

Ombudsman Affidavit Case Number IS-07-1399

Below is a synopsis of events that have taken us to the dilemma we have now.

October 4, 2006: Notification from Ombudsman office that they received our Intervention Affidavit package.

November 13, 2006: Notification from Ms Lindsay Waite (Ombudsman) that her office received our Ombudsman Intervention Affidavit package and scheduled a meeting between the two parties.

December 19, 2006: Ms Waite conducted a meeting between us (Doug Bruneau/Scott Ellestad) and representatives from the Sunset Greens HOA (Patti Adams, President, and Pat Taylor, Property Manager). Allegations in the affidavit were not resolved.

December 22, 2006: Notification from Ms Waite that she was forwarding our case to the Ombudsman Compliance Section.

February 22, 2007: Notification from Mr. David F. Garrick (Compliance Investigator) that he was investigating the allegations in our affidavit.

April 25, 2007: Notification from Mr. Garrick that he was sending a recommendation to Mr. Bruce Alitt (Chief Investigator) that our case be sent to an Administrative Law Judge.

June 22, 2007: Notification from Mr. Alitt that good cause exists to forward our case to an Administrative Law Judge.

June 19, 2007: Notification from Ms Terilyn Thompson (Commission Coordinator) that our case had been assigned to an Administrative Law Judge, Mr. Persi Mishel.

July 2, 2007: Notification from Mr. Mishel that he had been assigned as the Administrative Law Judge to hear our case. He requested dates and times that we would be available for a telephonic pre-hearing conference.

July 9, 2007: Notification from Mr. Mishel that the telephonic pre-hearing conference was set for July 19, 2007 at 4:30 p.m.

July 19, 2007: Mr. Mishel initiated the telephonic pre-hearing conference between us and Mr. John Leach, counsel for the Sunset Greens HOA. Mr. Leach adamantly objected to our case being assigned to an Administrative Law Judge, citing rules, regulations, and laws that had not been followed by the Ombudsman Office. Mr. Mishel put our case in abeyance until further notice.

July 21, 2007: Notification from Mr. Mishel that our case was in abeyance until further notice.

August 22, 2007: Our legal representative, Mr. Michael F. Lynch requested documentation from Mr. Mishel regarding the status of our affidavit package.

August 27, 2007: Mr. Lynch received written notification from Mr. Mishel that the Real Estate Division had instructed him not to perform any further work on our case until further notice.

September 25, 2007: Mr. Lynch requested the status of our case from Mrs. Gail J. Anderson (Administrator, Department of Business and Industry). He also requested advice about when we could expect our case to continue with an Administrative Law Judge hearing. He has not received a reply to his request as of this date. To this date, we have not received any information about our case.

The lack of information about our case is becoming very frustrating. We have not heard anything about our case since July 21, 2007 when it was put in abeyance. We have followed every rule and regulation asked by the Ombudsman system. We were making adequate progress through the necessary steps to resolve our case until we got to the last step—the Administrative Law Judge hearing.

Fourteen months after we initially filed our affidavit with the Ombudsman office we can't even get a response to our legal counsel's request for information or the status of our case.

September 25, 2007

Gail J. Anderson, Administrator  
Department of Business and Industry  
Real Estate Division  
2501 E. Sahara Avenue, Suite 102  
Las Vegas, NV 89104

**Re: Office of the Ombudsman Division Case No. IS-07-1399**

Dear Ms. Anderson:

As you may be aware, my clients, the Ellestads and the Bruneaus, first approached the Ombudsman's office by filing an intervention affidavit with a series of comprehensive and cogent exhibits a year ago tomorrow. At that time, my clients had already secured an opinion letter from the Nevada Legislative Counsel Bureau, which directly addresses the core issue raised by my clients – whether an association may use its reserves to replace sod in the back yards of certain homeowners. According to the Nevada Legislative Counsel, in direct response to the issues raised by the Ellestads and Bruneaus, issued the following opinion:

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 backyards of certain homeowners.

*See Letter from State of Nevada Legislative Counsel Bureau dated August 14, 2006, a true and correct copy of which is attached hereto (emphasis in original).*

My clients have diligently and patiently coaxed this dispute through the various processes and prerequisites required and suggested by the Division in their continuing effort to resolve this matter. The current status of this dispute appears to have been stalled, however, by the lack of a formal complaint. *See e.g., letter from Persi Mishel, the Administrative Law Judge assigned to this matter, dated August 27, 2007, a true and correct copy of which is attached hereto.* Pursuant to NRS 116.765(5), it appears the Division must now file a formal complaint under the circumstances.

For ease of reference:

**If, after investigating the alleged violation, the Division determines that the allegations in the affidavit are not frivolous, false or fraudulent and that good cause exists to proceed with a hearing on the alleged violation, the Administrator shall file a formal complaint with the Commission and schedule a hearing on the complaint before the Commission or a hearing panel.**

(emphasis added). We respectfully submit that the Ellestads and the Bruneaus have done everything that they have been asked to do (and more) during this lengthy process that has been costly to them on multiple levels. They have also provided a mountain of competent evidence that demonstrates good cause exists to file a formal complaint with the Commission. My clients are undeniably entitled to be heard on this matter, and we request your assistance in ensuring their statutory rights are protected.

If you require any additional information from us in order to fully evaluate the issues raised herein, please do not hesitate to contact me directly. Thank you in advance for your prompt response.

Best regards,

Michael Lynch

Cc: Ms. Lindsay Waite, Ombudsman  
Persi Mishel, Esq., Administrative Law Judge  
Teralyn Thompson, Commission Coordinator  
John E. Leach, Esq.

Hi Mike,

Sorry, but we don't agree with the opinion that the Ombudsman's process is totally closed to us at this time. Mr. Mishel based his letter to us on what his superiors at the Real Estate Division/Ombudsman's office are telling him.

We agree in part with John Leach that the Division/Commission needs to file a formal complaint in accordance with NRS 116.765. Therefore, we drafted a letter to the Division that's attached. If you feel uncomfortable sending this letter please let us know.

Scott and Barb

Lynch, Michael wrote:

Dear Scott and Barb:

Attached is a letter from John Leach for your review and records.

It is my opinion that, based upon the administrative judge's latest letter, that the administrative hearing avenue is now foreclosed. Our options at this point would be to drop the issue, or proceed to mediation. I am happy to discuss in more detail at your convenience.

Best regards,  
Michael

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**Subject:** Letter from John Leach  
**From:** "Lynch, Michael" <MLynch@lrlaw.com>  
**Date:** Mon, 10 Sep 2007 15:51:43 -0700  
**To:** <barb@bjellestad.com>

Dear Scott and Barb:

Attached is a letter from John Leach for your review and records.

It is my opinion that, based upon the administrative judge's latest letter, that the administrative hearing avenue is now foreclosed. Our options at this point would be to drop the issue, or proceed to mediation. I am happy to discuss in more detail at your convenience.

Best regards,  
Michael

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**LEACH JOHNSON SONG & GRUCHOW**

Attorneys at Law

5495 South Rainbow Boulevard, Suite 202  
Las Vegas, Nevada 89118

**John E. Leach**  
jleach@leachjohnson.com

Telephone: (702) 538-9074  
Facsimile: (702) 538-9113

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August 31, 2007

**VIA FACSIMILE 233-2092**

Persi J. Mishel, Esq.  
Administrative Law Judge  
2340 Flower Spring Street  
Las Vegas, Nevada 89134

**Re: Sunset Greens Homeowners Association, et al. adv. Ellestad/Bruneau  
NRED Case No.: IS-07-1399**

Dear Mr. Mishel:

As you are aware, this office serves as legal counsel for the Sunset Greens Homeowners Association (the "Respondent") in the above-referenced matter. The Respondents understand that you have been appointed as the Administrative Law Judge ("ALJ") in the above-referenced matter. Respondent is in receipt of the August 22, 2007 letter issued by Michael F. Lynch. In his correspondence, Mr. Lynch indicates that his firm has been retained to represent the Ellestads and the Bruneaus in the above-referenced matter.

It is evident from Mr. Lynch's letter that he does not understand the role or jurisdiction of the ALJ. Mr. Lynch "emphatically" suggests that your office has some duty to file a formal complaint. Even a cursory review of the applicable statutes indicates that the Administrator has the duty to file the formal complaint with the Commission. See NRS 116.765(5). The ALJ serves as the hearing panel under the auspices of the Commission.

