MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Sixth Session
May 12, 2011

The Committee on Judiciary was called to order by Chairman William C. Horne at 9:11 a.m. on Thursday, May 12, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/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 William C. Horne, Chairman
Assemblyman James Ohrenschall, Vice Chairman
Assemblyman Steven Brooks
Assemblyman Richard Carrillo
Assemblyman Richard (Skip) Daly
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Jason Frierson
Assemblyman Scott Hammond
Assemblyman Ira Hansen
Assemblyman Kelly Kite
Assemblyman Richard McArthur
Assemblyman Tick Segerblom
Assemblyman Mark Sherwood

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Nancy Davis, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Mark Smallhouse, representing Executive Committee of the Business Law Section, State Bar of Nevada
Robert C. Kim, Chairman, Executive Committee of the Business Law Section, State Bar of Nevada
Susan L. Fisher, representing Valley Electric Association, Inc.
Curt R. Ledford, representing Valley Electric Association, Inc.
James L. Wadhams, representing Nevada Rural Electric Association
Judy Stokey, representing NV Energy
Rocky Finseth, representing Carrara Nevada; and Nevada Land Title Association
Russ Dalton, Legislative Chairman, Nevada Land Title Association
Marilyn Brainard, Commissioner, Nevada Commission for Common-Interest Communities and Condominium Hotels, Real Estate Division, Department of Business and Industry
Teresa McKee, representing Nevada Association of Realtors

Chairman Horne:
[Roll was called.] We have two bills on the agenda. I will open the hearing with Senate Bill 405 (1st Reprint).

Senate Bill 405 (1st Reprint): Revises provisions governing business entities. (BDR 7-528)

Mark Smallhouse, representing Executive Committee of the Business Law Section, State Bar of Nevada:
The purpose of this bill is to address certain portions of Nevada's business law statutes that members of the Executive Committee have identified as needing clarification or as needing revision in light of the current business environment. This bill will also make us more competitive with other states as far as how our business laws attract businesses from other states. I will provide a summary of the relevant parts of the bill (Exhibit C). I will not be going over changes to the law that affect typographical errors or clarifications in numbering. There are eight broad proposals that the Business Law Section is proposing. These proposals were approved by the Board of Governors of the State Bar of Nevada

on December 8, 2010 and by the Senate Judiciary Committee on April 25, 2011.

The first proposal deals with the electronic technology provision, sections 1-11, 16-19, 24-26, 58, 64, 72, 78, 92-94, and 102. There are changes to Title 7 of the *Nevada Revised Statutes* (NRS) that deal with the Uniform Electronic Transactions Act and the Federal E-Sign Act. This is designed to bring Nevada current with those two acts.

Next are amendments to sections 14, 16, and 30-48. Generally the Executive Committee will often take certain provisions of the Business Corporations Act and determine whether they need updating and review them periodically to ensure they are in compliance with various other acts in the Model Business Corporations Act. That was done with Chapter 92A of the *Nevada Revised Statutes* (NRS) this session. We are trying to ensure that it is easier to effect a business combination when there are interested shareholders. We also wanted to look at vague provisions and clear up some language in the statute as well. We also need to ensure there are protections so that if there are business combinations with interested shareholders, and there are adequate approvals of majorities of the boards of directors and shareholders, that those types of transactions can go forward even though they previously would have been prohibited by statute. With that in mind, the proposed amendments will continue to protect Nevada corporations and transactions while affording directors and shareholders greater flexibility and otherwise bring about a friendly corporate combination. At the same time, it also protects shareholders and directors against hostile takeovers.

The next major change deals with dissolution of corporations and the fiduciary duties that directors or trustees who are involved in the dissolution owe to the shareholders and creditors of the corporation. This involves sections 15, 49, 51, 63, and 102. It was felt that the fiduciary duty that was owed by trustees of a dissolving corporation was somewhat vague and could be subject to different interpretations. This will clarify what type of fiduciary duty is owed by a director or an officer of the corporation who is engaged in dissolving and winding up the affairs of the corporation. We are proposing that the fiduciary duty be one of ordinary care, which is similar to what a director generally has to the corporation and shareholders otherwise in statute. We also wanted to get rid of a provision in the statute that provided for joint and several liability for trustees who were winding up the corporation.

Chairman Horne:
Is that level of duty for the fiduciary, ordinary care, the typical standard of fiduciary duty or is it usually a more heightened standard?

Mark Smallhouse:
The statute did not clarify what the duty was. We are trying to clarify that it is an ordinary duty just as the director already has with respect to operating and managing the affairs of the corporation.

Chairman Horne:
Is there a higher duty than ordinary care?

Mark Smallhouse:
In this case it would not be the higher fiduciary duty; it would be an ordinary duty of care.

Chairman Horne:
Why would we do just the ordinary duty and not a higher duty of care for a fiduciary and its dissolution of the corporation?

Mark Smallhouse:
The duty is owed to creditors of the corporation and if the duty is violated, the director becomes personally responsible for the improper distribution. Our thoughts in having a lower standard is that it will make the dissolution more efficient, and a director would be more willing to be involved in the dissolution of the corporation.

