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NEVADA COMMISSION FOR
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS*mgeallo*CIC Commission Meeting Open Forum 9/10/24
Talking Paper – Mike Kosor**1- NRED has abused its discretion and CIC Commission does nothing:**

- Division is captured by the industry it is tasked to regulate. Owners have no voice. (see #1)
- What the Division and Commission fail to do have unintended negative consequences.
- Heavy resistance by NRED to owner access to Commission hearing process (NRS 116.765(5))
 - Excessive use of “unsubstantiated” investigation findings with no recourse defeats the clear legislative intent the Commission hearing process provide alternative to litigation.
 - Purpose- “put aggrieved party in as good a position as if [performance] occurred.”
 - Special or punitive damages “may not be awarded except as specially noted...” NRS 116.1114.
- Ombudsman directed to assist owners in understanding rights...(NRS 116.625(4)(b)) and dispute resolution efforts (NRS 116.765(2))-but the office does not act accordingly.
- Administrator refuses valuable petitions for declaratory orders, advisory opinions (NRS 116.623), and/or other actions to provide clarity. Some recent examples:
 - NRS 116.31032- Declarant Control Termination (see attached #2)
 - NRS 116.30134(10)- “stand to gain personal profit or compensation” (see attached #3)
 - NRS 116.31034(8)- board candidate disclosures (see Opinion 10-04, 2009)
- Result- unnecessary litigation greatly favoring deep pockets.
- HOA’s using the purse of owners to chill opposition
 - Allegations of noncompliance with either NRS or governing documents combined with threats of litigation by association is incredibly chilling (see NRS 116.4117- paper #4)).
 - Seeking attorney fees “against public policy” (see Opinion 12-01-16)
 - Owner litigation opens door to counterclaims -never intended.
 - My experience – sued for simply applying to be a board candidate.
 - My experience- sued when HOA determines “inadequate” disclosure.
 - “Actual damages” are required to bring an action- in theory. But the mere threat of counterclaim/litigation is nonetheless chilling.
 - Was it intended HOAs could bring litigation without a vote of owners and sidestep NRED/Commission jurisdiction? (see #4)
 - Easily abused under declarant control. Advances self-interests of some developers, management companies, and attorneys.
- ADR program is broken despite good intentions. My experience, it is little more than an added barrier for deep pockets to silence owner voices.

2- Ideas to advance the voice of owners presently muted and address abuses:

- CIC Taskforce best option-
 - Legislative compromise (SB 392(2019)) to a truly independent Ombudsman.
 - B&I Director chairs- but used only twice, last in 2020, then abandoned.
 - Provides a forum for all stakeholders, particularly owners, to raise legislative reform.
 - Span beyond regulatory – into proposed legislative action vetted and packaged in a manager legislators can digest/consider.
 - Ongoing forum for all stakeholders.
- Commission conducts formal reviews of the above, plus other abuses. Some examples:
 - NAC 116.405(8)(d)- “obtain at least three bids”, Opinion not enforced
 - NRS 116.31085- Requirement for “meeting” and “workshops” abused, Opinion 11-01
 - NAC 116.405(4)(d) amended in R-129-21 (2022) but as yet is unpublished.

#1

Senator Schneider in 2009 sponsored a landmark HOA reform bill in the wake of the FBI investigation into attorney directed abuses of HOAs. He made the comment below concluding his presentation before the Committee. His words are still applicable today.

"Let me conclude by observing that the developers of HOAs, the HOA boards, the attorneys and community managers who run the HOAs, and many others with interests in the management of these communities, ALL have powerful lobbying groups here in the Capital. The homeowners have no lobbyists. In effect, we are their representatives and we have a duty to voice their needs and address their concerns. "

I suggest the "we" Senator Schneider refers to, includes not just elected representatives, but you, the entire Commission, and NRED.

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Statute required owner resale disclosure (NRS 116.41095)

There is no government agency in this state that investigates or intervenes to resolve disputes in homeowner's associations. (Deleted in 2005, by SB 325(2005))

Applicable portion of current required disclosure.

If you have a dispute with the association, its executive board or other governing bodies, you may be able to resolve the dispute through the complaint, investigation and intervention process administered by the Office of the Ombudsman for Owners in Common-Interest Communities and Condominium Hotels, the Nevada Real Estate Division and the Commission for Common-Interest Communities and Condominium Hotels. However, to resolve some disputes, you may have to mediate or arbitrate the dispute and, if mediation or arbitration is unsuccessful, you may have to file a lawsuit and ask a court to resolve the dispute. In addition to your personal cost in mediation or arbitration, or to prosecute a lawsuit, you may be responsible for paying your share of the association's cost in defending against your claim (underline added).

NRS 116.31032 Period of declarant's control of association; representation of units' owners on executive board. (underline added)

1. Except as otherwise provided in this section, the declaration may provide for a period of declarant's control of the association, during which a declarant, or persons designated by a declarant, may appoint and remove the officers of the association and members of the executive board. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period and, in that event, the declarant may require, for the duration of the period of declarant's control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective. Regardless of the period provided in the declaration, a period of declarant's control terminates no later than the earliest of:

(a) For a common-interest community with less than 1,000 units, 60 days after conveyance of 75 percent of the units that may be created to units' owners other than a declarant;

(b) For a common-interest community with 1,000 units or more, 60 days after conveyance of 90 percent of the units that may be created to units' owners other than a declarant;

(c) If the association exercises powers over a common-interest community pursuant to this chapter and a time-share plan pursuant to chapter 119A of NRS, 120 days after conveyance of 80 percent of the units that may be created to units' owners other than a declarant;

(d) Five years after all declarants have ceased to offer units for sale in the ordinary course of business;

(e) Five years after any right to add new units was last exercised; or

(f) The day the declarant, after giving notice to units' owners, records an instrument voluntarily surrendering all rights to control activities of the association.

Key components of statute

- Control threshold moved to 90% from 75% in AB 192(2015)
- "Regardless," of CCR's threshold control terminates "no later than" 90%
- Declaration (CC&Rs) may provide of a different (lessor) period of control

My position

- CC&Rs of my HOA provide for 75% threshold- established in 1998
- If Legislators had wanted to void existing CC&Rs it would have said so.
- NV Appeals Court in 2021 (*Kosor v NRED*) found 75% is the threshold for my association

HOA's position

- Statute changed threshold to 90%
- CC&Rs of HOA were voided pursuant to NRS 116.1206 as conflicting with governing documents.

NRED Administrator's response in 2017 and again in 2022 to request for opinion/advisory (NRS 116.623)

- Rejected twice- 2017 letter Administrator writes: "opinion would not be appropriate. I do not find the [the statute] unclear.
- "Nothing in AB 192(2015) makes the change retroactive..."

#3

NRS 116.31034 Election of members of executive board and officers of association; term of office of member of executive board; staggered terms; eligibility to be candidate for or member of executive board or officer of association; required disclosures; procedure for conducting elections; certification by member of executive board of understanding of governing documents and provisions of chapter.

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10. Except as otherwise provided in subsections 11 and 12, unless a person is appointed by the declarant:

(a) A person may not be a candidate for or member of the executive board or an officer of the association if:

(1) The person resides in a unit with, is married to, is domestic partners with, or is related by blood, adoption or marriage within the third degree of consanguinity or affinity to another person who is also a member of the executive board or is an officer of the association;

(2) The person stands to gain any personal profit or compensation of any kind from a matter before the executive board of the association; or

(3) The person, the person's spouse or the person's parent or child, by blood, marriage or adoption, performs the duties of a community manager for that association.

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13. If a person is not eligible to be a candidate for or member of the executive board or an officer of the association pursuant to any provision of this chapter, the association:

(a) Must not place his or her name on the ballot; and

(b) Must prohibit such a person from serving as a member of the executive board or an officer of the association.

Key components of statute

- Person who stands to gain personal profit or compensation may not be a candidate of the board
- A conflict of interest requires disclosure and recusal, but is not disqualifying (see Advisory Opinion 10-4)

My position

- Litigation seeking declaratory relief and no damages does not fit the definition of profit. Owner cannot "profit" (revenue less expenses) or be "compensated" (existing contract) seeking dec relief.
- "Pecuniary" interest- defined as related to or consisting of money (even if "of any kind")- is not what the Legislature intended, or they would have said so.
- What does a minority director do if he/she believes a board is violating the law?
- My candidacy was approved by the board the year prior. They have no authority to remove me.
- HOA is conflating conflict of interest (disclosure) with the statute prohibition (profit/compensation).
- Huge chilling effect if simply applying to be a directors could result in you being a target of litigation

HOA's position

- Litigations of any kind constitutes a violation
- Removed by "operation of law"- following a determination by the board

NRED

- Silence despite aware of the controversy and related ADR efforts

NRS 116.1114 Remedies to be liberally administered. The remedies provided by this chapter must be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. Consequential, special or punitive damages may not be awarded except as specifically provided in this chapter or by other rule of law. (underline added)

NRS 116.4117 Effect of violations on rights of action; civil action for damages for failure or refusal to comply with provisions of chapter or governing documents; members of executive board not personally liable to victims of crimes; circumstances under which punitive damages may be awarded; attorney's fees. (underlines added)

1. Subject to the requirements set forth in subsection 2, if a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a civil action for damages or other appropriate relief.

2. Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:

3. Members of the executive board are not personally liable to the victims of crimes occurring on the property.

4. Except as otherwise provided in subsection 5, punitive damages may be awarded for a willful and material failure to comply with any provision of this chapter if the failure is established by clear and convincing evidence.

5. Punitive damages may not be awarded against:

(a) The association;

(b) The members of the executive board for acts or omissions that occur in their official capacity as members of the executive board; or

(c) The officers of the association for acts or omissions that occur in their capacity as officers of the association.

6. The court may award reasonable attorney's fees to the prevailing party.

Key components of statute

- NRS 38 ADR mandatory prerequisite to litigation if governing documents involved
- NRED/Commission as regulatory body has exclusive jurisdiction of NRS 116
- Intended to limit litigation by first, filing administrative complaint, second, only after ADR, and third, only where actual damages shown and fourth, a willful and material failure to comply.
- Preclude special or punitive awards related to HOA disputes.

Questions

Was the intent an association could bring litigation without a vote of owners?

Was the intent to allow an HOA bypass NRED/Commission jurisdiction? Administrative exhaustion.

Was the intent to exempt all parties from damage awards except owners?