to comments by Owners and discussion of those comments must be scheduled for the beginning of each meeting. Owners may not attend or speak at an Executive Session, unless the Board specifically so permits. An "Executive Session" is an executive session of the Board (which may be a portion of a Board meeting), designated as such by the Board in advance, for the sole purpose of:

(a) consulting with an attorney for the Association on matters relating to proposed or pending litigation, if the contents of the discussion would otherwise be governed by the privilege set forth in NRS §§ 49.035 to 49.115, inclusive; or

(b) discussing Association personnel matters of a sensitive nature; or

(c) discussing any violation ("Alleged Violation") of the Governing Documents (including, without limitation, the failure to pay an Assessment) alleged to have been committed by an Owner ("Involved Owner") (provided that the Involved Owner shall be entitled to request in writing that such hearing be conducted by the Board in open meeting, and provided further that the Involved Owner may attend such hearing and testify concerning the Alleged Violation, but may be

excluded by the Board from any other portion of such hearing, including, without limitation, the Board's deliberation).

No other matter may be discussed in Executive Session. Any matter discussed in Executive Session must be generally described in the minutes of the Board meeting, provided that the Board shall maintain detailed minutes of the discussion of any Alleged Violation, and, upon request, shall provide a copy of said detailed minutes to the Involved Owner or his designated representative.

ARTICLE 4
VOTING RIGHTS

Section 4.1 Owners' Voting Rights. Subject to the following provisions of this Section 4.1, and to Section 4.6 below, each Member shall be entitled to cast one (1) vote for each Unit owned. In the event that more than one Person holds fee title to a Unit ("co-owners"), all such co-owners shall be one Member and may attend any meeting of the Association, but only one such co-owner shall be entitled to exercise the vote to which the Unit is entitled. Such co-owners may from time to time all designate in writing one of their number to vote. Fractional votes shall not be allowed. Where no voting co-owner is designated, or if such designation has been revoked, the vote for such Unit shall be exercised as the majority of the co-owners of the Unit mutually agree. No vote shall be cast for any Unit where the co-owners present in person or by proxy owning the majority interests in such Unit cannot agree to said vote or other action. The nonvoting co-owners shall be jointly and severally responsible for all of the obligations imposed upon the jointly owned Unit and shall be entitled to all other benefits of ownership. All agreements and determinations lawfully made by the Association in accordance with the voting percentages established herein, or in the Bylaws, shall be deemed to be binding on all Owners, their successors and assigns. Notwithstanding the foregoing, the voting rights of an Owner shall be automatically suspended during any time period that Annual Assessments or any Special Assessment levied against such Owner are delinquent

Section 4.2 Transfer of Voting Rights The right to vote may not be severed or separated from any Unit, and any sale, transfer or conveyance of fee interest in any Unit to a new Owner shall operate to transfer the appurtenant Membership and voting rights without the requirement of any express reference thereto. Each Owner shall, within ten (10) days of any sale, transfer or conveyance of a fee interest in the Owner's Unit, notify the Association in writing of such sale, transfer or conveyance, with the name and address of the transferee, the nature of the transfer and the Unit involved, and such other information relative to the transfer and the transferee as the Board may reasonably request, and shall deliver to the Association a copy of the Recorded deed therefor.

Section 4.3 Meetings of the Membership. Meetings of the Association must be held at least once each year, or as otherwise may be required by applicable law. The annual Association meeting shall be held on a recurring anniversary basis, and shall be referred to as the "Annual Meeting." The business conducted at each such Annual Meeting shall include the election of Directors whose terms are then expiring. If the Members have not held a meeting for one (1) year, a meeting of the Association Membership must be held by not later than the March 1 next following. A special meeting of the Association Membership may be called at any reasonable time and place by written request of: (a) the Association President, (b) a majority of the Directors, or (c) Members

representing at least ten percent (10%) of the voting power of the Association, or as otherwise may be required by applicable law. Notice of special meetings shall be given by the Secretary of the Association in the form and manner provided in Section 4.4, below.

Section 4.4 Meeting Notices; Agendas; Minutes. Meetings of the Members shall be held in the Properties or at such other convenient location near the Properties and within Clark County as may be designated in the notice of the meeting.

(a) Not less than ten (10) nor more than sixty (60) days in advance of any meeting, the Association Secretary shall cause notice to be hand delivered or sent postage prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by any Owner. The meeting notice must state the time and place of the meeting and include a copy of the agenda for the meeting. The notice must include notification of the right of an Owner to: have a copy of the minutes or a summary of the minutes of the meeting distributed to him upon request, if the Owner pays the Association the cost of making the distribution, and speak to the Association or Board (unless the Board is meeting in Executive Session).

(b) The meeting agenda must consist of:

(i) a clear and complete statement of the topics scheduled to be considered during the meeting, including, without limitation, any proposed amendment to any of the Governing Documents, any fees or assessments to be imposed or increased by the Association, any budgetary changes, and/or any proposal to remove an Officer or Director; and

(ii) a list describing the items on which action may be taken, and clearly denoting that action may be taken on those items ("Agenda Items"); and

(iii) a period devoted to comments by Owners and discussion of such comments, provided that, except in emergencies, no action may be taken upon a matter raised during this comment and discussion period unless the matter is an Agenda Item. If the matter is not an Agenda Item, it shall be tabled at the current meeting, and specifically included as an Agenda Item for discussion and consideration at the next following meeting, at which time, action may be taken thereon.

(c) In an "emergency" (as said term is defined in Section 3.10(b), above, Members may take action on an item which is not listed on the agenda as an item on which action may be taken.

(d) If the Association adopts a policy imposing a fine on an Owner for the violation of a provision of the Governing Documents, the Board shall prepare and cause to be hand-delivered or sent prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by the Owner thereof, a specific schedule of fines that may be imposed for those particular violations, at least thirty (30) days prior to any attempted enforcement, and otherwise subject to Section 17.1, below.

(e) Not more than thirty (30) days after any meeting, the Board shall cause the minutes or a summary of the minutes of the meeting to be made available to the Owners. A copy

of the minutes or a summary of the minutes must be provided to any Owner who pays the Association the cost of providing the copy.

Section 4.5 Record Date. The Board shall have the power to fix in advance a date as a record date for the purpose of determining Members entitled to notice of or to vote at any meeting or to be furnished with any Budget or other information or material, or in order to make a determination of Members for any purpose. Notwithstanding any provisions hereof to the contrary, the Members of record on any such record date shall be deemed the Members for such notice, vote, meeting, furnishing of information or material or other purpose and for any supplementary notice, or information or material with respect to the same matter and for an adjournment of the same meeting. A record date shall not be more than sixty (60) days nor less than ten (10) days prior to the date on which the particular action requiring determination of Members is proposed or expected to be taken or to occur.

Section 4.6 Proxies. Every Member entitled to attend, vote at, or exercise consents with respect to, any meeting of the Members, may do so either in person, or by a representative, known as a proxy, duly authorized by an instrument in writing, filed with the Board prior to the meeting to which the proxy is applicable. A Member may give a proxy only to a member of his immediate Family, a Resident tenant, or another Member. No proxy shall be valid after the conclusion of the meeting (including continuation of such meeting) for which the proxy was executed. Such powers of designation and revocation may be exercised by the legal guardian of any Member or by his conservator, or in the case of a minor having no guardian, by the parent legally entitled to permanent custody, or during the administration of any Member's estate where the interest in the Unit is subject to administration in the estate, by such Member's executor or administrator. Any form of proxy or written ballot shall afford an opportunity therein to specify a choice between approval and disapproval of each matter or group of related matters intended, at the time the written ballot or proxy is distributed, to be acted upon at the meeting for which the proxy or written ballot is solicited, and shall provide, subject to reasonably specified conditions, that where the person solicited specifies a choice with respect to any such matter, the vote shall be cast in accordance with such specification. Unless applicable Nevada law provides otherwise, a proxy is void if (a) it is not dated or purports to be revocable without notice; (b) it does not designate the votes that must be cast on behalf of the Member who executed the proxy; or (c) the holder of the proxy does not disclose at the beginning of the meeting (for which the proxy is executed) the number of proxies pursuant to which the proxy holder will be casting votes and the voting instructions received for each proxy. If and for so long as prohibited by Nevada law, a vote may not be cast pursuant to a proxy for the election of a Director.

Section 4.7 Quorums. The presence at any meeting of Members who hold votes equal to twenty percent (20%) of the total voting power of the Association, in person or by proxy, shall constitute a quorum for consideration of that matter. The Members present at a duly called meeting at which a quorum is present may continue to do business until adjournment, notwithstanding the withdrawal of enough Members to leave less than a quorum, if any action taken other than adjournment is approved by at least a majority of the Members required to constitute a quorum, unless a greater vote is required by applicable law or by this Declaration. If any meeting cannot be held because a quorum is not present, the Members present, either in person or by proxy, may, except as otherwise provided by law, adjourn the meeting to a time not less than five (5) days nor more than thirty (30) days from the time the original meeting was called, at which reconvened meeting the quorum requirement shall be the presence, in person or by written proxy, of the Members entitled to vote at least twenty percent (20%) of the total votes of the Association.

Notwithstanding the presence of a sufficient number of Owners to constitute a quorum, certain matters, including, without limitation, amendment to this Declaration, require a higher percentage (e g , 67%) of votes of the total voting Membership, as set forth in this Declaration.

Section 4 8 Actions If a quorum is present, the affirmative vote on any matter of the majority of the votes represented at the meeting (or, in the case of elections in which there are more than two (2) candidates, a plurality of the votes cast) shall be the act of the Members, unless the vote of a greater number is required by law or by this Declaration.

Section 4 9 Action By Written Consent, Without Meeting. Any action which may be taken at any regular or special meeting of the Members may be taken without a meeting and without prior notice, if authorized by a written consent setting forth the action so taken, signed by Members having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all Members were present and voted, and filed with the Association Secretary, provided, however, that Directors may not be elected by written consent except by unanimous written consent of all Members. Any Member giving a written consent, or such Member's proxy holder, may revoke any such consent by a writing received by the Association prior to the time that written consents of the number of Members required to authorize the proposed action have been filed with the Association Secretary, but may not do so thereafter. Such revocation shall be effective upon its receipt by the Association Secretary. Unless the consents of all Members have been solicited in writing and have been received, prompt notice shall be given, in the manner as for regular meetings of Members, to those Members who have not consented in writing, of the taking of any Association action approved by Members without a meeting Such notice shall be given at least ten (10) days before the consummation of the action authorized by such approval with respect to the following:

(a) approval of any reorganization of the Association;

(b) a proposal to approve a contract or other transaction between the Association and one or more Directors, or any corporation, firm or association in which one or more Directors has a material financial interest, or

(c) approval required by law for the indemnification of any person.

Section 4 10 Adjourned Meetings and Notice Thereof. Any Members' meeting, regular or special, whether or not a quorum is present, may be adjourned from time to time by a vote of a majority of the Members present either in person or by proxy thereat, but in the absence of a quorum, no other business may be transacted at any such meeting except as provided in Section 4.9. When any Members' meeting, either regular or special, is adjourned for seven (7) days or less, the time and place of the reconvened meeting shall be announced at the meeting at which the adjournment is taken. When any Members' meeting, either regular or special, is adjourned for more than seven (7) days, notice of the reconvened meeting shall be given to each Member as in the case of an original meeting. Except as aforesaid, it shall not be necessary to give any notice of an adjournment or of the business to be transacted at a reconvened meeting, and at the reconvened meeting the Members may transact any business that might have been transacted at the original meeting.

ARTICLE 5
FUNCTIONS OF ASSOCIATION

Section 5 1 Powers and Duties. The Association shall have all of the powers of a Nevada nonprofit corporation, subject only to such limitations, if any, upon the exercise of such powers as are expressly set forth in the Declaration, Articles and Bylaws. The Association shall have the power to perform any and all lawful acts which may be necessary or proper for, or incidental to, the exercise of any of the express powers of the Association. The Association's obligations to maintain the Common Elements shall commence on the date Annual Assessments commence on Units; until commencement of Annual Assessments, the Common Elements shall be maintained by Declarant, at Declarant's expense. Without in any way limiting the generality of the foregoing provisions, the Association may act through the Board, and shall have:

(a) Assessments. The power and duty to levy assessments against the Owners of Units, and to enforce payment of such assessments in accordance with the provisions of Article 6 hereof

(b) Repair and Maintenance of Common Elements. The power and duty to paint, plant, maintain and repair in a neat and attractive condition, in accordance with standards adopted by the ARC, all Common Elements and any Improvements thereon, and to pay for utilities, gardening, landscaping, and other necessary services for the Common Elements. Notwithstanding the foregoing, the Association shall have no responsibility to provide any of the services referred to in this subsection 5 1(b) with respect to any Improvement which is accepted for maintenance by any state, local or municipal governmental agency or public entity. Such responsibility shall be that respectively of the applicable agency or public entity.

(c) Removal of Graffiti. The power and duty to remove or paint over any graffiti from or on Exterior Walls, pursuant and subject to Section 9.6, below.

(d) Taxes. The power and duty to pay all taxes and assessments levied upon the Common Elements and all taxes and assessments payable by the Association.

(e) Utility Services. The power and duty to obtain, for the benefit of the Common Elements, any necessary commonly metered water, gas and electric services (or other similar services), and/or refuse collection, and the power but not the duty to provide for all refuse collection and cable or master television service, if any, for all or portions of the Properties.

(f) Easements and Rights-of-Way. The power but not the duty to grant and convey to any Person, (i) easements, licenses and rights-of-way in, on, over or under the Common Elements, and (ii) with the consent of seventy-five percent (75%) of the voting power of the Association, fee title to parcels or strips of land which comprise a portion of the Common Elements, for the purpose of constructing, erecting, operating or maintaining thereon, therein and thereunder: (A) roads, streets, walks, driveways, and slope areas; (B) overhead or underground lines, cables, wires, conduits, or other devices for the transmission of electricity for lighting, heating, power, television, telephone and other similar purposes; (C) sewers, storm and water drains and pipes, water systems, sprinkling systems, water, heating and gas lines or pipes; and, (D) any similar public or quasi-public improvements or facilities.

(g) Manager. The power, subject to Section 5.5, below, but not the duty to employ or contract with a professional Manager to perform all or any part of the duties and responsibilities of the Association, and the power but not the duty to delegate powers to committees, Officers and employees of the Association. Any such management agreement, or any agreement providing for services by Declarant to the Association, shall be for a term not in excess of one (1) year, subject to cancellation by the Association for cause at any time upon not less than thirty (30) days written notice, and without cause (and without penalty or the payment of a termination fee) at any time upon ninety (90) days written notice.

(h) Rights of Entry and Enforcement. The power but not the duty, after Notice and Hearing (except in the event of emergency which poses an imminent threat to health or substantial damage to property, in which event, Notice and Hearing shall not be required), to enter upon any area of a Unit, without being liable to any Owner, except for damage caused by the Association entering or acting in bad faith, for the purpose of enforcing by peaceful means the provisions of this Declaration, or for the purpose of maintaining or repairing any such area if for any reason whatsoever the Owner thereof fails to maintain and repair such area as required by this Declaration. All costs of any such maintenance and repair as described in the preceding sentence (including all amounts due for such work, and the costs and expenses of collection) shall be assessed against such Owner as a Special Assessment, and, if not paid timely when due, shall constitute an unpaid or delinquent assessment pursuant to Article 7, below. The responsible Owner shall pay promptly all amounts due for such work, and the costs and expenses of collection. Unless there exists an emergency, there shall be no entry into a Dwelling without the prior consent of the Owner thereof Any damage caused by an entry upon any Unit shall be repaired by the entering party Subject to Section 5 3, below, the Association may also commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of the Declaration and to enforce, by mandatory injunctions or otherwise, all of the provisions of the Declaration, and, if such action pertaining to the Declaration is brought by the Association, the prevailing party shall be entitled to reasonable attorneys' fees and costs to be fixed by the court.

(i) Other Services. The power and duty to maintain the integrity of the Common Elements and to provide such other services as may be necessary or proper to carry out the Association's obligations and business under the terms of this Declaration to enhance the enjoyment, or to facilitate the use, by the Members, of the Common Elements.

(j) Employees, Agents and Consultants. The power but not the duty, if deemed appropriate by the Board to hire and discharge employees and agents and to retain and pay for legal, accounting and other services as may be necessary or desirable in connection with the performance of any duties or exercise of any powers of the Association under this Declaration.

(k) Acquiring Property and Construction on Common Elements. The power but not the duty, by action of the Board, to acquire property or interests in property for the common benefit of Owners, including Improvements and personal property. The power but not the duty, by action of the Board, to construct new Improvements or additions to the Common Elements, or demolish existing Improvements (other than maintenance or repairs to existing Improvements).

(l) Contracts. The power, but not the duty, to enter into contracts with Owners to provide services or to maintain and repair Improvements within the Properties which the Association is not otherwise required to maintain pursuant to this Declaration, and the power, but not the duty, to contract with third parties for such services. Any such contract or service

agreement must, however, provide for payment to the Association of the cost of providing such service or maintenance.

(m) Records and Accounting. The power and the duty to keep, or cause to be kept, true and correct books and records of account at the sole cost and expense of the Association in accordance with generally accepted accounting principles. Financial statements for the Association shall be regularly prepared and distributed to all Members as follows:

(i) Pro forma operating statements (Budgets), Reserve Budgets, and Reserve Studies shall be distributed pursuant to Section 6.4, below;

(ii) Reviewed or audited Financial Statements (consisting of a reasonably detailed statement of revenues and expenses of the Association for each Fiscal Year, and a balance sheet showing the assets (including, but not limited to, Association Reserve Funds) and liabilities of the Association as at the end of each Fiscal Year) and a statement of cash flow for the Fiscal Year, shall be distributed within one hundred twenty (120) days after the close of each Fiscal Year.

(n) Maintenance of Other Areas. The power but not the duty to maintain and repair slopes, parkways, entry structures and Community signs identifying the Properties, to the extent deemed advisable by the Board.

(o) Use Restrictions. The power and the duty to enforce use restrictions pertaining to the Properties

(p) Insurances. The power and the duty to cause to be obtained and maintained the insurance coverages pursuant to Article 12, below.

(q) Licenses and Permits. The power and the duty to obtain from applicable governmental authority any and all licenses and permits reasonably necessary to carry out Association functions hereunder.

Section 5.2 Rules and Regulations. The Board shall be empowered to adopt, amend, repeal, and/or enforce reasonable and uniformly applied Rules and Regulations, which shall not discriminate among Members, for the use and occupancy of the Properties, as follows:

(a) General. A copy of the Rules and Regulations, as from time to time may be adopted, amended or repealed, shall be posted in a conspicuous place in the Common Elements and/or shall be mailed or otherwise delivered to each Member. Upon such mailing, delivery or posting, the Rules and Regulations shall have the same force and effect as if they were set forth herein and shall be binding on all Persons having any interest in, or making any use of any part of, the Properties, whether or not Members; provided, however, that the Rules and Regulations shall be enforceable only to the extent that they are consistent with the other Governing Documents. If any Person has actual knowledge of any of the Rules and Regulations, such Rules and Regulations shall be enforceable against such Person, whether or not a Member, as though notice of such Rules and Regulations had been given pursuant to this Section 5.2. The Rules and Regulations may not be used to amend any of the other Governing Documents.

(b) Limitations. The Rules and Regulations must be:

(i) reasonably related to the purpose for which adopted;

(ii) sufficiently explicit in their prohibition, direction, or limitation, so as to reasonably inform an Owner or Resident, or tenant or guest thereof, of any action or omission required for compliance;

(iii) adopted without intent to evade any obligation of the Association;

(iv) consistent with the other Governing Documents (and must not arbitrarily restrict conduct, or require the construction of any capital improvement by an Owner if not so required by the other Governing Documents);

(v) uniformly enforced under the same or similar circumstances against all Owners; provided that any particular rule not so uniformly enforced may not be enforced against any Owner (except as, and to the extent, if any, such enforcement may be permitted from time to time by applicable law); and

(vi) duly adopted and distributed to the Owners at least thirty (30) days prior to any attempted enforcement.

Section 5.3 Proceedings. The Association, acting through the Board, shall have the power and the duty to reasonably defend the Association (and, in connection therewith, to raise counterclaims) in any pending or potential lawsuit, arbitration, mediation or governmental proceeding (collectively hereinafter referred to as a "Proceeding"). The Association, acting through the Board, shall have the power, but not the duty, to reasonably institute, prosecute, maintain and/or intervene in a Proceeding, in its own name, but only on matters affecting or pertaining to this Declaration or the Common Elements and as to which the Association is a proper party in interest, and any exercise of such power shall be subject to full compliance with the following provisions:

(a) Any Proceeding commenced by the Association: (i) to enforce the payment of an assessment or an assessment lien or other lien against an Owner as provided for in this Declaration, or (ii) to otherwise enforce compliance with the Governing Documents by, or to obtain other relief from, any Owner who has violated any provision thereof, or (iii) to protect against any matter which imminently and substantially threatens all of the health, safety and welfare of the Owners, or (iv) against a supplier, vendor, contractor or provider of services, pursuant to a contract or purchase order with the Association and in the ordinary course of business, or (v) for money damages wherein the total amount in controversy for all matters arising in connection with the action is not likely to exceed Ten Thousand Dollars ($10,000.00) in the aggregate; shall be referred to herein as an "Operational Proceeding." The Board from time to time may cause an Operational Proceeding to be reasonably commenced and prosecuted, without the need for further authorization.

(b) Any and all pending or potential Proceedings other than Operational Proceedings shall be referred to herein as a "Non-Operational Controversy" or "Non-Operational Controversies." To protect the Association and the Owners from being subjected to potentially costly or prolonged Non-Operational Controversies without full disclosure, analysis and consent, to protect the Board and individual Directors from any charges of negligence, breach of fiduciary

duty, conflict of interest or acting in excess of their authority or in a manner not in the best interests of the Association and the Owners; and to ensure voluntary and well-informed consent and clear and express authorization by the Owners, strict compliance with all of the following provisions of this Section 5.3 shall be mandatory with regard to any and all Non-Operational Controversies commenced, instituted or maintained by the Board:

(i) The Board shall first endeavor to resolve any Non-Operational Controversy by good faith negotiations with the adverse party or parties. In the event that such good faith negotiations fail to reasonably resolve the Non-Operational Controversy, the Board shall then endeavor in good faith to resolve such Non-Operational Controversy by mediation, provided that the Board shall not incur liability for or spend more than Five Thousand Dollars ($5,000.00) in connection therewith (provided that, if more than said sum is reasonably required in connection with such mediation, then the Board shall be required first to reasonably seek approval of a majority of the voting power of the Members for such additional amount for mediation before proceeding to arbitration or litigation). In the event that the adverse party or parties refuse mediation, or if such good faith mediation still fails to reasonably resolve the Non-Operational Controversy, the Board shall not be authorized to commence, institute or maintain any arbitration or litigation of such Non-Operational Controversy until the Board has fully complied with the following procedures:

(1) The Board shall first investigate the legal merit, feasibility and expense of prosecuting the Non-Operational Controversy, by obtaining the written opinion of a licensed Nevada attorney regularly residing in Clark County, Nevada, with a Martindale-Hubbell rating of "av", expressly stating that such attorney has reviewed the underlying facts and data in sufficient, verifiable detail to render the opinion, and expressly opining that the Association has a substantial likelihood of prevailing on the merits with regard to the Non-Operational Controversy, without substantial likelihood of incurring any material liability with respect to any counterclaim which may be asserted against the Association. The Board shall be authorized to spend up to an aggregate of Five Thousand Dollars ($5,000.00) to obtain such legal opinion, including all amounts paid to said attorney therefor, and all amounts paid to any consultants, contractors and/or experts preparing or processing reports and/or information in connection therewith. The Board may increase said $5,000.00 limit, with the express consent of more than fifty percent (50%) of all of the Members of the Association, at a special meeting called for such purpose.

(2) Said attorney opinion letter shall also contain the attorney's best good faith estimate of the aggregate maximum "not-to-exceed" amount of legal fees and costs, including, without limitation, court costs, costs of investigation and all further reports or studies, costs of court reporters and transcripts, and costs of expert witnesses and forensic specialists (all collectively, "Quoted Litigation Costs") which are reasonably expected to be incurred for prosecution to completion (including appeal) of the Non-Operational Controversy. Said opinion letter shall also include a draft of any proposed fee agreement with such attorney. If the attorney's proposed fee arrangement is contingent, the Board shall nevertheless obtain the Quoted Litigation Costs with respect to all costs other than legal fees, and shall also obtain a written draft of the attorney's proposed contingent fee agreement. (Such written legal opinion, including the Quoted Litigation Costs, and also including any proposed fee agreement, contingent or non-contingent, are collectively referred to herein as the "Attorney Letter").

(3) Upon receipt and review of the Attorney Letter, if two-thirds (2/3) or more of the Board affirmatively vote to proceed with the institution or prosecution of, and/or intervention in, the Non-Operational Controversy, the Board thereupon shall duly notice and call

a special meeting of the Members. The written notice to each Member of the Association shall include a copy of the Attorney Letter, including the Quoted Litigation Costs and any proposed fee agreement, contingent or non-contingent, together with a written report ("Special Assessment Report") prepared by the Board: (A) itemizing the amount necessary to be assessed to each Member ("Special Litigation Assessment"), on a monthly basis, to fund the Quoted Litigation Costs, and (B) specifying the probable duration and aggregate amount of such Special Litigation Assessment. At said special meeting, following review of the Attorney Letter, Quoted Litigation Costs, and the Special Assessment Report, and full and frank discussion thereof, including balancing the desirability of instituting, prosecuting and/or intervening in the Non-Operational Controversy against the desirability of accepting any settlement proposals from the adversary party or parties, the Board shall call for a vote of the Members, whereupon: (x) if not more than fifty percent (50%) of the total voting power of the Association votes in favor of pursuing such Non-Operational Controversy and levying the Special Litigation Assessment, then the Non-Operational Controversy shall not be pursued further, but (y) if more than fifty percent (50%) of the total voting power of the Association (i.e., more than fifty percent (50%) of all of the Members of the Association) affirmatively vote in favor of pursuing such Non-Operational Controversy, and in favor of levying a Special Litigation Assessment on the Members in the amounts and for the duration set forth in the Special Assessment Report, then the Board shall be authorized to proceed to institute, prosecute, and/or intervene in the Non-Operational Controversy. In such event, the Board shall engage the attorney who gave the opinion and quote set forth in the Attorney Letter, which engagement shall be expressly subject to the Attorney Letter. The terms of such engagement shall require (i) that said attorney shall be responsible for all attorneys' fees and costs and expenses whatsoever in excess of one hundred twenty percent (120%) of the Quoted Litigation Costs, and (ii) that said attorney shall provide, and the Board shall distribute to the Members, not less frequently than quarterly, a written update of the progress and current status of, and the attorney's considered prognosis for, the Non-Operational Controversy, including any offers of settlement and/or settlement prospects, together with an itemized summary of attorneys fees and costs incurred to date in connection therewith.

(4) In the event of any bona fide settlement offer from the adverse party or parties in the Non-Operational Controversy, if the Association's attorney advises the Board that acceptance of the settlement offer would be reasonable under the circumstances, or would be in the best interests of the Association, or that said attorney no longer believes that the Association is assured of a substantial likelihood of prevailing on the merits without prospect of material liability on any counterclaim, then the Board shall have the authority to accept such settlement offer. In all other cases, the Board shall submit any settlement offer to the Owners, who shall have the right to accept any such settlement offer upon a majority vote of all of the Members of the Association.

(c) In no event shall any Association Reserve Fund be used as the source of funds to institute, prosecute, maintain and/or intervene in any Proceeding (including, but not limited to, any Non-Operational Controversy). Association Reserve Funds, pursuant to Section 6.3, below, are to be used only for the specified replacements, painting and repairs of Common Elements, and for no other purpose whatsoever.

(d) Any provision in this Declaration notwithstanding: (i) other than as set forth in this Section 5.3, the Association shall have no power whatsoever to institute, prosecute, maintain, or intervene in any Proceeding, (ii) any institution, prosecution, or maintenance of, or intervention in, a Proceeding by the Board without first strictly complying with, and thereafter continuing to comply with, each of the provisions of this Section 5.3, shall be unauthorized and ultra

vires (i.e., an unauthorized and unlawful act, beyond the scope of authority of the corporation or of the person(s) undertaking such act) as to the Association, and shall subject any Director who voted or acted in any manner to violate or avoid the provisions and/or requirements of this Section 5.3 to personal liability to the Association for all costs and liabilities incurred by reason of the unauthorized institution, prosecution, or maintenance of, or intervention in, the Proceeding; and (iii) this Section 5.3 may not be amended or deleted at any time without the express prior written approval of both (1) Members representing not less than seventy-five percent (75%) of the total voting power of Association, and (2) not less than seventy-five percent (75%) of the total voting power of the Board of Directors, and any purported amendment or deletion of this Section 5.3, or any portion hereof, without both of such express prior written approvals shall be void.

Section 5.4 Additional Express Limitations on Powers of Association. The Association shall not take any of the following actions except with the prior vote or written consent of a majority of the voting power of the Association:

(a) Incur aggregate expenditures for capital improvements to the Common Elements in any Fiscal Year in excess of five percent (5%) of the budgeted gross expenses of the Association for that Fiscal Year; or sell, during any Fiscal Year, any property of the Association having an aggregate fair market value greater than five percent (5%) of the budgeted gross expenses of the Association for that Fiscal Year.

(b) Enter into a contract with a third person wherein the third person will furnish goods or services for the Association for a term longer than one (1) year, except (i) a contract with a public or private utility or cable television company, if the rates charged for the materials or services are regulated by the Nevada Public Service Commission (provided, however, that the term of the contract shall not exceed the shortest term for which the supplier will contract at the regulated rate), or (ii) prepaid casualty and/or liability insurance policies of no greater than three (3) years duration

(c) Pay compensation to any Association Director or Officer for services performed in the conduct of the Association's business; provided, however, that the Board may cause a Director or Officer to be reimbursed for expenses incurred in carrying on the business of the Association.

Section 5.5 Manager. The Association shall have the power to employ or contract with a Manager, to perform all or any part of the duties and responsibilities of the Association, subject to the Governing Documents, for the purpose of operating and maintaining the Properties, subject to the following:

(a) Any agreement with a Manager shall be in writing and shall be for a term not in excess of one (1) year, subject to cancellation by the Association for cause at any time upon not less than thirty (30) days written notice, and without cause (and without penalty or the payment of a termination fee) at any time upon not more than ninety (90) days written notice. In the event of any explicit conflict between the Governing Documents and any agreement with a Manager, the Governing Documents shall prevail.

(b) The Manager shall possess sufficient experience, in the reasonable judgment of the Board, in managing residential subdivision projects, similar to the Properties, in the County, and shall be duly licensed as required from time to time by the appropriate licensing and

governmental authorities (and must have the qualifications, including education and experience, when and as required for the issuance of the relevant certificate by the Nevada Real Estate Division pursuant and subject to the provisions of NRS Chapter 645 and/or NRS § 116.3119.3, or duly exempted pursuant to NRS § 116.3119.4). Any and all employees of the Manager with responsibilities to or in connection with the Association and/or the Community shall have such experience with regard to similar projects. (If no Manager meeting the above-stated qualifications is available, the Board shall retain the most highly qualified management entity available, which is duly licensed by the appropriate licensing authorities).

(c) No Manager, or any director, officer, shareholder, principal, partner, or employee of the Manager, may be a Director or Officer of the Association.

(d) As a condition precedent to the employ of, or agreement with, a Manager, the Manager (or any replacement Manager) first shall be required, at its expense, to review the Governing Documents, Plat, and any and all Association Reserve Studies and inspection reports pertaining to the Properties.

(e) By execution of its agreement with the Association, a Manager shall be conclusively deemed to have covenanted: (1) in good faith to be bound by, and to faithfully perform all duties (including, but not limited to, full and faithful accounting for all Association funds within the possession or control of Manager) required of the Manager under the Governing Documents (and, in the event of any irreconcilable conflict between the Governing Documents and the contract with the Manager, the Governing Documents shall prevail); (2) that any penalties, fines or interest levied upon the Association as the result of Manager's error or omission shall be paid (or reimbursed to the Association) by the Manager; (3) to comply fully, at its expense, with all applicable regulations of the Nevada Real Estate Division; and (4) at Manager's sole expense, to promptly turn over, to the Board, possession and control of all funds, documents, books, records and reports pertaining to the Properties and/or Association, and to coordinate and cooperate in good faith with the Board in connection with such turnover, in any event not later than ten (10) days of expiration or termination of the Association's agreement with Manager (provided that, without limiting its other remedies, the Association shall be entitled to withhold all amounts otherwise due to the Manager until such time as the Manager turnover in good faith has been completed).

(f) Upon expiration or termination of an agreement with a Manager, a replacement Manager meeting the above-stated qualifications shall be retained by the Board as soon as possible thereafter and a limited review performed, by qualified Person designated by the Board, of the books and records of the Association, to verify assets.

(g) The Association shall also maintain and pay for the services of such other personnel, including independent contractors, as the Board shall determine to be necessary or desirable for the proper management, operation, maintenance, and repair of the Association and the Properties, pursuant to the Governing Documents, whether such personnel are furnished or employed directly by the Association or by any person with whom or which it contracts. Such other personnel shall not all be replaced concurrently, but shall be replaced according to a "staggered" schedule, to maximize continuity of services to the Association.

Section 5.6 Inspection of Books and Records.

(a) The Board shall, upon the written request of any Owner, make available the books, records and other papers of the Association for review during the regular working hours of the Association, with the exception of: (1) personnel records of employees (if any) of the Association, and (2) records of the Association relating to another Owner.

(b) The Board shall cause to be maintained and made available for review at the business office of the Association or other suitable location: (1) the financial statements of the Association; (2) the Budgets and Reserve Budgets; and (3) Reserve Studies.

(c) The Board shall cause to be provided a copy of any of the records required to be maintained pursuant to (a) and (b) above, to an Owner or to the Nevada State Ombudsman, as applicable, within 14 days after receiving a written request therefor. The Board may charge a fee to cover the actual costs of preparing such copy, but not to exceed 25 cents per page (or such maximum amount as permitted by applicable Nevada law).

(d) Notwithstanding the foregoing, each Director shall have the unfettered right at any reasonable time, and from time to time, to inspect all such records.

Section 5.7 Continuing Rights of Declarant. Declarant shall preserve the right, without obligation, to enforce the Governing Documents (including, without limitation, the Association's duties of maintenance and repair, and Reserve Study and Reserve Fund obligations). After the end of Declarant Control Period, throughout the term of this Declaration, the Board shall deliver to Declarant notices and minutes of all Board meetings and Membership meetings, and Declarant shall have the right, without obligation, to attend such meetings, on a non-voting basis. Declarant shall also receive notice of, and have the right, without obligation, to attend, all inspections of the Properties or any portion(s) thereof. The Board shall also, throughout the term of this Declaration, deliver to Declarant (without any express or implied obligation or duty on Declarant's part to review or to do anything) all notices and correspondence to Owners, all inspection reports, the Reserve Studies prepared in accordance with Section 6.3 below, and audited annual reports, as required in Section 5.1(m), above. Such notices and information shall be delivered to Declarant at its most recently designated address.

Section 5.8 Compliance with Applicable Laws. The Association shall comply with all applicable laws (including, but not limited to, applicable laws prohibiting discrimination against any person in the provision of services or facilities in connection with a Dwelling because of a handicap of such person). The provisions of the Governing Documents shall be upheld and enforceable to the maximum extent permissible under applicable federal or state law or City or County ordinance. Subject to the foregoing, in the event of irreconcilable conflict between applicable law and any provision of the Governing Documents, the applicable law shall prevail, and the affected provision of the Governing Document shall be deemed automatically amended (or deleted) to the minimum extent reasonably necessary to remove such irreconcilable conflict. In no event shall the Association adhere to or enforce any provision of the Governing Documents which irreconcilably contravenes applicable law.

ARTICLE 6
COVENANT FOR MAINTENANCE ASSESSMENTS

Section 6.1 Personal Obligation of Assessments. Each Owner of a Unit, by acceptance of a deed therefor, whether or not so expressed in such deed, is deemed to covenant and agree to pay to the Association: (a) Annual Assessments, (b) Special Assessments, and (c) any Capital Assessments, such assessments to be established and collected as provided in this Declaration. All assessments, together with interest thereon, late charges, costs and reasonable attorneys' fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit against which such assessment is made. Each such assessment, together with interest thereon, late charges, costs and reasonable attorneys' fees, shall also be the personal obligation of the Person who was the Owner of such Unit at the time when the assessment became due. This personal obligation cannot be avoided by abandonment of a Unit or by an offer to waive use of the Common Elements. The personal obligation only shall not pass to the successors in title of any Owner unless expressly assumed by such successors.

Section 6.2 Association Funds. The Board shall establish at least the following separate accounts ("Association Funds") into which shall be deposited all monies paid to the Association, and from which disbursements shall be made, as provided herein, in the performance of functions by the Association under the provisions of this Declaration. The Association Funds shall be established as trust accounts at a federally or state insured banking or savings institution, and shall include: (1) an operating fund ("Operating Fund") for current expenses of the Association, and (2) a reserve fund ("Reserve Fund") for capital repairs and replacements as set forth in Section 6.3 below, and (3) any other funds which the Board may establish, to the extent necessary under the provisions of this Declaration. To qualify for higher returns on accounts held at banking or savings institutions, the Board may commingle any amounts deposited into any of the Association Funds (other than the Reserve Fund, which shall be kept segregated), provided that the integrity of each individual Association Fund shall be preserved on the books of the Association by accounting for disbursements from, and deposits to, each Association Fund separately. Each of the Association Funds shall be established as a separate trust savings or trust checking account, at any federally or state insured banking or lending institution, with balances not to exceed institutionally insured levels. All amounts deposited into the Operating Fund and the Reserve Fund must be used solely for the common benefit of the Owners for purposes authorized by this Declaration. The Manager shall not be authorized to make withdrawals from the Reserve Fund. Withdrawals from the Reserve Fund shall require signatures of both the President and Treasurer (or, in the absence of either the President or Treasurer, the Secretary may sign in place of the absent Officer). The President, Treasurer, and Secretary all must be Directors and (after the Declarant Control Period) must also all be Owners.

Section 6.3 Reserve Fund; Reserve Studies.

(a) Any other provision herein notwithstanding: (i) the Association shall establish a reserve fund ("Reserve Fund"), (ii) the Reserve Fund shall be used only for capital repairs, restoration, and replacement of major components ("Major Components") of the Common Elements, (iii) in no event whatsoever shall the Reserve Fund be used for regular maintenance recurring on an annual or more frequent basis, or as the source of funds to institute, prosecute, maintain and/or intervene in any Proceeding, or for any other purpose whatsoever, (iv) the Reserve Fund shall be kept in a segregated account, withdrawals from which shall only be made upon specific approval of the Board subject to the foregoing, (v) funds in the Reserve Fund may not be

withdrawn without the signatures of both the President and the Treasurer (provided that the Secretary may sign in lieu of either the President or the Treasurer, if either is not reasonably available); (vi) under no circumstances shall the Manager (or any one Officer or Director, acting alone) be authorized to make withdrawals from the Reserve Fund, and (vii) any use of the Reserve Fund in violation of the foregoing provisions shall be unauthorized and ultra vires as to the Association, and shall subject any Director who acted in any manner to violate or avoid the provisions and/or requirements of this Section 6.3(a) to personal liability to the Association for all costs and liabilities incurred by reason of the unauthorized use of the Reserve Fund.

(b) The Board shall periodically retain the services of a qualified reserve study analyst, with sufficient experience with preparing reserve studies for similar residential projects in the County, to prepare and provide to the Association a reserve study ("Reserve Study"). The Board shall cause to be prepared an initial Reserve Study by not later than October 1, 2000. Thereafter, the Board shall: (1) cause to be conducted at least once every five years, a subsequent Reserve Study; (2) review the results of the most current Reserve Study at least annually to determine if those reserves are sufficient; and (3) make any adjustments the Board deems necessary to maintain the required reserves.

(c) Each Reserve Study must be conducted by a person qualified by training and experience to conduct such a study (including, but not limited to, a Director, an Owner or a Manager who is so qualified). The Reserve Study must include, without limitation: (1) a summary of an inspection of the Major Components which the Association is obligated to repair, replace or restore; (2) an identification of the Major Components which have a remaining useful life of less than 30 years; (3) an estimate of the remaining useful life of each Major Component so identified; (4) an estimate of the cost of repair, replacement or restoration of each Major Component so identified during and at the end of its useful life; and (5) an estimate of the total annual assessment that may be required to cover the cost of repairing, replacement or restoration the Major Components so identified (after subtracting the reserves as of the date of the Reserve Study). The Reserve Study shall be conducted in accordance with any applicable regulations adopted by the Nevada Real Estate Division

Section 6.4 Budget; Reserve Budget.

(a) The Board shall adopt a proposed annual Budget at least forty-five (45) days prior to the first Annual Assessment period for each Fiscal Year. Within thirty (30) days after adoption of any proposed Budget, the Board shall provide to all Owners a summary of the Budget, and shall set a date for a meeting of the Owners to consider ratification of the Budget. Said meeting shall be held not less than fourteen (14) days, nor more than thirty (30) days after mailing of the summary. Unless at that meeting the proposed Budget is rejected by at least seventy-five percent (75%) of the voting power of the Association, the Budget shall be deemed ratified, whether or not a quorum was present. If the proposed Budget is duly rejected as aforesaid, the annual Budget for the immediately preceding Fiscal Year shall be reinstated, as if duly approved for the Fiscal Year in question, and shall remain in effect until such time as a subsequent proposed Budget is ratified.

(b) Notwithstanding the foregoing, except as otherwise provided in subsection (c) below, the Board shall, not less than 30 days or more than 60 days before the beginning of each Fiscal Year, prepare and distribute to each Owner a copy of:

(1) the Budget (which must include, without limitation, the estimated annual revenue and expenditures of the Association and any contributions to be made to the Reserve Fund); and

(2) The Reserve Budget, which must include, without limitation:

(A) the current estimated replacement cost, estimated remaining life and estimated useful life of each major component of the Common Elements ("Major Component");

(B) as of the end of the Fiscal Year for which the Reserve Budget is prepared, the current estimate of the amount of cash reserves that are necessary, and the current amount of accumulated cash reserves that are set aside, to repair, replace or restore the Major Components;

(C) a statement as to whether the Board has determined or anticipates that the levy of one or more Capital Assessments will be required to repair, replace or restore any Major Component or to provide adequate reserves for that purpose; and

(D) a general statement describing the procedures used for the estimation and accumulation of cash reserves pursuant to subparagraph (B) above, including, without limitation, the qualifications of the person responsible for the preparation of the Reserve Study.

(c) In lieu of distributing copies of the Budget and Reserve Budget, the Board may distribute to each Owner a summary of those budgets, accompanied by a written notice that the budgets are available for review at the business office of the Association or other suitable location and that copies of the budgets will be provided upon request.

Section 6.5 Limitations on Annual Assessment Increases. The Board shall not levy, for any Fiscal Year, an Annual Assessment which exceeds the "Maximum Authorized Annual Assessment" as determined below, unless first approved by the vote of Members representing at least a majority of the voting power of the Association. The "Maximum Authorized Annual Assessment" in any fiscal year following the initial budgeted year shall be a sum which does not exceed the aggregate of (a) the Annual Assessment for the prior Fiscal Year, plus (b) a twenty-five percent (25%) increase thereof. Notwithstanding the foregoing, if, in any Fiscal Year, the Board reasonably determines that the Common Expenses cannot be met by the Annual Assessments levied under the then-current Budget, the Board may, upon the affirmative vote of a majority of the voting power of the Association and a majority of the voting power of the Board, submit a Supplemental Annual Assessment, applicable to that Fiscal Year only, for ratification as provided in Section 6.4 above.