Please be advised that it is the Respondent's position that this matter must be dismissed as the Commission for Common-Interest Communities ("Commission") and the ALJ, the Commission's appointed hearing panel, do not have jurisdiction in this matter. On July 30, 2007, this office issued a detailed letter to the Commission and Nancy Savage, Deputy Attorney General, outlining the shortcomings in the process including, but not limited to, the Commission's/Nevada Real Estate Division's ("Division") failure to comply with the procedures set forth in Nevada Revised Statutes ("NRS") 116. I have attached a copy of the letter and the exhibits delivered to the Division and the Attorney General. As of this date, a response has not been received. However, by way of summary, the Respondents request that this matter be dismissed for all of the following reasons:

Persi Mishel, Esq.

August 31, 2007

Page 2

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1. The Division did not file a complaint that complies with statutory protocols. See NRS 116.765(5) ("*the Administrator shall file a formal complaint with the Commission*") (emphasis added);
2. This matter does not involve or the "complaint" does not reference an alleged violation of any provision of NRS Chapter 116, any regulation adopted pursuant to NRS Chapter 116, or any order of the Commission or hearing panel. See NRS 116.745. Based purely on the purported "complaint", this matter may pertain only to governing document interpretation and/or enforcement issues governed by the Division's Alternative Dispute Resolution ("ADR") process. See NRS 38.300 to 38.600;
3. The purported "complaint" fails to state a cause of action for which relief may be granted since it does not identify a violation defined by NRS 116.745;
4. The purported complaint fails to include a necessary and indispensable party; namely, the Real Estate Administrator and the Division must be the named Plaintiffs. See NRS 116.765(5);
5. Private citizens do not have a private right of action to prosecute an alleged violation of this nature before the Commission. See NRS 116.660 to 116.680, 116.745 to 116.790 and NAC 116.550 to 116.595 (as supplemented by LCG R142-06). These statutes provide a public right of action that may be prosecuted only by the government, through the Division. See NRS 116.765(5). Thus, Sona Aprahamian cannot be the purported plaintiff and cannot prosecute this action;

Please be advised that, in the past month, the undersigned has participated in or been noticed of three (3) other pre-hearing conferences with ALJ's Brian Holthus, Craig Hoppe and Janet Trost. In each case, the respondents requested that the case be dismissed or, in the alternative, that the pre-hearing conference be postponed until the Division and Attorney General have had an opportunity to respond to the enclosed letter. In both instances, the ALJs agreed to postpone the pre-hearing conference and the scheduling of a hearing until a response had been received. It is believed that it would be an incredible waste of time and money, both on the part of the Respondents and the tax payers, should these proceedings be compelled to go forward and subsequently determine that there is no jurisdiction.

In addition, Mr. Lynch has requested certain documents to be produced from Taylor Association Management, the Respondents' community management firm. This request is purportedly based on NRS 116.31175. However, the letter issued by Mr. Lynch is not directed to the Respondent as required by the statute. It is unclear how Mr. Lynch concludes that a letter to an ALJ is the equivalent of a request to the Respondent. Notwithstanding the foregoing, please be advised that until the Administrator has filed a formal complaint with the Commission, the documentation regarding the investigation in this matter is confidential. See NRS



Persi Mishel, Esq.  
August 31, 2007  
Page 3

116.757(1). Thus, the Respondent will not be providing any documents in response to this request.

In addition, Mr. Lynch requests the financial documents, bills and/or invoices between the Respondent and its legal counsel as pertaining to this Ombudsman Intervention Affidavit case. Please be advised that this office has already litigated this issue in courts of competent jurisdiction in this State. The Respondent is more than happy to provide redacted copies of the invoices. However, neither Mr. Lynch nor his clients is entitled to the entries on the invoices to the extent that the invoices contain attorney-client communication.

In summary, neither Mr. Lynch nor his clients have standing to prosecute this case before the Commission or an ALJ. Furthermore, the Division has failed to file a formal complaint with the Commission and, therefore, the ALJ does not have proper jurisdiction of this matter. Thus, the matter must be dismissed until such time as a formal complaint has been filed.

Your time and attention to this matter are very much appreciated. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



John E. Leach, Esq. *JEL*

JEL:mc

cc: Board of Directors  
Patricia Taylor-McLeod  
Michael F. Lynch, Esq.

Sunset Greens/ElIstead(IS-07-1399)/Mishel082807

**PERSI J. MISHEL**  
**Attorney at Law**

**2340 Flower Spring St.**  
**Las Vegas, NV 89134**

**Phone: (702) 255-7029**  
**Fax: (702) 233-2092**

August 27, 2007

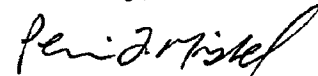
Michael F. Lynch, Esq.  
Beckley Singleton, Chtd.  
530 Las Vegas Blvd. South  
Las Vegas, Nevada 8101-6516

Re: Division Case No. IS-07-1399

Dear Mr. Lynch:

This letter is in response to your letter of August 22, 2007. The Real Estate Division has instructed me not do perform any further work on this case until further notice. Therefore, I cannot take the actions that you have requested in your letter. Be assured that if I receive instructions that I do have jurisdiction, I will promptly address your requests and concerns.

Sincerely,



Persi J. Mishel, Esq.  
Administrative Law Judge

cc: John E. Leach, Esq.  
Teralyn Thompson, Commission Coordinator

DANIEL F. POLSENBERG  
JAMES L. EDWARDS  
IKE LAWRENCE EPSTEIN  
DAN R. WAITE  
DAVID C. MCELHINNEY  
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BRIDGET ROBB PECK

**BECKLEY  
SINGLETON**  
ATTORNEYS AT LAW CHTD

530 LAS VEGAS BOULEVARD SOUTH  
LAS VEGAS, NEVADA 89101  
(702) 385-3373 ■ FAX (702) 385-9447  
WWW.BECKLEYLAW.COM

JILL GARCIA  
ANNE M. LORADITCH  
SCOTT S. HOFFMANN  
JOEL D. HENRIOD  
HEIDI PARRY STERN  
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JAMES E. HARPER  
DANIEL S. IVIE  
CHRIS STANGE\*  
KARA B. HENDRICKS  
MICHAEL F. LYNCH  
\*ADMITTED IN CONNECTICUT, NEW JERSEY,  
NEW YORK AND WASHINGTON DC

**OF COUNSEL**  
BRUCE A. LESLIE, CHTD  
DAVID W. WASICK  
SCOTT W. DOYLE

August 22, 2007

**VIA FACSIMILE**

Mr. Perci Mishel, Esq.  
Administrative Law Judge  
2340 Flower Spring St.  
Las Vegas, NV 89134  
Facsimile: (702) 233-2092

**Re: Division Case No. IS-07-1399  
Ellestad / Bruneau Grievance as to Sunset Greens HOA**

Dear Mr. Mishel:

Please accept this letter as notification that my office will be representing the Ellestads and the Bruneaus in connection with this matter. In conjunction with this appearance, we have some questions and concerns that we would ask you to address at your earliest convenience.

As you will recall, on July 19, 2007, we attempted to have a telephonic pre-hearing conference regarding the Ombudsman Affidavit Division Case No. IS-07-1399 between you, Mr. Leach's office, counsel for Sunset Greens Homeowners' Association, (Respondents) and me, counsel for Mr. Doug Bruneau and Mr. Scott Ellestad, (Complainants). During the call, Mr. Leach raised objections to the use of an Administrative Law Judge to hear the instant dispute. In response to Mr. Leach's objections, you ruled that this process would be held in abeyance for three weeks so that you or the Ombudsman's office could confirm your ability to holding the hearing and enter findings in this matter. You later indicated in your letter July 21, 2007, that the case is being held in abeyance until further notice.

Please also note that should the Ombudsman's office determine it does not have jurisdiction to hear this matter absent a formal complaint in accordance with NRS 116.765, that we would emphatically suggest that a formal complaint by your office is

called for under the circumstances. This matter was first formally brought to the attention of the board as early as September 2006, when my clients submitted a formal complaint to the board of directors. Later, the Ombudsman office's investigator, Mr. Alitt, requested information regarding my clients' case in March 2007. This case has therefore been pending in the Ombudsman's office for over one year, and it would be unfairly prejudicial to make my clients start over at this point.

During the July 19 telephone conference, Mr. Leach spoke of a letter he had sent to Nancy Savage objecting to the Ombudsman use of Administrative Law Judges. We request a copy of that letter be forwarded to this office so we may fully understand Mr. Leach's objections.

As a secondary issue, my clients have made several requests for documents from the property manager, Taylor Management, in accordance with NRS 116.31175, specifically:

- a. Documents associated with the Ombudsman investigator, Mr. Alitt, as outlined in his letter to Mr. Garrick dated April 25, 2007.
- b. Financial documents, bills, and/or invoices between Sunset Greens HOA and its legal counsel as pertains to this Ombudsman affidavit case.

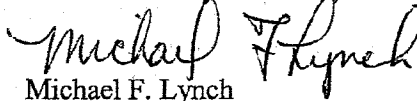
To date we have not received the above-referenced documents as requested. We believe these documents pertain to the successful resolution of this case and request you provide us an avenue with which we can receive these documents. We also request any and all documents between the Sunset Greens HOA Board of Directors, the property management company, and Mr. Leach pertaining to this case.

We respectfully request you continue to pursue a resolution to my client's affidavit. We also request that your office pursue Mr. Leach's objections to the Ombudsman process in and of itself separately from my client's case.

Thank you in advance for your prompt response.

Sincerely,

BECKLEY SINGLETON, CHTD.

  
Michael F. Lynch

cc: John E. Leach, Esq. (via facsimile to (702) 538-9113)

\*\*\*\*\*  
\*\*\* MULTI TX/RX REPORT \*\*\*  
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**BECKLEY SINGLETON CHTD.**

530 Las Vegas Blvd. South  
Las Vegas, Nevada 89101  
(702) 385-3373  
Fax: (702) 385-9447

To: Mr. Perci Mishel, Esq (233-2092)

Cc: John E. Leach, Esq. (538-9113)      Date: August 23, 2007

Fax #:      Pages: 2 including this cover sheet.

From: Michael Lynch

Subject: Division Case No. IS-07-1399  
Our Client 10902.001

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Correspondence dated August 23, 2007, attached for your review. Hard copy will **not** follow by regular mail. If you have any questions or concerns, please contact Michael Lynch at 385-3373.

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
\*\*\*\*\*

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FAX TRANSMISSION

**BECKLEY SINGLETON CHTD.**

530 Las Vegas Blvd. South  
Las Vegas, Nevada 89101  
(702) 385-3373  
Fax: (702) 385-9447

To: Mr. Perci Mishel, Esq (233-2092)

Cc: John E. Leach, Esq. (538-9113)      Date: August 23, 2007

Fax #:      Pages: 2 including this cover sheet.

From: Michael Lynch

Subject: Division Case No. IS-07-1399  
Our Client 10902.001

Correspondence dated August 23, 2007, attached for your review. Hard copy will not follow by regular mail. If you have any questions or concerns, please contact Michael Lynch at 385-3373.

**PERSI J. MISHEL**  
**Attorney at Law**

**2340 Flower Spring St.**  
**Las Vegas, NV 89134**

**Phone: (702) 255-7029**  
**Fax: (702) 233-2092**

July 21, 2007

Michael F. Lynch, Esq.  
Beckley Singleton, Chtd.  
530 Las Vegas Blvd. South  
Las Vegas, Nevada 8101-6516

John E. Leach, Esq.  
Leach Johnson Song & Gruchow  
5495 South Rainbow Blvd., Suite 202  
Las Vegas, Nevada 89118

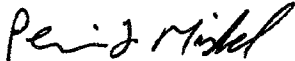
Re: Division Case No. IS-07-1399

Dear Mr. Lynch and Mr. Leach:

I have decided to hold this case in abeyance until further notice. Therefore, I will not be scheduling any further Telephonic Pre-hearing Conference at this time.

Please note that correct case number is IS-07-1399.

Sincerely,

  
Persi J. Mishel, Esq.  
Administrative Law Judge

cc: Teralyn Thompson, Commission Coordinator

**PERSI J. MISHEL**  
**Attorney at Law**

**2340 Flower Spring St.**  
**Las Vegas, NV 89134**

**Phone: (702) 255-7029**  
**Fax: (702) 233-2092**

**Date:** July 9, 2007

→ **To:** Scott Ellestad

**Fax No:** (240) 248-4314

**To:** Sean L. Anderson, Esq.

**Fax No:** (702) 538-9113

**To:** Teralyn Thompson  
Commission Coordinator

**Fax No:** (702) 486-4520

**From:** Persi J. Mishel, Esq. Administrative Law Judge.

**Total Pages (including cover sheet):** 1

**Re:** Division Case No. IS-07-1424

Dear Complainants and Respondents:

Please be advised that I have scheduled a Telephonic Pre-hearing Conference (PHC) **for July 19, 2007, at 4:30 p.m.** I will initiate the call. The purpose of this PHC is to ascertain the number of witnesses that will be testifying at the hearing; the scope of their testimony, whether the issues can be narrowed, and procedure for the hearing, and etc. Please have your calendars before you at the PHC because I will be scheduling the hearing as well. After the PHC, I will be sending you a Notice of Hearing, which will contain the date, time, place of the hearing, and a two-page information sheet titled: "General Information Regarding Hearing Procedure before the Administrative Law Judge for the Commission for Common-interest Communities."

Thank you.

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**PERSI J. MISHEL**  
**Attorney at Law**

**2340 Flower Spring St.**  
**Las Vegas, NV 89134**

**Phone: (702) 255-7029**  
**Fax: (702) 233-2092**

July 2, 2007

Scott Ellestad  
1431 Pinehurst Dr.  
Mesquite, Nevada 89027

Sunset Greens Homeowners Association  
1426 Pinehurst Dr.  
Mesquite, Nevada 89027

Re: Division Case No. IS-07-1424

Dear Complainants and Respondents:

Please notify me by July 10, 2007, of all the dates listed below on which you are available for a 15-minute block of time for a **Telephonic Pre-hearing Conference** by faxing or mailing this sheet back to me with your notations. I am available on the following dates:

July 12:	12:00 p.m. <u>  X  </u>	4:30 p.m. <u>  /  </u>
July 13:	12:00 p.m. <u>      </u>	4:30 p.m. <u>  X  </u>
July 16:	12:00 p.m. <u>      </u>	4:30 p.m. <u>      </u>
July 17:	12:00 p.m. <u>  X  </u>	4:30 p.m. <u>  X  </u>
July 18:	12:00 p.m. <u>      </u>	4:30 p.m. <u>      </u>
July 19:	12:00 p.m. <u>      </u>	4:30 p.m. <u>  X  </u>
July 20:	12:00 p.m. <u>      </u>	4:30 p.m. <u>  X  </u>
July 23:	12:00 p.m. <u>      </u>	4:30 p.m. <u>      </u>
July 24:	12:00 p.m. <u>      </u>	4:30 p.m. <u>      </u>
July 25:	12:00 p.m. <u>      </u>	4:30 p.m. <u>      </u>

I realize that there are several Complainants and Respondents in this case. I am able to do a conference call with only two other lines; therefore, I am requesting you provide me the telephone number of one party from the Complainants and one from the Respondents.

*Please use this  
phone number  
SCOTT ELLESTAD  
702-346-6432*

Sincerely,

*Persi Mishel*  
Persi J. Mishel, Esq.  
Administrative Law Judge

cc: Teralyn Thompson, Commission Coordinator

Scott A. Ellestad  
1431 Pinehurst Drive  
Mesquite, NV 89027

July 13, 2007

Douglas Bruneau  
1430 Pinehurst Drive  
Mesquite, NV 89027

Pershi J. Mishel, Esq.  
Attorney at Law  
2340 Flower Spring St.  
Las Vegas, NV 89134

RE: Administrative Law Judge  
Case No. IS-07-1424

Dear Mr. Mishel,

We received a letter from Mr. Bruce D. Alitt, Chief Investigator, Compliance/Audit, Office of the Ombudsman, dated June 22, 2007, (Attachment 1) regarding the above case in which he informed us that our case was being sent to a hearing before an Administrative Law Judge.

Attached to his letter was a second letter, dated April 25, 2007, from Investigator David F. Garrick to him, listing seven exhibits created in conjunction with this case. In the list of exhibits we noticed four exhibits of which we have no previous knowledge: Exhibit 4-Respondent Request for Information, Exhibit 5-Respondent Request for Information (Different Address), Exhibit 6-Respondent Response for Request for Information, and Exhibit 7-Respondent Response for Request for Information. Mr. Garrick indicated the Division had received the Respondent's Reply on March 30, 2007 (Exhibit 6 & 7). (Attachment 1)

We requested copies of these exhibits from Taylor Management, our HOA management company and were denied. Under NRS 116.757.2 we believe the documents are public records and as such we should have access to them.