The next general provision deals with effective date and time for filings with the Office of the Secretary of State, sections 20-21, 27-29, 49, 55, 59-62, 65-68, 70, 71, 73-74, 76-77, 79-81, 83, and 87. This provision allows for filers of corporate documents with the Secretary of State to specify the effective time of the filing. Currently, you can specify the effective date if it is a date other than the actual date of the filing, but not a specific time. In the event the time is not specified, it will default to 12:01 a.m. on the date of the filing. This does not increase the burden that is imposed upon the Secretary of State. They already stamp all documents with a date and time. The idea is that, where the time is important, the filer may specify the effective time and date.

The next provision is clarification on restrictions to transfers in section 22 of this bill. This section clarifies subsection 2 of *Nevada Revised Statutes* (NRS) 78.242 and expands potential grounds of such restrictions. Currently, it is possible to read subsection 2 of NRS 78.242 as requiring that if a restriction is approved by the board of directors and the shareholders, it affects all shareholders in their ability to transfer their shares, including those who did not vote for it. In reviewing the intent of the law, we determined that it should mean that only those shareholders who vote in favor of the proposed restrictions should be bound by it. It also allows for specifying the reasons for

having a restriction on transfers. For example, it might be to preserve a Subchapter S Election or it might be to preserve tax attributes and net operating loss flow-throughs to shareholders to ensure the restrictions cannot be made to change that. It also puts restrictions on transfers that might be imposed by gaming laws.

The next general change is amendments to bylaws in section 53. This is primarily to prohibit retroactive changes in bylaws that affect officer, director, and agent indemnification provisions. In reviewing other state's laws, it was found that we want to ensure that someone could not retroactively amend the bylaws to provide for indemnification of officers, directors, and agents of the corporation.

The next provision deals with charging orders in sections 52, 69, 75, and 82. The intent is to update Nevada's charging order protection laws that affect corporations, limited liabilities, and limited partnerships to make our laws as good as other states' laws including South Dakota, Wyoming, and Delaware, which have recent significant changes and clarifications as to when a charging order applies and ensuring the charging order is the exclusive remedy that is available to creditors. This aids estate planners and wealth preservation planners who will often select Nevada as a state in which to organize a corporation, limited liability, or limited partnership based upon our charging order statutes. Again, the change does not affect the relationship between consensual creditors or financial institutions that have direct dealings with a corporation.

The final change deals with the Uniform Statutory Trust Entity Act, which is set forth in NRS Chapter 88A, and is in sections 84-86 and 90 of the bill. The Executive Committee was asked to review the proposed Uniform Statutory Trust Entity Act of 2009 that has been proposed by the National Conference of Commissioners on Uniform State Laws. We looked at the proposal and law from Delaware and rather than propose that Nevada adopt the Uniform Statutory Trust Entity Act, we decided that we would be better off amending our current act to implement important provisions of the Uniform Act but also to take advantage of some differences in laws that Delaware has as well. We believe we have an act that works better for Nevada.

Robert C. Kim, Chairman, Executive Committee of the Business Law Section, State Bar of Nevada:

I would like to point out that we are requesting an amendment to the bill to clarify an aspect of NRS Chapter 82 (Exhibit D).

Chairman Horne:
What is this amendment for?

Robert Kim:
The concern is that a nonprofit cooperative corporation is a unique entity structure where all of the owners are the customers as well. Although Valley Electric is a corporation, it is much different than stockholders and owners. The request being made is to allow Valley Electric to protect the names of its customers from those that may have nonbusiness purposes.

Assemblyman Frierson:
My first question is regarding the fiduciary duty. I believe the testimony was that the standard is currently unclear. I am assuming there has been a case, a court ruling, or some type of nonstatutory conclusion of what the fiduciary duty is, and this is during the dissolution of a corporation. Could you explain what the higher fiduciary duty is? Also, are any other jurisdictions that we know of reducing the fiduciary duty down to one of ordinary care?

Robert Kim:
The concern is the fact that a director, by statute, was jointly and severally liable for any distributions made as part of the dissolution, which would expose him to individual liability in excess of what is currently permitted to the extent he followed his own fiduciary obligations. We have found in practice that burden was resulting in many corporations not formally dissolving. Many corporations were having their directors resign. We felt that, in the name of economic efficiency, it made sense to clarify that a board of directors abide by the fiduciary duty that it already owes to its stockholders and other constituents which is clearly stated so there is no ambiguity as to the benefits of a proper dissolution. In checking with the corporate laws of both Delaware and Maryland, that has been adopted by those states. We thought it would be best to add more certainty to the duties owed by the directors so they would be inclined to properly dissolve instead of abandoning the corporation and leaving more questions than answers.

Assemblyman Frierson:
What is the higher level?

Robert Kim:
It is a higher level of liability. The standard review should be the same in terms of what duties are owed to the extent that if something is done improperly, the directors were jointly and severally liable for that. There is no clear standard as to what that really means. By connecting the duties in a dissolution setting with those duties that currently exist, individual liability is imposed when there

is both a breach of fiduciary duty and when that breach involves intentional misconduct, violation of law, or fraud.

Chairman Horne:
There was a standard that called for certain fiduciaries to use the reasonable care that a professional in that field would use to protect the assets of their corporation or their charge. I seem to remember there was an articulation on exactly what that fiduciary higher standard was.