Section 6.6 Initial Capital Contributions to Association. At the Close of Escrow for the sale of a Unit by Declarant, the Purchaser of such Unit shall be required to pay a capital contribution to the Association, in an amount equal to two (2) full monthly installments of the greater of the initial or then-applicable Annual Assessment, notwithstanding Section 6.7 below. Such capital contribution is in addition to, and is not to be considered as an advance payment of, the Annual Assessment for such Unit, and may be applied to initial working capital needs of the Association.

Section 6.7 Assessment Commencement Date. The Board, by majority vote, shall authorize and levy the amount of the Annual Assessment upon each Unit, as provided herein. Annual Assessments shall commence on Units on the respective Assessment Commencement Date. The "Assessment Commencement Date" hereunder shall be: (a) with respect to Units within the Original Property, the first day of the calendar month following the Close of Escrow to a Purchaser of the first Unit in the Original Property, and (b) with respect to each Unit within Annexed Property, that date on which the Annexation Amendment for such Unit is Recorded; provided that Declarant may establish, its sole discretion, a later Assessment Commencement Date uniformly as to all Units by agreement of Declarant to pay all Common Expenses for the Properties up through and including such later Assessment Commencement Date. The first Annual Assessment for each Unit shall be pro-rated based on the number of months remaining in the Fiscal Year. All installments of Annual Assessments shall be collected in advance on a regular basis by the Board, at such frequency and on such due dates as the Board shall determine from time to time in its sole discretion. The Association shall, upon demand, and for a reasonable charge, furnish a certificate binding on the Association, signed by an Officer or Association agent, setting forth whether the assessments on a Unit have been paid. At the end of any Fiscal Year, the Board may determine that all excess funds remaining in the operating fund, over and above the amounts used for the operation of the Properties, may be retained by the Association for use in reducing the following year's Annual Assessment or for deposit in the reserve account. Upon dissolution of the Association incident to the abandonment or termination of the maintenance of the Properties, any amounts remaining in any of the Association Funds shall be distributed proportionately to or for the benefit of the Members, in accordance with Nevada law.

Section 6.8 Capital Assessments. The Board may levy, in any Fiscal Year, a Capital Assessment applicable to that Fiscal Year only, for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement or other such addition upon the Common Elements, including fixtures and personal property related thereto; provided that any proposed Capital Assessment shall require the advance consent of a majority of the voting power of the Association.

Section 6.9 Uniform Rate of Assessment. Annual Assessments and Capital Assessments shall be assessed at an equal and uniform rate against all Owners and their Units. Each Owner's share of such assessments shall be a fraction, the numerator of which shall be the number of Units owned by such Owner, and the denominator of which shall be the aggregate number of Units in the Original Property (and, upon annexation, of Units in portions of the Annexed Property).

Section 6.10 Exempt Property. The following property subject to this Declaration shall be exempt from the assessments herein:

(a) all portions, if any, of the Properties dedicated to and accepted by, the United States, the State of Nevada, Clark County, or any political subdivision of any of the foregoing, or any public agency, entity or authority, for so long as such entity or political subdivision is the owner thereof, or for so long as such dedication remains effective; and

(b) the Common Elements owned by the Association in fee.

20000307
00211

Section 6.11 Special Assessments. The Association may, subject to the provisions of Section 9.3 and Section 11.1 (b) hereof, levy Special Assessments against specific Owners who have caused the Association to incur special expenses due to willful or negligent acts of said Owners, their tenants, families, guests, invitees or agents. Special Assessments also shall include, without limitation, late payment penalties, interest charges, fines, administrative fees, attorneys' fees, amounts expended to enforce assessment liens against Owners as provided for herein, and other charges of similar nature. Special Assessments, if not paid timely when due, shall constitute unpaid or delinquent assessments, pursuant to Article 7, below.

ARTICLE 7
EFFECT OF NONPAYMENT OF ASSESSMENTS; REMEDIES OF THE ASSOCIATION

Section 7.1 Nonpayment of Assessments. Any installment of an Annual Assessment, Special Assessment, or Capital Assessment shall be delinquent if not paid within thirty (30) days of the due date as established by the Board. Such delinquent installment shall bear interest from the due date until paid, at the rate of two (2) percentage points per annum above the prime rate charged from time to time by Bank of America N.T. & S.A. (or, if such rate is no longer published, then a reasonable replacement rate), but in any event not greater than the maximum rate permitted by applicable Nevada law, as well as a reasonable late charge, as determined by the Board, to compensate the Association for increased bookkeeping, billing, administrative costs, and any other appropriate charges. No such late charge or interest or any delinquent installment may exceed the maximum rate or amount allowable by law. The Association may bring an action at law against the Owner personally obligated to pay any delinquent installment or late charge, or foreclose the lien against the Unit. No Owner may waive or otherwise escape liability for the assessments provided for herein by nonuse of the Common Elements or by abandonment of his Unit.

Section 7.2 Notice of Delinquent Installment. If any installment of an assessment is not paid within thirty (30) days after its due date, the Board may mail notice of delinquent assessment to the Owner and to each first Mortgagee of the Unit. The notice shall specify: (a) the amount of assessments and other sums due; (b) a description of the Unit against which the lien is imposed; (c) the name of the record Owner of the Unit; (d) the fact that the installment is delinquent; (e) the action required to cure the default; (f) the date, not less than thirty (30) days from the date the notice is mailed to the Owner, by which such default must be cured; and (g) that failure to cure the default on or before the date specified in the notice may result in acceleration of the balance of the installments of such assessment for the then-current Fiscal Year and sale of the Unit. The notice shall further inform the Owner of his right to cure after acceleration. If the delinquent installment of assessments and any charges thereon are not paid in full on or before the date specified in the notice, the Board, at its option, may declare all of the unpaid balance of such assessments levied against such Owner and his Unit to be immediately due and payable without further demand, and may enforce the collection of the full assessments and all charges thereon in any manner authorized by law or this Declaration.

Section 7.3 Notice of Default and Election to Sell. No action shall be brought to enforce any assessment lien herein, unless at least sixty (60) days have expired following the later of: (a) the date a notice of default and election to sell is Recorded; or (b) the date the Recorded notice of default and election to sell is mailed in the United States mail, certified or registered, return receipt requested, to the Owner of the Unit. Such notice of default and election to sell must recite a good

and sufficient legal description of such Unit, the Record Owner or reputed Owner thereof, the amount claimed (which may, at the Association's option, include interest on the unpaid assessment as described in Section 7.1 above, plus reasonable attorneys' fees and expenses of collection in connection with the debt secured by such lien), the name and address of the Association, and the name and address of the Person authorized by the Board to enforce the lien by sale. The notice of default and election to sell shall be signed and acknowledged by an Association Officer, Manager, or other Person designated by the Board for such purpose, and such lien shall be prior to any declaration of homestead Recorded after the date on which this Declaration is Recorded. The lien shall continue until fully paid or otherwise satisfied.

Section 7.4 Foreclosure Sale. Subject to the limitation set forth in Section 7.5 below, any such sale provided for above may be conducted by the Board, its attorneys, or other Person authorized by the Board in accordance with the provisions of NRS §116.31164 and Covenants Nos. 6, 7 and 8 of NRS § 107.030 and §107.090, as amended, insofar as they are consistent with the provisions of NRS § 116.31164, as amended, or in accordance with any similar statute hereafter enacted applicable to the exercise of powers of sale in Mortgages and Deeds of Trust, or in any other manner permitted by law. The Association, through its duly authorized agents, shall have the power to bid on the Unit at the foreclosure sale and to acquire and hold, lease, mortgage, and convey the same. Notices of default and election to sell shall be provided as required by NRS § 116.31163. Notice of time and place of sale shall be provided as required by NRS § 116.311635.

Section 7.5 Limitation on Foreclosure. Any other provision in the Governing Documents notwithstanding, the Association may not foreclose a lien by sale for the assessment of a fine or for a violation of the Governing Documents, unless the violation is of a type that substantially and imminently threatens the health, safety, and welfare of the Owners and Residents of the Community. The foregoing limitation shall not apply to foreclosure of a lien for Annual Assessments or Capital Assessments, or any portion respectively thereof, pursuant to this Article 7.

Section 7.6 Cure of Default. Upon the timely cure of any default for which a notice of default and election to sell was filed by the Association, the Officers thereof shall Record an appropriate release of lien, upon payment by the defaulting Owner of a reasonable fee to be determined by the Board, to cover the cost of preparing and Recording such release. A certificate, executed and acknowledged by any two (2) Directors or the Manager, stating the indebtedness secured by the lien upon any Unit created hereunder, shall be conclusive upon the Association and, if acknowledged by the Owner, shall be binding on such Owner as to the amount of such indebtedness as of the date of the certificate, in favor of all Persons who rely thereon in good faith. Such certificate shall be furnished to any Owner upon request, at a reasonable fee, to be determined by the Board.

Section 7.7 Cumulative Remedies. The assessment liens and the rights of foreclosure and sale thereunder shall be in addition to and not in substitution for all other rights and remedies which the Association and its assigns may have hereunder and by law or in equity, including a suit to recover a money judgment for unpaid assessments, as provided above.

Section 7.8 Mortgagee Protection. Notwithstanding all other provisions hereof, no lien created under this Article 7, nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Unit, made in good faith and for value; provided that after such Beneficiary or some other Person

obtains title to such Unit by judicial foreclosure, other foreclosure, or exercise of power of sale, such Unit shall remain subject to this Declaration and the payment of all installments of assessments accruing subsequent to the date such Beneficiary or other Person obtains title. The lien of the assessments, including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit. The release or discharge of any lien for unpaid assessments by reason of the foreclosure or exercise of power of sale by the First Mortgagee shall not relieve the prior Owner of his personal obligation for the payment of such unpaid assessments.

Section 7.9 Priority of Assessment Lien. Recording of the Declaration constitutes Record notice and perfection of a lien for assessments. A lien for assessments, including interest, costs, and attorneys' fees, as provided for herein, shall be prior to all other liens and encumbrances on a Unit, except for: (a) liens and encumbrances Recorded before the Declaration was Recorded, (b) a first Mortgage Recorded before the delinquency of the assessment sought to be enforced, and (c) liens for real estate taxes and other governmental charges, and is otherwise subject to NRS § 116.3116. The sale or transfer of any Unit shall not affect an assessment lien. However, the sale or transfer of any Unit pursuant to judicial or nonjudicial foreclosure of a First Mortgage shall extinguish the lien of such assessment as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Unit from lien rights for any assessments which thereafter become due. Where the Beneficiary of a First Mortgage of Record or other purchaser of a Unit obtains title pursuant to a judicial or nonjudicial foreclosure or "deed in lieu thereof," the Person who obtains title and his successors and assigns shall not be liable for the share of the Common Expenses or assessments by the Association chargeable to such Unit which became due prior to the acquisition of title to such Unit by such Person. Such unpaid share of Common Expenses and assessments shall be deemed to become expenses collectible from all of the Units, including the Unit belonging to such Person and his successors and assigns.

ARTICLE 8
ARCHITECTURAL AND LANDSCAPING CONTROL

Section 8.1 ARC. The Architectural Review Committee, sometimes referred to in this Declaration as the "ARC," shall consist of three (3) committee members; provided, however, that such number may be increased or decreased from time to time by resolution of the Board. Notwithstanding the foregoing, Declarant shall have the sole right and power to appoint and/or remove all of the members to the ARC until such time as Declarant no longer owns any property in, or has any power to annex the Annexable Area or any portion thereof; provided that Declarant, in its sole discretion, by written instrument, may at any earlier time turn over to the Board the power to appoint the members to the ARC; thereafter, the Board shall appoint all members of the ARC. A member of the ARC may be removed at any time, without cause, by the Person who appointed such member. Unless changed by resolution of the Board, the address of the ARC for all purposes, including the submission of plans for approval, shall be at the principal office of the Association as designated by the Board.

Section 8.2 Review of Plans and Specifications. The ARC shall consider and act upon any and all proposals, plans and specifications, drawings, and other information or other items (collectively in this Article 8, "plans and specifications") submitted, or required to be submitted, for ARC approval under this Declaration, subject to Sections 9.7(b) and 10.15, below, and shall perform such other duties as from time to time may be assigned to the ARC by the Board, including

the inspection of construction in progress to assure conformance with plans and specifications approved by the ARC.

(a) With the exception of any such activity of Declarant, no construction, alteration, grading, addition, excavation, removal, relocation, repainting, demolition, installation, modification, decoration, redecoration or reconstruction of an Improvement, including Dwelling and landscaping, or removal of any tree, shall be commenced or maintained by any Owner, until the plans and specifications therefor showing the nature, kind, shape, height, width, color, materials and location of the same shall have been submitted to, and approved in writing by, the ARC. No design or construction activity of Declarant shall be subject to ARC approval. The Owner submitting such plans and specifications ("Applicant") shall obtain a written receipt therefor from an authorized agent of the ARC. Until changed by the Board, the address for submission of such plans and specifications shall be the principal office of the Association. The ARC shall approve plans and specifications submitted for its approval only if it deems that: (1) the construction, alterations, or additions contemplated thereby in the locations indicated will not be detrimental to the appearance of the surrounding area or the Properties as a whole; (2) the appearance of any structure affected thereby will be in harmony with other structures in the vicinity; (3) the construction will not detract from the beauty, wholesomeness and attractiveness of the Common Elements or the enjoyment thereof by the Members; (4) the construction will not unreasonably interfere with existing views from other Units; and (5) the upkeep and maintenance will not become a burden on the Association

(b) The ARC may condition its review and/or approval of plans and specifications for any Improvement upon such changes therein as the ARC may deem appropriate or necessary, which may, but need not necessarily include any one or more or all of the following conditions: (1) agreement by the Applicant to furnish to the ARC a bond or other security acceptable to the ARC in an amount reasonably sufficient to (i) assure the completion of such Improvement or the availability of funds adequate to remedy any damage, or any nuisance or unsightly conditions occurring as a result of the partial completion of such Improvement, and (ii) to protect the Association and the other Owners against mechanic's liens or other encumbrances which may be Recorded against their respective interests in the Properties or damage to the Common Elements as a result of such work; (2) such changes therein as the ARC deems appropriate, (3) agreement by the Applicant to grant appropriate easements to the Association for the maintenance of the Improvement; (4) agreement of the Applicant to reimburse the Association for the costs of maintenance; (5) agreement of the Applicant to replace such removed trees as may be designated by the ARC; (6) agreement of the applicant to submit "as-built" record drawings certified by a licensed architect or engineer which describe the Improvements in detail as actually constructed upon completion of the Improvement; (7) payment or reimbursement, by Applicant, of the ARC and/or its members for their actual costs incurred in considering the plans and specifications; (8) payment, by Applicant, of the professional fees of a licensed architect or engineer to review the plans and specifications on behalf of the ARC, if such review is deemed by the ARC to be necessary or desirable; and/or (9) such other conditions as the ARC may reasonably determine to be prudent and in the best interests of the Association. The ARC may further require submission of additional plans and specifications or other information prior to approving or disapproving materials submitted. The ARC may also issue rules or guidelines setting forth procedures for the submission of plans and specifications, requiring a fee to accompany each application for approval, or stating additional factors which it will take into consideration in reviewing submissions. The ARC may provide that the amount of such fee shall be uniform, or that the fee may be determined in any other reasonable manner, such as based upon the reasonable cost of

the construction, alteration or addition contemplated or the cost of architectural or other professional fees incurred by the ARC in reviewing plans and specifications.

(c) The ARC may require such detail in plans and specifications submitted for its review as it deems proper, including without limitation, floor plans, site plans, drainage plans, landscaping plans, elevation drawings and descriptions or samples of exterior materials and colors. Until receipt by the ARC of any required plans and specifications, the ARC may postpone review of any plans and specifications submitted for approval. Any application submitted pursuant to this Section 8.2 shall be deemed approved, unless written disapproval or a request for additional information or materials by the ARC shall have been transmitted to the Applicant within forty-five (45) days after the date of receipt by the ARC of all required materials. The ARC will condition any approval required in this Article 8 upon, among other things, compliance with Declarant's (a) design criteria as established from time to time, (b) Improvement standards and (c) development standards, as amended from time to time, all of which are incorporated herein by this reference.

(d) Any Owner aggrieved by a decision of the ARC may appeal the decision to the ARC in accordance with procedures to be established by the ARC. Such procedures would include the requirement that the appellant has modified the requested action or has new information which would in the ARC's opinion warrant reconsideration. If the ARC fails to allow an appeal or if the ARC, after appeal, again rules in a manner aggrieving the appellant, the decision of the ARC is final. The foregoing notwithstanding, after such time as the Board appoints all members of the ARC, all appeals from ARC decisions shall be made to the Board, which shall consider and decide such appeals.

(e) Notwithstanding the foregoing or any other provision herein, the ARC's jurisdiction shall normally extend only to the external appearance or "aesthetics" of any Improvement, and shall not extend to structural matters, method of construction, or compliance with a building code or other applicable legal requirement. ARC approval shall be subject to all applicable requirements of applicable government authority, drainage, and other similar matters, and shall not be deemed to encompass or extend to possible impact on neighboring Units.

Section 8.3 Meetings of the ARC. The ARC shall meet from time to time as necessary to perform its duties hereunder. The ARC may from time to time, by resolution unanimously adopted in writing, designate an ARC representative (who may, but need not, be one of its members) to take any action or perform any duties for and on behalf of the ARC, except the granting of variances pursuant to Section 8.8 below. In the absence of such designation, the vote of a majority of the ARC, or the written consent of a majority of the ARC taken without a meeting, shall constitute an act of the ARC.

Section 8.4 No Waiver of Future Approvals. The approval by the ARC of any proposals or plans and specifications or drawings for any work done or proposed or in connection with any other matter requiring the approval and consent of the ARC, shall not be deemed to constitute a waiver of any right to withhold approval or consent as to any similar proposals, plans and specifications, drawings or matters subsequently or additionally submitted for approval or consent.

Section 8.5 Compensation of Members. Subject to the provisions of Section 8.2(b) above, members of the ARC shall not receive compensation from the Association for services rendered as members of the ARC.

Section 8 6 Correction by Owner of Nonconforming Items. Subject in all instances to compliance by Owner with all applicable requirements of governmental authorities with jurisdiction, ARC inspection (which shall be limited to inspection of the visible appearance of the size, color, location, and materials of work), and Owner correction of visible nonconformance therein, shall proceed as follows

(a) The ARC or its duly appointed representative shall have the right to inspect any Improvement ("Right of Inspection") whether or not the ARC's approval has been requested or given, provided that such inspection shall be limited to the visible appearance of the size, color, location, and materials comprising such Improvement (and shall not constitute an inspection of any structural item, method of construction, or compliance with any applicable requirement of governmental authority) Such Right of Inspection shall, however, terminate sixty (60) days after receipt by the ARC of written notice from the Owner of the Unit that the work of Improvement has been completed If as a result of such inspection, the ARC finds that such Improvement was done without obtaining approval of the plans and specifications therefor or was not done in substantial compliance with the plans and specifications approved by the ARC, it shall, within sixty (60) days from the inspection, notify the Owner in writing of the Owner's failure to comply with this Article 8 specifying the particulars of noncompliance. If work has been performed without approval of plans and specifications therefor, the ARC may require the Owner of the Unit in which the Improvement is located, to submit "as-built" record drawings certified by a licensed architect or engineer which describe the Improvement in detail as actually constructed. The ARC shall have the authority to require the Owner to take such action as may be necessary to remedy the noncompliance.

(b) If, upon the expiration of sixty (60) days from the date of such notification, the Owner has failed to remedy such noncompliance, the ARC shall notify the Board in writing of such failure Upon Notice and Hearing, the Board shall determine whether there is a noncompliance (with the visible appearance of the size, color, location, and/or materials thereof) and, if so, the nature thereof and the estimated cost of correcting or removing the same. If a noncompliance exists, the Owner shall remedy or remove the same within a period of not more than forty-five (45) days from the date that notice of the Board ruling is given to the Owner. If the Owner does not comply with the Board ruling within that period, the Board, at its option, may Record a notice of noncompliance and commence a lawsuit for damages or injunctive relief, as appropriate, to remedy the noncompliance, and, in addition, may peacefully remedy the noncompliance The Owner shall reimburse the Association, upon demand, for all expenses (including reasonable attorneys' fees) incurred in connection therewith. If such expenses are not promptly repaid by the Owner to the Association, the Board shall levy a Special Assessment against the Owner for reimbursement as provided in this Declaration. The right of the Association to remove a noncomplying Improvement or otherwise to remedy the noncompliance shall be in addition to all other rights and remedies which the Association may have at law, in equity, or in this Declaration

(c) If for any reason the ARC fails to notify the Owner of any noncompliance with previously submitted and approved plans and specifications within sixty (60) days after receipt of written notice of completion from the Owner, the Improvement shall be deemed to be in compliance with ARC requirements (but, of course, shall remain subject to compliance by Owner with all requirements of applicable governmental authority).

(d) All construction, alteration or other work shall be performed as promptly and as diligently as possible and shall be completed within one hundred eighty (180) days of the date on which the work commenced

Section 8.7 Scope of Review. The ARC shall review and approve, conditionally approve, or disapprove, all proposals, plans and specifications submitted to it for any proposed Improvement, alteration, or addition, solely on the basis of the considerations set forth in Section 8.2 above, and solely with regard to the visible appearance of the size, color, location, and materials thereof. The ARC shall not be responsible for reviewing, nor shall its approval of any plan or design be deemed approval of, any proposal, plan or design from the standpoint of structural safety or conformance with building or other codes. Each Owner shall be responsible for obtaining all necessary permits and for complying with all applicable governmental (including, but not necessarily limited to, County) requirements.

Section 8.8 Variances. When circumstances such as topography, natural obstructions, hardship, or aesthetic or environmental considerations may require, the ARC may authorize limited variances from compliance with any of the architectural provisions of this Declaration, including without limitation, restrictions on size (including height, size, and/or floor area) or placement of structures, or similar restrictions. Such variances must be evidenced in writing, must be signed by a majority of the ARC, and shall become effective upon Recordation. If such variances are granted, no violation of the covenants, conditions and restrictions contained in this Declaration shall be deemed to have occurred with respect to the matter for which the variance was granted. The granting of any such variance by ARC shall not operate to waive any of the terms and provisions of this Declaration for any purpose except as to the particular property and particular provision hereof covered by the variance, nor shall it affect in any way the Owner's obligation to comply with all governmental laws, regulations, and requirements affecting the use of his Unit, including but not limited to zoning ordinances and Lot set-back lines or requirements imposed by the County, or any municipal or other public authority. The granting of a variance by ARC shall not be deemed to be a variance or approval from the standpoint of compliance with such laws or regulations, nor from the standpoint of structural safety, and the ARC, provided it acts in good faith, shall not be liable for any damage to an Owner as a result of its granting or denying of a variance.

Section 8.9 Non-Liability for Approval of Plans. The ARC's approval of proposals or plans and specifications shall not constitute a representation, warranty or guarantee, whether express or implied, that such proposals or plans and specifications comply with good engineering design or with zoning or building ordinances, or other governmental regulations or restrictions. By approving such proposals or plans and specifications, neither the ARC, the members thereof, the Association, the Board, nor Declarant, assumes any liability or responsibility therefor, or for any defect in the structure constructed from such proposals or plans or specifications. Neither the ARC, any member thereof, the Association, the Board, nor Declarant, shall be liable to any Member, Owner, occupant, or other Person or entity for any damage, loss, or prejudice suffered or claimed on account of (a) the approval or disapproval of any proposals, plans and specifications and drawings, whether or not defective, or (b) the construction or performance of any work, whether or not pursuant to the approved proposals, plans and specifications and drawings.

Section 8.10 Declarant Exemption. The ARC shall have no authority, power or jurisdiction over Units owned by Declarant, and the provisions of this Article 8 shall not apply to Improvements built by Declarant, or, until such time as Declarant conveys title to the Unit to a

Purchaser, to Units owned by Declarant. This Article 8 shall not be amended without Declarant's written consent set forth on the amendment.

ARTICLE 9
MAINTENANCE AND REPAIR OBLIGATIONS

Section 9.1 Maintenance Obligations of Owners. It shall be the duty of each Owner, at his sole cost and expense, subject to the provisions of this Declaration requiring ARC approval, to maintain, repair, replace and restore all Improvements located on his Unit, and the Unit itself, in a neat, sanitary and attractive condition, except for any areas expressly required to be maintained by the Association under this Declaration. If any Owner shall permit any Improvement, the maintenance of which is the responsibility of such Owner, to fall into disrepair or to become unsafe, unsightly or unattractive, or otherwise to violate this Declaration, the Board shall have the right to seek any remedies at law or in equity which the Association may have. In addition, the Board shall have the right, but not the duty, after Notice and Hearing as provided in the Bylaws, to enter upon such Unit to make such repairs or to perform such maintenance and to charge the cost thereof to the Owner. Said cost shall be a Special Assessment, enforceable as set forth in this Declaration.

The foregoing notwithstanding: (a) the Association shall have an easement for the maintenance, repair and replacement of any portion of a Lot which constitutes a Common Element and the Improvements constructed by Declarant or the Association thereon, and (b) each Owner (other than Declarant), by acceptance of a deed to a Unit, whether or not so expressed in such deed, is deemed to covenant and agree not to place or install any Improvement on a Common Element, and not to hinder, obstruct, modify, change, add to or remove, partition, or seek partition of, any Common Element or any Improvement installed by Declarant or the Association thereon.

Section 9.2 Maintenance Obligations of Association. No Improvement, excavation or work which in any way alters the Common Elements shall be made or done by any Person other than the Association or its authorized agents after the completion of the construction or installation of the Improvements thereto by Declarant. Subject to the provisions of Sections 9.3 and 11.1 (b) hereof, upon the Assessment Commencement Date, the Association shall provide for the maintenance, repair, and replacement of the Common Elements. The Common Elements shall be maintained in a safe, sanitary and attractive condition, and in good order and repair. The Association shall also provide for any utilities serving the Common Elements. The Association shall also ensure that any landscaping on the Common Elements is regularly and periodically maintained in good order and in a neat and attractive condition. The Association shall not be responsible for maintenance of any portions of the Common Elements which have been dedicated to and accepted for maintenance by a state, local or municipal governmental agency or entity. All of the foregoing obligations of the Association shall be discharged when and in such manner as the Board shall determine in its judgment to be appropriate.

Section 9.3 Damage by Owners to Common Elements. The cost of any maintenance, repairs or replacements by the Association within the Common Elements arising out of or caused by the willful or negligent act of an Owner, his tenants, or their respective Families, guests or invitees shall, after Notice and Hearing, be levied by the Board as a Special Assessment against such Owner as provided in Section 11.1 (b) hereof.

Section 9.4 Damage and Destruction Affecting Dwellings and Duty to Rebuild. If all or any portion of any Unit or Dwelling is damaged or destroyed by fire or other casualty, it shall be the duty of the Owner of such Unit to rebuild, repair or reconstruct the same in a manner which will restore the Unit substantially to its appearance and condition immediately prior to the casualty or as otherwise approved by the ARC. The Owner of any damaged Unit shall be obligated to proceed with all due diligence hereunder, and such Owner shall cause reconstruction to commence within three (3) months after the damage occurs and to be completed within six (6) months after the damage occurs, unless prevented by causes beyond his reasonable control. A transferee of title to the Unit which is damaged shall commence and complete reconstruction in the respective periods which would have remained for the performance of such obligations if the Owner at the time of the damage still held title to the Unit. However, in no event shall such transferee of title be required to commence or complete such reconstruction in less than ninety (90) days from the date such transferee acquired title to the Unit.

Section 9.5 Party Walls. Each wall which is built as a part of the original construction by Declarant and placed approximately on the property line between Units shall constitute a party wall. In the event that any party wall is not constructed exactly on the property line, the Owners affected shall accept the party wall as the property boundary. The cost of reasonable repair and maintenance of party walls shall be shared by the Owners who use such wall in proportion to such use (e.g., if the party wall is the boundary between two Owners, then each such Owner shall bear half of such cost). If a party wall is destroyed or damaged by fire or other casualty, the party wall shall be promptly restored, to its condition and appearance before such damage or destruction, by the Owner(s) whose Units have or had use of the wall. Subject to the foregoing, any Owner whose Unit has or had use of the wall may restore the wall to the way it existed before such destruction or damage, and any other Owner whose Unit makes use of the wall shall contribute to the cost of restoration thereof in proportion to such use, subject to the right of any such Owner to call for a larger contribution from another Owner pursuant to any rule of law regarding liability for negligent or willful acts or omissions. Notwithstanding any other provision of this Section 9.5, an Owner who by his negligent or willful act causes a party wall to be exposed to the elements, or otherwise damaged or destroyed, shall bear the entire cost of furnishing the necessary protection, repair or replacement. The right of any Owner to contribution from any other Owner under this Section 9.5 shall be appurtenant to the land and shall pass to such Owner's successors in title. The foregoing, and any other provision in this Declaration notwithstanding, no Owner shall alter, add to, or remove any party wall constructed by Declarant, or portion of such wall, without the prior written consent of the other Owner(s) who share such party wall, which consent shall not be unreasonably withheld, and the prior written approval of the ARC. In the event of any dispute arising concerning a party wall under the provisions of this Section 9.5, each party shall choose one arbitrator, such arbitrator shall choose one additional arbitrator, and the decision of a majority of such panel of arbitrators shall be binding upon the Owners which are a party to the arbitration.

Section 9.6 Perimeter Walls. Portions of Perimeter Walls, constructed or to be constructed by Declarant, abutting or located on individual Lots, are Improvements all portions of which are located, or conclusively deemed to be located, within the boundaries of individual Units. By acceptance of a deed to his Unit, each Owner on whose Unit a portion of the perimeter wall is located, hereby covenants, at the Owner's sole expense, with regard to the portion of the Perimeter Wall ("Unit Wall") located or deemed located on his Unit: to maintain at all times in effect thereon property and casualty insurance, on a current replacement cost; to maintain and keep the Unit Wall at all times in good repair; and, if and when reasonably necessary, to replace the Unit Wall to its condition and appearance as originally constructed by Declarant. No changes or alterations

(including, without limitation, temporary alterations, such as removal for construction of a swimming pool or other Improvement) shall be made to any perimeter wall, or any portion thereof, without the prior written approval of the ARC (and any request therefor shall be subject to the provisions of Article 8 above, including, but not necessarily limited to, any conditions imposed by the ARC pursuant to Section 8.2(b) above). The foregoing and any other provision herein notwithstanding, under no circumstances shall any wall, or portion thereof, originally constructed by Declarant, be changed, altered or removed by any Owner (or agent or contractor thereof) if such wall, or portion thereof, is shown on any improvement plan as a flood control wall, or any other wall, or if such change, alteration or removal in the sole judgment (without any obligation to make such judgment) of the ARC would adversely affect surface water, drainage, or other flood control considerations or requirements. If any Owner shall fail to insure, or to maintain, repair or replace his Unit Wall within sixty (60) days when reasonably necessary, in accordance with this Section 9.6, the Association shall be entitled (but not obligated) to insure, or to maintain, repair or replace such Unit Wall, and to assess the full cost thereof against the Owner as a Special Assessment, which may be enforced as provided for in this Declaration. The foregoing notwithstanding, the Association, at its sole expense, shall be responsible for removing or painting over any graffiti from or on Exterior Walls.

Section 9.7 Installed Landscaping.

(a) Declarant shall have the option, in its sole and absolute discretion, to install landscaping on the front yards of Lots ("Declarant Installed Landscaping").

(b) Subject to the requirements of Article 8 (Architectural and Landscaping Control), above, each Owner shall have an aggregate period, following the Close of Escrow on his or her Lot, of (i) not more than six (6) months (with regard to front yard landscaping other than Declarant Installed Landscaping), and one (1) year (with regard to rear yard landscaping), in which to apply for and obtain approval of plans for landscaping and to commence and complete, in accordance with such approved plans, installation of such landscaping on the Lot ("Homeowner Installed Landscaping"). Each Owner shall be responsible, at his sole expense, for: (1) maintenance, repair, replacement, and watering of all landscaping on his Unit (whether initially installed by Declarant or an Owner) in a neat and attractive condition; and (2) maintenance, repair, and/or replacement of any and all sprinkler or irrigation or other related systems or equipment pertaining to such landscaping, subject to Section 9.7(c)-(e), below.

(c) Each Owner covenants to pay promptly when due all water bills for his or her Unit, and (subject to bona-fide force majeure events) to not initiate or continue any act or omission which would have the effect of water being shut off to the Unit. In the event that all or any portion of landscaping and/or related systems is or are damaged because of any Owner's act or omission, then such Owner shall be solely liable for the costs of repairing such damage, and any and all costs reasonably related thereto, and the Association may, in its discretion, perform or cause to be performed such repair, and to assess all related costs against such Owner as a Special Assessment, and the Association, and its employees, agents and contractors, shall have an easement over Lots to perform such function.

(d) In the event that any plants (including, but not necessarily limited to, trees, shrubs, bushes, lawn, flowers, and ground cover) on a Unit require replacement, then the cost of such replacement, and costs reasonably related thereto, shall be the responsibility of the Owner of the Unit.

(e) To help prevent and/or control water damage to foundations and/or walls, each Owner covenants, by acceptance of a deed to his Unit, whether or not so stated in such deed, to not cause or permit irrigation water or sprinkler water on his Unit to seep or flow onto, or to strike upon, any foundation, slab, side or other portion of Dwelling, wall (including, but not necessarily limited to, party wall and/or Perimeter Wall), and/or any other Improvement. Without limiting the generality of the foregoing or any other provision in this Declaration, each Owner shall at all times ensure that: (1) there are no unapproved grade changes (including, but not necessarily limited to, mounding) within three (3) feet of any such foundation or wall located on or immediately adjacent to the Owner's Unit; and (2) only non-irrigated desert landscaping is located on the Owner's Unit within three feet of any such foundation, slab, side or other portion of Dwelling, wall (including, but not necessarily limited to, party wall and/or Perimeter Wall).

(f) Absent prior written approval of the ARC, in its sole discretion, no Owner may add to, delete, modify, or change, any landscaping or related system.

Section 9.8 Modification of Improvements. Maintenance and repair of Common Elements shall be the responsibility of the Association, and the costs of such maintenance and repair shall be Common Expenses; provided that, in the event that any Improvement located on a Common Element is damaged because of any Owner's act or omission, such Owner shall be solely liable for the costs of repairing such damage and any and all costs reasonably related thereto, all of which costs may be assessed against such Owner as a Special Assessment under this Declaration. Each Owner covenants, by acceptance of a deed to his Unit, whether or not so stated in such deed, to not: add to, remove, delete, modify, change, obstruct, or landscape, all or any portion of the Common Elements, or Site Visibility Restriction Area, or Perimeter Wall, and/or any other wall or fence constructed by Declarant on such Owner's Lot, without prior written approval of the ARC, in its sole discretion.

ARTICLE 10
USE RESTRICTIONS

Subject to the rights and exemptions of Declarant as set forth in this Declaration, and subject further to the fundamental "good neighbor" policy underlying the Community and this Declaration, all real property within the Properties shall be held, used and enjoyed subject to the limitations, restrictions, and other provisions set forth in this Declaration. The strict application of the limitations and restrictions set forth in this Article 10 may be modified or waived in whole or in part by the Board in specific circumstances where such strict application would be unduly harsh, provided that any such waiver or modification shall not be valid unless in writing and executed by the Board. Any other provision herein notwithstanding, neither Declarant, the Association, the Board, nor their respective directors, officers, members, agents or employees, shall be liable to any Owner or to any other Person as a result of the failure to enforce any use restriction or for the granting or withholding of a waiver or modification of a use restriction as provided herein.

Section 10.1 Single Family Residence. Each Unit shall be improved and used solely as a residence for a single Family and for no other purpose (provided that Declarant shall have the right, but not the obligation, to designate certain specific Lots as private park or "open area" Common Elements). No part of the Properties shall ever be used or caused to be used or allowed

or authorized to be used in any way, directly or indirectly, for any business, commercial, manufacturing, mercantile, primary storage, vending, "reverse engineering," destructive testing, or any other nonresidential purposes; provided that Declarant, its successors and assigns, may exercise the reserved rights described in Article 14 hereof. The provisions of this Section 10.1 shall not preclude a professional or administrative occupation, or an occupation of child care, provided that the number of non-Family children, when added to the number of Family children being cared for at the Unit, shall not exceed a maximum aggregate of five (5) children, and provided further that there is no nuisance under Section 10.5, below, and no external evidence of any such occupation, for so long as such occupation is conducted in conformance with all applicable governmental ordinances and are merely incidental to the use of the Dwelling as a residential home. This provision shall not preclude any Owner from renting or leasing his entire Unit by means of a written lease or rental agreement subject to this Declaration and any Rules and Regulations; provided that no lease shall be for a term of less than six (6) months.

Section 10.2 No Further Subdivision. Except as may be expressly authorized by Declarant, no Unit or all or any portion of the Common Elements may be further subdivided (including, without limitation, any division into time-share estates or time-share uses) without the prior written approval of the Board; provided, however, that this provision shall not be construed to limit the right of an Owner: (1) to rent or lease his entire Unit by means of a written lease or rental agreement subject to the restrictions of this Declaration, so long as the Unit is not leased for transient or hotel purposes; (2) to sell his Unit; or (3) to transfer or sell any Unit to more than one person to be held by them as tenants-in-common, joint tenants, tenants by the entirety or as community property. The terms of any such lease or rental agreement shall be made expressly subject to this Declaration. Any failure by the lessee of such Unit to comply with the terms of the Governing Documents shall constitute a default under the lease or rental agreement. No two or more Units in the Properties may be combined in any manner whether to create a larger Unit or otherwise, and no Owner may permanently remove any block wall or other intervening partition between Units.

Section 10.3 Insurance Rates. Without the prior written approval of the Board, nothing shall be done or kept in the Properties which will increase the rate of insurance on any Unit or other portion of the Properties, nor shall anything be done or kept in the Properties which would result in the cancellation of insurance on any Unit or other portion of the Properties or which would be a violation of any law. Any other provision herein notwithstanding, the Board shall have no power whatsoever to waive or modify this restriction.

Section 10.4 Animal Restrictions. No animals, reptiles, poultry, fish, or fowl or insects of any kind ("animals") shall be raised, bred or kept on any Unit, except that a reasonable number of dogs, cats, birds, or fish may be kept, provided that they are not kept, bred or maintained for any commercial purpose, nor in unreasonable quantities nor in violation of any applicable County ordinance or any other provision of the Declaration, and such limitations as may be set forth in the Rules and Regulations. As used in this Declaration, "unreasonable quantities" shall ordinarily mean more than two (2) pets per household; provided, however, that the Board may determine that a reasonable number in any instance may be more or less. The Association, acting through the Board, shall have the right to prohibit maintenance of any animal in any Unit which constitutes, in the opinion of the Board, a nuisance to other Owners or Residents. Subject to the foregoing, animals belonging to Owners, Residents, or their respective Families, licensees, tenants or invitees within the Properties must be either kept within an enclosure, an enclosed yard or on a leash or other restraint being held by a person capable of controlling the animal. Furthermore, to the extent

permitted by law, any Owner and/or Resident shall be liable to each and all other Owners, Residents, and their respective Families, guests, tenants and invitees, for any unreasonable noise or damage to person or property caused by any animals brought or kept upon the Properties by an Owner or Resident or respective Family, tenants or guests; and it shall be the absolute duty and responsibility of each such Owner and Resident to clean up after such animals in the Properties or streets abutting the Properties. Without limiting the foregoing: (a) no "dog run" or similar structure pertaining to animals shall be placed or permitted in any Lot, unless approved by the Board in advance and in writing (and, in any event, any such "dog run" or similar Improvement shall not exceed the height of any party wall on the Lot, and shall otherwise not be permitted, or shall be immediately removed, if it constitutes a nuisance in the judgment of the Board; and (b) all Owners shall comply fully in all respects with all applicable County ordinances and rules regulating and/or pertaining to animals and the maintenance thereof on the Owner's Unit and/or any other portion of the Properties.

Section 10.5 Nuisances. No rubbish, clippings, refuse, scrap lumber or metal; no grass, shrub or tree clippings, and no plant waste, compost, bulk materials or other debris of any kind; (all, collectively, hereafter, "rubbish and debris") shall be placed or permitted to accumulate anywhere within the Properties, and no odor shall be permitted to arise therefrom so as to render the Properties or any portion thereof unsanitary, unsightly, or offensive. Without limiting the foregoing, all rubbish and debris shall be kept at all times in covered, sanitary containers or enclosed areas designed for such purposes. Such containers shall be exposed to the view of the neighboring Units only when set out for a reasonable period of time (not to exceed twelve (12) hours before or after scheduled trash collection hours). No noxious or offensive activities (including, but not limited to the repair of motor vehicles) shall be carried out on the Properties. No noise or other nuisance shall be permitted to exist or operate upon any portion of a Unit so as to be offensive or detrimental to any other Unit or to occupants thereof, or to the Common Elements. Without limiting the generality of any of the foregoing provisions, no exterior speakers, horns, whistles, bells or other similar or unusually loud sound devices (other than devices used exclusively for safety, security, or fire protection purposes), noisy or smokey vehicles, large power equipment or large power tools (excluding lawn mowers and other equipment utilized in connection with ordinary landscape maintenance), inoperable vehicle, unlicensed off-road motor vehicle, or other item which may unreasonably disturb other Owners or Residents or any equipment or item which may unreasonably interfere with television or radio reception within any Unit, shall be located, used or placed on any portion of the Properties without the prior written approval of the Board. No unusually loud motorcycles, dirt bikes or similar mechanized vehicles may be operated on any portion of the Common Elements without the prior written approval of the Board, which approval may be withheld for any reason whatsoever. Alarm devices used exclusively to protect the security of a Dwelling and its contents shall be permitted, provided that such devices do not produce annoying sounds or conditions as a result of frequently occurring false alarms. The Board shall have the right to reasonably determine if any noise, odor, activity, or circumstance, constitutes a nuisance. Each Owner and Resident shall comply with all of the requirements of the local or state health authorities and with all other governmental authorities with respect to the occupancy and use of a Unit, including Dwelling. Each Owner and Resident shall be accountable to the Association and other Owners and Residents for the conduct and behavior of children and other Family members or persons residing in or visiting his Unit; and any damage to the Common Elements, personal property of the Association or property of another Owner or Resident, caused by such children or other Family members, shall be repaired at the sole expense of the Owner of the Unit where such children or other Family members or persons are residing or visiting.

Section 10.6 Exterior Maintenance and Repair; Owner's Obligations. No improvement anywhere within the Properties shall be permitted to fall into disrepair, and each improvement shall at all times be kept in good condition and repair. If any Owner or Resident shall permit any improvement, which is the responsibility of such Owner or Resident to maintain, to fall into disrepair so as to create a dangerous, unsafe, unsightly or unattractive condition, the Board, after consulting with the ARC, and after affording such Owner or Resident reasonable notice, shall have the right but not the obligation to correct such condition, and to enter upon such Unit, for the purpose of so doing, and such Owner and/or Resident shall promptly reimburse the Association for the cost thereof. Such cost may be assessed as a Special Assessment pursuant to Section 6.11 above, and, if not paid timely when due, shall constitute an unpaid or delinquent assessment for all purposes of Article 7 above. The Owner and/or Resident of the offending Unit shall be personally liable for all costs and expenses incurred by the Association in taking such corrective acts, plus all costs incurred in collecting the amounts due. Each Owner and/or Resident shall pay all amounts due for such work within ten (10) days after receipt of written demand therefor.

Section 10.7 Drainage. By acceptance of a deed to a Unit, each Owner agrees for himself and his assigns that he will not in any way interfere with or alter, or permit any Resident to interfere with or alter, the established drainage pattern over any Unit, so as to affect said Unit, any other Unit, or the Common Elements, unless adequate alternative provision is made for proper drainage and approved in advance and in writing by the ARC, and any request therefor shall be subject to Article 8 above, including, but not necessarily limited to, any condition imposed by the ARC pursuant to Section 8.2(b) above. Without limiting the generality of the foregoing, any request by an Owner for ARC approval of alteration of established drainage pattern shall be subject to payment, by the Owner, of the professional fees of a licensed engineer to review the plans and specifications on behalf of the ARC, pursuant to Section 8.2(b)(8) above, which shall be required in all such cases, and further shall be subject to the Owner obtaining all necessary governmental approvals pursuant to Section 8.7, above. For the purpose hereof, "established drainage pattern" is defined as the drainage which exists at the time that such Unit is conveyed to a Purchaser from Declarant, or later grading changes which are shown on plans and specifications approved by the ARC.

Section 10.8 Water Supply and Sewer Systems. No individual water supply system, or cesspool, septic tank, or other sewage disposal system, or exterior water softener system, shall be permitted on any Unit unless such system is designed, located, constructed and equipped in accordance with the requirements, standards and recommendations of any water or sewer district serving the Properties, County health department, and any applicable utility and governmental authorities having jurisdiction, and has been approved in advance and in writing by the ARC.

Section 10.9 No Hazardous Activities. No activities shall be conducted, nor shall any improvements be constructed, anywhere in the Properties which are or might be unsafe or hazardous to any Person, Unit, Common Elements. Without limiting the foregoing, (a) no firearm shall be discharged within the Properties, and (b) there shall be no exterior or open fires whatsoever, except within a barbecue and contained within a receptacle commercially designed therefor, while attended and in use for cooking purposes, or except within a fireplace designed to prevent the dispersal of burning embers, so that no fire hazard is created, or except as specifically authorized in writing by the Board (all as subject to applicable ordinances and fire regulations).

Section 10.10 No Unsightly Articles. No unsightly article, facility, equipment, object, or condition (including, but not limited to, clotheslines, and garden and maintenance equipment, or

inoperable vehicle) shall be permitted to remain on any Unit so as to be visible from any street, or from any other Unit, Common Elements, or neighboring property. Without limiting the foregoing or any other provision herein, all refuse, garbage and trash shall be kept at all times in covered, sanitary containers or enclosed areas designed for such purpose. Such containers shall be exposed to view of the public, or neighboring Units, only when set out for a reasonable period of time (not to exceed twelve (12) hours before and after scheduled trash collection hours).

Section 10.11 No Temporary Structures. Unless required by Declarant during the initial construction of Dwellings and other Improvements, or unless approved in writing by the Board in connection with the construction of authorized Improvements, no outbuilding, tent, shack, shed or other temporary or portable structure or Improvement of any kind shall be placed upon any portion of the Properties. No garage, carport, trailer, camper, motor home, recreational vehicle or other vehicle shall be used as a residence in the Properties, either temporarily or permanently.

Section 10.12 No Drilling. No oil drilling, oil, gas or mineral development operations, oil refining, geothermal exploration or development, quarrying or mining operations of any kind shall be permitted upon, in, or below any Unit or the Common Elements, nor shall oil, water or other wells, tanks, tunnels or mineral excavations or shafts be permitted upon or below the surface of any portion of the Properties. No derrick of other structure designed for use in boring for water, oil, geothermal heat or natural gas, or other mineral or depleting asset shall be erected.

Section 10.13 Alterations. There shall be no excavation, construction, alteration or erection of any projection which in any way alters the exterior appearance of any Improvement from any street, or from any other portion of the Properties (other than minor repairs or rebuilding pursuant to Section 10.6 above) without the prior approval of the ARC pursuant to Article 8 hereof. There shall be no violation of the setback, side yard or other requirements of local governmental authorities, notwithstanding any approval of the ARC. This Section 10.13 shall not be deemed to prohibit minor repairs or rebuilding which may be necessary for the purpose of maintaining or restoring a Unit to its original condition.

Section 10.14 Signs. Subject to the reserved rights of Declarant contained in Article 14 hereof, no sign, poster, display, billboard or other advertising device or other display of any kind shall be installed or displayed to public view on any portion of the Properties, or on any public street abutting the Properties, without the prior written approval of the ARC, except: (a) one (1) sign for each Unit, not larger than eighteen (18) inches by thirty (30) inches, advertising the Unit for sale or rent, or (b) traffic and other signs installed by Declarant as part of the original construction of the Properties, or (c) signs regulated to the maximum extent permitted by applicable law. All signs or billboards and the conditions promulgated for the regulation thereof shall conform to the regulations of all applicable governmental ordinances.

Section 10.15 Improvements.

(a) No Lot shall be improved except with one (1) Dwelling designated to accommodate no more than a single Family and its servants and occasional guests, plus a garage, fencing and such other Improvements as are necessary or customarily incident to a single-Family Dwelling; provided that one additional small permanent building (e.g., a small "pool house" or "hobby house") may (but need not necessarily) be authorized on a Lot by the ARC, subject to the following: (1) full compliance with the requirements of Article 8, above; (2) the ARC, in its sole discretion, must determine that the Lot is large enough and otherwise suitable to accommodate

such proposed Improvement; (3) such Improvement in all regards must comply with the Governing Documents, and all applicable governmental ordinances and laws; and (4) such Improvement may not and shall not be used for any commercial purpose whatsoever, pursuant to Section 10.1 above. No part of the construction on any Lot shall exceed the height limitations set forth in the applicable provisions of the Governing Documents, or any applicable governmental regulation(s). No projections of any type shall be placed or permitted to remain above the roof of any building within the Properties, except one or more chimneys or vent stacks. No permanent or attached basketball backboard, jungle gym, play equipment, or other sports apparatus shall be constructed, erected, or maintained on the Properties without the prior written approval of the Board. A portable basketball hoop or other portable sports apparatus shall be permitted on a Lot, provided that such item: (i) is not placed in any street, (ii) is used only daylight hours, (iii) during non-daylight hours, is stored on the Lot so as to be out of sight of any street, and (iv) does not otherwise constitute a nuisance in the reasonable judgment of the Board. Apart from any installation by Declarant as part of its original construction, no patio cover, antennae, wiring, air conditioning fixture, water softeners or other devices shall be installed on the exterior of a Dwelling or allowed to protrude through the walls or roof of the Dwelling (with the exception of items installed by Declarant during the original construction of the Dwelling), unless the prior written approval of the ARC is obtained, subject to Section 10.16, below.

(b) All utility and storage areas and all laundry rooms, including all areas in which clothing or other laundry is hung to dry, must be completely covered and concealed from view from other areas of the Properties and neighboring properties.

(c) No fence or wall shall be erected or altered without prior written approval of the ARC, and all alterations or modifications of existing fences or walls of any kind shall require the prior written approval of the ARC.

(d) Garages shall be used only for the their ordinary and normal purposes. Unless constructed or installed by Declarant as part of its original construction, no Owner or Resident may convert the garage on his Unit into living space or otherwise use or modify the garage so as to preclude regular and normal parking of vehicles therein. The foregoing notwithstanding, Declarant may convert a garage located in any Unit owned by Declarant into a sales office or related purposes.

Section 10.16 Antennas and Satellite Dishes. No exterior radio antenna or aerial, television antenna or aerial, microwave antenna, aerial or satellite dish, "C.B." antenna or other antenna or aerial of any type, which is visible from any street or from anywhere in the Properties, shall be erected or maintained anywhere in the Properties. Notwithstanding the foregoing, "Permitted Devices" (defined as antennas or satellite dishes: (i) which are one meter or less in diameter and designed to receive direct broadcast satellite service; or (ii) which are one meter or less in diameter or diagonal measurement and designed to receive video programming services via multi-point distribution services) shall be permitted, provided that such Permitted Device is:

(a) located in the attic, crawl space, garage, or other interior space of the Dwelling, or within another approved structure on the Unit, so as not to be visible from outside the Dwelling or other structure, or, if such location is not reasonably practicable, then,

(b) located in the rear yard of the Unit (i.e., the area between the plane formed by the front facade of the Dwelling and the rear lot line) and set back from all lot lines at least eight (8) feet, or, if such location is not reasonably practicable, then,

(c) attached to or mounted on a deck or patio and extending no higher than the eaves of that portion of the roof of the Dwelling directly in front of such antenna; or, if such location is not reasonably practicable, then,

(d) attached to or mounted on the rear wall of the Dwelling so as to extend no higher than the eaves of the Dwelling at a point directly above the position where attached or mounted to the wall, provided that,

(e) if an Owner reasonably determines that a Permitted Device cannot be located in compliance with the foregoing portions of this Section 10.16 without precluding reception of an acceptable quality signal, then the Owner may install such Permitted Device in the least conspicuous alternative location within the Unit where an acceptable quality signal can be obtained; provided that,

(f) Permitted Devices shall be reasonably screened from view from the street or any other portion of the Properties, and shall be subject to Rules and Regulations adopted by the Board, establishing a preferred hierarchy of alternative locations, so long as the same do not unreasonably increase the cost of installation, or use of the Permitted Device.

Declarant or the Association may, but are in no way obligated to, provide a master antenna or cable television antenna for use of all or some Owners. Declarant may grant easements for maintenance of any such master or cable television service.

Section 10.17 Landscaping. Subject to the provisions of Articles 8 and 9 (including, but not limited to, Sections 9.7 and 9.8 above), each Owner shall install and shall thereafter maintain the landscaping on his Unit in a neat and attractive condition. No plants or seeds infected with insects or plant diseases shall be brought upon, grown or maintained upon any part of the Properties. The Board may adopt Rules and Regulations to regulate landscaping permitted and required in the Properties. If an Owner fails to install and maintain landscaping in conformance with this Declaration or such Rules and Regulations, or allows his landscaping to deteriorate to a dangerous, unsafe, unsightly, or unattractive condition, the Board shall have the right to either (a) after thirty (30) days' written notice, seek any remedies at law or in equity which it may have; or (b) after reasonable notice (unless there exists a bona-fide unsafe or dangerous condition, in which case, the right shall be immediate, and no notice shall be required), to correct such condition and to enter upon the exterior portion of such Owner's Unit for the purpose of so doing, and such Owner shall promptly reimburse the Association for the cost thereof, as a Special Assessment, enforceable in the manner set forth in Article 7, above. Each Owner shall be responsible, at his sole expense, for maintenance, repair, replacement, and watering of any and all landscaping on the Unit, as well as any and all sprinkler or irrigation or other related systems or equipment pertaining to such landscaping.

Section 10.18 Prohibited Plant Types. Without limiting the generality of any other provision herein, the following plant types are hereby specifically declared to be nuisances, and shall not be permitted anywhere within the Properties: (a) Olea europaea ("olive"), other than "fruitless olive" which shall be permitted; (b) Morus alba or nigra ("mulberry"); (c) Cynodon dactylon ("bermuda

grass"). (d) Amaranthus palmen ("careless weed"); (e) Salsola kali ("Russian thistle"); and/or (f) Fransenan dumosa ("desert ragweed").

Section 10 19 Parking and Vehicular Restnctions. No Person shall park, store or keep anywhere within the Properties, any inoperable or similar vehicle, or any large commercial-type vehicle, including, but not limited to, any dump truck, cement mixer truck, oil or gas truck or delivery truck, bus, aircraft, or any vehicular equipment, mobile or otherwise, except wholly within the Owner's garage as onginally constructed by Declarant ("Garage") and only with the Garage door closed. Any boat, trailer, camper, motor home, and similar recreational vehicle (collectively and individually, "RV"), shall be parked only (i) wholly within a Garage, with the Garage door completely closed, or (ii) wholly between the building lines (i.e., wholly behind the front building lines and wholly in front of the rear building lines) of the homes on both immediately adjacent Lots (or, if there is only one immediately adjacent Lot, then the building lines of the home on such adjacent Lot, provided that the Board shall have the power and authority, in its sole discretion, to entirely disapprove and/or prohibit parking of an RV on any Lot with only one other Lot immediately adjacent thereto) if such parking reasonably may be deemed to constitute a nuisance, and appropriately screened from view from all streets as determined by the Board in its reasonable discretion, and no variance from this requirement shall be authorized or permitted. The foregoing shall not be deemed to prohibit a pickup or camper truck or similar vehicle up to and including one (1) ton when used for daily transportation of the Owner or Resident, or the Family respectively thereof, which vehicle shall be permitted, subject to the Garage, nuisance, and parking provisions herein No Person shall conduct repairs or restorations of any motor vehicle, boat, trailer, aircraft or other vehicle upon any portion of the Properties or on any street abutting the Properties. However, repair and/or restoration of one (1) such item only shall be permitted within the Garage so long as the Garage door remains closed; provided, however, that such activity may be prohibited entirely by the Board if the Board determines in its reasonable discretion that such activity constitutes a nuisance Vehicles owned, operated or within the control of any Owner or of a resident of such Owner's Dwelling shall be parked in the Garage to the extent of the space available therein All garages shall be kept neat and free of stored materials so as to permit the parking of at least one (1) standard sized American sedan automobile therein at all times. Garage doors shall not remain open for prolonged periods of time, and must be closed when not reasonably required for immediate ingress and egress. The Association, through the Board, is hereby empowered to establish and enforce any additional parking limitations, rules and/or regulations (collectively, "parking regulations") which it may deem necessary, including, but not limited to, the levying of fines for violation of parking regulations, and/or removal of any violating vehicle at the expense of the owner of such vehicle. No parking of any vehicle shall be permitted along any curb or otherwise on any street within the Properties, except only for ordinary and reasonable guest parking, subject to parking regulations established by the Board. Notwithstanding the foregoing, these restrictions shall not be interpreted in such a manner as to permit any parking or other activity which would be contrary to any County ordinance, or which is determined by the Board, in its reasonable discretion, to constitute a bona-fide nuisance.

Section 10 20 Sight Visibility Restriction Areas. The maximum height of any and all sight restricting Improvements (including, but not necessarily limited to, landscaping), on all Sight Visibility Restriction Areas, shall be restricted to a maximum height not to exceed twenty-four (24) inches, or such other height set forth in the Plat ("Maximum Permitted Height"). In the event that any Improvement located on any Sight Visibility Restriction Area on a Unit exceeds the Maximum Permitted Height, the Association shall have the power and easement to enter upon such Unit and to bring such Improvement into compliance, and the Owner shall be solely liable for the costs

thereof and any and all costs reasonably related thereto, all of which costs may be assessed against such Owner as a Special Assessment under this Declaration.

Section 10.21 Prohibited Direct Access. Any other provision herein notwithstanding, there shall be no direct vehicular access to Tompkins from any abutting Unit (and no direct vehicular access to Carsoli Court from Lots 18, 19, 20, or 21 of Block 1 of Unit 1 of the Properties), and any such direct vehicular access is hereby prohibited pursuant to and in accordance with the Plat (other than over Private Streets which shall be permitted, subject to the provisions set forth in this Declaration).

Section 10.22 No Waiver. The failure of the Board to insist in any one or more instances upon the strict performance of any of the terms, covenants, conditions or restrictions of this Declaration, or to exercise any right or option herein contained, or to serve any notice or to institute any action, shall not be construed as a waiver or a relinquishment for the future of such term, covenant, condition or restriction, but such term, covenant, condition or restrictions shall remain in full force and effect. The receipt by the Board or Manager of any assessment from an Owner with knowledge of the breach of any covenant hereof shall not be deemed a waiver of such breach, and no waiver by the Board or Manager of any provision hereof shall be deemed to have been made unless expressed in writing and signed by the Board or the Manager.

Section 10.23 Declarant Exemption. Lots owned by Declarant, shall be exempt from the provisions of this Article 10, until such time as Declarant conveys title to the Lot to a Purchaser, and activities of Declarant reasonably related to Declarant's development, construction, and marketing efforts, shall be exempt from the provisions of this Article 10. This Article 10 may not be amended without Declarant's prior written consent.

ARTICLE 11
DAMAGE TO OR CONDEMNATION OF COMMON ELEMENTS

Section 11.1 Damage or Destruction. Damage to, or destruction or condemnation of, all or any portion of the Common Elements shall be handled in the following manner:

(a) Repair of Damage. Any portion of this Community for which insurance is required by this Declaration or by any applicable provision of NRS Chapter 116, which is damaged or destroyed, must be repaired or replaced promptly by the Association unless: (i) the Community is terminated, in which case the provisions of NRS § 116.2118, 166.21183 and 116.21185 shall apply; (ii) repair or replacement would be illegal under any state or local statute or ordinance governing health or safety; or (iii) eighty percent (80%) of the Owners, including every Owner of a Unit that will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a Common Expense. If the entire Community is not repaired or replaced, the proceeds attributable to the damaged Common Elements must be used to restore the damaged area to a condition compatible with the remainder of the Community; (A) the proceeds attributable to Units that are not rebuilt must be distributed to the Owners of those Units; and (B) the remainder of the proceeds must be distributed to all the Owners or lien holders, as their interests may appear, in proportion to the liabilities of all the Units for Common Expenses. If the Owners vote not to rebuild any Unit, that Unit's allocated interests are automatically reallocated upon the vote as if the Unit had been condemned, and the Association promptly shall prepare, execute and Record an amendment to this Declaration reflecting the reallocations.

(b) Damage by Owner. To the full extent permitted by law, each Owner shall be liable to the Association for any damage to the Common Elements not fully reimbursed to the Association by insurance proceeds, provided the damage is sustained as a result of the negligence, willful misconduct, or unauthorized or improper installation or maintenance of any Improvement by said Owner or the Persons deriving their right and easement of use and enjoyment of the Common Elements from said Owner, or by his respective Family and guests, both minor and adult. The Association reserves the right, acting through the Board, after Notice and Hearing, to: (1) determine whether any claim shall be made upon the insurance maintained by the Association; and (2) levy against such Owner a Special Assessment equal to any deductible paid and the increase, if any, in the insurance premiums directly attributable to the damage caused by such Owner or the Person for whom such Owner may be responsible as described above. In the case of joint ownership of a Unit, the liability of the co-owners thereof shall be joint and several, except to any extent that the Association has previously contracted in writing with such co-owners to the contrary. After Notice and Hearing, the Association may levy a Special Assessment in the amount of the cost of correcting such damage, to the extent not reimbursed to the Association by insurance, against any Unit owned by such Owner, and such Special Assessment may be enforced as provided herein.

Section 11.2 Condemnation. If at any time, all or any portion of the Common Elements, or any interest therein, is taken for any governmental or public use, under any statute, by right of eminent domain or by private purchase in lieu of eminent domain, the award in condemnation shall be paid to the Association. Any such award payable to the Association shall be deposited in the operating fund. No Member shall be entitled to participate as a party, or otherwise, in any proceedings relating to such condemnation. The Association shall have the exclusive right to participate in such proceedings and shall, in its name alone, represent the interests of all Members. Immediately upon having knowledge of any taking by eminent domain of Common Elements, or any portion thereof, or any threat thereof, the Board shall promptly notify all Owners and all Eligible Holders.

Section 11.3 Condemnation Involving a Unit. For purposes of NRS § 116.1107(2)(a), if part of a Unit is required by eminent domain, the award shall compensate the Owner for the reduction in value of the Unit's interest in the Common Elements. The basis for such reduction shall be the extent to which the occupants of the Unit are impaired from enjoying the Common Elements. In cases where the Unit may still be used as a Dwelling, it shall be presumed that such reduction is zero (0).

ARTICLE 12
INSURANCE

Section 12.1 Casualty Insurance. The Board shall cause to be obtained and maintained a master policy of fire and casualty insurance with extended coverage for loss or damage to all of the Association's insurable Improvements on the Common Elements, for the full insurance replacement cost thereof without deduction for depreciation or coinsurance, and shall obtain insurance against such other hazards and casualties as the Board deems reasonable and prudent. The Board, in its reasonable judgment, may also insure any other property whether real or personal, owned by the Association or located within the Properties, against loss or damage by fire and such other hazards as the Board may deem reasonable and prudent, with the Association as the owner and beneficiary of such insurance. The insurance coverage with respect to the Common

Elements shall be maintained for the benefit of the Association, the Owners, and the Eligible Holders, as their interests may appear as named insured, subject however to the loss payment requirements as set forth herein. Premiums for all insurance carried by the Association are Common Expenses included in the Annual Assessments levied by the Association.

The Association, acting through the Board, shall be the named insureds under policies of insurance purchased and maintained by the Association. All insurance proceeds under any policies shall be paid to the Board as trustee. The Board shall have full power to receive and receipt for the proceeds and to deal therewith as deemed necessary and appropriate. Except as otherwise specifically provided in this Declaration, the Board, acting on behalf of the Association and all Owners, shall have the exclusive right to bind such parties with respect to all matters affecting insurance carried by the Association, the settlement of a loss claim, and the surrender, cancellation, and modification of all such insurance. Duplicate originals or certificates of all policies of insurance maintained by the Association and of all the renewals thereof, together with proof of payment of premiums, shall be delivered by the Association to all Eligible Holders who have expressly requested the same in writing.

Section 12.2 Liability and Other Insurance. The Association shall have the power and duty to and shall obtain comprehensive public liability insurance, including medical payments and malicious mischief, in such limits as it shall deem desirable (but in no event less than $1,000,000.00 covering all claims for bodily injury and property damage arising out of a single occurrence), insuring the Association, Board, Directors, Officers, Declarant, and Manager, and their respective agents and employees, and the Owners and Residents of Units and their respective Families, guests and invitees, against liability for bodily injury, death and property damage arising from the activities of the Association or with respect to property maintained or required to be maintained by the Association including, if obtainable, a cross-liability endorsement insuring each insured against liability to each other insured. Such insurance shall also include coverage, to the extent reasonably available, against liability for non-owned and hired automobiles, liability for property of others, and any other liability or risk customarily covered with respect to projects similar in construction, location, and use. The Association may also obtain, through the Board, Worker's Compensation insurance (which shall be required if the Association has one or more employees) and other liability insurance as it may deem reasonable and prudent, insuring each Owner and the Association, Board, and any Manager, from liability in connection with the Common Elements, the premiums for which are a Common Expense included in the Annual Assessment levied against the Owners. All insurance policies shall be reviewed at least annually by the Board and the limits increased in its reasonable business judgment.

Section 12.3 Fidelity Insurance. The Board shall further cause to be obtained and maintained errors and omissions insurance, blanket fidelity insurance coverage (in an amount at least equal to 100% of Association Funds from time to time handled by such Persons) and such other insurance as it deems prudent, insuring the Board, the Directors and Officers, and any Manager against any liability for any act or omission in carrying out their respective obligations hereunder, or resulting from their membership on the Board or on any committee thereof. If reasonably feasible, the amount of such coverage shall be at least $1,000,000.00, and said policy or policies of insurance shall also contain an extended reporting period endorsement (a tail) for a six-year period. The Association shall require that the Manager maintain fidelity insurance coverage which names the Association as an obligee, in such amount as the Board deems prudent. From such time as Declarant no longer has the power to control the Board, as set forth in Section 3.7(c) above, blanket fidelity insurance coverage which names the Association as an obligee shall

be obtained by or on behalf of the Association for any Person handling funds of the Association, including but not limited to, Officers, Directors, trustees, employees, and agents of the Association, whether or not such Persons are compensated for their services, in such an amount as the Board deems prudent; provided that in no event may the aggregate amount of such bonds be less than the maximum amount of Association Funds that will be in the custody of the Association or Manager at any time while the policy is in force (but in no event less than the sum equal to one-fourth (1/4) of the Annual Assessments on all Units, plus Reserve Funds), or such other amount as may be required by FNMA, VA or FHA from time to time, if applicable.

Section 12.4 Other Insurance Provisions. The Board shall also obtain such other insurances customarily required with respect to projects similar in construction, location, and use, or as the Board may deem reasonable and prudent from time to time, including, but not necessarily limited to, Worker's Compensation insurance (which shall be required if the Association has any employees) All premiums for insurances obtained and maintained by the Association are a Common Expense included in the Annual Assessment levied upon the Owners. All insurance policies shall be reviewed at least annually by the Board and the limits increased in its sound business judgment. In addition, the Association shall continuously maintain in effect such casualty, flood, and liability insurance and fidelity insurance coverage necessary to meet the requirements for similar developments, as set forth or modified from time to time by any governmental body with jurisdiction.

Section 12.5 Insurance Obligations of Owners. Each Owner is required, at Close of Escrow on his Unit, at his sole expense to have obtained, and to have furnished his Mortgagee (or, in the event of a cash transaction involving no Mortgagee, then to the Board) with duplicate copies of, a homeowner's policy of fire and casualty insurance with extended coverage for loss or damage to all insurable improvements and fixtures originally installed by Declarant on such Owner's Unit in accordance with the original plans and specifications, or installed by the Owner on the Unit, for the full insurance replacement cost thereof without deduction for depreciation or coinsurance. By acceptance of the deed to his Unit, each Owner agrees to maintain in full force and effect at all times, at said Owner's sole expense, such homeowner's insurance policy, and shall provide the Board with duplicate copies of such insurance policy upon the Board's request. Nothing herein shall preclude any Owner from carrying any public liability insurance as he deems desirable to cover his individual liability, damage to person or property occurring inside his Unit or elsewhere upon the Properties. Such policies shall not adversely affect or diminish any liability under any insurance obtained by or on behalf of the Association, and duplicate copies of such other policies shall be deposited with the Board upon request. If any loss intended to be covered by insurance carried by or on behalf of the Association shall occur and the proceeds payable thereunder shall be reduced by reason of insurance carried by any Owner, such Owner shall assign the proceeds of such insurance carried by him to the Association, to the extent of such reduction, for application by the Board to the same purposes as the reduced proceeds are to be applied. Notwithstanding the foregoing, or any other provision herein, each Owner shall be solely responsible for full payment of any and all deductible amounts under such Owner's policy or policies of insurance.

Section 12.6 Waiver of Subrogation. All policies of physical damage insurance maintained by the Association shall provide, if reasonably possible, for waiver of: (1) any defense based on coinsurance; (2) any right of set-off, counterclaim, apportionment, proration or contribution by reason of other insurance not carried by the Association; (3) any invalidity, other adverse effect or defense on account of any breach of warranty or condition caused by the Association, any Owner or any tenant of any Owner, or arising from any act, neglect, or omission

of any named insured or the respective agents, contractors and employees of any insured; (4) any rights of the insurer to repair, rebuild or replace, and, in the event any Improvement is not repaired, rebuilt or replaced following loss, any right to pay under the insurance an amount less than the replacement value of the Improvements insured; or (5) notice of the assignment of any Owner of its interest in the insurance by virtue of a conveyance of any Unit. The Association hereby waives and releases all claims against the Board, the Owners, Declarant, and Manager, and the agents and employees of each of the foregoing, with respect to any loss covered by such insurance, whether or not caused by negligence of or breach of any agreement by such Persons, but only to the extent that insurance proceeds are received in compensation for such loss; provided, however, that such waiver shall not be effective as to any loss covered by a policy of insurance which would be voided or impaired thereby.

Section 12.7 Notice of Expiration Requirements. If available, each of the policies of insurance maintained by the Association shall contain a provision that said policy shall not be canceled, terminated, materially modified or allowed to expire by its terms, without thirty (30) days' prior written notice to the Board and Declarant and to each Owner and each Eligible Holder who has filed a written request with the carrier for such notice, and every other Person in interest who requests in writing such notice of the insurer. All insurance policies carried by the Association pursuant to this Article 12, to the extent reasonably available, must provide that: (a) each Owner is an insured under the policy with respect to liability arising out of his interest in the Common Elements or Membership; (b) the insurer waives the right to subrogation under the policy against any Owner or member of his Family; (c) no act or omission by any Owner or member of his Family will void the policy or be a condition to recovery under the policy; and (d) if, at the time of a loss under the policy there is other insurance in the name of the Owner covering the same risk covered by the policy, the Association's policy provides primary insurance.

ARTICLE 13
MORTGAGEE PROTECTION CLAUSE

In order to induce FHA, VA, FHLMC, GNMA and FNMA and any other governmental agency or other Mortgagees to participate in the financing of the sale of Units within the Properties, the following provisions are added hereto (and to the extent these added provisions conflict with any other provisions of the Declaration, these added provisions shall control):

(a) Each Eligible Holder, at its written request, is entitled to written notification from the Association of any default by the Mortgagor of such Unit in the performance of such Mortgagor's obligations under this Declaration, the Articles of Incorporation or the Bylaws, which default is not cured within thirty (30) days after the Association learns of such default. For purposes of this Declaration, "first Mortgage" shall mean a Mortgage with first priority over other Mortgages or Deeds of Trust on a Unit, and "first Mortgagee" shall mean the Beneficiary of a first Mortgage.

(b) Each Owner, including every first Mortgagee of a Mortgage encumbering any Unit which obtains title to such Unit pursuant to the remedies provided in such Mortgage, or by foreclosure of such Mortgage, or by deed or assignment in lieu of foreclosure, shall be exempt from any "right of first refusal" created or purported to be created by the Governing Documents.

(c) Except as provided in NRS § 116.3116(2), each Beneficiary of a first Mortgage encumbering any Unit which obtains title to such Unit or by foreclosure of such Mortgage, shall take title to such Unit free and clear of any claims of unpaid assessments or charges against such Unit which accrued prior to the acquisition of title to such Unit by the Mortgagee.

(d) Unless at least sixty-seven percent (67%) of Eligible Holders (based upon one (1) vote for each first Mortgage owned) or sixty-seven percent (67%) of the Owners (other than Declarant) have given their prior written approval, neither the Association nor the Owners shall:

(i) subject to Nevada nonprofit corporation law to the contrary, by act or omission seek to abandon, partition, alienate, subdivide, release, hypothecate, encumber, sell or transfer the Common Elements and the Improvements thereon which are owned by the Association, provided that the granting of easements for public utilities or for other public purposes consistent with the intended use of such property by the Association as provided in this Declaration shall not be deemed a transfer within the meaning of this clause.

(ii) change the method of determining the obligations, assessments, dues or other charges which may be levied against an Owner, or the method of allocating distributions of hazard insurance proceeds or condemnation awards;

(iii) by act or omission change, waive or abandon any scheme of regulations, or enforcement thereof, pertaining to the architectural design of the exterior appearance of the Dwellings and other Improvements on the Units, the maintenance of the Exterior Walls or common fences and driveways, or the upkeep of lawns and plantings in the Properties;

(iv) fail to maintain Fire and Extended Coverage on any insurable Common Elements on a current replacement cost basis in an amount as near as possible to one hundred percent (100%) of the insurance value (based on current replacement cost);

(v) except as provided by any provision of NRS Chapter 116 applicable hereto, use hazard insurance proceeds for losses to any Common Elements property for other than the repair, replacement or reconstruction of such property; or

(vi) amend those provisions of this Declaration or the Articles of Incorporation or Bylaws which provide for rights or remedies of first Mortgagees.

(e) Eligible Holders, upon written request, shall have the right to (1) examine the books and records of the Association during normal business hours, (2) require from the Association the submission of an annual audited financial statement (without expense to the Beneficiary, insurer or guarantor requesting such statement) and other financial data, (3) receive written notice of all meetings of the Members, and (4) designate in writing a representative to attend all such meetings.

(f) All Beneficiaries, insurers and guarantors of first Mortgages, who have filed a written request for such notice with the Board shall be given thirty (30) days' written notice prior to: (1) any abandonment or termination of the Association; (2) the effective date of any proposed, material amendment to this Declaration or the Articles or Bylaws; and (3) the effective date of any termination of any agreement for professional management of the Properties following a decision of the Owners to assume self-management of the Properties. Such first Mortgagees shall be given

immediate notice (i) following any damage to the Common Elements whenever the cost of reconstruction exceeds Ten Thousand Dollars ($10,000.00); and (ii) when the Board learns of any threatened condemnation proceeding or proposed acquisition of any portion of the Properties.

(g) First Mortgagees may, jointly or singly, pay taxes or other charges which are in default and which may or have become a charge against any Common Elements property and may pay any overdue premiums on hazard insurance policies, or secure new hazard insurance coverage on the lapse of a policy, for Common Elements property, and first Mortgagees making such payments shall be owed immediate reimbursement therefor from the Association.

(h) The Reserve Fund described in Article 6 above must be funded by regular scheduled monthly, quarterly, semiannual or annual payments rather than by large extraordinary assessments

(i) The Board shall require that any Manager, and any employee or agent thereof, maintain at all times fidelity bond coverage which names the Association as an obligee; and, at all times from and after the end of the Declarant Control Period, the Board shall secure and cause to be maintained in force at all times fidelity bond coverage which names the Association as an obligee for any Person handling funds of the Association.

(j) When professional management has been previously required by a Beneficiary, insurer or guarantor of a first Mortgage, any decision to establish self-management by the Association shall require the approval of at least sixty-seven percent (67%) of the voting power of the Association and of the Board respectively, and the Beneficiaries of at least fifty-one percent (51%) of the Eligible Holders.

(k) So long as VA is insuring or guaranteeing loans or has agreed to insure or guarantee loans on any portion of the Properties, then, pursuant to applicable VA requirement, for so long as Declarant shall control the Association Board, Declarant shall obtain prior written approval of the VA for any material proposed: action which may affect the basic organization, subject to Nevada nonprofit corporation law, of the Association (i.e., merger, consolidation, or dissolution of the Association); dedication, conveyance, or mortgage of the Common Elements; or amendment of the provisions of this Declaration, the Articles of Incorporation, Bylaws, or other document which may have been previously approved by the VA; provided that no such approval shall be required in the event that the VA no longer regularly requires or issues such approvals at such time

In addition to the foregoing, the Board of Directors may enter into such contracts or agreements on behalf of the Association as are required in order to reasonably satisfy the express applicable requirements of FHA, VA, FHLMC, FNMA or GNMA or any similar entity, so as to allow for the purchase, insurance or guaranty, as the case may be, by such entities of first Mortgages encumbering Units Each Owner hereby agrees that it will benefit the Association and the Membership, as a class of potential Mortgage borrowers and potential sellers of their Units, if such agencies approve the Properties as a qualifying subdivision under their respective policies, rules and regulations, as adopted from time to time. Mortgagees are hereby authorized to furnish information to the Board concerning the status of any Mortgage encumbering a Unit.

ARTICLE 14
DECLARANT'S RESERVED RIGHTS

Section 14.1 Declarant's Reserved Rights. Any other provision herein notwithstanding, pursuant to NRS §116 2105(1)(h), Declarant reserves, in its sole discretion, the following developmental rights and other special Declarant's rights, on the terms and conditions and subject to the expiration deadlines, if any, set forth below:

(a) Right to Complete Improvements and Construction Easement. Declarant reserves, for a period terminating on the fifteenth (15th) anniversary of Recordation of this Declaration, the right, in Declarant's sole discretion, to complete the construction of the Improvements on the Properties and an easement over the Properties for such purpose; provided, however, that if Declarant still owns any property in the Properties on such fifteenth (15th) anniversary date, then such rights and reservations shall continue for one additional successive period of ten (10) years thereafter

(b) Exercise of Developmental Rights. Pursuant to NRS Chapter 116, Declarant reserves the right to annex all or portions of the Annexable Area to the Community, pursuant to the provisions of Article 15 hereof, for as long as Declarant owns any portion of the Annexable Area No assurances are made by Declarant with regard to the boundaries of those portions of the Properties which may be annexed or the order in which such portions may be annexed. Declarant also reserves the right to withdraw real property from the Community.

(c) Offices, Model Homes and Promotional Signs Declarant reserves the right to maintain signs, sales and management offices, and models in any Unit owned or leased by Declarant in the Properties, and signs anywhere on the Common Elements, for so long as Declarant owns or leases any Unit

(d) Appointment and Removal of Directors. Declarant reserves the right to appoint and remove a majority of the Board as set forth in Section 3.7 hereof, for the period set forth therein during the Declarant Control Period.

(e) Amendments. Declarant reserves the right to amend this Declaration from time to time, as set forth in detail in Section 17.7, below, during the time periods set forth therein.

(f) Appointment and Removal of ARC. Declarant reserves the right to appoint and remove the ARC, for the time period set forth in Section 8.1, above.

(g) Easements Declarant has reserved certain easements, and related rights, as set forth in this Declaration.

(h) Other Rights. Declarant reserves all other rights, powers, and authority of Declarant set forth in this Declaration, including, but not limited to, Article 16 below, and, to the extent not expressly prohibited by NRS Chapter 116, further reserves all other rights, powers, and authority, in Declarant's sole discretion, of a declarant under NRS Chapter 116.

(i) Control of Entry Gates. Declarant reserves the right, until the Close of Escrow of the last Unit in the Properties, to unilaterally control all entry gates, and to keep all entry

gates open during such hours established by Declarant, in its sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities.

(j) Restriction of Traffic. Declarant reserves the right, until the Close of Escrow of the last Unit in the Properties, to unilaterally restrict and/or re-route all pedestrian and vehicular traffic within the Properties, in Declarant's sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities; provided that no Unit shall be deprived of access to a dedicated street adjacent to the Properties.

(k) Possible Future Common Recreation Area. Declarant reserves the right, but not the obligation, in Declarant's sole and absolute discretion, until the Close of Escrow of the last Unit in the Properties, to unilaterally develop and convey to the Association a common recreational area within the Community (which may but need not necessarily include, and need not necessarily be limited to, a tot lot, park, and/or pool) as a part of the Common Elements of this Community (and, in such event, the costs of maintenance and repair of the same shall be a Common Expense)

Section 14.2 Exemption of Declarant. Notwithstanding anything to the contrary in this Declaration, the following shall apply:

(a) Nothing in this Declaration shall limit, and no Owner or the Association shall do anything to interfere with, the right of Declarant to complete excavation and grading and the construction of Improvements to and on any portion of the Properties, or to alter the foregoing and Declarant's construction plans and designs, or to construct such additional Improvements as Declarant deems advisable in the course of development of the Properties, for so long as any Unit owned by Declarant remains unsold.

(b) This Declaration shall in no way limit the right of Declarant to grant additional licenses, easements, reservations and rights-of-way to itself, to governmental or public authorities (including without limitation public utility companies), or to others, as from time to time may be reasonably necessary to the proper development and disposal of Units; provided, however, that if FHA or VA approval is sought by Declarant, then the FHA and/or the VA shall have the right to approve any such grants as provided herein.

(c) Prospective purchasers and Declarant shall have the right to use all and any portion of the Common Elements for access to the sales facilities of Declarant and for placement of Declarant's signs.

(d) Without limiting Section 14.1(c), above, or any other provision herein, Declarant may use any structures owned or leased by Declarant, as model home complexes or real estate sales or management offices, subject to the time limitations set forth herein, after which time, Declarant shall restore the Improvement to the condition necessary for the issuance of a final certificate of occupancy by the appropriate governmental entity. Any garages which have converted into sales offices by Declarant shall be converted back to garages at the time of sale to a Purchaser of such Unit

(e) All or any portion of the rights of Declarant in this Declaration may be assigned by Declarant to any successor in interest, by an express and written Recorded assignment which specifies the rights of Declarant so assigned.

(f) The prior written approval (which shall not be unreasonably withheld) of Declarant, as developer of the Properties, shall be required before any amendment to the Declaration affecting Declarant's rights or interests (including, without limitation, this Article 14) can be effective

(g) The rights and reservations of Declarant referred to herein, if not earlier terminated pursuant to the Declaration, shall terminate on the date set forth in Section 14.1(a) above.

ARTICLE 15
ANNEXATION

Section 15 1 Annexation of Property. Declarant may, but shall not be required to, at any time or from time to time, add to the Properties covered by this Declaration all or any portion of the Annexable Area then owned by Declarant, by Recording an annexation amendment ("Annexation Amendment") with respect to the real property to be annexed ("Annexed Property"). Upon the recording of an Annexation Amendment covering any portion of the Annexable Area and containing the provisions set forth herein, the covenants, conditions and restrictions contained in this Declaration shall apply to the Annexed Property in the same manner as if the Annexed Property were originally covered in this Declaration and originally constituted a portion of the Original Property; and thereafter, the rights, privileges, duties and liabilities of the parties to this Declaration with respect to the Annexed Property shall be the same as with respect to the Original Property and the rights, obligations, privileges, duties and liabilities of the Owners and occupants of Units within the Annexed Property shall be the same as those of the Owners and occupants of Units originally affected by this Declaration. By acceptance of a deed from Declarant conveying any real property located in the Annexable Area (Exhibit "B" hereto), in the event such real property has not theretofore been annexed to the Properties encumbered by this Declaration, and whether or not so expressed in such deed, the grantee thereof covenants that Declarant shall be fully empowered and entitled (but not obligated) at any time thereafter, and appoints Declarant as attorney in fact, in accordance with NRS §§ 111 450 and 111.460, of such grantee and his successors and assigns, to unilaterally execute and Record an Annexation Amendment, annexing said real property to the Community, in the manner provided for in this Article 15.

Section 15 2 Annexation Amendment. Each Annexation Amendment shall conform to the requirements of NRS § 116.2110, and shall include:

(a) the written and acknowledged consent of Declarant;

(b) a reference to this Declaration, which reference shall state the date of Recordation hereof and the County, book and instrument number, and any other relevant Recording data;

(c) a statement that the provisions of this Declaration shall apply to the Annexed Property as set forth therein;

(d) a sufficient description of the Annexed Property;

(e) assignment of an Identifying Number to each new Unit created;

(f) a reallocation of the allocated interests among all Units; and

(g) a description of any Common Elements created by the annexation of the Annexed Property.

Section 15.3 FHA/VA Approval. In the event that, and for so long as, the FHA or VA is insuring or guaranteeing loans (or has agreed to insure or guarantee loans) on any portion of the Properties with respect to the initial sale by Declarant to a Purchaser of any Unit, then a condition precedent to any annexation of any property other than the Annexable Area shall be written confirmation by the FHA or the VA that the annexation is in accordance with the development plan submitted to and approved by the FHA or the VA, provided, however, that such written confirmation shall not be a condition precedent if at such time the FHA or the VA has ceased to regularly require or issue such written confirmations.

Section 15.4 Disclaimers Regarding Annexation. Portions of the Annexable Area may or may not be annexed, and, if annexed, may be annexed at any time by Declarant, and no assurances are made with respect to the boundaries or sequence of annexation of such portions. Annexation of a portion of the Annexable Area shall not necessitate annexation of any other portion of the remainder of the Annexable Area. Declarant has no obligation to annex the Annexable Area, or any portion thereof.

Section 15.5 Expansion of Annexable Area. In addition to the provisions for annexation specified in Section 15.2, above, the Annexable Area may, from time to time, be expanded to include additional real property, not as yet identified. Such property may be annexed to the Annexable Area upon the Recordation of a written instrument describing such real property, executed by Declarant and all other owners of such property and containing thereon the approval of the FHA and the VA; provided, however, that such written approval shall not be a condition precedent if at such time the FHA or the VA has ceased to regularly require or issue such written approvals.

Section 15.6 Contraction of Annexable Area. So long as real property has not been annexed to the Properties subject to this Declaration, the Annexable Area may be contracted to delete such real property effective upon the Recordation of a written instrument describing such real property, executed by Declarant and all other owners, if any, of such real property, and declaring that such real property shall thereafter be deleted from the Annexable Area. Such real property may be deleted from the Annexable Area without a vote of the Association or the approval or consent of any other Person, except as provided herein.

