Via Electronic Mail

April 12, 2026

Nevada Common-Interest Community Task Force
c/o Nevada Real Estate Division Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels
3300 W. Sahara Avenue, Suite 350
Las Vegas, Nevada 89102
sbates@red.nv.gov
publiccomments@red.nv.gov,

Re: Agenda Item 4.A.5, CIC Task Force, April 14, 2026 Meeting — Public Comment

Agenda Item 4.A.5 should be rejected. It not only moves Nevada's CIC dispute-resolution system in the opposite direction of the problem lawmakers have long been trying to solve, it removes the simple and obvious solution. The low-cost referee program — not mediation, and not the now-proposed return to arbitration — should be the default. Little more by way of statutory change is needed.

Nevada lawmakers have long understood the real problem in most HOA disputes. Homeowners need an affordable, neutral written determination before the economics of the dispute force surrender. My attached policy paper, previously provided, explains that the central defect in Nevada's current governance-dispute track is not the absence of ADR, but the absence of reliable access to a determinative process. The current structure leaves the only processes capable of producing a merits determination — referee review or arbitration — subject to veto, while mediation remains available even though it cannot provide a neutral determination.

Mediation has shown itself ineffective given the nature of most HOA disputes: interpretation of declaration provisions. Mediation simply cannot decide them. It depends entirely on compromise, and when one side has the superior economic position, and/or seeks to advance an agenda, the predictable result is non-resolution. Mediation becomes a mere speedbump when one side has the resources and incentives to outlast the other in the courts. My examination of NRED ADR reporting over many years, as well as my own participation in the mediation program and the civil litigation that followed, bears this out. In practice, mediation, like civil litigation, is attractive to the better-resourced party — the party with the upper hand.

Arbitration can produce a determination, even if binding, but at a price many homeowners cannot reasonably absorb given the nature of most disputes. The 2013 legislative record makes clear that lawmakers understood that point. The Subcommittee was told arbitration costs were much too high to serve either homeowners or associations well. The cost exhibit submitted that year, and attached here, showed board-side attorney fees in arbitration reaching $17,325, $17,336, and even $20,000 in individual matters, while expressly excluding arbitrator fees. It must be assumed, absent any contrary NRED data, that those costs are materially worse today.

That cost structure does not merely make arbitration unattractive. As Assemblyman Ohrenschall stated during the March 27, 2013 Assembly Judiciary hearing on S.B. 370:

I do not have anything against arbitration or against the arbitrators, but everything I have seen shows that the price is much too high. Rather than having what we had always hoped for with alternative dispute resolution, something that is more efficient and less costly than taking the dispute through the courtroom, we end up with something that in some cases can be more costly and more time consuming. I do not think that is a service to the homeowners or to the associations. (Assembly Committee on Judiciary, March 27, 2013)

That observation was well founded then and, absent contrary NRED data, must be assumed even more true today. The proposed amendment may well hold owners hostage. Faced with the expense of arbitration, many owners will see mediation as the only viable option, only to discover that mediation cannot produce the determination they need. The cost of arbitration will pressure the weaker party into a process that predictably produces no determination at all.

That is why the referee program matters and should be the default — not arbitration. The Division's proposal offers no explanation why arbitration should be the preferred default or why the referee program should be eliminated. Here I echo Assemblyman Orrenschall question in 2013: "where are the statistics?" The Legislature did not identify the referee program as the problem. It identified the lack of an affordable determination as the problem.

The referee program was low cost, quicker, accessible without effectively requiring legal counsel, and capable of producing the one thing homeowners most often need: a written neutral determination. Just as important, it did not give the decision-maker the power an arbitrator can have to impose party attorney-fee exposure. That distinction changes the entire cost-benefit calculation facing a homeowner before litigation even begins. My attached paper explains why the referee path is the appropriate default for governance disputes: it is far less expensive than arbitration or district court litigation, it produces a written reasoned evaluation, it remains advisory and nonbinding, and it preserves access to court.

It also avoids attorney-fee shifting. Mandating a nonbinding referee determination alters the dynamic. Even without formal preclusive effect, it introduces a credible, low-cost merits assessment into a space that has long lacked one. The very act of rejecting such a determination adds functional tension: it requires a dissatisfied party to proceed in the face of a competent neutral contrary analysis, and in the case of an association, requires disclosure to members because the determination—unlike privileged legal advice—cannot be withheld under an advice-of-counsel rationale. If litigation follows, the board's decision also invites process-based judicial scrutiny. In this way, the referee's nonbinding status becomes a strength rather than a weakness—it preserves party autonomy while creating a practical accountability mechanism that has been missing from the governance-dispute track since its inception.

The problem after the 2013 legislation was not the referee concept itself. The problem was that the drafting kept the veto power. Even after lawmakers added the referee structure, either side could still avoid it. The obvious fix is therefore to preserve the referee program and remove the

veto power that prevents homeowners from reaching a low-cost neutral determination. Parties can still mutually agree to mediation or arbitration.

Agenda Item 4.A.5 does the opposite. It deletes the statutory "program" altogether and with it the referee program. That retreat is especially hard to justify because NRED itself supported the referee/program approach in 2013. In written testimony on A.B. 370, Administrator Gail Anderson stated that the Division supported a program under which parties could obtain a hearing or review on governing-document interpretation and assessment procedures, and that the program could operate at no cost to participants other than the filing fee. Her testimony also recognized that the existing arbitration structure was often costly to the participant who did not prevail and had a chilling effect on owners seeking to challenge a board action or simply obtain an interpretation of a rule, even if not binding.

Finally, Agenda Item 4.A.5 also fails to address the waiver problem created by the recent Nevada Supreme Court ruling in *Kosor v. SHCA*. As explained in my attached paper, the Court's 2025 ruling left NRS 38.310 waivable, as a mere claim-processing rule. The Task Force must recommend that the Legislature restore the mandatory character of ADR in express terms, unequivocally making compliance "jurisdictional."

For those reasons, the Task Force should reject Agenda Item 4.A.5 as drafted. Nevada should preserve the referee program, make it the default path for governing-document disputes unless the parties jointly elect another lawful route, and correct the waiver problem created by *Kosor*.

My policy paper, *Reforming Nevada CICs Dispute Resolution Systems*, is incorporated by reference, and I request that it be included in the Task Force record in connection with Agenda Item 4.A.5.

Sincerely,

/s/ signed

Mike Kosor
HOA homeowner and Founder
NVHOAReform.com

NEVADA HOA REFORM COALITION
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Attachment: 1) *Reforming Nevada CICs Dispute Resolution Systems* 2) Arbitration fee FY 2010

Reforming Nevada CICs Dispute Resolution Systems

Executive Summary

Common-interest communities have developed into systems of private governance without the public institutional support structures that typically accompany such authority. As a result, Nevada lacks trusted state adjudication service(s) designed specifically for CICs — accessible, efficient, and capable of resolving disputes arising under both statute and governing documents.

The Nevada Supreme Court has recognized that an HOA is "no less of 'a quasi-government entity' … 'paralleling in almost every case the powers, duties, and responsibilities of a municipal government.'"[1] Its governance structure however, is based on the corporate model, lacking the checks and balances that typically constrain cities from abusing their residents. Disputes are common and often seen as petty and unnecessary. Nevada, consistent with the American Law Institute's *Restatement (Third) of Property: Servitudes* finds that "public policy supports use of alternatives to judicial resolutions of common-interest community (CIC) disputes, and implying a power to use less drastic alternative enables the association to carry out its functions and meets the probable expectations of the property owners."[2]

Nevada's CIC dispute-resolution system has never fully achieved this non-judicial resolution objective nor the Legislature's explicit and long-standing goal: ensuring that homeowners and associations can obtain a low-cost, neutral, and timely determination of their rights and obligations without being forced into expensive civil litigation. For more than thirty years, Nevada lawmakers have relied on two complementary tracks to pursue this goal:

(1) an administrative enforcement system for alleged violations of NRS 116, and
(2) an ADR-based governance-dispute process for disagreements arising under the declaration, bylaws, and other governing documents.

Despite periodic improvements, both tracks fail at the same critical point: from the perspective of homeowners, neither reliably produces a determinative outcome unless the homeowner assumes the prohibitive cost and risk of civil litigation**.** In theory the system provides alternatives; in practice it often delivers only delay, opacity, and the abandonment of legitimate concerns.

An authoritative State interpretation of commonly encountered rules and provisions in common-interest communities is needed — including recurring provisions in governing documents that routinely shape governance disputes yet lack an accessible, authoritative interpretive forum. Such interpretive clarity would be an enormous public service and would reduce disputes by addressing uncertainty at its source. The broader question of expanding the State's role in consumer protection, with the potential to meaningfully affect outcomes before disputes arise,

[1] *Kosor v. Olympia Co.*, 136 Nev. 834, 837 (2020) (quoting *Cohen v. Kite Hill Cmty. Ass'n*, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209, 214 (1983))
[2] See *Restatement (Third) of Property: Servitudes* § 6.8 cmt. a, at 155 (2000)

warrants careful examination and should be a core policy discussion — but is outside the scope of this paper.[3]

Administrative Enforcement (Section I)

The administrative process established by innovative lawmakers in 2003 made Nevada a leader in CIC regulatory oversight--the Nevada Real Estate Division (NRED) investigates alleged statutory violations and an independent Commission for Common-Interest Communities dedicated to CICs acts as a binding adjudicatory tribunal. Yet operational deficiencies—most visibly the lack of transparency experienced by owners—prevent the administrative track from functioning as intended. Opacity erodes confidence in the process and makes it impossible for the public or the Commission to evaluate whether statutory duties are being enforced evenhandedly.

