MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fifth Session
April 2, 2009

The Senate Committee on Judiciary was called to order by Chair Terry Care at 8:41 a.m. on Thursday, April 2, 2009, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Terry Care, Chair
Senator Valerie Wiener, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Mike McGinness
Senator Maurice E. Washington
Senator Mark E. Amodei

GUEST LEGISLATORS PRESENT:

Senator Bernice Mathews, Washoe County Senatorial District No. 1
Senator Michael A. Schneider, Clark County Senatorial District No. 11

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Bradley A. Wilkinson, Chief Deputy Legislative Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

David M. Smith, Executive Secretary, State Board of Pardons Commissioners
Claudia Stieber, Lieutenant, Division of Parole and Probation, Department of Public Safety
Keith L. Lee, Sutton Place Limited, LLC
Mike Henle, Rolladen Rolling Shutters

John Leach
Jonathan Friedrich
Robert Robey
Gary Lein, CPA; Commission for Common-Interest Communities and Condominium Hotels
Karen Dennison, Lake at Las Vegas Joint Venture, LLC
Jesse A. Wadhams, Southern Nevada Home Builders Association
Lindsay Waite, Ombudsman for Owners in Common-Interest Communities
Barbara Mello

CHAIR CARE:
We have been sued again. I have discussed this with Legislative Counsel Bureau, and unless advised otherwise, the hearing tomorrow on Senate Bill (S.B). 372 will go forward. There was a Petition of Extraordinary Writ filed yesterday with the Nevada Supreme Court. Because it is a petition, we do not do anything unless the court instructs us to respond. It is the argument on the three-year rule; after you have had the referendum process, there is an effective date of more than three years after the date the election was certified. The basis for the petition is because the three years have not run yet. I wanted you all to be aware of it.

SENATE BILL 372: Revises the Nevada Clean Indoor Air Act. (BDR 15-1099)

I will open the work session on S.B. 238.

SENATE BILL 238: Revises certain provisions relating to the restoration of civil rights for certain criminal offenders. (BDR 16-895)

LINDA J. EISSMANN (Committee Policy Analyst):
Senate Bill 238 would allow the State Board of Pardons Commissioners to adopt a policy to expedite the process that restores civil rights to certain persons. You may recall that the proponents explained the bill does not add any additional civil rights, and it expedites the process by which those rights may be restored.

Ben Graham had submitted an amendment to the bill that changes it slightly so the bill clarifies that the Board can adopt a policy where they can take action to restore the civil rights without a meeting. There are no other amendments.

CHAIR CARE:
The Committee will recall nobody opposed the bill, but we have the issue of a potential fiscal note. I did receive an e-mail yesterday—as did Senator Parks, the sponsor of the bill—from David M. Smith to Assemblyman James Ohrenschall, Assembly District No. 12. Mr. Smith, can you offer any insight what the impact of this bill might be if enacted the way it is written?

DAVID M. SMITH (Executive Secretary, State Board of Pardons Commissioners):
With the amendment to take action without a meeting only applies to community case applicants, people discharged from prison or Division of Parole and Probation for a period of time in the community without any new criminal conduct. Typically, the people who we see in these types of cases are drug cases. I have seen cases go back to 1950 without any misconduct since that time. They apply for a pardon for the restoration of all their civil rights. Parole and Probation will do a large number of investigations on these community cases all at once in preparation for the meeting of the State Board of Pardons Commissioners. With this process, we get low-level applicants, and we can submit them to Parole and Probation. They can do a background check, if there is no objection from the district attorney and the judge, and if there is not a victim in the case, we submit the petition to the State Board of Pardons Commissioners members by a file. Done in that manner, they can approve the issuance of the pardon for the restoration of rights.

On any cases that have objections or are of a more serious nature, a State Board of Pardons Commissioners member could state they would rather hold a meeting. But by doing it this way, petitioners or applicants get their pardons more quickly. It would save us the cost of a longer meeting. Or, if we were trying to catch up and hold more meetings, we would not have to have a court reporter. We do not have to prepare 15 packets of material for each member to have at the meeting with the district attorney and applicant. Instead of Parole and Probation having a large number of applications to investigate at once, they would be spread throughout the year.

On the other hand, it would probably increase the number of cases that could be seen from prisons. There could be an impact on prisons if we held more State Board of Pardons Commissioners cases for inmates. But they would have to address any potential impact. I do not see a major fiscal impact.

SENATOR PARKS:
We have Claudia Stieber with Parole and Probation here. The question would be the level of workload. Are you saying you do not see a fiscal impact on this particular bill? Does Parole and Probation do support work for you?

MR. SMITH:
That is correct. Parole and Probation would better address their impact. I do not see an impact on our agency.

CLAUDIA STIEBER (Lieutenant, Division of Parole and Probation, Department of Public Safety):
As Mr. Smith pointed out, as long as the request for the investigations comes to us on a trickle-down basis, we probably would not have a fiscal impact.

As it stands now, we have two staff members in our headquarters office in Carson City who handle these investigations. Normally, we get them from Mr. Smith's group in a large bundle of 50, 60, and 70 at a time. But in speaking with him this morning, they would send them to us as they approve the applications. The staff members we have now can do approximately eight per month. If we do not exceed that, I see no fiscal impact.

There was some testimony earlier this week about a backlog. A large number from the backlog would impact us.

CHAIR CARE:
Any other comments, questions or thoughts from the Committee? If not, I will entertain a motion.

SENATOR MCGINNESS:
I see that they have to meet these three conditions including no objection from the court and the district attorney or they have not received a written request from the victim. Would there be notification to the court, the district attorney and the victim?

MR. SMITH:
Yes. If we were to approve an application for this type of a process, we would contact the judge and the district attorney. If there is a victim notification, we would not approve it that way. It would go through the formal meeting process. If they objected to it, we would hold it over for a meeting.

SENATOR MCGINNESS:
You said if there is a victim notification. Do they have to have something on file?

MR. SMITH:
The statute requires us to give notice to a victim who has requested notification. For community case applications, most applicants are drug cases, and there is no victim notification. Occasionally, we see robberies or burglaries. Those typically wait a longer period of time, and we do not have any information. If the district attorney has a notification, we would find that out as well. If that is the case, they would go through the meeting process.

LT. STIEBER:
As part of our investigation, the Division contacts the victim, the original sentencing judge and the original prosecuting attorney. We do not just notice them. We personally contact and interview them to find out their input.

SENATOR MCGINNESS:
That is my concern. The victim should be on top of this list.

> SENATOR WIENER MOVED TO AMEND AND DO PASS AS AMENDED S.B. 238.
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> SENATOR AMODEI SECONDED THE MOTION,
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> THE MOTION PASSED UNANIMOUSLY.

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CHAIR CARE:
I will open the work session on S.B. 287.

SENATE BILL 287: Makes various changes concerning the personal financial administration. (BDR 13-658)

Senator Wiener is the sponsor of this bill, which makes various changes concerning personal financial administration. Senator Wiener, do you want to discuss the proposed amendments or make it brief and say the amendments

come from the same people who made the presentation, the Legislative Subcommittee of the Trust and Estate Section of the State Bar of Nevada?

MS. EISSMANN:
That is what I was going to say. Keith Lee presented an amendment after the hearing, which is in your work session document (Exhibit C, original is on file in the Research Library). Mr. Lee is here if you have any questions on his amendment.

CHAIR CARE:
On page 7, section 39, number 13 of Keith Lee's amendment in Exhibit C, see the language in parenthesis, "including any limited liability company." That drafting exercise would normally not be there, so we have "trustee shall" prior to that. Mr. Lee, my understanding, is you have had a chance to discuss this either with Mark Solomon, Julia Gold or Matthew Gray?

KEITH L. LEE (Sutton Place Limited, LLC):
That is correct. I have talked with Matthew Gray, who indicated he sees no problem with this on behalf of the State Bar.

To explain: the language you see in green is what we have proposed. Because of the nature of the trusts we represent, sometimes we are trustees. Because of the number of beneficiaries, it is not always easy to get all beneficiaries to concur. We are suggesting an alternative: "or done pursuant to a Notice of Proposed Action pursuant to NRS 164.725." We interpret that chapter of *Nevada Revised Statutes* (NRS) as a:

> procedure by which the trustee will notify all of the income beneficiaries or all beneficiaries are entitled to either income or distribution of corpus of an intention to take an action within a certain period of time and the beneficiaries or any of them can either object to it, and if they cannot resolve it in that fashion there is a means by which either the beneficiary or trustee can go to court to resolve the issue.

