Proposed Nevada CIC Governance Legislative Remedies *

The list that follows identifies a number of areas where the law (NRS 116) runs counter to democratic governance principles. We ask our Legislator to address the following:

Legislative Remedies for Developer controlled associations:

- Developer control (NRS116)- return to the Nationally recognized (UCIOA)* 75% control change threshold in place prior to AB192(2015 (see NRS116.31032).
- Special Declarant Rights NRS 116.089(7) change to read: appoint and remove any declarant appointed officer. Currently conflicts with NRS 116.31036 (removal of executive board).
- End the power of a declarant via declaration provisions to require declarant approval of actions of the association or executive board before they become effective.
- Prohibit the use of a declarant affiliated management company during any declarant control period. Currently, a conflict of interest to act as fiduciaries of the HOA is created when the manager is owned by the declarant.
- Prohibit declarants from appointing employees as HOA Directors while under declarant control - a clear potential conflict of interest for directors that must act as fiduciaries of the HOA.
- Require all community board members to be unit owners (preferably they reside in the community), upon some nominal developer buildout—say 25%.
- Generally, limit “declarant rights” and “special declarant rights” that now proliferate CC&Rs

Legislative Remedies for all associations:

- Enact a Homeowner Association Consent to be Governed Agreement Act requiring actual notice-proof of knowing and voluntary agreement. Implied/constructive notice is too easily abused.
- Address CC&Rs attorney fees for any action brought by owners to enforce compliance with Nevada law. There is a compelling policy argument that homeowners who initiate administrative actions to enforce their statutory rights should not confront potential liability for attorney's fees simply because a planned community association has chosen to restate its statutory obligations in its governing documents.
- Repeal NRS 116.1206. The statute is being interpreted to change an HOA’s CC&Rs (the community constitution) whenever the Nevada Legislature makes changes of any kind to NRS 116. At present HOA owner agree to CC&Rs that can be changed without their consent. I argue this destroys the contract nature of CC&Rs. Plus, the standing provision doing so without the proper Legislative vetting violates the Contract Clause of the US Constitution (barring States to change private contracts).
- Amend NRS 116.2117(2) to address a court precedent blocking all challenges to an amendment after I year, to include those with no clear evidence of adoption. (see *Kosor v NRED*)
- Amend NRS 116.2117 deleting the provision allowing the declarant to condition owner amendments to the CC&Rs on declarant (or other person) approval. The provision was added by SB 204(2011) ch 389.
- Clarify NRS 116.31034(10) as to what constitutes an ability of an association’s board to bar an owner from holding a director position per the language “stand[ing] to gain any person profit or compensation”. A process of obtaining the above determination with proper due process needs to be specified.
- Limit the powers available to an association and its Board (“*Except as otherwise provided in the declaration, the bylaws, this section or other provisions of this chapter, the executive board acts on behalf of the association*.”) Amend NRS 116.3103 making all declaration Board powers subject to the statutes, not the other way around, as is currently the case.
- Specifically identify a CIC Board meeting as a “public” forum in NRS 41.637. Ensure the application of Nevada’s anti-SLAPP laws to HOA proceedings. Clarity is needed in NRS dealing with owner communications rightly being entitled to the protections provided all Nevadans during other public forums. Stop developer/HOA strategic defamation actions intended to silence owner opposition. Residents should not be deterred from challenging existing leadership regimes for fear of reprisals. There is great danger in allowing private entities performing public services to escape generally accepted constraints to limiting free speech.

- Repeal SB-72 2021 section 3 amending NRS 116.31085. Passage of the bill allows executive boards to meeting in executive session (not open to owners) to discuss any content provided an attorney-invoking attorney-client privileges. The change opened a huge door for abuse by boards so inclined. Prior to the legislation, only matters related to proposed or pending litigation were permitted in executive session.
- Change NRS 116.2117 whereby special declarant rights may not be amended without consent of the declarant, even upon reaching post-developer control.
- Prohibit all employees of the contracted association management from serving as an association director.
- Clarify and edit NRS 116.31034(17) and NRS 116.1175(4)(b) to require an association provide a candidate a list of unit owners (physical address and electronic authority, if provided) to communicate campaign material directly to owners. Doping so should not allow the association from including a candidates application information in the ballot mailing,
- Association boards should have exclusive authority as the duly elected representatives of owners of a distinct organization. This is not always the case. Declaration provisions too often subvert Board authority where statute language describing said authority unnecessarily contain "except as otherwise provided in the declaration…" provisions. See NRS116.3103 as example.
- Preclude CC&Rs from requiring an Association make payments to entities not created or contracted by the Association and/or where the Board lacks the ability to terminate conditions driving said payments.
- Preclude an Association from entering into a loan, lease, leasehold, and/or "subsidy" agreement with the Declarant while under Declarant Control. Certainly, prohibit any such board action without a majority vote of owners.
- Limit the definition of common element to property "within the planned community". Delete section 2- making "any other interest in real estate for the benefit of units' owner's subject to the declaration. (reverse changes made in SB 204(2011) sec 10). Prohibit a CIC from acquiring or holding property not within the community- i.e. not a common element. Owners should not be subjected to obligations without the formalities of an amendment of the declaration redefining the boundaries of the common interest community. There is no good reason an Association would seek to acquire title to real estate which is physically located outside the CIC (or condominium), in its own name, which would not automatically become a common element. The current provision provides a CIC can buy and sell non-common element real estate without the need to observe the requirements for conveying or encumbering common elements stated in Section 3-112.
- Preclude "leased" property holdings. (NRS116.017(1)(a)).
- Mandate the statutory definition of "majority vote" (i.e. allowing the declaration to establish). End the ability to restrict most amendments by a minority interest or single owner, except in very limited circumstances. (NRS116.2117)
- Require annexation of all units at creation or upon annexation of any unit in a sub-association. Limited annexation of units provides a developer/builder assessment avoidance that could leave homeowners with under-funded Reserves.
- Clarify HOA bid solicitation requirements (NRS116.31086). Remove the "If" from the statute language. Require bids for all major projects as originally intended, especially for declarant-controlled management or other declarant affiliate contracts. Limit the use of "evergreen" provisions to avoid a requirement to address contracts.
- Require HOA board of directors to respond to formal complaints by owners (NRS116.31087). Currently BODs need only place an item on the agenda- nothing more. No formal (or informal) answer is required.
- Require the publication of a draft association budget be available to owners at least thirty (30) days before any meeting where adoption of the budget is on the association's Board agenda.
- Make all information compiled during a formal NRED investigation to determine whether a violation of the statute is made available for examination to the person(s) filing the underlying affidavit. Require NRED be accountable and transparent in its consumer protection role. (NRS 116.760)
- Prohibit the annexation of properties on which golf clubs, fitness facilities, or other recreational activities occur, on a club membership basis or otherwise, not identified as a common element in the original declaration. At least require a majority owner vote.

- Prohibit provisions exempting and/or establishing reduced association assessments for properties on which golf clubs, fitness facilities, or other recreational activities not identified as a common element in the original declaration.
- Prohibit board action/authority considering/approving changes to any association governing document outside a scheduled meeting open to owners and providing them an opportunity to comment (outside an emergency). Prohibit common CC&R provisions wherein boards can outside a meeting.

Consumer protection ideas

- Make the Ombudsman's office independent of the NRED and/or Division of B&I.
- Revise the CIC Task Force where HOA stakeholders formally and regularly come together to discuss changes in HOA laws. CIC Task Force currently dormant.
- Implement regulatory oversight/consumer protection around CC&R construction (see items below) - none currently exists.
- Require a fixed number for the "maximum units" denominator of the declarant control percentage be clearly identified and reasonably obtained – i.e. preclude CC&Rs that use an arbitrarily large number with the intent of indefinitely extending control change. See NRS116.2105(d) where a "statement of maximum number" is at odds to NRS 116.2122 requiring a specific "number".
- Require HOAs post within a reasonable time (recommend 15 days) board election result. Currently no requirement exists for posting election results. The numbers are arguably important because they indicate in a contested election what percentage of the electorate is disenchanted with the governing body.
- Require regular disclosure (recommend annually) of the current declarant control percentage, accompanied by an explanation of the calculation and identifying all declarants. (add to NRS 116.310312).
- Require CICs under declarant control report annually to NRED the above control percentage.
- Limit developer control to a maximum of 15 years (add to NRS 116.310312).
- Mandate general warranty deeds be used for all properties "delivered" to the association. (see NRS 116.31038) Prohibit the use of quit-claim deeds.
- Preclude establishing discriminating common area use rights within an association (eliminate Limited Common Areas)
- Preclude the association from paying for any services provided to/for common areas that are not "owned" (titled held) by the association.
- Preclude declarations from establishing restricted voting classes or otherwise limiting each "unit" owner (as defined by NRS) an equal right to vote on all association affairs requiring an owner vote.
- Require declarant obtain a NRED "opinion" that all provisions of the declaration comply with NRS. Buyers cannot be expected to know the terms of the declaration because of the legalese used and the voluminous nature of contract, despite the legal fiction of "constructive notice". Buyers are unable to reasonably obtain legal assistance to interpret CC&Rs. Realtors are explicitly prohibited from providing said understanding. In addition, prospective homeowners do not have bargaining power to decline terms of declaration nor are they able to dicker over individual terms and restrictions imposed upon them by homeowner associations.

** I am not an attorney. This paper is not legal advice or an attempt to provide a legal interpretation of Nevada laws. It is my opinion developed from my researching and fighting for Nevadan HOA owner rights for years.*

I am a supporter of HOAs as intended under Uniform Code. I believe they serve a viable and desirable need for many homeowners. Unfortunately, Nevada's HOA laws have been manipulated by special interest over many years. Reform is needed.

CC&Rs are legally regarded as a contract. Nonetheless, the nature of this governing document's terms can be troublesome. Most housing consumers don't understand that CC&Rs are one-sided legal

documents that, very often, do not provide the owner with equitable power to amend the terms of the contract, either before or after the sale.

When developers supplement CC&Rs with special rights for themselves, the contract is fundamentally unfair. Not only are the terms of most “modern” CC&Rs onerous in terms of restrictions, they also skew to benefit declarant/developer and the HOA corporation to the detriment of individual rights.

HOAs laws have the ability to significantly restrict and sometimes even unduly threaten private property rights. HOAs have the power to penalize owners and residents by imposing fines, removing privileges to use of common areas, and to foreclose on liens to collect unpaid assessments, fees, and fines. No other private organization in Nevada (or U.S.) has the legal authority to exercise these far-reaching powers: not employers, not businesses, not non-profit entities such as private schools or hospitals.

Given the ramification of HOA laws on over 60% of Nevada homeowners, they need to be carefully curated.

Mike Kosor