Confidentiality magnifies the risks inherent in an administrative system that relies heavily on discretion. Some degree of discretion is indispensable. But discretion cannot serve as the primary operating mode of enforcement when its exercise is largely invisible.

The failures themselves are modest but consequential:

- No review mechanism exists for Division closures of complaints filed, leaving complainants without recourse and depriving the Commission and public of visibility into gatekeeping consistency.
- An overly expansive interpretation of NRS 116.757 (confidentiality).

They can be corrected through modest reforms:

- creation of an independent Review Officer (RO) to assess closure decisions upon request;
- clarification of permissible information-sharing under NRS 116.757;
- adoption of redacted closure summaries, improved reporting by the Division to include analysis not just data, and uniform procedural guidance.

Governance Disputes (Section II)

The governance-dispute track, under NRS 38.300–.360, was intended to provide an affordable alternative to litigation capable of producing a determination. It has never done so. The

[3] See Susan F. French, *Making Common Interest Communities Work: The Next Step* (2005). French observes that simply identifying all of the legal sources governing common-interest communities can be daunting, and that understanding and reconciling them can be even more difficult for laypersons. Governing documents are often lengthy and technical, and the addition of overlapping statutory requirements can further complicate interpretation. She suggests that states could provide an enormous public service by assembling this information in accessible form and by offering authoritative interpretations of provisions frequently encountered in governing documents. This type of state involvement has parallels in established consumer-protection frameworks, where states regulate and clarify the terms of standardized, non-negotiated arrangements, limit the unilateral expansion of authority absent meaningful approval, and thereby reduce confusion, prevent disputes, and protect individuals operating at an informational disadvantage. Such state involvement would reduce uncertainty, prevent disputes, and support the fair operation of community associations.

fundamental defect is structural: either party may unilaterally block, in effect veto, the ADR pathway capable of issuing a decision, forcing the dispute into mediation (which cannot decide the merits) and then into civil litigation.

Prevailing-party attorney-fee provisions, embedded in nearly all CC&Rs, magnify the risk even when a complainant (typically a homeowner) is simply attempting to enforce the protections the Legislature enacted or the obligations the developer imposed through the declaration without regulatory review. Associations defend litigation costs using assessment-funded counsel and business judgment protections[4], while individual homeowners face personal financial exposure for simply seeking clarity regarding their rights. Legislative testimony over decades consistently reflects the same reality: the merits of governance disputes remain unexamined not because owners lack valid concerns, but because the system makes neutral review financially inaccessible.

Mandating a nonbinding referee determination alters that dynamic. Even without formal preclusive effect, it introduces a credible, low-cost merits assessment into a space that has long lacked one. The very act of rejecting such a determination adds functional tension: it requires a dissatisfied party to proceed in the face of a competent contrary analysis, and in the case of an association, requires disclosure to members because the determination—unlike privileged legal advice—cannot be withheld under an advice-of-counsel rationale. If litigation follows, the board's decision also invites process-based judicial scrutiny. In this way, the referee's nonbinding status becomes a strength rather than a weakness—it preserves party autonomy while creating a practical accountability mechanism that has been missing from the governance-dispute track since its inception.

Core Reform

This paper proposes a single structural correction drawn directly from the model introduced in A.B. 34 (2013)[5]: If the Ombudsman cannot resolve the matter informally under NRS 116.765, and the parties do not mutually choose arbitration or civil litigation, the dispute defaults to the referee process. A referee conducts a very low-cost merits review and issues a written decision and award deemed nonbinding arbitration under NRS 38.300–.360. The reform preserves full

[4] *Associations defend litigation costs using assessment-funded counsel and business-judgment protections, a structural asymmetry long recognized in CIC scholarship. See* Restatement (Third) of Property: Servitudes *§ 6.13 & cmt. b (Am. L. Inst. 2000) (explaining that importing corporate-law deference into CIC governance can insulate boards from accountability even where decisions directly burden individual owners). *In governance-dispute litigation, these protections are implicated because an association can rely on assessments to finance defense costs while invoking the Business Judgment Rule to shield its underlying decision from judicial review. The combination magnifies the financial and doctrinal obstacles faced by homeowners and reinforces the cost-based coercion this paper seeks to address. The paper does not develop the full argument that the Business Judgment Rule is inappropriate for CICs, but notes its relevance to understanding present incentives and barriers.*

[5] Despite support from NRED, CIC Commissioners and homeowners. Assembly Bill 34 (2013) failed to pass out of committee and therefore died pursuant to legislative deadline. Strong opposition from industry stakeholders--especially HOA management companies, developers, and industry attorneys, to include the Real Property Section of the state bar.

access to the courts but removes the respondent's unilateral ability to block any determinative process.

This model:

- restores the *determinative* function the Legislature intended in 1995 and reaffirmed in 2013;
- prevents strategic "vetoes", delays, and cost-based coercion;
- ensures every governance dispute receives a neutral determination; and
- produces a written, neutral merits award that carries significant practical and fiduciary weight and is likely to deter unnecessary litigation,
- while post-award civil litigation remains available.

Legislative Imperative

Industry stakeholders are likely to frame the referee program much as they did in 2013 claiming it expands NRED jurisdiction, circumvent existing processes, add cost to associations, or constitutes impermissible intrusion on "private" contracts.[6] Those objections lack support in fact or in law.

The Nevada Supreme Court's 2025 decision in *Kosor v. SHCA* rendered the entire NRS 38 ADR requirement waivable- no longer "mandatory" and not jurisdictional. Unless the Legislature restores the mandatory character, any governance-dispute reform, including this referee-default model, remains vulnerable to waiver, gamesmanship, and judicial nullification.

Appendix A therefore includes necessary amendments to NRS 38.310–.330, and appendix B providing for implementation structure for the referee process as the default program.

[6] See testimony before Assmb. Committee Judiciary on several CIC bills (A.B 320, A.B 370 and A.B 397), 03/27/2013

Reforming Nevada CICs Dispute Resolution Systems

By Mike Kosor[7]

Introduction

Obligations of common-interest communities (CICs) ownership are established in the governing document, along with a foundational document — in Nevada, typically nonprofit articles of incorporation. The distinctive feature of a common-interest community is that ownership carries mandatory obligations to the support of common property, or other facilities, or the activities of an association, whether or not the owner used the common property or facilities, or agree to join the association.[8]

When disputes arise over those obligations, common-interest communities occupy an uneasy space between public governance and private corporate law. As Professor Susan French observed, "neither the law governing cities, nor the law governing corporations, is well suited to common interest communities."[9] The American Law Institute's *Restatement (Third) of Property: Servitudes* concludes that "legal proceedings to enforce compliance with [CIC] obligations should ordinarily be the last resort….public policy supports use of alternatives to judicial resolutions of common-interest community (CIC) disputes, and implying a power to use less drastic alternatives enables the association to carry out its functions and meets the probable expectations of the property owners."[10]

Nevada's common-interest community (CIC) dispute-resolution and regulatory-enforcement system is bifurcated. Alleged violations of NRS 116 fall within the jurisdiction of the Nevada Real Estate Division (NRED) and the Commission for Common-Interest Communities (Commission), while disputes arising exclusively from governing documents fall outside the authority of both bodies and must proceed through the civil courts. Despite these separate pathways—and notwithstanding the long-recognized tension over how to classify CICs, and the Nevada Supreme Court finding they operate in the "quasi-governmental "space [11]—neither track consistently delivers what homeowners identify as an important need: a low-cost, neutral determination of whether an association or owner has complied with governing obligations.

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[7] Founder, NVHOAReform Coalition. https://www.nvhoareform.com/ Kosor is not an attorney and as such nothing in this paper is intended to serve as legal advice.

[8] See *Restatement (Third) of Property: Servitudes* § 6.2 cmt. at 77 (2000)

[9] Susan F. French, *Making Common Interest Communities Work: The Next Step,* UCLA School of Law, pg 5.

[10] See *Restatement (Third) of Property: Servitudes* § 6.8 cmt. a, at 155 (2000)

[11] The Nevada Supreme Court confirmed that common-interest community associations exercise "delegated powers of governance" that are "public in character," placing them in a *quasi-governmental* posture when enforcing governing documents and imposing obligations on owners. *Kosor v. S. Highlands Cmty. Ass'n*, 140 Nev. Adv. Op. (2024) (recognizing that associations wield authority that is not purely contractual but derives from statute and functions in a manner analogous to governmental power). The Court emphasized that CICs do not operate solely as private contracting parties; they enforce obligations through statutory mechanisms that bind all owners as a condition of property ownership.