We don't feel that we can adequately prepare for the upcoming hearing before you without these documents. Since the documents are part of the case file sent to you, the Administrative Law Judge, we therefore request a copy of the four exhibits from your office.

We would also like to obtain copies of the records created by Lindsay Waite, the Ombudsman, Mr. Garrick, and Mr. Alitt, investigators, in conjunction with this case.

We appreciate your time and assistance in this matter.

Sincerely,

*Signed*

Scott A. Ellestad

*Signed*

Douglas Bruneau

1 Attachment:

Letter from Bruce D. Alitt, dated  
June 22, 2007 w/ attachment

**Commission for Common-Interest Communities**

**ADMINISTRATIVE LAW JUDGE  
CASE ASSIGNMENT LETTER**

Date: **6/29/07**

Complaining Party: **Scott A. Ellestad & Douglas Bruneau**

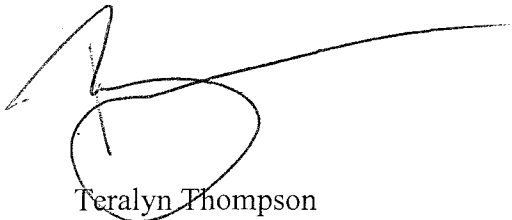
Responding Party: **Sunset Greens Homeowners Association: Arlis Swartzendruber, Patti Adams, Anna Schaffer, Bill O'Connell**

Re: Case No. **IS-07-1424**

Dear Mr. Ellestad, Mr. Bruneau and Sunset Greens Homeowners Association:

Your case has been assigned to Persi Mishel, the Administrative Law Judge who has been appointed by the Commission for Common-Interest Communities to hear your case. The Administrative Law Judge will contact you regarding scheduling of this case.

Sincerely,



Teralyn Thompson  
Commission Coordinator

cc: ALJ

**Certificate of Service**

I certify that on the 29th day of June, 2007 I deposited a copy of the foregoing:

**Administrative Law Judge Case Assignment Letter**

in the United States Mail, postage pre-paid, in Las Vegas, Nevada, through the State of Nevada mailroom, by first class mail addressed to the following respondents at their last known address as follows:

Sunset Greens Homeowners Association      **Certified No. 7004 1350 0002 8150 7285**  
1426 Pinehurst Dr.  
Mesquite, Nevada 89027

Arlis Swartzendruber      **Certified No. 7004 1350 0002 8150 7278**  
1228 Quicksilver  
Mesquite, Nevada 89027

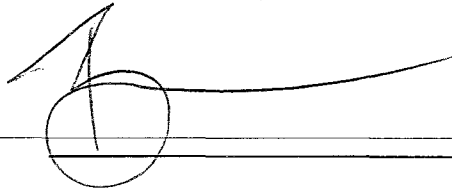
Patti Adams      **Certified No. 7004 1350 0002 8150 7209**  
1426 Pinehurst Dr.  
Mesquite, Nevada 89027

Anna Schaffer      **Certified No. 7004 1350 0002 8150 7216**  
1387 Sea Pines  
Mesquite, Nevada 89027

Bill O'Connell      **Certified No. 7004 1350 0002 8150 7223**  
1422 Sea Pines  
Mesquite, Nevada 89027

Scott Ellestad      **Certified No. 7004 1350 0002 8150 7254**  
1431 Pinehurst Dr.  
Mesquite, Nevada 89027

Douglas Bruneau      **Certified No. 7004 1350 0002 8150 7261**  
1430 Pinehurst Dr.  
Mesquite, Nevada 89027



**Teralyn Thompson, Commission Coordinator**

JIM GIBBONS  
*Governor*

STATE OF NEVADA

GAIL J. ANDERSON  
*Administrator*

MENDY K. ELLIOTT  
*Director*



LINDSAY WAITE  
*Ombudsman*

**DEPARTMENT OF BUSINESS AND INDUSTRY  
REAL ESTATE DIVISION  
OFFICE OF THE OMBUDSMAN**

2501 E. Sahara Avenue, Suite 202  
Las Vegas, Nevada 89104  
(702) 486-4480 • Fax (702) 486-4520  
Statewide Toll Free 1-877-829-9907  
CICOmbudsman@red.state.nv.us  
[www.red.state.nv.us](http://www.red.state.nv.us)

JUNE 22, 2007

**CERTIFIED MAIL#: 70051160000505226242  
RETURN RECEIPT REQUESTED**

**SCOTT A. ELLESTAD  
1431 PINEHURST DRIVE  
MESQUITE NEVADA 89027**

Re: **Notice of Intended Action**  
DIVISION CASE No. IS- 07-1399

Dear **SCOTT A. ELLESTAD,**

The Division has completed an investigation and determined that good cause exists for the above case to proceed to hearing, based on the following alleged matter(s) which are delineated in the enclosed Complaint.

The hearing, on the alleged matter(s), will take place before an ADMINISTRATIVE LAW JUDGE appointed by the COMMISSION FOR COMMON INTEREST COMMUNITIES pursuant to the provisions of NRS Chapter 116.

The ADMINISTRATIVE LAW JUDGE will hold the hearing, take sworn testimony, and render a **DECISION** concerning the disputed issues in this case. You will have an opportunity to present your evidence concerning the above referenced alleged matter(s) through witnesses and/or documents.

The ADMINISTRATIVE LAW JUDGE has authority to impose fines of up to **\$1000 per violation** and other penalties as set forth in Nevada Revised Statutes (NRS) and the Nevada Administrative Code (NAC) Chapters 116, including NRS 116.785 and NRS 116.790. If a party fails to comply with an Administrative Law Judge's Decision, **ADDITIONAL** fines or other penalties could be imposed, and action could be taken to collect fines or other monetary awards which are not timely paid.

You will be notified when this matter is assigned to an Administrative Law Judge, who will set this matter for hearing. After assignment, your communications regarding this matter should be directed to the Administrative Law Judge.

**IF YOU FAIL TO PARTICIPATE IN THE PROCESS BEFORE THE ADMINISTRATIVE LAW JUDGE, A DECISION MAY BE ENTERED AGAINST YOU.**

Sincerely,

Bruce D. Alitt  
Chief Investigator, Compliance/Audit

David F. Garrick  
Compliance Investigator II

JIM GIBBONS  
*Governor*

STATE OF NEVADA

GAIL J. ANDERSON  
*Administrator*

MENDY K. ELLIOTT  
*Director*



LINDSAY WAITE  
*Ombudsman*

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CICombudsman@red.state.nv.us  
[www.red.state.nv.us](http://www.red.state.nv.us)

COMPLAINT

DATE: APRIL 25, 2007

TO: CHIEF INVESTIGATOR BRUCE ALITT

FROM: INVESTIGATOR DAVID F. GARRICK

RE: CASE # IS-07-1399

CLAIMANT: SCOTT ELLESTAD AND DOUGLAS BRUNEAU  
Vs.  
SUNSET GREENS HOMEOWNERS ASSOCIATION

ALLEGATION(S): GOVERNING DOCUMENTS

*Summary of Allegation(s)*

THE CLAIMANT, (NAME), HAS ALLEGED  
It has been alleged that the Board of Directors has spent association monies that were part of the reserve for replacement of individual homeowners sod replacement as they were damaged by bug infestation. It has been further alleged that these areas replaced were the backyards of homeowners and were not part of the common elements but were the primary responsibility of individual homeowners.



*List of Exhibits*

- Exhibit 1.....CLAIMANT INTERVENTION AFFIDAVIT
- Exhibit 2.....PRINT OUT OF BOARD/ MANAGEMENT
- Exhibit 3.....INITIAL LETTER TO COMPLAINANTS
- Exhibit 4..... RESPONDENT REQUEST FOR INFORMATION
- Exhibit 5.....RESPONDENT REQUEST FOR INFORMATION  
(DIFFERENT ADDRESS)
- Exhibit 6..... RESPONDENT RESPONSE FOR REQUEST FOR  
INFORMATION
- Exhibit 7.....RESPONDENT RESPONSE FOR REQUEST FOR  
INFORMATION

*Factual Synopsis (Facts in Evidence)*

THE CLAIMANTS, (SCOTT ELLESTAD AND DOUGLAS BRUNEAU), RESIDING AT (1430 PINEHURST DRIVE MESQUITE NV 89027 & 1431 PINEHURST DRIVE MESQUITE NV 89027), ARE HOMEOWNERS IN THE (SUNSET GREENS HOMEOWNERS ASSOCIATION).

