BRIAN SANDOVAL
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Director

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Administrator

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STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
COMMON-INTEREST COMMUNITIES AND
CONDOMINIUM HOTELS PROGRAM
CICOmbudsman@red.nv.gov
http://www.red.nv.gov

July 25, 2017

Via Certified Mail Return Receipt Requested
7016 2070 0000 4948 3065

Southern Highlands Development Corporation
C/o Goold Patterson
1975 Village Center Circle, Ste. 140
Las Vegas, Nevada 89134

Re: Case No. 2017-1638; Southern Highlands Community Association (the "Association")

Dear Sir or Madam:

The State of Nevada Real Estate Division (the "Division"), Enforcement Section for Common-Interest Communities and Condominium Hotels, has opened an investigation against Southern Highlands Development Corporation as the Declarant for Southern Highlands Community Association to determine if there has been a violation of Nevada Revised Statutes (NRS) 116 or Nevada Administrative Code (NAC) 116. The actual complaint is confidential in accordance with NRS 116.757.

Please provide a notarized written response to the following allegations:

a. It has been alleged that as the Declarant you violated NRS 116.31032 by not terminating declarant control when over 75% of the units were conveyed to units' owners other than the declarant as reflected in the 2015 Southern Highlands Master Budget. The budget reflects that 8,240 units had been conveyed to units' owners other than the declarant (excluding 456 commercial units). The original declaration reflects a maximum unit count of 9000.

b. It has been alleged that the Third Amendment to the Master Declaration did not conform with NRS 116.2122 and therefore did not increase the maximum number of units from 9000 as stated in the original Declaration. NRS 116.1206(1)(a) provides that provisions in the declaration that violate NRS 116 are deemed to conform by operation of law and NRS 116.1104 provides that provisions of the law may not be varied by agreement and rights provided in NRS 116 may not be waived. These provisions of NRS 116 do not support a finding that a declarant can improperly amend the declaration and it is deemed effective if it is not challenged within 1 year.

In addition, please provide all documents or other evidence to support your written response **and** include the following documents:

1. A response and supporting documents showing that the 1079 "builder units" reflected on the Southern Highlands Adopted 2015 Budget were assigned Declarant Rights;

2. A response and supporting documents that reflect the Third Amendment to the Master Declaration conformed with NRS 116.2122 and therefore would increase the number of units to 10,400;

If possible, please provide all documents on a compact disk, or some other electronic format. Please do not email large documents.

Enclosed is an affidavit form for you to complete with your statement concerning the above mentioned allegation(s) and have it notarized. This affidavit is also available on our website at www.red.nv.gov as an interactive form (#652). Each board member is asked to respond independently to the allegations by a separate affidavit.

Each board member's notarized written response and the requested documentation must be submitted to the Division to the undersigned's attention no later than **10 business days** from the date of this letter.

Please be advised that pursuant to NAC 116.405(5), the Commission may find that a member of the executive board violated his or her duties pursuant to NRS 116.3103 by impeding or otherwise interfering with an investigation by the Division. NAC 116.405(5) states in part:

> In determining whether a member of the executive board has performed his or her duties pursuant to NRS 116.3103, the Commission may consider whether the member of the executive board has:
> 5. Impeded or otherwise interfered with an investigation of the Division by:
> (a) Failing to comply with a request by the Division to provide information or documents;
> (b) Supplying false or misleading information to an investigator, auditor or any other officer or agent of the Division; or
> (c) Concealing any facts or documents relating to the business of the association. . .

Upon review of the requested documents, the undersigned may be contacting you for further information and/or an interview.

Thank you in advance for your anticipated cooperation. Should you have any questions, you may contact me at (702) 486-4480 or by email at cpitch@red.nv.gov.

Sincerely,

Christina Pitch
Compliance/Audit Investigator II

Enclosure: Affidavit Form

cc:
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STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
Administrative Office

Affidavit Form

STATE OF NEVADA

County of _____

Affidavit of _____

Date _____

Time Taken _____ O'Clock

City _____ State _____

_____ deposes and says:
Name

I freely and voluntarily give this affidavit to Christina Pitch who is known to me as Compliance Audit Investigator II for the Nevada Real Estate Division.

Case No. _____

Email Address _____

Continue statement here.

(Use additional pages if necessary)

I have read the foregoing affidavit consisting of ____ pages, and it is true and correct to the best of my knowledge and belief.

I AGREE THAT IF REQUESTED BY THE NEVADA REAL ESTATE DIVISION, I WILL VOLUNTARILY APPEAR AS A WITNESS IN ANY PROCEEDING RELATING TO THE ABOVE MATTER WITHOUT THE NECESSITY OF BEING SERVED WITH A SUBPOENA.