CIC purchasers are understandably surprised by the extent to which the freedoms they associate with homeownership have been curtailed.[12] At the same time, enforcement practices among CICs vary widely, waiver problems persist, and volunteer boards are often "guided" by advisors whose incentives are not always aligned with de-escalation. The result is predictable: disagreements that could be resolved informally instead escalate toward litigation. Outrage, defiance, inexperience, and other human factors then compound the problem, producing lawsuits that courts frequently view as petty or unnecessary.[13]

Ordinances must be enforced by local officials, while CC&Rs (covenants, conditions, and restrictions, the core governance documents) can be enforced by any property owner in the common interest community, as well as by the association. As Susan French, Reporter for the American Law Institute (ALI) *Restatement (Third) of Property: Servitudes*, has described: "t[T]he community association governance structure, which is based on the corporate model, lacks the checks and balances that typically constrain cities from abusing their residents. The corporate model theoretically protects owners from abusive boards and management companies by giving them power to elect and remove the board of directors. However, individual owners who lack the political clout to mount a recall or successful run for the board have little recourse against board misconduct. In most states, if persuasion and politics fail, the owner can only resort to the courts. Resort to the courts is not only cumbersome and costly, but it is also risky. Governing documents for common interest communities typically provide that in suits between an owner and the association, the loser pays the winner's attorney fees."[14]

Industry actors have repeatedly advanced a contract-centered model of CIC enforcement in which disputes are framed as private-law matters for judicial determination rather than issues for public regulatory oversight.[15] While lawmakers urged by owners seek alternatives capable of providing timely, proportionate, and affordable determinations.[16]

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[12] CC&Rs are quintessential adhesion documents. For the most part, courts do not undertake a substantive analysis of the desirability of individual community covenants. Purchasers do not negotiate their terms; they are imposed by the declarant and accepted on a take-it-or-leave-it basis as a condition of acquiring title. Courts acknowledge the "legal fiction" of owner consent: the owner is deemed to have agreed by purchasing property encumbered by the declaration, even though the terms are not read, cannot be modified, and are often not understood. See *Restatement (Third) of Property: Servitudes* § 6.13 cmt. a (2000) (noting that common-interest community servitudes are typically non-negotiable and imposed unilaterally by the developer); see also Susan F. French, *Making Common Interest Communities Work: The Next Step*, at 4–6 (2004) (describing CC&Rs as adhesion contracts that lack the procedural safeguards of public law); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 Colum. L. Rev. 773, 782–84 (2001) (explaining that the "contract" framing of servitudes obscures their adhesive nature and regulatory function).

[13] Id. at 238 (2000)

[14] Susan F. French, *Making Common Interest Communities Work: The Next Step*, UCLA School of Law Working Paper, at 5 (2004)

[15] Industry stakeholders have long framed common-interest community governance as a matter of private contract, with disputes over governing documents treated as issues for judicial enforcement rather than public regulatory adjudication. *See* Evan McKenzie, *Privatopia* (1994); Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 49 Real Prop. Tr. & Est. L.J. 63 (2014); Community Associations Institute, *Community Association Governing Documents* & *Public Policy Statements*.

[16] Legislative testimony across multiple sessions reflects sustained industry advocacy for a "civil-court-only" model grounded in corporate-contract principles, and equally sustained legislative pushback. Repeatedly expressed are

Nevada ultimately developed a dual-track system: administrative enforcement for statutory violations and an adapted alternative-dispute-resolution (ADR) structure as a precursor to civil litigation for CC&R-based disputes. For more than three decades, legislators have repeatedly expressed concerns with the effectiveness of this structure.[17]

This paper addresses reforms to both tracks. Section I analyzes the administrative-enforcement system created in 2003 and concludes that it is structurally sound but operationally incomplete, offering two targeted reforms to restore transparency and review. Section II addresses governance disputes and explains why the Legislature's longstanding goal—creating a reliable, lower-cost alternative to litigation capable of producing a determination—has not been achieved. The reform advanced corrects the structural defect that allows either party to avoid any determination of the merits and the chilling effect that prevents owners from obtaining interpretive clarity before litigation.

An authoritative State interpretation of commonly encountered rules and provisions in common-interest communities is needed — including recurring provisions in governing documents that routinely shape governance disputes yet lack an accessible, authoritative interpretive forum. Such interpretive clarity would be an enormous public service and would reduce disputes by addressing uncertainty at its source. [18] Opting of a CIC is not an option and declaration for a CIC function like a constitution for the community.[19] Changing covenant terms is cumbersome at best and impossible in some cases. Thus, there is a great need to have some initial control of the

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concerns traditional litigation was too costly, too slow, too inaccessible for most homeowners, and fundamentally ill-suited to the low-value, high-volume disputes typical of common-interest communities. See Hearing on A.B. 237 Before the Assembly Comm. on Judiciary, 69th Leg. (Nev. Mar. 19, 1997) (industry testimony urging that CIC disputes "belong in court" as private contractual matters); Hearing on S.B. 314 Before the S. Comm. on Judiciary, 71st Leg. (Nev. Feb. 18, 2001) (industry resistance to expanding administrative resolution mechanisms); Hearing on A.B. 370 Before the Assembly Comm. on Judiciary, 77th Leg. (Nev. Mar. 27, 2013) (industry witnesses cautioning that a referee determination could supplant the role of civil litigation in resolving declaration-based disputes); Hearing on A.B. 370 Before the Assembly Comm. on Judiciary, 77th Leg. (Nev. Mar. 27, 2013) (legislators and NRED officials emphasizing that civil litigation is "not workable" for most CIC disputes and that affordable determinative mechanisms were necessary); Hearing on S.B. 100 Before the S. Comm. on Judiciary, 72nd Leg. (Nev. May 1, 2003) (lawmakers noting that owners "cannot realistically litigate" most disputes and requiring a more accessible dispute-resolution structure).

[17] Hearing on S.B. 314 Before the S. Comm. on Judiciary, 69th Leg. (Nev. Feb. 18, 1997) (testimony describing that homeowners "cannot afford to sue," "avoid litigation even when they have legitimate complaints," and "do not have the resources to challenge their association").

[18] See Susan F. French, *Making Common Interest Communities Work: The Next Step* (2005). French observes that simply identifying all of the legal sources governing common-interest communities can be daunting, and that understanding and reconciling them can be even more difficult for laypersons. Governing documents are often lengthy and technical, and the addition of overlapping statutory requirements can further complicate interpretation. She suggests that states could provide an enormous public service by assembling this information in accessible form and by offering authoritative interpretations of provisions frequently encountered in governing documents. This type of state involvement has parallels in established consumer-protection frameworks, where states regulate and clarify the terms of standardized, non-negotiated arrangements, limit the unilateral expansion of authority absent meaningful approval, and thereby reduce confusion, prevent disputes, and protect individuals operating at an informational disadvantage. Such state involvement would reduce uncertainty, prevent disputes, and support the fair operation of community associations.

[19] *Restatement (Third) of Property: Servitudes* § 6.10 cmt. at 196 (Am. L. Inst. 2000)

legitimate subject matter for regulations of private community covenants. The broader question of expanding the State's role in consumer protection, with the potential to meaningfully affect outcomes before disputes arise, warrants careful examination and should be a core policy discussion — but is outside the scope of this paper.

SECTION I — Regulatory Enforcement

A. Origins and Development (1991–2003)

Nevada adopted the Uniform Common-Interest Ownership Act (UCIOA) in 1991, establishing for the first time a comprehensive statutory structure for common-interest communities in the state. The Act codified duties for associations, boards, and unit owners but created no enforcement mechanism.[20] Throughout the 1990s, disputes—whether based on statutory duties or governing documents—could be addressed only through the civil courts.

In 1995, the Legislature adopted Nevada's formal alternative dispute-resolution (ADR) structure for CIC governance issues. But this early framework offered no binding outcomes and allowed parties to proceed to civil court without obtaining a neutral determination of the underlying issues. The structural gaps persisted.

In 1997, the Legislature created the Office of the Ombudsman within the NRED, seeking to provide homeowners with education, assistance, and support in navigating disputes.[21] In 1999, lawmakers expanded the Ombudsman's authority to request records and maintain complaint and education databases.[22] Still, Nevada lacked the crucial components of effective regulatory oversight: investigative capacity and an adjudicatory forum outside civil litigation.

