

**State of Nevada Board of Professional Engineers and Land Surveyors
Minutes of the Public Hearing, Intent to Act on Regulations.
Held 2:00 pm in the Ed and Mary Alice Pine Board Room, Suite 130,
1755 East Plumb Lane, Reno, Nevada 89502**

Board Chairman Robert LaRiviere, PLS, called the meeting to order at 2:00 pm, in the Ed and Mary Alice Pine Board Room, Suite 130, 1755 East Plumb Lane, Reno, Nevada 89502. Board members present were Chairman Robert LaRiviere, PLS and Vice Chairman Karen Purcell, PE. Board members connected via teleconference were Greg DeSart, PE; Angelo Spata, PE; Kent Anderson, PE; Brent Wright, PE; Michael Kidd, PLS; Tracy Larkin-Thomason, PE; and Thomas Matter, Public Board Member. Also on the teleconference were Patty Mamola, PE, Executive Director; Christopher MacKenzie, Board Counsel; Lynn Campbell from Assurance Limited; and Michael Edwards from Messner Reeves LLP. Also present were Murray Blaney, Compliance Officer, and Louisa Kern, Administrative Assistant.

1. Open Hearing for LCB file number R085-18 – Section 2 by Chair Bob LaRiviere:Public Comment

Mr LaRiviere asked if there was any public comment.

Ms Campbell (Lynn Campbell) introduced herself as being an insurance agent from Assurance Limited. She continued to say that she has been in the insurance business for over 40 years in Las Vegas and specializes in professional liability insurance for the design community. Ms Campbell said she read the proposal and thought she might be able to provide some clarity on the issues.

Mr Edwards (Michael Edwards) introduced himself as an attorney at the law firm Messner Reeves. He said he had been representing design professionals in the state of Nevada for a better part of 25 years and like Ms Campbell, could provide insight on the proposed changes to the administrative Code 625 Section 2.

Mr LaRiviere invited those with public comments to speak.

Mr Edwards said he wanted to address the board with comments specifically about the disclosure of the policy limits for a design professional policy. Mr Edwards said he was sure the board is aware that professional liability policies for design professionals are very unique, and that the policies were very different from those carried by general contractors and sub-contractors. He added, the policies themselves, regardless of the amount of the policy, are known in the industry as burning limits policy or eroding polices which specifically means that all costs including defense cost; all costs incurred in either defending or paying a claim during a policy year erodes the limits of the policy. Mr Edwards said, if a company has a \$500,000 policy and there is a claim, even if there is no indemnity money paid on that claim, and the defense costs are \$300,000, then the available limits of that \$500,000 policy is eroded to \$200,000. He added that in essence makes the disclosure of the limits of the policy a possible source of misinformation because the limits purchased may not be the limits available on policy at the time of contract.

Mr Edwards said he was concerned on that issue on whether that amount may be relied upon by a consumer, that it would be a misunderstanding of the limits of the policy that are actually available and what that policy may in fact cover. He continued to say a lot of consumers want the policy limits

to be known because they want to be named as additional insured. Mr Edwards said it can bring up issues like guarantees or they want additional insurance to cover their own insurance, or otherwise take on liability on things that are also in their policy, so he thought potentially it could be a source of misinformation. He continued saying, these types of insurance policies are very expensive - the higher the limits the more expensive the policy.

Mr Edwards said that there are many multi-jurisdiction design professionals that do work in the state of Nevada, that by the very nature of their work, carry much larger limits of insurance – such as a \$5,000,000 policy or a \$10,000,000 policy. He stated the he had a concern that many of our local design professionals typically don't have the ability to carry those types of large limit policies and that a consumer looking at nothing but stated limits of the policy might be unfairly biased in favor of a company just because of the higher limits. Mr Edwards added, that those higher limit companies may have 2, 3, or 4 claims against that one policy. He said he thought there could be potential for unfair prejudice or bias against smaller companies in the state of Nevada.

Ms Campbell said the main message she wanted to convey was that the limits of insurance on a policy does not equate to the limits available to pay a claim. Professional liability policies are written on what is called claims made concept vs an assurance concept so it is completely different from auto, commercial, and general liability. Ms Campbell added that stating a limit at any given time could definitely be a misunderstanding by the consumer; especially the uneducated consumer in terms of insurance.

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

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

Mr LaRiviere thanked Mr Edwards and Ms Campbell for their public comment. Mr LaRiviere said that a number of the points raised about claims against these coverages had been discussed in previous meetings. He said that what we want to do is to inform the consumer that hires an engineer or surveyor, when they are signing a contract, whether the licensee has insurance or not. Mr LaRiviere added that the board is aware that available coverage can be a revolving door at any given point. Ms Campbell said that the people at this hearing understand how professional liability insurance works but let's take this a step further to the individual consumer who is building a patio or having a pad for a garage or something, do you think they would understand the last sentence of the proposed regulation - that the limits of coverage provided by the policy are not necessarily the limits available to them at the time of a claim. Mr LaRiviere said that educating the consumer would be a big endeavor. He said that the board wanted to address the point that people may automatically assume that every professional carries insurance and that that is not the case. Mr LaRiviere added that getting into the details of available coverage, was not somewhere the board wanted to go, so we are stopping at limits of policy coverage.

Mr Edwards said the limits of the policy again may not be an honest or accurate reflection of the amount of insurance available under that policy.

Mr DeSart said the way the amendment is written the engineer is to disclose their purchase limits or their limits of coverage - it doesn't really define whether it is purchase limits or available limits - but either way they may be able to claim in a contract that they purchased \$1,000,000 of coverage and may in fact on any given day have no available coverage. Mr DeSart continued, that there lays the concern is that if this regulation were to be approved and passed as it is written, in many cases design professionals that have claims against their policies, would be disclosing a purchase limit that was greater than their available limit, and they would be misleading the public.

Mr Edwards said from the design professionals prospective stating that they have \$1,000,000 purchase limit but no available coverage, and then a client makes a claim against their insurance, now not only do they have a claim for negligence, but may also set themselves up for a claim for breach of contract, and potentially fraud.

Mr Kidd said that the board has gone back and forth on the language and he believed the Legislative Committee felt that there was value or gave weight to trying to inform the unsophisticated consumer as best we could. He said that there was a possibility that this coverage could vary, that it could be a sliding scale. Mr Kidd added that he felt the committee has vetted those issues and had these discussions. He said he didn't have anything new to add or offer, other than to the two people who are new to the discussion that may not know, that yes, the committee understands the issues.

Ms Mamola said the committee has vetted the issues and have had these very same discussions that we are having now. She said it is at the board's discretion and the board's decision to determine whether this proposed regulation is going to protect the public, and if so, we would vote accordingly.

Mr DeSart said, as brought up by Mr Edwards, that he thought it was the first time that this could potentially put a design professional in a position of committing fraud or breach of contract. It is not something I have heard come up in one of our board discussions about this and to me if the board would knowingly approve a regulation that would potentially put design professionals at risk and actually requiring them to put them into a position of committing fraud. I believe even if they have \$1,000,000 worth of purchase coverage and when in fact they have zero dollars of available coverage or something less than \$1,000,000 that is a big concern and is worth thinking about.

Mr Anderson said that as the board knows he is opposed to the amendment and NAC 625.545 as currently written. He said a contract is between the two parties and doesn't believe the board has any business being involved in setting parameters. Mr Anderson added that the board stressed quality based selection, but the proposed change may have implications where two companies bidding a project and the one with the best insurance is likely the one that wins - regardless of the capabilities of the company.

Ms Larkin-Thomason asked Ms Campbell for estimate on what professional liability insurance would cost a small business annually. Ms Campbell said it is difficult to give a general estimate as there are many variables that go into the equation. Mr DeSart highlighted the premium difference between firms performing certain disciplines and those involved in professional geotechnical engineering.

Ms Mamola said as a reminder, the proposed regulation isn't requiring professional liability insurance it is just requiring it be disclosed whether a licensee maintains it.

Mr Wright said he sees the issue as the unsophisticated client making an assumption that a higher insurance policy means a better engineer, when in fact it is just the opposite; it is the unsophisticated client that automatically assumes that any engineer they hire has insurance when that is not always the case. He said in nearly every situation a sophisticated client already asks for insurance and they ask for the limits of coverage. They don't ask for the available coverage. So that is a pretty common term.

Mr Wright asked Mr MacKenzie for an opinion of a professional indicating on a contract their limits of coverage without stating their available coverage (with that being a moving target and impossible to state), would the professional be committing fraud or deceptive practice to the public by doing that. Mr MacKenzie replied that there is always a possibility for a plaintiff's attorney to construe something akin to that. The disclosure of the amount of the policy or limit of the policy is something that every professional has the opportunity to craft in their agreement to protect themselves. Mr Mackenzie added that he would assume the professional would likely, with the assistance of an attorney, craft an agreement that sets forth how best to satisfy this regulation and protect themselves. He added that if a licensee does a one page agreement, and just states the limits, there is a possibility it could be misconstrued by a plaintiff's attorney. There is a possibility that the claim could be made whether or not it succeeds would be hard to know. Mr MacKenzie said there are many unknowns. Every professional is going to have a different contract, different provisions, and different ways of satisfying this regulation.

Mr LaRiviere said the Legislative Committee met on October 23rd and it was decided not to amend the current proposed language. He added, that commonly contracts allow you to submit an insurance certificate and that doesn't list the available insurance it just shows your insurance limits. The committee decided that was the intent and interpretation.

Mr DeSart said, as the board knows, he is adamantly opposed to the idea of disclosing the limits of coverage, mainly because it has the potential to mislead the public as opposed to an added layer of protection. Mr DeSart said he would not be opposed to the amendment if it was just a disclosure as to whether or not a professional has insurance. If it simply said that the design professional had to disclose whether or not they carry professional liability insurance it would address his concern. Mr DeSart added that once the clause of the limits of coverage is added, he believed the change could potentially be causing more harm than good.

Ms Purcell said when the Legislative Committee had met it talked about how the board would issue an opinion as to the intent of what that meant, so it would help eliminate any confusion by the public.

Mr Wright said he didn't recall the committee discussing the issue of policy limits possibly being deceptive or considered to be deceptive. He added the board may need to table the draft regulation and reconsider in light of this new discussion, that he didn't think it had been adequately vetted.

Mr Kidd put forward a motion with the understanding that the board will produce some type of

memorandum to clarify the intent of limits of coverage, to move forward with the language as it is written today. Ms Purcell seconded.

Mr DeSart said he thought it would be premature to take a vote without the document that describes the clarification because that could be key to a board member decision. He continued to say that he incorrectly assumed that this clarification document would be available to review prior to this public hearing and could be considered as part of the vote. Mr DeSart said he did not think the board should be voting until we have that document.

Mr Wright said if the last half of the sentence requiring listing the limits of coverage were to be removed we might possibly make the regulation more agreeable to some members that are not currently on board as currently proposed.

Mr Spata said, perhaps not as much thought had been put into the misperception by the public relating to policy limits, or that clients may shop based on policy limits. He agreed the vote should wait until the statement of intent was available for review.

Mr LaRiviere said since there is a motion and a second on the floor, asked if Mr Kidd would entertain a friendly amendment, that would strike out the last part of the sentence, the text relating to disclosing the limits of the coverage provided by the policy of insurance. Mr LaRiviere said the new motion would read as ***a disclosure as to whether the licensee currently maintains a policy of professional liability insurance.***

18-80 A motion was made Mr Kidd, seconded by Ms Purcell, to approve NAC 625.545, striking the last portion of text, to read as ***a disclosure as to whether the licensee currently maintains a policy of professional liability insurance.*** The motion passed 8 to 1 (Nay, Mr Anderson).

Mr DeSart asked for clarification from Mr MacKenzie if with the changing of language the amendment had to go back through the full LCB process. Mr MacKenzie said the LCB may be willing to accept strike out of language as long as it doesn't change the original intent of the proposed amendment. He said, if it were to be addition of language, the higher the likelihood of having to resubmit. Mr MacKenzie said he will confirm the process with the LCB and that the proposed amendment still has to go to the legislative commission for consideration before it becomes permanent.

3. Close hearing for LCB file number R085 – 18 – Section 2: Public Comment

There is no public comment

Adjourned

Mr LaRiviere adjourned meeting at 2:44pm

Respectfully,
Patty Mamola – Executive Director