We suggest that be put in also. It is not always easy to get all beneficiaries to agree on these complicated matters. We are suggesting an alternative way to deal with those issues. The language in orange, "including any limited liability company," is a clarification to make sure we fit in the noncorporate trustee provision rather than at some point being considered a corporate trustee.

CHAIR CARE:
Any comments or questions of Mr. Lee? The Chair will entertain a motion.

SENATOR PARKS MOVED TO AMEND AND DO PASS AS AMENDED S.B. 287 WITH THE AMENDMENTS FROM MR. LEE AS WELL AS THE TRUST AND ESTATE SECTION OF THE STATE BAR OF NEVADA.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR CARE:
I will open the work session on S.B. 314. Senator Bernice Mathews, Washoe County Senatorial District No. 1, and Lora E. Myles, Attorney for Carson and Rural Elder Law Program, are with us. Legal Division prepared Proposed Amendment 3817 Exhibit C using amendments from Ms. Myles and Bill Uffelman, Nevada Bankers Association. Does the Committee want an explanation of each change from Ms. Myles? I will take that as a resounding no. If there are no other comments from the Committee, the Chair will entertain a motion.

SENATE BILL 314: Adopts the Uniform Power of Attorney Act. (BDR 13-183)

SENATOR AMODEI MOVED TO AMEND AND DO PASS AS AMENDED S.B. 314 WITH THE COMBINED MYLES-UFFELMAN AMENDMENT 3817 AS DESCRIBED IN EXHIBIT C WITH THE UFFELMAN SOLO AMENDMENT CHANGING SEVEN BUSINESS DAYS TO TEN BUSINESS DAYS.

SENATOR WIENER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR CARE:
I will open the hearing on S.B. 353.

SENATE BILL 353: Revises certain provisions relating to sealed records concerning criminal proceedings. (BDR 14-193)

This is the bill relating to sealed records concerning criminal proceedings. There was no opposition to the bill, but there was an amendment proposed by Senator Wiener.

SENATOR WIENER:
My thoughts during the hearing were indeed unsealing it for law enforcement purposes to determine a criminal conviction. If other matters had been sealed in the record, they would remain sealed. Only that information germane to the conviction would be accessible. I understand other things can be sealed. Are they all criminal?

CHAIR CARE:
You would have arrests in there, would you not?

BRADLEY A. WILKINSON (Chief Deputy Legislative Counsel):
Yes. The bill refers to information regarding arrests, dismissals and acquittals. It would include all of that information.

SENATOR WIENER:
I have no problem capturing anything relevant to criminal behavior. But are there other sealed items that should not be touched?

MR. WILKINSON:
No. There should not be anything else in the records other than those.

SENATOR WIENER:
Nothing else could be sealed?

MR. WILKINSON:
I do not believe so, no.

CHAIR CARE:
The requester says I only want this information, but I do not want anything else in there. That leaves it up to somebody to do a redaction exercise.

SENATOR WIENER:
I was curious because other matters might be sealed other than criminally related matters.

CHAIR CARE:
Do you want to withdraw the proposed amendment?

SENATOR WIENER:
Sure.

CHAIR CARE:
We are left with S.B. 353 as introduced. There are no proposed amendments. Does anybody from the Committee need to discuss this any further? There was no opposition.

SENATOR COPENING MOVED TO DO PASS S.B. 353.

SENATOR PARKS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR CARE:
I will open up the hearing on S.B. 216.

SENATE BILL 216: Revises provisions regarding the addition of shutters to units in common-interest communities. (BDR 10-1078)

SENATOR MICHAEL A. SCHNEIDER (Clark County Senatorial District No. 11):
This bill comes from the Energy, Infrastructure and Transportation Committee. Shutters are an outstanding energy tool. You can put the shutters on the outside of your unit. They come down, they are a good insulator and they keep the sun out; they cut your power usage tremendously.

The second benefit we addressed a few sessions ago is they are good for security. In my district, I have many senior citizens who live in condominiums, houses and associations, but especially condominiums. They want shutters; they are concerned about their security. I have talked to many senior ladies in

the district who live in condominiums—Heritage Square, Weatherstone and areas like that—and request these. Shutters are not allowed right now. The homeowners' associations (HOAs) decide they do not like them for some reason.

You were provided with a document (Exhibit D) from the Governor of Colorado. The Governor of Colorado has a list of things they are passing for their HOA. They will allow numerous items, including evaporative coolers, outdoor lighting, and retractable clotheslines in HOAs. That is controversial in Nevada. They are doing awnings, shutters, trellises and other energy-reducing shade structures in Colorado.

As we have discussed in our Committee and brought to the Senate Floor, the cheapest watt of energy is the one never used. That is what we are getting at with shutters. You put shutters on; they are going to leak. You drill a hole and penetrate the membrane that seals the house; god made caulk for a reason. You can caulk all of these things.

Last Session when we discussed this, people were saying Senator Schneider's brother sells Rolladen shutters and that is why he brings that forward. You will hear silly things like that going around, and it gets insulting. You have attorneys representing HOAs tell you how horrible shutters are.

In south Florida, they are mandated on homes and condominiums to protect from hurricanes. When you have a hurricane, water comes sideways at your house over 100 miles an hour. A shutter protects; it saves the structures.

This has to do with reducing our energy consumption and letting our people feel more secure, especially seniors.

CHAIR CARE:
These are the roller kind for the most part. I have seen these on television commercials, they come down, they go up; is that what we are talking about?

SENATOR SCHNEIDER:
That is exactly what we are talking about. Let me indicate everybody says Rolladen rolling shutters. That happens to be a brand name like Xerox or Jacuzzi. They advertise in Las Vegas, but there are other brands. You can go to

Home Depot and Lowe's, which sell different brands. We are not here pushing one particular brand.

CHAIR CARE:
Senate Bill 216 says an association may not unreasonably restrict. My question is what does that mean, how would the determination be made as to what is a reasonable restriction?

SENATOR SCHNEIDER:
What we are addressing is they come in different colors and they should match the color palette of the building and the association.

CHAIR CARE:
Going to page 2, lines 41 to 42, say: " ... which is not part of his unit, which is common element or limited common element ... ." If you would explain that to the Committee, please.

SENATOR SCHNEIDER:
On condominiums and town homes, especially condominiums, you only own the inside of the unit. You own the paint on the walls and inside. In a condominium unit, you do not own your walls or exterior walls, which are part of the maintenance of the association. We are saying you can mount these on the exterior of your unit, over your window and doors, and they are common elements of the association.

CHAIR CARE:
You mentioned Heritage Square South, which is where I moved when I first came to Las Vegas. As an example, that complex had 510 units, more or less. Some of them were two-story units, some single-story units. Everybody had the big front window. I can see the shutter coming down and going up on that. Are you saying that is a common element?

SENATOR SCHNEIDER:
I am not sure how Heritage Square does theirs. Does the association restucco and repaint the exterior of the unit?

CHAIR CARE:
They did, but that was in the covenants, conditions and restrictions (CC&Rs). I am using this as an example.

SENATOR SCHNEIDER:
That would be common elements.

CHAIR CARE:
Is there a distinction made for cosmetic purposes, such as Heritage Square South where you have homes that do not rise above the second story, and the high-rise condominiums which can be seen a few miles away.

SENATOR SCHNEIDER:
No distinction. What I would suggest is those high-rise buildings being built in Las Vegas which face east or west. All of that glass gets hot. My mother-in-law lives in a high-rise building, and her unit faces west. Her unit gets hot, as you can only imagine, with the glass facing west.

CHAIR CARE:
My last question is, are there HOAs that already permit shutters?

SENATOR SCHNEIDER:
There are HOAs that do permit them. But some do not. In single-family homes, they have been permitted. The lobbyist for the Nevada Association of Realtors has shutters all around his house. I have talked to him and his wife, and they thoroughly enjoy their shutters, especially when he is lobbying. She puts them down at night and feels quite secure. He says their power bills are reduced substantially. He lives in Summerlin South; he got shutters approved there. Summerlin North has had some heartburn with them. Some townhomes in Summerlin have them. It is hit and miss all over.

