

Via Email

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To:

Administrator
Nevada Real Estate Division (NRED)
In Coordination with the
Commission for Common-Interest Communities and Condominium Hotels (CICCH
Commission)
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From:

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**Re: PETITION FOR RULEMAKING -Request to Clarify Enforcement Standards Under
NAC 116.405**

I. Introduction

Pursuant to NRS 233B.100 and NRS 116.623, I hereby petition the Administrator of the Nevada Real Estate Division (NRED), in coordination with the Commission for Common-Interest Communities and Condominium Hotels (CICCH Commission), to initiate interpretative rulemaking to clarify ambiguities and the application of fiduciary breach under NRS 116.3103 and in a manner consistent with the for-profit standard (NRS 78) articulated in *Chur v. Eighth Judicial District Court*, 136 Nev. 68, 458 P.3d 336 (2020). This petition further urges the Commission to reexamine the structure and function of NAC 116.405, which enumerates factors for evaluating executive board member conduct, to ensure these considerations do not give rise to improper or inconsistent findings of fiduciary failure.

II. Problem Statement

Nevada law imposes on directors of nonprofit homeowners' associations (HOAs) a duty to act on an **informed basis**, in **good faith**, and in the **honest belief** that their decisions are in the best interest of the association (NRS 116.3103). This standard mirrors that applied to corporate directors, yet nonprofit directors—often unpaid volunteers—are afforded no equivalent judicial clarity or protection.

In the for-profit context, the Nevada Supreme Court has firmly established the limits of director liability. In *Chur*, the Court reaffirmed that directors are shielded from liability unless their

conduct amounts to “intentional misconduct, fraud, or a knowing violation of law”—provided appropriate corporate instruments are in place. The Court explained:

“If the plaintiff sufficiently alleges that the directors acted in bad faith, were not informed, or had a conflict of interest, the business judgment rule does not apply and the case may proceed.”

— *Chur*, 136 Nev. at 72, 458 P.3d at 341

This clarity has not been extended to nonprofit governance. As a result, HOA board members—despite their volunteer status—face scrutiny and sanctions for conduct that would not support liability in a for-profit setting. Without equivalent judicial interpretation or administrative guidance, the duties imposed under NRS 116.3103 have been applied inconsistently, often failing to distinguish good-faith procedural missteps from true fiduciary breaches.

This regulatory gap exposes volunteer directors to disproportionate risk while allowing Commission decisions to drift from the legislative intent of NRS 116.3103, which is to encourage informed and good-faith service. Without clear standards, board members may be penalized for procedural missteps rather than genuine misconduct. Rulemaking—rather than ad hoc interpretation through case deliberations—is essential to clarify what constitutes bad faith or a fiduciary breach. Doing so would promote consistency, protect well-intentioned volunteers, and ensure fairer enforcement of the law.

III. Clarifying the Role and Sequencing of NAC 116.405 Considerations

NAC 116.405 provides that “[i]n determining whether a member of the executive board has performed his or her duties pursuant to NRS 116.3103, the Commission may consider” a list of enumerated factors. However, the regulation does not explain how those factors relate to the threshold protections of the Business Judgment Rule (BJR).

A. The Sequencing Problem: Threshold or Independent Analysis?

It remains unclear whether the Commission first applies a threshold analysis akin to *Chur*—asking whether the director acted in bad faith, was uninformed, or had a conflict of interest—before turning to the enumerated considerations. Or, alternatively, whether a failure to satisfy one or more NAC 116.405 factors can, by itself, justify a finding of fiduciary breach regardless of that threshold.

The petition respectfully urges the Commission to confirm that it will follow the *Chur*-style sequence: unless the facts support a reasonable inference of serious misconduct, intentional violation, or bad faith, the enumerated considerations in NAC 116.405 should not be used to support a finding of fiduciary breach. This approach not only reflects judicial precedent, but also comports with the legislative purpose of protecting volunteer directors from unwarranted liability.

B. Application of *Chur* Threshold to Commission Findings

In *Chur*, the Nevada Supreme Court confirmed that the BJR protects directors unless they act in bad faith, without being informed, or while conflicted. While *Chur* addressed corporate directors under NRS 78.138, its underlying logic applies equally to nonprofit fiduciaries under NRS 116.3103.

Courts require allegations of bad faith or knowing misconduct before liability may attach. In contrast, the current application of NAC 116.405 by the Commission allows for potential findings of breach absent that threshold.

The Commission should therefore adopt a consistent review structure:

- **First**, determine whether BJR protections have been rebutted (i.e., is there plausible evidence of bad faith, conflict, or knowing misconduct?).
- **Only then**, evaluate NAC 116.405 considerations as potential evidence in support of a fiduciary breach finding.

Absent such sequencing, the Commission risks undermining judicial precedent and chilling good-faith board participation. While NAC 116.405 allows the Commission to identify procedural or regulatory lapses, such conduct—without a showing of bad faith, self-interest, or a failure to act on an informed basis—**should not be elevated to a fiduciary breach**.

Contextual Illustrations

- *Conflict of Interest Without Intent*: A director may unintentionally participate in a discussion implicating a conflict. While that may rebut BJR deference, it does not automatically equate to a fiduciary breach without additional evidence of willful misconduct.
- *Disregarding Legal Advice or Board Process*: A director may decline to follow legal counsel or act without board authorization in limited circumstances. Unless those actions reflect bad faith or intent to harm, they should not be treated as fiduciary violations.

IV. Ambiguity in NAC 116.405 Considerations Undermines Post-Threshold Review

Even if the Commission adopts a threshold analysis consistent with *Chur*—requiring a finding that the Business Judgment Rule has been overcome before evaluating potential fiduciary breach—the current language of NAC 116.405 remains problematic. Once that threshold is crossed, the factors listed in the regulation become central to determining whether a director's conduct constitutes a violation of NRS 116.3103.

While NAC 116.405 describes these factors as *considerations*, that label alone does not resolve their ambiguity or mitigate their potential misuse. Once the presumption of good faith is set aside, these considerations take on substantive significance. Without clear interpretive context, even well-intentioned directors and Commissioners tasked to adjudicate, face uncertainty as to how their actions will/should be judged.

Many of these considerations as currently written are too vague, subjective, or open-ended. This ambiguity is especially dangerous once BJR protections are set aside. At that stage, the Commission is no longer merely evaluating governance quality—it is potentially imposing discipline, reputational harm, or legal conclusions based on loosely defined expectations. Without further regulatory clarification, these considerations may operate as de facto liability triggers in contexts where no intentional wrongdoing has occurred.

Accordingly, this petition urges the Commission to undertake a comprehensive review of each NAC 116.405 factor, to ensure that—even when used post-threshold—they:

- Are stated with sufficient precision to support consistent interpretation;
- Distinguish clearly between preferred action, procedural deficiency and serious misconduct;
- Are applied with transparent guidance as to what weight they carry and in what context they will be deemed relevant.

Illustrative Examples

- **Example 1 – NAC 116.405(8)(d): Three-bid requirement**

This provision calls for at least three bids “when practicable.” Yet no definition of “practicable” exists in rule or statute. In enforcement, directors may face allegations of breach despite making genuine efforts or being constrained by market realities. I call your attention to the July 28, 2035 NRS 233b petition seeking clarification.

- **Example 2 – LCB File R129-21 (Section 4): “Acting without authority granted by the executive board”**

The language fails to distinguish between deliberate usurpation of authority and minor or informal board member actions. A director who arranges an informal owner meeting may be accused of acting beyond authority—even if no harm, intent, or secrecy is involved. Does this factor presume that individual board members lack any autonomous authority absent express delegation?

- **Example 3 – NAC 116.405(7): “Cooperated with the Division”**

This term offers no guidance on what constitutes adequate cooperation. A director who declines to disclose certain records or invokes procedural rights during a contested proceeding could be viewed as non-cooperative—without any evidence of bad faith.

- **Example 4 – NAC 116.405(3): “Committed an act or omission which amounts to incompetence, negligence or gross negligence”**

This provision allows consideration of acts that fall short of intentional wrongdoing. Yet under *Chur*, fiduciary liability requires a showing of bad faith, fraud, or a knowing violation of law—not mere gross negligence. Is/should this standard still be applicable? Without clarification, NAC 116.405(3) may permit findings of fiduciary breach based on errors of judgment that do not satisfy Nevada’s established fiduciary duty thresholds.

These examples demonstrate how vague language, once untethered from BJR protections, can lead to unfair or inconsistent findings. Clarifying these terms would not limit enforcement authority but would **ensure due process and consistency** in how fiduciary duties are applied.

V. Requested Action

The undersigned respectfully petitions that the Real Estate Division and the CICCH Commission:

1. **Amend NAC 116.405** to include language affirming that no fiduciary breach exists unless the conduct involves:
 - o Intentional misconduct,
 - o Fraud,
 - o A knowing violation of the law,
 - o Bad faith,
 - o A knowing conflict of interest, or
 - o A sustained pattern of violations after being informed.
2. **Clarify by regulation or policy** that failing to meet one or more considerations in NAC 116.405 does not, by itself, constitute a fiduciary breach.
3. **Reexamine all NAC 116.405 considerations** to determine:
 - o Whether they are sufficiently specific and objective;
 - o Whether they appropriately account for volunteer status;
 - o Whether they reflect the standards articulated in *Chur*.
4. **Distinguish procedural or good-faith failures** from those that warrant formal discipline or referral.

VI. Conclusion

The current framework allows for overbroad enforcement actions that risk chilling volunteer participation in HOA governance. The lack of distinction between procedural error and true fiduciary breach contradicts Nevada law and undermines the protective purpose of nonprofit corporate governance.

Clarifying this distinction will restore balance, align enforcement with legal precedent, and support the goal of encouraging responsible, good-faith service by HOA board members across Nevada.

Respectfully submitted,



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