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Case No. 07-CV-0081

Dept. No. II

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DOUGLAS COUNTY  
DISTRICT COURT CLERK

R. WILLIAMS

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

HILLTOP DUPLEXES HOMEOWNERS  
ASSOCIATION, INC., a Nevada  
Non-Profit Corporation;  
SHERIE RICH; and MAXINE YIP,

Plaintiffs,

vs.

SUMMIT VILLAGE, INC., a  
Nevada Non-Profit  
Corporation; DOES I-XX; and  
BLACK COMPANIES 1-20,

Defendants.

ORDER FOR PARTIAL SUMMARY  
JUDGMENT

THIS MATTER came before the court for trial on July 10,  
2008, and July 11, 2008. Trial was recessed and shall continue  
in August. At trial, the plaintiffs (collectively "Hilltop  
Duplexes") were represented by Michael Matuska, Esq., and  
defendant ("Summit Village") was represented by Whitney Selert,  
Esq., and Michael Rowe, Esq. Counsel offered extensive oral  
argument on legal issues and additional briefing. The court  
took under submission plaintiffs' request for summary judgment.

Plaintiffs seek summary judgement finding that NRS Chapter  
116 applies in this case and that, since the parking deck in

1 question has not officially been designated as a "limited  
2 common element," Summit Village is responsible for the care of  
3 the parking deck in question.

4 **A. Relevant Facts**

5 The court provides relevant facts, from the evidence  
6 offered at trial to date, to give context to its legal  
7 analysis.

8 Summit Villages is a large homeowners association. Its  
9 original CC&Rs were enacted in 1968. Plaintiffs' Exhibit 1.  
10 Later, Summit Village enacted Amended CC&Rs in 1990.  
11 Defendant's Exhibit 1. The parties dispute whether the passage  
12 of the Amended CC&Rs was properly done. Regardless, no unit  
13 owner challenged the Amended CC&Rs within six years of their  
14 adoption.  
15

16 Hilltop Duplexes is a sub-HOA of Summit Village. It was  
17 created because the duplexes face specific challenges due to  
18 the geography of the area, including the need to maintain a  
19 separate wastewater pump.

20 Hilltop Duplexes is serviced by a parking deck on Tramway  
21 Drive ("the parking deck in question"). The deck railing was  
22 damaged during snow removal in the winter of 2004/2005. At  
23 that time, it was determined that the parking deck in question  
24 needed substantial repairs, maintenance, and/or possible  
25 replacement. Because of the apparent danger, Hilltop Duplexes  
26 fenced-off the parking deck in October 2005; the parking deck  
27 has been closed since.  
28

1 Hilltop Duplexes and Summit Village could not agree which  
2 party was responsible to pay for the repairs to the deck. As  
3 such, this litigation ensued.

4 **B. Standard of Law - Summary Judgment**

5 Summary judgment is appropriate when, after viewing the  
6 evidence in a light most favorable to the non-moving party,  
7 there remain no genuine issues of material fact and the moving  
8 party is entitled to judgment as a matter of law. NRCP 56;  
9 *Butler v. Bogdanovich*, 101 Nev. 449, 451 (1985). A genuine  
10 factual dispute occurs when the evidence is such that a  
11 rational trier of fact could return a verdict for the non-  
12 moving party. *Wood v. Safeway, Inc*, 121 Nev. 724, 731 (2005).

13 The court must give the party opposing summary judgment  
14 the benefit of all favorable inferences. *O'Dell v. Martin*, 101  
15 Nev. 142, 144 (1985). While the court must construe the  
16 pleadings and evidence in a light most favorable to the non-  
17 moving party, that party must show more than some metaphysical  
18 doubt as to the operative, material facts. *Wood*, 121 Nev. Adv.  
19 Op. 73, 121 P.3d at 1031. The party opposing summary judgment  
20 "is not entitled to build a case on the gossamer threads of  
21 whimsy, speculation and conjecture." *Collins v. Union Fed.*  
22 *Savings & Loan*, 99 Nev. 284, 302 (1983), quoting *Hahn v.*  
23 *Sargent*, 523 F.2d 461, 468 (1<sup>st</sup> Cir. 1975). The non-moving  
24 party may not simply rest upon allegations in its pleadings to  
25 rebut a motion for summary judgment; it must provide competent,  
26  
27  
28

1 admissible evidence that shows specific facts demonstrating a  
2 genuine, material dispute of fact or that the moving party is  
3 not entitled to judgment as a matter of law. *Id.*; *Wood*, 121  
4 Nev. Adv. Op. 73, 121 P.3d at 1031; *Soebbing v. Carpet Barn*,  
5 109 Nev. 78, 82 (1993); *Elizabeth E. v. ADT Sec. Sys. W.*, 108  
6 Nev. 889, 892 (1992).

7 C. NRS Chapter 116 Control and Summit Village's CC&Rs are  
8 Superseded By It, to the Extent They Conflict, as a Matter of  
9 Law  
10

11 Plaintiffs move the court to find that pursuant to NRS  
12 116.1206(1), that NRS Chapter 116 controls as a matter of law.

13 NRS 116.1206(1) states,

14 Any provision contained in a declaration, bylaw or  
15 other governing document of a common-interest community  
16 that violates the provisions of [NRS Chapter 116] shall  
17 be deemed to conform with those provisions by operation  
18 of law, and any such declaration, bylaw or other  
19 governing document is not required to be amended to  
20 conform to those provisions.

21 The phrase "deemed to conform with those provisions by  
22 operation of law" is not clear. There is no case law  
23 interpreting this provision. As such, this court must examine  
24 the legislative history of this statute to determine the  
25 Legislature's intent.

26 A version of NRS 116.1206 was adopted in 1991 when this  
27 statute was first enacted. The original language required an  
28 association to adopt amendments to their declaration in order  
to make it comply with NRS Chapter 116. It appears the

1 original version is now subparagraphs (2) and (3) of the  
2 current statute.

3 At that time (1991), the Legislature also adopted NRS  
4 116.1204 ("Applicability to Pre-Existing Common Interest  
5 Communities) and NRS 116.1205 ("Same; Exception for Small Pre-  
6 Existing Cooperatives and Planned Communities"). These  
7 provisions expressly applied portions of the act to common  
8 interest communities in existence prior to January 1, 1992.  
9 These provisions were identical to the Uniform Common-Interest  
10 Ownership Act §§ 1-204 and 1-205 ("UCIOA"). The comments to  
11 UCIOA provide that the specific provisions listed (short of the  
12 entire act) "automatically apply to common interest communities  
13 created under pre-existing law, even though no action is taken  
14 by the unit owners." UCIOA §1-204 cmt. 3 (1994).  
15

16 Also in 1991, the Legislature adopted NRS 116.1201  
17 ("Applicability; regulations.") which stated that, "Except as  
18 otherwise provided in NRS 116.1203, this chapter applies to all  
19 common-interest communities created within this state on or  
20 after January 1, 1992."

21 Major revisions to NRS Chapter 116 were done through SB  
22 451 in the 70<sup>th</sup> Regular Session of the Legislature in 1999.  
23 The apparent purpose of the changes were to provide protection  
24 to homeowners from mismanaged and underfunded HOAs, regardless  
25 of the date of the HOAs creation.

26 Under SB 451 § 35, the Legislature repealed NRS 116.1204  
27 and 116.1205 in their entirety. At the same time, NRS 116.1201  
28

1 was amended to strike the limiting language "on or after  
2 January 1, 1992." SB 451 § 16, 1996. On their face, these  
3 changes made the entirety of NRS Chapter 116 applicable to "all  
4 common-interest communities created within this state." NRS  
5 116.1201.

6 At the April 8, 1999, Senate Committee on Commerce and  
7 Labor Meeting concerns were raised about these changes:

8 Mr. [Michael] Buckley perceived problems in the  
9 suggested language stating documents created before  
10 January 1, 1992, are not required to be revised to  
11 conform to the provisions of SB 451. Senator  
12 Schneider agreed with Mr. Buckley, and he referred to  
13 numerous constituent calls from members of older  
14 associations requesting the provisions of the bill  
15 apply to them. Ms. Scott proposed to not delete  
16 existing law that delineates applicability to  
17 preexisting common-interest communities. Mr.  
18 Ashleman said it would be possible to retain the  
19 enforcement provisions, except the impractical  
20 changes.

21 A month later, Assemblywoman Buckley commented that NRS  
22 115.1201 "was changed to include homeowner associations formed  
23 before January 1, 1992." Assembly Committee on the Judiciary  
24 at 6 (70<sup>th</sup> Session May 14, 1999). Senator Schneider, who had  
25 worked on the bill over the interim, stressed the need for  
26 these changes due to the "proliferation of homeowners  
27 associations over the past 30 years. Many of these  
28 associations [have] been mismanaged with loosely written codes  
covenants and restrictions (CC and R)." *Id.* At 6-7.

Section 16.5 of SB 451 added the current provision in NRS  
116.1206(1). Mr. Ashleman stated that "associations would not  
need lawyers to rewrite their documents. The documents would

1 be automatically amended with this bill, avoiding any legal  
2 expenses." Minutes from Ass. Cmt. on Judiciary at 7.

3 Assemblyman Manendo asked outright, "[I]f a homeowners  
4 association operated under NRS 116 or did the existing CC and R  
5 take precedence[?]" *Id.* at 9. Mr. Ashleman responded,  
6 "Generally, the homeowner associations followed the CC and Rs  
7 unless the CC and Rs conflicted with NRS 116." *Id.*

8 Assemblyman Manendo then asked the meaning of the "operation of  
9 law" clause. "Mr. Ashleman replied because this bill was  
10 enacted every homeowners association CC and Rs would  
11 automatically be rewritten to save the associations the expense  
12 of requiring lawyers to rewrite the CC and Rs for each  
13 association." *Id.*

14  
15 The intent of NRS 116.1206 has always been that CC&Rs  
16 should comply with NRS 116 retroactively. The Legislature  
17 originally intended that such CC&Rs be formally amended to do  
18 so. When that proved impractical, the Legislature imposed such  
19 amendments automatically through the operation of law.  
20 Additionally, changes in 1999 made it clear that these changes  
21 applied to all common-interest associations regardless of the  
22 date they were created. As such, Summit Village's CC&Rs are  
23 superseded by NRS 116.

24 Because NRS 116 automatically rewrites the CC&Rs under the  
25 "operation of law" clause in NRS 116.1206(1), the court must  
26 first examine NRS 116. Mr. Ashleman's comments to the  
27 Legislature's committee, while well taken, is an improper  
28

1 method of examining how the statute and CC&Rs interact. If NRS  
2 116 is silent or if it directs the court to look at the CC&Rs,  
3 then the court may refer to the CC&Rs. This makes common sense  
4 because if the CC&Rs conflict with NRS 116, then NRS 116  
5 controls; if the CC&Rs do not conflict, then it means that they  
6 are the same and NRS 116 would control anyway. Either way, the  
7 court always starts with an analysis of NRS Chapter 116.

8 This is a matter of law for which summary judgment is  
9 appropriate: NRS Chapter 116 controls in this case.<sup>1</sup> To the  
10 extent that Summit Village's CC&Rs conflict, then NRS Chapter  
11 116 has superseded them.

12  
13 **D. Summit Village's 1990 Amended CC&Rs also Control.**

14 The court's analysis does not end there. The controlling  
15 statute in this case, NRS 116.3115, refers the court to Summit  
16 Village's CC&Rs. See NRS 116.3115(4).

17 However, there are two CC&Rs in this matter and the  
18 parties dispute which one is controlling. This court finds as  
19 a matter of law that the appropriate declaration to rely upon  
20 are the Amended CC&Rs adopted in 1990. See Defendant's Exhibit  
21 1.

22 The adoption of the Amended CC&Rs, if improper,  
23 constituted a breach of the original CC&Rs. Accordingly, the  
24 statute of limitations to challenge the enactment of the  
25

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26 <sup>1</sup>  
27 Because NRS Chapter 116 applies, this court finds that Summit Village's  
28 argument that Hilltop Duplexes has waived its right to challenge its  
obligation to repair the parking deck because the unit owners did not  
timely object or challenge earlier assessments is without merit.

1 Amended CC&Rs began running at the time of their adoption. The  
2 unit owners within Summit Village had six years to challenge  
3 their validity. NRS 11.190(1); *Diaz v. Ferne*, 120 Nev. 70, 73  
4 (2004); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025 (1998).  
5 By allowing the statute of limitations to lapse, the unit  
6 owners (and by extension their successors) waived the right to  
7 challenge the Amended CC&Rs as improperly approved.

8 Accordingly, the Amended CC&Rs control in addition to NRS  
9 Chapter 116.

10  
11 **E. There is a Material Dispute of Fact Regarding Whether**  
12 **Hilltop Duplexes has Exclusive Use of the Parking Deck Which**  
13 **Preclude Summary Judgment at this Time**

14 Generally, the common expenses of the association must be  
15 allocated equally among an association's units. NRS  
16 116.2107(1) and(2); NRS 116.3115(2)(a). Common expenses are  
17 any expenditures or liabilities of the association. NRS  
18 116.019.

19 However, an expense can be allocated to fewer than all of  
20 the units "[t]o the extent required by the declaration." NRS  
21 116.3115(4). Under NRS 116.3115(4), the declaration may  
22 provide:

23  
24 (a) Any common expense associated with the maintenance,  
25 repair, restoration or replacement of a limited common  
26 element must be assessed against the units to which that  
27 limited common element is assigned, equally, or in any  
28 other proportion the declaration provides;

(b) Any common expenses or portion thereof benefitting  
fewer than all the units must be assessed exclusively  
against the units benefitted. . .

1           A limited common element is a portion of the association's  
2 real estate "allocated by the declaration" or by operation of  
3 law for the "exclusive use of one or more but fewer than all of  
4 the units." NRS 116.059. A limited common element is created  
5 by law under NRS 116.2102(2) and (4) (e.g. common walls) or by  
6 an express statement in the declaration. NRS 116.2108; NRS  
7 116.2105(1)(g). If so allocated by the declaration, the  
8 declaration "must specify to which unit or units each limited  
9 common element is allocated." NRS 116.2109(1)

10           The Connecticut Supreme Court has interpreted what is a  
11 limited common element under its own, substantially similar  
12 Uniform Common-Interest Ownership Act. Connecticut General  
13 Statute 42-202(19) is the same as NRS 116.059. In *Liberty*  
14 *Transportation v. Caldwell*, the condominium's declaration  
15 provided that "portions of common elements . . . have been  
16 allocated as limited common elements, including 'stoops and  
17 steps at the entrances to each building, which provide access  
18 to less than [sic] all the Units, the use of which is limited  
19 to the Units to which they provide access.'" 2000 Conn. Super.  
20 Lexis 579 (Superior Court of Connecticut, Judicial District of  
21 Waterbury 2000) (unreported). The declaration apparently did  
22 not further designate the defendant's front steps as limited  
23 common elements. The court found that the defendant's steps  
24 were limited common elements, based upon the declaration's  
25 statement. *Id.*

26  
27  
28       -----

1           The Alaska Supreme Court has found that based upon maps  
2 and usage, certain land was a limited common area under the  
3 uniform act. *Black v. Municipality of Anchorage*, 2008 Lexis  
4 103 (July 18, 2008). The declaration expressly reserved "for  
5 the benefit of each Unit Owner, an exclusive easement for use  
6 of those areas depicted on the Plans or otherwise described  
7 herein as Limited Common Elements, as assigned to each Unit  
8 Owner for his or her numbered unit." *Id.* at 11. The recorded  
9 plat maps included one, barely legible heading labeling certain  
10 area to Black's unit as "Limited Common Interest Lot Area."  
11 *Id.* at 9. An unrecorded map, although not part of the legal  
12 chain of title, likewise made the same designation. *Id.* at 10.  
13 Finally, the homeowner's own use of the property - reflecting  
14 the perception that the land was associated with the unit -  
15 supported a finding that the land was associated with the unit -  
16 supported a finding that the land in question was a limited  
17 common element. *Id.* at 12-13.

18           Summit Village wishes to assess repair of the parking deck  
19 to the homeowners within Hilltop Duplexes. In order to do  
20 this, they must meet the requirements of NRS 116.3115(4)(a) or  
21 (b).

22           The Amended CC&Rs provide:

23           Any walkway, sidewalk, driveway or path which shall be  
24 used in common by two or more residence lot owners for  
25 the purposes of ingress or egress from their lots,  
26 shall be governed by the same rules, rights,  
27 obligations and liabilities as are applicable and set  
28 forth in Section 3.21 [meant to be 3.20, sic]  
pertaining to party walls.

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1 Defendant's Ex. 1 at §3.21. A walkway includes "any paths,  
2 sidewalks, driveways, wooden parking decks or any type of  
3 easement for ingress and egress." *Id.* at § 2.13. The parking  
4 deck in question is clearly a "walkway" within the meaning of  
5 this provision as it is both a wooden parking deck (albiet  
6 paved with asphalt) and an easement for ingress and egress.  
7 Although not titled as "limited common elements," because such  
8 language post-dates the adoption of the amended CC&Rs, the  
9 court must determine if this language still effectively creates  
10 a limited common element.

11 A limited common element is real estate allocated for "the  
12 exclusive use of one or more but fewer than all of the units."  
13 NRS 116.059. Although such property must be expressly  
14 allocated to fewer than all the units, the statute does not  
15 require that such property be expressly labeled as "limited  
16 common elements." *Liberty Transportation* is instructive. In  
17 that case, the Connecticut Superior Court found that steps  
18 outside a condominium were effectively allocated as limited  
19 common elements because they were set aside in the declaration  
20 exclusively for access to certain units, even though the  
21 declaration did not label the specific steps in question as  
22 "limited common elements." 2000 Conn. Super. Lexis 579.

23  
24 The statute requires exclusive use for an element to  
25 constitute a limited common element. NRS 116.059. This is  
26 consistent with *Liberty*. In *Liberty*, stoops and stairs that  
27 only accessed certain units were treated by the court as a  
28

1 limited common element. This is also consistent with Hilltop  
2 Duplexes' position that the stairways leading to their units  
3 from the parking deck are limited common elements for which  
4 they are responsible. It is undisputed that these staircases  
5 are exclusively used by Hilltop Duplexes. However, Summit  
6 Village's position - which would allocate responsibility for  
7 maintaining the parking deck based not upon exclusive use, but  
8 upon whether a parking space primarily benefits a unit or units  
9 for ingress and egress - is not consistent with the plain  
10 language of NRS 116.059.

11 Without labeling walkways as "limited common elements," in  
12 any document<sup>2</sup>, this court is left to analyze what is a limited  
13 common element based on its exclusive use.<sup>3</sup> This means that  
14 any decision by this court is solely applicable to the parking  
15 deck in question. Whether a walkway would qualify as a  
16 "limited common element" under the language in the Amended  
17 CC&Rs is a question of fact because it is a question of  
18 exclusive use.  
19

20 The court recognizes that this analysis alters the "user  
21 pays" mentality that Summit Village has employed since adopting  
22

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23 <sup>2</sup> Maps (like those from the *Black* case), meeting minutes, policies, or other  
24 documents tending to show that the parking deck in question was allocated  
25 to Hilltop Duplexes for its exclusive use would be relevant and persuasive.

26 <sup>3</sup> This analysis covers both NRS 116.3115(4)(a) and (b). Because a walkway is  
27 expressly allocated in the declaration, it may be a limited common element,  
28 depending upon its use under subparagraph 4(a). At the same time, the  
repair costs for this parking deck would be a common expense under  
subparagraph 4(b). However, both sections hinge on exclusive use which, as  
explained further below, is disputed in this case.

1 the Amended CC&Rs. This analysis has changed because of the  
2 enactment of NRS Chapter 116. Such a change is not  
3 unprecedented; indeed, Summit Village has changed its analysis  
4 with regard to the costs to maintain Gary Lane since the  
5 enactment of NRS Chapter 116. Summit Village has historically  
6 determined who the user is based on who has the primary benefit  
7 of ingress and egress. However, NRS Chapter 116 determines  
8 user upon exclusive use. See NRS 116.059 and 116.3115(4) (b).  
9 Who has primary benefit for ingress and egress has much less  
10 relevance under NRS Chapter 116.

11  
12 The parties dispute if Hilltop Duplexes has exclusive use  
13 of the parking deck in question. Unless the parties agree to  
14 submit this issue to the court based upon the evidence already  
15 offered, then the court believes that this is a material  
16 dispute of fact precluding full summary judgment.

17 **F. Other Procedural Matters**

18 The court notes that the issue of exclusive use is the  
19 only issue remaining and that trial, if it continues, need only  
20 focus on that issue. Evidence regarding past repair practices,  
21 past assessments, and adoption of the Amended CC&Rs, are  
22 irrelevant. The court believes a site visit may or may not  
23 still be appropriate. It will be discussed when trial

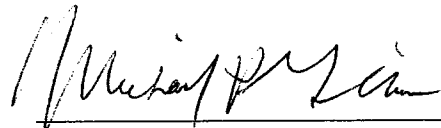
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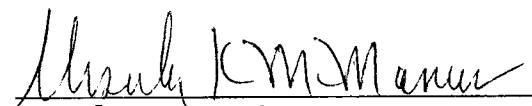
reconvenes on August 19, 2008. The court strongly encourages the parties to reopen settlement negotiations.

IT IS SO ORDERED.

Dated this 4 day of August, 2008.

  
MICHAEL P. GIBBONS  
DISTRICT JUDGE

Copies served this 4<sup>th</sup> day of March, 2008; to: Michael Smiley Rowe, Esq., P. O. Box 2080, Minden, NV 89423; Michael L. Matuska, Esq., P. O. Box 2860, Minden, Nv 89423; Whitney J. Selert, Esq., 5450 Longley Lane, Reno, NV 89511.

  
Ursula K. McManus