

**MINUTES OF THE
SENATE COMMITTEE ON GOVERNMENT AFFAIRS**

**Seventy-fourth Session
February 14, 2007**

The Senate Committee on Government Affairs was called to order by Chair Warren B. Hardy II at 1:55 p.m. on Wednesday, February 14, 2007, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Warren B. Hardy II, Chair
Senator Bob Beers, Vice Chair
Senator William J. Raggio
Senator Randolph J. Townsend
Senator Dina Titus
Senator Terry Care
Senator John J. Lee

STAFF MEMBERS PRESENT:

Olivia Lodato, Committee Secretary
Eileen O'Grady, Committee Counsel
Michael J. Stewart, Committee Policy Analyst
Erin Miller, Committee Secretary

OTHERS PRESENT:

Allen Lichtenstein, American Civil Liberties Union of Nevada
John L. Wagner, The Burke Consortium
Janine Hansen, Nevada Eagle Forum
Lynn Chapman, Nevada Eagle Forum
David K. Schumann, Nevada Committee for Full Statehood
Bradford Jerbic, City Attorney, City of Las Vegas
William Henry, City Attorney's Office, City of Las Vegas
Jay David Fraser, Nevada League of Cities and Municipalities
Shaun E. Jillions, City of Henderson

Senate Committee on Government Affairs
February 14, 2007
Page 2

Jason M. Frierson, Clark County
Morgan Baumgartner, Nevada Resort Association
Scott Scherer, Fremont Street Experience

CHAIR HARDY:

We have a Committee bill draft request (BDR) to consider and introduce by tomorrow. This is the local option tax for Douglas County.

BILL DRAFT REQUEST S-39: Revises provisions governing the occupancy tax imposed on lodging in Douglas County. (Later introduced as [Senate Bill 94.](#))

SENATOR TOWNSEND MOVED TO INTRODUCE BDR S-39.

SENATOR BEERS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS RAGGIO AND TITUS WERE ABSENT FOR THE VOTE.)

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CHAIR HARDY:

We have one item on the agenda today. Senate Bill (S.B.) 13 is being introduced by Senator Care.

SENATE BILL 13: Restricts local governments from enacting or enforcing certain local laws which regulate signs held, carried or displayed by persons on public sidewalks on the basis of content or viewpoint. (BDR 19-123)

SENATOR TERRY CARE (Clark County Senatorial District No. 7):

In May 2005, two street ministers were arrested for carrying signs on the sidewalk of the Las Vegas Strip. They were arrested pursuant to a Clark County ordinance. In front of you is a news column by Thomas Mitchell of the *Las Vegas Review-Journal* ([Exhibit C](#)) that demonstrates this incident occurred in May 2005. In November 2006, there was another incident where a Salvation Army bell ringer was asked to leave the sidewalk in front of a Las Vegas Strip property ([Exhibit D](#)) because of an eminent domain question. I raise that incident to demonstrate that there is some question as to who can be on the sidewalk doing what, especially when the resort corridor or Las Vegas Strip is involved.

Before you is the original ordinance ([Exhibit E](#)); I call your attention to some provisions. Under general definitions, there is a description of a "public sidewalk." The definition in [Exhibit E](#) allows the private property owner to decide whether it is a public sidewalk. Under "obstructive use," depending on the size of a person, the size of the sign is going to vary. "Permitted obstructive use" in subsection 5 defines "arguably protected" and cites a 1959 United States (U.S.) Supreme Court case. The case arose out of California. In reading the case, I concluded it did not have to do with sidewalks but with labor organizers picketing on private property of the employer.

Altogether, this means that if it is all right with the private property owner, you can picket. There are certain restrictions for the arguably protected conduct: the labor picketers. This could mean no demonstrations by war protestors, those against high gas prices, those in support of or against President Bush, or those who want to send a religious message depending on what the property owner has to say about it. This ordinance is what First Amendment case law refers to as content neutral. It does not say everybody or nobody gets to do it; it states an exception for this conduct.

Let me give you a feel for the law in this area as I read it. In a public forum, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion, it must show its regulation is necessary to serve a compelling state interest and narrowly drawn to achieve that end. The state must also enforce regulations as to time, place and manner of expression which are content neutral; narrowly tailored to suit a significant government interest; and leave open ample alternative channels of communication. The quintessential, traditional public forums are sidewalks, streets and parks. The Fremont Street Experience cases cite another U.S. Supreme Court case where there is a discussion about sidewalks.

General rule has a sidewalk as a traditional public forum. If you are going to regulate speech on a traditional public forum, you cannot do so on the basis of content. This ordinance is unconstitutional on two grounds: It is not content neutral and it is unconstitutionally vague. Senate Bill 13 says if the government is to enact such an ordinance that existed in Clark County, it has to be content neutral. The statute also amends applicable city charters to make them consistent with S.B. 13. I want to level the playing field. You can still have ordinances that regulate disturbances, crowd control and even pornography under this bill.

CHAIR HARDY:

For the record, I am president of the Associated Builders and Contractors of Las Vegas, and our industry is heavily governed by the National Labor Relations Board.

SENATOR RAGGIO:

From what I understand in reading section 1, subsection 1, I am troubled. Let us say a person is on a public sidewalk carrying a sign that states "join me here at 5 p.m. to throw a bomb or set fire to this site" or displays the ultimate pornography. In this bill, you could not prohibit that because of content. Am I misreading this?

SENATOR CARE:

Existing case law and other ordinances would pass constitutional muster and govern such a scenario. There is an abundance of case law on fighting words and hate speech. In my judgment, it is impossible to draft a statute that says here is a list of things people may say. We generally let the courts make that decision. At some point, speech slides into conduct.

SENATOR RAGGIO:

The language seems overly broad. The content of the sign may have to be addressed because my examples of what somebody could carry that may provoke something abhorrent were not the most extreme.

SENATOR LEE:

I am chairman of the Bus Shelter and Bench Advisory Committee in Clark County that provides advertising on bus shelters. Could anything be put on a bus shelter? A commercial language is understood and recognized as the language of advertising communications. Is it possible this bill could say the content of signs equates to the commercial language of the community or say something to take that fear of unreasonable content away?

SENATOR CARE:

We regulate commercial speech to some degree. We have statutes that govern deceptive trade practices. It is somewhat easier for states to regulate commercial speech because of statutes like the Nevada Deceptive Trade Practices Act. The ordinance before the Committee does not make a distinction between commercial and noncommercial speech. It will probably be up to Clark

County to enact an ordinance to restrict commercial speech. I do not know how you can put that in a statute.

SENATOR TITUS:

What about people who hand out pamphlets on The Strip about escort services? Will they be affected under this?

SENATOR CARE:

That is under the realm of solicitation; the Ninth Circuit Court of Appeals has discussed that issue. If the labor unions could pass out flyers to express their point of view, then everyone else could also. You might be making a distinction between commercial speech and a political handbill. I am inclined to say it would be permitted. I agree with the Majority Leader to take a further look at this.

CHAIR HARDY:

This is a difficult issue, and one that cannot be ignored. Questions need to be answered, and this Legislature needs to make a statement and take a position.

ALLEN LICHTENSTEIN (American Civil Liberties Union of Nevada):

I am speaking in favor of this bill with amendments. Senator Raggio brought up the issue of incitement. Similar fact patterns have occurred in U.S. Supreme Court cases. The *Brandenburg v. Ohio* case set forth the U.S. Supreme Court standard on whether speech is considered criminally inciting or mere rhetoric. The decision is based on two factors: intent and the likelihood of breach of peace or lawless activity. In areas such as pornography, Nevada has laws concerning material harmful to minors. There are always questions of bad taste. It is not true—in absence of a statute that gives carte blanche to a government to decide what is allowed or not allowed—there is no particular regulation in a public forum. When you have a content-based distinction concerning speech in a public forum, the government needs to show it serves a compelling governmental interest, is effective in doing so and narrowly tailored to that effect with the least-restrictive means in order for courts not to look at it as presumptively unconstitutional. Restrictions that can occur in terms of content have been defined by the courts over the years. Commercial speech is the same even though there is a lower level of scrutiny.

Concern is where the government can decide whether they like something, depending on how they or the voters feel. The amendment language we

suggested ([Exhibit F](#)) states if a law says you cannot obstruct the sidewalk with signs, the law has to focus on obstruction of the sidewalk, not on whether the sign is wider or narrower than the body. *Nevada Revised Statute* (NRS) 266.275 gives carte blanche to municipalities to prohibit or control leafleting, demonstrations, picketing and signs in all public places. This statute is unconstitutional based on U.S. Supreme Court law and Ninth Circuit jurisprudence. In addition to this amendment, I suggest the Committee look long and hard into changing NRS 266.275 to remove the unconstitutional provisions. The American Civil Liberties Union (ACLU) discussed adding this to the two street preachers case because we are confident the provisions in statute will not withstand constitutional scrutiny. Our preference is to deal with this legislatively.

CHAIR HARDY:

Senator Care brought forth this bill. We are here to be certain our statutes comply with the *Constitution of the State of Nevada*.

MR. LICHTENSTEIN:

The concern with Senator Care's bill was it only said content- or viewpoint-based discrimination is not allowed when regulating signs. Jurisprudence says if you have an ordinance to prohibit obstruction, it has to have reasonable nexus with actual obstruction. To arrest somebody for obstructing the sidewalk, when he stands on a corner with a sign and people walk by with no obstruction, is not a situation any court will accept as reasonable regulation that does not violate the First Amendment. The ACLU tried to take away the focus on content or viewpoint discrimination in S.B. 13. In order for someone to be arrested for obstruction, they have to be involved in actual obstruction.

If someone is leafleting in a way where people have to walk into the street around them, they could and should be stopped from obstructing the sidewalk. The problem with both Clark County ordinances passed limiting the handbillers was overbroad content. Those pieces of legislation were struck down by the district court and Ninth Circuit. It is difficult for government to restrict content in a public forum. In dealing with the First Amendment, the courts are strict about circumscribing that particular power.

CHAIR HARDY:

In your amendment, you changed the definition of public sidewalk from "a private property upon which a public easement has been granted" to "a private property upon which a public easement exists." What is the practical change?

MR. LICHTENSTEIN:

We read about a situation a few months ago at a property on The Strip where dealers wanted to go out on the sidewalk and protest conditions. The government involved gave indications that since they asked for an easement, but papers did not get signed, the hotel could remove them. We put that change in to make sure it is not up to the property owner or government if a public easement is based on use and function.

JOHN L. WAGNER (The Burke Consortium):

We favor this legislation. We believe in the First Amendment as long as people are not belligerent and the public can traverse, I see no problem with S.B. 13.

JANINE HANSEN (Nevada Eagle Forum);

We do not want local governments to use the wording on page 2, line 7 of S.B. 13 which states "... unless the ordinance or regulation applies uniformly to all signs and does not discriminate" as an excuse to pass legislation to prohibit demonstrations. We support the amendments by the ACLU. Under current legislation, they can prohibit any practice tending to annoy persons passing in public places. I have concerns about that language since most of my demonstrations have annoyed someone. I have given you a copy of the Freedom Calendar 2007 ([Exhibit G](#), original is on file in the Research Library). The first page mentions the First Amendment which is foundational to our freedom. The *Constitution of the State of Nevada* explains these freedoms clearly and states people shall have the right to freely assemble. I use these fundamental First Amendment rights on many occasions. Many demonstrations we participated in had good results for our community. The purpose of the First Amendment is to restrain government and free people from the government. Bureaucrats and other enforcers of our government are willing to tread on the toes of citizens who exercise their liberties. If we do not make sure they are restrained, we will lose our liberties.

LYNN CHAPMAN (Nevada Eagle Forum);

I brought visual aides to show times we held up signs ([Exhibit H](#)). We would like to keep our speech free and support S.B. 13.

DAVID K. SCHUMANN (Nevada Committee for Full Statehood):

I support S.B. 13 and the amendments. We have over 100 years of law that says we have absolute freedom of speech and the right to peaceably assemble to petition our government, but if we step outside and shout fire in a crowded theater, we will get arrested and that is fine.

CHAIR HARDY:

We will now take testimony in opposition of S.B. 13.

BRADFORD JERBIC (City Attorney, City of Las Vegas):

I have not had the benefit of viewing Mr. Lichtenstein's proposed amendments. Based on what I heard, we are opposed to the bill as originally drafted and to the proposed amendments. Historically, governments have had the ability to do reasonable time, place and manner restrictions when it comes to speech. The ordinance read by Senator Care is a county ordinance. I understand the concern, but to amend every city charter is overkill. Testimony given earlier was if the power to regulate signs on sidewalks is removed from municipalities and counties, other ordinances or laws regulate those things. I do not know those ordinances; this bill is clear that if passed, we will not be able to enact ordinances necessary to protect against unreasonable speech.

