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14 **STATE OF NEVADA**
15
16 **DEPARTMENT OF BUSINESS AND INDUSTRY**
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18 IN THE MATTER of the Petition of Jonathan 19 Friedrich, for an Application for the Repeal of 20 a Common Interest Community Commission 21 Regulation Pursuant to NRS 233B.100 and 22 NAC §232.020	Docket No.
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23 COMES NOW, Petitioner Jonathan Friedrich (“Petitioner”) and hereby applies by Petition
24 to the Nevada Department of Business and Industry and the Nevada Real Estate Division for the
25 repeal of LCB File No. R199-09 (the “Regulation” attached hereto as Exhibit 1,) a regulation relating
26 to common-interest communities; establishing provisions concerning fees charged by an association
27 or person acting on behalf of an association to cover the costs of collecting a past due obligation of
28 a unit’s owner; and providing other matters properly relating thereto. This Petition for Repeal is
made pursuant to NRS 233B.100 and NAC §232.020. This Petition is made to the Director of the
Department of Business and Industry and Chief Administrator of the Nevada Real Estate Division.
In support of this Petition, Petitioner, by and through its counsel, states as follows:

29 **I**
30 **PETITIONER**

31 Petitioner is not a party in any administrative, civil or criminal action concerning the matters
32 contained in this Petition. Petitioner is a owner of a home located within a Nevada common interest
33 community and is, therefore, affected by the regulation which is the subject of this Petition. All
34 correspondence can be mailed to Petitioner at: Adams Law Group, Ltd., 8330 W. Sahara Ave., Suite

1 290, Las Vegas, NV 89117.

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4 (b) A clear and concise statement of the regulation to be repealed;

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6 (c) The reason for the repeal of the regulation;

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8 (d) The statutory authority for the adoption, filing, amendment or repeal of the regulation; and

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10 (e) The name of the public officer, Department or division of the Department authorized to adopt,
11 file, amend or repeal the regulation.

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14 **II.**

15 **THE REGULATION**

16 The Nevada Common Interest Community Commission (the "Commission") adopted the
17 Regulation which became effective May 5, 2011. The Regulation permits a homeowners'
18 association, "or a person acting on behalf of an association" such as a collection agency, to charge
19 to a homeowner certain enumerated fees and costs in connection with the collection of delinquent
20 homeowners' association assessments. For example, a homeowners' association, "or a person acting
21 on behalf of an association" can charge the homeowner \$400.00 for the filing of a one page Notice
22 of Default, \$275.00 for a one page Notice of Sale, \$150.00 for sending a one page Demand Letter
23 and \$325.00 for the filing of a one page "Notice of Delinquent Assessment Lien" (which document
24 does not exist as a matter of Nevada law). The Regulation calls for an overall cap on such collection
25 costs of \$1,950.00 plus an unlimited amount of third party costs such as trustee sale guaranties,
26 mailing costs, posting and publishing fees, recording costs and skip tracing fees. The Regulation
27 must be repealed for the following reasons:

- 1 1. The legislation which enabled the Commission to adopt a regulation establishing
2 such fees only authorized the Commission to establish the amount of the fees that a
3 homeowners' association may charge to a homeowner. The enabling statute did not
4 permit the Commission to adopt a regulation setting rates for the collection industry
5 or other third parties and establishing an independent right of recovery for such third
6 parties against a homeowner. However, the Regulation allows a third party collection
7 agent to directly charge and recover its collection fees from a homeowner. Thus, the
8 Commission was without lawful authority to adopt the Regulation.
- 9 2. The adoption of the Regulation violates the Administrative Procedures Act in that the
10 Regulation is materially and substantive different from the draft which was proposed
11 and upon which the public had an opportunity to comment.
- 12 3. The members of the Commission have a pecuniary interest in the subject matter of
13 the Regulation and in all matters within the jurisdiction of the Commission and,
14 pursuant to NRS 232A(5)(b), are barred from serving on the Commission. The
15 members with such a pecuniary interest must, therefore, resign or be removed from
16 office.

17 **III.**

18 **THE ISSUES**

19 **A. The Commission was Without Legal Standing to Adopt Portions of the Regulation**

20 Pursuant to NRS 116.310313, “An association may charge a unit’s owner reasonable fees to
21 cover the costs of collecting any past due obligation. The Commission shall adopt regulations
22 establishing the amount of the fees that an association may charge pursuant to this section.” Thus,
23 pursuant to its enabling legislation, the Commission could only adopt a regulation establishing what
24 a homeowners’ association could charge and recover from its homeowners for collection fees.
25 However, the Commission stepped outside of its authority by adopting a regulation which establishes
26 how much an independent, third party collection agent can charge and recover from a homeowner
27 with whom the homeowner has no contractual or other legal relation. For example:

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1. Except as otherwise provided in subsection 5, to cover the costs of collecting any past due obligation of a unit's owner, an association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 which exceed a total of \$1,950, plus the costs and fees described in subsections 3 and 4.

2. An association or a person acting on behalf of an association to collect a past due obligation of a unit's owner may not charge the unit's owner fees in connection with a notice of delinquent assessment pursuant to paragraph (a) of subsection 1 of NRS 116.31162 which exceed the following amounts:

- (a) Demand or intent to lien letter\$150
- (b) Notice of delinquent assessment lien325
- (c) Intent to notice of default letter90
- (d) Notice of default400
- (e) Intent to notice of sale letter90
- (f) Notice of sale275
- (g) Intent to conduct foreclosure sale25
- (h) Conduct foreclosure sale125
- (i) Prepare and record transfer deed125
- (j) Payment plan agreement - One-time set-up fee30
- (k) Payment plan breach letter25
- (l) Release of notice of delinquent assessment lien30
- (m) Notice of rescission fee30
- (n) Bankruptcy package preparation and monitoring100
- (o) Mailing fee per piece for demand or intent to lien letter, notice of delinquent assessment lien, notice of default and notice of sale2
- (p) Insufficient funds fee.....20
- (q) Escrow payoff demand fee150
- (r) Substitution of agent document fee25
- (s) Postponement fee75
- (t) Foreclosure fee150

3. If, in connection with an activity described in subsection 2, any costs are charged to an association or a person acting on behalf of an association to collect a past due obligation by a person who is not an officer, director, agent or affiliate of the community manager of the association or of an agent of the association, including, without limitation, the cost of a trustee's sale guarantee and other title costs, recording costs, posting and publishing costs, sale costs, mailing costs, express delivery costs and skip trace fees, the association or person acting on behalf of an association may recover from the unit's owner the actual costs incurred without any increase or markup.

1 4. **If an association or a person acting on behalf of an association**
2 **is attempting to collect a past due obligation from a unit's owner,**
3 **the association or person acting on behalf of an association may**
4 **recover from the unit's owner:**

5 (a) **Reasonable management company fees which may not exceed**
6 **a total of \$200; and**

7 (b) **Reasonable attorney's fees and actual costs, without any**
8 **increase or markup, incurred by the association for any legal**
9 **services which do not include an activity described in**
10 **subsection 2.**

11 5. **If an association or a person acting on behalf of an association**
12 **to collect a past due obligation of a unit's owner is engaging in**
13 **the activities set forth in NRS 116.31162 to 116.31168, inclusive,**
14 **with respect to more than 25 units owned by the same unit's**
15 **owner, the association or person acting on behalf of an association**
16 **may not charge the unit's owner fees to cover the costs of**
17 **collecting a past due obligation which exceed a total of \$1,950**
18 **multiplied by the number of units for which such activities are**
19 **occurring,** as reduced by an amount set forth in a resolution adopted
20 by the executive board, plus the costs and fees described in
21 subsections 3 and 4.

22 The Commission, pursuant to NRS 116.310313, had absolutely no authority to establish the
23 rates of collection fees of independently licensed, third party collection agencies. Nor did the
24 Commission have the legal authority to adopt a regulation which permits collection agencies, which
25 have no contractual or other legal relation to a homeowner, to independently charge and recover from
26 a homeowner collection fees and costs. Extraordinarily, and in contravention to the enabling
27 legislation, the Commission actually created a new, legal right to recovery for parties who are neither
28 a homeowner, nor a homeowners' association. The ONLY authority granted to the Commission
pursuant to statute was to adopt a regulation establishing how much a homeowners' association
could charge its homeowners for collection fees and costs.

 Indeed, the Commission has no jurisdiction to establish collection agency fees. That is the
province of the Financial Institutions Division which licenses and regulates the collection industry.
Therefore, as the Commission was without legal authority and jurisdiction to regulate collection
agency fees, the Commission's act in adopting the Regulation was ultra vires. The Regulation must
be repealed.

1 B.

2 NRS 233B, commonly known as the Nevada Administrative Procedure Act ("APA"), sets
3 forth the requirements that must be followed by agencies, bureaus, boards, commissions,
4 departments, and divisions of the Executive Department. On December 7, 2010, the Commission
5 for Common-Interest Communities and Condominium Hotels ("CCIC") held an adoption hearing,
6 to consider adopting R199-09.

7 Prior to that hearing, the CCIC published a copy of LCB approved draft of the regulation to be
8 adopted. That draft of the regulation was discussed and vetted at the December 7, 2010 adoption
9 hearing, where members of the public both for and opposed to the regulation gave many comments.

10 Over the course of the hearing, the CCIC made numerous substantive changes to the LCB approved
11 draft. At the conclusion of the hearing the CCIC adopted a substantively different version of
12 R199-09, without

13 1. Receiving a revised text of the proposal from Legislative Counsel, as required by NRS
14 233B.064; and,

15 2. Publishing or giving noticed of the revised text to the public for 30 days, as required by NRS
16 233B.060.

17 Accordingly, R199-09 was not validly adopted by the CCIC on December 7, 2010, and was
18 improperly before the Legislative Commission on May 5, 2011.

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V.

CONCLUSION

1 This Petition requested action in two areas:

- 2 1. Pursuant to NRS §116.3116, what portion of a homeowners' association lien, if any,
3 is superior to the unit's first mortgage lender's security interest ("super priority lien")
4 and may the sum total of the super priority lien amount, whether it be comprised of
5 assessments, fees, costs of collection, or other charges, ever exceed 9 times the
6 monthly assessment amount for common expenses based on the periodic budget
7 adopted by the association pursuant to NRS §116.3115, plus any charges incurred by
8 the association on a unit pursuant to NRS §116.310312 (unit repair expenses)?
- 9 2. Pursuant to NRS §116.3116, does a "super priority lien" exist in the absence of a
10 homeowners' association's failure to file a complaint with a court to enforce the lien,
11 i.e., the failure to institute a "civil action" as defined by Nevada Rules of Civil
12 Procedure 2 and 3?

13 As the existing law makes clear, in Nevada, assessments, late fees, costs of collecting and
14 other charges may be included in the Super Priority Lien Amount. However, as the plain language
15 of NRS §116.3116 states, and as noted by the Colorado courts and James Winokur's commentary,
16 there is a ceiling on the Super Priority Lien Amount of 9 times (6 times in other states) the
17 association's monthly assessment amount for common expenses based on the periodic budget
18 adopted by the association (plus repair expenses pursuant to NRS §116.310312). In addition, the
19 total amount of assessments, late fees, costs of collecting and other charges may not exceed that
20 ceiling in order to be considered a "super priority lien" rather than a "junior" lien. With the exception
21 of the repair expenses pursuant to NRS §116.310312, the Super Priority Lien Amount is limited to
22 a finite number, i.e., an amount which cannot exceed a figure equaling 9 times the monthly
23 assessments which immediately preceding institution of an action to enforce the lien.

24 Additionally, as a "condition precedent" to elevate a portion of a homeowners' association's
25 lien from "junior" status to "super priority" status, a homeowners' association must file an "action"
26 to enforce the lien. Nevada Rules of Civil Procedure 2 states, "There shall be one form of action to
27 be known as 'civil action.'" Nevada Rules of Civil Procedure 3 states, "A civil action is commenced
28 by filing a complaint with the court." Thus, until a homeowners' association files a complaint with
the court to enforce its lien, no amount of its lien can achieve "super priority" status. Therefore,
while the lien remains a lien on the homeowner's unit, it is in "junior" status to the first security
holder's deed of trust. Thus, until the filing of a complaint with the court to enforce its lien, upon
the first mortgage holder's foreclosure, the association's junior lien is extinguished in its entirety.
Pursuant to NRS §116.3116, a homeowners' association's filing of a complaint with the court to

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enforce its lien is a condition precedent for any portion of its lien to achieve “super priority” status.

Dated this _____ day of September, 2010.

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