MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
April 24, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9 a.m. on Tuesday, April 24, 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 Mark E. Amodei, Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

COMMITTEE MEMBERS ABSENT:

Senator Maurice E. Washington, Vice Chair (Excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Joe Hardy, Assembly District No. 20
Assemblyman William Horne, Assembly District No. 34

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Barbara Moss, Committee Secretary

OTHERS PRESENT:

James J. Leavitt
Leslie A. Nielsen, District Attorney's Office, Clark County

Kermitt Waters
Jacob Snow, General Manager, Regional Transportation Commission of Southern Nevada, Clark County
David K. Schumann, Nevada Committee for Full Statehood
Steven Polikalas, Steven T. Polikalas, Limited
Joseph A. Turco, American Civil Liberties Union of Nevada

CHAIR AMODEI:
The Committee has been provided Proposed Amendment 612 to Senate Bill (S.B.) 299 (Exhibit C), which is the culmination of discussions from the Minority Leader, the bill's prime sponsor.

SENATE BILL 299: Establishes provisions relating to crimes against unborn children. (BDR 15-730)

I asked to have the amendment returned to the Committee. It was the Committee's intent to deal with the crime and punishment aspects of the circumstances that gave rise to S.B. 299 in terms of the lack of ability to charge appropriately in a criminal law sense with a woman whose pregnancy was terminated based upon driving under the influence (DUI).

I wanted the Committee to peruse the amendment process with Committee concurrence. We discussed it informally, but in a nutshell, it makes a pregnant woman a vulnerable person under *Nevada Revised Statute* (NRS) 193, which has other sections dealing with vulnerable people for potential enhancements.

Proposed Amendment 612 to S.B. 299 also deals with the DUI issue on page 3, lines 13 and 14 which says "or proximately causes the termination of the pregnancy of a person other than himself"; it is repeated again on page 4, lines 18 and 19; and there is more DUI language on page 5. This deals appropriately and globally regarding all crime and punishment aspects.

I wanted it back before the Committee because it was their charge and intent. There are people who want to argue the reproductive rights issues, but that is not our jurisdiction, and we will not be given it at this time.

The Chair would entertain a motion to adopt Amendment 612 to S.B. 299 and, if it is the will of the Committee, we will call it up first on the Senate Floor. If it passes, we will not deal with the previous amendment by the Committee.

SENATOR WIENER MOVED TO ADOPT AMENDMENT 612 TO S.B. 299.

SENATOR HORSFORD SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS NOLAN AND WASHINGTON WERE ABSENT FOR THE VOTE.)

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CHAIR AMODEI:
Mr. Wilkinson, while the amendment says it was prepared for me, it was to have been prepared for Senators Dina Titus, Warren B. Hardy II and members of the Senate Committee on Judiciary. Will it say that in final form?

BRAD WILKINSON (Chief Deputy Legislative Counsel):
It is supposed to have those names; however, as a technical matter, I am unsure how many names can fit on the form. I will check into the matter.

CHAIR AMODEI:
The hearing is opened on Assembly Bill (A.B.) 102 and Assembly Joint Resolution (A.J.R.) 3.

ASSEMBLY BILL 102 (1st Reprint): Makes various changes to provisions relating to eminent domain. (BDR 3-38)

ASSEMBLY JOINT RESOLUTION 3 (1st Reprint): Proposes to amend the Nevada Constitution to revise provisions relating to the taking of private property by eminent domain. (BDR C-529)

ASSEMBLYMAN WILLIAM HORNE (Assembly District No. 34):
Senator Terry Care, Assemblyman Joe Hardy, Clark County Commissioner Bruce L. Woodbury, Kermitt Waters, Jim Leavitt and others crafted the language in A.B. 102 to address eminent domain and the protection of property owners in Nevada. I have dealt with this issue since my freshman session in 2003 and have the pleasure of continuing the fight.

In the *Kelo v. City of New London*, 545 U.S. 469 (2005) case, the U.S. Supreme Court found a government entity can take private property and give it to another private person. In that decision, the U.S. Supreme Court left

the door open for states to craft their own eminent domain legislation, laws and how they will deal with the takings power of the state. Subsequent to the *Kelo* decision, a People's Initiative to Stop the Taking of Our Land (PISTOL) initiative circulated around the state and passed the first round of elections. There are concerns with provisions in the initiative which hamstring some essential operations the state will need to do in the future. Nevada has enormous growth and the problems that come with it, particularly transportation.

