MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fifth Session
May 13, 2009

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:28 a.m. on Wednesday, May 13, 2009, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was video conferenced 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
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
Assemblywoman Marilyn Dondero Loop

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Katherine Malzahn-Bass, Committee Manager
Karyn Werner, Committee Secretary
Steven Sisneros, Committee Assistant

OTHERS PRESENT:

Renny Ashleman, representing Southern Nevada Home Builders Association, Las Vegas, Nevada
Steve Holloway, Executive Vice President, Associated General Contractors, Las Vegas, Nevada
Richard Peel, Peel Brimley, Henderson, Nevada, representing Subcontractor Legislative Coalition, Las Vegas, Nevada
Steve Redlinger, Las Vegas, Nevada, representing the Southern Nevada Building and Construction Trades Council, Henderson, Nevada
Jerry Miller, representing the Nevada Land Title Association, Las Vegas, Nevada
Bill Uffelman, President and Chief Executive Officer, Nevada Bankers Association, Las Vegas, Nevada
Dan Musgrove, representing NAIOP of Southern Nevada and the Commercial Real Estate Development Association, Las Vegas, Nevada
Michael Mathis, Vice President and General Counsel, Boyd Gaming, Las Vegas, Nevada
Robert Crowell, Carson City, Nevada, representing Boyd Gaming, Las Vegas, Nevada
James Wadhams, Jones Vargas, Las Vegas, Nevada, representing Herbst Gaming, Inc., Golden Gaming Inc., and Las Vegas Convention and Visitors Authority, Las Vegas, Nevada
Michael Alonso, Jones Vargas, Las Vegas, representing Herbst Gaming Inc., Las Vegas, Nevada
Sean Higgins, Executive Vice President and General Counsel, Herbst Gaming Inc., Las Vegas, Nevada
Steve Arcana, Chief Operating Officer, Golden Gaming Inc., Las Vegas, Nevada
Joe Wilcock, Proprietor, The Brewery Bar and Grill, Las Vegas, Nevada
Ronald Drake, Proprietor, Point After, Las Vegas, Nevada

Trevor Hayes, Lionel Sawyer & Collins, representing the International Premium Cigar and Pipe Retailers, Las Vegas, Nevada
Tom McCoy, Government Relations Director, American Cancer Society, Reno, Nevada
Dr. Nancy York, Assistant Professor, School of Nursing, University of Nevada, Las Vegas, Las Vegas, Nevada
Michelle Washington, Private Citizen, Reno, Nevada
Dr. John Middaugh, Director of Community Health, Southern Nevada Health District, Las Vegas, Nevada
Christopher Roller, representing the American Heart Association and the Nevada Tobacco Prevention Coalition, Las Vegas, Nevada
Allison Newlon-Moser, Executive Director, American Lung Association, Las Vegas, Nevada
Michelle Gorelow, Director of Program Services, March of Dimes, Las Vegas, Nevada
Michael Hackett, Vice President, Alrus Consulting, representing the Nevada State Medical Association, Reno, Nevada
Teresa Price, Private Citizen, Las Vegas, Nevada

Chairman Anderson:
[Roll called. The Chairman reminded everyone present of the Committee rules and expectations of behavior.]

I will open the hearing on Senate Bill 352 (1st Reprint), continued from Saturday, May 2, 2009.

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

Renny Ashleman, representing Southern Nevada Home Builders Association, Las Vegas, Nevada:
I just wanted to add a "me too." The concerns I had on Saturday were alleviated.

Steve Holloway, Executive Vice President, Associated General Contractors, Las Vegas, Nevada:
We have not reached a consensus on the bill. However, since its journey from the Senate, we have made 21 changes to the bill, including deleting section 7 which was the center of the dispute at the last meeting (Exhibit C).

Richard Peel, Peel Brimley, Henderson, Nevada, representing Subcontractor Legislative Coalition, Las Vegas, Nevada:

At the hearing on May 2, I had a chance to go through S.B. 352 (R1) as well as the amendment. The biggest concern that was raised by some of the owner groups, title companies, and bankers was with respect to section 7. If the Committee will recall, the proposed language that we had brought by way of amendment for section 7 would have allowed lien claimants to get paid for work, materials, or equipment that they had furnished for the improvement of the property, even where a prior deed-of-trust holder or a subsequent deed-of-trust holder may foreclose on their deed-of-trust. We explained to the Committee about many of the projects currently in Las Vegas that are having financial distress and are being foreclosed upon by lenders, wiping out lien claimants. Lien claimants are not getting paid for the work, materials, or equipment that they furnish.

We tried our best. I made about seven separate revisions to section 7 to try to appease the many voices that had concerns. Ultimately, after going back and forth, Mr. Holloway and I decided that the removal of section 7 would be the best option under the circumstances. There are too many other important provisions in this bill that help contractors, subcontractors, and material suppliers to get paid for work, materials, or equipment.

I believe, at this point, we will have satisfied bankers and title companies' concerns with respect to the bill. We will have satisfied gaming's concerns with respect to section 7. There are still other concerns raised by other groups. In an attempt to resolve these other concerns, we have modified language in section 14 of the bill specifically to make certain that, if a contractor, subcontractor, or lower-tiered subcontractor wishes to receive a copy of any of the Owner Controlled Insurance Program (OCIP) policies and endorsements thereto, they must request a copy of the same within 30 days of the date that they enter into a contract. Another revision was made to section 13. There was some language there with which some owner groups had concern. We removed some language from section 4 which was in the prior draft of the amendment, from that subsection of section 13. We also modified the new section to attempt to resolve some concerns, which is item number 3 on pages 1 and 2 of the amendment.

We have had one more request made by the Associated General Contractors of Northern Nevada. That request pertains to item number 4, located on page 2. They have asked that that language be removed. We have agreed to remove item number 4 on page 2 from our amendment, so that this language will not appear in the draft of S.B. 352 (R1).

Chairman Anderson:
You are removing the green language from this amendment or from the original bill?

Richard Peel:
It is the green language from the amendment that you have in front of you; item number 4 on page 2 of the amendment.

We have a crisis right now. People are not getting paid. They are going bankrupt. If we do not find a way to resolve the problems that are happening in this industry, we will not have people available in years to come to work on projects. We need to have a fair and responsible mechanic's lien statute that is going to assure that people get paid and help them make informed decisions when they enter into contracts. We would ask this Committee to please amend and do pass S.B. 352 (R1) with the amendment that Mr. Holloway and I have presented to the Committee and without further changes.

Assemblyman Horne:
On page 2, paragraph 2 of your amendment, I would like some clarification in subparagraph (c). It says, "The owner has paid the prime contractor for the work, materials, and equipment which are the subject of the notice of the lien recorded by the lien claimant." Then you have the transition language. "The prime contractor shall defend, indemnify, and hold the owner harmless from the notice of lien, and the owner may withhold from any monies due the prime contractor the amount of money for which the lien claimant's notice of lien is recorded." It seems like they have to defend, indemnify, and hold harmless if they have been paid. But then it goes on to say that the owner can withhold the money for which the notice of lien is recorded. It seems like it is saying two contradictory things. You only have to indemnify them if you have been paid for that work for which you have placed a notice of lien. Then it says the owner can withhold that money for that work. Can you explain?

Richard Peel:
If you look at 2(c) on page 2, it says, "The owner has paid the prime contractor for the work, materials, and equipment which are the subject of the notice of the lien...." So you have a notice of lien that has been recorded by a lien claimant, and the owner has already paid the prime contractor for that work. In that particular instance, if it has already been paid for, the "then," the arrow, allows the owner to withhold the amount attributable to what they previously paid, which is the subject of the notice of lien, from any further payments to be made to that prime contractor. The owner has already paid for it once. We are trying to alleviate the necessity of the owner being responsible to pay for it twice. The owner can withhold that money at that point in time. The "then" language, to which you refer, allows that owner to withhold those monies from any payments to be made to the prime contractor.

Assemblyman Horne:
The owner can withhold the monies that he has already paid?

Richard Peel:
He is not withholding the monies he has already paid. He is withholding monies that are attributable or the subject of the notice of lien, which has been recorded by the lien claimant, because he has already paid for that work.

Assemblyman Horne:
On page 4, paragraph 2 says, "A lien claimant is not required to provide an owner a notice of right to lien if: (a) The lien claimant contracts directly with the owner or the agent of the owner to perform work or furnish materials or equipment; or (b) The owner or his agent has reasonable notice or knowledge that the lien claimant has provided or intends to provide work, materials or equipment for the work of improvement." It sounds like this language has the effect of removing the obligation to file a notice of right to lien. What owner or agent does not reasonably know that you are providing or intend to provide work?

Richard Peel:
With respect to 2(a), that language exists in the statute today. Without this modification, it is already there. So if the owner contracts directly with the lien claimant, the lien claimant does not have to give a notice of right to lien. With respect to the language in 2(b), there is a decision that came from the Nevada Supreme Court called the *Fondren* decision (*Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990)). In that decision, the Nevada Supreme Court found that a lien claimant need not give a notice of right to lien where an owner knew of the work that was being performed on the project. That decision is much broader than the language we are proposing. In that decision, the landlord simply had knowledge that work was being performed on the project but did not have specific knowledge about a particular lien claimant. What we are proposing by way of our amended language is that, if an owner has reasonable notice or knowledge—meaning that he knows that the lien claimant is out there on the job site—then the intent of the giving of a notice of right to lien has already been satisfied. Let us look at it from this perspective: you give a notice of right to lien so that the owner knows you are there and can take steps to make sure you are paid. If the owner already knows you are there, then the giving of a notice of right to lien does not do any good. There is no additional purpose for giving the notice. From our perspective, if the owner has reasonable notice or knowledge, then the purpose or intent of this statute has been satisfied. There are circumstances that come up where an owner has reasonable notice or knowledge. For example, a trailer is on the job site. Or you have an owner that issues joint checks, or receives conditional waivers and releases during the course of the project, or has job site meetings where he meets with representatives of the subcontractors and he

knows who is there. There are circumstances where the owner absolutely has knowledge that the trade is on the project. It is unfair for a lien claimant to lose his lien rights where an owner knows that he is there, has reasonable notice or knowledge, and in some of these cases, these liens can mean the difference between getting paid or not getting paid. A good example is on the City Center project. One particular client of mine was owed $50 million for work that he had performed and had yet to be paid for, retention, and the work that he was currently performing.

Should we be penalizing a lien claimant to that extent for not giving a notice of right to lien when the owner knew that they were out there and could have taken steps to protect himself by simply making sure that particular subcontractor was paid? The answer is no, we should not be penalizing that lien claimant.

