

# FIDUCIARY DUTY

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Presented by the Training Officer for the Office of the Ombudsman;  
Common-Interest Communities & Condominium Hotels Program



# Defining a Fiduciary

- A **fiduciary** is an individual in whom another has placed the utmost trust and confidence to manage and protect property or money.
- A **fiduciary duty** is an obligation to act in the best interest of another party.

# Acting as Fiduciaries – NRS 116.3103

- With regard to a CIC, the executive board acts on behalf of the association.
- In the performance of their duties, officers and members of the executive board:
  - shall act on an **informed basis**, in good faith, and in the honest belief that their actions are in the best interest of the association;
  - shall not **stand to gain** any personal profit or compensation of any kind from the association;
  - may not act to **amend** the declaration or terminate the common-interest community;
  - may not **elect** members of the executive board except through appointment when there becomes a vacancy outside of an election period;
    - An appointment only lasts the duration of the unexpired portion of the term or until the next regularly scheduled election.
  - shall adopt **budgets**.

## Being Informed – NRS 82.221



- In performing their respective duties, directors and officers rely on information, opinions, reports, statements and other financial data prepared by:
  - (a) One or more directors, officers, committee members or employees reasonably believed to be reliable and competent in the matters presented; or
  - (b) Counsel, public accountants or other persons with professional expertise.

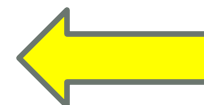
# Relying on the Manager - NRS 116A.630

- A community manager shall, among other things:
  - At all times act as a fiduciary in any client relationship;
  - Comply with all applicable federal, state and local laws and lawful provisions of the governing documents of each client;
  - Keep informed of new developments in the CIC industry;
  - Advise a client to obtain advice from an independent expert relating to matters that are beyond their expertise;
  - At all times ensure that the financial transactions of a client are current, accurate and properly documented and maintain internal accounting controls;
  - Comply with the directions of a client, unless the directions conflict with the governing documents or applicable laws of this State.

## Declaration of Certification Common-Interest Community Executive Board Member

*Each elected or appointed executive board member must complete Form 602 within 90 days of his/her election or appointment and submit a copy of Form 602 to the Division. Only one copy is required, per election or appointment, to be submitted to the Division at the time of registration NRS 116.31034(18).*

I \_\_\_\_\_, an elected or appointed member  
(print name)  
 of the executive board of \_\_\_\_\_\*, a common- interest  
(association's legal name)  
 community or condominium hotel, Secretary of State (SOS) File# \_\_\_\_\_\*,  
 master association of \_\_\_\_\_\*\*, certify that I have  
(master association's legal name)  
 read and understand, to the best of my ability, the governing document of the association  
 and the provisions of Chapter 116 or 116B of Nevada Revised Statutes (NRS) and  
 Chapter 116 of the Nevada Administrative Code (NAC).



*Date of election or appointment to the board* \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
month date year

***“I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.”***

Executed on \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

## Gaining from Voting - NRS 116.31084

- A person MAY NOT be a candidate for or member of the executive board if the person **stands to gain any profit or compensation of any kind** from a matter before the board (NRS 116.31034).

*Not much incentive to save a life when you are making money upon their death*



- A member of an executive board who has a relative by blood or adoption who stands to gain any personal profit or compensation of any kind from a matter before the executive board, shall **disclose** the matter to the board *before voting*.

# Accepting Commission – NRS 116.31187

- A member of an executive board or an officer of an association shall not:



(a) enter into a contract with the association to provide financing, goods or services; or



(b) accept any commission, personal profit or compensation of any kind from the association.





# Solicitation - NRS 116.31185

- A member of an executive board or an officer of an association shall not solicit or accept any form of compensation that:
  - (a) Would improperly, or appear to improperly *influence* the decisions made by those persons; or
  - (b) Would result, or appear to a reasonable person to result in a *conflict of interest* for those persons.
- A member of an executive board or an officer of an association shall not accept, directly or indirectly, any gifts, incentives, gratuities, rewards or other items of value from:
  - (a) Any one attorney, law firm, declarant, affiliate of the declarant, or vendor exceeding \$100 per year.

## Punishment for Bribery – NRS 116.31189

- A member of the executive board who asks for or receives, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his or her vote, opinion or action will be influenced thereby, is guilty of a category D felony (punished as provided in NRS 193.130).
- A person who offers the bribe is also guilty of a category D felony.