ARTICLE 16
ADDITIONAL DISCLOSURES, DISCLAIMERS AND RELEASES

Section 16.1 Additional Disclosures and Disclaimers of Certain Matters. Without limiting any other provision in this Declaration, by acceptance of a deed to a Unit, each Owner (for purposes of this Section 16.1, the term "Owner" shall include the Owner, and the Owner's Family, guests and tenants), and by residing within the Properties, each Resident (for purposes of this Article 16, the term "Resident" shall include each Resident, and the Resident's family and guests) shall conclusively be deemed to understand, and to have acknowledged and agreed to, all of the following:

(a) that there are or may be major electrical power system components (high voltage transmission or distribution lines, transformers, etc.) presently and from time to time located within, adjacent to, or nearby the Properties (including, but not limited to, the Common Elements and/or the Unit), which generate certain electric and magnetic fields ("EMF") around them, and that Declarant disclaims any and all representations or warranties, express and implied, with regard to or pertaining to EMF,

(b) that the Unit and the other portions of the Properties are or from time to time may be located within or nearby: (1) airplane flight patterns or clear zones, and subject to significant levels of airplane noise, and (2) major roadways, and subject to significant levels of noise, dust, and other nuisance resulting from proximity to major roadways and/or vehicles. Also, each Unit is located in proximity to streets and other Dwellings in the Community, and subject to substantial levels of sound and noise. Declarant disclaims any and all representations or warranties, express and implied, with regard to or pertaining to such airplane flight patterns or clear zones and/or roadways or vehicles or noise;

(c) that the Unit and other portions of the Properties are or may be nearby major regional underground natural gas transmission pipelines. Declarant hereby specifically disclaims any and all representations or warranties, express and implied, with regard to or pertaining to gas transmission lines,

(d) that the Las Vegas Valley contains a number of earthquake faults, and the Unit and other portions of the Properties may be located on or nearby an identified or yet to be identified seismic fault line. Declarant specifically disclaims any and all representations or warranties, express and implied, with regard to or pertaining to earthquake or seismic activities;

(e) that construction or installation of Improvements by Declarant, other Owners, or third parties, and/or installation or growth of trees or other plants, may impair or eliminate the view, if any, of or from a Unit. Declarant disclaims any and all representations or warranties, express and implied, with regard to or pertaining to the impairment or elimination of any existing or future view;

(f) that residential subdivision and new home construction is an industry inherently subject to variations and imperfections. Purchaser acknowledges and agrees that items which do not materially affect safety or structural integrity shall be deemed "expected minor flaws" (including, but not limited to reasonable wear, tear or deterioration; shrinkage, swelling, expansion or settlement; squeaking, peeling, chipping, cracking, or fading; touch-up painting; minor flaws or corrective work; and like items) and are not constructional defects. Purchaser acknowledges that: (1) the finished construction of the Unit and the Common Elements, while within the standards of the industry in the Las Vegas Valley, Clark County, Nevada, and while in substantial compliance with the plans and specifications, will be subject to expected minor flaws; and (2) issuance of a Certificate of Occupancy by the relevant governmental authority with jurisdiction shall be deemed conclusive evidence that the relevant Improvement has been built within such industry standards;

(g) that indoor air quality of the Unit may be affected, in a manner and to a degree found in new construction within industry standards, by particulates or volatiles emanating or evaporating from new carpeting or other building materials, fresh paint or other sealants or finishes, and so on,

(h) that installation and maintenance of a gated community and/or any security device shall not create any presumption or duty whatsoever of Declarant or Association (or their respective officers, directors, managers, employees, agents, and/or contractors) with regard to security or protection of person or property within or adjacent to the Properties;

(i) that the Unit and other portions of the Properties are located adjacent or nearby to certain undeveloped areas which may contain various species of wild creatures (including, but not limited to, coyotes and foxes), which may from time to time stray onto the Properties, and which may otherwise pose a nuisance or hazard;

(j) that Purchaser acknowledges having received from Declarant information regarding the zoning designations and the designations in the master plan regarding land use, adopted pursuant to NRS Chapter 278, for the parcels of land adjoining the Properties to the north, south, east, and west, together with a copy of the most recent gaming enterprise district map made available for public inspection by the jurisdiction in which the Unit is located, and related disclosures. Declarant makes no further representation, and no warranty (express or implied), with regard to any matters pertaining to adjoining land or uses thereof or to gaming uses. Purchaser is hereby advised that the master plan and zoning ordinances are subject to change from time to time. If Purchaser desires additional or more current information concerning these zoning and gaming designations, Purchaser should contact the City of Las Vegas Planning Department. Purchaser acknowledges and agrees that its decision to purchase is based solely upon Purchaser's own investigation and not upon any information provided by any sales agent;

(k) that Declarant presently plans to develop only those Lots which have already been released for construction and sale, and Declarant has no obligation with respect to future phases, plans, zoning, or development of other real property contiguous to or nearby the Unit. The Purchaser or Owner of a Unit may have seen proposed or contemplated residential and other developments which may have been illustrated in the plot plan or other sales literature in or from Declarant's sales office, and/or may have been advised of the same in discussions with sales personnel, however, notwithstanding such plot plans, sales literature, or discussions or representations by sales personnel or otherwise, Declarant is under no obligation to construct such future or planned developments or units, and the same may not be built in the event that Declarant, for any reason whatsoever, decides not to build same. A Purchaser or Owner is not entitled to rely upon, and in fact has not relied upon, the presumption or belief that the same will be built; and no sales personnel or any other person in any way associated with Declarant has any authority to make any statement contrary to the foregoing provisions;

(l) that residential subdivision and new home construction are subject to and accompanied by substantial levels of noise, dust, traffic, and other construction-related "nuisances". Purchaser acknowledges and agrees that it is purchasing a Unit which is within a residential subdivision currently being developed, and that Purchaser will experience and accepts substantial levels of construction-related "nuisances" until the subdivision and any neighboring land have been completed and sold out;

(m) that Declarant shall have the right, from time to time, in its sole discretion, to establish and/or adjust sales prices or price levels for new homes;

(n) that model homes are displayed for illustrative purposes only, and such display shall not constitute an agreement or commitment on the part of Declarant to deliver the Unit in conformity with any model home, and any representation or inference to the contrary is hereby expressly disclaimed. None of the decorator items and other items or furnishings (including, but

not limited to, decorator paint colors, wallpaper, window treatments, mirrors, upgraded carpet, decorator built-ins, model home furniture, model home landscaping, and the like) shown installed or on display in any model home are included for sale to a Purchaser unless an authorized officer of Declarant has specifically agreed in a written Addendum to the Purchase Agreement to make specific items a part of the Purchase Agreement; and

(o) that the Unit and other portions of the Properties are or may be located adjacent to or nearby a school, and school bus drop off/pickup areas, and subject to levels of noise, dust, and other nuisance resulting from or related to proximity to such school and/or school bus stops; and

(p) that some, but not all, Units, are large enough to accommodate parking of a recreational vehicle ("RV") on the side yard area of the Unit, subject to all restrictions set forth in the Declaration. If a Purchaser desires to purchase a Unit suitable for accommodating parking of an RV on the Unit, it is solely the Purchaser's responsibility and obligation to specifically confirm and verify with Declarant in a written addendum to the Purchase Agreement, whether the Unit being purchased may legitimately accommodate parking of an RV, subject to all use and other restrictions set forth in the Declaration; and

(q) that Declarant reserves the right, until the Close of Escrow of the last Unit in the Properties, to unilaterally control the entry gate(s), and to keep all such entry gate(s) open during such hours established by Declarant, in its sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities;

(r) that Declarant reserves the right, until the Close of Escrow of the last Unit in the Properties, to unilaterally restrict and/or re-route all pedestrian and vehicular traffic within the Properties, in Declarant's sole discretion, to accommodate Declarant's construction activities, and sales and marketing activities; provided that no Unit shall be deprived of access to a dedicated street adjacent to the Properties;

(s) that Declarant reserves all other rights, powers, and authority of Declarant set forth in this Declaration, and, to the extent not expressly prohibited by NRS Chapter 116, further reserves all other rights, powers, and authority, in Declarant's sole discretion, of a declarant under NRS Chapter 116 (including, but not necessarily limited to, all special declarant's rights referenced in NRS § 116.110385);

(t) that Declarant has reserved certain easements, and related rights and powers, as set forth in this Declaration;

(u) that there are presently and may in the future be a water reservoir site and/or other additional water retention facilities located nearby or adjacent to, or within the Community, and the Community is located adjacent to or nearby major water and drainage channels (including, but not necessarily limited to, the Naples Channel), major washes, and a major water detention basin (all of the foregoing, collectively, "Channel"), the ownership, use, regulation, operation, maintenance, improvement and repair of which are not within Declarant's control, and over which Declarant has no jurisdiction or authority, and, in connection therewith: (1) the Channel may be an attractive nuisance; (2) maintenance and use of the Channel may involve various operations and applications, including (but not necessarily limited to) noisy electric, gasoline or other power driven vehicles and/or equipment used by Channel maintenance and repair personnel during various times of the day, including, without limitation, early morning and/or late evening hours; and (3) the possibility of damage to Improvements and property on the Properties, particularly in the event of overflow of water or other substances from or related to the Channel, as the result of nonfunction,

malfunction, or overtaxing of the Channel or any other reason; and (4) any or all of the foregoing may cause inconvenience and disturbance to Purchaser and other persons in or near the Unit and/or Common Elements, and possible injury to person and/or damage to property.

Section 16.2 Disclaimers and Releases. As an additional material inducement to Declarant to sell the Unit to Purchaser, and without limiting any other provision in the Purchase Agreement, Purchaser (for itself and all persons claiming under or through Purchaser) acknowledges and agrees (a) that Declarant specifically disclaims any and all representations and warranties, express and implied, with regard to any of the foregoing disclosed or described matters (other than to the extent expressly set forth in the foregoing disclosures); and (b) fully and unconditionally releases Declarant and the Association, and their respective officers, managers, agents, employees, suppliers and contractors, from any and all loss, damage or liability (including, but not limited to, any claim for nuisance or health hazards) related to or arising in connection with any disturbance, inconvenience, injury, or damage resulting from or pertaining to all and/or any one or more of the conditions, activities, and/or occurrences described in the foregoing portions of this Declaration

ARTICLE 17
GENERAL PROVISIONS

Section 17.1 Enforcement. Subject to Section 5.3 above, the Governing Documents may be enforced by the Association as follows:

(a) Breach of any of the provisions contained in the Declaration or Bylaws and the continuation of any such breach may be enjoined, abated or remedied by appropriate legal or equitable proceedings instituted, in compliance with applicable Nevada law, by any Owner, including Declarant so long as Declarant owns a Unit, by the Association, or by the successors-in-interest of the Association. Any judgment rendered in any action or proceeding pursuant hereto shall include a sum for attorneys' fees in such amount as the court may deem reasonable, in favor of the prevailing party, as well as the amount of any delinquent payment, interest thereon, costs of collection and court costs. Each Owner shall have a right of action against the Association for any material unreasonable and continuing failure by the Association to comply with the material and substantial provisions of this Declaration, or of the Articles or Bylaws.

(b) The Association further shall have the right to enforce the obligations of any Owner under any material provision of this Declaration, by assessing a reasonable fine as a Special Assessment against such Owner or Resident, and/or suspending the right of such Owner to vote at meetings of the Association and/or the right of the Owner or Resident to use Common Elements (other than ingress and egress, by the most reasonably direct route, to the Unit), subject to the following

(i) the person alleged to have violated the material provision of the Declaration must have had written notice (either actual or constructive, by inclusion in any Recorded document) of the provision for at least thirty (30) days before the alleged violation; and

(ii) such use and/or voting suspension may not be imposed for a period longer than thirty (30) days per violation, provided that if any such violation continues for a period of ten (10) days or more after notice of such violation has been given to such Owner or

Resident, each such continuing violation shall be deemed to be a new violation and shall be subject to the imposition of new penalties;

(iii) notwithstanding the foregoing, each Owner shall have an unrestricted right of ingress and egress to his Unit by the most reasonably direct route over and across the relevant streets;

(iv) no fine imposed under this Section 17.1 may exceed the maximum amount(s) permitted from time to time by applicable provision of NRS Chapter 116 for each failure to comply. No fine may be imposed until the Owner or Resident has been afforded the right to be heard, in person, by submission of a written statement, or through a representative, at a regularly noticed hearing (unless the violation is of a type that substantially and imminently threatens the health, safety and/or welfare of the Owners and Community, in which case, the Board may take expedited action, as the Board may deem reasonable and appropriate under the circumstances, subject to the limitations set forth in Section 5.2(b), above);

(v) subject to Section 5.2(c)(iii) above, if any such Special Assessment imposed by the Association on an Owner or Resident by the Association is not paid within thirty (30) days after written notice of the imposition thereof, then such Special Assessment shall be enforceable pursuant to Articles 6 and 7 above; and

(vi) subject to Section 5.3 above, and to applicable Nevada law (which may first require mediation or arbitration), the Association may also take judicial action against any Owner or Resident to enforce compliance with provisions of the Governing Documents, or other obligations, or to obtain damages for noncompliance, all to the fullest extent permitted by law.

(c) Responsibility for Violations. Should any Resident violate any material provision of the Rules and Regulations or Declaration, or should any Resident's act, omission or neglect cause damage to the Common Elements, then such violation, act, omission or neglect shall also be considered and treated as a violation, act, omission or neglect of the Owner of the Unit in which the Resident resides. Likewise, should any guest of an Owner or Resident commit any such violation or cause such damage to Common Elements, such violation, act, omission or neglect shall also be considered and treated as a violation, act, omission or neglect of the Owner or Resident. Reasonable efforts first shall be made to resolve any alleged material violation, or any dispute, by friendly discussion or informal mediation by the ARC or Board (and/or mutually agreeable or statutorily authorized third party mediator), in a "good neighbor" manner. Fines or suspension of voting privileges shall be utilized only after reasonable efforts to resolve the issue by friendly discussion or informal mediation have failed.

(d) The result of every act or omission whereby any of the provisions contained in this Declaration or the Bylaws are materially violated in whole or in part is hereby declared to be and shall constitute a nuisance, and every remedy allowed by law or equity against a nuisance either public or private shall be applicable against every such result and may be exercised by any Owner, by the Association or its successors-in-interest.

(e) The remedies herein provided for breach of the provisions contained in this Declaration or in the Bylaws shall be deemed cumulative, and none of such remedies shall be deemed exclusive

(f) The failure of the Association to enforce any of the provisions contained in this Declaration or in the Bylaws shall not constitute a waiver of the right to enforce the same thereafter.

(g) If any Owner, his Family, guest, licensee, lessee or invitee violates any such provisions, the Board may impose a reasonable Special Assessment upon such Owner for each violation and, if any such Special Assessment is not paid or reasonably disputed in writing to the Board (in which case, the dispute shall be subject to reasonable attempts at resolution through mutual discussions and mediation) within thirty (30) days after written notice of the imposition thereof, then the Board may suspend the voting privileges of such Owner, and such Special Assessment shall be collectible in the manner provided hereunder, but the Board shall give such Owner appropriate Notice and Hearing before invoking any such Special Assessment or suspension

Section 17.2 Severability. Invalidation of any provision of this Declaration by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

Section 17.3 Term. The covenants and restrictions of this Declaration shall run with and bind the Properties, and shall inure to the benefit of and be enforceable by the Association or the Owner of any land subject to this Declaration, their respective legal representatives, heirs, successive Owners and assigns, until duly terminated in accordance with NRS § 116.2118.

Section 17.4 Interpretation. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development of a residential community and for the maintenance of the Common Elements. The article and section headings have been inserted for convenience only, and shall not be considered or referred to in resolving questions of interpretation or construction. Unless the context requires a contrary construction, the singular shall include the plural and the plural the singular; and the masculine, feminine and neuter shall each include the masculine, feminine and neuter.

Section 17.5 Amendment. Except as otherwise provided by this Declaration, and except in cases of amendments that may be executed by a Declarant, this Declaration, including the Plat, may only be amended by both: (a) the vote and agreement of Owners constituting at least sixty-seven percent (67%) of the voting power of the Association, and (b) the written assent or vote of at least a majority of the total voting power of the Board. Notwithstanding the foregoing, termination of this Declaration and any of the following amendments, to be effective, must be approved in writing by the Eligible Holders of at least two-thirds (2/3) of the first Mortgages on all of the Units in the Properties at the time of such amendment or termination, based upon one (1) vote for each first Mortgage owned

(a) Any amendment which affects or purports to affect the validity or priority of Mortgages or the rights or protection granted to Beneficiaries, insurers and guarantors of first Mortgages as provided in Articles 7, 12, 13, 14 and 16 hereof.

(b) Any amendment which would necessitate a Mortgagee, after it has acquired a Unit through foreclosure, to pay more than its proportionate share of any unpaid assessment or assessments accruing after such foreclosure.

(c) Any amendment which would or could result in a Mortgage being canceled by forfeiture, or in a Unit not being separately assessed for tax purposes.

(d) Any amendment relating to the insurance provisions as set out in Article 12 hereof, or to the application of insurance proceeds as set out in Article 12 hereof, or to the disposition of any money received in any taking under condemnation proceedings.

(e) Any amendment which would or could result in termination or abandonment of the Properties or subdivision of a Unit, in any manner inconsistent with the provisions of this Declaration

(f) Any amendment which would subject any Owner to a right of first refusal or other such restriction if such Unit is proposed to be sold, transferred or otherwise conveyed

(g) Any amendment materially and substantially affecting: (i) voting rights; (ii) rights to use the Common Elements; (iii) reserves and responsibility for maintenance, repair and replacement of the Common Elements; (iv) leasing of Units; (v) establishment of self-management by the Association where professional management has been required by any Beneficiary, insurer or guarantor of a first Mortgage; (vi) boundaries of any Unit; (vii) Declarant's right and power to annex or de-annex property to or from the Properties; and (viii) assessments, assessment liens, or the subordination of such liens.

Notwithstanding the foregoing, if a first Mortgagee who receives a written request from the Board to approve a proposed termination, amendment or amendments to the Declaration does not deliver a negative response to the Board within thirty (30) days of the mailing of such request by the Board, such first Mortgagee shall be deemed to have approved the proposed termination, amendment or amendments. Notwithstanding anything contained in this Declaration to the contrary, nothing contained herein shall operate to allow any Mortgagee to: (a) deny or delegate control of the general administrative affairs of the Association by the Members or the Board; (b) prevent the Association or the Board from commencing, intervening in or settling any litigation or proceeding, or (c) prevent any trustee or the Association from receiving and distributing any proceeds of insurance, except pursuant to NRS §§ 116.31133 & 116.31135.

A copy of each amendment shall be certified by at least two (2) Officers, and the amendment shall be effective when a Certificate of Amendment is Recorded. The Certificate, signed and sworn to by at least two (2) Officers, that the requisite number of Owners have either voted for or consented in writing to any termination or amendment adopted as provided above, when Recorded, shall be conclusive evidence of that fact. The Association shall maintain in its files the record of all such votes or written consents for a period of at least four (4) years. The certificate reflecting any termination or amendment which requires the written consent of any of the Eligible Holders shall include a certification that the requisite approval of the Eligible Holders has been obtained. Until the first Close of Escrow for the sale of a Unit, Declarant shall have the right to terminate or modify this Declaration by Recordation of a supplement hereto setting forth such termination or modification.

Notwithstanding all of the foregoing, for so long as Declarant owns a Lot or Unit, Declarant shall have the power from time to time to unilaterally amend this Declaration to correct any scrivener's errors, to clarify any ambiguous provision, to modify or supplement the Exhibits hereto, to make and process through appropriate governmental authority, minor revisions to the Plat deemed appropriate by Declarant in its discretion, and otherwise to ensure that the Declaration conforms with requirements of applicable law. Additionally, by acceptance of a deed from Declarant conveying any real property located in the Annexable Area (Exhibit "B") hereto, in the event such real property has not theretofore been annexed to the Properties encumbered by this

Declaration, and whether or not so expressed in such deed, the grantee thereof covenants that Declarant shall be fully empowered and entitled (but not obligated) at any time thereafter, and appoints Declarant as attorney in fact, in accordance with NRS §§ 111.450 and 111.460, of such grantee and his successors and assigns, to unilaterally execute and Record an Annexation Amendment, adding said real property to the Community, in the manner provided for in NRS § 116.2110 and in Article 15 above, and to make and process through appropriate governmental authority, any and all minor revisions to the Plat deemed appropriate by Declarant in its reasonable discretion, and each and every Owner, by acceptance of a deed to his Unit, covenants to sign such further documents and to take such further actions as to reasonably implement and consummate the foregoing.

Section 17.6 Notice of Change to Governing Documents. If any change is made to the Governing Documents, the Secretary (or other designated Officer) shall, within 30 days after the change is made, prepare and cause to be hand-delivered or sent prepaid by United States mail to the mailing address of each Unit or to any other mailing address designated in writing by the Owner, a copy of the changes made.

Section 17.7 No Public Right or Dedication. Nothing contained in this Declaration shall be deemed to be a gift or dedication of all or any part of the Properties to the public, or for any public use

Section 17.8 Constructive Notice and Acceptance. Every Person who owns, occupies or acquires any right, title, estate or interest in or to any Unit or other portion of the Properties does hereby consent and agree, and shall be conclusively deemed to have consented and agreed, to every limitation, restriction, easement, reservation, condition and covenant contained herein, whether or not any reference to these restrictions is contained in the instrument by which such person acquired an interest in the Properties, or any portion thereof.

Section 17.9 Notices Any notice permitted or required to be delivered as provided herein shall be in writing and may be delivered either personally or by mail. If delivery is made by mail, it shall be deemed to have been delivered three (3) business days after a copy of the same has been deposited in the United States mail, postage prepaid, addressed to any person at the address given by such person to the Association for the purpose of service of such notice, or to the residence of such person if no address has been given to the Association. Such address may be changed from time to time by notice in writing to the Association.

Section 17.10 Priorities and Inconsistences. The Governing Documents shall be construed to be consistent with one another to the extent reasonably possible. If there exist any irreconcilable conflicts or inconsistencies among the Governing Documents, the terms and provisions of this Declaration shall prevail (unless and to the extent only that a term of provision of this Declaration fails to comply with applicable provision of NRS Chapter 116. In the event of any inconsistency between the Articles and Bylaws, the Articles shall prevail. In the event of any inconsistency between the Rules and Regulations and any other Governing Document, the other Governing Document shall prevail.

Section 17.11 Limited Liability. Except to the extent, if any, expressly prohibited by applicable Nevada law, none of Declarant, Association, and/or ARC, and none of their respective directors, officers, any committee representatives, employees, or agents, shall be liable to any Owner or any other Person for any action or for any failure to act with respect to any matter if the

action taken or failure to act was reasonable or in good faith. The Association shall indemnify every present and former Officer and Director and every present and former committee representative against all liabilities incurred as a result of holding such office, to the full extent permitted by law.

Section 17.12 Business of Declarant. Except to the extent expressly provided herein or as required by applicable provision of NRS Chapter 116, no provision of this Declaration shall be applicable to limit or prohibit any act of Declarant, or its agents or representatives, in connection with or incidental to Declarant's improvement and/or development of the Properties, so long as any Unit therein owned by Declarant remains unsold.

Section 17.13 Compliance With NRS Chapter 116. It is the intent of Declarant and the Community that this Declaration shall be in all respects consistent with, and not in violation of, applicable provisions of NRS Chapter 116. In the event any provision of this Declaration is found to irreconcilably conflict with or violate such applicable provision of NRS Chapter 116, such offending Declaration provision shall be deemed automatically modified or severed herefrom to the minimum extent necessary to remove the irreconcilable conflict with or violation of the applicable provision of NRS Chapter 116. Notwithstanding the foregoing or any other provision set forth herein, if any provision of Senate Bill 451 (1999) should, in the future, be removed or made less burdensome (from the perspective of Declarant), as a matter of law, then the future change in such provision shall automatically be deemed to have been made and reflected in this Declaration.

IN WITNESS WHEREOF, Declarant has executed this Declaration the day and year first written above

DECLARANT:

PERMA-BILT,
a Nevada corporation

By: _____
Daniel Schwartz, President

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

This instrument was acknowledged before me on this 29 day of February, 2000, by DANIEL SCHWARTZ, as President of PERMA-BILT, a Nevada corporation.

_____
NOTARY PUBLIC

(SEAL)

Notary Public - State of Nevada
County of Clark
RENA L. WINTERS
My Appointment Expires
September 19, 2000
No. 92-4318-1

My Commission Expires:

9-19-2000

wmr\1369.2611 CCRS 01.wpd

200003 07
00911

EXHIBIT "A"

ORIGINAL PROPERTY

ALL THAT REAL PROPERTY SITUATED IN THE COUNTY OF CLARK, STATE OF NEVADA, DESCRIBED AS FOLLOWS

Lot Thirteen (13) in **Block One (1)**, as shown by final map of **CONQUISTADOR/TOMPKINS - UNIT 1**, on file in **Book 92** of Plats, **Page 68**, Office of the County Recorder, Clark County, Nevada; TOGETHER WITH a non-exclusive easement of ingress, egress, and enjoyment of Common Elements of the Properties (as said terms are defined and egress over and across the entry area and private streets of NAPLES, and a non-exclusive easement of use and enjoyment of the Common Elements thereof (subject to and as set forth in the foregoing Declaration, as the same from time to time may be amended and/or supplemented by instrument recorded in the Office of the County Recorder of Clark County, Nevada)

20000307
.00911

EXHIBIT "B"

ANNEXABLE AREA

[ALL, OR ANY PORTIONS FROM TIME TO TIME MAY, BUT NEED NOT NECESSARILY, BE ANNEXED BY DECLARANT TO THE PROPERTIES]

PARCEL 1

All of the real property as shown by final map of **CONQUISTADOR/TOMPKINS - UNIT 1**, on file in **Book 92** of Plats, **Page 68**, Office of the County Recorder of Clark County, Nevada;

(**EXCEPTING THEREFROM ONLY** Lot Thirteen (13), in Block One (1), of NAPLES, as shown by said final map of CONQUISTADOR/TOMPKINS - UNIT 1).

PARCEL 2

All of the real property in **CONQUISTADOR/TOMPKINS - UNIT 2**, as shown by final map thereof on file in **Book 93** of Plats, **Page 1**, Office of the County Recorder of Clark County, Nevada.

PARCEL 3

All of the real property in **CONQUISTADOR/TOMPKINS - UNIT 3**, as shown by final map thereof on file in Book ____ of Plats, Page ____, Office of the County Recorder of Clark County, Nevada

[NOTE: DECLARANT HAS SPECIFICALLY RESERVED THE RIGHT FROM TIME TO TIME TO UNILATERALLY ADD TO OR MODIFY OF RECORD ALL OR ANY PARTS OF THE FOREGOING AND/OR ATTACHED DESCRIPTIONS]

When Recorded, Return to:

WILBUR M. ROADHOUSE, ESQ.
Goold Patterson DeVore Ales & Roadhouse
4496 South Pecos Road
Las Vegas, Nevada 89121
(702) 436-2600

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:
W ROADHOUSE
03-07-2000 15:17 JSB 77
OFFICIAL RECORDS
BOOK: 20000307 INST: 00911
FEE: 83.00 RPTT: .00

19 -

200012 08
.00019

216238-DJG-4

APN: 163-19-311-020

ANNEXATION AMENDMENT
NAPLES

3

REFERENCE IS MADE to that certain Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for NAPLES ("Declaration"), recorded March 7, 2000, as Instrument No. 00911, in Book 20000307, of the Official Records, Clark County Recorder, Clark County, Nevada.

Pursuant to Article 15 of the Declaration, Declarant PERMA BILT, a Nevada corporation, hereby annexes, to the real property currently covered by the Declaration, the real property described on Exhibit "1" hereto ("Annexed Property").

Upon the recordation of this Annexation Amendment, the covenants, conditions and restrictions and reservation of easements contained in the Declaration shall apply to the Annexed Property in the same manner as if the Annexed Property originally had been covered in the Declaration and constituted a portion of the Original Property. Upon said recordation, the rights, privileges, duties and liabilities of the parties to the Declaration with regard to the Annexed Property shall be the same as with regard to the Original Property, and the rights, obligations, privileges, duties and liabilities of the Owners and occupants of Units within the Annexed Property shall be the same as those of the Owners and occupants of Units within the Original Property.

The Identifying Number of each Unit in the Annexed Property is the unit number as shown on the Plat. The additional Common Area, if any, created by the annexation of the Annexed Property also are as shown on the Plat or as set forth in the Declaration. The allocated interests among all Units in the Planned Community covered by the Declaration

shall be as set forth in the Declaration. Each Unit shall have an equal prorated share of the liability for Common Expenses, and each Unit shall have one vote in the Association.

Upon the recordation of this Annexation Amendment, the Annexed Property shall become, and shall thereafter be, subject to the provisions of the Declaration, including, without limitation, the duty to pay assessments as set forth therein.

Capitalized terms herein not otherwise defined shall have the meanings set forth in the Declaration.

IN WITNESS WHEREOF, Declarant has executed this Annexation Amendment as of this 6th day of December, 2000.

DECLARANT:

PERMA BILT,
a Nevada corporation

By: _____
RUTH OCHOA, Vice President

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

This instrument was acknowledged before me on this 6th day of December, 2000, by RUTH OCHOA, as Vice President of PERMA BILT, a Nevada corporation.

_____
NOTARY PUBLIC

[seal]

NOTARY PUBLIC
County of Clark-State of Nevada
AINA RODARTE
No. 93-0957-1
My Appointment Expires Jan. 8, 2001

200012 08
.00019

EXHIBIT "1"

ANNEXED PROPERTY

Lot(s) 70, 72, 75, 77, 78, 86, 89, 103 & 104, in Block One (1), and a nonexclusive easement of enjoyment, as set forth in the above-described Declaration, over Common Elements of **NAPLES**, as shown by final map of as shown by final map of **CONQUISTADOR/TOMPKINS - UNIT** 2, on file in Book 93 of Plats, Page 1, Office of the County Recorder, Clark County, Nevada.

Lots 33 & 36 in Block One (1), and a nonexclusive easement of enjoyment, as set forth in the above-described Declaration, over Common Elements of NAPLES, as shown by final map of CONQUISTADOR/TOMPKINS - UNIT 1, on file in Book 92 of Plats, page 68, in the Office of the County Recorder of Clark County, Nevada.

When recorded, return to:

PERMA-BILT HOMES
Attn: Sandy Charlsley
7150 Pollock Drive, Suite #104
Las Vegas, Nevada 89119

(wmr\1388.25\Sannecam.01.wpd)

CLARK COUNTY, NEVADA
JUDITH A. VANDEVER, RECORDER
RECORDED AT REQUEST OF:
LAND TITLE OF NEVADA

12-08-2000 08:00 DBX 3
OFFICIAL RECORDS
BOOK: 20001208 INST: 00019

9.00 RPTT: .00

Exhibit 2

Exhibit 2

Exhibit 2

DISTRICT COURT
CLARK COUNTY, NEVADA

Title to Property | COURT MINUTES | January 28, 2013

A-12-672790-C Stanford Burt, Plaintiff(s)
vs.
Sutter Creek Homeowners Association, Defendant(s)

January 28, 2013 3:00 AM **Minute Order Re: Decision on Plaintiff's Motion For Preliminary Injunction**

HEARD BY: Becker, Nancy COURTROOM: RJC Courtroom 14D

COURT CLERK: Susan Jovanovich

RECORDER: Kerry Esparza

REPORTER:

NO PARTIES PRESENT:

JOURNAL ENTRIES

This matter came before the Court on January 14, 2013, on Plaintiff Burt's Motion For Preliminary Injunction and Defendant SBW Investments' Countermotion To Dismiss The Complaint. The Court granted a temporary restraining order on January 14, 2013, prohibiting SBW from evicting Burt pending the Court's decision on the motions. The Court has reviewed all the pleadings in this case, including all exhibits attached to the complaint, and the motions, as well as additional documents supplied to the Court during, or immediately, after the hearing, as requested by the Court. The following ruling is based on the information supplied in all of the pleadings and supplemental documents.

This matter involves a dispute between Burt and his homeowner's association, Sutter Creek over assessments and late fees. In 2009, Sutter Creek claimed that Burt was behind in his assessments, and began charging him late fees. Burt asserted that he had paid his assessments. Sutter Creek records indicate in the same time period, a member of the Association's Board was charged with embezzling Association funds and removed. The Association asked Burt to supply records of the payments he claimed were not properly credited. Meanwhile, Burt made his current monthly assessments payments. The records reflect the Association continued to charge late fees each month. It is unclear whether these were being imposed because the disputed amounts had not been paid, or because Burt

was late each month in paying the current assessment.

The records reflect no action by Burt to supply the documentation by August of 2010. On August 2, 2010, Sutter Creek filed a lien against the property in the amount of $1,080.00 pursuant to NRS 116.3116(1). The accounting records and the lien reflect that the amount included attorney fees and costs of collection. A Notice of Default was filed on February 23, 2011. The amount was now $1,924.00, which again included attorney fees and costs of collection. Burt had 90 days to satisfy the lien or face foreclosure. On April 21, 2011, Burt supplied the Association with money orders (MO) and checks to support his claim that payments were not credited to his account. Although the notations on the Association records reflect they received the documents, there is no notation of what was done with them. No additional credits appear on Burt's account and there is no notation that the records were reviewed, and why the Association believed they did not support applying additional credits.

At some point Burt sought help from the Senior Citizens Law Project. A spreadsheet prepared by them allegedly indicates Burt was not properly credited with payments. This would affect the accrual of late charges, and whether Burt owed any assessments. The process or documents used to create the spreadsheet are not indicated in the pleadings.

The Association pursued foreclosure upon the lien and a Notice of Trustee's Sale was recorded on July 17, 2012. The sale was scheduled to occur on August 12, 2012. According to the documents supplied by Sutter Creek, Burt and the first deed of trust holder, Defendant Wells Fargo, were sent a copy of the Notice of Sale by certified mail on July 18, 2012. According to the Trustee s Deed Upon Sale, the property was sold on August 29, 2012 to Defendant SBW.

The central legal issues involved whether the lien was proper under NRS 116.3116(1). If the lien, and therefore the subsequent foreclosure notices which relied upon the lien, were improper, then Burt argues the foreclosure was invalid, and SBW should be enjoined from evicting him or selling the property pending this litigation. SBW asserts even if the lien was improper, Burt waited too long to assert his rights and the complaint should be dismissed pursuant to NRS 107.080(5). SBW also claims Burt failed to comply with NRS 38.310. The Court is not convinced that statute applies to the instant circumstances.

The Court will not recite the law relating to preliminary injunctions here, it is correctly cited by the parties and the Court has considered the relevant factors as noted in the pleadings. The Court has also considered the administrative opinions of the Commission for Common Interest Communities and Condominium Hotels (Adv. Op. 2010-01) and State Real Estate Division (Adv. Op. 13-01). While not binding upon a court, opinions issued by agencies charged with enforcing or interpreting a state statute can be given deference. Both agencies meet this standard. This Court finds the rationale of the Real Estate Division opinion the more persuasive and well-reasoned interpretation of NRS 116.3116(1) and the various statutes which related to the provision. The Court finds as follows:

1. NRS 116.3116(1) and NRS 116.3116(2) do not describe two separate association liens as asserted by

Burt. There is only one lien procedure and only one lien. What can be included in that lien by an association is described in NRS 116.3116(1). The so-called 'super-priority lien' discussed in NRS 116.3116(2) is not a separate lien. Rather that section simply describes how much of the lien under NRS 116.3116(1) will have statutory super priority over other liens, trusts, etc. that were recorded before the associations lien.

2. The Court agrees with the Real Estate Division that the only fees, assessments, etc. which can be part of a lien under NRS 116.3116(1) are those specifically enumerated by the statutes. Attorney fees and costs of collection are not so enumerated and cannot be included in an association's lien. Since there is no dispute that the lien in this case did include such amounts, there is a reasonable probability of Burt succeeding on this issue.

3. If the lien is improper, then does the inclusion of these improper amounts in the subsequent foreclosure proceedings invalidate the proceedings? Burt asserts that if the lien is improper than the foreclosure proceedings become void. Burt asserts actions for constructive fraud, wrongful foreclosure and breach of fiduciary duty to support this. The Court agrees if the lien is invalid then Under NRS 107.080(3) the Notice of Default and Election to Sell would be invalid. As the lien included amounts not permitted under NRS 116.3116(1), the Notice would be defective. The purpose of the notice, which is to give the amount necessary for redemption, is defeated if the amount is materially in error.

4. NRS 107.080(5) says, essentially, that a good faith purchaser at a foreclosure sale takes title regardless of equity and without right of redemption so long as the notices are proper. Burt has a reasonable probability of succeeding in showing the notice was improper under NRS 107.080, therefore a court would be mandated to set aside the sale except for one additional provision. NRS 107.080(5)(b) requires an action to void the foreclosure must be made within 90 days of the date of sale. Here, the date of sale was August 29, 2012 and the action was not filed until November 30, 2012, beyond the 90 day period. Burt claims NRS 107.080(5)(b) does not apply, rather the appropriate period of time is the 120 day period in NRS 107.080(6). Burt also asserts that only his statutory claims are barred by NRS 107.080(5)(b) citing to Long v. Towne, 98 Nev. 11, 639 P.2d 928 (1982).

5. Long v. Towne does not support Burt's position. The case deals with the definition of constructive fraud, not the interpretation of NRS 107.080(5)(b). There is no indication in the case that it was not timely filed or that the statute was even considered.

6. NRS 107.080(6) provides if the homeowner was not given proper notice under NRS 107.080(3) and/or NRS 107.080(4)(a), then the owner has 120 days from the date actual notice of the sale is received. As noted above, NRS 107.080(3) governs the Notice of Default and Election to Sell. The body of the Notice of Default and Election was defective as the amount included attorney fees and collection costs. Sutter Creek has supplied the Court with a Transaction Report that indicates the Notice was sent to Burt by regular and certified mail on February 25, 2011. NRS 107.080(4)(a)

requires the Notice of Sale be personally served or sent by certified or registered mail. Sutter Creek's exhibits indicate this was done on July 18, 2012.

7. Burt has presented no evidence that NRS 107.080(4)(a) was not complied with, therefore, that provision provides no relief. The only issue, therefore, is what does proper notice under NRS 107.080(3) mean? Does it refer only to the service of the Notice of Default and Election, in which case, Burt has failed to meet his burden of proving it was not properly mailed. Or, does the term 'proper notice' also include the content of the notice? If that is that is the case, then Burt has a reasonable probability of showing the Notice of Default was not proper and the 120 day rule would apply.

8. The Court finds the statute is capable of two reasonable interpretations, and therefore, the Court will interpret the statute in Burt's favor for purposes of the request for a preliminary injunction. Granting the injunction will maintain the status quo while the parties research cases and legislative intent on this issue as it relates to SBW's Motion to Dismiss. The Court takes no position on the ultimate interpretation to be given to the statute.

9. The motion for preliminary injunction is GRANTED as follows:

a. SBW is enjoined from pursuing eviction proceedings or selling the property pending resolution of Plaintiff's Complaint and its Motion To Dismiss.

b. Burt shall continue to pay his mortgage to Wells Fargo. As nothing in the Complaint alleges Wells Fargo had anything to do with the foreclosure proceedings, there is no basis for any injunction relief against it. It may continue to administer the first deed of trust as though the sale had not occurred, that is, if Burt defaults on the first deed of trust, Wells Fargo is not prohibited from pursuing any remedies provided by law.

c. Burt must pay the difference between the rent SBW is demanding and the mortgage to SBW. Burt must also pay all association fees and assessments during the term of the injunction.

d. Although Burt requests no bond or a bond of $1.00, the Court rejects this request. Burt had many opportunities to seek legal relief or the help of the State Ombudsman long before the foreclosure took place and the claim to set aside the foreclosure may well be time barred depending on the resolution of the NRS 108.080(6) issue. But a $40,000 bond is also not warranted in light of the Court's finding about the propriety of the lien amounts. The Court believes a bond of $6,000 is reasonable under the circumstances.

10. Finally, SBW's motion to dismiss will be CONTINUED. SBW will have twenty days from the date of these minutes to file supplement pleadings addressing the interpretation of NRS 108.080(6). Burt shall have twenty days from service of SBW's supplemental pleadings to respond and address SBW's arguments regarding NRS 108.080(6) and/or assert any other arguments why claims relating to setting aside the foreclosure proceedings are not time barred. SBW shall then have ten days from service of the opposition to file a reply.

11. The Clerk of the Court shall set a status check after the dates for filing supplemental pleadings have passed so that the Court may determine whether the Motion To Dismiss is ready to be set for argument.

12. Burt shall prepare the draft order and preliminary injunction for Senior Judge Becker's signature and shall submit it after providing copies to the Defendants. Senior Judge Becker will resolve any issues concerning the content of the orders relating to the preliminary injunction motion. All other matters will be handled by Judge Leavitt.

3/25/13 8:30 A.M. STATUS CHECK: SUPPLEMENTAL PLEADINGS AND ARGUMENTS ON SBW INVESTMENT LLC'S MOTION TO DISMISS

CLERK'S NOTE: A copy of the above minute order has been delivered by facsimile to: Richard S. Ehlers, Esq. (Fax No. (702) 946-1345); Huong Lam, Esq. (Fax No. (702) 222-4043); Richard L. Tobler, Esq. (Fax No. (702) 256-2248); Sheryl Serreze, Esq. (Nevada Legal Services Fax No. (702) 388-1641); and Anita Lapidus, Esq. (Nevada Legal Services Fax No. (702) 388-1641). /// sj

Exhibit 3

Exhibit 3

Exhibit 3

Presentation to Senate Committee on Judiciary
Real Estate Division Advisory 13-01
By Gail J. Anderson, Administrator
May 6, 2013

SUMMARY OF NRED ADVISORY OPINION 13-01

Advisory Conclusions:

- An association's lien does not include "costs of collecting" as defined by NRS 116.310313, so the super priority portion of the association's lien does not include "costs of collecting;"
- The super priority portion of the association's lien (the "super priority lien") consists of: (1) 9 months of assessments; and (2) abatement costs under NRS 116.310312;
- The assessment portion of the super priority lien consists of only "assessments", i.e. not late charges, fines or interest;
- The association must take action to enforce its super priority lien, but it need not institute a civil action by the filing of a complaint. The association may begin the foreclosure process set out in NRS 116.31162 to enforce its super priority lien.

The Division's advisory looks at the language of NRS 116.3116 to reach its conclusions.

NRS 116.3116 Liens against units for assessments.

1. The association has a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.310305, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due. Unless the declaration otherwise provides, any penalties, fees, charges, late charges, fines and interest charged pursuant to paragraphs (j) to (n), inclusive, of subsection 1 of NRS 116.3102 are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and

(c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. If federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior to all security interests described in paragraph (b) must be determined in accordance with those federal regulations, except that notwithstanding the provisions of the federal regulations, the period of priority for the lien must not be less than the 6 months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

3. Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

4. Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

5. A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within 3 years after the full amount of the assessments becomes due.

6. This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

EXHIBIT D Senate Committee on Judiciary
Date: 5-6-2013 Page: 1 of 7

7. A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

8. The association, upon written request, shall furnish to a unit's owner a statement setting forth the amount of unpaid assessments against the unit. If the interest of the unit's owner is real estate or if a lien for the unpaid assessments may be foreclosed under NRS 116.31162 to 116.31168, inclusive, the statement must be in recordable form. The statement must be furnished within 10 business days after receipt of the request and is binding on the association, the executive board and every unit's owner.

9. In a cooperative, upon nonpayment of an assessment on a unit, the unit's owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and:

(a) In a cooperative where the owner's interest in a unit is real estate under NRS 116.1105, the association's lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

(b) In a cooperative where the owner's interest in a unit is personal property under NRS 116.1105, the association's lien:

(1) May be foreclosed as a security interest under NRS 104.9101 to 104.9709, inclusive; or

(2) If the declaration so provides, may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

10. In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action. The receivership is governed by chapter 32 of NRS. The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments based on a periodic budget adopted by the association pursuant to NRS 116.3115.

(Added to NRS by 1991, 567; A 1999, 390; 2003, 2243, 2272; 2009, 1010, 1207; 2011, 2448)

NRS 116.3102 Powers of unit-owners' association; limitations.

1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

(a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.

(b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.

(c) May hire and discharge managing agents and other employees, agents and independent contractors.

(d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community.

(e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.