By 2000, the American Law Institute (ALI) had concluded that civil litigation was structurally mismatched to the nature of community-association disputes—too slow, too costly, and procedurally ill-fitted to the recurring, low-dollar, high-volume conflicts characteristic of CICs. "Using legal proceedings to enforce compliance with common-interest-community obligations should ordinarily be the last resort because of their expense and hostile character" [23] Nevada lawmakers heard similar testimony, emphasizing that homeowners faced disproportionate burdens when seeking to resolve even relatively minor disputes.[24]

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[20] See A.B. 221, 66th Leg. (Nev. 1991) (enacting Nevada's version of the Uniform Common-Interest Ownership Act)
21 See S.B. 347 197, 69th Leg. (Nev. 1997) Legislature significantly amended NS 116, often described as Nevada's "HOA Bill of Rights" and created the Office of the Ombudsman.
22 In 1999, the Legislature expanded the Ombudsman's authority to request records, maintain association databases, and seek subpoenas through the Commission. See S.B. 451, 70th Leg., ch. 541, §§ 13–16, 1999 Nev. Stat. 2703–07.
[23] *Restatement (Third) of Property: Servitudes* § 6.8 cmt. a, at 155 (Am. L. Inst. 2000)
[24] See Hearing on A.B. 237 Before the Assembly Comm. on Judiciary, 69th Leg. (Nev. Mar. 19, 1997) (testimony describing civil litigation as prohibitively expensive and inaccessible for ordinary homeowners); Hearing on S.B. 314 Before the Senate Comm. on Judiciary, 71st Leg. (Nev. May 10, 2001) (lawmakers expressing concern that homeowners were forced into costly litigation to resolve routine community-association disputes)

In 2003, the Legislature enacted Senate Bill 100, creating Nevada's modern administrative enforcement framework. SB 100 empowered NRED to investigate alleged violations of NRS 116 and associated regulations and established the Commission for Common-Interest Communities (Commission) as an independent adjudicatory body to hear and decide those matters. Senator Mike Schneider, the bill's sponsor, later summarized the Commission's design succinctly: "The purpose of the Commission is to give homeowners an expeditious and inexpensive forum for resolving disputes with CICs."[25] Homeowners repeatedly described court as too expensive, too slow, and intimidating while NRED officials stated that a system should provide timely, proportionate handling of conflicts at minimal cost.[26]

Legislation limited NRED and Commission enforcement jurisdiction to statutory duties—"not [to] intrude into internal governance matters except when necessary to prevent or remedy a statutory violation."[27] The administrative track thus emerged as the sole mechanism for enforcing statutory duties, absent actual damages,[28] explicitly separate from the civil-litigation pathway that continues to govern CC&R-based disputes today.

B. Current Administrative Process

A homeowner initiates the administrative process by submitting an Intervention Affidavit (Form 530) alleging a violation of NRS 116. The affidavit is filed with the Ombudsman, who conducts an initial review for jurisdiction, completeness, and procedural compliance and may attempt informal resolution with the parties. The Ombudsman then prepares a written report and transmits the matter to the Division for investigation.[29]

The Division then determines whether "*good cause exists*" to refer the case to the Commission.[30] If the Division declines to refer the matter, the case is closed. At that point:

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25 See Mike Schneider, Nevada's Commission for Common-Interest Communities, written testimony submitted to the California Assembly Committee on Housing and Community Development (Mar. 9, 2005)

[26] Nevada Legislature, Legislative Counsel Bureau, *Legislative History of Senate Bill 100 (2003)*, Research Division (Mar. 20, 2005).

27 *See* Testimony of Sen. Mike Schneider (Nev.), Presentation to the California Assembly Committee on Housing and Community Development on Common-Interest Development Reform (circa 2004–05)

[28] NRS 116 creates a private right of action only where a violation causes actual damages. The Act's general civil remedy provision, NRS 116.4117, authorizes an action for damages or injunctive relief only where the claimant can demonstrate actual damages or a threatened loss. Nevada courts have held that absent actual damages, owners and associations have no private right of action under NRS 116.4117. *Piazza v. Bd. of Dirs. of Spring Mountain Ranch Homeowners Ass'n*, 133 Nev. 44, 49, 388 P.3d 83, 87 (2017) ("NRS 116.4117 requires a showing of actual damages."). Other private rights of action in NRS 116 are similarly limited to specific statutory grants and do not extend to general governance disputes. SB 201 (2025) amended the statutory right to display qualifying religious items (NRS 116.325) and created a specific right of action, but because it did not displace NRS 116.4117's actual-damages requirement, enforcement is arguably restricted absent damages and therefore remains effectively confined to the administrative track.

[29] *See* NRS 116.760, NAC 116.150–.160, and Nevada Real Estate Division, *Form 530: Intervention Affidavit*.

[30] NRS 116.765(4). NRS 116 contains no definition of "good cause." The term, consistent with general administrative-law principles, implies a referral is warranted where the evidence submitted, if true, plausibly supports a material violation.

- the complainant has no right to appeal,
- there is no internal review mechanism, and
- the Division is required to provide only a categorical notice of closure.

Closure decisions occur within a confidentiality framework that significantly constrains transparency *(see Section I.C.2 for a full discussion)*. A complainant may submit a Reopening Request (Form 605), but only if new or additional facts are presented that were not available during the initial investigation.[31]

C. Administrative Reforms

The administrative system created in 2003 reflects the Legislature's core intent: statutory duties should be enforced in an accessible forum distinct from civil litigation, with the Commission providing binding, publicly accountable decisions. Structurally, the system is sound and includes an unusually valuable feature—rare among CIC regulatory models nationwide—employing an independent adjudicatory commission.[32]

Yet public trust in the system remains low. Because Nevada publishes no meaningful data capable of measuring homeowner satisfaction or any programmatic success metrics—such as how often disputes submitted for investigation culminate in a substantive determination rather than administrative closure—the assessment must necessarily be qualitative.[33] What does exist is years of homeowner testimony and the Commission's own minutes reflecting persistent concerns with the investigative and disposition process.[34] Importantly, because enforcement and any subsequent defense are carried out by the State, individual owners are not required to fund the action or an appeal, removing the resource disparity that typically deters private enforcement.

In design, this framework provides meaningful public enforcement. In practice, however, its effectiveness depends on how the Division implements it. The deficiencies are not structural but

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[31] *See* Nevada Real Estate Division, Form 605 — Request to Reopen Intervention Affidavit

[32] *See* Hearing on S.B. 100 Before the S. Comm. on Judiciary, 72d Leg. (Nev. Feb. 20, 2003) (statement of Sen. Mike Schneider) (explaining that SB 100 was drafted to provide an "expeditious and inexpensive forum" for resolving statutory disputes and to ensure that enforcement of NRS 116 obligations occurred outside the civil courts through an independent commission).

[33] Presentations consist primarily of raw totals-- a "data-dump" of allegation and disposition counts, without statute-level interpretation or context. Statute-level patterns are rarely identified. The Commission receives no clear determination as to which governance duties generate recurring violations, lack of public awareness or understanding of said, potential ambiguity, or importantly which statutes present elevated compliance risk.

[34] CICCH Commission Meeting Minutes (multiple years) (recording repeated homeowner complaints regarding transparency, inconsistent closure determinations, and the perceived opacity of NRED's investigative dispositions, as well as Commissioner statements expressing concern about cases being closed at the Division without reaching the Commission). See also Hearing on A.B. 361 Before the Assembly Comm. on Judiciary, 80th Leg. (Nev. Apr. 2, 2019) (homeowners describing the investigative process as opaque and lacking any mechanism for contesting closure decisions); Hearing on S.B. 69 Before the S. Comm. on Judiciary, 80th Leg. (Nev. Mar. 6, 2019) (testimony noting that "very few complaints ever make it to the Commission" and that closure letters provide insufficient explanation); and Hearing on A.B. 396 Before the Assembly Comm. on Judiciary, 81st Leg. (Nev. Apr. 5, 2021) (homeowners and advocates criticizing the administrative process as a barrier that prevents complainants from receiving meaningful adjudication).

operational: first, the absence of any mechanism to review Division closures prior to a hearing referral, including situations where complaints are closed through unreviewable enforcement discretion rather than a formal finding that no violation occurred; and second, an overly expansive interpretation of confidentiality. Together, these shortcomings undermine core administrative-law values: transparency, consistency, and the complainant's ability to understand how the Division reached a decision.

Confidentiality magnifies the risks inherent in an administrative system that relies heavily on discretion. Some degree of discretion is indispensable: the Ombudsman must be able to resolve straightforward matters informally, obtain corrective action without unnecessary escalation, and focus investigative resources where statutory attention is most warranted. But discretion cannot serve as the primary operating mode of enforcement when its exercise is largely invisible. When allegations are screened out, resolved internally, or marked as "found" without Commission adjudication—and when confidentiality prevents any meaningful public or institutional review—the system loses the very safeguards that legitimize discretionary enforcement. Without external visibility, it becomes impossible to determine whether discretion is being exercised equitably, consistently, or in a manner that deters repeat violations. The result is that patterns of governance failure remain hidden, homeowners perceive the process as opaque and unaccountable, and the Commission lacks the visibility and information it needs to carry out its statutory responsibility under NRS 116.665(2)(g) to identify areas of concern affecting owners, associations, managers, and developers. Limited discretion is necessary; unmonitored discretion is destabilizing.

Reforms are suggested below. They do not require expanding jurisdiction or materially amending NRS 116. Each proposal restores features the Legislature understood as essential when it created the administrative track in 2003.

1. Review Officer (RO): Independent Review of Division Closures

Nevada provides no mechanism to review the Division's discretion in closing complaints it has investigated that do not result in referral. When the Division determines there is no "good cause" to proceed, the matter ends. A complainant has no pathway for review, and the Commission and public have very limited information to evaluate whether the Division's gatekeeping function is being exercised consistently and appropriately.

