Assembly Bill 34 (BDR 10-354)
Testimony of Gail J. Anderson, Administrator
Real Estate Division
February 22, 2013

The Real Estate Division brings Assembly Bill 34 to make substantive changes to NRS 116 governing common-interest communities and NRS 38 as it relates to the mandatory arbitration / mediation program for people living in common interest communities. The main focus of this Bill is to add a component to the authority of the Ombudsman to appoint a referee who can issue a written decision on homeowner association governing document disputes. Only parties who have filed an intervention affidavit with the Ombudsman's office would be eligible for the program. The referee hearing and decision would be offered at no cost to the parties, other than a filing fee, as it will be funded by the common-interest communities' program budget. The referee's decision would be non-binding, but the process would satisfy the requirements of NRS 38 concerning alternative dispute resolution for common-interest community residents. The referee will not be able to award attorneys' fees or an amount to exceed $7,500 to either party. Many matters can be resolved with a fair hearing by a neutral party and a decision rendered and will not be pursued as a civil matter in court.

The impetus for this change in the law is to address the overwhelming cost of arbitrations that discourages homeowners from asserting their rights. The referee will be able to look at the issues and provide a decision upon which the homeowner can assess their likelihood of success in court. The process would be streamlined and consist of a hearing before the referee, unless the parties agreed not to have a hearing. The Division believes this process would satisfy a significant need of Nevada homeowners living in common-interest communities.

The other changes to NRS 116 are sought to clarify the law in various areas of concern. They will be discussed in more detail as each section is described.

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Submitted by: Gail J. Anderson

Section 1: Clarifies changes to NRS 116 are in Sections 2 to 5, inclusive.

Section 2: This Section defines "meeting" to be a congregations of a majority of the board to hear, discuss or deliberate on association matters. It excludes situations where board members meet within the community to determine violations of the governing documents or to inspect an association project (defined by NRS 116.31086(2)). This section also prohibits a series of gatherings by board members of less than a quorum with the intent to avoid the provisions of NRS 116.31083. This section also includes in the definition of a meeting a teleconference of a majority of the board. There is a lot of confusion about what constitutes a "meeting" and what can be done without a meeting. The Division receives complaints regarding board meetings that aren't noticed and actions taken without meetings. The Division would like the law to be very clear in this regard, so board members and all homeowners understand these requirements and so that unit owners have the opportunity to be aware of the considerations and decision-making of their elected boards. Without such a definition, there are simply too many abuses that can and do occur.

The amendment to this section allows boards to attend formal education programs through the Ombudsman's office or a private party and to discuss necessary repairs for an association project. [Note: Add to amendment "to discuss necessary repairs for" in (2)(c) after "inspect" and before "an".]

Under the current law, meetings have very specific requirements to allow transparency of board conduct. But since there is no definition of what constitutes a meeting – boards are free to meet and discuss association business without calling a meeting. We have received complaints of serial meetings where members have discussed among themselves one-by-one (in person or by e-mail) matters that are going to be considered at a "noticed meeting." Boards hold "pre-meetings" to go over who is going to make a motion, who is going to second a motion, and how the vote is going to go. Boards also have what they call "workshops" to discuss association meetings - but not take votes - that may not be noticed to the unit owners and where unit owners may not be allowed to attend or comment. Then, at the "noticed" meeting – there is no or very limited discussion and the actions are

taken. The Division believes that all considerations and deliberations need to be held in meetings that unit owners have an opportunity to attend and listen – and comment. Board members should not separately meet to discuss how to vote on a particular issue, so at a meeting only a decision is made and there is no discussion. The Division believes a definition of meeting is necessary to make clear what must be done at a meeting and that should include not just to take action, but to deliberate, discuss and hear matters within the authority of the board.

This Section ties into Section 4 – which allows action without a meeting in limited circumstances, so boards cannot get around the meeting requirements by signing consents without a meeting.

Section 3: This section concerns the voting monitor concept and establishes a panel of available monitors through a registration process with the Division. A voting monitor would supervise and administer the voting process in homeowner associations. The Division has been asked to monitor and/or conduct elections – and this would be a remedy to address that and to ensure fair elections.

(1) This section gives the Division authority to certify a person as a voting monitor and allows the Administrator to adopt regulations to establish the qualifications for a voting monitor and standards of practice for voting monitors. While there are currently companies that perform this service, if the Division could certify a person has attended classes and training necessary to properly handle a vote, it would give associations an easy and readily available way to find someone capable of providing this service. The panel of certified voting monitors would be published on the Division's website for easy reference.

(2) This section requires an association to use a voting monitor if it is requested by the president, a majority of the executive board, or by a petition of unit owners constituting no less than 10% of the total number of voting members of the association. This section provides the procedure unit owners must follow to petition for a voting monitor. Such petition must be delivered to the executive board or the manager by regular US mail, return receipt requested, served

personally by a process server, or hand delivered when a receipt is signed by a board member or the community manager. We did not put in a timeframe for the submittal of the petition because in associations where there is a concern over elections the owners may not realize an election will be taking place until the nomination forms are sent to owners. NRS 116.31034 only requires 30 days' notice before the ballots will be prepared. The open timeframe also allows 10% of unit's owners to petition if something is discovered during the time notice of the election is sent out and the meeting is scheduled. Imposing a time constraint on the units' owners to file the petition seems to limit the effectiveness of this safeguard. We have a drafting error in the amendment and need to revise the amendment: Section 2: Delete "solicit bids from at least three voting monitors and". The Division plans to certify those eligible persons as voting monitors and post their names and billing statements on the Division's website. This would eliminate the need to request bids for this process.

(3) This section restricts a voting monitor from providing services to an association if that voting monitor is on the board or holds an office for the association or is the association's community manager. Amend to add "(d) a unit's owner or resident within the association" (based on input from a stakeholder).

(4) This section requires a voting member to obtain the list of owners eligible to vote, compile the ballots and materials to be sent to the owners, deliver the ballots and materials, and collect and log the returned ballots.

(5) For secret written ballot votes, the voting monitor must use a three envelope system. One envelope contains two other envelopes. One of the inner envelopes is addressed with the voting monitor's return address and the unit owner's return address. The other inner envelope is labeled "ballot." The unit owner must be instructed to complete the ballot and put it in the "ballot" envelope and seal it. The sealed "ballot" envelope is put in the envelope addressed to the voting monitor. Only the ballots returned by the unit owner to the voting monitor in this way can be counted in the vote. The voting monitor keeps all returned ballots and takes them to the unit owner meeting where they are opened and tallied by the voting monitor. The voting monitor provides all records to the association, but keeps a record of the

owner list who received ballots and the outcome of the vote (including the names of the unit owners who voted) for a period of ten years. NRS 116.31175 requires associations maintain all records for a period of ten years, except minutes which are retained forever.

(6) This section defines the term as someone certified by the Real Estate Division to administer and supervise an association's voting and election processes.

Section 4: Allows boards the right to take action by unanimous consent provided such action is purely ministerial or to implement actions previously taken at a meeting. Notice of the unanimous consent must be given to the unit owners promptly. This language is taken from the Uniform Common Interest Ownership Act Section 3-108(9) (Meetings) – added in 2008. Under NRS 82.271, boards may take action without a meeting with only a majority of the board agreeing. If Section 4 is added to NRS 116, it would prevail over NRS 82. NRS 116.11085 states that NRS 116 prevails over conflicts with corporate statutes. We think it is necessary for NRS 116 to address when action can take place without a meeting, not for corporate statutes to apply. The Division requests for clarifying purposes to amend to include the word "only" after "meeting" and before "to perform any". This is to make clear that actions without a meeting are restricted to only these circumstances.

Section 5: Section 5 introduces the Referee Program. The Referee Program is a process by which the Ombudsman may refer matters to a third party referee for a decision concerning a governing documents dispute between homeowners and HOAs. This expands the authority of the Ombudsman's office to provide more than an informal conference to attempt to resolve the dispute with homeowners. It also provides an alternative to mandatory arbitration / mediation under NRS 38 as participating in the referee program would satisfy the requirements of NRS 38.300 to 38.360, inclusive.

(1) This section seeks to expand the authority of the Ombudsman's office. The Ombudsman would be given authority to appoint a referee for the purpose of hearing and deciding cases concerning homeowner and HOA complaints. The cost of the referee would come from the Account for Common-Interest Communities and Condominium Hotels, to the extent funds are available.

(2) This section requires that the referee be qualified in training and experience in real estate and CIC law.

(3) The referee must review a claim and answer submitted and then hold a hearing, unless waived. The referee will then issue a decision and award that is provided to the parties and the Ombudsman's office. This section details the limits on the jurisdiction of the referee. Referees may not award damages in excess of $7,500 and they may not award attorneys' fees to either side.

(4) This section allows the referee program to satisfy the requirements of NRS 38.300 to NRS 38.360, inclusive. The decision is treated the same as an arbitrator's non-binding decision under NRS 38.330(5). The parties can proceed to court for a de novo review of the claim within 30 days of the decision or the decision can be confirmed by a court within 1 year.

(5) This section makes clear that any applicable statute of limitations is tolled during the referee process.

(6) The Administrator may adopt regulations concerning the referee program.

(7) No party to the referee program may file a claim under NRS 38.320.

The Referee Program is also referenced in Sections 17, 19, and 21 of the bill amending existing language.

Section 6: Incorporates the definition in Section 2.

Section 7: Section 7 modifies NRS 116.3103 to require board members to cause the association to maintain insurance coverage in all circumstances where the board grants an indemnification to a third party and that if a claim for indemnification is made by the third party, that claim is submitted to the association's insurance company.

The Division needs to add clarifying language to Section 7: in subsection "c," add "cause the association to" after "Shall" and before "maintain".

This section also amends NRS 116.3103 to require board members who – at the end of their terms – have records of the association to turn those records over to the new board or manager. The board member is required to get a written receipt from the person accepting

custody of the records. Currently, there is no requirement in law for board members to turn over records; that requirement exists only for community managers in NRS 116A.

The Division wishes to add clarifying language by including at the end the "unless" statement "or is only in possession of copies of books, records or papers already within the possession of the association."

Section 8: This section amends NRS 116.31031 to require that a fine be based on reasonable evidence to support the violation. The Division receives multiple complaints regarding violations of this section of law concerning fines imposed by the association, but the Division has no ability to evaluate the decision of the board, rather only the process the board took. If the board has an obligation to have reasonable evidence to support a finding of a violation, the law should make that clear. Amendment to the original language provides for situations where the fine is assessed against an owner, but the owner did not commit the violation.

Section 9: This section amends NRS 116.310312 to require lenders to give the association notice of the results of the lender's foreclosure sale so they can have a record of the new owner. And it allows the association to enter a unit to mitigate a water intrusion occurring within the unit. Amendment requires that notice be in writing.

Section 10: Adds the reference to Section 3 to NRS 116.31034(11). Amendment to original draft requires that ballots that are not returned by mail must be hand-delivered by the voting unit owner at the election meeting.

Section 11: Adds the reference to Section 3 to NRS 116.31036(3).

Section 12: Amends NRS 116.31083 to allow for teleconferenced meetings. The amendment to the original language requires that either a board member or the community manager be physically present at a location where units' owners may attend. Subsection 6 adds the requirement for the reconciliation of any construction defect account to be reviewed at a meeting each quarter.

Section 13: This section amends NRS 116.31086 to require that boards solicit three bids for an association project, including for renewals of contracts. The definition of association project is amended to include "construction." The law currently in NRS 116.31086 does not require 3 bids by a board, but requires that when bids are obtained for an "association project," they be opened at a meeting. NRS 116A.630 requires a community manager to obtain at least 3 bids for any "capital improvement project." NAC 116.405 includes a possible violation of NRS 116.3103 consideration of whether the board caused the association to "obtain, when practicable, at least three bids from reputable service providers who possess the proper licensing before purchasing any such service for use by the association." It sounds as if only associations with managers are required to obtain 3 bids for capital improvement projects, but not for self-managed associations. And boards should obtain bids for services. The Division seeks to have the law clarified to require no less than 3 bids for all "association projects." The amendment to this section requires the bids be opened and discussed at a meeting of the board. The amendment also provides for two exceptions for bids: where the contract totals less than $1,500 or 10% of the annual budget, whichever is less and where renewals are without changes to the contract and the term is 1 year or less.

Section 14: NRS 116.311 incorporates the provisions of Section 3.

Section 15: Corrects an internal cross-reference in NRS 116.31158.

Section 16: Revises NRS 116.31175 to allow the Administrator to issue a subpoena for records requested by the Ombudsman.

Section 17: Amends NRS 116.625 to expand the Ombudsman's authority to administer the referee program. The amendment to this section requires that the Ombudsman's office maintain a record of the recording information for the governing documents and any amendments. The Division is charged with, pursuant to NRS 116.31155, registering every association in Nevada. Each association is required to support the Office of the Ombudsman with a $3.00 per residential unit fee annually.

During these economic times, it has become increasingly difficult to stay abreast of the ownership and the required filings for parcels located within common-interest communities, as ownership can change 2-3 times without the knowledge of the Division due to foreclosures and bankruptcy. This in turn makes communication with these associations non-existent. Therefore, maintaining an accurate database of associations located in Nevada requires tracking the ownership and the required filings utilizing the county recorder's records. Requiring each association to provide the Division with the instrument, book and page number pertaining to the CC&Rs and plat maps will provide the Division the information needed to identify, verify, and notify each association in the state required to register with our office.

Section 18: Amends NRS 116.660 to add authority for the Administrator to issue subpoenas for production of books, records and other papers and to compel attendance of witnesses. For purposes of investigation, it is a conflict to have the adjudicatory body issuing subpoenas.

Section 19: NRS 116.745 is amended to add a definition of "breach" for governing documents.

Section 20: Amends NRS 116.760 to allow an aggrieved party to assert a claim with the Ombudsman for a "breach" in addition to a violation of law. The amendment allows an aggrieved party to file an affidavit for a violation committed by an association or officer or board member.

Note: amendment misstates statutory language. The Division has a transcription amendment: insert back into the text of subsection 1 of NRS 116.760 the words: "later than 1 year after the person discovers or…" It should read: 1. Except as otherwise provided in this section, a person who is aggrieved by an alleged violation may, not <u>LATER THAN 1 YEAR AFTER THE PERSON DISCOVERS OR</u> reasonably should have discovered the alleged violation, file with the Division a written affidavit that sets forth the facts constituting the alleged violation. The affidavit may allege any actual damages suffered by the aggrieved person as a result of the alleged violation.

Section 21: Under the current law, an aggrieved party may file an Intervention Affidavit with the Ombudsman's office. That Affidavit triggers the offering of an informal conference held by the Ombudsman's office. Once the informal conference takes place, if no resolution is reached - this section allows the Ombudsman to refer the parties to the referee program for unresolved disputes concerning governing documents of the association. NRS 116.765 is amended to allow the Ombudsman the authority to refer parties to the referee program. The party wishing to participate in the referee program must file a claim form and serve it on the other side just as is required by NRS 38.320. The responding party must file an answer and each party must pay a filing fee (as is required in NRS 38.320); this process satisfies the mandatory arbitration provisions of NRS 38. As the law currently reads, the Ombudsman refers only violations of law to the Compliance Section for investigation.

Section 22: This section amends NRS 116.790 to add as an additional element of discipline the Commission may impose the requirement to hire a voting monitor.

Section 23: NRS 116A.280 is amended to add subpoena power for the Administrator in addition to the Commission.

Section 24: NRS 116B.670 is amended to add subpoena power for the Administrator in addition to the Commission.

Section 25: Amends NRS 116B.835 to expand Administrator subpoena authority.

Sections 26 through 31 are amendments the Division presents to the original bill.

Section 26 section amends NRS 116.3115 to prohibit the Association from applying assessment payments toward any fine, fee or other charge due and from refusing to accept from a unit's owner payment of any assessment or other charge because there is an outstanding payment due. This language already exists in NAC 116A.345 as it applies to community managers. The Division desires to make this applicable to the association as well.

Section 27: Revises NRS 116.311635 to have the language within the notice of sale modified. As indicated in NRS 116.311635 (2) (b) (3), the Division is required to receive a copy of each notice of sale. The language as written in NRS 116.311635 (3) (b) appears to the public that by calling the Office of the Ombudsman that we have the authority to stop the foreclosure process. It appears the intent of the language (contacting NRED) was to provide a resource to assist those involved in the foreclosure process they are currently involved in and to provide information as to what their options are. The staff takes every opportunity available to try to assist callers by communicating with the association and/or collection agency regarding the foreclosure, when possible. Unfortunately, a lot of the calls resort in the callers feeling as if it was a waste of time contacting our office if we are not able to make the association remove the lien and stop the foreclosure process right then and there. Therefore, the additional three words "UNDERSTAND THE NOTICE" is to manage the caller's expectations that, at a minimum, the office will help them understand the foreclosure process.

Section 28: This section expands investigative and disciplinary authority to voting monitors under NRS 116.750. NRS 116.750 (2) is also amended to make it clear that the jurisdiction in subsection (1) applies to "any officer, employee or agent of an association or any member of the board who commits a violation if they currently hold the position or held the position when the violation occurred. The 1 year timeframe only limits the jurisdiction of the Division and serves no purpose. NRS 116.760(1) contains the 1 year time frame for the filing of affidavits – which remains. Subsection (3) is added to NRS 116.750 to allow the Division to initiate its own investigation. NRS 116.750 and NRS 116.765 are in conflict. NRS 116.760 allows investigative authority to the Division. But NRS 116.765 seems to require the Division may not investigate a matter until after an affidavit is filed under NRS 116.760. The Division should be able to investigate any violation of law regardless of whether or not an aggrieved party files an affidavit under NRS 116.760. The Division gets many challenges to its authority during an investigation. The Division would like the law to be clear in this regard.

Section 29: This section amends NRS 116.757 to allow the Division to turnover its file and share investigative information to a law enforcement agency before a complaint is filed

with the Commission. This is already permitted for community managers under NRS 116A.270. The Division would like the confidentiality provisions to mirror one another.

Section 30: This adds to NRS 116A.630 to expand an obligation on the community manager to not contract for indemnification from an association unless the association has insurance to cover the indemnification. It further requires that the manager direct the association in writing to submit any claim for indemnification to the association's insurance company.

It has become standard for community managers to include indemnification clauses in their contracts. As soon as a complaint is filed against them by a unit owner they assert their indemnification and get their attorneys' fees paid for by the association. In some cases, the association's attorney represents the community manager. This expense is not budgeted for by the association and becomes a strain. To the extent the association owes the manager indemnification is a question of law that should not be decided by the board. Claims for indemnification should be submitted to the association's insurance company for a determination of coverage. In many cases, the board is threatened with legal action by the manager if attorneys' fees are not paid. This creates a precarious situation for a manager who owes a fiduciary duty to the association. The Division's bill requires the association to maintain insurance to cover indemnifications granted by the board in Section 7 of this bill and to submit such claims to their insurance company. This section would make sure the community manager reinforced that requirement.

Section 31: This section would exclude class actions from the ADR process in NRS 38. The arbitration process was intended to prevent an influx of cases in the district court. The cases would be decided in arbitration and the parties would not need to have the issues handled by a court. In cases dealing with class actions – those cases are never going to end after arbitration. They will always go to district court. It is futile and a waste of division resources to have multiple claims filed in ADR only to go directly to court to have the process started over. Mandatory arbitration in district court also excludes class actions. It makes sense for class actions for association matters to be excluded in NRS 38 as well.