There was a problem in Summerlin North where I became involved in a particular case. A woman who works for the school district as an administrator in charge of the hearing impaired. She is severely hearing impaired. She was putting shutters on her unit for security in her downstairs bedroom and sliding glass doors so no one could enter in the back while she was sleeping at night. Then she went to put them on her upstairs because she has her equipment upstairs. The upstairs, which faces west, got really hot so she put shutters up there and that is when Summerlin North association said she could not do that, even though the subassociation said it was okay. She had to attend many hearings. When there is a hearing with a person who is severely hearing impaired, the HOA has to pay for an interpreter. Some associations would rather

spend the money and fight. I attended a few hearings with her and was amazed that the association pays hundreds of dollars to provide a translator.

SENATOR COPENING:
Just a few questions to make sure I understand what Senator Care was just talking about. In section 1, subsection 4, are you saying that an association—if I owned a condominium—is not allowed to restrict me from changing the appearance of another part, something that is not my unit. Take my next-door neighbor's unit and the common element, which in condominiums and town homes, the outside is generally owned by the association or the responsibility of the association. You are saying they cannot restrict me from changing that outside even if it is not my unit? Am I reading this correctly? I am taking out some of the words in between, but an association may not restrict a unit's owner from changing the appearance of a window which is not a part of his unit but a common element or limited common element.

SENATOR SCHNEIDER:
I would defer to your legal counsel on the interpretation. The intent is they can put a rolling shutter over their own windows. Remember, when it attaches to the exterior wall, it is considered a common element because your dues are paid every month and the association paints and maintains the exterior. If the Committee wanted to define it more properly, the owner of the unit would be responsible for the maintenance of those shutters and must take the shutters with them if they leave. But if they take them, they would be responsible to put the wall back to its original condition. They would have to fill the holes and paint the walls.

SENATOR COPENING:
That was my second question. Does it make it the responsibility of the association, which incurs an additional cost?

As far as defining shutters, you gave an example of the Rolladen. You are also talking about shutters viewed as decorative, the wooden shutters, and any kind of design that would go over it. The reason I am asking that question is perhaps we need to have a definition of the need for the shutters. Many shutters are created specifically for decorative elements and have worked for master-planned communities. A lot of thought, time and money goes into the design of that particular community. We call it the integrity of the community. I have a concern with allowing people to come in and possibly changing the look.

SENATOR SCHNEIDER:
If you want specifically to say rolling shutters, that is fine. It is not my intent to have decorative shutters that look like you live in New England with a shutter on each side.

SENATOR COPENING:
Thank you. That answers my question.

CHAIR CARE:
I read it the same way Senator Copening does, so maybe we can play with the drafting of this.

SENATOR PARKS:
Senator Schneider, could you comment on the issue of CC&Rs that may already be in place. This says if you have CC&Rs in place which prohibit shutters, someone could still install these rolling shutters.

SENATOR SCHNEIDER:
Correct. This as a State law would supersede the CC&Rs. We have done that a lot through NRS 116. On the floor today, we will vote on a bill to allow solar on the roofs in HOAs. Solar collectors have been outlawed in many HOAs.

CHAIR CARE:
If the homeowner or unit owner wants the shutters and CC&Rs prohibit it, is there the option of attempting to remove the board or to amend the CC&Rs? Apparently, you do not think that would work?

SENATOR SCHNEIDER:
No, that does not work. With most of these CC&Rs, you have to have a supermajority to change your CC&Rs. Some of the old ones go up to a 75- to 90-percent vote, and if you can get 25 percent of the people to show up for a vote on anything, that is big time. I have areas in my district where only 20 percent of the people are registered to vote, and on Election Day, 20 percent of that 20 percent votes. It is virtually impossible to change CC&Rs. It is like changing our Nevada Constitution; it is really hard to change.

CHAIR CARE:
I do have a few letters in support of S.B. 216. We will make them part of the record if you wish. One is from Wanda Jaranowski (Exhibit E), and the other, Barbara Mello (Exhibit F).

SENATOR SCHNEIDER:
I would like to point out to the Committee that Colorado is already geared to do these things.

CHAIR CARE:
We will make that part of the record also, Exhibit D.

SENATOR COPENING:
Because you have referenced Colorado, Exhibit D says under page 2 you do not have the right to install energy-efficient measures on limited or general common elements or on property owned by someone else. If you live in a condominium, it says you cannot do it unless they live in a condominium. Do you agree with Colorado?

SENATOR SCHNEIDER:
No. But Colorado does not have our NRS 116. They are not as progressive as we are yet. We have always led the nation in HOA rules. But you go to south Florida, they are mandated. Ordinance says homes must have them because of the hurricane problem.

I never play golf in mid-summer, but you go to a golf course community then and see shutters down on the houses. Those belong to snowbirds. They lock their places and leave. Nothing inside fades from the sun, and they are secure. That is what we are talking about. People have the option with these. Let people have the options to reduce their power bills and feel more secure.

CHAIR CARE:
I do not have anybody in Carson City to testify in favor of the bill. Kyle Davis, Nevada Conservation League did sign in favor of the bill but did not sign in to testify. In Las Vegas, Mike Henle signed in for the bill but not to testify. Mr. Henle, was it your intent to testify?

MIKE HENLE (Rolladen Rolling Shutters):
The shutters have become so important in many ways. The Rolladen Company was started here in 1984 before other companies joined, primarily because of the crime.

Then we got into the energy issues, and now with the deteriorating economy, crime is rearing its ugly head. As we know, shutters do save a lot of money on power. But right now, crime is running rampant down here. When people case a neighborhood, they go into them, be it a single family or a town house. They do not take your stuff, they go in and trash the place. The bottom line is they do not mess with a home that has shutters, no matter what the brand.

There are so many elements to shutters. They have been in Europe for over 100 years, and they are part of construction. They started going big time in southern Nevada and other places. There are many reasons to have them.

As Senator Schneider alluded, if somebody wants to put pink shutters on the side of a condominium or town house, that is not a good idea. But if it meshes with the color and compliments the design, there is a good reason to have them.

We go back to when the original bill was passed. An elderly single lady named May Roy lived in Sunrise Village. Suspects came into her home and took everything. She had just left the house; thankfully, she was gone. She has shutters on her home now, and feels better because of it. An attorney had fits about them and raised all kinds of Cain. Mary Roy still got her shutters, and she is happy.

I see no reason not to pass S.B. 216 as long as the colors match.

JOHN LEACH:
This bill is more of a conflict between real estate rights and the right to have shutters. Senator Schneider was successful a few years back in getting a provision that already provides the relief you are talking about. The statute says an association may not unreasonably restrict, prohibit or withhold approval for a unit's owner to add shutters to improve the security of the unit or to reduce the cost of energy. That has been the law in Nevada for many years. Associations are already restricted from doing that.

The only purpose of S.B. 216 is to expand that to property you do not own. Senator Schneider pointed out that in a condominium, you own the airspace. You own inside, you do not own the exterior. You do not maintain it, and you do not individually pay for it. The association takes care of the paint, stucco, roofs, etc., based upon assessments paid by everybody. It is a common element, it is not owned by the individual.

I question, from a constitutional standpoint, whether you can legislate that I can put something on property I do not own, even if you say I am responsible for maintenance of the shutter. With all due respect, you have to drive around Las Vegas for a while and see how many units have been abandoned and the condition they are left in. To suggest we have a provision that says the homeowner who installs this shutter is responsible to maintain it does not mean it is going to be maintained. In condominiums, the roofs and exterior walls may be maintained by the association, but they are owned in common by all unit owners.

Traditionally, condominium CC&Rs do not give title to the association. It says the association must maintain those components, even though they are owned as undivided interests by all unit owners.

Take a hypothetical. John Leach decides to purchase a shutter and place it in the common area. He decided not to pay for it, he is unhappy for some reason. Now the person arguably has a mechanic's lien because of an improvement to a building. Guess who gets sued when John Leach does not pay for it? They would have to name all 100 units because those people have fractural interests. This is a concern if someone is trying to sell a unit because there could be a lawsuit involving the buildings impeded.