THE CLAIMANT FILED AN INTERVENTION AFFIDAVIT WITH THE DIVISION ON OCTOBER 04, 2006 Exhibit 1.

THE DIVISION OPENED THE INVESTIGATION AND MAILED A CERTIFIED LETTER TO THE RESPONDANT SEEKING INFORMATION AND DOCUMENTS Exhibit 4 & 5 & 6. THE DIVISION RECEIVED THE RESPONDENT'S REPLY ON MARCH 30, 2007. Exhibit 6 & 7.

*Recommendation: Submission to Administrative Law Judge (ALJ) for a rendering of a decision regarding this case # IS-07-1399*

Hi Pat,

We are writing in regards to Ombudsman Division Case No. IS-07-1399, to which Sunset Greens HOA is a respondent.

We have been notified that the investigator for this case mailed a certified letter to the SSG HOA seeking information and documents associated with this case. According to our information, the Division received a reply to their request from the SSG HOA on March 30, 2007.

We hereby request copies of any and all correspondence between the Investigator and the respondent (Sunset Greens HOA) in regards to the Ombudsman Division Case NO IS-07-1399.

We are making this request in accordance with NRS 116.31175.

Thanks.

Scott Ellestad  
Doug Bruneau

**Pat Taylor - Sod Replacement (letter)**

**From:** <arlissw2@aol.com>  
**To:** PTaylor@tamhoa.com  
**Date:** 10/13/2006 10:09 AM  
**Subject:** Sod Replacement (letter)

**CONFIDENTIAL:** Between Pat Taylor and John Leach

Hello Pat. This follows our conversation yesterday regarding the letter that you forwarded from John Leach. I would prefer that this memo stay between you and John Leach as it provides you and our legal counsel with what I believe are relevant facts related to the end of his letter where he addresses whether or not we can seek reimbursement from homeowners whose backyard sod was replaced. I appreciate the clarity with which he addressed the use of reserve funds for this project.

The following is offered at this point because I do not know what my future role, if any, will be with the Board. In the fall of 2005 when this project unfolded, I was president and was also the liaison to the landscape committee, attending every monthly meeting. Also, Sunset Greens was in many ways still rather young, many properties being only two years old and others up to eight. Major corrections to the growing turf of a rather young development was considered normal by our landscaping contractor.

During the early fall of 2005 the landscape committee conducted their annual fall checklist of homes with areas in yards that needed to be resodded. They found many areas needed sod for perhaps the second or third time in as many years and approximately 90% of the areas were rear yards. They concluded, after discussions with our contractor Kokopelli, that they needed to "fix things right" this time by going down six inches into the soil, remove all poor top soil, and then recondition the soil with better materials, fertilizer, and then resod. They also agreed that many areas needed drains installed. Norm Vielmette received the go-ahead from all board members for the project with the understanding that the association would attempt to create optimal growing conditions in carrying out the resod project.

Upon commencing the project, several back yards had bare spots excavated and grubs were found. The question immediately became, what do we do? Do we leave the spots excavated, notify the owner that they must now fix the lawn, or do we as an association deal with it? Several homeowners were notified that the contractor found grubs. At least one homeowner obtained an opinion from an expert (I believe the County Extension Service) that the grub infestation was minor and the grub density was insufficient to cause the sod to die. More than one homeowner also claimed that the HOA overwatered the area for much of the summer and the sprinklers came on at 9:00 p.m., thus causing an ideal environment for pest growth.

Norm Vielmette was in charge of setting irrigation times that summer and early fall and he indeed set the last watering time at approximately 9:00 p.m. The times he set was in conjunction with the recommendations and with consultation from Kokopelli. Kelby Hughes, the owner of Kokopelli agreed that turf that is wet all night provides an ideal environment for pest growth, particularly if the turf has not received preventive pest treatment at the proper times. Norm was subsequently removed from that responsibility and that chore was assumed by Kokopelli.

Given the above dilemma and variables, the landscape committee and the Board met to determine how to proceed with the project, particularly given that no homeowners were ever forewarned that sod replacement could be at their expense if pests were found. It was also not clear that the presence of pests was a clear cause for the sod to die given the other detrimental conditions. We all believed that passing the responsibility back to the homeowners without prior warning would elicit scores of formal challenges. It was agreed to proceed with the project and the HOA would "do it right," including drainage and incentives for homeowners to change portions of their lawns to desertscape. But also, it was agreed that the landscape committee would draft a letter to all homeowners notifying them that they had a clear responsibility for preventative treatment and that the association would limit its sod replacement for 2006.

The sod replacement project received formal approval from the Board at its regular meeting on November 16,

2005 and the minutes reflect this discussion. The project's total cost was \$81,292, including soil rejuvenation, drain installation, desertscape incentives, and sod. Leo Black did not vote in favor of the motion. The 60% rate of pest infestation was an observation estimate provided by Norm. The letter to the homeowners from the landscape committee was unanimously approved and the Board approved the letter on January 18, 2006.

To my knowledge, there is not a list of properties with addresses and the square feet of sod that was replaced. Additionally, there is not a sub-list of properties by address where pests were found, and of those properties, there is not a record of how dense they were.

The reports that I have received since the project's completion is that lawns are looking much better this year and that homeowners are for the most part dutifully applying pest control.

In my opinion, the Board properly carried out its responsibilities, considered all factors and variables, obtained sound input, considered all options, and made its decisions accordingly. The letter from legal counsel further reinforces this belief.

Arlis Swartzendruber  
Board Secretary

JOHN E. LEACH  
GREGORY J. WALCH  
NICHOLAS J. SANTORO  
MICHAEL E. KEARNEY  
J. DOUGLAS DRIGGS, JR.  
RICHARD F. HOLLEY  
DAVID G. JOHNSON  
RONALD J. THOMPSON  
JAMES E. WHITMIRE, III  
DANIEL L. SCHWARTZ  
VICTORIA L. NELSON  
DEAN S. BENNETT  
KIRBY C. GRUCHOW, JR.  
ANDREW J. GLENDON

KEVIN L. JOHNSON  
LEE E. DAVIS  
THOMAS G. GRACE\*  
SEAN L. ANDERSON  
JAMES D. BOYLE

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON

ATTORNEYS  
400 SOUTH FOURTH STREET, THIRD FLOOR  
LAS VEGAS, NEVADA 89101  
TEL (702) 791-0308  
FAX (702) 791-1912  
WRITER'S EMAIL: JLEACH@NEVADAFIRM.COM

OLIVER J. PANCHERI  
BRIAN W. BOSCHEE  
BRYCE K. EARL  
OGONNA M. ATAMOH  
JENNIFER K. CRAFT  
JAMES P. JENSEN  
BEN WEST  
MICHAEL F. LYNCH  
BYRON E. THOMAS  
STELLA B. DORMAN  
TRACY A. GALLEGOS  
F. THOMAS EDWARDS  
JASON D. SMITH  
CODY T. WINTERTON  
ROBERT B. KOUCHOUKOS  
LISA T. BLACKBURN  
RACHEL N. SOLOW

OF COUNSEL:  
ANTHONY A. ZMAILA  
CHARLES L. TITUS

\*LICENSED IN ILLINOIS ONLY

October 11, 2006

*Via U.S. Mail and  
Facsimile to 736-0679*

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

RE: Sunset Green Homeowners Association  
Response to Information Provided by Scott Ellestad and Douglas Bruneau  
Regarding Use of Reserve Funds for Replacement of Sod

Dear Ms. Taylor:

This office is in receipt of your correspondence dated September 19, 2006, wherein you enclosed documentation from Scott Ellestad and Douglas Bruneau pertaining to Sunset Greens Homeowners Association's (the "Association") alleged improper use of reserve funds to replace sod within the community. It is our understanding that the Board of Directors (the "Board") for the Association has requested a review and analysis of the documentation provided by Mr. Ellestad and Mr. Bruneau.