Assemblyman Horne:
Mr. Peel misunderstands the purpose of my question. I have always understood the practice to be that, if you go onto a project to work, you file that notice of lien to give notice that you are there on the project. Today you have told me that there is a Nevada Supreme Court decision that says it is unnecessary if the owner knows, or his agent knows, about the subcontractor. What agent is not going to know that you are there? Will this, in effect, do away with the notice of right to lien?

Richard Peel:
The answer is no. The notice of right to lien will still need to be given, but if it is not given properly, and the owner otherwise has notice or knowledge, in those circumstances the failure to give it is not penalized.

Chairman Anderson:
So I, as the homeowner or the person who is purchasing a large building, have paid you, the contractor, for ongoing work. I am making all my payments in a timely fashion. Now you go into bankruptcy, and the material man, the guy who poured the pad or put up the steel or put in the plumbing or electrical systems or whatever, files a lien against me because it is my building. I am already out of pocket to you for the payments I made to you, plus I am paying the bank for the loans I took out. Money has been coming to you, and you are overextended. How am I protected? Am I protected?

Richard Peel:
You are protected in the sense that, if you were making sure that the people you knew about were paid over the course of the project, as well as those from whom you received notices of right to lien, you could protect yourself by issuing joint checks to the prime contractor and the particular subcontractor. You could also protect yourself by getting waivers and releases from those particular

trades to reflect that they have been paid. The only time that this particular exception would come into play is if you knew about the subcontractors but did not take active steps to make sure they got paid.

Chairman Anderson:
If I were a contractor and was about to make a deal with an owner who wants me to build his building, I would be well-advised to tell him that any checks should be joint checks payable to me and the subcontractors. If it were not that way, I would not have knowledge of who was on the property. I hired you to do that.

Richard Peel:
There is a provision in the Nevada State Contractors Board statute that requires contractors on residential projects to provide a list of subcontractors and suppliers who will furnish work, materials, or equipment for the project. It is a violation of that statute not to be giving those lists of subcontractors and suppliers. For residential projects, in most instances, there is a statutory requirement already there. In most prime contracts for commercial projects, there is a requirement that the prime contractor provide a list of subcontractors and suppliers who will be providing work, materials, or equipment for that job.

Chairman Anderson:
The issuing of the check is what I am concerned about. Now I would have to have an accounting system in order to protect myself, as envisioned by this bill. To protect myself, I would be well-advised to have a list of subcontractors. All those checks should be joint checks so that I knew you were paying them on a timely basis.

Richard Peel:
You will recall that we talked about construction disbursement. Construction disbursement is a process many owners use for purposes of making certain that the trades are being paid on a given project. What you described is exactly what the voucher control or construction control does. They verify who is there and use a two-party check process, or joint checks, to make sure people are paid. If you look at *Nevada Revised Statutes* (NRS) 108.2457, it already talks about the joint-check rule—which we codified back in 2003—which says that if a joint check is used for payment, you have been deemed to have received payment for the work, materials, or equipment that you have provided.

Assemblyman Mortenson:
This is fine for a large casino being built, where they have someone who is knowledgeable about all of these little factors like joint checks and so on, but the average homeowner has no idea what you are talking about. He hires a contractor to build his house or to remodel his house. He knows nothing about

joint checks to the subcontractor and the contractor. This is a bill that is not very good for a homeowner. I am in the middle of a project now. I just did a big expansion on my house. I do not know all of the subcontractors who are there. The contractor did not give me a list of all of the subcontractors. Even if he did, he changes them halfway through. All of the things I am hearing from you do not seem to be happening for the homeowner.

Richard Peel:
Going back to the Nevada State Contractors Board statute, it does require the contractor, on a residential project, to provide a list of the subcontractors and suppliers for that job. It is unfortunate on your particular project that they did not provide that initially. They should have updated it if they were going to change. The Contractor's Board can take action against that contractor for not having done so. They have historically taken action against contractors in those circumstances. Additionally, you should be receiving notices of right to lien from any lower-tiered vendors who wish to pursue lien rights. If they do not give the notice of right to lien, and you did not know about them on that project, then they would not have the right to record a lien against your property in the event that they are not paid.

Assemblyman Mortenson:
It sounds like you are trying to change that now. I agree. Every right-to-lien notice I have goes into a file. At the end, I am going to call every subcontractor and make sure he has been paid before I give the prime contractor the last check. There are some subcontractors who have not filed a right to lien. There must be 15 different subcontractors on this job. I am not sure I remember them. I may have talked to them. They may be able to prove in court that I knew that they were there, but I have forgotten. I just feel the homeowner is really unprotected.

Richard Peel:
Our intent is not to change the law. The *Fondren* decision is already the law of this state. We believe it to be a good law. It has already carved out an exemption to the existing statutory language. The intent is simply to codify what the *Fondren* decision found.

There are some active measures that all of us have to do as owners who are going to contract for work to be performed. You have to have a good contract to begin with so you can require the contractor to identify whoever they have on the project. In addition, you are required to pay attention to who is on the job site, look at your notices of right to lien, and make sure those people are paid, either by joint check or by receipt of waivers and releases. The process is such that, on the one side we want owners to get notice so they can make sure these people get paid, and on the other side we want to make sure people get paid for the work, materials, or equipment that they furnish.

In addition, there is another requirement for residential projects. *Nevada Revised Statutes* (NRS) 108.226, subsection 6, requires lien claimants on a residential project to provide the owner a 15-day notice of intent to lien before recording a notice of lien. That gives the owner the ability to go back and make certain that the prime contractor is taking care of the subcontractor and getting that potential lien resolved before it is recorded.

Steve Holloway:
We have heard from the banking industry and the Nevada Banking Association is in support of this amendment as is the title insurance industry. Gaming is not in support.

Steve Redlinger, Las Vegas, Nevada, representing the Southern Nevada Building and Construction Trades Council, Henderson, Nevada:
We were in support of this bill at the original hearing, and we remain in support of this bill.

Assemblywoman Parnell:
When we had the first hearing on this bill, I was concerned. A lot of people brought up the wrap loan insurance. Was that issue resolved in your amendment?

Richard Peel:
I believe that we have resolved the concerns surrounding the wrap insurance. The request made by the gaming industry most recently was to add language which said that if a contract has been entered into, the requesting party must request a copy of the policy and endorsements within a certain time period. We made that time period 30 days. I think we have resolved all issues concerning the wrap insurance at this point.

Assemblyman Horne:
On page 5, subsection 6, where it talks about requesting in writing a copy of the insurance policy and endorsements to confirm coverage within 30 days, is this going to change the stop-work statutes?

Richard Peel:
This should have no impact whatsoever on the right-to-stop-work sections that are set forth in NRS 624.606 through NRS 624.630. Those sections do not talk about insurance. They talk about a project where you have wrap insurance and the requirement to provide a copy of the policy and the endorsements thereto. The answer is no.

Assemblyman Horne:
If this request is not honored, you can terminate the agreement. I do not know if work has already begun while you are waiting on these documents, but if

they are not forthcoming and you get the impression that they are not going to be coming, you terminate the agreement. It tells me that you are terminating your work, or am I going too far?

Richard Peel:
Yes, you do have the right to terminate. If you go to subsection 4, it requires that a copy of the policy and endorsements thereto be provided before the earlier of the date you entered the contract or the date you start work. The goal is to get those policies and endorsements to the insured parties in time so they can review them, understand them, and know whether they are properly covered for work to be performed on that project. There are many of these projects where contractors do not have adequate insurance because the policies are not even finalized until sometime during the project or after the project has been completed. So, yes, under paragraph 6, if you did not get a copy of the policy and any endorsements thereto, you contracted for the project, and you still have not received it within 30 days of the date you entered the contract, you can terminate work.

Assemblyman Horne:
So you are envisioning this to take place before work begins?

Richard Peel:
Not necessarily in this particular instance. It could happen up to 30 days after you entered the contract, and work may have commenced already.

Assemblyman Horne:
You do not have to defend the rationale for why you want the amendment. I am checking it against the other statutes that we have, and I know we have specific stop-work statutes. This is dealing with insurance which is a contractual agreement. If you have already begun working and then decided to stop working because you have not received proof of adequate insurance—you might have received the documents and find that you are not covered—is that subcontractor going to run into trouble by violating the stop-work statute?

Richard Peel:
No. In paragraph 7, it says "A contractor, subcontractor or lower-tiered subcontractor, their lower-tiered subcontractors and the sureties of each may not be held liable for any delays or damages that may result from declining to enter or terminating a contract pursuant to subsections 5 and 6." So a safe harbor is built into this in the event that you terminate work because you have not received copies of the policies, and endorsements thereto, that would reflect what type of coverage you have for the project. The goal and hope is to make sure that an informed decision is made on the part of the trades, which are going to be covered by this insurance, that the insurance may be adequate.

Chairman Anderson:
I have writings from Dan Musgrove (Exhibit D) and Michael Mathis (Exhibit E) which will be entered into the record.

Jerry Miller, representing the Nevada Land Title Association, Las Vegas, Nevada:
We withdraw our opposition to the bill based on the deletion of section 7 in its entirety in the amendment of the bill.

Bill Uffelman, President and Chief Executive Officer, Nevada Bankers Association, Las Vegas, Nevada:
With the amendment offered today deleting section 7 of the bill, our objections to the bill have been addressed. We are no longer in opposition.

Dan Musgrove, representing NAIOP of Southern Nevada and the Commercial Real Estate Development Association, Las Vegas, Nevada:
I have submitted an amendment (Exhibit D). I had a chance to support Mr. Mathis' testimony on section 7. We also had a couple of additional concerns in sections 13 and 14 of the bill. Mr. Peel talked about those. We have had a chance to look at the amendment they presented today. We had to react quickly to what we received late yesterday, review it, and then give you something based on the newest data on the newest amendment.

Chairman Anderson:
This amendment deals with the Peel amendment?

Dan Musgrove:
It does. Section 13 of the bill provides for certain limitations on the recovery of a lien. We think that it still puts a great deal of burden on the owner, when it is not his position to know what is going on between the prime contractor and his potential lien claimants. In most instances, it is the prime contractor who has a direct contractual relationship with a potential lien claimant. Representing those owner/developers for NAIOP, we suggest that there still be some further amendment to section 13, deleting paragraphs 3 and 6 from the proposed amendment, and then going back to Senate Bill 352 (1st Reprint) and reinserting language at lines 25 and 28 on page 19.

