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PUBLIC COMMENT

TO: Commission for Common-Interest Communities and Condominium Hotels
Nevada Real Estate Division -- PublicComments@red.nv.gov

FROM: Michael McKelleb, Esq. -- McKelleb Law -- mmckelleb@mckelleblaw.com

DATE: June 9, 2026

RE: Proposed Regulation -- LCB File No. R091-25

Comment on Section 2 -- NAC 116 (New) -- Criteria for Imminent Threat; Fine Limits

Issue 1: The Fine Cap Described in the Legislative Counsel's Digest Is Absent from the Regulatory Text

The Legislative Counsel's Digest states that Section 2 "prohibits an executive board from imposing a fine that exceeds $10,000 for each violation that causes a substantial adverse effect on the health, safety or welfare of the units' owners or residents." That cap does not appear anywhere in the text of proposed Section 2. Section 2(3) provides only that the board "may impose a fine in an amount commensurate with the severity of the violation, in accordance with NRS 116.31065." No dollar ceiling is stated.

A review of existing law confirms the cap exists nowhere else. NRS 116.31031 -- the governing fine statute -- contains no upper limit on fines for health/safety violations; it provides only the "commensurate with severity" standard. NAC 116 and NAC 116A are likewise silent. As drafted, the regulation provides unlimited board discretion over fine amounts for any violation classified as a health/safety threat. The Digest describes an intent the text does not execute, and that defect must be corrected before adoption.

Issue 2: The "Failure to Exercise Reasonable Care" Standard Is an Expansion of Existing Practice, Inappropriate in This Context, and Should Be Reconsidered

"Failure to exercise reasonable care" is not a defined or objective standard. It is the foundational negligence test in tort law. In Nevada civil practice, the question of whether a party exercised reasonable care under the circumstances is a question of fact for the jury -- not for an interested party acting as its own adjudicator. Importing this standard into the HOA fine context is a significant expansion of the criteria that have historically supported an elevated health/safety finding. Under prior practice, such a finding required conduct that was immediately and actually

dangerous. "Failure to exercise reasonable care" potentially encompasses any act or omission a board dislikes.

The structural problem is compounded by the fact that the board making the allegation is the same body adjudicating it. There is no neutral fact-finder, no discovery, no cross-examination. The board defines "reasonable care," evaluates compliance with that standard, and imposes the fine -- all in the same proceeding. This is precisely the kind of structural conflict that courts have found constitutionally problematic in other contexts. The Commission should strongly reconsider including this term in the criteria and replace it with specific, objective, and verifiable conditions.

Issue 3: The Fine Amounts Are Too High; the Aggregate Must Be Capped; and Mandatory Arbitration Should Be Required Before Collection

The purpose of fining in a common-interest community is to obtain compliance. That principle is not a platitude -- it is the stated legal and policy basis for the authority. Courts and the Legislature have recognized that HOA fines are not criminal penalties, not punitive damages, and not a revenue mechanism. They are tools to secure adherence to governing documents. When a fine exceeds what is necessary to obtain compliance, it has crossed into punishment. That distinction should govern everything about how this Commission sets the ceiling.

The process by which an HSW fine is imposed is already burdened with systemic unfairness. Whether to send a notice of violation is a board decision. Whether a violation occurred is a board decision. Whether the conduct poses an imminent health/safety threat -- thereby triggering the elevated fine authority -- is a board decision. What the fine amount should be is a board decision. The same body that chooses to enforce, classifies the conduct, and sets the penalty also hears any challenge to it. In any other legal context, this structure would be recognized as a fundamental denial of due process. In the HOA context, it is routine. The Commission should not respond to that reality by increasing the available penalty. It should respond by limiting the penalty to what is necessary and sufficient to secure compliance.

The undersigned has devoted a career to HOA law and to the representation of boards. That experience makes clear that the fine cap is the single greatest avenue for abuse in this statute. The undersigned has terminated client relationships because of it -- including one engagement ended upon learning that board members were physically looking over backyard walls to locate violations, with those same directors serving as adjudicators of the fines they found. This is not a theoretical concern; it is a pattern. A $10,000 per-violation cap is the single most effective tool an overzealous board has to wield.

Extreme circumstances can justify substantial fines. The undersigned has personal experience with a matter in which a $35,000 fine was issued in connection with a unit owner whose tenant engaged in violent criminal conduct. That fine was placed in abeyance and served its purpose: the owner made a different tenancy decision, ultimately placing a working mother and her young daughter in the unit. The daughter played violin. The building became safer. Compliance was achieved. That is what fining authority in an HOA is for. It is not a mechanism for a board to collect revenue from a neighbor over a condition it has classified, without independent review, as a failure of reasonable care.

To address the systemic unfairness of the board-as-adjudicator problem, the Commission should require that before any fine under this section may be imposed and become final, the matter must be submitted to mandatory, binding arbitration before a neutral arbitrator appointed or approved by the Division. This removes the board from the adjudicative role in precisely the cases where

the stakes are highest -- where the health/safety classification is invoked and fines of $5,000 or more are at stake. It is consistent with the Division's existing alternative dispute resolution infrastructure and with the Legislature's expressed preference for accessible, affordable dispute resolution in NRS 116.670. The arbitrator should be empowered to determine both whether the health/safety classification is warranted and whether the proposed fine is commensurate with the severity of the violation -- the two determinations the board currently makes for itself.

The Commission must also confront the continuing violation mechanism. Under NRS 116.31031(7), once a violation is deemed uncured after 14 days, additional fines may be imposed for each subsequent 7-day period. Even with a per-violation cap of $5,000, a board that classifies a condition as an ongoing health/safety violation can stack weekly fines for months. At $5,000 per week over three months, that accumulates to more than $60,000 -- enough to place a lien on a home and initiate the foreclosure process. People can lose a lifetime of accumulated equity over a dispute that had more to do with board politics or dissent than with any genuine threat to health or safety. A per-violation cap does not solve this. The regulation needs an aggregate cap that applies to the totality of fines -- including all continuing violation additions -- arising from any single underlying incident or course of conduct, and that aggregate must be $5,000.

The Commission should hold this principle at the end of its deliberations, as the undersigned holds it at the end of this comment: fining is to obtain compliance, not to punish. These amounts are comparable to what would be seen in criminal cases, but without any of the procedural protections that criminal defendants receive -- no independent prosecutor, no neutral judge, no jury, no rules of evidence, no standard of proof beyond a reasonable doubt. When a fine shocks the senses, it is punishment. The Commission should reduce these amounts to what is necessary to obtain compliance and no more. The undersigned is prepared to lose clients over this position. It is the right position.

Comment on Section 3 -- NAC 116 (New) -- Fiduciary Duty Affidavits

Issue: The Proposed Regulation Misapprehends the Legal Nature of the Duty, Inverts the Structure of Standing, and Exceeds the Commission's Authority

Section 3 requires a person "aggrieved by an alleged breach of the fiduciary duties set forth in NRS 116.3103" to specify, in a written affidavit, any statute, regulation, or order the board member is alleged to have violated. The provision is objectionable on multiple independent grounds.

A. The Duty Runs to the Association as an Entity, Not to Individual Unit Owners

NRS 116.3103(1) is explicit: the executive board "acts on behalf of the association," and its members "shall act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association." The statute expressly measures board member conduct against the standard applicable to "officers and directors of a nonprofit corporation" -- and under NRS Chapter 82, directors owe duties to the corporation as an entity, not to individual members.

Individual unit owners are beneficiaries of a well-run association, but they do not hold the fiduciary duty personally and cannot enforce it as an individual right. The proper vehicle for enforcing a breach of a duty owed to the association is a derivative action filed on behalf of the association itself -- not an individual administrative complaint. By structuring Section 3 as a remedy available to any "aggrieved" person, the proposed regulation creates individual standing

to enforce a duty the statute directs to the entity. Complainants will inevitably frame their affidavits in terms of how the board's actions affected them personally, but that is not the legal standard. The standard is what serves the best interest of the association as an entity.

B. The Business Judgment Rule -- Codified in NRS Chapters 78 and 82, Not Chapter 116 -- Forecloses the Review This Provision Would Invite

NRS 116.3103(1)(a) provides that board members are held to the standard of "officers and directors of a nonprofit corporation, subject to the business-judgment rule." Chapter 116 does not define that rule. Its substance is found in NRS 78.138, which governs private corporations, and NRS Chapter 82, which governs nonprofit corporations -- neither of which falls within this Commission's enabling authority. Under NRS 78.138(3), directors and officers are presumed to act "in good faith, on an informed basis and with a view to the interests of the corporation." Under NRS 78.138(7) -- which the Nevada Supreme Court has held provides the "sole method for holding individual directors liable for corporate decisions" -- a plaintiff must both rebut that presumption and demonstrate that the director's conduct involved "intentional misconduct, fraud or a knowing violation of law." *Guzman v. Johnson*, 137 Nev. Adv. Op. 14 (2021). The Court was unambiguous: this statutory standard is the "sole avenue to hold directors and officers individually liable," and it "plainly requires the plaintiff to both rebut the business judgment rule's presumption of good faith and show a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of the law." *Id.* This bar -- intentional misconduct, fraud, or knowing violation of law -- is not negligence. It is not poor judgment. It is not a decision with which unit owners disagree. It is a standard that forecloses judicial review of the vast majority of board decisions, and it forecloses administrative review no less.

If the courts themselves -- applying the rules of evidence, the right to cross-examination, and the full procedural protections of civil litigation -- are constrained by the *Guzman* standard, this Commission cannot impose a lower threshold through administrative regulation. The proposed regulation contains no requirement that an affidavit allege intentional misconduct, fraud, or a knowing violation of law before the Division initiates an investigation. It therefore opens the door to administrative scrutiny of board decisions in precisely the circumstances where the Nevada Supreme Court has made clear that scrutiny is inappropriate.

Furthermore, any existing provisions the Commission has adopted that purport to allow it to adjudicate whether a board has breached its fiduciary duties -- evaluating the wisdom, good faith, or adequacy of board decisions -- likewise exceed the Commission's authority under NRS Chapter 116. Chapter 116 confers no jurisdiction to adjudicate the substance of fiduciary duty claims. That jurisdiction belongs to the district courts applying NRS Chapters 78 and 82 and the common law. All regulatory provisions in the NAC that purport to give the Commission or Division that adjudicative function should be reviewed and removed.

C. The Commission Lacks Authority to Adjudicate Fiduciary Duty Claims

NRS Chapter 116 references fiduciary duties but does not confer on the Commission authority to determine whether a duty has been breached. The Commission's enabling authority under NRS 116.615 does not extend to claims arising under NRS Chapter 82 or the common law. Stated plainly: this Commission is not empowered to adjudicate, enforce, adopt regulations concerning, or otherwise pronounce upon the substantive content of fiduciary duties owed by HOA board members. That authority resides with the courts. If the regulation causes the Division to receive and investigate individual fiduciary duty complaints measured against a standard the Commission has no authority to establish, it exceeds the Legislature's grant.

Comment on Section 4 -- NAC 116 (New) -- Remedial Measures During Investigation

Issue: The Provision as Drafted Creates an Impermissible Evidentiary Sword and Should Be Rewritten as a True Safe Harbor

Section 4 authorizes the Division to provide a list of remedial measures to the subject of an investigation, with the apparent intent of offering a voluntary compliance pathway as an alternative to a formal complaint. That intent is sound. The mechanism is not.

The provision states that "failure to take such action may be considered by the Division to be good cause to proceed with a hearing on the alleged violation." This single sentence transforms a suggestion into a practical mandate. A subject who reviews the Division's suggested measures and in good faith concludes they are inapplicable, unreasonable, or incorrect now risks having that judgment used against them as grounds for a hearing. The subject is not contesting whether a violation occurred -- they are contesting the remedy. The regulation punishes that contest.

A. Nevada Law Expressly Prohibits Using Remedial Measures as Evidence of Fault

NRS 48.095 provides that "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event." This is Nevada's codification of Federal Rule of Evidence 407, and it reflects a policy judgment that runs throughout the law of evidence: a party's willingness or unwillingness to take corrective action should not be used as a sword on the question of whether a violation occurred. To permit it would chill the very remediation the rule is designed to encourage.

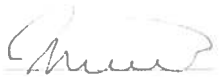
Section 4 does exactly what NRS 48.095 is designed to prevent. It takes a party's response to a compliance suggestion and makes it available as a basis for a formal proceeding. The fact that the proceeding is administrative rather than judicial does not change the analysis. The underlying policy is the same, and an administrative agency has no more authority than a court to circumvent it through regulation. A subject who would otherwise cooperate and attempt remediation may now be advised by counsel not to do so -- because any action taken could be characterized as an admission of the underlying violation. This produces exactly the opposite of the outcome the regulation intends.

B. The Provision Should Be Rewritten as a True Safe Harbor

If the purpose of Section 4 is to reduce formal complaints through voluntary compliance, the Division does not need a punitive consequence for declining its suggestions. The availability of remedial measures as an alternative will itself provide adequate incentive for most subjects to cooperate. What the provision needs is not a threat but a protection: a genuine safe harbor making clear that the remedial measures track is entirely separate from the enforcement track, that nothing a subject does or does not do in response to suggested measures may be used against them, and that the Division's list represents one possible path to compliance, not a binding standard.

The undersigned advises the Commission that if this provision is adopted in its current form, legal challenge before the Nevada Supreme Court is likely. The Division would be using administrative regulation to create a de facto evidentiary presumption against parties who exercise their right to contest informal agency guidance -- a result that exceeds the Division's statutory authority and conflicts with NRS 48.095.

Respectfully Submitted,



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