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BEFORE THE COMMISSION FOR COMMON-INTEREST
COMMUNITIES AND CONDOMINIUM HOTELS
STATE OF NEVADA

FILED

JUL 01 2016

NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

JOSEPH (J.D.) DECKER, Administrator,
REAL ESTATE DIVISION, DEPARTMENT
OF BUSINESS & INDUSTRY, STATE OF
NEVADA,

Petitioner,

vs.

ANTHEM HIGHLANDS COMMUNITY
ASSOCIATION; ROBERT STERN;
CHARLES HERNANDEZ; AND RONNIE
YOUNG,

Respondents.

Case Nos. 2015-3615; 2015-2155;
2015-3100; 2015-2207

**MOTION TO RECONSIDER FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER**

This Motion to Reconsider Findings of Fact, Conclusions of Law, and Order, filed June 15, 2016 (the "Motion"), is submitted by BOYACK ORME & TAYLOR, counsel for the Respondent ANTHEM HIGHLANDS COMMUNITY ASSOCIATION ("Anthem", "Association"), and counsel for Respondent CHARLES HERNANDEZ ("Charlie") in his capacity as a Board Member for Anthem (collectively, the "Respondents"). This Motion addresses several facts not known to Anthem or Charlie at the time of the Commissions June 7-9, 2016 hearing, wherein the Complaint was argued and a decision rendered. The new facts put forth in this Motion greatly impact the Commission's findings as to the above-referenced case numbers, and therefore the Findings of Fact, Conclusions of Law, and Order (the "Order") warrant reconsideration and, ultimately, reversal.

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1 This Motion is based on the attached Memorandum of Points and Authorities, the attached
2 exhibits, all pleadings and papers on file herein, and any oral argument the Commission may wish
3 to entertain.

4 DATED this 30th day of June, 2016.

5 BOYACK ORME & TAYLOR

6 By: /s/ Edward D. Boyack
7 EDWARD D. BOYACK
8 Nevada Bar No. 005229
9 401 N. Buffalo Drive #202
10 Las Vegas, NV 89145
11 Attorney for Respondents

12 **STATEMENT OF PARTIES AND POSTURE**

13 At this time, Respondents ROBERT STERN and RONNIE YOUNG are no longer parties
14 to this matter, having been dismissed from this action by way of an individual Stipulation and Order
15 for Partial Settlement of Disciplinary Action between each of the above respondents and the
16 Division.

17 Stern's Stipulation was read into the record and accepted by the Commission on June 7,
18 2016. The official copy was filed on June 16, 2016. In the Stipulation, Stern agreed not to serve on
19 any board of directors for any common-interest community in Nevada, nor to serve as an officer for
20 any common-interest community in Nevada, for a period of 10 years from the date of the Stipulation.

21 Young's Stipulation was filed on February 2, 2016. In his Stipulation, Young resigned from
22 his position on the Anthem Board of Directors, effective May 20, 2016. He also agreed not to serve
23 on the board of any common-interest community in Nevada, nor to serve as an officer for any
24 common-interest community in Nevada, for a period of 10 years from the date of the Stipulation.

25 Accordingly, the Motion is not intended to apply to Stern's or Young's discipline. Rather,
26 this Motion is requesting specifically reconsideration of the Order as it relates to Anthem and
27 Charlie.

1 **STATEMENT AS TO TIMING**

2 The Motion is brought in accordance with Nevada Administrative Code (NAC) Chapter 116's
3 requirements for post-hearing motions. Specifically, NAC 116.617 states the following:

- 4 1. After the close of a hearing before the Commission, a party may file only
5 the following motions:
6 (a) A motion for rehearing.
7 (b) A motion for reconsideration of the final decision of the
8 Commission.

9 The timing of such a motion to reconsider is also explicit from the NAC:

- 10 2. A motion for rehearing or reconsideration must be filed with the
11 Commission, and a copy of the motion provided to all parties, not
12 later than 15 days after the date on which the final decision of the
13 Commission is served.
14 *NAC 116.617(2).*

15 The Order was filed on June 15, 2016, and served to this office on June 16, 2016. Any
16 motion, either for rehearing or reconsideration, must therefore be filed with the Commission and
17 served upon the other parties no later than July 1, 2016. The Motion is well within that time frame
18 as of the date above.

19 **FACTS**

20 The facts presented here are intended only to highlight the procedure and flow of the
21 Commission's June 7-9, 2016 hearing. All points of error that underlie the Motion are taken from
22 procedural defects in the proceedings themselves, and from the conclusions reached therein.

23 The hearing on the Complaint was held before the Commission beginning roughly a half-
24 hour into the first day, June 7, 2016. Prior to the beginning of proceedings on the merits of the
25 Division's Complaint, the Commission heard and decided on two pending motions filed by
26 Respondents, a Motion for a Pre-Hearing Conference, and a Motion to Dismiss the Complaint.

27 Upon the conclusion of argument on the Motion for a Pre-Hearing Conference,
28 Commissioner Aichroth moved to deny the motion, seconded by Commissioner Williams. The

1 Commission then voted unanimously to deny the Motion for Pre-Hearing Conference.

2 Upon the conclusion of argument on the Motion to Dismiss the Division's Complaint,
3 Commissioner Williams moved to deny the motion, seconded by Commissioner Woods. The
4 Commission then voted unanimously to deny the Motion to Dismiss the Complaint.

5 Following the votes on the pre-hearing motions, the Division presented its case, and
6 Respondents presented their defense. The hearing on the merits began on June 7, and was decided
7 by the Commission on June 9. During the hearing, the Division called as witnesses the Division's
8 Ombudsman, Sharon Jackson; Division Chief Investigator Darik Ferguson; former Anthem Board
9 Member Jody Fassette; former Anthem Board Member Ronnie Young; and Division Administrator
10 Joseph Decker. Respondents called as witnesses Steven Parker, President of First Service Residential
11 Community Management, and current Anthem Board Member Ken Brensinger.