Robert Kim:
Typically, directors are charged with operating a company and taking actions in the best interest of not only the stockholders but the corporation's other constituents. Where directors are held to a higher standard of care is in the context of a change of control, such as a hostile takeover or other acquisition type situations where the board may no longer be motivated to maximize interest of the stockholders and other constituents, but may in fact be motivated to entrench themselves and continue the corporation for their own benefit. In that context, the duties and presumptions offered to the board are suspended and a higher duty is applied. In 1999, due to the court ruling in *Hilton Hotels Corporation v. ITT Corporation,* United States District Court, District of Nevada, 978 F. Supp. 1342 (D. Nev. 1997, the Legislature adopted NRS 78.139, which deals with the duties imposed when officers and directors are confronted with a change or potential change of control and, at that point, the presumption is removed and the director must affirmatively show that there has been a reasonable threat to corporate policy and the actions taken do not impede stockholders' rights. It is in the hostile context where the members of the board of directors can be subjected to a higher standard of scrutiny.

Assemblyman Frierson:
Section 18 proposes to strike a corporation's ability to refuse to allow electronic communication as an official form of communication. Earlier in the bill there seems to be a significant effort at allowing electronic versions of communication. My concern is about notice and the provisions dealing with that notice. Oftentimes email may come from an unknown source and go to junk mail folders; there is no confirmation requirement. I am concerned that it would be relied upon as an official notice provision particularly because in section 11, subsection 3, it talks about a valid notice being revoked, or is deemed to be revoked if there is reason to believe the person is not getting email. There can be a significant amount of time before someone knows that email is being filtered out. I am concerned about relying on email as an official way to communicate and as an official trigger for notice. While we are on notice, section 11, subsection 7, paragraph (b), the trigger for notice in that section is when it is put in the mail box. I am wondering, in the absence of

certified mail, if that is standard. It takes a few days in the mail, yet they are deemed to have been put on notice when it is put in the mailbox.

Robert Kim:
As a committee, we are asked to look at and pass over certain postal changes to the Model Business Corporation Act or other model acts that are appropriate in our state. Usually, when these uniform sections or acts are provided to us, the larger body has already passed over them. In this instance, these sections were adopted by the American Bar Association and the Model Business Corporation Act. For the most part, we have viewed the effort going into these sections as being well-respected and well-thought through. I understand the concerns raised in terms of what is deemed notice. I would like to point out that under Nevada corporate law, notice can only be given no less than 10, and no more than 60, days out for any meeting. Clearly there is some buffer, but obviously 10 days goes by and many things cannot be tracked in 10 days. Currently, if a corporation has a bad physical address, it is permitted to mail to that address as the last address it has on its records. To some extent, there is always going to be an issue of people who are not able to, or do not, notify the corporation of an appropriate address for any kind of communication with the corporation. There are concerns about whether an email notice or electronic transmission will be sequestered in a junk mail box. That is a reality we deal with every day on other mailings also. It is no different than a letter being put in the mail to a bad address. I do not have a response in terms of a way to correct that, but I do know these statutes have been thought through by the American Bar Association and the Model Business Corporation Act Committee.

Assemblyman Ohrenschall:
Regarding page 9, section 15, lines 9 through 25, I would like someone to explain to me how this new heightened level of immunity differs from the immunity stockholders currently have under Nevada law.

Robert Kim:
Section 15 is part of the updates that we made to the common interest to stockholder statutes. Many times when we make changes, the Legislative Counsel Bureau rearranges text. Currently, section 15 is part of the dissolution provisions and again, we are trying to get more clarity as to what happens once the proceeds from a corporation are released by the board to the stockholders. The stockholder does not have discretion to determine what is distributed to that person. The purpose of this section is to provide more clarity as to what a stockholder needs to be concerned about to the extent that a distribution is deemed later to be inappropriate.

Assemblyman Ohrenschall:

In subsection 3 of section 15, would it be possible in a very closely held corporation that a stockholder who receives a very small distribution after the dissolution of the corporation would then have extremely limited liability, even though they might be culpable for more?

Robert Kim:
They could be culpable for more if they had a duty separate from their pure ownership capacity and they had effected a plan of dissolution that was fraudulent, they would have an independent duty. This merely addresses someone's capacity as a stockholder only, that amount given to that person pursuant to the point of dissolution. In that instance, one's exposure is limited to the amount that person receives in that context, however, to the extent that party has effected or had another role in effecting a potentially fraudulent plan of dissolution, that would give rise to separate liability or exposure.

Assemblyman Ohrenschall:
If three people start a corporation and they commit fraudulent activities and then when it dissolves, all three people receive $1 each. You are saying there are other avenues for the harmed parties to try to recover, even though this statute seems to say they would only be liable for the $1 they received upon dissolution of the corporation?

Robert Kim:
That $1 delineates the exposure they received. That is only one remedy to reclaim the funds of innocent investors. However, in that context, there were the duties that were owed in operating a company in the first place, where assets may have been wasted that would give exposure to those individuals. There are also security laws that would apply where that behavior is regulated and enforced.

Assemblyman Daly:
You stated there are some provisions that need to be put in for compliance or alignment with federal law, and there are some other provisions to match up with uniform acts and various things. Being in line with federal law basically sets a minimum standard that everyone follows. You also stated that you want to be competitive with other states in their corporate laws. I do not know the difference in the sections on which ones apply to which. When you said there is an advantage, that inversely means there is a disadvantage. If the advantage is going to a business corporation, businesses will incorporate here because we have more favorable provisions. A former legislator gave me some sage advice, he said, "Before you vote on a bill make sure you know who is going to be helped and who is going to be hurt." I understand trying to create an advantage to induce business, but we also need to know the balance on the other side.

