



STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
ADVISORY OPINION

Subject: Charging a Unit Owner Attorney Fees for Attending A Hearing Regarding a Fine	Advisory No. 12-01-116	3 pages
	Issued By: Real Estate Division	
	Amends/ Supersedes	N/A
Reference(s): NRS 116.3115 (6);	Effective Date: May 18, 2012	

QUESTION PRESENTED:

Does NRS 116.3115(6) give an association the right to charge a unit's owner an attorney fee when the association's attorney attends a hearing against a unit's owner?

SHORT ANSWER:

No, attending a hearing on an alleged violation does not constitute "willful misconduct" or "gross negligence" and does not entitle an association to charge a unit's owner for their attorney to be present at the hearing.

ANALYSIS OF THE ISSUE PRESENTED:

The basis for the question stems from an association's exercise of NRS 116.3115(6). The Petitioner clarified that the hearing referenced is one required by NRS 116.31031 prior to the imposition of a fine for a violation of governing documents. The hearing required by NRS 116.31031(4) affords a unit's owner the right to defend against the imposition of a fine.

Prior to January 1, 2012, NRS 116.3115(6) stated:

If any common expense is caused by the misconduct of any unit's owner, the association may assess that expense exclusively against his or her unit.

The Nevada Legislature revised this language in 2011 and now NRS 116.3115(6) states:

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

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expense exclusively against his or her unit, even if the association maintains insurance with respect to that damage or common expense, unless the damage or other common expense is caused by a vehicle and is committed by a person who is delivering goods to, or performing services for, the unit's owner, tenant or invitee of the unit's owner or tenant.

Having an attorney present at a violation hearing is not required, but done only at the discretion of an association's board. Passing such an expense on to a unit owner should be highly scrutinized since it is not within the unit owner's control. Attorney's fees are generally a common expense of an association. But whether or not common expenses can be charged to a particular unit owner required "misconduct" on the part of the particular unit's owner prior to January 1, 2012 and now requires "willful misconduct or gross negligence." Merriam-Webster defines "misconduct" as "intentional wrongdoing" and "improper behavior."¹ By enacting more stringent language, the Nevada Legislature made it clear that prior to passing on a common expense to a unit owner much more severe behavior must cause the common expense.

The right to a hearing is a procedural safeguard to allow unit owners to refute an alleged violation before the association imposes a fine. The right to a hearing with the opportunity to be heard is a due process right. Exercising due process rights does not – in and of itself – constitute "misconduct," much less "willful misconduct or gross negligence." It is further against public policy to allow an association to discourage unit owners from exercising their due process rights for fear that they could end up with a larger fine. The association has the right to fine for violations which is intended to be commensurate with the severity of the violation and expressly limited by NRS 116.31031(1)(b)(2). The idea that an association can fine unit owners *and* impose a charge for attorney's fees is in conflict with limits on the amount it can fine for a violation.

The inclusion of "willful" and "or gross negligence" in NRS 116.3115(6) are taken from the Uniform Common Interest Ownership Act ("Uniform Act"). The comments to the Uniform Act do not address attorney's fees as a possible charge back to unit owners. It is unlikely that this provision was ever intended to include attorney's fees. The Uniform Act and NRS 116 address when attorney's fees can be awarded for a violation of NRS 116 or the association's governing documents. NRS 116.4117 provides that in a civil action for damages or other relief, "The court may award reasonable attorney's fees to the prevailing party." NRS 116.3115(6) should not be used to circumvent the obligation of having a court award attorney's fees² absent clear intent. Moreover, it is not clear that "misconduct" was ever intended to include exercising one's right to a hearing on an alleged violation.

¹ "Misconduct." Merriam-Webster Online. Merriam-Webster, n.d. Web. February 13, 2012.

² This opinion does not address all the ways attorney's fees can be awarded to an association. For example, attorney's fees may be available to an association under the governing documents or in an arbitral proceeding. The statements in this advisory opinion represent the views of the Division and its general interpretation of the provisions addressed. It is issued to assist those involved with common interest communities with questions that arise frequently. It is not a rule, regulation, or final legal determination. The facts in a specific case could cause a different outcome.

ADVISORY CONCLUSION:

Exercising the due process right to a hearing on an alleged violation under NRS 116.31031 is not in and of itself “misconduct,” “willful misconduct,” or “gross negligence.” Associations should not be using NRS 116.3115(6) to pass on any attorney fees resulting from a hearing, especially where the association imposes a fine to the maximum extent possible under NRS 116.31031. NRS 116 specifically provides for attorney’s fees to be provided to prevailing parties under NRS 116.4117 in civil actions to enforce the governing documents or NRS 116. The court is not required to award attorney’s fees even if an association is the prevailing party. Association board members who chose to have an attorney present at alleged violation hearings do so at the expense of all the unit owners. Such expense cannot be passed on to a particular unit owner.

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