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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL KOSOR, JR., a Nevada resident, Plaintiff, vs. SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION, a Nevada Non-Profit Corporation; SOUTHERN HIGHLANDS DEVELOPMENT CORPORATION, a Nevada Corporation; CHRIS ARMSTRONG, an individual; RICK REXIUS, an individual; MARC LIEBERMAN, an individual; Defendants.	Case No.: A-23-881474-W Dept. No.: 31 **PLAINTIFF'S MOTION FOR (1) TEMPORARY RESTRAINING ORDER AND (2) PRELIMINARY INJUNCTION ON AN ORDER SHORTENING TIME** ***** HEARING REQUESTED *****

Plaintiff MICHAEL KOSOR, JR. ("Plaintiff" or "Col. Kosor"), by and through his counsel of record, Hutchison & Steffen, LLP, hereby moves the court for an order preliminarily enjoining Defendants from holding Board elections except as ordered by this Court, enjoining Defendants from holding Board meetings except as permitted by this Court, enjoining Defendants from taking any kind of Board action except as permitted by this Court, and enjoining Defendants from entering into any contracts or obligations except as permitted by this Court.

The relief sought is based upon this Motion, Plaintiff's Amended Complaint, which is incorporated herein by reference, the attached exhibits, the attached affidavits, and such argument as the Court may allow.

ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefore, IT IS HEREBY ORDERED that PLAINTIFF MICHAEL KOSOR, JR's ("Plaintiff") REQUEST FOR (1) TEMPORARY RESTRAINING ORDER AND (2) PRELIMINARY INJUNCTION ON AN ORDER SHORTENING TIME, shall be heard on the ___ day of _____, 2023, at _____ a.m./p.m. or as soon thereafter as counsel may be heard.

*/s/*_____

Respectfully submitted by:

HUTCHISON & STEFFEN, PLLC

/s/ Robert E. Werbicky

_____

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DECLARATION OF ROBERT E. WERBICKY IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

I, Robert E. Werbicky, declare as follows:

1. I am a resident of Nevada and am an attorney with the law firm of Hutchison & Steffen, PLLC, acting as Plaintiff's counsel in this matter.

2. I submit this declaration in support of PLAINTIFF'S MOTION FOR (1) TEMPORARY RESTRAINING ORDER AND (2) PRELIMINARY INJUNCTION ON AN ORDER SHORTENING TIME (the "Motion").

3. As detailed in the Motion, per the Master Declaration of Covenants, Conditions, and Restrictions for SHCA (the "CC&Rs") Southern Highlands Development Corporation ("SHDC") is the "Declarant" of the Southern Highlands Community Association ("SHCA") and appoints three of the available five Director positions on SHCA's Board.

4. Per the CC&Rs the Declarant (i.e., SHDC) is to cede control of the SHCA and its Board to the SHCA homeowners after 75% of the "Maximum Units" are conveyed within the community. *See* CC&R §2.19, Exhibit 1 at 0015.

5. Documents show on January 26, 2022, the SHCA reported to the Nevada Real Estate Division that it had conveyed 79.88% (i.e., 8,308 of the total 10,400) of its Maximum Units. Exhibit 8 at 0232.

6. I have been informed that Declarant's appointed, unelected Directors for the SHCA Board continue to maintain control of the Board.

7. On September 19, 2023, the SHCA Board sent a letter to all its homeowners with an invitation to run for a single seat on the SHCA Board rather than the entire Board. Exhibit 2 at 0194.

8. This September 19, 2023 letter a deadline of October 27, 2023 by which to submit a written request to serve on the Board. *Id.*

9. I was informed by the Plaintiff that he timely submitted a written request to serve on the Board prior to the October 27, 2023 but has not yet heard from the Board approving or rejecting his application to the ballot. See NRS 116.31034(4)

10. The thousands of ballots for the anticipated election could be mailed to the homeowners at a substantial cost.

11. Documents show Plaintiff was removed from his duly elected position as Director on or about May 16, 2023 without a removal election by a mere Declarant controlled Board vote performed in violation of due process and contrary to Nevada law.

12. Before filing this motion, Plaintiff sought alternative dispute resolution of the issues associated with this lawsuit pursuant to CC&R §19.2 ("ADR"). Exhibit 1 at 0081.

13. Col. Kosor intends to exhaust his administrative remedies pursuant to NRS 38.310 if the ADR process is waived or is not fruitful.

