



**TO:** Chairman and Board Members  
**FROM:** Laine Christman, Resource Economist  
**DATE:** September 8, 2015  
**SUBJECT:** Report and discussion regarding TMWA staff's work with agency staffs regarding Landscape ordinances and discussion of NRS 116.330

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### **SUMMARY**

As directed by the Board, TMWA began reviewing the municipal code for Washoe County and the cities of Reno and Sparks related to water conservation and landscaping mandates. In April of 2015, the codes for the three entities were revisited to determine i) what changes have been made to these code provisions since TMWA last reviewed them in 2005 and ii) identify recommendations to the Reno City Council, Sparks City Council, and Washoe County Board of Commissioners regarding revisions to the current ordinances as well as the potential addition of new requirements. During that same month TMWA had a meeting with planning representatives from the three entities to determine fundamental changes in the landscaping/water conservation codes and discuss possible recommendations. An initial report of the finding and recommendations was drafted in May and sent to the planning representatives for comments. The representatives provided feedback over the next few months, and a second meeting was scheduled for September 10<sup>th</sup> to discuss the final recommendations in greater detail. The meeting will also allow TMWA and planners to hear from representatives from the Washoe County District Health Department regarding its requirements related to landscaping material adjacent to sidewalks and curbs and how to reduce sprinkler runoff, as well as, comments from the Builders Association of Northern Nevada regarding potential changes to the codes. A final report to the Board is scheduled to be completed for the October, 2015 Board meeting.

Additionally, a detailed discussion of how NRS 166.330 relates to private CC&Rs can be found in the attached memo. This topic will also be included in the final report.



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TO: TMWA Board of Directors  
Mark Foree

FROM: Michael Pagni

DATE: September 4, 2015

RE: NRS 116.330: Homeowners Associations and Drought Tolerant Landscaping

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Commissioner Hartung requested a summary of NRS 116.330 and its application to a homeowner's ability to install drought tolerant landscaping. That summary is provided below.

**A. Summary**

NRS 116.330 prohibits a common interest community ("HOA") from unreasonably withholding approval of an owner's plan to install drought tolerant landscaping; however, the HOA may require the owner to first submit a detailed plan for architectural review and approval and the plan must be designed to the maximum extent possible to be compatible with the style of the HOA.

**B. Discussion**

NRS 116.330 provides, in relevant part, that the executive board and governing documents of a homeowners association shall "not prohibit a unit's owner from installing or maintaining drought tolerant landscaping within such physical portion of the common-interest community as that owner has a right to occupy and use exclusively, including, without limitation, the front yard or back yard of the unit's owner." Drought tolerant landscaping means, "landscaping which conserves water, protects the environment and is adaptable to local conditions. The term includes, without limitation the use of mulches such as decorative rock and artificial turf." The statute must be construed liberally in favor of encouraging the use of drought tolerant landscaping.

Before installing any drought tolerant landscaping, the owner must first submit a detailed plan for architectural review and approval and the plan must be designed to the maximum extent possible to be compatible with the style of the HOA. While the HOA is authorized to review and approve the landscaping plan, the HOA is prohibited from unreasonably denying or withholding approval for the installation of drought tolerant landscaping or unreasonably determine that the drought tolerant landscaping is not compatible with the style of the common-interest community.

HOA's may penalize an owner for installing drought tolerant landscaping prior to



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completing the review process if the governing documents of the HOA specify procedures to approve landscaping and a penalty if procedures are not followed. The review process would still need to be completed and the owner may have to modify the landscaping if the landscaping is grossly incompatible with the style of the HOA.

NRS 116.330 clearly applies to CC&R's and homeowners associations organized after its adoption on October 1, 2005. NRS 116.1206 provides that any provision in a governing document which violates any statute in NRS 116, including 116.330, "shall be deemed to conform with those provisions by operation of law" and is "superseded by the provisions of this chapter". While this statute indicates that NRS 116.330 will apply to all associations, regardless of when created, application to HOA's created before 2005 raises constitutional issues as to whether such application would constitute an impermissible impairment of contract or ex post facto law. *See Art. I, sec. 10, United States Constitution.*

Courts have created fairly significant loopholes to the constitutional principal that States are prevented from interfering with private contracts. In *Koscot Interplanetary, Inc. v. Draney* (530 P.2d 108 (1974)), the Nevada Supreme Court addressed the constitutionality of a statute aimed at prohibiting pyramid schemes. In upholding the statute, the Nevada Supreme Court stated:

"Although contracts previously entered into may be affected thereby, the constitutional interdiction against the impairment of the obligation of contract does not prevent a state in the reasonable exercise of its police power from enacting laws intended to benefit the public. Individuals, by entering into contracts, may not estop the legislature from enacting laws for the public good."

More recently, in considering whether NRS 40.459 (which would limit a deficiency judgment to the amount paid by the creditor for the debt in question) applied retroactively to existing loans, the Nevada Supreme Court adopted the following test to determine whether a regulation violates the Contracts Clause:

1. Threshold inquiry: does a state law in fact impair a contractual relationship?
2. If so, does the state have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem?
3. Is the adjustment of rights and responsibilities of the contracting parties appropriate to such public purposes?

*Eagle SPE NV I, Inc. v. Kiley Ranch Communities* (5 F. Supp3d 1238 (2014)). In adopting this test, the Court noted that "[t]he Contracts Clause is no barrier to otherwise legitimate legislation concerning the public welfare that incidentally abrogates private contracts."

Based on the above, I believe a fairly strong argument could be made that retroactive application of NRS 116.330 to HOA's organized before 2005 would be constitutional, given the



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public purpose and benefit resulting from encouraging efficient use of water. However, the issue would be one of first impression for the Courts if the challenge were raised, so I cannot state with any certainty how a Court would rule if presented with the issue.