Reporting on Intervention Affidavits closed without referral to the Commission is inadequate, and improved reporting alone will not materially enhance transparency or accountability. To restore the balance the Legislature intended in 2003, this paper proposes creation of an independent Review Officer (RO) to evaluate Division closure decisions upon written request. The RO would not alter jurisdiction or expand rights; it would introduce oversight into a gap the Legislature never affirmatively created and ensure closure decisions comport with the statutory purpose.

The RO would receive:

- a written statement from the complainant identifying alleged investigative deficiencies, and

- access to the case file.[35]

The RO would prepare a brief written recommendation[36], to the Commission to:

- affirm the closure,
- remand for further investigation, or
- refer the matter to hearing.

The Commission's counsel could serve in this role, but to avoid separation-of-functions concerns, the position should be located outside the Attorney General's Office. [37] Alternatively, the RO could be a contracted administrative-law professional funded through existing Ombudsman Fund resources and, if appropriate, cross-used in the referee capacity discussed in the following section. This reform increases transparency, introduces proportional oversight, and restores the accountability structure envisioned by SB 100—without expanding jurisdiction or altering substantive rights.

2. Confidentiality Reform

According to the Director of the Department of Business and Industry, the "Commission's role is adjudicative, focusing on addressing proven violations during hearings." That description, reflected in his February 2025 memorandum, substantially understates the Commission's statutory responsibilities. A straightforward reading of NRS 116.660–.680—and particularly NRS 116.615(2)—shows that the Commission's powers and duties are far broader than adjudicating the cases the Division chooses to prosecute. Lawmakers intended the Commission to serve a policy-oversight role on behalf of "persons affected by common-interest communities" (NRS 116.615(2)(g)), a mandate that necessarily encompasses systemic concerns, recurring issues raised by homeowners, and broader patterns within CIC governance.

To accomplish this statutory duty, the Commission must rely on the Division for administrative support and information. A major component of that information arises from the Division's investigations of Intervention Affidavits—alleged violations of the chapter, most often filed by unit owners. As noted earlier, these complaints, and the Division's handling of them, should be

[35] Disclosure to the Commission or its designated review officer is consistent with NRS 116.757(2), which permits disclosure "as necessary for the performance of the official duties of the Division or the Commission." Review of Division closures falls squarely within the Commission's supervisory and adjudicatory role under NRS 116.745(3) and NRS 116.750

[36] Although the RO would issue a written recommendation in each matter reviewed, nothing in this proposal requires the Commission to vote on individual closure decisions. Consistent with existing Commission practice, RO recommendations could be transmitted as periodic, collective reports, providing oversight without converting each closure into a docketed adjudication.

[37] Administrative-law doctrine seeks to separate investigative, prosecutorial, and adjudicative functions to preserve the independence and objectivity of agency decision-making. Under *Withrow v. Larkin*, 421 U.S. 35 (1975), combining investigative and prosecutorial responsibilities with adjudicative or advisory roles within a single agency—as occurs when the Attorney General's Office both prosecutes NRED cases and serves as counsel to the Commission—is not a per se due-process violation. However, the optics are poor: the arrangement creates an avoidable appearance that the adjudicator is being advised by the same institution advancing the charges. This concern can be wholly eliminated by structurally separating these roles, such as assigning Commission counsel to a different unit, contract attorney, and/or an independent Review Officer.

an essential source of insight to the Commission, not only for the exercise of its adjudicative responsibilities but also to inform its regulatory and rulemaking functions, as well as its broader understanding of how Nevada's common-interest community laws operate in practice and affect unit owners and other affected persons.[38]

Confidentiality itself is not the problem. The problem is the absence of an administrative-access exception in NRS 116.757 and the Division's interpretation of the statute as prohibiting disclosure to the Commission and complainants. Unless corrected, the Commission cannot fulfill its statutory responsibility to provide policy oversight and address issues of concern to the people affected by Nevada's common-interest communities. Limits on public disclosure of investigative materials are common across administrative agencies, and NRED is no exception. What is uncommon, and structurally problematic, is that NRS 116.757 contains *no administrative-access exception***.** Yet its sister body, the Real Estate Commission--also supported administratively by the Division--does operate under the typical exception: NRS 116A.270 expressly permits the Division to disclose investigative information "as necessary in the course of administering this chapter," including to other governmental agencies. By contrast, the CIC Commission is restricted from receiving the investigative information that informs its duty under NRS 116.615[39]

Because owner-filed Intervention Affidavits contain allegations implicating the operation of common-interest communities and the experiences of unit owners, the Division's handling of these matters should provide essential insight into the concerns of those affected by CIC governance. Yet under the current interpretation of NRS 116.757, the Commission appears to receive no access to investigative materials in cases that do not proceed to a formal complaint. The result is that the Commission is unable to evaluate systemic issues, recurring concerns, or whether statutory standards are being applied consistently and correctly—exactly the areas in which many Nevada homeowners express understandable frustration.

The February 2025 Director's memorandum compounds this limitation by characterizing the Commission's role as narrowly adjudicative and by implying that broader oversight functions rest with the Department's administration rather than with the Commission itself. That framing is inconsistent with the statute. NRS 116 assigns policy-oversight responsibilities—including responsibility to address "other issues" affecting unit owners, associations, and other stakeholders—to the Commission, not to the Director. Preventing the Commission from accessing investigative information necessary to discharge that duty undermines the structure the Legislature intended.

Confidentiality itself is not the problem. The problem is the absence of an administrative-access exception in NRS 116.757 and the Division's interpretation of the statute as prohibiting disclosure to the Commission and complainants.[40] Unless corrected, the Commission cannot

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[38] *See* NRS 116.615

[39] Suggested in Memo Director of Business and Industry Memorandum, February 11, 2025, subject The Role of the Commissioners -CICCH (cautioning Commissioners were not access confidential information compiled from investigations conducted by the Division absent a formal complaint filed.)

[40] Because the IA process requires the complainant to notify the respondent and attempt resolution before filing, the respondent necessarily knows the complainant's identity. Confidentiality interpreted as protecting anonymity

fulfill its statutory responsibility to provide policy oversight and address issues of concern to the people affected by Nevada's common-interest communities.

Nothing in NRS 116.757 prohibits the Division from sharing investigative information internally with the Commission or with an RO for the limited purpose of reviewing closure decisions. Nor does the statute bar the Division from providing complainants with a redacted explanation of:

- the investigative steps taken,
- the reasons a violation was not found, or
- deficiencies in the submitted allegations.

Similarly, the statute does not prevent the Division from issuing anonymized or categorical public information necessary to ensure consistent application of "good cause" standards across cases.[41] What the statute protects is the confidentiality of *investigatory materials*, not the opacity of *outcomes*.

The Commission should seek a formal opinion clarifying NRED's current limitations, and—working jointly with NRED—use its rulemaking authority to adopt regulations that establish:

(1) redacted closure summaries in all closed cases**,**
(2) limited internal access to investigative materials for Commission and RO review**,** and
(3) public procedural guidance promoting consistency and accountability.

These reforms do not expand jurisdiction or alter substantive rights. They correct an administrative interpretation that exceeds statutory text and restore the transparency necessary for the legitimacy of the administrative-enforcement system.

SECTION II — Governance Disputes

A. Origins and Development (1995–2013)

In 1995, four years after adopting the UCIOA framework for CICs, the Legislature enacted a statutory ADR framework within NRS 38, Nevada's law on mediation and arbitration, mandating[42] that CC&R-based disputes complete requiring mediation or a division-administered program before a party could file a civil action. The Legislature's goal in bringing ADR to CICs mirrored the concerns driving administrative reform efforts: civil litigation was too slow, too

between the parties therefore misunderstands the statutory design and obscures information without serving its intended purpose.

[41] Under the plain-meaning canon, statutory restrictions on "investigatory files" limit disclosure of the protected materials themselves, not anonymized or categorical summaries that do not reveal their contents. Confidentiality provisions in comparable regimes are routinely interpreted to bar disclosure of identifiable records, not anonymized or aggregate information. Law has historically treated de-identified data as outside core privacy prohibitions.

[42] NRS 38.320, see Section II.F. of this paper for recent issues related to the mandatory nature of ADR

costly, and too procedurally rigid for the small-scale disputes that dominate common-interest community life.

However, the 1995 ADR structure offered no neutral contract interpretation, no determination on the merits, and no binding outcome absent the mutual consent of the parties. Either participant in ADR can satisfy its mandatory requirement[43] merely by attending mediation or participating in a program format, then proceed directly to civil court.

By the early 2000s, national legal authorities recognized the structural mismatch between CIC disputes and traditional civil litigation. Susan F. French—Reporter for the American Law Institute's *Restatement (Third) of Property: Servitudes*—explains that "neither the law governing cities, nor the law governing corporations, is well suited to common interest communities," and that when politics fails, owners are left with only "cumbersome," "costly," and "risky" litigation under loser-pays provisions.[44] The ALI likewise observed litigation is inherently ill-suited as an enforcement mechanism in CICs.[45] Nevada lawmakers heard and echoed similar testimony.