Our second concern is at section 14 of the bill. We believe that it allows the Legislature to dictate terms which are generally negotiated between the contracting parties. I appreciate one of the statements that Mr. Peel made in response to Mr. Mortenson's question regarding a good contract. That is essentially what we are talking about. You have to put those items together in a good contract between the contracting parties. Instead, what their amendment and language does is place a cap on the contractor's liability with respect to defects. It limits the timeframe in which an owner can notify a

contractor regarding those defects, and will also limit the time frame in which an owner can rely on the contractor's warranties with respect to the contractor's work. Our suggestion for section 14 is to provide limitations on certain indemnity and hold harmless provisions in the contract and provide for notification for a prime contractor/owner of the deficient work of the contractor or subcontractor. In our amendment we talk about deleting subsections 4-10 in paragraph 7 of Mr. Peel's amendment, and deleting lines 44-48 on page 20, and lines 1-45 on page 21 of the bill. This is all relating to the first reprint of S.B. 352 (R1), though the first one deals with paragraph 7 of their proposed amendment.

I am not an attorney. I am simply representing what our legal counsel did in the late hours of last night.

Chairman Anderson:
Mr. Anthony, do you have any drafting questions that you need to have answered?

Nicolas Anthony, Committee Counsel:
This is my first review of the document this morning. So far it looks OK, but we might need to be in touch with Mr. Peel for clarification.

Assemblyman Segerblom:
Mr. Musgrove, with respect to your first suggested amendment to section 13, it is my understanding based on Mr. Peel's testimony, that right now you do not have to provide notice if the owner knows. His amendment codifies what is existing law. It sounds like you are trying to change that with your amendment number 1.

Dan Musgrove:
I am not sure. I would have to get in contact with our legal counsel.

Michael Mathis, Vice President and General Counsel, Boyd Gaming, Las Vegas, Nevada:
You will recall that in my May 1, 2009, letter that preceded my testimony, in addition to expressing concern about the lender priority issue, I referenced other issues that we wanted to discuss in front of the Committee. Looking back on it, I had a concern that the lender priority issue was such a bad idea that part of the strategy was to consume the hearing about it and not get to some of the substantive issues. In some ways, I am concerned that that is where we are.

With respect to the amendment that was handed out by Mr. Peel (Exhibit C), there is a very important issue presented in it that is, from a developer's standpoint, as important as the lender priority issue. It demonstrates the fact that the lien laws can act not only as a shield for contractors, but also a sword.

The particular issue in question relates to section 3 of their amendments on page 1. It starts with adding a new section to the act by amending NRS 108.235. It speaks to how difficult this material is. The issue here is the strikeout at NRS 108.235 (1)(b). They would propose that, upon payment of a contractor's lien, where the existing law would require that the contractor pay all liens below him, that obligation be limited to the amount of the payment on the lien. At first blush, that does not sound unreasonable.

Using a hypothetical scenario, if I, as an owner, contract with a general contractor to build a structure for $1, and that general contractor engages suppliers and subcontractors underneath him for 85 cents, then the profit to that general contractor is 15 cents. That only works if what I buy from the contractor is what the contractor buys from his subcontractors and suppliers. You often see gaps where the owner has bought a better job than the general contractor has. That is where you sometimes see profits or losses. If we get into a lien situation where that contractor is owed $1 and liens our property for $1, you will often see subcontractors also add their liens. Because it is cumulative, there is a pyramid effect. You would often see something like $2 of those liens. Now you have a job that has liens totaling $3. In the short term, that is a problem. The reason it works long term is, once that general contractor is paid his dollar, the law requires him to take care of all of the liens underneath him.

The change in the proposed amendment is outrageous. What it proposes to say is if I, the owner, pay the general contractor his $1, then even if he overbought the job and there is $1.50 of liens out there, his obligations are limited to the $1. So the owner, through the lien of a subcontractor which has not been extinguished, would be paying for that overbuy. I do not see any justification for this or how it could be interpreted in any other way than to try to put that risk and liability unfairly onto the owner.

There is some continuing language which changes the indemnification. If a contractor is paid his lien amount, then what is left to withhold? To me, the whole section is problematic because of the very substantive issue at the beginning.

Chairman Anderson:
I appreciate the fact that you want to raise your concerns about the bill because, if we are going to move forward with anything, we need to make sure we are making an informed decision.

Michael Mathis:
Our amendment (Exhibit E) is a way to allow the bill to go forward by covering some of the issues from the owner's side.

Chairman Anderson:
Your amendment addresses S.B. 352 (R1), not to Mr. Peel's amendment. These suggestions are to the bill itself?

Michael Mathis:
That is right. The first provision for your consideration deals with section 2 of the reprint, specifically the definition of "commencement of construction." Looking at that definition in the context of the lender discussion, there is still existing law, even with section 7 removed, that talks about the priority of a first-in-time deed-of-trust lender's recording, as long as that recording happens prior to the commencement of construction. It is a very important definition. In addition to having the clock start when work is actually performed from a reasonable inspection, which is the current law, the proponents of the bill propose that a notice can be filed which would start the clock. Because it does not specify that the notice has to be filed by the owner, there is a scenario where the contractor can file the notice to start the clock. The important thing from our perspective is this process needs to be qualified by an obligation that there has been work or equipment furnished by the contractor with the approval of the owner. Otherwise, it is a potentially arbitrary start of the clock prior to the time that lending and financing is in place. I thought it was a reasonable request to qualify that new provision.

Assemblyman Cobb:
I had a question about your first comments about amendment number 3. Were you referencing the newly proposed amendment from Mr. Peel?

Michael Mathis:
I was referencing the one dated May 12, 2009. It does not have a numeration on it in terms of what edition it is. It is the one I believe that was handed out this morning.

Assemblyman Cobb:
Number 3 of Mr. Peel's amendment that is the area you are referencing?

Michael Mathis:
Yes, section 3.

Assemblyman Cobb:
If I understand your testimony, you are suggesting that, because this requires a prime contractor to pay a subcontractor when paid, that obligation is limited to the amount that they are paid. Can you show me where in that section it suggests that the prime contractor is only on the hook to the limit of what they are paid by the owner?

Michael Mathis:
I was referencing the phrase in green underline which states, "for which he has received payment."

Assemblyman Cobb:
Correct. Oftentimes these projects are paid in installments. If a prime contractor contracts with a subcontractor and says at the beginning of a project, "I would like $200,000 worth of bolts and just bring them all," and they are going to be installing them over the course of a year or two, the issue is that the prime contractor may only be paid in monthly installments of $50,000. I believe what this is saying is that if you are being regularly paid by the owner, you need to regularly pay the subcontractor. If you do not want to accept $200,000 worth of bolts up front, accept and pay for them in installments because you are going to be paid by the owner in installments. There is also no limitation on the amount. There is no explicit language in here that suggests that if you have been paid, you only must pay up to that amount. It says if you have been paid, period. If you choose, as the prime contractor, to accept $200,000 worth of materials, and you are only paid $50,000, I read this to say you owe $200,000.

Michael Mathis:
Perhaps the proponents can elaborate on the intent. I do not read it the way you read it. Part of the reason is because paragraph (b) is qualified by the receipt of the amount described in paragraph (a). Your question related to progress payments or partial payments. Paragraph (a) states, "Upon a notice of lien, may recover the lienable amount due to him, plus all amounts that may be awarded to him by the court pursuant to NRS 108.237." *Nevada Revised Statute* 108.237 refers to lien hearings and a lien being filed. I thought this comment was in the context of a full lien notice, a payment of that lien, and based on the old language, which is still here even under Mr. Peel's proposal, which states "shall pay all liens for the work." So, I think if that is the intent, then a lot more work would have to be done to this provision so there is no ambiguity about the "all liens" and partial payment that you are describing.

Assemblyman Cobb:
I do not necessarily disagree with you, but I think the greater concept is that—and you touched on it there—we are talking about a full project. We are not talking about just paying up to the value of a particular installment or portion of a project and, therefore, we are going to take that one segment and separate it. That is why, when you asked the question about if the prime contractor has already been paid, and the owner knows about it and, therefore, would be able to withhold payments so that the owner could pay directly to subcontractors, you referenced that idea and said, "Wait a minute. If the prime contractor has already been paid, then what are they withholding?" Well, the concept here is that, in reality, you are dealing with installments. If the owner is continuing a

project, and the prime contractor is not paying its subcontractors, which is fairly common, the owner would withhold payments on future or continuing work, obviously not payments that have already been paid to the prime contractor.

Chairman Anderson:
I do not feel it is necessary to carry on this particular line of questioning. Let us see if we can get through Mr. Mathis' amendments so, in the event that we decide to move with the bill, we have the possible questions in front of us. If you like, Mr. Cobb, you can arrange a meeting with Mr. Peel and Mr. Mathis to see if you can straighten out the language.

Michael Mathis:
Moving onto section 2 of our proposed amendment, which starts on page 1 and overlaps onto page 2, the concept here is that there should be no liening rights for work not performed and for equipment and materials not furnished. What this points out is that, starting with the third line of the bolded paragraph 2 at the top, there needs to be a recognition of materials and equipment that has been committed. There should be lien rights. The proposal I have asked to be considered is a qualification that it is only to the extent that the lien claimant does not provide the owner with reasonable mitigation rights. This comes from real-life experience, unfortunately, with our shutdown of Echelon. We were presented with choices by some of the better contractors along the lines of: "Owner, do you want to take receipt of the pipe for 100 cents on the dollar, or do you want to pay a 20 cent restocking fee and not have it?" That is a choice an owner wants, and it is good business to make that decision one way or another. We should not be liened for pipe that is three months out, when we could have the ability to cancel it. There is language in here that just talks about giving us cancellation and mitigation rights and qualifying that obligation.

Assemblyman Horne:
Let us consider a scenario where a subcontractor has already ordered a number of materials for a project, and those materials have been delivered or are awaiting pick up, but the contract has been terminated. He ordered those materials in anticipation of performing the contract, so your amendment still permits him to either put in the lien rights for that material, or, as they say in the practice, offer dimes on the dollar in order to restock it? Is that the practice? It is either/or?

Michael Mathis:
That is exactly right. We recognize that improvements to the actual property are lienable and that materials and commitments in the pipeline should be lienable. That is a good clarification, and that is fair to the contractor. If there is cancelation or mitigation ability, then that should be an obligation on the contractor before he can lien for it.

Continuing on with section 2. These are inserts into their language which makes it acceptable for us. It is just clarification. In the last sentence of that provision it says, "this subsection does not preclude a lien claimant from including in a lien any overhead and profit that the lien claimant would otherwise be entitled to under the contract." There is a reference above that there should only be a lien, and they recognize there should only be a lien for work performed and materials that are in place. It is clarification that the clause does not somehow trigger lost profits on the very materials that the drafters were trying to carve out above. We only ask for a qualification that that proviso is on the work, materials, and equipment that can be liened for, as set forth above.

