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1 Case No. 07-CV-0081

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5 DISTRICT COURT CLERK

6 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF DOUGLAS

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

11 plaintiffs,

12 vs.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

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

16 Defendants.

17 THIS MATTER came before the court for a bifurcated trial
18 on July 10, July 11, August 19, and August 20, 2008. During
19 the break between July and August, the court issued its Order
20 for Partial Summary Judgment narrowing the issues for the last
21 two days of trial. Both parties moved for reconsideration of
22 the Order for Partial Summary Judgment. Both parties also
23 sought pretrial orders for summary judgment.

24 At trial, the plaintiffs (collectively "Hilltop Duplexes")
25 were represented by Michael Matuska, Esq., and defendant
26 ("Summit Village") was represented by Whitney Selert, Esq., and
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1 Michael Rowe, Esq. Counsel offered extensive evidence and
2 arguments on the factual and legal issues. At the conclusion
3 of trial, the court took the matter under submission.

4 **I. Motions for Reconsideration**

5 Both parties have asked the court to reconsider, in part,
6 its *Order Granting Partial Summary Judgment*. The court grants
7 defendant's request to the extent that the sole issue is not
8 just "exclusive use" but also includes exclusive benefit under
9 NRS 116.2107. After considering all the evidence presented at
10 trial, the court declines to reconsider its finding that the
11 parking deck is a "walkway" within the meaning of Summit
12 Village's Amended CC&Rs § 3.21. See *Order Granting Partial*
13 *Summary Judgment* at 11:23-12:6.

14
15 With the exception of this narrow reconsideration, the
16 court incorporates by reference the findings, analysis, and
17 conclusions in its *Order Granting Partial Summary Judgment* as
18 if fully set forth herein. This means that NRS Chapter 116
19 supersedes and controls in this instance, and that Summit
20 Village's Amended CC&Rs are also applicable.

21 **II. Analysis**

22 The court must begin its analysis with NRS 116.3115(4).
23 NRS 116.1207 and NRS 116.3115(2) do not initially apply because
24 each of these sections requires a formula for assessing a
25 common expense to "each" and "all" unit(s) in a planned
26 community. Summit Village wants to assess repairs of the
27 parking deck to only twenty-two of 311 units, which is less
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1 than each and all the units. As such, the more specific
2 statute (NRS 116.3115(4)) should be examined first.

3 **1. The Parking Deck is Not a Limited Common Element**
4 **and an Assessment Under NRS 116.3115(4) (a) is Not Appropriate.**

5 Summit Village asserts that the parking deck is a limited
6 common element because it is exclusively used, based upon
7 ingress and egress, by the Hilltop Duplexes. Hilltop denies
8 exclusive use, and further asserts that the requirements of a
9 limited common element are not met because Summit Village has
10 never allocated the parking deck to it.

11 NRS 116.3115(4) (a) states:

12 To the extent required by the declaration: Any common
13 expense associated with the maintenance, repair,
14 restoration, or replacement of a limited common
15 element must be assessed against the units to which
that limited common element is assigned, equally, or
in any other proportion the declaration provides.

16 A limited common element is a portion of a common element
17 allocated by the declaration or by operation of law for the
18 exclusive use of one or more, but fewer than all, the units.
19 NRS 116.059. Labeling an element with the title "limited
20 common element" is not necessary to find that it qualifies as
21 such. *Liberty Transportation v. Caldwell*, 2000 Conn. Super.
22 Lexis 579 (Superior Court of Conn., Judicial District of
23 Waterbury 2000) (unreported); *Mayflower Square Condominium*
24 *Association v. KMALM, Inc.*, 724 A.2d 389, 394 (Commonwealth Ct.
25 of Penn., 1999).

26 In this case, the parking deck is not a limited common
27 element because neither the Amended CC&Rs nor the law have
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1 assigned the deck to fewer than all the units.

2 The parking deck is a walkway within the meaning of the
3 CC&Rs, but it is used for ingress and egress by more than just
4 the Hilltop Duplexes. Although not precisely drafted,
5 "walkway" may be defined as any easement for ingress and
6 egress, non-exclusive examples would include paths, sidewalks,
7 driveways, and wooden parking decks. Amended CC&Rs § 3.21. If
8 the parking deck is used to access or exit a unit, then it is
9 used for ingress and egress to that unit and would, by the
10 terms of the Amended CC&Rs, be set aside to that unit for use.

