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August 3, 2006

Via Facsimile
736-0679

Patricia Taylor
c/o Sunset Greens Homeowners Association
Taylor Association Management
259 North Pecos Road, Suite 100
Las Vegas, NV 89074

Re: Use of Reserve Funds for Replacement of Sod

Dear Ms. Taylor:

This letter is written to acknowledge receipt of your facsimile transmission of July 18, 2006, on behalf of the Sunset Greens Homeowners Association (the "Association"). It is my understanding that the Board of Directors for the Association has requested a written legal opinion regarding the use of reserve funds for replacement of sod in the community.

It is my understanding that the Association's landscaper recently discovered that the grass in the backyards of many, if not most, of the units was inundated with "grub infestation." It has been explained to me that if the "grub infestation" is not removed, then it will spread and eventually destroy the sod. An issue has now been raised regarding whether the Association was authorized to use reserve funds to replace the sod due to the grub infestation.

Please be advised that in preparing this opinion, I have reviewed the Second Amended and Restated Declaration of Covenants, Conditions and Restrictions for Sunset Greens (the "Declaration") and relevant provisions of the Nevada Revised Statutes, Chapter 116 ("NRS 116").

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Article I, Sections 1.29 and 1.30 define Single Family Attached Residences and Single Family Detached residences, respectively. Single Family Attached Residences are defined to mean "a single family residence constructed on a Lot, which residence shares an Internal Party Wall with another immediately adjoining Single Family Attached Residence." This distinction is very important with respect to maintenance responsibilities.

Article II, Section 2.8.1 of the Declaration reads, in pertinent part, as follows:

> Pursuant to Article V of this Declaration, the Association is required and authorized to maintain, as Common Elements, the landscaping of each Lot upon which a Single Family Attached Residence is situate. An Easement over and across each Lot upon which a Single Family Attached Residence is located, is hereby created and granted in favor of the Association for the purpose of entering such Lots at reasonable working hours and to perform such landscape maintenance functions. See landscape contract

Similarly, Article III, Section 3.16.1 of the Declaration reads, as follows:

> Each Lot upon which a Single Family Attached Residence is situated will be provided with front, side and rear yard landscaping by Declarant, and such landscaping shall be maintained by the Association.

Based on the foregoing, one may reasonably conclude that the Association is responsible for maintaining the landscaping on each Lot upon which a Single Family Attached Residence is situated. The Declaration grants to the Association an easement across, on and over each Lot for the purpose of performing the landscape maintenance functions.

In a recent letter addressed to the Board, Scott Ellestad and Doug Bruneau alleged that the Association inappropriately used reserve fund money for non-common elements (sod for backyards.) However, this conclusion does not appear to be consistent with the express language of the Declaration. As noted above, Section 2.8.1 of the Declaration provides that "the Association is required and authorized to maintain, as Common Elements, the landscaping of each Lot upon which a Single Family Attached Residence is situated. Furthermore, Article I, Section 1.8 of the Declaration defines "Common Area" or "Common Elements" to include the "Association's rights in and to the "Landscape Easements" as granted pursuant to the terms and provisions of Section 2.8 below.

One can understand why Mr. Ellestad and Mr. Bruneau reached their conclusion. NRS 116.017 defines common elements in a planned community as "any real estate within the planned community owned or leased by the Association, other than a unit." The rear yards are neither owned nor leased by the Association. Thus, by simply referring to NRS 116 one may reach the conclusion asserted by Mr. Ellestad and Mr. Bruneau. However, if you read the Declaration and NRS 116 in harmony with one another, clearly the Association has an obligation

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to maintain the rear yards on the Lots upon which Single Family Attached Residences are located. NRS 116 does not shift that responsibility to the membership, regardless how the land is characterized.

Having concluded that the rear yard landscaping is the maintenance responsibility of the Association and that this portion of the Community has been defined as Common Area in the Declaration, it naturally follows that the Association has the right to retain services to maintain the rear yards. *See* Article V, Section 5.1.5 and Section 5.2.4 of the Declaration.