Regarding section 3 of our amendment, which deals with section 10 of the first reprint, on the top of page 4, our proposal deletes subsection 2. That is in the existing law, but we think it is inequitable. It says that, in a stop work scenario involving a claimant, one of the remedies for that lien claimant, if the contractor is not permitted to restart work, is the balance of the profit that the prime contractor and his lower-tiered contractors and suppliers would have earned if the contract had not been terminated. So that is truly a lost-profits penalty, for lack of a better term. In the context of a lien statute that is supposed to protect work in place, we think it is inappropriate to have a lost-profit penalty in the statute. We ask that it be deleted.

Section 4 of our proposed amendment deals with section 14 of the bill. Our language shows up on page 5 at the very end of their section 6. This deals with the accepted concept of limiting indemnity and holding harmless insurance proceeds. The only thing we want to clarify here is that, what often happens in practice even on these large wrap projects, is insurance is put into place and the owner pays for it. That is more economical and saves the contractors the costs of putting that into their bids. What often happens is the insurer requires, for lack of a better term, skin in the game—each contractor has a deductible requirement or some other amount that is liquidated that must be paid so that contractors are incentivized to be safe and not cause injury or property damage. The only concern or clarification here is that if there is a separate agreement regarding a deductible that the contractor has to chip in for—or some other liquidated amount in the contract—that should be paid as part of this limitation to get to the insurance proceeds.

Section 5 of our amendment deals with what has been a problematic part of NRS Chapter 108 going back to 2003. It deals with the forms of lien releases. Prior to 2003, those lien releases were freely contracted for between owner and contractor. But the concept was: in exchange for a payment that the owner gives, the owner gets a lien release through a certain date. When payment is made, you know that all claims are taken care of through a certain date, not only regarding the individual you have contracted with, but it is certification that

everyone beneath him has been paid through that date. In 2003, there was a change to the law that introduced a required form. That form cannot be waived; it cannot be contracted against. It undercuts the freedom of contract. That form contains a very important qualifier, which is that all liens are released to the extent of the payment received. So there is no date certain, and there is no real lien release. There is only a check acknowledgement. This lien release form does what a cancelled check would do. It shows that a payment was honored, but there is no certification by the contractor that they have actually done the work to make sure that all costs have been calculated and all releases have been obtained all the way down their chain. So our proposed changes would strike the ambiguous language which only limits the lien release to the amount of the payment received. Our proposed changes can be found in a couple of spots because they are all the same lien form, essentially. They are conforming changes to all of the releases.

Chairman Anderson:
Did you have an opportunity to participate in the discussions in the "Woodshed?"

Robert Crowell, Carson City, Nevada, representing Boyd Gaming, Las Vegas, Nevada:
We have participated in several discussions. We have been working with Associated General Contractors (AGC) since late last September to try to resolve these differences.

Chairman Anderson:
These proposed amendments still remain unresolved? In your proposed amendment, would you leave in section 7 of the bill?

Bob Crowell:
We would take section 7 out. That is the intent.

Chairman Anderson:
I thought your amendment was a stand-alone, or do you consider that they both have to fit together in order for the bill to move?

Michael Mathis:
Yesterday afternoon we received a copy of the proponents' amendment that deletes section 7. With that large issue addressed, when we proposed our amendment, we thought that they would work in tandem.

Chairman Anderson:
So then you are hoping that Legal and Research will sift through the combination to present a solution to the Committee that you could not find?

Michael Mathis:
There have been very productive meetings between us at Boyd and the proponents. Some movement has been made on certain issues. The issues I presented to you today were all issues that I either raised in concept or actually provided language for that were not acceptable to Boyd. We are at an impasse. The short answer is, as imperfect as the existing law is at this time, I think if we are not able to put together a good consensus bill, then we would accept the status quo going forward until we can make it more perfect.

Chairman Anderson:
If we were to move with the bill, you would prefer that some of these concerns are answered in whatever solution we finally reach?

Michael Mathis:
Reluctantly, that is the case.

Chairman Anderson:
I will close the hearing on S.B. 352 (R1).

We will recess for five minutes.

[The Committee reconvened.]

I will open the hearing on Senate Bill 372 (1st Reprint).

Senate Bill 372 (1st Reprint): Revises the Nevada Clean Indoor Air Act. (BDR 15-1099)

Before we begin, please recognize that this issue has been before the Senate Committee on Health and Education where the consequences of health were discussed. This is the Committee on Judiciary, and we will discuss the legal aspects of the question.

James Wadhams, Jones Vargas, Las Vegas, Nevada, representing Herbst Gaming, Inc., Golden Gaming Inc., and Las Vegas Convention & Visitors Authority, Las Vegas, Nevada:
I have distributed a copy of Initiative Petition No. 1, called the Nevada Clean Indoor Air Act which was passed in 2005 (Exhibit F). It is critical, when reviewing a piece of legislation such as S.B. 372 (R1), to put it into the context of what it is intended to amend. We have heard a great deal of discussion that this is indeed the will of the people. The initiative process is an important element of our democracy. The Nevada Clean Indoor Air Act is an example of that initiative process.

I think it is critical that we review it. This is precisely what the voters voted upon. "Section 1: This Act shall be known, cited and referred to as the "Nevada Clean Indoor Air Act: protecting children and families from secondhand smoke in most public places, excluding stand-alone bars and gaming areas of casinos." Please note lines 3 and 4. The will of the people was to exclude stand-alone bars from the restriction on indoor smoking.

I will also draw the Committee's attention to line 19.

Chairman Anderson:
The voter Initiative passed in 2005. The vote was 310,524 in the affirmative, or 53.92 percent of the population. The vote in the negative was 265,375, or 46.08 percent of the people. That was question number 5 to the amendment to Title 15 of the *Nevada Revised Statutes* (NRS).

James Wadhams:
I need to draw the Committee's attention to two other lines in this Act. One is line 19. This is how the ballot appeared. "Smoking tobacco is ***not*** prohibited...." Ironically, the way this appeared on the ballot, the "not" was placed in bold. That is not my enhancement of anything that was there. The public certainly read the first page. We saw that. Smoking is not prohibited. The other elements of that are not important, but line 22 specifically identified stand-alone bars, taverns, and saloons. Today, consistent with the will of the people, there are smoking bars in Nevada. That was excluded from the prohibition.

The Nevada Clean Indoor Air Act does not say tobacco is bad. There is no doubt in my mind that tobacco is bad. The question today is not whether tobacco is bad for the health. Everyone knows it is bad. The question we are dealing with is the Nevada Clean Indoor Air Act, which has specifically excluded stand-alone bars.

What does S.B. 372 (R1) do? It allows smoking bars to serve food to its customers. It does not change what is already in place, other than allowing those persons who have chosen to enter into an establishment that legally allows smoking, to also have food. Ironically, in our state, there has never been a prohibition, since the passage of this Act, for food to be brought in. The prohibition was simply on that tavern serving the food. This raises an important point. When this passed, several taverns had to make a choice. Were they going to become smoking taverns or nonsmoking taverns? Those that chose to become smoking taverns closed their kitchens and laid off their employees. We have business people who are here to testify to that. There has been some discussion about the recession. Let me remind the Committee, this was passed in 2006, well before the recession started.

The other issue I want to discuss is that of adult-only locations. The definition of a stand-alone tavern begins at line 35 on page 3 of the bill. That means an establishment that is licensed to sell alcohol, holds a nonrestricted or restricted gaming license, and absolutely must prohibit at all times persons who are under 21 years of age from entering the premises. That is a clear addition to the existing Act and we think it strengthens the protection. The purpose of the Act was to protect children and families from secondhand smoke. Even though it excluded stand-alone bars, we think it is sufficiently important that a prohibition to further protect children from secondhand smoke be placed into the law.

I want to talk about the enforcement issues. Enforcement is a very important element of any law that is designed to constrain conduct in locations. We have an interesting situation in southern Nevada, in Clark County. Judge Herndon ruled that the law was unconstitutional as a criminal statute. No such suit has been filed or processed in northern Nevada, so we have a slightly different element between the two major portions of the state. In southern Nevada it is exclusively enforced quite effectively by the Southern Nevada Health District as a civil or administrative statute. In northern Nevada I think it is a joint effort between the Washoe County District Attorney's (DA) office and the Washoe County Health District.

There was some question in the Senate whether this was going to undermine enforcement. What has happened over the course of the last 24 months is that the local health districts were seeking assistance from the State Board of Health to adopt statewide regulations that would assist in the enforcement effort. The Health Division acts as the health officer for the balance of the state where we do not have organized health districts like we do in Washoe County and in southern Nevada. Subsection 6, which appears on page 3 of the bill, makes it clear that the state shall adopt statewide regulations and designate, unless the local health district declines it, the local health officer to be the enforcement mechanism to impose fines, as may be necessary. Fines are found in subsection 7, page 3, line 22. One of the issues that became clear in the enforcement process is that the Act places a penalty on a person who smokes in a place that is nonsmoking. It does not place any obligation on the landlord, the proprietor, or the manager of that place to deal with the smoker. It was a penalty on the smoker, not on the premises. For the stand-alone bar, their obligation was twofold: remove the ashtrays and smoking paraphernalia and put up a no smoking sign if they were going to serve food. The enforcement became a little bit difficult. The Southern Nevada Health District has worked through this process and has developed a mechanism for enforcing this locally. We think that the language on page 3 of the first reprint will strengthen their hand and give them, at lines 25 and 26, specific monetary fining power of $1,000 for the first offense and $2,000 for any subsequent offense. At lines 38 through 41, the people who operate the adult stand-alone taverns will also

hold gaming licenses, liquor licenses, and food service licenses. They have licenses that are under the jurisdiction of several authorities.

The significant changes resulting from S.B. 372 (R1) clearly does not create smoking where there was none. It allows stand-alone taverns that are nonsmoking and keep minors out of their premises to serve food to their customers. Currently they cannot do that. We are proposing to change this. The bars that are currently exempted from the prohibition will be able to serve food to their customers.

The second change is with regard to page 2 of the bill, lines 25-31. This is a limited exception for convention facilities. It is well documented that both of our major convention sites have lost bookings due to the interpretation of the prohibition that a smoking convention, a tobacco-related convention, could not be held there. A representative of the Las Vegas Convention & Visitors Authority testified that they had lost around $43 million worth of bookings. This change would allow a limited ability to have a convention that deals with tobacco and tobacco products. It may not be open to the public, but it does allow that opportunity. We have been informed that those tobacco conventions that have moved to New Orleans will come back to Las Vegas should this pass.

We are proposing this because we want to emphasize choice. As long as we are adults, whether it is healthy or not, we have a choice. Adults, who should be able to exercise their judgment and choose to go into a location where there is smoking, should be allowed to eat there and be served by that tavern as well. Another reason is jobs. A number of people lost their jobs because kitchens had to close to maintain their customer base. We think this may enhance business and reverse some of the business lost. Hopefully, we are coming out of the recession and people may have time to sit in an adult stand-alone tavern, have an adult beverage, engage in some gaming activity, and have something to eat. Tourism is another element that would clearly be enhanced by bringing those sorts of conventions back to the state. Finally, it brings a clarity of law and a uniformity of statewide enforcement, reinforcing the local government's ability to enforce the law.

People have never been prohibited from eating in an adult-only tavern; they could easily buy food outside the establishment, bring it in, and legally eat inside. The proposed changes would simply allow taverns to serve their customers food they can legally eat inside.

Michael Alonso, Jones Vargas, Reno, Nevada, representing Herbst Gaming, Inc., Las Vegas, Nevada:

We will be happy to answer any questions the Committee may have.

Assemblyman Horne:
My constituents have made it clear that they do believe that this is overturning the will of the people on this issue. In your presentation you state that it was to protect the children and families. One of my constituents told me that he and his spouse do not have any children. But are they not considered a family if he and his spouse and his mother go into one of these places? Was the spirit of the law not intended to protect them as a family?

James Wadhams:
I was not presenting an opinion, I was reading from the Act itself that was voted upon by 53.9 percent of the people who said it is protecting children and families from secondhand smoke in most public places, excluding stand-alone bars and gaming areas of casinos. The point I think your question raises is that people who do not want to be around secondhand smoke should have ample opportunity to avoid it and should have ample notice of where that secondhand smoke may be. What we want to accomplish with S.B. 372 (R1) is to make it clear, via signs and designations, that it is okay for this stand-alone tavern to serve food, so that somebody does not walk in there and wonder if laws are being violated. The will of the people was that this situation of food and tobacco can coexist.

I respect the question that was raised. Should people not have the right to find someplace to eat where there is no smoke? Absolutely. Our clients own over 42 of these establishments. Did they all quit smoking? Did they all close the kitchen? No. They met the customer base that served them. Several places declared themselves smoking bars, protected under the Act. Several of their locations are complete open family restaurants. To comply with the law, the business has a choice. The people gave business that choice. The only change we are asking for is that those businesses that have chosen to be smoking, if they protect children from access, should be allowed to serve food rather than have it brought in from an outside location.

Assemblyman Horne:
That is the rub. A few emails I received identify, by name, taverns where some of my constituents like to eat. If this were to pass, that choice would be removed from them. They would have to seek another dining establishment. These are neighborhood taverns that are near, and in, my district.

James Wadhams:
I truly think that you have an important question. Please ask this question of Mr. Arcana, who represents 42 of these establishments. Our proposal does not change what he is doing. In his locations that are smoking bars, that particular constituent to whom you refer is not going in there to eat. When they start opening their kitchens and serving their delicious hamburgers again, the question that presents itself is, "Do I want to go into a smoking bar to eat?"

There are taverns that are smoking bars today. That business will make a decision. Do I want to change what I am doing, or do I have a sufficient clientele of parents, who bring in their kids after soccer on Saturday, and little league games in the evening, or families who want to come in? That will be a business decision. We are not changing that circumstance. We are trying to identify those places that had to close their kitchens. Can they serve food rather than have their customers go down to another establishment, buy food, and bring it back to the tavern to eat? It is not a sweeping change. It does not repeal the law. In the law it states that smoking is not prohibited in stand-alone bars, taverns, and saloons. That is the will of the people. All we are asking is that those places that are exempted from the smoking prohibition should be able to serve food to their patrons.

Assemblyman Segerblom:
If we pass this law and somebody finds an 18-year-old in one of these bars, will the company forfeit their gaming license?

Michael Alonso:
The provisions in S.B. 372 (R1) have among them an enforcement provision that provides for fines. Serving to minors in any bar or violating any law could already subject somebody who holds a gaming license to disciplinary action by the State Gaming Control Board and the Nevada Gaming Commission.

Assemblyman Segerblom:
So the answer is yes?

Michael Alonso:
Your specific question was if they would forfeit their license. I do not believe so, but they could be subject to disciplinary action by the Gaming Control Board.

Assemblyman Segerblom:
There is no criminal penalty involved here?

Michael Alonso:
That is correct.

Assemblyman Segerblom:
Even though it is a civil penalty, could it affect their gaming license?

Michael Alonso:
Gaming regulations and statutes require license holders to comply with all laws at all times. The failure to comply with all applicable laws is potentially a subject of disciplinary action.

Chairman Anderson:
There is no requirement for notification by the Department of Health to the Gaming Control Board if a place were violating health codes or the Clean Indoor Air Act.

Michael Alonso:
That is correct.

Chairman Anderson:
They would have to find that out on their own? An investigator from the Gaming Control Board would have to investigate an establishment.

Michael Alonso:
Or by finding it in the newspaper or in any list of sanctions by local government or health districts. If that same entity applies for a new license, all of those things are in the application and are required to be disclosed by the applicant.

Assemblyman Manendo:
Currently, if there is a bar that has a separate section which serves food, is a minor allowed in that portion of the bar?

James Wadhams:
Several of the taverns modified their structure to comply with the law in both ends of the state. They built dividing walls and adjusted their ventilation systems. Are minors allowed in the smoking/drinking part of the bar? No.

Assemblyman Manendo:
I am talking about the food area where they serve the food.

James Wadhams:
Minors are allowed in these areas, yes.

Assemblyman Manendo:
With this particular piece of legislation, would it change my scenario in any way?

James Wadhams:
No. Under existing law, that would still be permitted. What S.B. 372 (R1) does is allow an entity that has declared itself smoking and closed its kitchen to rehire people and serve food to adults in that smoking tavern. It would not be a split situation, as I described earlier. Several "hybrid" taverns were built with separate eating areas to satisfy the law and are operating in compliance. This is why we have created a separate category called adult stand-alone bars. Many people spent a great deal of money to satisfy this requirement by splitting their facilities into two parts and changing the ventilation systems. That is existing

law. This proposal creates the opportunity for those places that have declared themselves smoking to reopen their kitchens and hire some help.

Chairman Anderson:
Under the existing law, a bar would be allowed to have chips and peanuts, and smoking would be allowed because that would not be considered the kind of food that we are talking about?

James Wadhams:
If you look at page 3, line 36, of the Initiative (Exhibit F), it defines incidental food service or sales as meaning the service of prepackaged food, including but not limited to peanuts, popcorn, chips, et cetera. But, the question asked by the Chairman was if they could serve chips? You could only serve them under this definition if they were delivered to the table in a sealed bag.

Chairman Anderson:
So if they came out of a vending machine that dispensed foodstuffs, would that be acceptable?

James Wadhams:
It would become a question of interpretation. I do not believe it would be. However, this brings up an interesting point. What about the celery stalk in your Bloody Mary? What about the orange juice in your Tequila Sunrise? All of these are foodstuffs. While that ambiguity did not carry the day, it did raise the question in the judge's mind as to how one enforces this criminally. The point of the question that the Chairman asked is that you can get into ambiguity in a smoking tavern. This will partially clear up this ambiguity. These are the smoking taverns. They can go back to serving burgers and fries sold out of their kitchen.

Assemblyman Hambrick:
Minors are only in the food sections. If they are unaccompanied, minors cannot go in. I believe they have to be accompanied minors. I do not know if that would create a difference in the answer, but I do not think a 19-year-old in the food section of an establishment would still have to have an adult with him. Unaccompanied minors are never allowed in those buildings.

Michael Alonso:
I am not sure that is true. It depends upon the configuration. If you have one of these places that is a sports bar, for example, and it has a kitchen, bar, food area, and an arcade, it depends. The business owner needs to deal with the gaming, the service of liquor, and the age restriction on that. It depends, and it depends on local jurisdiction as well.

Assemblyman Hambrick:
We are talking about those places where the tavern is already walled off, and there is only a food section and only an adult beverage section. Those sections that only have food are still not available to unaccompanied minors. An unaccompanied minor cannot even walk in the front door.

Chairman Anderson:
I guess it depends on where the front door is. If the front door came through the food section first, and then led into the bar area, then the person would probably be able to make that transition without stepping into the bar area.

Sean Higgins, Executive Vice President and General Counsel, Herbst Gaming, Inc., Las Vegas, Nevada:
Incorrect. In today's world, a minor can walk in and sit down and have lunch. Additionally, I do not believe they are excluded from the smoking section, either, under the current law. They are certainly excluded from sitting at a bar and in front of gaming devices or being served alcohol at the bar. I do not think either of those situations described by Chairman Anderson or Assemblyman Hambrick are correct.

Assemblyman Cobb:
This bill is a revision of the Clean Indoor Air Act, so I would like to refer back to that Act itself. Mr. Segerblom asked about having your gaming license revoked for a violation of allowing a minor in your location. Is there anything in the underlying Act which would provide for a revocation of a gaming license currently?

Michael Alonso:
No. The Clean Indoor Air Act, as it stands now, is intended to be enforced against the customer. The bar owner's responsibility under the Act is to remove ashtrays and smoking paraphernalia and to put up signs.

Assemblyman Cobb:
So any type of revocation or punishment with respect to the gaming license was not envisioned in the underlying Act?

Michael Alonso:
That is correct.

Chairman Anderson:
If we move with the bill, there would be a question as to whether we would give that responsibility to the Gaming Control Board. There are some problems with how that process might work, but as Mr. Alonso said, holding a gaming license is a privilege that the state gives and expects the licensee to be in compliance with all laws. But, if we required the health departments to

notify the Gaming Control Board of any violations they identified, that would put an additional burden on the health departments, which may be what we would have to do if we were to move in this regard. Not being able to predict what the Gaming Control Board will do, unless we mandated them to take certain actions, also creates something of a problem.

Assemblywoman Parnell:
I want to talk about children. Currently, if we look at the language, you can go into a casino with your children, walk through the gaming area, through the smoking area, into the restaurant. There is no smoking in the restaurant, but you have travelled the path. Is this correct?

Michael Alonso:
That is correct. You cannot loiter in the casino area. That is something different from your question of walking through with the children.

Assemblywoman Parnell:
What I am getting at is really what this bill proposes: adult-only, stand-alone bars that can serve food. Technically, as far as minors' exposure to smoke, this protects minors more than the existing Act does, correct?

Michael Alonso:
We believe it does. That is correct.

Chairman Anderson:
If we decide to move with this bill, it would be helpful if there was a large, prominently-displayed outdoor sign that clearly states this is a smoking establishment so that the potential endangerment to the child would never be in question.

Sean Higgins:
We are here because there was an initiative passed in 2006 which set forth certain requirements if you wanted to smoke. I am not going to debate the initiative itself. Suffice it to say, Mr. Wadhams did a good job of discussing the misleading nature of that initiative. The consequence of that initiative was lost revenue, from slot routes to taverns to several businesses. Lost revenues mean lost jobs. If that was not the case, and we did not believe that it was important to the economy to put smoking back into these locations where people over the age of 21 frequent, I would not be sitting here today. I am not a vehement smoking advocate. But I know that this body, unlike an initiative process, is tasked with looking at all of the evidence and weighing the social, economic, and health and welfare interests of the citizens of this state. The citizens include business owners. This is an emotional issue for people. I understand that people have lost loved ones to cancer caused by that person's smoking. It is also caused by secondhand smoke. I am not here to debate that either.

I am here to say that this legislative body is tasked with looking at the whole and asking, "Is this, when taken as a whole, in the best interests of the State of Nevada?" I would ask you to consider that when you consider this bill and take that task seriously. Look at all of the factors before you.

This legislation will clean up some improperly drafted law. Senate Bill 372 (1st Reprint) still protects children and families and allows adults the right to choose whether to enter smoking areas or not. We are not asking you to expose any people who may not already choose to be exposed to that smoke.

I am a tavern owner, and I chose to separate my food and gaming area because of this law. It certainly had an impact on the bottom line at that location when I chose to allow my gamblers to smoke. For a period of time, I did not. I left it open. From personal experience at my own tavern, that occurred.

I hope you consider all these items when looking at this bill. Thank you.

Assemblyman Cobb:
Some of the complaints we have heard about the Initiative that was passed in 2006 pertain to the unintended consequences or issues that are left ambiguous, because it was not drafted in a legislative committee with the Legislative Counsel Bureau (LCB) helping to harmonize it with current law. Is the intent of some of the language in this bill to clean up some of the ambiguity? What has been the ambiguity? What has developed because of the ambiguous language? How is this bill intended to clean up the language?

Sean Higgins:
Now you have the enforcement at the individual county level. Although S.B. 372 (R1) still allows that, the enforcement will move down through the state health officers. So today you will have a more uniform reading because there are differences in enforcement between Washoe and Clark Counties. You will have more of a level playing field as far as enforcement. In Washoe County, there is a fine system set up specifically which fines the bar owner or the establishment rather than going after the smoker himself. No one wants to walk in and try to tell a guy who is smoking a cigarette, "Here is your ticket. Have a good day." It is a little more difficult. So this bill cleans up that area of the law.

Additionally, eating food and smoking are mutually exclusive under current law. A person who is 21 years of age or older should be able to make the choice whether he wants to eat food while smoking. You would still have locations that will allow people to have smoke-free dining as well. Just because this passes does not mean I am going to rip down my windows and walls and go back to one big smoking room. I have tons of families who go into my restaurant and eat. They enjoy smoke-free dining. I am going to continue to

provide that to people. However, it gives people over the age of 21 the ability to choose rather than following the charade of bringing boxes of food over from another restaurant. There is a loophole there, and this closes it up and properly takes care of it.

Steve Arcana, Chief Operating Officer, Golden Gaming, Inc., Las Vegas, Nevada:

Over the past eight years, Golden Gaming has experienced significant growth. The foundation of that growth has always been our employees. We offer employee benefits, competitive wages, bonuses, and incentive programs, and many of our employees have been with the company for over ten years. These employees play a critical role in gaining and maintaining loyal guests.

Our operations are not restaurants. Our taverns cater to responsible adult activity. They are well-appointed, clean environments focusing on a variety of gaming selections, our Golden Rewards Players Club, outstanding food and drinks, and a friendly staff. Recent statistics show that approximately 25 percent of Nevadans are smokers. That same 25 percent of consumers represent a disproportionate amount of potential revenue at our customer base. In particular, the smoking population is a group of very strong gamblers and drinkers. By eliminating smoking in 2007, our taverns experienced a severe decline in revenues. I will ask you to refer to the slide presentation that was provided to you (Exhibit G). The graphs show our percentage revenue declines as of January 2007. Please pay particular attention to the trending graphs, which are the second graphs of the series. Page 2 represents monthly beverage revenues based on same-store comparisons. Those same stores, as they went through December 2006 and into January 2007, experienced a 25 percent decline after the smoking ban was passed. On page 4, we see the same story with food sales. The trend graph will show you we experienced a 28 percent decline on food sales within the first two months of the smoking ban. Continuing on to page 6, you will see that the trend on same-store gaming revenues continues as well. You will see from December 2006 to December 2007 we experienced a 17 percent decline in taxable gaming revenues.

Perhaps the most alarming consequence is that, as a result of the smoking ban, our company has had no choice but to downsize its workforce. I would like to emphasize, on pages 7 and 8, that these graphs are real. They depict lost jobs. In this case, in January 2007, we had a work reduction of 60 employees, or over 15 percent of our Golden Tavern Group workforce. As is clearly illustrated in these graphs, the significant decline we are attributing to the smoking ban was well before the macroeconomic downturn we are now experiencing.

Is it fair to invest hundreds of millions of dollars into our taverns, our products, and our team members, only to have more than 25 percent of our consumers eliminated through legislation? Is it fair that smoking legislation has forced us to eliminate a sizeable amount of our workers and prevent millions of dollars from entering the economy? As an operator, I should see economic fluctuation in the business as a result of consumers' choices, not from legislative efforts. Our taverns cater to adults, not children. Adults should have the choice as to whether they wish to be in a smoking environment or not.

In summary, (1) let us put Nevadans back to work by reopening our kitchens; (2) give Nevadans the right to choose; (3) create a clear, enforceable mechanism with sizeable fines issued for violators; and (4) protect children from the dangers of secondhand smoke.

Please support S.B. 372 (R1).

Chairman Anderson:
Since your company is a multistate organization, do these statistics reflect only Nevada's experience or the overall condition of your enterprise throughout several states?

Steve Arcana:
The graphs only represent Nevada. The Golden Tavern Group represents taverns in both Clark County and Washoe County.

Chairman Anderson:
Did you not indicate to me, however, that you had taverns in other states?

Steve Arcana:
We have casinos. They are not reflected in these studies.

Chairman Anderson:
Is there any kind of similar decline in your organizations outside of Nevada?

Steve Arcana:
Ironically enough, we imposed a smoking ban in January 2008 in Colorado that affected the three gaming jurisdictions in the state of Colorado. Yes, it significantly impacted our gaming revenues there as well by about 20 percent.

Joe Wilcock, Proprietor, The Brewery Bar and Grill, Las Vegas, Nevada:
I will speak specifically to the economic impact of the passage and some human impact as well. Immediately after passage, we surveyed our membership in the Nevada Tavern Owners Association, comparing 2006 to 2007. Typical taverns' gaming revenue declined 12 to 20 percent, food revenue declined 30 percent,

and bar revenue declined 12 to 20 percent. On average, we lost 3.3 employees per tavern. This is before the economic downturn that really crashed in 2008.

After passage, we tried to figure out exactly what we were going to do. All taverns were able to be remodeled at some cost. In my tavern, I was able to cordon off my restaurant by erecting a glass wall. That has become a permanent nonsmoking area. I have a smoking area of the bar as well.

If I chose smoking, I lost patrons. If I chose food, I lost patrons. It was like the train wreck or the bus crash. There was no good outcome. All of the people who were suddenly going to roll out of bed and become tavern patrons miraculously never appeared in anybody's tavern. I was one of the lucky ones; I could afford it. If you take some taverns where the kitchen was located in a very remote spot, economically it was not feasible for the owners to remodel the tavern and create a nonsmoking area.

The only thing we are asking for is to be able to serve food in the smoking area of the bar. It does not take anything away from what the people wanted. It provides an owner with an avenue to accommodate patrons who wish to eat in the adult area. It also allows us to provide a smoke-free environment at the owner's choice. Minors would not be able to go into the smoking area. My bar is near Sunset Park. We have volleyball teams and Little League teams that come to our bar. They come in the front door, they turn left, and go into the posted, nonsmoking area. Our patrons are very familiar with it. Some request it. Most do not. Gamblers are smokers. It has really hurt everyone, including Clark County's businesses.

I have been working with this issue for the past four years, and I find it very interesting to see all of the ambiguity in current legislation, as was nicely demonstrated with the example of a vending machine in the bar area. This proposed legislation would clear up the ambiguity. We do not mind hefty fines. All we want is to be able to serve food in the smoking area of the bar.

The economic impact is horrible. I had 17 employees when I first bought the Brewery seven years ago. Now I have 12. I laid off four servers, a busgirl, and two cooks. It has been devastating for all of them.

I appreciate your support.

Ronald Drake, Proprietor, Point After, Las Vegas, Nevada:
I agree with the opening paragraph of the Nevada Clean Indoor Air Act which describes the intent of protecting children and families from secondhand smoke. But, as currently written, the Clean Indoor Air Act is confusing, contradictory, and, in many cases, difficult to enforce. Senate Bill 372 (1st Reprint) will address many of those flaws and the shortsightedness found in the bill.

Regarding the confusion, many of us attempted to modify our facilities to conform to the Act as it was interpreted at that time. We found out that it changes from individual to individual, from meeting to meeting, and from county to county. Many of our members, in order to comply, would have to gut their entire building and start from scratch. Their kitchen is on one side, their bar is in the middle, and their bathrooms are on the other side. As is interpreted, no one can cross that smoking area from the food service area. Even in the best of times, modifications would be difficult. Right now, with this economy, they are out of the question, particularly in my situation.

Regarding the contradictions, it allows for food service and for children to frequent establishments that have 16 or more gaming machines. One of the things that was not taken into account with the Clean Indoor Air Act is that there happens to be grandfather licenses where people have 20 or 35 machines. Those people can operate, serve food, and allow minors to participate, while down the street, a tavern cannot serve adults if they have only 15 gaming machines. How does that 16th machine magically protect children and families? What does the act of serving food have to do with the health effects of secondhand smoke? In many cases, we have had to close our kitchens. This has brought the tavern industry in the State of Nevada to a halt. Many people have lost their jobs.

In Clark County we have heard that there is a district court decision that no criminal penalty can be assessed. This is not the case in the rest of the state. By simply posting "No Smoking" signs at your door and removing the ashtrays, the violator becomes the smoker. Despite all the gnashing of teeth and pulling of hair, S.B. 372 (R1) is not going to gut the Clean Indoor Air Act. It is not going to undo the will of the people. It is going to do the opposite. This is not a pro-smoking bill. This is a pro-food service bill. It would provide for a structure to implement the Clean Indoor Air Act. It would also provide for a structure to fine those people who are violating S.B. 372 (R1). As an owner, I am willing to put up any sign that you choose to tell us to put up. We will put up "No one under 21." We will even go so far as to put up the Surgeon General's warning that comes on a pack of cigarettes if we have to do that.

In conclusion, the State of Nevada has long had a tradition of allowing adults to choose the legal activities in which they participate. Where adults are allowed to gather and minors are prohibited, we feel adults ought to be able to make that decision for themselves. That decision is: do I want to patronize an establishment that allows smoking and serves food? It should be my adult decision. I strongly support the passage of S.B. 372 (R1).

Trevor Hayes, Lionel Sawyer & Collins, representing the International Premium Cigar and Pipe Retailers, Las Vegas, Nevada:
We are in support of this bill but wanted to highlight paragraph (f) of section 1 relating to the trade shows. My client has a trade show that they used to traditionally bring to Las Vegas and now have moved to New Orleans. The numbers I received from the Las Vegas Convention & Visitors Authority said that our show, along with another show related to the tobacco industry, combined brought in $41 million and 27,000 visitors to the State of Nevada over the last couple of years. Both of those shows are now in New Orleans and would like the opportunity to come back to the State of Nevada. One of the Committee members asked me if the conventions were guaranteeing that they would come back. I can think of no greater commitment than what they have shown. They have hired someone to come back and ask that this bill be passed. I urge your passage of S.B. 372 (R1).

Tom McCoy, Government Relations Director, American Cancer Society, Reno, Nevada:
I wish to defer to the other witnesses.

Dr. Nancy York, Assistant Professor, School of Nursing, University of Nevada, Las Vegas, Las Vegas, Nevada:
We are here to present the results of a study conducted by faculty at the University of Nevada, Las Vegas (UNLV) School of Nursing, Department of Health Care Administration (Exhibit H).

We conducted this economic study because local media outlets were reporting negative outcomes as a result of the Nevada Clean Indoor Air Act. While researchers from other states have published reports that smoke-free laws have no negative economic impact on businesses, some Nevadans believe that we are a unique state due to our gaming industry. I say this because our research team did not hypothesize or predict what the outcomes of the study might be. We began with no concept of what we would ascertain, and we agreed amongst ourselves that, no matter what the findings, they would be shared with both the local media, legislature, and scholarly publications.

We used only recognized analytical approaches, and the results I report today have been peer reviewed and presented at the University's interdisciplinary research conference in April. Our preliminary analyses of key indicators as completed by a UNLV health policy expert, two UNLV economists, and me, revealed that the Clean Indoor Air Act itself had little overall economic impact on Clark County. The data we analyzed came only from publicly available sources, including the Department of Employment, Training, and Rehabilitation, the Department of Taxation, the Gaming Control Board, and the Southern Nevada Health District. There are no anecdotal stories, nor did we use single-business information, which is confidential and not at our disposal.

We used purely aggregate and objective data which we believe provides the most reliable and valid evaluation of the Act's impact on business. The law did not just affect bars and taverns, as we have heard so far this morning, but all eating and drinking establishments that serve food.

Even more importantly, our team has tracked these indicators when available from 1999 to the first quarter of 2009. What I want to stress is that we have compared quarterly trends for each of the indicators over many years, which take into account seasonal effects that occur naturally in the market and the general economy, which we know have had a significant decline in our state. Economists have stated publicly that the recession started in Nevada in October 2007. While we found that many economic indicators we evaluated did decrease after the Act, most of these declining trends either began prior to the passage of the Act and/or are consistent with downward trends in other non-Clean Indoor Air Act affected segments of our economy.

We first looked at employment. We found that the majority of employment sectors that we believed could be potentially affected by the Act, including overall leisure and hospitality, restaurant and drinking establishments, health and personal care stores, and grocery stores, actually started showing declines in employment in the second quarter of 2006, or six months before the Act was passed. In addition, employment in these same sectors actually rose in late 2007 and 2008, despite a drop in overall employment linked to the recession. For business openings, the number of newly-opened drinking establishments increased quarterly from the time the Act went into effect until the second quarter of 2008. Our graphs demonstrate that over 90 drinking establishments and almost 80 restaurants opened in the first two quarters of 2007 alone. The number of currently opened restaurants and drinking establishment permits has only increased since the law went into effect.

For taxable sales, we looked at these sales in restaurants and drinking establishments and saw a significant decline in the two quarters before the Act was passed. Trends have since followed county-wide taxable sales trends in both 2007 and 2008, paralleling the county's economy.

For slot machine revenue and collections, we found taxable slot revenue did drop immediately after the Act went into effect but rebounded by the second quarter of 2007. Since the Act, overall slot revenue trends were consistent with general downward trends in total gross gaming revenue and game and table revenue, again paralleling the county's economy, all of which has been in decline.

We also looked at data of slot collections: the fees that each business pays for housing slot machines. We found that restricted businesses, such as those with the 15-or-fewer slot machines, followed the same trend of slot collection as in nonrestricted businesses.

While our findings are still preliminary, they are consistent with similar independently administered economic studies in other states within the last five years that show little or no statistically-significant, downward economic trends after passage of smoke-free legislation in those states. We hope to finalize our study within the next six months.

Chairman Anderson:
Would you say that the revenue declines can be attributed to the macroeconomic downturn rather than the Nevada Clean Indoor Air Act?

Nancy York:
The trends that we have reported on have trended like all other industries. So when the Clean Indoor Air Act itself took effect, we do not see a tremendous drop. We see a trending downwards of things, which was typical of the entire economy.

Chairman Anderson:
Perhaps the losses of jobs and revenue in the food and service industry might be characterized as a leading economic indicator of the overall macroeconomic health of the economy?

Nancy York:
Correct.

Michelle Washington, Private Citizen, Reno, Nevada:
The information I am presenting to the Committee today comes from my master's professional project. The title is "Smoking Restrictions and Economic Impacts: A Preliminary Analysis of the 2006 Nevada Clean Indoor Air Act."

The handout provides a brief overview of key study findings (Exhibit I). We looked at key economic indicator data and evaluated 271 objective and publicly-available data points over a 15-year period of time. For the taxable sales statistics revenue, we looked at the *722 Food and Drinking Places* tax code, *713 Entertainment* tax code, which includes gaming, and the *721 Accommodations* tax code. The 722 tax code was the code that had to make the most changes to be in compliance with the Nevada Clean Indoor Air Act. Casino floors, as you know, were exempt. Hotel rooms and accommodations were also exempt.

The study showed that seasonal trends and fluctuations were consistent over the observed 72-month period. There was an observed decrease in all taxable sales revenue before the implementation of the Clean Indoor Air Act. Overall, the *722 Food and Drinking Places* tax code still generated the most revenue, despite being the tax code most impacted by the Nevada Clean Indoor Air Act.

Next, I would like to draw your attention to the Business Tax and Modified Business Tax. State revenue generated from the Modified Business Tax has increased consistently over the 72-month period. The steady increase descriptively represents an increase in the overall economic trend in the State of Nevada. Even after the implementation of the Nevada Clean Indoor Air Act, the Modified Business Tax continued to increase over the 24-month period. The consistent increase in revenue from the Modified Business Tax supports an increase in business revenue overall.

Last, I would like to draw your attention to the number of restaurant-permitted versus bar-permitted facilities. Some argued that people would close their kitchens to be in compliance with the law. The number of exempt stand-alone-bar-permitted facilities did not surpass the number of nonexempt restaurant-permitted facilities as speculated. However, the number of both types of facilities consistently increased over the 72-month period after the law came into effect.

Finally, more data is needed at the establishment level to examine the statistical significance of these findings. Again, all of this data is objective and publicly available from the Department of Taxation and the Washoe County Health District. A full report of this study can be found at the University of Nevada, Reno, School of Community Health Sciences.

Dr. John Middaugh, Director of Community Health, Southern Nevada Health District, Las Vegas, Nevada:
I am testifying today in opposition to S.B. 372 (R1).

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

Chairman Anderson:
What is precluding the adequate enforcement of this law, as it currently exists in statute, in southern Nevada? Is it because of the court order, the challenge that has been put forward which is now in front of the Nevada Supreme Court; a reluctance of your agency; or ambiguity in the law? Is there an issue with the Nevada Clean Indoor Air Act? Is it a cultural issue between the different areas of the state?

John Middaugh:
I have only been in Nevada since last July. You put a very sweeping question in front of me. The health district has been very active in enforcing the Act and has undertaken three steps. The first step is education. Affected businesses, especially food and tavern businesses, were provided handouts and written guidelines regarding compliance with the Act. Businesses, which had to make changes so their operations complied with the Act, were encouraged to meet with the health district plan review staff to review and discuss physical plans and business models. The Health District then met with various business groups to hear and discuss concerns and compliance issues.

The second step involved reaching out to individual businesses that were the subject of complaints. The Health District set up a system for the public to make complaints. Letters were then sent to businesses with the most complaints, pointing out violations of the Act as reported, and inviting the businesses to the Health District to discuss compliance issues. Thirty letters, over six months, were sent, many to taverns and restaurants with multiple locations.

Particular challenges faced during the step of enforcement were: (a) business owners who agreed to post signs and remove ashtrays and then called a week later saying they would not comply because the competitor across the street would not comply, or (b) business owners who just straight out said "no." As a result, the health district filed two lawsuits, obtained injunctions, and secured compliance.

The third step was the development of a citation process. The Act calls for the issuance of citations for violations of the Act, with a $100 penalty to be collected and sent to the State Treasurer. Remember, in Clark County, enforcement is limited to citations written by the Health District, while in the rest of Nevada, law enforcement can write a citation, still limited to a $100 penalty.

Christopher Roller, representing the American Heart Association and the Nevada Tobacco Prevention Coalition, Las Vegas, Nevada:
I submitted my written testimony to the Committee (Exhibit K). Senate Bill 372 (1st Reprint), regardless of what is being said by the bill's proponents that it would not undermine the will of Nevada voters, it does have a negative impact in several ways. It would repeal the current restrictions on smoking in additional places of employment by creating a new adult-only stand-alone bar classification as well as creating another exemption to the current law for tobacco trade shows and conventions, which could be loosely interpreted. It would also negatively impact the ability of local authorities to enforce the law. It would also create preemptions so that cities and counties could not pass stronger smoke-free laws, even if their citizens desire it. This is

a common tactic of the tobacco companies. They work hard to create legislation similar to this in other states in order to prevent the spread of clean indoor air laws. It would also drastically alter law created through a ballot initiative before the constitutionally-mandated three-year moratorium. This has never been done in our state, and it would create uncertain consequences for future initiatives.

In addition to the exposure of employees to secondhand smoke in additional establishments, it would undermine the will of the 54 percent who voted for the Act. Opening up further establishments to smoking does not protect families. Employees of these establishments are members of families. Exposing further employees to the dangers of secondhand smoke would not be true to the original intent of the Act to protect those families.

Nevada was ahead of the curve when it passed this law in 2006. Stronger smoke-free laws are being passed across the country. If this bill passes and it weakens our law, it will put us behind that curve. As these laws continue to be passed in other parts of the country, eventually we will have to revisit our law and make it more comprehensive and stronger. It would be a step backwards to pass this bill.

The law was not intended to create the situation where bars had to choose between serving food and allowing smoking. It was to prevent smoking and exposure to secondhand smoke in areas where families frequented.

We strongly oppose the passage of this bill. The health impacts from the Act were significant and we would like to protect those gains.

Assemblyman Cobb:
My main concern with this bill is the issue of the will of the people, because I do not take it lightly when the people put laws into place through the initiative process. Having said that, the title of the Act that was put into law in 2006 includes the following language: "protecting children and families from secondhand smoke in most public places, excluding stand-alone bars and gaming areas of casinos." We are dealing with a situation where these are stand-alone bars, which I am assuming were supposed to be excluded in the Act itself. Under the language of this bill, stand-alone bars are places where only individuals over the age of 21 are allowed to enter. Does this not seem to provide a greater match to what the people voted for in 2006: by clearly defining what a stand-alone bar is and preventing kids from going in there?

Christopher Roller:
The bill, S.B. 372 (R1), would open it up for more establishments to be able to allow for smoking, which would expose further individuals to the dangers of secondhand smoke, including employees. That is one thing that would have to be considered. Part of the intention of the Act was not just to protect patrons but also the employees who work within those establishments. I cannot speak for everyone who voted for the Act; I can only speak for myself and my family and our vote. But, if you look further into the original language of the law, it specified that food could not be served in these stand-alone establishments. That was made fairly clear.

Assemblyman Cobb:
So in your interpretation, protecting children and families would include employees who wish to work in these establishments?

Christopher Roller:
Yes, my interpretation would be that the employees of those establishments as well as the patrons are included within the definition of "families."

Allison Newlon-Moser, Executive Director, American Lung Association, Las Vegas, Nevada:
I have a list of 25 or 30 organizations that specifically will not come to conferences in Nevada because of smoking being permitted in public places and meeting rooms. Because the people who are supporting the amendment were saying that the Act hampers our economic activities in the state, I think there are just as many, if not more, organizations which refuse to come here, thereby hampering our economic activities even more.

If you are breathing secondhand smoke for 30 minutes, that is the equivalent of smoking one cigarette yourself. So an employee working an 8-hour shift is doing the equivalent of smoking 16 cigarettes, even if he made the choice as an adult to protect his health by not smoking. That is nearly a pack-a-day equivalent, which would increase that person's risk of lung cancer by 30 percent.

I have heard a lot of questions during this decision making process about whether the voters in 2006 understood the ramifications of the law and whether they would vote for that law again today. My organization here in Nevada commissioned the Drucker Institute to do a survey in January. We just received the results in March. The citizens of Nevada, across all demographic groups, indicated in that survey that their number one concern was preventing children from smoking, and their number two concern was strengthening the laws protecting them from secondhand smoke.

Michelle Gorelow, Director of Program Services, March of Dimes, Las Vegas, Nevada:
I had submitted my testimony yesterday (Exhibit L).

Not only was the Act to protect patrons, but also the employees. Many of the employees are young women who get pregnant. Secondhand smoke has been shown to be a risk factor in preterm birth.

Chairman Anderson:
I have a handout from the Washoe County Health Department (Exhibit M). I also have written testimony from Teresa Price (Exhibit N). Both of these packets will be entered into the record.

Michael Hackett, Vice President, Alrus Consulting, representing the Nevada State Medical Association, Reno, Nevada:
In the testimony today, one of the things I have heard from the other side is that adults should be free to make a choice. That has been demonstrated very clearly. This issue of smoking in public places has been before the public bodies since 2002. In 2002 they recognized very specifically where smoking should not be allowed and who should have control over tobacco policies. The same thing was emphasized again in 2006 when voters not only passed the Act but also chose to reject the measure sponsored by many of the proponents of S.B. 372 (R1), which was called "Responsibly Protect Nevadans from Second Hand Smoke."

As indicated, the Act passed by 54 percent. To that end, in order to find out where the voters are right now, a study was commissioned by the American Lung Association. The American Cancer Society also commissioned a study, which is this handout (Exhibit O).

This poll was commissioned from April 17 through April 20 of this year. Seventy-two percent of Nevada voters support the current smoke-free laws; including 23 percent who say they wish the law had gone further to make more public places smoke free. By more than a five-to-one margin, Nevada voters say they are more likely to go to a restaurant or a bar if that establishment is smoke free. Sixty-one percent say going to smoke-free restaurants and other venues has become more enjoyable since this law went into effect in 2006. Sixty-two percent of voters oppose this bill. Finally, the last piece from this study, a majority of voters, 68 percent, side with the argument that current smoke-free laws have not hurt local businesses.

When I took a look at the Legislative website this morning, I went to the online survey to see what the voters are saying. I found that those poll results mirror very successfully what is contained in this study. It shows that, by a margin of three-to-one, people are opposed to S.B. 372 (R1). There is no confusion among the public in terms of what the Act does and what it is they specifically want.

We have heard the argument that this bill is about being allowed to provide food and eat at a stand-alone bar. I really think it is more than that. This speaks to the one exemption in the Act that has to do with allowing smoking in the gaming areas, and only the gaming areas, of casinos. As you look at the bill, in section 1, subsection 3, paragraph (b), where they put in this new provision of adult stand-alone bars and taverns, why is there a need for both of these exemptions to be in there? Does this not add to a level of confusion? Also, if this is really about allowing these stand-alone bars to serve food, then under the definition of adult stand-alone bar, why is it required that you have a gaming license? What about those stand-alone bars that do not have a gaming license? Why are they not included in this bill? I think this speaks specifically to that one exemption in the bill that has to do with allowing smoking in the gaming areas of casinos.

If you go further down in the bill to section 1, subsection 5, this was taken out of the original bill before it was amended. This piece of the bill was one of the key components of the Act which removed preemption and allowed for local control by local governmental authorities. If this bill, and the efforts by the proponents of this bill, is to truly address what they perceive as an economic harm or unlevel playing field, why are they removing preemption? What does that have to do with the economics of this Act?

In Section 1, subsection 7, the bill removes law enforcement from being one of the enforcing agencies. How does diluting enforcement and limiting the number of agencies or bodies that are allowed to enforce this Act make it a better act? How does it make it a stronger act? When you listened to the testimony provided by the proponents of this bill, all of the witnesses from Clark County were from Las Vegas. What is the common element there? That is the one place where enforcement is not administered by law enforcement. Nobody from Washoe County testified. In fact, one of the witnesses stated that Washoe County has a fine system in terms of enforcement. If this bill succeeds and removes law enforcement as an agent of enforcement, you are going to have Clark County's problems all around the state. I do not see how that makes the law better, stronger, or more protective of people's desire not to be exposed to smoke in public places.

This bill is troubling due to a lot of factors. It is troubling from the point of view that the economic harm, which the proponents of this bill have alleged, has all been self-reported. There is nothing in terms of independent studies, peer reviews, or anything like that to substantiate their claims that their problems are caused specifically by the Act and not by the overall economic conditions. The second summary point is that there is no precedent in statute, or in any Initiative that has been put into statute and later changed, so far, that allows for a statute to be changed prior to the expiration of the three-year hands-off period. We feel that is a very dangerous precedent that would have a permanent and very severe impact on the whole initiative process. Finally, there is litigation pending on this. It is before the Nevada Supreme Court right now. Oral arguments were heard April 6. The case before the Supreme Court stems from legal action taken in Clark County, filed by the proponents of this bill, when they requested a permanent injunction preventing the Act from going into effect.

We would like to see that legal process be allowed to run its full course. That is why we have state courts to adjudicate these issues. If there are problems with the Act, I believe the proper venue is before the state's highest court.

Teresa Price, Private Citizen, Las Vegas, Nevada:
I have been involved in trying to do something about secondhand smoke since 1990 (Exhibit N). I was a dealer at Caesar's Palace. A study was done over three years ago, and we just now got the results. The results show what happens to an employee who works eight-hour shifts and what is found in their system. I was involved in helping to get the Act passed, and I find it truly confusing that the Legislators would go backwards.

Not too many people mention what happens to the employees who work in these restaurants and bars. They say they lose customers. Well, I was 15 and I was a busgirl at a bar/restaurant. That means people who are younger than 21 could not work there now. They are eliminating a whole different kind of people who could be employed in a restaurant. Does that mean that these family restaurants now completely eliminate children? When I go to these places, I see lots of families. Does that mean that these places will only allow people who are 21 and over to go in? Our lungs count also. Our hearts count also.

This is about health. This is about people's lives. Even the people who proposed S.B. 372 (R1) have admitted that secondhand smoke kills people.

Chairman Anderson:
We are now in a subcommittee of three. Anybody else who has a desire to speak and needs to get on the record? I will close the hearing on S.B. 372 (R1).

We are adjourned [at 12:22 p.m.].

RESPECTFULLY SUBMITTED:

_____
Karyn Werner
Recording Secretary

RESPECTFULLY SUBMITTED:

_____
Robert Gonzalez
Transcribing Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 13, 2009 Time of Meeting: 8:28 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda.
	B		Attendance roster.
S.B. 352 (R1)	C	Richard Peel	Proposed amendment for S.B. 352 (R1).
S.B. 352 (R1)	D	Dan Musgrove	Proposed amendment to S.B. 352 (R1).
S.B. 352 (R1)	E	Michael Mathis	Proposed amendment to S.B. 352 (R1).
S.B. 372 (R1)	F	James Wadhams	Initiative Petition No. 1, March 5, 2005
S.B. 372 (R1)	G	Steven Arcana	Nevada Clean Indoor Air Act Analysis.
S.B. 372 (R1)	H	Nancy York	The Economic Impact of Nevada's Clean Indoor Air Act in Clark County.
S.B. 372 (R1)	I	Michelle Washington	Economic Trends in Washoe County Before and After the Nevada Clean Indoor Air Act.
S.B. 372 (R1)	J	John Middaugh	Written testimony regarding S.B. 372 (R1).
S.B. 372 (R1)	K	Christopher Roller	Written testimony regarding S.B. 372 (R1).
S.B. 372 (R1)	L	Michelle Gorelow	Written testimony regarding S.B. 372 (R1).

S.B. 372 (R1)	M	Chairman Bernie Anderson	Nevada Clean Indoor Air Act 2009 Spring Assessment by the Washoe County Health District
S.B. 372 (R1)	N	Teresa Price	Statement in Opposition of S.B. 372 (R1).
S.B. 372 (R1)	O	Michael Hackett	Survey of Nevada Voters Examines Views Towards Smoke-Free Law and S.B. 372 (R1).