

FIDUCIARY DUTY



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.

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.

Performing Duties - 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

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.

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.

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 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.
- The executive board has a duty to create a funding plan designed to allocate the costs for repair, replacement and restoration over a period of years, ensuring that sufficient money is available when necessary.
- If the funding plan is continuously adjusted to meet unforeseen needs, the reserve account should remain well funded and a special assessment should not be necessary.

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 executive board, or
 - at least one member of the executive board and one officer.
- Money in the **operating account** of an association may not be withdrawn without the signatures of:
 - at least one member of the executive board OR one officer, and
 - a member of the executive board,
 - an officer of the association, or
 - the community manager.



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) An attorney, law firm or vendor not to exceed \$100 per year per such attorney, law firm or vendor; or
 - (b) A declarant, not to exceed \$100 per year per such declarant, affiliate or person.



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.



Gaining from Voting - NRS 116.31084

- A person **may not be a candidate for or member of the executive board** if the person (or the person's spouse in a communal property state) **stands to gain any profit or compensation of any kind** from a matter before the board (NRS 116.31034).
- 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**.

Taking Action – 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.

Meetings – NRS 116.31083

- 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** and **minutes must be taken at each meeting**.
- Not more than 30 days after each meeting, the secretary or other officer specified in the bylaws shall cause the audio recording (if applicable), the minutes, and a summary of the minutes to be made available to unit owners (in electronic format whenever possible, free of charge).

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 or sides.
- 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.

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).
 - Not be adopted to evade any obligation of the association.
 - **Be consistent with the governing documents.**
 - 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 as a member of the executive board, except that the candidate's campaign may be limited to 90 days before the date that ballots are required to be returned to the association.

Amending the Declaration – NRS 116.2117

- The declaration, including any plats, may be amended *only* by vote or agreement of a majority of eligible unit owners in that association (unless the declaration specifies a different percentage).
- If the declaration requires the approval of another person as a condition of its effectiveness, the amendment is not valid without that approval.
- An amendment to the declaration 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 the amendment was recorded, as long as the unit's owner remains the owner of that unit.

Notice to Unit Owners – 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.

Fine Notices – NRS 116.31031

- The executive board may not impose a fine unless, at least 30 days before the alleged violation, the person against whom the fine will be imposed was provided with written notice of the applicable provisions of the governing documents that form the basis of the alleged violation.
- A unit's owner shall not be deemed to have received written notice of a violation unless it is mailed to the address on file.
- If the association adopts a policy imposing fines for any violations, an officer specified in the bylaws shall prepare and cause to be hand-delivered, or sent prepaid by U.S. mail, a schedule of the fines that may be imposed for those violations (fine amounts are not to exceed \$100 for each violation, aside from health and safety violations).

Enforcement - 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, fees, etc., but all actions must be universally enforced.
- The executive board may NOT 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 has not paid all assessments due to the association (NRS 116.31031).
 - If he or she does, that action/vote is void.

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's 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 records within 21 days after receiving a written request.
- The books, records and other papers of an association must be maintained for at least 10 years (meeting minutes must be maintained until the community is terminated).

Resale Package – NRS 116.4109

- Within 10 days after receipt of a written request, the association shall furnish all of the following to the unit owner or his or her authorized agent for inclusion in the resale package:
 - A copy of the governing documents, **other than any plats**, and the information statement.
 - A statement of demand setting forth the amount of monthly assessment and any unpaid obligation due from the seller.
 - A copy of the current operating budget and current year-to-date financial statement.
 - A statement of any unsatisfied judgments or pending legal actions against the association (certificate).
 - A statement of any transfer, transaction, or any other fees associated with the resale of a unit (certificate).
 - The association shall make the entire study of the reserves available upon request.
- The association may charge the unit's owner a fee for these documents:
 - \$20 – Basic documents
 - \$160 (+\$125 expedited)– Certificate
 - \$150 (+\$100 expedited)– Statement of Demand
- If the association becomes aware of an error in a statement of demand, the association must deliver a replacement.

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 - Email Questions
- http://red.nv.gov/Content/CIC/Program_Training/