Part of our job is to ensure the citizens of the state are not disadvantaged unduly in relation to the benefit. Maybe you can tell me something to give me confidence that the people are not going to be disadvantaged based on the advantage we are giving corporations.

Robert Kim:
I would be happy to address the sections you are referring to and what the intention is. My understanding is that the charging order statutes are the statutes in which we are proposing to make amendments to. This would also advance the ball in terms of making Nevada competitive with other states. I think that is the series of laws or amendments that you have expressed the most desire to know more about.

The charging order statutes are not a new concept for Nevada entities. In fact, statute currently states that the charging order remedy is the sole remedy as it is. The two things we are trying to accomplish here are adjusting the inconsistency that exists between NRS Chapters 87A and 88. There are two limited partnership structures where you can either adopt the revised Uniform Limited Partnership Act that is pre-statute, or you can choose to be governed by the common law premise of the Limited Partnership Act. The latter has charging order as a sole remedy, and the former was not adopted with that conforming remedy because it was the Uniform Act and that dismissed it. The reason we are changing it in NRS Chapter 87A is to conform to the remedies that currently exist. The second aspect is to merely sharpen the language and the effect of the charging order remedy. As I mentioned, it states that the charging order remedy is the sole remedy. As you can imagine, states are trying to retain, regain, or increase revenue, trying to further word their statutes to sound as though they offer more. Many times people will base their decision on perception, not reality. We are trying to merely reiterate the effects of the charging order remedy in the various chapters so that Nevada remains as competitive as it was before with other states, such as Wyoming and South Dakota. I hope that gives you a little more background as to why those statutes are being adopted.

Mark Smallhouse:
As one of the drafters of the bill, what happened was in the last legislative session, we adopted the revised Uniform Limited Partnership Act which inadvertently changed what previously had been the charging order provision in the law for limited partnerships that said that the charging order was the sole remedy. Our limited liability company (LLC) laws and otherwise limited partnership laws all provided that the charging order was the sole remedy. One of the provisions in the bill clarifies that for limited partnerships, the charging order is the sole remedy. The Uniform Act provided that not only was the

charging order a remedy, but you could also foreclose on a limited partnership interest which was not under previous law and was inconsistent with our LLC laws otherwise. As far as improving our charging order statutes, our statutes provide the charging order is the sole remedy; however, other states have added to their language that they exclude expressly any other remedies. We are making it very clear that the charging order is the sole remedy and excluding any other remedy. That is consistent with current laws and is not an expansion.

Assemblywoman Dondero Loop:
Are there other corporations or groups that are using this on the West Coast? Are there other groups using a closed meeting?

Mark Smallhouse:
What section of the bill addresses the closed meeting?

Assemblywoman Dondero Loop:
I am not sure; it is on some page, somewhere, line something. Essentially it says that your customers and your corporations are basically the same people, so the request would be to have a closed meeting. Am I clear on that?

Robert Kim:
I think you are referring to the amendment that has not yet been presented (Exhibit D).

Assemblywoman Dondero Loop:
We have two of those amendments; one does not have a name on it.

Chairman Horne:
We will address that amendment soon. Are there any other questions on this bill? I see none. Is anyone here wishing to testify in favor of this bill?

Susan L. Fisher, representing Valley Electric Association, Inc.:
Valley Electric is one of the largest rural electric co-ops in the State of Nevada. We have an amendment to propose (Exhibit E). I would like to turn this over to Mr. Ledford to review the amendment.

Curt R. Ledford, representing Valley Electric Association, Inc.:
Valley Electric is a member-owned cooperative. It is a rural power company. This amendment relates to NRS 82.181, which requires the dissemination of name and address information to any member seeking that information for a bona fide purpose. Generally, that purpose would be for voting, because we are a member-owned cooperative and are governed by a board of directors who are

elected by the public. When a member runs for the board, one of the ways he campaigns is to get the information of the membership of the company so that he can do his campaigning.

The reason for this amendment is essentially for privacy. Identity theft is an epidemic. The Federal Trade Commission has been making efforts to protect the privacy information of Americans. We think this bill needs to be in conformity with that in an effort to protect the privacy of our membership. We informally polled a select group of interested members who take more of an active role in the management and operation of the company; they were surprised that a law existed requiring the dissemination of information. We received a resounding "No, do not give out my name and address." It is worth noting that the membership is generally a member, because in order to receive power, you must be a member. They have no choice but to join this company to get electricity. They do not join it as a stockholder for investment purposes; in contrast, our members do not have a choice.

The existing statute does describe bona fide purposes, and that is a good provision in the law, but the problem is secondary dissemination. A member comes in with a petition to run for the board, and we hand them 16,500 names and addresses. Once I give that out, I cannot control what happens to those names and addresses. That is one of the primary concerns with the requirement of NRS 82.181. Some would argue that this is a transparency issue and that member cooperatives should remain as transparent as possible. We agree 100 percent. In fact, I would argue that cooperatives are probably one of the most transparent organizations in the State of Nevada. It is not about closed board meetings. Our board meetings are open. Any member can get the minutes from the board meetings. They can get all the financial information from the company; balance sheets, income statements, et cetera. This relates to privacy information. This information is not public; it is not germane to the interest of the cooperative. It is not about creating a secret organization or trying to do things behind closed doors. It is simply protecting the personal information of our customers.