There are liability issues. Senator Schneider alludes to the maintenance issues and suggests this could be only a few nails, a few things. If you are in a home that has had water intrusion and there is mold inside, the people suggest that is more significant.

Lastly, in 1996, they passed a federal Telecommunications Act which granted people the ability to install satellite dishes and circumvented HOAs, which were restricting this and now approve satellite dishes. However, even with the FCC, 13 years down the road, different rules apply if you own the unit versus if you do not own the unit. If you do not own the condominium, you cannot put a

satellite dish on the roof of that building. You do not own it; you cannot install it. If you have a limited common element or an exclusive use area where you could install the satellite dish and it does not intrude into the common area, that is fine. Otherwise, you cannot because you do not own that unit.

As Senator Copening pointed out in the Colorado explanation, it is a different type of housing product. When you buy that type of housing product, you have to understand what the differences mean.

Since we already have a statute that grants the right of an individual to install shutters for security and to reduce energy costs, and if they are not allowed to put them on the exterior, they could be on the interior. If you are trying to protect yourself, if the paramount issue is security, there are other ways to do that than by putting a shutter on the exterior property you do not own.

This bill would be fraught with many issues. I am not confident this bill even passes constitutional muster because you are allowing someone to do something to someone else's property without their consent. When it comes to CC&Rs, people say they bought their unit believing that was the game plan.

CHAIR CARE:
I am looking at the proposed NRS 116.2111, subsection 2, paragraph (b), subparagraph (3) in S.B. 216, page 2, lines 23 and 24.

MR. LEACH:
Correct.

CHAIR CARE:
It says "An association may not unreasonably restrict, prohibit or withhold approval for a unit's owner to add to a unit shutters to improve the security of the unit or to reduce the costs of energy for the unit." What if we were to add to subsection 3 something like "shutters, including but not limited to exterior rolling shutters, to improve the security of the unit or to reduce the costs of energy for the unit."

MR. LEACH:
That would still pose a problem with subsection 2, paragraph (b) because the introductory language says "to a unit." If you added rolling shutters—I am not a proponent or opponent to rolling shutters—it is where it is placed. It appears

that subsection 2, paragraph (b) is the preface to those sections including the shutters. Since the condominium owner does not own the exterior, even if we added rolling shutters to subsection 3, I am not opposing that, it would not change which owners would be able to do it. Senate Bill 216 is aimed to allow the condominium owner to put them outside units on property they do not own.

CHAIR CARE:
I have listened to Senator Schneider and understood his intent. My concerns are the same as Senator Copening's—if only there were a way to craft language so it is clear we are only talking about rolling shutters. I am thinking of where I used to live, Heritage Square South and that big front window. My unit faced west, and I can tell you in July at approximately 5 p.m., I could have scrambled eggs in the living room. But if I ever put a rolling shutter in back then, I am thinking exterior or interior? There may be a way to craft the language so it cannot be construed to mean common areas.

MR. LEACH:
The biggest objection of the parties to whom I have spoken is it is not their unit. Senator Schneider was accurate when he said in the single-family residential units, this already applies. Since homeowners own their single-family residential unit, they can go ahead and install shutters—although the association does have the ability to reasonably restrict. But as Senator Schneider pointed out, that is happening for those two legitimate purposes, security and reducing energy. These are significant purposes. We are asking the Committee to consider the fact you can only do it on property you own, and you still have to recognize the differences in the types of housing product.

SENATOR SCHNEIDER:
If I may respond. In Mr. Leach's amendment, you are discriminating against people who happen to live in condominiums right now. For the good of society, we are making huge changes in the way we deal with energy. The Committee could look at putting shutters on windows and doors that lead directly to a person's unit—perhaps you could craft language like that. We are talking about the exterior, which is a common element, but it is possible you could attach it to the common element that leads directly to your unit. This is a higher good than just a particular HOA. Mr. Chair, even Heritage Square, where you used to live, was not wired for cable. The unit you owned probably has cable today; they drilled through the wall and brought it in. Those things have been going on

for years. People demanded cable, so cable was installed, coming through the wall into the units.

To respond to Mr. Leach on the matter of putting the shutters on the inside: you are attaching them to a common element. They have to be anchored to a common element, and the shutters do not work inside because they heat up inside. Outside, they are insulated, and there is airspace. They work outside but not inside. The sun will come through the window and heat them up inside. They do not work inside at all.

MR. LEACH:
Discrimination is a strong word. People buy different housing products with different benefits and detriments. We cannot change the real estate law by saying because it is better efficiency or security. You can take someone else's interest in real estate.

I cannot testify to the success of placing a shutter inside a unit. I do not know how efficient they would be. I still have a problem with the notion of placing shutters on components you do not own. Whether it is liability, maintenance or constitutional issues, S. B. 216 is fraught with issues if modified as you suggested, Mr. Chair. Adding the reference to rolling is not the issue. If homeowners want to add rolling shutters, no problem; recognize the distinction that "on a unit" is the problem.

JONATHAN FRIEDRICH:
I have submitted written testimony (Exhibit G). I came here with the thought I was partially against S. B. 216 in that it would create an esthetic patchwork quilt on multifamily condominium-type units. I have no problem with S. B. 216 when it deals strictly with residential, individual, standalone homes.

I have heard testimony but have not seen any facts. I am somewhat neutral now as far as the energy savings. I would love to see some independent testing laboratory reports on what R value these shutters provide and how much power consumption they save.

As far as putting these shutters on the outside, it is a question of esthetics on a multifamily complex. Film could be installed on the inside of the glass, which would cut down on heat transmission. Shades can also be used.

As far as security is concerned, the homes built here in the last ten years or so are constructed of approximately 1-inch foam with approximately three-sixteenths of an inch of synthetic stucco on them. Somebody can easily kick right through the walls. If they could not get through the windows because of the shutters, they would still have easy access into the premises through the walls. At this point, I am somewhat neutral on the bill.

ROBERT ROBEY:
I moved from opposed to neutral.

MR. HENLE:
I have some figures for you. The slats have 46 millimeters on the five-sixteenths and 55 millimeters on the three-eighths. To reiterate one more thing from Senator Schneider, some attorneys are saying you can put these inside. Senator Care, you remember how hot the inside of your unit was in July at 5 p.m? Shutters are made to block the heat. If you put them inside and the heat has gotten through the window and radiated on the shutter, trust me, you can cook the egg real quick.

CHAIR CARE:
I received an e-mail correspondence from Michael Shulman with letters attached in opposition. Meanwhile, Mr. Wilkinson, if you can play with the language to see whether we can make it clear we are talking about the person's property, not the common elements. We can talk about it at the next work session.

We will close the hearing on S.B. 216. I will open the hearing on S.B. 351. This was a Judiciary Committee bill at the request of Mr. Leach.

SENATE BILL 351: Makes various changes relating to common-interest communities. (BDR 10-1145)

MR. LEACH:
Senate Bill 351 attempts to address several changes to NRS 116 based upon experience and things that have happened in the industry over many years. You have been given a memorandum (Exhibit H) that goes section by section. I attached four amendments to the back of Exhibit H because after I read through provisions, I recognized there might be unintended consequences. I thought this language would help remove some of those consequences or at least improve the bill.

Section 2 attempts to define the term "civil action." Civil action is used in *Nevada Revised Statutes*. The NRS 116.31088 uses the term civil action and goes into detail as to which types of civil actions do not apply. But we have not defined civil action. The only definition we could find in existence was in NRS 38.300 which defines civil action for the purposes of determining jurisdiction for the Real Estate Division. Certain claims involving homeowners' associations must be submitted through the Real Estate Division before you have the opportunity to go to court. They have to first exhaust their remedies through the Real Estate Division. The definition that excludes cases which involve immediate threat of irreparable harm and titled residential. That does not fit in NRS 116 because we are not talking about jurisdiction of the Division.

On page 8 of your Memorandum, Exhibit H, is a proposed amendment to section 2 of S.B. 351, which would include the definition of civil actions as those cases "in equity for injunctive relief in which there is an immediate threat of irreparable harm." Those are preliminary injunctions, temporary restraining orders and any case that involves titled residential property.