Assembly Bill 102 and A.J.R. 3 are an attempt to craft legislation and a Nevada constitutional amendment to provide protection for property owners and allow government to work as needed. Assembly Bill 102 has been amended in the Assembly and other amendments will be proposed today. Assembly Bill 102 and A.J.R. 3 are identical proposals. Assembly Bill 102, if passed, will go into effect upon being signed by the Governor; A.J.R. 3 will take effect once it has gone through its course and becomes part of the *Constitution of the State of Nevada*; A.B. 102 is the provision that takes effect until the Nevada constitutional amendment has been completed.

Senate Bill 85 has already been heard and has the same provisions as A.B. 102 and A.J.R. 3. The proposed friendly amendments mirror the negotiations between the parties in crafting the legislation.

SENATE BILL 85 (1st Reprint): Makes various changes to provisions relating to eminent domain. (BDR 3-9)

ASSEMBLYMAN JOE HARDY (Assembly District No. 20):
This is a triple image bill, of which A.J.R. 3 is the Nevada constitutional amendment that addresses eminent domain in the fix. I would not presume to keep everybody happy with this particular improvement on the *Kelo* decision or PISTOL. The reality is that some people will be more affected than others. The goal is to have the agreement made between Commissioner Woodbury, Kermitt Waters, Don Chairez and many other players and partners. Senator Horsford was also involved in the discussions.

We want to march forward together with a statute that would take effect upon passage; a constitutional amendment that would take another Legislative Session to be approved by this body; then the Governor followed by the voters in 2010, after which the Nevada Constitution would be amended in 2011 by that vote. That amendment to the Nevada Constitution would bring about what

I call PISTOL-plus, which would take the good things in PISTOL and put them into the Nevada Constitution in a way that will protect property rights of the people and allow the state to move forward in the appropriate eminent domain field.

JAMES J. LEAVITT:
We reviewed the proposed legislative language and spoke with Commissioner Woodbury's office and Leslie Nielsen. We agree with the comments by the Clark County District Attorney's Office. A couple of provisions that were stricken are proposed to be repealed which were previously in A.B. 102 as the project influence rule. We strongly agree with the District Attorney's Office that the rule should remain in the statutory provisions.

I would like to address two other issues. Language was stricken from NRS 37.175, which addressed interest. We agree with the District Attorney's Office that the language should remain in the statutory provisions. Of concern were the comments sent up with A.B. 102 by the District Attorney's Office which state the government should not have to pay interest on money deposited with the court. We want it made clear that one of the provisions in NRS 37.175 provides that the district court judge shall enter an order to determine the date of the commencement of interest. The District Attorney's Office agreed.

The landowner may argue it may be an earlier date. When that argument is presented to the judge, the judge may order interest prior to the commencement of the cause of action. For example, if a complaint is filed in January 2006, a judge may order interest to commence on January 2005, which would also be one year or some time prior to the government making a deposit. If that occurs, the government would be required to pay interest on the entire award, including the money which has not yet been deposited. Once a deposit is made, interest would stop running on the amount paid. We wanted that section clarified.

We also want to clarify NRS 37.010, which refers to redevelopment. We all agree that A.B. 102 narrowly limits redevelopment or taking of property for redevelopment. We agreed that when property is taken for redevelopment purposes, the redevelopment must comply with the public use requirements listed in NRS 37.010 and is subject to those specific public use limitations set forth in the new proposed language.

Even though property may be taken for redevelopment, it is still subject to the public use requirements in NRS 37.010. Both parties further agree that the only time redevelopment may be used under A.B. 102 is where the government itself engages in a public redevelopment project and does not transfer the property to a private entity, and both parties agree that the determination of whether the property has, indeed, been taken for public use is subject to judicial review under the new proposed language in NRS 37.100.

LESLIE A. NIELSEN (District Attorney's Office, Clark County):
Commissioner Woodbury was unable to attend the hearing and asked me to convey his request that we consider A.J.R. 3 and A.B. 102 in light of the agreed alternative language. He previously testified in legislative hearings and would like to have his prior comments incorporated into the minutes of this meeting (Exhibit D).

We mostly agree with the representations made by Mr. Leavitt. With respect to the interest provision and the requirement that the government might pay interest between some prior date of taking and the filing of the complaint, we may still argue that interest would commence on a later date, such as the filing of the complaint or the service of summons. Mr. Leavitt understands the government may argue, but A.J.R. 3 and A.B. 102 are very clear that the district court is given the power to order the date on which interest shall commence because it is stated a couple of times throughout the bills.

With respect to the redevelopment provision, we agree the word redevelopment should stay in A.B. 102 in the listing of public uses allowable. We understand the taking would be for a public redevelopment project, and we would not be able to transfer it to a private party, except as provided in the exceptions listed in A.B. 102 and A.J.R. 3. For the most part, we agree on the interest and redevelopment provisions.

I will address the points raised in my memorandum to Sabra Smith-Newby, Director, Intergovernmental Relations, Clark County, dated April 24, 2007 (Exhibit E).

KERMITT WATERS:
Ms. Nielsen summed up our agreement.

SENATOR CARE:
What does PISTOL or A.J.R. 3 do to a redevelopment agency taking blighted property and conveying that property to another private entity? I am not referring to noneconomic blight, which we got rid of last Legislative Session. I am talking about blight where 4 of the now-existing 11 factors must be demonstrated to exist. Do either of these proposed constitutional amendments take that power away from the redevelopment agency?

MR. WATERS:
The redevelopment agency can take the property under eminent domain but cannot transfer it to somebody else. They can always deal with this in regard to nuisance. For example, the City of Las Vegas has Chapter 9.04 of the *Las Vegas Municipal Code* which allows them to fine a homeowner $500 a day for nuisance, or $1,000 a day for commercial, for every day that nuisance is maintained. They can then lien and sell the property for the fine. They have remedies other than eminent domain.

SENATOR CARE:
I read it as it could not be conveyed to a third party.

MR. WATERS:
That is the intent.

MS. NIELSEN:
That is our understanding as well.

SENATOR CARE:
In the mock-up Proposed Amendment 3812 to Assembly Joint Resolution No. 3_R1 First Reprint (Exhibit F), section 8, subsection 7, paragraph (b) says:

> The entity that took the property leases the property to a private person or entity that occupies an incidental part of an airport or a facility that is owned by a governmental entity and, before leasing the property.

I believe "airport" is in there because somebody was thinking of the case of the concession at the airport. Is that your understanding?

MR. WATERS:
Airport is in there.

MR. LEAVITT:
Those discussions came up during negotiation regarding the government wanting the right to lease property to concessionaires at the airport.

SENATOR CARE:
The language also says "or a facility that is owned by a governmental entity." The question is whether it would include the ability for, let us say, the university system that takes property by eminent domain to also lease some of that property to a private party in the form of a concession.

MR. WATERS:
I see no problem with it.

MS. NIELSEN:
Absolutely.

SENATOR CARE:
Assuming we process this bill out with these amendments, what we have now is S.B. 85 which mirrors A.B. 102 word-for-word. I assume the Assembly would make the same changes to S.B. 85.

ASSEMBLYMAN HORNE:
Yes, the same changes would be made in the Assembly. The danger would be if the Senate Committee on Judiciary chose to adopt some, all or none of the amendments that did not match ours, it would then end up in a conference committee.

JACOB SNOW (General Manager, Regional Transportation Commission of Southern Nevada, Clark County):
Transportation infrastructure may not be at the top of everybody's mind, but traffic is a top concern. We have done a good job working with the Bureau of Land Management, other governmental agencies, the public and private owners to preserve the right-of-way for transportation projects. There are occasions when eminent domain is necessary for transportation improvements. As my boss, Commissioner Bruce Woodbury, testified in your Committee several

weeks ago, the PISTOL initiative on the ballot last November had the potential to cripple those transportation projects.

The intent of the initiative to protect personal property rights is important. We recognize the intent and appreciate the things learned from Kermitt Waters, Jim Leavitt and others in this regard; however, PISTOL on its own, would have made it almost impossible for us to have used eminent domain as we have used it in the past for necessary projects.

I thank Assemblymen Hardy and Horne and recognize Senator Care in their efforts to bring everybody together and create the compromise before you today. It will provide us needed flexibility to use eminent domain when necessary for transportation projects while protecting the rights of property owners to fair compensation for that property.

More importantly, it allows us the time necessary to complete transportation projects; the original language in PISTOL limited us to only five years from the time the property would be acquired to complete the transportation project. For regionally significant projects, such as the 215 Beltway, five years was not enough time to complete the project. We now have a 15-year window offered in A.J.R. 3 and A.B. 102 to allow us to plan ahead, preserve the right-of-way and have enough time to complete the project.

As southern Nevada grows, transportation infrastructure becomes more critical. A recent study found the average rush hour trip in southern Nevada takes 39 percent longer than the same time during non-rush hour times of the day. Another similar study found those trips will take longer in the future if we do not continue our commitment to building transportation infrastructure. That study projects that by 2030, rush hour trips would take almost 80 percent longer than the same trip in non-rush hour traffic. In Nevada, gridlock is not caused by a failure to plan; it is caused by a failure to implement those plans.

Transportation funding and the ability to acquire the right-of-way for transportation infrastructure are critical to our ability to plan and implement projects. Assembly Joint Resolution 3 and A.B. 102 give us the ability to use eminent domain in those rare cases when it is needed. It is not our first choice, but it is necessary to have the ability to use it in instances when it is in the public's best interest. We agree with the statements made by Mr. Waters, Mr. Leavitt and Ms. Nielsen and support the amendments.

DAVID K. SCHUMANN (Nevada Committee for Full Statehood):
I oppose A.J.R. 3 and A.B. 102. The original PISTOL was far better language. I grew up in Philadelphia, which has an extensive elevated railway line that dwarfs anything they have, or plan to have, in Las Vegas. It was built under the existing prohibitions of the Fifth Amendment, which defined public use. As Justice Clarence Thomas said, the *Kelo* decision amended the U. S. Constitution by replacing the words "public use" with the words "public purpose."

Page 5, section 8, subsection 12 of A.J.R. 3 says 15 years, which is an outrageous amount of time. They should plan the project before seizing the property and have it all done in five years. After 15 years, the person who owned the property would probably be dead. Page 5, section 8, subsection 10 of A.J.R. 3 says "In all actions in eminent domain, fair market value is the highest price, on the date of valuation," without tying that date to the date they took the property. They can value it five or ten years before they take the property and then the value is much less. There should be language that ties the date of valuation to some short period before they actually seize the property; otherwise, the compensation is not the highest and just compensation that people deserve.

Testimony at this hearing, as well as the previous hearing, has not provided a good explanation why PISTOL is deficient and why we need to expand the powers of government to take property.

STEVEN POLIKALAS (Steven T. Polikalas, Limited):
We have been watching the various initiatives throughout the Legislative Session. I would like to have the opportunity to work with Assemblyman Hardy and proponents of the resolution to use the language existing before and integrate what is now proposed.

JOSEPH A. TURCO (American Civil Liberties Union of Nevada):
We support both A.B. 102 and A.J.R. 3. Everybody knows about due process. When a fundamental right is at stake, government must afford meaningful safeguards, particularly in a case where the taking involves taking from one private property owner for another private entity, that maximum due process is accorded. We are satisfied both bills are on the right track.

Assembly Bill 102 places the burden of proof that the public use is legitimate on the taker. It is unclear whether that burden applies to government or the private

entity to which they are giving the property. I do not know how important it is, but in practice, it would have an effect. Exactly whose burden is it?

I work with some of the brightest lawyers and questioned Lee Rowland and Alan Lichtenstein on A.J.R. 3, page 4, section 8, subsection 7, paragraph (d), lines 18 to 20 that say "or to facilitate or avoid payment of excessive compensation or damages." I do not know what that means, neither does Mr. Lichtenstein or any of the lawyers at the ACLU. Is it a potential loophole? I do not know who wrote the language or its intent. We caution you to look carefully at it and know what it means before you vote on it.

CHAIR AMODEI:
The hearing is closed on A.B. 102 and A.J.R. 3. What is the pleasure of the Committee on A.B. 102?

SENATOR CARE:
I would move to amend and do pass as amended A.B. 102, the amendments being the agreed-to testimony between Ms. Nielsen, Mr. Waters and Mr. Leavitt.

> SENATOR CARE MOVED TO AMEND AND DO PASS AS AMENDED A.B. 102.
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> SENATOR WIENER SECONDED THE MOTION.
>
> THE MOTION CARRIED. (SENATORS NOLAN AND WASHINGTON WERE ABSENT FOR THE VOTE.)

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CHAIR AMODEI:
What is the pleasure of the Committee on A.J.R. 3?

SENATOR CARE:
I would move to amend and do pass as amended A.J.R. 3 adopting the amendments testified on by Ms. Nielsen, Mr. Waters and Mr. Leavitt and agreed to by Assemblymen Hardy and Horne.

SENATOR CARE MOVED TO AMEND AND DO PASS AS AMENDED A.J.R. 3.

SENATOR McGINNESS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS NOLAN AND WASHINGTON WERE ABSENT FOR THE VOTE.)

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CHAIR AMODEI:
The hearing is opened on A.J.R. 5.

ASSEMBLY JOINT RESOLUTION 5: Proposes to amend the Nevada Constitution to authorize the Legislature to provide for a statewide lottery for textbooks, computers and other educational media for classrooms. (BDR C-921)

CHAIR AMODEI:
What is the pleasure of the Committee on A.J.R. 5? Seeing none, and there being no further business to come before the Committee, the hearing is adjourned at 9:47 a.m.

RESPECTFULLY SUBMITTED:

Barbara Moss,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: