From: Michael Kosor
To: Kelly Valadez
Subject: Fwd: Flawed closure of Case 2021-472
Date: Sunday, August 22, 2021 2:35:29 PM

Kelly

The email below lays out my argument why the Division's current position is flawed and why the CIC Commission needs to be involved. I'd appreciate you including it with the materials already being provided to the Commission.

Mike

-----Original Message-----
From: Michael Kosor <mkosor@aol.com>
To: twheaton@red.nv.gov <twheaton@red.nv.gov>; schandra@red.nv.gov <schandra@red.nv.gov>
Cc: cfoger@red.nv.gov <cfoger@red.nv.gov>
Sent: Sun, May 23, 2021 2:30 pm
Subject: Flawed closure of Case 2021-472

Mr Wheaton

I appreciate you taking the time to call me Friday. It is unfortunate we have conflicting opinions on my claim made in Case 2021-472. It is my position NRED is again arbitrarily and unilaterally wrongly blocking my statutory right to a CIC hearing.

You state NRED points to NRS 116.31086, reading the “If” that begins the section, in asserting bids are not required. The Ombudsman's (despite having given no guidance as required per NRS 116.765 (2)) would eventually assert in an informal email responding to my case closure objections- bids "are optional". Apparently, and without providing an explanation, NRED reads the “if” in this section as the pivotal determinate. You contend only “if” bids are solicited must an HOA follow the criteria established in the statutes. But you have not produced any court ruling, legal opinion(s), or Division opinion to support this reading.

I argue this is not an appropriate reading. Both the intent of the statute (see below) and a plain reading of NRS 116.31086 does not support your apparent interpretation. Setting mandatory criteria on when bids are required only “if” a board decides to use bids- makes no sense.

Until 2015, paragraph (a) of NRS 116.31086 did not exist. It was added with AB 238-2015. (Note a trend here in 2015 HOA legislation timely and advantageous to Olympia- i.e. AB 192 inexplicably changing the declarant control percentage?) Prior to this legislation, the section simply established how bids were to be handled. "If” bids were solicited, they had to be opened during a meeting of the executive board.

A review of committee testimony about AB 238, adding section (a), finds the **clear intent of the legislative was to mandate bids when the cost of the project exceeded certain criteria.** Not simply “if” bids were solicited. As I previously noted, the latter makes no sense and was not at issue in any testimony.

I argue prior to AB 238, bids were required for all contracts but the statute set no specific criteria outside NAC 116.405. See the testimony of the bills sponsor and other experts (https://www.leg.state.nv.us/Session/78th2015/Minutes/Assembly/JUD/Final/599.pdf)

Bill sponsor Assemblywoman Victoria Dooling stated- *The second part of the bill relates to soliciting bids for association projects that are expected to cost more than $500. Section 2 requires the association to solicit at least three bids on projects costing more than $500, to read the bids out loud at the meeting, and*

to use the procedures in Robert's Rules of Order in voting on the bids. You will also see the existing definition of association project has been clarified to include professional services such as engineering or legal services. That concludes the overview of the bill. (underline added)

In later testimony of record, you will find the following by a former CIC Commissioner Friedrich stated - *Section 2 would require the board to request bids for any expense over $500. Garrett Gordon is going to speak about that because he represents Southern Highlands Community Association, where there are major problems with that issue. Currently, there is no requirement for an HOA to get bids for professional services, such as attorneys, accountants, and engineers. Years ago, that was in regulations but somehow got lost in the shuffle. We would like to see associations go out and get bids for these services. This is what is addressed in section 2.*

Gordon Garret would state in testimony- *Regarding section 2, you have heard that $500 is too low. We are going to work with the sponsor to maybe use a percentage of the budget. That may be something that will work with both small and large HOAs.* Notably, his objection was on the size of the threshold criteria, not that a mandate be established.

John Leach, an HOA attorney and long time key player in HOA law stated: *With respect to section 2 regarding bids, there is already a provision in Nevada Administrative Code 116.405. It specifically says that when practical, a board of directors is supposed to get three bids. It is broader than what has been suggested, but it does include services. I am an attorney, and over the past several years, more often than not, I am being asked for biographies, fee schedules, et cetera. I believe this has already been taken care of. The bid amount of $500 is absolutely unworkable in associations. It is an inefficient way to do business. We need to have a much higher threshold, if there is going to be a dollar amount placed in there. Perhaps using percentages might be a better option.*

At bottom, despite the statute being poorly worded, resulting from the inappropriate use of existing language (an intentionally deceptive action by the author(s) or not), the legislation clearly intended to establish a mandate for soliciting bids via the plain reading of the entire code.

I argue while NRS 116.31086 may not make clear criteria a *requirement* for bids, other sections of the code do. NRS 115.3103(a) *requires* HOA boards exercise exercise “ordinary and reasonable care…”. No-bid contracting, especially where board director’s are employees of the owner of the company awarded a major contract, is not ordinary and/or reasonable. It is not in the public/association's interest to do so and it is widely accepted as not being a good business practice.

In addition, NAC 116.405(8)(d) establishes pointed criteria under which the Commission is to use to determine when bids are to be solicited- not the Division. It states”
(d) Obtain, when practicable, at least three bids from reputable service providers who possess the proper licensing before purchasing any such service for use by the association;

In September 2011, NRED published Opinion 11-2 describing how to determine “when practicable”. The Opinion states: *"The Commission would determine whether the factual allegations constitute a violation..."* (underline added). As you will see from my affidavit, the SHCA board failed to meet the criteria. SHCA simply argues it is not required to solicit bids under NRS 116.31086. It affectively and intentionally simply "snubbed its nose" at the statutes. I argue bids are required. Doing so is not optional (despite the poorly written statute and opinion of the Ombudsman). At end, **any determination is exclusively that of the Commission.**

Despite the above and absent a legal ruling, (once again) NRED refuses to allow for a Commission hearing on affidavits I have submitted. I argue doing so again violates NRS 116.750 as we discussed. The Division's jurisdiction is only to "investigate". The Commission has exclusive jurisdiction to take action. Further, NRS 116.760 clearly establishes my right to a hearing upon, among other things, a finding of good cause. In this case, only the Commission can make such a determination. The authority rests with the Commission, not the Administrator of the Division. NRED is abusing it position in the regulatory structure in closing my case.

Mike Kosor