14. If necessary, Col. Kosor intends to further amend his complaint to assert additional causes of action including petitions for quo warranto relief.

15. The instant Motion must be heard on shortened time as the potential harm to Plaintiff (and all the homeowners within the SHCA) is substantial in that the SHCA Board is set to expend a significant amount of additional time and SHCA resources to carry out an improper Board election while Col. Kosor exhausts appropriate ADR and administrative remedies.

16. Further, if a Board election is held, it could make Col. Kosor's quo warranto relief ineffective.

17. Plaintiff respectfully submits that good cause exists to set this matter on shortened time pursuant to EDCR 2.26. This request is made in good faith and not for any improper purpose.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct based upon my knowledge, information, and belief.

DATED this 17th day of November, 2023.

/s/ Robert E. Werbicky
Attorney Robert E. Werbicky

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2021 Retired Colonel Michael Kosor ("Col. Kosor") was elected as Director of the Southern Highlands Community Association ("HOA" or "SHCA") by its homeowners on a platform of securing the right to self-determination for the thousands of homeowners of the SHCA by requiring the Southern Highlands Development Corporation (the "Declarant") to cede control of the SHCA and its Board to these homeowners, and for the SHCA Board to conduct the necessary elections to do so. Despite being retired, Col. Kosor has sacrificed significant amounts of his time, effort, and money attempting to fulfill his duty to the homeowners of the SHCA. In return, the Declarant and its agents have repeatedly retaliated against Col. Kosor and obstructed all his efforts. Steadfast in his resolve to fulfill his duties to the SHCA homeowners, Col. Kosor brings the instant action and motion.

The Declarant has maintained control of the SHCA, appointing all or a majority of its Board, for over 24 years. The SHCA is currently governed by a five-member Board of Directors. The Declarant appoints three of the five Directors. In 2021, Col. Kosor became one of two Directors elected by the homeowners to the Board. The Declarant and its appointed SHCA Board have strenuously resisted Col. Kosor's efforts on behalf of the homeowners to hold the SHCA and the Declarant account for their failure to cede control to the SHCA homeowners.

The Master Declaration of Covenants, Conditions, and Restrictions for Southern Highlands (the "CC&Rs") provides Declarant must cede control of the SHCA and its Board after 75% of the Maximum Unit were conveyed. *See* Exhibit 1, §2.19, at 0015.[1] The documentation provided by the SHCA to the Nevada Real Estate Division shows 8,308 of 10,400 (79.88%) of the Maximum Units[2] were conveyed by Jan. 26, 2022. Exhibit 8, at 0232. As the 75% threshold

[1] Termination of Declarant control triggers a number of required actions under NRS 116.31038 and/or the CC&Rs, including, but not limited to delivering all property under its control, accounting of association monies, audited financials, disclosure of the amount by which the Declarant has subsidized the SHCA, provide for the termination of any contract or lease that was entered into by the Declarant, and more.

[2] Col. Kosor alleges the proper Maximum Unit number is 9,000 units, but this need not be determined to establish Declarant control ended. The exact termination of declarant control should be investigated and addressed, as may be necessary, by SHCA once all board directors are elected by the owners.

has been exceeded, Declarant control must cease.

This matter is urgent because an election of the Board is anticipated to occur in late 2023 and must be halted until the issue of Declarant Control can be determined by this Court. *See* Exhibit 2, at 0194. As such, Col. Kosor, a unit owner in the SHCA and an elected Director on the Board,[3] is seeking a temporary restraining order and a preliminary injunction to halt any elections of Directors and also halt any Board action (except such actions authorized by this Court) until this Court determines the issue of Declarant control of the SHCA and the current Board's legitimacy and authority to act on behalf of the SHCA.[4]

II. FACTUAL BACKGROUND

A. The Parties

Col. Kosor is a retired United States Air Force Colonel living within the Southern Highlands Community Association. *See* Exhibit 3 at 0198 and Exhibit 4 at 0199-0202. On December 17, 2021, Col. Kosor was publicly elected by the homeowners as a Director for the Southern Highlands Community Association. *See* Exhibit 5 at 205. A central focus of Col. Kosor's campaign was the turnover of Board control from the Declarant to the SHCA homeowners. *Id.* and Exhibit 9, at ¶ 7.

The Southern Highlands Development Corporation is defined as the Declarant in §2.18 of the CC&Rs. Exhibit 1 at 0014; *see also* NRS 116.035. The CC&Rs were executed by the Declarant on December 27, 1999. *See* Exhibit 1 at 0009 and 0093.

The SHCA is the homeowners' association originally comprising a maximum of up to 9,000 units of Southern Highlands master-planned community located in the southern foothills of Las Vegas, Nevada. The Declarant alleges it amended the Declaration in 2005 increasing the

[3] The Board improperly and without due process removed Col. Kosor from his elected position as Director in May 2023 without an election as required by statute. This further deprives the SHCA members from their right to self-determination. Col. Kosor intends to seek quo warranto relief with this Court as soon as practicable. As such, injunctive relief is also necessary to prevent Col. Kosor's quo warranto induction relief from becoming ineffective.

[4] A temporary restraining order and injunction is also needed to the extent Col. Kosor must follow the applicable alternative dispute resolution procedures of the CC&Rs as well as NRS 38.310. NRS 38.300(3) does not prohibit an action in equity, such as the Declaratory action, while also seeking injunctive relief.

Maximum Units to 10,400 units. *See* Exhibit 1, at 183-184. [5]

The SHCA is governed by a Board consisting of five Directors. *See* Exhibit 6 at 216-17; *see also* Exhibit 7 at 0230; Exhibit 8 at 233 (listing the number of Board members). The Board of Directors is defined by CC&R §2.8 and is responsible for administration of the SHCA. Exhibit 1 at 0013. The Declarant appointed three of the current five-member Board: Mr. Chris Armstrong, Mr. Rick Rexius and Mr. Marc Lieberman.

B. Over 75% of the Maximum Units have been conveyed.

The Annual Association Registration provided by the SHCA to the Nevada Real Estate Division in January 2022 provided the number of annexed units was 8,308. *See* Exhibit 8 at 232-233. The listed Maximum Unit Total on this document is 10,400. *Id*. at 232. The document was signed on January 25, 2022, by Sara Gillam who attested "to the accuracy of the information provided." *Id*., at 233. Thus, by January 25, 2022, 79.88% of the Units had been conveyed according to the Declarant controlled SHCA (through the management company controlled by the Declarant).[6]

As more than 7,800 units (75% of the Maximum Units) were conveyed, the Declarant Control Period was required to terminate **no later than** January 25, 2022.[7] This required the SHCA to conduct homeowner elections of all Directors on the Board. The current Board is therefore illegitimate since it has three Directors who were not properly elected by the homeowners. As such, any actions taken are and will be ultra vires and void.

The intervention of this Court is necessary to halt another illegitimate Board from being seated, and to halt actions taken by an illegitimate Board and officers appointed by that

[5] Col. Kosor alleges the proper number is 9,000 units, but this need not be determined to establish Declarant control ended.

[6] In 2020 Col. Kosor initiated an action (A-20-825485-C) seeking a declaration the threshold unit count had been met based on a unit count prior to October 13, 2020. That matter was not submitted to mandatory mediation pursuant to NRS 38.310, so any and all orders entered in that case are void because the case was not ripe for adjudication. A NRCP 60(b)(4) motion to that effect is pending in that case and will be heard on December 12, 2023. Further, the 2022 Annual Association Registration indicates the unit count changed between 2020 and 2022.

[7] The Declarant Control Period may have terminated much earlier, but this dispute need not be addressed at this time. The precise date the Declarant Control Period ended need not be determined at this time, but Col. Kosor does not concede his position the Declarant Control Period ended long before 2022.

illegitimate Board.[8]

III. LEGAL ARGUMENT

A. Standards for issuance of a temporary restraining order and preliminary injunction.

A temporary restraining order and preliminary injunction are proper when the moving party can demonstrate that the nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory relief is inadequate and that the moving party has a reasonable likelihood of success on the merits. *Boulder Oaks Community Association v. B & J Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). In addition, a court should balance the threat of harm that an injunction may cause to the moving party and the nonmoving party, as well as whether injunctive relief would be contrary to public interest. *Ellis v. McDaniel*, 95 Nev. 455, 459, 596 P.2d 222, 225 (1979).

The purpose of injunctive relief is to preserve the status quo ante litum – "the last uncontested status which preceded the pending controversy"-- until the matter may be fully heard by the Court. *GoTo.Com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (internal quotation marks omitted)[9]; *accord Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987). "Determining whether to grant or deny a preliminary injunction is within the district court's sound discretion." *Labor Commissioner of State of Nevada v. Littlefield*, 123 Nev. 35, 38, 153 P.3d 26, 28 (2007).

Pursuant to NRS 33.010, the Court may issue an injunction:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
> 3. When it shall appear, during the litigation, that the defendant is

[8] Court intervention may also be necessary to force the SHCA and/or the Board to conduct homeowner elections pursuant to NRS 116.31034 and end Declarant control in favor of the Southern Highland homeowners.

[9] Federal cases interpreting rules of civil procedure are persuasive authority in Nevada courts. *Executive Management. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (*citing Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

> doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

"A preliminary injunction is available if an applicant can show a likelihood of success on the merits and a reasonable probability the non-moving party's conduct, if allowed to continue, will cause irreparable harm." *Clark County School District v. Buchanan*, 112 Nev. 1146, 1149, 924 P.2d 716, 719 (1996). "The district court may also weigh the public interest and the relative hardships of the parties in deciding whether to grant a preliminary injunction." *Id.*

NRCP 65(b) authorizes the issuance of a temporary restraining order to prevent irreparable harm occurring prior to the hearing on a preliminary injunction. The analysis of whether to issue a temporary restraining order is substantially identical to that of a preliminary injunction. *Stuhlbarg International Sales Company, Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir. 2001); *V'Guara Inc. v. Dec*, 925 F. Supp. 2d 1120, 1123 (D. Nev. 2013); *News Herald v. Ruyle*, 949 F. Supp. 519, 521 (N.D. Ohio 1996) ("If there is notice to the other side and a hearing, the Court applies the same standards governing issuance of a preliminary injunction in determining whether to issue a temporary restraining order.").

Under these standards, as shown further below, Col. Kosor is entitled to a temporary restraining order and preliminary injunction.

B. Plaintiff has a reasonable probability of success on the merits.

The requirement of a "reasonable probability of success on the merits" means that the moving party must demonstrate both the existence of a viable claim against the defendant, as well as a likelihood of prevailing on that claim. *State Farm Mutual Automotive Insurance Company v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993).

1. Turnover of the SHCA and the Board to the homeowners.

a. The CC&Rs provide the Declarant shall terminate when 75% of Maximum Units are conveyed.

The Declarant control of the SHCA Board "shall terminate" 60 days after 75% of the Maximum Units are conveyed. CC&R §2.19 provides, in part:

> The period of time during which Declarant is entitled to appoint and

> remove the entire Board of Directors (or a majority thereof). The Declarant Control Period **shall terminate** upon the first to occur of the following:
> (a) 60 days after the Declarant has conveyed 75% of the Maximum Units;

(all emphasis added). Exhibit 1 at 0015.

CC&R §2.32 provides:

> The maximum number of Units approved for development within Southern Highlands under the Master Plan, as amended from time to time; provided, that nothing in this Declaration shall be construed to require Declarant to develop the maximum number of lots approved. The Maximum Units as of the date of this Declaration is 9,000 Units.

Id. at 0016. The Declarant recorded an Amendment on October 6, 2005, which purportedly increased the Maximum Units from 9,000 to 10,400.[10] Exhibit 1 at 00167-168. Using the 10,400 Maximum Unit number, the 75% threshold would be crossed once 7,800 Units were conveyed.

The statute in effect at the time the CC&Rs were adopted, NRS 116.31034(1), provides:

> Except as otherwise provided in subsection 5 of NRS 116.2120, **not later than the termination of any period of declarant's control**, the units' owners **shall** elect an executive board of at least three members, at least a majority of whom must be units' owners. The executive board shall elect the officers. The members and officers of the executive board shall take office upon election.

(AB 612 (1993) Approved July 12, 1993 Effective October 1, 1993) (all emphasis added).

The current version of the statute provides at the termination of declarant control: "the units' owners shall elect an executive board of at least three members, all of whom must be units' owners. The executive board shall elect the officers of the association." Before the ballots are prepared, the association must give notice of each unit owner's eligibility to serve on the board (NRS 116.31034(4)), allow for nominations (Id.), prepare and mail ballots (NRS 116.31034(8)), and the election must be conducted pursuant to NRS 116.31034 (15)&(16).

b. The Units conveyed to homeowners exceed 75% of the Maximum Unit total.

The Annual Association Registration dated January 25, 2022, Exhibit 8, is an official

[10] Plaintiff does not concede the Maximum Units to 10,400 is correct.

document provided by the SHCA to the Nevada Real Estate Division ("NRED") and was signed by Sara Gillam on behalf of the SHCA who attested "to the accuracy of the information provided." *Id*. at 0233. The listed Maximum Unit Total on this document is 10,400 and the states number of conveyed units was 8,308. *Id*, at 0232. Thus, according to the Declarant-controlled SHCA, through the management company controlled by the Declarant, by January 25, 2022, 79.88% of the Maximum Units had been conveyed. Clearly, the 75% threshold requiring turnover was exceeded. Thus, using the SHCA's own admissions, the Declarant Control Period has already terminated.

Despite the Declarant Control Period having terminated, the **mandatory** homeowner elections of all Board members did not occur as required by statute. As such, three of the five members of the current Board were not properly elected pursuant to NRS Chapter 116, the CC&Rs, or its Bylaws. Therefore, as provided below, the actions taken by the Board after the Declarant Control Period terminated are void and ineffective. A new Board must be properly elected, and this Court should halt all actions of the Declarant and the Board other than those necessary to turn over control of the SHCA and the Board to the homeowners of the SHCA.

c. The threshold is not 90% of the Maximum Units.

It is anticipated that Declarant will attempt to argue the threshold ending the Declarant Control Period was changed to a 90% minimum (and maximum) by NRS 116.31032 when it was amended by the Legislature in 2015. This argument fails on at least two grounds.

First, the 90% threshold in NRS 116.31032(1)(b) is only a ceiling, and the statute expressly allows for turnover to occur earlier. Since the CC&Rs allow for a turnover at or before 75% of units are conveyed, the CC&Rs do not conflict with the 2015 statute.

Second, the CC&Rs were created in 1999. NRS 116.1206 -- which mandates CC&Rs conform to subsequent changes to NRS Chapter 116 -- was passed in 2003 but was not retroactive. Thus, NRS 116.1206 applies to CC&R provisions adopted on or after October 1, 2003, but the Contract Clause of the United States and Nevada Constitutions, prohibit that statute's application for CC&R's effective before October 1, 2003. The CC&Rs of the SHCA were effective in late 1999 -- well before the October 1, 2003 cutoff -- so any change to the 75%

threshold would violate the Contract Clause of the United States and Nevada Constitutions.

i. CC&R §2.19 can be read in harmony with NRS 116.31032.

The current NRS 116.31032(1) provides, in relevant part:

> Except as otherwise provided in this section, **the declaration may provide for a period of declarant's control of the association**, during which a declarant, or persons designated by a declarant, may appoint and remove the officers of the association and members of the executive board. . . .Regardless of the period provided in the declaration, a period of declarant's control **terminates no later than** the earliest of:
> . . .
> (b) For a common-interest community with 1,000 units or more, 60 days after conveyance of 90 percent of the units that may be created to units' owners other than a declarant;

(emphasis added). CC&R §2.19 provides, in part:

> The Declarant Control Period **shall terminate** upon the first to occur of the following:
> (b) 60 days after the Declarant has conveyed 75% of the Maximum Units;

(emphasis added). Exhibit 1 at 0015.

The rules of construction governing the interpretation of contracts apply to the interpretation of restrictive covenants for real property. *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 371, 373 P.3d 66, 73 (2016). When there is no dispute of fact, a contract's interpretation is a legal question. *Id.* When a contract is ambiguous, it will be construed against the drafter. *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994). An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract. *Id.*

"Contractual provisions should be harmonized whenever possible," *Vegas United Inv. Series 105, Inc. v. Celtic Bank Corp.*, 135 Nev. 456, 459, 453 P.3d 1229, 1231–32 (2019) *quoting Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996). No provision should be rendered meaningless. *Id. citing Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998). Whether reading a statute, a contract, or a recorded instrument, we consider the text as a whole, harmonizing, when possible, all sections or provisions, and giving words their plain and ordinary meaning. *McMullin v. Hauer*, 420 P.3d

271, 274 (Colo. 2018).

The first sentence of NRS 116.31032(1) provides the "declaration may provide for a period of declarant's control of the association". If NRS 116.31032(1)(b) prohibits a lesser percentage than the 90% threshold, it renders this language superfluous. Such a reading would also nullify the "no later than" language immediately in front of NRS 116.31032(1)(b). A reading which sets 90% as a maximum ceiling but not the minimum, gives meaning to all language in the statute and harmonizes the sections of the statute.

Thus, since the CC&Rs mandate transfer to the homeowners once 75% of the Maximum Units are conveyed, this is permitted as it does not conflict with the statute. In fact, it makes more sense to read the CC&R and statute in this way. When the statute was changed in 2015, there was no indication in the bill that the 90% threshold would act as both a floor and a ceiling, that the statute obviated prior CC&R provisions regarding the threshold invalid, or that the statute was retroactive. Further, Col. Kosor's reading of the statute would mitigate the impact on homeowners who became bound by CC&Rs before 2015.

Prior to 2015 NRS 116.31032(1) provided, in relevant part:

> Except as otherwise provided in this section, the declaration may provide for a period of declarant's control of the association, during which a declarant, or persons designated by a declarant, may appoint and remove the officers of the association and members of the executive board. . . .Regardless of the period provided in the declaration, a period of declarant's control terminates no later than the earliest of:
>
> (a) Sixty days after conveyance of 75 percent of the units that may be created to units' owners other than a declarant . . .

Indeed, in 1993, the effective version of the statute when the CC&Rs were created, provides, in part:

> Regardless of the period provided in the declaration, a period of declarant's control terminates no later than the earlier of:
>
> (a) Sixty days after conveyance of 75 percent of the units that may be created to units' owners other than a declarant

(AB 612 (1993) Approved July 12, 1993 Effective October 1, 1993).

Homeowners purchasing property subject to CC&Rs prior to 2015 would have a reasonable expectation that declarant control would end no later than when 75% of units were conveyed. Reading the change to NRS 116.31032(1) would fulfil these reasonable expectations.

If homeowners wanted to allow declarants more time to control the HOAs, they could vote to amend the CC&Rs to that effect.

ii. As the SHCA CC&Rs predate October 1, 2003, the 2015 change to NRS 116.31032 cannot alter the 75% threshold.

Further, NRS 116.31032 could not alter the 1999 CC&Rs without running afoul of the Contract Clause of the United States and Nevada Constitutions which provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts...." U.S. Const. art. I, § 10, cl. 1. "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. *Eagle SPE NV I, Inc. v. Kiley Ranch Communities*, 5 F. Supp. 3d 1238, 1245 (D. Nev. 2014). The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1147 (9th Cir.2004). If so, did the State have a proper public purpose. *Id.* If this step is also met, whether the adjustment of rights and responsibilities is appropriate to the public purpose. *Id.*

In dealing with the impairment of contracts under NRS 116.1206, the Federal District Court of Nevada decided a Contract Clause issue can be avoided by reading NRS 116.1206 prospectively – as statutes are intended to be read and applied. A prospective reading avoids invalidating CC&R provisions adopted between January 1, 1992 and October 1, 2003. *U.S. Bank v. Countryside Homeowners Ass'n*, 2016 WL 3638112, at *4 (D. Nev. July 7, 2016). *Nationstar Mortg., LLC v. Hometown W. II Homeowners Ass'n,* 2016 WL 3660112, at *6 (D. Nev. July 8, 2016), on reconsideration in part, 2017 WL 58567 (D. Nev. Jan. 4, 2017).

The *Countrywide HOA* court noted NRS 116.1206(1) did not become effective until October 1, 2003. *Id.* It is also important that NRS 116.1206(1)(b) is not retroactive. *Id.* Parties to CC&Rs adopted on or after October 1, 2003 were on notice that they would bear the risk of changing statutes going forward. *Id.* But parties to CC&Rs contracting before October 1, 2003 had an expectation of the continued vitality of their CC&R provisions without being subject to retroactive nullification by the state. *Id.*

Thus, NRS 116.1206 applies **only** to CC&R provisions adopted on or after October 1,

2003, regardless of the respective dates of CC&R provisions and any conflicting provisions of Chapter 116. *Id.* at 5. The *Countrywide HOA* court explained Contract Clause problems would arise if it were to find that NRS 116.1206 also applied to CC&R provisions adopted before October 1, 2003. *Id.*

As both statutes and contracts are interpreted to avoid constitutional infirmity, NRS 116.31032 should be read to impose a 90% ceiling but allow a lower threshold in preexisting CC&Rs to remain unaffected.

As such, the 75% threshold mandated by §2.19 in the CC&Rs remains effective. The SHCA's own documentation and calculations show Declarant control of the SHCA should have ended long ago. As such, Col. Kosor has at least a reasonable probability of success on the merits.

2. Ultra vires actions by the Board are void and ineffective.

Generally, a corporate act is said to be ultra vires when it goes beyond the powers allowed by state law or the articles of incorporation. *Shoen v. SAC Holding Corp*., 122 Nev. 621, 643, 137 P.3d 1171, 1185 (2006), abrogated on other grounds by *Chur v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 136 Nev. 68, 458 P.3d 336 (2020), and abrogated on other grounds by *Guzman v. Johnson*, 137 Nev. 126, 483 P.3d 531 (2021); *Jacobi v. Ergen*, 2015 WL 1442223, at *5 (D. Nev. Mar. 30, 2015) (unpublished).

When a corporation acts beyond its corporate powers or its actions offend public policy, those actions are void. *Bilanko v. Barclay Ct. Owners Ass'n,* 375 P.3d 591, 595 (Wash. 2016). Void acts are "illegal acts or acts beyond the authority of the corporation." *Nevins v. Bryan*, 885 A.2d 233, 245 (Del. Ch.), aff'd, 884 A.2d 512 (Del. 2005). An ultra vires action taken by a corporation beyond the powers conferred upon it by the legislature, is not only voidable, but wholly void, and of no legal effect. *Trico Elec. Co-op. v. Ralston*, 196 P.2d 470, 475–76 (Ariz. 1948) *citing Central Trans. Co. v. Pullman's Palace Car Co*., 139 U.S. 24, 11 S.Ct. 478, 488, 35 L.Ed. 55 (1891). Ultra vires acts are void. *See Solomon v. Armstrong*, 747 A.2d 1098, 1114 (Del. Ch. 1999), aff'd, 746 A.2d 277 (Del. 2000)(providing ultra vires acts are part of the list of void actions).

Since the existing Board was not properly elected pursuant to the statutes, CC&Rs and Bylaws, its actions are void and without effect.[11] All actions taken by an illegitimate board should be found void and unenforceable. *See Lockard v. People*, 250 P. 152, 154 (Colo. 1926)(explaining acts taken by a board of directors not duly elected would be void); *see also Trieweiler v. Spicher*, 838 P.2d 382, 385 (Mont. 1992)(holding developer did not have the authority to remove a board, and the actions taken by the invalid board were invalid and unenforceable); *McKnight v. Bd. of Directors*, 512 N.E.2d 316, 321 (Ohio 1987)(holding an amendment adopted by an illegally constituted board was null and void); *Ahn v. Lee*, 471 S.E.2d 38 (Ga. App. 1996)(holding subsequent elections of board of directors were void when noticed by improper board members); *Greater Ft. Worth & Tarrant Cnty. Cmty. Action Agency v. Mims*, 627 S.W.2d 149, 151 (Tex. 1982) (holding that illegally constituted board of directors did not have authority to terminate executive director); *Whitman v. Fuqua*, 549 F. Supp. 315 (WD Pa 1982) (actions taken by old board of directors, after they were aware of election of new directors, were void and unenforceable); *Paducah Newspapers, Inc. v. Goodman*, 65 S.W.2d 990 (Ky. App. 1933)(acts of directors are not binding unless done according to law and shown by its records).

As the Board is comprised with a majority of Directors improperly appointed rather than elected, the Board is illegitimate and its actions are ultra vires and void. Thus, any actions taken by the Board going forward are void which could have a significant impact on the SHCA.[12]

C. Irreparable Injury will occur is the Declarant continues to exercise control, and if the unelected Board is allowed to continue operating.

Irreparable harm is an injury "for which compensatory damage is an inadequate remedy." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 353, 351 P.3d 720, 723 (2015). To show irreparable injury, a plaintiff must demonstrate potential harm that cannot be redressed by a legal remedy following litigation. *Dangberg Holdings Nevada, LLC v. Douglas County*, 115 Nev. 129, 143, 978 P.2d 311, 319 (1999) (holding that injunctive relief is appropriate where compensatory

[11] This includes the removal of Col. Kosor as an elected Director.

[12] *See, infra, Park Briar Assocs. v. Park Briar Owners, Inc.*, 582 N.Y.S.2d 273, 273 (NY App. 1992).

damages are an inadequate remedy). As a constitutional violation may be difficult or impossible to remedy through money damages, such a violation may, by itself, be sufficient to constitute irreparable harm. *City of Sparks v. Sparks Mun. Ct.*, 129 Nev. 348, 357, 302 P.3d 1118, 1124 (2013).

The right of self-determination is a "substantial" right and "cannot be meaningfully recompensed," because it constitutes irreparable injury. *Loc. 450 v. Int'l Union of Elec., Elec., Salaried Mach. & Furniture Workers, AFL--CIO*, 30 F. Supp. 2d 574, 586 (E.D.N.Y. 1998). Without an injunction, such a deprivation is "beyond remediation. *Id. See also Mason Tenders Dist. Council of Greater New York v. Laborers' Int'l Union of N. Am.*, 884 F. Supp. 823, 833 (S.D.N.Y. 1995)(explaining the abridging of the right of self-determination cannot be compensated for monetarily); *Savage v. Tweedy*, No. 3:12-CV-01317-HZ, 2012 WL 4601281, at *4 (D. Or. Oct. 2, 2012)(explaining the removal from elected offices satisfies the irreparable harm inquiry).

Further, when the election of a board was disputed a court granted a preliminary injunction "barring the elected board from entering into or performing any contracts, entering into or performing any term of a loan agreement, spending any moneys of the corporation, including incurring any liability, terminating or attempting to terminate its proprietary lease for nonpayment of maintenance, or from enforcing monetary penalties or late fees" and this was upheld. *Park Briar Assocs. v. Park Briar Owners, Inc.*, 582 N.Y.S.2d 273, 273 (NY App. 1992). The court reasoned substantial irreparable harm could reasonably result if the improperly elected board was permitted enter into costly long-term obligations. *Id.*

Here, irreparable injury is a foregone conclusion. If the Board alters the status quo, the SHCA homeowners will be denied the right to elect their own representatives to the board, in violation of Nevada law. This will perpetuate the existence of a Board that is neither representative of, nor accountable to, the thousands of homeowners. Finally, the unelected Board should be prevented from engaging in any operations which could bind the SHCA to any long-term contracts or obligations or engage in action which could result in the action being overturned owing to the infirmity of the unelected Board.

At this point, SHCA intends to proceed with elections as it deems fit for its own benefit—not the benefit of the homeowners. Further, monetary compensation alone could never repair this irreparable injury and disenfranchisement of the homeowners' voting rights.

D. The Balance of Hardships and the Public Interest Tips in Plaintiff's Favor.

In addition to evaluating the likelihood of success and irreparable harm, the Court "may also weigh the public interest and the relative hardships of the parties in deciding whether to grant a preliminary injunction." *Clark Cnty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996). Many of these factors are discussed above. For example: the right to self-determination, the need to follow applicable law, preventing an invalid Declarant controlled Board from harming the SHCA before the association is turned over to the homeowners.

The entire purpose of establishing HOAs is the notion that the owners have the power, through a community political process, to control actions of the association. Clearly, not allowing elections will result in a majority of the directors to be declarant-appointed and not representative of the community as required by Nevada law.

There would be very little, if any, hardship to the SHCA to prohibit the SHCA Board from orchestrating any further elections, including but not limited to the upcoming election cycle, until full resolution of this case is reached. In short, the SHCA would essentially bear no cost in maintaining the status quo and delaying action until due process is afforded. On the other hand, Plaintiff would have no recourse if the community is denied its right to *elect* a representative board that is accountable to the community, rather than be subject to an unauthorized, appointed Board majority. The chilling effect is clear. The public interest weighs in favor of granting an injunction. Plaintiff is simply attempting to secure an election on behalf of owners that was lawfully conducted in accordance with Nevada law.

IV. CONCLUSION

This action and motion involve a bedrock principle of the United States: **the right to self-determination.** The Declarant in this matter has steadfastly refused to allow the thousands of homeowners in the SHCA the right to elect Directors of their choice – and improperly harassed, obstructed and ultimately retaliated by removing Col. Kosor, a properly elected Director, when he

dared to fulfill his duty by questioning the legitimacy of the Board comprised of Declarant controlled Directors and when he dared to point out the Declarant's profit motive preventing homeowners from electing their Directors.

The evidence shows the 75% threshold to end the Declarant Control Period was exceeded long ago. Despite its legal and moral obligation to end its dictatorial control over thousands of homeowners, the Declarant and its captive Board and management company have steadfastly prevented SHCA homeowners from exercising their **rights to self-determination**. Such a condition cannot be tolerated by this Court.

As such, this Court should enjoin the Declarant, the illegitimate SHCA Board, the unelected Board members, and the agents and officers of all Defendants from conducting any elections (other than a properly conducted election of all Board members), from conducting Board meetings, issuing Board decisions, or binding the SHCA to from entering into any contracts or obligations except as permitted or ordered by this Court until a formal and final determination regarding the end of Declarant control is entered by this Court.

The thousands of homeowners of the SHCA deserve nothing less.

DATED this 17th day of November,2023.

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