MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
May 2, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 9:38 a.m. on Saturday, May 2, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman Tick Segerblom, Vice Chair
Assemblyman Ty Cobb
Assemblywoman Marilyn Dondero Loop
Assemblyman Don Gustavson
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman Mark A. Manendo
Assemblyman Richard McArthur
Assemblyman Harry Mortenson
Assemblyman James Ohrenschall
Assemblywoman Bonnie Parnell

COMMITTEE MEMBERS ABSENT:

Assemblyman John C. Carpenter (excused)

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Robert Gonzalez, Committee Secretary
Stephen Sisneros, Committee Assistant

OTHERS PRESENT:

Douglas Flowers, Holland & Hart LLP, Reno Nevada, representing Real Property Section, State Bar of Nevada
Bill Uffelman, President & Chief Executive Officer, Nevada Bankers Association, Las Vegas, Nevada
Richard Peel, Henderson, Nevada, representing the Legal Counsel, Subcontractor Legislative Coalition, Las Vegas, Nevada
Steven Holloway, Executive Vice President, Associated General Contractors, Las Vegas Chapter, Las Vegas, Nevada
Richard Lisle, Chairman, Subcontractors Legislative Coalition, Las Vegas, Nevada; Executive Director, Mechanical Contractor Association, Inc., Las Vegas, Nevada
Sherry Vyvyan, Las Vegas, Nevada, representing Southern Nevada Air Conditioning Refrigeration Service Contractors, Las Vegas, Nevada
Jerry Miller, Carson City, Nevada, representing the Nevada Land Title Association, Las Vegas, Nevada
John P. Sande, III, Jones Vargas, Reno, Nevada; representing the Nevada Bankers Association, Las Vegas, Nevada
Robert W. Potter, President, Affordable Concepts Inc., North Las Vegas, Nevada
David P. Bold, Owner, Done Right Plumbing Inc., Las Vegas, Nevada
Charlene C. Richards, Vice President, Desert Fire Protection, Reno, Nevada
Greg Esposito, Business Representative, Plumbers, Pipefitters & Heating, Ventilation & Air Conditioning Technicians Union Local 525, Las Vegas, Nevada
Steven Ross, Secretary Treasurer, Southern Nevada Building and Construction Trades Council, Henderson, Nevada
Sherry Hernandez, Administrator, Subcontractor Legislative Coalition, Las Vegas, Nevada

Ken Schultz, Chapter Executive, Sheet Metal and Air Conditioning Contractors National Association of Southern Nevada, Las Vegas, Nevada
Douglas Williams, Chairman, Associated Builders and Contractors, Las Vegas Chapter, Las Vegas, Nevada
Beverly Wolf, Risk Manager, Interstate Plumbing and Air Conditioning, Las Vegas, Nevada
Michael Mathis, Vice President and General Counsel, Echelon Resorts, Boyd Gaming, Las Vegas, Nevada
Angela Otto, Brownstein Hyatt Farber Schreck, representing the Nevada Resort Association, Las Vegas, Nevada
Dan Musgrove, Las Vegas, Nevada, representing the Southern Nevada Chapter of NAIOP, Las Vegas, Nevada

Chairman Anderson:
[Meeting called to order. Roll called. The Chairman reminded those present of the rules and expected behavior of the Committee meeting.]

Let us begin with Senate Bill 333.

Senate Bill 333: Makes various changes relating to real property. (BDR 9-865)

Douglas Flowers, Holland & Hart LLP, Reno Nevada, representing Real Property Section, State Bar of Nevada:
I appreciate the opportunity to share a few remarks with you this morning on S.B. 333. This bill originated out of the real estate finance subcommittee of our section. It has been approved by our executive committee and by the Board of Governors of the State Bar. In essence, the bill seeks to improve the fairness and utility of *Nevada Revised Statutes* (NRS) 106.300 and its related provisions, which govern the priority of future advances secured by a deed of trust.

[Continued to read from prepared testimony (Exhibit C).]

Chairman Anderson:
What is the harm that has happened in the current practice? Suppose I go to my bank and I put my house up as collateral for a line of credit to pay for certain expenses. I pay off the debt, but now I would like to keep the line of credit open so I can access it when necessary. Then suppose I have need of credit again, and I use my house as security to borrow money. I do this for a few years until I have no need for the credit any longer, and I want to end it. Can I call the bank, inform them that the credit line is paid off, and ask to close it?

Douglas Flowers:
Yes. As of right now, there is already a formal notice procedure in NRS Chapter 106.380. The concern is that the notice is not directed in any way that would tell a lender that it is valid. That very situation you are describing will become more available to borrowers when lenders have an increased comfort that the negative effects of the termination are somewhat mitigated by being able to focus where that notice goes.

Chairman Anderson:
What is the negative effect of termination? Who is harmed in the current practice?

Douglas Flowers:
Primarily, by statute, it is the lender, in the sense that after the notice comes through, all future advances are unsecured advances. In another very practical sense it is the borrower, in that lenders often document their loans if they are going to opt into NRS Chapter 106, to provide that any delivery of that notice is an event of default under the loan. So it ends up unwinding the entire loan transaction. I cannot say that this change would necessarily discourage lenders from still saying, "If we get one of these notices, it is going to put everything into default." But at least it would give a borrower the ability to go back and offer a reasoned response to that. The borrower might say, "Hey, if I clearly communicate this to you and I am still current on payments—I just do not want to take any additional advances—there is no reason for you to put me into default as long as I am continuing on with payments." I think it offers some benefit on both sides.

Chairman Anderson:
In my scenario I paid off the secured loan, and you are saying, although I still have my property up as collateral, I no longer want a loan and I do not want the lender to advance funds on my behalf based on the collateral.

Douglas Flowers:
Right. When you have reached that position where everything is paid off, and you do not want additional money, but the line is still there, the statute does not want a lender to be able to start advancing funds on your behalf. Say they get a notice from the pool man that put in a pool for you. The lender decides to extend credit to cover that to deal with the lien issue. In that kind of situation, the law says, "No security for you, lender, if the borrower has told you he does not want any more money extended against this line."

Assemblyman Horne:
In section 1, subsection 2, you have changed "working days" to "business days" and changed "receipt of" to "receiving." Can you tell us the nuance between "receiving" and "receipt of?"

Douglas Flowers:
I think that was probably a technical note that came out of our subcommittee. I do not know of any particular distinction between using those two words. In either case, I think that the date of measurement would be the one indicated on the receipt for the certified letter. The notice has to be sent via certified mail with a return receipt request.

Assemblyman Horne:
That is what I was getting at, whether the notice would have a return receipt.

Douglas Flowers:
Yes. That would apply both to the lender and the borrower. The borrower has the ability to notify the lender of a change of address. A lot of these loans are packaged, resold, and moved on down the line. This allows a lender to continue to utilize the process by giving notice to a borrower. The receipt for the borrower would be the same.

Chairman Anderson:
Mr. Anthony, is this a question for the bill drafters?

Nicolas Anthony, Committee Counsel:
No. I believe it is probably a little bit of wordsmithing, but I think it is pretty clear from the testimony what we are after.

Chairman Anderson:
Mr. Flowers, no one else is speaking in support of the legislation other than the State Bar; no one from banking or the loan industry?

Douglas Flowers:
No. Like the bylaws for the business law section say, it is intended to be as broad a tent of practitioners and industry groups, which those practitioners represent, as possible. We do not take up axes to grind for specific industry groups. These are what we view to be changes that are in furtherance of the administration of justice and facilitating business in the state.

Bill Uffelman, President & Chief Executive Officer, Nevada Bankers Association, Las Vegas, Nevada:
The Nevada Bankers Association is in favor of the bill.