The final issue is the source of the funds used necessary to replace the sod. NRS 116.3115(2)(b) reads, in pertinent part, as follows:

> Except for assessments under subsections 4 to 7, inclusive:
>
> . . .
>
> (b) the association shall establish adequate reserves, funded on a reasonable basis, for the repair, replacement and restoration of the major components of the common elements. The reserves may be used only for those purposes, including, without limitation, repairing, replacing and restoring roofs, roads and sidewalks and must not be used for dally maintenance.

As you can see, this provisions mandates that reserve funds only be used for the repair, replacement and restoration of "the major components of the common elements." Since the Declaration provides that the back yards are part of the Common Elements, an inquiry must be made as to whether the back yards can be considered "major components" of the common elements.

Fortunately, the term "major component of the common elements" was defined by the 2005 Nevada legislature, as follows:

> "Major component of the common elements" means any component of the common elements, including without limitation, any amenity, improvement, furnishing, fixture, finish, system or equipment, that may, within 30 years after its original installation, require repair, replacement or restoration in excess of routine annual maintenance which is included in the annual operating budget of an association."

In the case at hand, the landscaping is clearly an improvement in the Common Elements. *See* Declaration, Article I, Section 1.8 and Section 1.18. While mowing, watering, fertilizing and edging the sod may be "routine annual maintenance", replacing large sections of the sodded areas due to grub infestation would not be a routine, annual maintenance expense. Certainly an

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expense of that nature has not and would not be countenanced as part of the annual operating budget.

Accordingly, one may reasonably conclude that the sodded areas within the Association are a major component of the common elements, with respect to the replacement of the sodded areas due to grub infestation. As a result, it is this office's opinion that, in the absence of further legislation or court decisions to the contrary, the Board of Directors was authorized to utilize reserve funds to replace the sod in the back yards of the Single Family Attached Residences.

In summary:

1. The Association has a duty to maintain the front, side and rear yards of all Single Family Attached Residences. *See* Declaration, Article III, Section 3.16.1.

2. The front, side and rear yards of the Single Family Attached Residences are defined in the Declaration to be part of the Common Elements. *See*, Declaration, Article I, Section 1.8.

3. The Association is authorized to enter the lots on which the Single Family Attached Residences are situated for the purpose of maintaining the landscaping. *See* Declaration, Article II, Section 2.8.1.

4. The Association is empowered to hire contractors to provide services to maintain the Association's landscaping obligations. *See* Declaration, Article V, Sections 5.1.5 and 5.2.4.

5. Replacing the sod in the rear yards of the Single Family Attached Residences, due to grub infestation, is not "routine annual maintenance".

6. The front, side and rear yard portions of the Single Family Attached Residences may be characterized as a major component of the common elements. NRS 116.017.

Based on the foregoing, the Board of Directors was authorized to use reserve funds for replacement of the sod in the back yards.

I hope this adequately addresses the issue presently confronting the Board of Directors. However, if you have any additional questions or comments or need further clarification on this issue, please do not hesitate to contact me.

Very truly yours,

SANTORO, DRIGGS, WALCH,
KEARNEY, JOHNSON & THOMPSON

John E. Leach, Esq.

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August 14, 2006

Senator Warren Hardy
5070 Arville Street, #4
Las Vegas, NV 89118-4904

Dear Senator Hardy:

You have asked this office several questions pertaining to common-interest communities. First, you have asked whether an association may use its reserves to replace sod in the back yards of certain homeowners. Second, you have asked whether a provision contained in the governing documents of a common-interest community that conflicts with a provision contained in the Nevada Revised Statutes supersedes the conflicting statutory provision. Finally, you have asked whether, in a matter submitted to arbitration pursuant to NRS 38.310, the decision of the arbitrator concerning the interpretation of a statutory provision constitutes binding precedent with respect to any subsequent judicial or administrative proceeding.

1. May an association use its reserves to replace sod in the back yards of certain homeowners?

Your first question concerns the use of reserves to replace sod in the back yards of certain homeowners. Based on the information provided to this office, we understand that the governing documents of the common-interest community at issue specifically provide that the back yards are not owned by the association and are not common elements.

Paragraph (b) of subsection 2 of NRS 116.3115, which sets forth the permissible use of reserves, states:

> The association shall establish adequate reserves, funded on a reasonable basis, for the repair, replacement and restoration of the major components of the common elements. The reserves may be used only for those purposes, including, without limitation, repairing, replacing and restoring roofs, roads and sidewalks, and must not be used for daily maintenance.

In construing paragraph (b) of subsection 2 of NRS 116.3115, we are guided by the well-settled rule of statutory interpretation that the words in a statute "should be given their plain meaning

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unless this violates the spirit of the act." State, Dep't of Ins. v. Humana Health Ins., 112 Nev. 356, 360 (1996) (quoting McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986)).

The plain language of paragraph (b) of subsection 2 of NRS 116.3115 states that the reserves may be used only for the repair, replacement and restoration of the major components of the common elements. Because the back yards at issue are not common elements, the plain language of paragraph (b) of subsection 2 of NRS 116.3115 prohibits the use of reserves to replace sod in the back yards. For this reason, it is the opinion of this office that an association may not use its reserves to replace sod in the back yards of certain homeowners.

2. Does a provision contained in the governing documents of a common-interest community that conflicts with a provision contained in the Nevada Revised Statutes supersede the conflicting statutory provision?

You have also asked whether a provision contained in the governing documents of a common-interest community that conflicts with a provision contained in the Nevada Revised Statutes supersedes the conflicting statutory provision. To answer this question, we will consider fundamental principles of law concerning common-interest communities and review the language of several provisions of chapter 116 of NRS.

It is a fundamental principle of law that the governing documents of a common-interest community constitute a contract between the homeowners in the common-interest community and the homeowners' association. See, Divizio v. Kewin Enters., 666 P.2d 1085 (Ariz. Ct. App. 1983); Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 84 P.3d. 295, 302 (Wash. Ct. App. 2004). It is also a fundamental principle of law that, as a general rule, "a contract which violates or contravenes a federal or state constitution, statute, or regulation is illegal, invalid, unenforceable, and void." Laura Dietz et al., 17A Am. Jur. 2d Contracts § 229 (2006). Consequently, if a provision in the governing documents of a common-interest community conflicts with a statutory provision, that provision of the governing documents is superseded by the statutory provision and is therefore illegal, invalid, unenforceable and void. For this reason, it is the opinion of this office that a provision contained in the governing documents of a common-interest community which conflicts with a provision contained in the Nevada Revised Statutes does not supersede the conflicting statutory provision.

This conclusion is further supported by a review of the language of NRS 116.1203, which implicitly recognizes the superseding authority of NRS when a conflict arises between a provision contained in the governing documents of a common-interest community and a statutory provision. Subsection 1 of NRS 116.1203 states:

> 1. Any provision contained in a declaration, bylaw or other governing document of a common-interest community that violates the provisions of this chapter shall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.

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Thus, the plain language of subsection 1 of NRS 116.1203 implicitly recognizes that when a conflict arises between a provision contained in the governing documents of a common-interest community and a statutory provision, the statutory provision controls, and the nonconforming provision in the governing documents is automatically deemed to conform with the controlling provisions of NRS, without the necessity of an actual amendment to the governing documents.

Furthermore, the superseding authority of NRS is also evidenced by the fact that, in enacting the provisions contained in chapter 116 of NRS, the Legislature has, when deemed appropriate, specifically allowed certain provisions in the governing documents of a common-interest community to be valid and enforceable and to override a generally applicable statutory provision which would otherwise supersede that provision of the governing documents. For example, NRS 116.3109 states that "[u]nless the governing documents specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast 50 percent of the votes on that board are present at the beginning of the meeting." Thus, when the Legislature has intended to allow the governing documents of a common-interest community to take precedence over an otherwise applicable statutory provision, the Legislature has enacted statutory language that specifically authorizes the provision in the governing documents to take effect. If such specific authorization is not included in the text of a statute, then the statutory provision necessarily supersedes any conflicting provision in the governing documents, and pursuant to subsection 1 of NRS 116.1203, that provision in the governing documents is deemed to conform to the statutory scheme by operation of law.

Finally, we would also note that occasionally the argument is offered that a statutory provision which conflicts with a provision of the governing documents of a common-interest community constitutes a violation of the Contract Clause of the Nevada Constitution and the Contract Clause of the United States Constitution, which prohibit the state from passing any law that impairs the obligation of contracts. See U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15. However, such an argument would very likely be found unpersuasive by a court in Nevada, as the statutory provisions governing common-interest communities contained in chapter 116 of NRS would very likely withstand a constitutional challenge based upon the Contract Clause.