After a thorough review of all of the documents, we reiterate the conclusions reached in our legal opinion to you dated August 3, 2006, pertaining to this matter. Mr. Ellestad's and Mr. Bruneau's assertion that the Board improperly utilized reserve funds to replace sod is based largely upon the opinion issued by the Legislative Counsel Bureau (the "LCB") on August 14, 2006. The opinion from the LCB first states, "Based on the information provided to this office, we understand that the governing documents of the common-interest community at issue specifically provide that back yards are not owned by the association and are not common elements." The LCB then concludes that because the backyards are not common elements, the

Association was not authorized to utilize reserve funds to replace the sod in the backyards pursuant to Nevada Revised Statutes ("NRS") 116.3 115(2)(b).

The LCB's conclusion implies that it was not provided with or did not review all relevant provisions of the Association's Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions (the "Declaration"). Specifically, the LCB did not consider Article II, Section 2.8.1 of the Declaration, which expressly provides that the landscaping upon each lot is to be maintained as common elements. Article II, Section 2.8.1 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.

(Emphasis added).

Moreover, the LCB did not consider Article III, Section 3.16.1 of the Declaration which reads, in pertinent part, 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.**

(Emphasis added).

Based on the foregoing, although the Association does not own the backyards as the LCB states, the LCB is incorrect that the backyards are not common elements, as Article II, Section 2.8.1 clearly states that the landscaping upon each lot, which includes the backyard landscaping, is to be maintained by the Association as common elements. Moreover, Article III, Section 3.16.1 expressly requires the Association to maintain the rear yard landscaping upon each lot.

It is evident that the LCB opinion is limited to solely to statutory construction. NRS 116.017 defines common elements as "any real estate within the planned community owned or leased by the association, other than a unit." This narrow definition would appear to exclude the front, side and rear yard landscaping from the definition of common elements, even though the Association has a duty to repair and maintain those portions of the community. However, the law recognizes that the Association's obligation may extend beyond the narrow, statutory definition of common elements. Specifically, NRS 116.3107(1) reads, in pertinent part, as follows:

**Except to the extent provided by the declaration . . .** the association is responsible for maintenance, repair and replacement of the common elements, and each unit's owner is responsible for maintenance, repair and replacement of his unit.

As previously noted, the Declaration provides that the Association is responsible for maintaining and repairing the front, side and rear yard landscaping of the single-family attached residences. LCB is apparently of the opinion that the Declaration cannot expand the definition of the term common elements and, therefore, it is a violation of the law for the Association to treat the landscaping as common elements. Ironically, the LCB opinion states that the word in the statute "should be given their plain meaning unless this violates the spirit of the act." State Dept. of Ins. v. Human Health Ins., 112 Nev. 356, 360 (1996) (quoting McKay v. Bd of Supervisors, 102 Nev. 644, 648 (1986)). Clearly, it was the intent of the law to allow an association to maintain any portions of the community as defined in the declaration. NRS 116.3107. The LCB opinion would suggest that the Association either: (1) cannot repair and maintain the landscaping in question because it does not fall within the statutory definition of common elements, or (2) the Association can repair and maintain the landscaping in question but cannot reserve for the replacement of the landscaping because it is not a common element as defined in NRS 116.017. The first proposition would effectively amend the Declaration, which we submit was not the intent of the statute. The second proposition would cause the Association to have to rely on membership approval of special assessments in order to fulfill its obligations to the owners. Either proposition is certainly contrary to "the spirit of the act."

The statutes in question must be read, if at all possible, to be in harmony with one another. Seput v. Lacayo, 134 P.3d 733, 735 (Nev. 2006) (quoting Rose v. First Federal Savings & Loan, 105 Nev. 454, 457, 777 P.2d 1318, 1319 (1989)). Accordingly, it is this office's position that the landscaping referenced above should be treated, in all respects, as common elements, including the designation as a major component of the common elements and the use of reserve funds to replace the damaged or destroyed landscaping.

In light of the fact that the back yards are to be maintained as common elements by the Association, the Association was permitted to use reserve funds to replace the sod in the backyard pursuant to NRS 116.3115(2)(b) which 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.**

(Emphasis added).

Because the Declaration specifically provides that the landscaping on each lot, including backyard landscaping, is to be maintained as a common element, the Association may use its reserve funds for the repair, replacement, and restoration of the major components of the same, on the condition that the backyards are considered major components of the common elements. As previously stated in our August 3, 2006, correspondence, it is our opinion that replacement of the sod in the backyards is considered a major component of the common elements based upon NRS 116.0605 which reads, in pertinent part, 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.**

(Emphasis added).

The expense associated with replacement of the same is clearly in excess of the routine annual maintenance included in the Association’s annual operating budget. Furthermore, the Association’s reserve study prepared by Association Reserves, Inc. plainly states that side and back yards are to be maintained by the Association and includes these components in the reserve study. It logically follows that if such costs were included in the reserve study, if and when such costs were to be incurred, they would be taken from the reserve fund.

The LCB further concludes that any provision of the Declaration that conflicts with Nevada law is superseded by such law. We generally agree with this conclusion. However, it is important to note that the provision relied upon by the Board to use reserve funds does not conflict with NRS 116.3115(2)(b). NRS 116.3115(2)(b) simply states that reserve funds may only be used for the replacement, repair, and restoration of the major components of the common elements. Article II, Section 2.8.1 states that the back yards are to be maintained as common elements. Clearly, there is no conflict between the Declaration and Nevada law on this point.

Finally, the LCB concludes that the decision of an arbitrator does not constitute binding precedent with respect to any subsequent judicial or administrative proceeding. Again, we agree with this conclusion and will not go into detail regarding same.

Please be advised that in reviewing the materials submitted by Mr. Ellestad and Mr. Bruneau, we note that they raise several other provisions of the Declaration pertaining to the homeowners’ responsibility to control pests. Specifically, Article III, Section 3.17 of the Declaration reads, in pertinent part, as follows:

No Owner shall permit any thing or condition to exist upon his Lot that shall induce, breed, or harbor infectious plant or tree diseases or noxious insects, rodents or birds. **The Owner of each Lot, whether a single-family attached or Single Family Detached**



**Residence is located on such Lot, shall be responsible for pest control at such Owner's sole costs and expense.**

(Emphasis added).

This issue was not addressed in our previous correspondence. However, there may be different interpretations given to this provision. One interpretation may be that the Owner's obligation relative to pest control is limited to the residence or the portions of the lot that the Owner has a duty to maintain. Another interpretation may be that the Owner is responsible for all pest control association with the entire lot. Nonetheless, the foregoing provision clearly places some responsibility upon each Owner to maintain his or her lot in a clean and sanitary condition in order to prevent pests and so forth.

Mr. Bruneau and Mr. Ellestad contend that it was the responsibility of the Owners, based on the above-referenced provision, to spray their lawns to prevent grub infestation in the backyards. This interpretation is not necessarily incorrect, but it appears to ignore the competing provision that states that the Association is responsible for maintaining landscaping. This begs the question whether pest control is a component of maintenance of the landscaping. Regardless of the conclusion on the pest control issues, this **does not** change the interpretation pertaining to the Association's ability to use its reserve funds to replace the sod in the backyards. However, Mr. Bruneau's and Mr. Ellestad's interpretation of Article III, Section 3.17 of the Declaration raises an issue regarding whether the Association now has a claim for reimbursement against the homeowners' whose backyard sod was replaced because of the homeowners alleged failure to spray their lawns to prevent the infestation. It should be noted, however, that the documentation provided to this office suggests that there may have been other contributing circumstances, including over watering, which would be the Association's responsibility, and an extremely hot summer. Neither of these factors are related to pest control.

At this juncture, we cannot adequately advise the Board with respect to whether it may correctly seek reimbursement from the homeowners whose backyard sod was replaced because we do not have sufficient information pertaining to the condition necessitating the sod replacement and the factors causing the condition. We are aware that the sod suffered from grub infestation, but we do not know where or how it originated. For example, if the grub infestation began in the sod located within areas of the community that are clearly designated as common elements and then spread to the backyards, it becomes more difficult to assert that the homeowners should be responsible for the costs since the problem originated in areas over which the Association plainly has the responsibility to maintain and repair. If you have additional information, please forward it to us so that we may determine whether the costs for sod replacement may be assessed back to the individual homeowners.

We hope that this correspondence has adequately addressed your concerns pertaining to this issue. Please do not hesitate to contact this office should you have any additional questions.

Very truly yours,

SANTORO, DRIGGS, WALCH,  
KEARNEY, JOHNSON & THOMPSON



John E. Leach, Esq.