Chairman Anderson:
Mr. Uffelman, does this change the methodology of work in the banking industry in some substantial way?

Bill Uffelman:
The bankers I reviewed this with said it was not a bad bill, so therefore we support it. It may well change how some of them handle the business, and others may do things the old traditional way they have always done it. I cannot speak for all of the bankers, but what has been set out is a favorable bill.

Assemblyman Cobb:
Does it have any effect if there is no principal owed on the property in terms of what needs to be in the recording?

Douglas Flowers:
No. They do have, in the record of the obligation, whatever is the current principal balance. It is accrued outstanding interest which is the intent of the language. If it is zero balance as of the date of the notice, my guess is that common drafting form for almost any revolving credit facility indicates that the balance from time to time will be down to zero, but that is not in any way taken to be an indication that additional funds cannot be advanced. Any lender on one of these facilities, in particular if it is guaranteed, would probably take pains to make sure the notice of that fact is reflected, just so there is no ambiguity for the guarantors about the ability to continue reextending credit and still rely on the guarantees related to it.

Assemblyman Cobb:
So they would record it as zero and zero?

Douglas Flowers:
I believe so, yes.

Assemblyman Cobb:
Do we need to add anything to further define what is meant under section 1, subsection 2, paragraph (d), subparagraph (2), line 23, where it says "the interest accrued"? That needs to state "the outstanding interest accrued." The intent is that it is just the outstanding interest accrued, not the overall interest.

Douglas Flowers:
I think the suggestion is to say "The outstanding interest accrued on" rather than reinsertion of the language that has been deleted.

Assemblyman Cobb:
Yes.

Douglas Flowers:
I would agree with that change. The intent is not to record all interest that has ever accrued under the loan as of the date of the notice, it is just whatever is outstanding as of the date of the notice.

Nicolas Anthony:
Certainly if it is the Committee's intent, we could add the word "outstanding" on page 2, line 23, just to clarify that it is outstanding interest accrued.

Chairman Anderson:
Mr. Uffelman, apparently an amendment is going to be suggested.

Bill Uffelman:
I have no problem with that amendment.

Chairman Anderson:
I will close the hearing on S.B. 333 and turn our attention to Senate Bill 352 (1st Reprint).

Senate Bill 352 (1st Reprint): Makes various changes to provisions governing mechanics' and materialmen's liens. (BDR 9-866)

Richard Peel, Henderson, Nevada, representing the Legal Counsel, Subcontractor Legislative Coalition, Las Vegas, Nevada:
Our coalition employs thousands of laborers throughout the state and is the backbone of the construction industry. Our coalition of the southern Nevada chapter of the Associated General Contractors (AGC) is the sponsor of S.B. 352 (R1).

Under current law, if the construction lender records a deed of trust prior to commencement of construction, the lender is arguably in first position. In other words, the lender's deed of trust is superior to the liens of lien claimants that may be recorded against the property. Recently, a large number of these construction lenders are refusing to fully fund the construction loans that they have obligated themselves to fund, and they are foreclosing on the deeds of trust that they have recorded against the property. In many cases this is occurring after the project is well under way. In some cases the projects will be 60 to 90 percent complete at the time the lender decides it is going to foreclose on its deed of trust. In fact, this very thing is happening right now in Las Vegas on the Fontainebleau project. For those of you who are from southern Nevada

and you have looked at the news or read your newspapers, you would see that Turnberry West, or its affiliated entities, is in litigation with the construction lender for having pulled funding on that particular project. Just this week several thousands of laborers who were working on that job are no longer employed. They were let go from that project because of the inability to pay them for the work that they would have otherwise performed had the funding been in place.

This is not the only project that is having significant problems. The Manhattan West project and the Mercer project have had problems with their funding, and now the construction lenders are foreclosing on their deeds of trust. The work, materials, and equipment that contractors, subcontractors, material suppliers, and laborers have provided will not be paid for if the lenders foreclose on those deeds of trust; if their deeds of trust were in first position. We believe it is extremely unfair for hardworking people in this state, who go out and furnish work, materials, and equipment for the benefit of a project, not to get paid. That is not fair, and that is what is happening right now.

We are also trying to clean up another problem by way of this bill. Subsequent lenders are reluctant to come in and loan money for a given project because either the first lender is foreclosing on the project or the lien claimants are in second position. Changes in this bill are intended to address that issue as well.

After S.B. 352 (R1) passed out of the Senate, we discovered for the first time that the bill caused us some concerns. We have worked earnestly to try and address those concerns. Over the last two weeks we have met with a number of different groups. We have even come up with an amendment that you have before you (Exhibit D).

We believe that the amendment, coupled with S.B. 352 (R1) that came out of the Senate, will be a great benefit to the construction industry in a number of ways.

Sections 1 through 5 of the bill clarify and make technical revisions to existing definitions in the statute.

Section 6, which is the change to *Nevada Revised Statutes* (NRS) 108.222, will limit the costs of work, materials, or equipment that a lien claimant may include in his lien upon termination of his contract. Now currently, a lien claimant can arguably include the cost of work, materials, or equipment that he may never provide for a project if his contract is terminated. So this is a benefit to owners, because it will reduce the amount of the lien and make it more fair because those costs are not included in a lien.

Section 7, which is a change to NRS 108.225, will give a construction lender priority over lien claimants if the construction lender funds a construction disbursement account for the cost to construct the work of improvement, sets aside sufficient monies to pay for the cost to construct the work of improvement, or provides a mechanics' lien release bond. This goes along with what I was talking about early on in my testimony. We provided a mechanism where lenders can be in first position: they simply need to make sure the monies they have set aside are either put into a construction disbursement account or a set-aside account, or they provide a mechanics' lien release bond. It would make certain there is enough money to pay the lien claimants for the work that they provide on those projects. We would not have the problems where projects are being foreclosed and, yet, there is no money to pay for the work that has been provided.

Section 8, which is a change to NRS 108.226, subsection 7, clarifies the term "nonresidential construction project." This is a change for clarification purposes to clearly state what is a residential and what is not a residential project as it pertains to a 15-day notice of intent to give a lien by a lien claimant on a residential project.

Section 9 is a modification of NRS 108.2275. It changes the words "reasonable cause," to "a reasonable basis in law or fact." This change will make the terminology consistent throughout the statute. In other places in the statute, it says, "reasonable basis in law or fact." So we are making that change to be consistent. There is no intent to change the test or when the lien would be valid or not valid; instead, it is a change of terminology.

Another change is being proposed to section 9 that would allow a lien claimant, only when his lien has been sustained by a district court in an order-to-show-cause hearing, to subsequently go ahead, if he is going to foreclose on his lien, and file a complaint to foreclose on that lien in that action.

Section 10, which is a change to NRS 108.2403, clarifies that if the prime contractor stops work, his lower-tiered subcontractors and suppliers may also stop work. Currently, if a prime contractor stops work on a tenant improvement project, because the tenant has not complied with the statutory duties and obligations, there is no right for the subcontractors to stop work as well. We are trying to make certain that subcontractors do have that right.

Sections 11 and 12 pertain to mechanics' lien release bonds that are prospectively provided for a given project. Currently, the statute requires that 150 percent of the prime contract amount be posted by way of a prospective

mechanics' lien release bond. We are proposing to reduce that down to 100 percent of the prime contract amount. This will help these bonds to be more readily available. This is a mechanism that owners can use so that liens will not attach to the property, and they will not have problems with financing. Instead, those liens would attach to the mechanics' lien release bond.

Section 13, which is a change to NRS 108.245, clarifies who is required to give a notice of right to lien. It revises the form of the notice of right to lien, and it more clearly states when a notice of right to lien must be given and the penalty for not giving the notice of right to lien.

Section 14, which is a change to NRS 108.2453, confirms how obligations or liabilities provided for in the statute may be waived. It also limits the circumstances when a higher-tiered contract may be incorporated into a lower-tiered subcontract. In many subcontract agreements you will see what is called an incorporation-by-reference clause. These clauses will attempt to incorporate into the contract all kinds of documents which are never provided to the subcontractor for his review and approval before he executes his contract. This is unfair because, if you do not see those documents, you do not know to what you have bound yourself. This language would make it a requirement that those documents are provided before the subcontractor signs the subcontract, or he is not bound by those documents.

The next change to section 14 has to do with what we refer to as wrap insurance. Owner Controlled Insurance Policies (OCIP) and Contractor Controlled Insurance Program (CCIP) are other terminology for it.

Assemblyman Horne:
It is unfortunate that we are just now receiving this amendment. I have had limited experience in this area. It is not easy to get through or understand.

Mr. Peel, you say that these projects are not being fully funded, the lien holder forecloses on the project, and the subcontractors do not get paid. I can appreciate that. How often, particularly on large projects, are they fully funded? When you say fully funded, are you speaking on the phases of the project or are you speaking of the project in its entirety?

Richard Peel:
Nowadays we see projects being constructed where there is a hope of coming up with sufficient funds to complete the project. That was especially true on condominium projects. My belief is that, if you are going to construct any project in this state, you should have the funds available to construct that project. It is just unfair not to have those funds available so that people can get

paid when they have relied on the representation or the suggestion that the funds would be there. To answer your question, we are seeing a lot more projects in this state where the funds were not available from the start. Another example of that would be the Spanish View Towers that were to be constructed off of Interstate 215. It is a big hole in the ground right now. There were not sufficient funds from the beginning. From what I can tell from the discovery process, the owner was hopeful he would be able to sell condominium units to fund the project. On some of the bigger projects, they can use what is called a set-aside account. It does not mean that monies are deposited in a given account, it means that the lender and owner have agreed, by way of a writing, that monies have been dedicated to or set aside for a specific project so there are sufficient funds to pay for the work that is going to be performed on that job. The hope is that people will get paid and will not detrimentally rely on the suggestion that the money would be there.

Assemblyman Horne:
In real-world practicalities, it does not seem likely that a billion-dollar project would be fully funded for the entirety of the project. I can understand phases. Typically, when these contractors design the project, they set out a schedule for when things will be completed. I can understand a fully funded phase. If you did it for the entire project, it seems like you would just stifle the growth all together if you had to wait for absolutely everything to be fully funded before you started. The people who you are representing would actually be put to work, but they would be working in phases while that was occurring.

In regards to the incorporation-by-reference clause, it seems your request interferes with contract law. I am familiar with the incorporation-by-reference clause. Mr. Peel is correct in that many times those documents are not made available to the subcontractor. That is exactly what you do, Mr. Peel. If your clients bring you a contract, you identify this clause to them, tell them that this is problematic because you do not have the documents specified in the contract, and advise them not to sign the contract until all the documents to be incorporated into the contract can be seen. If we were to adopt this, we would be interfering with contracts. Is that not something attorneys should be doing?

Richard Peel:
Lower-tiered trades are not in a position to be able to negotiate those types of terms in a contract. For those of you who have been involved in the subcontracting industry, a contract is placed before you, and you are asked to sign it without changes or you do not do the work. In most cases, when you ask for copies of the prime-contract documents that are incorporated by reference, those copies are not provided. An exception to that rule would be the City Center project. They did provide the prime contract to the

subcontractors as part of the contract documents. But on other projects, you do not see that happening. It is like pulling teeth to try and get copies of those documents so that you can review them and understand to what you might be bound. It becomes an argument later on because the subcontractor says, "Even though I may have signed that subcontract with that language in there, despite my request, I never saw any of these documents." It becomes a big fight in a court of law. We are trying to alleviate that fight. It seems pretty simple to me. If you want to bind lower-tiered parties to specific contract terms, then provide them with the terms to which they will be bound. Give them a chance to review these terms and make an informed decision as to whether they want to enter into that agreement.

Assemblyman Horne:
Your proposed amendment provides that subcontractors must be provided these documents at the time the contract is signed, or is there a time frame like 30 days or something to that effect?

Richard Peel:
The proposed language set forth on page 6, section 7, subsection 3, of the amendment states that the higher-tiered party needs to provide copies of whatever documents are incorporated by reference to the lower-tiered subcontractor on or before the date that the lower-tiered party signs that agreement. If the lower-tiered party signs the agreement after it has received those documents, then it would be bound by them. It also provides a protection for the higher-tiered parties so they can avoid a dispute at a later date as to whether those terms were married into the agreement that was signed.

Assemblyman Cobb:
In particular, I like the section on the incorporation by reference. Oftentimes, as you have just described, arguably you would be bound by the documents; however, more and more we are seeing the subcontract terms say "and I acknowledge I have received these documents as well." It seems like all you are requiring is that the language in the subcontract be matched by the actions of the prime contractor, correct?

Richard Peel:
Yes. We are simply requiring them to provide the documents, which many of these subcontracts say have already been provided to the subcontractor, but have not been provided.

Assemblyman Cobb:
In reference to that issue of funding and phases, it may be a benefit to the Committee if you could describe how subcontracting works. In my experience,

a subcontractor oftentimes will deliver goods and materials on day one, even if that project is going to take two or three years. If the money runs out years down the road, and the owners have been paying in phases as they have been using the product, that subcontractor has still expended all of its funds to provide all those products on day one. You might want to explain to the Committee why, even though it would be beneficial to the owners and the lenders to be bonding or fully funding in phases, in reality it would hurt a lot of subcontractors.

Richard Peel:
That is very true. Even when you have a project that is funded in phases, you still have a situation where subcontractors, at the very minute that they know they have the job, will begin to do their work. They will start the shop drawings, they will order large, expensive switch gears, cooling towers, and things of that nature which incur costs for the subcontractor. At that very moment, they become indebted for certain materials and equipment provided for that project. As the project progresses, everybody wants to know they will be paid. None of us want to work for free. If we do work for free, we want to feel like we are doing it out of charity from our own heart. Contractors, subcontractors, and lower-tiered trades want to be paid. We want to know the money is there for the project. It is my belief that, if you are going to build a project in this state, you should have the monies earmarked, set aside, and dedicated for that project. If you do not, you should not be building that project. I believe it would have avoided many of the problems that we are seeing right now throughout southern Nevada and perhaps in northern Nevada. Before this is all over, we are going to see tens of thousands of people out of work and companies going out of business because they cannot collect the money.

Chairman Anderson:
Obviously, part of this issue deals with the big contractors, but it also affects small contractors. If I hire a roofer to fix the roof of my house, he incurs the expense of the materials as well as expending his skill and labor. He will certainly be paid because my house is on the line if he does not. How will the small contractor to be affected by this? Will he be protected as a result of the change in the law you are suggesting?

Richard Peel:
The change in law that we are proposing is only in respect to construction lenders loaning monies for a given project. It has nothing to do with a single-family residence owner who is going to fund the project out of his own pocket. Let us assume that the Chairman decides to replace the roof on his house, and he contracts with a contractor. The Chairman borrows money from

the bank to fund the project. The bank would need to have a construction-disbursement account set up so that those monies would be in place and paid out for the work being done.

We are concerned about having the money in place. Ultimately, if the bank goes out of business, we want to know the money is there. If it funded a construction disbursement account, there are assurances that the money would be there to pay for that work. It also gives the homeowner or commercial-property owner some assurances that there are monies to pay for the work, materials, and equipment claims that may arise so he will not have liens placed against his property.