Chairman Horne:
Current law states that upon request, you must provide the names, correct?

Curt Ledford:
That is correct.

Chairman Horne:
Based on your testimony, Valley Electric is not complying with that law?

Curt Ledford:
Since I have been general counsel, we have not had a request for this information. Our board of directors expressed great concern with respect to the requirement to release that information. The fact of the matter is most board members that campaign do so through a more modern medium as opposed to mailers. They will use the Internet or town board meetings.

Chairman Horne:
This information that you are required to provide, is it more than just the name and address or does it contain more detailed information?

Curt Ledford:
It is name, address, and class of membership.

Chairman Horne:
Your argument is that if someone releases a name and address, you could have an identity theft problem with that little bit of information?

Curt Ledford:
I think it can be used for harm. Specifically, there are many individuals in our service territory that go to great lengths to protect the fact that they live there. They will put their estate into a trust and name the trust something that is not indicative to their name, and they will go off grid. They try to protect that information. We want to respect their right to do so.

Assemblyman Ohrenschall:
If this amendment passes and someone wants to run for the board of directors of the cooperative, would he be able to give you the flyer and you could send it out to the members?

Curt Ledford:
That is something the board of directors has indicated they would be willing to do.

Assemblyman McArthur:
We had a compromise on Assembly Bill 246 which passed through this Committee. Basically what we did for a bona fide reason such as running for office is to provide addresses but no names.

Assemblyman Sherwood:
My horse sense says there is something wrong with this because there are so many other instances where you have access to that kind of information. If you are a shareholder in a public company, you have access to every shareholder in

that company. We are talking about access for members from members. A member is requesting it for other members. If the argument is identity theft, there are a hundred other ways to get that information, even voter records. If the issue is that there are a select number of members who want to go off grid, is there another remedy where we can say this 1 out of every 1000 customers is off grid and he can file something for confidentiality?

Curt Ledford:
That is certainly something we can explore. There is a distinction between NRS Chapter 82 entities and NRS Chapter 78 entities. In NRS Chapter 78, these people choose to become investors in corporations versus our members who have no choice. If they want power, they have to subscribe for membership. It is akin to NV Energy. NV Energy has two million customers. You cannot walk in as a customer and get two million names and addresses. By parallel, we would have to provide the names and addresses. I think that while there are different alternatives, the goal is to protect the privacy information of our members. Some of our members are not going to mind, in fact they will be very open about their name and address in the public domain. Others are not. If there is an opt-in system, we could definitely explore that.

Assemblyman Sherwood:
If we do something here, it will affect homeowners' associations, memberships in fraternal organizations, et cetera. Maybe we have to think of other remedies.

Assemblyman Brooks:
You stated that if you went to NV Energy you would not have to get the names of the governing directors and all the other information, correct?

Curt Ledford:
No, we are not concerned about the directors. My parallel was about the customers of NV Energy.

Assemblyman Brooks:
You are not NV Energy; they are a corporation. You are a creature of the state as a co-op, correct?

Curt Ledford:
That is correct.

Assemblyman Brooks:
You have many of the transparency issues that we have as elected officials, which is to put your name and address out there. Your social security number is not out there, correct?

Curt Ledford:
Correct.

Assemblyman Brooks:
I could Google your name and get your address. I am just trying to figure out what the difference is and why this is so important.

Curt Ledford:
You could Google me because I do not mind being in the public domain, but there is probably a large number of Nevadans who you could Google their name and not find out where they live.

Assemblyman Brooks:
Maybe you should consider becoming a corporation and go through the same regulations that it takes to be part of a corporation like NV Energy. You are a co-op, so you have to deal with what we have to deal with as elected officials. There is a transparency issue that you will continue to have to abide by unless you change the structure.

Assemblyman Ohrenschall:
My question is not about the need to protect people's identity, but the need for openness and sunshine. Do you have to submit your names to the Public Utilities Commission (PUC)? Do they regulate you the way other utility companies are regulated?

Curt Ledford:
We have very limited regulation by the PUC.

Assemblyman Ohrenschall:
Do you submit the names of your directors and members to the PUC?

Curt Ledford:
No, we do not. Again, it is not about the directors. Once one starts campaigning for the board, they open themselves up to the public dissemination of their information. It is about the customers.

Assemblyman Ohrenschall:
You said you have limited regulation through the PUC. What is that?

Curt Ledford:
The PUC regulates service territories.

Assemblyman Ohrenschall:
They do not regulate prices like they do with NV Energy?

Curt Ledford:
Correct, the cooperatives are self-regulated by the board of directors that are elected by the membership.

Assemblyman Ohrenschall:
So you are autonomous, you decide what you will charge, and write your own policies?

Curt Ledford:
Correct.

Chairman Horne:
Are there any other questions? I see none. Anyone else in favor of this bill?