# Amendments are Not Made at the Whim of the Board

- NRS 116.2117(1) - The declaration, including any plats, may be amended ONLY by vote or agreement of a majority of units' owners.
- NRS 116.2108(2) - Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration.
- An amendment which prohibits or materially restricts the permitted uses of a unit, or the number or other qualifications of persons who may occupy units, may not be enforced against a unit owner who was the owner on the date of the recordation of the amendment as long as he or she remains the owner of that unit.



# Creating Rules - NRS 116.31065

- Rules CAN be created or amended by the executive board, but they must:
  - Be sufficiently explicit in their prohibition, direction or limitation of any action required for compliance (used to clarify).
  - ***Be consistent with the governing documents.***
  - Not be adopted to evade any obligation of the association.
  - Be **uniformly enforced** under the same or similar circumstances against all units' owners.
- An association shall not adopt any rule or regulation:
  - that has the effect of prohibiting or unreasonably **interfering with a candidate** in the candidate's campaign for election; or
  - which prevents or unreasonably **interferes with the collection of the required percentage of signatures for a petition** (removal election/special meeting).

# Election/Removal – NRS 116.31034

- Elections and removals are conducted by *secret* written ballot.
- Only secret written ballots returned to the association may be counted to determine the outcome of the election.
- Secret written ballots must be opened and counted in plain sight at a meeting of the association; a quorum is not required to be present.
- Incumbent members of the executive board and each person whose name is placed on the ballot may not possess, be given access to, or participate in the opening or counting of the ballots (they can have access to them after the election).
- A person shall not knowingly, willfully and with intent alter the true outcome of an election by:
  - Changing or falsifying a voter's ballot;
  - Fraudulently casting a vote; or
  - Rejecting, failing to count, destroying, defacing or otherwise invalidating the valid ballot of another.
- A person who violates this section is guilty of a category D felony (NRS 116.31107).

# Publications – NRS 116.31035



- If an official publication contains any mention of a **candidate** or ballot question, the official publication must, upon request and **under the same terms and conditions**, provide equal space to all candidates.
- If an official publication contains the views or opinions of the association, the official publication must provide equal space to opposing views and opinions of a unit owner within the community.
- “Official publication” means:
  - (1) An official website;
  - (2) An official newsletter or other similar publication; or
  - (3) An official bulletin board, available to each unit owner.

## Financial Accounts - NAC 116.395

- The executive board has a fiduciary duty to ensure that any institution which holds money of the association:
  1. Is authorized to do business in the State of Nevada; or
  2. Has consented to the jurisdiction of the courts of this State.
- At least once every quarter, and not less than once every 100 days, the executive board shall review the association's financial information at one of its meetings.

# Reserve Study – NRS 116.31152

- The executive board SHALL:
  - (a) At least once every 5 years, cause to be conducted a study of the reserves;
  - (b) At least annually, review the results of that study to determine whether reserves are sufficient; and
  - (c) At least annually, make any necessary adjustments to the association's funding plan.



# Funding Plan – NRS 116.3115

- The executive board creates a funding plan designed to determine and prepare for the costs of running the association.
- The executive board has a **DUTY** to provide for the maintenance, repair and replacement of common elements (NRS 116.3107), and shall establish adequate reserve funds for this upkeep
- Adequately funded reserves means having funds sufficient to maintain the common elements:
  - (a) At the level described in the governing documents and reserve study; and
  - (b) Without using funds from the operating accounts or imposing special or reserve assessments (NAC 116.425).

# Signatures on Checks – NRS 116.31153

- Money in the **reserve account** of an association may not be withdrawn without the signatures of at least two members of the board.
- Money in the **operating account** may not be withdrawn without the signatures of at least two members of the board or one member of the board and the community manager.
- Money in the operating account may be withdrawn **without** signatures to:
  - (a) Transfer money to the reserve account at regular intervals;
  - (b) Make automatic payments for utilities;
  - (c) Make an electronic transfer of money to a government agency (\$10,000 or more).

