IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL KOSOR, JR., a Nevada resident,

Appellant,

vs.

NEVADA REAL ESTATE DIVISION,

Respondent.

Supreme Ct. Case No. 79831

Eighth Judicial District Court
Case No. A-18-778387-C

RESPONDENT'S ANSWER TO APPELLANT'S PETITION FOR REVIEW

DATED this 29th day of July, 2021.

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I. SUMMARY OF ARGUMENT

Appellant's (Mr. Kosor) Petition for Review boils down to two arguments, which are part and parcel. Mr. Kosor's arguments suggest this Court should create an exception to NRS 116.2117(2)'s one-year statute of repose.

Mr. Kosor's first argument is a legal one involving the statutory construction of NRS 116.2117(2). Mr. Kosor argues that NRS 116.2117(2) contains an implicit condition precedent, couched in the phrase "adopted by the association."[1] Mr. Kosor argues that a reviewing court must conduct a factual analysis into the process by which a common interest community adopted a challenged amendment before the court can apply NRS 116.2117(2)'s one-year statute of repose.

Mr. Kosor's second argument is factual. Mr. Kosor argues that Southern Highlands Development Corporation (the Declarant) unilaterally executed the Third Amendment to its Master Declaration of Covenants, Conditions and Restrictions and Reservations of Easements in 2005 (2005 Third Amendment) in violation NRS 116.2122. Specifically, Mr. Kosor argues that the Declarant unilaterally increased the maximum number of units through the 2005 Third Amendment in violation of NRS 116.2122's prohibition, stating "the declarant may not in any event increase the number of units in the planned community beyond the number stated in the

[1] NRS 116.2117(2) states, "No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than 1 year after the amendment is recorded." (Emphasis added).

original declaration[.]"[2] Mr. Kosor's argument contends that because the 2005 Third Amendment was unilaterally executed by the Declarant, it was not "adopted by the association" pursuant to NRS 116.2117(2); and therefore, the 2005 Third Amendment was void *ab initio*.

Respondent (the Division) submits that NRS 116.2117(2)'s one-year statute of repose cannot be superseded by Mr. Kosor's factual challenges to the validity of the 2005 Third Amendment because Mr. Kosor's challenges require a reviewing court to make factual findings regarding the adoption process of the 2005 Third Amendment beyond those pled in his Complaint for Declaratory Relief (Complaint).[3] Namely, Mr. Kosor's challenges require a Court to find that the Declarant acted ultra vires and unilaterally executed the 2005 Third Amendment in violation of NRS 116.2122. Mr. Kosor's challenges also necessitate this Court ignore the presumption created by NRS 116.089(7) and NRS 116.2117(5) that R. Brett Goett was validly appointed to execute the 2005 Third Amendment on behalf of the association during the period of declarant's control.[4]

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[2] NRS 116.2122.

[3] *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008) (The standard or review for a motion to dismiss under NRCP 12(b)(5) allows this Court to "recognize all factual allegations in [the] complaint as true and draw all inferences in its favor.").

[4] NRS 116.089(7) "Special declarant's rights" means rights reserved for the benefit of a declarant to: Appoint or remove any officer of the association or any master association or any member of an executive board during any period of

Mr. Kosor's arguments ignore the entire purpose of a statute of repose, which is to "protect a defendant against the evidentiary problems associated with defending a stale claim [and] . . . to promote repose by giving security and stability to human affairs."[5] Similarly, the relief requested by Mr. Kosor's Complaint completely ignores any responsibility Mr. Kosor had to perform due diligence prior to purchasing his Southern Highlands home in 2012.[6] In place of his own due diligence, Mr. Kosor has requested the judicial branch to order the Division, an executive branch agency, to ignore the advice of its counsel, the Attorney General's Office, and perform an investigation into stale facts dating back to 2005.[7] The Division's application of NRS 116.760(1) is not a question of law, but purely a matter of administrative discretion.[8] Mr. Kosor's request for a misdirection of

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declarant's control."; NRS 116.2117(5) "Amendments to the declaration required by this chapter to be recorded by the association must be prepared, executed, recorded and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association."

[5] *Nevada State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798, 801 P.2d 1377, 1381–82 (1990); JA 0082, fn. 10.

[6] *See* JA, Vol. I, 0006-7; JA, Vol. I, 0040, ln. 1-9; *see also* JA, Vol. I, 0040, ln. 10-17 (It is undisputed that Mr. Kosor filed his first administrative complaint challenging the 2005 Third Amendment with the Division in April of 2016; therefore, Mr. Kosor's challenge to the 2005 Third Amendment was stale by a decade.).

[7] *See* JA, Vol. I, 0040, ln. 1-9.

[8] *See Phelps v. Second Judicial Dist. Ct.*, 106 Nev. 917, 920-22, 803 P.2d 1101, 1105 (1990); *Prudential Ins. Co. v. Ins. Comm'r,* 82 Nev. 1 409 P.2d 248 (1966).

Division resources flies in the face of the Division's Legislatively afforded discretion, solidified in NRS 116.765(5) and by NRS 116.760(1), which places the determination whether to file a formal complaint with the Commission for Common-Interest Communities and Condominium Hotels (the Commission) solely within the hands of the Division and places a separate one-year statute of limitations on administrative complaints filed with the Division seeking hearings before the Commission.[9]

In the absence of the Declarant, the real party in interest, Mr. Kosor's Petition for Review continues, incorrectly, to request judicial supplanting of the Division's administrative function and discretion.[10] Mr. Kosor's Complaint for Declaratory

[9] NRS 116.760(1) "Except as otherwise provided in this section, a person who is aggrieved by an alleged violation may, not later than 1 year after the person discovers or reasonably should have discovered the alleged violation, file with the Division a written affidavit that sets forth the facts constituting the alleged violation. The affidavit may allege any actual damages suffered by the aggrieved person as a result of the alleged violation[;]" NRS 116.765(5) "If, after investigating the alleged violation, the Division determines that the allegations in the affidavit are not frivolous, false or fraudulent and that good cause exists to proceed with a hearing on the alleged violation, the Administrator shall file a formal complaint with the Commission and schedule a hearing on the complaint before the Commission or a hearing panel[;]"; *see also* Order of Affirmance at 3 ("Specifically, we do not consider whether the district court's factual findings were clearly erroneous when it determined NRS 116.760(1) time-barred Kosor's complaint.").

[10] *Nuleaf CLV Dispensary, LLC v. State Dep't of Health & Human Servs., Div. of Pub. & Behavioral Health*, 134 Nev. Adv. Op. 17, 414 P.3d 305, 308 (2018) (An agency's interpretation of a statute that it is authorized to execute is entitled to deference "unless it conflicts with the constitution or other statutes, exceeds the agency's powers, or is otherwise arbitrary and capricious.).

Relief against the Division, in Case No. A-18-778387, was filed on July 25, 2018, and is therefore delinquent in violation of NRS 116.2117(2) by more than a decade.[11] Mr. Kosor's Complaint fails to identify how the Division's decision to close his administrative complaints pursuant to NRS 116.760(1) or seek dismissal of his Complaint for Declaratory Relief pursuant to NRS 116.2117(2), on grounds of untimeliness, conflicts with the federal or Nevada Constitutions, exceeds the Division's statutory or regulatory authority, or was otherwise arbitrary or capricious."[12] In sum, even with a remand to the Division mandating an investigation into the 2005 Third Amendment, the outcome of such an unjustified investigation is uncertain. Therefore, Mr. Kosor can "prove no set of facts, which if true, would entitle [him] to relief."[13]

II. ARGUMENT

A. Mr. Kosor's Arguments Do Not Support Remand To The Division.

Mr. Kosor's arguments that the 2005 Third Amendment was not validly adopted by the association pursuant to NRS 116.2117(2) and his argument that the 2005 Third Amendment was void *ab initio* in violation of NRS 116.2122(1) are

[11] *Compare* JA, Vol I., 0001 (Mr. Kosor's Complaint for Declaratory Relief) *with* JA, Vol I., 0055-56 (2005 Third Amendment).

[12] *Id*.

[13] *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227–28, 181 P.3d 670, 672 (2008).

essentially one and the same. Both arguments necessitate factual findings regarding the 2005 Third Amendment. Mr. Kosor's NRS 116.2117(2) and 116.2122 arguments logically arguments merge into one, namely that declarant "unilaterally executed and recorded" the 2005 Third Amendment in violation of NRS 116.2112 and therefore the 2005 Third Amendment violated NRS 116.2117(2) because it was not "adopted by the association."[14] However, even accepting the allegations pled by Mr. Kosor's Complaint as true, his arguments cannot overcome the Division's discretion to rely upon the Legislature's creation of a period of declarant's control of the association.[15]

During the period of declarant's control of the association, the declarant may "appoint or remove any officer of the association or any master association or any member of the executive board."[16] Similarly, during the period of declarant's control of the association, "[a]mendments to the declaration required by this chapter to be recorded by the association must be prepared, executed, recorded and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association."[17]

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[14] NRS 116.2122; NRS 116.2117(2).
[15] *See* NRS 116.089(7); NRS 116.31032(1); and NRS 116.2117(5).
[16] NRS 116.089(7); *see also* NRS 116.31032(1).
[17] NRS 116.2117(5).