Subscribed before me this _____ day of _____, 20____ in the

County of _____

State of _____,

_____
Signature of Notary

_____
Signature

Name _____

Address _____

_____
City State Zip

Area Code _____ Phone _____

KEMP, JONES & COULTHARD
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October 16, 2017

Via Hand Delivery and Email

Christina Pitch
Compliance/Audit Investigator II
Nevada Department of Business and Industry
Real Estate Division
3300 West Sahara Avenue
Las Vegas, Nevada 89102
Email: cpitch@red.nv.gov

Re: Case No. 2017-1638; Southern Highlands Community Association

Dear Ms. Pitch:

This letter is written in response to your request that Southern Highlands Development Corporation (the "Declarant") provide a written response to allegations contained in your July 25, 2017 letter. Specifically, this letter addresses the issue of the declarant control period for the Southern Highlands Community Association (the "Association"), especially as it relates to a allegations from a disgruntled homeowner that the declarant control period should have ended.

We understand that the complainant has alleged the maximum allowable units used to calculate the percentage for declarant control transition, under NRS 116.31032, should be 9,000, which is in the initial Declaration of Covenants, Conditions, and Restrictions and Reservation of Easements for the Association as recorded on January 6, 2000 in Book 20000106 as instrument number 01679 (the "CC&R's" or "Declaration"). The complainant further argues that Declarant should have transitioned control of the Association prior to a legislative change that increased the turnover threshold from 75% to 90% of maximum units conveyed. But these assertions are incorrect.

Rather, the appropriate number to be used in the denominator is 10,400 as evidenced by the third amendment to the CC&R's, which was recorded on October 6, 2005 in Book number 20051006 as instrument number 5982 (the "Third Amendment"). A copy of the Third Amendment is enclosed herewith. And this complaint, which comes almost 12 years after the Third Amendment was sent to every homeowner in Southern Highlands, adopted, and recorded, has no merit because: (1) the Declarant had the authority under Nevada law and in accordance with the Declaration to execute and record the Third Amendment; (2) NRS 116.2117(2) and NRS 116.760 both state that no action to challenge the validity of the Third Amendment may be brought more than one year after it was recorded; and (3) the complaint

misrepresents the actual number of units conveyed by the Declarant, because the actual number of units conveyed never reached the threshold for declarant control turnover. Accordingly, any investigation into the meritless allegations by the complainant should be concluded and this file closed.

An in-depth analysis of the Third Amendment and why complainant's legal assertions about the declarant control turnover threshold continues below.

A. The Execution and Recordation of the Third Amendment

NRS 116.2105 requires that a declaration contain, among other things, "[a] statement of the maximum number of units that the declarant reserves the right to create." In compliance, the Declarant included a number in Article 2, Section 2.31 of the Declaration under the definition of "maximum units."

The maximum number of units for the Southern Highlands development listed in the Declaration was, by mistake, stated as 9,000 units. *See* Declaration § 2.32. That number did not reflect the planned, annexable section of Southern Highlands that was to be released by the Bureau of Land Management ("BLM") for development (the "BLM Land"). This land was contemplated as part of Exhibit B to the Declaration. Unfortunately, that error wasn't realized until the Declarant was in the process of addressing the release and acquisition of the BLM Land in an amendment to the Development Agreement with Clark County. In order to correct the error and comply with the original intent of the Southern Highlands planned community as well as the Development Agreement that was approved and signed by Clark County,[1] the Declarant exercised its rights under Article 23, Section 23.1 of the Declaration by amending the Declaration to properly reflect 10,400 as the maximum number of units for the Association.[2] The Third Amendment was recorded with the Clark County Recorder's Office on October 6, 2005.

The Third Amendment was mailed to each homeowner in Southern Highlands on October 27, 2005, in advance of the November 17, 2005 Annual Owners' Meeting. Based on the directions given in the cover letter, the home owners were instructed to read the Third Amendment and place the document with their other association documents. Every owner within Southern Highlands had actual notice of the amendment before the November 17, 2005 meeting where it was adopted. Thereafter, the amendment became part of the official documents of the Association, and it was required to be given to every new owner under NRS 116.4109. Thus, any homeowner in Southern Highlands had notice of the Third Amendment by November 2005, at the latest.

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[1] *See* Second Amendment to the Development Agreement Between the County of Clark and Southern Highlands Development Corporation, et al., enclosed herewith.