12 Following the lunch break on the second day of June 8, 2016, Respondents approached
13 Deputy Attorney General Michelle Briggs regarding a subpoena duces tecum that was served on the
14 Division prior to the hearing. The subpoena was issued to request all documents not already divulged
15 to Respondents so that the Respondents could fully prepare for the hearing.

16 Respondents had previously communicated to Briggs regarding the fulfillment of the
17 subpoena in an email dated May 31- over a week prior to the hearing. In that email, attached here
18 as Exhibit 1, Respondents requested a response, and an estimated time for fulfillment. Respondents
19 highlighted to Briggs their desire to review any such documents responsive to the subpoena prior to,
20 and in preparation for, the hearing.

21 Briggs replied to Respondents as follows:

22 I would suggest you review the Notice of Documents provided to the
23 respondents when the complaint was filed, which includes documents
24 numbered 1 through 3154. To the extent there are any additional documents
25 available, you'll get them when [Joseph Decker, Division Administrator] and
26 Sharon [Jackson, Ombudsman] have had a chance to look through their
27 records. I don't have a date certain. The subpoenas were just served [May
28 27].

See Exhibit 1 - Email Reply to Subpoena Duces Tecum

1 When Respondents approached Briggs after the lunch break on June 8, the second day of the
2 hearing, she produced a stack of approximately fourteen pages of documents not included in the
3 initial documents that accompanied the Complaint (filed in December). Respondents conducted the
4 remainder of the hearing without opportunity to review in any detail these newly-divulged
5 documents.

6 Following the conclusion of witness testimony, and the closing arguments of counsel, the
7 Commission found only one violation: that Respondents committed an act or omission amounting
8 to incompetence, negligence, or gross negligence. Based on this finding, the Commission then
9 ordered that Charlie be removed from the Board, effective immediately; that he pay from his
10 personal funds \$4,023; and that he not serve on another board for an association within the State of
11 Nevada for five years.

12 13 MEMORANDUM OF POINTS AND AUTHORITIES

14 The NAC sets forth the means by which a decision may be reconsidered upon motion:

- 15 9. A motion for rehearing or reconsideration may be based only on one
16 of the following causes or grounds:
17 (a) Newly discovered or available evidence of a material nature
18 which the moving party could not with reasonable diligence
19 have discovered and produced at the original hearing before
20 the Commission.
21 (b) Error in the hearing or in the decision that would be grounds
22 for reversal of the decision.
23 (c) A change of substantive law.
24 (d) The need in the public interest for further consideration of the
25 issues or evidence, or both.

NAC 116.617(9)(a)-(d).

22 Respondents hereby move the Commission to reconsider its Order on the basis of NAC
23 116.617(9)(a), newly discovered or available evidence of a material nature that was not discoverable
24 with reasonable diligence, and was only produced to Respondents late in the hearing; NAC
25 116.617(9)(b), error in the hearing or decision that constitutes grounds for reversal of the
26 Commission's decision; and NAC 116.617(9)(d), the public interest in ensuring fair and equitable
27

1 proceedings of government agencies when proceeding against private citizens.

2 Each of these points of error is discussed in detail below.

3
4 **I. ERROR IN THE PROCEEDINGS THAT CONSTITUTES GROUNDS FOR**
5 **REVERSAL**

6 **A. There is no such concept in the law as “willful and intentional” negligence.**

7 The sole Violation of Law that the Commission found proven was #70 of the Complaint. This
8 Violation reads as follows:

9 **RESPONDENTS STERN, YOUNG and HERNANDEZ *knowingly and***
10 ***willfully* violated NRS 116.3103 (through NAC 116.405(3)) by failing to act**
11 **in good faith and in the best interests of the Association by committing an act**
12 **or omission which amounts to incompetence, negligence, or gross negligence.**
13 ***Complaint at 8:70 (Emphasis added).***

14 This language creates a new standard not recognized under NRS/NAC 116, or anywhere in
15 the law: willful and/or intentional negligence.

16 Specifically, NRS 116.3103, as cited above, imposes the following duty:

- 17 1. Except as otherwise provided in the declaration, the bylaws, this
18 section or other provisions of this chapter, the executive board acts on
19 behalf of the association. In the performance of their duties, the
20 officers and members of the executive board are fiduciaries and shall
21 act on an informed basis, in good faith and in the honest belief that
22 their actions are in the best interest of the association. Officers and
23 members of the executive board:
- 24 (a) Are required to exercise the ordinary and reasonable care of
25 officers and directors of a nonprofit corporation, subject to the
26 business-judgment rule; and
 - 27 (b) Are subject to conflict of interest rules governing the officers
28 and directors of a nonprofit corporation organized under the
law of this State.

There is no mention of intent anywhere in this provision, or of “knowing[] or willful[]”
violations as put forth in the Violation alleged in the Complaint.

Likewise, NAC 116.405(3) is devoid of any mention of intent, or of a knowing or willful
frame of mind:

In determining whether a member of the executive board has performed his
or her duties pursuant to NRS 116.3103, the Commission may consider

1 whether the member of the executive board has:

2 3. Committed an act or omission which amounts to
3 incompetence, negligence or gross negligence;

4 NAC 116.405(3) does not require any finding of intent, or that such negligence was knowing
5 or willful. Indeed, this standard does not—can not—exist anywhere in Nevada law.

6 Negligence as a legal concept is perennial; the elements are well-understood. For traditional
7 negligence, four basic elements must be proven: a duty to act, or to refrain from acting; the breach
8 of that duty; proximate causation of injury related to the breach of duty; and damages resulting from
9 the breach. *Skworzec v. GKT II* (Nev., 2013), citing *DeBoart v. Senior Bridges of Sparks Family*
10 *Hosp., Inc.*, 128 Nev. ___, ___, 282 P.3d 727, 732(2012); see also *Smith v. Coast Hotels & Casinos,*
11 *Inc.* (Nev., 2014), citing *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev ___, 265 P.3d
12 at 690. Intent is not one of the elements of negligence, and any attempt to include intent (such as a
13 knowing or willful) changes the violation in its entirety. At its worst, negligence is concerned with
14 a failure to appreciate the consequences of one's actions, and the consequences themselves were
15 unintended.

16 By contrast, knowing and willful contemplates deliberate intent to bring about a result.

17 Willful conduct is such where the “damage [is] either intended or a necessary consequence.”
18 *Village Development Co. v. Filice*, 90 Nev. 305, 315, 526 P.2d 83 (Nev., 1974). In the employment
19 safety arena (another administrative sphere), a “willful violation” has been found to be one that is
20 taken “in an intentional, deliberate, knowing, and voluntary manner and the action is taken with
21 either intentional disregard or plain indifference to the relevant requirements.” *Century Steel v. State,*
22 *Div. Indus. rel.*, 137 P.3d 1155, 1157 (Nev., 2006). The *Century Steel* further defined a “willful”
23 violation as one that was “intentional, deliberate, knowing, and voluntary—distinguished from
24 accidental”. *Id.* at 1159.

25 Here, there has been no finding that Charlie's conduct was deliberate. In fact, all alleged
26 Violations of Law put forth in the Complaint were thrown out by this Commission, leaving *only* the

1 finding as to negligence. Furthermore, the discussion of the Commissioners during deliberation
2 indicates that the Commission did not believe any of Charlie's conduct to be intentional (knowing
3 and willful); rather, he simply failed to appreciate the consequences of his inaction. This failure to
4 appreciate was mitigated substantially by the steps that Charlie took to cure the impasse with his
5 Board: he negotiated with the other Board members (those that would participate in good faith); he
6 filed an ADR seeking mediation of the dispute; he solicited an attorney opinion as to his obligations
7 under the law; and he continued to attend Board meetings.

8 Nothing about Charlie's behavior indicates a President who was acting intentionally
9 (knowingly and willfully) to bring about the impasse; that sorry distinction is reserved for
10 respondents Young and Stern, two people who knowingly and willfully refused to attend meetings,
11 knowing it would lead to an impasse.

12 As such, Respondents request that this Commission revise the finding to reflect the
13 appropriate legal standard of negligence, and absent any improper language or inference of knowing
14 and willful conduct.

15 **B. Knowing and Willful violation is required to remove a board member, and to**
16 **make a respondent personally liable for a fine.**

17 The unlawful addition of a "knowing and willful" descriptor to the negligence finding
18 changed the calculus of permissible discipline that could be imposed, resulting in prejudice to the
19 Respondents.

20 As put forth in the Complaint, "IF RESPONDENTS ARE FOUND TO HAVE
21 KNOWINGLY AND WILLFULLY COMMITTED A VIOLATION of NRS or NAC 116 AND it
22 is in the best interest of the Association, such RESPONDENTS may be removed from his/her
23 position as a director and/or office." *Complaint* at 9:4 (Emphasis in original). Furthermore, NRS
24 116.785(5) only allows for the personal liability of fines in the following circumstances:

- 25 5. Notwithstanding any other provision of this section, unless the
26 respondent has knowingly and willfully committed a violation, if the
27 respondent is a member of an executive board or an officer of an
28 association:

- 1 (a) The association is liable for all fines and costs imposed
2 against the respondent pursuant to this section; and
3 (b) The respondent *may not be held personally liable* for those
4 fines and costs.
5 (Emphasis added).

6 Accordingly, it is unlawful to require that Charlie personally pay the administrative fine
7 imposed.

8 Here, the standard of “knowing and willful” violation has been misapplied, resulting in
9 personal liability. There is no basis in the law for this proposition, as negligence is a concept at law
10 that does not comport with a knowing and willful violation. Nevertheless, the Commission ordered
11 that Charlie pay the costs of the hearing—\$4,023—from his personal funds as opposed to the cost
12 being paid by Anthem. Such an order was predicated on the “knowing and willful” being improperly
13 applied to the negligence standard. Such personal liability is only permissible for knowing and
14 willful violations of the NRS/NAC, and the Violation found proven was negligence under NRS
15 116.3103 (via NAC 116.405(3)), not intentional misconduct.

16 As the negligence standards do not themselves contain “knowing and willful” elements, and
17 as there is no such thing under Nevada law as “knowing and willful” negligence (intentional
18 negligence), Respondents here request that the fine not require personal repayment.

19 As the fines would work further hardship upon Anthem despite the Board’s functioning
20 smoothly after this long ordeal, Respondents request reconsideration of the fine altogether- either
21 a reduction of the total amount, or a complete waiver in lieu of alternative discipline imposed.

22 **C. All elements of a “negligence” finding were not met, hence that finding is
23 unsupported by the law.**

24 As highlighted above, a finding of negligence requires the following elements: a duty to act,
25 or to refrain from acting; a breach of that duty; the breach was the proximate cause of (led to); injury
26 or damages. Specifically, the Commission’s finding did not name either the breach of duty, or
27 specify what damages had resulted from that apparent breach.

28 The Commission voted on the issue of negligence, and found that alleged Violation of Law
(Complaint at 8:70) to be proven. The Order reflects this finding on page 7, at lines 18-24:

1 CONCLUSIONS OF LAW

2 Based on the foregoing factual findings, the Commission concludes
3 by unanimous vote that the following violations of law occurred:

- 4 67. RESPONDENT HERNANDEZ knowingly and willfully
5 violated NRS 116.3103 (through NAC 116.405(3)) by failing
6 to act in good faith and in the best interests of the Association
7 by committing an act or omission which amounts to
8 incompetence, negligence, or gross negligence.

9 There is no description of what act or omission the Commission found to have been
10 negligent. This is particularly striking when reviewing all of the Commission's prior Orders dating
11 back to 2012, wherein each Conclusion of Law is supported by citation to a specific act or omission.
12 In fact, in every one of the Findings of Fact, Conclusions of Law and Order filed by the Commission
13 since that time, from 2012 to present, wherein the Commission found a violation of NRS 116.3103
14 and NAC 116.045(3) (for an act amounting to negligence), the Commission cited an specific act or
15 omission in every one of those cases. See Commission Orders, Cases IS 10-2074 (2012); IS 10-2194
16 (2012); 2013-3730 (2014); IN-1620 (2015); and 2015-1137 (2016).

17 The only finding of negligence under NRS 116.3103 and NAC 116.405(3) not to have a
18 specific act or omission tied to it is contained in the Order.

19 Prior to the Conclusion of Law section of the Order, wherein the finding of negligence is
20 made, the Order contains the Findings of Fact section. Order at 2-7. The Findings of Fact cover six
21 pages of the Order, and make 66 distinct findings. Yet when the finding of negligence against
22 Respondents is made, none of these findings are cited to, incorporated, etc. This failure to cite an act
23 or omission is novel with regard to the Commissions prior orders and prior findings of negligence
24 against other respondents, and does not meet due process requirements.

25 Without full knowledge of the act or omission that led to a finding of negligence, future
26 Board members (or Charlie, should he choose ever to serve on a Board again), will not know what
27 exactly it was that he did or did not do that led to discipline. This could paralyze board members
28 when confronted with similar disputes in the future; this could paralyze board members when
confronted with any disputes in the future.

1 Also, as discussed above, the failure to cite to an act or omission as the basis for the finding
2 of negligence, does not support the finding of knowing and willful conduct. Without a citation to any
3 act or omission, no analysis can take place as to any requisite mental state, consequences, or damages
4 present during the act or omission that would prove Respondents acted knowingly and willfully.

5 Furthermore, injury or damages is a necessary element of negligence, as set forth above. The
6 damage alleged here is that the Board was paralyzed and unable to act. However, as testified to by
7 Mr. Ken Brensinger, Board member for Anthem, the Association was not harmed by the inability
8 to hold meetings- the basic functions of the Association, such as bills to vendors and other providers,
9 were being handled. *See Commission Hearing Audio File DPM 0020, 4:05:39 - 4:06:08.*

10 As the Commission did not make a finding of any action or omission that amounted to a
11 breach, and no damages were demonstrated, two necessary elements of a negligence finding are
12 lacking. As such, Respondents ask that the Commission reconsider its finding of negligence.

13 14 **II. NEWLY DISCOVERED EVIDENCE OF A MATERIAL NATURE**

15 **A. Commissioner Williams engaged in an ex parte communication with Division 16 Administrator Joseph Decker.**

17 Ex parte communications violate due process, as they provide an unfair advantage to one side
18 in an adversarial proceeding. The Nevada Real Estate Division has recognized the dangers of ex
19 parte communications with regard to the fairness, impropriety, and due process of disciplinary
20 hearings:

21 **Ex Parte Communication**

22 An ex parte communication is a communication made to a commission
23 member concerning a pending licensing, disciplinary, rule making proceeding
24 or education course approval. The communication is made outside of the
25 formal proceeding and is not made to the entire commission. Literally, ex
26 parte means one side; by or for one side. The formal definition is: an oral or
27 written communication not on the public record with no prior notice to all
28 parties. Ex parte communications may violate due process and may force a
Commissioner to recuse him/herself from participation.

See Exhibit 2 - Copy of NRED's CICCH Commission Info Webpage

Ex parte communications are prohibited by NRS 233B.126:

1 Unless required for the disposition of ex parte matters authorized by law,
2 members or employees of an agency assigned to render a decision or to make
3 findings of fact and conclusions of law in a contested case shall not
4 communicate, directly or indirectly, in connection with any issue of fact, with
5 any person or party, nor, in connection with any issue of law, with any party
6 or the party's representative, except upon notice and opportunity to all parties
7 to participate. An agency member may, subject to the provisions of NRS
8 233B.123:

- 1 1. Communicate with other members of the agency.
- 2 2. Have the aid and advice of one or more personal assistants.

3 Ex parte communications are also the subject of rules governing the conduct of judicial
4 officers in the State of Nevada. While Commissioners are not judicial officers per se, their authority
5 is analogous to judges. The Commissioners are empowered with the ability to hear and decide
6 matters of policy, statutory interpretation, rulemaking, and discipline (to include the imposition of
7 fines and other remedies responsive to violations).

8 With no official framework as to ex parte communications between Commissioners and
9 parties to a disciplinary action (aside from the cited language, above), the Nevada Code of Judicial
10 Conduct (NCJC), Rule 2.9 is helpful.

11 The Rule states, "A judge shall not initiate, permit, or consider ex parte communications, or
12 consider other communications made to the judge outside the presence of the parties or their lawyers,
13 concerning a pending or impending matter ..." Exceptions to this prohibition against ex parte
14 communications include matters involving scheduling, administrative, or emergency purposes,
15 provided such exceptions do not include substantive matters at issue, and only if the judge in
16 question "reasonably believes that no party will gain a procedural, substantive, or tactical advantage
17 as a result of the ex parte communication", and "the judge makes provision promptly to notify all
18 other parties of the substance of the ex parte communication and gives the parties an opportunity to
19 respond." *NCJC Rule 2.9(A)(1)(a)-(b)*.

20 Here, Commissioner Williams initiated ex parte communication directly with Administrator
21 Decker, at such time where Administrator Decker was clearly a party in the disciplinary action put
22 forth in the Division's Complaint (Decker was named as Plaintiff in the action). The substance of
23

1 this ex parte communication involved Respondents' Motion for Pre-Hearing Conference:

2 [From Commissioner Williams:]

3 Good Morning, J.D.,

4 Are we granting a pre-hearing conference in the Anthem Highlands case? I
5 am pretty much gone until our meeting on June 7th but there are a couple of
6 days here and there that I'm in town.

7 To which Decker replied,

8 [From Administrator Decker]

9 Hi Ken,

10 No. ACHA [sic] could discuss the facts, allegations, complaint, or negotiate
11 settlement terms with the Division at any time informally. I will not be
12 convening an Interim Commission meeting solely for this Motion to be heard.
13 Their Motion will be heard at the next regularly scheduled Commission
14 Hearing.

15 *See Exhibit 3 - Ex Parte Communication*

16 This Motion for Pre-Hearing Conference was particularly contentious because Respondents
17 felt—and still feel—that they were not afforded an opportunity to prepare a meaningful defense to the
18 Division's Complaint due to the ambiguous nature of the allegations, the absurd amount of
19 documents produced that either were not in relation to the allegations or were of questionable
20 relation to the allegations, and the additional allegations raised in the Division's response to the
21 Motion for Pre-Hearing Conference. For perspective, Briggs produced almost 3,200 pages of
22 documents to Respondents, but then introduced less than 100 pages as exhibits at the hearing.

23 It is Respondents' contention that the Motion for Pre-Hearing Conference, if granted, would
24 have allowed a conference to clarify the allegations, narrow the exhibits and evidence to a
25 manageable amount, prepare for witness testimony (such as cross-examination), discuss stipulations
26 to make the hearing more efficient, and/or resulted in a continuance of the hearing to allow more
27 time to prepare. It is therefore Respondents' contention that the grant or denial of the Motion for Pre-
28 Hearing Conference, if properly heard and considered, was a substantive issue and thus should not
have been the subject of an ex parte communication.

The ex parte communication violated Respondent's due process rights for two additional
reasons. First, it removed the Commission's ability to decide the motion, as it is empowered to do.
NAC 116.557, titled "Prehearing conferences", specifically reserves to the *Commission* the decision

1 whether to grant a prehearing conference; that authority does *not* belong to Decker, or even to the
2 Division. NAC 116.557(1) states, “The Commission or a hearing panel may, upon its own motion
3 or a motion made by a party of record, hold a prehearing conference to accomplish [multiple
4 purposes]”. Decker is not a Commissioner, and he is not a member of any hearing panel (or a hearing
5 panel unto himself).

6 This distinction is made all the more clear by the fact that motion for such a prehearing
7 conference must be served upon the opposing parties- in this case Decker (NAC 116.557(2)
8 mandates that such a motion “must be provided to all parties of record”). Furthermore, if such a party
9 of record does not attend a prehearing conference (when granted), this failure to attend carries certain
10 procedural ramifications that can weaken or undermine a party’s position in the matter altogether
11 (failure to attend “constitutes waiver of any objection to the agreements reached or rulings made”).
12 *Id.*

13 In essence what Decker did in directing Commissioner Williams not to grant Respondents’
14 Motion for a Pre-Hearing Conference was to remove from the Commission’s consideration a
15 substantive issue, while simultaneously cutting the Division off from negative consequences that
16 may have been realized had the Division failed to attend such a conference. This essentially allowed
17 Decker to control the flow of the hearing, and to deny Respondents a due process right granted under
18 the NAC to pursue any of the *seven* remedies provided for through a prehearing conference.

19 Second as to due process violations visited upon Respondents, Decker’s suggestion that the
20 concerns laid out in the Motion for Pre-Hearing Conference could have been handled “informally”
21 flies in the face of established law, as well as common sense. It is axiomatic throughout common
22 law, and Nevada law as well, that no set of circumstances or interpretation of a law, statute, or
23 regulation should ever prevail that would render any portion of a regulation meaningless. What
24 Decker suggests—deny the Motion for Pre-Hearing Conference because the Respondents did not ask
25 to meet with him informally—would render NAC 116.557 meaningless and without effect.

26 If the need for a pre-hearing conference can always be thwarted by demanding that the parties
27
28

1 meet informally or their motion will be rejected (an all-or-nothing proposition), no matter how
2 intransigent another party is being (see below), then there would never be a need for a motion for
3 prehearing conference as it would always be a motion doomed to fail. In other words, nothing in
4 Decker's reply suggests that his "solution" of meeting informally was specific to Respondents, or
5 to this Complaint; rather, Decker seems to be of the mind that such a prehearing conference will
6 *never* be necessary as all parties should be required to go through the Division and be at its mercy.
7 This also empowers Decker (and the Division) to decide whether or not to grant informally any of
8 the *seven* avenues of redress available via prehearing conference under NAC 116.557(1)(a)-(g), as
9 opposed to the Commission *ordering* that one or all of those avenues be explored.

10 Decker's solution also errantly presents that the Division would have granted such an
11 informal session, or proceeded in good faith. While the reality of the Division's willingness to
12 participate or their earnestness in so participating may otherwise be the subject of debate, and largely
13 academic, here we do not need to guess as to how the Division truly felt with regard to Respondents'
14 requests for a prehearing conference.

15 While the Division made it a point to chastise Respondents for never reaching out to them
16 to confer informally—again, something *not* required anywhere in the NAC—Respondents point out
17 that neither did the Division, or Decker, reach out to resolve Respondents' concerns via informal
18 conference, or otherwise make any attempt to obviate the need for a motion on the matter of a
19 prehearing conference. Instead, the Division, and Decker, sat on the Motion for Pre-Hearing
20 Conference until the date of the hearing, knowing that he had already told Commissioner Williams
21 how to vote on the matter, and never once offering any of the *seven* remedies contemplated for
22 prehearing conferences under NAC 116.557(1)(a)-(g).

23 Furthermore, Briggs herself stated on the record at the hearing that she did not believe a
24 prehearing conference was necessary. Specifically, in the audio record of the hearing from June 7,
25 2016 (a transcript could not be provided to Respondents in timely enough fashion to use in this
26 Motion), Briggs states the following:

1 “There’s no reason for a prehearing conference. Nevermind that a prehearing
2 conference does not change the Complaint. That’s not the purpose of a
3 prehearing conference under the regulation. That’s what he asked for, so it
 can’t even be granted by this Commission. It should be denied.”
 See Commission Hearing Audio File DPM 0017, 24:50 - 25:20.

4 Briggs’ own argument on this point highlights Respondents’ position that the ex parte
5 communication worked a denial of due process. First, Briggs acknowledges that the decision to grant
6 a prehearing conference was the Commission’s decision, and within the Commission’s authority-
7 not Decker’s. Also, Briggs misstated the standard for a prehearing conference when she stated
8 Respondents’ request was not with the purposes of a prehearing conference.

9 NAC 116.557(1)(a) specifically names as a reason for a prehearing conference the aim of
10 “Formulat[ing] or simplify[ing] the issues involved in the hearing.” NAC 116.557(1)(c) allows for
11 “Arrang[ing] for the exchange of proposed exhibits or prepared expert testimony”, while NAC
12 116.557(1)(d) would have allowed the parties here to “Identify the witnesses and the subject matter
13 of their expected testimony and limit the number of witnesses, if necessary.” Respondents and Briggs
14 could have had the pending Motion to Dismiss decided prior to the hearing, freeing up valuable
15 Commission time (NAC 116.557(1)(e)), or the parties could have “Establish[ed] *any other*
16 *procedure* that may expedite the orderly conduct and disposition of the proceedings or settlements
17 thereof.” *NAC 116.557(1)(g)* (Emphasis added).

18 Instead, as Briggs told the Commission, on the record, she did not see a reason for a
19 prehearing conference- and apparently she did not see any of the four reasons cited above for such
20 a prehearing conference, either formal or informal. Nevertheless, Briggs and Decker appeared before
21 this Commission and, in their argument against a prehearing conference, stated multiple times that
22 Respondents should have contacted them directly rather than relying on the procedural due process
23 afforded to the Respondents under NAC 116.557. Based on Briggs’ own statements, it seems highly
24 unlikely that she would have felt compelled, obligated, or even amenable to granting a prehearing
25 conference, however informal, where she felt nothing was to be gained or accomplished by it.

26 Finally, Briggs’ own email, cited above as Exhibit 1, shows her hostility to any attempt at
27
28

1 conferring over documents and exhibits. When asked for some clarity as to the exhibits and
2 additional information, such as the kind responsive to a subpoena duces tecum, Briggs told
3 Respondents simply to review the almost-3,200 pages of documents the Division sent over initially.

4 **B. Commissioner William's failure to recuse had an immediate and substantial
5 prejudicial effect on Respondents.**

6 As stated in the Division's own rule on ex parte communications (Exhibit 2), Commissioner
7 Williams should have recused himself from the hearing. Rather than recuse himself, Commissioner
8 Williams was the vehicle by which substantial decisions against Respondents' interests were made
9 and advanced.

10 Commissioner Williams' recusal would not have had any effect on the ability of the
11 Commission to hear the Anthem matter. NRS 116.610(3) provides that "A majority of the members
12 of the Commission constitutes a quorum for the transaction of all business." Presently, the
13 Commission consists of seven members, thereby requiring any four to be present for quorum. At the
14 hearing, the following Commissioners were present:

15 June 7- Barry Breslow, Esq; Stephen Aichroth; James Rizzi; Ken Williams;
16 Richard Layton, C.P.A.; and Doris Woods.

17 June 8- Scott Sibley (recused due to lack of attendance on the first day);
18 Barry Breslow, Esq.; Stephen Aichroth; James Rizzi; Ken Williams; Richard
19 Layton, C.P.A.; and Doris Woods.

20 June 9- Scott Sibley (recused due to lack of attendance on the first day);
21 Stephen Aichroth; James Rizzi; Ken Williams; Richard Layton, C.P.A.; and
22 Doris Woods.

23 Thus despite Commissioner Breslow's lack of attendance on the third day of the hearing, four
24 Commissioners would still have been present, and thus constituted a quorum: Stephen Aichroth,
25 James Rizzi, Richard Layton, and Doris Woods. Commissioner Williams' ongoing participation was
26 not required for quorum, thus no emergency existed sufficient enough to warrant the denial of
27 Respondents' due process.

28 Instead, Commissioner Williams participated actively in the hearing, and even participated
directly in multiple motions brought by the Commission that directly impacted the Respondents, and
had a direct affect on the ultimate disposition of the matter.

1 Upon the finding of a violation of law, the Commission then deliberated on what discipline
2 to impose on Respondents. After much discussion, in which multiple Commissioners expressed
3 concern over ordering Charlie to bear the costs of the hearing where the other named respondents
4 had not been ordered to pay anything, Commissioner Williams moved for discipline including
5 Charlie's removal from the Board for five years, a fine for the hearing costs of \$4,023 that Charlie
6 be required to pay personally, and that the Association have a special election to appoint Charlie's
7 replacement. *See Commission Hearing Audio File DPM 0021, 1:57:55 - 1:59:10.*

8 However, both Commissioner Rizzi and Commissioner Aichroth expressed concern that
9 Charlie should be personally liable for the fine imposed. Commissioner Layton commented that he
10 was concerned about consistency in the discipline imposed versus the other two respondents.
11 Commissioner Williams argued again for personal fines due to Charlie's "failure" to settle like the
12 other respondents; in other words, Charlie should be personally responsible for the fine for seeking
13 to exonerate himself. *See Commission Hearing Audio File DPM 0021, 2:03:36 - 2:04:00.*

14 Ultimately, Commissioner Williams' motion for discipline was carried by a vote of 3-2. Had
15 Commissioner Williams recused himself initially, this vote either never would have happened (as
16 it was Commissioner Williams' motion, and brought in light of three other Commissioners' concerns
17 over the discipline suggested), or the vote would have impassably deadlocked at 2-2.

18 For the foregoing reasons, Respondents here request either that the Commission reconsider
19 the discipline imposed, or that the Commission void Commissioner Williams' vote for discipline,
20 resulting in a null 2-2 vote and no discipline imposed.

21 **C. Commission Chairman Sibley improperly interjected in discussions regarding**
22 **discipline during final deliberations.**

23 Chairman Sibley was not present during the first day of the hearing, but he was present
24 during the second and third day. Due to this lack of initial attendance, Chairman Sibley did not
25 participate in the hearing at all the second day, and only in a procedural capacity on the third day.
26 It was also understood that Chairman Sibley would not participate in the deliberations, or take part
27 in any votes.

1 Nevertheless, Chairman Sibley interjected his opinion during the final deliberations with
2 regard to the discipline to be imposed on Respondents.

3 When Commissioners Layton, Rizzi, and Aichroth expressed concern over the consistency
4 of requiring Charlie to pay personally any fine imposed, Chairman Sibley opined as to the presumed
5 validity of charging a respondent for defending themselves, saying "The only thing with that, I would
6 say, is that they did take us through three days of hearings with this entire state staff here waiting for
7 education courses to be approved and things like that, but he did - they did - prevail on a lot of the
8 things so there's some validity to that." *See Commission Hearing Audio File DPM 0021, 2:03:18 -*
9 *2:03:32.*

10 While Respondents are not unmindful that Chairman Sibley rehabilitated his opinion
11 somewhat, Respondents still raise error that the comment was even offered in the first place from
12 someone who was required to—and had stated they would—abstain from the deliberations.

13
14 **III. PUBLIC INTEREST IN ENSURING FAIR AND EQUITABLE PROCEEDINGS**

15 **A. Stay or reconsideration of the order to hold a special election**

16 As introduced during the hearing, the Association recently held an election to fill both
17 respondents Young's and Stern's vacant seats on the Board, as well as additional vacancies left by
18 expired terms. This election was costly to the Association. Respondents therefore request a stay until
19 such time as this Motion can be decided, and in light of the continued hardship this would work on
20 the Association.

21 A stay is within the Divison's power to grant, and enforcement of its June 15, 2016 order
22 need not be immediate. This authority is granted under NAC 116.617(8):

- 23 8. If:
24 (a) A motion for rehearing or reconsideration is filed;
25 (b) The Commission is not scheduled to meet before the effective
26 (c) The Commission has not authorized the Chair of the
27 Commission to rule on the motion,
28 --> The Division may stay enforcement of the decision for which a
 rehearing or reconsideration is requested. When determining whether

1 to grant a stay, the Division shall determine whether the motion was
2 timely filed and whether it alleges a cause or ground which may
3 entitle the moving party to a rehearing or reconsideration of the
4 decision.

5 Here, this Motion is timely. The Order was filed June 15, 2016, and served on Respondents
6 on June 16, 2016. Pursuant to NAC 116.617(2), this Motion needs to be filed no later than July 1,
7 2016. It is also Respondents' contention that the points of error raised in this Motion are valid and
8 supported by law, and are likely to result in reconsideration of the Commission's findings- either at
9 the Commission or at the District Court level on judicial review.

10 Furthermore, immediate compliance with the Order will work a hardship on the Association-
11 specifically, if the Association is again required to have a special election so soon after the previous
12 election.

13 As introduced at the hearing, the Association recently held its annual election to fill
14 respondent Stern's vacant seat, and two additional expired terms (respondent Young's term expired
15 in May 2016 by virtue of his settlement with the Division). There were nine candidates in the
16 election and the three seats were filled.

17 The elections are costly for Anthem in that candidate nomination forms, election packages,
18 and ballots must be mailed to 1,647 homes. The Association also hires an independent firm to
19 oversee the election and to count the ballots. While the Association does not yet have the exact cost
20 of the election that was recently held (invoices are still owing and anticipated), the Board of
21 Directors can already see that a special election will be a costly process in and of itself

22 The Board has begun seeking proposals for the special election that was just ordered by this
23 Commission, and those proposals already are exceeding \$4,000. Forcing Anthem to incur those costs
24 for a second time is unreasonable, especially since there are five other candidates available to be
25 appointed to Charlie's vacant seat and who campaigned and spent a significant amount of their
26 personal funds to run for the Board of Directors in the previous election. Requiring those remaining
27 candidates to campaign again less than 35 days after the election, and potentially to have to expend
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1 more funds, might disenfranchise them if they are unable to allot the time for campaigning and
2 canvassing for votes, or if they are unable to expend more personal funds.

3 As the Division is no doubt aware, NRS 116.3103(2)(c) provides that "the executive board
4 may fill vacancies in its membership for the unexpired portion of any term or until the next regularly
5 scheduled election of executive board members, whichever is earlier." Additionally, Anthem's
6 governing documents provide for the election of a replacement Board member by majority vote of
7 the remaining Board. As this Board is functioning, this is a viable alternative as well.

8 The Anthem Board of Directors has the authority and the ability to appoint a member to the
9 position vacated by Charlie. Previously, when the association had a seat become vacant shortly after
10 an election, the Board of Directors appointed the next candidate with the highest amount of votes
11 in the recently held election to fill the seat. The Board believed this to be a fair and equitable way
12 to handle the vacancy and is something that this Board could employ at its next scheduled meeting
13 on July 27, 2016 or sooner via "action without a meeting." Again, there are five remaining
14 candidates that spent their time and money campaigning and it would be unfair to them to hold an
15 election again so soon after the last one.

16 It is important to note that Respondents here are not attempting to evade the Order, or to stay
17 other enforcement.

18 Charlie is not unmindful of the Order filed by the Commission- he only wishes to see the
19 Association protected from further hardship. Accordingly, Charlie has agreed to resign effective
20 immediately in order for the Board to move forward with appointing a new member to fill his vacant
21 seat. Prior to the hearing, the Commission had suggested that Charlie "step down" pending a stay
22 of the proceedings. This suggestion was refused only because a "step down", not a resignation as he
23 offers now, would have left the Board unable to fill his vacancy, and would have led to another 4-
24 member Board situation like the one that initiated this entire investigation and complaint proceeding.
25 Now, with a recent election and a clear pool of successive candidates, Charlie feels comfortable in
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1 resigning, knowing that the Board can simply appoint the next-highest candidate and continue on
2 with business as a full, 5-member Board.

3 For these reasons illustrated here, Respondents request a stay of the Order and
4 reconsideration of the special election to allow the Anthem board of Directors to fulfill the duties
5 it is empowered to do- without any further cost to the Association or any prejudice brought to any
6 member of the community. Rather than incur the cost of another special election less than 45 days
7 after the most recent regular election, the Division should stay enforcement and allow the
8 Commission to reconsider simply allowing Anthem's Board to appoint the next-highest candidate
9 in lieu of the costs of another election.

10
11 **CONCLUSION**

12 Based on the foregoing points of error, Respondents respectfully request that the Commission
13 reconsider its order, either in whole or in part as put forth here in this Motion. Respondents also
14 request from the Division a stay of enforcement of the special election provision of the Order until
15 such time as the Commission decides on this Motion, as holding a special election will work
16 significant hardship on the Association and visit unfairness upon the candidates of the recent regular
17 election.

18 DATED this 30th day of June, 2016.

19
20 BOYACK ORME & TAYLOR
By: /s/ Edward D. Boyack
EDWARD D. BOYACK
Nevada Bar No. 005229
401 N. Buffalo Drive #202
Las Vegas, NV 89145
Attorney for Respondents

EXHIBIT 1

EXHIBIT 1

Michael VanLuven

From: Michelle D. Briggs
Sent: Tuesday, May 31, 2016 4:40 PM
To: Michael VanLuven
Subject: RE: Commission Complaint 2015-3615 et al. (Anthem Highlands Community Association)

I would suggest you review the Notice of Documents provided to the respondents when the complaint was filed, which includes documents numbered 1 through 3154. To the extent there are any additional documents available, you'll get them when JD and Sharon have had a chance to look through their records. I don't have a date certain. The subpoenas were just served Friday.

Thanks,
Michelle

From: Michael VanLuven [<mailto:mike@boyacklaw.com>]
Sent: Tuesday, May 31, 2016 4:31 PM
To: Michelle D. Briggs
Subject: Commission Complaint 2015-3615 et al. (Anthem Highlands Community Association)

Ms. Briggs,

We have subpoenaed all of the records relating to the investigation underlying the above-referenced complaint. Could you please give me an idea of when we can expect the documents? We would like an opportunity to review them prior to the actual hearing.

Thank you.

Mike Van Luven, Esq.
Nevada Bar #13975
Associate at Boyack Orme & Taylor
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
702-562-3415

EXHIBIT 2

EXHIBIT 2

Department of Business and Industry

Nevada Real Estate Division

NV^{REG}

ADA Americans with Disabilities Act

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CICCH COMMISSION INFO

The Commission for Common-Interest Communities and Condominium Hotels is a seven-member body, appointed by the governor that acts in an advisory capacity to the Division, adopts regulations, and conducts disciplinary hearings.

Qualifications and Limitations

- Must be a US citizen
- Must be a resident of the State of Nevada
- At least four members of the Commission must be residents of a county whose population is 700,000 or more (NRS 116.600)
- Must have resided in a common-interest community or have been actively engaged in a business or profession related to common-interest communities for not less than 3 years immediately preceding the date of his appointment
- After the initial terms, each member of the Commission serves a term of 3 years. Each member may serve not more than two consecutive full terms. If a vacancy occurs during a member's term, the Governor shall appoint a person qualified to replace the member for the remainder of the unexpired term
- One member shall be a unit's owner residing in this state and who has served as a member of an executive board in this state
- One member shall be in the business of developing common-interest communities in this state
- One member shall hold a permit or certificate
- One member shall be a certified public accountant licensed to practice in this state pursuant to the provisions of chapter 628 of NRS
- One member shall be an attorney licensed to practice in this state
- Two members who are unit owners residing in this State but who are not required to have served as members of an executive board.

Ex Parte Communication

An ex parte communication is a communication made to a commission member concerning a pending licensing, disciplinary, rule making proceeding or education course approval. The communication is made outside of the formal proceeding and is not made to the entire commission. Literally, ex parte means one side; by or for one side. The formal definition is: an oral or written communication not on the public record with no prior notice to all parties. Ex parte communications may violate due process and may force a Commissioner to recuse him/herself from participation.

Service of Process

Pursuant to chapter 116 of NRS service of process and other communications upon the Commission may be made at the principal office of the Real Estate Division. The following is the proper routing for service of process and other communication upon the Commission:

Legal Administrative Officer

State of Nevada, Department of Business & Industry

Real Estate Division

2501 E. Sahara Avenue, Suite 303

Las Vegas, NV 89104

Phone (702) 486-4036

Fax (702) 486-4067

Commission Members

SCOTT SIBLEY
Chairman

Homeowner
Member

REAPPOINTED: 02/28/2014
TERM EXPIRES: 10/01/2016

	Commission	
BARRY BRESLOW, ESQ. Vice Chairman	Attorney Member	REAPPOINTED: 10/01/2014 TERM EXPIRES: 09/30/2017
STEPHEN AICHROTH Secretary	Homeowner Member	APPOINTED: 10/02/2014 TERM EXPIRES: 10/01/2017
JAMES RIZZI Commissioner	Developer Member	REAPPOINTED: 10/01/2014 TERM EXPIRES: 09/30/2017
KEN WILLIAMS Commissioner	Community Manager Member	APPOINTED: 05/05/2014 TERM EXPIRES: 09/30/2016
RICHARD D LAYTON, C.P.A. Commissioner	Accountant Member	REAPPOINTED: 07/09/2015 TERM EXPIRES: 06/30/2019
DORIS WOODS Commissioner	Homeowner Member	APPOINTED: 12/16/2015 TERM EXPIRES: 09/30/2016

Meeting Schedule

Commission meeting schedules are subject to change without notice. We recommend that you call (702) 486-4606 or (702) 486-4036, or check back frequently.

Meeting agendas are stacked and the meeting will close upon completion of the agenda.

[Click here to view the meeting calendar.](#)

Other Commissions

Real Estate Commission

Appraisal Commission

EXHIBIT 3

EXHIBIT 3

Joe Decker

From: Joe Decker
Sent: Friday, April 22, 2016 10:05 AM
To: 'Ken Williams'
Subject: RE: Pre-Hearing Conference

Hi Ken,

No. ACHA could discuss the facts, allegations, complaint, or negotiate settlement terms with the Division at any time informally. I will not be convening an Interim Commission meeting solely for this Motion to be heard. Their Motion will be heard at the next regularly scheduled Commission Hearing.

And in reference to the question in your last email: I'm saving up to buy the Bradley Building....

Have a great weekend!

JD

From: Ken Williams [mailto:ken.williams@camconeveda.com]
Sent: Friday, April 22, 2016 9:18 AM
To: Joe Decker <jdecker@red.nv.gov>
Subject: Pre-Hearing Conference

Good Morning J.D.,

Are we granting a pre-hearing conference in the Anthem Highlands case? I am pretty much gone until our meeting on June 7th but there are a couple of days here and there that I'm in town.

Ken Williams
Founding Member, Consultant
702-234-9869