James L. Wadhams, representing Nevada Rural Electric Association:
Nevada Rural Electric Association is an association of all the rural electrical cooperatives, Chapter 318 of the NRS districts; Lincoln County and Overton Public Power District are NRS Chapter 318 districts. It also includes the municipality of Boulder City. We represent all the nonstockholder-owned purveyors of electricity in this state, with the exception of Valley Electric. We are in support of the bill, but opposed to this amendment for some very specific reasons. Some of the questions asked earlier have raised the points I would like to emphasize. These are cooperatives: the members control the rates; the consumers control the rates. That is the reason why the PUC does not regulate them. There is no separation between the owners and the customers. The investors have a profit motive, management has to balance that, and the PUC regulates that. That does not occur with cooperatives. Quite frankly, other sorts of cooperatives, not just electric, but dairy cooperatives and certain types of credit unions are also managed directly by their members. The process that becomes critical in the execution of that responsibility is access of members to know who they are in business with and who can vote for those directors. It is somewhat similar to the question of the responsibility to a constituency.

One of the manners, in fact the most primary manner, that occurs is access to the records of the membership. Who are the fellow members? How can I find out? How can I write my name on the ballot and persuade them to vote for me to be on the board of this entity?

I have represented the Nevada Rural Electric Association since 1985, and from time to time issues have arisen in management. It is ultimately the control of

the members that has resolved those issues. The essence of the problem is ensuring that any one member can find out who the other members are to solicit support for perhaps a change in management, a change in rate structure, or whatever else may be going on.

As your Committee has identified, NRS Chapter 78, section 105 and NRS 82.181, although structured slightly differently, are identical in the responsibility of identifying the ownership of any corporation, and whether it is a nonprofit. *Nevada Revised Statutes* Chapter 82 deals with the name and address of the members. In NRS Chapter 78 it is the name and address of the stockholders. The source of the request can only be another member in a cooperative or a nonprofit, or a shareholder in a corporation and the business entity can deny the request if it is for any purpose other than the business of that entity. That is specifically in NRS 82.181, section 6. The purposes of this are very limited. The importance of the law as it stands today is to maintain the ability of members to solicit their fellow members to change the management. We oppose this amendment because we think it insulates management from the membership, and that is the essence of the cooperative exercise.

Chairman Horne:
Any questions? I see none. Anyone else wishing to testify in favor of S.B. 405 (R1)? Anyone opposed? Anyone neutral?

Judy Stokey, representing NV Energy:
I agree with the comments made this morning. We are different from Valley Electric and the other cooperatives.

Chairman Horne:
Any questions? [There were none.] I will close the hearing on S.B. 405 (R1) and bring it back to Committee. I will now open the hearing on Senate Bill 403 (1st Reprint).

Senate Bill 403 (1st Reprint): Revises provisions relating to the information which must be provided by a unit's owner in a resale transaction. (BDR 10-1126)

Rocky Finseth, representing Carrara Nevada; and Nevada Land Title Association:
Russ Dalton, the Legislative Chairman for the Nevada Land Title Association will walk you through the bill.

Russ Dalton, Legislative Chairman, Nevada Land Title Association:
This bill is an important issue for both the title and escrow industries as well as the entire real estate industry. The section we are proposing to amend in a

common-interest community (CIC) statute is *Nevada Revised Statutes* (NRS) 116.4109 which deals with a resale package when an individual purchases property in a CIC. Section 1, subsection 1, paragraphs (a) through (f) identify the type of information that a buyer in a CIC is provided when there is a purchase and the purchasers are under contract and the closing is imminent. The information includes copies of the bylaws, covenants and restrictions, documents pertaining to the financial health of the CIC, any pending legal actions, and disclosure of any fees by the CIC for the purchase of the unit. NRS 116.4109, subsection 1(b) addresses the specific fee associated with the unit contemplated for purchase. The association is required to generate a statement which is transmitted to the title and escrow company which then uses the documentation for closing the escrow. The statement is ordered by the title and escrow company at the beginning of the transaction when a contract is in place so that all information can be provided to the new buyer and other parties timely. The CIC has 10 days to issue the up-front package and demand. Our challenge, and why S.B. 403 (R1) is before you, is that the information provided on the statement must be accurate and valid for a longer period than the date issued by the CIC or management company. If you order the statement today, in order to get the closing documents prepared for tomorrow or the next day, typically in the marketplace the statement ordered is no longer accurate on the day of the closing. What this means in a real estate transaction specifically for the consumer is that he may be told to bring in a certain amount of dollars to fund the closing, but then be told he needs to bring in more funds on the day of the actual closing because the amount due has changed on the statement from the CIC. This causes frustration on the part of all parties involved; the title escrow company, the real estate licensee who may or may not lose the transaction if the costs change dramatically, and of course the consumer who has discovered that his cost to purchase the unit has now risen.

The proposed change would ensure that the statement is accurate for 15 working days from the date of delivery of the statement and also require that, if there is an error or omission on the statement, the CIC must notify the unit owner or their agent of the error or omission and issue a replacement statement prior to the close of the transaction. This also requires the CIC to stand behind the demand as issued. Samples are available of letters received by a company in our industry regarding cease and desist along with a copy of verbiage in a recently issued demand (Exhibit F). It is virtually impossible to close an escrow with demands that are only good the day they are issued. We have several files that have been delayed or not closed because the demand was issued and then the property was sent to a collection agent the next day, which incurs more expenses and delays for all parties to the transaction. Our goal is to close the transaction timely, get new buyers into properties without a

last-minute cost increase, ultimately helping the CICs become healthier with property owners who are paying their dues.

