KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.
gaylekern@kernltd.com

KAREN M. AYARBE, ESQ.
karenayarbe@kernltd.com

5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511

TELEPHONE: (775) 324-5930
FACSIMILE: (775) 324-6173

February 21, 2018

Via email and first class mail

Board of Directors
Dayton Valley Community Association
c/o Mike Trudell
Valley Realty and Management
3246 N. Carson Street, Suite 100
Carson City, NV 89706

Re: *Dayton Valley Community Association*
Surveillance Cameras

Dear Members of the Board:

The Board would like to share my opinion with members of the Association. Accordingly, the following is a non-privileged communication for this purpose.

In preparing this opinion, I have reviewed and relied upon the following documents:

1. Second Amended and Restated Declaration of Covenants, Conditions and Restrictions for Dayton Valley Community Association ("Declaration"); and

2. A series of emails sent between November 20 and December 2, 2017 from Mike Trudell, Dennis Drury, and Mike Becker regarding the security camera system.

Please advise if there are other documents you think are relevant, or if there are other facts that I have not been provided or the facts stated herein are inaccurate. If that is the case, then this opinion may change and cannot be relied upon by the Board.

I. Factual Background

Members of the Dayton Valley Community Association ("Association") have expressed the desire for enhanced "security" in the community. Associations are not in a position to provide "security". No member may rely on the Association to provide security. The Board of Directors ("Board") did consider surveillance options. The Board has opted to upgrade existing surveillance cameras, add new surveillance cameras, and increase the height of the perimeter fence.

With regard to the perimeter fencing, the Board would like to install "No Trespassing" signs at various points along the perimeter fence and is seeking input on the proper wording for these signs.

With regard to surveillance, there are cameras located at the two gated entrances which are capable of recording the license plate of each vehicle entering the community as well as the image

of a person entering a manual access code at the gate. The Board would like to know whether it is required to post signage informing persons using the gate that images are being recorded.

In addition to cameras at the entry gates, the Board is considering the installation of cameras on several homes throughout the community aimed at the streets, sidewalks and other Common Areas. These homeowners agree to have a camera mounted on their home and to supply the wireless internet access which is on a local area network back to the Association's server ("Participating Owner"). The Association would purchase encryption software. Video feed from the gate cameras is digitally recorded and stored on a secure server for a period of 7 days. The home-mounted cameras would operate the same way. Board member Dennis Drury and two non-Board member volunteers are currently monitoring the recordings several times per day. Further, the Lyon County Sheriff's Department has the ability to access the recordings and has used them in a criminal investigation. The Board is seeking guidance on appropriate protocols and procedures including the nature of the material to be recorded, how these materials may be used, and what agreements must be in place with Participating Owners.

The Board and its volunteers have identified certain technical issues which may impact the Association's liability. According to Erin Shaw, one of the volunteers working with Dennis Drury, the home-mounted cameras are dependent on Owner-provided internet access which may make both the Owner's data and the Association's data vulnerable to malware. To address this vulnerability, Mr. Shaw proposes a working plan wherein the Association undertakes a risk assessment, hardens homeowner routers and verifies/implements data security measures and protocols. He notes that this will require an incident response plan, scheduled maintenance and auditing to mitigate risks. Additionally, Participating Owners will need proper anti-malware protection and approved operating systems, among other things, until the Association's system is better protected.

Finally, the Board is seeking an opinion on whether it can use the time stamp on the video cameras to enforce speed limits on the private streets.

II. No Trespassing Signs on Perimeter Fence

NRS 207.200(1) provides that any person who goes upon the land of another with an intent to commit an unlawful act or willfully goes or remains upon any land after having been warned by the owner or occupant not to trespass is guilty of a misdemeanor. The statute provides several methods by which a land owner can give an adequate warning. These methods include simply fencing the area or making an oral or written demand to any guest to vacate the land. *See* NRS 207.200(2)(c) and (d). The statute further provides that it is prima facie evidence of trespass for any person to be found on private property which is posted or fenced as provided in subsection 2 of NRS 207.200 without lawful business with the owner or occupant of the property. In summary, the statute does not require any signage when there is a fence surrounding the property nor does it require any particular wording if the land owner decides to post the warning. Common wording for "No Trespassing" signs include "No Trespassing NRS 207.200", "Private Property No Trespassing", "No Trespassing This Property is Under Video Surveillance" or any of these coupled with "Violators Will Be Prosecuted".

Pursuant to section 4.11, the CC&Rs require approval of all signs. Therefore, it is recommended you place an action item on the next agenda indicating your consideration of approving such signs.

III. Surveillance Cameras

There are three primary legal issues with regard to surveillance cameras: (1) privacy and illegal surveillance, (2) negligence claims; and (3) records retention pursuant to NRS 116.31175(7).

A. Privacy Issues

There is no prohibition on making *video-only* recordings of actions occurring in areas where persons have no reasonable expectation of privacy. While Nevada recognizes that individuals have a right to privacy, seclusion and solitude, the scope of that right is not unlimited. In order to have an interest in seclusion or solitude which the law will protect, a plaintiff must show that he or she had an actual expectation of seclusion or solitude and that that expectation was objectively reasonable. *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 630, 895 P.2d 1269, 1279 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht,* 113 Nev. 644, 650, 940 P.2d 134, 138 (1997)(citation omitted).

The relevant tort claim is invasion of privacy based on intrusion upon seclusion. To prevail on this claim, the plaintiff must show:

1) An intentional intrusion (physical or otherwise);

2) On the solitude or seclusion of another;

3) That would be highly offensive to a reasonable person.

PETA at 1279.

A plaintiff would not have an invasion of privacy claim against a photographer who takes photographs of the plaintiff in a public place. *PETA* at 1281. A person has no expectation of privacy if her actions or words can be readily seen or heard by a passerby. *Quinn v. Thomas*, 2:09-CV-00588-KJD, 2010 WL 3036828, at *3 (D. Nev. July 28, 2010). In *Quinn*, the court explained that a plaintiff does not have a reasonable expectation of privacy in the street in front of his home or in the parking lot next to his place of business. *Id.* [Because of the high walls surrounding plaintiff's home], the only activity defendant could monitor [at plaintiff's home] was the coming or going of plaintiff on the street. *Id.* Because defendant observed activity that any passerby or neighbor could have easily seen, defendant did not intrude upon the seclusion of plaintiff. *Id*

Finally, courts find limited or no expectation of privacy where the person has no right of ownership or possession of the property where the videotaping took place and is not in control of the premises. *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 490 (Cal. 1998), *as modified on denial of reh'g* (July 29, 1998) (cameraman's mere presence at accident scene and filming of events cannot be deemed intrusion on seclusion).

In summary, a person would have no reasonable expectation of privacy on the private streets, sidewalk or on the Common Area because the person has no right to control these areas and a person's actions or words could be readily seen or heard by people passing by.

Finally, there is no requirement for the Association to install signs alerting persons that video security cameras are in use. But, based upon information provided by other associations, this type of sign may act as a deterrent to undesirable behavior as people are less likely to do certain things when they are aware their actions and behavior are caught on camera. Therefore, while signs are not required, they may be beneficial.

B. Association's Liability: Negligence

The elements of a negligence claim under Nevada law are: (1) that defendant owed plaintiff a duty of care; (2) that defendant breached that duty of care; (3) the breach was the actual cause of plaintiff's injury; (4) the breach was the proximate cause of plaintiff's injury; and (5) that plaintiff suffered damages. *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589 (1991).

1. Association Provided "Security"

In Nevada, a landowner owes a duty to use reasonable care to keep the premises in a reasonably safe condition for use. However, the duty to protect from injury caused by a third person is circumscribed by the reasonable foreseeability of the third person's actions and the injuries resulting from the condition or circumstances which facilitated the harm. *Scialabba v. Brandise Const. Co., Inc.*, 921 P.2d 928, 930 (Nev. 1996). Nevada courts have held that whether a landowner owes a duty to protect an individual from an intentional act by a third-party turns on whether it exercised control over the premises and whether the criminal attack was reasonably foreseeable. *Id.* at 931. Foreseeability is not absolutely dependent on landowners having notice of similar prior crimes on or near their property but may be determined based on the totality of the circumstances. *Id.* In *Scialabba*, the court found that defendant was liable for the third party's violent assault of the plaintiff because criminal activity was foreseeable from its failure to keep the doors to vacant apartments locked. *Id.* With regard to the control factor, the court explained:

> [S]ince the ability of one of the parties to provide for his own protection has been limited in some way by his submission to the control of the other, a duty should be imposed upon the one possessing control (and thus the power to act) to take reasonable precautions to protect the other one from assaults by third parties which, at least, could reasonably have been anticipated.

Scialabba at 930.

The Association does indeed exercise control over the Common Area. *See* Declaration, Article 2, Section 2.5 (Board's authority to adopt and enforce Rules pertaining to the use of the Common Area); Article 7, Section 7.1 (Association's responsibility to maintain Common Area).

Article 7, Section 7.10 of the Declaration incorporates disclaimers of liability for the safety and security of residents. Article 7, Section 7.10(c) of the Declaration discusses the right of the Association, acting through the Board, to install a "Monitoring System" for the express purpose of controlling access to the Development. Pursuant to this section, the Board has the ability to eliminate, increase, decrease or alter access monitoring measures in its sole discretion. Subsection 7.10(d) provides that Owners, occupants, tenants and invitees acknowledge that the Association is not representing that the Monitoring System will "prevent loss by fire, smoke, burglary, theft, hold-up or otherwise", that "each Owner and the Association is responsible for protecting and insuring themselves" and that "provision of a Monitoring System does not constitute a warranty or representation as to the provision of or level of security within the Development".

2. Risks to Participating Owners

As an initial matter, I would advise the Association to contact its insurance broker to ascertain whether it has adequate coverage for this type of liability. The Association should consult with an expert to develop a document outlining the following:

- The Association's responsibilities for maintaining the system;
- Each Participating Owner's responsibilities (e.g. providing electricity for the camera, allowing the Association to make holes in the exterior of their home to install the cameras, maintaining certain anti-virus protections; notifying the Association in the event of problems; providing certain information to the Association about its wi-fi and router);
- The potential risks to his/her hardware, software or data which the Participating Owner will be assuming;
- The degree of intrusion which the Participating Owner should anticipate (e.g. periodic inspections of the camera which will require entry onto the Owner's property; requirements to consult with the Association on the choice of anti-virus software or operating systems).
- Additional costs, if any, which the Participating Owner and Association area assuming as a result of this program (e.g. costs of server maintenance, incident response); and
- An incident response plan (e.g. how problems are reported, who is dispatched to troubleshoot, who pays for troubleshooting and repair).

Each Participating Owner should also execute a comprehensive hold harmless agreement to which the above technical document is attached, acknowledging the risks and possible costs associated with participation. Please let me know if you would like us to draft this hold harmless agreement. It is my recommendation that I do this if you are going to proceed with the additional camera system as proposed.

Notwithstanding any hold harmless agreement, the Association will still have a duty to act with reasonable care in monitoring and maintaining this system. This duty may include ensuring that it purchases and maintains adequate anti-virus protection; retains qualified persons to maintain

the system, routinely adjusts cameras to ensure that the camera is only capturing images from the Common Area, keeps cameras in good working order and promptly replaces non-functional cameras, and that it has a process in place to address adverse incidents in a timely and effective manner.

IV. Video Recordings Are Records of the Association; Confidentiality

As part of its fiduciary duties, each Board member has an obligation to not disclose confidential information related to another unit's owner, a member of the board, an officer, employee or authorized agent of the association unless the person to whom the information relates consents to the disclosure, unless such disclosure is required by law or court order. *See* NAC 116.405(4). The digital recordings are records of the Association subject to Owner review pursuant to NRS 116.31175 and, in certain instances, may constitute records relating to another unit's Owner, which must be kept confidential. *See* NRS 116.31175(4)(b). Therefore, I recommend that the Board adopt a policy which addresses among other things:

- How the Association will preserve recordings of an incident and what constitutes an incident requiring preservation;
- Under what circumstances data may be deleted;
- Who may request to view the videotape (Owners only, board members only, residents, non-residents, law enforcement);
- Who will maintain control of the videotape (video remains in Association's custody and control while requesting person reviews it); and
- When copies will be provided (upon written request, verbal request, a search warrant, a court order).

The Association will need to ensure that the volunteers who have access to these records execute a confidentiality agreement. Please let me know if you would like us to draft a confidentiality agreement and a policy providing appropriate procedures for the records.

V. Use of Cameras for Speed Limit Enforcement

Article 4, Section 4.15(f) of the Declaration provides that the speed limit for all vehicles driven on Association roads is 15 MPH. The speed limit in the Declaration is a private contractual agreement between the Association and its members and not a law. You raised the issue as to whether NRS 484A.600 was applicable to a homeowners association. NRS 484A.600 prohibits a governmental entity or its agent from using photographic, video or digital equipment to gather evidence for a traffic citation unless the equipment is hand held or installed in a law enforcement vehicle or facility. By its terms, this statute is not applicable to the Association; nor would it be applicable to any private service which the Association hired to monitor speeding in the community because neither the Association nor its contractor is a governmental entity and neither the Association nor its contractor can issue a traffic citation for a violation of law.

With regard to enforcing the Association's speed limit, the Association may levy a fine pursuant to NRS 116.31031, suspend membership privileges, seek a court order enjoining the violating conduct or sue for money damages after complying with NRS Chapter 38. *See* Declaration, Article 10. It may not prohibit an owner, tenant or invitee from driving to and from the unit. *See* NRS 116.31031(1)(a)(2). Nor may it fine an Owner for the conduct of a vendor who is speeding while delivering goods to or performing services in the community for an owner, tenant or invitee. *See* NRS 116.31031(1)(b)(2). Before an association can impose a fine or other sanction on an Owner, it must have credible evidence that a violation has occurred. When the violation is one that can be photographed, the association is required to provide a photograph. *See* NRS 116.31031(4)(b)(1)(II).

As you explained, the cameras are mounted in fixed positions and include a date/time stamp. You explained the accuracy of the time stamp and indicated that it would be possible to calculate the speed of a vehicle based on the time it took to pass between two fixed camera positions. Assuming this to be true, there still remains the problem of identifying the vehicle in the videotape to a particular Unit and Owner. Unless the camera could also capture the vehicle's license plate number which could be tied to information in an Association-maintained vehicle registration program, the Association would know a vehicle was speeding but it would lack the information to call an Owner to hearing for the violation. If you have additional information on how the Association might overcome this deficiency, I would be happy to consider the idea of using the surveillance cameras for speed limit enforcement further.

VI. Conclusion

In conclusion, before the Association implements its video surveillance program, it needs to ensure that it has the appropriate safeguards in place. These safeguards include, but are not limited to:

1. Adequate insurance coverage;

2. Technical specifications for participating Owners;

3. Policy and procedure for how the Association will (1) install, monitor, inspect, maintain and upgrade the surveillance camera system, allocate costs (if any) between Participating Owners and the Association, and respond to adverse incidents; (2) cooperate with law enforcement; (3) respond to requests to Owner and/or resident requests to inspect the videotape; and (4) preserve potential video evidence so it is not overwritten after 7 days.

4. Hold harmless agreement acknowledging and accepting the risks of participating in this program;

5. Confidentiality agreement for volunteers;

6. Record retention policy.

Please let me know if you would like me to draft Items 3-6 for the Association. It would be helpful to have information on Item 1 and at least a working draft of Item 2 before drafting the remaining documents.

Very truly yours,

KERN & ASSOCIATES, LTD.

Gayle A. Kern