The Business Judgment Rule in Nevada Common-Interest Communities (HOAs): Time for a Better Idea

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Introduction

"Particularly in communities of primary residences, the stakes for members [of a common interest communities, (CICs)] are usually very high. Because the stakes are so high, directors and officers should be held to high standards of honesty and fair dealing." (*Restatement (Third) of Property: Servitudes* § 6.14 (Am. L. Inst. 2000) (comment b. p269)).

In 1991 Nevada made a major overhaul of its CICs laws adopting the Uniform Law Commission's Uniform Common-Interest Ownership Act (UCIOA)—a model statute for community-association law. Nevada lawmakers, departed quietly from the model in two consequential respects. First, it did not designate at the time an administrative agency to ensure compliance [1]. This would be corrected a few years later. The second departure was in the wording of NRS 116.3103, the provisions governing executive board duties.

This paper demonstrates that Nevada's statutory scheme—though enacted to balance volunteer protection with fiduciary responsibility—is in effect one in which duties exists but enforcement does not. It argues Nevada's latter departure from the UCIOA in 1991 related to director duties was a mistake – one in need of correction.[2]

Initial Departure from the UCIOA

When Nevada adopted the UCIOA in 1991, it followed the model act closely but made several *textual deviations in the section governing association boards—**NRS 116.3103***.

Specifically:

1. Nevada added language making HOA boards "subject to the business-judgment rule."
2. It inserted a phrase referring to "the insulation from liability provided for directors of corporations by the laws of this state."
3. Applied a single fiduciary standard to all directors and officers, without distinguishing between declarant-appointed and owner-elected members as the UCIOA and later the American Law Institute (ALI) in the *Restatement* (Third) *of Property*: Servitudes recommend [3].

Lawmakers codified the phrase "business judgment rule" —a doctrine drawn from corporate law but never formally defined in the community-association context. That insertion embedded a doctrine of judicial deference into a system of director accountability founded on administrative reasonableness and fiduciary obligation.[4]

From its inception, Nevada's version of UCIOA combined two differing models: the public-administrative ethos of the UCIOA and the for-profit presumptions of the BJR. The statute declared CIC directors to be fiduciaries while attaching a presumption of correctness that limits how that duty may be tested [5].

Over time, amendments to NRS 116.3103 have brought Nevada CIC governance more aligning it with the national model. But the foundational ambiguity has never been addressed: the BJR — undefined, judicially imported, and contextually misplaced—remains embedded in Nevada's CIC statute today.

Understanding the Business Judgment Rule

The business judgment rule is not a behavioral standard; it is a doctrine of judicial restraint that determines when courts will review, or defer to, a board's decisions [5]. At its core lies a presumption that directors act on an informed basis, in good faith, and in the honest belief that their decisions serve the organization's best interests. Designed for commercial corporations whose directors take risks in pursuit of profit, the rule prevents judges from substituting their own hindsight for managerial discretion.

Community-association boards, however, do not operate entrepreneurial enterprises. Their function is administrative—maintaining property, enforcing covenants, and spending mandatory assessments for collective purposes. Transplanting a rule meant to protect risk-taking business decisions into that environment replaces fiduciary accountability with deference. The result is a presumption of propriety in a setting where transparency and fairness, not speculation, are the governing norms.

Codified Definition?

This research finds Nevada law provides no single, unambiguous definition of the business judgment rule. The phrase itself appears only once in Nevada statutes—within NRS 116.3103(1), the provision governing executive boards of common-interest communities. There is no associated definition in NRS 116. Neither NRS 78 (for-profit corporations) nor NRS 82 (nonprofit corporations) uses those words.

Nevada is unusual in that the Legislature invoked the doctrine by name in its HOA statute before defining the term anywhere else in state law. The omission left the statute without interpretive guidance, inviting uncertainty about whether Nevada courts should apply corporate-style deference in the community-association context—a question the Legislature never answered.

From Fiduciary Duty to Presumption of Compliance

Fiduciary duties define ***what*** a board must do—act in good faith, be loyal, with care, and in the community's best interest. The BJR, by contrast, dictates ***how*** those actions are reviewed—by presuming they are valid unless an owner proves fraud, bad faith, or knowing illegality.

Shielding a fiduciary duty from examination with a presumption fundamentally alters the balance between homeowner rights and board discretion. What begins as an obligation of justification can, in practice, become a burden of disproval—shifting the onus from those entrusted with power to those subject to it. Without meaningful discovery rights or transparency, that inversion leaves homeowners with formal duties owed to them but few practical means to enforce them.[6]

Unlike public officials, association directors operate without an independent ethics body or inspector-general mechanism to which owners can turn. No administrative forum exists to review conflicts of interest or misuse of authority; the Division's limited investigatory function begins and ends within the same agency that decides whether to refer a case for discipline. The absence of that ethical oversight structure—routine in public governance—amplifies the consequences of statutory deference.

This pairing erodes both owner trust and the foundational principle that no one should wield unaccountable authority. It is most acute during periods of declarant control, when developer appointees dominate the board and internal checks are weakest. This has long been recognized by ALI and ULC.[7] Yet under current law, the presumption of propriety extends even to those directors whose loyalties may well be divided between fiduciary duty and private development interest.

By incorporating the "business-judgment" qualifier, Nevada transplanted a deference mechanism suited to business enterprise into a fiduciary framework designed for stewardship—creating a mismatch of function. In practice, this yields a fiduciary duty calibrated for entrepreneurial risk-taking rather than the administrative obligations of community governance.

The Court's For-Profit Definition

Long before *Chur v. Eighth Judicial District Court*—Nevada Judiciary's recent articulation of the BJR —courts had already applied the rule as a restraint on judicial interference in corporate governance. As early as the 1980s and 1990s, the Nevada Supreme Court followed Delaware's formulation, *presuming* that corporate directors act on an informed basis, in good faith, and in the honest belief that their decisions serve the corporation's best interests.

When the Court revisited the issue in *Chur* (2019), it did so under NRS 78.138, a lens to for-profit corporate governance. The Court confirmed that "NRS 78.138 codifies Nevada's business-judgment rule," interpreting subsections (3) and (7) as creating a statutory presumption of good faith and informed decision-making [8]. *Chur* did not invent the doctrine, rather it recognized the Legislature's deliberate codification of a presumption lawmakers explicitly deemed appropriate to the risk-taking environment of for-profit enterprises.

That statutory foundation, however, does not exist in NRS 116, which governs common-interest communities. The HOA statute contains no explicit presumption of good faith and no expression of the entrepreneurial risk the corporate rule was designed to protect. Instead, it simply directs that boards act "subject to the business-judgment rule," borrowing the vocabulary of corporate law without importing context.

The result is categorical confusion: a doctrine designed to shield commercial risk-taking has been grafted onto nonprofit governance. The court's deference, which makes sense when reviewing strategic business choices, becomes misplaced when applied to quasi-governmental boards exercising coercive authority over homeowners. This mismatch invites inconsistency and undermines accountability, underscoring the need for legislative clarification.

The BJR Remains: Possible Explanations

The persistence of the BJR clause in NRS 116.3103 is difficult to reconcile with the statute's fiduciary structure. Its survival through multiple comprehensive amendments—including the 2011 revision that redefined board duties, added nonprofit cross-references, and introduced conflict-of-interest rules—suggests conscious retention rather than legislative oversight. Whatever its origin in 1991, the clause has since taken on a life of its own.

Several factors may help explain this endurance. The first is conceptual. Legislators and industry witnesses appear to have conflated the BJR with general immunity for volunteer directors. In the absence of precise definition, it came to be viewed as a safe harbor for unpaid community volunteers rather than as a doctrine of judicial restraint. Legislative summaries and early Ombudsman training materials reinforced this misapprehension by describing the rule as a means of shielding volunteers from "personal liability," even though Nevada's nonprofit statute already offered indemnification and insurance provisions that served that function.[9]

A second factor is linguistic familiarity. Nevada's corporate statute, NRS 78.138, expressly codified a presumption for-profit corporation directors act in an "informed basis, good faith, and honest belief". Courts then built the BJR doctrine exclusively on this core resumption. Borrowing that phrasing may have seemed a natural way to modernize HOA law, particularly to legislative counsel accustomed to drafting in corporate idiom.

Third, the absence of judicial clarification allowed the ambiguity to persist unchecked. This research finds no Nevada decision interpreting the phrase "subject to the business-judgment rule" in the HOA context. Without case law highlighting its inconsistency, legislative committees had little incentive to reopen the issue.

Finally, institutional dynamics favored continuity. By the late 2000s, industry lobbyists had become the lead, arguably sole participants in drafting HOA legislation. Retaining the familiar BJR phrasing avoided controversy over director liability, in particular that of appointed directors —a politically sensitive issue. From a drafter's perspective, addressing the clause risked being misinterpreted as exposing volunteers to lawsuits, even though the true effect would have been only to clarify standards of review.

Whatever the motivation, the result is structural inconsistency. The next section turns to the model that Nevada might have followed instead: the approach adopted by the American Law Institute and the Uniform Law Commission, which preserves protection for good-faith volunteers without surrendering accountability to presumption.