Chairman Horne:
Typically in a transaction, a statement would not be requested until the time of closing. If I am making the purchase today, the closing may not take place for 3 or 4 months. So this is at the end of the process and the statement is supposed to be good for 15 days. I am curious, if these fees and assessments on the statement are typically monthly type charges, will the 15-day window still be feasible?

Russ Dalton:
There could be monthly fees, penalties, collections fees, et cetera.

Chairman Horne:
If in that period of 15 days, will new fees accrue, putting the CIC at a disadvantage, when a new and just fee becomes due a week after the statement was provided?

Russ Dalton:
If the association fees are due monthly on the 5th of each month, and we order a payoff demand on the 25th, the statement is good through the 10th of the following month. The CIC should include the amount that will be due on the 5th.

Chairman Horne:
So the burden would be on the CIC to look forward to see if anything will become due during the life of the statement.

Russ Dalton:
Correct. It is typical for a loan payoff, or any other obligation that we deal with in connection with the closing of an escrow, whether it is a sewer fee or a city lien for example.

Assemblyman Brooks:
If there is some type of assessment, such as the grass has not been kept up and that has found its way to a collection agency and they have tagged on several hundred dollars more, that can actually be inserted before the close of sale. Is that the type of thing you are referring to?

Russ Dalton:
Typically, that is what we are looking for, a look forward by the homeowners' association (HOA) for amounts that may come due later, and anticipate 15 days

out the amount that would be due. It also allows that if there are additional amounts that become due during that 15-day period before the closing, they cannot then notify us that there are additional amounts that may be due because of circumstances that occur after the date they issue the payoff statement.

Assemblyman Brooks:
If, for example, you make a sale and you have a statement that is valid for 15 days, does the case occur that 5 days after the buyer moves in he can get a bill for $2,000 to $3,000 in CIC fees?

Russ Dalton:
That is what we are trying to prohibit so that we and the new homeowner know that everything that is due has been submitted to the escrow company and that there are no other fees that the collection agency or the CIC has the ability of demanding from the new owner.

Assemblyman Brooks:
And this bill will do that?

Russ Dalton:
Yes, we believe so.

Assemblyman Ohrenschall:
If a new buyer receives this document which specifies a certain amount of collection costs, attorney fees, et cetera, and then gets a bill for more in collection costs or attorney fees, will they be able to point to this document and say no, this was the final total?

Russ Dalton:
That is our intent. They would be able to use the document and the provision in the bill, knowing this is all the HOA or CIC could expect and not come back after the fact and demand more.

Assemblyman Ohrenschall:
If this brings more certainty to the market, then it seems like a good thing.

Chairman Horne:
Any questions? I see none. Anyone here wishing to testify in favor of S.B. 403 (R1)?

Marilyn Brainard, Commissioner, Nevada Commission for Common-Interest Communities and Condominium Hotels, Real Estate Division, Department of Business and Industry:
We have submitted a statement that Michael Buckley sent yesterday regarding our Commission's concerns (Exhibit G). First, I would like to say that we are very much in favor of full disclosure to the buyer. We think it is very important because we want those folks who move in to understand what their obligations are. Our concern is that we are hearing the word "assessments" being all-inclusive. An assessment has a very specific definition when you are talking about a CIC. We are concerned about including other fines in with the assessments.

Also, I would like to direct you to subsection 5, page 3, line 41; we think the word "buyer" should be used instead of "seller" in the sentence ". . . the seller is not liable for the delinquent assessment." The buyer certainly should not be responsible for the obligations of the seller. The seller may have incurred obligations to the association that they need to meet, but it has nothing to do with the buyer. I think that is probably a concern that the legislators should have. Who is the responsible party here? Mr. Buckley sent a detailed statement of concern (Exhibit H). The reason we were not able to address this on the Senate side is that the Commission had not discussed the bill before it was heard in that Committee.

Chairman Horne:
It is my understanding from these statements, the reason the word "seller" is used is because they are relying on the statement given by the CIC. If you give me a statement showing how much I owe so we can close, 20 days later there is another amount due on something else that was not in the statement. This says that I will not be liable because I have asked you for a statement listing everything you owe me. You are stating only the buyer should not be liable, but the owner should still be on the hook.

Marilyn Brainard:
I could be in error, but as I understand it, the point is that the unit owner, who is in fact the seller in this situation, is well aware of his obligations, certainly the assessments that are owed. He should also be aware of outstanding fines for violations that have occurred. Violations could continue within that 15-day period.

Chairman Horne:
Even if I agree with you that any particular owner should know all the monies he owes, the CIC has documents and information that are kept on a daily basis. It is something that you should have readily available for any particular unit

owner. Whether I have it or not, or whether I should know or not, as a business practice, you definitely should know. If I have requested the statement, that implies that I do not know and when you give it to me, that implies that is the total sum of what I owe.

Marilyn Brainard:
That would be a logical explanation. As a former board president of my association in Sparks, I can tell you that we wish everything would be perfect. Mistakes are made sometimes, especially when dealing with violations of the rules and regulations. My concern is that the association should not be punished, nor should the buyer. That is why we are recommending the change from "seller" to "buyer". The buyer certainly should not be held to prior obligations by the seller. I understand the 15-day issue, but from people who deal with this on a regular basis, mistakes do happen and there should be the ability of keeping the association whole. Their revenues are very important and we do not want to have a disadvantage on that side of the ledger either. We would hope, in the interest of fairness, that this Committee would understand that and be able to make that amendment.

