BACK STORY

THE CONSEQUENCES AND NECESSITY OF PARTICIPATION

BY MICHAEL BUCKLEY, ESQ.

One of the great pleasures of my legal career has been that, through participation in bar and related activities, I have been able to follow many different paths, particularly the legislative process. Now that we have a Real Property Section of the bar, that path and participation is a lot less complicated than it used to be, but, there is no doubt that Nevada is truly a great state in this respect; it is small enough for someone interested in a topic to make a difference – though whether that is for better or worse is often hard to tell.

Back in 1988, when a good part of my practice involved preparing project documents for what we now know as "common interest communities" (CICs) (NRS 116.021), I attended the annual ALI-ABA CLE program on these developments in San Diego and had the pleasure of meeting Steve Hartman, a Carson City attorney. Steve and I heard about this marvelous law called the Uniform Common Interest Ownership Act (UCIOA). We both thought it would be a good idea to have an up-to-date, uniform law in Nevada to replace our first-generation condominium law (NRS 117) and our rather sketchy planned community law (NRS 278A). A couple of years later, after a false start in 1989, the Legislature agreed and in 1991 adopted the UCIOA in NRS Chapter 116 with support and input from the state bar's Business Law Committee.

In 1993, while serving on a legislative policy committee of the Community Associations Institute (CAI), I had the opportunity to work with Eleissa Lavelle as she promoted the legislative enactment of what is now found in NRS 38.300 – 38.400 requiring mandatory mediation or arbitration of most disputes involving the enforcement or interpretation of what we now refer to as a declaration (NRS 116.037) and what are commonly known as "CC&Rs."

Given the growth in our state, particularly in southern Nevada, of CICs there can be no question that Nevada's adoption of a comprehensive CIC law was necessary. While interpreting NRS 116 is often a difficult analysis involving different sections and competing policies in the law, the chapter provides a roadmap for developers and residents of CICs and the board members of the associations that manage them. As Assemblyman Robert Sader remarked in 1991, NRS 116 was perhaps the first consumer protection law in the state. That protection was strengthened in 1997 by the creation of the state ombudsman for CICs (NRS 116.625) and in 2003 by the Legislature's creation of what is now known as the Commission for Common Interest Communities and Condominium Hotels (NRS 116.600). In 2005 the Legislature required that managers of CICs be licensed under a different scheme from (rental) property managers (NRS 116A) and in 2007 created a statutory structure for hotel condominiums (NRS 116B) similar to the CIC scheme found in NRS 116.

Over the years NRS 116 has been criticized by both lawyers and lay people as being overly complex – a lawyer's full employment act. I don't think there can be any question; this is true. Back in 1989, however, having a well thought out uniform law in Nevada made a lot of sense – not only to our bar committee but the members of the Legislature who approved it. Language and laws, however, are never free from different interpretations. Adding another layer to this complexity are the CIC documents themselves – particularly the declaration and the bylaws – and, now that a commission exists, the regulations found in NAC 116, 116A and 116B. More people than I would care to admit are now bound by the thousands of words contained in these laws, documents and regulations. What began as consumer protection is now often a complex journey through a land of rights and wrongs.

Back in 1993, sending CIC disputes to arbitration seemed a sensible thing to do. It certainly made more sense than requiring claimants to use the courts. Arbitration, however, is not inexpensive. For many years I suspect that no one paid much attention to that paragraph in the miscellaneous section at the back of the declaration that permitted the prevailing party to be awarded its attorneys' fees from the losing party. What made sense in 1993 now might result in a losing party to an arbitration having to pay thousands of dollars in fees.

If I learned anything as a member of the commission, it was that punishing people for violating NRS 116 makes less sense than educating people as to how associations should operate. While the commission and the Real Estate Division, particularly through the Ombudsman, are a resource for this education, the existence of an expensive dispute resolution process does not contribute to better associations. In 2011, a bill providing for mediation of HOA disputes and fast tracking the CC&R arbitration process (SB 254) passed the Legislature but was vetoed by the governor, primarily because of concerns about the cost of mediation to homeowners. While these concerns were not unfounded, I can't help but think that the time has come for a better process. What in 1991 or 1993 a small group of well-meaning lawyers were able to accomplish now requires a more concerted effort. This is not just because getting legislative initiatives approved is more complex, but because the complexity of a law applied to thousands of people exponentially increases the need for a well thought out law, whose outcomes under so many different scenarios can be predicted; and nobody does a better job of finding holes and perfecting systems than lawyers!

The Real Property Section's Common Interest Committee will be meeting in 2012 to discuss this and other legislative proposals. Our 2010 work focused on updating the Nevada UCIOA with the 1994 and 2008 changes in the Uniform Act, resulting in the passage of SB 402. Our committee welcomes all who wish to participate in this process again this year – though it'll cost you $25 if you are not already a section member. ■

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