WILLIAM HENRY (City Attorney's Office, City of Las Vegas):

The bill is not a codification of the First Amendment or existing First Amendment jurisprudence. It is broader than that; it would have unintended consequences. We are protected by civil liberties under federal and state constitutions as interpreted by courts. It is a fundamental proposition of the courts that these are basic rights; Congress or state legislatures can increase the rights. The effect of this overbroad bill would be viewed by the courts as increasing those rights. The notion that existing jurisprudence about shouting fire in a theater or displaying hardcore pornography would not be affected by this bill is not true. If this bill becomes law, a court would say it was the decision of the Nevada Legislature to increase the First Amendment rights of citizens in Nevada by statute.

Senate Bill 13 states no regulation based on content, viewpoint, beliefs or purpose of the person holding the sign would result in people able to wear sandwich boards that state "Buy sex from Suzy, call this phone number" or "Buy crack cocaine from Joe, call this phone number." In addition, the Las Vegas Municipal Code 10.64 allows the City of Las Vegas to protect children

from harmful sexual material and prosecute people who commit certain acts, such as knowingly displaying material harmful to minors. This bill would allow that content—which the Municipal Code states is harmful to minors—on a sandwich board or sign someone holds while walking up and down the streets and sidewalks in the City of Las Vegas. I assume these consequences are unintended, but they would result from enacting S.B. 13 into law. Current laws to protect people from this content would no longer be available to municipal prosecutors in the State of Nevada. It is a general proposition of interpretation when a legislature enacts a law, they do so aware of laws on the books which might deal with the subject matter. For those reason, I oppose this bill.

SENATOR LEE:

Going back to the two street ministers who were arrested under an ordinance prohibiting blocking the sidewalk carrying signs, no court charges were ever filed. Is it the discretion of police officers or the police department to arrest people, detain them and let them go? Why are they harassed but not held accountable?

MR. HENRY:

I cannot speak to that other than in a speculative fashion. It is my understanding the incident did not happen in the city but in the county. If so, a county deputy district attorney or representative of the Las Vegas Metropolitan Police Department could better answer your question.

MR. JERBIC:

It is hard to conceive of a law not mistakenly used by a police officer. If that is the case here, it seems unreasonable for this bill to do the universal search and replace with all the consequences.

SENATOR CARE:

Does the City of Las Vegas have ordinances that regulate time, place and manner of speech or conduct which are not content neutral?

MR. JERBIC:

The example you gave previously where labor speech is separated out was a non-content neutral decision made by the county government. The city has a similar law that is not enforced and currently scheduled for repeal. It has been in litigation with the ACLU. There is an argument on both sides. One could argue that by singling out labor speech, local government made a decision to give

greater protection to labor unions than to a draft or war protestor. We argued we did not make the National Labor Relations Act; that is a congressional law. Litigation flows from that federal law. Through case law, the U.S. Supreme Court said it is important for labor organizations to practice speech; they allow them to practice it on private property because it is the only way to effectively organize people. The City of Las Vegas and the county tipped our hats to the U.S. Supreme Court ruling in our ordinances to acknowledge that is the reason it existed. The Ninth Circuit said it was not fine, so we are taking it off the books.

SENATOR CARE:

Is there similar language to replace the ordinance coming off the books?

MR. JERBIC:

We have been in litigation with the ACLU regarding ordinances that regulate the Freemont Street Experience. After the Ninth Circuit's recent ruling, we took that ruling as guidance to draft the ordinances in a way to not offend the courts. We drafted two new ordinances that passed in November replacing ordinances declared unconstitutional. The ACLU indicated they intend to sue us over them.

SENATOR CARE:

Will the new ordinance have a provision for labor workers to demonstrate on the Freemont Street Experience outside a resort?

MR. JERBIC:

The workers and war protestors would have the right as well. The new law does not contain an exception that favors labor and does not regulate someone expressing free speech in the Freemont Street Experience. The limitations are more time, place and manner restrictions having to do with specific conduct and not content-based conduct.

SENATOR CARE:

When does the expression of free speech delve over into the world of conduct? My worry is when someone demonstrates as a matter of right and that person is told by law enforcement it is not a demonstration, it is conduct and an ordinance says you cannot engage in this sort of conduct.

MR. JERBIC:

The kinds of conduct prohibited are when the demonstrator is blocking a sidewalk, not just two people holding signs. I do not know of an ordinance in the world that could prevent somebody from misusing or misconstruing the law. Certain conduct commingled with speech would be prohibited in most municipalities around the country. Law enforcement is not allowed to read the message, study the speech or hear the chants; they are only allowed to look at conduct. If the conduct violates the law and endangers the public, then, and only then, should intervention occur.

JAY DAVID FRASER (Nevada League of Cities and Municipalities):

The League of Cities opposes S.B. 13 for the reasons stated by Mr. Jerbic and Mr. Henry. The issues they brought forward are not unique to the City of Las Vegas. Under the bill, they apply to all members of the League.

SHAUN E. JILLIONS (City of Henderson):

Although existing case law grants us the ability to regulate lesser-protected categories of speech, under a plain reading of S.B. 13, we lose that ability.

JASON M. FRIERSON (Clark County):

Clark County has an issue with this bill as it prohibits the county from regulating and addressing speech in a commercial sense. In the instance of speech dealing with illegal activity and misleading commercial, Clark County would like to regulate that activity.

SENATOR RAGGIO:

I ask questions because I want to get full information and not because I have a position on a bill. If the Legislature adopts language pertaining to conduct, will that be looked upon as a preemption by the state so local governments might not otherwise impose limitations on the content of demonstrations? That issue needs attention.

MORGAN BAUMGARTNER (Nevada Resort Association):

Section 1, subsection 3 of S.B. 13 defines public sidewalks. Our properties typically grant easements to local governments in which they are situated. As we understand the well-defined body of law regarding easements, they are strictly construed in accordance with the contract between local government and the grantor of the easement. This particular definition of sidewalk, when it includes private property upon which easements are granted, is an infringement

on those private property rights. It expands beyond the agreement between parties. It takes rights away from private property holders and grants those to the public. A number of overpasses along The Strip have been constructed by casino property holders. An easement for safety issues has been granted back to the locality for pedestrian access. If we use this definition of public sidewalk, we could have protestors holding a sign and creating potential hazards on those public overpasses. Additionally, this might create civil liabilities for the state in that if these easements are expanded beyond the agreement between parties, it rises to an impediment of contract. Under law, the State Legislature cannot enact legislation that would inhibit the terms of the contract. Our private property rights for which they were contract are being changed by law. Any attempt to grant additional rights to occupy this private property by public protestors or anything beyond the terms of the easement would create a situation that could potentially be a taking.

These agreements have been negotiated with local governments over a period of time to achieve private and public balance of access and safety. Putting restrictions in law goes against years of work to protect the tourist economy and safety.

SENATOR CARE:

To get to one of the overpass walkways, you would have to enter private property by entering a casino or lobby and egress through private property. That situation is not what I contemplated for this bill. By the term taking, do you mean since the ordinance already allows labor picketers, would war protestors somehow constitute a taking?

MS. BAUMGARTNER:

That is not what I intended. The codification of the term public sidewalk deprives the property owner of additional property rights because the agreement did not contemplate an access easement would be converted into an easement that allows this behavior, whether it is labor picketing or war protesting.

SCOTT SCHERER (Fremont Street Experience):

Fremont Street Experience is a pedestrian mall that is a commercial entertainment attraction. In 2005, the mall attracted more than 17.7 million people as a major economic engine for downtown Las Vegas. The operating costs of the mall are paid largely by advertising and retail revenues within the mall, not by taxpayers. In the past, there has been litigation between the City of

Las Vegas, the Freemont Street Experience and the ACLU concerning certain regulations. We are not opposed to the First Amendment but about breadth of the language in S.B. 13. We are concerned about its impact on commercial activity and the Freemont Street Experience's ability to sell advertising and retail space within the mall. For example, the mall has exclusive licensing and advertising arrangements. If S.B. 13 is enacted as drafted, we could not enter into those types of agreements or regulate signage used by vendors who lease space from the mall. There are good things in this bill, but we need to pay close attention to the language and unintended consequences.

CHAIR HARDY:

It is my intention to assign a subcommittee on S.B. 13. I will serve as Chair, and I have asked Senators Care and Lee to participate in the subcommittee. Everybody will be welcome to participate in those discussions. This is not an issue we can ignore, and it is incumbent upon us to have a finding. If there is no further discussion, this meeting is adjourned at 3:16 p.m.

RESPECTFULLY SUBMITTED:

Erin Miller,
Committee Secretary

APPROVED BY:

Senator Warren B. Hardy II, Chair

DATE: _____