The ALI and *Restatement* Approach

By contrast, the *Restatement (Third) of Property*: Servitudes—which addresses community-association governance rather than corporate management—contains no BJR presumption. Section 6.14 imposes a straightforward fiduciary duty of loyalty and care on association directors.[10]

The omission was deliberate. The American Law Institute considered and rejected the Business Judgment framework when drafting §§ 6.13 and 6.14. Comment b to § 6.13 notes that volunteer directors should be protected "by indemnification and insurance, not by immunity from judicial review." [11] The ALI thus framed community-association governance through fiduciary principles and expressly declined to import the corporate doctrine of judicial deference [12]

Administrative Agencies: A Better Fit

If HOAs are to be treated as the powerful quasi-governmental entities that they are, they should be judged by standards appropriate to that role. They more closely resemble administrative agencies than profit-seeking corporations. [13] As Professor Michael C. Pollack observes, homeowners' associations more closely resemble administrative agencies than corporations. Both exercise coercive power over captive populations, but administrative agencies must earn judicial deference by showing they acted rationally, followed fair procedures, and based their decisions on evidence. Pollack would extend that model to community associations: deference earned through accountability, not presumed through status. [14]

When corporate deference is imported wholesale, it shields coercive authority rather than entrepreneurial judgment. That inversion is what makes the current rule structurally unsound.

From Misplaced Protection to Structural Reform

The BJR remains uniquely embedded in Nevada's version of the model law. Its presence prevents full conformity with the administrative-reasonableness approach envisioned by the UCIOA and ALI. In effect, a for-profit doctrine of judicial deference continues to govern a nonprofit system of community management—blocking the very evolution that Nevada's subsequent amendments otherwise advanced.

The Legislature can restore coherence to Nevada's statutory framework by completing the realignment it began more than two decades ago by:

1. **Deleting the BJR clause from NRS 116.3103(1).** This single clause converts a fiduciary duty into a presumption of correctness. Deleting it restores judicial discretion to weigh conduct under the proper standard.
2. **Codifying reasonableness as the governing test.** Directors should act "reasonably, in good faith, and in compliance with law." This aligns with ALI and ULC guidance and ensures review focuses on fairness, not presumption.
3. **Mandating heightened review during declarant control.** When a developer's appointees dominate the board, internal accountability is weakest; the statute should

therefore mandate more searching scrutiny—precisely the heightened review the ALI envisioned when recommending that declarant-appointed directors owe trustee-level duties.

4. **Retaining indemnity protections for true volunteers** under **NRS Chapter 82** so that good-faith service remains shielded from personal exposure while compensated or declarant-affiliated agents remain accountable.
5. **Considering the 1994 recommendation of the Uniform Law Commission** to raise the duty of declarant-appointed directors to that of a trustee. [15]

These reforms would realign Nevada with the national standard—protecting honest volunteers while reinstating meaningful oversight where it matters most.

Conclusion

Nevada's statutory experiment with the Business Judgment Rule has produced more confusion than clarity. In adopting NRS 116.3103, lawmakers inserted a judicial doctrine they either did not fully understand or that has since evolved beyond what they intended. Rather than defining its scope to fit the statutory purpose they were creating, they relied on a shorthand borrowed from corporate law—an undefined invocation of the BJR. That decision, or drafting error, left a void in the statute that courts have filled with deference, allowing a misplaced common-law doctrine to reshape the duties and accountability of association directors.

The Legislature, not the judiciary, must now clarify the standard it meant to impose and restore the statutory fidelity that Nevada's version of the Uniform Act was intended to preserve. Only then will Nevada's promise of fiduciary accountability move from paper to practice.

Lawmakers must focus on the real drivers of costly or unnecessary disputes—a nonresponsive administrative dispute process, prevailing-party fee provisions, and the underuse of alternative dispute-resolution structures already in existence—rather than permitting the insulation of boards through a misplaced rule of deference.

These reforms are part of a broader movement to restore enforceable accountability within Nevada's common-interest community system—aligning statutory intent, administrative process, and judicial doctrine around a single principle: **authority must be answerable.**

Endnotes

[1] The Uniform Common-Interest Ownership Act (UCIOA) was drafted with the expectation that adopting states would designate an administrative agency to oversee education, registration, and dispute resolution. *See* UCIOA § 5-101 & cmt. 1–2 (1982). Most early-adopting states — such as Colorado and Connecticut — placed implementation under their real estate divisions almost immediately. Nevada adopted UCIOA in 1991 without enacting Article 5 or designating such an agency. *See* 1991 Nev. Stat., ch. 245, §§ 1–132, at 555–609. Administrative oversight implementation did not follow until 1997, when the Legislature created (AB 221) the Office of

the Ombudsman for Owners in Common-Interest Communities and the Common-Interest Communities Commission. *See* 1997 Nev. Stat., ch. 635, §§ 1–31, at 3205–22 (enacting AB 221). *See also* Minutes of the Assemb. Comm. on Gov't Affairs, 69th Leg. (May 7, 1997) (statement of Jim Gibbons, Real Estate Administrator) (acknowledging that the Division previously had no authority to address homeowners' association complaints).

[2] A third departure from UCIOA was added in 2011- today section 1(b). The UCIOA did not include an explicit conflict-of-interest rule for association directors. See UCIOA § 3-103 & cmt. 2 (1994) (stating that the issue of conflicts "is left to other state law"). The omission was deliberate: the drafters expected that each state's existing nonprofit-corporate or public-ethics statutes would govern those situations. Two decades later Nevada, through Assembly Bill 354, 76th Leg. (2011), later codified at 2011 Nev. Stat., ch. 389, § 8, 2451–52, adding to NRS 116.3103(1) that executive-board members "are subject to the conflict-of-interest rules governing the officers and directors of a nonprofit corporation organized under the law of this State." The measure formed part of a broader 2011 reform package—AB 354 §§ 1–10—intended to strengthen governance transparency through new open-meeting and financial-disclosure provisions. During committee hearings, the Real Estate Division described the amendment as aligning HOA boards "with the accountability standards applicable to nonprofit corporations." The Uniform Law Commission did not adopt an analogous rule until the 2014 UCIOA § 3-118A ("Conflict of Interest—Association Officers and Directors").

[3] Restatement (Third) of Property: Servitudes §§ 6.13–6.14 (Am. L. Inst. 2000) (separating duties of declarant-appointed and owner-elected directors; declarant appointees owe trustee-level fiduciary duties). See also UCIOA § 3-103 (1982) ("officers and members of the executive board shall exercise (i) if appointed by the declarant, the degree of care and loyalty required of a trustee; and (ii) if elected by the unit owners, the degree of care and loyalty required of an officer or director of a nonprofit corporation") & cmt. 2 (clarifying that the heightened standard for declarant-appointed directors protects owners from self-interested control during the development period).

[4] See Michael C. Pollack, Judicial Deference and Homeowners' Associations, 45 Real Prop. Tr. & Est. L. J. 307, 314 (2010) (observing that corporate-style deference can "invert the accountability relationship" between boards and homeowners).

[5] "It seems [more likely, however,] that adoption of the business-judgment rule is intended to reduce the ease with which disgruntled members can obtain judicial review of association decisions…" *Restatement (Third) of Property: Servitudes* § 6.13 (Am. L. Inst. 2000) comment b, p236.

[6] This imbalance reflects a systemic design problem rather than isolated failure. Its components include a dispute-resolution framework ill-suited for HOA governance (channeling most conflicts into costly civil litigation), statutory prevailing-party fee provisions that chill owner challenges, a regulatory agency reluctant to use the enforcement tools lawmakers provided, and confidentiality laws that conceal outcomes from public scrutiny. The Nevada Real Estate Division investigative arm routinely dismisses owner complaints absent fully developed substantiation, often deferring to association counsel rather than testing statutory compliance.

Meanwhile, the Common-Interest Communities Commission, the adjudicative body intended to oversee enforcement, has effectively abdicated its role. Together, these elements convert fiduciary duties into formalities, leaving owners with rights on paper but little practical means to enforce them. See also *Nadav Shoked, Forget the Pink Flamingos: Governing Private Communities as the Public Interest Requires*, 45 Fla. St. U. L. Rev. 205 (2023); NVHOAReform.com, *Nevada Knows Fee-Shifting Is Dangerous — But Uses It in HOAs* (2025).

[7] *Cf.* supra note 3 and accompanying text.

[8] *Chur v. Eighth Judicial Dist. Ct.*, 136 Nev. 68, 460 P.3d 605 (2020) ("NRS 78.138 codifies Nevada's business-judgment rule").

[9] Cf. Minutes of the Assemb. Comm. on Gov't Affairs, 69th Leg. (May 7, 1997) (statement of Jim Gibbons, Real Estate Administrator) (describing intent to protect volunteer board members from personal liability).

[10] *Restatement (Third) of Property: Servitudes* § 6.14 (Am. L. Inst. 2000) (imposing fiduciary duties of loyalty and care on association directors without any business-judgment presumption).

[11] Id. § 6.13 cmt. b (stating that volunteer directors "should be protected by indemnification and insurance, not by immunity from judicial review," thereby rejecting the business-judgment rule as a shield for community-association governance).

[12] See *Proceedings of the American Law Institute*, *Restatement (Third) of Property: Servitudes* (1998–2000) (reflecting debate and formal decision not to extend corporate-law deference to association boards).

[13] *Pollack, Associations as Administrative Agencies*, 120 Mich. L. Rev. 753 (2022) (comparing HOAs to administrative agencies that must justify deference through procedure and reasonableness).

[14] *Id.* (arguing that deference should be earned through accountable process, not presumed through status).

[15] *Uniform Law Commission, Summary of 1994 UCIOA Revisions* (recommending elevated fiduciary duties for declarant representatives).