Assemblyman Frierson:
I would like to echo the Chairman's sentiment. It seems the intention of that provision is to say all of the information provided will facilitate the sale of this property. The parties rely on the finality of that information. If I convince someone to buy my home and I tell him what is owed, and then after the transfer there are things that are owed, then we have a problem with information that people relied upon to close that deal.

I understand the associations need to be made whole, but we are talking about soft costs here. We are not talking about reimbursing the association for expenses they incurred. Assessments and fees that the association receives are certainly items the association needs for their budget. For something like a lawn that was not mowed for 45 days, that is not a cost to the CIC. According to this policy, once there is a sale, we start from scratch for all of the soft costs. The parties that relied on this information to close this deal can know that we have a fresh start.

While I agree with you that it would not be fair to pass that cost on to a buyer, my reading of this is that the cost will not be passed on because the buyer had nothing to do with it, and we will start fresh with respect to the seller. With the foreclosures and issues we have now, with folks doing short sales in addition to firsts and seconds, and mortgage insurance, they should not have a late fee or a mow lawn fee also. I agree the buyer or the association should not

be penalized; I do not know that this is penalizing anyone as much as facilitating the transfer so we can move forward without anybody being out of pocket.

Marilyn Brainard:
Yes, I understand that. One of our concerns in section 1, subsection 1, paragraph (b), reads "A statement from the association setting forth the amount of the monthly assessment for common expenses and any unpaid assessment of any kind . . . ." The word "assessment" is being used inappropriately. Assessment has a very specific meaning. It goes with the title of the property and we think that including this in the language of the statute is very misleading because assessment stands alone by definition.

I would also like to inform you that a week ago the Legislative Commission passed a regulation for a cap on collections costs. We are very relieved; it has been in the process for a very long time.

Assemblyman Frierson:
I understand fees and assessments are different. It could be changed to "any unpaid fee or assessment of any kind," rather than risk having to redefine assessment. I think the fee should be included in this context even if it is not included in the definition of assessment.

Chairman Horne:
How about using the word obligation?

Marilyn Brainard:
I am not an attorney, but obligation certainly sounds fine with me. The use of "assessment of any kind," that is the language that was very troubling to the Commission.

Assemblyman Sherwood:
In section 1, subsection 1, paragraph (b), it states ". . . including, without limitation, management fees, transfer fees, fines, penalties, interest, collection costs, foreclosure fees . . . ." I think we are dealing with a technicality as opposed to a deal breaker. It clearly says anything that could hold up the sale. Having constituents who have lost deals on houses because they get to closing and thought that everything was lined up and suddenly there is $4,500 owing they did not know about. We are not disputing the $4,500; whether that money is valid is not the point. The point is nobody knew about it. What happens is you have a prospective homeowner who is ready to move into a home, often a foreclosed home, which will revitalize the street and neighborhood, and now he cannot move in. Or, you have a seller who says I do not have any more money. Then you have a real estate agent who has not sold

a house in six months and does not close the deal. Everybody loses. Then the HOA loses because all of the soft costs you are not getting, you are never going to get those because the house has been vacant for 18 months. I would say the point of being made whole is a different bill. This bill is not throwing HOA away by any means; it is just facilitating the transfer of the sale so everyone can move on.

Assemblyman Brooks:
By changing the word "assessment" to "obligation," what does that do for you? Why was that a concern to your president?

Marilyn Brainard:
Because "assessment" is a very specific kind of obligation.

Assemblyman Brooks:
Is it a monthly fee?

Marilyn Brainard:
It is an annual fee; it varies by CIC. There are different payment terms, but it is an annual amount that is clearly laid out in the budget of the association as part of the collection policy. Each unit owner is made aware of what is the assessment.

Assemblyman Brooks:
That is certainly a fee you can include in a timely manner before the sale is made. So the rest of these are soft costs, having to do with penalties, et cetera. I would like to see some kind of compromise made. A bill like this would benefit the HOAs more than it would hurt. I hope you would look into that a little more and ensure you are on board. I think this bill is good for you, it is good for the economy, and I think it is the right thing to do.

Marilyn Brainard:
In section 1, subsection 1, paragraph (b), it says "If the association becomes aware of an error in the statement . . . before the consummation of the resale, the association must deliver a replacement statement to the unit's owner or his or her agent . . . ." I think that is very appropriate and I would want to be sure this remains in the language of the statute.

Chairman Horne:
Any other questions? [There were none.]

Teresa McKee, representing Nevada Association of Realtors:
The realtors support this bill.

Chairman Horne:
Any questions? [There were none.] Anyone here in opposition? Anyone neutral? I will close the hearing on S.B. 403 (R1). This meeting is adjourned [at 10:46 a.m.].

RESPECTFULLY SUBMITTED:

_____
Nancy Davis
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: May 12, 2011 **Time of Meeting: 9:11 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 405 (R1)	C	Robert C. Kim	Proposed Amendment
S.B. 405 (R1)	D	Robert C. Kim	Suggested Change to NRS 81.410
S.B. 405 (R1)	E	Susan L. Fisher	Proposed Amendment by Valley Electric
S.B. 403 (R1)	F	Russ Dalton	Cease and Desist Example Letter
S.B. 403 (R1)	G	Michael Buckley	Letter dated April 11, 2011
S.B. 403 (R1)	H	Michael Buckley	Proposed Amendment