While the literal language of the Contract Clause appears to prohibit a state from passing any law that impairs the obligation of contracts, the decisions of the U.S. Supreme Court make clear that, notwithstanding the provisions of the Contract Clause, a state has broad authority to legislate for the benefit and protection of the public even when such legislation substantially impairs contract rights. As explained by the Court, "[t]he Contract Clause does not deprive the States of their broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result." Exxon Corp. v. Eagerton, 103 S. Ct. 2296, 2305 (1983) (internal quotations omitted). Thus, the Contract Clause does not prevent a state from enacting legislation that substantially impairs contract rights if the legislation is both reasonable and necessary to achieve an important public purpose. United

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States Trust Co. v. New Jersey, 97 S. Ct. 1505, 1517-19 (1977); In re Seltzer, 104 F.3d 234, 236 (9th Cir. 1996).

The enactment of chapter 116 of NRS is clearly reasonable and necessary to serve the important public purpose of regulating common-interest communities in Nevada. Consequently, even if a particular statutory provision in chapter 116 of NRS were to be found to impair contract rights substantially, the enactment of that provision would still not constitute a violation of the Contract Clause, as the legislation enacting that provision is reasonable and necessary to serve the important public purpose of regulating common-interest communities in Nevada.

3. In a matter submitted to arbitration pursuant to NRS 38.310, does the decision of the arbitrator concerning the interpretation of a statutory provision constitute binding precedent with respect to any subsequent judicial or administrative proceeding?

Finally, you have asked whether, in a matter submitted to arbitration pursuant to NRS 38.310, the decision of the arbitrator concerning the interpretation of a statutory provision constitutes binding precedent with respect to any subsequent judicial or administrative proceeding. To answer this question, we will consider fundamental principles of law concerning judicial authority in Nevada and arbitration proceedings.

It is a fundamental principle of law that the highest court in a state is the final arbiter with respect to the interpretation and application of the laws and constitution of that state. See Knapp v. Cardwell, 667 F.2d 1253, 1260 (9th Cir. 1982), *cert. denied*, 459 U.S. 1055 (1982); People v. Cahill, 853 P.2d 1037, 1083 (Cal. 1993). Indeed, federal courts are even entitled to give no deference to conflicting decisions by state courts of the same level in the absence of an authoritative ruling by the state's highest court. See generally Lori Monroe, 32 Am. Jur. 2d Federal Courts § 466 (2006).

In Nevada, the Nevada Supreme Court is the final arbiter with respect to the interpretation of NRS and the only body that can establish binding precedent regarding the interpretation of NRS. The construction of a statute is a question of law that the Nevada Supreme Court reviews *de novo*. See State v. Kopp, 118 Nev. 199, 202-203 (2002), citing Gallagher v. City of Las Vegas, 114 Nev. 595, 599 (1998). Accordingly, the decision of a district judge concerning the interpretation of NRS is not binding precedent with respect to another district judge in Nevada. Likewise, the decision of an arbitrator in an arbitration proceeding concerning the interpretation of a statutory provision does not constitute binding precedent in any subsequent judicial or administrative proceeding, and an award made within the scope of an arbitration proceeding is only binding upon the parties to the proceeding on the matters determined. See James Brearton et al., 4 Am. Jur. 2d Alternative Dispute Resolution § 216 (2006); see also Southern Cal. Pipe Trades Dist. Council No. 16 v. Merritt, 126 Cal.App. 3d 530, 536 (Cal. Dist. Ct. App. 1981) ("[A]n arbitration award against one party is not binding upon another person who was not party to the arbitration.").

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Based upon the fundamental principles of law set forth above concerning judicial authority in Nevada and arbitration proceedings, it is the opinion of this office that, in a matter submitted to arbitration pursuant to NRS 38.310, the decision of the arbitrator concerning the interpretation of a statutory provision does not constitute binding precedent with respect to any subsequent judicial or administrative proceeding.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

Brenda J. Erdoes
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