JEL:mc

Scott A. Ellestad  
1431 Pinehurst Drive  
Mesquite, NV 89027  
1-702-346-6432  
Email: barb@bjellestad.com

Douglas Bruneau  
1430 Pinehurst Drive  
Mesquite, NV 89027  
1-702-346-4609  
Email: mdrbrjoy@cascadeaccess.com

Lindsay Waite  
Nevada Real Estate Division  
Office of the Ombudsman  
2501 E. Sahara Ave, Suite 202  
Las Vegas, NV 89104

December 22, 2006

RE: Ombudsman Intervention Affidavit, Sunset Greens HOA, Mesquite, NV Case # IS-07-1399

Dear Ms. Waite,

1. We met with you and representatives of our HOA on Tuesday, December 19, 2006 in an attempt to resolve the complaint we made against our Board of Directors. During the meeting, Ms Taylor, Taylor Association Management, our HOA property manager, was in possession of two documents, one dated October 11, 2006 and one dated October 13, 2006, that represented the opposition's point of view regarding our complaint. To our dismay, those two documents were not presented until the meeting was adjourned. Therefore we did not have an opportunity to review the documents, discuss them, nor provide a rebuttal. We would like to take that opportunity now and also ask that you include this letter in our case file that will be reviewed by the Deputy Attorney General, as you indicated was the next step in our affidavit process.

2. We first want to discuss the email from Mr. Arlis Swartzendruber to Pat Taylor and John Leach dated October 13, 2006.

a. He states in his email there were "several backyards had bare spots excavated and grubs were found." He further states "At least one homeowner obtained an opinion from an expert (I believe the County Extension Service) that the grub infestation was minor and the grub density was insufficient to cause the sod to die." If in fact that were the case, he's contradicting his own words when compared to his public statements throughout 2005 and 2006 (Attachments 3, 5, 8, 9, and 13) when he stated "it is pests that are causing the problems with the sod." We find it interesting that for over 1 1/2 years Mr. Swartzendruber publicly advised homeowners that the sod damage was due to uncontrolled pest infestations. He now contends that none of that is true.

b. He states in his email that "The 60% rate of pest infestation was an observation estimate provided by Norm [on-site property management representative]." That is not how Mr. Swartzendruber presented the same information to all homeowners throughout 2005 and 2006 when he publicly declared and presented as fact at the Sunset Greens Board of Directors meeting, November 16, 2005 (Attachment 5): "He reported that the CC&Rs require the

homeowners to be responsible for pest control and it is pests that are causing the problems with the sod." And Mr. Swartzendruber presented this on January 12, 2006 (Attachment 8): "He also reported that 80% of the sod replacement was due to pests and damage by pets." Again, we feel Mr. Swartzendruber's October 13, 2005 email clearly contradicts his own words to the Sunset Greens homeowners throughout 2005 and 2006.

o. He states in his email "I know Wisnietz was in charge of setting irrigation times that summer..." This paragraph goes on to state that the reason for the sod damage was poor selection of irrigation times resulting in yards being watered at night. Not once during 2005 or 2006 did Mr. Swartzendruber ever state that perhaps this was the cause of the sod damage. He never discussed it at any Board of Directors meeting, homeowners meeting, nor correspondence with the general homeowner membership. In fact, if poor irrigation was indeed the cause of the sod damage, and in fact this was a known cause in late 2005 and early 2006, then why was this information not included in the Board of Directors letter of January 2006 "Sod Replacement Program for 2006" to all homeowners (Attachment 9). That letter clearly puts all the blame for sod damage on the lack of pest control by homeowners. We feel this diverts responsibility for this situation from the shoulders of the Board of Directors to others who did not have final decision-making authority.

d. He states in his email that "It was agreed to proceed with the project and the HOA would "do it right," including drainage and incentives for homeowners to change portions of their lawns to desertscapes." This option of changing to a desertscapes and offering rebate checks out of our HOA Reserve Fund was never discussed at any Board of Directors meeting nor any public Homeowners' meeting. We find it regrettable that our Reserve Funds were and are being used in such a manner and, in our opinion, in direct violation of NRS 116.3115. We feel strongly that our Reserve Funds are not to be used for rebate checks.

3. Regarding the rebuttal letter, October 11, 2006, from John E. Leach, Esq., who is legal counsel representing the Board of Directors in this matter:

a. Mr. Leach incorrectly states "Mr. Elstedt's and Mr. Brunson's assertion that the Board improperly utilized reserve funds to replace sod is based largely upon the opinion issued by the Legislative Counsel Bureau (the "LCB") on August 14, 2006." In fact, we began questioning the Board of Directors' allegedly incorrect expenditures from the Reserve Fund for sod replacement in February 2006 (Attachment 10), without receiving what we determined to be adequate answers. It wasn't until after we were continually stalled by the Board of Directors and received what we considered inadequate information from the April 19, 2006 meeting between Mr. Leach and the Board that we turned to the LCB. The attachments inserted in the Affidavit package, numbers 10 through 19, clearly show that we made many attempts to obtain satisfactory resolution of our concerns long before the LCB issued its opinion in this matter on August 14, 2006 (Attachment 21).

b. Mr. Leach states on Page 1 of his October 11, 2006 opinion, 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." We don't refute that statement at all. However, we do assert that replacing large amounts of sod for reasons clearly stated in our

governing documents, that of pest control and its resultant damage, is not part of normal maintenance and is rightfully the responsibility of the individual homeowner not our Association's Reserve Fund. We reiterate NRS 115.3115.2.b which states an association's reserve fund may not be used for routine maintenance. That contention is clearly and irrefutably supported by the LCE opinion of August 14, 2006. This point is also supported by the fact that sod replacement was not included in the routine maintenance contract (Attachment 7) between our Association and the landscaper (written by Mr. Switzenhuber) and was made a separate, special contract voted on by the Board of Directors (Attachment 5).

c. Mr. Leach states on Page 3, paragraph 1, that "The second proposition would cause the Association to have to rely on membership approval of special assessments in order to fulfill its obligations to the owners. Either proposition is certainly contrary to 'the spirit of the act.'" We disagree that these are the only two possibilities that could have been considered by the Board of Directors as a satisfactory resolution to the problem. The attachments in our Affidavit package, Attachments 2 through 5, clearly show that the Board of Directors knew well before the first yard was dug up, that pest control and all of its expenditures was rightfully that of individual homeowners. We contend that the Board of Directors chose to ignore the third viable option which was the necessity of requiring payments from individual homeowners in accordance with our CC&Rs, paragraph 3.17.

d. Mr. Leach continually relies on the definition of common elements as a point of correctness. We continue to rely on the fact that provisions exist in our governing documents that directly make sod replacement a burden of individual homeowners if the sod was damaged due to pest infestations. Mr. Leach states, "This issue was not addressed in our previous correspondence." We agree with Mr. Leach that the issue was not addressed in his previous correspondence. However, we consistently and continuously reiterated this point to the Board of Directors and Mr. Leach in previous correspondence beginning in February 2006. This point and question were not addressed by the Board or him until Mr. Leach's letter in October, 2006. He argues that pest control is secondary to maintenance and the right of the Association to use reserve funds to replace sod in the backyard. We contend that if the sod was indeed damaged by pests in the first place, then the provision in our governing documents controlling this situation is primary to all others and Mr. Leach's arguments regarding maintenance are secondary.

e. Mr. Leach argues the finer points of where, when, and how pests were introduced, exactly what part of the yard is to be sprayed for pests, etc. We contend that all his points on this matter are contrary to NRS 115 and the LCE point that words in the statute "should be given their plain meaning unless this violates the spirit of the act." The paragraph in our governing documents regarding controlling pests and spraying backyards is clear, concise, and meaningful and takes precedent when it comes to spending our Reserve Funds.

4. Mr. Leach's August 3, 2006 letter, Attachment 20, Page 4, states "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." (Underline emphasis added) We want to make the point that the Legislative Counsel Bureau opinion was issued on August 14, 2006, which draws conclusions contrary to Mr. Leach's opinions. The Board of Directors apparently requested Mr.


Leach to respond to our Ombudsman Intervention Affidavit dated September 14, 2006, which he did on October 11, 2006. The Board of Directors then requested Mr. Leach to appear at our annual Homeowners' Association meeting on November 16, 2006 to explain the resodding project and the use of Reserve funds. We are disappointed that our Board of Directors chose to repeatedly spend our money seeking legal opinions rather than working one-on-one with the homeowners to resolve this situation. We never received a reply to our initial filing of the Ombudsman Intervention Affidavit from any member of the Board of Directors.