(f) May regulate the use, maintenance, repair, replacement and modification of common elements.

(g) May cause additional improvements to be made as a part of the common elements.

(h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:

(1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and

(2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.

(i) May grant easements, leases, licenses and concessions through or over the common elements.

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

(k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

(l) May impose construction penalties when authorized pursuant to NRS 116.310305.

(m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.

(n) May impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.

(p) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.

(q) May exercise any other powers conferred by the declaration or bylaws.

(r) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:

(1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or

(2) Poses 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.

(t) May exercise any other powers necessary and proper for the governance and operation of the association.

- Section 1 of NRS 116.3116 defines the lien an association has. Under NRS 116.3116(1) - associations have a lien on units consisting of: (1) Construction penalties; (2) Assessments; and (3) Penalties, fees, charges, late charges, fines and interest permitted by NRS 116.3102 (1)(j) to (n)
- Section 2 of NRS 116.3116 sets out the lien's priority. Subsection 2(b) says the lien is subordinate to the first security, but after subsection 2(c), the language [highlighted in green] allows for part of the association's lien to be prior to the first security.
- The Division interprets this language to allow for two parts of the lien described in Subsection 1 to be <u>prior to</u> the first secured: (1) Costs pursuant to NRS 116.310312 (which are typically called abatement charges); and (2) 9 months of assessments as reflected in the association's budget.
- The 9 months of assessments is a "look back period" from the association's "action to enforce the lien."
- This statute having come from the Uniform Common Interest Ownership Act was written for a judicial foreclosure process, hence the term "action." But since Nevada does not require a judicial foreclosure process, the Division interprets this language to mean <u>any action pursuant to the non-judicial foreclosure process,</u> i.e. the mailing of the notice of delinquent assessment under NRS 116.31162.
- An association could do a judicial foreclosure process, but they are not required to.

Issues with NRS 116.3116:

1. Can anything other than regular assessments (monthly assessments based on the periodic budget) be part of the super priority lien?
   - Is there a cap to the super priority lien?
   - How does the regulation in NAC 645.470 on costs of collecting fit in?
2. Can an association's foreclosure of its super priority lien extinguish the first security interest?
   - Is the language in NRS 116.3116 sufficient?
   - Is the language describing the foreclosure process under NRS 116.31162 to 116.31168, inclusive sufficient to extinguish a first security?

1. Can anything other than regular assessments be part of the super priority lien?

This issue comes down to whether or not the language in NRS 116.3116(2)(c) [highlighted in green] includes collection costs for an association, and if so, is there a cap on the total super priority lien. The Division, as previously explained, reads this language to apply only to assessments provided in the association's budget that is limited to 9 months of regular monthly assessments.

Collection costs are not assessments provided in an association budget. The language of NRS 116.3116(2)(c) does not provide any mechanism for including collection costs within the priority lien.

Even more important to note, costs of collection are not referenced in the language of NRS 116.3116(1) that defines the association's lien. ***If costs of collection are not part of the lien, they cannot be part of the super priority portion of the lien.***

The concept of "costs of collecting" was first introduced to NRS 116 in 2009 with the adoption of NRS 116.310313. As is clear from the language of NRS 116.310313 an association may charge a unit's owner, but it does not say the charge can be liened on a unit.

NRS 116.310313 Collection of past due obligation; charge of reasonable fee to collect.

1. An association may charge a unit's owner reasonable fees to cover the costs of collecting any past due obligation. The Commission shall adopt regulations establishing the amount of the fees that an association may charge pursuant to this section.
2. The provisions of this section apply to any costs of collecting a past due obligation charged to a unit's owner, regardless of whether the past due obligation is collected by the association itself or by any person acting on behalf of the association, including, without limitation, an officer or employee of the association, a community manager or a collection agency.
3. As used in this section:

(a) "Costs of collecting" includes any fee, charge or cost, by whatever name, including, without limitation, any collection fee, filing fee, recording fee, fee related to the preparation, recording or delivery of a lien or lien rescission, title search lien fee, bankruptcy search fee, referral fee, fee for postage or delivery and any other fee or cost that an association charges a unit's owner for the investigation, enforcement or collection of a past due obligation. The term does not include any costs incurred by an association if a lawsuit is filed to enforce any past due obligation or any costs awarded by a court.

(b) "Obligation" means any assessment, fine, construction penalty, fee, charge or interest levied or imposed against a unit's owner pursuant to any provision of this chapter or the governing documents.

(Added to NRS by 2009, 2795)

(emphasis added)

NRS 116.310313 applies to the association's collection of any past due "obligation" as defined in the statute. It includes the collection of all amounts due to the association from an owner, i.e. fines and penalties, not merely assessments. The Commission for Common-Interest Communities and Condominium Hotels adopted NAC 116.470 with the authority provided in NRS 116.310313. It became effective May 5, 2011 on "the amount of the fees that an association may charge pursuant to this section."

NAC 116.470 Fees and costs for collection of past due obligations of unit's owner. (NRS 116.310313, 116.615)

1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment *pursuant to paragraph (a) of subsection 1 of NRS 116.31162* which exceed a total of $1,950, plus the costs and fees described in subsections 3 and 4.
2. An association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment *pursuant to paragraph (a) of subsection 1 of NRS 116.31162* which exceed the following amounts:

(a) Demand or intent to lien letter.....	$150	
(b) Notice of delinquent assessment lien.....	325	
(c) Intent to notice of default letter.....	90	
(d) Notice of default....	400	
(e) Intent to notice of sale letter.....		90
(f) Notice of sale.....		275
(g) Intent to conduct foreclosure sale.....	25	
(h) Conduct foreclosure sale.....	125	
(i) Prepare and record transfer deed.....	125	

(j) Payment plan agreement - One-time set-up fee..30
(k) Payment plan breach letter..... 25
(l) Release of notice of delinquent assessment lien..30
(m) Notice of rescission fee..... 30
(n) Bankruptcy package preparation and monitoring..... 100
(o) Mailing fee per piece for demand or intent to lien letter,
notice of delinquent assessment lien, notice of default and notice of sale..... 2
(p) Insufficient funds fee..... 20
(q) Escrow payoff demand fee..... 150
(r) Substitution of agent document fee..... 25
(s) Postponement fee..... 75
(t) Foreclosure fee..... 150

3. If, in connection with an activity described in subsection 2, any costs are charged to an association or a person acting on behalf of an association to collect a past due obligation by a person who is not an officer, director, agent or affiliate of the community manager of the association or of an agent of the association, including, without limitation, the cost of a trustee's sale guarantee and other title costs, recording costs, posting and publishing costs, sale costs, mailing costs, express delivery costs and skip trace fees, the association or person acting on behalf of an association may recover from the unit's owner the actual costs incurred without any increase or markup.
4. If an association or a person acting on behalf of an association is attempting to collect a past due obligation from a unit's owner, the association or person acting on behalf of an association may recover from the unit's owner:
(a) Reasonable management company fees which may not exeeed a total of $200; and
(b) Reasonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2.
5. If an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner is engaging in the activities set forth in NRS 116.31162 to 116.31168, inclusive, with respect to more than 25 units owned by the same unit's owner, the association or person acting on behalf of an association may not charge the unit's owner fees to cover the costs of collecting a past due obligation which exceed a total of $1,950 multiplied by the number of units for which such activities are occurring, as reduced by an amount set forth io a resolution adopted by the executive board, plus the costs and fees described in subsections 3 and 4.
6. For a one-time period of 15 business days immediately following a request for a payoff amount from the unit's owner or his or her agent, no fee to cover the cost of collecting a past due obligation may be charged to the unit's owner, except for the fee described in paragraph (q) of subsection 2 and any other fee to cover any cost of collecting a past due obligation which is imposed because of an action required by statute to be taken within that 15-day period.
7. As used in this section, "affiliate of the community manager of the association or of an agent of the association" means any person who controls, is controlled by or is under common control with a community manager or such agent. For the purposes of this subsection:
(a) A person "controls" a community manager or agent if the person:
(1) Is a general partner, officer, director or employer of the community manager or agent;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the community manager or agent;
(3) Controls in any manner the election of a majority of the directors of the community manager or agent; or
(4) Has contributed more than 20 percent of the capital of the community manager or its agent.
(b) A person "is controlled by" a community manager or agent if the community manager or agent:
(1) Is a general partner, officer, director or employer of the person;
(2) Directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote or holds proxies representing, more than 20 percent of the voting interest in the person;
(3) Controls in any manner the election of a majority of the directors of the person; or
(4) Has contributed more than 20 percent of the capital of the person.
(c) Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised.
(Added to NAC by Comm'n for Common-Interest Communities & Condo. Hotels by R199-09, eff. 5-5-2011)
(emphasis added)

The regulation in NAC 116.470 cannot expand the statute; the regulation only establishes fees that can be charged pursuant to NRS 116.301313. There is confusion over whether the association's lien can include costs of collecting as a result of this regulation. The Division's position is that this regulation is limited to the authority granted by the statue; the statute does not allow an association to lien for costs of collecting.

The Commission's authority in NRS 116.310313 was to adopt a regulation establishing the fees that could be charged pursuant to NRS 116.310313. To make the costs of collecting part of an association's lien, NRS 116.310313 would have to say those costs can be part of the lien and that would have to be incorporated into NRS 116.3116.

When NRS 116.310313 was adopted in 2009, the Nevada Legislature also adopted NRS 116.310312. These costs in NRS 116.310312 – typically referred to as abatement charges – are specifically made part of the association's lien in NRS 116.310313 and they are incorporated into NRS 116.3116(1) by addition to NRS 116.3102(1)(j). If costs of collecting past due assessments are intended to be part of the super priority, lien specific language needs to be added to NRS 116.3116. It is not sufficient to refer simply to "costs of collecting" in NRS 116.3116, because as defined in NRS 116.310313, those costs apply to the collection of more than just assessments. For example, they apply to fines and penalties. Generally, a lien for fines cannot be foreclosed by an association – and would certainly not be part of the super priority lien.

2. Can an association's foreclosure of its super priority lien extinguish the first security interest?

The super priority lien comes into play in two situations – when the association forecloses ahead of a first security and when a first security forecloses ahead of the association. If the first secured forecloses its lien ahead of the association, the amount of the super priority lien would remain a lien on the unit. When the association forecloses before the first security, the issue is whether the first security is extinguished. The Division believes the purpose of the super priority lien is to give associations leverage over a first security. For that reason, the Division takes the position that the association's foreclosure of its super priority lien would extinguish the first secured if the first secured does not pay the priority lien amount before the sale.

While the Division believes an association's foreclosure should be able to extinguish a first secured, the Division also recognizes problems with the current law making that conclusion uncertain. For example, NRS 116.3116 comes from the Uniform Common Interest Ownership Act which was written to apply to a judicial foreclosure process. Nevada does not require that associations follow a judicial foreclosure process, which leads to confusion regarding the meaning of certain words within NRS 116.3116. Additionally, the foreclosure statutes (NRS 116.31162 to 116.31168, inclusive) do not mandate notice to the first secured unless the lender previously requested such notice. While the Division believes notice to the first secured is commonplace for association foreclosures, the absence of a required notice in the law is a problem. Ultimately, the state of the current law will be for the courts to decide.

It is preferred that the law be absolutely clear as to the effect of the association's foreclosure. If the law is clear that an association's foreclosure would extinguish a first secured, associations would be more likely to receive payment from a lender making a foreclosure by the association

unnecessary. And in the unlikely event that a lender would ignore an association's foreclosure action, the sale by an association would be more likely to generate a sales price far greater than the amount of the super priority lien. In that event, the lender would receive the excess up to the amount of its deed of trust.

In a case out of Washington (Summerhill Village Homeowners Association v Roughley et al, 166 Wash.App. 625, 270 P.3d 639) (289 P.3d 645), an association's foreclosure did in fact extinguish a first security. Under Washington law, however, an association must follow a judicial foreclosure process in order to extinguish the first secured. Under Washington State law, an association could foreclose non-judicially, but it would not extinguish the first secured. A judicial foreclosure process would ensure adequate notice to the lender and allow them to participate in the process. It would also reflect in the record whether or not the lender maintained its secured status by paying the super priority lien amount. In order to generate a fair market value, the buyer needs to know whether the lender has paid the super priority lien. This would ensure an appropriate sales price at the sale.

Exhibit 4

Exhibit 4

Exhibit 4

Exhibit 4

Michele W. Shafe, Assessor

REAL PROPERTY PARCEL RECORD

Click Here for a Print Friendly Version

Assessor Map | Aerial View | Building Sketch | Ownership History | Neighborhood Sales | New Search

GENERAL INFORMATION	
PARCEL NO.	163-19-311-015
OWNER AND MAILING ADDRESS	SATICOY BAY LLC SERS 4641 VIAREG 900 S LAS VEGAS BLVD #810 LAS VEGAS NV 89101
LOCATION ADDRESS CITY/UNINCORPORATED TOWN	4641 VIAREGGIO CT SPRING VALLEY
ASSESSOR DESCRIPTION	CONQUISTADOR TOMPKINS-UNIT 2 PLAT BOOK 93 PAGE 1 LOT 70 BLOCK 1
RECORDED DOCUMENT NO.	* 20130906:00930
RECORDED DATE	Sep 6 2013
VESTING	NS
COMMENTS	

*Note: Only documents from September 15, 1999 through present are available for viewing.

ASSESSMENT INFORMATION AND SUPPLEMENTAL VALUE	
TAX DISTRICT	417
APPRAISAL YEAR	2014
FISCAL YEAR	2015-16
SUPPLEMENTAL IMPROVEMENT VALUE	0
SUPPLEMENTAL IMPROVEMENT ACCOUNT NUMBER	N/A

REAL PROPERTY ASSESSED VALUE		
FISCAL YEAR	2014-15	2015-16
LAND	10850	12950
IMPROVEMENTS	36913	46801
PERSONAL PROPERTY	0	0
EXEMPT	0	0
GROSS ASSESSED (SUBTOTAL)	47763	59751
TAXABLE LAND+IMP (SUBTOTAL)	136466	170717
COMMON ELEMENT ALLOCATION ASSD	0	0
TOTAL ASSESSED VALUE	47763	59751
TOTAL TAXABLE VALUE	136466	170717

Click here for Treasurer Information regarding real property taxes.

Click here for Flood Control Information.

ESTIMATED LOT SIZE AND APPRAISAL INFORMATION	
ESTIMATED SIZE	0.10 Acres
ORIGINAL CONST. YEAR	2001
LAST SALE PRICE MONTH/YEAR	125057 9/2013
LAND USE	110 - Single Family Residence
DWELLING UNITS	1

PRIMARY RESIDENTIAL STRUCTURE					
1ST FLOOR SQ. FT.	611	CARPORT SQ. FT.	0	ADDN/CONV	
2ND FLOOR SQ. FT.	933	STORIES	Two Story	POOL	NO
3RD FLOOR SQ. FT.	0	BEDROOMS	3	SPA	NO
BASEMENT SQ. FT.	0	BATHROOMS	2.00 FULL 1 HALF	TYPE OF CONSTRUCTION	Frame-Stucco

AA000331

GARAGE SQ. FT.	440	FIREPLACE	0	ROOF TYPE	Concrete Tile
CASITA SQ. FT.	0				

ASSESSORMAP VIEWING GUIDELINES	
MAP	163193
	In order to view the Assessor map you must have Adobe Reader installed on your computer system. If you do not have the Reader it can be downloaded from the Adobe site by clicking the following button. Once you have downloaded and installed the Reader from the Adobe site, it is not necessary to perform the download a second time to access the maps.

NOTE: THIS RECORD IS FOR ASSESSMENT USE ONLY. NO LIABILITY IS ASSUMED AS TO THE ACCURACY OF THE DATA DELINEATED HEREON.

AA000332

MDSM
Thomas E. McGrath, Esq.
Nevada Bar No. 7086
MESSNER REEVES LLP
5556 S. Fort Apache Road, Suite 100
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: tmcgrath@messner.com
Attorneys for Counter-defendant/Third-Party Defendant Naples Community Homeowners Association

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT, Plaintiff, vs. NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY, Defendants.	Case No. A-13-689240-C Dept. No.: V
NATIONSTAR MORTGAGE, LLC, Counterclaimant, vs. SATICOY BAY LLC SERIES 4641 VIAREGGIO CT; NAPLES COMMUNITY HOMEOWNERS ASSOCIATION; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Counter-defendants,	

MOTION TO DISMISS COUNTERCLAIMANT NATIONSTAR MORTGAGE, LLC's COUNTERCLAIM AS TO COUNTER-DEFENDANT/THIRD PARTY DEFFENDANT NAPLES COMMUNITY

HOMEOWNERS ASSOCIATION ONLY

COMES NOW Counter-defendant/Third Party Defendant NAPLES COMMUNITY HOMEOWNERS ASSSOCIATION, (erroneously and/or improperly sued herein as a Counter-defendant"), by and through its attorney Thomas E. McGrath, Esq., of the Law Firm of Messner Reeves LLP and hereby files its Motion to Dismiss Defendant/Counterclaimant NATIONSTAR MORTGAGE, LLC's Counterclaim as to NAPLES COMMUNITY HOMEOWNERS ASSOCIATION only in the above-captioned Action because the Court lacks subject matter jurisdiction to hear NATIONSTAR MORTGAGE, LLC's claims against NAPLES COMMUNITY HOMEOWNERS ASSSOCIATION because NATIONSTAR MORTGAGE, LLC has failed to submit this matter to mandatory mediation or arbitration as required by Nevada state law in accordance with NRS 38.300 et seq..

This Motion is made and based upon the pleadings and papers on file herein, the following Points and Authorities and the oral arguments of counsel upon the hearing of this matter.

Dated this 29th day of April, 2015.

MESSNER REEVES LLP

/s/ Thomas E. McGrath

THOMAS E. MCGRATH, ESQ.
Nevada Bar No. 7086
5556 S. Fort Apache Road, Suite 100
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: tmcgrath@messner.com
Attorney for Counter-defendant Naples Community Homeowners Association

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing MOTION TO DISMISS COUNTERCLAIMANT NATIONSTAR MORTGAGE, LLC's COUNTERCLAIM AS TO COUNTER-DEFENDANT NAPLES COMMUNITY HOMEOWNERS ASSOCIATION ONLY on for hearing before the above entitled Court in Department V on the 19 day of June, 2015, at the hour of 9:00am a.m./p.m., or as soon thereafter as counsel may be heard.

Dated this 29th day of April, 2015.

MESSNER REEVES LLP

/s/ Thomas E. McGrath
THOMAS E. MCGRATH, ESQ.
Nevada Bar No. 7086
5556 S. Fort Apache Road, Suite 100
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: tmcgrath@messner.com
Attorney for Counter-Defendant Naples Community Homeowners Association

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

NATIONSTAR MORTGAGE, LLC's ("Nationstar") filed its Answer and Counterclaim in this Court on March 13, 2015, improperly naming and including Naples COMMUNITY HOMEOWNERS ASSOCIATION ("Naples") as a counter-defendant despite the fact that Naples was not a party to the case. Nationstar failed to file a third party complaint to name non-party Naples as a party to this action.

Nationstar asserts causes of action in its Counterclaim for Quiet Title/Declaratory Relief, Permanent and Preliminary Injunction, and Wrongful Foreclosure. Nationstar directs only the First and Third Causes of Action against Naples.

The aforementioned causes of action are based on a foreclosure of Naples super-priority lien under NRS 116. Nationstar contends that Naples violated NRS 116 in conducting the foreclosure and sale of the subject property. Furthermore, Nationstar alleges that Naples violated the applicable Conditions, Covenants and Restrictions ("CC&Rs") of the homeowners association in noticing and conducting the foreclosure and sale.

Nevada law, specifically NRS 38.300 et seq. and the Nevada Supreme Court's decision in *McNight Family, LLP v Adept Management Services, Inc. et al.*, 310 P.3d 555, (Nev. 2013) has established that none of the cause of action, with the exception of the Quiet Title action, may be filed with the district court unless and until they are first submitted to the Nevada Real Estate Division for mandatory mediation or arbitration. NRS 38.310(1) requires all "claims" that require court "interpretation, application or enforcement" of the CC&Rs in a challenge to a foreclosure on residential property, to first be submitted through mediation or arbitration

through the Nevada Real Estate Division before a claimant can commence a lawsuit in district court.

In *McNight*, the Nevada Supreme ruled that alleged violations of NRS 116 et seq. also fall within the purview of NRS 38.300 et seq. in requiring mandatory mediation or arbitration before filing an action in district court. And Nevada law provides that this Court lacks subject matter jurisdiction to hear claims regarding NRS 116 violations and compels there dismissal.

II. Allegations in Counterclaim relating to CC&Rs

Nationstar's Counterclaim is replete with allegations regarding the applicable CC&Rs. Nationstar alleges that the CC&Rs "that relate to the Property require reasonable notice of delinquency to all lien holders of the Property". *See Attached Counterclaim, Paragraph 20.* Nationstar alleges that the CC&Rs contain a "Mortgage Protection" provision and a section entitled "Priority of Assessment Lien" that protects its claimed rights/interest in the property. *Id.* at Paragraphs 43 and 44.

Nationstar contends that it relied on the provisions of the CC&Rs and that its reliance was one of the reasons it did not attend the foreclosure sale. *Id.* at Paragraphs 46 through 48.

Nationstar alleges that Naples failed to comply with the CC&Rs in the manner in which Naples provided Nationstar with notice of the sale. *Id.* at Paragraphs 60 and 79.

III. Allegations in Counterclaim relating to NRS 116:

Nationstar asserts that an HOA sale must be conducted in accordance with NRS 116. *Id*. at Paragraph 18. Nationstar alleges that Naples failed to comply with NRS 116.31162 through NRS 116.31168 in the manner in which Naples mailed notice of the sale. *Id.* at Paragraph 21.

Nationstar also alleges that Naples violated NRS 116.3116 by including amounts in its lien that are not permitted to be a part of a "super-priority" lien. *Id.* at Paragraphs 28 through 32. Therefore, Nationstar alleges that "the HOA Sale is unlawful and void under NRS 116.3102 et seq.".

Nationstar also alleges that Naples breached its "obligations of good faith under NRS 116.1113 and their duty to act in a commercially reasonable manner". *Id.* at Paragraph 49.

Nationstar's Third Cause of Action against Naples for Wrongful Foreclosure is based, in part, on its allegation that Naples "did not comply with all mailing and noticing requirements stated in NRS 116.31162 through NRS 116.31168". *Id.* at paragraph 75.

IV. Applicable Law Regarding Motion to Dismiss

NRCP 12(b)(1) authorizes dismissal of any claim for relief for lack of subject matter jurisdiction, NRCP 12(b)(5) authorizes a court to dismiss a claim for relief, if it fails to state a claim upon which relief can be granted. The law in Nevada is that, in considering a motion to dismiss pursuant to NRCP 12(b)(5), a court "will recognize all factual allegations in [a plaintiff's] complaint as true and draw all inferences in its favor". *Buzz Stew, LLC v. City of North Las Vegas,* 124 Nev. 224, 227-228, 181 P.3d 670, 672 (2008).

V. NRS 38.300 et seq., Mandates Dismissal of the Counterclaim Against Naples

NRS 38.310 requires a matter such as this to first be sent to mandatory mediation or arbitration under the auspices of the Nevada Real Estate Division before a civil lawsuit can be filed. NRS 38.310 states in pertinent part:

> 1. No civil action based upon a claim relating to: (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association ... may be commenced in any court in this State *unless the action has been*

> *submitted to mediation or arbitration* pursuant to the provisions of NRS 38.300 to 38.360, inclusive…(emphasis added).
>
> 2. A court *shall dismiss* any civil action which is commenced in violation of the provisions of subsection 1 (emphasis added).

NRS 38.320 states in pertinent part:

> 1. Any civil action described in NRS 38.310 *must be submitted for mediation or arbitration* by filing a ·written claim with the Division. ["Division" means Nevada Real Estate Division of the Department of Business and Industry NRS 38.300(4)] (emphasis added)

NAC 38.250 provides in pertinent part:

> 7. The division will issue a certificate certifying that the claim has been submitted to arbitration or mediation as required by NRS 3 8.310 within 30 days after receiving a copy of:
>
> (a) The agreement reached through mediation;
>
> (b) The award reached through binding or nonbinding arbitration;

Moving party does not believe plaintiff will argue in opposition that it has complied with NRS 38.310 et seq. It hasn't complied, it hasn't pleaded that it complied, and it has not attached to its Complaint a Ce1tificate from Nevada Real Estate Division certifying that the claim has been submitted to arbitration or mediation as required by NRS 3 8.310, which Certificate the Division is required to provide per NAC 38.350(7).

The Nevada Supreme Court recently clarified that wrongful foreclosure actions - and all associated causes of action including those alleging violations of NRS 116 et seq. - do qualify as disputes involving the "interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association" and must therefore be submitted to NRED arbitration or mediation

before a district court action may be commenced. The only exception is a quiet title action, which will be addressed separately herein. The Nevada Supreme Court went on to make it clear that any court faced with such non-quiet title claims does not have discretion and must dismiss them if they haven't first been submitted to the NRED.

As is clear above, this case is based on alleged violations of the CC&Rs and of NRS 116 et seq. NRS 3 8.310 makes clear that "claims" which require the court to interpret, apply and enforce the CC&Rs are subject to mandatory mediation or arbitration" The Nevada Supreme Court has also made clear that when a party alleges in the wrongful foreclosure setting violations of NRS 116 et seq. - or any statutes applying to the foreclosure of a residential property~ such claims must also first go to NRED mediation or arbitration. If they are filed first in district court, they must be dismissed, as the court lacks subject matter jurisdiction to hear them.

In *McKnight Family, LLP v. Adept Management Services, Inc. et al.,* 310 P.3d 555 (Nev. 2013), the Supreme Court was faced with an amended complaint containing causes of action for (1) preliminary/permanent injunction, (2) negligence, (3) breach of contract, (4) violation of NAC 116.300 [recodified as NAC 116A.345], (5) violation of NAC 116.341 [recodified as NAC 116A.320], (6) violation of NRS 116.1113 and NRS 116.3101, and (7) slander of title/wrongful foreclosure/quiet title. *Id.* at p. 557. The district court had dismissed the entire complaint pursuant to NRS 38.310. The Nevada Supreme Court ruled that the district court was correct to dismiss every cause of action but quiet title, citing the exception to mandatory arbitration/mediation for a civil "action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property." NRS 38.300(3). *Id.* at p. 558.

The Supreme Court found that the causes of action for negligence, breach of contract, NAC and NRS claims, and wrongful foreclosure are civil actions and were properly dismissed. It reasoned that negligence should be dismissed because it concerned payments the plaintiff made pursuant to the CC&Rs and does not affect title to property. The breach of contract claims was properly dismissed because it concerned the CC&Rs. The Court further stated that the statutory violations (NAC and NRS) *"required the district court to interpret regulations and statutes* [referencing the alleged violations of NRS 116] *that contained conditions and restrictions applicable to residential property. Thus, these claims fell under NRS 38. 310's purview* (emphasis added)."

So the Nevada Supreme Court, in interpreting NRS 38.310 et seq., made clear that allegations of violations of the CC&Rs are not the only claims that must be submitted to mandatory NRED mediation or arbitration, alleged violations of NRS 116 et seq. also are required to proceed through mediation. And the claims Nationstar asserts against Naples are primarily, if not wholly, based on alleged violations of NRS 116. et seq.

In *McKnight,* the Nevada Supreme Court also found that:

> wrongful foreclosure is a civil action subject to_NRS 38.310's requirements because deciding a wrongful foreclosure claim against a homeowners' association involves· interpreting covenants, conditions, or restrictions applicable to residential property. See *Long* v. *Towne,* 98 Nev. 11, 14, 639 P.2d 528, 530 · (1982) (finding no impropriety where 'the lien foreclosure sale was conducted under the authority of the CC&Rs and in compliance with NRS 107.-080'). A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself. See *Collins v.· Union Fed. Sav. & Loan,* 99 Nev. 284, 304, 662 P .2d 610, 623 (1983). To determine whether an individual violated any conditions or failed to perform any duties required under an association's CC&Rs a court must interpret the CC&Rs to determine their applicability and enforceability regarding the individual. This type of interpretation falls under NRS 3 8 .310.

> Therefore, the [district] court acted properly in dismissing the wrongful foreclosure action." *Id.* at p. 558.

The Court rejected plaintiff's argument that the district court lacked the authority to dismiss the case *after* it commences. The Court found that NRS 38.210(2) does not determine when a court can dismiss a civil action; "rather, it mandates the court to dismiss any civil action initiated in violation of NRS 38.310(1)." *Id.* at p. 558.

Nationstar's Counterclaim as it relates to Naples is primarily a wrongful foreclosure claim. And Nationstar alleges that Naples violated the applicable/governing CC&Rs and NRS 116 et seq.. All of this requires the court to interpret, apply and enforce the CC&Rs and NRS 116 et seq. and determine whether the foreclosure violated the CC&Rs and various statutes in NRS 116. NRS 116 is the Nevada statutory scheme that governs non-judicial foreclosures for residential property in homeowner associations.

In *McKnight,* the Nevada Supreme Court made clear that allegations of wrongful foreclosure and related causes of action that involve the state statutes that govern homeowner foreclosures [including specifically NRS 116 *et seq.]* fall within the mandatory dismissal requirements of NRS 38.310. In *McKnight,* the Nevada Supreme Court declared that the allegation of statutory violations of NRS "required the district court to interpret regulations and statutes that contained conditions and restrictions applicable to residential property. Thus, these claims fell under NRS 38.310's purview." *Id.* at p 558.

//

//

//

//

VI. Nationstar's Quiet Title Cause of Action against Naples is Moot Because Naples does not Claim an Interest in the Property.

Nationstar alleges in its Counterclaim that a "Notice of Sale, a non-judicial foreclosure sale purportedly occurred on August 22, 2013 (hereinafter the "HOA Sale") whereby Buyer acquired its interest in the Property, if any, for $5,563.00. *See Attached Counterclaim* at Paragraph 16. Nationstar's allegations establish that Naples already conducted its foreclosure sale and it obviously does not claim an ownership interest in the subject property. If the buyer/current owner of the property (Plaintiff) or any subsequent owner fails to pay monthly assessments, Naples would again have a "super-priority" lien that would be superior to Nationstar's interest but that future scenario is not sufficient to justify including Naples as a party to Nationstar's Quiet Title cause of action. Therefore, the Quiet Title cause of action should be dismissed as to Naples.

CONCLUSION

For the foregoing reasons, Naples respectfully requests that this Court dismiss Nationstar's Counterclaim as to Naples.

Dated this 29th of April, 2015.

MESSNER REEVES LLP

/s/ Thomas E. McGrath_____
THOMAS E. MCGRATH, ESQ.
Nevada Bar No. 7086
5556 S. Fort Apache Road, Suite 100
Las Vegas, Nevada 89148
Telephone: (702) 363-5100
Facsimile: (702) 363-5101
E-mail: tmcgrath@messner.com
Attorney for Counter-defendant Naples Community Homeowners Association

CERTIFICATE OF SERVICE

Pursuant to Rule 9 of N.E.F.C.R. and Administrative Order 14-2, I certify that on this 29th day of April, 2015, the foregoing **MOTION TO DISMISS COUNTERCLAIMANT NATIONSTAR MORTGAGE, LLC's COUNTERCLAIM AS TO COUNTER-DEFENDANT/THIRD PARTY DEFFENDANT NAPLES COMMUNITY HOMEOWNERS ASSOCIATION ONLY** was served by electronic service via Wiznet to all registered parties.

Michael F. Bohn, Esq.
Law Offices of Michael F. Bohn, Esq.
376 East Warm Springs Road, Ste. 125
Las Vegas NV 89119
Attorneys for Plaintiff

WRIGHT, FINLAY & ZAK, LLP
Dana Jonathon Nitz, Esq.
Chelsea A. Crowton, Esq.
7785 W. Sahara Ave, Suite 200
Las Vegas NV 89117
Attorney for Defendant Nationstar Mortgage LLC

/s/ Bernita M. Lujan

Employee of MESSNER REEVES LLP

Exhibit A

SUMM
WRIGHT, FINLAY & ZAK, LLP
Dana Jonathon Nitz, Esq. (SBN 50)
Chelsea A. Crowton, Esq. (SBN 11547)
7785 W. Sahara Ave., Suite 200
Las Vegas, NV, 89117
Tel: (702) 475-7964 Fax: (702) 946-1345
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant, NATIONSTAR MORTGAGE, LLC

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT,

Plaintiff,

vs.

NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY,

Defendants.

NATIONSTAR MORTGAGE, LLC,

Counterclaimant,

vs.

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT; NAPLES COMMUNITY HOMEOWNERS ASSOCIATION; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Counter-Defendants,

Case No.: A-13-689240-C
Dept. No.: V

SUMMONS

SUMMONS

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ THE INFORMATION BELOW.

TO THE DEFENDANT: A Civil Complaint has been filed by the Plaintiff against you for the relief set forth in the Complaint.

NAPLES COMMUNITY HOMEOWNERS ASSOCIATION

1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you exclusive of the day of service, you must do the following:

a. File with the Clerk of the Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court.

b. Serve a copy of your response upon the attorney whose name and address is shown below.

2. Unless you respond, your default will be entered upon application of the Plaintiff, and this Court may enter a judgment against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.

3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.

Issued at direction of:

CLERK OF COURT

DISTRICT COURT ADELINE BELSEY SEAL

MAR 2 3 2015

Dana Jonathon Nitz, Esq.
Nevada Bar No. 00050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
WRIGHT, FINLAY & ZAK, LLP
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for NATIONSTAR MORTGAGE, LLC

DEPUTY CLERK
DATE
County Courthouse

AACC
WRIGHT, FINLAY & ZAK, LLP
Dana Jonathon Nitz, Esq. (SBN 50)
Chelsea A. Crowton, Esq. (SBN 11547)
7785 W. Sahara Ave., Suite 200
Las Vegas, NV, 89117
Tel: (702) 475-7964 Fax: (702) 946-1345
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant, NATIONSTAR MORTGAGE, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT, Plaintiff, vs. NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY, Defendants.	Case No.: A-13-689240-C Dept. No.: V **NATIONSTAR'S ANSWER TO THE COMPLAINT AND COUNTERCLAIM**
NATIONSTAR MORTGAGE, LLC, Counterclaimant, vs. SATICOY BAY LLC SERIES 4641 VIAREGGIO CT; NAPLES COMMUNITY HOMEOWNERS ASSOCIATION; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Counter-Defendants,	

COMES NOW Defendant/Counterclaimant, NATIONSTAR MORTGAGE, LLC ("Nationstar" or "Defendant"), by and through its attorneys of record, Dana Jonathon Nitz, Esq.,

and R. Samuel Ehlers, Esq., of the law firm of Wright, Finlay & Zak, LLP, and hereby submits its Answer to the Plaintiff's Complaint.

COMPLAINT

1. Defendant does not possess enough information to admit or deny the allegations in paragraph 1 of the Complaint; therefore, the Defendant denies said allegations.

2. Defendant admits only that Plaintiff was the successful bidder at a foreclosure sale occurring on August 22, 2013, concerning the property located at 4641 Viareggio Court, Las Vegas, Nevada 89147, APN No. 163-19-311-015 (the "Property"); and as to the remaining allegations contained in paragraph 2, Defendant does not possess enough information to admit or deny them; therefore, Defendant denies said allegations.

3. Defendant does not possess enough information to admit or deny the allegations in paragraph 3 of the Complaint; therefore, the Defendant denies said allegations.

4. Defendant admits the allegations in paragraph 4 of the Complaint.

5. Defendant admits the allegations in paragraph 5 of the Complaint.

6. Defendant does not possess enough information to admit or deny the allegations in paragraph 6 of the Complaint; therefore, the Defendant denies said allegations.

7. Defendant denies the allegations in paragraph 7 of the Complaint.

8. Defendant admits it has recorded a notice of default and election to sell under its deed of trust pursuant to NRS 107.080; however, as to the remaining allegations in paragraph 8 of the Complaint, Defendant denies those allegations.

9. Defendant denies the allegations contained in paragraph 9 of the Complaint.

10. Defendant denies the allegations in paragraph 10 of the Complaint.

SECOND [sic] CLAIM FOR RELIEF

11. Answering paragraph 11, Defendant hereby repeats, realleges and incorporates each of its admissions, denials, or other responses to all the paragraphs referenced hereinabove as if set forth at length and in full.

12. Defendant denies the allegations contained in paragraph 12 of the Complaint.

13. Defendant denies the allegations contained in paragraph 13 of the Complaint.

THIRD [sic] CLAIM FOR RELIEF

14. Answering paragraph 14, Defendant hereby repeats, realleges and incorporates each of its admissions, denials, or other responses to all the paragraphs referenced hereinabove as if set forth at length and in full.

15. Defendant denies the allegations in paragraph 15 of the Complaint.

16. Defendant denies the allegations in paragraph 16 of the Complaint.

FOURTH [sic] CLAIM FOR RELIEF

17. Answering paragraph 17, Defendant hereby repeats, realleges and incorporates each of its admissions, denials, or other responses to all the paragraphs referenced hereinabove as if set forth at length and in full.

18. Defendant does not possess enough information to admit or deny the allegations in paragraph 18 of the Complaint; therefore, the Defendant denies said allegations.

19. Defendant does not possess enough information to admit or deny the allegations in paragraph 19 of the Complaint; therefore, the Defendant denies said allegations.

20. Defendant does not possess enough information to admit or deny the allegations in paragraph 20 of the Complaint; therefore, the Defendant denies said allegations.

21. Defendant denies the allegations in paragraph 21 of the Complaint.

22. Defendant denies the allegations in paragraph 22 of the Complaint.

Defendant denies that Plaintiff is entitled to the relief sought in the "Wherefore" clauses of the Complaint.

Unless specifically admitted herein, all other allegations of the Complaint are expressly denied.

NATIONSTAR ASSERTS THE FOLLOWING AFFIRMATIVE DEFENSES:

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

Plaintiff's Complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Priority)

Plaintiff took title of the Property subject to Defendant's first priority Deed of Trust, which was signed by Monique Guillory, and recorded on January 25, 2007 (hereinafter "Deed of Trust"), which encumbers the Property and secures a promissory note (the "Note"), thereby forestalling any enjoinment/extinguishment of the Defendant's interest in the Property.

THIRD AFFIRMATIVE DEFENSE

(Assumption of Risk)

Plaintiff, at all material times, calculated, knew and understood the risks inherent in the situations, actions, omissions, and transactions upon which it now bases its various claims for relief, and with such knowledge, Plaintiff undertook and thereby assumed such risks and is consequently barred from all recovery by such assumption of risk.

FOURTH AFFIRMATIVE DEFENSE

(Commercial Reasonableness and Violation of Good Faith - NRS 116.1113)

The foreclosure sale of the alleged lien of Naples Community Homeowners Association (the "HOA") by which Plaintiff took its interest was commercially unreasonable if it eliminated Defendant's Deed of Trust, as Plaintiff contends. The sales price, when compared to the outstanding balance of Defendant's Note and Deed of Trust and the fair market value of the Property, demonstrates that the sale was not conducted in good faith as a matter of law. The circumstances of sale of the property violated the HOA's obligation of good faith under NRS 116.1113 and duty to act in a commercially reasonable manner.

FIFTH AFFIRMATIVE DEFENSE

(Equitable Doctrines)

Defendant alleges that the Plaintiff's claims are barred by the equitable doctrines of laches, unclean hands, and failure to do equity.

SIXTH AFFIRMATIVE DEFENSE

(Acceptance)

Defendant asserts that any acceptance of any portion of the excess proceeds does not

"satisfy" the amount due and owing on the Note and would not constitute a waiver of its rights under the Note and Deed of Trust, or statute.

SEVENTH AFFIRMATIVE DEFENSE

(Waiver and Estoppel)

Defendant alleges that by reason of Plaintiff's acts and omissions, Plaintiff has waived its rights and is estopped from asserting the claims against Defendant.

EIGHTH AFFIRMATIVE DEFENSE

(Void for Vagueness)

To the extent that Plaintiff's interpretation of NRS 116.3116 is accurate, the statute and Chapter 116 as a whole are void for vagueness as applied to this matter.

NINTH AFFIRMATIVE DEFENSE

(Due Process Violations)

A senior deed of trust beneficiary cannot be deprived of its property interest in violation of the Procedural Due Process Clause of the 14 Amendment of the United States Constitution and Article 1, Sec. 8, of the Nevada Constitution.

TENTH AFFIRMATIVE DEFENSE

(Violation of Procedural Due Process)

The HOA sale is void or otherwise does not operate to extinguish the first Deed of Trust pursuant to the Due Process Clause of the Nevada Constitution and United States Constitution.

ELEVENTH AFFIRMATIVE DEFENSE

(Satisfaction of Super-Priority Lien)

The claimed super-priority lien was satisfied prior to the homeowner's association foreclosure under the doctrines of tender, estoppel, laches, or waiver.

TWELFTH AFFIRMATIVE DEFENSE

(12 U.S.C. Section 4617(j)(3))

Plaintiff's claim of free and clear title to the property is barred by 12 U.S.C. Section 4617(j)(3), which precludes an HOA sale from extinguishing the Deed of Trust and preempts any state law to the contrary.

THIRTEENTH AFFIRMATIVE DEFENSE

(Additional Affirmative Defenses)

Defendant reserves the right to assert additional affirmative defenses in the event discovery and/or investigation indicates that additional affirmative defenses are applicable.

PRAYER

WHEREFORE, Defendant prays for judgment as follows:

1. That the Court make a judicial determination that Defendant's ownership interest and/or Deed of Trust is superior to Plaintiff's claim of title;
2. That the Court make a judicial determination that Defendant is the owner of the Property subject to the applicable one year right of redemption and/or that Defendant's Deed of Trust survived that certain purported non-judicial foreclosure sale which purportedly occurred on August 22, 2013;
3. That the Court make a judicial determination that Plaintiff took title subject to Defendant's ownership interest and/or Deed of Trust;
4. That Plaintiff recover nothing on account of the claims made in the Complaint and each of its purported claims;
5. For reasonable attorney's fees and costs; and
6. For any such other and further relief as the Court may deem just and proper in the case.

NATIONSTAR'S COUNTERCLAIM

COMES NOW Defendant/Counterclaimant, Nationstar Mortgage, LLC ("Nationstar"), by and through their attorneys of record, Dana Jonathon Nitz, Esq., and R. Samuel Ehlers, Esq., of the law firm of Wright, Finlay & Zak, LLP, and hereby submits its Counterclaim against Saticoy Bay LLC Series 4641 Viareggio Ct; Naples Community Homeowners Association; Does I through X; and Roe Corporations I through X, inclusive (collectively, "Counter-Defendants).

INTRODUCTION

1. This action is within the jurisdictional limits of this Court and this Venue is appropriate because the Property (defined below) involved is located within the jurisdiction of

this Court. Plaintiff is also authorized to bring this action in the State of Nevada by NRS 40.430.

2. The real property which is the subject of this civil action consists of a residence commonly known as 4641 Viareggio Court, Las Vegas, Nevada 89147, APN No. 163-19-311-015 (hereinafter "Property").

JURISDICTION AND VENUE

3. Venue and jurisdiction is proper in this judicial district because Defendants reside in this district; a substantial part of the events or omissions giving rise to Nationstar's claims occurred in this district; and the Property that is the subject of this action is situated in this district, in Las Vegas, Clark County, Nevada.

PARTIES

4. Nationstar is a Delaware limited liability company with its principal place of business in the State of Texas and at all times relevant was doing business in the State of Nevada.

5. Nationstar is now and at all times relevant herein the assigned Beneficiary under and deed of trust signed by Monique Guillory (hereinafter "Guillory"), recorded on January 25, 2007, (hereinafter "Deed of Trust"), which encumbers the Property and secures a promissory note.

