

1 Michael J. Nuñez, Esq.
Nevada Bar No. 10703
2 mnunez@murchisonlaw.com
3 **MURCHISON & CUMMING, LLP**
350 South Rampart Boulevard, Suite 320
Las Vegas, Nevada 89145
4 Telephone: (702) 360-3956
Facsimile: (702) 360-3957

5 Attorneys for Respondent, Sherryl Baca

FILED

JUL 22 2019

NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS



7
8 **BEFORE THE COMMISSION FOR COMMON-INTEREST**
COMMUNITIES AND CONDOMINIUM HOTELS
9 **STATE OF NEVADA**

10 Sharath Chandra, Administrator,
Real Estate Division, Department of
11 Business & Industry, State of Nevada,

12 Petitioner,

13 vs.

14 Sherryl Baca,

15 Respondent.

Case Nos. 2017-1579 and 2018-136

**REPLY TO OPPOSITION TO NOTICE OF
APPEAL AND REQUEST FOR
REHEARING AND RECONSIDERATION;
REQUEST FOR STAY**

16
17 COMES NOW Respondent, Sherryl Baca and submits this Reply to the Division's
18 Opposition to Notice of Appeal and Request for Rehearing and Reconsideration of the
19 Commission's June 27, 2019 Findings of Fact and Conclusions of Law in this matter. This
20 filing is based on the attached Memorandum of Points and Authorities, the documents
21 attached thereto and any oral testimony or argument to be offered at the hearing of this
22 matter.

23 DATED: July 22, 2019

24 **MURCHISON & CUMMING, LLP**

25
26 By: 

Michael J. Nuñez
Nevada Bar No. 10703
350 South Rampart Boulevard, Suite 320
Las Vegas, Nevada 89145
Attorneys for Respondent, Sherryl Baca

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 For minor infractions (in the end seemingly some unsigned minutes), and through an
5 investigation and complaint process which presented changing and altered allegations against
6 Respondent Baca, and following a hearing on an amended complaint wherein the Respondent
7 was not heard, the Deputy Attorney General ("DAG") seeks to uphold an order which amounts
8 to depriving Respondent of not only due process rights, but her right to earn a livelihood itself.
9 Specifically, Respondent does not have the means to pay the excessive fines issued against
10 her in this case, and depriving her of her professional license for a ten year period is depriving
11 her of a career.

12 The findings of fact and conclusion of law are on their face unsupportable, and would
13 not withstand judicial review. Purported breaches of duties without resulting harm do not
14 warrant terminating sanctions and do not comport with the mission of the Commission: to due
15 equity.

16 The findings of facts and conclusions of law say nothing at all about the eleven years of
17 service to the Cottonwood Homeowner's. In contrast to the generic conclusions that "fiduciary
18 duties" were violated, the only evidence presented was that: 1) not a single complaint was ever
19 presented against respondent Baca in that 11 year history; 2) that Respondent Baca improved
20 and benefitted the association and left it a better place than she found it; 3) Respondent Baca's
21 sworn affidavit attested to the fact that board meeting took place, minutes were approved (the
22 actual transcribed audio recording were produced) and her testimony in her affidavit that
23 minutes were signed remains unrefuted.

24 Completely absent in the opposition – and most disturbing - is the inequity, bias, and
25 contempt that DAG Brigg's demonstrated in presenting this matter. Blaringly obvious is that
26 the DAG does not deny her statement that Respondent "sickened" her. She failed to
27 acknowledge and extend the simplest of courtesies in conducting the hearing of this matter.
28 With such an attitude and posture, the DAG had an agenda, lost her objectivity, has tainted

1 the proceedings, and the Order that ultimately resulted is clearly reflective of that. Respondent
2 must have her day in Court and must be heard. Rehearing and reconsideration is respectfully
3 requested.

4 **II.**

5 **GROUNDS FOR RECONSIDERATION PURSUANT TO NAC 116A.637 & 116A.637(4)**
6 **ARE PROVIDED IN THE NOTICE OF APPEAL**

7 NAC 116A.637 and 116A.637(4) required a demonstration of a point of law or fact which
8 the Commission has overlooked or misconstrued. This has been shown in the Notice of Appeal
9 / Request for Reconsideration. Several of the elements of subsection (9) of NAC 116A.637(4)
10 have been demonstrated:

11
12 (a) Newly discovered or available evidence of a material nature which the moving
13 party could not with reasonable diligence have discovered and produced at the original hearing
14 before the Commission.