In 2013, lawmakers considered a suite of CIC bills prompted by growing dissatisfaction with a dispute-resolution system that forced homeowners into the purely private realm—where the only path to a neutral determination of governing-document conflicts was costly arbitration or full civil litigation. [46] Supported by the Real Estate Division, commissioners of the CIC Commission, and numerous homeowners, the Legislature sought to expand access to lower-cost, publicly accountable processes by embedding a referee option directly into the Ombudsman's existing NRS 116.765 workflow. A Division appointed hearing offical qualified by training and experience in Nevada real property and CIC law would issue a written decision and award capped at $7,500 and could not award attorney's fees.[47] The bill expressly preserved the right of any party to commence a civil action following issuance of the award.[48]

The effort met immediate and coordinated resistance from industry stakeholders and the State Bar's Common-Interest Communities Subcommittee. [49] Opposition argued that CC&Rs were private contracts beyond the reach of any process coordinated through the Division. Opposition also asserted the proposal, if passed, "would expand the jurisdiction [of the Ombudsman] to include disputes involving the interpretation and enforcement or applicability of an association's

[43] See Sec II F for a discussion of the Courts reading of the "mandatory" nature of NRS 38 directed ADR

[44] Susan F. French, Making Common Interest Communities Work: The Next Step, UCLA School of Law Working Paper 5 (2004).

[45] See *Restatement (Third) of Property: Servitudes* § 6.8 cmt. a, at 155 (2000)

[46] Hearing on AB 320 before the Assembly Judiciary Subcomm,, 77th Leg. (Mar 27, 2013) lawmakers considered three bills encompassing alleged violations of NRS 116 and claims relating to CC&R such as arbitration, mediation hearings and hearing panels, the ombudsman, alternate dispute resolutions; AB 34, AB 320, AB 370, and AB 397. See March 27, 2103 AB 34 minutes, pg3.

[47] See A.B. 34 (2013), Sec. 5(3)(a)–(b)

[48] A.B. 34 did not create an administrative adjudication system. See section 5(4). In effect, A.B. 34 would have placed the referee option inside the existing ADR framework while allowing the Ombudsman to refer certain disputes into that process as part of the NRS 116.765 workflow.

[49] Id.

governing documents" constituting improper state intrusion into private agreements and that any shift away from arbitration risked overwhelming the Division with complaints.[50]

The hearing minutes reflect the depth of the structural divide: homeowners and commissioners described a process marked by cost, opacity, and lack of accountability, while industry lawyers insisted that the private ADR framework—and the insulation it provides from administrative oversight--must remain intact. The result was-- and remains today-- a governance-dispute track that does not deliver on the Legislature policy objective: a reliable, low-cost alternative to civil litigation capable of providing owners and associations with an authoritative determination of their respective rights and obligations.

B. Current Governance / ADR Process

Under that framework, three private dispute-resolution formats exist:

- a referee process (available only upon mutual agreement),
- nonbinding arbitration (also available only upon mutual agreement), and
- mediation (the required default when the parties do not agree to a determinative process).

Mediation can facilitate discussion but does not generate a ruling, and its value depends on good-faith participation--an element that cannot be guaranteed in adversarial or escalated CIC conflicts.[51] It produces no written interpretation of the governing documents, no findings, and no determination of whether the respondent's conduct complies with its CC&Rs or bylaws. It is confidential.

In practice, therefore, the only ADR formats capable of issuing a merits-based evaluation, referee review or arbitration, are available only if both parties agree. When a respondent declines either option, the dispute defaults to mediation, which produces no evaluation on the merits. As a result, the parties receive no authoritative assessment unless the matter proceeds to civil litigation.

C. The Core Problem Requiring Reform

The Legislature has repeatedly signaled that homeowners should have access to a neutral decision-maker on governance disputes. [52] Yet the current structure allows the threat and expense of litigation to chill the pursuit of any determination. The fundamental defect is structural: either party may unilaterally block--effectively veto--the ADR pathway capable of

[50] This argument is questionable and was absent any supporting data/study. The proposed language of A.B. 34 did not assign interpretive authority to the Ombudsman or authorize the Division to issue adjudicatory findings. Rather, the referee function remained a form of ADR neutral review, with courts retaining authority over any civil action or confirmation under NRS 38.239. See Hearing on A.B. 34, A.B. 320, and A.B. 370 Before the Assemb. Comm. on Judiciary, 77th Leg. (Nev. Apr. 2, 2013).

[51] In addition, mediators do not do findings of fact, and if findings of fact are required, it destroys the process.

[52] This expectation is reflected throughout the legislative history but appears only indirectly in the statutory text. Under NRS 38.320(1), a party must submit the dispute to mediation or to a "program." The latter, defined in NRS 38.300(5), is a process "under which a person … can render decisions on disputes." One pathway can yield a determinative evaluation; the other cannot.

issuing a decision, forcing the dispute into mediation (which cannot decide the merits) and then into civil litigation.

Prevailing-party attorney-fee provisions, embedded in nearly all CC&Rs, magnify the risk even when a complainant is simply attempting to enforce the protections the Legislature enacted or the obligations imposed through the declaration. Associations defend litigation using assessment-funded counsel and business judgment protections, while individual homeowners face personal exposure merely for seeking clarity regarding their rights. Legislative testimony over decades reflects the same reality: the merits of governance disputes often remain unexamined not because owners lack valid concerns, but because the system makes neutral review financially inaccessible.

What is missing from the governance-dispute track is any mechanism that assures a substantive, independent merits assessment early enough to influence the parties' behavior. When disagreement arises over the meaning of the governing documents, the only written analyses available to the parties typically come from their respective attorneys—analysis that is both adversarial and privileged, and therefore too often shielded from members and immune from process-based judicial scrutiny. Nothing in the existing ADR structure introduces a transparent, nonprivileged, expert evaluation of the disputed provision. This absence not only contributes to escalation into civil litigation but allows associations to rely exclusively on counsel's view without ever having to confront competent contrary analysis or disclose to members that viable alternatives exist.

D. ADR Program Reforms

This paper proposes implementing the effort of A.B. 34(2013) (applicable sections are shown in **Appendix B**).

1. Implementing Structure

Rather than forcing governance disputes through mediation (which cannot resolve them), the reform proposed here follows that contemplated by lawmakers in 2013.

- The claimant files an IA.
- The Ombudsman screens the matter.
- If unresolved, the Ombudsman administratively assigns the dispute:
    - Statutory issues move to Division investigation under NRS 116.745.
    - Governing document disputes move to the referee program for a merits review.

It is important to emphasize that the referee program itself is not new. The Legislature incorporated the referee format into Nevada's ADR statutes in 2013, establishing it as a Division administered process within NRS 38.300–.360. Nothing in this reform proposal alters the structure, authority, or limits of that program, including its nonbinding character, its $7,500 cap (or as adjusted to reflect inflation, etc. since 2013), or its inability to award attorney's fees. What A.B. 34 would have changed, and what this proposal now adopts, is not the referee program but the pathway into it: the Ombudsman would be permitted to direct governance-document disputes

into the already-existing referee process when the parties do not mutually agree on mediation or arbitration. Opposition in 2013 centered on this assignment authority—not on the referee program itself—which remains unchanged in this proposal.

2. Why The Referee Program Is the Appropriate Default

The referee program has several characteristics that uniquely position it as the mandatory fallback:

- Most importantly, it produces a written, reasoned evaluation of the governing-document dispute.
- It is faster and dramatically lower-cost than arbitration or district-court litigation.
- It avoids the constitutional issues because the referee award remains advisory and nonbinding unless a party seeks judicial confirmation.
- It reflects the Legislature's long-standing objective: ensuring that homeowners have access to a neutral merit determination of their governing documents without incurring prohibitive litigation costs.
- It minimally alters the existing ADR model.

3. No Expansion of State Power; No Constitutional Defect

This reform:

- Does **not** mandate binding adjudication or a final administrative order;
- Does **not** close the courthouse doors- any party may still process to district court;
- Does **not** expand the Ombudsman's jurisdiction over CC&R interpretation
- Does **not** prohibit a party from retaining legal counsel, it
- **Simply** restores a process allowing the Ombudsman to channel governing-document disputes into a structured, neutral evaluation process rather than leaving homeowners without a path to a merits review.