5. During our December 19, 2006, meeting between you, us, and representatives from the Board of Directors, you directly asked us what we were looking for as a resolution to this situation. Upon further discussion between us and in the best interest of the total community, we offer the following as a suitable resolution if in fact it is found that the Sunset Greens Board of Directors acted improperly in this matter and erroneously spent our Reserve Funds:

- a. A letter of admission to be written and signed by the Board of Directors (preferably the BOD in charge during 2005/2006), approved by Mr. Ellestad and Mr. Bruneau and sent to all homeowners. The letter will adequately address the original situation, any improper expenditures paid by the Board of Directors, the resolution outlined in the next paragraph, and absolve any homeowner who questioned the Board regarding this matter of any negativity.
  - b. The Board of Directors will establish a line item in the 2007 Sunset Greens Operating Fund Budget labeled "Monies to Reimburse Reserve Account for Erroneous Sod Replacement/DesertScape Expenditures of BOD in 2005/2006" and transfer \$1 per door (\$699) monthly to the Sunset Greens Reserve Fund until such time as the total amount of sod replacement, \$81,292, is replaced in the Reserve Fund. We estimate it will take approximately seven years to replace the monies.
  - c. The Board of Directors will ensure that NRS 116 is clearly followed in each and every matter they address in the future.
  - d. The Board of Directors to refund to our Operating Fund any expenses paid to Mr. Leach in association with his attendance at our annual Association meeting on November 16, 2006, and his rebuttal opinion dated October 11, 2006.
6. We again respectfully request that this letter be included with our original Ombudsman Intervention Affidavit, dated September 15, 2006, and be included in any correspondence you may have already forwarded to other offices. In the spirit of open communication between homeowners and our HOA Board of Directors, we will supply each past and present Board member with a copy of this letter.

We appreciate your time and effort in helping us resolve this situation within our HOA.

Sincerely,



Doug Bruneau



Scott A. Ellestad

Client: 11886A Sunset Greens - Common Area

Reserve Study  
2004

Comp #: 1005 Landscape - Renovate (major)

Quantity: Grass, shrubs, sprinklers

Location: Common area landscaping

Evaluation: Townhouse front, side and back yards are reportedly the HOA's responsibility to maintain. Front and side yards of the detached homes, as well as central common areas (putting green, etc.) are likewise HOA responsibility. Cost and useful life of re-landscaping is highly unpredictable. This component provides an allowance for major landscape renovation.

Useful Life:  
16 years

Remaining Life:  
12 years



Best Case: \$100,000.00

Worst Case: \$150,000.00

Allowance for major re-landscaping and/or irrigation system upgrade

Higher allowance

Cost Source: ARI Cost Database

*Handwritten notes:*  
C&R to 11886A Sunset Greens  
MRS 116-0174 Sunset Greens

Client: 11886A Sunset Greens - Common Area

Comp #: 1005 Landscape - Renovate (minor)

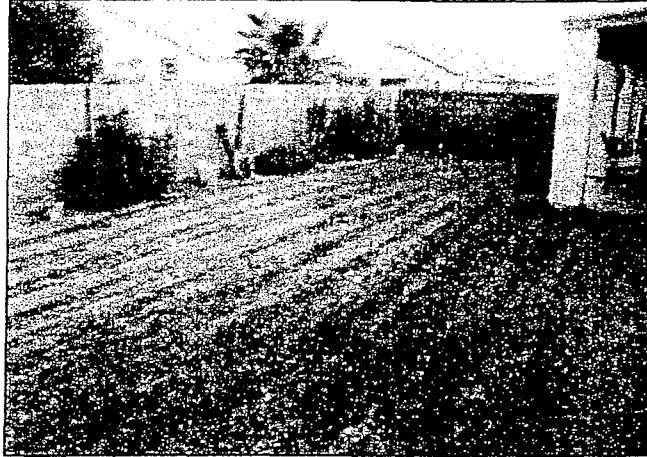
Quantity: Grass, shrubs, sprinklers

Location: Common area landscaping

Evaluation: Expect ongoing landscape expenses which are not covered under the landscaping service contract: PVC piping breakage, sprinkler head replacements, removal of dead areas, fertilization, etc. This component provides an allowance for periodic irrigation repairs and minor landscape upgrades.

Useful Life:  
16 years

Remaining Life:  
4 years



Best Case: \$20,000.00

Allowance for miscellaneous re-landscaping and irrigation system repairs

Worst Case: \$35,000.00

Higher allowance

Cost Source: ARI Cost Database

Comp #: 1006 Landscape Rock - Replenish

Quantity: Extensive GSF

Location: Throughout landscaped areas (entry area, pool areas, front/back yards, etc.)

Evaluation: Decorative rock/gravel shows some deterioration at local areas due to hard water corrosion. Other areas are in good shape. No expectancy for all landscape rock to ever require complete replacement at any one time. Plan on periodic replenishment and replacement due to deterioration or wash-out.

Useful Life:  
5 years

Remaining Life:  
1 years



Best Case: \$3,250.00

\$65 x 50 Cubic Yards; Lower estimate to replace 5,000 sq. ft. of landscape rock, 2" deep

Worst Case: \$4,000.00

\$80 x 50 Cubic Yards; Higher estimate to replace 5,000 sq. ft. of landscape rock, 2" deep

Cost Source: Research with Local Vendor/Contractor



Date: Thu, 30 Mar 2006 12:34:00 -0700  
From: ptaylor@tamhoa.com  
Subject: Ambler Hearing  
To:

Dear Board Members,  
I have heard back from John Leach today confirming that he will be at my office on April 19, 2006 at 1:00 PM to discuss two issues with the Board prior to the Hearing, which will commence at 2 PM. I will furnish John with any and all background information I can so he can be prepared for the issues at hand.

The two issues to be discussed at 1 PM are: using reserve funds to pay for sod replacement, and questions regarding the fence release form recently sent out.

We will send a formal letter to the Ambler's notifying them of the hearing date and time.

Thanks..

Pat

Pat Taylor, CMCA  
Owner/CEO  
Taylor Association Management  
2357 Renaissance Drive #B  
Las Vegas, NV 89119  
(702) 736-9450  
(702) 736-0679-fax

Scott A. Ellestad  
1431 Pinehurst Drive  
Mesquite, NV 89027  
1-702-346-6432  
Email: barb@bjellestad.com

October 2, 2006

Victoria Broadbent  
Nevada Real Estate Division  
Office of the Ombudsman  
2501 E. Sahara Ave, Suite 202  
Las Vegas, NV 89104

RE: Ombudsman Intervention Affidavit, Sunset Greens HOA, Mesquite, NV

We mailed the attached Ombudsman Intervention Affidavit package to the President, Board of Directors (Mrs. Patti Adams), Sunset Greens HOA, via certified mail, return receipt requested, on September 14, 2006. On that same day, Mr. Doug Bruneau and I met with Mrs. Adams and provided her with five advance copies, one for each board member. We informed her that the official copy was coming in the mail. She signed the certified mail receipt for it on September 15, 2006.

Since that date we have not received any communication from Mrs. Adams nor any of the other four board members regarding this affidavit.

We contacted legal counsel and discussed the affidavit with him. He suggested we try to receive answers to these key issues, among the others, addressed in the affidavit package.

1. The Sunset Greens HOA CC&Rs, paragraph 3.17 expressly states pest control is the homeowners' sole cost and expense. (Attachment 2) We asked for clarification of that issue (Attachment 18) but it was never formally addressed by our HOA legal counsel.
2. Sunset Greens HOA legal counsel opinion, August 3, 2006, (Attachment 20) discusses the definition of common elements as does the State of Nevada Legislative Counsel Bureau opinion, August 14, 2006 (Attachment 21). However, the two opinions appear to contradict each other. We feel it necessary for an independent office such as yours to clearly define what is and is not a "*common element*" as it pertains specifically to Sunset Greens HOA.

Mr. Doug Bruneau and I are serving as the points of contact and representatives for the group of concerned homeowners in Sunset Greens HOA regarding this issue. Our contact information is shown below:

Doug Bruneau  
1430 Pinehurst Drive  
Mesquite, NV 89027  
702-346-4609  
Email: mdrbrjy@cascadeaccess.com

Scott Ellestad  
1431 Pinehurst Drive  
Mesquite, NV 89027  
702-346-6432  
Email: barb@bjellestad.com

We appreciate your time and effort in helping us resolve this situation within our HOA.

Sincerely,

Doug Bruneau

Scott A. Ellestad