Here, Mr. Kosor's Complaint does not allege and cannot prove, that in 2005, R. Brett Goett was not appointed by the Declarant during the exclusive declarant control period. Likewise, at no point has Mr. Kosor alleged in his Complaint, or otherwise, that the Declarant was operating outside the declarant control period established by NRS 116.31032 when the 2005 Third Amendment was executed. Rather, NRS 116.089(7), NRS 116.2117(5), and NRS 116.31032 create a presumption that R. Brett Goett was authorized by the Declarant to execute the 2005 Third Amendment as an officer of the association during the declarant control period.

In absence of supporting evidence, Mr. Kosor's argument that the Declarant unilaterally violated NRS 116.2122 cannot be accepted without ignoring the presumption that the 2005 Third Amendment was adopted by the Declarant's appointed association and officers during the legislatively created period of declarant's control. Mr. Kosor's argument necessitates that before the Division can invoke NRS 116.2117(2)'s one-year statue of repose, the Division must disprove his allegations that R. Brett Goett was not cloaked as an officer of the association by the Declarant during the period of declarant control.[18] In light of the plain language of NRS 116.2117(2)'s one-year statute of repose, and the absence of any evidence of

[18] *See* JA, Vol I., 0055-0056 (2005 Third Amendment executed by R. Brett Goett, Vice President of the Declarant, Southern Highland Development Corporation).

fraud, the Division is entitled to rely on NRS 116.089(7) and NRS 116.31032(1) for the presumption that the 2005 Third Amendment was "executed, recorded, and certified on behalf of the association" by R. Brett Goett, an officer designated for that purpose by the Declarant during the period of declarant control.[19]

Instead, Mr. Kosor wants the Division to perform an archaeological investigation into decade-old records, which may no longer exist, of the Southern Highlands Development Corporation in furtherance of his own wholly personal crusade against Southern Highlands. Mr. Kosor's Petition for Review requests this Court ignore NRS 116.2117(2) and reverse the Court of Appeals and the District Court, supplant the administrative discretion of the Division, and to remand this matter to the Division presumably with instructions to investigate his complaint and hold a hearing pursuant to NRS 116.765. Such a remand would obviate the discretion provided to the Division by the Legislature in NRS 116.765(5), to determine whether to file a complaint with the Commission or a hearing panel.[20] Furthermore, a remand would force the Division to ignore the advice of its counsel, the Attorney General's Office, which advised the Division to dismiss Mr. Kosor's claims on the timeliness grounds set forth in NRS 116.2117(2) and NRS 116.760(1).[21] Such a remand would constitute a violation of the separation of

[19] *See Club Envy of Spokane, LLC*, 184 Wn.App. 593, 337 P.3d 1131 (2014).
[20] NRS 116.765(5).
[21] *See* JA, Vol I., 0077-0079.

powers, and an example of judicial overreach and disregard of the independence of an executive branch agency.[22] Fortunately, the Legislature has enacted two one-year time bar statutes, NRS 116.2117(2) and NRS 116.760(1), to prevent the unsettling of long cemented human affairs.

B. Mr. Kosor Cannot Demonstrate Facts Warranting An Exception to NRS 116.2117(2)'s One-Year Statute of Repose.

Mr. Kosor's contention that the 2005 Third Amendment was "unilaterally executed and recorded" is factually unsubstantiated.[23] Mr. Kosor's Petition for Review incorrectly seeks to place the burden on the Division to disprove the factual allegations of his Complaint, namely that the 2005 Third Amendment was properly adopted by the association during the period of declarant control, before it can assert the timeliness defense set forth in NRS 116.2117(2)'s statute of repose.[24]

Mr. Kosor's contention that the 2005 Third Amendment illegally increased the number of units from 9,000 to 10,400 in violation of NRS 116.2122 is

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[22] *Galloway v. Truesdell*, 83 Nev. 13, 31, 422 P.2d 237, 249 (1967) ("The courts must be wary not to tread upon the prerogatives of other departments of government or to assume or utilize any undue powers. If this is not done, the balance of powers will be disturbed and that cannot be tolerated for the strength of our system of government and the judiciary itself is based upon that theory.").

[23] *Petition for Review*, at 8.

[24] *See Petition for Review*, at 6-7; *see also Telegraphers v. R. Express Agency*, 321 U.S. 342, 348-349 (1944) ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.")

unfounded. Mr. Kosor's argument is based upon pure speculation that Mr. Goett did not have authority to execute the 2005 Third Amendment on behalf of the association. Mr. Kosor's Opening Brief filed with the Court of Appeals confirms this argument is speculative, expressly stating "the subject amendment ***was likely never adopted*** by the association."[25] Mr. Kosor's assumption that the 2005 Third Amendment violated NRS 116.2122 does not render it void *ab initio*.

The Supreme Court of Washington's reasoning in *Bilanko v. Barclay Court Owners Ass'n*, 185 Wash. 2d 443, 375 P.3d 591 (2016) as well as the Washington Court of Appeals reasoning in *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass'n,* 184 Wn.App. 593, 601, 337 P.3d 1131 (2014), regarding the distinction between void and voidable amendments to common interest community declarations, is illuminating.

The underlying question facing the Court in *Bilanko* was the application of a statute of limitations defense to claim for declaratory relief challenging an amendment to a condominium declaration.[26] In *Bilanko*, the Court explained that "when a corporation acts beyond its corporate powers or its actions offend public policy, those actions are void[,] but if a corporation fails to observe some statutory requirement while acting within its corporate powers, the act is 'voidable only, and

[25] Opening Brief at 22 (emphasis added).
[26] *Bilanko v. Barclay Court Owners Ass'n*, 185 Wash. 2d 443, 450–51 (2016).

is valid until avoided, not void until validated.'"[27] The *Bilanko* Court further explained that "[a]ctions that fail to comply with statutory requirements are generally not void unless the legislature has authorized such a penalty."[28] Ultimately, the Court in *Bilanko* held the amendment to the condominium declaration was not void av initio and challenge thereto was barred by the applicable statute of limitations.[29] In the *Club Envy* case, the Court reached the opposite result and created an exception to the statute of limitations based upon unique allegations of fraud.

Even so, the *Bilanko* and *Club Envy* cases are distinguishable from the instant controversy because both *Bilanko* and *Club Envy* involved the complainants and the real parties in interest – the declarants – as opposed to this matter which is between a complainant and the administrative agency.[30] Here, Mr. Kosor does not allege the

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[27] *Id*. citing *Twisp Mining & Smeling Co. v. Chelan Mining Co.,* 16 Wn.2d 264, 294, 133 P.2d 300 (1943) (quoting 19 C.J.S. *Corporations* § 968 (1940)).

[28] *Bilanko*, 185 Wash. 2d at 450 (citations omitted); *see* NRS 116.049(2); The Nevada Secretary of State's Silverflume website reflects that Southern Highlands Community Association has been registered with the Nevada Secretary of State since 2000 as a Domestic Nonprofit Cooperative Corporation Without Stock; NRS 47.130(2)(b) allows the Court to take Judicial Notice of matter of fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that fact is not subject to reasonable dispute; *see Jory v. Bennight*, 91 Nev. 763, 766, 542 P.2d 1400, 1403 (1975) (court taking judicial notice of secretary of state records.).

[29] *Id*., 185 Wash. 2d at 452-453.

[30] *See Bilanko*, 185 Wash. 2d 443, 375 P.3d 591 (2016); *Club Envy of Spokane, LLC,* 184 Wn.App. 593, 337 P.3d 1131 (2014).

Declarant acted fraudulently, but rather assumes the 2005 Third Amendment was not executed and recorded pursuant to NRS 116.089(7) and NRS 116.2117(5) during the period of Declarant's control. In the *Club Envy* case, the Court reached the opposite result and created an exception to the statute of limitations based upon unique allegations of fraud which are absent from the Mr. Kosor's the instant matter.[31]

Finally, Mr. Kosor's contention this case is "directly tied to the public interest" and affects the 8,000 residents of Southern Highlands fail to justify an exception to NRS 116.2117(2)'s one-year time bar. Mr. Kosor remains the sole resident of Southern Highlands challenging the 2005 Third Amendment and has not identified how the alleged dilution of voting rights or protracted control over the HOA has caused any cognizable injury. Additionally, Mr. Kosor's citation to this Court's holding in *Kosor v. Olympia Companies, LLC*, is an out-of-context attempt to magnify the public sentiment in support of his case. This Court did hold that Mr. Kosor's speech was constitutionally protected because it concerned "questions and criticisms of Olympia and the HOA board[,]" which were "directly tied to the public interest[.]"[32] However, the constitutionally protected status of Mr. Kosor's speech concerning the Declarant and Olympia properties validate his allegations regarding

[31] *See Club Envy of Spokane, LLC,* 184 Wn.App. 593, 337 P.3d 1131 (2014).

[32] *Kosor v. Olympia Companies, LLC,* 478 P.3d 390, 393, 136 Nev. Adv. Op. 83 (2020).

the 2005 Third Amendment or legitimize an alleged injury to the residents of Southern Highlands. Indeed, the absence of any other Southern Highlands homeowner(s) in support of Mr. Kosor's crusade is telling.

III. CONCLUSION

Based on the foregoing, the Division respectfully requests this Court deny Mr. Kosor's Petition for Review and find the instant Petition for Review frivolous pursuant to NRAP 38(b).

DATED this 29th day of July, 2021.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in font size 14 and font style Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 3,162 words.

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

the matter relied on is to be found. I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of July, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on July 29, 2021, I served a copy of the foregoing Respondent's Answer to Appellant's Petition for Review via this Court's electronic filing system (EFS) on the below parties that are registered with this Court's EFS.

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