

Governing Documents & NRS 116; Knowing which takes precedence, when



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



Introduction

- While NRS 116 creates the basis of law that an association must abide by, the specifics are often allocated to the governing documents of an association.
- In order to know which takes precedence, state law or the governing documents, it is important to start with NRS 116 and look for key phrases and words that serve to direct the reader as to which will be more stringent.
- These key words and phrases serve as guides, allowing readers to know if a provision is demanded by NRS 116 (“shall” or “must”), or if powers have been deferred to the governing documents (“may”).

Deferring to the Governing Documents

- Key phrases in NRS 116:
 - *“Unless the declaration or governing documents provide otherwise...”*
 - *“Unless the declaration imposes more stringent standards...”*
 - *“In accordance with the declaration or governing documents...”*
 - *“Except as otherwise provided in the governing documents...”*
 - ***“Notwithstanding [in spite of] any provision of the governing documents to the contrary...”***

What do we mean by Governing Documents? – NRS 116.049

- Governing documents include:
 - Articles, certificates and other organizing documents;
 - The Declaration (CC&Rs);
 - Bylaws;
 - Rules and regulations; and
 - Any other documents that govern operation of the CIC.

Articles - NRS 116.3101(4)

The association must:

- Be organized as a profit or nonprofit corporation, association, limited-liability company, trust, partnership or any other form of organization authorized by the law of this State;
- Include in its articles and certificate of registration that its purpose is to operate as an association pursuant to chapter 116; and
- Contain in its name the words “common-interest community,” “community association,” “master association,” “homeowners’ association” or “unit-owners’ association.”

Declaration (CC&Rs) – NRS 116.2105(1)

The declaration must contain:

- A statement that the CIC is either a condominium, cooperative or planned community;
- A legally sufficient description of the real estate included in the CIC;
- A statement of the maximum number of units that the declarant reserves the right to create (the declarant may not in any event increase the number of units beyond the number stated);
- If applicable, a description of the boundaries of each unit, the unit's identifying number and its location if within a building containing more than one unit;
- A description of any limited common elements and any real estate that is or must become common elements;
- A description of any developmental rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies and a time limit for each of those rights to be exercised;
- An allocation to each unit of a fraction or percentage of undivided interests/ common expenses of the association, and a portion of the votes; and
- Any restrictions on use, occupancy and alienation of the units.

Amendment of Declaration – NRS 116.2117

- UNLESS the declaration specifies a different percentage, the declaration, including any plats, may be amended ONLY by vote or agreement of a majority of units' owners.
 - 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 may not be enforced against a current unit's owner.
- Not later than 30 days after the date the amendment is recorded, the association SHALL deliver to all unit owners a copy of the amendment and a statement explaining that it has been recorded appropriately (NRS 116.12065).

Renting or Leasing - NRS 116.335

- UNLESS at the time a unit owner purchased his or her unit, the declaration prohibited renting or leasing, any amendment to the declaration by the association thereafter MAY NOT prohibit such for that owner.
- If a declaration contains a provision establishing a maximum number or percentage of units which may be rented or leased in the community, the declaration MAY NOT be amended to decrease that maximum number or percentage.
- If the declaration is silent regarding a rental cap and the association's membership approves an amendment to the declaration to put a cap in place, the cap would only apply to future unit owners.

Bylaws - NRS 116.3106(1)

The bylaws of the association MUST:

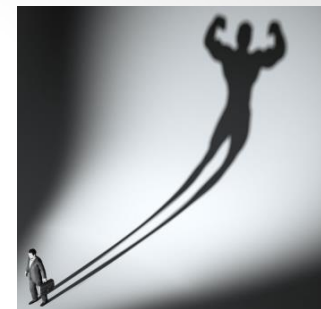
- Provide the number of members of the executive board and the titles of officers of the association (*president, treasurer, secretary, etc.*);
- Specify the qualifications, powers, *duties, terms* of office and manner of *electing* and *removing* officers of the association and members of the executive board and *filling vacancies*;
- Specify the powers the board may delegate to other persons or to a *community manager*;
- Specify the officers who may prepare, execute, certify and record *amendments* to the declaration on behalf of the association;
- Provide procedural rules for *conducting meetings* of the association (Robert's Rules - NRS 116.3109(4));
- Specify a method for the units' owners to amend the bylaws;
- Provide procedural rules for *conducting elections* (NRS 116.31034).

Rules – NRS 116.31065

- Any rules adopted by the executive board:
 - MUST be sufficiently explicit in their prohibition, direction or limitation.
 - MUST NOT be adopted to evade any obligation of the association.
 - MUST be consistent with the governing documents of the association.
 - MUST be uniformly enforced under the same or similar circumstances against all units' owners.

Powers of the Association

- NRS 116.3102



- Subject to the provisions of the declaration, the association:
 - SHALL adopt budgets.
 - MAY adopt and amend rules and regulations.
 - MAY hire managing agents and other employees.
 - MAY institute, defend or intervene in litigation affecting the CIC.
 - MAY regulate the use and modification of common elements.
 - MAY cause additional improvements to be made as a part of the common elements.
 - MAY impose charges for late payment of assessments.
 - MAY impose construction penalties when authorized.
 - MAY impose reasonable fines for violations.
 - MAY direct the removal of vehicles improperly parked on any road, street, alley or other thoroughfare within the CIC.

Upkeep of the Community-NRS 116.3107

- EXCEPT to the extent provided by the declaration, the association has the duty to provide for the maintenance, repair and replacement of the common elements (each unit owner is responsible for his or her unit).
 - Each unit's owner SHALL afford to the association access through his or her unit reasonably necessary for those purposes.
 - If damage is inflicted to any unit through which access is taken, the association, if responsible, is liable for the prompt repair thereof.
- **NRS 116.31152** The executive board **SHALL**:
 - (a) At least once every 5 years, cause to be conducted a study of the reserves required to repair, replace and restore major components of the common elements; and
 - (b) At least annually, review the results of the study to determine whether reserves are sufficient and make any adjustments to the association's funding plan necessary to cover costs.

Unit Boundaries – NRS 116.2102



EXCEPT as otherwise provided by the declaration:

- If walls, floors or ceilings are designated as boundaries of a unit, all *interior* materials constituting the finished surfaces are a part of the unit, and all other portions of the walls, floors or ceilings are part of the common elements.

Limited Common Elements – NRS 116.2108



- “Limited common element” means a portion of the common elements allocated by the declaration for the exclusive use of one or more but fewer than all units (NRS 116.059).
- Examples include:
 - Any duct, wire, conduit, bearing wall or other fixture laying partially within and partially outside the designated boundaries of a unit and serving only that unit; and
 - Any fixtures, shutters, awnings, window boxes, doorsteps, porches, balconies, patios and all exterior doors and windows designed to serve a single unit, but located outside the unit’s boundaries.
- EXCEPT as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration (all unit owners affected must consent).

Insurance



- The association SHALL maintain:
 - (a) Property insurance;
 - (b) Commercial general liability insurance;
 - (c) Crime insurance; and
 - (d) Directors & officers insurance (errors and omissions policy).
- Insurance policies carried MUST provide that if at the time of a loss under the policy there is other insurance in the name of a unit's owner covering the same risk, the association's policy provides primary insurance (NRS 116.31133).
- Any portion of the CIC which is damaged or destroyed MUST be repaired or replaced promptly by the association (NRS 116.31135).
 - The cost of repair or replacement in excess of insurance proceeds, deductibles and reserves is a common expense.
- If damage to a unit or other part of the common-interest community, or if any other common expense is caused by the *willful misconduct or gross negligence* of any unit's owner, tenant or invitee of a unit's owner or tenant, the association may assess that expense exclusively against his or her unit, even if the association maintains insurance with respect to that damage (NRS 116.3115(6)).

Alteration of Unit - NRS 116.2111

- SUBJECT TO the provisions of the declaration, a unit owner MAY NOT change the appearance of common elements, or the exterior appearance of a unit without permission of the association.
- An association MAY NOT unreasonably:
 - Restrict, prohibit or otherwise impede the lawful rights of a unit owner to have reasonable access to his or her unit; or
 - Restrict, prohibit or withhold approval for a unit's owner to add to a unit:
 - (1) Improvements necessary to improve access to the unit for any occupant who has a disability;
 - (2) Additional locks to improve security; or
 - (3) Shutters to improve security or reduce costs of energy.
- Any improvement or alteration made that is visible from any other portion of the community MUST be added in accordance with the procedures set forth in the governing documents and must be selected or designed to be compatible with the style of the community.



Violations of Governing Documents

- NRS 116.31031

- The executive board MAY NOT impose any fine for a violation of the governing documents unless the violator has been provided with written notice including:
 - the alleged violation in detail, a clear and detailed photograph when possible, a proposed action to cure, the amount of the fine, and the date, time and location for a hearing.
- If the association adopts a policy imposing fines for any violations, the officer specified in the bylaws SHALL prepare and cause to be sent by U.S. mail to each unit a schedule of the fines that may be imposed.
- A fine (not for health and safety) MUST NOT exceed \$100 for each violation or a total amount of \$1,000, whichever is less.
- 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.
- The association SHALL establish a compliance account to account for fines, which must be separate from any account established for assessments (NRS 116.310315).

Abatement - NRS 116.310312

- If a unit owner in violation refuses or fails to comply with a requirement imposed by the association, the association may, but is not required to, enter the grounds of the unit to take any of the following actions:
 - (a) Maintain the **exterior** of the unit in accordance with the standards set forth in the governing documents.
 - (b) Remove or abate a public nuisance on the **exterior** of the unit which:
 - (1) Is visible from any common area or public streets;
 - (2) **Threatens the health or safety** of residents;
 - (3) Results in blighting or deterioration of the unit or surrounding area; **and**
 - (4) Adversely affects the use and enjoyment of nearby units.
- If a unit is in a building that contains common walls, **and the unit is vacant**, the association may enter the grounds and **interior** of the unit to:
 - (a) Abate a water or sewage leak and remove any water or sewage from the unit if the owner refuses to do so; and
 - (b) After providing notice, but before a hearing, remediate or remove any water or mold damage or any internal components of the unit that were damaged as a result.
- After a hearing, the association may order that the costs of any maintenance or abatement be charged against the unit.
 - The association shall keep a record of such costs and interest charged and has a foreclosable lien on the unit for any unpaid amount.

Construction Penalties - NRS 116.310305

- A unit owner shall adhere to a schedule required by the association for:
 - (a) The completion of the design for improvement to a unit;
 - (b) The commencement of construction;
 - (c) The completion of construction; or
 - (d) The issuance of any permit necessary.
- The association MAY impose and enforce a construction penalty against a unit owner who fails to adhere to the schedule if the right to assess and collect a construction penalty was set forth in the declaration.
- The unit owner must receive notice of the alleged violation and be invited to a hearing on the alleged violation prior to any penalty being effective.
- **A construction penalty is NOT a fine.**
- The association MAY foreclose for a failure to adhere to a construction schedule.



Threats and Harassment -

NRS 116.31184

- No one in the CIC shall willfully and without legal authority 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.
- A person who violates this provision is guilty of a misdemeanor NOT enforceable by the Division (NRS 116.745).
- In order to hold the harasser accountable, the governing documents of an association MAY include a provision stating that any violent, abusive or threatening misconduct within the association is prohibited and such activity may be subject to a fine.



Meetings - NRS 116.3108 & 31083



- A meeting of the **executive board** MUST be held at least once every quarter, not less than once every 100 days, and at a time other than during standard business hours at least twice annually (must be audio recorded).
 - UNLESS the bylaws require a *longer* period of notice, the secretary or other officer specified shall, not less than 10 days prior, cause notice of the meeting to be given to unit owners, stating the time and place and indicating where and when copies of the agenda can be obtained.
 - At least once every quarter, not less than once every 100 days, UNLESS the declaration or bylaws of the association impose *more stringent standards*, the executive board shall review at a meeting financial information of the association.
- A meeting of the **unit owners** MUST be held at least once each year at a time and place stated in the bylaws.
 - At least 15 days in advance of any meeting of the unit owners, notice MUST be sent stating the time and place and including a copy of the agenda.
- Unit owners MUST be notified that they have the right to speak at these meetings (during executive board meetings, only at the beginning and end).
- The association SHALL maintain the minutes of each meeting until the CIC is terminated.

Quorum Requirements - NRS 116.3109

- **EXECUTIVE BOARD MEETING** - UNLESS the governing documents specify a *larger* number, a quorum of the executive board is present only if individuals entitled to cast a *majority* of the votes on that board are present at the time a vote to act is taken.
 - It then takes an affirmative vote by a majority of the board to make an action valid.
- **UNIT OWNER MEETING** - EXCEPT when the governing documents provide otherwise, a quorum is present throughout any meeting of the units' owners if persons entitled to cast 20% of the votes:
 - (a) Are present in person;
 - (b) Are present by proxy;
 - (c) Have cast absentee ballots; or
 - (d) Are present by any combination of paragraphs (a), (b) and (c).
 - The governing documents may limit the methods by which unit owners can vote (NRS 116.311).
- If the governing documents have a quorum requirement that is greater than 20% and a quorum cannot be met, at a subsequent meeting (held not less than 48 hours or more than 30 days from the meeting), the quorum requirement defaults to 20%.
- Remember, a quorum of the unit owners is not required:
 - For the election of any member of the executive board, or removal (35% in favor); or
 - To ratify the proposed budget.



Elections - NRS 116.31034



- Unit owners SHALL elect an executive board of at least 3 members, all of whom must be unit owners.
- The term of office of a member of the executive board MAY NOT exceed 3 years.
 - UNLESS the governing documents provide otherwise, there is no limitation on the number of terms that a person may serve on the board.
- The governing documents of the association MUST provide for terms of office that are staggered (if longer than 1 year terms).
- A unit owner MAY NOT be a candidate for the board if he or she:
 - Resides with, is domestic partners with, or is related by blood, adoption or marriage to another person who is also a member of the board (unless duly elected);
 - Stands to gain any personal profit or compensation of any kind from the association (NRS 116.31187);
 - Or the unit owner's spouse, parent or child by blood, marriage or adoption is the community manager for that association.

- Not less than 30 days before the preparation of ballots for an election, the association SHALL cause notice to be given (nomination/eligibility and disclosure forms).
- If the number of candidates nominated is greater than the number of vacancies, the association SHALL prepare and mail secret written ballots, with candidate disclosure statements, to each member of the association.
- Each unit owner MUST be provided with at least 15 days to return the secret written ballot to the association.
 - Incumbent members and each candidate MAY NOT possess, be given access to or participate in the opening or counting of the secret written ballots.
- Secret written ballots MUST be opened and counted at the annual meeting of the units' owners (or duly elected members announced).
- Members of the executive board and officers of the association SHALL take office upon election.
- The executive board SHALL elect the officers of the association.
 - UNLESS the governing documents provide otherwise, officers of the association are not required to be unit owners.

Budgets - NRS 116.31151



- UNLESS the declaration imposes *more stringent* standards, the executive board SHALL, not less than 30 or more than 60 days before the beginning of the fiscal year of the association, prepare and distribute to each unit's owner a copy of the budget, along with the collection policy.
- The budget MUST include, **without limitation**:
 - (1) The current estimated replacement cost and remaining useful life of each major component;
 - (2) The current estimate of the amount of cash reserves necessary and amount set aside;
 - (3) A statement as to whether the executive board has determined or anticipates the levy of one or more special assessments; and
 - (4) A general statement describing the procedures used for the estimation and accumulation of cash reserves.

Association Funds

- **NAC 116.425** “Adequately funded reserves” means having funds sufficient to maintain the common elements at the level described in the governing documents without using funds from the operating account or imposing special reserve assessments.
- **NRS 116.3114** UNLESS otherwise provided in the declaration, any surplus funds of the association remaining after payment for common expenses and prepayment of reserves MUST be paid to units’ owners in proportion to their liabilities or credited to them to reduce their future assessments for common expenses.
- **NRS 116.31144** The executive board SHALL cause financial statements of the association to be audited or reviewed if the:
 - annual budget is \$45,000 - \$75,000, reviewed by an independent CPA every 5 years.
 - annual budget is \$75,000 - \$150,000, reviewed by an independent CPA every fiscal year.
 - annual budget is \$150,000 or more, audited by an independent CPA every fiscal year.
- **NRS 116.3115** UNLESS the declaration imposes more stringent standards, the budget MUST include a budget for the daily operation of the association and a budget for the reserves.
- **NRS 116.31153** Money in the reserve account 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 two signatures; at least one of which must be a board member (community manager can be included).

Records - NRS 116.31175



- The executive board of an association SHALL, upon the written request of a unit's owner, make available the books, records and other papers of the association for review (can charge a unit owner up to \$10 per hour).
- Within 21 days of written request, the executive board SHALL provide a copy of:
 - (a) The financial statement of the association;
 - (b) Budgets; and
 - (c) The study of the reserves.
- Such records MUST be provided in electronic format at no charge or, if the association is unable to provide the records in electronic format, at a fee to cover the actual costs of preparing the copy.
- The association can never supply to a unit owner any records relating to another unit owner.
- Books, records and other papers of an association MUST be maintained for at least 10 years (minutes until the CIC is terminated).

Performing Your Duties

- **NAC 116.405** In determining whether a member of the executive board has performed his or her duties, the Commission may consider whether the member has:
 - Acted outside the scope of the authority granted in the governing documents;
 - Caused the association to comply with all laws and the governing documents of the association;
 - Uniformly enforced the governing documents of the association.
- **NRS 116.3102**
 - **(3)** The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commence an action for a violation of the declaration, bylaws or rules.
 - **(4)** The executive board's decision not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

When Documents Violate NRS

- NRS 116.1206

- Any provision contained in a governing document that violates NRS 116:
 - is superseded by the provisions of NRS 116;
 - *is not required to be amended to conform* to those provisions;
 - shall be deemed to conform by *operation*.
- If a board member is suspected of:
 - Violating NRS 116; you can file a complaint using form 530.
 - Misinterpreting the association's governing documents; you can file a complaint on form 520 [ADR]).

Questions

Where would you find answers to each of the following questions; State law or the association's governing documents?

1. What are the common elements that the association is responsible to maintain?
2. Can the association hire unit owners to perform services for the community?
3. What language should be included in a violation notice?
4. How should bids for service be obtained by the association?
5. When should our annual meeting take place?
6. Who is responsible for sending out meeting notices?
7. Do we need to get unit owner approval to initiate a capital improvement?
8. How should we handle appointing a unit owner to the board?
9. I have had my RV parked on the side of my house for 8 years, why is the association telling me now that it is not allowed?
10. Where in Chapter 116 are solar panels addressed?

Conclusion

- While NRS 116 sets the foundation of law that an association must abide by, it often defers to the association's governing documents for further clarification.
 - Some areas that do NOT defer: records to be provided, financial audit/review timelines, the requirement for a reserve study, timelines for elections/removals, insurance requirements.
 - Some areas that do: boundaries of a unit, duties of officers, how to run meetings of the association, restrictions on parking and renting, making alterations to your home.
- When reading the law and trying to determine which takes precedence, look for key words such as: MUST, SHALL, UNLESS, NOTWITHSTANDING, PURSUANT to, etc.

Thank you

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