

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

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

Petitioner,

vs.

Gerald Marks,

Respondent.

Case Nos. 2018-978

FILED

OCT 30 2019

NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

**COMPLAINT FOR DISCIPLINARY
ACTION AND NOTICE OF HEARING**

The Real Estate Division of the Department of Business and Industry, State of Nevada (the "Division"), by and through its counsel, Aaron D. Ford, Attorney General of the State of Nevada, and Michelle D. Briggs, Esq., Senior Deputy Attorney General, hereby notifies Respondent Gerald Marks ("RESPONDENT" or "MARKS") of an administrative hearing before the Commission for Common-Interest Communities and Condominium Hotels, State of Nevada, which is to be held pursuant to Chapters 233B and Chapters 116 and 116A of the Nevada Revised Statutes ("NRS") and Chapter 116 and 116A of the Nevada Administrative Code ("NAC"). The purpose of the hearing is to consider the allegations stated below and to determine if an administrative penalty will be imposed on the RESPONDENT pursuant to the provisions of NRS and NAC including, but not limited to, NAC 116A.360.

JURISDICTION AND NOTICE

1. During all relevant times mentioned in this complaint, RESPONDENT held, an active supervisory community manager certificate from the Division (CAM.0000086-SUPR) and is, therefore, subject to the jurisdiction of the Division and the provisions of NRS Chapters 116 and 116A and NAC Chapters 116 and 116A. RESPONDENT'S certificate is currently in "inactive" status.

...

1 **FACTUAL ALLEGATIONS**

2 2. RESPONDENT, at all relevant times, was the owner of MP Association
3 Management, Inc., a Nevada corporation ("MP Management") and was also the manager
4 of the Shadow Wood Homeowner's Association ("Shadow Wood" and/or "Association").

5 3. As background, prior to this investigation, Shadow Wood's president James
6 Ma ("Ma") filed a complaint with the Division leading to Commission Case No. 2017-1768
7 being brought against Shadow Wood's board members based in part, that board member
8 Jose Escalona ("Escalona") was being compensated to provide Association payroll services
9 through Escalona's company, JE & Associates.

10 4. Certain documents were produced in response to Commission Case No. 2017-
11 1768, leading to a subsequent case being brought by the Division against the Association
12 and board member Escalona as Commission Case No. 2018-680, where it was alleged in
13 part, that Escalona was being compensated for providing payroll services to Shadow Wood
14 through Escalona's company, JE & Associates.

15 5. Certain checks were produced in response to Commission Case No. 2018-680
16 leading to this action being brought against RESPONDENT.

17 6. Specifically, on September 19, 2018, the Division opened an investigation
18 against RESPONDENT to determine if RESPONDENT violated certain provisions of the
19 Nevada Revised Statutes or Nevada Administrative Code during his management of
20 Shadow Wood.

21 7. Notice of the investigation by the Division was properly sent to
22 RESPONDENT by certified mail on September 19, 2018.

23 8. In its investigation, the Division alleged that RESPONDENT did not exercise
24 reasonable care in his management of Shadow Wood because he permitted non-unit owner
25 George Bienkowski ("Bienkowski") to serve as an executive board member from 2008
26 through 2018.

27 9. NRS 116.31034 requires, in relevant part, that executive board members be
28 unit owners.

1 10. In response to the Division's investigation, RESPONDENT claimed that a
2 note attached as Exhibit "A" to his November 9, 2018 response letter to the Division showed
3 that Bienkowski is the owner of a unit located at 3609 Melonies Dr. #94, Las Vegas, NV
4 89103.

5 11. Exhibit "A" to RESPONDENT'S November 9th response letter to the Division
6 consists of an affidavit from Curtis Harmon ("Harmon Affidavit") stating that Harmon had
7 always known Bienkowski to live in unit 94 and "have now seen written proof that he does
8 own his condo."

9 12. Exhibit "A" to RESPONDENT'S November 9th response letter also contains a
10 limited power of attorney dated August 12, 2013 ("Limited Power of Attorney") from
11 Khamphanh Ennis to Bienkowski with respect to 3609 Melonies Drive, Unit 94.

12 13. Additionally, as part of Commission Case No. 2017-1768, the Division was
13 provided with two unrecorded promissory notes where Bienkowski was the promisor and
14 Khamphanh Ennis was the promisee (the "Notes"), to support that Bienkowski owned 3609
15 Melonies Drive, Unit 94.

16 14. Neither the Harmon Affidavit, Limited Power of Attorney, nor Notes convey
17 any ownership interest of 3609 Melonies Drive, Unit 94 to Bienkowski.

18 15. Clark County Assessor's records show that 3609 Melonies Dr. #94 is presently
19 owned by the Ennis Family Trust – not Bienkowski.

20 16. The Division also alleged in its investigation that RESPONDENT failed to
21 exercise reasonable care in managing Shadow Wood by permitting board member Escalona
22 to be compensated by Shadow Wood for providing payroll services to the Association,
23 through Escalona's company, JE & Associates.

24 17. In response to the Division's investigation, RESPONDENT admitted that
25 Escalona was compensated by Shadow Wood through Escalona's company, JE &
26 Associates.

27 18. NRS 116.31187 provides that in general, a member of an executive board or
28 officer of an association shall not enter into a contract or renew a contract with the

1 association to provide services or otherwise accept any personal profit or compensation
2 from the association for providing said services.

3 19. The Division further alleged that RESPONDENT co-signed, or sole signed, all
4 checks from the Association to JE & Associates for payroll services from November 2016
5 until at least April 2018.

6 20. In response to the Division, RESPONDENT claimed that he was authorized
7 to sign the checks from the Shadow Wood to JE & Associates because he was an authorized
8 signer on the Association's bank account.

9 21. To support his contention that he was an authorized signer on Shadow Wood's
10 bank account, RESPONDENT provided a document titled Community Association Account
11 Agreement & Resolution ("CAA Agreement"),

12 22. The CAA Agreement provided by RESPONDENT authorizes only the
13 following individuals to sign checks on behalf of the Association: Ma, Escalona, and Leslie
14 Hall.

15 23. The Division also alleged in its investigation that RESPONDENT co-signed
16 association checks from April 2017 through February 2018 despite that his Management
17 Agreement with Shadow Wood did not give RESPONDENT any authority to sign checks
18 on behalf of the Association.

19 24. In response, RESPONDENT denied that a management agreement must
20 authorize a community manager to sign checks on behalf of the Association.

21 25. In a subsequent letter dated November 19, 2018, the Division informed
22 RESPONDENT that NRS 116A.620(1)(p) requires that a management agreement, "state
23 the extent, if any, of the authority of a community manager to sign checks on behalf of the
24 client in an operating account."

25 26. In the Division's November 19th letter to RESPONDENT, the Division also
26 requested RESPONDENT provide the Division with copies of his management agreements
27 with Shadow Wood from April 2017 through March 2018.

1 27. The Division never received the requested management agreements or any
2 further response from RESPONDENT regarding the allegation that he improperly signed
3 Association checks in violation of the Management Agreement.

4 28. The Division later obtained the Management Agreement from the
5 Association's successor community manager.

6 29. Section 9 of Article II of RESPONDENT's Management Agreement with the
7 Association provides:

8 Section 9. Account Signatory

9 The withdrawal of funds from the Association's Accounts or
10 Certificate(s) of Deposit shall require the signatures of at least
11 two (2) Board members, usually the President and the Treasurer.
12 The Vice President will be a stand-in signer in the event on of the
13 other signatory is not available.

14 30. Never-the-less RESPONDENT co-signed, or sole signed, checks from the
15 Association contrary to the terms of the CAA Agreement and in violation of the
16 Management Agreement.

17 31. In its investigation, the Division also alleged that Defendant was the sole
18 signer of Association check nos. 45822, 45823, 45825, and 45826.

19 32. In response, RESPONDENT blamed the bank, stating that the bank should
20 not have accepted the checks with only RESPONDENT's signature.

21 33. In its investigation, the Division also alleged that RESPONDENT improperly
22 signed check number 1034 dated May 9, 2017 from the Association's reserve account.

23 34. In response, RESPONDENT admitted that he mistakenly signed this check.

24 35. In its investigation, the Division also alleged that RESPONDENT failed to
25 exercise reasonable care in managing Shadow Wood by failing to abide by its governing
26 documents by creating the Association's budgets since 2009 based on tiered assessments.

27 36. The Association's governing documents do not permit the Association's
28 budget to be based on tiered assessments.

 37. In response, RESPONDENT contended that he based the Association's
 budget on tiered assessments because the Association's assessment system was always

1 structured on a tiered basis and that no one ever requested a change in how the
2 assessments were calculated.

3 38. In addition, with respect to Commission Case No. 2017-1777, the law firm of
4 Boyak Orme & Anthony ("Law Firm") sent correspondence on September 8, 2017 to Shadow
5 Wood to RESPONDENT's attention at RESPONDENT's email address, advising the
6 Association that RESPONDENT was entitled to indemnification and defense through
7 Shadow Wood's legal counsel (the Law Firm), but that a potential conflict could exist
8 representing both RESPONDENT and Shadow Wood.

9 39. The letter stated that Shadow Wood's board had two options: (1) permit Law
10 Firm to go forward and represent RESPONDENT as an agent of the association, or (2) hire
11 outside counsel to represent RESPONDENT.

12 40. The letter stated if Law Firm did not hear from Shadow Wood's board by
13 September 14, 2017, then Law Firm would proceed to represent RESPONDENT.

14 41. The Board meeting records reflect that following RESPONDENT's receipt of
15 the September 8, 2017 Law Firm letter, the next board meeting was held on November 14,
16 2017.

17 42. The November 14, 2017 board meeting packet does not contain the September
18 8th Law Firm letter, nor does it indicate that the Board made any decision regarding
19 choosing one of the two options set forth in the Law Firm letter.

20 43. Board members advised they were not made aware of the September 8th letter
21 by RESPONDENT.

22 44. As a result, Law Firm charged Shadow Wood \$18,000 dollars in attorneys'
23 fees to represent RESPONDENT prior to the board even deciding whether or not
24 RESPONDENT should have separate counsel.

25 45. Association agendas and minutes obtained from the successor community
26 manager, also show that although executive sessions were being held since 2009, there
27 were only five minutes recorded from these executive sessions.

28

1 by failing to give unit owners notice of eligibility to serve as a member of the executive
2 board in 2013, 2015, and 2016.

3 54. RESPONDENT violated NAC 116A.355(1)(a)(1) (through NAC
4 116A.355(2)(b)) by committing unprofessional conduct by failing to disclose the Law Firm
5 letter to the board for a decision before the Association incurred \$18,000 in attorneys' fees.

6 55. RESPONDENT violated NRS 116A.630(2)(a) by failing to comply with state
7 laws.

8 56. RESPONDENT violated NRS 116A.630(10) by failing to cooperate with the
9 Division in resolving the complaint against him.

10 57. RESPONDENT violated NRS 116A.640(2)(a) and NAC 116A.345(2)(a) by
11 impeding or otherwise interfering with an investigation of the Division by failing to comply
12 with a request of the Division to provide documents.

13 58. RESPONDENT violated NRS 116A.640(2)(b) by impeding or otherwise
14 interfering with an investigation of the Division by providing false or misleading
15 information to an investigator.

16 59. RESPONDENT violated NAC 116A.355(1)(a)(1) (through NAC
17 116A.355(2)(f)) by committing unprofessional conduct by failing to cooperate with the
18 Division in the investigation of a complaint including, without limitation, failure to produce
19 any document, book or record in the possession or control of the community manager after
20 the Division requests the production of such document, book or record in the course of an
21 investigation of a complaint.

22 60. RESPONDENT violated NAC 116A.355(1)(a)(2) (through NAC
23 116A.355(3)(a)) by committing professional incompetence by demonstrating a significant
24 lack of ability, knowledge or fitness to perform a duty or obligation owed to a client.

25 61. RESPONDENT violated NAC 116A.355(1)(a)(2) (through NAC
26 116A.355(3)(b)) by committing professional incompetence by failing to exercise reasonable
27 skill and care with respect to a duty or obligation owed to a client.

28

1 will be held at the Nevada State Business Center, 3300 W. Sahara Avenue, Nevada
2 Room, Suite 400, Las Vegas, Nevada 89102 with videoconferencing to Division of
3 Insurance, 1818 E. College Parkway, Ste. 103, Carson City, Nevada 89706.

4 **STACKED CALENDAR:** Your hearing is one of several hearings that may
5 be scheduled at the same time as part of a regular meeting of the Commission
6 that is expected to take place on December 3-5, 2019. Thus, your hearing may be
7 continued until later in the day or from day to day. It is your responsibility to be
8 present when your case is called. If you are not present when your hearing is
9 called, a default may be entered against you and the Commission may decide the
10 case as if all allegations in the complaint were true. If you need to negotiate a
11 more specific time for your hearing in advance because of coordination with out
12 of state witnesses or the like, please call Teralyn Lewis, Administration Section
13 Manager, at (702) 486-4036.

14 **YOUR RIGHTS AT THE HEARING:** Except as mentioned below, the hearing is
15 an open meeting under Nevada's open meeting law, and may be attended by the public.
16 After the evidence and arguments, the commission may conduct a closed meeting to discuss
17 your alleged misconduct or professional competence. You are entitled to a copy of the
18 transcript of the open and closed portions of the meeting, although you must pay for the
19 transcription.

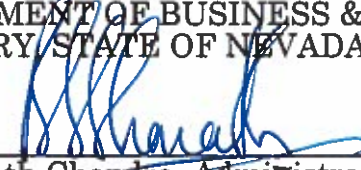
20 As a **RESPONDENT**, you are specifically informed that you have the right to
21 appear and be heard in your defense, either personally or through your counsel of choice.
22 At the hearing, the Division has the burden of proving the allegations in the complaint and
23 will call witnesses and present evidence against you. You have the right to respond and to
24 present relevant evidence and argument on all issues involved. You have the right to call
25 and examine witnesses, introduce exhibits, and cross-examine opposing witnesses on any
26 matter relevant to the issues involved.

27 You have the right to request that the Commission issue subpoenas to compel
28 witnesses to testify and/or evidence to be offered on your behalf. In making this request,


1 you may be required to demonstrate the relevance of the witness's testimony and/or
2 evidence. Other important rights and obligations, including your obligation to answer the
3 complaint, you have are listed in NAC 116A.560 through NAC 116A.655, NRS Chapter
4 233B, and NRS Chapters 116 and 116A and NAC 116 and 116A. Note that under NAC
5 116A.585, not less than five (5) working days before a hearing, RESPONDENT must
6 provide to the Division a copy of all reasonably available documents that are reasonably
7 anticipated to be used to support his or her position, and a list of witnesses RESPONDENT
8 intends to call at the time of the hearing. Failure to provide any document or to list a
9 witness may result in the document or witness being excluded from RESPONDENT'S
10 defense. The purpose of the hearing is to determine if the
11 RESPONDENT has violated any of the provisions of NRS and NAC Chapters 116 and
12 116A, and to determine what administrative penalty is to be assessed against
13 RESPONDENT, if any, pursuant to NAC 116A.360.

14 DATED: October 28, 2019.

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16 REAL ESTATE DIVISION,
17 DEPARTMENT OF BUSINESS &
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