6. Upon information and belief, Counter-Defendant, Saticoy Bay LLC Series 4641 Viareggio Ct, (hereinafter "Saticoy Bay" or "Buyer"), is a Nevada limited liability company and at all times relevant was doing business in the State of Nevada, and claims it is the current titleholder of the Property.

7. Upon information and belief, Counter-Defendant, Naples Community Homeowners Association (hereinafter "Naples" or the "HOA"), is a Nevada non-profit corporation, licensed to do business in the State of Nevada.

8. Nationstar does not know the true names, capacities or bases of liability of fictitious defendants sued as Does I through X and Roe Corporations I through X, inclusive (collectively "fictitious Defendants"). Each of the fictitious Defendants is in some way liable to Nationstar or claims some rights, title, or interest in the Property that is subsequent to or subject

to the interests of Nationstar, or both. Nationstar will amend this Counterclaim to reflect the true names of said defendants when the same have been ascertained.

9. Upon information and belief, Leach Johnson Song & Gruchow, (hereinafter "Leach Johnson" or "HOA Trustee") and one or more fictitious Defendants are the agents of the HOA, and the HOA is responsible for their acts and omissions under the doctrine of *respondeat superior*.

FACTUAL BACKGROUND

10. On or about January 22, 2007, Guillory purchased the Property.[1]

11. The Deed of Trust executed by Guillory identified First Magnus Financial Corporation as the Lender, Great American Title as the Trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary acting solely as a nominee for lender and lender's successors and assigns, and secured a loan in the amount of $258,400.00 (hereinafter the "Guillory Loan").[2]

12. On August 30, 2012, an Assignment of Deed of Trust was recorded by which MERS assigned all its beneficial interest under the Deed of Trust to Nationstar.[3]

13. On August 18, 2011, a Notice of Delinquent Assessment Lien was recorded against the Property on behalf of the HOA by the HOA Trustee.[4]

14. On January 24, 2012, a Notice of Default and Election to Sell under Homeowners Association Lien was recorded against the Property.[5]

---

[1] A true and correct copy of the Grant, Bargain and Sale Deed recorded in the Clark County Recorder's Office as Book and Instrument Number 20070125-0003582 on January 25, 2007, is attached hereto as **Exhibit 1**. All other recordings stated hereafter are recorded in the same manner.

[2] A true and correct copy of the Deed of Trust recorded as Book and Instrument Number 20070125-0003583 on January 25, 2007, is attached hereto as **Exhibit 2.**

[3] A true and correct copy of the Assignment of Deed of Trust recorded as Book and Instrument Number 20120830-0000676 on August 30, 2012, is attached hereto as **Exhibit 3.**

[4] A true and correct copy of the Notice of Delinquent Assessment Lien recorded as Book and Instrument Number 20110818-0002904 on August 18, 2011, is attached hereto as **Exhibit 4.**

[5] A true and correct copy of the Notice of Default and Election to Sell Under Homeowners Association Lien recorded as Book and Instrument Number 20120124-0000764 on January 24, 2012, is attached hereto as **Exhibit 5.**

15. On July 30, 2012, a Notice of Foreclosure Sale was recorded against the Property by the HOA Trustee.[6]

16. Upon information and belief, pursuant to that Notice of Sale, a non-judicial foreclosure sale purportedly occurred on August 22, 2013 (hereinafter the "HOA Sale"), whereby Buyer acquired its interest in the Property, if any, for $5,563.00.

17. On September 6, 2013, a Foreclosure Deed was recorded by which Buyer claims its interest.[7]

18. A homeowner's association sale conducted pursuant to NRS Chapter 116 must comply with all notice provisions as stated in NRS 116.31162 through NRS 116.31168 and NRS 107.090.

19. A lender or holder, such as Nationstar, has a right to cure a delinquent homeowner's association lien in order to protect its interest.

20. Further, the Covenants, Conditions and Restrictions that relate to the Property (the "CC&Rs") require reasonable notice of delinquency to all lien holders on the Property.

21. Upon information and belief, the HOA and its agent, the HOA Trustee, did not comply with all mailing and noticing requirements stated in NRS 116.31162 through NRS 116.31168.

22. A recorded notice of default must "describe the deficiency in payment."

23. The HOA Sale occurred without notice to Nationstar, or its predecessors, agents, servicers or trustees, what proportion of the lien, if any, that HOA and HOA Trustee claimed constituted a "super-priority" lien.

24. The HOA Sale occurred without notice to Nationstar, or its predecessors, agents, servicers or trustees, whether HOA was foreclosing on the "super-priority" portion of its lien, if any, or under the non-super-priority portion of the lien.

25. The HOA Sale occurred without notice to Nationstar, or its predecessors, agents,

---

[6] A true and correct copy of the Notice of Foreclosure Sale recorded as Book and Instrument Number 20120730-0001448 on July 30, 2012, is attached hereto as **Exhibit 6.**

[7] A true and correct copy of the Foreclosure Deed recorded as Book and Instrument Number 20130906-0000930 on September 6, 2013, is attached hereto as **Exhibit 7.**

servicers or trustees, of a right to cure the delinquent assessment and the super-priority lien, if any.

26. The HOA Sale violated Nationstar's rights to due process because it was not given proper, adequate notice and the opportunity to cure the deficiency or default in the payment of the HOA's assessments and the super-priority lien, if any.

27. The HOA Sale was an invalid sale and could not have extinguished Nationstar's secured interest because of defects in the notices given to Nationstar, or its predecessors, agents, servicers or trustees, if any.

28. Under NRS Chapter 116, a lien under NRS 116.3116(1) can only include costs and fees that are specifically enumerated in the statute.

29. A homeowner's association may only collect as a part of the super priority lien (a) nuisance abatement charges incurred by the association pursuant to NRS 116.310312 and (b) nine months of common assessments which became due prior to the institution of an action to enforce the lien (unless Fannie Mae and Freddie Mac regulations require a shorter period of not less than six months).

30. Upon information and belief, the HOA Foreclosure Notices included improper fees and costs in the amount demanded.

31. The attorney's fees and the costs of collecting on a homeowner's association lien cannot be included in the super-priority lien.

32. Upon information and belief, the HOA assessment lien and foreclosure notices included fines, interest, late fees, dues, attorney's fees, and costs of collection that are not properly included in a super-priority lien under Nevada law and that are not permissible under NRS 116.3102 et seq.

33. The HOA Sale is unlawful and void under NRS 116.3102 et seq.

34. The HOA Sale deprived Nationstar of its right to due process because the foreclosure notices failed to identify the super-priority amount, to adequately describe the deficiency in payment, to provide Nationstar notice of the correct super-priority amount, and to provide a reasonable opportunity to satisfy that amount.

35. A homeowner's association sale must be done in a commercially reasonable manner.

36. At the time of the HOA Sale, the amount owed on the Guillory Loan exceeded $300,216.00.

37. Upon information and belief, at the time of the HOA Sale, the fair market value of the Property exceeded $130,000.00.

38. The amount paid at the HOA Sale allegedly totaled $5,563.00.

39. The sales price at the HOA Sale is not commercially reasonable, and not done in good faith, when compared to the debt owed to Nationstar on the Guillory Loan and the fair market value of the Property.

40. The HOA Sale by which Buyer took its interest was commercially unreasonable if it extinguished Nationstar's Deed of Trust.

41. In the alternative, the HOA Sale was an invalid sale and could not have extinguished Nationstar's secured interest because it was not a commercially reasonable sale.

42. Without providing Nationstar, or its predecessors, agents, servicers or trustees, notice of the correct super-priority amount and a reasonable opportunity to satisfy that amount, including its failure to identify the super-priority amount and its failure to adequately describe the deficiency in payment as required by Nevada law, the HOA Sale is commercially unreasonable and deprived Nationstar of its right to due process.

43. The CC&Rs for the HOA[8] provide in Section 7.8, "Mortgage Protection," that

> Notwithstanding all other provisions hereof, no lien created under this Article 7, nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the Beneficiary under any Recorded First Deed of Trust encumbering a Unit, made on good faith and for value.... The lien of the assessments including interest and costs, shall be subordinate to the lien of any First Mortgage upon the Unit....

44. The CC&Rs for the HOA provide in Section 7.9, "Priority of Assessment Lien," that Nationstar's Deed of Trust encumbers the Property, even in the event the HOA conducts a

---

[8] A true and correct copy of the Declaration of Covenants, Conditions and Restrictions recorded as Book and Instrument Number 20000307.00911 on March 7, 2000, is attached hereto as **Exhibit 8.**

sale pursuant to NRS 116.3116 et seq.

45. Because the CC&Rs contained a Mortgagee Protection Clause in Section 7.9, and because Nationstar, or its predecessors, agents, servicers or trustees, was not given proper notice that the HOA intended to foreclose on the super-priority portion of the dues owing, Nationstar did not know that it had to attend the HOA Sale to protect its security interest.

46. Because the CC&Rs contained a Mortgagee Protection Clause, and because proper notice that the HOA intended to foreclose on the super-priority portion of the dues owing was not given, prospective bidders did not appear for the HOA Sale, making the HOA Sale commercially unreasonable.

47. Buyer, HOA, and HOA Trustee knew that Nationstar would rely on the Mortgagee Protection Clause contained in the recorded CC&Rs, and knew that Nationstar would not know that HOA was foreclosing on super-priority amounts because of the failure of HOA and HOA Trustee to provide such notice. Nationstar's absence from the HOA Sale allowed Buyer to appear at the HOA Sale and purchase the Property for a fraction of market value, making the HOA Sale commercially unreasonable.

48. Buyer, HOA, and HOA Trustee knew that prospective bidders would be less likely to attend the HOA Sale because the public at large believed that Nationstar was protected under the Mortgagee Protection Clause in the CC&Rs of public record, and that the public at large did not receive notice, constructive or actual, that HOA was foreclosing on a super-priority portion of its lien because HOA and HOA Trustee improperly failed to provide such notice. The general public's belief therefore was that a buyer at the HOA Sale would take title to the Property subject to Nationstar's Deed of Trust. This general belief resulted in the absence of prospective bidders at the HOA Sale, which allowed Buyer to appear at the HOA Sale and purchase the Property for a fraction of market value, making the HOA Sale commercially unreasonable.

49. The circumstances of the HOA Sale of the Property breached the HOA's and the HOA Trustee's obligations of good faith under NRS 116.1113 and their duty to act in a commercially reasonable manner.

50. Nationstar is informed and believes that Buyer is a professional property purchaser.

51. The circumstances of the HOA Sale of the Property and its status as a professional property purchaser prevent Buyer from being deemed a bona fide purchaser for value.

52. Upon information and belief, Buyer had actual, constructive or inquiry notice of Nationstar's first Deed of Trust, which prevents Buyer from being deemed a bona fide purchaser or lender for value.

53. In the event Nationstar's interest in the Property is not reaffirmed or restored, Nationstar suffered damages in the amount of the fair market value of the Property or the unpaid balance of the Guillory Loan and Deed of Trust, at the time of the HOA Sale, whichever is greater, as a proximate result of Defendants' acts and omissions.

FIRST CAUSE OF ACTION

(Quiet Title/Declaratory Relief Pursuant to NRS 30.010 et seq. and NRS 40.010 et seq. versus Buyer, HOA and all fictitious Defendants)

54. Nationstar incorporates and re-alleges all previous paragraphs, as if fully set forth herein.

55. Pursuant to NRS 30.010 et seq. and NRS 40.010, this Court has the power and authority to declare Nationstar's rights and interests in the Property and to resolve Counter-Defendants' adverse claims in the Property.

56. Further, pursuant to NRS 30.010 et seq., this Court has the power and authority to declare the rights and interest of the parties following the acts and omissions of the HOA and HOA Trustee in foreclosing the Property.

57. Nationstar's Deed of Trust is a first secured interest on the Property as intended by NRS 116.3116(2)(b).

58. As the current beneficiary under the Deed of Trust and Guillory Loan, Nationstar's interest still encumbers the Property and retains its first position status in the chain of title for the Property after the HOA Sale and is superior to the interest, if any, acquired by Buyer, or held or claimed by any other party.

59. Upon information and belief, Buyer claims an interest in the Property that is adverse to Nationstar's interest.

60. Upon information and belief, the HOA, the HOA Trustee and the fictitious Defendants failed to provide proper, adequate notices required by Nevada statutes, the CC&R's and due process to Nationstar and/or its predecessors, and therefore the HOA Sale is void and should be set aside or rescinded.

61. Based on the adverse claims being asserted by the parties, Nationstar is entitled to a judicial determination regarding the rights and interests of the respective parties to the case.

62. For all the reasons set forth above and in the Factual Background, Nationstar is entitled to a determination from this Court, pursuant to NRS 40.010, that Nationstar is the beneficiary of a first position Deed of Trust which still encumbers the Property and is superior to the interest held by Buyer, and all other parties, if any.

63. In the alternative, if it is found under state law that Nationstar's interest could have been extinguished by the HOA Sale, for all the reasons set forth above and in the Factual Background, Nationstar is entitled to a determination from this Court, pursuant to NRS 40.010, the HOA Sale was unlawful and void and conveyed no legitimate interest to Buyer.

64. Nationstar has furthermore been required to retain counsel and is entitled to recover reasonable attorney's fees for having brought the underlying action.

SECOND CAUSE OF ACTION

(Permanent and Preliminary Injunction versus Buyer)

65. Nationstar incorporates by reference the allegations of all previous paragraphs, as if fully set forth herein.

66. As set forth above, Buyer claims an ownership interest in the Property that is adverse to Nationstar.

67. Any sale or transfer of the Property, prior to a judicial determination concerning the respective rights and interests of the parties to the case, may be rendered invalid if Nationstar's Deed of Trust still encumbered the Property in first position and was not extinguished by the HOA Sale.

68. Nationstar has a reasonable probability of success on the merits of the complaint, for which compensatory damages will not compensate Nationstar for the irreparable harm of the loss of title to a bona fide purchaser or loss of the first position priority status secured by the Property.

69. Nationstar has no adequate remedy at law due to the uniqueness of the Property involved in the case.

70. Nationstar is entitled to a preliminary and permanent injunction prohibiting Buyer, its successors, assigns, and agents from conducting a sale, transfer or encumbrance of the Property if it is claimed to be superior to Nationstar's Deed of Trust or not subject to that Deed of Trust.

71. Nationstar is entitled to a preliminary injunction requiring Buyer to pay all taxes, insurance and homeowner's association dues during the pendency of this action.

72. Nationstar is entitled to a preliminary injunction requiring Buyer to segregate and deposit all rents with the Court or a Court-approved trust account over which Buyer has no control during the pendency of this action.

73. Nationstar has been required to retain counsel to prosecute this action and is entitled to recover reasonable attorney's fees to prosecute this action.

THIRD CAUSE OF ACTION

(Wrongful Foreclosure versus the HOA and fictitious Defendants)

74. Nationstar incorporates by reference the allegations of all previous paragraphs, as if fully set forth herein.

75. Upon information and belief, the HOA, the HOA Trustee and all fictitious Defendants did not comply with all mailing and noticing requirements stated in NRS 116.31162 through NRS 116.31168.

76. The HOA, the HOA Trustee and all fictitious Defendants failed to provide notice pursuant to the CC&Rs.

77. Because the HOA Sale was wrongfully conducted and violated applicable law, the Court should set it aside to the extent that it purports to have extinguished Nationstar's first Deed

of Trust and delivered free and clear title to the Property to Buyer.

78. Because the HOA Sale was not commercially reasonable, it was invalid, wrongful and should be set aside.

79. Because the HOA, HOA Trustee and fictitious Defendants did not give Nationstar, or its agents, servicers or predecessors in interest, the proper, adequate notice and the opportunity to cure the deficiency or default in the payment of the HOA's assessments required by Nevada statutes, the CC&R's and due process, the HOA Sale was wrongfully conducted and should be set aside.

80. As a proximate result of HOA, HOA Trustee and fictitious Defendants' wrongful foreclosure of the Property by the HOA Sale, as more particularly set forth above and in the Factual Background, Nationstar has suffered general and special damages in an amount not presently known. Nationstar will seek leave of court to assert said amounts when they are determined.

81. If it is determined that Nationstar's Deed of Trust has been extinguished by the HOA Sale, as a proximate result of HOA, HOA Trustee and fictitious Defendants' wrongful foreclosure of the Property by the HOA Sale, Nationstar has suffered special damages in the amount equal to the fair market value of the Property or the unpaid balance of the Guillory Loan, plus interest, at the time of the HOA Sale, whichever is greater, in an amount not presently known. Nationstar will seek leave of court to assert said amounts when they are determined.

82. Nationstar has been required to retain counsel to prosecute this action and is entitled to recover reasonable attorney's fees to prosecute this action.

PRAYER

Wherefore, Nationstar prays for judgment against the Counter-Defendants, jointly and severally, as follows:

1. For a declaration and determination that Nationstar's interest is secured against the Property, and that Nationstar's first Deed of Trust was not extinguished by the HOA Sale;

2. For a declaration and determination that Nationstar's interest is superior to the

interest of Buyer, and all other fictitious Defendants;

3. For a declaration and determination that the HOA Sale was invalid to the extent it purports to convey the Property free and clear to Buyer;

4. In the alternative, for a declaration and determination that the HOA Sale was invalid and conveyed no legitimate interest to Buyer;

5. For a preliminary and permanent injunction that Buyer, its successors, assigns, and agents are prohibited from conducting a sale or transfer of the Property if it is claimed to be superior to Nationstar's Deed of Trust or not subject to that Deed of Trust;

6. For a preliminary injunction that Buyer, its successors, assigns, and agents pay all taxes, insurance and homeowner's association dues during the pendency of this action;

7. For a preliminary injunction that Buyer, its successors, assigns, and agents be required to segregate and deposit all rents with the Court or a Court-approved trust account over which Buyer has no control during the pendency of this action;

8. If it is determined that Nationstar's Deed of Trust has been extinguished by the HOA Sale, for special damages in the amount of the fair market value of the Property or the unpaid balance of the Guillory Loan and Deed of Trust, at the time of the HOA Sale, whichever is greater;

9. For general and special damages in excess of $10,000.00;

10. For attorney's fees;

11. For costs of incurred herein, including post-judgment costs; and

12. For any and all further relief deemed appropriate by this Court.

DATED this 17th day of March, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq. (SBN 50)
Chelsea A. Crowton, Esq. (SBN 11547)
7785 W. Sahara Ave., Suite 200
Las Vegas, NV, 89117
Tel: (702) 475-7964 Fax: (702) 946-1345
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant, Nationstar Mortgage, LLC

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **DEFENDANT NATIONSTAR'S ANSWER TO PLAINTIFF'S COMPLAINT AND COUNTERCLAIM** filed in Case No. A-13-689240-C **does not** contain the social security number of any person.

DATED this 13th day of March, 2015

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq. (SBN 50)
Chelsea A. Crowton, Esq. (SBN 11547)
7785 W. Sahara Ave., Suite 200
Las Vegas, NV, 89117
(702) 475-7964; Fax: (702) 946-1345
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant, Nationstar Mortgage, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WRIGHT, FINLAY & ZAK, LLP, and that on this 13 day of March, 2015, I did cause a true copy of **NATIONSTAR'S ANSWER TO THE COMPLAINT AND COUNTERCLAIM** to be e-filed and e-served through the Eighth Judicial District EFP system pursuant to NEFR 9.

Law Offices of Michael F. Bohn, Esq.

Name	Email
Eserve Contact	office@bohnlawfirm.com
Michael F Bohn Esq	mbohn@bohnlawfirm.com

The Cooper Castle Law Firm, LLP

Name	Email
Jason Peck, Esq.	jasonpeck@ccfirm.com

An Employee of WRIGHT, FINLAY & ZAK, LLP

Exhibit 1

Exhibit 1

Exhibit 1

APN: 163-19-311-015
Affix R.P.T.T.: $1,647.30
Escrow NO.: 07-01-6578DH
WHEN RECORDED MAIL DEED AND TAX STATEMENTS TO:
Monique Guillory
4641 Viareggio Court
Las Vegas, NV 89147

8-2

Declaration copy attached

20070125-0003582

Fee: $19.00 RPTT: $1,647.30
N/C Fee: $0.00

01/25/2007 13:30:50
T20070014336
Requestor:
GREAT AMERICAN TITLE

Debbie Conway KXC
Clark County Recorder Pgs: 8

GRANT, BARGIN, SALE DEED

THIS INDENTURE WITNESSETH: That Bakers Financial Power Group LLC, A Limited Liability

For valuable consideration, receipt of which is hereby acknowledged, hereby Grant, Bargain, Sell and Convey to Monique Guillory, A Single Woman

All that real property situated in the County of Clark, State of Nevada, bounded and described as follows:

SEE EXHIBIT "A"

SUBJECT TO: 1. Taxes for the current fiscal year.
2. Rights of way, reservations, restrictions, easements and conditions of record.

Together with all an singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my/our hand(s) this 22 day of January, 2007

Bakers Financial Power Group, LLC

By: Justin Baker, President

STATE OF NEVADA
COUNTY OF CLARK

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KATIE HOLDEN
2009

On January 22, 2007 personally appeared before me, a Notary Public, Justin Baker, personally known (or proven) to me to be the person(s) whose name(s) is/are subscribed to the within Instrument and who acknowledged that he/she/they executed the instrument.

Notary Public

EXHIBIT "A"

PARCEL ONE (1):

Lot Seventy (70) in Block One (1) of CONQUISTADOR/TOMPKINS-UNIT 2, as shown by map thereof on file in Book 93 of Plats, Page 1, in the Office of the County Recorder of Clark County, Nevada.

PARCEL TWO (2):

A non exclusive easement for ingress, egress and Public Utility Purposes on, over and Across the Private Streets on the Map Referenced Hereinabove, which easement is Appurtenant to parcel one (1).

Clarification copy

APN: 163-19-311-015
Affix R.P.T.T.: $1,647.30
Escrow NO.: 07-01-6578DH
WHEN RECORDED MAIL DEED AND TAX STATEMENTS TO:
Monique Guillory
4641 Viareggio Court
Las Vegs, NV 89147

GRANT, BARGIN, SALE DEED

THIS INDENTURE WITNESSETH: That Bakers Financial Power Group LLC, A Limited Liability

For valuable consideration, receipt of which is hereby acknowledged, hereby Grant, Bargain, Sell and Convey to Monique Guillory, A Single Woman

All that real property situated in the County of Clark, State of Nevada, bounded and described as follows:

SEE EXHIBIT "A"

SUBJECT TO: 1. Taxes for the current fiscal year.
2. Rights of way, reservations, restrictions, easements and conditions of record.

Together with all an singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

Witness my/our hand(s) this 22 day of January, 2007

Bakers Financial Power Group, LLC

By: Justin Baker, President

STATE OF NEVADA
COUNTY OF CLARK

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KATIE HOLDEN
No: 05-[illegible]
My [illegible]
Expires Jan 23, 2009

On January 22, 2007 personally appeared before me, a Notary Public, Justin Baker, personally known (or proven) to me to be the person(s) whose name(s) is/are subscribed to the within instrument and who acknowledged that he/she/they executed the instrument.

Notary Public

EXHIBIT "A"

:
:
:

PARCEL ONE (1):

Lot Seventy (70) in Block One (1) of CONQUISTADOR/TOMPKINS-UNIT 2, as shown by map thereof on file in Bokk 93 of Plats, Page 1, in the Office of the County Recorder of Clark County, Nevada.

PARCEL TWO (2):

A non exclusive ensement for ingress, egress and Public Utility Purposes on, over and Across the Private Streets on the Map Referenced Hereinabove, which easement is Appurtenant to parcel one (1).

STATE OF NEVADA
DECLARATION OF VALUE

1. **Assessor Parcel Number(s):**
   a) 163-19-311-015
   b) _____
   c) _____
   d) _____

For recorders optional use only
Document/Instrument#:_____
Book_____**Page:**_____
Date of Recording:_____
Notes:_____

2. **Type of Property**
   a) ☐ Vacant Land b) ☑ Single Fam. Res.
   c) ☐ Condo/Twnhse d) ☐ 2-4 Plex
   e) ☐ Apt. Bldg f) ☐ Comml/Indl
   g) ☐ Agricultural h) ☐ Mobile Home

3. **Total Value/Sales Price of Property** $323,000.00
   Deed in Lieu of Foreclosure Only (value of property) $
   Transfer tax value $323,000.00
   Real Property Transfer Tax Due: $1,647.30

4. **If Exemption Claimed**
   a) Transfer Tax Exemption per NRS 375.090, Section
   b) Explain Reason for Exemption:

5. **Partial Interest: Percentage being transferred: %**

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS.375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ Capacity Seller

Signature _____ Capacity Agent

SELLER (GRANTOR) INFORMATION (REQUIRED)		BUYER (GRANTEE) INFORMATION (REQUIRED)	
Print Name:	Bakers Financial Power Group, LLC	Print Name:	Monique Guillory
Address:	4641 Viareggio Court	Address:	4641 Viareggio Court
City:	Las Vegas NV 89147	City:	Las Vegas, NV 89147

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)
Great American Title
3137 E. Warm Springs, Suite 200
Las Vegas NV, 89120

Escrow No 07-01-6578DH (AS A PUBLIC RECORD THIS FORM MAY BE RECORDED)

3582 Cont

STATE OF NEVADA
DECLARATION OF VALUE

1. **Assessor Parcel Number(s):**
   a) 163-19-311-015
   b) _____
   c) _____
   d) _____

5

For recorders optional use only
Document/Instrument#:_____
Book_____**Page:**_____
Date of Recording:_____
Notes:_____

2. **Type of Property**
   a) ☐ Vacant Land b) ☒ Single Fam. Res.
   c) ☐ Condo/Twnhse d) ☐ 2-4 Plex
   e) ☐ Apt. Bldg f) ☐ Comml/Indl
   g) ☐ Apricultural h) ☐ Mobile Home

3. **Total Value/Sales Price of Property** $323,000.00
   Deed in Lieu of Foreclosure Only (value of property) $
   Transfer tax value $323,000.00
   Real Property Transfer Tax Due: $1,647.30

4. **If Exemption Claimed**
   a) Transfer Tax Exemption per NRS 375.090, Section
   b) Explain Reason for Exemption:

5. **Partial Interest: Percentage being transferred: %**

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS.375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature _____ Capacity Seller

Signature _____ Capacity Agent

SELLER (GRANTOR) INFORMATION (REQUIRED)		BUYER (GRANTEE) INFORMATION (REQUIRED)	
Print Name:	Bakers Financial Power Group, LLC	Print Name:	Monique Guillory
Address:	4641 Viareggio Court	Address:	4641 Viareggio Court
City:	Las Vegas NV 89147	City:	Las Vegas, NV 89147

COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)
Great American Title
3137 E. Warm Springs, Suite 200
Las Vegas NV, 89120

Escrow No 07-01-6578DH (AS A PUBLIC RECORD THIS FORM MAY BE RECORDED)

3582

Exhibit 2

Exhibit 2

Exhibit 2

21

20070125-0003583

Fee: $40.00
N/C Fee: $0.00

01/25/2007 13:30:50
T20070014336
Requestor:
GREAT AMERICAN TITLE

Debbie Conway KXC
Clark County Recorder Pgs: 27

Assessor's Parcel Number:
163-19-311-015
Return To:
FIRST MAGNUS FINANCIAL CORPORATION

603 N. WILMOT
TUCSON, AZ 85711

Prepared By:

FIRST MAGNUS FINANCIAL CORPORATION
603 N. WILMOT
TUCSON, AZ 85711

~~Recording Requested By:~~
FIRST MAGNUS FINANCIAL CORPORATION

07.01.6578DH [Space Above This Line For Recording Data] 4

DEED OF TRUST

LOAN NO.: 5040782241
ESCROW NO.: 07-01-6578DH

MIN 100039250407822414
MERS Phone: 1-888-679-6377

DEFINITIONS
Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.
(A) "Security Instrument" means this document, which is dated JANUARY 17, 2007 , together with all Riders to this document.
(B) "Borrower" is
MONIQUE GUILLORY, A SINGLE WOMAN

Borrower is the trustor under this Security Instrument.
(C) "Lender" is
FIRST MAGNUS FINANCIAL CORPORATION, AN ARIZONA CORPORATION

Lender is a CORPORATION
organized and existing under the laws of ARIZONA

Lender's address is
603 North Wilmot Road, Tucson, AZ 85711
(D) "Trustee" is
GREAT AMERICAN TITLE
(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated JANUARY 17, 2007
The Note states that Borrower owes Lender
TWO HUNDRED FIFTY EIGHT THOUSAND FOUR HUNDRED AND NO/100 X X X X X X X X X
Dollars
(U.S. $ 258,400.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than FEBRUARY 01, 2037
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

[XX] Adjustable Rate Rider	[ ] Condominium Rider	[ ] 1-4 Family Rider
[ ] Graduated Payment Rider	[XX] Planned Unit Development Rider	[ ] Biweekly Payment Rider
[ ] Balloon Rider	[ ] Rate Improvement Rider	[ ] Second Home Rider
[XX] Other(s) [specify]	INTEREST-ONLY ADDENDUM TO ADJUSTABLE RATE RIDER ADDENDUM TO ADJUSTABLE RATE RIDER	

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

Initials: MG

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the COUNTY [Type of Recording Jurisdiction] of CLARK [Name of Recording Jurisdiction]:

LEGAL DESCRIPTION ATTACHED HERETO AND MADE PART HEREOF .....AND BEING MORE PARTICULARLY DESCRIBED IN EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

Parcel ID Number: 163-19-311-015 which currently has the address of
4641 VIAREGGIO COURT [Street]
LAS VEGAS [City], Nevada 89147 [Zip Code]
("Property Address"):

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances

of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives

Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

Initials: MM6n

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

Initials: JMG

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

Initials: MG

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be

one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

Initials: MG

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Assumption Fee. If there is an assumption of this loan, Lender may charge an assumption fee of U.S. $.

Initials: _____

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

_____
-Witness

_____
-Witness

MONIQUE GUILLORY _____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

STATE OF NEVADA California
COUNTY OF Los Angeles

This instrument was acknowledged before me on January 19, 2007 by
MONIQUE GUILLORY

ASHLEE LENA TURNER
COMMISSION 1572756
NOTARY PUBLIC CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires April 9, 2009

Notary Public

Mail Tax Statements To:

CLARK COUNTY

PO BOX 551220
LAS VEGAS, NV 89155-0000

PLANNED UNIT DEVELOPMENT RIDER

MIN: 100039250407822414
MERS Phone: 1-888-679-6377

LOAN NO.: 5040782241

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 17th day of JANUARY, 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to FIRST MAGNUS FINANCIAL CORPORATION, AN ARIZONA CORPORATION

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

4641 VIAREGGIO COURT, LAS VEGAS, NV 89147
[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in

COVENANTS, CONDITIONS AND RESTRICTIONS.
(the "Declaration"). The Property is a part of a planned unit development known as

CONQUISTADOR TOMPKINS

[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

Initials: MLG

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan.

Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become

Initials: MG

additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this PUD Rider.

MONIQUE GUILLORY _____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

_____(Seal) -Borrower

Electronically Filed
05/04/2015 12:30:35 PM

CLERK OF THE COURT

RPLY
MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
mbohn@bohnlawfirm.com
GERALD L. TAN, ESQ.
Nevada Bar No.: 13596
gtan@bohnlawfirm.com
LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 FAX

Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT Plaintiff, vs. NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY Defendants.	CASE NO.: A-13-689240-C DEPT NO.: V
NATIONSTAR MORTGAGE, LLC, Counterclaimant vs. SATICOY BAY LLC SERIES 4641 VIAREGGIO CT; NAPLES COMMUNITY HOMEOWNERS ASSOCIATION; LEACH SONG & GRUCHOW; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Counter-defendants.	

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND OPPOSITION TO COUNTERMOTION FOR SUMMARY JUDGMENT

Plaintiff, Saticoy Bay LLC Series 4641 Viareggio Ct, by and through its attorney, Michael F. Bohn, Esq., submits the following points and authorities in reply to the arguments raised in Nationstar's

opposition to motion to dismiss counterclaim and countermotion for summary judgment, filed on April 20, 2015.

POINTS AND AUTHORITIES

A. The HOA lien did not violate NRS 116.3116.

At page 9 of its opposition, defendant cites the Nevada Real Estate Division's Advisory Opinion 13-01 as authority that "a lien under NRS 116.3116(1) can only include costs and fees that are specifically enumerated in the statute." In footnote 8 on page 9, Nationstar asserts that Advisory Opinion 13-01 is attached as Exhibit 3 to the opposition, but Exhibit 3 is not a copy of Advisory Opinion 13-01 – Exhibit 3 is instead a presentation made by Gail J. Anderson to the Senate Committee on the Judiciary on May 6, 2013. Advisory Opinion 13-01 was issued on December 12, 2012. Question #1 focused on whether the portion of the association's lien which is superior to a unit's first security interest could contain "costs of collecting" as defined in NRS 116.310313, and question #2 focused on whether the sum total of the super priority lien could exceed 9 times the monthly assessment amount for common expenses.

Subsequent to the issuance of Advisory Opinion 13-01, and subsequent to the non-binding decisions cited at pages 9 and 10 of defendant's opposition, the Nevada Supreme Court issued its decision in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014). In SFR, the Nevada Supreme Court stated that because the notice of default and notice of sale are sent "to the homeowner and other junior lienholders" and not just the lender, "it was appropriate to state the total amount of the lien." The Court also stated that "nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale **or paying the entire amount and requesting a refund of the balance**." Id. The Supreme Court did not approve of the option chosen by defendant – allow an HOA foreclosure sale to be completed without objection and then claim that the sale was void due to the content of the notices.

As set forth at page 5 of plaintiff's motion to dismiss, there is a common law presumption that a foreclosure sale was conducted validly. Pursuant to NRS 116.31166, there is a conclusive presumption that the HOA foreclosure sale held on August 22, 2013 was conducted validly. As evidenced by the corporate assignment of deed of trust attached as Exhibit 3 to defendant's counterclaim, defendant did

not obtain its interest in the deed of trust until August 3, 2012, which is a date after both the notice of default and the notice of sale were recorded and served. Defendant has produced no evidence that either defendant or its predecessor objected to the notices prior to the HOA foreclosure sale. As set forth at page 6 of plaintiff's motion to dismiss, the recitals in the foreclosure deed are "conclusive proof" of the proper service of the required notices, and as provided by NRS 116.31166(2), the foreclosure deed is "conclusive" against "the unit's former owner, his or her heirs and assigns, and all other persons." This includes the defendant. To allow defendant to now challenge the content of the notices mailed to defendant's predecessor would read NRS 116.31166(2) out of the statute.

B. The "commercial reasonableness" requirements contained in the Uniform Commercial Code do not apply to the HOA's foreclosure sale in this case.

At pages 7 to 11 of its motion to dismiss, plaintiff explained in detail why the language contained in NRS 104.9610(2) requiring that a disposition of collateral secured by an Article 9 security interest must be "commercially reasonable" cannot be applied to limit the nonjudicial foreclosure procedure expressly prescribed by NRS 116.31162 through NRS 116.31168 and, by incorporation, NRS 107.090.

At page 12 of its opposition, defendant asserts that the "obligation of good faith" contained in NRS 116.31164 incorporates the definition of "good faith" contained in the Comment to Section 1-113 of the UCIOA. NRS 116.31164, however, contains no such "obligation of good faith." The "obligation of good faith" instead appears in NRS 116.1113, and the Comment to Section 1-113 of the UCIOA does not include any requirement of "commercial" reasonableness. The Comment to Section 1-113 of the UCIOA instead states that "good faith" means "observance of two standards: 'honesty in fact', and observance of reasonable standards of fair dealing." The word "commercial" does not appear in the definition. NRS 104.9109(4)(k) also expressly provides that Article 9 of the Uniform Commercial Code does not apply to "[t]he creation or transfer of an interest in or lien on real property . . . ."

As a result, the cases interpreting the **commercial** reasonableness of nonjudicial sales held under Article 9 of the Uniform Commercial Code cited at page 12 and 13 of defendant's opposition have absolutely no relevance to the foreclosure sale held in this case pursuant to the statutory foreclosure process defined by by NRS 116.31162 through NRS 116.31168 and, by incorporation, NRS 107.090.

As discussed in detail at page 8 of plaintiff's motion to dismiss, the opinion in Will v. Mill Condominium Owners' Association, 848 A.2d 336, 342 (2004), has no relevance to the present case because Vermont law does not include a nonjudicial foreclosure process like that provided in NRS Chapter 116. The non-binding decisions cited at pages 14 and 15 of defendant's opposition were decided before the Supreme Court's decision in SFR where the Court stated:

> **But the choice of foreclosure method for HOA liens is the Legislature's,** and the Nevada Legislature has written NRS Chapter 116 to allow nonjudicial foreclosure of HOA liens, subject to the special notice requirements and protections handcrafted by the Legislature in NRS 116.31162 through NRS 116.31168. (emphasis added)
>
> 334 P.3d at 417.

This is a clear direction by the Supreme Court that it is not the job of the district courts to re-write or add new conditions to the foreclosure procedure approved by the Court in SFR.

At page 15 of its opposition, defendant asserts that plaintiff is not a bona fide purchaser because plaintiff acquired the property with notice of defendant's deed of trust, and at page 16 of its opposition, defendant asserts that plaintiff purchased the property with "record notice of both the mortgage protection clause and Nationstar's senior Deed of Trust.". Relief based on a mortgage savings clause was specifically rejected by the Supreme Court in the SFR decision. The court stated:

> NRS 116.1104 defeats this argument. It states that Chapter 116's "provisions may not be varied by agreement, and rights conferred by it may not be waived ... [e]xcept as *expressly* provided in" Chapter 116. (Emphasis added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." *See 7912 Limbwood Court Trust,* 979 F.Supp.2d at 1153: The mortgage savings clause thus does not affect NRS 116.3116(2)'s application in this case. [FN7] *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC,* 125 Nev. 397, 407, 215 P.3d 27, 34 (2009) (holding that a CC & Rs clause that created a statutorily prohibited voting class was void and unenforceable).
>
> Id. at 419.

The SFR decision also held that foreclosure of the HOA's superpriority lien extinguishes a first deed of trust. Id. As noted at pages 6 and 7 of plaintiff's motion to dismiss, the conclusive presumption provided by NRS 116.31166 is not limited to bona fide purchasers, but extends to any purchaser of a unit pursuant to NRS Chapter 116.

C. The CC&Rs did not preserve defendant's deed of trust, and the recitals are conclusive proof that the HOA provided all required notices.

At pages 16 to 19 of its opposition, defendant asserts that the mortgage protection clause in Article X of the CC&Rs supersedes the provisions of NRS Chapter 116 even though the Nevada Supreme Court expressly rejected this argument in SFR. Id. at 419.

At pages 19 and 20, defendant argues that the recitals in the foreclosure deed do not prove that any copies of notices were mailed except the mailing of a copy of the delinquent assessment. To the contrary, defendant has quoted at page 20 language from a foreclosure deed other than that in the deed attached as Exhibit 3 to defendant's counterclaim, which attests to the proper mailing and service of both the notice of default and the notice of sale.

At page 21, defendant asserts that there is no proof that the HOA foreclosed on a super priority lien and that the notices failed to adequately describe the deficiency in payment. As noted by the Supreme Court in SFR, "due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right." Id. at 418. Defendant has produced no evidence that it exercised due diligence or took any steps to preserve its deed of trust even though defendant had record notice that the HOA had filed both a notice of default and a notice of sale prior to the date that defendant acquired its interest in the property.

D. The foreclosure process in NRS Chapter 116 does not violate due process because NRS 116.31168(1) incorporates the notice requirements in NRS 107.090 and required that copies of both the notice of default and the notice of sale be mailed to holders of "subordinate" interests.

At page 22 of its opposition and countermotion, Defendant asserts that NRS Chapter 116 has a "fatal flaw" because "none of its express notice provisions provide for mandatory notice to lenders; despite the fact that their property rights are directly threatened by an HOA's non-judicial foreclosure."

The claim that the notice requirements in NRS Chapter 116 are unconstitutional was specifically addressed in the SFR decision and rejected by the Nevada Supreme Court. The Court painstakingly went through each of the foreclosure requirements in NRS Chapter 116 and called the statutory scheme "elaborate." In rejecting U.S. Bank's claim that there was a due process violation, the Court stated:

> U.S. Bank makes two additional arguments that merit brief discussion. First, the lender contends that the nonjudicial foreclosure in this case violated its due process rights. Second, it invokes the mortgage savings clause in the Southern Highlands CC & Rs, arguing that this clause subordinates SHHOA's lien to the first deed of trust. Neither

argument holds up to analysis.

1.

SFR is appealing the dismissal of its complaint for failure to state a claim upon which relief can be granted. NRCP 12(b)(5). The complaint alleges that "the HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale." It further alleges that, "prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the HOA Lien representing 9 months of assessments for common expenses." **In view of the fact that the "requirements of law" include compliance with NRS 116.31162 through NRS 116.31168 and by incorporation, NRS 107.090, *see* NRS 116.31168(1)**, we conclude that U.S. Bank's due process challenge to the lack of adequate notice fails, at least at this early stage in the proceeding. (emphasis added)

334 P.3d at 417-418.

At page 26 of its opposition and countermotion, Defendant asserts that NRS 116.31168(1) does not incorporate the provisions of NRS 107.090 requiring that copies of both the notice of default and the notice of sale be mailed to holders of "subordinate" interests even if they do not make an affirmative request for notice. As noted in the SFR decision, on the other hand, the Nevada Supreme Court has adopted plaintiff's reading of the statute that the notices require under NRS 107.090 are also required for an HOA foreclosure "by incorporation." Id. at 418.

NRS 107.090 provides in part:

> **Request for notice of default and sale: Recording and contents; mailing of notice; request by homeowners' association; effect of request.**
>
> 1. As used in this section, "person with an interest" means any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder of the county in which any part of the real property is situated.
> . . . .
>
> 3. The trustee or person authorized to record **the notice of default** shall, within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of the notice, addressed to:
>
> (a) Each person who has recorded a request for a copy of the notice; and
>
> **(b) Each other person with an interest whose interest or claimed interest is subordinate to the deed of trust.**
>
> 4. The trustee or person authorized to make the sale shall, at least 20 days before the date of sale, cause to be deposited in the United States mail an envelope, registered or certified, return receipt requested and with postage prepaid, containing a copy of **the notice of time and place of sale**, addressed to each person described in subsection 3. (emphasis added)

The language of this statute makes it clear that all persons with an interest, whose interests are subordinate to the super priority lien, are entitled to notice. The statutory scheme provided for foreclosures of trust deeds in NRS 107.080 mirrors the foreclosure procedures for HOA liens found in NRS Chapter 116. In the case of Charmicor v. Deaner, 572 F.2d 694 (9th Cir. 1978), the federal appeals court ruled that the statutory procedure for non-judicial foreclosure sales provided in NRS 107.080 did not transform the private action into state action for due process purposes.

The statutory requirements for the foreclosure procedures under NRS Chapter 116 for an HOA foreclosure and under NRS 107.080 for a bank foreclosure are detailed in the following graph:

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.31162(1)(a)	Delinquency by homeowner	NRS 107.080(1)
NRS 116.31162(1)(a)	Mail notice of delinquency to homeowner	No statutory requirement but required by terms of deed of trust
NRS 116.31162(1)(b)	Execute notice of default and election to sell (NOD) that describes the deficiency in payment	NRS 107.080(2)(b)
NRS 116.31162(1)(a)	Record NOD	NRS 107.080(3)
NRS 116.31162(2)(b)	Mail NOD by certified or registered mail, return receipt requested to homeowner	NRS 107.080(3)
NRS 116.31163 and NRS 116.31168(incorporating requirements of NRS 107.090)	Mail NOD to interested parties who request notice	NRS 107.090(3)(a)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail NOD to subordinate claim holders	NRS 107.090(3)(b)
NRS 116.31162(1)(c)	Failure to pay for 90 days after NOD is recorded and mailed	NRS 107.080(3)
NRS 116.311635(1)(a)	Give notice of the time and place of the sale in the manner and for a time not less than that required by law for the sale of real property upon execution/posting in a public place and on property	NRS 107.080(4)

HOA Foreclosure	Statutory Requirement	Bank Foreclosure
NRS 116.311635(1)(a)(1)	Mail Notice of Sale (NOS) to homeowner	NRS 107.080(4)
NRS 116.311635(1)(b)(1) and NRS 116.311635(1)(b)(3)	Mail Notice of Sale (NOS) to interested parties who request notice	NRS 107.090(4)
NRS 116.31168 (incorporating requirements of NRS 107.090)	Mail Notice of Sale (NOS) to subordinate claim holders	NRS 107.090(4)
NRS 116.311635(1)(b)(3)	Mail Notice of Sale (NOS) to Ombudsman	No statutory requirement
NRS 116.311635(2)	Post NOS on property or personally deliver to homeowner	NRS 107.080(4)

The statutory requirements for foreclosure of an HOA lien and trust deed are virtually identical, and the statutes mirror each other. The notices provided to claimants to the real property are the same under both NRS Chapter 107 and NRS Chapter 116, and the notices are adequate.

Defendant's interpretation of NRS 116.31168(1) and NRS 107.090 is inconsistent with numerous rules of statutory construction. For example, the Nevada Supreme Court has recognized that when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it. City Council of Reno v. Reno Newspapers, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989). Additionally, courts must construe statutes to give meaning to all of their parts and language, and courts are to read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation. Board of County Comm'rs v. CMC of Nevada, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983). A statute should be interpreted to give the terms their plain meaning, considering the provisions as a whole, so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory. Southern Nevada Homebuilders v. Clark County 121 Nev. 446, 117 P.3d 171 (2005). A statute should be construed so that no part is rendered meaningless. Public Employees' Benefits Program v. Las Vegas Metropolitan Police Department 124 Nev. 138, 179 P.3d 542 (2008). All of these standards are violated by defendant's assertion at page 26 of its opposition that NRS 116.31168 "unconstitutionally shifts the burden to lenders, requiring they 'opt in' to receive notice of foreclosure

as under NRS 107.090 . . . ." This argument simply ignores the express language in NRS 107.090 requiring that copies of the notice of default and the notice of sale be mailed to holders of "subordinate" interests even if they do not record a request for notice. Defendant provides no evidence that the HOA mailed both of these notices to defendant's predecessor prior to the HOA foreclosure sale.

The Nevada Supreme Court has also recognized a general presumption that statutes will be interpreted in compliance with the Constitution. Sereika v. State, 114 Nev. 142, 955 P.2d 175, 180 (1998). The Nevada Supreme Court has stated that "statutes must be construed consistent with the constitution and, where necessary, in a manner supportive of their constitutionality." Foley v. Kennedy, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1994). Where a statute is susceptible to both a constitutional and an unconstitutional interpretation, the court is obliged to construe the statute so that it does not violate the constitution. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 380, 878 P.2d 913, 919 (1994), citing Sheriff v. Wu, 101 Nev. 687, 708 P.2d 305 (1985).

The notice requirements of NRS 116.31162 through 116.31168, and by incorporation, NRS 107.090, provide holders of "subordinate" deeds of trust with adequate notice prior to an HOA foreclosure sale. The statutory foreclosure process does not violate due process.

E. The statute does not violate the takings clauses of the United States and Nevada Constitutions.

At page 27 of its opposition and countermotion, defendant asserts that "permitting the extinguishment of a first-recorded deed of trust in favor of a *de minimis* homeowners' association's lien to recover several months of assessments is a taking that violates both Constitutions." The present case, however, does not involve any property being "taken for public use" as required by the Fifth Amendment to the U.S. Constitution or Article I, Section 8 of the Nevada Constitution.

The case of McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 137 P.3d 1110 (2006), is unlike the present case because that case involved a height restriction ordinance adopted by Clark County that reduced the height of any structures that could be erected on plaintiff's property from 150 feet to only 80 to 90 feet. In addition, the plaintiff argued that approximately 100 planes per day used his airspace at altitudes below 500 feet. In the present case, on the other hand, both the adoption of NRS Chapter 116

by the Nevada legislature in 1991, and the recording of the CC&Rs for the HOA on May 7, 2000 pre-dated the recording on the deed of trust on January 25, 2007 and the assignment of the deed of trust to defendant on August 30, 2012. Defendant was therefore "on notice that by operation of the statute, the [earlier recorded] CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] deed of trust." SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev., Adv. Op. 75, *22, 334 P.3d 408, 418 (2014), quoting 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F. Supp. 2d 1142, 1152 (D. Nev. 2013).

In the case of United States v. Security Industrial Bank, 459 U.S. 10 (1982), cited at page 28 of defendant's opposition and countermotion, the United States Supreme Court affirmed a decision by the Court of Appeals that the exemptions created by 11 U.S.C. § 522(f)(2) could not have "retrospective application" and invalidate liens acquired before the enactment date of the Bankruptcy Reform Act of 1978. In the present case, the enactment of NRS Chapter 116 in 1991 and the recording of the CC&Rs by the HOA on May 7, 2000 could not be a taking of defendant's interest in the property because the deed of trust assigned to defendant was not recorded until January 25, 2007.

In Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), cited at page 28 of defendant's opposition and countermotion, the United States Supreme Court held that a sub-section added to §75 of the Bankruptcy Act by the Frazier-Lemke Act adopted on June 28, 1934 could not be applied to change the mortgagee's rights in mortgages recorded in 1922 and 1924. No "retrospective" application of NRS 116.3116(2) exists in the present case. Defendant obtained its interest in the real property with constructive notice that NRS Chapter 116 and the CC&Rs for the HOA provided the HOA with super priority lien rights that could extinguish its "subordinate" interest in the property.

The case of Armstrong v. United States, 364 U.S. 40 (1960), cited at page 28 of defendant's opposition and countermotion, is unlike the present case because the United States took ownership of 11 boats that were subject to the petitioners' materialmen's liens under state law and thereby made those liens unenforceable. In this case, the private foreclosure sale by the HOA did not involve a government purchaser, and defendant's deed of trust was always subordinate to the HOA's super priority lien.

At pages 29 of its opposition and countermotion, defendant states that "government seizure" of

property is not necessary to finding "an unconstitutional taking," but that "[t]he government's 'simply impos[ing] a general economic regulation," which "in effect transfers the property interest from a private creditor to a private debtor" is a taking. United States v. Security Industrial Bank, 459 U.S. at 78. In the present case, however, no such economic regulation was adopted by the government **after** defendant acquired its deed of trust against the Property. Defendant instead acquired its interest in the Property subject to the HOA's super priority lien rights.

F. Defendant has not provided any reason not to apply the general rule that the Supreme Court's interpretation of the statute applies retroactively.

At page 30 of its opposition and countermotion, defendant asserts that "SFR should be applied prospectively only, for it **establishes a new principle of law by overruling clear past precedent** on which litigants may have relied and by deciding **an issue of first impression whose resolution was not clearly foreshadowed**." (emphasis added) Defendant, however, does not identify the "clear past precedent" that is claims was overruled by "a new principle of law" that "was not clearly foreshadowed." To the contrary, the decision in SFR is based upon enforcing the long-established principle that the nonjudicial foreclosure of a **prior** lien extinguishes all subordinate liens. Brunzell v. Lawyerrs Title Insurance Corp. 101 Nev. 395, 705 P.2d 642 (1985), citing Erickson Construction Co. v. Nevada National Bank 89 Nev. 350, 513 P.2d 1236 (1973); Aladdin Heating Corp. v. Trustees of Central States 93 Nev. 257, 563 P.2d 82 (1977). It is defendant that seeks to establish new principles of law by adding conditions and limitations to the statutory nonjudicial foreclosure procedure that are not warranted by established canons of statutory construction.

G. Defendant's request for time to conduct discovery should be denied.

At pages 32-34 of its opposition and countermotion, defendant asserts that it should be granted the opportunity to conduct discovery regarding the handling of the foreclosure sale by Leach Johnson and the HOA. Although the discovery that defendant seeks to conduct may be relevant to presenting a claim for wrongful foreclosure against Leach Johnson and the HOA, the proposed discovery will not produce any evidence that could cause plaintiff's ownership of the property to be subject to defendant's extinguished deed of trust. As noted above, the requirement of "commercial reasonableness" does not

apply to an HOA foreclosure sale conducted pursuant to NRS Chapter 116. NRS 116.31166 expressly provides that the foreclosure deed recorded on September 6, 2013 is "conclusive" against defendant and supersedes all of the arguments that defendant has raised to challenge the extinguishment of its deed of trust.

CONCLUSION

The statutes and the SFR decision make it clear that the foreclosure sale vests title with the plaintiff and that the defendant's trust deed has been extinguished. The recitals in the foreclosure deed are, by statute, conclusive proof that the statutory requirements have been met. The commercial reasonableness argument is not applicable to an HOA foreclosure sale, the sale price alone is not grounds to set aside a foreclosure sale, and the mortgage savings clause is preempted by statute.

For these reasons, defendant's counterclaim against plaintiff should be dismissed.

DATED this 4th day of May 2015.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s /Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
Gerald L. Tan, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff

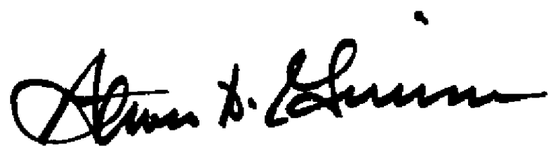
CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 4th day of May, 2015 an electronic copy of the **REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM AND OPPOSITION TO COUNTERMOTION FOR SUMMARY JUDGMENT** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

Dana Jonathon Nitz, Esq.
Chelsea A. Crowton, Esq.
WRIGHT FINLAY & ZAK
7785 W. Sahara Ave # 200
Las Vegas, NV 89117

/s/ /Marc Sameroff /
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

Electronically Filed
05/18/2015 04:25:52 PM



CLERK OF THE COURT
ELECTRONICALLY SERVED
05/19/2015 08:51:19 AM

OPPM
Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant/Counterclaimant, Nationstar Mortgage, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

SATICOY BAY LLC SERIES 4641 VIAREGGIO CT, Plaintiff, vs. NATIONSTAR MORTGAGE, LLC; COOPER CASTLE LAW FIRM, LLP; and MONIQUE GUILLORY, Defendants.	Case No.: A-13-689240-C Dept. No.: V **NATIONSTAR'S OPPOSITION TO NAPLES COMMUNITY HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS COUNTERCLAIM** **Hearing Date: 6-19-2015** **Hearing Time: 9:00 A.M.**
NATIONSTAR MORTGAGE, LLC, Counterclaimant, vs. SATICOY BAY LLC SERIES 4641 VIAREGGIO CT; NAPLES COMMUNITY HOMEOWNERS ASSOCIATION; LEACH JOHNSON SONG & GRUCHOW; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Counter-Defendants,	

Defendant/Counterclaimant, Nationstar Mortgage, LLC (hereinafter "Nationstar"), by and through its attorneys of record, Dana Jonathon Nitz, Esq. and Chelsea A. Crowton, Esq. of

the law firm Wright, Finlay & Zak, LLP, hereby submits its Opposition to Counter-Defendant's Motion to Dismiss Counterclaim. The Opposition is based on the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, all judicially noticed facts, and on any oral or documentary evidence that may be submitted at a hearing on this matter.

DATED this 15th day of May, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Defendant and Counterclaimant, Federal National Mortgage Association

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action centers on the parties' rights in that certain real property commonly described as 4641 Viareggio Court, Las Vegas, Nevada 89147 (the "Property").[1] Plaintiff Saticoy Bay LLC Series 4641 Viareggio Ct ("Saticoy Bay") claims superior title by virtue of a foreclosure deed following a non-judicial foreclosure on a lien by the Counter-Defendant, Naples Community Homeowners Association (hereinafter "HOA"). Nationstar claims superior title by virtue of its first position Deed of Trust on the Property. By its Motion to Dismiss, HOA claims it is not a proper party to Nationstar's quiet title claim because it does not claim an interest adverse to Nationstar. Also, HOA contends Nationstar's claims against it for Wrongful Foreclosure must be dismissed since it was not first submitted to the Nevada Real Estate

[1] A true and correct copy of the Grant, Bargain and Sale Deed recorded in the Clark County Recorder's Office as Book and Instrument Number 20070125-0003582 on January 25, 2007, is attached to Nationstar's Answer/Counterclaim as **Exhibit 1**. All other recordings stated hereafter are recorded in the same manner.

Division for mediation or arbitration in accordance with NRS 38.300 and McKnight Family, LLP v. Adept Management Services, Inc., 129 Nev. Adv. Op. 64, 310 P.3d 555 (2013).

Nationstar rejects HOA's arguments, first, because the quiet title and declaratory relief claims are tied to one another and the procedures used by the HOA and its agent, Counter-Defendant Leach Johnson Song & Gruchow (hereinafter "LJSG") selling the Property are in dispute and are directly at issue. Moreover, since the relief requested – setting aside the HOA Sale –would directly affect the HOA, it is a necessary party to Nationstar's Counterclaim against Plaintiff. Indeed, if the Court finds that the HOA or LJSG did not properly foreclose on the HOA lien in dispute – and specifically a super-priority lien – the sale must either be declared void or Nationstar's Deed of Trust must be restored to its first position status. Dismissal could only be proper if the HOA does not care if its sale is voided or if Nationstar's Deed of Trust survives in first position.

Second, NRS Chapter 38 and McKnight are not applicable because Nationstar has not commenced an action to trigger their alternative dispute resolution procedures. Rather, Plaintiff, Saticoy Bay, commenced the instant action. Nationstar has simply asserted counterclaims as a primary defense to Plaintiff's quiet title claims. Furthermore, the mediation procedure established by NRS Chapter 38 was clearly intended by the Nevada Legislature to apply to disputes between homeowner's associations and their member homeowners, not between them and the lender for the unit.

Finally, it is unclear what the HOA hopes to accomplish by trying to bifurcate the quiet title and declaratory relief claims from the remaining causes of action. All of the claims hinge on the propriety of the HOA's foreclosure sale which the HOA and LJSG conducted. Bifurcating or splitting these causes of action may result in double recovery, inconsistent findings and judgments. In other words, the Court will either grant quiet title/declaratory relief voiding the HOA's foreclosure sale and/or preserving Nationstar's interest in the Subject Property; or in the alternative, the Court will award damages to Nationstar for improprieties with the sale, but not both. Notably, NRS Chapter 38 was recently amended in 2013 and now only requires mediation and not mandatory arbitration. The mediation objective can just as easily be served in this action

through a mandatory settlement conference or mediation with a third-party neutral. Moreover, any mediation would almost certainly fail given the extent of the unpaid balance of the loan and the fair market value of the Property and given the fact that mediation among Nationstar and the HOA would be meaningless without the Buyer, Saticoy Bay, whose interests would be directly affected by any result setting aside the sale. A dismissal would simply delay the proceedings on the merits as Nationstar would thereafter promptly move this Court to allow it to amend its Answer and Counterclaim to bring the HOA back in as a party to the case. Needless delay and needless expense can be avoided by simply denying the motion to dismiss or staying the case to permit the mediation rather than dismissal.

II. STATEMENT OF FACTS

On or about January 22, 2007, Guillory purchased the Property. The Deed of Trust executed by Guillory identified First Magnus Financial Corporation as the Lender, Great American Title as the Trustee, and Mortgage Electronic Registration Systems, Inc. ("MERS") as beneficiary acting solely as a nominee for lender and lender's successors and assigns, and secured a loan in the amount of $258,400.00 (hereinafter the "Guillory Loan").[2] On August 30, 2012, an Assignment of Deed of Trust was recorded by which MERS assigned all its beneficial interest under the Deed of Trust to Nationstar.[3]

On August 18, 2011, a Notice of Delinquent Assessment Lien was recorded against the Property on behalf of the HOA by the HOA Trustee, LJSG.[4] On January 24, 2012, a Notice of Default and Election to Sell under Homeowners Association Lien was recorded against the

---

[2] A true and correct copy of the Deed of Trust recorded as Book and Instrument Number 20070125-0003583 on January 25, 2007, is attached to Nationstar's Answer/Counterclaim as **Exhibit 2.**

[3] A true and correct copy of the Assignment of Deed of Trust recorded as Book and Instrument Number 20120830-0000676 on August 30, 2012, is attached to Nationstar's Answer/Counterclaim as **Exhibit 3**.

[4] A true and correct copy of the Notice of Delinquent Assessment Lien recorded as Book and Instrument Number 20110818-0002904 on August 18, 2011, is attached to Nationstar's Answer/Counterclaim as **Exhibit 4.**

Property.[5] On July 30, 2012, a Notice of Foreclosure Sale was recorded against the Property by the HOA Trustee.[6] Upon information and belief, pursuant to that Notice of Sale, a non-judicial foreclosure sale purportedly occurred on August 22, 2013 (hereinafter the "HOA Sale"), whereby Buyer acquired its interest in the Property, if any, for $5,563.00. On September 6, 2013, a Foreclosure Deed was recorded by which Buyer claims its interest.[7]

On September 25, 2013, Plaintiff filed a Complaint against Nationstar, among others, in this Court contending that the HOA foreclosure sale eliminated or extinguished Nationstar's interest in the Property. The Complaint also claimed exemption from arbitration on the grounds that the Complaint concerned title to real property. The Complaint's causes of action or claim for relief included Declaratory Relief/Quiet Title.

Nationstar filed an Answer and Counterclaim on March 13, 2015. The Counterclaim seeks Quiet Title/Declaratory Relief Pursuant to NRS 30.010 et seq. and NRS 40.010 et seq. against Plaintiff and the HOA, stating that the HOA's sale was unlawful and void, or in the alternative that the Deed of Trust still encumbers the Property. This is premised on the allegations that: (a) the CC&Rs do not permit foreclosure of the Property; (b) the CC&Rs were recorded prior to the enactment of the super-priority lien statute and thus the subordination provisions are enforceable; (c) the HOA did not provide proper notice to Nationstar; and (d) the sale was commercially unreasonable. Additionally the cause of action for wrongful foreclosure is asserted against HOA.

After being served with the Answer and Counterclaim, HOA now brings a Motion to Dismiss the Counterclaim portion primarily under NRS 38 and McKnight.

---

[5] A true and correct copy of the Notice of Default and Election to Sell Under Homeowners Association Lien recorded as Book and Instrument Number 20120124-0000764 on January 24, 2012, is attached to Nationstar's Answer/Counterclaim as **Exhibit 5.**

[6] A true and correct copy of the Notice of Foreclosure Sale recorded as Book and Instrument Number 20120730-0001448 on July 30, 2012, is attached to Nationstar's Answer/Counterclaim as **Exhibit 6.**

[7] A true and correct copy of the Foreclosure Deed recorded as Book and Instrument Number 20130906-0000930 on September 6, 2013, is attached to Nationstar's Answer/Counterclaim as **Exhibit 7.**

III. LEGAL ARGUMENTS

A. THE DECLARATORY RELIEF CLAIM IS DIRECTLY TIED TO THE QUIET TITLE CLAIM MAKING HOA A PROPER PARTY.

The HOA contends that it is not a proper party to the quiet title claim since it does not claim an adverse interest to the Property. However, the quiet title claim is directly tied to the declaratory relief claim. And the relief sought in that cause of action is alternative: obtain an order of the Court establishing that Nationstar's Deed of Trust was not extinguished but remains in first position despite the sale or obtain an order establishing that the sale was void and must be set aside; the HOA and its Trustee may have no interest if the first position status is re-affirmed but they would certainly have an interest if the sale were set aside as void. Courts have the power to declare rights, status and other legal relations whether or not further relief is or could be claimed. NRS 30.030; Knittle v. Progressive Casualty Insurance Company, 112 Nev. 8, 10, 908 P.2d 724, 725 (1996). "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." NRS 30.130.

The declaratory relief in this case is akin to setting aside a foreclosure sale. In McKnight, which the HOA heavily relies on in its Motion, the Nevada Supreme Court reversed and remanded the lower court's order denying a motion to set aside the homeowner association's foreclosure sale because the outcome depended on the quiet title claim. 310 P.3d at 559. Likewise, the Court should void the sale in this case if it finds (1) the CC&Rs prohibited the HOA and LJS&G from foreclosing on the Property; (2) improper notice of the foreclosure sale including improper notice of any claimed super-priority lien; and/or (3) finds the sale to be commercially unreasonable.

The question in this case then is not strictly limited to who is claiming an adverse interest in the Property, but rather whose rights or interest may be affected by a declaration from this Court that the foreclosure sale is void. Consider NRCP Rule 19(a), "Joinder Of Persons Needed For Just Adjudication – Persons to Be Joined if Feasible,"

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action

> if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

The attendance in mediation by the HOA and not the Buyer or the litigation by Nationstar against the Buyer without the HOA frustrates all these purposes. The same reasoning applies under NRCP Rule 20, "Permissive Joinder of Parties – Permissive Joinder":

> …All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

The sale procedures used by LJS&G and the HOA existed at the beginning of this lawsuit and are the focal points of the dispute to either declare the HOA sale invalid or affirm/restore the Deed of Trust on the Property. While the HOA may not be currently claiming an interest to the Property itself, they certainly did claim to have the power to sell the Property. It only seems logical that the HOA would want to defend against the invalidation of their sale. However, if HOA contends there will be no prejudice to it if the Court enters an order voiding its sale or declaring the Deed of Trust as a first position lien on the Property, then dismissal could be permitted. Otherwise, the Court should deny dismissal of the Counterclaim.

B. THE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES OF NRS 38.310 DO NOT APPLY TO THE CASE AT HAND.

NRS 38.310 was recently amended in October 1, 2013 to only require mediation of certain disputes and to take out the mandatory arbitration provision of the prior statute. The amended NRS 38.310 provides:

> No civil action based upon a claim relating to:
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or
> (b) The procedures used for increasing, decreasing, or imposing

> additional assessments upon residential property,
> May be commenced in any court in this State unless the action has been submitted to mediation or, if the parties agree, has been referred to a program pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.

The term "civil action" in this section is defined under NRS 38.300(3) and "includes an action for money damages or equitable relief[,] [but] [t]he term does not include an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property."

1. Nationstar Has Not Commenced a "Civil Action" to Trigger NRS 38.310.

Again, NRS 38.310 provides in relevant part that "[n]o civil action abased upon a claim relating to: [interpretation, application or enforcement of CC&Rs, bylaws, rules or regulations adopted by an HOA] *may be commenced* in any court in this State unless the action has been submitted to mediation . . ." (Emphasis added.) "A civil action is commenced by filing a complaint with the court." NRCP 3 ("Commencement of Action").

Here, Nationstar has not commenced any action as Plaintiff filed its complaint to commence the instant action for quiet title relief. Nationstar has simply brought in the HOA through a counterclaim because attacking the sale procedures used by the HOA is a major defense to Plaintiff's claim that it acquired free and clear title to the Property. This is indeed a distinguishable characteristic from the McKnight case cited by the HOA where the action, or complaint, in that case was commenced or initiated by the former unit owner against the homeowners association and its agents. 310 P.3d at 555. Nationstar is simply on the defensive end and bringing in the HOA is necessary to dispute their sale procedures and to essentially seek indemnity for their actions.

2. Nationstar Does Not Fall Within the Class of Persons to Which NRS 38 Applies Since It is Not a Homeowner.

The scope of NRS 38 was meant to apply to homeowners, and not lien holders such as

Nationstar. When NRS 38.310 was presented to the Assembly Committee on Judiciary as Assembly Bill 152 in 1995, the prime sponsor of the bill, Michael Schneider, stated:

> Over the past year [I have] been privy to problems arising in the associations developed for the homeowners, by the homeowners. The associations have developed their own "constitutions" which are referred to as covenants, conditions and restrictions (CC&R's). Although these associations have flourished and existed with encouragement, there are personality problems and management problems between the board and the residents. As a result, many lawsuits are being filed which could be resolved in some sort of dispute resolution such as arbitration. Dispute resolution may bring about results in 30 to 45 days rather than the years it takes a lawsuit to proceed through District Court.

(See Minutes of the Assembly Committee on Judiciary, Sixty-Eighth Session, Feb. 14, 1995, pg. 3 attached hereto as **Exhibit 1**).

Later, Mr. Schneider also appeared before the Senate Committee and explained:

> This bill proposes for any problems between the residents of the community or the residents and the board . . . the parties go to arbitration or mediation, rather than court . . . this first step will result in most of the dispute being resolved before they make it to court. Especially since most of the disagreements end up as personality conflicts, rather than conflicts over substantive issues.

(See Minutes of the Senate Committee on Judiciary, Sixty-Eighth Session, June 16, 1995, pg. 4 attached hereto as **Exhibit 2**).

As explained by Mr. Schneider, AB 152 or NRS 38.310 was designed to quickly and cost efficiently resolve disputes between homeowners and the associations. Since Nationstar is a first deed of trust lien holder, and not a homeowner, it falls outside the class of persons NRS 38.310 was intended to encompass.

3. The Policy Objectives of NRS 38.310 Are Not Met if the Wrongful Foreclosure Cause of Action is Dismissed and Sent to Mediation.

When interpreting statutes, a court must avoid interpretations that would violate the spirit of the provision. See Nevada Mining Ass'n v. Erdoes, 117 Nev. 531, 538 26 P.3d 753, 757 (2001). Bifurcating out or dismissing the claims other than for quiet title or declaratory relief will not result in a quicker or more cost-effective resolution, and most likely will be an exercise in futility. At the outset it must be noted, that since the decision in McKnight, NRS 38 was

Nationstar. When NRS 38.310 was presented to the Assembly Committee on Judiciary as Assembly Bill 152 in 1995, the prime sponsor of the bill, Michael Schneider, stated:

> Over the past year [I have] been privy to problems arising in the associations developed for the homeowners, by the homeowners. The associations have developed their own "constitutions" which are referred to as covenants, conditions and restrictions (CC&R's). Although these associations have flourished and existed with encouragement, there are personality problems and management problems between the board and the residents. As a result, many lawsuits are being filed which could be resolved in some sort of dispute resolution such as arbitration. Dispute resolution may bring about results in 30 to 45 days rather than the years it takes a lawsuit to proceed through District Court.

(See Minutes of the Assembly Committee on Judiciary, Sixty-Eighth Session, Feb. 14, 1995, pg. 3 attached hereto as **Exhibit 1**).

Later, Mr. Schneider also appeared before the Senate Committee and explained:

> This bill proposes for any problems between the residents of the community or the residents and the board . . . the parties go to arbitration or mediation, rather than court . . . this first step will result in most of the dispute being resolved before they make it to court. Especially since most of the disagreements end up as personality conflicts, rather than conflicts over substantive issues.

(See Minutes of the Senate Committee on Judiciary, Sixty-Eighth Session, June 16, 1995, pg. 5 attached hereto as **Exhibit 2**).

As explained by Mr. Schneider, AB 152 or NRS 38.310 was designed to quickly and cost efficiently resolve disputes between homeowners and the associations. Since Nationstar is a first deed of trust lien holder, and not a homeowner, it falls outside the class of persons NRS 38.310 was intended to encompass.

3. The Policy Objectives of NRS 38.310 Are Not Met if the Wrongful Foreclosure Cause of Action is Dismissed and Sent to Mediation.

When interpreting statutes, a court must avoid interpretations that would violate the spirit of the provision. See Nevada Mining Ass'n v. Erdoes, 117 Nev. 531, 538 26 P.3d 753, 757 (2001). Bifurcating out or dismissing the claims other than for quiet title or declaratory relief will not result in a quicker or more cost-effective resolution, and most likely will be an exercise in futility. At the outset it must be noted, that since the decision in McKnight, NRS 38 was

amended to no longer require arbitration. The parties must now agree to referral to a "program" or arbitration. See NRS 38.310; see also NRS 38.330(2).[8] It simply does not make sense for Nationstar to agree to separately arbitrate the non-quiet title or declaratory relief claims out of fear of inconsistent findings of fact and outcomes. This just leaves mediation as the only alternative dispute resolution procedure.

When resolving disputes in mediation, the natural inclination is to resolve all claims and causes of action in one settlement. In this case, Nationstar seeks two general remedies. Either the Court will (1) reaffirm/restore Nationstar's first Deed of Trust on the Property; or (2) award damages for the loss of Nationstar's interest in the Property. Nationstar certainly does not contend it is entitled to both as that would constitute double recovery. The problem with mediation is that the HOA cannot effectively agree that the foreclosure sale was invalid and/or that the Deed of Trust survived the sale without the consent and involvement of Plaintiff as the record owner of the Property. Also, on the flip side of the coin, the HOA will most likely decline to offer any money for the improprieties of the sale when it would be more cost effective for it to just agree that the Deed of Trust remains a valid lien on the Property. The mediation process therefore becomes useless in this case if some claims are mediated, and others are not.

4. The Monetary Damages Sought by Nationstar Hinge on or Relate to Title to the Property Thereby Exempting this Matter from Alternative Dispute Resolution Procedures.

The non-declaratory relief/quiet title causes of action also fall within the "relating to the title to residential property" exception under NRS 38.300(3). Again, the purpose of the Counterclaim is to either reaffirm or restore Nationstar's interest in the Property, or in the alternative seek damages for the lost interest. Nationstar again is not seeking both remedies as a form of double recovery. Whether damages are awarded will hinge in part on whether Nationstar is affirmed or restored its lien on the Property. Thus, the causes of action that seek

---

[8] "Before commencing a civil action in the proper court, the parties named in the claim [submitted to NRED] may agree to arbitration if the parties have participated in mediation in which an agreement was not obtained or if a written decision and award [from a hearing officer of the Program] have been issued pursuant to NRS 38.325."

damages against the HOA all directly relate to title to the Property.

C. TO THE EXTENT THE COURT FINDS MEDIATION IS REQUIRED UNDER NRS 38, THE COURT SHOULD STAY THIS CASE PENDING COMPLIANCE OR SET A MANDATORY SETTLEMENT CONFERENCE.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for the litigants." Landis v. North American Co., 299 U.S. 248, 254, 57 S. Ct. 163, 166 (1936). The causes of action and claims for relief in the Complaint and Counterclaim all arise out of the same transaction or occurrence, or arise out the same common nucleus of operative fact – the HOA's foreclosure sale. It simply makes sense to litigate these issues in one forum to eliminate potential inconsistent findings of facts and inconsistent judgments. Accordingly, the Court should stay the proceedings in this action if compliance with NRS 38 is necessary.

Alternatively, and if the parties so agree, the Court should set a Mandatory Settlement Conference so all parties may participate in an attempt to resolve all claims and causes of action. This would no doubt be a more economical way under the circumstances to serve the objective of NRS 38 in attempting to quickly and efficiently resolve disputes.

///

///

///

///

///

///

///

///

///

///

///

///

IV. CONCLUSION

Based upon the foregoing, Nationstar respectfully requests that the Court deny the HOA's Motion to Dismiss the Counterclaim. In the alternative, Nationstar requests a stay of this matter pending mediation under NRS Chapter 38 or in the alternative a mandatory settlement conference under the auspices of this Court.

DATED this 18th day of May, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant/Counterclaimant, Nationstar Mortgage, LLC

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding **NATIONSTAR'S OPPOSITION TO NAPLES COMMUNITY HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS COUNTERCLAIM** filed in Case No. A-13-689240-C **does not** contain the social security number of any person.

DATED this 5th day of May, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
dnitz@wrightlegal.net
ccrowton@wrightlegal.net
Attorneys for Defendant/Counterclaimant, Nationstar Mortgage, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WRIGHT, FINLAY & ZAK, LLP, and that on this 18th day of May, 2015, I did cause a true copy of **NATIONSTAR'S OPPOSITION TO NAPLES COMMUNITY HOMEOWNERS ASSOCIATION'S MOTION TO DISMISS COUNTERCLAIM** to be e-filed and e-served through the Eighth Judicial District EFP system pursuant to NEFR 9 and/or by depositing a true copy of same in the United States Mail, at Las Vegas, Nevada, addressed as follows:

Law Offices of Michael F. Bohn, Esq.

Eserve Contact	office@bohnlawfirm.com
Michael F Bohn Esq	mbohn@bohnlawfirm.com

McCarthy Holthus

Thomas N. Beckom	tbeckom@mccarthyholthus.com

Messner Reeves LLP

Bernita Lujan	blujan@messner.com
Tom McGrath	tmcgrath@messner.com
Jason M. Peck	jason.peck@libertymutual.com

An Employee of WRIGHT, FINLAY & ZAK, LLP

Exhibit 1

Exhibit 1

Exhibit 1

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-eighth Session
February 14, 1995

The Committee on Judiciary was called to order at 1:06 p.m., on Tuesday, February 14, 1995, Chairman Sandoval presiding in Room 4401 of the Grant Sawyer State Building, Nevada Legislature, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Ms. Barbara E. Buckley, Vice Chairman
Mr. Brian Sandoval, Vice Chairman
Mr. Thomas Batten
Mr. John C. Carpenter
Mr. David Goldwater
Mr. Mark Manendo
Mrs. Jan Monaghan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Michael A. (Mike) Schneider
Mrs. Dianne Steel
Ms. Jeannine Stroth

COMMITTEE MEMBERS ABSENT:

Mr. David E. Humke, Chairman (excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Douglas Bache

STAFF MEMBERS PRESENT:

Dennis Neilander, Research Analyst
Patty Hicks, Committee Secretary
Barbara Moss, Committee Secretary

OTHERS PRESENT:

Judy Jacoboni, Victim Advocate, Mothers Against Drunk Driving
Laurel Stadler, Legislative Liasion, Mothers Against Drunk Driving
Mark Smith, Las Vegas Chamber of Commerce
Vicki Brennan, private citizen
James Mastrino, private citizen
Judi Root, private citizen
Jean Georges, private citizen and mediator
Michael Mack, private citizen
Allen Duke, private citizen
Jim Banner, private citizen and former legislator

Andy Maline, Vice-President, Community Association Institute
John Leach, President, Community Association Institute
Eleissa Lavelle, Legislative Action Chair, Community Association Institute
John Delmazzo, private citizen
Kate Davis, private citizen
Ken Way, private citizen

ASSEMBLY CONCURRENT RESOLUTION 2 - Urges peace officers to identify and arrest, and courts to impose prompt, meaningful and consistent sanctions upon, juveniles who violate laws related to alcohol and drugs.

Judy Jacoboni, Lyon County Chapter President, Mothers Against Drunk Driving (MADD) spoke in support of Assembly Concurrent Resolution (A.C.R.) 2. Ms. Jacoboni stated A.C.R. 2 goes hand in hand with the other bills currently before the legislature this session regarding the laws affecting juveniles drinking. MADD feels currently law enforcement officers will not expend the time and energy to pursue arrests for juvenile consumption since they know virtually nothing will be done to that juvenile. A.C.R. 2 urges police officers to pursue arrests of juvenile alcohol offenders. A.C.R. 2 urges follow-through from the police officer's arrest, to the prosecutors, through the judge's conviction. She believes passage of A.C.R. 2 will send a message to law enforcement and courts that crimes involving minors possessing, purchasing, or consuming alcohol or drugs will not be tolerated. Ms. Jacoboni's prepared testimony is attached hereto as (Exhibit C).

Laurel Stadler, Legislative Liaison, Mothers Against Drunk Driving, echoed Ms. Jacoboni's comments and added that someone needs to take a leadership role in the issue surrounding juvenile alcohol offenders. The legislators have been called upon to become that leadership role. Both Ms. Jacoboni and Ms. Stadler referred the committee to previous testimony made before the committee in recent weeks regarding the treatment programs, mandatory license revocation, and possession arrests. Ms. Stadler feels addressing youth alcohol offenders early on will hopefully eliminate the problem of alcohol in the lives of those youth as they become adults.
The committee adjourned for a break at 1:16 p.m. and reconvened at 1:55 p.m.

ASSEMBLY BILL 152 - Requires arbitration of certain claims relating to residential property.

Chairman Sandoval acknowledged the large number of persons wishing to testify and informed everyone that the meeting would adjourn at 3:15 p.m. He hoped to accommodate as many people as possible within the time frame available to them. He asked all those wishing to testify to form a line and limit their

testimony to three minutes each.

Mr. Schneider, the prime sponsor of A.B. 152, stated it is a form of dispute resolution which developed as a result of his working closely with property management associations. Over the past year he has been privy to problems arising in the associations developed for the homeowners, by the homeowners. The associations have developed their own "constitutions" which are referred to as covenants, conditions, and restrictions (CC&R's). Although these associations have flourished and existed with encouragement, there are personality problems and management problems between the board and the residents. As a result, many lawsuits are being filed which could be resolved in some sort of dispute resolution such as arbitration. Diispute resolution may bring about results in 30 to 45 days rather than the years it takes a lawsuit to proceed through District Court.

Mr. Schneider stated there are some amendments already prepared on A.B. 152 which are contained in the folders of each committee member. Mr. Schneider also stated that 60% of the people in Clark County now live under some form of association and all the new housing projects in Clark County will be under an association.

Mr. Anderson asked if these "associations" wished to no longer be an association, how would they dissolve the association? Mr. Schneider stated property, street management, or whatever else was affected, would probably fall back to the city or county. Mr. Anderson clarified that should an association wish to dissolve their association, the landscaping and street maintenance that is currently taken care of by the association would then fall to the city or county which would result in an overall tax burden. Mr. Schneider agreed.

Chairman Sandoval acknowledged the presence of Kathy Letterman, Sue Miller, Deanna Royder, Hans Hansen, and Joy Bolice, employees from the Las Vegas Chamber of Commerce. He also acknowledged the presence of John Gibbons, State of Nevada Real Estate Division, and Larry Struve, Nevada Department of Business and Industry, in Carson City. Chairman Sandoval again stressed the importance of the witnesses wishing to testify to keep their testimony brief and if there was a group of individuals perhaps they could identify one spokesperson to speak on their behalf.

Mark Smith, a private citizen living at 3163 Predara Avenue, Las Vegas, candidly stated he was unable to interpret much of the language in A.B. 152; however, he supports the bill in that he has had much personal experience in associations stemming back some ten years ago. In fact, he was once sued by a "dictatorial" board. The lawsuit was erroneous and in fact, that lawsuit precipitated him running as President for the Association and he was in that position for several years. These lawsuits would cost the association a lot of money. He feels that there should be a mechanism in place to avoid the lawsuits and keep the issues out of court allowing settlement on a more reasonable basis and therefore supports passage of A.B. 152.

Vicki Jean Brennan stated her understanding of the by-laws states there is an annual meeting every year however in her unit homeowners cannot go to those board meetings unless specifically invited. She further stated there was a parking problem in the covered parking areas. If someone is in your covered parking area, you are not allowed to call to have them towed away. Lastly, Ms. Brennan expressed her dismay that her complex did not have a children's playground. Chairman Sandoval asked if Ms. Brennan was testifying in support of A.B. 152 and Ms. Brennan stated she was in support of the bill.

James Mastrino testified he lives in west Las Vegas, across from Spanish Trails. Mr. Mastrino explained his experience of being attacked on the common ground of his complex near the swimming pool. He went on to state the board of his association is doing nothing about it and he feels he has no equal rights and the CC&R's are not being fulfilled.

Judi Root, private citizen and resident at Quail Estates, Las Vegas, stated she presently has a lawsuit against her board, not against the association but against the board because of the acts they carried out. She feels she has had her first amendment rights taken away because the board does not allow freedom of speech at the board meetings. Ms. Root also addressed the fact that whenever there is a problem everyone tells you to "read your CC&R's". She understands such things as maintaining your property in a good manner comes under the CC&R's, by-laws, and/or rules and regulations. However, the problem is the rules are written by the developer who does not even live on the premises. Yet, the only way to change the rules or bylaws is to rewrite them and a 75% passage is required. Ms. Root expressed her dismay in the association, board members, and the residents, because they are all acting like kindergartners rather than adults. The management company and their secretary are paid by the residents yet they will not act in any fashion without first checking with the board. She feels the passage of this bill is extremely important. Ms. Root thanked Mark Sawyer and Channel 13 for announcing today's meeting.

Jean Georges, a private citizen residing at 701 Rancho Circle, Las Vegas, testified that he was a member of the Community Association Institute Legislative Action Committee; however, today he was testifying as a homeowner and as a private mediator. He feels the passage of A.B. 152 is extremely important because it represents choices and options for both homeowners and boards for a faster, less expensive, time consuming, traumatic resolution. He hears horror stories every day as a private mediator. In most cases, none of the participants wish to take the case to court. He felt the bill provides a two-fold purpose. First, it provides an alternative for boards and homeowners to resolve their dispute; and secondly, by directing the disputes to mediation or arbitration, the communities become aware that these dispute resolutions are available.

Mr. Georges also expressed his concern with the way mediators would be paid and felt the method of payment should be consistent with how arbitrators are paid. He also feels that if

arbitration is binding it should remain so and all the outs for appealing to the courts should not apply.

Mr. Schneider asked if Mr. Georges would enlighten the committee on what happens when there is a lawsuit pending before an association.

Mr. Georges stated, of course, any litigation is stressful. Further, the entire area is turned into a battleground involving the children as well as the adults. It eliminates any sense of peace and quiet that property owners have. A dispute over the building of a fence erupts into secondary disputes and both sides become angry. Mr. Schneider also commented that during litigation in an association, virtually all property sales come to a halt. You cannot sell your property because no title company will insure property with title insurance with a full blown lawsuit underway. It also affects the property value.

Michael Mack, 4800 Merlin Parkway, Las Vegas, a private citizen, testified he was in favor of A.B. 152; however, although he feels the bill will do a lot of good, it does not go quite far enough. He further stated that most of the condominium associations in Las Vegas are operating under CC&R's from 20 years ago and the law being applied in Nevada is federal law since the state law lacks details. Mr. Mack stated he owns three condominiums in three different states: Nevada, Hawaii, and Utah. He believes Hawaii's state law is very clear and effective as relates to associations in that Hawaii's legislature meets every year to redefine association laws. Mr. Mack provided a copy of one-fifth of the laws that the State of Hawaii has adopted, most particularly involving condominium management which is attached hereto as (Exhibit D). Mr. Mack would like to see Nevada pattern their laws regarding condominium associations to that of the State of Hawaii. Mr. Mack went on to provide the committee with examples of how effective Hawaii laws were in relation to specific problems such as liens, funding of the reserve account, and obtaining copies of minutes. He also stated the State of Florida, since they have so many condominiums, has some good laws on the books that perhaps Nevada could pattern their laws from.

Allen Duke, Paradise Spa, brand new condominium resident in Las Vegas, testified that when he moved into his condominium he learned the bylaws had been amended six times since 1986. Although he realized he had to pay $75 per month for association fees he was not aware of a 10% increase in those fees and yet another 10% increase and a $17 assessment. He stated these assessments go back to 1986 and he should not have to pay for them since he did not reside in the condominium at that time. Mr. Duke is a disabled veteran of World War II and this is his first real estate purchase.

Ms. Ohrenschall addressed Mr. Mack's previous testimony and asked him why Spanish Oaks had no reserve funding. Mr. Mack stated it was because of very poor management and the managers absconded with many funds.

Chairman Sandoval closed the testimony on A.B. 152 and opened testimony on a companion bill, Assembly Bill 74, sponsored by

Assemblyman Bache.

ASSEMBLY BILL 74 - Revises provisions governing use of units in common-interest community.

Douglas Bache, District 11 Assemblyman, Las Vegas stated A.B. 74 had been previously heard in Carson City and then introduced Jim Banner.

Jim Banner, private citizen residing at 2533 Lotis Hill Drive, Las Vegas, and former legislator, spoke in favor of A.B. 74 and further stated he believes the CC&R's in Las Vegas are scattered all over the town with different descriptions for each--nobody knows what is going on and who to talk to when a problem arises.

Mr. Banner stated he had read the CC&R's and had them reviewed by other people with more knowledge of CC&R's than himself, and at that point he was happy with the contents of the CC&R's. Mr. Banner further stated that soon after moving into his new residence a tenant filed suit against him and in his opinion this suit was filed to personally annoy and harass him. Mr. Banner stated that due to this annoyance and harassment he was hospitalized with heart problems, and the association's ruling was made as if nothing had happened, but Mr. Banner stated again that he was hospitalized with heart problems due to the annoyance and harassment made by this suit. Mr. Banner still feels changes need to occur in the laws because if someone wants to file a lawsuit they can do so but the moving party is the name of the association rather than the individual so you don't really know who is suing you.

Mr. Banner stated he would like to see some amendments in A.B. 74 which would include no retroactivity or no ex post facto, whatever language is preferred by the LCB. Mr. Banner further stated he would like to be invited to be on any subcommittees relating to A.B. 74 or Mr. Schneider's bill, A.B. 152 as long as there were no conflicts between the two bills. Chairman Sandoval stated there would be subcommittees formed in relation to A.B. 74 and A.B. 152 and thanked Mr. Banner for his testimony.

Andy Maline, Vice President of the Southern Nevada Chapter of Community Association Institute of Southern Nevada, spoke in opposition to A.B. 74 stressing that it would be disastrous to gridlock the process of amending bylaws. Ms. Buckley stated her understanding of A.B. 74 affects youth, occupancy, and alienation only. The testimony the committee heard on Mr. Banner's case had to do with him using a saw mill in his garage after he had moved in. Mr. Maline, referring to Mr. Banner's situation, stated he believes occasional use of your garage to build a bookcase would be okay but if it is constant, you have to consider the neighbors, the noise level, and whether it is for gain, employment or business. Mr. Maline thinks the democratic process should prevail and he does not see how A.B. 74 would work at all.

Mr. Anderson asked if Mr. Maline had reviewed the laws from Hawaii that were presented to this committee. Mr. Maline stated he had read those laws and has worked for the past year on the committee that designed A.B. 152. He felt the committee needed

to look at NRS 116 which has adopted and applied the Uniform Common Interest Ownership Act. This act develops uniformity across the states and the associations can apply the uniform act or choose not to. He discussed the quorum requirements of the uniform act and the proposed legislation.

John Leach, Attorney at Law and President of the Community Association Institute of Southern Nevada, stated he was going to testify in favor of A.B. 152 but after listening to Mr. Maline's concerns he changed his mind and stated he was very much opposed to this legislation. Mr. Leach's concerns were that of section 1, "subject to provisions of the declaration" and the requirement for somewhere 100% of the vote for CC&R's. Mr. Leach also stated that subsection 3 discusses bylaws. He informed the committee that a bylaw is a document that discusses procedures within the association, not restrictions on youths, occupancy, or alienation. Those items would be governed by the declaration not the bylaws. The bylaws make up the annual meetings, special meetings, elections, definitions, etc. He reminded the committee that the developers make these documents before any homeowners are residing there and within time the homeowners need to amend them so they have the ability to adapt and adjust within those prepared documents. By imposing a 100% agreement by the homeowners you create enormous difficulties. He stated that 75% agreement is currently too high and unrealistic. Mr. Anderson stated the common interest statutes in this state have only been on the books since 1991 and were amended in 1992 and wondered if Mr. Leach provided testimony at that time. Mr. Leach stated that a law partner of his, Michael Buckley, participated in those discussions but he personally was not involved at that time. Mr. Anderson asked if he was familiar with the Hawaii legislation discussed earlier. Mr. Leach stated he was familiar with some portions of it because they do try to keep informed of what other jurisdictions are doing to learn from their experiences. Mr. Anderson asked Mr. Leach if he felt there were major problems in existence regarding the current system for addressing common interest ownership problems. Mr. Leach stated that under the current laws, NRS Chapter 116, he did not consider there to be major problems. He does not feel that, like Mr. Mack, we need to change everything to the way Hawaii has their laws set up. Mr. Anderson asked how the legislature could change the apparent "dictatorial power" that currently exists in the associations. Mr. Leach did not feel there was a way, through the legislature, to change one person's power or control. He stated there are over 600 homeowner associations in the valley and many are run by honorable upstanding people but there is no way to legislate the dictatorial individual. In addition, there are procedures within each associations' declarations to remove board members. There is a mechanism in place for this if necessary. Perhaps the homeowners are not exercising their rights under the CC&R's to accomplish this.

Mr. Perkins stated he understood that having an unanimous vote is restrictive if not prohibitive in the amendment process but he was troubled with someone coming before the committee to oppose a bill and not offering them an alternative. He asked Mr. Leach what alternative he may have to protect the rights of the individual who buys a home based on existing CC&R's, spends

money to create a workshop in his garage because it is allowed, and then is later threatened by homeowners that he will no longer be able to keep his workshop. Mr. Leach discussed the grandfathering-in clause that is usually used in enacting amendments and in fact he counsels his clients that they cannot pass one rule and then later on take it back. Before you could change the way someone uses their garage the way he was originally allowed to use it, the association's members have to adopt and amend the CC&R's by 75% to 90%. This is very difficult to do. He conveyed to the committee that amendments, because of the high percentage of quorum required, do not pass regularly.

Eleissa Lavelle, Attorney at Law, Crockett & Myers, Las Vegas, stated she has been an attorney for 18 years and currently the majority of her law practice is representation of homeowners associations, individual homeowners, and developers. She is also chairman of the Legislative Action Committee of Community Associations Institute and has been working closely with A.B. 152. She is a strong supporter of A.B. 152 "with some changes". They recognize the concerns of various members of the community and are addressing those concerns specifically in two areas to make amendments to A.B. 152. One area is primarily the great length of time it takes these cases to go through litigation and that usually litigation exacerbates the problem rather than fixing it. The other area of concern is that the bill does not cover certain properties that do not necessarily fit with the associations. She believes arbitration would create a forum composed of people that homeowners and associations could trust--their peers. She stated they are working within the community to address the concerns everyone has and focus on the proper division each concern may address for instance, consumer problems or real estate problems, and they want to find the best place for the process because she feels it is an important process.

Ms. Lavelle stated there are two separate distinctions between the Hawaii law versus what is currently proposed in Nevada: 1) arbitration is by choice in Hawaii rather than mandatory; 2) the difference here is the confusion as to whether there is a trial including the introduction of findings of fact and conclusions of law. Ms. Lavelle concluded that she would like to be invited to subcommittees on these bills when so formed.

John J. Delmazza, Las Vegas resident, stated he supported the passage of A.B.152 and further informed the committee that he sat on the board of directors for his association for approximately three years. However, on October 23, 1994, the developer/declarant president fired four board members. Currently, within his association there is an injunction in place, bankruptcy proceedings, and temporary restraining orders. The interim board immediately amended the CC&R's which has increased power. He feels they are in violation of NRS 116 and also his rights have been violated. He further discussed the developer going bankrupt and therefore has not performed the terms and conditions promised to the homeowners relating to common areas and improvements within the complex. As homeowners, they cannot get 75% of the homeowners to amend the newly amended CC&R's. He stated the current association is

Mr. Schneider commented that the law does not have to do only with associations. This law pertains to all property that has covenants over it so it pertains to single family residences where there are covenants but you are not in an association. So, this is a very broad bill that is going to require a lot of work.

Chairman Sandoval stated once the subcommittee has been formed anyone interested should stay in touch with Mr. Schneider.

There being no further business before the committee the meeting was adjourned at 3:25 p.m.
RESPECTFULLY SUBMITTED:

Joi Davis,
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

_____
Assemblyman David E. Humke, Chairman

Assembly Committee on Judiciary
February 14, 1995
Page

Exhibit 2

Exhibit 2

Exhibit 2

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Sixty-eighth Session
June 16, 1995

The Senate Committee on Judiciary was called to order by Chairman Mark A. James, at 8:30 a.m., on Friday, June 16, 1995, in Room 224 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Mark A. James, Chairman
Senator Jon C. Porter, Vice Chairman
Senator Maurice Washington
Senator Mike McGinness
Senator Ernest E. Adler
Senator Dina Titus
Senator O. C. Lee

GUEST LEGISLATORS PRESENT:

Assemblyman Michael A. Schneider
Assemblywoman Dianne Steel
Assemblyman Richard Perkins

STAFF MEMBERS PRESENT:

Allison Combs, Senior Research Analyst
Lori M. Story, Committee Secretary

OTHERS PRESENT:

Eric Cooper, Lobbyist, Las Vegas Chamber of Commerce
Greg Harwell, Lobbyist, California State Automobile Association
Paula Treat, Lobbyist, Nevada Judges Association
Eleissa C. Lavelle, Attorney, Lobbyist, Community Associations Institute
Andy Maline, Vice President, Community Associations Institute
I.R. (Renny) Ashleman, Lobbyist, Commission for Binding Arbitration/Dispute Resolution Commission and Southern Nevada Home Builders Association
Becky Lu Brown, PCAM, Owner, Community Consulting Services
John L. Gibbons, Investigator, Real Estate Division, Department of Business and Industry

Jean Georges, Citizen
Lansford Leavitt, President, Nevada Dispute Resolution Services
Pat Coward, Lobbyist, Nevada Association of Realtors
Nancy M. Saitta, Senior Deputy Attorney General, Human Resources Division, Office of the Attorney General
Ben Graham, Chief Deputy, Clark County District Attorney, Lobbyist, Nevada District Attorneys Association
Richard Gammick, District Attorney, Washoe County
John C. Morrow, Chief Administrative Deputy, Washoe County Public Defender
Margaret Springgate, Legal Counsel, Governor's Office

Chairman James opened the hearing on the first bill and welcomed Assemblyman Michael A. Schneider to the hearing.

ASSEMBLY BILL 540: Increases monetary limits relating to small claims in justices' courts.

Senator James asked the assemblyman to explain the purpose of the bill, since the

Legislature had addressed the same issue in the last session. Mr. Schneider explained he brings the bill because he was not involved in the "background negotiations" during the last session. He noted many businesses, particularly auto dealers and real estate companies, must discount their claims against parties in order to qualify for small claims court. If these businesses cannot meet the $3500 cutoff to get into small claims courts they must pay an attorney to represent them. Thus, he said, there is a lot of support from the business community for a raise in the dollar limit.

Mr. Schneider admitted the judges are not in favor of this measure, noting "they never like it," but, there were discussions held with them and they "signed off on it." He reported the original small claim limit proposal was for $10,000, but the compromised limit came in at $5000. Senator James interjected that Paula Treat, Lobbyist, Nevada Judges Association, was indicating from the audience that the judges concurred but were "not acting on free will." Mr. Schneider disagreed, noting Ms. Treat always acts on free will.

The assemblyman explained the filing fee was raised to $85 for any small claims in the $3500 to $5000 range. This, he reported, made the judges more agreeable to the concept.

Senator James asked the witness how this proposal will help the public. Mr. Schneider replied it will help the small businessman, who is part of the public. This bill will save these small businesses "$10,000" in attorney's fees needed to defend a $10,000 claim in court, the witness testified.

Senator Lee observed that the true answer to the chairman's last question is this bill will not help the public. He observed the testimony was that the small businesses were discounting their claims in order to qualify for the small claims court, and as a result the members of the public who are the subjects of the claims are facing a smaller claim. This would appear, the senator noted, to be more of a benefit to the public than raising the limit. He stated he is willing to agree this is a small businessman's bill; but to help the people, the law should remain the same as it is currently.

Eric Cooper, Lobbyist, Las Vegas Chamber of Commerce, explained the chamber of commerce likes this bill. In fact, they preferred the original limit request of $10,000, and the $5000 figure is a compromise. He admitted the limit was raised at the last session, but he reminded the committee there is a great deal of discounting done by the businesses, which costs them quite a bit of money. Additionally, the business people are developing the skills necessary to effectively use the small claims courts and would prefer to be able to use them more often. For these reasons, the chamber believes this is a good bill for the small business person. He pointed out that these small businesses are owned by members of the public.

Mr. Schneider added that Judge Nancy Osterly, a constituent of Assemblywoman Barbara Buckley and the chairman, met with a subcommittee held by the Assembly judiciary committee and negotiated for this $5000. He told the committee that Ms. Buckley not only supported the measure but is a sponsor of it Senator Porter suggested the committee look to the merits of the bill, rather than the sponsorship. The witnesses stepped down.

Greg Harwell, Lobbyist, California State Automobile Association, spoke in opposition to the bill. Mr. Harwell spoke from prepared testimony (Exhibit C). When asked what the highest amount allowed for small claims was in the country, he stated the original proposal for $10,000 would have made Nevada the highest, but he could not say which state currently has the highest limit.

When Mr. Harwell noted small claims courts would limit the amount of pretrial discovery done for a substantial monetary claim, the chairman interjected that most actions in small claims courts are for unpaid bills, which do not really require much

discovery. Mr. Harwell countered that is not necessarily true. In California there are more and more personal injury cases being filed in small claims court. The chairman replied the only real concern would probably be the assertion of an affirmative defense to counter such a claim. He asked the witness if this is so. Mr. Harwell agreed this may be one of the problems, but it has been his experience in California that "unscrupulous law firms would--for a fee--script out a case and send the plaintiff off to small claims court" where they would meet up with an unprepared and unsophisticated defendant. These defendants would be unable to respond to the scripted attack of the plaintiff who was coached by the attorney.

Mr. Harwell concluded his testimony, noting $3500 is an appropriate amount for small claims court, where people come to settle their differences without a lot of "hassles."

Ms. Treat spoke next, stating, when asked, that she was speaking neither for or against the bill. She explained she finds herself in an awkward position because she is friends with the proponents of the bill. On the other hand, the judges association negotiated the same issue last session, in good faith, with then-Senator Matt Callister, who promised it would not come up again. She represented that during the processes of the subcommittee hearings on the issue this session, she was faced with a group of people who were adamant that something be done. Ms. Treat testified that when the subcommittee asked her if $5000 was alright with the judges, her reply was, "If we have to go, $5000 is as high as we [can] go."

Ms. Treat explained she finds herself in a "catch-22" because if nothing is done this session it will be brought up again next time, and if something is done this time it will be brought up again next time. The issue does not seem to go away, she emphasized. The judges association feels they are the people's court, she testified, and if Nevada raises the limit to $5000 they will have the second highest limit in the country.

Senator James declared he has learned his lesson. He noted the issue was thoroughly examined and debated during the previous session, and he is hard-pressed to understand the need. He asked the committee how they feel about the issue.

Senator Adler pointed out the committee has already passed a measure which allows businesses to hire an agent, who is experienced and adept at handling these small claims matters, to represent them effectively. This gives the businessmen a major advantage over the average consumer who would be faced with the action in small claims court, he observed. He asked someone to address that change in relation to this proposal.

Ms. Treat agreed with the senator. She noted there are many bills around which could negatively impact the state courts, which are already burdened with full calendars. There are not enough judges, nor enough financial backing, she testified, to hire personnel to process all the work the courts face. She asked the Legislature to take an opportunity, in some interim, to examine the lower courts in an attempt to gain a clear perspective of their situation and to examine possible ways to make them work better.

There was no further testimony on Assembly Bill (A.B.) 540 and the chairman closed the hearing. He moved to the next bill, brought by Assemblyman Schneider, A.B. 152.

ASSEMBLY BILL 152: Requires arbitration or mediation of certain claims relating to residential property.

The assemblyman explained this bill is very important to the citizens of Clark County, as well as being a good step toward tort reform. Mr. Schneider reported that currently 60 percent of all people in Clark County live under some type of community association. Virtually all the new homes being built in the county are in an association. This is supported by the city and county government because it shifts some of the governmental responsibilities to the associations which are like

"mini-cities," the witness said, with their own "little" governments, police forces, etc.

Unfortunately, these mini-cities are without real enforcement authority and the residents and boards of directors are at war with each other, the assemblyman reported. There have been efforts to devise a solution to this problem, Mr. Schneider said, with representatives of the Community Associations Institute (CAI) working with the assemblyman to draft this legislation. He reported there was much public testimony on the problem during hearings held in the Assembly, and many stories were told of the extent to which the animosity exists between these boards and the residents of the community.

This bill proposes for any problems between the residents of the community or the residents and the board, Mr. Schneider explained, the parties go to arbitration or mediation, rather than court. He opined this first step will result in most of the dispute being resolved before they make it to court. Especially since most of the disagreements end up as personality conflicts, rather than conflicts over substantive issues, he stated. Senator James asked how it is decided whether mediation or arbitration is used. Mr. Schneider told him the parties must choose, and they must both agree.

Mr. Schneider told the committee the Assembly had amended the bill, but it did not come out of bill drafting quite as intended, and therefore, there are some small changes to be made, as time allows. He reported the Assembly ways and means committee approved the bill due to its minimal fiscal impact. He noted the Real Estate Division requested the bill become effective January 1, 1996, and there is no opposition to this request. He offered to answer questions from the committee.

Senator Porter told the witness he had read newspaper articles which told of these community problems, referring to the parties involved as "condo commandos." This is because the problem is way out of hand, with physical assaults and emotional and psychological warfare. This bill is very much needed, he opined, and offered his support for the bill. Mr. Schneider informed the senator the bill covers all real property that is covered by covenants. The assemblyman turned the floor over to the next witnesses, who were there to explain the technical aspects of the bill.

Eleissa C. Lavelle, Attorney, Lobbyist, Community Associations Institute, and Andy Maline, Vice President, Community Associations Institute (CAI) came forward. The chairman asked the witnesses if the bill allows the parties to choose from mediation and arbitration that is binding or nonbinding, depending upon their agreement. Ms. Lavelle responded affirmatively. He asked if the parties could then file an action in court and go to trial. He asked also what would be the effect of an adverse, nonbinding arbitration.

Ms. Lavelle reported the intent was to provide some "bite" to the law because it is believed it is important that people understand the significance of the arbitration. It is not simply one more layer of bureaucracy that people would have to go through. If the award made by the arbitrator is not bettered by the court, should the parties proceed to that venue, then the party taking the action to court will be bound to pay the attorney's fees and costs of the opposing party, she explained. Thus, the law should make the parties pause to consider whether the court action is really justified and worth the possible expense. It is not the intent to foreclose access to the court, but it is important to make the arbitration a legitimate means of resolving these conflicts.

Senator James asked if the losing party would have to pay only the attorney's fees and costs for the court action, but not the arbitration. He read from the bill. Ms. Lavelle replied the senator is correct, and it would be the costs incurred after the filing of the petition for rehearing or a complaint for suit. The intent of the bill is to make it clear that the costs incurred after the trial de novo or the rehearing is requested, would be those paid by the party that requested the rehearing or trial and still does not receive a better award.

Senator James opined it would not be a rehearing if the matter is moved from the arbitrator to the court. Ms. Lavelle stated it was her understanding the parties would only have one arbitrator. Senator James agreed with the witness. He noted the parties are entitled to challenge the decision collaterally on the basis of fraud or the arbitrator exceeding his authority, without having to pay the attorney's fees. Ms. Lavelle explained that any time the matter proceeds to court the parties will be exposed to fees, as the bill is currently drafted. She expressed her preference to allow the parties to challenge the hearing collaterally without having to pay fees of the other party.

Ms. Lavelle explained the bill is designed to allow the parties mediation, if both parties agree to it. If the mediation is not successful, or if a decision cannot be made, or if no mediation is sought, the matter will go to arbitration. The parties can elect to make the arbitration binding, in which case there is no court review; or they can decided to have nonbinding arbitration, with the option of a rehearing before the court or filing for a trial de novo before the court. Therefore, the exposure to fees only applies to arbitration and not mediation, the witness stated.

Mr. Maline spoke next, telling the committee the history of this bill. He explained the bill is designed to cover all property with covenants, even those with no architectural committee or board of directors to enforce the covenants. This bill is unique to Nevada, he told, and it is beneficial to the citizens because it provides a low-cost and expedient means of dispute resolution. He voiced support for the Real Estate Division's request to postpone the effective date of the bill.

Ms. Lavelle told the committee she has been very active in the process of drafting this bill. As an attorney that works with community associations, she stated, she has noticed the same issues develop over and over again. The need for the association to repeatedly defend the same issue is very costly to all the members of the association. This bill will provide a means to quickly, easily, and expertly resolve the disputes in the communities.

She explained there are some changes to the bill being requested. They relate to section 6, Ms. Lavelle told, and one would add a requirement that the fees charged by the arbitrators and mediators should be provided to the litigants in order to allow an informed choice. The second change would be a minor word change; the requirement that the parties offering the mediation or arbitration should be trained in one or the other, but not both. Thus, if the service offered is mediation, it should not be a requirement to be trained in arbitration, she explained.

The chairman pointed out the bill says the board "may require" that they have training. Ms. Lavelle responded it is the hope that they will have the training because it is one of the chief components of the bill. The senator read the section again and the intent was clarified to be the board may require proof of the training. Finally, Ms. Lavelle noted, the bill currently includes an incomplete list of the sources for arbitrators or mediators. She asked that the list be expanded to include all possibilities such as the American Arbitration Association, Nevada Arbitration Association, Communities Associations Institute, Nevada Dispute Resolution Service and Mediators of Southern Nevada, Inc.. Another alternative would be to remove the list altogether.

Senator Adler interjected there seems to be no real utility in listing the groups, because they could change over time. He supports requiring training in either mediation or arbitration, but there are other persons who may have expertise in the area, but would not appear on the list. Ms. Lavelle reiterated the group would support the alternative of listing no specific groups.

Senator James asked what section 10 of the bill intends to do. Ms. Lavelle explained this portion of the bill was an add-on, which would be explained by another witness. I.R. (Renny) Ashleman, Lobbyist, Commission for Binding Arbitration/Dispute Resolution Commission and the Southern Nevada Home Builders Association, came to the stand to explain section 10. He stated this section

contains language that is in California law which allows the posting of a bond rather than depositing funds to cover the costs of special add-ons in a construction project.

Mr. Ashleman explained depositing these funds, along with the necessary tracing and tracking of it, is quite bothersome. In 99 percent of the cases the money is paid over, he explained, and posting a bond to cover those cases where it is not paid over would aid in cash flow and tracking, for both the escrow company and the developer. Senator James asked the witness to backtrack a bit to page 4 of the bill which refers to Nevada Revised Statutes (NRS) 116.4110. He asked him to explain.

Mr. Ashleman told the chairman this is a section of the Uniform Common Interest Ownership Act, which talks about what happens to various kinds of deposits that are made by the purchaser in a real estate transaction. The chairman read section 10, subsection 1(a)-(c), asking the witness to confirm his understanding of the provision. He noted the declarant is the builder and the deposits must be placed in escrow and held until: the deposit is delivered to the declarant at closing (as part of the purchase price); delivered to the declarant because of the purchaser's default (the liquidated damages provision of the act); or released to the declarant for an additional item, improvement, optional item or alteration (if the purchaser wanted upgraded carpet or the like). He continued to read the section and asked if this section was being removed because a bond was being posted, rather than the deposit made. Mr. Ashleman agreed, adding the idea of making the deposits into escrow is to protect the purchasers should he have good reason to back out of the purchase. He noted the bond would be more than adequate to cover these concerns. The chairman expressed confusion.

Senator Adler pointed out his concern with dealings with bonding companies. It is typical to end up in litigation with bonding companies that do not pay. Mr. Ashleman explained he asked the regulators in California if there is a problem of this nature. They report they do not have such problems, possibly because the amounts are relatively small, he reported. He explained that ordinarily a master bond is purchased which is for a good sum or money, then individual segments of the master bond are inserted into the individual transactions. The bond segment amounts are not great, he explained. The senator opined that, "telling someone they can sue a bonding company is not doing them a favor." Mr. Ashleman explained there are very few instances where the purchase does not go through.

The chairman asked the witness if section 10, subsection 1 refers to the purchaser who is putting up the money. Mr. Ashleman agreed. The senator asked if subsection 3 refers to the builder. The witness concurred the declarant is the builder. The chairman asked what the purpose of this section is. Mr. Ashleman replied the builder mainly wishes to avoid the bookkeeping problems that arise with all the miscellaneous deposits that must be made and tracked.

Under subsection 3(c), the chairman asked, what if the bond is in an amount of $5000, for example, and the declarant gets the bond released for the purchase of some item or improvement that costs less than $5000. Mr. Ashleman opined this would not occur because the bond would stand for each of the separate elements in the transaction. When an upgrade is ordered by the purchaser it is paid for by the builder up front, he stated. The witness opined the language in subsection 3 of section 10 simply mirrors the language already in NRS 116.4110. Senator James interjected this was with the exception of the language in subsections 1 and 2.

Mr. Ashleman emphasized the bond was only released as to the amount of the item or improvement, the bond is not redelivered or surrendered. The senator did not believe that is what the provision said. Mr. Ashleman disagreed. He stated when a bond is given up it is delivered, which accounts for the first two subparagraphs in subsection 3. Subparagraph, (c) says the bond is released for an additional item.... Here, the witness opined, "released" is a technical term talking about the

relinquishment less than the whole. This is a different term than "delivered" which is used in the subparagraphs above. He stated he is willing to consider language that might clarify this difference.

The chairman asked if it includes the "stuff in lines 5-8." Mr. Ashleman responded it does not. Senator James stated it might not be important, but it seems to him the language in lines 5-8 should be included in subsection 3. Mr. Ashleman could not say why subparagraph (c) of subsection 3 was included. He referred to section 10, subsection 1, lines 3 and 4 of page 5, noting the funds referred to here are always passed directly through. There is never any bond on these funds, he reported. Senator James suggested the language in lines 5-7 of page 5 should be reinserted in subsection 3(c) in order to clarify the intent. The witness did not object to this change.

The next witness to speak was Becky Lu Brown, PCAM, Owner, Community Consulting Services. Ms. Brown stated, despite comments made by previous witnesses, community associations are a positive means of ownership. The problems experienced in them also occur outside the associated communities, she observed. Ms. Brown explained she is a private sector consultant who specializes in management and process consulting for public and private communities. She stated she has many years of experience in the field.

Ms. Brown recommended the passage of A.B. 152 with the discussed amendments. She opined that arbitration is a positive way of dealing with the problems that arise in these communities. She voiced particular support for the concept of naming all or naming no dispute resolution services in the statute. She stepped down.

John L. Gibbons, Investigator, Real Estate Division, Department of Business and Industry, came to the witness stand. Mr. Gibbons stated he appears as a representative of the Administrator, Joan Buchanan, who was unable to attend. He said the division is in support of making the effective date of the law January 1, 1996. This is because the appropriations needed to effect the change will not be available until October 1, 1995. The division will need some time to prepare before the change takes effect, he reported. Mr. Gibbons stepped down.

The next witness to come forward was Jean Georges, Citizen. Ms. Georges offered a copy of her prepared statement (Exhibit D). She informed the committee that the third page of her testimony contains some suggested amendments. These can all be disregarded, except the amendment to page 4, section 6 and section 9, she said, as they have been addressed.

Senator Titus asked to note for the record that Ms. Georges is an expert in this area, whom she has known since 1989, when other legislation in this area was started. The next witness to speak about A.B. 152 was Lansford Leavitt, President, Nevada Dispute Resolution Services.

Mr. Leavitt voiced concurrence with his colleagues noting this is a very important bill. He spoke of one dispute that ended in a 2-week trial costing in the neighborhood of $50,000 in legal fees. That dispute could have been remedied through the process proposed in this bill, he opined. Mr. Leavitt expressed support for the bill and the proposed amendments.

Mr. Leavitt told the committee the Nevada Dispute Resolution Services is a non-profit corporation that was formed in cooperation with the national judicial college and the juvenile/family court judges. The corporation has considerable experience in training and also in providing services of mediation and arbitration throughout the state. Also, the corporation has been responsible for training arbitrators for all the state courts, he reported, as well as for the state bar association. Currently, the organization is administering the real estate contracts disputes for the Reno/Sparks Association of Realtors and for Incline Village. Because of the vast experience of the organization, the witness asked either it be included in the listing of recommended arbitrators and mediators, or alternatively, that no list be provided in the statute. This concluded his testimony.

Finally, Pat Coward, Lobbyist, Nevada Association of Realtors, came forward to support this bill. He stated the association feels it is good legislation and very much needed. He offered to answer questions. There were none and he stepped down. There were no more witnesses to testify in support of or opposition to A.B. 152 and the chairman closed the hearing. He moved to the next bill.

ASSEMBLY JOINT RESOLUTION 38: Urges congress to require application for passport for child to be signed by both parents under certain circumstances.

Nancy M. Saitta, Senior Deputy Attorney General, Human Resources Division, Office of the Attorney General, came forward to bring Assembly Joint Resolution (A.J.R.) 38 to the committee on behalf of Assemblywoman Dianne Steel. Ms. Saitta reported the resolution, in conjunction with other pending legislation, will provide a significant step toward protecting children of Nevada from international abduction.

In 1994, the U.S. State Department reported over 1057 instances of international abduction, the witness reported. Nevada had 17, she said. It is very important for the state to make an effort to protect children from becoming victims of this crime. She urged the committee to support the adoption of this resolution. Senator James noted the situation is tragic, and Ms. Saitta responded the children who are abducted are almost never reunited with the parent left behind. Ms. Steel arrived at the witness table and simply echoed the statement of Ms. Saitta.

Senator Porter voiced concern with the wording of lines 20-21 of the resolution. He opined that joint custody arrangements should require the signature of both parents. Ms. Saitta agreed that both parents should have to sign in all instances. Ms. Steel responded that the primary physical custodial parent should be able to take a child in their custody to London, for example, on vacation. The senator could not agree, noting he has personal experience in this area. He emphasized that joint custody should provide equal legal rights to both parents, not only the parent with primary physical custody. Ms. Steel agreed with the senator in the situation where there arises a dispute between the parents.

Ms. Steel voiced the hope that Congress will recognize the importance of thie issue and change their policy. There was no further testimony. The vice chairman closed the hearing on A.J.R. 38.

Senator James opened the hearing on the next bill.

ASSEMBLY BILL 624: Defines "deadly weapon" for purpose of imposition of additional penalty for use of such weapon in commission of crime.

Ben Graham, Chief Deputy, Clark County District Attorney, Lobbyist, Nevada District Attorneys Association, addressed the committee noting A.B. 624 arose over discussions about deadly weapons, especially those considering battery with a deadly weapon and crimes whose penalties are enhanced because of the use of a deadly weapon. The Assembly judiciary committee, from these discussions, concluded there are two different definitions for deadly weapon.

Assemblyman Richard Perkins and Richard Gammick, District Attorney, Washoe County, came forward to explain the bill. The bill is an attempt to provide some consistency in the definition, Mr. Perkins told, because it is frequently difficult to make interpretations in the line of duty as police officers. There is always the question of how the state supreme court will stand when cases dealing with deadly weapons are brought before them, he added.

Mr. Perkins explained it is very difficult to tell someone whose family member was killed with a claw hammer that such a weapon is not a deadly weapon. He opined

there is a need to determine, on an individual basis, what a deadly weapon is and allow a jury to make that determination based on the facts of the case. Senator James asked if the enhancement aspect of deadly weapons charges would apply to murder, because murder, by definition would have to result from a deadly weapon. Mr. Perkins noted the enhancement aspect of the definition is aimed at things that are shocking to the general public.

Senator James noted that subparagraph c of subsection 5 refers to murder, which is always committed with a deadly weapon. Thus, a charge of murder would always be enhanced through the use of a deadly weapon, "because, if they're dead, whatever you used on them was deadly," he said. Mr. Perkins responded he understands the senator's observation but noted when weapons are used that shock the public, the public is interested in punishing those crimes more severely.

The senator noted that hands would be the only item excluded from the deadly weapons enhancement to murder because they are not considered an instrument. Thus, for murder, what this bill really is, is an automatic doubling of the penalty. Mr. Perkins could not disagree. There have been decisions handed down by the supreme court which ruled things such as steel-toed boots are not deadly weapons. However, the assemblyman noted, Justice Mowbray, in a dissenting opinion asked someone to explain to the dead person how steel-toed boots are not deadly weapons. This bill is designed to address the inconsistency brought by the supreme court decisions such as this, the assemblyman asserted.

Senator James, noting that murder is a separate case because it always involves a deadly weapon, asked the assemblyman what policy was being effectuated by the law. Crimes such as robbery, sexual assault or kidnaping are different situations, he observed, where the policy of the law would make the difference in whether the enhancement was brought or not. He asked if the state is attempting to stop people from using guns because they are inherently dangerous, or is there no desire to make a distinction between a gun and a candlestick, for example, and thus make no statement about the use of guns specifically.

Mr. Perkins responded to the question of whether the candlestick would be a deadly weapon, noting it would depend on the circumstances of the crime. If the candlestick is used to strike someone over the head, it might be considered a deadly weapon, he opined. If, however, the assailant swung the candlestick at the victim's knees, it would most likely not be considered a deadly weapon. It has been his experience, he noted, that is how the jury would decide the question, by examining the circumstances.

Under the bill, the chairman asserted, if an assailant swung the candlestick at someone and missed it could still be a deadly weapon because there still exists the capability of causing substantial bodily harm. Mr. Perkins replied it was his guess that neither of the two district attorneys sitting in the hearing would approve such a charge. The totality of the circumstances should be the determining factor, he insisted.

Senator Adler stated that when the Legislature is writing criminal statutes, it is necessary to proscribe specific behavior which everyone can understand as being criminal. It is necessary to write the statute clear enough to be understood by the "average guy." He observed that the possibility of charging assault with a deadly weapon against an individual who swung a pillow in a pillow fight exists simply because that same pillow could be used to suffocate the individual. This is not good because it gives the district attorney too much discretion, he opined.

Mr. Perkins noted he understands the senator's concern about ambiguity, adding he wished there were more statutes which were less ambiguous. Senator Adler stated he has seen too many laws passed by the Legislature and arrive at the supreme court only to be overturned. This results in some very guilty people being released simply because the Legislature did a sloppy job, he insisted. Mr. Perkins stated the "flip side" of the situation is that because deadly weapon is so narrowly defined many guilty people are not given the penalty they deserved simply because they did not use a firearm in the commission of their crime.

SENATE BILL 416: Makes various changes regarding sentencing of persons convicted of felonies.

Senator Adler asked if this language appeared in other statutes of other states or of the federal government. Mr. Perkins could not say. The chairman observed the real reason for this statute is to enhance the penalty of the crime. These penalties have already been doubled with the passage of Senate Bill (S.B.) 416, the truth-in-sentencing bill, he asserted.

Senator James again questioned what the policy statement was inherent in the bill. There is a qualitative difference between a gun and a candlestick, he opined, because guns are made for killing, but with a candlestick there is a "fighting chance" the victim will not be killed. There is a policy to discourage people from using guns, which are unquestionably deadly weapons. It is the goal to discourage the use of guns, because people always get killed with guns, he stated. If all the criminals were out using candlesticks, there would be a lot less death involved in crime, he stated. This bill, however, will throw guns and candlesticks into the same arena. Mr. Perkins agreed with the caveat that the circumstances must exist and the burden of proof must be met by the prosecutor.

Senator Adler asked whether an automobile or other motor vehicle would fall under the "any instrument" descriptor. He wondered if the bill would double the penalties for vehicular homicide or drunk driving with substantial bodily harm. Mr. Gammick responded, he did not believe this would be the case because the bill requires the intent to be present. The chairman disagreed with Mr. Gammick, noting the bill says, "used in a manner capable of causing substantial bodily harm," and driving when drunk is using an instrument (the vehicle) in a manner capable of causing substantial bodily harm. Mr. Gammick opined such a charge would result in a "tremendous discussion in front of a court."

Mr. Gammick referred to the Nevada Supreme Court decision of Clem v. State, 1988, which specifically adopted a broader test. They did this by referring to other states which have generally resolved the definitional question by resorting to a functional test of how the instrument is used, he stated, along with the facts and circumstances of its use. In Clem, the supreme court specifically adopted this definition, he insisted. The thing to remember, Mr. Gammick stated, is that a jury is given the definition and they decide whether or not the situation reveals the instrument to be a deadly weapon.

The Clem decision has since been rendered ineffective, due to a subsequent decision in the case of Zombach, the witness explained, and we are in a mess. He offered several examples of how the deadly weapons enhancement would have been useful in particular cases. This bill will help law enforcement and prosecutors do their job to get these violent criminals in prison where they belong.

The chairman pointed out the Senate had not bothered with issues such as what kind of knife was used in the crime; the Senate simply doubled the penalty for murder with S.B. 416. He reminded the witness the purpose of the deadly weapon definition is to get the enhancement of the penalty. With the truth-in-sentencing bill the penalties have already been doubled.

Senator Titus asked if this law would provide the prosecution with another tool for plea negotiations. Mr. Gammick replied in the affirmative, noting it is very effective because it can be applied in many more crimes than the four listed in the bill. The four in the bill are cases where parole would not be allowed, he explained, but the enhancement could be applied in any number of cases.

Senator James stated he sees the proponent's point, noting the bill should pass. He did express continued concern about the language in lines 1 and 2 of page 2 of the bill. He asked Mr. Gammick to provide language that is closer to the Clem definition, which talks about allowing the jury to determine the totality of the circumstances and the functional definition. This is important because the

language will be the jury instruction, he reminded the proponents.

Mr. Gammick stated he has the Clem definition with him. He read it, "A deadly weapon is any object, instrument or weapon which is used in such a manner as to be capable of producing and likely to produce death or great bodily injury." The chairman asked Mr. Gammick to attempt to "tighten it up a little." The witness agreed to try.

Senator Adler asked if the supreme court decision, which made reference to other states, had mentioned other states specifically, noting if this information was available it would be easy to examine the other states' statutes. Senator James asked some work be done to ensure the definition is not overbroad.

John C. Morrow, Chief Administrative Deputy, Washoe County Public Defender, spoke briefly in opposition to the bill, as it is drafted. He stated the chairman's concerns are on target, because it is overbroad. This definition has already been effectively discredited by the state supreme court. This concluded his remarks, until there is a work session on the bill, he stated.

The chairman closed the hearing on A.B. 624 and moved to the work session.

ASSEMBLY BILL 317: Makes various changes related to juvenile courts, sentencing, crimes and punishments.

Margaret Springgate, Legal Counsel, Governor's Office, came to the table to explain the conflict amendments to A.B. 317. The chairman noted none of these conflicts are substantive. He referred to Exhibit E which was provided by the research analyst. This document is a summary of the conflict amendments needed for the Governor's crime bill.

Ms. Springgate explained the conflict amendments, as well as the compromise amendments (Exhibit F). She observed there is a consensus among the legislators and the public that there are more and more violent youthful offenders, who need to be dealt with. Additionally, it is understood that many of the young criminals really do not belong in the adult system, she stated.

Senator Washington asked for confirmation that a youth at the age of 16 who commits a crime with a deadly weapon will automatically go to adult court. Ms. Springgate explained that was the original provision in A.B. 317, but not in the compromise amendment. She read the proposed amendment to section 1 of the bill, as outlined in Exhibit F.

Additionally, Ms. Springgate explained, a child 14 years old or above who is charged with a sexual assault involving the use or threatened use of force or violence or the use of a deadly weapon shall be certified to adult court, unless the court makes a specific finding that there were exceptional circumstances, or the child was not the principal actor in the offense, she explained. The goal here is to have the court determine whether the child is "saveable," she explained. This change is also outlined in Exhibit F.

Senator Titus asked where the 14-year-olds would be housed in the prison system. She asked Ms. Springgate if she was aware of what Mr. Bayer, Director, Department of Prisons, was planning to do with these young offenders. Ms. Springgate explained there is currently no special provision for housing these juveniles. However, it is clearly the goal of the director is to keep the inmates safe, she stated, with some exploration being done about special housing at the new Lovelock prison. It was estimated, during the original drafting of the bill, that by the end of the biennium there would be 27 children 16 years old and older in the prison system, Ms. Springgate explained. Under the compromise, she estimated the number to be fewer.

Senator James noted he had originally voiced concern about the young inmates because once they enter the system, it is very unlikely they will be anything other

than hardened criminals. The other concern with that fact is, they eventually will be released from the prisons. He opined the changes are a fair compromise. Senator Washington voiced support for the compromise as well. Senator Adler noted the amendments seem to address his concerns.

Senator Washington asserted that if the young offenders are caught at an earlier age there may be a chance to salvage them and make them productive citizens rather than hardened criminals.

Ms. Springgate noted that if the amendments that are proposed are found to be acceptable, it may not be necessary to amend A.B. 393.

ASSEMBLY BILL 393: Makes various changes related to possession of firearms by children and increases penalty for sale of certain firearms to children.

The chairman noted it will be necessary to change the amendment to A.B. 393 rather than trying to explain two different amendments. He asked the committee if they are comfortable with the proposed changes as presented so far and then asked the witness to continue her discussion of the remaining proposals.

Moving to the habitual offender changes, she explained, the habitual violent felon in A.B. 317 would be amended to include lewdness with a child under 14 as one of the offenses covered. Senator Adler asked to confirm the language from S.B. 416 would be incorporated into the habitual violent offender provision of A.B. 317. Ms. Springgate concurred. He was pleased. The "big" habitual statute would retain the language from A.B. 317 which provides for three felonies and then a subsequent violent felony will result in a discretionary habitual criminal charge, with a mandatory minimum of 10 years in addition to the underlying penalty. Also, the "little" habitual criminal language will be reinserted. These aspects are outlined on Exhibit E she explained.

The chairman continued with the overview of the conflict amendments outlined on Exhibit E, including the commutation of the sentences and the residential confinement. The exhibit also discusses conflicts with the age of juveniles who could be subject to the counseling provision; it clarifies the definition of victim; and also the length of time between parole eligibility hearings. This concluded the witnesses explanation.

The chairman asked the committee for questions, concerns or comments. Senator Adler noted there has been a good job done in the compromise effort; he commended Ms. Springgate for her work.

Senator James called for a motion to amend and do pass A.B. 317 as explained by Ms. Springgate and as outlined on Exhibit E and Exhibit F.

SENATOR ADLER MOVED TO AMEND AND DO PASS A.B. 317.

SENATOR WASHINGTON SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR PORTER WAS ABSENT FOR THE VOTE.)

*****

The chairman then called for a motion the have the Legislative Counsel Bureau bill drafters change the amendment to A.B. 393, that they are currently drafting, to reflect the juvenile certification and age for counseling of other family members as outlined in Exhibit E.

SENATOR ADLER MOVED TO CHANGE THE AMENDMENT TO A.B. 393 TO REFLECT THE CHANGES NOTED ABOVE.

SENATOR TITUS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR PORTER WAS ABSENT FOR THE VOTE.)

*****

Senator James thanked Ms. Springgate for her work on the bill. Senator Titus asked if the committee was going to take any action on the bills heard that day. The chairman explained A.B. 624 would be held to allow some tightening of the language. He asked if everyone understood the amendments proposed to A.B. 152. He outlined them: change the word "and" to "or" on page 4, subsection 1, lines 4 and 14; eliminate the list of those who provide mediation and arbitration services, since the bill already provides a list of requirements to be met by those providing the services; add a disclosure of the arbitration fees before selection of the arbitrator is made; and finally, amend section 10 by adding in language from lines 5, 6, and 7 on page 5, at the end of subsection 3(c), on line 23. Additionally, the effective date would be changed to January 1, 1996, he stated. He called for a motion.

SENATOR TITUS MOVED TO AMEND AND DO PASS A.B. 152 AS OUTLINED ABOVE.

SENATOR LEE SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR PORTER WAS ABSENT FOR THE VOTE.)

*****

Senator James explained that A.B. 540 would be held for a work session at a later date, along with A.J.R. 38, to allow time to address Senator Porter's concerns about joint custody. There was no further business and the chairman adjourned the hearing at 10:35 a.m.

RESPECTFULLY SUBMITTED:

Lori M. Story,
Committee Secretary

APPROVED BY:

Senator Mark A. James, Chairman

DATE: