

NEVADA STATE BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS
Minutes of the Public Hearing
Held at 241 W Charleston, Suite 130, Las Vegas, Nevada 89102,
Thursday, September 13, 2018

Vice Chair Karen Purcell, PE, declaring a quorum present, called the meeting to order at 8:30 am. Board members present were; Kent Anderson, PE (joined the meeting in progress at 8:55 am); Michael Kidd, PLS; Brent Wright, PE/SE (joined the meeting in progress at 8:45 am); Angelo Spata, PE; Tracy Larkin-Thomason, PE; Thomas Matter, public member; Gregory DeSart, PE. Also present were Patty Mamola, PE, Executive Director; Louisa Kern, Administrative Assistant; Murray Blaney, Compliance Officer; and Chris MacKenzie, Board Legal Counsel. Board Chair Robert LaRiviere was excused.

1. Open hearing for LCB number R085-18

Ms Purcell called the meeting to order at 8:30 am. She stated that each of the agenda items would be discussed and voted on individually.

2. Presentation, discussion and adoption of the proposed changes to Nevada Administrative Code 625 as drafted by the Nevada Legislative Council Bureau, LCB file number R085-18

- a. NAC 625.260 revises provisions concerning structures and buildings that are required to be designed by professional engineers licensed as structural engineers, also clarifies highest point reference.

Ms Purcell asked if there was any discussion or clarification needed on this item. There was none. Ms Purcell then asked if there was any public comment on this item. There was none.

18-55 Motion was made by Mr Kidd, seconded by Mr Matter to approve the adoption of the revised provisions of NAC 625.260 as presented. The motion passed unanimously (members Wright and Anderson had not yet arrived to participate in the vote).

- b. NAC 625.545 adds professional liability insurance disclosure to the contract requirements, if professional liability insurance is carried, disclosure of the limits of coverage provided by the policy.

Ms Purcell asked if there was any public comment on this item. There was none. Ms Purcell asked if there was any discussion by the board.

Mr DeSart said he would like to take a few minutes to articulate his concerns to the board regarding this item. He said that the proposed changes are well intended in the sense that it is protecting the public to make a more informed decision before they enter into a contract. He continued to say that the intention he agreed with, but the mechanism, he did not know if he did.

Mr DeSart said it has been argued that one of the primary focuses of the vote by the board is for the welfare of the public. He added that is exactly what the board's role is, as stated in NRS 625.005. He said it also has been discussed that there is a threat to licensure, and it has even been discussed at NCEES. Mr DeSart continued to say that it is out there looming but we don't exactly know what it means at this time. He said at NCEES annual meeting there was a keynote speaker that discussed how the boards are relevant. The speaker eloquently pointed out, for us to be relevant, boards need to promote the public welfare and develop regulations that business understands. Mr DeSart continued to say that the presenter stated that these don't have to be mutually exclusive - it does not have to be an either or kind of thing. He said that the speaker used a stark example showing an image of the New Hampshire license plate highlighting the state motto of "Live Free or Die". The speaker then asked the question - does it have to be one or the other or can it just be something in the middle. Mr DeSart said this item can be a case where that sentiment can be applicable. He continued to say, unfortunately, the proposed changes, even though well intended, do neither in his opinion.

Mr DeSart said he thought, as written the amendment can cause the public to be misled and that he believed it could also result in confusion for business owners and engineers. He said to him the issue has to do with the language and that it misses the mark on how professional liability insurance is written.