15 **Response:** The entire point of continuing the May 28, 2019 hearing was so that
16 evidence could be presented of the minutes being transferred from Respondent to the new
17 managers. Certainly, the Commission was not interested in simply a piece of paper with a box
18 checked.¹ Certainly, the Commission was interested in whether or not meetings were
19 undertaken and recorded in compliance and in accordance with the rules and regulations of
20 the Real Estate Division. That evidence was collected and presented to the Commission one
21 week before the June 4, 2019 hearing. The evidence was not considered by the Commission,
22 but certainly should have been.

23 Concerning the reasonable diligence requirement, this too has been met. The DAG's
24 complaint presented a moving target, initially commencing in January of 2016 as an audit
25

26 ¹ That piece of paper was provided to counsel on May 29, 2019 as set forth in the Notice of Appeal /
27 Motion for reconsideration. However, if that was all that was presented at the June 4, 2019 hearing, certainly the
28 DAG would have taken the position that the transfer memorandum did not show the actual minutes and did not
show they were actually signed.

1 notification regarding reserve funding², then seemingly transitioning into an issue with
2 management agreements³, then veering into an inquiry regarding check signing authority⁴,
3 then raising an issue with minutes not being signed⁵, returning to an issue with management
4 agreements⁶, and lastly at the March 28, 2019 hearing introducing a claim of unsigned minutes
5 during HOA Board Meeting. When the Commission asked for further evidence on that subject,
6 it was sought and produced.

7
8 (b) Error in the hearing or in the decision that would be grounds for reversal of the
9 decision.

10 **Response:** A decision has been issued by the Commission on an Amended Complaint
11 without a hearing. To the extent the DAG's investigators found minutes and amended the
12 complaint which originally stated that "no minutes existed" respondent had a right to cross-
13 examine the investigator on this altered position. Seemingly, the DAG had access to these
14 minutes for years, yet somehow between March 28, 2019 and June 4, 2019, minutes were
15 suddenly discovered. This further calls into question the DAG's objectivity in presenting this
16 case.

17 The record clearly shows that responsive evidence, affidavits, and testimony were
18 prepared to be presented at a hearing. A request to continue to call Board Members on the
19 topic was summarily denied. This violated due process and would constitute error on judicial
20 review.

21 ///

22 ///

23 ///

24
25 ² See, Original Complaint, attached to the moving papers as **Exhibit A** at ¶¶1-5.

26 ³ See, **Exhibit A** to the moving papers at ¶¶5-12.

27 ⁴ See, **Exhibit A** to the moving papers at ¶¶13-14.

28 ⁵ See, **Exhibit A** to the moving papers at ¶¶16.

⁶ See, **Exhibit A** to the moving papers at ¶¶17-21.

1 (c) The need in the public interest for further consideration of the issues or evidence,
2 or both.

3 **Response:** The public needs to be assured that the proceedings of the Commission
4 are fair and unbiased. The public need to be assured that the conduct of the DAG in presenting
5 the cases and claims before the Commission are not capricious or contemptuous.

6 **III.**

7 **THE INVENTORY LIST ONLY REVEALED THAT MINUTES WERE TRANSFERRED.**
8 **THE COMMISSION SHOULD HAVE HEARD TESTIMONY AND EVIDENCE THAT THE**
9 **MINUTES WERE SIGNED AND APPROVED**

10 Respondent has addressed and responded to inquiries concerning unsigned minutes.
11 There can be no dispute that meetings took place, that the minutes were recorded and that
12 they were signed. This evidence, and the supporting affidavits are unrefuted. The DAG has
13 presented no evidence or testimony that any action of Respondent, over the course of her
14 eleven year history of management of the property harmed the community in any way.

15 Page 5, line 11 through page 6, line 18 advances the position that Respondent
16 addressed and responded to each and every allegation of the Complaint (and Amended
17 Complaint for that matter) even by the March 28, 2019 hearing. The subject Order is a default
18 judgment in nature as it complete fails to acknowledge and address all of that evidence and
19 testimony that was provided and which would have been provided if a hearing was permitted.

20 **IV.**

21 **SANCTIONS AND PENALTIES ISSUES ARE EXCESSIVE AND REVERSIBLE**

22 Under the Administrative Procedures Act, reviewing courts may set aside an agency
23 decision that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
24 with law. 5 U.S.C.S. § 706(2)(A); BALICE v. USDA, 203 F.3d 684, 687, 2000 U.S. App. LEXIS
25 1622, *1.

26 A \$64,000 penalty and a 10 year license suspension is, no doubt, ruinous. It is
27 excessive and not sustainable. (In fact, the only early sanction by this Commission against
28 Respondent, only resulted in a \$1,000 penalty – which was paid – and no suspension.) This

1 grounds for reconsideration is unaddressed in the opposition and in and of itself warrant
2 reconsideration.

3 The Eighth Amendment reads: "Excessive Bail shall not be required, nor excessive fines
4 imposed, nor cruel and unusual punishments inflicted." Browning-Ferris v. Kelco Disposal, 106
5 L.Ed.2d 219, 230 (1989). In United States v. Halper, 104 L.Ed.2d 487 (1989), the U.S.
6 Supreme Court implied that damages awarded to the Government in a civil action may raise
7 Eighth Amendment concerns in cases in which the Government was exacting punishment in a
8 civil action.

9 The doctrine of proportionality that the U.S. Supreme Court has adopted under the Cruel
10 and Unusual Punishments Clause offers some broad guidelines for determining whether a
11 particular civil Penalty assessment is excessive. See, Solem v. Helm, 463 U.S. 277, 284; 77
12 L.Ed.2d 637, 645 (1983); see also, Browning-Ferris v. Kelco Disposal, 492 U.S. , 106 L.Ed.2d
13 219, 255 (1989) (O'Connor, J., concurring in part and dissenting in part) (applying Solem
14 factors to award of punitive damages in civil suit); United States v. Busher, 817 F.2d 1409,
15 1415 (9th Cir. 1987) (applying Solem factors to civil forfeiture under RICO). The Eighth
16 Amendment "prohibits not only barbaric punishments, but also sentences that are
17 disproportionate to the crime committed." See, Solem v. Helm, Id.

18 In accordance with the Solem framework as applied to civil penalties, a reviewing court
19 must: 1) accord "substantial deference" to legislative judgments concerning appropriate
20 sanctions for the conduct at issue; 2) examine the gravity of the defendant's conduct and the
21 harshness of the imposition of civil penalties; 3) compare the civil and criminal penalties
22 imposed in the same jurisdiction for different types of conduct, and the civil and criminal
23 penalties imposed by different jurisdictions for the same or similar conduct. See, Browning-
24 Ferris, Id; United States v. Nevada Power Co., 1990 U.S. Dist. LEXIS 18998, *13-18, 31 ERC
25 (BNA) 1878.

26 In this case, the sheer magnitude and longevity of the order and award is excessive and
27 completely disproportionate to the conduct at issue. It is 6,000% higher than a previous penalty
28 assessed against Responded. Any fine or penalty which ultimately may result in this case

1 should be proportionate to the conduct at issue and not because the DAG or the Commission
2 is "sick" of Respondent. Fines and penalties that are punitive and punishing in nature may not
3 stand and would constitute reversible error.

4 **V.**

5 **CONCLUSION**

6 Respondent respectfully requests that the Commission weight the merits of this matter
7 and in the interest of equity take no disciplinary action in this matter, including suspension or
8 fines. Respondent has done no harm to the Cottonwood HOA. To the contrary. At most, the
9 DAG has raised issues that a management agreement may not have been technically correct
10 (though the parties never knew it for eleven years) and the new management company seems
11 to have lost minutes. Regardless, lost minutes do not erase eleven years of professional
12 property management.

13 Respondent has learned a lesson and in that regard the mission of the Commission has
14 been served. Respondent has no objection to any advisory opinions or class / education
15 recommendations.

16 DATED: July 22, 2019

17 **MURCHISON & CUMMING, LLP**

18
19 By: 

20 Michael J. Nuñez
21 Nevada Bar No. 10703
22 350 South Rampart Boulevard, Suite 320
23 Las Vegas, Nevada 89145
24 Attorneys for Respondent, Sherryl Baca
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

Baca, Inc. adv. Chandra, Sharath

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada. My business address is 350 South Rampart Boulevard, Suite 320, Las Vegas, NV 89145.

On July 22, 2019, I served true copies of the following document(s) described as **NOTICE OF APPEAL AND REQUEST FOR REHEARING AND RECONSIDERATION; REQUEST FOR STAY; DECLARATION OF MICHAEL J. NUNEZ** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY HAND DELIVERY: I caused a copy of the document to be delivered by hand to the office of the addressee(s).

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on July 22, 2019, at Las Vegas, Nevada.



Nicole Garcia

SERVICE LIST

- | | |
|--|---|
| Michelle D. Briggs, Esq.
Senior Deputy Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
Tel: (702) 486-3420
Email: Mbriggs@ag.nv.gov | Attorneys for Nevada Real Estate Division |
| Jan M. Unger, Commission Coordinator
State of Nevada – Department of Business and Industry
Real Estate Division
3300 W. Sahara Ave., Ste. 350
Las Vegas, NV 89102-3203
Tel: (702) 486-4606
Email: jmunger@red.nv.gov | |