This is more comprehensive. It is a broader definition of the term civil action and is more accurate when dealing with the types of civil actions a homeowners' association may be confronted with. The statute list says you must get membership approval to commence a civil action and then gives examples when you do not need to get membership approval. We would need to add cases involving titled residential property.

For example, many people have lost homes to foreclosures. If a common-interest community acquired title to a residential unit through foreclosure, the homeowners' association should not have to get membership approval to obtain quiet title to that property. They would need to do that. That is why we felt we needed to add the types of cases that were exceptions; where you do not need membership approval would be a case involving titled residential property.

The proposed amendment as set forth on page 8 in Exhibit H is a more practical and accurate improvement for common-interest communities than the one I originally submitted.

Section 3 would address association funding and investments. There has been, and continues to be, some uncertainty or confusion regarding the board's ability

to invest certain funds and what they can invest in. There are some existing *Nevada Administrative Code* (NAC) provisions that you have to put your money in a Federal Deposit Insurance Corporation (FDIC) insured account. But there is still confusion. This provision would add a new section to NRS 116 to allow an association to invest their funds in other entities.

I noticed a written submission from Gary Lein. Mr. Lein is a member of the Commission for Common-Interest Communities and a much-respected Certified Public Accountant (CPA) in southern Nevada. I have looked at his comments and find them appropriate to the extent the Committee considers this type of provision as a statute. Mr. Lein does a better job of wordsmithing references to insurance and CPA terms than I. Section 3 is an appropriate measure but would be better with Mr. Lein's modifications than drafted.

SENATOR COPENING:
Mr. Leach, I am not familiar with how the whole investment works. What is the risk involved if an association takes the money of the members and invests in what you have listed here, treasury bills and municipal bonds. You have it listed as security guaranteed by the United States. What does that mean?

MR. LEACH:
Mr. Lien did a much better job of clarifying this.

CHAIR CARE:
We are looking at the proposed amendment to section 2 of S.B. 351 which is contained in Exhibit H, Mr. Leach's comments. The second proposed amendment would be the language from Mr. Lein (Exhibit I) as opposed to what Mr. Leach is now offering. Do I have that right so far?

MR. LEACH:
Yes, sir. The NAC would require associations have their funds in an insured institution. The institution is insured, not the funds. The old standard was $100,000, now it is up to $250,000, which may or may not extend after this year. There was concern because operating expenditures in those master-planned communities can exceed the amount insured at an institution because the dollar amounts are too high. Initially, the effort was focused on what we can do to create a system that would allow for a greater insurance.

Mr. Lein found there is a Securities Investor Protection Corporation (SIPC). There are ways to insure these funds to better protect the association. The difficulty was a master-planned association would have a certain sum of money in one account with one depository, another with another bank and so on. This is an attempt to make it easier for the master-planned communities to handle finances and offer secure alternatives.

You should be conservative right now. A statute in NRS 116 places a fiduciary duty on the board to do what is in the best interest of the association. We cannot be risky with other people's money. That is why we tried to expand this to identify other sources to insure the funds and enhance the likelihood that if there was a failure of some sort, the association recover or protect more of those funds.

In section 5, I mistakenly expanded the definition of common element. A common-interest community in its CC&Rs has a maintenance responsibility for certain parts of a lot. John Doe owns the unit and I own my front yard. The association has a duty to maintain, repair, and restore certain components that are not common elements. They are properties owned by the individual resident, but the CC&Rs make the association accountable to repair and maintain those.

The definition of common element in NRS 116 is narrow. It says the association must either own or lease the property. Oftentimes, associations have the duty to maintain something they do not own or lease. We had a major problem in Mesquite with grub infestation, and much land was destroyed. The association believed, because it was in their reserve study, they could use reserve funds to replace it. A legal opinion said no because the property is not owned or maintained by the association and not a common element. If it is not a common element, then by definition it cannot be a major component of the common elements, therefore you cannot use reserves.

I have attached proposed language to your Memorandum, Exhibit H, on page 9 that would shift this. Instead of putting a time to expand the definition of common element that would create unintended consequences, I recommend we retain: "The association shall establish adequate reserves funded on a reasonable basis for the repair, replacement and restoration of the major components of the common elements." That is the statute. But to expand it in case it is not part of the common elements and something someone else owns, I recommend we say "and any other portion of the planned community or

common-interest community which the association has a duty to maintain, repair, replace or restore."

This appropriate measure is not trying to shift liability to anyone else. It is recognition under certain circumstances the association board must access its reserve funds to maintain the properties. The current definition would preclude that.

SENATOR WIENER:
I do not quite identify with the example you gave about Mesquite. Could you give us something we urbanites might understand a little more?

MR. LEACH:
Associations are often required to maintain the front of yards, including large, mature trees. Some associations also have to take care of driveways. Sometimes it is everything up to what looks like a return wall or the entryway. The association has to take care of that even though they do not own it. They often have to replace mature trees and landscaping, driveways, block walls, stucco and paint, and components of front yards that the association has to maintain. Under the strict definition of a common element, they would not be able to use reserve funds.

Section 6 proposes to insert a provision expressly allowing the board of directors to amend governing documents for the sole and limited purpose of compliance with Nevada law. In 1999, the Legislature adopted a provision that specifically said if you are in an association created after 1992 when NRS 116 was adopted, you must amend your governing documents to come into compliance. There are good reasons for that. I am reselling a house, and a person wants to go over the CC&RS. I am handing them old and outdated documents that are no longer consistent with the law. It does not seem to be a reasonable solution to hand them NRS 116 and say, by the way, after you finish reading the CC&Rs, please read NRS 116 so you can see if there is a conflict.

The Legislature adopted a reviser's note, which said you must change your governing documents to come into compliance. All I am asking is to reinstate that ability on the condition it is for the sole and limited purpose of bringing the provision into compliance with Nevada law. The board is not given any latitude to amend any other provisions without getting membership approval.

The CC&Rs clearly have provisions requiring membership approval. This is a positive thing. I consulted with several attorneys both in northern and southern Nevada who are involved with representing many associations. We are finding abuses. We are not finding associations trying to trick someone or slide something by without membership approval. There is a mechanism in place assuming there is such a person, and the Commission has jurisdiction over anyone who would violate State law. If a board tried to sneak something in on someone, that person would have recourse through the Commission to challenge not only the act but also to remove and fine the board member who was not complying with the law.

On page 10 of Exhibit H is a proposed amendment which does not make it mandatory but discretionary. Boards should be given discretion to update their governing documents to come into compliance with NRS 116.

SENATOR WIENER:
Giving potential buyers outdated information at time of sale or in the process of sale—we have that concept of ignorance of the law, but this relates to outdated information. What kind of standard are sellers held to if in good faith, they were following outdated CC&Rs when the law was different? If there is a conflict, what happens?

MR. LEACH:
The law would supersede in most instances. Some recent provisions are the flag and political sign provision that did not exist before. These provisions specifically indicate how you use your property. There are other issues—like the satellite dish, the antenna—and rental restrictions, how you use your rents and the viability or enforceability of rental provisions. Those are issues which, if I gave a prospective purchaser a document, they might read it and say okay, this is what I am looking for, but the law would supersede. The homeowner's purpose may be frustrated if they think they are buying into an association where they can do certain things, but they may not be able to.

SENATOR WIENER:
Because of the changing laws every two years, sellers may have CC&Rs that are six to eight years old or the owner's original CC&Rs. Is there a disclaimer that notes the date these may have changed since the time of drafting? You said you do not want to carry the chapter of law around, but is there a buyer-beware in terms of information to make thoughtful decisions?

MR. LEACH:
Because the Legislature has enacted more disclosure provisions, the burden is placed on the developer of new developments to update public offering statements at least every three months. Once the association is built out, the developer is finished. We go down our road many years, the laws change and yet we are handing out incorrect documents. I do not want this to be difficult for the association, but if the association board believes it is in their discretion and a good thing for their community, they should be allowed to do updates without having to get all the votes of the homeowners if the only purpose is to comply with the law.

SENATOR WIENER:
Not all of the examples cited would produce harm, a flag, a political sign. But the renter provision might, with the intent of the purchaser, do something the law says you cannot do, or maybe there is something they did not have in mind but would like to do. Maybe we should consider a disclaimer or disclosure.

CHAIR CARE:
If we alter "must" to "may," but maybe it ought to say "must be changed" to conform to those provisions if those provisions apply to that association. Take the case of the political sign. Say you have an association that already permits political signs. The law gets changed, and they say we do not need to amend anything because we already permit that. The discretion is we are not going to do it because we do not have to. Nonetheless, how is the owner, seller, buyer to know, assuming they sit down and read through all the CC&Rs?

MR. LEACH:
This is not intent. It only says if you do it, it is just to bring them into compliance. If you are in compliance, your CC&R provisions grant you the latitude to allow political signs or you allow them, there is no reason for you to amend.

We have found many CC&Rs that say no signs except one for rent or for sale sign can be placed in certain sites. It flat out says no, and then as Senator Wiener pointed out earlier, if there is a conflict, obviously the law applies. In that case, the homeowner would be given the right to have the political sign even if the CC&R is not there. There are some people who do not want political signs in their front yard. Perhaps they bought into that

community, believing they do not have to worry about signs in this neighborhood. Well, yeah, you do, and here is why.

This is not intended to compel associations to spend money to do this on a regular basis or clean it up. If it is not consistent in compliance with the law or conflicts with the law, then the Board should have the ability to clean it for consistency with the law. All other amendments require membership approval.

SENATOR COPENING:
The industry association—is that the Community Associations Institute (CAI)?

MR. LEACH:
There is a Nevada chapter of CAI, yes.

SENATOR COPENING:
When laws are changed, does CAI put out uniform language that goes to the associations, or is it each individual association's responsibility to determine the changes in the law so as to interpret and communicate those in whatever way they see fit?

MR. LEACH:
There is not a mechanism CAI has other than seminars and presentations to the public to present changes in the law. Most people who attend those are board members and managers. We do not reach as many homeowners as we would like. The burden usually falls on the boards or managers to get back to their individual communities and get the word out to homeowners. The best mechanism we have is to hold open seminars for the public, but we do not get many people to come.

SENATOR COPENING:
I am in agreement with what you say because we are talking about making those changes in law without the vote of whatever percentage you need from the membership. Could we get one body to distribute that information? Even if the association did not necessarily want to go to the trouble of updating their CC&Rs, they can always attach an amendment. Information could be distributed to all associations, and then everybody has consistent language. It could be an amendment. We are taking the long way to get all of this—seminars have to be held, which are good to explain what they mean, but consistent language is important too.

MR. LEACH:
There may be other mechanisms. We even toyed with an idea once of preparing a cover sheet to the front sheet of the CC&Rs that says, please note that NRS 116 changed. We ended up giving them an interpretation or analysis of NRS 116 as it changed. As it changed every two years, the cover sheet was changing and you kept shuffling pages; we found it almost became more confusing for the association, but it is a good point.

The entity that prepares that type of analysis, since it is an interpretation of State law, would have to be Legislative Counsel or someone from the State. A private attorney would not be the right person. Other lawyers would interpret it differently.

SENATOR WIENER:
Presuming you are addressing the content or substance of a change, a generic notice could be made every two years telling people the Legislature may have changed the laws. The notice could have a consumer contact number or Website. If people are concerned about something that affects them directly, give them access to where they could go. Our bills are all online. They could come to our Website to read the change in the law.

My house was built in 1975, so people may have the presumption that a CC&R has changed. The people have different reasons for buying in different developments. Buyers beware but also notice them. People get a CC&R, think that is biblical and rely on it because we have been taught to rely on them.

MR. LEACH:
The CC&R is a covenant against land. When people buy property, their title insurance lists the declaration of covenants, conditions and restrictions. They need to read that, be familiar with it and know how they can use their home.

One of the reasons we had for amending the governing document was there are so many papers handed to buyers at closings, they normally do not read them. We have to find ways to make sure the homeowner reads and understands the product. A home is the biggest thing they buy in their lives, and we want to make sure they are happy. Senator Wiener some of the suggestions you have made must be considered.

CHAIR CARE:
On section 7, give a brief summation of the Red Hills case.

MR. LEACH:
Section 7 on page 11 in Exhibit H has the change I am proposing to S.B. 351. Section 7 is a deletion from the statute. The NRS 116 is a by-product of the Uniform Act. The Uniform Law Commissioners put this Act together in 1982. It was adopted in 1991 by our Legislature and became effective on January 1, 1992. In 1994, the Uniform Law Commissioners amended this section of the Uniform Law and removed what I am asking you to remove today, which is the section about uses to which any unit is restricted.

Every set of CC&Rs has a section usually called Use Restrictions that addresses your pets, parking and rental restrictions. The statute says no amendment may change the uses to which any unit is restricted without unanimous consent. The Uniform Law Commissioners realized the general rule is majority, although most CC&Rs have a supermajority requirement, and it certainly was not the intent to require unanimous consent.

In the Red Hills case, the association adopted a rental amendment with 70 percent of the homeowners voting in favor and 14 percent not participating. They grandfathered in existing owners. The Nevada Supreme Court struck the amendment, saying you needed unanimous consent because you are changing the uses. You have to give the membership, even a supermajority of 67 percent or 75 percent, the ability to amend their documents to evolve as a community gets older and more mature.

CHAIR CARE:
This is consistent with the Revised Uniform Act on page 11 of Exhibit H. What happens to the bold language, the additional language in S.B. 351? It picks up at line 45 on page 4 of the bill. Does that come out or stay in?

MR. LEACH:
It comes completely out and is replaced by the amendment on page 11.

Section 8 is a clarification. The NRS 116 lists the powers of an association. We would like that provision changed to say unless your document says otherwise, here are your powers. If there is a conflict, your CC&Rs control. So we are not

taking powers away from the homeowner. If anything, we are solidifying that they still have those rights.

Section 9 tries to clarify filling vacancies. The law says the board of directors may fill vacancies for the balance of the term. Many associations provide that if a vacancy is created because the membership voted to remove the director, then the membership fills that vacancy. We want to clarify that the governing documents have a method for filling the vacancy created by removal.

Section 10 is about calling special meetings. There is confusion as to what this means. This proposed amendment does not allow the board to remove a director. It allows the sitting board to call a meeting of the membership at which the membership can vote on whether the director is removed.

There are two mechanisms in the statute. There is what is called a removal election only available to the membership. If the members submit a petition signed by 10 percent of the membership, there is a removal election. The glory of a removal election is you do not have to deal with special meeting requirements. You do not have an agenda or a member forum, just an election. You prepare the ballots and mail them out. If they vote to keep the person, a removal election is straightforward. It can only be accomplished by the membership, not the board. Think about your understanding of a corporation. The board of directors of a corporation can call a special meeting of the shareholders, or in our case members, for a purpose. Say there is a three-member board and one has not come to a meeting for five or six months and refuses to attend. Should we have to circulate a petition to get the members? All the board wants to do is to call the meeting so we can ask the homeowners if they agree the person should be removed. This does not give the board any authority whatsoever to remove a director, it only allows them to call a special meeting to let the membership vote.

Section 11 would clarify the issue regarding workshops. The law specifically says no action can be taken unless it is at the board meeting and on the agenda. Before I can hire a contractor, I have to have it on an agenda. I cannot go behind closed doors. I should not have to interview people or a company about their business at a membership meeting. I may want to meet with the landscaper on-site to discuss problems. If the majority board shows up, that should not be considered a meeting. At least every three months the board is given a packet which can be several inches thick and include collection issues—

who is past due and what do we do about it. The board should review those things and discuss the issues.

This amendment would clarify that the board may meet in a workshop to discuss these types of issues, but no action can be taken. Even if it is an important issue, they cannot take action on that item. It must be placed on a future board meeting agenda so members can be present when the decision is made and hear the dialogue explaining why.

CHAIR CARE:
I have two issues. One, what is to prevent them from agreeing to take action at the next board meeting? Two, as to the documents they would be reviewing, would those documents be made available to a unit owner who wanted to review them prior to the board meeting?

MR. LEACH:
Some may, some may not. For example, if a homeowner is delinquent in the payment of their assessments, usually part of the board packet is what they call a delinquency list. There might be an account history. Under NRS 116, that is deemed a confidential record. I would not be allowed to do it. We would not give them an architecture review, but other items and documents may certainly be available.