# Signatures Cont'd

- An association **may use electronic signatures** to withdraw from the operating account if:
  - (a) The transfer is made pursuant to a written agreement entered into between the association and financial institution;
  - (b) The executive board has expressly *authorized* the electronic transfer of money; and
  - (c) The association has established internal accounting controls **which comply with generally accepted accounting principles to safeguard the assets of the association.**



Jul 12	Electronic Withdrawal	From AVIDPAY SERVICE	98.00-
Jul 17	Electronic Withdrawal	From AVIDPAY SERVICE	35.00-
Jul 25	Electronic Withdrawal	From AVIDPAY SERVICE	11,632.65-
Jul 25	Electronic Withdrawal	From AVIDPAY SERVICE	172,240.53-

# Actions of the Board

- Actions of the executive board that impact the community must be taken at a meeting of the association and comply with NRS 116.31083.
  - Notice must be provided, an agenda must be prepared/adhered to and minutes must be taken.
- There is nothing that prevents an executive board from having more than the minimum number of meetings required to address association business (at least once every quarter).
- As fiduciaries, the executive board should apply common sense when determining whether a meeting is necessary and what should be included on the agenda; NRS 116.31087.
- Examples of when action can be taken without a meeting include:
  - walking through a community to look for violations of the governing documents;
  - meeting with vendors to discuss work that needs to be done under an agreement;
  - addressing an unforeseen event requiring immediate attention, such as a burst pipe or fallen tree.



# Quorum Requirements – NRS 116.3109

- A quorum must be present for purposes of determining the validity of any action taken at a meeting of the executive board.
- Unless the governing documents specify a **larger** number, a quorum exists only if individuals entitled to cast a **majority** of the votes on the board **are present** at the time a vote regarding any action is taken.
- If a quorum is present, **the affirmative vote** of a **majority** of the members validates the action to be taken.
  - No board member can act alone to make decisions for the association.

# Meeting Duties – NRS 116.31083

- Robert's Rules should be followed unless otherwise specified or determined.
- A period required to be devoted to comments by unit owners *and discussion* of those comments must be scheduled for both the beginning and end of each meeting (NRS 116.31083).
  - At the beginning of each meeting, comments by unit owners must be limited to items listed on the agenda.
- The secretary or other officer specified in the bylaws shall cause each 'open' meeting of the executive board to be audio recorded.
- Not more than 30 days after each meeting, the secretary or other officer specified in the bylaws shall cause the audio recording, minutes, or a summary of the minutes to be made available to unit owners; in electronic format whenever possible, free of charge.

## Notice Requirements – NRS 116.31068

- If any change is made to the governing documents, the association shall, within 30 days after the change is made, cause to be delivered to each unit owner a copy of the change (NRS 116.12065).
- An association shall deliver any notice not required to be delivered by U.S. mail by any means a unit owner designates.
  - If a unit owner has not designated an email address to which a notice must be delivered, the association may deliver notices by hand delivery or any other reasonable method.
- The ineffectiveness of a good faith effort to deliver notice does not invalidate the action described in the notice.

# Enforcement Duties - NRS 116.3102

- **The executive board may determine whether to take enforcement action for a violation of the governing documents**, including whether to negotiate fines and fees.
- The executive board may decide NOT to take enforcement action if it determines that:
  - (a) The association's legal position does not justify taking the action;
  - (b) The covenant or rule being enforced is inconsistent with current law;
  - (c) The violation is not deemed to be offensive to a reasonable person; or
  - (d) It is not in the association's best interests to pursue an enforcement action, i.e. expend the association's resources.
- The executive board may not be arbitrary or capricious in taking enforcement action.
- A member of the executive board shall not participate in any hearing or cast any vote relating to a fine if the member him or herself has not paid all assessments due to the association (NRS 116.31031).



# Duties Regarding Fines – NRS 116.31031

- If the association adopts a policy imposing fines for any violations, the board shall prepare and cause to be hand-delivered, or sent prepaid by U.S. mail, a schedule of the fines that may be imposed.
- Fine amounts are not to exceed \$100 for each violation, aside from health and safety violations.
- If a change to the governing documents is made, the executive board may not impose a fine unless, at least 30 days before the alleged violation, the person was provided with any revisions or amendments pertaining to their violation.

# Fines Cont'd

- The executive board may also not impose a fine unless, within a reasonable time after the discovery of the alleged violation, the violator has been provided with written notice including:
  - in **detail** the alleged violation (including provision violated),
  - a clear and detailed **photograph**,
  - the proposed action to **cure** the alleged violation,
  - the amount of the **fine**, and
  - the date, time and location for a **hearing**.
    - The executive board must schedule the hearing so that the violator is provided with a reasonable opportunity to prepare for and be present at the hearing.
- This section of law establishes the minimum procedural requirements that the executive board must follow before it may impose a fine and does not preempt any provisions of the governing documents that provide greater procedural protections.

## Retaliation - NRS 116.31183

- An executive board shall not take, or direct or encourage another person to take, any retaliatory action against a unit owner because he or she has:
  - (a) Complained in good faith about any alleged violation of NRS 116 or the governing documents of the association;
  - (b) Recommended the selection or replacement of an attorney, community manager or vendor; or
  - (c) Requested in good faith to review the books, records or other papers of the association.

# Records - NRS 116.31175

- The executive board shall, upon the written request of a unit owner, **make available** the books, records and other papers of the association including:
  - The financial statement;
  - The budgets;
  - The study of the reserves;
  - The violation record;
  - All contracts to which the association is a party; and
  - All records filed with a court to which the association is a party.
- The executive board shall not require a unit owner to pay an amount in excess of \$10 per hour to **review** any books, records, contracts or other papers.
- The executive board shall provide a **copy** of financial statements, budgets, and the reserve study within 21 days after receiving a written request.

## Threats & Harassment – NRS 116.31184

- A member of the board shall not willfully threaten, harass or otherwise engage in a course of conduct against any other person in the community which:
  - (a) Causes harm or serious emotional distress; or
  - (b) Creates a hostile environment for that person.
- A person who violates this law is guilty of a misdemeanor.

# Duties Overall - NAC 116.405



- In determining whether a member of the executive board has performed his or her **duties, the Division will consider** whether the member:
  1. Acted outside the scope of authority granted in the governing documents;
  2. Acted for reasons of self-interest, gain, prejudice or revenge;
  3. Committed an act or omission amounting to incompetence or gross negligence;
  4. Inappropriately disclosed confidential information relating to a unit owner, member of the executive board, or an officer, employee or authorized agent of the association;
  5. Impeded or otherwise interfered with an investigation of the Division by:
    - (a) Failing to provide information or documents;
    - (b) Supplying false or misleading information; or
    - (c) Concealing any facts or documents relating to the business of the association;
  6. Kept informed of laws, regulations and developments relating to CICs;
  7. Cooperated with the Division in resolving complaints filed; and

# Overall Duties Continued

8. Caused the association to:
  - Comply with all applicable federal and state **laws and regulations** and the governing documents of the association;
  - **Uniformly enforce** the governing documents of the association;
  - Hold **meetings** of the executive board with such frequency as to properly and efficiently address the affairs of the association;
  - Obtain, when practicable, at least three **bids** from reputable service providers who possess the proper licensing;
  - Consult with appropriate **professionals** as necessary before making any major decision affecting the association;
  - Maintain current, accurate and properly documented **financial records**;
  - Establish policies and procedures for the disclosure and resolution of potential **conflicts of interest**; and
  - Make the **records** of the association available for inspection.

# Breach of Fiduciary Duty

- Acts such as disclosing confidential information, not holding meetings properly, not maintaining or making available financial records of the association, gaining any profit or compensation from the association, acting autonomously as a single board member...are all breaches of a board member's fiduciary duty.
- These are also violations of other provisions of NRS or NAC 116 however.
- As a board member, it is crucial that you abide by your fiduciary duty. If you do not, you are not only automatically violating the law, but are most likely violating multiple areas of the law.



# Conclusion

- Every contract or duty governed by NRS 116 imposes an obligation of good faith in its performance or enforcement (NRS 116.1113).
- In a CIC, the executive board acts on behalf of the association.
- In the performance of their duties, officers and members of the executive board are fiduciaries and shall act:
  - on an informed basis,
  - in good faith, and
  - **in the honest belief that their actions are in the best interest of the association** (NRS 116.3103).
- If a member of an executive board is sued for actions undertaken in his or her role as a member of the board, the association shall undertake all costs of defense, **UNLESS** it is proven that the member intentionally violated the law, abused his or her power, or acted with gross negligence (NRS 116.31037).

# Thank You

- <http://red.nv.gov/> - Main Page
- [CICOmbudsman@red.nv.gov](mailto:CICOmbudsman@red.nv.gov) - Email Questions
- [http://red.nv.gov/Content/CIC/Program\\_Training/](http://red.nv.gov/Content/CIC/Program_Training/)