Mr DeSart said as he understands it, professional liability insurance is written on a claims made basis. When you buy insurance for a year and you have coverage during that year, claims can be made that year, or maybe for work that was done 10 years ago. Mr DeSart continued to say with that scenario there are a couple issues; first, is that a member of the public could enter in a contract with an engineer on Monday and that insurance could expire on Tuesday; that public member is made to believe that he is entering in a contract with an engineer that has insurance. He may have insurance that day and it would be perfectly legal but he may not have insurance the next day. Therefore the public would be misled. He continued to say, it could be a day, a year later, or whatever. Secondly, the proposed change indicated that the engineer must disclose the limits of coverage provided by the policy of insurance. He said that this language is unfortunate. He added that he didn't think that is really what our committee actually proposed in several ways; - A) the limits of coverage may not be the same as the available coverage since there may be claims that have been made on that policy that may have eroded the coverage amount. He continued to say, if you buy a million dollar insurance policy and you have a \$500,000 claim against you, you only really have \$500,000 in available coverage but the limits of coverage are still a million dollars - which can be misleading to the public. Mr DeSart stated that the available coverage may even be close to zero even though the limits are a lot higher than that. He then said, B) the engineer/business owner will have a problem with this too because they are left to interpret if they need to disclose the limit of coverage that they purchased or the available coverage at the time of contract signing. Mr DeSart said that he thought the only way that it is going to be figured out is by an issue coming to the board. He said he didn't think it is clear what amounts that would need to be disclosed in the contract. He continued to say he didn't think it was really protecting the public.

Mr DeSart said, in summary, and in his opinion, even though the revision has good intentions, as written, the proposed amendments 625.545 are potentially misleading to the public, may cause confusion, and may cause a new burden on engineers for the reasons that he described. He said that he would move that this amendment to NAC 625.545 not be adopted at this time. He added that he personally did not have a suggestion on how to make it better. He said he thought it requires possibly some input from the insurance industry and more consideration. Mr DeSart continued to say that licensed contractors have bonding requirements, and that he thinks this kind of goes along those lines; but the bonds contractors have are way different from liability insurance. He said they are performance bonds that have to do with making sure they finish jobs as opposed to professional liability insurance for negligence.

Mr DeSart said that he would like to make a motion that the changes not be adopted.

Mr MacKenzie said that the four proposed NAC amendments were all a part of one submission package, and it would have to be determined by consulting with the LCB if we can strike a section, and whether we can go forward with the others. He said the LCB have provided the draft regulations to us in one package with different sections and we would ask, since we are not changing the section, we would be deleting it, that the rest could move forward to the LCB. He continued to say that the LCB might say no, and then the board would then need to go back and start over and make a new submission. He said ideally we would like to work these things out at the workshop level, but that is why we go through this process because points of opposition are being brought up.

Ms Mamola said that at the last special board meeting that the board members voted to move forward with this proposed language and that is why we are here today to vote on the adoption of these regulations. She continued to say, as Mr MacKenzie had mentioned, this has been a very lengthy process to solicit public comment from our licensees, specifically small businesses. The survey statistics indicated that about 25% of the small business respondents had concerns with the language, and that most of those concerns related to what they believed were mandating that they carry professional liability insurance, which is a misunderstanding. She continued to say, the language change is not mandating that anybody carry professional liability insurance, it is that they must disclose if they have it, and if they have it, the limits of coverage. Ms Mamola also said, alternately, 75% of small business owners did not have issue with the proposed change.

Mr DeSart said the part of his weighing in on the issue is that the language is confusing and there are some misunderstandings with the way it is written. He added that when the board did vote on it at the last special board meeting it was a split vote and there were 7 people present, 3 voted against it and 4 in favor of it, so it was not a unanimous vote. He continued to say that he does realize that it has been a long process and it may seem like a setback, but this is the last chance to come up with a better language or a better way to address this issue.

Ms Mamola asked for clarification from Mr DeSart, is his issue the disclosing the limits of professional liability, or just the limits of coverage provided, or the full amendment. She added that this would be helpful, to get clarification, if the proposed changes are sent back to the legislative committee for revision.

Mr DeSart said it is essentially both, the full amendment. He said he is less concerned with disclosing whether or not you have coverage as he is with disclosing what the limits are, because the limits are what would be disclosed in the contract. He continued to say, but disclosing that you have coverage, again the way it is done, you can sign a contract on Monday that says you have coverage, and on Tuesday, you don't have coverage. Mr DeSart said that in his opinion this is misleading to the public. He added there are no requirements here to maintain it and that he would be more supportive of something that said you had to have professional liability insurance, but that too has issues. It may not be available as you may not be insurable, and it's expensive. Mr DeSart said that if the licensee only did one or two engineering projects a year it may not be viable to have professional liability insurance. Mr DeSart stated that he did not have the solution to this and believes it requires a little bit more study before we move forward with any temporary regulation.

Mr MacKenzie said if the board was to go forward with the amendment, and he clarified that he was not advocating one way or the other, would the revision at least have an expression on the policy coverage point. He added that he believed it would be a worthy discussion on the board's intent as whether or not it is just to disclose your policy limits or your policy balance and to provide at least some clarification on how it is to be interpreted. He asked whether the licensee would have to disclose their policy balances at the time of the contract or what their policy limit was at the time of the contract.

Mr DeSart said he again thought both ways are problematic and could be misleading to the public. He continued to say, if the intent is to disclose the available coverage, then in his opinion, that is a burden on the engineers as it is a moving target, in that it may change on a daily or weekly basis. He added some larger companies that have a 10 million dollar policy may have claims all across the world and gathering that information may be a problem, even for smaller firms. He said he'd prefer it not be included.

Mr MacKenzie said if the amendment does happen to be approved today by the board, what the board would convey as their intent so there is some guidance for people. Would it be that we want to know the balance or do we just the policy limits - so we are not requiring the licensee to figure out a moving balance.

Mr Kidd said he thinks there is a general perception by the public that when they hire a professional that they (the professional) has professional liability insurance. He continued to say that this is an effort to try to add clarity for the public. Mr Kidd said he wasn't sure if there was language that could address all of the issues, but at least there could be a discussion between the two parties entering into a contract.

Mr DeSart said he understands the intent and he agrees with the intent, but he is more concerned with how it is currently written and that it may be misleading to the public. He said duration of coverage is not addressed. A licensee saying they have insurance today may not have it a year from now or may not have it two years from now when a client's house falls down - and now the public goes and says I am going to make a claim against your insurance, and the engineer says well I don't have insurance. Mr DeSart said that is a problem.

Mr Kidd asked if the possibility of misleading a portion of the public outweighs the current general misconception that every professional has liability insurance. Mr DeSart said that he thought it did.

Ms Purcell asked for any public comment. There was none.

18-56 Motion was made by Mr DeSart, seconded by Ms Larkin-Thomason to not approve the adoption of revised provisions of NAC 625.545 as presented.
The vote was split. For the motion were; Mr DeSart, Ms Larkin-Thomason, Mr Anderson, and Spata. Against the motion were; Mr Wright, Ms Purcell, Mr Kidd, and Mr Matter.

Mr MacKenzie said the motion fails for lack of majority.

18-57 Motion was made by Mr Kidd, seconded by Mr Matter to approve the adoption of revised provisions of NAC 625.545 as presented.
The vote was split. For the motion were; Mr Wright, Ms Purcell, Mr Matter, and Mr Kidd. Against the motion were; Mr Spata, Ms Larkin-Thomason, Mr DeSart, and Mr Anderson.

Mr MacKenzie said the motion fails for lack of majority.

Ms Mamola asked if it would it change anybody's thought process just to remove the language about limits of coverage. She clarified that this was to give the legislative committee direction on any revisions to the amendment.

Mr DeSart said that would still create an issue of having insurance at the time the contract is signed and that it may not necessarily be carried for the duration of the project.

Mr Kidd said if the liability wording is not on the contract there is a general assumption by the public that the professional carries it, but if there was something included that they had to read, then it creates awareness. Questions can then begin about how much is it, can you cover my claim, and when does it expire. Mr Kidd continued to say that he thought this language would better inform the public when entering into a contract.

Mr Kidd asked if language was approved and adopted as is, and then the legislative committee comes back with more suitable language; would there be a specific timeframe to adapt the regulation. Ms Mamola replied that the language can be changed, as the current amendment would be adopted as a temporary regulation. She added additional revisions would need to go the LCB and their committee for final approval before permanent adoption.

Mr MacKenzie also said that the Legislative Counsel Bureau would meet and that any temporary regulation is subject to any number of reviews at that level, and even if the board approved a change, it doesn't mean it will be passed by the legislators.

Mr MacKenzie said that something to consider is that everyone will have a different contract. Where some projects may involve two parties who more sophisticated, where their contract will cover many of the points mentioned; then others may be a homeowner who has no contract experience. He added that if a licensee met the elements required of the contract, they could not be disciplined even if they stated something very basic. Mr MacKenzie said that if this amendment is adopted a lot of it is going to come down to how people fashion their contract.

Mr Wright said that less knowledgeable members of the public who are contracting for smaller projects would gain by having the additional language to make them aware. He added that he acknowledged the possibility that a contract could be signed stating that there was insurance coverage today but that it may not be current tomorrow.

Mr DeSart said that the same engineers that are working for those less sophisticated people are the ones that would pull that type of a stunt and are most likely try to work the system. He said he knew of engineers who don't carry professional liability insurance so that they don't risk getting sued. Mr Wright said that proposed language does not mandate carrying professional liability insurance. Mr DeSart responded that he believed some may purchase insurance for a month just so they can say they had it when signing a contract.

Ms Mamola said the current recourse for a homeowner whose house may be falling down is disciplinary action against the licensee and possible recovery of engineering services costs; but they have a house that is falling down, and they are going to be out of a home and out of pocket for a lot of money. She continued to say as a board, it is our charge to protect the health, safety, and welfare of the public.

Mr DeSart said that again, it doesn't have to be mutually exclusive. The way it is currently written without the clarification for what the insurance will be covering, if it could be interpreted as the available limits, then that is a burden on business, the engineer, and the engineering community.

Ms Mamola said from her understanding, the intent of regulation was to create a minimum standard. The intent is asking what the limits of your policy are and that is it – not to see what your available coverage is. That is the bare minimum. Ms Mamola added it does raise the issue for the public in entering into that contract and they can add more stringent requirements in the contract if that is their desire; they can also choose to ask other questions. She continued to say that at least they are informed and they are entering into a contract making assumptions.

Mr DeSart said he is just saying we need to try to protect the public from a false sense of security, and that we might be leading them down the wrong path.

Ms Purcell asked if there was further discussion or any public comment. There was none.

18-58 Motion was made by Mr Matter, seconded by Mr Kidd to approve the adoption of the revised provisions of NAC 625.545 as presented.

The vote was split. Those in favor were; Mr Wright, Ms Purcell, Mr Matter, and Mr Kidd. Against were; Mr Spata, Ms Larkin-Thomason, Mr DeSart, and Mr Anderson.

Mr MacKenzie said the motion fails and this portion will not move forward to the LCB.

- c. NAC 625.610 revises provisions related to stamps, seals, and signatures of professional engineers and professional land surveyors.

Ms Purcell asked if there was any discussion or public comment on this item. There was none.

18-59 Motion was made by Ms Larkin-Thomason, seconded by Mr DeSart to approve the adoption of the revised provisions of NAC 625.610 as presented.
The motion passed unanimously.

- d. NAC 625.630 revises provisions related to advertising for or offering to perform land surveying or engineering – removing the physical requirement of full-time PE/PLS at each business location where work is being completed.

Ms Purcell asked if there was any discussion or public comment on this item. There was none.

18-60 Motion was made by Ms DeSart, seconded by Ms Larkin-Thomason to approve the adoption of the revised provisions of NAC 625.630 as presented.
The motion passed unanimously.

3. Public comment (Discussion Only)

There was no public comment.

4. Close Hearing for LCB file number R085-18.

5. Adjournment.

The hearing was adjourned by Vice Chair Purcell adjourned at 9:30am.