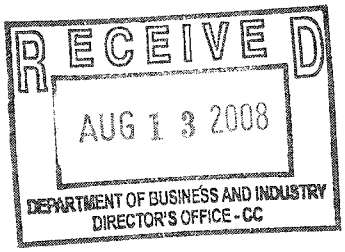

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August 11, 2008

Mendy K. Elliott, Director
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Dear Ms. Elliott:

You have requested an Attorney General's Opinion regarding the interpretation of the provisions of NRS Chapter 116 to determine whether or not certain "planned communities" are "common-interest communities." Subsequent to your initial request, we have received additional input and clarification from the Real Estate Division and your Deputy Director concerning the specific facts underlying some of your inquiries. The questions initially submitted have, in some cases, been slightly modified to reflect the clarifications.

QUESTION ONE

If a planned community does not have any common elements, is it a common-interest community pursuant to NRS Chapter 116, which is required to register with and pay fees to the Ombudsman's Office as provided in NRS 116.31158 and 116.31155, respectively?

ANALYSIS

It is our understanding that Question One is premised upon the assertion of several homeowners associations that they are not common-interest communities subject to the provisions of NRS Chapter 116 (Chapter 116 or NRS 116), because the association does not have any common elements. The associations involved have Declarations of Covenants, Conditions, and Restrictions (CC&Rs or Declaration), that

run with the land and, in some instances, other "governing documents" as defined in NRS 116.049. The issue has only arisen in communities which were created before 1992.[1]

NRS 116.075 states that a '[p]lanned community,' means a common-interest community that is not a condominium or cooperative." Our analysis and conclusions, throughout this opinion, will address the application and interpretation of Chapter 116 only as it pertains to planned communities.

For the purposes of Chapter 116, a common-interest community, "means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit." NRS 116.021. "Real estate" as used throughout Chapter 116 is specifically defined in NRS 116.081, as follows:

> "Real estate" means any leasehold or other estate or interest in, over or under land, including structures, fixtures and other improvements and interests that by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

"Interests that by custom, usage or law pass with the conveyance of land though not described in the contract of sale or instrument of conveyance" encompass CC&Rs which run with the land. NRS 116.081. The substance of the CC&Rs is determinative of whether they are "real estate" within the context of NRS 116. Documents which are recorded to create common-interest communities may be titled differently and hence a generic description was used in the definition. The inclusion of the custom, usage, or law clause in the definition of "real estate" explicitly includes interests other than land, structures, fixtures, or improvements as the basis for determining or defining a particular planned community to be a common-interest community.

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[1] Due to the difficulty the Ombudsman's Office has identifying existing common-interest communities subject to the registration and fee requirements of NRS 116.31155 and NRS 116.31158, the Legislature provided a means, through NRS 78.170, for there to be coordination between the Secretary of State's corporate registration process, and the registration required of common-interest communities with the Ombudsman's Office. As a result, common-interest communities which had not been previously identified have been contacted by the Ombudsman's Office for payment of the statutorily imposed fee, as they have been identified during the process of renewing the registration of the corporations formed by the homeowner's associations, with the Secretary of State's Office.

It is well established that where a statute is clear and unambiguous a court may not look beyond the language of the statute to determine the Legislature's intent. *Westpark Owners' Ass'n v. Eighth Jud. Dist. Ct.*, 123 Nev __, 167 P.3d 421, 427 (Adv. Op. 37, September 20, 2007); *Sheriff v. Witzenburg*, 122 Nev. ____, 145 P.3d 1002 (2006); *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438,441 (1986). The term "real estate" contained within the definition of "common-interest community" in NRS 116.021 is clear and unambiguous, and may include CC&Rs which run with the land.

The NRS 116.081 definition of "real estate" is more expansive than the phrase would be in its more common usage. Where there is a specific statute, that specific statute prevails over a more general statute. *Gaines v. State*, 116 Nev. 359, 365, 998 P.2d 166, 170 (2000). The definition of "real estate," used throughout Chapter 116, encompasses not only land, structures, fixtures and other improvements, but also "interests that by custom, usage or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance." The CC&Rs are a separate property interest from the land with which they run, *Thirteen South Ltd. v. Summit Village Inc.*, 109 Nev. 1218, 1221, 866 P.2d 257, 259 (1993), and are, therefore, "real estate" within the context in which the term is used in NRS 116.021.

It appears that the confusion about whether or not a particular planned community is a common-interest community arises from the phrase, "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit." NRS 116.021. There is no specification of when the obligation to pay for real estate that is not part of the owned unit must occur, the nature or frequency of the payments, or to whom such payment is anticipated to be directed. An owner might be obligated to pay for the value of the benefits conferred by the CC&Rs that preserve the standards, quality, character, or value of the neighborhood in which the unit is located, as a component of the purchase price of a unit.

In statutory interpretation, a legislative enactment must be read as a whole, and no part of a statute is to be rendered meaningless. *D.R. Horton Inc. v. Eighth Jud. Dist. Ct.*, 123 Nev. ___, 168 P.3d 731, 738 (Adv. Op. 45, October 11, 2007). In order to find that the type of planned communities addressed here were not subject to NRS 116, the custom, usage, or law clause contained in NRS 116.081 would have to be ignored and given no effect.

Typical CC&Rs, for the planned communites at issue, include a statement of purpose to the effect that the CC&Rs have been recorded to maintain the quality, standards, character, or value of the neighborhood, or language having similar effect. The CC&Rs also typically impose restrictions on what can be constructed on the lots, how the individual properties must be maintained, and/or what changes to the lots and/or structures can be made subject to the CC&Rs. Examples of the types of use restrictions contained in the CC&Rs include requirements for initial construction and subsequent additions, improvements, or changes to any structures built upon the land, including without limitation, the minimum square footage of a residence, the maximum number of stories, acceptable architectural styles, exterior colors, landscaping materials, roofing and fencing materials, height limitations, and minimum setbacks.

Many of the planned communities which have claimed not to be common-interest communities under NRS 116 have CC&Rs which require approval of an architectural review committee before construction of the plans for original construction and/or subsequent improvements or additions to structures on the affected lots can be started. Many of the CC&Rs similarly require approval of landscaping plans, and contain restrictions imposing other limitations on the appearance or exterior aesthetics of the units within the community.

The restrictions in the CC&Rs provide assurance to those who purchase property within a planned community that there are legally enforceable standards and requirements with which neighboring homes must comport, making it foreseeable that the neighborhood will have a consistent quality and value. Neighbors cannot change their property to the extent that it might adversely affect the property values within the planned community. The CC&Rs have an inherent value included in the price paid for a unit to which CC&Rs apply. Pursuant to the provisions of NRS 116.021, using the definition for real estate in NRS 116.081, CC&Rs for planned communities constitute "real estate," other than the unit owned, for which a person is obligated to pay.

Common elements in a planned community are defined in NRS 116.017(2) as, "any real estate within the planned community . . . other than a unit." The definition of real estate, contained in NRS 116.081, also applies to the term's use in NRS 116.017 resulting in an expansion of the term "common elements" from what the commonly held understanding of the phrase might otherwise be.

There is no reference to "common elements" in the NRS 116 definition of either "common-interest community" or "planned community." The exclusion of a requirement that a common-interest community must have "common elements" is deemed to have been intentional under well established rules of statutory construction. *Dep't. of*

Taxation v. DaimlerChrysler Services North America, LLC, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005). As explicitly defined in NRS 116, a planned community is not required to have "common elements," or to have physical property, such as land, structures, fixtures, or improvements, in addition to the individual units, in order to be defined as a common-interest community pursuant to NRS 116. 021.

The evolution of the language, contained in NRS 116, further supports the interpretation of the provisions set forth above. Chapter 116 was originally enacted into law in Nevada in 1991. The language was adopted, substantially verbatim, from the Uniform Common-interest Ownership Act (UCIOA) which had been adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1982. In sessions since 1991, the Nevada Legislature has enacted amendments, but the definitions contained in NRS 116.021, NRS 116.075, and NRS 116.081 have remained the same. UCIOA was amended in 1994. The definitions of "real estate," "planned community," and "common-interest community" were not changed by the NCCUSL's 1994 amendments. To date, Nevada has not adopted the 1994 amendments to UCIOA. The history of the drafting of UCIOA is instructive in the interpretation of the provisions of Chapter 116 addressed here. *Beazer Homes Nevada, Inc. v. Eighth Jud. Dist. Ct.*, 120 Nev. 575, 583, 97 P.3d 1132, 1137 (2004).

Prior to UCIOA, the NCCUSL had promulgated the Uniform Condominium Act (UCA) in 1977, an amended version of which it adopted in 1980. The NCCUSL had also adopted the Uniform Planned Community Act (UPCA) in 1980. The version of UCIOA, adopted in 1982 by the NCCUSL, later adopted by Nevada as NRS 116, incorporated elements of the UCA, the UPCA, and the Model Real Estate Cooperative Act (1981) with the goal of consistency in the governance of communities where there were common ownership interests.

The interpretation of "real estate" as used in the Act is pivotal in responding to Question One. A review of the acts combined into UCIOA establishes that the definition of "real estate" is the same, verbatim, in the UCA, and in the UPCA. However, the definition of a "planned community" contained in the UPCA differs significantly from that used in UCIOA.

In the UPCA, "planned community" was defined, in pertinent part, as: "real estate with respect to which any person by virtue of his ownership of a unit, is obligated to pay for *real property taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration.*" National Conference of Commissioners on Uniform State Laws, *Uniform Planned Commissioners on Uniform State Laws*, Houston, TX, February 9, 1981, at _____ (emphasis added).

The UCA did not contain a definition of "planned community." Neither the UPCA nor the UCA included a definition of "common-interest community." One of the express goals of the NCCUSL in drafting UCIOA was to have a Uniform Act which addressed, cohesively and consistently, the law applying to the various forms of common ownership interests in which real property could be held. Some provisions of the previous acts were incorporated, some were not, some were revised, and others were drafted anew. Since the committee utilized the UPCA in drafting UCIOA, it is clear that their exclusion of the narrower definition of "planned community" was intentional. "Common-interest community," although not previously defined, could have been drafted using narrower language, similar to the definition of "planned community" used in the UPCA. Again, the drafters intentionally decided to adopt a broader definition. They were aware of the narrower language in the UPCA and chose not to use it.

To date six other states, Alaska, Colorado, Connecticut, Minnesota, Vermont, and West Virginia have enacted UCIOA into law. Of significance to the interpretation of NRS 116, as currently in effect, is each of the other six states have enacted a narrower, more specific, definition of "common-interest community" than contained in UCIOA. *See Alaska Stat. Ann.* 34.08.990(7); Colo. Rev. Stat. Ann. 38-33.3-103; Conn. Gen. Stat. Ann. 47-202(7); Minn. Stat. Ann. 515B.1-103(10); Vt. Stat. Ann. 27A 1-103(7); and W. Va. 36B 1-103(7).

Discussions and hearings concerning amendments to UCIOA have been ongoing since 2005 by the NCCUSL committee, and some revisions have been made to the initial 2005 draft. It is clear from the proposed amendments and the changes which have evolved over the past two years that the NCCUSL committee recognizes that the interpretation of NRS 116.021 that we have provided above is consistent with their interpretation of the identical language currently contained in UCIOA.[2] In the absence of legislative amendment of the pertinent provisions of Chapter 116, the statute must be applied according to the provisions of law as currently in effect, and not as they might be if amended.

The Nevada Legislature has recognized the breadth of the current definition of "common-interest community" in NRS 116. During the 2007 Legislative Session, an unsuccessful effort was made to narrow the definition of "common-interest community." Assembly Bill 396, Sec. 6, proposed that the definition of "common-interest community" in NRS 116.021 be revised to include, as subpart 3, the following: "For the purposes of determining whether real estate is a 'common-interest community' pursuant to this section, the fact that the real estate is subject to covenants, conditions and restrictions is not relevant or determinative."

[2] November 2007 draft of proposed amendments, Section 1-210.

Inherent in the substance of the amendment proposed at the 2007 Legislative Session is the understanding that the definition of "common-interest community" currently in effect is as we have opined above.

A.B. 396 (2007) was not signed into law, therefore, the definitions of "common-interest community," "planned community," and "real estate" continue in effect as originally adopted by the NCCUSL and by the Nevada Legislature. Pursuant to the law as it currently exists, a common-interest community can exist in the absence of any "common elements," commonly owned land, structures, fixtures, or improvements.

CONCLUSION TO QUESTION ONE

Common elements, or commonly owned land, structures, fixtures, or improvements, separate from the individually owned unit, are not required for a planned community to be found to be a common-interest community under Chapter 116. Covenants, conditions, and restrictions may be "real estate" within the definition set forth in NRS 116.081.

QUESTION TWO

Can the CC&Rs constitute an "interest that by custom, usage or law passes with land though not described in the contract of sale or instrument of conveyance"?

CONCLUSION TO QUESTION TWO

For the reasons discussed, in responding to Question One above, the CC&Rs may constitute an interest that by custom, usage, or law passes with the land though not described in the contract of sale, or instrument of conveyance.

QUESTION THREE

What is the effect of an owners association's assertion that the association is a "voluntary" association or a "social club" on the determination of whether there is, or is not, a common-interest community?

ANALYSIS

Question Three is addressed in the context where an owners association has been formed and incorporated with the Secretary of State. The members of the association are all owners of property subject to the same Declaration or CC&Rs. The

CC&Rs contain use restrictions, such as limitations of what can be built on the property, how the property must be maintained, and/or what additions or improvements can be made, and which materials can be used. Pursuant to the discussion above, absent statutory exclusions, the community in issue would be a common-interest community under NRS 116.021.

The associations at issue, in many instances, collect monies from the Unit Owners, which they characterize as "voluntary" dues. The dues are voluntary in the sense that no one takes action against the unit owners who do not pay. The dues are usually fairly nominal because the association is not responsible for maintaining any commonly owned land, structures, fixtures, or improvements. The fact that the board or members have not pursued collection of the dues does not change the fact that the planned community at issue is, by definition, a common-interest community. The characterization of the members association as a "social club" does not affect the determination that the planned community at issue is a common-interest community. At some point in time the units in such a planned community will be sold to others. A group of newer owners could, at some point, decide to pursue collection of the unpaid dues, and, if not paid, could pursue actions to collection.

CONCLUSION TO QUESTION THREE

The characterization of an association as a "social club" has no impact upon the determination of whether or not it is a common-interest community subject to NRS 116. Neither does the characterization of dues as being "voluntary."

QUESTION FOUR

If an association has not taken any action to enforce the use restrictions in the CC&Rs, does that effect a determination that the community is a common-interest community?

ANALYSIS

The CC&Rs are recorded against each lot or unit, and run with the land. Although they are considered a separate property interest, the CC&Rs cannot be severed from the property. All owners of the property continue to be bound by and subject to the use restrictions in the CC&Rs until the CC&Rs are lawfully terminated. The fact that no action has been taken may result from the Unit Owners' compliance with the CC&Rs. That does not preclude enforcement actions in the future. If the

CC&Rs are terminated in conformance with Nevada law, the community would no longer be a common-interest community; otherwise they continue to run with each unit.

CONCLUSION TO QUESTION FOUR

The fact that the association has not ever taken action to enforce the restrictions in their CC&Rs does not affect the determination of whether a common-interest community exists.

QUESTION FIVE

If the association in a planned community dissolves the corporation through which the community acts, does the community cease to be a common-interest community?

CONCLUSION TO QUESTION FIVE

A common-interest community is created through the recordation of the Declaration/CC&Rs which will continue to run with the land until terminated. The dissolution of the association's corporation does not terminate the CC&Rs and does not change its status as a common-interest community subject to NRS 116.

QUESTION SIX

Does the fact that a common-interest community's CC&Rs were recorded and/or the homeowners association was formed prior to the enactment of NRS Chapter 116 impact whether or not the common-interest community must comply with NRS 116.31155 and 116.31158?

ANALYSIS

The language contained in the provisions of Chapter 116 makes clear that the Act was intended to apply to all common-interest communities in existence at the time of its enactment, as well as those formed after the Act took effect. NRS 116.1201(1), provides in pertinent part that, "[e]xcept as otherwise provided in this section and NRS 116.1203, this chapter applies to all common-interest communities within this State."

NRS 116.1201(2) provides exemptions from Chapter 116. Chapter 116 does not apply to a limited purpose association, except that a limited purpose association must pay the fees required by NRS 116.31155, must register with the Ombudsman as required by NRS 116.31158, and shall comply with several other provisions of NRS 116, delineated.

NRS 116.1201(2)(d) provides that NRS 116 does not apply to a common-interest community that was created before January 1, 1992, which is located in a county whose population is less than 50,000, and which has less than 50 percent of its units put to residential use. The specificity of the pre-1992 common-interest community which is excluded from the requirements of NRS 116 emphasizes the inclusion of all common-interest communities which do not come within the exclusion.

The intent of the Legislature to have Chapter 116 apply to certain common-interest communities which had been created prior to 1992 is also evident from the substance of NRS 116.1109 and NRS 116.1201(3)(b). NRS 116.1109(2) expresses the intention for the enactment of Chapter 116, as follows: "This chapter must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it."

The intended purpose of the Act, as well as clear intention that the Act be applied to certain common-interest communities in existence prior to 1992, would be defeated were common-interest communities created before 1992 excluded from compliance with the Act, other than as stated within the provisions of the Act.

NRS 116.1201(3)(b) explicitly provides that common-interest communities created before 1992 are not required to comply with the provisions contained in NRS 116.2101–.2122, inclusive. By implication, common-interest communities created prior to 1992 must comply with all provisions of Chapter 116, from which they are not expressly excluded. Common-interest communities created before 1992 are not exempt or otherwise immune from the requirement of NRS 116.31155 to pay the annual per unit fee, nor are they exempt or immune from the requirement that they register annually with the Ombudsman's Office under NRS 116.31158.

NRS 116.1206(1) provides that any provision of a common-interest community's governing documents which violates the provisions of Chapter 116 will be deemed by operation of law to conform to NRS 116 without being required to amend their governing documents. NRS 116.1206 sets forth a different standard for amending governing documents to be applied to a common-interest community created before January 1, 1992. However, there are otherwise no differences in the treatment of governing

document violations as they exist in a common-interest community created either before or after January 1, 1992.

CONCLUSION TO QUESTION SIX

Common-interest communities created before and after January 1, 1992, are required to comply with NRS 116.31155 and NRS 116.31158, with the narrow exception contained in NRS 1201(2)(d), for common-interest communities in counties with a population of less than 50,000 which have less than half of their units being used for residential purposes.

QUESTION SEVEN

Can a common-interest community, created before 1992, which has no provision in its CC&Rs authorizing it to impose assessments on its members, make assessments of its members for the purpose of paying the per unit fee required to be paid pursuant to NRS 116.31155?

ANALYSIS

The planned communities, in which this issue has arisen, have CC&Rs containing use restrictions for the benefit of all units and have homeowners associations which have been incorporated with the Secretary of State's Office. Most collect "dues," although the payment of the dues is contended to be "voluntary."

NRS 116.31155(1) provides, in pertinent part:

> Except as otherwise provided in subsection 2, an association shall:
> (a) If the association is required to pay the fee imposed by NRS 78.150, 82.193, 86.263, 87.541, 87A.560 or 88.591, pay to the Administrator a fee established by regulation of the Administrator for every unit in the association used for residential use.

In order for a homeowners association to complete its annual renewal with the Secretary of State's Office, evidence must be provided that its fees have been paid, pursuant to NRS 116.31155, to the Ombudsman's Office. Upon receipt of such payment the Administrator provides documentation to the association that its obligation to pay the fees and any penalties and interest has been met. The documentation must

be provided to the Secretary of State's Office before an association can renew its registration. The only exceptions to the requirement that the association for a common-interest community pay the per unit fee are contained in NRS 116.31155(2), and relate to master associations and their sub-associations.

The fee owed by each common-interest community to the Ombudsman's Office, under NRS 116.31155, is a common expense and a financial obligation of the common-interest community. The issue of the extent to which a common-interest community may require its members to contribute to the common expenses of the community has not been addressed by the Nevada Supreme Court. However, the principle under which a common-interest community would have authority to impose fees on its members for commonly owed expenses has been addressed in *Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003). UCIOA, as enacted in Nevada, was adopted in Colorado in 1992. The applicable provisions, adopted in Colorado, are identical to the provisions in NRS 116, and thus the Colorado Supreme Court's decision is relevant to the application of law that would be made under the uniform code. *Moody v. Manny's Auto Repair*, 110 Nev. 320, 871 P.2d 935 (1994).

In *Evergreen*, *supra*, a subdivision was created in 1972, which consisted of 63 lots and a 22.3 acre park for the use of the members and owned by the association. The association was formed in 1973, and the park was conveyed to the association by the developer in 1976. From 1976 to 1995 the Association relied upon voluntary assessments from lot owners to pay for costs of maintenance and improvements of the park. Expenses incurred for the park annually included taxes and insurance. In 1995, 75 percent of the lot owners voted to add a new article to the CC&Rs. The article required all lot owners to be members of the Association and to pay assessments.

One of the lot owners who had not voted in favor of the amendment brought suit challenging the validity of the 1995 amendment. The association counterclaimed seeking declaratory judgment that it had implied power to collect assessments from all lot owners in the subdivision. The Colorado Supreme Court holding was based upon the Restatement (Third) of Property: Servitudes § 6.5 (2000). The Restatement provides, in pertinent part: "the power to raise funds reasonably necessary to carry out the functions of a common-interest community will be implied if not expressly granted by the declaration."

The court held that even in absence of an express provision in the CC&Rs, the association had an implied power to levy assessments to raise the funds necessary to maintain the park.

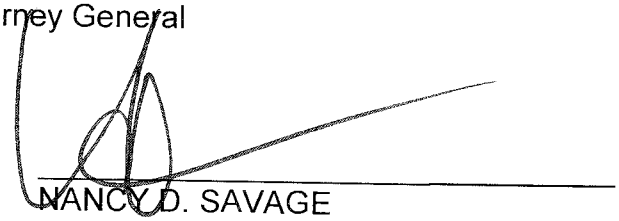
Although the decision in *Evergreen* addressed the issue of expenses for maintenance of common area, the basis for the court's holding, pursuant to the Restatement of Property, is broader and clearly extends beyond expenses related to common area, to "funds necessary to carry out the functions of a common-interest community. . . ." *Evergreen*, 73 P.3d at 1. Pursuant to NRS 116, common-interest communities are required, by law, to register and pay fees to the Ombudsman's Office on a per unit basis. The payment is a function of a common-interest community, and hence, one for which the homeowners association for a common-interest community has implied authority to make assessments of all affected lot owners.

CONCLUSION TO QUESTION SEVEN

A common-interest community created before 1992, which does not have an express provision in its Declaration of CC&Rs authorizing its homeowners association to impose assessments on its members, has implied authority to make assessments to raise funds to pay the amounts due to the Ombudsman's Office pursuant to NRS 116.31155.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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