11 Ingress is "[t]he act, or right of, entering. Access;
12 entrance." Black's Law Dictionary 782 (West, 6th Ed.) (1990).
13 Ingress, egress, and regress is defined as, "the right (e.g. of
14 a lessee) to enter, go upon, and return from the lands in
15 question." *Id.* Egress is "[t]he path or opening by which a
16 person goes out; exit; The means or act of going out." *Id.* at
17 515.
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19 The testimony shows that the parking deck in question is
20 used to access and exit from the lower eight units within
21 Hilltop. Without the deck, it would be very difficult for
22 residents of those lower eight units to enter or exit their
23 units. Since it is used for ingress and egress by those lower
24 eight units, it is clearly a walkway for them.

25 But the deck is also used for ingress and egress by more
26 than those lower eight homeowners. The evidence shows that all
27 twenty-two Hilltop units have used or can use the deck to
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1 access their units, both in practice and under Summit Village's
2 parking policy. The evidence also shows that non-Hilltop units
3 and vacationers use the parking deck. Indeed, Bob Attinger,
4 Summit Village's President, testified that Trend West used this
5 parking area. Others testified to witnessing individuals use
6 the parking deck and returning to units on Bigler Court and
7 Bonnie Court. Even if this violated the parking policy,¹
8 Summit Village admits that it has never removed a non-Hilltop
9 car from the deck so long as it had a Summit Village parking
10 sticker. Anyone parking their car on this deck is using it to
11 access and return from their unit, whether it is one of the
12 lower or upper Hilltop units, units on Bigler Court, units on
13 Bonnie Court, units from Trend West, homeowners or lessees.

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15 Summit Village asserts that assessments should be made to
16 the Hilltop Duplexes because the deck provides ingress and
17 egress for them. Summit Village believes that only Hilltop
18 Duplexes' residents use this deck and "user pays." Summit
19 Village's logic is flawed. Direct ingress and egress is only
20 available to the lower eight Hilltop units. If Summit Village
21 were truly following its own logic, assessments should be made
22 only to those eight units. During closing arguments, Summit
23 Village failed to address why the other fourteen Hilltop units
24 could be assessed. There is no substantial difference between
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27 ¹ It is not clear that this violates the parking policy because the signage
28 at the deck is ambiguous whether it created a type of reserved parking or
was a form of identification of nearby units.

1 an upper Hilltop unit (whose staircase does not connect to the
2 parking deck) and any other Summit Village unit which uses the
3 deck. Neither unit owner has direct ingress or egress to their
4 unit by crossing over the deck.

5 Because the parking deck is used by more than just the
6 Hilltop Duplexes, it is used for ingress and egress by anyone
7 with a Summit Village parking pass. It has not been assigned
8 or set aside to less than all the units within Summit Village
9 pursuant to the Amended CC&Rs. Accordingly, it is not a
10 limited common element.

11 The court recognizes that this ruling may be problematic
12 for Summit Village in the future, but Summit Village had a
13 clear remedy: Summit Village could have declared this deck (or
14 any other parking area) a limited common element. Such a
15 remedy is still available in the future. This would result in
16 a clear demarcation of which units are responsible to pay for
17 the maintenance and replacement of any particular structure.

18
19 **2. The Parking Deck Does Not Benefit Fewer than All**
20 **the Units; Therefore, an Assessment Under NRS 116.3115(4)(b) is**
21 **Inappropriate.**

22 Even if a common element is not a limited common element,
23 fewer than all the units may be required to pay for it if it
24 exclusively benefits them. NRS 116.3115(4)(b) states:

25 To the extent required by the declaration: Any common
26 expense or portion thereof benefitting fewer than all
of the units must be assessed exclusively against the
units benefitted.

27 Benefit is broader than usage. A benefit is an advantage,
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1 whereas use means to actually employ for some purpose.

2 *American Heritage Dictionary* (Houghton Miffler Co. 2006),

3 accessed through Dictionary.com ("benefit" and "use").

4 Presumably, someone that uses something also has a benefit in

5 it; however, just because someone has a benefit does not mean

6 they also use it. For example, many HOAs maintain parks and

7 recreation areas with children's playground equipment.

8 Generally, the entire neighborhood benefits from the park and

9 equipment regardless of whether the residents actually use the

10 playground.

11 Such is true in this case. The entirety of Summit Village

12 benefits from the parking spaces throughout the development.

13 Although units on one side of the development may not use this

14 particular deck, they have the advantage - as Summit Village

15 homeowners - of being able to do so. Further, as evidence

16 showed in this case, the parking deck in question provides a

17 benefit when it is open by reducing the stress and congestion

18 on other parking areas in the neighborhood. Indeed, one of the

19 side effects of the deck's closure has been the limited parking

20 for many people residing along Tramway, Bigler, and Bonnie.

21 As stated above, the evidence shows that anyone with a

22 Summit Village parking pass has and may park on the deck. As

23 such, it does not benefit fewer than all the units. While it

24 primarily benefits the lower eight units of the Hilltop

25 Duplexes, the evidence shows that it has been used by the upper

26 Hilltop units, Bigler Court units, Bonnie Court units, and

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1 Trend West units. Further, it is a benefit to any unit with a
2 Summit Village parking pass. A Summit Village unit owner may
3 not avoid responsibility for this deck if it has not used the
4 deck. Amended CC&Rs § 4.8(C).

5 Because the parking deck does not benefit fewer than all
6 of Summit Village's units, NRS 116.3115(4) (b) does not apply.

7 **3. Since the Parking Deck is Neither a Limited**
8 **Common Element, nor a Common Expense Benefitting Fewer than All**
9 **the Units, Any Expense to Repair it Must be Assessed on a Pro**
10 **Rata Basis to Each Summit Village Unit Pursuant to NRS**
11 **116.2107, NRS 116.3115(2), and the Amended CC&Rs.**

12 Since NRS 116.3115(4) does not apply, the court must now
13 examine NRS 116.3115(2) and NRS 116.1207.

14 NRS 116.1207 requires that the declaration provide a
15 formula to allocate common expenses to "each unit." NRS
16 116.3115(2) states that common expenses should be assessed
17 "against all the units" according to the allocation formula in
18 the previous statute and the declaration. The Amended CC&Rs
19 require that assessments be made to all members of Summit
20 Village in like proportions. Amended CC&Rs § 4.8(B). Further,
21 capital improvement assessments "shall be assessed to all
22 members in proportion to their voting rights." *Id.* at §
23 4.8(E).

24 Accordingly, pursuant to statute and the terms of its own
25 declaration, the cost to repair or make capital improvements to
26 the deck must be assessed on a pro rata basis to each unit
27 within Summit Village.

28 The court recognizes "user pays" has generally worked for

1 Summit Village. But changes to the laws and other issues
2 brought up at trial show that this standard is vague and may
3 result in selective application. Even if the present board
4 handles this standard fairly, there is no guarantee that future
5 boards would handle this standard in the same way. For
6 instance, the testimony from Summit Village witnesses Bob
7 Attinger, Carol Traenor, Tom Lynch, and Michael Paulson shown
8 an inconsistent application and interpretation of its own
9 written parking policy. The same could easily happen with the
10 unwritten "user pays" standard. Additionally, such a standard
11 results in the appearance of a conflict since Summit Village
12 unit owners are also the same board members who would decide
13 how such a standard would apply to make assessments on
14 themselves and other units. Furthermore, both parties'
15 unwitting adherence to past practices does not mean that they
16 are bound to do the same thing - especially in light of the
17 changes to the statutes in 1999.

18
19 Further, it is inequitable to assess only the lower eight
20 Hilltop units for the repair of this deck. While they are
21 primarily benefitted by the deck, any Summit Village unit
22 owner, their guests or lessees, may use the deck and many have.
23 The use by other units may have contributed to the
24 deterioration of the structure. Moreover, this is a long and
25 narrow parking structure immediately adjacent and connected to
26 the public roadway because of its asphalt overlay. Such a
27 design almost invites use by all.
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III. Findings

The court finds that, as a matter of law, the lower parking deck on Tramway Drive is Summit Village's responsibility. It was and is required to maintain and repair the parking deck by NRS Chapter 116 and its Amended CC&Rs. Its failure to maintain the deck and maintain adequate reserves to fix the deck is a violation of NRS Chapter 116. However, this failure was unintentional as there was a legitimate dispute about who should repair and maintain the deck. Summit Village is hereby enjoined from further breaches of NRS 116 with regard to this parking deck.

IV. Further Orders

This matter was presented as a bifurcated trial and the issue of damages still needs to be resolved. This is not a final order.

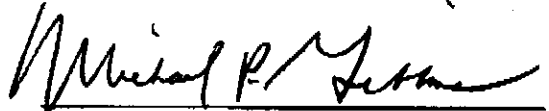
It is disconcerting to the court, and should be to the homeowners on both sides of this dispute, that the money they have spent on this litigation may have paid for a functional new parking structure. Further litigation may pay for a parking structure many times over.

The parties are directed to stipulate and arrange for mediation or some form of alternative dispute resolution within thirty days, or to contact this court to set this matter for a case management conference pursuant to NRCP 16. The court is available to help the parties select a mediator or a method of ADR. The parties may concurrently request a final trial date.

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IT IS SO ORDERED.

Dated this 19 day of September, 2008.



MICHAEL P. GIBBONS
DISTRICT JUDGE

Copies served this 19th day of September, 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