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### Vegas United Inv. Series 105 v. Celtic Bank, 135 Nev. Adv. Op. 61 (December 19, 2019)

Jordan Gregory Cloward

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## PROPERTY LAW: NRS CHAPTER 116

### **Summary**

Nevada Revised Statutes (NRS) Chapter 116 codifies the Uniform Common-Interest Ownership Act and outlines statutory regulations governing common-interest communities in Nevada. NRS Chapter 116 applies generally to all residential property owners' associations (POAs) but does not automatically apply to nonresidential POAs. Nonresidential POAs may voluntarily elect to incorporate NRS Chapter 116 either in whole or in part. NRS Chapter 116 applies only to nonresidential POAs only to the extent expressly provided for by the incorporated statutory provisions.

Vegas United Investment Series 105, Inc. purchased a nonresidential property at a foreclosure sale pursuant to NRS § 116.3116. The conditions, covenants, and restrictions (CC&Rs) of the nonresidential property upon which this appeal was based expressly incorporated only NRS 116.3116-31168 and not the entirety of NRS Chapter 116. The CC&Rs did not incorporate the provisions of Chapter 116 which might invalidate a mortgage savings clause or which might provide for assessments supporting a lien that would have superpriority status. Because Vegas United's lien did not have a superpriority portion and the mortgage savings clause was still valid, Celtic Bank's existing mortgage on the property was not extinguished and the district court properly determined that Vegas United took the property subject to Celtic Bank's prior interest.

### **Facts and Procedural History**

In 2005, a third-party borrowed \$748,000 from Celtic Bank's predecessor-in-interest in order to buy commercial property located in Henderson, Nevada. The third-party, Gibson Road, LLC, executed a first priority deed of trust to secure payment of the note. In 2009, the note and deed of trust were assigned to Celtic Bank. The commercial property is located within two common-interest communities (CICs) which encompass the same business park. Gibson Road failed to pay both its POA assessments and its mortgage. In 2011, the POAs agent, Red Rock Financial Services, recorded a lien for delinquent assessments and a notice of default. In 2014, Red Rock posted a notice of foreclosure sale. Vegas United was the highest bidder at the nonjudicial foreclosure sale.

In March 2015, Celtic Bank recorded a notice of default for nonpayment of the mortgage payments and filed an action for the judicial foreclosure of the property. Vegas United counterclaimed seeking to quiet title and asserted that the nonjudicial foreclosure at which Vegas United purchased the property had extinguished Celtic Bank's deed of trust. After a bench trial, the district court ruled in favor of Celtic Bank, finding that the POA's CC&Rs did not expressly incorporate the substantive provisions of Chapter 116 related to competing security interests. Celtic Bank's interest was not extinguished, and it was thus entitled to foreclose on its first security interest. Vegas United filed a timely appeal.

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<sup>1</sup> By Jordan Gregory Cloward.

## **Discussion**

Vegas United argued on appeal that its delinquent assessment lien had superpriority status, that the CC&R's mortgage savings clause was unenforceable by as a matter of law, and that the POA's nonjudicial foreclosure sale thus extinguished Celtic Bank's deed of trust.

*The CC&Rs partially incorporated provisions from NRS Chapter 116*

NRS Chapter 116 applies only to nonresidential POAs where the community's declaration incorporates its provisions in whole or in part. A POA may choose to incorporate Chapter 116 (a) entirely, (b) specifically NRS § 116.001-.2122 and NRS § 116.3116-.31168, or (c) solely NRS § 116.3116-.31168. The CC&Rs of the property's POA incorporate NRS § 116.116's delinquent assessment lien enforcement procedure. No other provisions of Chapter 116 are incorporated by the CC&Rs. The CC&Rs also provide that delinquent assessment liens shall not be valid against a prior-recorded mortgage. As such, the nonjudicial foreclosure sale was conducted pursuant to NRS Chapter 116 and per the POA's CC&Rs.

*Mortgage savings clauses are not necessarily unenforceable in nonresidential POAs*

An apparent conflict exists between NRS § 116.3116's superpriority provision and the CC&Rs mortgage savings clause which purported to prevent an action from invalidating a preexisting mortgage. While the Supreme Court had previously held that a mortgage savings clause in HOA CC&Rs is unenforceable against Chapter 116's superpriority provision, mortgage savings clauses are not necessarily unenforceable in nonresidential POAs. The CC&Rs for the property involved incorporated Chapter 116 on a limited basis. Accordingly, the CC&Rs must be interpreted to give force to both provisions, "harmonizing their meaning without negating either."

*Where CC&Rs permit both foreclosure of delinquent assessment liens and mortgage savings clauses, such provisions must be harmonized*

The POA's CC&Rs provided that delinquent assessment liens must not impair a prior recorded mortgage. While NRS § 116.310312 and NRS § 116.3115 provide that the superpriority exception applies against first security interests for certain charges and expenses incurred, neither of those statutes were incorporated into the CC&Rs. Thus, no portion of Vegas United's delinquent assessment lien had superpriority status per Chapter 116. To impair the priority of Celtic Bank's deed of trust would conflict with the POA's CC&Rs. Accordingly, the district court correctly enforced the mortgage savings clause and ruled in favor of Celtic Bank.

## **Conclusion**

Because the POA's CC&Rs expressly incorporate only part of NRS Chapter 116, the statute does not render the CC&R's mortgage savings clause unenforceable. Nor does the statute give superpriority status to Vegas United's delinquent assessment lien. Therefore, Vegas United took its interest subject to Celtic Bank's deed of trust.