E. Big Gains From A "Nominal" Change

Although removing a respondent's ability to veto referee review appears modest, its impact is foundational. Under the current structure, a party can avoid any neutral evaluation simply by rejecting arbitration or referee review, thereby forcing the matter into mediation—which cannot resolve governing-document disputes—or into immediate civil litigation. This dynamic is not incidental; it creates a structural pressure point. It allows an association, or any similarly well-resourced respondent, to use cost, time, and prevailing-party fee exposure to chill access to any neutral early determination. Legislative testimony across multiple sessions—most vividly in 2013—reflects the same pattern: only a very small fraction of governance disputes ever reach court, not because the system resolves them early, but because the cost and risk of litigation deter homeowners from pursuing a ruling at all. The merits remain unexamined not because homeowners lack substantive concerns, but because the only available path to a ruling requires incurring litigation risks that far exceed the stakes of any individual dispute. The result is an

appearance of apathy that does not reflect disinterest or satisfaction, but a rational response to a system that makes clarity prohibitively risky to pursue. [53]

Industry opponents frequently argue that prevailing-party attorney-fee clauses serve as a necessary deterrent against frivolous litigation and that removing or softening fee exposure would unleash a wave of baseless claims. This concern often raised during legislative hearings misunderstands both the structure of CIC disputes and the incentives of the parties involved. It is correct that fee-shifting discourages litigation; indeed, this writer agrees. But the deterrent does not distinguish between frivolous claims and legitimate efforts to obtain clarity on governing-document obligations. In the HOA context—where parties often exist in radically unequal positions of knowledge, expertise, and financial capacity (a single homeowner versus an assessment-funded association), the risk of a fee award becomes not simply a deterrent but an absolute barrier to obtaining any neutral merits assessment.

Nor are CC&Rs the kind of freely negotiated contracts in which fee-shifting is traditionally justified. CC&Rs are adhesive instruments drafted by developers to serve the developer's interests during the build-out period; those interests often diverge from the governance needs of post-turnover associations and bear no resemblance to the justified expectations of ordinary purchasers.[54] Buyers rarely read these documents, cannot negotiate their terms, and yet are bound by them as servitudes enforceable against their property. To treat prevailing-party provisions in such instruments as if they reflected bargained-for risk allocation is a legal fiction that magnifies the chilling effect on owners seeking interpretive clarity.

To be clear, nothing in this reform eliminates fee recovery for genuinely frivolous actions. A party who knowingly or recklessly brings a meritless claim should remain subject to sanctions. But frivolousness requires knowledge--or a reasonable basis to conclude--that a claim lacks merit. The entire point of the referee-default reform is to make that determination low-cost, fast, and neutral**,** rather than financially ruinous. Neither the owner nor the association should be required to incur substantial attorney's fees simply to learn what the governing documents mean or whether a disputed action is permissible. A referee determination provides precisely the low-risk, low-cost filter the current system lacks aiding in distinguishing meritorious disputes from frivolous ones without forcing either party to gamble their financial security to obtain a ruling.

A reformed process culminating in a written referee determination changes the dynamic entirely. Even though the referee's decision remains formally nonbinding, it supplies what the system presently lacks: an impartial evaluation of the parties' rights and obligations. At that point, the

[53] ADR-outcome data from the 2013 period was not available. The Ombudsman's quarterly ADR reports provided to the Commission since 2019 show a consistent pattern: for every claim reported as "successful" or "settled," approximately twice as many are categorized as "unsuccessful." Fewer than five percent of reported ADR matters proceed through the referee program during this period. The reports do not identify the types of disputes involved or the reasons why claims do not resolve or move forward, leaving the low utilization of the referee program an important but unreported unknown. This persistent pattern is consistent with concerns expressed in 2013 legislative testimony regarding the difficulty homeowners face in obtaining a merits determination under the existing ADR structure, though the reports themselves do not reveal the causes.

[54] See fn #10

association's fiduciary duties—particularly the duties of good faith, loyalty, and reasoned decision-making—become operative in a manner they are not today.

Once a credible neutral has evaluated the issue and provided a well-supported interpretation, a party that elects to litigate against that assessment must still satisfy its obligation—if an association, its duty to consider that contrary information—before justifying to both its members and any reviewing court why further escalation is necessary despite the costs, risks, and availability of an expert independent opinion. The existence of a neutral determination does not formally bind the association, but it alters the fiduciary landscape in which the board must operate. A board choosing to disregard such a determination assumes a burden to demonstrate that its departure from the neutral's analysis reflects a reasoned and informed judgment, rather than a decision animated by predisposition, selective reliance on counsel, or an unwillingness to meaningfully engage with competent contrary analysis. In this posture, the board's process—not the ultimate correctness of its interpretation—becomes the focal point, particularly where litigation would impose substantial costs and extend conflict that could otherwise be resolved through accepted, low-cost neutral evaluation. The reform does not require courts to second-guess settled interpretations or abandon deference; it simply raises the bar for invoking the Business Judgment Rule[55] once a qualified neutral has clarified the dispute's merits.

In practice, this creates a powerful disciplining effect. The HOA—or any party dissatisfied with the determination—retains access to the courts but cannot invoke that access reflexively or strategically. The referee's decision thus becomes the functional pivot point: it resolves the dispute in most cases, aligns the association's incentives with its governing duties, and eliminates the ability to weaponize litigation cost as a means of avoiding a merits determination. This is why the "nominal" reform—the removal of the veto—is crucial. It does not alter the substantive legal rights of either party; it corrects the incentive structure that presently prevents ADR from functioning as the Legislature intended.

And perhaps not insignificantly, what this reform does constrain is not homeowners or associations, but the financial incentives of attorneys on both sides. When the pathway to interpretive clarity becomes inexpensive, fast, and neutral, the volume of protracted fee-generating litigation diminishes accordingly.[56]

In practice, this creates a powerful disciplining effect. The HOA—or any party dissatisfied with the determination—retains access to the courts but cannot invoke that access absent reflection.

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[55] The American Law Institute has concluded that the traditional corporate Business Judgment Rule is not well suited to community-association governance. See *Restatement (Third) of Property: Servitudes* §6.13 cmt. b (2000) (noting that corporate-law rules "do not translate well" to common-interest communities). In light of this, Nevada's statutory codification of the BJR for CICs, NRS 116.3103(1), warrants legislative re-examination.

[56] It bears noting that the existing structure—where the only path to a merits determination is civil litigation—creates substantial attorney-fee opportunities for lawyers on both sides of a dispute. This is not an accusation of misconduct, but a structural observation: when the default mechanism for resolving routine governance disagreements is full-scale litigation, counsel necessarily becomes the primary economic beneficiary of a system that otherwise leaves most homeowners unable to obtain clarity on their rights. A referee-default model materially reduces this dynamic by resolving the great majority of disputes before prevailing-party exposure attaches, thereby shrinking the volume of litigated cases and, with it, the fees that attorneys on both sides currently earn from the status quo.

The referee's decision thus becomes the functional pivot point: it resolves the dispute in most cases, aligns the association's incentives with its governing duties, and eliminates the ability, to weaponize litigation cost as a means of avoiding a merits determination. This is why the nominal reform--the removal of the veto--is crucial. It does not alter the substantive legal rights of either party, *but it corrects the incentive structure that presently prevents ADR from functioning as the Legislature intended*.

F. Legislative Fix to NRS 38.310 ("Mandatory" ADR is no longer mandatory)

As a result of the Nevada Supreme Court's 2025 ruling in *Kosor v. SHCA*, the entire CIC arbitration and mediation framework in NRS 38 is now waivable.[57] The Court found NRS 38.310 does not create a right of judicial review or hinge on finality.[58] It simply imposes a procedural prerequisite to certain civil lawsuits involving HOAs. The statute does not limit the court's jurisdiction over them. The Court held, without support, that treating the "mandatory" ADR requirement as jurisdictional would defeat the statute's purpose of encouraging early resolution. Its justification appears one strictly related to judicial efficiency.[59]

This vulnerability permitting a bypass of ADR must be addressed by the Legislature regardless of whether the broader reforms proposed in this paper are adopted. Unless corrected, *Kosor* allows the *mandatory* ADR system—long understood by lawmakers as a protective, non-waivable prerequisite --to be bypassed through inadvertence, unfamiliarity, or litigation strategy. That outcome directly contradicts the statute's purpose, supported by decades of legislative history**.** [60]

In practical terms, it also means that any future reform to Nevada's ADR structure will remain vulnerable to judicial recharacterization unless the Legislature states unequivocally that compliance is a jurisdictional requirement. The defect identified in *Kosor* was not constitutional but textual: the Court did not question the Legislature's authority to require mandatory ADR or to assign exclusive first-instance adjudicatory jurisdiction to the Division. The record indicates it

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[57] Kosor v. Southern Highlands Community Ass'n, 140 Nev. Adv. Op.34 (Jun. 18 2025), NSC case #87942. Applying the clear-statement rule, the Court concluded that NRS 38.310 is a claim-processing rule, not a jurisdictional requirement. Jurisdiction was not affected by the parties' failure to comply with the statute's ADR.

[58] See *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975) (concluding that there was no subject matter jurisdiction over claims of class members who had not participated in agency proceedings because "the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are 'final' and 'made after a hearing") (emphases added); *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989) (noting that "[c]ourts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review").

[59] Understandably, some judges and court systems are reluctant to accept mandatory dismissal rules that interfere with discretionary case management. Each branch of government depends on the others for critical functions—funding, appointments, or legal authority. This in turn motives officials to defend their prerogatives. Nonetheless, in the opinion of the author, the Court's ruling was a policy preference, not a legal justification. Courts are supposed to follow legislative directives, not reweigh them. Read more at NVHOAReform.com https://www.nvhoareform.com/post/nevada-supreme-court-ignores-the-law-on-hoa-disputes-legislature-overruled

[60] Hearings on AB 34 (2011), AB 192(215), AB 370(2013)

did not examine legislative history; it held only that the statute did not speak with the level of clarity the Court required for a jurisdiction-stripping provision**.**

Although the Court stated that "magic words" are not necessary to express jurisdictional intent, the decision in *Kosor* effectively adopted a strict clear-statement rule but failed to articulate any standard by which the Legislature might convey its intent in future enactments[61]. Mandatory phrasing--such as "no civil action may be commenced" and "the court shall dismiss"--is insufficient unless the statute explicitly states that ADR compliance is a condition of subject matter jurisdiction. In so doing, the Court has not merely overlooked legislative authority—it has actively displaced it.[62] In this interpretive environment, the safest and most effective means of ensuring that legislative intent is implemented—and not transformed through judicial construction is to use the term "jurisdictional" directly.

This is not a concession to judicial preference; it is a drafting necessity to restore and preserve the protective policy design the Legislature has repeatedly endorsed. A waivable ADR process fails to protect homeowners, allows strategic noncompliance, and places the burden of legal sophistication on those least likely to possess it. By contrast, a clearly jurisdictional ADR prerequisite guarded by the courts, ensures that governance disputes proceed through the proportionate, neutral process the Legislature intended. The statutory revisions presented in **Appendix A** reflect this imperative.

[61] A *claim-processing rule*, the Court explained as the nature of NRS 38, can be mandatory, meaning it must be enforced if timely and properly raised**,** but nonetheless nonjurisdictional because it can be ***forfeited or waived***. Because Kosor filed suit without insisting on the ADR requirement first being met, and the HOA failed to object, the parties waived the claims-processing rule-the Court found.

[62]Had the Legislature intended ADR under NRS 38.310 to be waivable under certain criteria, it would have said so—as it has in numerous other statutes. It did not. Courts begin with the statute's plain meaning, departing from it only when that meaning is clearly not intended; and when ambiguity exists, they turn to context and legislative history to discern legislative intent. These are longstanding interpretive principles. *Kosor*, however, did not engage with legislative intent and instead sidestepped the issue by relying on its own interpretive framework, effectively avoiding the statute's clear command.

Appendix A

Proposed Amendment to NRS 38

NRS 38.310 Limitations on commencement of certain civil actions.

1. **[No civil action]** A court of this State does not have jurisdiction over any 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]** that has not completed **[been submitted, to mediation or if the parties agree, or has been referred to]** mediation or a program established pursuant to NRS 38.325[30] 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.

2. The requirement of submission of a claim pursuant to subsection 1 is jurisdictional. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

NRS 38.320 (unchanged)

NRS 38.325 Program of dispute resolution: Authority of Division to establish; procedure for claim referred to program. [If the Division establishes a program:]

1. Upon receipt of a written claim and answer filed pursuant to NRS 38.320 **[in which all the parties indicate that they wish to have the claim referred to such a program,]** the Division **[may]** shall refer the parties to the program unless all parties, in writing, elect mediation or arbitration pursuant to NRS 38.330.

2. The person to whom the parties are referred pursuant to the program shall review the claim and answer filed pursuant to NRS 38.320 and, unless the parties agree to waive a hearing, conduct a hearing on the claim. After reviewing the claim and the answer and, if required, conducting a hearing on the claim, the person shall issue a written decision and award not to exceed $15,000 and provide a copy of the written decision and award to the parties. The person may not award to either party costs or attorney's fees.

3. Any party may, within 60 days after receiving the written decision and award pursuant to subsection 2, commence a civil action in the proper court concerning the claim. Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been referred to a program pursuant to the provisions of NRS 38.300 to 38.360,

inclusive. If such an action is not commenced within 60 days after receiving the written decision and award pursuant to subsection 2, any party may, within 1 year after receiving the written decision and award, apply to the proper court for a confirmation of the written decision and award pursuant to NRS 38.239.

NRS 38.330 Procedure for mediation or arbitration of claim; payment of costs and fees upon failure to obtain a more favorable award or judgment in court.

1. **[Unless a program has been established and the parties have elected to have the claim referred to a program,]** Parties upon written agreement to mediation of a civil action [the parties] shall select a mediator from the list of mediators maintained by the Division pursuant to NRS 38.340. ….

Bold Bracket [ ] yellow shading notes deleted text, Red is added text

Appendix B

Exact replica of the applicable sections presented in AB 34 (2013) DBR 10-354 see: *https://www.leg.state.nv.us/App/NELIS/REL/77th2013/Bill/586/Text*

Sec. X. 1. The Ombudsman may, to the extent that money is available in the Account for Common-Interest Communities and Condominium Hotels for that purpose, appoint a referee to render a decision on the merits of a claim filed with the Division pursuant to paragraph (a) of subsection 3 of NRS 116.765.

2. A referee appointed pursuant to subsection 1 must be qualified by training and experience in the laws of this State governing real property and common-interest communities.

3. A referee appointed pursuant to subsection 1 must review the claim and the answer filed pursuant to paragraph (a) of subsection 3 of NRS 116.765 and, unless the parties agree to waive a hearing, conduct a hearing on the claim. After reviewing the claim and the answer and, if required, conducting a hearing on the claim, the referee shall issue a written decision and award and provide a copy of the written decision and award to the parties and to the Ombudsman. The referee may not award to either party:

(a) Damages in an amount which exceeds $7,500.

(b) Attorney's fees.

4. For the purposes of NRS38.300 to 38.360, inclusive, a written decision and award of a referee appointed pursuant to this section is deemed to be the decision and award in a claim submitted to nonbinding arbitration. Any party may, within 30 days after receiving the written decision and award of the referee, commence a civil action in the proper court concerning the claim which was referred to the referee. Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint were referred to a referee pursuant to this section and NRS 116.765. If such an action is not commenced within that period, any party may, within 1 year after receiving the written decision and award, apply to the proper court for a confirmation of the written decision and award pursuant to NRS 38.239.

5. Any statute of limitations applicable to a claim referred to a referee pursuant to this section and NRS 116.765 is tolled from the time the affidavit setting forth the facts constituting the claim

was filed with the Division pursuant to NRS 116.760 until the issuance of the written decision and award by the referee.

6. The Administrator may adopt such regulations as are necessary to carry out the provisions of this section.

Sec. XX. NRS 116.765 is hereby amended to read as follows: 116.765 Upon receipt of an affidavit that complies with the provisions of NRS 116.760, the Division shall refer the affidavit to the Ombudsman.

2. The Ombudsman shall give such guidance to the parties as the Ombudsman deems necessary to assist the parties to resolve the alleged violation [.] or breach.

3. If the parties are unable to resolve the alleged violation or breach with the assistance of the Ombudsman, the Ombudsman [shall]:

(a) May refer the parties to a referee appointed pursuant to section 5 of this act. The aggrieved person who filed the affidavit must file with the Ombudsman a written claim which includes the information requested by the Ombudsman and the fee prescribed pursuant to subsection 2 of NRS 38.320. The claimant must serve a copy of the claim in accordance with subsection 3 of NRS 38.320 and the person upon whom a copy of the claim is served must comply with subsection 4 of NRS 38.320. All fees collected by the Ombudsman pursuant to the provisions of this paragraph must be accounted for separately and may only be used by the Division to administer the provisions of NRS 38.300 to 38.360, inclusive, and section 5 of this act.

(b) Shall, for an alleged violation, provide to the Division a report concerning the alleged violation and any information collected by the Ombudsman during his or her efforts to assist the parties to resolve the alleged violation.

FEES CHARGED BY ATTORNEYS REPRESENTING HOA BOARDS IN ARBITRATION CASES IN FY 2010

Above information obtained from Nevada Real Estate Records published on their website.

CASE NO.	AMOUNT	CASE NO.	AMOUNT
06-80	$ 8,832.46	09-09	$ 12,099.78
09-85	13,673.50	09-25	6,414.50
09-27	12,023.50	09-91	17,220.89
09-99	2,438.46	09-112	1,453.00
08-110	5,934.94	08-128	6,660.21
09-06	12,386.84	09-07	17,336.32
09-47	NONE SHOWN	09-65	6,140.24
09-87	10,215.00	09-106	NOT SHOWN
10-09	NONE SHOWN	09-119	9,649.00
09-107	2,416.00	09-87	1,051.24
09-106	NONE SHOWN	09-113	20,000.00
09-110	17,325.48	10-06	NONE SHOWN
10-07	NONE SHOWN	10-08	NONE SHOWN
10-20	2, 859.76	10-40	10,967.06
10-25	2,752.08	09-72	10,000.00
09-117	NONE SHOWN	10-31	2,364.30
10-51	9,480.73	10-30	2,031.70
10-41	3,249.55	10-35	891.14
10-37	819.21	10-38	751.48
10-39	789.64	10-50	7,238.43
09-54	5,767.00	10-53	3,301.35
10-58	7,828.00		

The above figures do not include the Arbitrators fees.

Submitted by Jonathan Friedrich
February 2011