Normally, we do not make bids available to the public until we have a meeting because we do not want to interfere with the integrity of the bid process or the decision process. If we start circulating bids, who knows where they would go. We try to keep that closed until we make a motion to hire a contractor, second it and have discussion. Then if they want to look, the bids would be made available.

To your first question, Mr. Chair, yes, board members might agree at a workshop, but they cannot take action. They are not at liberty to make or implement a decision until a board meeting, which could be 15 or 30 days down the road and must notice agenda items to the homeowners.

SENATOR COPENING:
To add clarification—when I served on the board at Sun City Aliante, we regularly held workshops pertaining to the budget. Because putting a budget together takes some time and you need to get the board members together, we

held it in open forum. This allowed free-flowing conversation. By the time we were ready to vote on the budget, we were able to come to a consensus at those workshops on different things we either agreed upon or needed to get more information on.

SENATOR WIENER:
The workshop was treated as an open meeting so the public could come and go. I am hearing that a workshop can be touring a landscape site or congregating in a less formal environment so board members can get together and take a look as long as there was no action.

My Chair's asked whether they can agree when they are there. They are not voting, but can they agree not to take action and informally say it is not on the record yet, but I am going to support it?

MR. LEACH:
That would happen even if we do not have this statute. The membership is entitled to hear the dialogue. I make a motion, I second it. If all the board members are doing is rubber-stamping things they discussed outside the presence of the membership, that would be a violation of NRS 116.

The purpose of this provision was to allow boards to be more efficient, to save time, to interview potential vendors, beautify the community, those types of things—but not to take action. Boards that rubber-stamp items they have discussed on the telephone or e-mail act inappropriately.

What needs to happen is you put it on the agenda, John makes a motion, it is seconded by someone else and there is a discussion, period.

CHAIR CARE:
Mr. Leach, we have sections 12 and 13 to go through.

MR. LEACH:
Section 12 is an effort to clarify declarations. The CC&Rs may be unclear as to who has the maintenance responsibility for limited common elements and exclusive use areas. The Legislature has adopted a provision subject to the declaration. We want to clarify if the declaration does not say it, the law applies.

Section 13 expands the definition of a confidential record to include the architecture records of an individual homeowner. I should not have to give my architectural plans to somebody else.

SENATOR PARKS:
Going back to section 11, I have a concern if the executive board conducts a workshop, the executive board is not required to provide notice. I am wondering if that is not a way for an executive board to get around some of its requirements. Can we put something else in there, short of an official notice to all of the owners? Take a requirement that a unit owner would know, say, the second Tuesday of every month at 7 o'clock is when the executive board meets—could you comment on that?

MR. LEACH:
This is not an attempt to circumvent the notice requirement. There are numerous meetings within a common-interest community, which is a corporation, where notice is not required.

For example, there is no notice requirement for architecture review committees and budget committees because these are not board meetings. Committees are not under that requirement. There are meetings within common-interest communities where the notice requirement does not apply. If I had to send out a notice to 7,000 people in a community, you can imagine that expense every time we had a meeting. Many times, these workshops are not scripted or planned in advance; an issue comes up or we have a problem, such as our landscaper is not taking care of the property, it looks horrible and homeowners are upset. The management sets up an appointment for the landscaper to meet with the board. It does not make sense to have notice of a board meeting for such a situation. We may report back to the membership that on such and such a date the board met with the landscaper, and this is what happened.

The same is true with interviewing vendors. The key is: no action may be taken. If a board of directors takes action that is not on an agenda, the Commission can hold these boards accountable for not complying with the law.

SENATOR PARKS:
Looking at how large NRS 116 has now become, are we at a point where common-interest communities below a certain size, say 300 units, should have a different set of requirements than those larger communities that need higher

requirements? I am sensing a lot of smaller, common-interest communities are falling under the strain of all these requirements.

MR. LEACH:
There is no question that a large-scale, master-planned development with all of the intricacies and major undertakings—infrastructure such as schools, stores, you name it— is a completely different beast than the condominium association with 200 units. When we try to legislate in a bill for the type of product, common-interest communities, there are times when we stray farther afield than what is practical.

When I spoke earlier about why I did not want to mandate updating your CC&Rs, that was because of the dollars. You have bigger issues this Session, and they all involve money. We do not want to keep adopting legislation compels a price tag for the homeowners to pay a larger assessment; so we are sensitive to that.

It is also true for high-rises. There are issues about different products. In 1997, we had a provision that said if your assessment payment was less than a certain amount, it did not apply. That did not work well because it was not the size of the community or the amount of the assessment that creates the problem, but the size of the community brings more issues. That might be something we could look at to address NRS 116 in the future.

CHAIR CARE:
I have a question regarding the definition of civil action in section 2. As I understood your testimony, there is no existing definition, so we need a definition. Other than the amendment on page 8, Exhibit H, to add "to determine title to residential property," it does not change anything else under NRS 116. Is that correct?

MR. LEACH:
It should not. If you look on page 8, Exhibit H, paragraph (f) is the health, safety and welfare provision. Traditionally, that is where the construction defect litigation comes.

CHAIR CARE:
You are aware there is another bill, S.B. 182, which would amend that. If we adopt this definition of a civil action, how would it play with S.B. 182?

SENATE BILL 182: Makes various changes relating to common-interest communities. (BDR 10-795)

MR. LEACH:
I do not think it should. This is a standalone definition because it defines civil action, and a construction defect case would fall within the definition of an action for money damages or equitable relief to complete it. The construction defect cases would fall under paragraph (f). The reason I felt we could change this definition rather than the one in NRS 38 is when it is injunctive relief or threats of irreparable harm. The most an association is involved in that type of case is when a person is building, such as constructing a second story to their house without architecture approval, and you need an injunction to stop work and talk. That is already covered by paragraph (b), to enforce the declaration. This definition would be okay and not interfere with S.B. 182.

CHAIR CARE:
Gary Lein, you signed in to speak neutrally, but I gather your handout is Exhibit I, the letter to me, is that correct?

GARY LEIN, CPA (Commission for Common-Interest Communities and Condominium Hotels):
Yes, that is correct.

CHAIR CARE:
You heard Mr. Leach's testimony, and he said he preferred your language to his.

MR. LEIN:
Okay. That works for me. We would like this Committee to consider our proposed changes to section 3, subsections 1 and 2. In subsection 1, we are asking you to delete "all money collected in an account which is federally insured or insured by a private insurer" and replace that language with "or invest all association funds."

I have rewritten section 3, subsection 2 on page 2 of my letter, Exhibit I. The basis behind this is to comment on types of insurance and accounts but stay away from calling out specific investments that are appropriate for associations. That is more a fiduciary responsibility of the boards themselves. But to specify what types of accounts would be appropriate, and those are accounts insured by the FDIC, SIPC insurance and insurance through the National Credit Union

Share Insurance Fund. We specifically reference NRS 678.755, which deals with State-chartered credit unions and securities backed by the full faith and credit of the United States government. I would like you to consider these changes on behalf of the Commission.

KAREN DENNISON (Lake at Las Vegas Joint Venture, LLC):
I am only going to speak on one section, section 6. Mr. Leach has done a good job presenting S.B. 351 by giving practical solutions to problems which face common-interest communities. Section 6 deals with a board being able to amend CC&Rs without an owner vote for the purpose of complying with NRS 116.

Many governing documents are complex legal documents, especially in master-planned communities. They may run 100 pages or more. There could be unintended consequences when a lay board is given the power under this bill to amend the CC&Rs to conform to NRS 116.

The NRS 116 is complicated. I often find myself looking at comments on the Uniform Act to determine what was intended. By placing this power on a lay board, I fear an overambitious board may go through an entire document and make many amendments, only to find those amendments not in compliance with NRS 116. That document then gets recorded. If it is the declaration, you have put the onus on the other owners to either go to the Common-Interest Community Commission or somehow try to undo the damage done.

There is some middle ground. Suggestions have been made that disclosures may not comply with NRS, perhaps as Senator Copening suggested. There could be some standardized language not necessarily in the form of an amendment to the CC&Rs, but a notification document where you notify owners of changes to NRS 116 as they seem to exist every session except last Session.

I would like you to weigh that against the need for the board to have the power to amend the CC&Rs. I am worried that the unintended consequences which could result from that would create more harm than good. I would be happy to work with Mr. Leach if he would consider other alternatives such as disclosure documents. Perhaps we could come up with some language or concepts this Committee might entertain.

CHAIR CARE:
Okay, I ask that you do that.

SENATOR WIENER:
As you have that conversation, is there a requirement that every so often they have to review and update their CC&Rs? We could go 30 years with antiquated CC&Rs.

MS. DENNISON:
No, there is no updating requirement to my knowledge.

SENATOR WIENER:
That would be hand in hand with the other piece because unless you update every time we leave town, it is outdated without notice.

MS. DENNISON:
That could be burdensome on boards, especially financially strapped boards and associations.

SENATOR WIENER:
Without updating, how do you know to rely on the document? There has to be something we should look at.

JESSE A. WADHAMS (Southern Nevada Home Builders Association):
We would recommend bringing in section 20 of S.B. 182 to make sure we are not inadvertently bringing in other remedies, such as construction defect, and to make sure the language is carefully considered.

CHAIR CARE:
So noted. We are aware of it.

LINDSAY WAITE (Ombudsman for Owners in Common-Interest Communities):
I am here to observe, I did not sign up to testify.

CHAIR CARE:
Okay. Did you want to make any comments based on what you have heard this morning?

MS. WAITE:
No, I do not. I am here to learn and understand the positions taken by the parties.

CHAIR CARE:
Mr. Robey and Mr. Friedrich, we have your statements (Exhibit J, original is on file in the Research Library, and Exhibit K, respectively), so you do not have to read those word for word, unless there is something you would like to add. A letter (Exhibit L) we received from Shari O'Donnell on behalf of Signatures Homes as to S.B. 351 will be part of the record as well.

MR. ROBEY:
I am a member of a board in Las Vegas, but I am speaking as an individual, not as a board member. My board has taken no position on any issue before the Committee.

Senate Bill 351 is totally regressive. It goes back into the Dark Ages. It is byzantine. I cannot express my utter exasperation in reading this. The Ombudsman for Owners in Common-Interest Communities recently came forth with a decision attached to Exhibit J, which said workshops were not authorized. Boards cannot meet without an agenda and minutes. The proposition that boards can sit down and discuss things in private and not reach a decision does not make sense to me. I have been on boards before this one.

Mr. Leach made a profound statement. He said if there was a way for a commission or a group to decide what NRS 116 means, it should go to a commission because individual attorneys would disagree on what NRS 116 says. Yet, he asks that the board of directors be allowed to amend the CC&Rs to express what the board thinks NRS 116 says. It does not make sense to me.

I wish you would take S.B. 351 and put it someplace. We have an Open Meeting Law, NRS 241, that it should apply right down the line to everything done in these community associations. It would not cost much money. They would have to put out one monthly newsletter announcing their meetings. Minutes do not have to be hours, they can be just minutes. I hope you defeat everything in S.B. 351.

MR. FRIEDRICH:
There are three portions of the bill, and the discussion has been quite lengthy. I will try to keep my remarks short.

Section 3 is about the protection of homeowners' funds. I am in complete agreement. They should be conservatively invested, no stock market investments, no derivatives.

In section 6, there is overriding consideration no one has taken into account. When you buy into a homeowners' association, you are signing a contract with the association. It normally takes two people to change a contract. The Nevada Constitution, Article 1, section 15 states: "No bill of attainder ex post facto law, or law impairing the obligation of contracts shall ever be passed." By trying to change the CC&Rs of a community every time the State changes a statute portion of NRS 116 would violate the Constitution. Nobody has addressed that issue. Most boards do not even know NRS 116 exists. I served on a board briefly in Rancho Bel Air, and board members were not familiar with NRS 116 or CC&Rs.

The other issue deals with workshops. We need more transparency, not less. By allowing the board workshops to work in a vacuum, you do not get any input, thought or ideas from members of the community. It is a common-interest community, and I stress the word "common" where all of the people are involved. I have a great deal of difficulty with allowing a board workshop not giving notice to the members, taking no minutes of the meetings and operating in the dark.

As far as architecture review, in our community we have a home approved by the architecture review board with the knowledge or consent of the members that does not fit within our community. It is an eyesore. Many homeowners are complaining, and there is nothing we can do. By allowing architecture review to be restricted is not a good idea, and it is not beneficial to the community.

SENATOR WIENER:
Ms. Mello we have your comments (Exhibit F). Do you wish to add anything?

BARBARA MELLO:
I am neutral with regard to the bulk of S.B. 351, but I do oppose section 11 regarding workshops. Part of our complaints in our organization concerns secret meetings held by our board.

Teeth are needed in the law regarding complaints dealing with homeowners' association boards. Three years and eight months ago, I filed a complaint regarding our homeowners' association and the manner in which they conducted themselves. Since then, I have filed numerous other complaints with the Ombudsman of the Real Estate Division with no results.

These complaints include the executive board: meeting in secret by computer and telephone in violation of NRS 116.1185; calling their meetings executive sessions that members are not allowed to attend, then failing to provide minutes of these secret executive board meetings in violation of NRS 116.31085, subsection 5; merging our association with the association adjoining ours without a vote of the membership, a violation of NRS 116.2121.

Over the past five years, the executive board has approved the expenditure of thousands of dollars of members' dues for the maintenance of roads and common areas of the association, while these roads and common areas are owned by the developer, not the association.

This is a breach of the board's fiduciary duties as detailed in NRS 116.3103 and NRS 116.3107. Last year, the board increased the members' dues to build a large reserve for maintenance of the developer's roads.

The board has tried to change the CC&Rs of the association by making rules outlawing all-terrain vehicles in the association. This brought out the largest attendance to a meeting in the history of our board. The president and vice president resigned after this meeting.

After three years and eight months and the election of four different boards that violated the same sections of NRS 116, the Deputy Attorney General and Ombudsman met in February with the current president, past president—who resigned—and the board's attorney in private about one more of my complaints. The president reported in the board minutes that the board is following NRS 116 and making decisions in the best interest of the homeowners in spite of their secret meetings.

The Deputy Attorney General confirmed that the board's comments were accurate. He said there would be an official letter regarding the meeting, and we have yet to receive this letter. Meanwhile, the board is still violating the above sections of NRS 116.

At this time, the results of the process of filing a complaint about a homeowners' board is a well-kept secret, and a complaining person is not allowed any input into the disciplinary process.

I would refer this Committee to the S.B. 269 timeline proposed by the Board of Medical Examiners for handling complaints. No more than 90 days should be needed to investigate a complaint and for the Ombudsman to decide whether to go forward with the hearing involving both parties to the complaint or dismiss the complaint as groundless with an explanation to all parties in the complaint.

SENATE BILL 269: Makes various changes to provisions governing physicians and certain related professions. (BDR 54-757)

Three years, eight months and the election of four different boards are far too long for any complaint to linger. If this Committee decides to do anything with NRS 116, you should look at changing the enforcement of the NRS.

The Executive Branch and Attorney General's Office are not doing their jobs in a timely manner. I was told by a State employee that the Real Estate Division seldom, if ever, hears complaints about homeowners' association boards. There are already provisions that call for fining boards that break the law, and this could bring income to the Division if NRS 116 was enforced.

At the present time, NRS 116 is not working to the benefit of the homeowner.

MR. FRIEDRICH:
The NRS 116 has become so large and complicated, it is almost like the *Internal Revenue Service Internal Revenue Code*. It is unworkable, it is difficult to comprehend, it leaves a lot of room for interpretation, and Assembly Bill (A.B.) 350 addresses many of the issues heard last week. It was opposed by much of the legal community in the State and many property managers, but it goes a long way to resolving the abuses and problems caused by out-of-control or unknowledgeable boards. I am sure you are going to see A.B. 350 circulated throughout the Legislature.

ASSEMBLY BILL 350: Makes various changes relating to common-interest communities. (BDR 10-620)

SENATOR WIENER:
The Committee is adjourned at 10:59 a.m.

RESPECTFULLY SUBMITTED:

Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

Senator Terry Care, Chair

DATE: