

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

4 IN THE MATTER of the Petition of Jonathan  
5 Friedrich for an Application for the Repeal of a  
6 Common Interest Community Commission  
Regulation Pursuant to NRS 233B.100 and  
NAC §232.020

**DECISION ON PETITION TO REPEAL  
REGULATION FILE NO. R199-09**

7                   **INTRODUCTION**

8                   Petitioner Jonathan Friedrich ("Petitioner") has petitioned (the "Petition") the Nevada  
9 Department of Business and Industry and the Nevada Real Estate Division for the repeal of LCB  
10 File No. R199-09 (the "Regulation") pursuant to NRS 233B.100(a). The Commission for Common-  
11 Interest Communities and Condominium Hotels (the "Commission") is the agency, as defined in  
12 NRS 233B.031 which adopted the Regulation and, accordingly, pursuant to NRS 233B.100 is the  
13 proper body to consider the repeal Petition.<sup>1</sup> The Regulation was adopted by the Commission at a  
14 properly noticed adoption hearing pursuant to NRS Chapter 233B on December 7, 2010. The  
15 Legislative Commission's Subcommittee to Review Regulations approved the Regulation on May 5,  
16 2011.

17                   The Petition came before the Commission on July 12, 2011. Appearing on behalf of the  
18 Petitioner was James R. Adams, Esq. of the Adams Law Group. Petitioner seeks the repeal of the  
19 Regulation for the following four reasons:

- 20                   1.       The Regulation adopted by the Commission exceeded the statutory authority of the  
21 Commission.
- 22                   2.       Several commissioners had conflicts of interest precluding them from lawfully voting  
23 on the Regulation.
- 24                   3.       The form of the Regulation as adopted by the Commission violated the Nevada  
25 Administrative Procedure Act.
- 26                   4.       The Regulation created a new fee which is not authorized by statute.

27  
28 <sup>1</sup> The process to repeal a regulation is the same as the process to propose or amend a regulation because NRS  
233B.038 defines a regulation as any amendment or repeal of a prior regulation. NRS 233B.038(c)

1 After deliberation by the Commissioner based on the Petition submitted and oral argument  
2 by the Petitioner, the Commission voted 5-0 to deny the Petition at its July 12, 2011 Commission  
3 meeting.<sup>2</sup> This decision to deny the Petition was based on the following.

#### 4 DECISION

##### 5 I. Authority of Commission.

6 Petitioner claims that the Regulation exceeds the statutory authority granted to the  
7 Commission. NRS 116.310313(1) requires the Commission to adopt regulations establishing the  
8 amount of the fees that an association may charge a unit's owner to cover the "costs of collecting" a  
9 past due obligation. Petitioner argues the Commission acted outside of its authority "by adopting a  
10 regulation which seeks to permit, and establish how much an independent, third-party collection  
11 agent can charge and recover from a homeowner with whom the collection agent has no contractual  
12 or other legal relation." (Petition, p. 4, ll. 14-17) Petitioner also claims that the Commission  
13 exceeded its authority by creating "a new, legal right of recovery for third-parties." (Petition, p. 6, ll.  
14 7-9)

15 Petitioner focuses on language in Sections 1-5 of the Regulation which limits the costs of  
16 collection not only by the association but by a "person acting on behalf of an association."  
17 Petitioner's assertion that the Regulation establishes "the rates of collection fees of independently  
18 licensed, third-party collection agencies" is not true. There is nothing in the Regulation that  
19 prohibits an association and a collection agency from agreeing on any amounts payable to the  
20 collection agency, including amounts above the limits in the Regulation. The Regulation only limits  
21 the amounts that may be charged to the unit's owner.

22 The intent of the Regulation is consistent with NRS 116.310313(2) which states that the  
23 statute applies "to any costs of collecting a past due obligation charged to a unit's owner, *regardless*  
24 *of whether the past due obligation is collected by the association or by any person acting on behalf*  
25 *of the association*, including, without limitation, . . . a collection agency." The Regulation  
26 acknowledges that an association may seek to pass on charges by third-parties and includes these  
27 within the regulated amounts.

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28 <sup>2</sup> Commissioner Watkins was absent and Commissioner Sibley did not vote on the Petition.

1 The Petitioner's claim that the Regulation creates "a new legal liability of Nevada  
2 homeowners to third-party collection agencies"(Petition, p. 6, ll. 1-15) is also without merit. The  
3 Regulation does not create any new theory of recovery. It limits the "costs of collecting." The  
4 liability of a homeowner to pay for costs of collecting past due obligations is governed by NRS  
5 Chapter 116 and the governing documents. For example, NRS 116.3102(1)(k) permits an  
6 association to "impose charges for late payment of assessments pursuant to NRS 116.3115" and  
7 NRS 116.310313(1) permits an association to "charge a unit's owner reasonable fees to cover the  
8 costs of collecting any past due obligation." The Regulation itself does not create the right to charge  
9 and recover these or any other charges. It simply limits the amounts that may be charged and  
10 recovered from the unit's owner.

11 In summary, the purpose of the Regulation is to limit amounts charged to a homeowner. The  
12 Regulation creates no new theory of liability whether in favor of the association or any third-party.  
13 Whether collection costs may be charged at all is not established by the Regulation. Once collection  
14 costs are sought to be recovered, however, the amounts are limited by the Regulation.

15 **II. Conflicts of Interest.**

16 Initially, it is important to note that Petitioner's request to repeal the Regulation is required  
17 prior to seeking declaratory relief for an order from the Court to declare a regulation invalid. A  
18 Court shall invalidate a regulation if it finds that it violates constitutional or statutory provisions or  
19 exceeds the statutory authority of the agency. Accordingly, even if any of the Commissioners  
20 violated NRS Chapter 281A, such a violation is not grounds for determining that a regulation is  
21 invalid. NRS 233B.110

22 Notwithstanding the irrelevancy of any alleged NRS Chapter 281A violation, Petitioner  
23 claims that "several" members of the Commission (though only Commissioner Buckley is named)  
24 were precluded from voting on the Regulation pursuant to NRS 281A.420(3). Petitioner argues that  
25 the employment of Buckley's law firm (as disclosed prior to the adoption of the Regulation in  
26 December, 2010) by a collection agency for representation in the 2011 Legislative Session  
27 constituted "a direct pecuniary interest in making sure collection agencies are well protected under  
28 the law." (Petition, p. 8, ll. 8-9) The Regulation was adopted pursuant to an existing law effective in

1 2009 and the disclosed employment involved legislation to be considered in the upcoming 2011  
2 Legislature. Putting this defect aside, however, this claim must also fail.

3 NRS 281A.420(3) prohibits a public officer from voting on or advocating the passage or  
4 failure of "a matter with respect to which the independence of judgment of a reasonable person in  
5 the public officer's situation would be materially affected by (a) the public officer's acceptance of a  
6 gift or loan; (b) the public officer's pecuniary interest; or (c) the public officer's commitment in a  
7 private capacity to the interests of others." Petitioner fails to mention, however, that Subsection 4 of  
8 the statute provides:

9 4. In interpreting and applying the provisions of subsection 3:

10 (a) It must be presumed that the independence of judgment of a  
11 reasonable person in the public officer's situation would not be  
12 materially affected by the public officer's pecuniary interest or  
13 the public office's commitment in a private capacity to the  
14 interests of others where the resulting benefit or detriment  
15 accruing to the public officer, or if a public officer has a  
16 commitment in a private capacity to the interests of others,  
17 accruing to the other persons, is not greater than that accruing  
18 to any other member of the general business, profession,  
19 occupation or group that is affected by the matter. . . .

16 (b) The [Ethics] Commission must give appropriate weight and  
17 proper deference to the public policy of this state which favors  
18 the right of a public officer to perform the duties for which the  
19 public officer was elected or appointed and to vote or otherwise  
20 act upon a matter, provided the public officer has properly  
21 disclosed the public officer's acceptance of a gift or loan, the  
22 public officer's pecuniary interest or the public officer's  
23 commitment in a private capacity to the interests of others in  
24 the manner required by subsection 1. Because abstention by a  
25 public officer disrupts the normal course of representative  
26 government and deprives the public and the public officer's  
27 constituents of a voice in governmental affairs, the provisions  
28 of this section are intended to require abstention only in clear  
cases where the independence of judgment of a reasonable  
person in the public officer's situation would be materially  
affected by the public officer's acceptance of a gift or loan, the  
public officer's pecuniary interest or the public officer's  
commitment in a private capacity to the interests of others.

25 The Petition does not allege any specific pecuniary benefit or private commitment of any  
26 commissioner, but merely claims the existence of some relationship. More importantly, the  
27 Commission's action on the Regulation affected all homeowner's associations and anyone action on  
28 their behalf to collect a debt not just the client of Buckley's firm or any particular homeowner's

1 association or collection agency. The Regulation governs all homeowner's associations and anyone  
2 acting on their behalf to collect a debt and, indeed, would cover the activities of Buckley himself,  
3 were he, a licensed attorney, to be employed by an association for any of the activities described in  
4 Subsection 1 of the Regulation. (See Regulation, Subsection 4).

5 As has been noted in public meetings of the Commission in the past, NRS 116.600  
6 establishes the requirement that each of the commissioners either reside in a common interest  
7 community or have been actively engaged in a business or profession related to common interest  
8 communities. NRS 116.600(4) The claim by Petitioner that certain commissioners did business  
9 with or had relationships with homeowner's associations or collection companies might be said of  
10 any regulation adopted by the Commission, since the regulations in NAC Chapter 116, 116A and  
11 116B all relate to persons or businesses with whom commissioners, as a part of their qualifications,  
12 must frequently deal. In particular, it would not be surprising if in this time of substantial  
13 delinquencies among homeowner's associations, every commissioner has had dealings of one kind  
14 or another with collection agencies, all of whom would be affected by the Regulation in the same  
15 manner.

16 Assuming, for the sake of argument, that there is some pecuniary interest or commitment in  
17 a private capacity to the interests of others obtained by any commissioner with respect to the  
18 Regulation, it is clear that the language in NRS 281A.420(4)(a) validates the action of the  
19 commissioners in acting on the Regulation. The resulting benefit or detriment accruing to the public  
20 officer or, in the case of a commitment in a private capacity to the interests of another, to the other  
21 person, none of which has been specifically alleged, is not greater than that accruing to any other  
22 member of the general business, profession, occupation or group that is affected by the Regulation.  
23 Thus, this basis for attacking the Regulation must also fail.

### 24 **III. Form of Regulation.**

25 Petitioner argues that the form of the Regulation as adopted was not approved by the  
26 Legislative Counsel Bureau ("LCB") in accordance with NRS 233B.064. (Petition, p. 11, ll. 7-14)  
27 While the form of the Regulation adopted by the Commission on December 7, 2010 was changed  
28 following public comment at the adoption hearing, the Commission acted on a form approved by

1 LCB. The Regulation as adopted by the Commission was subsequently reviewed by the LCB and  
2 acted on by the Legislative Commission. NRS 233B.090 provides a rebuttable presumption that a  
3 regulation, once filed with the Secretary of State, "was adopted and filed in compliance with all  
4 requirements necessary to make it effective."

5         Assuming, for the sake of argument, that the Commission's changes were not proper, the  
6 LCB had the ability to return the Regulation to the Commission rather than submitting it to the  
7 Legislative Commission. Additionally, had the Legislative Commission or the Subcommittee to  
8 Review Regulation not approved the Regulation, it would have also instructed LCB to return the  
9 Regulation to the Commission with the reasons why it did not approve the Regulation. It did not do  
10 so. NRS 233B.063 and NRS 233B.067. Having passed the Regulation on to the Legislative  
11 Commission, the LCB removed the Regulation from future action by the Commission and the  
12 subsequent review by the Legislative Commission's Subcommittee to Review Regulations did not  
13 include a request to return the Regulation to the Commission and resulted in the approval of the  
14 Regulation.

15         Assuming, again for sake of argument, the Commission were to repeal the Regulation and  
16 act on it again, the form of the Regulation would be that approved by LCB and the Legislative  
17 Commission now in effect. Accordingly, while Petitioner might have raised a technical defect to the  
18 form of the Regulation acted on by the Commission, that defect was cured by the subsequent LCB  
19 review and approval of the Regulation by the Legislative Commission. The Commission declines to  
20 repeal the Regulation simply to enact the Regulation again in its same or similar form.

21         Notwithstanding the above, and as discussed at the July 12, 2011, Commissioner meeting, it  
22 appears that there is some confusion regarding the intent of certain language in the Regulation.  
23 Based on the confusion and other prior requests to review the Regulation, the Commission voted 5-  
24 0, under a separate agenda item, to amend the Regulation pending agreement by the Governor that  
25 the Regulation is exempt from the Governor's Executive Order freezing all rulemaking until the end  
26 of 2011.

1 **IV. The Commission Created a New Fee in Violation of Law.**

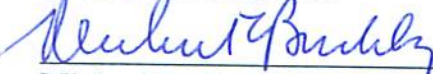
2 Petitioner's argument that the Regulation created a statutorily impermissible fee for a "rogue  
3 document" (Petition, p. 12, ll. 11-12) fails for the same reasons set forth above under Section I  
4 above. The Regulation does not purport to create the basis for the collection of any fee. It limits the  
5 amounts of fees that can be collected. Whether those fees can be collected in the first instance by an  
6 association or anyone else is governed by statute and the governing documents. The Regulation  
7 operates only to limit the amounts of authorized fees.

8 **CONCLUSION**

9 For the reasons set forth above, the Regulation reflects legislative intent and does not violate  
10 constitutional or statutory provisions nor does it exceed the statutory authority of the Commission.  
11 Accordingly, the Commission hereby denies the Petition.

12 DATED this 15<sup>th</sup> day of July, 2011.

14 **NEVADA COMMISSION FOR COMMON-  
15 INTEREST COMMUNITIES AND  
16 CONDOMINIUM HOTELS**

16 By:   
17 **Michael E. Buckley, Commissioner**