[2] The Declarant's original intent was to include these units as part of the Southern Highlands development all along. *See* Declaration Art. 10 – Annexation; Expansion of Community. Specifically, Declaration § 10.1 allows the Declarant to annex all or any portion of property described in Exhibit B to the Declaration and, according to its right to do so, the BLM Land was incorporated into Exhibit B of the Declaration. *See* Declaration § 23.1 and Fourth Supplement to Declaration Exhibit B.

B. NRS 116 and Uniform Common Interest Ownership Act Provisions Govern the Allegations in This Complaint and Show That Declarant Had the Right to Execute and Record the Third Amendment.

Chapter 116 of the Nevada Revised Statutes governs "all common-interest communities created within this State." NRS 116.1201. Chapter 116 is Nevada's embodiment of the Uniform Common Interest Ownership Act ("UCIOA"). Chapter 116 directs that it "must be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2).

Accordingly, a discussion of specific sections of NRS Chapter 116, UCIOA provisions, and applicable case law follows because (1) the Third Amendment was done in accordance with NRS 116.2117 and § 23.1 of the Declaration, which gives the Declarant the unilateral ability to amend the Declaration to correct scrivener's errors, clarify any ambiguous provision, and modify or supplement the exhibits to the Declaration; (2) NRS 116.2122 is not applicable to the amendment, land, or units mentioned by complainant; and (3) Nevada gives Declarant the Special Declarant Rights and Developmental Rights to add additional real estate and create units, as reserved by Declarant in the Declaration. *See* NRS 116.089(2) ("Special Declarant's Rights" include the exercise of "developmental rights"); NRS 116.039(1)-(2) ("Developmental rights" include the ability to add real estate and create units).

1. NRS 116.2117 – Amendment of Declaration

NRS 116.2117 governs amendments to the declaration. NRS 116.2117 allows the amendment of a declaration by a majority vote or agreement of units' owners, unless (1) the declaration specifies a different percentage or (2) ***specifies particular subjects of amendment.*** In this case, the Third Amendment indicates it was undertaken to correct a scrivener's error or provide clarification on ambiguity in the Declaration. To that end, the Declaration, in § 23.1, specifically authorizes the Declarant to unilaterally make just such an amendment. Therefore, under NRS 116.2117 and the Declarant's rights specified in the Declaration, Declarant was permitted to unilaterally amend the Declaration to correct a scrivener's error and provide clarification on the total number of units to conform to the approved development agreement with Clark County. For this reason alone, there was no violation of NRS 116.2122, which neither governs nor controls the Third Amendment and need not even be considered. Nevertheless, an analysis of additional reasons why there is no substance to the allegations regarding NRS 116.2122 follows.

2. NRS 116.2122 – Addition of Unspecified Real Estate

In your letter, Declarant was specifically requested to respond to the allegation that the Third Amendment did not conform with the requirements of NRS 116.2122. The flaw in the complainant's argument, however, is that the additional units described in the Third Amendment were not for **unspecified** real estate. Rather, the Third Amendment corrected a scrivener's error in the original

declaration and included the units that were part of the real estate that was specified by the Declaration to be added.

NRS 116.2122 permits that "the declarant, in addition to any other developmental right, may amend the declaration at any time" for the purposes of "adding additional real estate to the planned community" without having to describe the location of that real estate. As stated in the title of the section, however, this provision is focused on and limited to the addition of "unspecified" or undescribed real estate. To better understand what NRS 116.2122 is really meant to address, the official comment to UCIOA § 2-122 (on which NRS 116.2122 is based) provides that this section was not designed to prevent the addition of units, but rather to address the "relatively unusual problem" of any substantial increases in the potential common expenses of the unit owners and to "foreclose the possibility of an increase in the density of the project beyond that which was originally contemplated." Thus, only if no description of the real estate being added is included or added to the declaration, then the amount of real estate added to the planned community "may not exceed 10 percent of the real estate" described in the "original declaration" ***and then*** the declarant may not "increase the number of units in the planned community beyond the number stated in the original declaration."[3] *Id.*

The BLM Land, on which the units described in the Third Amendment sit, was contemplated and described in the Declaration. Furthermore, NRS 116.2122 does not prevent or impede Declarant from rectifying a scrivener's error in the Declaration under NRS 116.2117 or adding units within the BLM Land as an exercise of Declarant's developmental rights per NRS 116.0.39 and NRS 116.089.

3. NRS 116.039 & 116.089 – Developmental Rights and Special Declarant's Rights

NRS 116.211 allows for the exercise of "developmental rights," and NRS 116.039 defines what those rights may be. This statute provides that a declarant may exercise certain rights, including the ability to "***add real estate*** to a common interest community; ***create units***, common elements or limited common elements within a common-interest community; subdivide units or convert units into common elements; or withdraw real estate from a common interest community." NRS 116.039 (emphasis added). So long

[3] As indicated above, NRS 116.2122 is meant to apply to unique circumstances involving substantial increases to common expenses or density for a community. In contradiction to what complainant is alleging in this case, the UCIOA commentary on this provision, other provisions, and Nevada statutes within Chapter 116, indicate developers absolutely have a right to add real estate and units to a planned community. *See, e.g.*, NRS 116.039 (providing that a declarant may exercise certain rights, including the ability to "***add real estate*** to a common interest community" and "***create units***"); NRS 116.2107(3): "***If units may be added to or withdrawn from the common-interest community***, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the common-interest community after the addition or withdrawal." (emphasis added); *see also* NRS 116.211(2) "Developmental rights may be reserved within any real estate ***added*** to the common-interest community…" (emphasis added).

as a declarant reserves these developmental rights in the declaration, it may exercise any developmental right as part of its "special declarant's rights." NRS 116.089(2).[4]

According to the commentary on UCIOA 1-103 (on which NRS 116.039 is based), "[t]he concept of 'development rights' lies at the heart of one of the principal goals of the Act, which is to maximize the flexibility available to a developer seeking to adjust the size and mix of a project to the demands of the marketplace, both before and after creation." UCIOA § 1–103 cmt. 15. Thus, "development rights" include declarant's right to: "(a) Increase the size or density of a project, either by adding real property to it, or by creating new units, common elements or limited common elements on either the original land or within the original buildings, or on any other land or buildings subsequently added." *Id.* UCIOA clearly recognizes that if the developer must relinquish control before fully developing the land, then the unit owners could dictate further development, potentially destroying the developer's investment along with the property values in the community. *Solowicz v. Forward Geneva Nat.*, 316 Wis. 2d 211, 236–37, 763 N.W.2d 828, 840, (2008); *see also* Restatement (Third) of Property: Servitudes § 6.19(2) (1998) stating that turnover should occur "[a]fter the time reasonably necessary to protect [the developer's] interests in completing and marketing the project."

In creating the Declaration, Declarant reserved its special declarant's rights. The introductory paragraph to Part Four of the Declaration makes this clear, providing: "The Declaration reserves various rights to Declarant in order to facilitate the smooth and orderly development of Southern Highlands and to accommodate changes in the Master Plan which inevitably occur as a Community the size of Southern Highlands grows and matures." Declarant's reservation of its special declarant's rights continues through Articles 10 (Annexation; Expansion of the Community) and Article 11 (Additional Rights Reserved to Declarant) of the Declaration. Among those provisions, Declarant specifically included the ability to add new units as part of any real estate in Exhibit B to the Declaration. *See* Declaration § 10.1 (All Units subject to this Declaration, whether initially described or annexed pursuant to an Annexation Notice or Supplemental Declaration...."); § 10.4 ("the Units in any additional property subjected to this Declaration shall be assigned voting rights in the Association"). By reserving its special declarant rights – as permitted under NRS 116.089(2) – Declarant had the authority to create or add units on the BLM Land, which was included as part of Exhibit B to the Declaration. Yet again, NRS 116.2122 does not impede or limit the Declarant's ability or rights to add or create units per its developmental and special declarant's rights.

[4] An example provided in the commentary to UCIOA 1-103 provides additional insight on this issue. It provides that: a declarant may be building a 50-unit building on Parcel A "with the intention, if all goes well, to 'expand' the common interest community by adding an additional building on Parcel B, containing additional units, as part of the same common interest community." UCIOA 1-130, cmt. 15. So long as the declarant "reserves the right to do so, *i.e.*, to 'add real estate to a common interest community,' he has reserved a 'development right'" and may add those units at a later date. *Id.*

C. The Statute of Limitations in NRS 116.2117(2) Precludes This Complaint from Proceeding

As described above, the Third Amendment to the Declaration was recorded on October 6, 2005. NRS 116.2117 provides, that "[n]o action to challenge the validity of an Amendment adopted by the association pursuant to this section may be brought more than one year after the Amendment is recorded." In light of this statutory limitation, a challenge to the Third Amendment should have been filed by October 6, 2006. *See Regency Towers Ass'n, Inc. v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 281 P.3d 1212 (Nev. 2009) (Regency Towers' suit was dismissed because, under NRS 116.2117, it could have sued to challenge the validity of an amendment to a declaration within one year after the amendment was recorded, but failed to do so). Likewise, NRS 116.760 prevents a person who is "aggrieved by an alleged violation" of NRS 116 from filing an affidavit alleging a violation more than a year after the person should reasonably have discovered the alleged violation.[5]

After October 6, 2005, every home owner in Southern Highlands had actual and constructive notice of the Third Amendment (per its mailing and recording), and that the maximum number of units in Southern Highlands was 10,400. *See* Notice Regarding Third Amendment, enclosed herewith. Any attempt by an owner to bring a challenge to the Third Amendment now – nearly twelve years later – is extremely untimely and prohibited by Nevada law.

D. Determining the Appropriate Number of Conveyed Units under NRS 116.31032

Based on your letter, we understand that the complainant has argued that the "units conveyed" under NRS 116.30132 should be greater than the count presented by the Declarant. It appears that complainant claims the conveyance of units to owners other than a declarant includes plats of raw land sold by a developer to a participating builder, i.e., "builder units." There is little support for this interpretation.

Your letter specifically mentions the Southern Highlands 2015 Adopted Budget and the 1079 "Builder Units." There are, however, significant reasons why this number is not and should not be used in determining the actual number of units conveyed under NRS 116.31032. First, this number is nothing more than an estimated projection done at the end of 2014 for ***potential*** units on land conveyed to builders. *See* Southern Highlands 2015 Ratified Budget, enclosed herewith, ("Adopted: ***10/9/14*** – Ratified: ***11/20/14***"). This number does not reflect actual units conveyed to homeowners. Second, the builder is not an end user and often owns nothing more than raw land, which has yet to be developed. For purposes of calculating the actual number of units conveyed, that was always based on the conveyance of a unit to the "end user," which is the purchaser (i.e., homeowner) of a particular unit or units.

[5] Developer seriously questions whether NRS 116.760 was actually complied with in this case.

This approach has always been accepted by the Nevada Real Estate Division ("NRED"). For example, the NRED is permitted under NRS 116.31155 to collect an annual "per door" fee for each conveyed unit in order to fund its operation. Accordingly, the Association must submit its count of units to the NRED each January. The submitted unit count is then cross-checked by the NRED and the department has the right to randomly audit the submission. On more than one occasion, the Association has been audited and its unit count, based on conveyance of units to "end users," has been accepted by the NRED as accurate. *See* Correspondence with NRED Auditor Joseph J. Osisek, enclosed herewith.

Additionally, the unit count and whether the developer control period had ended was already looked at when the NRED assigned an investigator to a claim filed by Mr. Kenneth Fitzgerald in 2011 as Case IS 11-2404. According to a letter sent from Cheryl Fleming of the NRED to the development company in June of 2012, she was reviewing a claim that the declarant control period had been reached. While a detailed decision by the NRED could not be located, Declarant's records show that NRED closed the matter on August 28, 2012 due to a lack of sufficient evidence to support the claim.

Based on the NRED's decisions in various audits and Case IS 11-2404, the measurement of the turnover percentage has always been and should be determined by dividing the current number of units sold to end users (the numerator) by the maximum number of planned units (the denominator).[6] Accordingly, the Association has ***never*** met the threshold under NRS 116.31032 for terminating declarant control, whether that threshold be 75% or 90%, and this complaint is without merit.[7]

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[6] As the Nevada Supreme Court has previously noted, NRED "is charged with administering Chapter 116." *SFR Invs. Pool 1 v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 416 (2014).; *see also* NRS 116.615. That administration includes issuing "advisory opinions as to the applicability or interpretation of ... [a]ny provision of this chapter." *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 71 (2016); *see also* NRS 116.623(1)(a). The Nevada Supreme Court also explained that "'[a]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as necessary precedent to administrative action' and that 'great deference should be given to the agency's interpretation when it is within the language of the statute.'" *State v. Morros*, 766 P.2d 263, 266 (Nev. 1988) (quoting *Clark Co. Sch. Dist. v. Local Govt.*, 530 P.2d 114, 117 (Nev. 1974)).

[7] By way of example, only 7,157 units had been conveyed to unit's owners as of October, 2015. *See* VMS Log, enclosed herewith. Based on these numbers, the percentage of conveyed units was approximately 69%, well below the declarant turnover threshold. Currently, turnover of control for a common-interest community in excess of 1,000 units from a declarant to the owners must occur "60 days after conveyance of ***90 percent*** of the units that may be created to units' owners other than a declarant." NRS 116.31032 (emphasis added).

Should you have any questions regarding anything included in this letter, please do not hesitate to contact me.

Very Truly Yours,

Nathanael R. Rulis, Esq.

Enclosures as stated
cc: Southern Highlands Dev. Corp.