Chairman Anderson:
If I do not make my loan payment to the bank, the bank gets to call in the loan? Even if the roof was completed six months ago, I have to pay that loan off or the bank is going to come after me?

Richard Peel:
The lender may come after you if you do not pay the loan off. But the work, materials, or equipment would have been paid from the construction-disbursement account.

Assemblyman Segerblom:
What about the situation where there is a major change order during the construction which would increase the costs? How do you deal with that situation?

Richard Peel:
Currently, most sophisticated lenders will require a prime contractor to enter into a construction-disbursement agreement. It is an agreement that says that you will bring change orders to our attention so that we can make sure there is enough money for this project. Assume you had a construction-disbursement account, some money has been deposited into the account, and then you have a major change order which will increase the overall cost for the project. At that point in time, monies needed to be added to the account in order to cover those costs.

Assemblyman Segerblom:
That is in this law?

Richard Peel:
As far as the construction-disbursement agreement, no. It is common practice right now in the industry. The law contemplates that sufficient funds would be

placed in the account to cover not only the original scope work but also the change-order work that may be requested by the owner during the course of the project.

Assemblyman Segerblom:
Suppose I am a subcontractor who does not come in until late in the project and the project is stopped in the middle of construction, do I get paid even though I have not done any work, or do I get paid for the work I have done?

Richard Peel:
Currently, the law provides and allows for a lien to be placed for the work, materials, or equipment that the lien claimant has furnished as well as all they may furnish. We are proposing to change the language, in a case where the contract is terminated, to disallow liens for the cost of work, materials, or equipment that will never be furnished. To more directly answer your question, you would have lien rights in your particular situation under current law, in my opinion, to lien for work that you have furnished as well as that which you might furnish.

Assemblywoman Parnell:
Does this bill come to us as a result of a long standing problem, or is this bill a reaction to the last couple of years with real estate? I think that is important for us to understand.

Richard Peel:
This has been a problem for a long time. In 2003 and 2005, when changes were made to the mechanics' lien statute, we did not address this particular issue at that time. We addressed some of the things that were on the hot seat at that moment, for example, waivers and release forms. Those forms were necessary to make sure that people were paid. We addressed those things that we felt were the biggest and most important issues. Yes, this has become a bigger issue because of the economy. Yes, it has become more of a problem recently. However, it has been a problem for a number of years.

The next point that I was discussing, which has to do with section 14, touches on wrap insurance, CCIP, and OCIP. These types of policies are used more frequently on construction projects today than they have ever been in the history of this state. One of the biggest problems is, if you are a subcontractor or lower-tiered trade that will be enrolled in the insurance program but you do not know what the coverage is going to be, it is absolutely terrible to try and guess whether you are going to be covered in ten years.

In Nevada, we have what is called a statute of repose that allows people to bring complaints for up to 12 years after a construction project is completed. When you have wrap insurance, usually the longest we will see completed-operations coverage is around 10 years. More recently, we are starting to see hanky-panky being played with the terms of these wrap insurance policies. On the Aladdin project, the actual policies for that project were not finalized until two months after the project opened for business because a dispute arose between Saint Paul Insurance Company and the prime contractor as to what the insurance carrier was and was not going to cover. In the meantime, people are working who are relying on having insurance in place for that project. The second project I want to mention is the Lehrer Project. Even though one of my clients thought they had an insurance policy for the project that had a 10-year-completed-operations coverage, after they finished their work, the prime contractor renegotiated the completed-operations portion of the policy so that the coverage was only a year. That means if any claims arose in the second or third year after the project was completed, there would be no coverage. The purpose of this language in our proposed bill is to make certain that these policies are distributed up front so that people can make an informed decision as to whether sufficient coverage is in place for them to do the work.

The next change to section 14 has to do with the time period for a contractor to warrant his work. We believe that a contractor should not be required to warrant his work for more than two years by contract.

Section 15, which is a change to NRS 108.2457, confirms the circumstances in which a waiver and release is to be given and amends the waiver and release forms to include a reference to Invoice/Payment Application Period, which is not a waiver through date, and to include a notary block on each of the forms. We believe the notary block is important because it will help to cut out some of the fraud that might otherwise occur where a lower-tiered subcontractor signs a waiver and release for his supplier, when in fact the supplier has never been paid. We want to have a notary block on there so we can make certain that people are getting paid and, in fact, the person who signs the form is the party who is giving up those rights.

We feel that S.B. 352 (R1) is fair to the construction industry. We feel that it is really needed at this point in time. It is important. It will get people paid for the work they provide. We feel that, without it, we will see a catastrophic affect on this industry over the next couple of years.

Chairman Anderson:
The statute of repose is where in this amendment?

Richard Peel:
The statute of repose is codified in Chapter 11 of NRS, but the language that discusses this can be found on pages 6 and 7 of the amendment, subsections 4, 5, and 6. That deals with wrap insurance.

Chairman Anderson:
Can you explain what is wrap insurance?

Richard Peel:
Wrap insurance is where an owner or a prime contractor will obtain an insurance policy specifically for that project. That insurance policy will provide commercial general liability insurance among other types of policies for the work to be provided for the project.

Chairman Anderson:
In part, a surety bond?

Richard Peel:
The surety bond that we talked about before has to do with a prospective mechanics' lien release bond. That is something that an owner or prime contractor can obtain in advance of the commencement of the work. If they record that bond against the title to the property, the liens will attach to the mechanics' lien release bond rather than to the real property.

Chairman Anderson:
This does not change, in any way, the responsibility of the contractor or subcontractor for the workmanship on the job?

Richard Peel:
It does not, Mr. Chairman.

Assemblyman Mortenson:
When a mechanics' lien is placed, what are the consequences to the owner of having that lien on his property? I think he cannot sell it with a lien in place, but are there any other consequences?

Richard Peel:
The consequences of a mechanics' lien being placed on the property are the same as any encumbrance that may be placed against title to the property. The lien holder, if he is not paid, will have the opportunity to file a complaint to foreclose on his lien. If the lien is still not paid during the pendency of the foreclosure action, then the property could be sold at a foreclosure proceeding by the court, and any proceeds from the sale would be used to pay the lien

claimant. As far as the sale of the property goes, there are different ways that an owner of a residential project or owner of a commercial project can sell the property free and clear of mechanics' liens. One of the ways is to bond around the lien, in other words, to obtain a surety bond. Another way is to put up sufficient security for the title company so the title company would give clear title to the buyer of the property. Those are some of the ways that are used. Historically, sellers gave letters of indemnity to title companies so that they would give clear titles so the property could be sold.

Chairman Anderson:
Mr. Peel, are you aware of any other amendments that are going to be coming forward other than those presented in your document?

Richard Peel:
I am aware that there will be people testifying in opposition to this bill today. I have not seen any amendments that will be submitted today to change the language that we have presented. I am not aware of any other amendments.

Steven Holloway, Executive Vice President, Associated General Contractors, Las Vegas Chapter, Las Vegas, Nevada:
I will dwell on section 7 of the bill, which we are amending.

Chairman Anderson:
Has the amendment been distributed to the people at your location in the south?

Steven Holloway:
It has been distributed to all the people you see on the left hand side, but it has not been distributed to the opponents. I did not have any additional copies.

In regard to the priority of liens, the amendment still allows deeds of trust, mortgages, or other encumbrances that occurred before construction to maintain their priority, other than those that are directly made for the construction of the project. For example, if you obtained a loan to purchase the property on which you were going to do the work of improvement, that loan would have priority. The deed of trust resulting from that loan would have priority over all of the mechanics' liens that were subsequently recorded. It would also have, as it does now under law, a priority over any of the construction loans.

One of the problems we initially addressed in this bill, which is no longer a part of it as a result of this amendment, was an ongoing problem for the past 50 years. At the conclusion of a project, the owner owes the prime contractor who in turn owes the subcontractors, their retention, which is usually about

10 percent of the contract price, and the last month's draw to conclude the project. The owners typically do not pay either the retention or last month's draw, declare bankruptcy, and continue to operate. By declaring bankruptcy, they wipe out all of the subsequent loans that they may have received after the start of construction as well as all of the mechanics' liens and come away with a clear deed to the property. This happened on the Aladdin project with the performing arts center. At the conclusion of the project, the prime contractor was owed $4 million, which was not paid. The Aladdin declared bankruptcy. They are still operating and making money. That prime contractor is no longer in business. That prime contractor testified on the Senate side, but, unfortunately he could not be here today to testify again.

In the original bill, which is now being amended, we put in a provision that any liens would remain with the property despite bankruptcy foreclosure. This would have addressed that problem. It would have also addressed another problem. Often, during a foreclosure, the property and the work of improvement are sold for a lot less than they are worth. There is no money left for the other loans or mechanics' liens, and they are all left out in the cold. In the original bill that passed the Senate and came to you we had a provision that these liens would remain with the property despite a bankruptcy foreclosure. As a result of the objections of the gaming industry and title companies, we have taken that language out as part of this amendment. All that is left is the language Mr. Peel has explained to you.

I would add one more thing. Currently, any loan made after the commencement of construction does not have priority over liens. This bill would give those loans a priority if the owner would establish one of the three things enumerated: either a construction disbursement account, a set-aside, or a surety. We had hoped this would help encourage those types of loans because most projects now require a number of loans in order to be completed. One of the reasons it is so difficult to get loans after the start of construction is that they have no priority; therefore, it is difficult to get these loans, and if you do get them, they are very expensive.

Chairman Anderson:
Did you include the suggestions from Mr. Michael Buckley in your amendment?

Steven Holloway:
We did get an email from Mr. Buckley. We have reviewed it. We have incorporated some of his suggestions, but I do not believe we incorporated all of them.

Chairman Anderson:
In addition, the Nevada Land Title Association has made some suggestions. Are you aware of those?

Steven Holloway:
Yes. We did not incorporate their specific language, but we did address the problem they had raised. The deeds of trust that exist before the start of construction have priority now under the law. The way the bill was initially presented, they would have lost that priority. We have fixed that by restoring the language in subsection 1 of NRS Chapter 108.225, which is part of Section 7.

Chairman Anderson:
And you had indicated that you have also worked out some level of compromise with the gaming industry?

Steven Holloway:
We had attempted to do this by deleting subsection 5 of section 7, which was the language on the liens remaining with the property despite a bankruptcy foreclosure. We also attempted to address one of their problems, which is in paragraph (b) of subsection 3, by loosening up that language, making it a little easier to utilize if you are an owner. Also, we deleted all of the restrictive language on having to provide information as to the location of the bank, its name and address, and so forth.

I do not think we have satisfied Boyd Gaming. I am sure you will hear from them.

Richard Peel:
Mr. Chairman, you had asked me a question whether I had seen any other amendments. I just knew it was a proposed amendment from Rocky Finseth, but I did not believe it to be a formal amendment to the language. As Mr. Holloway indicated, we revised Section 7 to take out the language that we thought Mr. Finseth was concerned about. I wanted to make the record clear that we did receive something from him.

Richard Lisle, Chairman, Subcontractors Legislative Coalition, Las Vegas, Nevada; Executive Director, Mechanical Contractor Association, Inc., Las Vegas, Nevada:
We are here today to urge you to support S.B. 352 (R1) with the amendments as discussed. This is very complicated legislation as you have heard from the testimony of Mr. Holloway and Mr. Peel. This important legislation will fine-tune and level the playing field for owners, general contractors,

subcontractors, and material suppliers. I feel we have bent over backwards and compromised with any groups with constructive ideas for fairness in our industry. We urge this Committee to pass this important legislation.

Sherry Vyvyan, Las Vegas, Nevada representing Southern Nevada Air Conditioning Refrigeration Service Contractors, Las Vegas, Nevada:
We are very much behind this bill. We believe it is going to be very fair. I thank you for your time.

Jerry Miller, Carson City, Nevada, representing the Nevada Land Title Association, Las Vegas, Nevada:
The Association has concerns with one provision contained in S.B. 352 (R1) as it pertains to the ability of title companies to issue title insurance not only on construction projects but also on any loan secured by real estate in the State of Nevada. Before I cover our concerns, let me briefly explain the concept of title insurance.

[Continued to read from prepared testimony (Exhibit E), including a reference to the amendment (Exhibit F).]

Coming here this morning, I see that they have proposed an amendment which they represent would remove our concerns. I do not see in the amendment they are proposing that it deletes subsection 5, with which we have a concern. While I recognize and sympathize with the concerns of the contractors expressed in support of the bill, the terms of the bill, withdrawing the ability of the citizens of Nevada to provide a first-lien-priority position to a lender in exchange for loan funds, is not an appropriate remedy for the situation. We do not want that language included in the bill. Mr. Holloway said it has been removed. I just want to make sure that language remains deleted.

Chairman Anderson:
Does anyone else have an amendment? Mr. Sande, do you have an amendment that I received?

John P. Sande, III, Jones Vargas, Reno, Nevada; representing the Nevada Bankers Association, Las Vegas, Nevada:
It was Michael Buckley's (Exhibit G).

Chairman Anderson:
You are representing Mr. Buckley here?

John Sande:
Yes.

Chairman Anderson:
I had my staff review Mr. Buckley's amendment, but go ahead, Mr. Sande.

John Sande:
I have served on the loan committee for two banks, including Valley Bank of Nevada, and I am currently on a holding company board of five banks; two of them are located in Nevada. I can tell you that if this legislation passes with the proposed amendment, there will not be any more construction lending in Nevada. In my opinion, I would never approve any construction loan as set forth in the revised subsection 3 of section 7, which says that any deed of trust, whether it is before or after the commencement of construction, is subordinate to any liens, unless the lender deposits all funds necessary to do the construction, including any additional or change work, at the beginning. First of all, how will the banks know what funds will be necessary, especially if it is a large construction project that may take several years? It is very difficult to know how much money a project will need, but lenders would have to deposit it up front, and they would have no way of knowing if someone is going to challenge them down the line. It would be almost impossible to get title insurance. Also, that money would be deposited immediately, and that means the lenders are going to start charging the borrower immediately on the entire amount. So if it is a $200 million dollar project, lenders will start charging interest immediately on that loan, and I do not think the borrower would be very happy about that.

A lot of times the depositor is required to put up equity first, and banks are not actually funding the loan until all of those equity funds have been dispersed. That would cause a problem here as well. What if there is more than one deed of trust? How much do you deposit? There are a number of issues, but I will highlight the ones that strike me.

Chairman Anderson:
Have you looked at the amendment that was proposed yesterday from Mr. Holloway, which deletes subsection 5 of the bill?

John Sande:
It removes subsection 5 of Section 7, but the concept is reinserted in subsection 3, on page 2 of the proposed amendment that I saw. It still causes the same problem. It says that if lenders are to be protected, they must deposit all of the monies for the construction of the project, regardless of whether the project will take a month or two years. Lenders must deposit it immediately, and it is the lender's burden to make sure it covers everything, including any additional or change work. How will lenders know that at the beginning? Where will they deposit the funds? Will it be deposited in a financial institution?

If that financial institution goes belly-up, what happens then? Who is responsible for that?

The Federal Deposit Insurance Corporation (FDIC) looks at the types of loans in a bank. If you have too many of a certain type of loan, the FDIC will say that is not appropriate. Construction loans are deemed to be speculative loans because they do not have a guaranteed payback. That is why a lot of lenders, if they are doing an apartment project or something of that nature, will require a certain number of signed leases before they will lend the money. I think that this would be devastating for southern Nevada. Right now, the FDIC is much tougher than they have ever been before, especially in Nevada. They will look at these types of construction loans and say that they are speculative, so lenders will need to have bigger loan-loss reserves on their books.

Chairman Anderson:
Suppose I am developing a large project and I have taken out a loan from you. The bank is financing the project in phases as the project is completed. Now the project is 80 or 90 percent complete, and the bank no longer has available funds. As a result, the contractor cannot meet his obligations, but the subcontractors continue to work because the contractor believes he is going to get the money from somebody else. However, it does not happen. What happens to the subcontractors and workers who are on that job? They have done the work. It is already done. What will happen?

John Sande:
If I am a contractor and I am dealing with the owner, I want to make sure that I have a contractual relationship to make sure the funds are available. For example, you can have a construction-control account where all the funds from the lender and the borrower are put into that account and someone makes sure the contractors are paid. Many times banks will insist on this because they want to ensure that, after the project is done, the project is completed. It is not a consistent practice, however, because it is an additional cost. It is a matter of contract law. There is no question that a contractor can say, "I want to make sure that funds are available, and I am not going to send my people out on a weekly basis unless I am prepaid or the funds are available." That is a matter of contract. This legislation, with the proposed amendment, places the entire burden on the lender to put up all the money and make sure it is in some account. That may sound good, but I can tell you, in my opinion, nobody is going to make loans in Nevada under these scenarios. I do not see it happening because it puts all the risk of failure upon the lender. Even now, in southern Nevada especially, it is very difficult to get construction loans.

Chairman Anderson:
Why would I walk onto any job and spend my time working if I was not assured that I was going to get paid at the end of the day?

John Sande:
I would not go on the job unless I was assured of that.

Chairman Anderson:
So I trust that my boss is going to be able to pay me on Friday. When he cannot make his payroll because the contractor cannot make his payroll, the subcontractor is going to have to reach into his bank account to keep things moving until he gets paid or goes bankrupt. But the bank should not have to put the money up in the beginning to make sure that all of this is guaranteed?

John Sande:
The bank lends the money. The bank is out-of-pocket. The bank should not be responsible to contract with the contractors and the subcontractors to make sure that they get paid. The bank funnels money. You can say, "Yeah, let us go after the lender. Let us put all of this obligation on them." But, in my opinion, if I were on a loan committee for a bank, I would say, "We are not going to make these kinds of loans. They are too risky for us. What happens if we deposit these funds into some account and the account goes under? Are we liable? If we underestimate how much it is going to cost to finish the project, are we liable? What if we want to have the borrower put up funds first for the first phase and then we come along? We cannot do that anymore." It is the obligation of the contractors, the subcontractors, and the borrower to contract with one another to make sure that they are all protected.

Chairman Anderson:
You do not think that the workman who walked onto the job and worked that day is not out-of-pocket and time?

John Sande:
Not if they are careful at the beginning.

Chairman Anderson:
How are they going to know? They have a reasonable expectation of getting paid. That is the reason why they are working for their boss. They know that it might be a tight budget and the boss is trying to keep all of them employed, looking for new work. There has to be some assurance that the worker is going to get paid at the end.

John Sande:
That is why, when the contractor is dealing with the borrower at the beginning of the job, he can say, "OK, we want to have a construction-control account. We want to make sure that there is always money available. If the bank lends us money, it will be deposited to a construction-control account, and we will be paid." Or he can talk to the borrower and say, "Set aside some other account." If it is a very well-known borrower with a lot of funds, then he will probably feel more assured that he will be paid. My point is that, if this law passes, in my opinion, I would not vote in favor of making a loan because it puts too much of an obligation on banks and bank employees and there is too much ambiguity in this section to know that we would be protected.

Assemblyman Cobb:
Under the amendment, section 7, subsection 3, paragraph (a), (Exhibit D) where it includes funds for additional or change work orders, I agree that is too speculative. But I did like the language in the original bill, which was the cost of the prime contract. You mentioned the construction-control accounts, but those are all decided by the owner and the lender. The subcontractors are not privy to them. You mentioned that you would not walk onto a project unless you were assured that you were going to be paid. I know you are talking about the reality of the banking business, they would not approve these types of loans, but the realities of the construction business is that no one would ever walk onto a project if there was not a 100 percent guarantee for payment. I do not think that would work either. If you as a lender are agreeing to fund a project, then fund the project. If the bank decides ahead of time that it is too risky, the bank could charge higher interest or something to that effect. We want assurances, as the Chairman was alluding to, that people who put in the work and materials, out-of-pocket, do eventually get paid. If that part of the amendment about the additional or change work were taken out, do you still feel it would not be appropriate to ask that the lender actually provide the funds up front that they are pledging?

John Sande:
Yes, it still has tremendous problems, as I have pointed out. First, how do you treat the situation where the lender says, "I want the borrower to put up the money initially to get the project started, I have my deed of trust on file, and once the project is going well, then I will loan the additional amount"? That would not work under your scenario. What if there are two deeds of trust? How does that work? There are a lot of other things that the real estate lawyers would understand better. If this law passes and requires lenders to set aside funds to make sure the project is paid, that puts an obligation on them. These loans are speculative enough. The FDIC does not like them. It sets a limit on how many loans of this type a lender can make. Lenders will wonder

why they should make these types of loans in Nevada when they can go somewhere else.

Robert W. Potter, President, Affordable Concepts, Inc., North Las Vegas, Nevada:

I am one of the individual companies that has been impacted by this issue, so I feel it is appropriate to tell my story. I employ about 60 people. I have worked my entire life as a general contractor, with 24 years in the Las Vegas valley. I have been active in the Las Vegas Chapter of the Association of General Contractors (AGC).

I believe this is a good bill worthy of your support. It ensures that everyone involved in the project, incurring debt as a result of a commitment to the project, is paid and becomes whole. We have in the past and are currently experiencing catastrophic financial ruin to our industry participants as the result of, at best, poor decisions that owners and/or lenders have made. Owners have committed to construction without adequate funds, e.g., City Center. Banks and lenders have reneged on their commitments. One example is Fontainebleau. The result is bankruptcy, bankrupting many individuals and companies that relied on upper-tier common sense and best practices, which have not been followed. These bankrupt companies are forced to lay off thousands of workers with no notice. At least if you finish a job and you see it coming in six months, you can make appropriate changes in your lifestyle and/or financial commitments. But these situations have put people on the streets immediately.

I speak from personal experience. Although the projects with which I have been personally involved have not been in the hundreds of millions of dollars, they have been in the hundreds of thousands. I have paid between one and two million dollars on two projects where lenders and/or owners have not honored their commitments. I cannot continue to make those kinds of financial outlays. I do not think I should have to. I was prudent in my assessment of the funds at the beginning, given the information I had available. It simply is not fair that the general contractor should have to step into the shoes of the owner or lender and be the financial guarantor. Therefore, if we cannot rely on the owners and lenders to use common sense in their original decision-making process, then I believe that this Legislature should do it for them. With passage of this bill, we can ensure the following: there is enough money from the beginning to do the complete project; the prime contractor will get paid, and subsequently all lower-tiered and material suppliers will be paid, banks and lenders will honor their commitments, jobs are secure, and businesses will remain whole. Further, and more specifically, this bill does the following: it delineates what work or material to be furnished may have a lien placed upon it; revises and strengthens the test to determine whether a lien is frivolous; allows a prime contractor to

stop work any time during a tentative improvement project if there is no surety; reduces the required preconstruction surety amount to the amount of the prime contract; limits construction-defect liability on OCIP/wrap projects; requires a prime contractor to defend, indemnify, and hold the owner harmless from a lien only if the prime contractor was provided with a notice of the right to lien and was paid for the work, materials, or equipment that is the subject of the lien; and allows lien releases through a specific date.

David P. Bold, Owner, Done Right Plumbing Inc., Las Vegas, Nevada:
I do not feel it is right that I go onto a job site and have concerns about being paid. We support this bill. Thank you.

Charlene C. Richards, Vice President, Desert Fire Protection, Reno, Nevada:
We do most of the major projects on the Las Vegas Strip and in northern Nevada. We have been around for nearly 30 years. Until recently, we employed over 450 employees. We are on the Fontainebleau project. On April 30, 2009, we had to lay off 76 employees, almost one-fifth of our work force, without any notice because the project lost its funding. We want to be paid for what we fairly provided, and we want to make sure our rights are protected.

Greg Esposito, Business Representative, Plumbers, Pipefitters & Heating, Ventilation & Air Conditioning Technicians Union Local 525, Las Vegas, Nevada:
There has been a lot of discussion about assurances and growth. We do marketing and advertising for some of our contractors as a way to help them get more business. I called ten of our smaller contractors a few weeks ago and asked them if we could help them. The majority of them said no. They did not want to take on new contracts and new customers with whom they were not personally familiar because they were afraid they would not be paid. When you are talking about growth, this is a very dangerous business practice to be forced to adopt. We are in full support of this bill. Its importance is reflected in the fact that it is supported by both union and nonunion groups. The members of many unions who were laid off are going to wonder if the wages, benefits, and pensions that they earned in March will be deposited. This bill helps both the workers and the contractors. Thank you.

Steven Ross, Secretary Treasurer, Southern Nevada Building and Construction Trades Council, Henderson, Nevada:
We are pleased to sit with our partners and trade associations in the industry in full support of this bill.

Sherry Hernandez, Administrator, Subcontractor Legislative Coalition, Las Vegas, Nevada:
We urge your support of Senate Bill 352 (R1). This is a shared responsibility for all of us: the prime contractor, the owner, the subcontractor, and the bankers. Thank you.

Ken Schultz, Chapter Executive, Sheet Metal and Air Conditioning Contractors National Association of Southern Nevada, Las Vegas, Nevada:
While the current lien statute has helped get all contractors paid, S.B. 352 (R1) will help everyone involved in a project by removing some of the areas of dispute that in the past have had to be decided in the court system. Sheet Metal and Air Conditioning Contractors National Association's (SMACNA) 23 contractors—our employees, our vendors, our suppliers—all stand in strong support of S.B. 352 (R1) with the amendment presented by the Subcontractor's Legislative Coalition (SLC) and the Association of General Contractors (AGC). Thank you.

Douglas Williams, Chairman, Associated Builders and Contractors, Las Vegas Chapter, Las Vegas, Nevada:
I am owed 3 to 4 million dollars for work I have done on five different condominium projects, which failed. I have had to lay off 20 to 50 employees. When I handed them their final check with no notice, the expression they had on their faces makes a simple, "me too," insufficient. I support S.B. 352 (R1).

Beverly Wolf, Risk Manager, Interstate Plumbing and Air Conditioning, Las Vegas, Nevada:
I have handled the risk, the insurance, and human resources for Interstate Plumbing and Air Conditioning for almost 11 years. Interstate is one of the biggest plumbing and mechanical subcontractors in the State of Nevada. I will say "me too," with the added note that Interstate also has laid off many employees and lost millions of dollars due to this issue over the last couple of years.

I want to address a couple of the other items in S.B. 352 (R1): the contract issue and the wrap insurance issue. Since I negotiate all the contracts for Interstate Plumbing and Air Conditioning, I am well versed in how that contract negotiation goes. We are handed a contract that says that a ton of other documents are incorporated into that contract, we have been able to read those documents, we know what is in them, and we have had the ability to have legal counsel review them. Then we are asked to sign the contract, which includes that we agree with all of the incorporated documents. When we ask for those documents, whether it is the policies of insurance on a wrap or it is a prime contract, we are blatantly told that we cannot have them. We are told to sign

the contract or we do not get the work. The issue of wrap insurance is a horrible issue for subcontractors. A lot of subcontractors cannot obtain insurance to do residential projects on their own, so these projects have to have wrap insurance. The subcontractors and contractor who are on that project need to be able to know that the insurance covers them, otherwise what is the point of having insurance? It is very difficult to obtain and review those documents. It is not just a matter of saying, "No, we will not work on your project," it is a matter of getting the work.

When the banking industry talks about a borrower who is supposed to put up equity first, which is supposed to be spent first, why cannot the borrower put the equity in the same account that the lender puts its money in? As far as this legislation would stop construction lending in Nevada, I do not believe it is going to happen. A lot of the lending is private lending, not bank lending. That is partially the reason that we are seeing the problem. The private lending is choosing at the end or middle of these projects to stop the funding.

Chairman Anderson:
Let us now hear from those in opposition to S.B. 352 (R1).

Michael Mathis, Vice President and General Counsel, Echelon Resorts, Boyd Gaming, Las Vegas, Nevada:
I sent a letter on behalf of Boyd Gaming, joined by the Nevada Resort Association, Wynn Resorts, MGM Mirage, and Harrah's in opposition to this bill (Exhibit H). On behalf of Boyd, I have personally been involved in negotiations about this bill with Steve Holloway, who is with the AGC, and his counsel going back to the fall of 2008. Mr. Holloway and his counsel suggested that he act as an intermediary between development, gaming, and the subcontractors, because AGC has that middle position. It made a lot of sense to us. We have been involved, although you have only recently seen the opposition.

In recent sessions, particularly the 2003 and 2005 Sessions, NRS Chapter 108 has seen a great deal of activity. Many of those changes arose from high-profile construction disputes in Las Vegas, namely the Venetian, the Aladdin, and at that time, Summerlin. Those changes attempted to and have successfully rebalanced the interests of owners and contractors by strengthening mechanics' lien rights and excusing certain technical notice requirements that contractors and subcontractors may fail to achieve. As recently as 2003, those changes clarified the priority of mechanics' liens over lender mortgages filed after the commencement of construction for which the contractors had notice. I stress the word "after," because what is going on today is a dramatic change to that concept. What S.B. 352 (R1) attempts to do on this last issue is reverse the longstanding practice of lender priority through

first-in-time filing. This change is more than just trying to adjust the balance between owner and contractors, it goes to the very underpinnings of the billions and billions of dollars that Wall Street and third parties have invested in Nevada.

I do not think it overstates it to say that Nevada's and the gaming industry's growth is in jeopardy through this issue. We have had well-publicized bank takeovers of projects in midconstruction and historic drops in visitation and gaming. In one case, lenders thought it was a better investment to pay a billion-dollar penalty than to honor a financing commitment to a gaming company. Consider that: a billion-dollar penalty was a better use of their funds than to invest in a gaming company. The pressure on our continued growth is at every level. Just the other day I was in a negotiation with a major contractor who was describing a negotiation they were having with their own bank about a line of credit. In prior negotiations he used to brag about the fact that 90 percent of his business was in Nevada and in support of gaming projects. He was told in these negotiations that the company needed to diversify itself away from Nevada and gaming. The issue with growth is not only at the owner-lender level, but it is also all the way through the supply chain. We all know the ramifications of those types of negotiations that are going on right now and what that does to the costs of projects and future growth.

At the very time that we should be doing everything we can to attract lenders to our beleaguered economy, this change in priority says the exact opposite. It says, "Stay away." Through today's amendment, the proponents have offered a mechanism for lenders to regain their priority by completely prefunding a project. For example, let us posit a four-year project. In that scenario, there is an excavator who would be brought onto the project in month three. If you accepted S.B. 352 (R1), the project would have to be completely funded—four years worth of construction—before the excavator can be hired, contracted, and paid. Foundations come in at month six. Again, it is the same issue. The whole project would have to be funded before the foundation work could begin. There was a reference earlier about phasing. I think that is the right concept when thinking about the challenges with the proposed legislation.

As disappointed as we were to have to stop the Echelon project one year into the four-year project, there are 500 million dollars worth of contractors who are happy that we were able to do that initial work. They were fully paid, and despite our complex loan arrangements, which did not allow us to continue, we honored that work.

There is a real issue that the contractors pointed out. The potential of not getting paid further down the line is a real possibility. However, I think the answer is freedom of contract. Mr. Peel and his clients can require, before

entering into a contract, that a project be fully-prefunded. That is their contractual right. I know, from my own experience, there are contractors who, because of what the gaming company is, will or will not bid on that work. That goes to the very issue of whether they feel comfortable that, somewhere down the line, they will not have a problem. Fortunately for Boyd Gaming, we have a sterling reputation, so this is not an issue for us. But this bill does not protect Mr. Peel and his clients against lenders, it protects his clients against the other contractors who are willing to take that risk when they bid on that work. The other protection they have is to negotiate lower retention to mitigate some of their exposure. Again, I have been in those negotiations and I know contractors are very capable of doing that. They can negotiate shorter payment cycles so their exposure is limited. The changes Mr. Peel and the AGC have accomplished in the last few sessions has resulted in statutory protection, the right to walk off the job with ten days notice if they have not been paid. Is there exposure on that last payment cycle? Absolutely. Is that exposure mitigated? Yes it is. I think, ultimately, especially with the economic crisis, the guarantee we are all looking for is the success of our business: people showing up, enjoying our products, and paying what they used to pay. That guarantee is not there for any of us. I really think freedom of contract is something that is slowly being eroded through NRS Chapter 108. In the 2003 and 2005 changes a number of provisions were passed that said not only certain things were not able to be waived but also that if a contractor entered into a contract and waived those rights, the law would not recognize the waiver. These are freely contracted rights that any of his clients could negotiate. What this law would do is strip all of us of the ability to negotiate.

In closing, I would say that if the Nevada Bankers Association is correct, I cannot believe that there is anyone who would support drying up the pipeline of loans to the construction community. We should all have a choice, and if times are such that the market demands it, I think certain contractors would be willing to take that risk. I think the only reason that we are here today is because, for some reason, the contractor and the subcontractor communities do not believe that to be the case. If you pass this bill and have to see those ramifications, that would be unfortunate.

Assemblyman Horne:
On these projects, particularly large projects, I am concerned about instances where there is more than one loan and multiple deeds of trust. Some come at the very beginning of a project before ground is broken. Some come subsequently after work. Then there are multiple phases of work, change orders, and the like. Sometimes there are attempts by the subsequent lenders to move ahead in priority of the subcontractors for the work that has already

been performed. How do we protect that work for which the subcontractors are entitled payment? Is that through contract as well?

Michael Mathis:
I think the current law actually protects that situation in some ways. As I understand it, what the current law states is that mechanic liens that attach to a mortgage or deed of trust that is filed after the commencement of construction do not lose their priority. The attempt by the subcontractors and contractors to fix that problem is a good one. They proposed a system where you have a second deed of trust. In that case, you would have the option, if you want to get your priority back, to prefund. This is not the original lender, this is a subsequent lender. For those subsequent lenders the mechanics' liens either share or have priority under existing law.

Assemblyman Horne:
Let us say that the same lender is going to lend $100 million, but one-quarter of that is going to be at the initial start of construction. Then it is broken into phases. Would that $100 million loan be considered, in its entirety, senior to the liens, or would the subsequent payouts from the other three-quarters as the project went on be subordinate to the liens that were filed prior to those payouts?

Michael Mathis:
I found it interesting that the bill, which was heard by this Committee just prior to this one, was exactly on that subject. I learned a bit myself by listening to the discussion. As I understand the law, the $100 million deed of trust, if drafted correctly, would protect not only the initial 25 percent, but also the priority of the subsequent advances. While we are on that topic, when you look at the structure of one of these fairly complex financial arrangements, I think it is important to see all the various triggers and conditions that, sensibly, are in them. For example, a lender may agree to fund a project, but they are going to want to see certain things along the way. Those things are third-party retail agreements. They want to see how well you have leased the property. In certain other recent projects that are contingent on condominium sales, lenders sensibly want to see that there is interest in the condominium project. They will want to see thresholds as to deposits and sales. So the concept of a fully prefunded project, which is the concept that is incorporated into this amendment, does not exist in reality. If you want to impose that requirement, then I think you go back to the very challenge we are talking about: are any of these projects going to be viable? Close colleagues have lost their jobs in this industry. A lot of people have suffered. I heard the anecdotes about individuals at the Fontainebleau losing their jobs. But the reality is that we are all exposed

in some way to the success of the industry. There is no way to fully protect against that.

Assemblyman Cobb:
You talked about the realities of the lending industry and what would happen if this were put into place. Some of the solutions you proposed were contractual changes. You do recognize the fact that the reality in the subcontracting business is there are rarely changes to those subcontracts because there are a number of subcontractors on one project? Do you not feel your solution may not actually be viable given the realties of the subcontracting business, because of the leverage the prime contractors have?

Michael Mathis:
I recognize the realities of a negotiation. Ironically, we as a gaming company were in a recent situation where we were concerned that there would not be enough laborers for construction. In that case we adjusted our budget accordingly because the market is the market. You will have tougher restrictions and shorter pay cycles. My answer is the market drives that. I have been in negotiations where contractors have walked away and said, "We are not agreeing to that. We are not agreeing to a 45-day pay cycle. We will only agree to a 20-day pay cycle." When that contractor walks away and does not come back—they usually do come back in negotiation—you have to scratch your head and say, "Am I going to go with the second contractor who is 10 percent higher?" Those are all business decisions that we make. The reality of the business is that it is driven by market forces. I have seen very sophisticated contractors who stayed away from bad jobs.

Bill Uffelman, President & Chief Executive Officer, Nevada Bankers Association, Las Vegas, Nevada:
We are in opposition to this bill.

Angela Otto, Brownstein Hyatt Farber Schreck, representing the Nevada Resort Association, Las Vegas, Nevada:
We oppose this bill as well. We are concerned about discouraging lenders from loaning money in Nevada and the higher costs to borrowers due to lenders' increased risk.

Dan Musgrove, Las Vegas, Nevada, representing the Southern Nevada Chapter of NAIOP, Las Vegas, Nevada:
Me too. We would like to talk to you about sections 13 and 14 at another time. We echo all of the comments made.

Chairman Anderson:
We are adjourned.

[Meeting adjourned at 12:03 p.m.]

RESPECTFULLY SUBMITTED:

Robert Gonzalez
Committee Secretary

RESPECTFULLY SUBMITTED:

Karyn Werner
Editing Secretary

APPROVED BY:

Assemblyman Bernie Anderson, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 2, 2009 **Time of Meeting: 9:38 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 333	C	Douglas Flowers	Written statements concerning S.B. 333.
S.B. 352 (R1)	D	Richard Peel	Proposed amendments to S.B. 352 (R1).
S.B. 352 (R1)	E	Jerry Miller	Written statements concerning S.B. 352 (R1).
S.B. 352 (R1)	F	Jerry Miller	Proposed amendment to S.B. 352 (R1).
S.B. 352 (R1)	G	John Sande	Proposed amendment to S.B. 352 (R1).
S.B. 352 (R1)	H	Michael Mathis	Letter from various gaming industry representatives concerning S.B. 352.